

Cambridge University Press

978-1-107-04274-2 - Nuclear Weapons Under International Law

Edited by Gro Nystuen, Stuart Casey-maslen and Annie Golden Bersagel

Frontmatter

[More information](#)

## NUCLEAR WEAPONS UNDER INTERNATIONAL LAW

*Nuclear Weapons Under International Law* is a comprehensive treatment of nuclear weapons under key international law regimes. It critically reviews international law governing nuclear weapons with regard to the inter-state use of force, international humanitarian law, human rights law, disarmament law and environmental law, and discusses where relevant the International Court of Justice's 1996 Advisory Opinion. Unique in its approach, it draws upon contributions from expert legal scholars and international law practitioners who have worked with conventional and non-conventional arms control and disarmament issues. As a result, this book embraces academic consideration of legal questions within the context of broader political debates about the status of nuclear weapons under international law.

GRO NYSTUEN is a senior partner at the International Law and Policy Institute in Oslo where she works on public international law issues, including the ILPI Nuclear Weapons Project, humanitarian law, law of armed conflict and disarmament. She is also the Director of the ILPI Centre for International Humanitarian Law.

STUART CASEY-MASLEN is head of research at the Geneva Academy of International Humanitarian Law and Human Rights. He is an international human rights and humanitarian lawyer specialising in weapons law and the international law of law enforcement.

ANNIE GOLDEN BERSAGEL is a legal advisor at the International Law and Policy Institute, where she works on a broad range of international law issues, including human rights and corporate complicity, the laws of armed conflict, international economic transparency and treaty law.

Cambridge University Press

978-1-107-04274-2 - Nuclear Weapons Under International Law

Edited by Gro Nystuen , Stuart Casey-maslen and Annie Golden Bersagel

Frontmatter

[More information](#)

---

Cambridge University Press

978-1-107-04274-2 - Nuclear Weapons Under International Law

Edited by Gro Nystuen, Stuart Casey-Maslen and Annie Golden Bersagel

Frontmatter

[More information](#)

# NUCLEAR WEAPONS UNDER INTERNATIONAL LAW

Edited by

GRO NYSTUEN, STUART CASEY-MASLEN  
AND ANNIE GOLDEN BERSAGEL



Cambridge University Press  
978-1-107-04274-2 - Nuclear Weapons Under International Law  
Edited by Gro Nystuen , Stuart Casey-maslen and Annie Golden Bersagel  
Frontmatter  
[More information](#)

**CAMBRIDGE**  
**UNIVERSITY PRESS**

University Printing House, Cambridge CB2 8BS, United Kingdom

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning and research at the highest international levels of excellence.

[www.cambridge.org](http://www.cambridge.org)

Information on this title: [www.cambridge.org/9781107042742](http://www.cambridge.org/9781107042742)

© Cambridge University Press 2014

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press.

First published 2014

Printed in the United Kingdom by Clays, St Ives plc

*A catalogue record for this publication is available from the British Library*

*Library of Congress Cataloguing in Publication data*

Nuclear weapons under international law / edited by Gro Nystuen, Stuart Casey-Maslen, Annie Golden Bersagel.

pages    cm

Includes bibliographical references and index.

ISBN 978-1-107-04274-2 (hardback)

1. Nuclear weapons (International law)    I. Nystuen, Gro, editor of compilation.  
II. Casey-Maslen, Stuart, editor of compilation.    III. Bersagel, Annie  
Golden, 1983—editor of compilation.

KZ5665.N83 2014

341.7'34—dc23

2014011305

ISBN 978-1-107-04274-2 Hardback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for external or third party internet websites referred to in this publication, and does not guarantee that any content on such websites is, or will remain, accurate or appropriate.

