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Nuclear Weapons and International Law: Prolegomenon to General Illegality

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NUCLEAR WEAPONS AND INTERNATIONAL LAW: PROLEGOMENON TO GENERAL ILLEGALITY*

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I

Let us begin by acknowledging immediately that, despite the aggravated mutilations we call Hiroshima and Nagasaki,[1] which some reputable scholarship says lacked military necessity,[2] the world community has yet to enact an explicit treaty or treaty provision prohibiting generally the development, manufacture, stockpiling, deployment, or actual use of nuclear weapons. 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 decision of the Permanent Court of International Justice in *The Case of the S.S. Lotus*,[3] *i.e.*, that states

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1. For recent important accounts, see THE COMMITTEE FOR THE COMPILATION OF MATERIALS ON DAMAGE CAUSED BY THE ATOMIC BOMBS IN HIROSHIMA AND NAGASAKI, HIROSHIMA AND NAGASAKI—THE PHYSICAL, MEDICAL, AND SOCIAL EFFECTS OF THE ATOMIC BOMBINGS (E. Ishikawa & D. Swain trans. 1981); JAPAN BROADCASTING CORPORATION, UNFORGETTABLE FIRE: PICTURES DRAWN BY ATOMIC BOMB SURVIVORS (1981).

2. *See, e.g.*, the United States Strategic Bombing Survey established by the Secretary of War: U.S. GOV'T PRINTING OFFICE, JAPAN'S STRUGGLE TO END THE WAR (July 1, 1946) at 13:

> Based on a detailed investigation of all the facts and supported by the testimony of the surviving Japanese leaders involved, it is the Survey's opinion that certainly prior to 31 December 1945, and in all probability prior to 1 November 1945, Japan would have surrendered even if the atomic bombs had not been dropped, even if Russia had not entered the war, and even if no invasion had been planned or contemplated.

See also G. ALPEROVITZ, ATOMIC DIPLOMACY: HIROSHIMA AND POTSDAM 236-42 (1965); Baldwin, *The Atomic Bomb—The Penalty of Expediency*, in HIROSHIMA: THE DECISION TO USE THE A-BOMB 95, 97 (E. Fogelman ed. 1964). *But see* Paust, *The Nuclear Decision in World War II—Truman's Ending and Avoidance of War*, 8 INT'L LAW. 160, 179-80 (1974).

3. (Fr. v. Turk.), 1927 P.C.I.J., ser. A, No. 10.

are free to do whatever they are not strictly forbidden from doing.[4] 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.[5]

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*,[6] the fact 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 1945:

> 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.[7]

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

It is, at any rate, according to this more true-to-life portrayal of the so-called "sources" or law-creating processes of international law that the argument against the legality of nuclear weapons, qualified or unqualified, is fashioned.[8] While ruing the absence of an explicit treaty

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4. Thus, in this spirit, does U.S. Army Field Manual No. 27-10 provide: "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." U.S. DEP'T OF ARMY, THE LAW OF LAND WARFARE, FIELD MANUAL No. 27-10, para. 35 (1956) (emphasis added).

5. *See, e.g.*, Stowell, *The Laws of War and the Atomic Bomb*, 39 AM. J. INT'L L. 784 (1945); Thomas, *Atomic Bombs in International Society, id.* at 736; Thomas, *Atomic Warfare and International Law*, 1946 PROC. AM. SOC'Y INT'L L. 84. *Cf.* Baxter, *The Role of Law in Modern War*, 1953 PROC. AM. SOC'Y INT'L L. 90.

6. Consider, for example, the emphasis added to the U.S. Army Field Manual quotation, *supra* note 4.

7. 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 464 (1948).

