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MYRES S. MCDOUGAL DISTINGUISHED LECTURE

Nuclear Weapons and International Law: Illegality in Context

BURNS H. WESTON*

It is a distinct pleasure—more than that—a great privilege to speak tonight as this year's McDougal lecturer. I thank you for the invitation. In my judgment, Myres McDougal is without peer among international law scholars and jurisprudential thinkers in the Twentieth Century. He is to the fields of international law and jurisprudence, I believe, what Albert Einstein was to the world of physics: a man of seismic vision and consequence. So it is for me a tremendous honor as well as pleasure to be here tonight, speaking under his name. Not that Mac would agree with everything I plan to say this evening; indeed, he sometimes thinks of me, I suspect, as one of his black sheep, somehow gone astray. But if ever there was a man willing to engage in honest disagreement and still call you a valued friend and colleague, that man is Myres McDougal—provided, of course, that you muster the intellectual wherewithal needed to make that disagreement honorable and respected. Myres McDougal does not suffer fools lightly.

Now in the interest of avoiding the fool's errand, let me say at the outset that I harbor no illusions about the role of law and lawyers in relation to nuclear weapons and warfare. There is only so much any one constituency, professional or otherwise, can do by itself. But relative to the other professions, the legal profession can boast, I believe, at least three comparative advantages when it comes to such matters of high state policy as that of nuclear weapons and warfare; and each merits at least brief mention.

One is found in the realm of negotiation, mediation, conciliation, and the like—the so-called table skills of agreement-making and conflict settlement. Alan Sherr and others of us from LANAC (the Lawyers Alliance

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for Nuclear Arms Control) are hard at work exploring and promoting such ways and means to minimize, if not altogether to eliminate, the threat of nuclear war from the face of the earth.

Another especially lawyerly function—one, frankly, that goes much too unsung these days—is the art of regime-building, of inventing and constituting institutions and structures that are capable of coping with major misfeasance of malfunction—for example, the twin diseases of militarism and nuclearism that now infest our planet. Lawyers, I believe, are especially well equipped for what McDougal would call the constitutive enterprise, although shamefully few are now seriously engaged in mapping out those alternatives to the present madness that realistically could enhance our collective national and international security without endangering our biological survival.

Finally, taking my cue from the religious communities (most conspicuously, perhaps, the Catholic Bishops) who with increasing unanimity now condemn the use and threat of use of nuclear weapons as fundamentally immoral and violative of our sacred traditions, there is the all-important business of rendering normative judgment—here, of assessing the legality of nuclear weapons and warfare—and it is this function or comparative advantage I want to stress this evening. We lawyers, particularly in the United States, are to a large degree the high priests of the secular order, and for this reason we have an especial obligation, together with our clerical friends, to point up the normative rights and wrongs of coercive nuclearism. It is an obligation that is, I think, especially important in an essentially voluntarist community, such as our present world community, where one is well advised to emphasize the authority over the control component of international legal prescription lest the law be revealed as merely or mainly the expression of the will of the strongest. The fox in the chicken coop has somehow to be leashed.

I.

Permit me to begin, then, by first acknowledging that, despite the aggravated mutilations we call Hiroshima and Nagasaki, which some reputable scholarship says lacked military necessity, the world community has yet to enact an explicit treaty or treaty provision that prohibits generally the development, manufacture, stockpiling, deployment, or actual use of nuclear weapons. True, a series of important treaties prohibit nuclear weapons in Antartica, Latin American, outer space, and on the seabed beyond the limit of the national territorial seas. The Partial Test Ban Treaty outlaws the testing of nuclear weapons in outer space, underwater, and within the earth's atmosphere (testing nuclear weapons is truly the Devil's act, you see; you have to go underground). The United Nations General Assembly has declared the use of nuclear weapons to be "a direct violation of the Charter of the United Nations," "contrary to the rules of international law and to the laws of humanity," "a crime against mankind and civilization," and therefore a matter of "permanent prohibition." And, in a much too neglected decision rendered almost twenty years ago,

in the *Shimoda Case*, a Japanese tribunal felt compelled to condemn as contrary to international law the only instance of actual belligerent use of nuclear weapons to date, the United States bombings of Hiroshima and Nagasaki. But the fact remains that, despite these various efforts to limit resort to nuclear weapons, there does not yet exist a general treaty ban on their use and threat of use.