CONTENTS

*List of contributors*      page viii  
*Foreword by Charles Garraway*      xiv  
*Editors' preface*      xvi  
*Disclaimer*      xviii

Introduction      1

GRO NYSTUEN AND STUART CASEY-MASLEN

PART I    **Nuclear weapons and *jus ad bellum***      13

1    Using force by means of nuclear weapons and requirements  
of necessity and proportionality *ad bellum*      15  
NOBUO HAYASHI

2    Legality under *jus ad bellum* of the threat of use of  
nuclear weapons      31  
NOBUO HAYASHI

3    Nuclear weapons and the separation of *jus ad bellum* and  
*jus in bello*      59  
JASMINE MOUSSA

PART II    **Nuclear weapons and international  
humanitarian law**      89

4    The use of nuclear weapons under rules governing  
the conduct of hostilities      91  
STUART CASEY-MASLEN

5    Nuclear weapons and the unnecessary suffering rule      128  
SIMON O'CONNOR

6    Threats of use of nuclear weapons and international  
humanitarian law      148  
GRO NYSTUEN

7	The use of nuclear weapons as a reprisal under international humanitarian law	171
	STUART CASEY-MASLEN	
	<b>PART III International criminal law</b>	<b>191</b>
8	Use of nuclear weapons as genocide, a crime against humanity or a war crime	193
	STUART CASEY-MASLEN	
9	Use of nuclear weapons as an international crime and the Rome Statute of the International Criminal Court	221
	ANNIE GOLDEN BERSAGEL	
	<b>PART IV International environmental law</b>	<b>245</b>
10	Use of nuclear weapons and protection of the environment during international armed conflict	247
	ERIK V. KOPPE	
11	Environmental approaches to nuclear weapons	269
	MARTINA KUNZ AND JORGE E. VIÑUALES	
12	The testing of nuclear weapons under international law	292
	DON MACKAY	
	<b>PART V International disarmament law</b>	<b>319</b>
13	International law, nuclear weapon-free zones and the proposed zone free of weapons of mass destruction in the Middle East	321
	MARCO ROSCINI	
14	Nuclear weapon-free zones: the political context	347
	CECILIE HELLESTVEIT AND DANIEL MEKONNEN	
15	The Nuclear Non-Proliferation Treaty	374
	GRO NYSTUEN AND TORBJØRN GRAFF HUGO	
16	The legal meaning and implications of Article VI of the Non-Proliferation Treaty	397
	DANIEL H. JOYNER	
17	Armed non-state actors and ‘nuclear terrorism’	418
	STUART CASEY-MASLEN	

Cambridge University Press  
978-1-107-04274-2 - Nuclear Weapons Under International Law  
Edited by Gro Nystuen , Stuart Casey-maslen and Annie Golden Bersagel  
Frontmatter  
[More information](#)

CONTENTS vii

PART VI	<b>International human rights law</b>	433
18	Human rights law and nuclear weapons	435
	LOUISE DOSWALD-BECK	
19	The right to a remedy and reparation for the use of nuclear weapons	461
	STUART CASEY-MASLEN	
PART VII	<b>The legality of nuclear weapons under international law</b>	481
20	Conclusions on the status of nuclear weapons under international law	483
	GRO NYSTUEN	
	<i>Subject index</i>	487
	<i>Author index</i>	499

Cambridge University Press

978-1-107-04274-2 - Nuclear Weapons Under International Law

Edited by Gro Nystuen, Stuart Casey-maslen and Annie Golden Bersagel

Frontmatter

[More information](#)

## CONTRIBUTORS

ANNIE GOLDEN BERSAGEL is a legal advisor at the International Law and Policy Institute, where she works on a broad range of international law issues, including human rights and corporate complicity, the laws of armed conflict, international economic transparency and treaty law. She holds a JD (juris doctorate) degree from Stanford Law School, in addition to a Master of Philosophy degree in peace and conflict Studies from the University of Oslo and a Bachelor of Arts degree in economics and political science from Wake Forest University. She was a Fulbright scholar at the University of Oslo from 2006 to 2007. Golden Bersagel has published articles on business and human rights, Norway's legal relationship with the European Union and international sports arbitration.

STUART CASEY-MASLEN is head of research at the Geneva Academy of International Humanitarian Law and Human Rights. He is an international human rights and humanitarian lawyer specialising in weapons law and the international law of law enforcement. He has written a commentary on the 1997 Anti-Personnel Mine Ban Convention and co-edited with Gro Nystuen a commentary on the 2008 Convention on Cluster Munitions. He is the editor of *The War Report: 2012*, which classifies armed conflicts around the world, published in December 2013, and editor of *Weapons Under International Human Rights Law*, published by Cambridge University Press in January 2014.

