

January 1985

## The Nuclear Collision Course: Can International Law Be of Help

John H. E. Fried

Follow this and additional works at: <https://digitalcommons.du.edu/djilp>

---

### Recommended Citation

John H. E. Fried, The Nuclear Collision Course: Can International Law Be of Help, 14 Denv. J. Int'l L. & Pol'y 97 (1985).

This Comment is brought to you for free and open access by the University of Denver Sturm College of Law at Digital Commons @ DU. It has been accepted for inclusion in Denver Journal of International Law & Policy by an authorized editor of Digital Commons @ DU. For more information, please contact [jennifer.cox@du.edu](mailto:jennifer.cox@du.edu), [digitalcommons@du.edu](mailto:digitalcommons@du.edu).

---

## The Nuclear Collision Course: Can International Law Be of Help

### Keywords

International Law: History, Nuclear Energy, States

# The Nuclear Collision Course: Can International Law Be Of Help?

JOHN H.E. FRIED\*

## I. INTRODUCTION

During the four decades since Hiroshima and Nagasaki, the build-up of nuclear weapons has spiraled beyond the worst fears and most strenuous warnings. Although recent research has revealed that the effects of a major nuclear war would be even more catastrophic than hitherto expected (a nuclear night followed by nuclear winter), ever more sophisticated nuclear weapons are being produced and planned. There is the prospect of a new dimension to the arms race in outer space, competitive preparations by the superpowers for "star wars." The seemingly axiomatic conviction that nuclear war is unthinkable has been superceded by plans for protracted and winnable "limited" nuclear war. The fundamental question arises: Is the use of nuclear weapons permitted by international law?

Self-styled realists consider the question naive; they assert that states will pay little heed to law when their national interests are at stake. However, the realists are only able to advocate reliance on intensified force, and in today's world, intensified force ultimately suggests nuclear war.

Respect for the rules of international conduct is a basic requirement for a viable international community.<sup>1</sup> As Chancellor James Kent said in 1826:

A comprehensive and scientific knowledge of international law is highly necessary. . .to every gentleman who is animated by liberal views and a generous ambition to assume stations of high public trust. It would be exceedingly to the discredit of any person who should be called to take a share in the councils of the nation, if he should be found deficient in all the great learning of this law. <sup>2</sup>

Without international law (the sum total of treaties, customs and principles that regulate the mutual conduct of states), the world could

---

\* John H. E. Fried, PH.D., Columbia University; LL.D., Vienna University; Professor of Political Science, City University of New York (emer.); Member, Committee on the Law of Armed Conflict, Am. Branch, International Law Assoc.; Consultative Council, Lawyers Committee on Nuclear Policy; Special Legal Consultant to the Judges, U.S. War Crimes Tribunals, Nuremberg.

1. For a searching, non-legalistic analysis, see G. CRAIG & A. GEORGE, *FORCE AND STATE-CRAFT: DIPLOMATIC PROBLEMS OF OUR TIME* (1983).

2. 1 J. KENT, *COMMENTARIES ON AMERICAN LAW* 19-20 (1826), cited by W. BISHOP JR., *INTERNATIONAL LAW: CASES AND MATERIALS* at 17 (2d ed. 1962).

not function, just as no society could function without domestic law. As domestic law deals, in part, with disturbances threatening the domestic community, so does international law include an elaborate body of rules concerning war between nations.

For a discussion of the impact which the international law of war<sup>3</sup> must have on governmental policies, some facts should first be recalled:

(1) The international law of war is binding. Governments instruct their Armed Forces to respect the law of war. As the basic *U.S. Army Field Manual* says about the treaties on the law of war which it incorporates: "the treaty provisions quoted herein must be observed by both military and civilian personnel with the same strict regard for both the letter and the spirit of the law which is required for the Constitution and statutes. . . ."<sup>4</sup> The basic *U.S. Air Force Treatise* on the conduct of armed conflict states that:

The law of armed conflict is essentially inspired by the humanitarian desire of civilized nations to diminish the effects of conflicts. . . . It has been said to represent in some measure the minimum standards of civilization. . . . [I]ts permanence is 'based on a general consciousness of stringent and permanent obligation'. . . . We in the Air Force constantly benefit from the existence of international law. . . .<sup>5</sup>

(2) The international law of war is not imposed either on governments or on the military. Existing treaty rules were drafted at international conferences in collaboration with, and with the approval of, the military experts of the participating countries. Hence, the rules imply that the military found it useful to limit the extent of violence permissible against the enemy, because this equally limits the extent of permissible violence by the enemy.

(3) History shows that while the destructiveness of military technology has increased, so has the condemnation of war. By 1928, the Kellogg-Briand Pact prohibited war as an instrument of national policy. The U.N. Charter calls war a scourge. The General Assembly stigmatized a war of aggression as a "crime against international peace."<sup>6</sup> The Charter forbids not only use of force against the territorial integrity or political independence of any State (except in self-defense "if an armed attack occurs") but forbids even the threat of force.<sup>7</sup> These fundamental rules also prohibit the use or threat of use of any weapons against another country in

3. It is more precisely called "the law of armed conflict" in order to prevent the subterfuge that military hostilities, when called "police action" or the like, are not subject to the rules of war.

4. DEPT. OF THE ARMY, FM27-10, *THE LAW OF LAND WARFARE* art. 7 (1956). [hereinafter cited as *U.S. ARMY FIELD MANUAL*].

5. DEPT. OF THE AIR FORCE, AFP 110-31, *INTERNATIONAL LAW: THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS* 6-5 (1976) (*Also known as U.S. AIR FORCE TREATISE*) [hereinafter cited as *U.S. AIR FORCE TREATISE*].

6. G.A. Res. 3314, 29 U.N. GAOR Supp. (No. 19), U.N. Doc. A/9619 and Corr. 1 (1974).

7. U.N. CHARTER arts. 2, para. 4, and 51.

military actions such as a "surgical strike" on any specific object or area or group of persons, a "demonstration explosion," or an attack in pursuit of any political aim. These rules prohibit any pre-emptive or anticipatory attack. As one commentator stated: "[S]omeday tensions between the Soviet Union and the United States may be so high that the only security either nation will have against a war of annihilation will be the clear legal rule prohibiting anticipatory self-defense."<sup>8</sup>

(4) Society's aversion to the cruelty of war (which is characteristic of our era) is relevant for the interpretation of rules that become binding when, despite all prohibitions, war occurs. These rules must be interpreted restrictively, insofar as they permit violence, and extensively, insofar as they forbid violence.

(5) Grave breaches of the law of war are crimes, regardless of whether or not those responsible for them are tried.

Keeping these considerations in mind, what are the implications of international law concerning the use of nuclear weapons?

## II. FIRST-USE OF NUCLEAR WEAPONS

### A. *Nuclear Warfare Violates the Fundamental Rules of Combat*

It is sometimes asserted that nuclear weapons are "ordinary weapons just as any other weapons" and, consequently, mankind must live with them or, as the case may be, die from them. Obviously, they are not "ordinary" weapons. Their effects threaten calamities beyond the capacity of conventional weapons. As has often been asserted, once the threshold between conventional and nuclear war is crossed, unparalleled catastrophe is unavoidable.<sup>9</sup>

Even accepting, *arguendo*, that nuclear weapons are like other weapons, this assumption does not show that their use is permissible. To the contrary, the very assumption proves the illegality of nuclear warfare. For if nuclear weapons are weapons like any other then the rules for non-nuclear combat must also apply to nuclear combat. Any rule that prohibits the use of conventional weapons must also prohibit the use of nuclear weapons. The difference is that non-nuclear weapons can be used without violating the rules of combat, whereas nuclear weapons cannot.