Of course, this fact is not lost on those who defend the legality of these weapons. Consistent with the traditional state-centric theory of international legal obligation, which requires that prohibitions on international conduct be based on the express or implied consent of States, they rest their claim, in substantial part, on the proposition drawn from the World Court decision in *The Case of the S. S. Lotus;* i.e., that States are free to do whatever they are not strictly forbidden from doing. Indeed, consistent with Cicero's oft-quoted maxim *inter arma silent leges* (in war the law is silent), some go so far as to contend that nuclear weapons have made the laws of war obsolete.

But surely this is not the end of the matter. While the lack of an explicit ban may mean that nuclear weapons are not illegal per se, the face is that restraints on the conduct of war never have been limited to explicit treaty prohibitions alone. As stated by the International Military Tribunal at Nuremberg in September, 1946:

> The law of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practiced by military courts.

The law of war, like the whole of international law, is composed of more than treaty rules, explicit and otherwise.

Well, taking my lead from the Nuremberg Judgment, I undertook this last year to consider what the conventional and customary laws of war had to say about our topic; and what I found were at least six core rules that struck me as prima facie relevant:

> first, that is is prohibited to use weapons or tactics that cause unnecessary and/or aggravated devastation and suffering;
>
> second, that is is prohibited to use weapons or tactics that cause indiscriminate harm as between combatants and noncombatant military and civilian personnel;
>
> third, that is is prohibited to effect reprisals that are disproportionate to their antecedent provocation or to legitimate military objectives, or that are disrespectful of persons, institutions, and resources otherwise protected by the laws of war;
>
> fourth, that it is prohibited to use weapons or tactics that cause widespread, long-term, and severe damage to the natural environment;
>
> fifth, that it is prohibited to use weapons or tactics that violate the neutral jurisdiction of non-participating States; and

> sixth, that it is prohibited to use asphyxiating, poisonous, or other gases, and all analogous liquids, materials, or devices, including bacteriological methods of warfare.

Of course, these humanitarian rules of armed conflict, as I choose to call them, are general rules, and like all general rules, which are susceptible of differing contextual as well as linguistic interpretation, they harbor exceptions. Also, each traditionally has involved, particularly the first three, a balancing of the customary principles of military necessity and humanity, with "the line of compromise," as McDougal has written, tending to be "closer to the polar terminus of military necessity than to that of humanity." The relative tolerance heretofore extended to "scorched earth" and "saturation bombing" policies and to incendiary and V-weapons, for example, probably attests to this observation. Nevertheless, even after subjecting these core rules to the sophisticated jurisprudence of New Haven, as I have attempted to do elsewhere for the purpose of determining their precise jural quality, one may reasonably accept their pertinence to nuclear weapons and warfare.

More precisely, one may reasonably reach the following three conclusions about them: first, that they continue as a vital civilizing influence upon the world community's warring propensities; second, that as contemporaneously understood, they are endowed with an authority signal that communicates their applicability to nuclear as well as to conventional weapons and warfare; and finally, that there exists on the part of the world community as a whole, evidence—thankfully, more in words than in deeds—an unmistakable intention to have them govern the use of nuclear weapons should ever that terrible day arrive again. To be sure, there is manifest an ambiguity about the extent to which this control intention could in fact be fulfilled, and this ambiguity will persist as long as the distribution of the world's effective power remains as oligarchic as it now is. But it would be error to conclude from this ambiguity that there is no prescription or law placing nuclear weapons and warfare under the legal scrutiny of the humanitarian rules of armed conflict. Moreover, in view of the horrifying and potentially irreversible devastation of which nuclear weapons are capable, not to mention the very little time their delivery systems allow for rational thought, it is only sensible that all doubts about whether they are subject to the humanitarian rules of armed conflict, as a matter of law, should be answered unequivocally in the affirmative, as a matter of policy. Such a response seems mandated, in any event, by a world public order of human dignity, in which, as McDougal has repeatedly stated, values are shaped and shared more by persuasion than they are by coercion.