LOUISE DOSWALD-BECK was appointed a professor of the Graduate Institute in 2003 and retired in 2012. She is a member of the Directorate of the Geneva Academy of International Humanitarian Law and Human Rights, created in September 2007. Professor Doswald-Beck was formerly the Director of the University Centre for International Humanitarian Law (CUDIH) from 2003 to 2007, and was Secretary General of the International Commission of Jurists (2001–2003). She was a legal adviser at the International Committee of the Red Cross (ICRC) from 1987 and became Head of the Legal Division in 1998. She began her career as a lecturer in law at Exeter University and then London University. During the 1990s Louise Doswald-Beck played an important role in the campaign to establish the International Criminal Court (ICC) and participated in the negotiations on the Rome Statute. In particular, she had a major role in negotiations that led to the establishment of the ICC's Elements



Cambridge University Press

978-1-107-04274-2 - Nuclear Weapons Under International Law

Edited by Gro Nystuen, Stuart Casey-maslen and Annie Golden Bersagel

Frontmatter

[More information](#)

## LIST OF CONTRIBUTORS

ix

of Crimes, Protocols II (amended) and IV of the Convention on Certain Conventional Weapons, the Anti-Personnel Mine Ban Convention, Protocol II of the Hague Convention on Cultural Property and the San Remo Manual on armed conflicts at sea. Professor Doswald-Beck has written extensively on subjects relating to the use of force, and humanitarian law and human rights law, including the ICRC's study on customary international humanitarian law (2005) for which she was awarded the Ciardi Prize at the time of the XVIIth Congress of the International Society for Military Law and the Law of War in 2006.

CHARLES GARRAWAY CBE served for thirty years as a legal officer in the United Kingdom Army Legal Services, initially as a criminal prosecutor but latterly as an adviser in the law of armed conflict and operational law. He represented the Ministry of Defence at numerous international conferences. He was also the senior Army lawyer deployed to the Gulf during the 1990/91 Gulf Conflict. On retirement, he spent three months in Baghdad working for the Foreign Office on transitional justice issues and six months as a Senior Research Fellow at the British Institute of International and Comparative Law before taking up the Stockton Chair in International Law at the United States Naval War College, Newport, Rhode Island in August 2004 for the year 2004/05. He was a Visiting Professor at King's College London from 2002 to 2008, teaching the Law of Armed Conflict, and an Associate Fellow at Chatham House from 2005 to 2012. He is currently a Fellow at the Human Rights Centre, University of Essex and was awarded an Honorary Doctorate by the University in 2012. In December 2006 he was elected to the International Humanitarian Fact Finding Commission under Article 90 of Additional Protocol I to the Geneva Conventions of 1949, of which he is now a Vice-President. He worked for the British Red Cross from 2007 to 2011 and now works as an independent consultant. He was appointed CBE in 2002. He has worked on a number of expert groups and is currently the General Editor of the United Kingdom Manual on the Law of Armed Conflict.

NOBUO HAYASHI is currently a researcher at PluriCourts, a project of the University of Oslo Law Faculty. He also maintains his affiliation as a Senior Advisor with the International Law and Policy Institute. His previous positions include Visiting Professor, International University of Japan; Researcher, Peace Research Institute Oslo; Legal Advisor, Norwegian Centre for Human Rights; and Legal Officer, Office of the Prosecutor, International Criminal Tribunal for the Former Yugoslavia. He specializes in the law of armed conflict, international criminal law, *jus ad bellum* and public international law.

CECILIE HELLESTVEIT has recently submitted her Ph.D. on Humanitarian Law and Non-international armed conflict at the Faculty of Law at the University of Oslo. She has previously worked at PRIO (Peace Research Institute, Oslo), and

Cambridge University Press

978-1-107-04274-2 - Nuclear Weapons Under International Law

Edited by Gro Nystuen, Stuart Casey-maslen and Annie Golden Bersagel

Frontmatter

[More information](#)

NCHR (Norwegian Centre for Human Rights). For the past two years she has been a part of the Gulf Research Unit at the University of Oslo, with a particular focus on Saudi Arabia and Iraq. Hellestveit served as the Special Rapporteur on conduct of hostilities in military operations to the International Society for Military Law and the Laws of War 2008–2009. She has studied domestic Norwegian law (LLM), international law at Sorbonne Paris-X and Islamic law, and she holds the equivalent of an LLM in area and conflict studies and international relations with a particular emphasis on the Arab and Muslim world. Hellestveit has broad field experience, and she has also studied/worked in the USA (UN), France, Germany, Russia, Israel and several Arab countries. She is also attached to the ILPI Centre for International Humanitarian Law and the ILPI Centre for African Studies.