This fact becomes apparent by reviewing the basic rules of combat laid down in the Hague Regulations of 1907<sup>10</sup>, which were confirmed and

8. D'Amato, *Israel's Air Strike Upon the Iraqi Nuclear Reactor*, 77 AM. J. INT'L L. 588 (1983).

9. To point out the basic difference between nuclear and conventional warfare is, of course, not meant as advocacy for conventional war as the smaller evil. The very assumption that conventional war is "preferable" implies the inevitability of war. And as long as war plans provide for mixed conventional-nuclear combat from the onset of hostilities, rapid escalation into full nuclear war is assured.

10. The Hague Convention Respecting the Law and Customs of War on Land, 1907, art. 18 (annex), 36 Stat. 2277, T.S. No. 539 [hereinafter cited as Hague Convention].

adapted to modern conditions in the Geneva Conventions of 1949, four years after the advent of nuclear weapons. Although the Conventions of 1949 make no specific reference to nuclear weapons, it is precisely because special rules for nuclear weapons were never promulgated that general rules which forbid or restrict the use of any weapon must apply to nuclear weapons.

The ground rule of the entire law of war stipulates that "the right of belligerents to adopt measures of injuring the enemy is not unlimited."<sup>11</sup> This means that the rules of war, and not the technological possibilities, determine the limits of permissible violence in war.

Another basic principle of the law of war specifically bans the use of an entire category of weapons, regardless of whether their use would be technologically possible or militarily advantageous: "it is especially prohibited to employ arms, projectiles, or materials of a nature to cause unnecessary suffering."<sup>12</sup>

This rule protects not only civilians, but also the military forces (combatants). The *U.S. Air Force Treatise* states: "[T]he rule against unnecessary suffering applies also to the manner of use of a weapon or method of warfare against combatants or enemy military objectives."<sup>13</sup> It states further that, "[t]he rule prohibiting the use of weapons causing unnecessary suffering or superfluous injury is firmly established in international law," going back to the 1868 St. Petersburg Declaration which prohibited "the employment of arms which uselessly aggravate the suffering of disabled men or render their death inevitable."<sup>14</sup>

Since nuclear arms are unquestionably of a nature to cause unnecessary suffering, their use is prohibited by this general rule. The prohibition applies also to the use of accurate "counterforce" nuclear weapons against "military objectives" (such as ammunition depots and silos where military personnel would be hit by them).

Nuclear warfare would also not respect what the International Red Cross calls "the very basis of the whole law of war,"<sup>15</sup> namely, the distinction between combatants and civilians. It is true that in every war, civilian casualties will occur although non-combatants are, in principle, immune. As the 1976 *U.S. Air Force Treatise* states: "This immunity of the civilian population does not preclude unavoidable and incidental civilian casualties which may occur during attacks against military objectives and which are not excessive in relation to the concrete and direct military

---

11. *Id.* art. 22.

12. *Id.* art. 23(e).

13. U.S. AIR FORCE TREATISE, *supra* note 5, at 2.

14. *Id.*

15. INTERNATIONAL RED CROSS, 4 COMMENTARY TO THE 1949 GENEVA CONVENTION 153 (1958)[hereinafter cited as COMMENTARY].

advantages anticipated.”<sup>16</sup>

The proposition that “unavoidable and incidental” civilian casualties may result from otherwise legitimate military action may have to be tolerated by the harsh logic of war. But at what point do such incidental consequences, precisely because they are unavoidable, become so nefarious as to make a military action illegitimate?

The multi-million civilian death toll expected from even a limited use of tactical nuclear arms cannot be considered “unavoidable and incidental” and hence tolerable. The law of war carefully distinguishes between permissible destruction and prohibited devastation. It permits the destruction of military objects, yet it does not permit destruction beyond the limits it has set. The notions that a purpose of war is destruction for destruction’s sake; that destruction is a success in itself; that the more desolation caused, the better; that war may aim at preventing the enemy country’s recovery after the war’s end — are anathema to the honorable profession of arms. Three important provisions of the law of war state:

(a) *Prohibition of indiscriminate destruction*: “it is especially forbidden. . .to destroy. . .the enemy’s property, unless such destruction. . .be imperatively demanded by the necessities of war.”<sup>17</sup> “Property” here means any property movable or immovable, public or private, from a single object to an entire city.

(b) *Prohibition of attacking or bombarding undefended places*: “The attack or bombardment by whatever means, of towns, villages, dwellings or buildings which are undefended is prohibited.”<sup>18</sup> Thanks to this rule, Rome and Paris were saved from destruction in World War II when they were declared undefended, or open cities. Such cities could not be exempted from radioactive fallout caused by nuclear strategic area bombings or tactical precision attacks on defended places.

(c) *Prohibition of attacks on civilian hospitals*: “Civilian hospitals. . .may in no circumstances be the object of attack, but shall at all times be respected and protected by the Parties to the conflict.”<sup>19</sup> Obviously, hospitals could not be protected against radioactive fallout.

#### B. “Prisoners Will Not Be Taken”

The law of war states that members of the armed forces have the right to surrender, individually or in units, however large, and become prisoners of war. Thereupon, the enemy must provide them with shelter, food, medical care, clothing, etc. “until their final release and repatria-

---

16. U.S. AIR FORCE TREATISE, *supra* note 5, at 6.

17. Hague Convention, *supra* note 10, art. 23(g).

18. *Id.* art. 24.

19. Convention Relative to the Protection of Civilian Persons in Time of War, Geneva, Aug. 12, 1949, art. 18, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287. [hereinafter cited as Civilian Convention].

tion."<sup>20</sup> This safety valve guaranteed by the law of war, which even in the fury of World War II saved millions of lives, would be closed in nuclear war. In the U.S.-Indochina war, when the U.S. combined intense conventional air warfare with ground warfare, large numbers of Indochinese soldiers were still taken prisoner. But, in long-distance nuclear war, the possibility to surrender would not exist. The situation would be the same as that of a declaration that "no quarter will be given." Such a declaration is among the methods of war "especially forbidden" by the Hague Regulations.<sup>21</sup>

### C. Nuclear Warfare Would Violate the Immunity of Neutral States

Nuclear warfare would not only transgress the law which regulates combat between belligerent states, but would also transgress the rules regulating the behavior of belligerents toward neutral states. The most sacrosanct of these is the time-honored axiom that "[t]he territory of neutral Powers is inviolate."<sup>22</sup> Disregard for this immunity of neutrals is considered a particularly grave outrage.

The 1976 *U.S. Air Force Treatise* states that "particular weapons or methods of warfare may be [considered] prohibited because of their indiscriminate effects. . . Indiscriminate weapons are those incapable of being controlled, through design or function. . . . Uncontrollable effects. . . may include injury to the civilian population of other States as well as injury to an enemy's civilian population."<sup>23</sup>

The Secretary-General's *Comprehensive Study on Nuclear Weapons* declares: "In a nuclear war. . . all nations in the world would experience grave physical consequence from radioactive fallout. . . and during the decades after a major nuclear war, fallout would take a toll of millions worldwide in present and future generations."<sup>24</sup>

It would be sophistry to assert that the catastrophe predicted for countries uninvolved in the nuclear conflict would not violate the immunity of their territory guaranteed by Hague Convention V.<sup>25</sup> Even if nuclear warfare could be conducted between belligerents in obedience to the rules of war, the disastrous consequences for the neutrals would prohibit it.

The situation of certain neutral states, namely those which harbor nuclear weapons of a belligerent state on their territory, is particularly

20. Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 5, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135.

21. Hague Convention, *supra* note 10, art. 23(d).

22. *Id.* art. 1.