In sum, despite an erosion over the years of legal inhibitions regarding the conduct as well as the initiation of war, there remains even in this nuclear age an inherited commitment to standards of humane conduct within which the reasonable belligerent can operate, a commitment to the fundamental principle from which all the laws of war derive, namely, that the right of belligerents to adopt means and methods of warfare is *not*

unlimited. It is, I think, not unreasonable to contend that nuclear weapons are illegal per se, within the terms of Rule 6 prohibiting the use of chemical, biological, and "analogous" means of warfare. Perhaps not all nuclear weapons conceivable, but certainly all nuclear weapons now deployed or planned, including the so-called "neutron bomb" or "enhanced radiation" (ER) weapon and the "reduced residual-radiation" (RRR) or "minimum residual-radiation" (MRR) weapon, manifest radiation effects that for all intents and purposes are the same as those that result from poison gas and bacteriological means of warfare; and, in any event, the 1925 Geneva Gas Protocol is so comprehensive in its prohibition that it may be said to dictate the nonuse of nuclear weapons altogether. But in the absence of a specific prohibition, one is expected to ask the same basic question that the conscientious belligerent is obliged to ask in any given conflict situation: Is resort to this means or method of warfare proportionate to a legitimate military end?

II.

In most if not all nuclear warfare situations, the answer to this foregoing question must be given, I believe, in the negative. It is hard to imagine any nuclear war, except possibly one involving a very restricted use of extremely low-yield battlefield weapons, where this vital link between humanity and military necessity, i.e., proportionality, would not be breached or threatened in the extreme; and it is especially hard to imagine in the face of the "countervalue" and "counterforce" strategic doctrines that underwrite the core of the nuclear deterrence policies of the two superpowers. Considering the millions of projected deaths and uncontrollable environmental harms that would result from any *probable* use of nuclear weapons, it seems inescapable that nuclear warfare is contrary to the core precepts of international law.

But the point here is not to deal in generalities, important as the generalities are. Rather, as my subtitle is meant to indicate, it is to investigate how and to what extent the humanitarian rules of armed conflict actually operate in concrete nuclear weapons contexts. After all, if Myres McDougal teaches us anything, it is that a proper appreciation af any prescription, whether explicitly or implicitly formulated, cannot be had without a conscious understanding of the "real world" contexts within which it has to function.

Let us first be clear, however, about the overall issue we are addressing, which is to say *not* the lawfulness of using or threatening to use nuclear weapons as part of a campaign or single act of aggression (as that term is defined in the 1974 United Nations General Assembly Resolution on the Definition of Aggression). Whatever the exact legal status of the Kellogg-Briand Pact and U.N. Charter article 2(4), particularly after the deafening silence that greeted the 1980 Iraqi invasion of Iran, arguably an act of aggression is unlawful irrespective of the kinds of weapons used, nuclear or conventional. Thus, recalling the customary right of individual and collective self-defense (now enshrined in U.N. Charter article 51),

and noting that all the nuclear weapon states admit to no other rationale for their arsenals, the question ultimately before us must be whether any *defensive* use or threat of use of nuclear weapons may be considered contrary to international law, and hence prohibited. The issue subdivides, first, in terms of the actual first- or second-strike defensive use of these weapons for "strategic" or "tactical" purposes; and second, in terms of the threat of their use by way of research and development, manufacture, stockpiling, or deployment for any defensive use or purpose. It should be understood, however, that "strategic" objectives and uses have been the centerpiece of U.S. and Soviet deterrence policies since the late 1940s and early 1950s when the nuclear arms race between them began. Indeed, despite a growing interest on both sides in counterforce doctrine and capabilities for damage limitation, the concept of "countervalue" or "assured (societal) destruction" has served at least the United States as the principal rationale for its nuclear arms buildup ever since it began.

A. *First Defensive Use of Nuclear Weapons*

1. *Strategic Warfare: Countervalue Targeting*

Nuclear weapons designed for countervalue or city-killing purposes tend to be of the strategic class, with known yields of deployed warheads averaging somewhere between two to three times and 1500 times the firepower of the bombs dropped on Hiroshima and Nagasaki. Further, they are "dirty" bombs, capable of producing severe initial nuclear radiation, spatially and temporally dispersed residual radiation (or radioactive fallout) and, in addition, wide-ranging electromagnetic pulse (EMP) effects. Further still, their CEP ("circular error probable") currently averages somewhere between 300 and 2500 meters (i.e., 0.3 to 2.5 kilometers)—which is to say that they lack pinpoint accuracy. Thus, in addition to violating the Rule 6 prohibition against chemical, biological, and "analogous" means of warfare, their capacity for violating all the other prohibitory rules noted, and on a truly awesome scale, seems self-evident.

