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## Nuclear Weapons and the Law of Armed Conflict

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## Nuclear Weapons and the Law of Armed Conflict

### Keywords

Weapons, International Law: History, Nuclear Energy

# MYRES S. MCDUGAL DISTINGUISHED LECTURE

## Nuclear Weapons and the Law of Armed Conflict\*

L.C. GREEN\*\*

It is a great honour for me to be asked to deliver this address which has been established in the name of Myres McDougal. Like every individual working in international law, I have had encounters with Mac. Let me give just one instance. In 1964, while I was Dean of Law at Singapore, we held a conference on the teaching of international law and Mac was among those present. I asked him if he would deliver a lecture to my class and he agreed. The first thirty minutes or so were taken up with Mac writing his peculiar vocabulary on the board followed by about forty minutes of lecture. This was followed by a heated debate between Mac and me. As we left the building, Mac asked another visiting professor, who, unlike me, was a former student of his, whether he thought that the lecture had made an impact. Our colleague replied that he wasn't sure that they understood what Mac was saying, but he was sure that these students would never forget that Mac had had the audacity to quarrel with their professor in public, something which is not normally done in the East.

Mac has written on many subjects and is, of course, an ardent believer in the rule of international law, and the contribution it can make to world order. He is also cognizant of the views of international decision makers. The cognizance of these views is essential in forecasting the acceptance and the possible legalizing of nuclear weapons and nuclear warfare. These views are becoming even more relevant since there is a growing awareness that fall-out and radiation are inherently dangerous to the environment and perhaps to the very existence of mankind. Mac recognizes this even though he has emphasised that nuclear weapons may be

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\* Based on addresses to the Ottawa Conference on Nuclear Weapons and The Law, 1987, and the McDougal lecture at the University of Denver College of Law, 1988.

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essential for the defence of the free world<sup>1</sup>. As he has pointed out:

From the perspective of realistic description, . . . international law . . . is not a mere static body of rules but is rather a whole decision-making process, a public order which includes structure of authorized decision-makers as well as a whole international body of highly flexible, inherited prescriptions. It is, in other words, a process of continuous interaction, of continuous demand and response, in which the decision-makers of a particular nation-state unilaterally put forward claims of the most diverse and conflicting character . . . , and in which other decision-makers, external to the demanding state and including both national and international officials, weigh and appraise these competing claims in the terms of the interests of the world community and of the rival claimants, and ultimately accept or reject them. As such a process, it is a living, growing law, grounded in the practices and sanctioning expectations of nation-state officials, and changing as their demands and expectations are changed by the exigencies of new interests and technology and by other continually evolving conditions in the world arena.<sup>2</sup>

Insofar as the 'Legal Bases for Securing the Integrity of the Earth-Space Environment' are concerned, Mac has reminded us that:

. . . law is not some frozen set of pre-existing rules or arrangements that inhibits constructive action about environmental and other problems, but rather a dynamic and continuous process of authoritative decision through which the members of a community clarify and implement their common interests. . . . In recent decades, participation in world constitutive process, as in the embracing process of effective power, has been tremendously democratized—with not merely nation-states but also international governmental organizations, political parties, pressure groups, private associations, and individual human beings playing important roles. . . . Similarly, a multiplying host of private associations, operating within the larger constitutive process, and increasingly international in membership, has similar goals and areas of activity.<sup>3</sup> Groups and individuals especially concerned with environmental problems have abundant opportunity to participate in all aspects of making and applying law. . . . [But if] comprehensive planning, development, and controls are to be achieved and made to secure the overriding goals of both maintaining a secure environmental base and promoting and augmenting human dignity values, many delicate and continuing adjustments will be required in the management of processes of authority and effective power at all levels of government, from local through national and regional to global. . . . The task of highest priority for all genuinely committed to the goal values of human dignity is, of course, that of creating in the peoples of the world the perspective necessary both to

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1. McDougal, *The Hydrogen Bomb Tests and the International Law of the Sea*, 49 *AM. J. INT'L L.* 356, 356-357 (1955).

2. *Id.* at 356-357.

3. *E.g.*, Greenpeace, *Men of the Trees*, Sierra Club; see *Sierra Club v. Coleman*, 421 F. Supp. 63 (1976).

their more realistic understanding of their common interests in relation to the environment and to their invention, acceptance, and initiation of some of the many equivalent measures in constitutive processes that might better secure such common interests.<sup>4</sup>

In addition to his concern for preserving the environment, Myres McDougal is equally concerned for human rights. He maintains that the respect for these rights constitutes *jus cogens*.<sup>5</sup> It cannot be denied that nuclear warfare would amount to the greatest threat to the fundamental human right to life and yet, Mac recognizes the legality of such weapons in self-defence. Moreover, while he points out that

[t]he destructive power of forces unleashed by the fission or fusion of atomic nuclei. . . makes it difficult to characterize nuclear and thermonuclear bombs as 'just another weapon', [n]onetheless, the basic policy issues involved in the use of those weapons in war are fundamentally the same issues raised by the other weapons or methods of mass destruction, including, in particular, strategic target area bombing. In respect of the one as in respect of the other, it is difficult to accept with much confidence absolute affirmation or blanket denials of legitimacy, however creditable the motivations of the persons affirming or denying. No clear and unmistakable consensus is observable among commentators or governments on questions of lawfulness. The continuing attempts, however, by various governments and groups to 'outlaw' nuclear weapons tend to sustain the impression that such weapons are regarded as permissible pending the achievement of agreement to the contrary. . . . [H]owever distressing it may be, . . . processes of derivation and 'analogy' from conventional rules and from inherited principles are hopelessly inadequate to sustain assertions, in realistic expectation of probable future decision, of a comprehensive prohibition in international law of the use of nuclear weapons. Such a prohibition so devoutly to be wished for by all who cherish the values of human dignity, or perhaps even survival, must require more effective implementation. Perhaps the only limitation that can at present be projected with any plausibility is the ultimate one, that is, the prohibitions of uses of these weapons for purposes of terrorization, in effect the annihilation, of the general enemy population. . . . [E]ffective control of and protection from nuclear weapons can be hopefully sought . . . no[t] even in a new and unequivocal agreement outlawing these weapons, but rather in the achievement of a consensus . . . in the context of a comprehensive and continuing sanctioning process, that sustains the principle of minimum order itself as well as a prohibition of nuclear weapons.<sup>6</sup>

This latter comment should caution us in our enthusiasm for agree-

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4. *Festschrift für Wilhelm Wengler*, 1 *MULTITUDO LEGUM IUS UNUM*, 261, 263-65, 270-71, 288 (1973).

5. Address on Human Rights and World Public Order, *INT'L L. A. CONF.*, Brussels (1973).

6. M. McDUGAL & FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER*, 659, 667-68 (1961).

ments on the limitation of specific types of nuclear weapons among the various nuclear weapons. There is a tendency to acclaim any such agreement as the great breakthrough and guarantee of future safety, overlooking the fact that, despite the destruction of such weapons envisaged by the particular agreement, the remaining stockpile is still sufficient to destroy the world many times over. Given this fact and the realisation that no country is prepared to see its own or the world's destruction, it is time we turned our attention to the issue of nuclear weapons and the law of armed conflict.

Any such analysis must begin with the 'Martens Clause' part of the Preamble of the IVth Hague Convention of 1907.

Until a more complete code of the laws of war has been issued [—and this has not yet occurred—], the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them [—and annexed to the Convention—], the inhabitants and belligerents *remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.*<sup>7</sup>

Article 22 of the Regulations expressly provided that "the right of belligerents to adopt means of injuring the enemy is not unlimited." That these humanitarian principles are still applicable is clear from what may be regarded as the nearest we have to a supplementary code additional to that of The Hague. In the Protocol I Addition to the Geneva Conventions of 12 August, 1949, relating to the Protection of Victims in International Armed Conflicts, adopted in 1977, this preambular reference has been elevated to the main body of the Protocol.<sup>8</sup> It is reproduced with merely a slight verbal change, "as they result from the usages established among civilized peoples" having become "derived from established custom." This acknowledges development during the seventy years since The Hague. It is now accepted that all independent nations are in fact 'civilized',<sup>9</sup> and that the distinction between civilized and other peoples belongs to an outdated colonial era. Article 35 of the Protocol is more restrictive in its control of methods and means of warfare, providing as 'basic rules' that:

1. In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited. 2. It is prohibited to employ weapons, projectiles and material methods of warfare of a nature to cause superfluous injury or unnecessary suffering, and Article 35 introduces a new concept which reflects the United Nations Convention on the Prohibition of Military and Other Hostile Use of Environmental Modification Techniques.<sup>10</sup> The Article states that:

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7. D. SCHINDLER & J. TOMAN, *THE LAWS OF ARMED CONFLICTS* 63-64 (1981).