23. U.S. AIR FORCE TREATISE, *supra* note 5, at 6-3.

24. Comprehensive study on Nuclear Weapons, Report by the Secretary General, para. 495, U.N. Doc. A/35/392 (1980). The study calls nuclear weapons "a perpetual menace to human society." *id.* para. 490.

25. Hague Convention, *supra* note 10.



serious. They are exposed to unintended radiation effects of nuclear warfare between others and risk that the belligerent's opponent will deny their status as neutrals.

For a state wishing to remain neutral in a war between others, it is not enough to abstain from fighting on either side. In order to claim the status of a neutral, the state must fulfill certain obligations. First, it must not allow "belligerents to use its territory as a base of operations in war."<sup>26</sup> The Hague Convention demands that "[a] neutral Power which receives on its territory troops belonging to the belligerent armies shall intern them, as far as possible, at a distance from the theatre of war."<sup>27</sup> Logically, and by universal practice, the arms of the interned foreign troops must also be seized. As the *U.S. Army Field Manual* states, these troops "must be disarmed."<sup>28</sup> Since, as the *Manual* explains, this refers to their "munitions, arms, vehicles, and other equipment,"<sup>29</sup> nuclear weapons must also be seized.

These obligations would have to be fulfilled by any European NATO country which would decide to remain neutral in the event of a U.S.-Soviet war.<sup>30</sup> However, NATO has systematically combined and interwoven its members' preparations for instantaneous war, and nuclear weapons are available to U.S. forces on the soil of several European NATO countries. At the start of a U.S.-Soviet war, those claiming the status of neutrals would therefore have to seize such arms within minutes. This, of course, would be impossible.

The Soviet Union would have to expect that U.S. nuclear weapons deployed in NATO countries would be used against it or its allies. Hence, the Soviet Union could rightly claim that those countries, although they do not actively participate in the war, do not have neutral status and it

---

26. 2 L. OPPENHEIM & H. LAUDERPACHT, *INTERNATIONAL LAW* 727 (7th ed. 1952).

27. Hague Convention, *supra* note 10, art. 11.

28. U.S. ARMY FIELD MANUAL, *supra* note 4, art. 533.

29. *Id.* art. 536.

30. See NATO Treaty, June 19, 1951, 4 U.S.T. 1793, TIAS No. 2678. "If an armed attack on any NATO member occurs, each shall take 'such action as it deems necessary, including the use of armed force.'" (Art. 5). Hence, each NATO member has the sovereign right to take no action, military or otherwise. Furthermore, in order to exclude the interpretation that any NATO member must go to war whenever any other NATO member goes to war, the Treaty underscores the obvious, namely that each NATO member would take the fatal decision to go to war "in accordance with its constitutional processes." (Art. 11) Evidently, neither the U.S. nor any other country would, without such safeguard, have entered the NATO alliance.

It should also be noted that the NATO Treaty does not specify the country or countries against which it is to apply. While having primarily the Soviet Union in mind, the Treaty applies to an attack by any State against a NATO State in the NATO area. Had the treaty established an automatic obligation to go to war, this would, in case of an attack by NATO member A against NATO member B, scurrilously require the other NATO member States to fight NATO member A. In fact, this could conceivably have occurred already if Turkey's 1974 invasion of Cyprus and subsequent occupation of a large part of the island had led to war between NATO members Greece and Turkey.

may therefore destroy those weapons.<sup>31</sup>

This principle applies equally to the non-NATO countries of the world that wish to stay out of a U.S.-Soviet war, but harbor U.S. nuclear weapons.<sup>32</sup> It also applies to Warsaw-Pact and non-Warsaw-Pact States in which Soviet nuclear weapons may be located. Thus, a U.S.-Soviet war in Europe would, from its inception, threaten to assume global dimensions because both sides would feel compelled to eliminate the danger of weapons available to the opponent in third countries.

#### D. *Fate of Enemy Areas "Won" by Nuclear Attack*

It has been necessary to conclude that the law of combat and the law of neutrality prohibit nuclear warfare. The same is true of the law of belligerent occupation.

The law of belligerent occupation is based on the proposition that it is the very aim of war to penetrate and thereupon to occupy parts or even the whole of the enemy's territory. From the moment of occupation, and for as long as the occupation lasts, "the authority of the legitimate power [has] in fact passed into the hands of the occupant."<sup>33</sup> The occupant must "take all the measures in his power to restore, and ensure, as far as possible, public order and safety."<sup>34</sup> "To the fullest extent of the means available to it, the occupying power has the duty of ensuring the food and medical supplies of the population."<sup>35</sup> The occupant must "in particular, bring in [from outside the occupied territory] the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate."<sup>36</sup>

31. However, if the U.S. had not used nuclear weapons first (from whatever location), the Soviet Union would by its own no first-use pledge be prevented from using nuclear arms for the purpose.

32. The situation can be illustrated by referring to the Philippines and Japan. Two of the most important overseas American installations are in the Philippines. The Subic Naval Base is the U.S. Navy's largest logistical support base in the Western Pacific, and Clark Air Base (headquarters of the 13th Air Force) is the largest U.S. airbase in East Asia; the complex of bases is staffed by 15,400 military and Department of Defense personnel. See W. Bello, *Springboards for Intervention, Instruments for Nuclear War*, SOUTHEAST CHRONICLE, at 3,5 (Apr. 1983).

In Japan, the U.S. presence consists of some 50,000 troops provided with aircraft, and major facilities such as naval ports and communications, command and control stations. A Marine Corps station, some 11,000 strong, is located at Iwakuni, 20 miles from Hiroshima. See G. Mitchell, *Rearming Japan*, IN THESE TIMES, at 12,13 (Aug. 2, 1985).

The U.S. policy not to confirm or deny the presence of nuclear weapons also applies to the Philippines and Japan. If none are there, they could in a crisis be brought in quickly, whereupon the obligation of the host nation, to seize those weapons and intern the U.S. forces (pursuant to Hague Convention), would apply but could hardly be fulfilled.

33. Hague Convention, *supra* note 10, art. 42.

34. *Id.*

35. *Id.*

36. See Civilian Convention, *supra* note 19, art. 55. "Article 55, Geneva Civilian Convention, confirming extensive responsibility for the welfare of the occupied territory, imposes upon the occupying power the duty of ensuring food and medical supplies to the best

The vast obligations of the occupant (to which numerous others listed in the law of war would have to be added) apply to "the occupied territory," and hence also to occupied areas not directly affected by combat but where these supplies are needed.

However, the phrase, "[t]o the fullest extent of the means available to [the Occupant]"<sup>37</sup> qualifies the obligation in any occupied area. The significance of the qualification must be considered. In particular, the International Red Cross Committee's *Commentary* states:

The rule that the Occupying Power is responsible for the provision of supplies for the population places that Power under a definite obligation to maintain at a reasonable level the material conditions under which the population of the occupied territory lives. The inclusion of the phrase 'to the fullest extent of the means available to it' shows, however, that the authors of the Convention did not wish to disregard the material difficulties with which the Occupying Power might be faced in wartime (financial and transport problems, etc) but the Occupying Power is nevertheless under an obligation to utilize all the means at its disposal.<sup>38</sup>

The *Commentary* then underscores the extent of the obligation: "Supplies for the population are not limited to food, but include medical supplies and any article necessary to support life."<sup>39</sup> In addition,

[t]he duty of ensuring supplies is reinforced by an obligation to bring in the necessary articles when the resources of the occupied territory are inadequate. . . . The Convention does not lay down the method by which this is to be done. The occupying authorities retain complete freedom of action in regard to this, and are thus in a position to take the circumstances of the moment into account.<sup>40</sup>

The *Commentary* concludes by suggesting some concrete measures that the occupant should take "in good time"<sup>41</sup> to facilitate imports to the occupied territory, for example, arranging for free transit subject to the occupant's verification and control.