However, when evaluating this defensive option, what really matters, in a certain sense, is less the fact that nuclear weapons would violate one or another of the prohibitory rules mentioned than the fact that massive nuclear warfare, as a defensive measure, would be unleashed most probably in response to a conventional warfare provocation. By any rational standard, this would constitute a gross violation of the cardinal principle of proportionality. Assuming even the so-called "worst-case" scenario, e.g., a Soviet conventional assault against Western Europe or the oilfields of the Middle East, where is the military necessity in incinerating entire urban populations, defiling the territory of neighboring and distant neutral countries, and ravaging the natural environment for generations to come simply for the purpose of containing or repelling a conventional attack? Surely a failure to provide for an adequate conventional defense or to develop alternative energy sources does not excuse these probable results. If so, then we are witness to the demise of Nuremberg, the triumph

of *Kriegsraison*, the virtual repudiation of the humanitarian rules of armed conflict in at least large-scale warfare. The very meaning of "proportionality" becomes lost, and we come dangerously close to condoning the crime of genocide, as a military campaign directed more towards the extinction of the enemy than towards the winning of a battle or conflict.

It is, of course, conceivable that a city-killing first strike might be in response to a perceived but as yet unexecuted threat of nuclear attack—an imminent one, we must assume. Indeed, it is conceivable that the threatened attack would be equivalent in character. Thus, however much the anticipatory or preemptive strike would run afoul of the rules against aggravated and indiscriminate suffering (Rules 1 and 2 above), it might nevertheless be argued to meet the test of proportionality in some rough way. But the argument would be, I think, deceptive. A preemptive strike of the sort contemplated here, particularly if surface bursts are involved, still would inflict large-scale collateral harms beyond the place and moment of immediate conflict. In addition to violating the Rule 6 ban on chemical, biological, and "analogous" weapons, it would likely violate also the minimal safeguards extended to internationally protected persons (Rules 2 and 3), the natural environment (Rule 4), nonparticipating neutral States (Rule 5), and consequently by these excesses would strain severely the principle of proportionality. Moreover, to the extent that U.N. Charter article 51 admonishes recourse to minimally coercive and nonviolent modes of conflict resolution, including resort to the collective conciliation functions of the United Nations, a preemptive strike probably would disproportionately violate Rules 1 and 2 as well. After all, the threat still would be unexecuted. In any event, the principle of proportionality surely would require that the burden of policy proof be shouldered by those who would unleash the preemptive countervalue strike, and that burden would be a heavy one considering the massive and extended deprivation potentially involved. It is difficult to conceive of any nuclear threat that could not be met by some lesser preemptive mode —except, of course, in the case of foreign policies lacking in creative imagination and insensitive to the magnitude of the human values at stake.

2. *Strategic Warfare: Counterforce Targeting*

Involving the same strategic weapons with the same odious capabilities relied upon for countervalue targeting, a counterforce first strike, like a countervalue first strike, faces the test of proportionality with many presumptions against it. Even if intended for essentially military targets alone, it still would have far-reaching EMP and radiation effects that could not be confined to the place and moment of immediate confrontation, thus violating not only the Rule 6 ban on chemical, biological, and "analogous" weapons but, as well, the rights of great numbers of innocent and neutral—including distant—third parties both living and unborn. And, howevermuch actually restricted to essentially military targets, it still would consist of a massive nuclear retort to what likely would be only a conventional war provocation.

Concededly, because counterforce strategy is a policy of targeting the military, especially nuclear, forces rather than the cities of the other side, there is at least surface plausibility in the argument that a counterforce first strike would not unduly trample upon the Rule 2 prohibition against indiscriminate injury to noncombatant persons and property. Indeed, a lure of counterforce doctrine is that it makes nuclear weapons more credible as instruments of war in part because, at least theoretically, it is less subject to the legal and moral criticisms that can be leveled against countervalue doctrine. The plausibility of this argument quickly vanishes, however, when it is matched against the available data. An oft-cited Office of Technology Assessment study published in 1979, for example, quotes U.S. Government studies indicating that between 2 million and 20 million Americans would be killed within thirty days after a countersilo attack on United States ICBM sites, due mainly to early radiation fallout from likely surface bursts. The test of proportionality is thus greatly strained once again.

Indeed, when all the dynamics of an actual counterforce first strike are taken into account, the test of proportionality seems to be abrogated completely, particularly when the opposing sides are both nuclear powers, as would likely be the case. In the first place, unless the counterforce attack were an all-out "disarming first strike" aimed at the total incapacitation of the enemy's nuclear forces (a highly unlikely achievement), it would virtually guarantee retaliation and therefore greater and more widespread devastation and suffering. Second, notwithstanding voguish theories of "intra-war bargaining," "intra-war deterrence," and "controlled escalation," it is highly improbable that the opposing sides would or could restrict themselves to fighting a "limited" rather than "total" nuclear war, as if somehow governed by the rules of the Marquess of Queensbury. Finally, it seems fairly clear that counterforce capabilities, involving missiles that never have been tested over their expected wartime trajectories, are neither as accurate nor as reliable as publicly claimed.