8. *See, e.g.*, C. BUILDER & M. GRAUBARD, THE INTERNATIONAL LAW OF ARMED CONFLICT: IMPLICATIONS FOR THE CONCEPT OF ASSURED DESTRUCTION (Rand Publication Series R-2804-FF, 1982); E. CASTREN, THE PRESENT LAW OF WAR AND NEUTRALITY (1954); G. DRAPER, THE RED CROSS CONVENTIONS (1958); G. SCHWARZENBERGER, THE LEGALITY OF NUCLEAR WEAPONS (1958); N. SINGH, NUCLEAR WEAPONS AND INTERNATIONAL LAW (1959); J. SPAIGHT, THE ATOMIC PROBLEM (1948); Brownlie, *Some Legal Aspects of the Use of Nuclear Weapons*, 14 INT'L & COMP. L.Q. 437 (1965); Castren, *The Illegality of Nuclear Weapons*, 3 U. TOL. L. REV. 89 (1971); Falk, Meyrowitz & Sanderson, *Nuclear Weapons and International Law*, 20 IND. J. INT'L L. 541 (1980); Fried, *International Law Prohibits the First Use of Nuclear Weapons: Existing Prohibitions in International Law*, 12 BULL. PEACE PROPOSALS 21 (1981); Fujita, *First Use of Nuclear Weapons: Nuclear Strategy vs. International Law*, 3 KANSAI U. REV. L. & POL. 57 (1982); H. Meyrowitz, *Les*

or treaty provision that could dispel all doubts, those who deny the legality of nuclear weapons in whole or in part are mindful that, historically, the law of war has sought to inhibit weapons and tactics that cause aggravated and indiscriminate damage, and accordingly they point to an array of treaty provisions which, they say, implicitly outlaw the use or threat of use of nuclear weapons. Furthermore, they rely upon numerous other "sources" of international authority, such as international customs, general principles, judicial decisions, United Nations declarations and resolutions, and draft rules, to make their case. Some even affirm—correctly, I believe—the appositeness of initiatives by groups having little or no formal status in the international legal order as traditionally conceived.[9]

Now a distinct advantage of this line of argument—one may even say a virtue—is that it departs from exclusively hegemonic and statist models of international legal process. It therefore helps to discourage the widespread cynicism that international law is or must be only the expression of the will of the strongest. A distinct weakness, however, is its tendency—actually little different from that of its complementary opposite—toward an essentially rule-oriented conception of international law and law-making. Prone to look upon international law mainly as a body of rules governing relations between states rather than as a complex process of authoritative and controlling decision in which rules (and doctrines and principles) are continuously being fashioned and refashioned by a wide variety of global actors to suit the needs of the living and unborn, this positivist model does not adequately conjoin law and social reality. Hence, it makes little or no attempt to ask the question recently and felicitously put by Professor D'Amato: "What 'counts' as law?"[10] Ergo, it never really challenges the notion posited by Eugene Rostow at the Annual Meeting of the American Society of International Law in 1982, namely, that international custom (by which Rostow meant a general *state* practice accepted as law) simply countermands whatever implicit, even if express, nuclear weapons prohibitions may be said to exist.[11]

It seems evident, then, that the legality (or illegality) of nuclear weapons is not to be judged simply by the existence or non-existence of an explicit treaty rule or by a mere recitation of other "sources" of world authority, written or unwritten. The issue is not, fundamentally,

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juristes devant l'arme nucleaire, 67 REV. GEN. INT'L PUB. 820 (1963).

9. *See, e.g.*, Falk, Meyrowitz & Sanderson, *supra* note 8, at 592-94. *See also infra* notes 62-66, 92-96 and accompanying text.

10. D'Amato, *What "Counts" As Law?*, in LAW-MAKING IN THE GLOBAL COMMUNITY 83 (N. Onuf ed. 1982).

11. *See* 1982 PROC. AM. SOC'Y INT'L L. (forthcoming).

the explicitness of the rule. Nor is it whether suitable language can be found to support one position or another. The issue is whether any of the authority cited—in this case, the laws of war—is of a sort that "counts as law" insofar as the use and threat of use of nuclear weapons are concerned. The issue is whether any of it, explicit or implicit, comports with what is needed to give it jural quality relative to nuclear weapons, and, if so, how and to what extent it applies.

It is my view (a) that the laws of war do indeed extend to nuclear weapons and (b) that in fact they severely restrict the use of these weapons in most instances. In this article, however, I restrict myself primarily to the first of these propositions, leaving it to other occasions to amplify on the second.[12]

II

The traditional approaches to the question of whether an international rule of law has in fact been made or does in fact endure, such as whether the humanitarian laws of war apply to nuclear weapons and warfare, suffer from disabilities that, at the very least, prompt serious skepticism.[13] The mainstream *opinio juris* test, for example, which bids inquiry into what states "believe" a rule to be, does not lend itself easily, if at all, to empirical verification. Nor does it rest comfortably in a world increasingly beset by fundamental challenges to the primacy of the nation-state as a global claimant and decision-maker.