The significance of the *Commentary* lies in the emphasis it puts on the legal obligation of belligerents not to let helpless enemy populations perish but "to support their life"<sup>42</sup> as well as possible by potentially major undertakings. The question arises whether the rules of belligerent occupation become irrelevant when, under the conditions of nuclear war,

---

of its capabilities, even if it has to bring these in from outside the territory." U.S. AIR FORCE TREATISE, *supra* note 5, at 41.

37. *Id.*

38. See COMMENTARY, *supra* note 15, at 153.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

they can hardly be obeyed. How could either superpower, upon becoming the occupant, take "the prophylactic and preventive measures necessary to combat the spread of contagious diseases and epidemics"<sup>43</sup> from thousands of miles away and "to the fullest extent of the means available to it,"<sup>44</sup> as stipulated in the Geneva Civilians Convention? The superpowers' own medical personnel and medical supplies, decimated by the war, could not even begin to take care of the casualties at home. A 1984 Report of the World Health Organization estimates that:

[t]he detonation of even a single 1-megaton bomb over a large city would kill more than 1.5 million people and injure as many. A 'limited' nuclear war with smaller tactical nuclear weapons totalling 20 megatons, aimed at military targets in a relatively densely populated area would exact a toll of about 9 million dead and seriously injured, of whom more than 8 million would be civilians, an all-out nuclear war. . . would result in more than 1000 million deaths and 1000 million injured people. . . Therefore, the only approach to the treatment of health effects of nuclear explosions is primary prevention of such explosions, that is, the prevention of atomic war.<sup>45</sup>

This counsel by W.H.O. experts is even more justified by two other aspects of nuclear war which these experts do not address directly.

First, the primary purpose of occupying enemy territory during war is to deprive the enemy of the capability of using the territory and its resources for military purposes; to wage war from it. To achieve this aim, it is not necessary, and therefore not legitimate under the military concept of "economy of force,"<sup>46</sup> always to inflict great damage on that territory or its population. But a no-occupation strategy could not be carried out with restraint; it could only make the territory militarily useless to the enemy by devastating it.

Second, even after the end of nuclear hostilities, the "victor" would find its own country in a disastrous situation, and be unable to undertake the massive relief actions desperately needed by the defeated side, such as those rendered after World War II to the defeated Axis countries by the Allies — notably by the United States which was unscathed by the war.

Indeed, the cruelest irony of long-distance nuclear war is that there would be no occupation of enemy territory. Bombardments by long-range missiles and bombers are capable of destroying their targets (which would inevitably also produce large-scale lethal radiation beyond their targets) but are evidently incapable of occupying territory. In short, the enemy areas subjected to those bombardments would not be occupied because

43. Civilian Convention, *supra* note 36, art. 56.

44. *Id.*

45. See WORLD HEALTH ORGANIZATION, SUMMARY OF THE REPORT OF THE INTERNATIONAL COMMITTEE OF EXPERTS IN MEDICAL SCIENCE AND PUBLIC HEALTH: EFFECTS OF NUCLEAR WAR ON HEALTH AND HEALTH SERVICES 5-6 (1984).

46. U.S. AIR FORCE TREATISE, *supra* note 5, at 5-8.

this is neither intended nor physically possible. The survivors would be relinquished to their own misery. Anarchy, famine and epidemics would be left unchecked. This aspect of nuclear war is hardly ever mentioned.<sup>47</sup>

No rule of international law obligates a belligerent to occupy enemy territory which his attacks have "made ripe" for occupation. The law of war does not prescribe military strategy, but it sets the limits of permissible strategy. To occupy ("conquer") enemy territory has been the essential goal in war, the very purpose of strategy, the pride of generals, and the hoped for justification of the sacrifices imposed by war, from Troy to Stalingrad, and from Richmond to Hanoi. Yet the question now is whether nuclear war technology makes occupation of enemy territory unfeasible, and therefore grants a belligerent the right to devastate enemy territory and take no responsibility for the fate of the survivors.

In fact, nuclear war would deprive the attacked opponent of the palliative that has made even the worst wars (until now) somehow survivable, namely, the occupation of the enemy territory "won" during the war, whereupon the occupant has had to provide the survivors with the essentials of life.

To leave the survivors of nuclear attack to oblivion is both morally repulsive and legally impermissible. It condemns possibly millions of people to horrible suffering subsequent to exposing them, illegally, to the attack itself. Moreover, the law of war (the Preamble to the Hague Regulations IV)<sup>48</sup> generally forbids methods of warfare which, although not specifically forbidden, are contrary to "the usages established among civilized peoples, the laws of humanity, or the dictates of the public conscience."<sup>49</sup>

#### F. *The Law of Humanity and the Dictates of the Public Conscience Forbid Nuclear War*

We have so far surveyed specific rules of the international law on armed conflict which make nuclear warfare illegal. In addition, nuclear warfare is implicitly forbidden by a general rule appearing in the Hague Regulations of 1907.<sup>50</sup> The makers of these Regulations, statesmen, generals and jurists, intended to create a truly comprehensive code of the law of war. However, knowing that the development of war technology was unforeseeable, they agreed that the Regulations had to provide for future developments, so as not to become incomplete and obsolete. Therefore, they inserted a general clause into the Preamble to the Regulations, known as the "Martens Clause."<sup>51</sup> The Martens Clause stipulates that if methods of warfare are not foreseen by the Regulations, but are contrary

---

47. U.S. SECRETARY OF DEFENSE ANNUAL REPORT (1980).

48. Hague Convention, *supra* note 10.

49. *Id.*

50. Hague Convention, *supra* note 10.

51. *Id.*

to "the usages established among civilized peoples, to the laws of humanity, to the dictates of the public conscience,"<sup>52</sup> then they are forbidden by those overriding standards themselves, without the need for any additional treaty.

This principle, which a U.S. Nuremberg Tribunal called "more than a pious declaration," namely, "a legal yardstick,"<sup>53</sup> is repeated in all major treaties on the law of war concluded since the advent of the nuclear age.

The urgent warnings by statesmen, religious leaders, medical authorities, physicists, environmentalists, and professionals in many other fields, including the military,<sup>54</sup> and the intensity and ubiquity of the general protest movement "dictate" that governments abstain from initiating nuclear war.

Considering the obligation to respect the conscience of the world and remembering the more specific demands of the law of war discussed above, nuclear warfare is manifestly prohibited by international law.<sup>55</sup> Yet, in spite of all this there exist arguments — and they are widely accepted — claiming the permissibility of nuclear warfare.

#### G. *Arguments Asserting that Nuclear War is Permissible*

The most influential of these arguments is that there exists no treaty which specifically outlaws the use of nuclear weapons. Hence, it is maintained, as long as such a treaty does not exist, there is no law that would forbid nuclear warfare.<sup>56</sup>

52. *Id.*

53. IX TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No.10, , Nuernberg October 1946-April 1949, at 1340 [hereinafter cited as T.W.C.].

54. *See, e.g.*, the statements of American, British, Dutch, French, Greek, Italian, Portuguese and West German retired generals and admirals. *GENERALE FÜR DEN FRIEDEN* (G. Kade ed. 1982).

55. "It seems inescapable that nuclear warfare is contrary to the core precepts of international law." B.H. Weston, *Nuclear Weapons and International Law: Illegality in Context*, 13 DEN. J. INT'L L. & POL'Y 5 (1983). Professor Weston reached the same conclusion in his longer study: *Nuclear Weapons Versus International Law: A Contextual Reassessment*, 28 MCGILL L.J. 542-590, at 562 (1983).