Again, however, it remains to be asked whether different conclusions might not obtain in the case of an anticipatory counterforce first strike as distinguished from an initiating one. Such a strike, designed to preempt, say, an imminent devastation of equivalent or greater dimension, conceivably could meet the test of proportionality precisely because it would be directed, pursuant to counterforce doctrine, against only military targets. Particularly might this be the case where the statistical probability of accurate warhead delivery would be fairly high, i.e., where the CEP of the preemptive strike would be fairly low (within 100-200 meters by current standards). This logic is based, however, on a calculation of statistical probability, and probabilities, let us be clear, are not certainties. In addition, it suffers from all the disabilities concerning proportionality that we noted in connection with both the preemptive countervalue strike and the initiating counterforce strike. Again, therefore, it is reasonable to conclude that the test of proportionality would not be met or that, at the

very least, those who would unleash the preemptive counterforce strike would have the burden of proving otherwise.

3. *Tactical Warfare: Theater/Battlefield Targeting*

There is no clear borderline between so-called "tactical" and so-called "strategic" nuclear weapons, with the yields and consequent effects of the former commonly rising to the level and impact of the latter. The public debates and demonstrations in Europe since late 1979, which have related primarily to intermediate-range weapons and weapons systems such as the SS-20 ballistic missile and Backfire bomber on the WTO (Warsaw Pact) side, and the planned deployment of Tomahawk ground-launched cruise missiles and Pershing II ballistic missiles on the NATO side, are vivid witness to this fact. Accordingly, it is logical to conclude that the first-strike use of tactical nuclear weapons above, say, the 13 to 22 kiloton range of Hiroshima-Nagasaki, i.e., almost sixty percent of the estimated intermediate "theater of war" and more limited "battlefield" nuclear weapons currently deployed by the NATO and WTO countries, should be subject to the same legal judgments that attend the first-strike use of strategic nuclear weapons (both countervalue and counterforce). The first-strike use of their strategic (particularly counterforce) equivalents would appear to violate in the same way and to a similar degree, separately and in combination, not only all or most of the humanitarian rules of armed conflict listed in Section I but, as well, the fundamental principle of proportionality that mediates among them.

But what of tactical nuclear weapons below the 13 to 22 kiloton range of Hiroshima-Nagasaki? Would the first-strike use of such lower yield weapons, particularly those in the one to two kiloton or sub-kiloton range, equally violate the prohibitory rules discussed above? Would such a strike equally violate the principle of proportionality, on the grounds that, like its strategic counterparts, it probably would be in response to a conventional warfare provocation; indeed, in likely contrast to its strategic counterparts, probably in response to a conventional warfare provocation by a *non-nuclear* adversary? By common definitional agreement, it will be recalled, the term "tactical nuclear weapons" is intended generally to refer to those weapons systems that are designed or otherwise available for use against essentially military targets in so-called intermediate "theater of war" and more limited "battlefield" situations.

In theory, I agree, the answers to these questions must depend, inter alia, on the characteristics and capabilities of the tactical weapons in question. For example, though the provocation might be a conventional one or, indeed, at the hands of a non-nuclear opponent, it is possible at least to conceive of a low-yield, relatively "clean," and reasonably accurate nuclear weapon or weapon system whose tactical first defensive use actually would save lives and protect property within the meaning of military necessity, that is, without violating the principle of proportionality. This "best-case" scenario, however, appears to be a limited one. Judging

from the state of the art as so far publicly revealed, no such option is available among existing intermediate-range theater weapons, although some "progress" in this direction appears to be taking place in connection with limited-range battlefield weapons. The possibility of minimizing destruction and of avoiding indiscriminate harm consonant with Rules 1 and 2 may be present, but not without substantial and, I submit, disproportionate cost in most circumstances relative to internationally protected persons (Rules 2 and 3), the natural environment (Rule 4) and nonparticipating neutral States (Rule 5), due to initial and residual radiation. Moreover, except by a process of interpretation that is uninformed by the basic assumptions of a world public order of human dignity, there is no getting around the Rule 6 prohibition of chemical, biological, and "analogous" weapons. By its very nature, a fission weapon must be regarded as "dirty," and even if a pure fusion weapon with no fission were developed, its explosion in the air and, of course, at ground-level still would result in some radioactive contamination, albeit not as extensive as when nuclear technology was less "tailored" than it is today.