TORBJØRN GRAFF HUGO holds an M.Phil. in Peace and Conflict Studies and a BA in International Studies from the University of Oslo. He has worked on issues related to nuclear non-proliferation and disarmament for a number of years, and is currently attached to ILPI's Nuclear Weapons Project, which aims to shape and inform the debate on how to eliminate nuclear weapons by way of analysis, networking and outreach. Before joining ILPI Hugo worked in the Section for Disarmament and Non-proliferation in the Norwegian Ministry of Foreign Affairs in Oslo.

DANIEL H. JOYNER received a BA in Japanese from Brigham Young University, his JD from Duke Law School, an MA in political science from the University of Georgia and a Ph.D. in law from the University of Warwick School of Law in the United Kingdom. Prior to joining the University of Alabama Law faculty in 2007, Professor Joyner taught for four years on the faculty of the University of Warwick School of Law. During Michaelmas Term 2005 he was also a Senior Associate Member of St Antony's College, Oxford University. Professor Joyner teaches Public International Law, International Trade and Investment Law, The Law of War, WMD Law and Policy, and Contracts. Professor Joyner's research interests are focused on public international law, with particular interest in the area of nuclear weapons non-proliferation law and civilian nuclear energy law. His areas of expertise include nuclear non-proliferation treaties and international organisations, and sources of international trade, investment, safety, security, liability and export control law in the nuclear energy area. He has also written extensively on international use of force law, and on the UN Security Council.

ERIK V. KOPPE is an assistant professor of public international law at Leiden Law School and the Grotius Center for International Legal Studies. He is also Managing Editor of the *Netherlands International Law Review*. Koppe studied International and European Law as well as Dutch Law (Civil Law) at the University of Groningen and received his doctorate degree (*cum laude*) in 2006 at the same university for his research on *The Use of Nuclear Weapons*

Cambridge University Press

978-1-107-04274-2 - Nuclear Weapons Under International Law

Edited by Gro Nystuen, Stuart Casey-maslen and Annie Golden Bersagel

Frontmatter

[More information](#)

## LIST OF CONTRIBUTORS

xi

*and the Protection of the Environment During International Armed Conflict* (2008). Subsequently he worked as a researcher at the T.M.C. Asser Instituut in The Hague and as an associate at the Dispute Resolution Practice Group of Freshfields Bruckhaus Deringer LLP in Amsterdam.

MARTINA KUNZ is a Ph.D. candidate at the University of Cambridge, United Kingdom, and previously a teaching and research assistant at the Graduate Institute, Geneva. She studied international law at the Graduate Institute (LLM), Tsinghua University (China Scholarship Council Visiting Scholar) and the University of Geneva (LLB). She is fluent in German, English, Chinese, French and Spanish. Martina Kunz has worked on a number of international and comparative law research projects for universities, NGOs and international organisations, mainly in the fields of environmental law, economic law and public law at large.

DON MACKAY was New Zealand Ambassador for Disarmament and Permanent Representative to the United Nations and Specialised Agencies in Geneva from 2006 to 2009. Prior to that he served as New Zealand Permanent Representative to the United Nations in New York from 2001 to 2005. His positions within the New Zealand Ministry of Foreign Affairs and Trade have included Deputy Secretary responsible for legal and multilateral affairs, Legal Adviser and Director of the Legal Division, and Director of the Disarmament and International Security Division. Mr MacKay was Co-Agent and Counsel in the case of *New Zealand v. France (Nuclear Tests case)* before the International Court of Justice in 1995, and was Counsel in the *New Zealand v. France Rainbow Warrior Arbitration* in New York. He graduated from Victoria University of Wellington with first class honours in Law in 1970. He was a Visiting Fellow at the Research Centre for International Law at the University of Cambridge (United Kingdom) in 1996. He is currently an independent consultant in international law and international affairs.