Professor Wolfgang Daubler points out that the view that existing international law unambiguously prohibits the first use (unzweideutiges verbot des Ersteinsatzes) of nuclear weapons is "almost universally shared by the science of international law" (fast einhellige Auffassung der Völkerrechts-Wissenschaft). W. DAUBLER, *STATIONIERUNG UND GRINDGESETZ* 54, 187 (1982). *See also*, J. Goldblat, *Nuclear War Cannot Be Conducted with Obedience to the Rules of International Law*, BULL. OF PEACE PROPOSALS 317 (Apr. 1982); *see also* papers presented by members of the American Society of International Law at a Conference on Nuclear Weapons and Law, 7 NOVA L.J. (1982); Lawyers Committee on Nuclear Policy, *Statement on the Illegality of Nuclear Weapons* (rev. ed. 1984).

56. *See, e.g.*, Almond, *Nuclear Weapons are Legal Tools*, BULL. OF THE ATOMIC SCIENTISTS 32-35 (May, 1985).

The official position of the U.S. is expressed in its two most important military texts. The *U.S. Army Field Manual* states: "The 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>57</sup> The words "as such" can only mean that the restrictions contained in the law of war, especially those of the Hague Regulations of 1907 and the 1949 Geneva Conventions, apply also to what the *Manual* calls "explosive atomic weapons", but which evidently includes all nuclear weapons. Their employment is not illegal because they are nuclear weapons ("as such"). Rather, it is illegal because international law makes illegal the employment of any weapon that is "of a nature to cause unnecessary suffering."<sup>58</sup>

This is confirmed by the analogous formulation in the *U.S. Air Force Treatise* which states: "The use of explosive nuclear weapons, whether by air, sea or land forces, cannot be regarded as violative of existing international law in the absence of any international rule of law restricting their employment."<sup>59</sup> Here the words "as such" in the 1956 *U.S. Army Field Manual* are replaced by the immediately following sentence: "Nuclear weapons can be directed against military objectives as can conventional weapons."<sup>60</sup>

The legal situation described in these statements should be clear: since no specific ban against nuclear weapons exists, the general rules of war apply to them. However, the U.S. texts conclude from this premise that nuclear weapons can be used in obedience to those rules. Such a conclusion is incorrect, even for limited or tactical warfare.

The unnecessary suffering of enemy combatants and the risks to civilians and friendly forces anticipated in even limited nuclear war, can be seen from a provision in the 1976 *U.S. Army Field Manual Operations*:

A soldier exposed to 650 rads. . . can be expected to die in a few weeks under battlefield conditions. Exposure in the 100 rad region usually has little effect. Accordingly, in conventional nuclear combat it would be prudent to subject front line enemy to 3,000-8,000 rads or more, enemy to the rear to 650-3,000 rads, and avoid subjecting friendly forces and civilians to an unacceptable dose level (100 or more rads).<sup>61</sup>

Another influential argument for the permissibility of nuclear war is the "total war" argument. The term "total war" may mean different things. If it means a total effort to defeat the aggressor (such as, total mobilization, drastic rationing of consumer goods, severe penalties for ab-

---

57. U.S. ARMY FIELD MANUAL, *supra* note 4, art. 35.

58. Hague Convention, *supra* note 10.

59. U.S. AIR FORCE TREATISE, *supra* note 5, at 5.

60. *Id.*

61. DEPARTMENT OF THE ARMY, FM 100-5, OPERATIONS 32 (1976).

senteeism, prohibition of the use of motorcars for non-war purposes), it is an entirely legitimate policy. However, if it means a war of total ferocity, it is what the Nuremberg International Tribunal condemned as the "Nazi conception of total war:"

In the Nazi conception of 'total war' . . . the moral ideas underlying the conventions which seek to make war more humane are no longer regarded as having force or validity. . . and so, freed from the restraining influence of international law, the aggressive war is conducted by the Nazi leaders in the most barbaric way. Accordingly, War Crimes were committed when and wherever the Fuhrer and his close associates thought them to be advantageous.<sup>62</sup>

The cliché that "this is an era of total war," has ominous implications. It fosters a nihilistic contempt of morality and law. It is brutalizing because it condones and accustoms society to mass atrocities. It is limitless: how much license does total war grant? It is unpatriotic because the claim of one own country's right to behave barbarously against the enemy authorizes the enemy to behave barbarously in return. Worst of all, it may nourish the belief that a nuclear holocaust is inevitable.

Finally, there is an argument which claims that "restrained nuclear warfare" would be rationally justifiable because it would limit the casualties and destruction to "acceptable" dimensions. Apart from the fact that restrained nuclear war would still be illegal, it cannot be assumed that such war would remain restrained. The late George B. Kistiakowski, Science Advisor to three U.S. Presidents, stated it was "totally unrealistic" to assume that a superpower nuclear war could be "controlled and limited," even under the counterforce doctrine, which intends to avoid direct attacks on population centers. "[I]t may start that way, but with millions of compatriots among the casualties from the counterforce strikes, with much of the military communications and command centers out of control. . . the launching of warheads will continue and accelerate with less and less central control. . . . Thus, as an inevitable consequence of a limited nuclear war between the superpowers, the holocaust would come, the organized national societies would cease to function. . . ."63 Kistiakowsky went on to quote Krushchev's prediction that "the living will envy the dead," and added that this view is shared "by a large majority of senior statesmen and military leaders."<sup>64</sup>

---

62. 1 TRIAL OF MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, November 1945-October 1946, 277.

63. Kistiakowsky, *Can a Limited Nuclear War be Won?*, THE DEFENSE MONITOR, at 3,4 (Oct. 1981).

64. *Id.* See also ZUCKERMAN, NUCLEAR ILLUSION AND REALITY 67 (1982): "escalation to all-out nuclear war is all but implicit in the concept of fighting a field war with 'tactical' and 'theatre' nuclear weapons." (quoting B.H. LIDDELL HART, DETERRENT AND DEFENSE 61 (1960)). The use of 'small' nuclear weapons to stop advancing troops would most likely escalate into "an illimitable and suicidal H-bomb devastation of countries and cities; the initial employment of nuclear weapons would rapidly escalate into an all-out nuclear war between the two alliances." Lodgaard, *Nuclear Disengagement in Europe*, 14 BULL. OF PEACE PRO-



### III. THE CONCEPT OF MILITARY NECESSITY

Contrary to the concept of “total war,” which is unknown to the law of war, the concept of “military necessity” — it may also be called “military emergency” — does exist in the law of war.

The meaning of the concept of military necessity was assiduously debated at the Nuremberg trials. Some defendants admitted that their actions in World War II violated the rules of war, but were excusable because these actions had been necessary in the emergency situation in which Germany found itself. The three U.S. Nuremberg Tribunals that were faced with this plea answered it unqualifiedly:

(1) Judgment in the Krupp case (31 July 1949):

The contention that the rules and customs of war can be violated if either party is hard pressed in war must be rejected. . . . It is an essence of war that one or the other side must lose, and the experienced generals and statesmen knew this when they drafted the rules and customs of land warfare. In short, these rules and customs of warfare are designed specifically for all phases of war. . . . The claim that they can be wantonly—and at the sole discretion of any one belligerent—disregarded when he considers his own situation to be critical, means nothing more or less than to abrogate the laws and customs of war entirely.<sup>65</sup>

(2) Judgment in the Fieldmarshal List, et al. (Hostages) case (19 February 1948):

As we have previously stated in this opinion, the rules of international law must be followed even if it results in the loss of a battle or even a war. Expediency or necessity cannot warrant their violation.<sup>66</sup>

(3) Judgment in the Fieldmarshal von Leeb, et al. (High Command) case (27 October 1948):

It has been contended in this case that military necessity includes the right to do anything that contributes to the winning of a war. . . . [S]uch a view would eliminate all humanity and decency and all law from the conduct of war and is a contention which this Tribunal repudiates as contrary to the accepted usages of civilized nations.<sup>67</sup>

These statements, made in reference to what is now called conventional

---

POSALS 209 (1983) (quoting General Rogers). There is no “persuasive reason to believe that any use of nuclear weapons, even on the smallest scale, could reliably be expected to remain limited . . . even the most restrained battlefield use would be enormously destructive to civilian life and property. . . . Any use of nuclear weapons in Europe, by the [NATO] Alliance or against it, carries with it a high and inescapable risk of escalation into the general nuclear war which would bring ruin to all and victory to none.” Bundy, Kennan, McNamara and Smith, *Nuclear Weapons and the Atlantic Alliance*, FOREIGN AFFAIRS 9 (Spring 1982).