But what truly is damning of the first defensive use of tactical nuclear weapons, whether in theater or battlefield operations, is less the nature of the weapons themselves than the nature of tactical nuclear warfare as a whole. In the first place, as should be apparent to all, if a military campaign defined in part by a first-strike use of nuclear weapons were ever to take place, it surely would not be limited to one or two nuclear strikes, even if only the first user were a nuclear power. Likely as not, as conservatively projected in the 1980 Report of the Secretary-General on nuclear weapons, tactical nuclear warfare, at least at theater level, would result in hundreds and thousands of nuclear explosions and, consequently, untold immediate and long-range, long-term collateral harms. In addition, once unleashed, the probability that tactical nuclear warfare could be kept at theater or battlefield level would be small. A crisis escalating to the actual first use of even relatively small nuclear weapons would bring us dangerously close to the ultimate stage, a "strategic exchange," particularly if one of the two sides saw itself at a disadvantage in a drawn-out "tactical exchange." In sum, once out of the bottle, likely as not even the tactical nuclear genie would quite literally cause "all hell to break loose;" and this fact, in combination with the observations already made regarding the humanitarian rules of armed conflict, would seem by any rational analysis to run hard up against the principle of proportionality upon which the doctrine of military necessity is premised.

Thus, the first use of nuclear weapons again would appear contrary to the basic laws of war as contemporaneously understood. It need only be added that, for all the reasons noted above, but especially the last two relative to the essential uncontrollability of tactical nuclear warfare in general, this conclusion may be seen to apply to the preemptive first use of tactical nuclear weapons as well as to their initiating first use.

B. *Second Defensive Use of Nuclear Weapons*

Would a second defensive use of nuclear weapons—one undertaken as a *claimed* "legitimate reprisal" in response to a prior attack unlawfully initiating the use of such weapons—equally or similarly violate the humanitarian rules of armed conflict? In view of the numerous qualifying reservations now attached to the 1925 Geneva Gas Protocol, conditioning adherence to it upon reciprocal observance of its terms, it may be that the Rule 6 ban on chemical, biological, and "analogous" means of warfare would not stand in the way. On this point, concededly, there is ambiguity. But what about the Rule 3 prohibition of reprisals that are disproportionate to legitimate belligerent objectives or that are disrespectful of persons, institutions, and resources otherwise protected by the laws of war? Is there ambiguity here as well?

1. *Strategic Warfare: Countervalue Targeting*

In the case of a second use of nuclear weapons characterized by countervalue targeting, there is, I submit, no ambiguity. For at least three reasons, such a use may be said to violate the humanitarian rules of armed conflict as contemporaneously understood, especially Rule 3.

In the first place, a retaliatory city-killing attack would flagrantly trample upon guarantees extended to civilians and civilian populations, among other internationally protected persons, by the most recent formal statements on the laws of war. Article 51(6) of 1977 Protocol I Additional to the 1949 Geneva Conventions, for example, is characteristically unequivocal: "Attacks against the civilian population or civilians by way of reprisals are prohibited."

Second, except to destroy enemy morale, which is clearly an impermissible objective under the laws of war, and the more so, one would think, when the result is to terrorize an enemy community through the infliction of literally overwhelming—perhaps irremedial—societal destruction, it is difficult to see how a retaliatory countervalue strike would serve any military necessity whatsoever. To the contrary, even if the antecedent first use were likewise countervalue-destructive in character, it would appear to serve mainly the purpose of vengeance rather than the values of proportionate policing (given, at least, the present essentially rural deployment of the world's strategic forces).

Finally, if the history of belligerent reprisals is any indication, there is the near certainty that a retaliatory countervalue strike would lead not to a reduction of hostilities nor to a moderation of tactics but to an escalatory spiral and spread of countervalue exchanges. At this point, virtually everything for which the principle of proportionality is supposed to stand, including the integrity of the natural environment and the inviolability of neutral state territory, would be threatened; the humanitarian rules of armed conflict would become all but obsolete.