8. *Id.* at 558, art. 1(2).

9. *See, e.g.*, *Walton v. Arab American Oil Co.*, 233 F.2d 541, 545 (2d. Cir. 1956), in which the 2d Circuit Court refused to consider Saudi Arabia as 'uncivilized'.

10. D. SHINDLER & J. TOMAN, *supra* note 7, at 131.

3. It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.

The importance of the references to the Protocol, even though it has not yet been ratified by any major military power, lies in the fact that, unlike Hague Convention IV, it is not restricted to land warfare. It should be noted, however, that the Nuremberg Tribunal expressly stated<sup>11</sup> that "by 1939 [the] rules laid down in the Convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war." It is arguable that the general principles embodied in the Hague Regulations, especially those relating to the treatment of non-combatants, armistice and peace, based as they are on humanitarian principles, are of general application regardless of the theatre of war. This view is supported in the 1949 Geneva Conventions and Protocol I of 1977.

It should be noted that a finding of "superfluous injury or unnecessary suffering," which was forbidden in Hague Regulations 23,<sup>12</sup> is not based on the subjective reaction of the person injured. It is foreseeable that a victim would consider any injury suffered in conflict, by whatever means, to be 'unnecessary or superfluous'. Support for this interpretation may be seen in a 1962 publication of the United States Department of the Army<sup>13</sup> in its comment upon the ban on the use of poison in the Hague Regulations.<sup>14</sup>

It is in the area of poisonous rather than poisoned weapons that the chief difficulty in applying the prohibition against poison is encountered. (a) The *poisoned* spear, arrow or bullet would be prohibited because the spear, arrow, and bullet are or have been legitimate weapons in their own right. The poison adds little to their effectiveness. The suffering produced by the poison is unnecessary, the weapon itself having already placed the victim *hors de combat*. Also, the application of poison to them converts them into a mere conveyance of the poisoned substance. It is the poison and the unnecessary suffering, not the bullet, which is condemned. (b) Such is not the case with such modern weapons as toxic chemical agents and nuclear explosives. Here the poison, if it can be called that, is either an after effect of the use of the weapon or an essential part of the weapon itself. Prior to the perfection of modern weapons the use of poison had been condemned because its use was both unnecessary and unsoldierly, it being administered almost always in a covert fashion. It was a maxim of the Roman Senate that 'war was to be carried on with arms not with poison'. Tiberius, in rejecting the use of poison states, '[i]t was the practice of the Romans to take vengeance on their enemies by open

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11. *Judicial Decisions Int'l Military Tribunal (Nuremberg), Judgement and Sentences*, 41 AM. J. INT'L L. 172, 248-49 (1947).

12. "... it is especially forbidden. . . (e) To employ, arms, projectiles, or material calculated to cause unnecessary suffering."

13. *U.S. Dept. of the Army Pamphlet 27-161-2*, 2 INT'L L. 40, 40-41 (1962).

14. REG. 23: "... it is especially prohibited (a) To employ poison or poisoned arms."

force and not by treachery and secret machinations.<sup>15</sup> These reasons are not applicable to modern weapons. The 'poison' may be an arm and it may be administered by open force. If so, then other considerations may be more applicable in determining its legality or illegality.

Such other considerations bring into play the concept of proportionality. A recent commentary on Protocol I explains that:

The prohibition concerning the infliction of superfluous injury or unnecessary suffering is merely an implementing rule derived from the basic principles . . . prohibiting those measures of military violence, not otherwise prohibited by international law, which are not necessary (relevant and proportionate) to the achievement of a definite military advantage. The rule is therefore another way of stating the rule of proportionality . . . . In this context the language . . . is more a reaffirmation than a development.<sup>16</sup>

This implies that since the purpose of war is to defeat the enemy and to impose one's own will upon him, it is sufficient to disable his fighting forces, without the concomitant of complete destruction of those forces. Clausewitz recognized this to be so, even though he stated that since "war is an act of force, there is no logical limit to the application of force."<sup>17</sup> This seems to be in line with his assertions that "[the] impos[ition of] our will on the enemy is [the] object[ive of our using force]. To secure [this] object[ive] we must render the enemy powerless . . . . The fighting forces must be *destroyed*: that is they must be *put in such condition that they can no longer carry on the fight*."<sup>18</sup> However,

attached to force are certain self-imposed perceptible limitations . . . known as international law and custom . . . if civilized nations do not put their prisoners to death or devastate cities or countries, it is because intelligence plays a larger part in their methods of warfare and has taught them more effective ways of using force than the crude expression of instinct.<sup>19</sup>

In fact, we may define the principle of proportionality as establishing:

a link between the concepts of military necessity and humanity. This means that the commander is not allowed to cause damage . . . which is disproportionate to military need [—nor is he permitted to allow those under his command to cause such damage]. It involves weighing the interests arising from the success of the operation on the one hand, against the possible harmful effects upon protected persons and objects on the other [—thus it is enough to render combatants *hors de*

15. Vattel, *LE DROIT DES GENS OU PRINCIPES DE LA LOI NATURELLE*, ch. VII at 155 (1758) [Carnegie tr. at 288 (gives the Tiberius reference as "that the Romans revenged themselves upon their enemies by open force, and not by dishonorable methods and secret plots,") (1916)].

16. BOTHE, PARTSCH & SOLF, *NEW RULES FOR VICTIMS OF ARMED CONFLICTS* 195 (1982).

17. C. CLAUSEWITZ, *ON WAR* 27 (Howard-Paret ed. 1984).

18. *Id.* at 90.

19. *Id.* at 76.



*combat* without inflicting excessive injury or inevitable death]. That is, there must be an acceptable relation between the legitimate destructive effect and undesirable collateral effects . . . It is much easier to formulate the principle of proportionality in general terms than it is to apply it to a particular set of circumstances, largely because the comparison is often between unlike quantities and values.<sup>20</sup>

In so far as specific weapons may have been banned the issue of proportionality is irrelevant, for any use of such weapons would constitute a breach of the law.<sup>21</sup> If weapons, for example, booby traps,<sup>22</sup> incendiaries,<sup>23</sup> or gas,<sup>24</sup> have been proscribed by treaty there is no problem. This is true although a power which has neither ratified nor acceded to such a treaty may well argue that it is not bound thereby, regardless of the number of parties or the extent to which *opino juris* maintains that the proscription amounts to customary law. This was the position with regard to the 1925 Geneva Gas Protocol which affirmed that "the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices has been justly condemned by the general opinion of the civilized world . . . [and its] prohibition shall be universally accepted as part of International Law, binding alike the conscience and practice of nations . . ." In 1935 the United States Naval War College concluded that "the use of poisonous gases and those that cause unnecessary suffering is in general prohibited".<sup>25</sup> However, as Charles Cheney Hyde has pointed out:

It is to be expected that a belligerent power will endeavor to make the best possible use of a relative military advantage and to be contemptuous of the dictates of humanity when they appear to frustrate a means of attaining an early and decisive victory. It may be greatly doubted, therefore, whether conventions purporting to restrict or regulate or prohibit recourse to particular forms of chemical warfare are to be relied upon to prevent a belligerent from employing them against the enemy when a relative advantage from so doing is sufficiently clear.<sup>26</sup>

This statement concerns what course of action is likely if a belligerent considers a treaty's restraint to be against its interests. The 1956 edition of the United States Field Manual on the Law of Land Warfare was less definitive:

20. Lt. Col. W. Fenreck, Paper given to officers attending Basic Law of Armed Conflict course 8701 (Dept. of the Judge Advocate General, National Defence Headquarters, Ottawa, Apr. 1987).