DANIEL MEKONNEN obtained his primary legal education in Eritrea, where he served, among other things, as Judge of the Zoba Maekel Provincial Court in Asmara. His LLM in Human Rights and LLD in Public International Law are respectively from the University of Stellenbosch and the University of the Free State, both in South Africa. With a strong bias towards human rights, international humanitarian law and international criminal law, he also has a cumulative work experience in diverse areas ranging from development cooperation to corporate social responsibility, North–South relations, non-violent action, democratisation, peace and conflict studies and transitional justice. He has taught courses on human rights and international law at tertiary levels. He has thus far produced more than eighty academic publications and research outputs attached to his name, which include monographs, journal articles, chapters in edited volumes, conference papers, consultancies and

Cambridge University Press

978-1-107-04274-2 - Nuclear Weapons Under International Law

Edited by Gro Nystuen, Stuart Casey-maslen and Annie Golden Bersagel

Frontmatter

[More information](#)

expert legal advices. He is a frequent commentator in popular media and in online forums. Previously, Daniel was a research fellow at the School of Law at Queen's University Belfast, where he was involved in a research project dealing with the role of lawyers in conflict and transition. Daniel is associated with the ILPI Centre for African Studies.

JASMINE MOUSSA has a Ph.D. in Law from the University of Cambridge. Between 2008 and 2010 she was the desk officer in charge of Legal Affairs and Human Rights Affairs in the Cabinet of Egypt's Minister of Foreign Affairs, where she has also worked at the Legal Department and Multilateral Affairs Department. Other engagements include being a legal researcher at the Cabinet of the Secretary General of the League of Arab States and a legal consultant to several international non-governmental organisations and think tanks. She completed a BA in Political Science and MA in International Human Rights Law from the American University in Cairo, a Bachelor of Laws from Cairo University and a Master of Laws in Public International Law from the London School of Economics and Political Science before joining Magdalene College at the University of Cambridge as a Ph.D. candidate in Law. From 2012 to 2013 she was editor and editor-in-chief of the Cambridge Journal of International and Comparative Law.

GRO NYSTUEN is an international lawyer with a doctorate in public international law (dr. juris) from 2004. Nystuen worked in the Norwegian Ministry for Foreign Affairs from 1991 to 2005. From 2005 to 2013 she was Associate Professor of International Humanitarian Law/the Law on Armed Conflict at the University of Oslo and from 2008 also Associate Professor at the Defence Staff University College in Oslo. In addition to public international law and treaty law in general, she has worked in particular with international humanitarian law and the law of armed conflict, disarmament law and arms control law, arms export control law, constitutional law, peace agreements, international criminal law, penal law and procedural law, human rights law and corporate social responsibility. She has published extensively on the above issues. From 2004 to 2011, Nystuen also chaired the Council on Ethics of the Norwegian Government Pension Fund. Since 2009 she has been Senior Partner at ILPI and since June 2013 she has also been Director of the ILPI Centre for International Humanitarian Law.

SIMON O'CONNOR is a senior legal adviser at the Norwegian Red Cross. He is a Barrister and served in the British Army Legal Services from 2001 to 2006. He holds M.Phils. from the Universities of Tromsø and St Andrews in International Relations and lectures and publishes in international humanitarian law. In 2011 he was a Visiting Fellow at the Institute for Ethics Law and Armed Conflict at the University of Oxford where he remains a Research Associate.

MARCO ROSCINI is Reader in international law at the University of Westminster School of Law. He has a Ph.D. in international law from the

Cambridge University Press

978-1-107-04274-2 - Nuclear Weapons Under International Law

Edited by Gro Nystuen, Stuart Casey-maslen and Annie Golden Bersagel

Frontmatter

[More information](#)

## LIST OF CONTRIBUTORS

xiii

University of Rome ‘La Sapienza’. Dr Roscini was previously a Research Fellow at the University of Verona School of Law and lectured on the international law of armed conflict at UCL, King’s College London and Queen Mary University London. He also collaborated with the International Justice Project at the International Secretariat of Amnesty International, for which he prepared extensive commentaries on the implementation of the International Criminal Court’s Statute in the Democratic Republic of the Congo and in Italy. Dr Roscini is the author of a monograph on nuclear weapon-free zones (2003) and the co-editor, with Daniel H. Joyner, of *Non-proliferation Law as a Special Regime* (Cambridge University Press, 2012). His book on cyber operations and the use of force in international law will be published in 2014.