Essentially free from such disabilities, however, and therefore worthy of responsible attention, is the "coordinate communication flow" theory of norm prescription espoused by Myres McDougal and Michael Reisman.[14] Law-making, they write, is "a process of communication which creates, in a target audience, a complex set of expectations comprising three distinctive components: expectations about a policy content; expectations about authority; and expectations about control."[15] And to speak meaningfully of law, they emphasize, all three components must be copresent."[16] Thus Reisman elaborates:

> [P]rescriptive or law-making communications . . . carry simul-

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12. *See* Weston, *Nuclear Weapons Versus International Law: A Contextual Reassessment*, 28 MCGILL L.J. 572 (1983). *See also* Weston, *Nuclear Weapons and International Law: Illegality in Context*, 13 DENVER J. INT'L L. & POL. (forthcoming).

13. For insightful criticism, see McDougal & Reisman, *The Prescribing Function in World Constitutive Process: How International Law is Made*, 6 YALE STUD. IN WORLD PUB. ORDER 249, 256-68 (1980).

14. *See id.* at 249-56, 268-84.

15. *Id.* at 250.

16. *Id.* at 251.

> taneously three coordinate communication flows in a fashion akin to the coaxial cables of modern telephonic communications. The three flows may be briefly referred to as the policy content, the authority signal and the control intention. Unless each of these flows is present and effectively mediated to the relevant audience, a prescription does not result.[17]

Equally important, he adds, the three components "*must continue to be communicated* for the prescription, as such, to endure . . . ."[18]

In this article, I attempt to resolve the question of whether the laws of war apply to nuclear weapons and warfare according to this tripartite communications model of national and international law-making. I do so, in part, because it does indeed avoid the many pitfalls of the traditional theories. But I do so also, and more importantly, because it demythologizes the business of law-making in favor of a common sense appreciation for the richly textured social and jural environment within which law-making necessarily takes place. So critically significant an issue as the legality of nuclear weapons requires, I think, a large dose of jurisprudential realism.

A. Policy Content

Except for a series of treaties prohibiting nuclear weapons in Antarctica, Latin America, outer space and on the seabed beyond the limit of national territorial seas,[19] plus the Partial Test Ban Treaty outlawing the testing of nuclear weapons in outer space, under water and within the earth's atmosphere,[20] no international covenant expressly forbids the development, manufacture, stockpiling, deployment, or use of nuclear weapons *in general*. The United Nations General Assembly has declared the use of nuclear weapons to be "a direct violation of the

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17. Reisman, *International Lawmaking: A Process of Communication*, 1981 PROC. AM. SOC'Y INT'L L. 101, 108.

18. *Id.* at 108. Reisman explains: "[I]f one or more of the components should cease to be communicated, the prescription undergoes a type of desuetude and is terminated." *Id.*

19. *See* The Antarctic Treaty, Dec. 1, 1959, arts. I & V, 12 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 71; Treaty for the Prohibition of Nuclear Weapons in Latin America, Feb. 14, 1967, 634 U.N.T.S. 281; Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, art. IV, 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205; Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof, Feb. 11, 1971, 23 U.S.T. 701, T.I.A.S. No. 7337.

20. Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, Aug. 5, 1963, 14 U.S.T. 1313, T.I.A.S. No. 5433, 480 U.N.T.S. 43.

Charter of the United Nations,"[21] "contrary to the rules of international law and to the laws of humanity,"[22] "a crime against mankind and civilization,"[23] and therefore a matter of "permanent prohibition."[24] In addition, in a much too neglected decision rendered almost twenty years ago, a Japanese tribunal saw fit 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.[25] Considering, however, that U.N. General Assembly resolutions are presumptively not binding as law and that, ordinarily, a single national tribunal decision cannot alone establish rules of international law, it scarcely can be said that these expressions, although certainly probative of customary legal expectation, are by themselves dispositive of the issue at hand. Explicit content does not automatically spell legal prescription, however wise the content communication may be.