21. See generally L.C. GREEN, *Lawful and Unlawful Weapons and Activities*, in *ESSAYS ON THE MODERN LAW OF WAR* (1984).

22. *Convention on Prohibition or Restriction on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects, Protocol II*, 19 I.L.M. 1523, 1529 (1981).

23. *Id.* at 1529.

24. D. SCHINDLER & J. TOMAN, *supra* note 7, at 109.

25. C. HYDE, *INTERNATIONAL LAW SITUATIONS* 106 (1935).

26. 3 INT'L L. CHIEFLY AS INTERPRETED AND APPLIED BY THE U.S. 1823 (1947).

The United States is not a party to any treaty, now in force, that prohibits or restricts the use in warfare of toxic or non-toxic gases, . . . or of bacteriological warfare . . . . The Geneva Protocol . . . signed . . . on behalf of the United States and many other powers has been ratified or adhered to by and is now effective between a considerable number of States. However, the United States Senate has refrained from giving its advice and consent to the ratification of the Protocol by the United States, and it is accordingly not binding on this country.<sup>27</sup>

This situation was changed with the formal adherence by the United States to the Protocol in 1975.<sup>28</sup>

The attitude of the United States prior to its adherence to the Protocol was in accordance with the accepted position in the international law of treaties.<sup>29</sup> This principle is seen in the decision of the World Court in the *S.S. Lotus* case.

International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.<sup>30</sup>

The general effect of the judgment is that states are free to do whatever international law does not forbid them from doing. In the light of this approach to the nature of international law and the discretion possessed by states there evolved the doctrine *pacta tertiis nec nocent nec prosunt* which was applied in the *Free Zones*<sup>31</sup> case. The doctrine was restated bluntly by Judge Read in his Separate Opinion on the *International Status of South-West Africa*. "It is a principle of international law that the parties to a multilateral treaty, regardless of their number or importance, cannot prejudice the legal rights of other States."<sup>32</sup> This principle is stated *simpliciter* in the Vienna Convention on the Law of Treaties:

Article 34. *General rule regarding third States*

A treaty does not create either obligations or rights for a third state without its consent.<sup>33</sup>

In addition to weapons which are expressly banned by treaty, some

27. U.S. Dept of the Army, FM27-10, ¶ 38.

28. See *Presidential Statement of Jan. 22, 1975*, 14 I.L.M. 299 (1975); *Executive Order 11850*, 14 I.L.M. 794 (1975).

29. But see, Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 56 BRIT. Y.B. INT'L L. 1 (1985).

30. *S.S. Lotus (Fr. v. Turk.)* 1927 P.C.I.J. (ser. A) No. 10, at 20, 35.

31. *Free Zones of Upper Savoy and the District of Gex (Fr. v. Switz.)*, 2 HUDSON WORLD COURT REPORTS 448 (P.C.I.J. 1932).

32. 1950 I.C.J. 128, 165.

33. *Vienna Convention on the Law of Treaties*, 8 I.L.M. 679, 693 (1969).

means and methods of warfare are forbidden in accordance with customary law, although it must be recognized that such weapons have, for the main part, fallen into desuetude and lost their usefulness in modern combat. Thus, both the British and American Manuals of Military Law<sup>34</sup> forbid lances with barbed heads which would have been of value in hand-to-hand combat by mounted knights in armour. The German War Book of 1902, however, is more explicit. "The progress of modern invention has made superfluous the express prohibition of certain old-fashioned but formerly legitimate instruments of war (chain shot, red-hot shot, pitch balls, etc.), since other, more effective, have been substituted for these."<sup>35</sup>

*Prima facie*, knowing what we now do of the effects of atomic or nuclear weapons, it would appear that these weapons fall within the prohibitions concerning unnecessary suffering and proportionality. However, it may be questioned whether the effects, especially long-term, of the atomic bombs used against Hiroshima and Nagasaki in 1945, were sufficiently known to bring them within the prohibition. From the point of view of the casualties, both personal and material, immediately affected, there seems little ground for contending that such aerial attack was any more illegal than the attacks against Rotterdam, Coventry, Dresden, Bremen, Hamburg, Berlin or the 'fire-bomb' attacks against Tokyo.<sup>36</sup> As to the long-term effects, many of which might not have been foreseeable at the time, it is perhaps useful to refer to *Administrative Decision No. 11*,<sup>37</sup> rendered by the United States-German Mixed Claims Commission.

The proximate *cause* of the loss must have been in legal contemplation the act of Germany. The proximate *result* or *consequence of that act* must have been the loss, damage or injury suffered . . . Whether the subjective nature of the loss was direct or indirect—is immaterial, but the *cause* of [the injured party's] . . . suffering must have been the act of Germany or its agents. This is but an application of the familiar rule of proximate cause—a rule of general application both in private and public law—. . . It matters not whether the loss be directly or indirectly sustained so long as there is a clear, unbroken connection between Germany's act and the loss complained of. It matters not how many links there may be in the chain of causation connecting Germany's act with the loss sustained, provided there is no break in the chain and the loss can be clearly, unmistakably, and definitely traced, link by link, to Germany's act. But the law can not consider . . . the 'causes of causes and their impulsion on one another'. Where the loss is far removed in causal sequence from the act complained of, it is not competent for this tribunal to seek to unravel a tangled network of causes and of effects, or follow, through a baffling labyrinth of confused thought, numerous disconnected and collateral chains, in or-

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34. H.M.S.O., *MANUAL OF MILITARY LAW*, Part III, The Law of Land Warfare, ¶ 110 (1958); U.S. FM, *supra* note 27, at ¶ 34.

35. Morgan trans. 66, (1915).

36. See, e.g., J. SPAIGHT, *AIR POWER AND WAR RIGHTS* 273-75 (1947).

37. 7 U.N.R. INT'L ARB. AWARDS 23, 29-30 (1923) (italics in original).

der to link Germany with a particular loss. All indirect losses are covered, provided only that in legal contemplation Germany's act was the efficient and proximate cause from which they flowed.

In the *War Risk Insurance Premium Claims*<sup>38</sup> case the same Commission stated:

The use of the term [indirect damages] to describe a particular class of claims is inapt, inaccurate and ambiguous. The distinction sought to be made between *damages* which are direct and those which are indirect is frequently illusory and fanciful and should have no place in international law. The legal concept of the term 'indirect' when applied to an act proximately causing a loss is quite distinct from that of the term 'remote'. The distinction is important.

Some of this 'importance' may be seen if we refer to the claim made in the *Trail Smelter*<sup>39</sup> arbitration for damages in respect to the non-production of timber allegedly resulting from the original tort.

With respect to damage due to the alleged lack of reproduction . . . the Tribunal is of the opinion that it is not proved that fumigations prevent trees from producing sufficient seeds, except in so far as the parent-trees may be destroyed or deteriorated themselves . . . [T]he loss of possible reproduction from seeds which might have been produced by trees destroyed by fumigation . . . is too speculative a matter to justify any award of indemnity . . . [Evidence shows] there is a general lack of reproduction of both yellow pine and Douglas fir over a fairly large area, and this is certainly due to some extent to fumigations. But . . . it is impossible to ascertain to what extent this lack of reproduction is due to fumigations or to other causes such as fires occurring repeatedly in the same areas or destruction by logging of the cone-bearing trees . . . It is further to be noted that the amount of rainfall is [also] an important factor in the reproduction [of the trees in question].

It is asserted that the atomic bombs contributed to the sterility of some of their victims. Other factors, however, such as the inability of particular victims to find mates, as well as natural sterility, may have been deciding factors. The size of a damages award depends upon the illegality of the original act from which the damage is alleged to have followed. Since there was in 1945 no clear rule of customary law or treaty forbidding resort to atomic weapons, the decision as to their legality depends upon the basic rules regarding unnecessary suffering and proportionality. Since the use of these two bombs was intended to bring the war in the Far East to an earlier termination than might otherwise have been possible, and since it was feared that the resistance by the Japanese forces would be sustained and determined, resulting in exceedingly heavy allied casualties, it is arguable that the rule of proportionality was not infringed.

