

Lawyers' Committee on Nuclear Policy, New York ([www.lcnp.org](http://www.lcnp.org))  
U.S. affiliate of the International Association of Lawyers Against Nuclear Arms  
Member, Abolition 2000 Global Network for the Elimination of Nuclear Weapons and United for Peace and Justice

*Year of Remembrance and Action, August 2005*  
*60<sup>th</sup> Anniversary of U.S. Atomic Bombings of Hiroshima and Nagasaki*

## **THREAT OR USE OF NUCLEAR WEAPONS: ILLEGAL THEN, ILLEGAL NOW**

### U.S. Atomic Bombings of Hiroshima and Nagasaki, August 6 and 9, 1945

200,000 people, mostly civilians, died immediately or by the end of 1945. In the 60 years since, delayed effects including radiation-induced cancers, immunologic disorders, birth defects, and lasting psychological traumas have killed and afflicted many tens of thousands more. *Were the bombings nonetheless lawful because they ended a horrible war?*

Some answer "yes." As Takashi Hiraoka, then Mayor of Hiroshima, testified before the International Court of Justice in The Hague in 1995: "History is written by the victors. Thus, the heinous massacre that was Hiroshima has been handed down to us as a perfectly justified act of war."

But in its 1996 advisory opinion, "Legality of Threat or Use of Nuclear Weapons," the International Court of Justice ([www.icj-cij.org](http://www.icj-cij.org)) held that the international law prohibitions of attacking civilians and inflicting indiscriminate harm predated the invention of nuclear arms. It inescapably follows that the bombings were illegal.

The bombings were also morally wrong and profoundly unwise. Japan had been contained. In addition to the civilian death and injury they caused, the bombings set a precedent for use of nuclear weapons and sparked nuclear proliferation. *If the United States had followed the precepts of law and morality 60 years ago, the world might not now be facing the terrifying risks of the nuclear age.*

### Present-day U.S. Nuclear Posture

The United States is ready to rapidly launch 2000 strategic warheads with land- and submarine-based missiles. Each warhead would inflict vast heat, blast and radiation 7-30 times that of the Hiroshima bomb. The effects, as the International Court of Justice said, "cannot be contained in space or time ... would affect health, agriculture, natural resources and demography over a very wide area ... and would be a serious danger to future generations."

U.S. law and international law as U.S. law prohibit threatening or inflicting indiscriminate harm and unnecessary suffering, in any circumstance in war or peace. The constitutional war powers of Congress and the president are not unlimited. Particular prohibitions of law are expressed in the U.S. criminal code that prohibits war crimes and genocide; treaties that are part of the "supreme law of the land" (U.S. Constitution, Art VI); and universally binding rules and principles of humanitarian law.

This body of law is summarized most authoritatively by the International Court of Justice:

*\*It is a "fundamental," "cardinal," and "intransgressible" rule that "States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilians and military targets."*

\*Other rules forbid the infliction of unnecessary suffering, widespread, long-term and severe damage to the environment, and damage to neutral states; prohibit the commission of genocide by the intentional destruction of ethnic and other groups in whole or part; and prohibit violation of the right to life and other human rights underlying humanitarian law.

\*If a use of weapons "would not meet the requirements of humanitarian law, a threat to engage in such use would also be contrary to that law."

Humanitarian law applies equally to both sides of a conflict, both the aggressor state and the defending state. Neither self-defense or retaliation justify threat or use of indiscriminate weapons. The International Criminal Tribunal for the Former Yugoslavia stated, "No circumstances would legitimize an attack against civilians even if it were a response proportionate to a similar violation perpetrated by the other party."

*Because they are true weapons of mass destruction, even extermination, nuclear weapons cannot be used compatibly with established law. Their threat or use is illegal.* That they are deployed pursuant to U.S. law and Congressional appropriations is no excuse. As the Nuremberg Tribunal famously held, the "very essence of the [Nuremberg] Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state." In principle, individuals could be prosecuted for use of nuclear weapons under the U.S. criminal code, Nuremberg law, and the Statute of the International Criminal Court.

#### The Obligation of Disarmament and Citizens' Right and Responsibilities

*The practical and lawful solution, a current obligation of all countries as affirmed by the International Court of Justice, is "to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control."* This obligation arises from Article VI of the Nuclear Non-Proliferation Treaty, a U.S. treaty, and other international law.

The urgency of fulfilling the obligation is heightened by new threats of use and proliferation of nuclear weapons. At least eight countries together have about 28,000 nuclear weapons, with several thousand ready for instant use. 97% are in the hands of the United States and Russia. At least 36 more countries have nuclear reactors each of which produces plutonium. Hear the testimony of the survivors of the atomic bombings ([www.afsc.org/newengland/pesp/Hibakusha.htm](http://www.afsc.org/newengland/pesp/Hibakusha.htm)), multiply it by millions.

*U.S. citizens are part of the global majority favoring nuclear abolition.* Most recently, an April 2005 AP poll found that 66% of Americans believes that no country should have nuclear weapons. Over the last decade, the Abolition 2000 Global Network to Eliminate Nuclear Weapons, including many U.S. groups, and others have developed a realistic agenda for the verified reduction and elimination of nuclear arsenals globally. And since the 1980s, many thousands of U.S. citizens have participated in principled and reasonable non-violent direct action to end reliance on the nuclear threat and to advance abolition (while sometimes implicitly acknowledging its rightness, courts generally have not recognized the lawfulness of such action).

Citizens' actions, whether signing petitions, proposing disarmament measures, or engaging in non-violent direct action, build upon the Nuremberg principle of individual responsibility. They respond appropriately to the gravity of the risk facing us all and exemplify and promote a loyalty to humankind and the earth that is essential to ensuring a secure and livable world for all living things.