2. *Strategic Warfare: Counterforce Targeting*

The case of a second counterforce use of nuclear weapons is not so clear-cut. Because such a response would be directed, pursuant to counterforce doctrine, against the military (especially nuclear) forces rather than the cities of the first user, and because the laws of war do not invite national suicide, there is room to contend that such a strike would be compatible with prohibitory Rule 3 and the other humanitarian rules of armed conflict, provided that it not be patently excessive relative to the antecedent attack and the goal of law-compliance or nonrecurrence. Indeed, paradoxical though it may seem, it might even be argued that, to ensure a minimum destruction of cherished values (preferably the values of freedom and equality), a nuclear counterstrike of this kind would be required. On the other hand, bearing in mind the characteristics and capabilities of the weapons and weapons systems that constitute today's counterforce arsenals, there remains the problem of reconciling the rights of states not party to the conflict and of persons and property expressly shielded by the law of reprisals and the more general laws of war. "Clean bombs" and "surgical strikes," especially in relation to strategic warfare, exist more in the minds of military planners than they do in reality. Additionally, there is the customary injunction that reprisals be taken only as measures of last resort. In the context of nuclear war, this injunction is all the more imperative.

Thus, the permissibility of a counterforce second strike under the humanitarian rules of armed conflict may be regarded as ambiguous. Of course, because of the essentially uncontrollable dangers involved, one must assume that such a second use, if permissible, would be authorized only in response to an antecedent attack of equivalent or greater proportion, i.e., a prior counterforce or countervalue attack. But even then, because of the unrefined nature of the weaponry involved and the likelihood of crisis escalation and spread, the burden of policy proof would again weigh heavily on those who would retaliate in this manner. Let us be candid. As Roger Fisher has written, "Honestly, each of us would prefer to have our children in Havana, Belgrade, Beijing, Warsaw, or Leningrad today than in Hiroshima or Nagasaki when the nuclear bombs went off."

3. *Tactical Warfare: Theater/Battlefield Targeting*

If there is a case to be made for the use of nuclear weapons consistent with the humanitarian rules of warfare, it is here, in respect of the second use of tactical nuclear weapons. Arguably, a second retaliatory use of a low-yield "clean," and reasonably accurate intermediate- or limited-range nuclear weapon directed only at a military target could be said to meet the requirements of proportionality (or military necessity) that govern the law of reprisals as presently understood. When making the case beyond this highly circumscribed option, however, at least two major complexities arise. First, to the extent that a retaliatory second use would involve theater or battlefield weapons around or above the 13 to 22 kilo-

ton range of Hiroshima-Nagasaki, there is the problem of having to deal with all the ambiguities and qualifications noted in connection with a second counterforce use of nuclear weapons. And second, regarding all tactical nuclear weapons, including those in the one to two kiloton or subkiloton range, there is the problem of establishing upper limits on the number of retaliatory strikes that could be launched at any time without doing violence either to the rights of internationally protected persons (Rules 2 and 3) and neutral States (Rule 5) or, more generally, to the principle of proportionality. In other words, except in the narrowest of circumstances, the unrefined and unpredictable nature of nuclear weapons and weapon systems in general continues to cloud the legality of their second use even in tactical warfare. Add to this the extreme dangers that would attend a likely escalatory spiral once the process of reprisal and counter-reprisal were set into motion, and again the burden of proving that this retaliatory approach should be favored over other means of deterring the enemy becomes very heavy.

C. *Threat of First or Second Defensive Use*

If a given use of nuclear weapons is properly judged contrary to the humanitarian rules of armed conflict, then logically any threat of such use—including not only an ostentatious brandishing of arms (such as a menacing "demonstration burst"), but also their research and development, manufacture, stockpiling, and deployment—should be considered contrary to the humanitarian rules of armed conflict as well. In view of our preceding discussion, the threat at least of a strategic first strike, a tactical first strike, a second countervalue strike, and possibly also a second counterforce strike as well as most tactical second strikes would fit this logic.