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38. *Id.* at 44, 62-63.

39. 3 U.N.R. INT'L ARB. AWARDS 1905, 1929-30.

It is also arguable that, even assuming the weapon is *prima facie* illegal, recourse to it might be justified on the ground of reprisal. One must recall the behavior of the Japanese in the invasion of China, specifically what happened in Shanghai and Nanking, which was followed by the atrocities in Hong Kong and Singapore. Then, when one considers the ill-treatment of prisoners, under Japanese control, on the Siam-Burma railway and the frightfulness of what happened in Manila, and the threat that this might occur prior to every retreat by the Japanese, it becomes difficult to contend that the effects of the atomic bombs were in any way disproportionate, particularly since Japan's surrender followed so closely upon their use. In this connection the comment by Lauterpacht is notable:

. . . it is difficult to express a clear view as to whether an explicit prohibition of the use of atomic weapon in warfare would be merely declaratory of existing principles of International Law. In any case, so long as the production of the atomic bomb has not been prevented in practice by international agreement and supervision, there must be envisaged the possibility of its being resorted to in contingencies not amounting to a breach of International Law. In the first instance, its use must be regarded as permissible as a reprisal for its actual prior use by the enemy or his allies. Secondly, recourse to the atomic weapon may be justified against an enemy who violates rules of the law of war on a scale so vast as to put himself altogether outside the orbit of considerations of humanity and compassion. Thus if during the Second World War it had become established beyond all reasonable doubt that Germany was engaged in a systematic plan of putting to death millions of civilians in occupied territory, the use of the atomic bomb might have been justifiable as a deterrent instrument of punishment . . . . Moreover, as laws are made not only for the protection of human life, but also for the preservation of ultimate values of society, it is possible that should those values be imperilled by an aggressor intent upon dominating the world the nations thus threatened might consider themselves bound to assume the responsibility of exercising the supreme right of self-preservation in a manner which, while contrary to a specific prohibition of International Law, they alone deem to be decisive for the ultimate vindication of the law of nations.<sup>40</sup>

Since international law reflects the views of what states regard as legally binding upon them, it is essential that the laws of armed conflict reflect military realities, and this of course is endemic in the concept of proportionality. If the laws of war are too far from what military necessities demand, those rules will not be observed. In fact, as was clear from the Geneva Conference on Humanitarian Law, 1974-77, most delegations include military personnel to ensure that idealism does not run wild and replace reality. The importance of paying attention to military requirements may be seen from the criticism levelled against Lieber's Code<sup>41</sup> by

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40. 2 L. OPPENHEIM, INTERNATIONAL LAW 351 n.2 (7th Ed. 1952).

41. Instructions for the Govt. of Armies of the U.S. in the Field, Gen. Orders No. 100,

Bordwell.<sup>42</sup> Bordwell states that because the Code was "written by a non-military man, it lacked the clearness which actual experience would have afforded, and omitted much that might have occurred to one who had seen responsible service in the field." The importance of military experience is clearly indicated in the Preface to the *Oxford Manual* published by the Institute of International Law in 1880. "The Institute . . . believes it is fulfilling a duty in offering to the governments a *Manual* suitable as the basis for national legislation in each State, and in accord with both the progress of juridical science and *the needs of civilized armies*."<sup>43</sup> In light of this we should also look to the views of some of the leading nuclear powers to ascertain their appreciation of the law concerning atomic or nuclear warfare. Since China and France, both nuclear powers, have refused to become parties to the Nuclear Test Ban Treaty of 1963<sup>44</sup> it may be presumed that they are unwilling to concede that nuclear weapons are illegal. The Soviet Union has expressed its opposition to such weapons in ideological terms. The Soviet Union is:

guided by the principles of socialist humanism [and] continues to work for the international prohibition of barbarous means of waging war. It is necessary especially to emphasise the outstanding part played by the U.S.S.R. in the campaign for the prohibition of atomic and thermonuclear weapons, which are weapons for the mass annihilation of civilian populations. The impermissibility of the use of weapons of mass destruction arises from a generally recognised principle of International Law and *expresses the legal awareness of all progressive mankind* . . . . The use of such weapons is also condemned by some *bourgeois* writers, e.g., P. Guggenheim . . . .<sup>45</sup>

Since Soviet endeavours to this end have been 'sabotaged' by the 'obstructionist tactics' of the United States and the United Kingdom, the Soviet emphasis has reverted to what it was in the days of the League of Nations, advocacy of complete disarmament. This includes:

the abolition of armed forces and armaments of all States, to end arms production, abolish ministries of war, general staffs, and all kinds of military and para-military establishments and organizations and also stop the allocation of money for military purposes . . . . The Soviet Government continues to strive for agreement on the cessation of tests and the prohibition of atomic weapons, and on *disarmament as a whole, in which all the peoples of the world are interested*.<sup>46</sup>

24 Apr. 1863, D. SCHINDLER & J. TOMAN, *supra* note 7, at 3.

42. BORDWELL, *THE LAW OF WAR BETWEEN BELLIGERENTS* 74 (1908).

43. D. SCHINDLER & J. TOMAN, *supra* note 7, at 35-36 (italics added).

44. 480 U.N.T.S. 43, *See, e.g.* ROSSEAU, *LE DROIT DES CONFLICTS ARMÉS* 127 (1983): "il n'existe aucune disposition juridique qui interdise d'une manière générale la production, la possession et l'emploi des armes nucléaires, en dehors de l'interdiction des essais nucléaires à des fins militaires résultant du traité de Moscou du 1963, auquel sont parties 105 Etats, à l'exception de la France et de la Chine."

45. ACADEMY OF SCIENCES OF THE U.S.S.R., *INSTITUTE OF STATE LAW, INTERNATIONAL LAW* 411-12 (1963) (italics added).

46. *Id.* at 414-15 (italics added).

The United States *Manual on the Law of Law Warfare* states “[t]he use of explosive ‘atomic weapons’, whether by air, sea, or land forces, cannot as such be regarded as violative of international law in the absence of any customary rule of international law or international convention restricting their employment.”<sup>47</sup> The British *Manual* is somewhat shorter, and states:

There is no rule of international law dealing specifically with the law of nuclear weapons. Their use, therefore, is governed by the general principles laid down in . . . paragraph 107, note 1. (In the absence of any rule of international law dealing expressly with it, the use which may be made of a particular weapon will be governed by the ordinary rules and the question of the legality of its use in any individual case will, therefore, involve merely the application of the recognized principles of international law, as to which see Oppenheim, vol. II, pp. 346-52).<sup>48</sup>

The most complete military statement on the issue of nuclear weapons is to be found in a 1962 publication of the United States Department of the Army:

The provisions of international conventional and customary law that may control the use of nuclear weapons are (1) Article 23(a) of the Hague Regulations prohibiting poisons and poisoned weapons, (2) the Geneva Protocol of 1925 which prohibits the use not only of poisonous and other gases but also of ‘analogous liquids, materials or devices’,<sup>49</sup> (3) Articles 23(e) of the Hague Regulations which prohibits weapons calculated to cause unnecessary suffering, and (4) the 1868 Declaration of St. Petersburg which lists as contrary to humanity those weapons which ‘needlessly aggravate the sufferings of disabled men or render their death inevitable’.<sup>50</sup>

It has been asserted that even if these four provisions are applicable to nuclear weapons they are inadequate to control them, without a new specific prohibition.<sup>51</sup> Article 35, FM27-10 [the Field Manual] adopts the position that ‘explosive atomic weapons’ are not violative of international law in the absence of a rule restricting their employment.

The unpublished annotation to paragraph 35 explains the reason for the conclusion that such weapons are now (1956) lawful: The weapon has already been used, it is still with us, and the major powers are virtually committed in an operational sense to its use in a future war . . . . The weapon has gained such acceptance that it is spoken of in the context of disarmament rather than of illegality.