65. T.W.C., supra note 53, at 1347.

66. *Id.* at 1272.

67. *Id.* at 541; Also cited in U.S. ARMY, PUB. No. 27-161-2, U.S. ARMY PUBLICATIONS 248 (Oct. 1962).

war, are even more valid for the nuclear weapons age.

The instructions of the U.S. military establishment on the concept of military necessity are clear. The Air Force defines it as "the principle which justifies measures of regulated force not forbidden by international law" and warns that it "is not the German doctrine, *Kriegsraison*, asserting that military necessity could justify any measures—even in violation of the laws of war—when the necessities of the situation purportedly justified it."<sup>68</sup> The *U.S. Army Field Manual* also stresses that military necessity justifies only "measures not forbidden by international law" and adds that the laws of war "have been developed and framed with consideration for the concept of military necessity,"<sup>69</sup> i.e., that these laws have themselves established which legitimate measures may become necessary in war.

Our era's aversion to war is so deep that it can engender a desire to punish the aggressor by all means available. Such emotion overlooks the truism that the decision to make war is commonly made by a small number of policy-makers. An American Nuremberg Tribunal, speaking of the "cataclysmic catastrophe" caused by the Third Reich's aggressive wars, reasoned:

International law condemns those who, due to their actual power to shape and influence the policy of their nations, prepare for, or lead their country into or in an aggressive war. . . [b]ut those under them cannot be punished for the crimes of others. The misdeed of the policy-makers is all the greater in as much as they use the great mass of the soldiers and officers to carry out an international crime; however, the individual soldier or officer below the policy level is but the policy maker's instrument.<sup>70</sup>

The present conventional weapons arsenals guarantee a more cataclysmic catastrophe than World War II. Adding nuclear arms to this stockpile would not magnify the revenge against the guilty decision-makers, but instead would victimize the armed forces and the peoples of all nations.

#### IV. DANGER OF ACCIDENTAL, UNINTENDED NUCLEAR WAR

The most ominous threat posed to the world is the fact that nuclear war could be triggered, and was on some occasions almost triggered, because computers erroneously reported enemy nuclear missiles or bombers to be on the way, or because human beings misinterpreted computer reports and messages from sensors planted in various parts of the earth and from observation devices in outer space.

If it is pointed out that nuclear war technology leaves no alteration to

---

68. U.S. AIR FORCE TREATISE, *supra* note 5, at 1.

69. U.S. ARMY FIELD MANUAL, *supra* note 4, art. 3.

70. T.W.C., *supra* note 53, at 489.

reliance on such intrinsically unreliable determinants, the dilemma can be avoided only by the recognition that such type of warfare is forbidden by elementary standards of legality and morality.

#### V. NUCLEAR REPRISAL AGAINST FIRST-USE OF NUCLEAR WEAPONS

Reprisals are actions which are in themselves unlawful, but which become lawful when taken in response to unlawful actions by the other side. There can be no doubt that "the institutions of the reprisal is one of the most horrible aspects of the laws of armed combat. But in time of war it provides for almost the only sanction on violation of the law."<sup>71</sup>

The rules of the Geneva Civilian Convention of 1949<sup>72</sup> prohibit reprisals against civilians in enemy-occupied territories, but "do not protect civilians who are under the control of their own countries,"<sup>73</sup> i.e., those rules which do not protect the civilian population in the belligerent countries. This is also the view of the Red Cross.<sup>74</sup> However, the radiation caused by nuclear weapons used in reprisal would have the same effect on the civilian population of either side. A tragic dilemma exists in that there is no military method, except nuclear response, to force the first user (who by his first-use has shown his disregard of the law) to discontinue his nuclear attack. All plans for nuclear war take for granted the right of nuclear response to first-use, because proportionate reprisal is required by elementary military logic and legitimized by the law of war. Without the right of nuclear counter-attack, there would be unilateral nuclear war; the opponent who has built up his nuclear deterrence capacity for self-defense would be virtually defenseless.<sup>75</sup>

On the other hand, it is questionable whether nuclear reprisal could achieve the very purpose of reprisal, namely, to induce the opponent to discontinue its illegal behavior. Instead, nuclear reprisal might induce the

71. STOCKHOLM INT'L PEACE RESEARCH INST. [SIPRI], *THE LAW OF WAR AND DUBIOUS WEAPONS* 47 (1976). "Reprisals serve as an ultimate legal sanction or law enforcement mechanism. . .to force an adversary to stop its extra-legal activity." See also U.S. AIR FORCE TREATISE, *supra* note 5.

72. Civilian Convention, *supra* note 19.

73. U.S. AIR FORCE TREATISE, *supra* note 5, at 4.

74. See COMMENTARY, *supra* note 15, at 45-47, 228 (1958). See also Diplomatic Conference on the Reaffirmation & Devel. of Humanitarian Law Applicable in Armed Conflict Protocol I [1977] U.N. JURID. Y.B. 95, U.N. Doc ST/LEG/SER.C/15. This protocol extends the prohibitions of reprisals against civilians in enemy-occupied countries to the civilian population in the belligerents' own countries. However, except for China (which acceded to Protocol I on Sept. 14, 1983, with effect as of March 14, 1984), the nuclear-weapon states have not yet become parties to the treaty. (Information Service of the U.N. Treaty Section, Sept. 4, 1985).

75. An examination by a Finnish scholar of over a dozen authoritative studies showed that only two denied the right of nuclear reprisal: Charlier, *Questions Juridiques Soulevees Par l'evolution de la Science Atomique*, 91 RECUEIL DE COURS 357 (1957); Brownlie, *Some Legal Aspects of the Use of Nuclear Weapons*, 14 INT'L & COMP. L. Q. 445 (1965); Rosas, *International Law and the Use of Nuclear Weapons*, in *ESSAYS IN HONOUR OF ERIK CASTREN* 77 (1979).

first user to intensify and accelerate its nuclear attacks, although the law of war forbids counter-reprisal. Yet it remains true that if the victim of the first-use of nuclear weapons were deprived of the right to respond in kind, it would also be deprived of the right of response to consecutive nuclear attack. Ultimately, the country might have to accept the ever greater destruction of its territory with passivity.

The only way to solve the tragic dilemma is to prevent the first-use of nuclear arms. Without first-use, there can be no subsequent use, and the question about the legality of nuclear reprisal becomes moot.

## VI. THE SIGNIFICANCE OF NO FIRST-USE PLEDGE

There exists a remedy for the fear of first-use of nuclear weapons. It obviates the need for the time consuming and laborious negotiation and subsequent ratifications of a treaty. The goal is obtainable by formal declarations which governments can make unilaterally at any time, and which, if they wish, become binding at once.