A distinct problem with this thesis, however, is that nothing in the traditional rules of warfare prohibits the preparation in contrast to the actual use of weapons and weapon systems. Also, it flies in the face of the deterrence doctrines which are said to have kept the peace, at least between the superpowers, for the last thirty-odd years—a conflict of major significance because, to be minimally credible, a policy of deterrence requires the research and development, manufacture, stockpiling, and deployment of the weapons upon which it is premised. It is true that the nuclear deterrence policies currently practiced, between the superpowers especially, may be criticized in numerous ways: for involving unacceptably high risks; for building upon an inherently unstable balance; for terrorizing populations and holding them hostage as a consequence; for detracting from acceptable solutions or alternatives in case of failure of deterrence; and so forth. But because of the widespread preception, however much open to debate, that the prevention of widespread conflict rests on nuclear deterrence and that this system is, in turn, dependent on credible nuclear threat, it would be difficult to conclude that measures short of actual use would violate the humanitarian rules of armed conflict as presently understood. Not even U.N. General Assembly Resolution

1653 (XVI) or 2936 (XXVII), which declare the use of nuclear weapons, respectively, "a crime against mankind and civilization" and a matter of "permanent prohibition," seek to outlaw measures short of actual use.

Nevertheless, to facilitate comprehensive outlook, at least three qualifying observations should be borne in mind. First a number of path-breaking treaties do specifically prohibit nuclear weapons preparations short of actual combat use: the 1959 Antarctica Treaty, the 1963 Partial Test Ban Treaty, the 1967 Treaty of Tlatelolco, the 1967 Outer Space Treaty, the 1971 Seabed Arms Control Treaty, and the 1979 Draft Moon Treaty. Second, where "demonstration bursts" or equivalent menacing tactics are involved, there is always the possibility of violating the Rule 6 ban on chemical, biological, and "analogous" weapons and, in addition, the other humanitarian rules of armed conflict designed to safeguard internationally protected persons, the natural environment, and neutral states. Finally, because of the high risks and monumental dangers involved, any nuclear weapons measure short of actual use, but especially those of a particularly ostentatious or provocative nature, must be taken with extreme caution. The history of war is riddled with well-meaning doctrines gone out of control, and the possibilities of war increase in direct proportion to the effectiveness of the instruments of war we adopt. It is, no doubt, this viewpoint that lies behind article 36 of 1977 Geneva Protocol I Additional to the 1949 Geneva Conventions: "In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether if employment would, in some or all circumstances, be prohibited by this Protocol or any other rule of international law applicable to the High Contracting Party."

In sum, and by way of conclusion, while no treaty or treaty provision specifically forbids nuclear warfare per se, except in certain essentially isolated whereabouts, almost every use to which nuclear weapons might be put, most notably the standard strategic and theater-level options which dominate United States and Soviet nuclear policy, appear to violate one or more of the laws of war that serve to make up the contemporary humanitarian law of armed conflict, in particular the cardinal principle of proportionality. Whatever legal license is afforded appears restricted to the following at most:

- essentially cautious, long-term preparations for preventing or deterring nuclear war, short of provocative "saber-rattling" activities;
- very limited tactical—mainly battlefield—warfare utilizing low-yield, "clean," and reasonably accurate nuclear weapons for second use retaliatory purposes only; and
- possibly, *but not unambiguously* (until as yet undeveloped technological refinements are achieved), an extremely limited counterforce strike in strategic and theater-level settings for second use retaliatory purposes only.

In other words, applying the humanitarian rules of armed conflict to dif-

ferent nuclear weapons options or uses tends to prove rather than disprove the illegality of these weapons generally. And when one adds to this the conclusion at Nuremberg that the extermination of a civilian population in whole or in part is a "crime against humanity," plus the spirit if not also the letter of the 1948 Convention of the Prevention and Punishment of the Crime of Genocide, then a presumption of illegality and a commensurate heavy burden of contrary proof relative to the use of nuclear weapons on *any* extended or large-scale basis seems beyond peradventure. To be sure, ambiguities exist here and there, especially in the case of limited tactical uses where the venerable test of proportionality must struggle between increasingly "tailored" military technologies and the human propensity for escalatory violence. But overall, the law opposes resort to these instruments of death, and to argue otherwise on the basis of the arguable permissibility of some essentially restricted use is to engage in a high form of sophistry.

Of course, as I stated at the outset, it would be naive to expect that the law alone can make the progressive difference, particularly when, as here, it touches sensitively upon prevailing notions of national security. But more and more the strategic planners among the nuclear weapon states especially; the defense policymakers, the military operators, the laboratories of military R & D, and even the arms controllers have got to change their modes of thinking. More and more they (we) must come to see the essential incompatibility of nuclear weapons with the core precepts of international law. More and more they (we) must be made to understand that the bell tolls for us all—so that we can wake up tomorrow not to the threat of nuclear holocaust but, in the gentle words of Emily Dickinson, spoken at the close of that magnificent film *Sophie's Choice* to "a morning excellent and fair."