47. U.S. FM, *supra* note 27, at n.22, ¶35.

48. H.M.S.O., *supra* note 34, at n.29 ¶111.

49. G. SCHWARZENBERGER, *LEGALITY OF NUCLEAR WEAPONS* 37-38 (1958) (author bases the illegality of such weapons on that of gas, considering both a form of ‘poison’).

50. D. SCHINDLER & J. TOMAN, *supra* note 7, at 95.

51. See, e.g., STONE, *LEGAL CONTROLS OF INTERNATIONAL CONFLICTS* 344 (1954); Kunz, *The Chaotic State of the Laws of War*, 45 AM. J. INT’L. L. 37 (1951).

The qualifying word "explosive" is inserted to save taking a position on the use of an atomic weapon, the effect of which was confined to radiation [—such as the neutron bomb]. Such an arm might conceivably run afoul of the prohibition of paragraph (a), Article 23, HR, prohibiting the use of poison or poisoned weapons. This last paragraph of the annotation is important because it underlines the fact that the atom bomb has not one effect, but three effects. They are fire, blast, and radiation. The weapon was used in World War II for its blast effect, a use similar to all high explosives. However, it can conceivably be used in a situation where only one of the three effects will result, that of radiation. This could occur if the bomb were detonated under water in a harbor. The port city would then be drenched with radioactive water. Similarly a high altitude explosion would create only a radiation hazard. It is this singular effect which the annotation warns may run afoul of Article 23(a) HR on the use of poison. Because the blast effect is similar to normal bombings, FM27-10 offers some guidance in its adoption of the rule of proportionality in bombardments: ". . . loss of life and damage to property must not be out of proportion to the military advantage to be gained."<sup>52</sup> The norm of proportionality would apply equally well to the radiation side effects of the blast. If the radiation is cumulative, then the continued use of nuclear weapons might tend to make such use disproportionate despite the fact that the blast effects are confined to important military objectives.<sup>53</sup>

If, however, nuclear weapons of a type that may be used solely for tactical purposes in the field are involved, some of the objections based upon the indiscriminate character of the fall-out become irrelevant.

Since the military manuals of the kind discussed here are not legislative measures, they possess no greater binding authority than any other commentary or legal textbook. This point is clearly made in the opening paragraph of the United States Manual.

The purpose of this Manual is to provide authoritative guidance to military personnel of the customary and treaty law applicable to the conduct of warfare on land and to relationships between belligerents and neutral States . . . . This Manual is an official publication of the United States Army. However, those provisions of the Manual which are neither statutes nor the text of treaties to which the United States is a party should not be considered binding upon courts and tribunals applying the law of war. However, such provisions are of evidentiary value insofar as they bear upon questions of custom and practice . . . .

A similar exposition of the role of the British Manual is to be found in Part I of that Manual, published in 1956. The true significance of such Manuals may be seen in the comments of the United States military tribunal in *Re List (The Hostages Trial)*:<sup>53</sup>

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52. U.S. FM, *supra* note 27, at n.8, 42-44.

53. 8 U.N.W.C.C., *Law Reports of Trials of War Criminals* 34 (1948).



The fact that the British and American armies may have adopted [Oppenheim's views on the validity of superior orders as a defence to a war crimes charge] for the regulation of their own armies as a matter of policy does not have the effect of enthroneing it as a rule of International Law . . . . Army regulations are not a competent source of International Law. They are neither legislative nor judicial pronouncements. They are not competent for any purpose in determining whether a fundamental principle of justice has been accepted by civilized nations generally. It is possible, however, that such regulations, as they bear upon a question of custom and practice in the conduct of war, might have evidentiary value, particularly if the applicable portions have been put into general practice . . . . Determination, whether a custom or practice exist, is a question of fact. Whether a fundamental principle of justice has been accepted is a question of judicial or legislative declaration. In determining the former, military regulations may play an important role but, in the latter, they do not constitute an authoritative precedent.<sup>54</sup>

Since judicial decisions are not obliged to follow military manuals, it is necessary to examine what judicial statements, concerning the legality of atomic or nuclear weapons, have been made. Neither of the International Military Tribunals, Nuremberg nor Tokyo, established at the end of World War II, dealt with the legality of aerial bombardment, nor with the use of the atomic bomb. However, Judge Pal of India, who dissented on all counts from the majority verdict at Tokyo, delivered a most scathing condemnation of the use of this weapon which he compared with the most 'atrocious' orders or policies of Wilhelm II during World War I.

In the Pacific war under our consideration, if there was anything approaching [the ruthlessness of the Kaiser], it is the decision coming from the allied powers to use the ATOM BOMB. Future generations will judge this dire decision. History will say whether any outburst of popular sentiment against usage of such a new weapon is irrational and only sentimental and whether it has become legitimate by such indiscriminate slaughter to win the victory by breaking the will of the whole nation to continue the fight. We need not stop here to consider whether or not 'the atom bomb comes to force a more fundamental searching of the legitimate means for the pursuit of military objectives'. It would be sufficient for my present purpose to say that if any indiscriminate destruction of civilian life and property is still illegitimate in warfare, then, in the Pacific war, this decision to use the atom bomb is the only near approach to the directives of the German Emperor during the first world war and of the Nazi leaders during the second world war. Nothing like this could be traced to the credit of the present accused.<sup>55</sup>

More significant is the decision of the Tokyo District Court in

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54. *Id.* at 51.

55. Pal, INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST—DISSIDENTING JUDGMENT, 620-21 (1953).

*Shimoda v. Japan*<sup>56</sup> that the atomic bombing of both Hiroshima and Nagasaki was 'an illegal act'. The Court recognized, however, that the bomb was a new weapon and that there was no prohibition directly on point.

Of course, it is right that the use of a new weapon is legal, as long as international law does not prohibit it. However, the prohibition in this case is understood to include not only the case where there is an express provision of direct prohibition but also the case where it is necessarily regarded that the use of a new weapon is prohibited, from the interpretation and analogical application of existing international laws and regulations (international customary laws and treaties). Further, we must understand that the prohibition includes also the case where, in the light of principles of international law which are the basis of the above-mentioned positive international laws and regulations, the use of a new weapon is admitted to be contrary to the principles. For there is no reason why the interpretation of international law must be limited to grammatical interpretation, any more than in the interpretation of national law.

There is also an argument that a new weapon is not an object of regulation of international law at all, but such argument has not a sufficient ground as mentioned above. It is right and proper that any weapon contrary to the custom of civilized countries and to the principles of international law, should be prohibited even if there is no express provision in the laws and regulations. Only where there is no provision in the statutory (international) law, and as long as a new weapon is not contrary to the principles of international law, can the new weapon be used as a legal means of hostility . . . .

In the past, although objections were made by various interests against the appearance of a new weapon because international law was not yet developed, . . . new weapons nevertheless came to be regarded as legal with the later advancement of civilization and the development of scientific techniques. This, however, is not always true . . . . Therefore, we cannot regard a weapon as legal only because it is a new weapon, and it is still right that a new weapon must be exposed to the examination of positive international law.

. . . [T]here arises the question whether the act of atomic bombing is admitted by the laws and regulations respecting air raids, since the act is an aerial bombardment as a hostile act by military plane.

No general treaty respecting air raids has been concluded. However, according to customary law recognized generally in international law with regard to a hostile act, a defended city and an undefended city are distinguished with regard to bombardment by land forces, and a defended place and an undefended place are distinguished with regard to bombardment by naval forces. Against the defended city and place, indiscriminate bombardment is permitted, while in the case of an undefended city and place bombardment is permitted only against combatant and military installations (military objectives) and bombardment is not permitted against non-combatants and non-mili-

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56. 8 JAP. ANN. INT'L L. 1964 212 (1963).

tary installations (non-military objectives). Any contrary bombardment is necessarily regarded as an illegal act of hostility . . . .