The legally binding character of states' unilateral declarations, if given publicly and with an intent to be bound, was reasserted by the International Court of Justice in 1974, in a case that involved the testing of nuclear weapons:

Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking. . . . Any undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding.<sup>76</sup>

So far, two nuclear-weapon states have made such declarations; China in 1965 and the Soviet Union in 1982. The Soviet Union declared that "[t]he U.S.S.R. assumes an obligation not to be the first to use nuclear weapons."<sup>77</sup>

---

76. *Nuclear Tests*(Aust. & N.Z. v. Fr.) 1974 ICJ 253, 257. The Court stated this in its judgment in the *Nuclear Tests* case in which Australia and New Zealand contended that French nuclear tests in the Pacific were illegal because France had publicly declared not to make them. For a critique of the Court's stand as being too absolute, see Rubin, *The International Legal Effects of Unilateral Declarations*, 71 AM J. INT'L L. 1 (1977). For a reply to this critique see Sicault, *Du Caractere Obligatoire des Engagements Unilateraux en Droit International Publique* 83 REVUE GENERALE DE DROIT INTERNATIONAL PUBLIQUE 3 (1979).

77. The full text of Foreign Minister Gromyko's announcement at the 2nd U.N. Special Session on Disarmament on June 7, 1982 reads: "Guided by the desire to do all in its power to deliver the people from the threat of nuclear devastation and ultimately to exclude its very possibility from the life of mankind, the Soviet Union solemnly declares: The Union of Soviet Socialist Republics assumes an obligation not to be the first to use nuclear weapons. This obligation shall become effective immediately from the rostrum of the U.N. General Assembly." U.N. Doc. PUR/A/S-12, PV 12, 21-52, reprinted in, H.JACK, *DISARM—OR DIE* 43 (1983).

The objection that such a pledge is unenforceable is meaningless, for enforcement, in the sense of "punishment," is relevant only after an obligation is broken. If the no first-use pledge were broken by a first-use against a nuclear-weapons state, enforcement would, with virtual certainty, come in the form of nuclear response. If the pledge (which is addressed to all states) was broken by a first-use against a non-nuclear-weapons state, any nuclear-weapons state would have the right of nuclear response under the principle of collective self-defense. A treaty could threaten no more compelling enforcement.

If, in contrast, the term "enforcement" is used to denote the intent to assure observance of an obligation before it is broken, by threatening "punishment" in case of non-observance, then again the pledge neither adds to nor detracts from the threat. The Soviet, as well as the Chinese, no first-use pledge neither promises nor expects any renunciation of the right to nuclear reprisal (second-use).

These considerations address the objection that the Soviet Union could benefit from breaking or withdrawing its no first-use pledge. There have been assertions that the pledge is a ruse to lull the West into a false sense of security, in order to improve the chances for a Soviet first strike. But, the pledge need not and certainly does not diminish the vigilance of the Soviet Union's potential adversaries, nor does the pledge in the present climate of deep mutual distrust influence the preparations of either side for nuclear war. In short, if the pledge were broken or rescinded, the legal and factual situation would be the same as if no pledge had been made.

This, however, does not mean that the pledge is useless. Whereas the deliberate unleashing of superpower nuclear war is altogether improbable, the possibility of accidental first-use has become even more threatening by the systematic preparations for instantaneous nuclear response. Consequently, the time for reasoned reflection and response is being extinguished, when the aim should be to expand that precious time. The significant benefit of a mutual no first-use pledge would be the psychological readiness to see the approach — and even the detonation — of a nuclear weapon as the result of human or machine failure, or as the work of terrorists or unauthorized subalterns. That readiness, and the resulting conclusion that a nuclear "counter" attack under such circumstances would be an irremediable mistake, might save the world from a nuclear holocaust.

The NATO refusal to reciprocate the Soviet's no first-use pledge does not imply the intention to start nuclear or conventional war. But as long as NATO insists on preserving the option of a first-use, the Soviet Union will have less reason to assume that a first nuclear strike against it was unintended, and might consider it necessary to act on the assumption that the strike was intended. A mutual no first-use pledge can, as much as humanly possible, guarantee the prevention of the ultimate blasphemy — an unintended end of civilization.

## VII. CAN THE STRATEGIC DEFENSE INITIATIVE DIVERT THE NUCLEAR COLLISION COURSE?

The Strategic Defense Initiative (S.D.I.), emphasizing the unacceptable risks posed by offensive nuclear weapons, calls for a huge endeavor to eliminate this danger through an arms system that would destroy nuclear weapons in outer space, before they can hit the earth. Announcing the scheme in his television speech on March 23, 1983, President Reagan expressed the expectation that this would make nuclear weapons "impotent" and "obsolete" and free the American people of the fear of nuclear war. To accomplish this would, indeed, be a historic breakthrough.

The project raises fundamental questions. First, if S.D.I. is technologically feasible (which critics deny), would it really protect the American people against Soviet nuclear weapons? The S.D.I. does not make such a claim. It is directed solely against nuclear weapons coming from outer space; but those arriving from air, land or sea might still destroy the United States as a functioning society. Second, could the S.D.I. create an American monopoly of protection against space-delivered weapons? Hardly, since the Soviet Union would develop its own S.D.I., and both sides would develop weapons for the destruction of each other's "star wars" potential. Thirdly, would the scheme reduce the risk of unintended nuclear war? Since S.D.I. requires staggeringly complex new computer technology it would virtually exclude human decision-making and detection of computer errors. Moreover, S.D.I. could not guarantee against a deliberate first nuclear strike. In a major crisis, S.D.I. could conceivably induce either side to make a pre-emptive nuclear attack, in the knowledge that the attacked side's capacity to respond with space-delivered nuclear weapons would be destroyed.<sup>78</sup>

It is in the context of these considerations that the S.D.I.'s compatibility with existing treaty law, the ABM Treaty,<sup>79</sup> must be examined. The ABM Treaty of 1972 is the most important arms control agreement concluded since World War II.<sup>80</sup> "ABM remains the only weapons system of

---

78. For various positions on the S.D.I., see also UNION OF CONCERNED SCIENTISTS, APPEAL TO THE UNITED STATES AND THE SOVIET UNION TO BAN SPACE WEAPONS (May, 1985), (signed by 54 Nobel laureates, a majority of members of the National Academy of Sciences, and many other scientists) ; Ball, *The War for Star Wars*, N.Y. REV. OF BOOKS, April 11, 1985; Bethe, Garwin, Gottfried, Kendall, *Space-based Ballistic Missile Defense*, 194 SCIENTIFIC AMERICAN 39-49 (1949); Boyle, *Star Wars vs. International Law: The Force Will Be Against Us* 6 ACDIS BULL. 2 (1985).

79. ABM Treaty, May 26, 1972, United States-U.S.S.R., 23 U.S.T. 3435, T.I.A.S. No. 7503.

80. For the texts and histories of negotiations of the agreements aiming at arms control and disarmament, concluded since 1945 and in force for the United States, see U.S. ARMS CONTROL AND DISARMAMENT AGENCY, ARMS CONTROL AND DISARMAMENT AGREEMENTS, (1980). For an insider's analysis "of the initiatives and actions taken within the United Nations on the question of non-use of nuclear weapons and the prevention of nuclear war" from 1946 to the 1982 General Assembly 2nd Special Session on Disarmament (which also shows the obstacles the United Nations has been facing due to attitudes of Member States) see Cor-

significance to be effectively limited in the arms-control negotiations.”<sup>81</sup>

The U.S - U.S.S.R. Anti-Ballistic Missile Treaty, as the prefix “Anti” shows, is opposed to weapons designed to protect either nation’s territory against attack. Its philosophy is based on the lessons of the 1960’s, which indicate that such defense cannot be truly effective, but that their build-up nevertheless nourishes the suspicion of an intention to start a war. Instead, consonant with the deterrence doctrine, the Treaty expresses the philosophy that strategic stability requires an equal vulnerability; neither would attack the other, as the consequences would be unacceptable to both.