JORGE VIÑUALES is the Harold Samuel Professor of Law and Environmental Policy at the University of Cambridge, United Kingdom, and a Visiting Professor of International Law at The Graduate Institute, during the academic year 2013–2014. Professor Viñuales has published widely in his speciality areas, most recently his books *Foreign Investment and the Environment in International Law* (Cambridge University Press, 2012), *Harnessing Foreign Investment to Promote Environmental Protection: Incentives and Safeguards* (Cambridge University Press, 2013, co-edited with P.-M. Dupuy) and *Diplomatic and Judicial Means of Dispute Settlement* (2012, co-edited with L. Boisson de Chazournes and M. G. Kohen). He has also wide experience as a practitioner. He has worked on many cases under ICSID, UNCITRAL, ICC or LCIA rules, including several high-profile inter-state, investor–state and commercial disputes, and he regularly advises companies, governments, international organisations or major NGOs on different matters of environmental law, investment law and public international law at large. Professor Viñuales was educated in France (Doctorat – Sciences Po, Paris), the United States (LLM – Harvard Law School), Switzerland (Licence and Diplôme d’études approfondies in international relations – HEI; *liz jur* – Universität Freiburg; Licence and Diplôme d’études approfondies in political science – Université de Genève) and Argentina (Abogado – UNICEN).

Cambridge University Press

978-1-107-04274-2 - Nuclear Weapons Under International Law

Edited by Gro Nystuen, Stuart Casey-maslen and Annie Golden Bersagel

Frontmatter

[More information](#)

## FOREWORD

We have recently commemorated the fiftieth anniversary of the assassination of President John F. Kennedy on 22 November 1963. The regular question asked of my generation was: ‘where were you when you heard the news?’ Everybody could remember, just as, for a later generation, the news of ‘9/11’ and the attacks on Washington and New York would provide similar memories. And yet Kennedy’s death overshadowed an equally momentous date, the night of 27/28 October 1962, when the world was on the brink of nuclear war in the Cuban Missile Crisis. As a schoolboy, I can remember going to bed that night wondering whether there would be a morning for me to wake up to. We lived that night in fear of nuclear annihilation.

Later, as a serving officer, I would be part of the forward UK division on the Inner German Border. Our task was to resist an invasion for as long as we could, though we knew in such an event our position was suicidal. Later at Supreme Headquarters Allied Powers Europe, I took part in exercises to resist such an invasion and such exercises almost inevitably ended in a nuclear exchange. On one such exercise, the first nuclear explosion in the UK missed its intended target, Greenham Common, and landed on a nearby village – where my family lived. It was a sobering moment.

Today the nuclear shadow cast during the Cold War has evaporated – but the danger has not gone away. The fear of nuclear proliferation remains and the new danger of nuclear technology falling into the hands of non-state actors is grounds enough for taking the issue seriously. As Gro Nystuen says in her conclusion, ‘[a] strongly polarised debate over nuclear weapons and their legality has taken place over the past decades’ and almost twenty years have passed since the International Court of Justice gave its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons. That Advisory Opinion did little to stem the debate, except that there emerged a new factor: ‘both sides taking the Advisory Opinion as evidence that they were right.’

This book has sought to take a dispassionate view of the debate, taking into account the legal developments since 1996 in the various fields of international law relevant to the use or threat of use of nuclear weapons. As should be expected, most if not all of the authors have strong views on the legality of nuclear weapons – which may or may not come across in their writings.

Cambridge University Press

978-1-107-04274-2 - Nuclear Weapons Under International Law

Edited by Gro Nystuen, Stuart Casey-maslen and Annie Golden Bersagel

Frontmatter

[More information](#)

---

FOREWORD

XV

However, all have tried to view the issues dispassionately with the result that there are no firm conclusions on the legality or otherwise of nuclear weapons, contrary to what some would undoubtedly wish. Arguments are put forward and it is left to the reader to reach his or her own conclusions on the facts presented.

It is a relief to me – and to many – that the argument has now shifted from the political suspense of the Cold War into the more rarefied atmosphere of academia. However, we should not forget that this remains a real issue and a real threat. Regardless of the legal niceties, a nuclear conflict would be a catastrophe. There could be no winners. Any steps that can be taken to reduce such a risk are therefore to be welcomed. It is my hope that no child ever again has to go to sleep in the deep despair and fear of the unknown that I experienced on the night of 27/28 October 1962.