With regard to air warfare, there are 'Draft Rules of Air Warfare'<sup>57</sup> . . . . In these provisions, stricter expressions are used than in the case of bombardment by land and naval forces, but what they mean is understood to be the same as the distinction between the defended city (place) and the undefended city (place). The Draft Rules of Air Warfare cannot directly be called positive law since they have not yet become effective as a treaty. However, international jurists regard the Draft Rules as authoritative with regard to air warfare<sup>58</sup> . . . . [T]he fundamental provisions of the Draft Rules are consistently in conformity with international laws and regulations, and customs at that time. Therefore, we can safely say that the prohibition of indiscriminate aerial bombardment on an undefended city and principle of military objective, which are provided for by the Draft Rules, are international customary law, also from the point that they are in common with the principle in land and sea warfare. Further, since the distinction of land, sea, and air warfare is made by the place and purpose of warfare, we think that there is also sufficient reason for existence of the argument that, regarding the aerial bombardment of a city on land, the laws and regulations respecting land warfare analogically apply since the aerial bombardment is made on land . . . . Of course, it is naturally anticipated that the aerial bombardment of a military objective is attended with the destruction of non-military objectives or casualty of non-combatants; and this is not illegal if it is an inevitable result accompanying the aerial bombardment directed at a non-military objective, and an aerial bombardment without distinction between military objectives and non-military objectives (the so-called blind aerial bombardment) is not permitted . . . . The power of injury and destruction of the atomic bomb is tremendous . . . , and even such small scale atomic bombs as those dropped on Hiroshima and Nagasaki discharge energy equivalent to a 20,000 ton TNT bomb in the past. If an atomic bomb of such power and destruction once explodes, it is clear that it brings almost the same result as complete destruction of a middle-sized city, to say nothing of indiscrimination of military objective and non-military objective. Therefore, the act of atomic bombing on an undefended city, setting aside that on a defended city, should be regarded in the same light as a blind aerial bombardment; and it must be said to be a hostile act contrary to international law of that day.

. . . Hiroshima and Nagasaki were not cities resisting a possible occupation attempt by land forces at that time. Further, . . . both cities did not come within purview of the defended city, since they were not in the pressing danger of enemy's occupation, *even if both cities were defended with anti-aircraft guns, etc.*, against air raids and had military installations. Also, . . . some 330,000 civilians in

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57. D. SCHINDLER & J. TOMAN, *supra* note 7, at 147.

58. J. SPAIGHT, *supra* note 36, at 42-3; *see also* GREEN, *Aerial Considerations in the Law of Armed Conflict*, *supra* note 21 at n.21, ch. VII.

Hiroshima and 270,000 in Nagasaki maintained homes there, even though there were so-called military objectives such as armed forces, military installations, and munitions factories in both cities.<sup>59</sup>

Therefore, since an aerial bombardment with an atomic bomb brings the same result as a blind aerial bombardment from the tremendous power of destruction, even if the aerial bombardment has only a military objective as the target of its attack, it is proper to understand that an aerial bombardment with an atomic bomb on both cities of Hiroshima and Nagasaki was an illegal act of hostility as the indiscriminate aerial attack on undefended cities . . . .

During World War II, aerial bombardment was once made on the whole place where military objectives were concentrated, because it was impossible to confirm an independent military objective and attack it where munitions factories and military installations were concentrated in comparatively narrow places, and where defensive installations against air raids were very strong and solid; and there is an opinion regarding this as legal. Such aerial bombardment is called the aerial bombardment of an objective zone, and we cannot say there is no room for regarding it as legal, even if it passes the bounds of the principle of military objective, since the proportion of the destruction of non-military objective is small in comparison with the large military interests and necessity. However, the legal principle of the aerial bombardment of an objective zone cannot apply to the city of Hiroshima and the city of Nagasaki, since it is clear that both cities could not be said to be places where such military objective concentrate. [This statement appears to be somewhat inconsistent with previous recognition of the presence of guns, armed forces, military installations and munitions factories.]

Besides, the atomic bombing on both cities . . . is regarded as contrary to the principle of international law that the means which give unnecessary pain in war and inhumane means are prohibited as means of injuring the enemy . . . . [I]t goes without saying that such an easy analogy that the atomic bomb is necessarily prohibited since it has characteristics different from former weapons in the inhumanity of its efficiency, is not admitted . . . . [H]owever great the inhumane result of the use of a weapon may be, the use of the weapon is not prohibited by international law, if it has a great military efficiency. . . .

The destructive power of the atomic bomb is tremendous, but it is doubtful whether atomic bombing really had an appropriate military effect at that time and whether it was necessary. It is a deeply sorrowful reality that the atomic bombing of both cities . . . took the lives of many civilians, and that among the survivors there are people whose lives are still imperilled owing to the radial rays even today 18 years later. In this sense, it is not too much to say that the pain brought by the atomic bombs is severer than that from poison and poison-gas and we can say that the act of dropping such a cruel bomb is contrary to the fundamental principle of the laws of war that un-

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59. It is arguable whether these are statements of good law.

necessary pain must not be given.<sup>60</sup>

It is not surprising that the Japanese court examined the issue from a somewhat subjective point of view. Many of the comments made could be used to sustain an argument to the contrary. Moreover, much of the reasoning is *ex post facto*, reflecting upon what had in fact occurred, and construes the facts solely from the 'victim's' perspective. The judgment does not prove that recourse to the atomic bombs at the end of the war, and for reasons prevailing at the time, was in fact contrary to the law of war as then understood.

When one considers Judge Pal's judgement, one is compelled to conclude that his general attitude to the charges levied and his comparison of the bomb with the practices of the Nazis completely ignores the circumstances of its use or the true character of the crimes committed by the accused. It is therefore disproportional. In fact, it is a little difficult to appreciate the legal reasoning that leads a High Court judge to feel that a crime—if indeed there was one—committed by the prosecutor constitutes sufficient ground to acquit an accused charged with a series of serious crimes. Moreover, bearing in mind the history of the Indian National Army<sup>61</sup> and India's struggle for independence still continuing at the time of the trial, one is tempted to enquire whether Pal's attitude does not reflect a certain amount of subjective racism.

To some extent it might be considered that the nuclear is a more developed and sophisticated form of the atomic weapon. It may also be arguable that the difference in potential between today's nuclear weapons and the atomic bombs of 1945 is such that the latter might almost be regarded as conventional weapons. Again, it must be recognized that, whatever may have been the situation in 1945, we now are aware of the various effects of nuclear explosions and our attitude to the legality of the weapon must be effected by this knowledge. At the same time, we dare not ignore the fact that, as with every other issue in international law, the practice of states must be taken into consideration, particularly the practice of those states most capable of using nuclear devices. In the *North Sea Continental Shelf Case*,<sup>62</sup> the World Court pointed out that for a rule to develop, it required, "a very widespread and representative participation . . . provided it included that of States whose interests were especially affected." In this connection it should be recalled that the 1907 Hague Conventions included an 'all-participation clause.'<sup>63</sup> Both the English Prize Court in *The Mowe*,<sup>64</sup> and the Judicial Committee in *The*

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60. Shimoda, *supra* note 56, at 235-42 (italics added).

61. See Green, *The Indian National Army Trials*, 11 MOD. L. REV. 47 (1948).

62. 3 I.C.J. 42 (1969).

63. See, e.g., Convention IV, Art. 2: "The provisions in the Regulations. . . , as well as in the present Convention, do not apply except between Contracting Powers, and then only if all the belligerents are parties to the Convention."

64. P. 1 (1915).

*Blonde*,<sup>65</sup> made it clear, however, that Convention VI relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities<sup>66</sup>, could not be ignored even when one was dealing with belligerents, particularly non-maritime powers, who had not acceded or ratified the Convention. For the Judicial Committee in *The Blonde* this was not considered sufficient to invalidate the application of Convention VI:

. . . are the 'belligerents', who are to be taken into account . . . , the belligerents merely who detain or suffer detention, or are they all the Powers who are simultaneously engaged in war . . . ? Is the adherence of all the belligerents, however remote from each other or unconnected with the ships and their detention, the consideration for the attaching of the obligation of any one of them, or are the mutual promises of the Powers concerned—that is, of the detainer and the detained—a sufficient consideration to bind them both together? Mutuality is of the essence of the Convention. Is that mutuality complete if the detaining sovereign and the sovereign of the ships detained ratify and abide by the Convention, or is it imperfect, so as to prevent the application of the Convention, unless and until other Powers, in no way concerned in the ships or their fortunes, but merely connected with one or both of those sovereigns in the general war, have likewise ratified and likewise abided by the Convention, whether or not they have ships or harbours, and whether or not they make or suffer captures, or are ever directly affected by maritime war at all?