The key stipulation of the ABM Treaty reads: “Each party undertakes not to develop, test or deploy ABM systems or components which are sea-based, air-based, space-based or mobile land-based.”<sup>82</sup> Thus the Treaty prohibits not only the deployment and, implicitly, the use of ABM weapons, but also their development and testing.

The Treaty proves the parties’ earnest intent to prevent its demise. Thus, it shows a calm attitude toward potential infractions. For instance, the treaty states that “ABM systems or their components prohibited by this Treaty shall be destroyed or dismantled under agreed procedures within the shortest possible agreed period of time.”<sup>83</sup> In other words, such matters are to be disposed of amicably. Also, in contrast to the time-restricted validity of other arms control agreements, such as SALT I and II, the ABM Treaty stipulates that it “shall be of unlimited duration.”<sup>84</sup>

Nevertheless, the Treaty provides for emergency situations: “Each Party shall, in exercising its national sovereignty, have the right to withdraw from this Treaty if it decides that extraordinary events related to the subject matter of this Treaty have jeopardized its supreme interests.”<sup>85</sup> The prerogative to withdraw from the Treaty, then, depends on three conditions: (a) events must have occurred which, in the withdrawing Party’s judgment, were “extraordinary”; (b) the extraordinary events must, in the withdrawing Party’s judgment, have been so grave to have “jeopardized its supreme interests,” and (c) these events must be related to antiballistic missile matters. This third condition excludes the right to

---

radini, *Prevention of Nuclear War: The Multilateral Approach*, DISARMAMENT, A PERIODIC REVIEW BY THE UNITED NATIONS 32,52 (Summ. 1983).

81. Krell, *On the theory of Armaments Dynamics*, in ARMAMENTS, ARMS CONTROL AND DISARMAMENT 117 (M. Thee ed. 1981).

82. The treaty permitted two carefully restricted types of non-mobile land-based ABM installations (hence its title as “limitation” instead of “prohibition” of ABM systems): the deployment of specified numbers of ABM launchers, ABM missiles and ABM radar complexes within a specified radius around Washington, D.C. and Moscow, and analogous by specified ABM installations in one additional area of each country (art. III). A 1974 Protocol to the Treaty reduced the number of those areas from two to one in each country. ABM Treaty, *supra* note 79.

83. *Id.* art. VIII.

84. *Id.* art XV, para. 1.

85. *Id.* art XV, para 2.

base the withdrawal on any other grounds. Linkage to extraordinary events unconnected with anti-ballistic weapons matters may not be invoked.

Furthermore, the withdrawal must not be abrupt. Notice of the decision to withdraw has to be given "six months prior to withdrawal from the Treaty".<sup>86</sup> The cooling-off period could permit bilateral negotiations, as well as third-party efforts (e.g., by the parties' allies and/or the United Nations), to prevent the withdrawal and thus avoid a serious deterioration of the international climate and a new arms race.

Finally, "[s]uch notice shall include a statement of the extraordinary events the notifying Party regards as having jeopardized its supreme interests."<sup>87</sup> The notice of withdrawal must make a convincing case that can stand outside scrutiny. Withdrawal from a bilateral treaty by either Party terminates the treaty, which is the reason why the ABM Treaty surrounds the right of withdrawal with strict conditions. The pursuit of the S.D.I. without a formal withdrawal from the ABM Treaty may indicate the wish of the United States not to be considered as causing the Treaty's dissolution. But, since it conflicts with the essence of the Treaty, the S.D.I. entitles the Soviets to terminate the Treaty themselves.<sup>88</sup> In any case, the ABM Treaty, as it stands, cannot survive the S.D.I., nor does any prospect exist for a U.S.-Soviet agreement to amend the Treaty.

Indeed, the fact that the S.D.I. does not expect to make nuclear weapons obsolete, but that it is to be combined with preparations for their offensive use, came to public knowledge in May of 1985. Reporting on Washington's "most extensive review of the nuclear policy in ten years", a *New York Times* dispatch stated:

The Defense Department is devising a nuclear war plan and command structure that would integrate offensive nuclear weapons with the projected anti-missile shield. . . . Until now, the United States has relied solely on offensive weapons such as missiles, as a nuclear deterrence. It is the prospect of the shield and the preconceived need to coordinate these two elements that has prompted the current review. . . .

In addition, the United States has begun to field an array of new nuclear weapons, including the B-1 bomber, Trident submarines armed with ballistic missiles, the Pershing-2 medium range ballistic missile, and cruise missiles based on land, sea and air. . . . [T]he new plan is intended to coordinate the potential use of these weapons, plus others

---

86. *Id.*

87. *Id.*

88. The 1969 Vienna Convention on the Law of Treaties states: "A material breach of a bilateral treaty by one of the Parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operations in whole or in part." (art. 60, para. 1) A material breach of a treaty, for the purposes of this article, consists in. . . (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty." (art. 60, para. 3) Convention on the Law of Treaties, U.N. Doc. A/CONF. 3 9/27 (1969).



still being developed, with the shield. . . .<sup>89</sup>

Three months later, “[t]he White House announced that, despite Soviet objections, the U.S. would proceed with the first American test of an anti-satellite weapon against an object in space.”<sup>90</sup>

The large numbers of orbiting satellites are the superpowers’ indispensable eyes and ears for their command and control of communication and intelligence networks. The side deprived of its satellites would be in a disastrously inferior situation. Were both sides deprived of them, complete chaos would result.

Since “satellite-killers” are not anti-ballistic missiles, neither their development nor their testing or deployment is prohibited by the ABM Treaty. However, the technology of anti-satellite (ASAT) weapons is so much identical with that of anti-ballistic missiles that tests of ASAT weapons would simultaneously test anti-ballistic missiles, and must therefore also be considered forbidden. All in all, the pursuit of the S.D.I. scheme not only violates the ABM Treaty, but erects no barrier against nuclear war.

#### VIII. CONCLUSION

The collision course toward nuclear war can only be diverted by remembering and following the reasonable and rational rules of conduct set by international law. If the evil threatened by nuclear war is laid side by side with these legal norms it is hard to see how they could permit nuclear war.

Respect for law is more important for human survival and well-being than is the perfection of technology. If the human mind was able to split the atom, it must be able to concentrate efforts to split the fascination with the pernicious offspring of that feat - the path toward nuclear catastrophe. Practicable, carefully designed proposals for reversing the trend exist. Based on years of study and thorough discussion, the most comprehensive list of the measures available and in principle agreeable to all Members of the United Nations is contained in the “Program of Action” enunciated by consensus in the Final Document of the 1978 General Assembly Special Session on Disarmament.<sup>91</sup> Various additional constructive proposals are to be found in other General Assembly resolutions, in formal statements by groups of World leaders, and in the conclusions reached by highly respected personalities such as those of the Pugwash

---

89. N.Y. Times, May 29, 1985, at A-8.

90. N.Y. Times, Aug 21, 1985, at 1, 8. Concerning some planned future tests of S.D.I. Weapons, see, J. Smith. ‘Star Wars’ Tests and the ABM Treaty, 229 SCIENCE, July 5, 1985, at 29.

91. The Consensus Declaration of the Special Session states: “Mankind is confronted with a choice: we must halt the arms race and proceed to disarmament or face annihilation.” U.N. Department of Public Information, *Final Document of the Special Session of the General Assembly on Disarmament* (May-July 1978) at 10-19.

group. Yet, who will be left to be blamed, and by whom, if the counsel of reason is disregarded?