Charles Garraway



Cambridge University Press

978-1-107-04274-2 - Nuclear Weapons Under International Law

Edited by Gro Nystuen, Stuart Casey-maslen and Annie Golden Bersagel

Frontmatter

[More information](#)

## EDITORS' PREFACE

This book seeks to describe and assess the status of nuclear weapons under international law as it stands today, not as one might like to see it. Indeed, although many of the authors believe in the desirability of eliminating completely this category of non-conventional means of warfare, great care has been taken to focus on the identification of *lex lata* rules and to apply them dispassionately to nuclear weapons. Where authors believe the law is evolving in a particular field, such asserted *lex ferenda* is made explicit with contrary views duly reflected.

The book takes as its starting premise that the International Court of Justice (ICJ) did not, in its 1996 Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, find that nuclear weapons were unlawful per se under any branch of international law. However, such is not the understanding of every international lawyer, for a number have argued fervently that the Court did rule nuclear weapons illegal (or at least that application of the rules deduced by the Court inevitably renders not only their use but also their stockpiling illegal). Certainly, where the ICJ did not address or apply a particular rule to nuclear weapons or, in the relevant author's view, did not assess its application correctly, the lacuna or error is acknowledged and discussed in this book. Further, where the state of the law in a particular field has evolved since the 1996 Advisory Opinion, this too is openly debated.

In identifying customary international law, authors have sought to discern a general practice of states (*usus*) accepted as law (*opinio juris*).<sup>1</sup> Where an issue under review calls for interpretation of a treaty provision, the approach taken is to employ the customary rules codified in the 1969 Vienna Convention on the Law of Treaties, especially its Articles 31 and 32. Thus, a treaty is interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of the treaty's object and purpose. A special meaning is only given to a term if it is established that the negotiating parties

<sup>1</sup> Statute of the International Court of Justice, San Francisco, 26 June 1945, in force 24 October 1945, 3 Bevans 1179, Art. 38. For a more detailed description of customary international law, see I. Brownlie, *Principles of Public International Law*, 5th edn (Oxford University Press, 1998), pp. 4–11.



Cambridge University Press

978-1-107-04274-2 - Nuclear Weapons Under International Law

Edited by Gro Nystuen, Stuart Casey-maslen and Annie Golden Bersagel

Frontmatter

[More information](#)

## EDITORS' PREFACE

xvii

so intended.<sup>2</sup> Supplementary means of interpretation, particularly the *travaux préparatoires*, are used in order to confirm the meaning that is discerned, or to determine the meaning when the general rules of interpretation either leave it ambiguous or obscure, or lead to a manifestly absurd or unreasonable result.

As set out in more detail in the introduction to this book, we have sought to embrace all branches of international law deemed relevant to an assessment of the legality of nuclear weapons: the law on inter-state use of force (*jus ad bellum*); international humanitarian law;<sup>3</sup> international human rights law; international criminal law; disarmament law; and international environmental law. Although not the primary purpose of the book, we argue that this approach can be used to assess the legality of any weapon, whether conventional or non-conventional in nature.

We hope that readers will find this book engaging and thought-provoking, and that it will contribute to the various debates on nuclear weapons. Arguably, given the hugely destructive effects of all nuclear weapons, whatever their explosive yields, too few lawyers are currently involved in reflections and discussions in this area. If the book stimulates more to turn their minds to this critical humanitarian and security issue, then it can already be considered a success.

We would like to thank all the authors for their contributions. Two experts meetings were held during the course of the project to review the draft chapters, in December 2012 and June 2013. Special thanks are also owed to several hardworking interns at the International Law and Policy Institute for contributions to the editorial work: Marisol Nina Guttman, Lars Jørgen Røed and Kjøl Egeland. We are also very grateful to Charles Garraway for his careful review of the draft manuscript, which has further improved the text. Of course, any remaining errors of fact or law remain our responsibility.

<sup>2</sup> Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, in force 27 January 1980, 1155 UNTS 331, Art. 31(1) and (4).

<sup>3</sup> By international humanitarian law is meant the entire international law of armed conflict, including Hague law governing the conduct of hostilities.

Cambridge University Press

978-1-107-04274-2 - Nuclear Weapons Under International Law

Edited by Gro Nystuen , Stuart Casey-maslen and Annie Golden Bersagel

Frontmatter

[More information](#)

---

## DISCLAIMER

This report is the work of the authors. The designation of armed non-state actors, states or territories does not imply any judgement by the International Law and Policy Institute or Cambridge University Press regarding the legal status of such actors, states or territories, or their authorities and institutions, or the delimitation of their boundaries, or the status of any states or territories that border them.