It is very hard to credit that the operation of an agreement, so earnestly directed to the attainment of the highest practical ends in war, should have been deliberately made to depend on the accidents or the procrastinations of diplomatic procedure in time of peace, even when no real relation existed between the condition and the consequence, between the ratification of all the parties and the detention of the ships of one of them.<sup>67</sup>

In view of this, it is irrelevant that the General Assembly, in 1961, adopted a Declaration on the Prohibition of the Use of Nuclear and Thermo-Nuclear Weapons to the effect that:

- (a) The use of nuclear and thermo-nuclear weapons is contrary to the spirit, letter and aims of the United Nations and, as such, a direct violation of the Charter of the United Nations;
- (b) The use of nuclear and thermo-nuclear weapons would exceed even the scope of war and cause indiscriminate suffering and destruction to mankind and civilization and, as such is contrary to the rule of international law and to the laws of humanity;
- (c) The use of nuclear and thermo-nuclear weapons is a war directed not against an enemy or enemies alone but also against mankind in general, since the peoples of the world not involved in such a war will

65. 1 A.C. 313 (1922) [hereinafter *The Blonde*].

66. D. SCHINDLER & J. TOMAN, *supra* note 7, at 703 (the 'all-participation clause' is Art. 6).

67. *The Blonde*, *supra* note 65, at 324.

be subjected to all the evils generated by the use of such weapons;<sup>68</sup>  
 (d) Any State using nuclear and thermo-nuclear weapons is to be considered as violating the Charter<sup>69</sup> of the United Nations, as acting contrary to the laws of humanity and as committing a crime against mankind and civilization. . . .<sup>70</sup>

Only the Soviet Union, among the nuclear powers, voted in favour of this Declaration, while China, France, South Africa and the United States opposed it, and Israel and Pakistan, believed to possess a nuclear potential, abstained. It, therefore, becomes difficult to consider such a Declaration to be in accord with State Practice or what the states effected believe to be of legal relevance. While the voting technically satisfied the requirement of Article 18,<sup>71</sup> it can not be said to represent either *opinio generalis* or *universalis*, or even *necessitatis*, for it only received 55 affirmative votes, with 20 against and 26 abstaining. Thus, there were only 9 more supporting the Resolution than there were opposing it or refusing to take a stance on it one way or the other. Even the 1972 Resolution<sup>72</sup> on the Non-Use of Force in International Relations and Permanent Prohibition of the Use of Nuclear Weapons which “solely declares . . . the permanent prohibition of the use of nuclear weapons”, was adopted by a mere 73 votes, with 4 opposed and 46 abstaining. Here, China and South Africa voted against it, while the others named above abstained. This was probably because, in addition to condemning nuclear weapons, the Resolution renounced “the use of force in all its forms and manifestations in international relations,” hardly a principle to which they could express their opposition.

Other documents to which reference might be made include those of the International Conference of the Red Cross held in Vienna in 1965 on the Protection of Civilian Populations against the Dangers of Indiscriminate Warfare. It declared “that the general principles of the Law of War apply to nuclear and similar weapons.”<sup>73</sup> Another is the 1969 Edinburgh Resolution of the Institute of International Law on the Distinction between Military Objectives and Non-military Objectives in general and particularly the Problems Associated with Weapons of Mass Destruction.<sup>74</sup> These documents have become somewhat historical in character, however, since they have been overrun by the Protocol adopted at Geneva

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68. See, e.g., McDOUGAL & FELICIANO, *supra* note 6.

69. See *Draft Articles Provisionally Accepted By The International Law Commission On Other Topics*, 18 I.L.M. 1568. (It is interesting that the International Law Commission makes no mention of the use of nuclear weapons in its draft articles on state responsibility.)

70. D. SCHINDLER & J. TOMAN, *supra* note 7, at 121 [G.A. Res. 1653(XVI)].

71. U.N. CHARTER art. 18, ¶ 2: “Decisions of the General Assembly on important questions shall be made by a two-thirds majority of the members present and voting. These questions shall include recommendations with respect to the maintenance of international peace and security. . . .”

72. D. SCHINDLER & J. TOMAN, *supra* note 7, at 129 (G.A. Res. 2936).

73. *Id.* at 195.

74. *Id.* at 201.

in 1977 relating to the Protection of Victims of International Armed Conflicts (Protocol I).<sup>75</sup>

Before examining the position under Protocol I of 1977, it is necessary to refer to the 1976 Convention of the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques<sup>76</sup> since it is generally accepted that the discharge of nuclear weapons does in fact have long-term deleterious effects upon the environment. Article 1 in general terms states that "Each State Party to this Convention undertakes not to engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party."<sup>77</sup> It is important to note that while the Soviet Union, the United Kingdom and the United States are parties to this Convention, it has not been signed or ratified by China, France, Israel, Pakistan or South Africa.

As to Protocol I, Article 55 transfers the provision from the Environment Convention into a principle of humanitarian law in armed conflict:

1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.
2. Attacks against the natural environment by way of reprisals are prohibited.<sup>78</sup> Presumably, if the discharge of a nuclear weapon would only cause temporary, localised damage to the environment it might not fall within this ban.

The only direct reference in the Protocol to nuclear energy is to be found in Article 56 which relates to the protection of works and installations containing dangerous forces, and has nothing to do with the use of nuclear weapons as such.

1. Works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, shall not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population. Other military objectives located at or in the vicinity of these works or installations shall not be made the object of attack if such attack may cause the release of dangerous forces from the works or installations and consequent severe losses among the civilian population.

2. The special protection against attack provided by paragraph 1 shall cease: . . . (b) for a nuclear electrical generating station only if it provides

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75. *Id.* at 132.

76. *Id.* at 131; *see, e.g.*, McDOUGAL & FELICIANO, *supra* note 6, at 388-89.

77. D. SCHINDLER & J. TOMAN, *supra* note 7, at 132.

78. *Id.* at 583.



electric power in regular, significant and direct support of military operations and if such attack is *the only feasible way to terminate such support . . .*.<sup>79</sup>

It is clear that if an attack on such a nuclear installation would not effect the civilian population it would not be forbidden, while the reservation indicates that military necessity overrides humanitarian considerations even in this matter. It should be noted that the United Kingdom, when signing the Protocol, made a declaration regarding this provision to the effect “. . . that military commanders and others responsible for planning, deciding upon or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is available to them at the relevant time,”<sup>80</sup> thus giving them extensive discretion.

More significant from the point of view of the legality of nuclear weapons in armed conflict are the provisions with regard to the law to be applied in such a conflict, together with the provisions specially providing for protection of the civilian population and civilian objects. As has already been indicated, the Martens Clause, with its reference to “established custom, . . . principles of humanity and . . . the dictates of public conscience,”<sup>81</sup> has been embodied in Article 1, while Article 2 makes it clear that when the Protocol refers to ‘rules of international law applicable in armed conflict’ it “means the rules applicable in armed conflict set forth in international agreements to which the Parties to the conflict are Parties and the generally recognized principles and rules of international law which are applicable in armed conflict.”<sup>82</sup> In connection with the problem of the legality of nuclear weapons and the protection of the civilian population, Article 51 is most significant:

1. The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances.

2. The civilian population as such . . . shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

. . . .

4. Indiscriminate attacks are prohibited. Indiscriminate attacks are:

(a) those which are not directed at a specific military objective

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79. *Id.* at 583-84 (italics added).

80. *Id.* at 634-35, ¶1(d).

81. *Id.* at 558.

82. *Id.*

(b) those which employ a method or means of combat which cannot be directed at a specific military objective; or

(c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol;

and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

5. Among others, the following types of attacks are to be considered as indiscriminate:

. . . .

(b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.<sup>83</sup>

To prevent unnecessary civilian damage, Article 57, 2(a)(iii), requires those who plan or decide upon an attack to "refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."<sup>84</sup> Here again, the United Kingdom declaration, already mentioned, goes further, in that it specifically asserts "in relation to paragraph 5(b) of Article 51 and paragraph (2)(a)(iii) of Article 57, that the military advantage anticipated from an attack is intended to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack."<sup>85</sup> This would suggest that the reasons given for recourse to the atomic bombs in 1945, namely early termination of hostilities without further excessive loss of life, might be put forward to give effect to this declaration of understanding. It is also likely that, since the United Kingdom is a member of NATO, the other members of the alliance would adopt a similar approach.

*Prima facie*, it would appear that these provisions render the use of nuclear weapons in armed conflict contrary to the new treaty law of war. However, the Protocol was directed at the Reaffirmation and *Development* of Humanitarian Law in Armed Conflict, so that any provision aimed at its development and not merely at its codification would only apply, unless already established as a rule of customary law, to those parties which ratify it. It is therefore important that, of the nuclear or allegedly potential nuclear powers, neither Israel nor South Africa has signed the Protocol, and only China, of the major nuclear powers, has acceded to it. If the Protocol's provisions with regard to protection of the environ-

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83. *Id.* at 581.

84. *Id.* at 584-85.

85. *Id.* at 635, ¶1(e).

ment, long-term damage and the like are new developments, they are insignificant from our point of view. If the provisions with regard to indiscriminate attack, disproportionate casualties or unnecessary suffering are merely declaratory of existing law, then the arguments presented earlier with regard to the atomic weapon and its legality would equally apply.

More importantly, however, is that, in so far as the major powers are concerned, it was never intended that the Protocol should deal in any way with the nuclear weapon. In his *Droit des Conflicts Armes* Professor Rousseau states:

Les armes nucléaires ont été exclues du champ des débats de la Conférence qui a abouti à l'adoption des protocoles additionnels de 1977 et les trois grandes Puissances nucléaires (Etats-Unis, Grande-Bretagne et U.R.S.S.) ont confirmé par des déclarations unilatérales que les dispositions du protocole nombre 1 ne devaient pas être interprétées comme s'appliquant à l'emploi des armes nucléaires.<sup>86</sup>

It is of interest to note that when the later conference on conventional weapons was held,<sup>87</sup> there was no suggestion that any attempt should be made to proscribe the nuclear arm. Even before this, the International Committee of the Red Cross (ICRC) had stated in connection with their drafts, which became the subject of the humanitarian law conference and ultimately the 1977 Protocols,<sup>88</sup> that “[p]roblems relating to atomic, bacteriological and chemical warfare are subjects of international agreements or negotiations by governments, and in submitting these draft Protocols the ICRC does not intend to broach these problems . . . .”<sup>89</sup> As early as the thirteenth session of the Conference the United Kingdom endorsed this approach and

commented that it was on the assumption that the draft Protocols would not affect those problems that the UK had worked and would continue to work towards final agreement on the Protocols. The United States expressed a similar understanding, expressing the view that “such problems were beyond the scope of the Conference.” The Soviet Union also expressed its concurrence in the ICRC’s statement.<sup>90</sup>

The Protocol was ultimately adopted by consensus, at which time the United States made a declaration of understanding:

From the outset of the Conference, it has been our understanding that rules to be developed have been designed with a view to conventional weapons. During the course of the conference we did not discuss the use of nuclear weapons in warfare. We recognize that nuclear weapons are the subject of separate negotiations and agreements, and further

86. ROUSSEAU, at 127 (1983).

87. See *supra* notes 22 & 23 and accompanying text.

88. Protocol II concerning non-international conflicts is irrelevant in this discussion.

89. BOTHE, *supra* note 16, at 188.

90. D. SCHINDLER & J. TOMAN, *supra* note 7, at 551.

that their use in warfare is governed by the present principles of international law. It is the understanding of the United States that *the rules established by this Protocol were not intended to have any effect on and do not regulate or prohibit the use of nuclear weapons.* We further believe that the problem of regulation of nuclear weapons remains an urgent challenge to all nations which must be dealt with in other forums and by other agreements.<sup>91</sup>

Similar statements were made by France and the United Kingdom, and no party to the conference, with the exception of a written statement submitted by India in the final Plenary, raised any objection to these understandings. It is clear that nothing in the Protocol, whatever its form or implied content, can be taken to apply to nuclear weapons. This was reiterated by the United Kingdom and the United States when they signed the Protocol. The former declared "that the *new rules* introduced by the Protocol are not intended to have any effect on and *do not regulate or prohibit the use of nuclear weapons.*"<sup>92</sup> The United States declared that "it is . . . [our] understanding . . . that *the rules established by the protocol were not intended to have any effect on and do not regulate or prohibit the use of nuclear weapons.*"<sup>93</sup>

In the light of the statements made by the three major powers and France it is clear that if and when any of them ratify Protocol I, the party ratifying will still be free of any restriction flowing from the Protocol as far as the use of nuclear weapons is concerned. Although there is no treaty banning nuclear weapons, and although the major nuclear powers have reiterated their conviction that no black letter law exists proscribing their use as such, it must be accepted that nuclear weapons, like any others, are subject to the normal rules regarding proportionality,<sup>94</sup> indiscriminate damage, unnecessary suffering and the protection of civilians. Provided these requirements, and particularly the rule on proportionality,<sup>95</sup> are met it would seem that in the eyes of the law of armed conflict, the nuclear weapon is as much a legitimate weapon of war when properly used as is any conventional weapon. As with any conventional weapon, improper

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91. BOTHE, *supra* note 16, at 189 (italics added).

92. D. SCHINDLER & J. TOMAN, *supra* note 7, at 635, ¶1(i) (italics added).

93. *Id.* at 636 (italics added).

94. See, e.g., Mallison, *The Laws of War and the Juridical Control of Weapons of Mass Destruction in General and Limited Wars*, 36 GEO. WASH. L. REV. 308, 333 (1967).

95. MCDUGAL & FELICIANO, *supra* note 6, at 218:

. . . proportionality . . . is but another application of the principle of economy of coercion . . . . There is increasing recognition that the requirements of necessity and proportionality as ancillary prescriptions (in slightly lower-order generalization) of the basic community policy prohibiting change by violence, can ultimately be subjected only to that most comprehensive and fundamental test of all law, reasonableness in particular context. What remains to be stressed is that reasonableness in particular context does not mean arbitrariness in decision but in fact its exact opposite, the disciplined ascription of policy import to varying factors in appraising their operational and functional significance for community goals in given instances of coercion.

use of the nuclear weapon would constitute a breach of the law and a war crime amenable to trial by any authority still in existence and willing to institute the necessary proceedings. However, there is probably little to be gained in pursuing the recent suggestion<sup>96</sup> that it might be worthwhile for

one of the political organs of the United Nations to ask the Court for an Advisory Opinion on the present meaning of "civilised nations" in Article 38(1)(c) of its Statute. The request might be formulated under three heads:

- (1) Can a nation which *prepares*, if only contingently, for use of means of mechanised barbarism and co-extirpation be considered as being civilised?
- (2) *A fortiori*, can this description be applied to any nation which, in any circumstances, actually *resorts* to the use of such weapons?
- (3) Would the Court subscribe to the view, expressed by Alberico Gentili four centuries ago, on the unlawfulness of any weapons which are unacceptable "because war, a contest between men, through these acts is made a struggle of demons"?<sup>97</sup>

This ignores the fact that the General Assembly is made up of state representatives, and, while the nuclear powers may be in a minority, they can be relied upon to ensure that they and their friends will constitute a one-third blocking minority. Moreover, even those not yet possessing nuclear weapons, but hoping to do so in the future, are unlikely to agree to ask for any Opinion which might label them even potentially 'uncivilized'.

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96. 4 SCHWARZENBERGER, *INTERNATIONAL LAW* 732-33 (1986).

97. 2 *DE JURE BELLI* ch. VI, §261 (1612) (Carnegie trans. 1933).