Accordingly, if international law has anything useful to say about our topic, as I believe it does, then it will do so implicitly rather than explicitly, through derivations from and analogies to the conventional and customary laws of war, both traditional and modern-day; and highly apropos in this connection are at least six core rules which stand out as *prima facie* relevant (hereinafter usually referred to as "the humanitarian rules of armed conflict"). Each, to be sure, is susceptible of differing linguistic and contextual interpretation. Also, each involves a balancing of the customary principle of humanity against that of military necessity,[26] which inevitably challenges one's capacity for com-

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21. Declaration on the Prohibition of the Use of Nuclear and Thermo-nuclear Weapons, G.A. Res. 1653 para. 1(a), 16 U.N. GAOR Supp. (No. 17) at 4, U.N. Doc. A/5100 (1961).

22. *Id.* at para. 1(b).

23. *Id.* at para. 1(d).

24. Declaration on the Non-use of Force in International Relations and Permanent Prohibition of the Use of Nuclear Weapons, G.A. Res. 2936 para. 1, 27 U.N. GAOR Supp. (No. 30) at 5, U.N. Doc. A/8730 (1972).

25. The Shimoda Case, Judgement of Dec. 7, 1963, District Court of Tokyo, *translated into English and reprinted in full in* 8 JAP. ANN. INT'L L. 212 (1964).

26. Adam Roberts and Richard Guelff summarize:

> Three general customary principles seek to delineate legal limits on belligerent conduct: the principle of military necessity, the principle of humanity, and what is still called the principle of chivalry. The principle of military necessity provides that, strictly subject to the principles of humanity and chivalry, a belligerent is justified in applying the amount and kind of force necessary to achieve the complete submission of the enemy at the earliest possible moment and with the least expenditure of time, life, and resources. The principle of humanity prohibits the employment of any kind or degree of force not actually necessary for military purposes. The principle of chivalry denounces and forbids

plete objectivity, be he or she Scholar Laureate or Commander-in-Chief. Nevertheless, I dare to note them here with a brief summmary of what I understand to be their contemporary meaning—independent, of course, of the nuclear weapons factor.[27]

RULE 1. *It is prohibited to use weapons or tactics that cause unnecessary or aggravated devastation and suffering.*[28]

Here the principles of humanity and military necessity meet head-on, highlighting the interest of all states and peoples in simultaneously

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resort to dishonourable means, expedients, or conduct in the course of armed hostility. All three principles are integrally related and require an appropriate balance to be struck. In general, the law which has been codified is the product of such balancing. . . .

DOCUMENTS ON THE LAWS OF WAR 5 (A. Roberts & R. Guelff eds. 1982).

The last of the three principles noted by Roberts and Guelff has tended to lose significance as warfare has become more and more impersonal. Observe McDougal and Feliciano:

> The principle of chivalry would seem little more than a somewhat romantic inheritance from the Medieval Ages when combat between mailed knights was surrounded by symbolic and ritualistic formalities. In an age increasingly marked by mechanized and automated warfare, the scope of application of chivalry as a principle distinct from humanity may very probably be expected to diminish in corresponding measure.

M. MCDOUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER—THE LEGAL REGULATION OF INTERNATIONAL COERCION 522 (1961).

27. The following summaries, while no substitute for what an appropriately detailed analysis would reveal, are based primarily on the following expertise: S. BAILEY, PROHIBITIONS AND RESTRAINTS IN WAR (1972); G. BEST, HUMANITY IN WARFARE: THE MODERN HISTORY OF THE INTERNATIONAL LAW OF ARMED CONFLICTS (1980); J. BRIERLY, THE LAW OF NATIONS—AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE ch. 9 (6th ed. H. Waldock 1963); THE NEW HUMANITARIAN LAW OF ARMED CONFLICT (A. Cassese ed. 1979); M. GREENSPAN, *supra* note 8; F. KALSHOVEN, THE LAW OF WARFARE (1973); MCDOUGAL & F. FELICIANO, *supra* note 26; 2 L. OPPENHEIM, INTERNATIONAL LAW—A TREATISE (7th ed. H. Lauterpacht 1952); J. PICTET, HUMANITARIAN LAW AND THE PROTECTION OF WAR VICTIMS (1975); G. SCHWARZENBERGER, 2 INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS—THE LAW OF ARMED CONFLICT (1968); J. STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT (1954 & reprint ed. 1973).

28. *See, e.g.*, Article 23 of the 1907 Hague Regulations, Respecting the Laws and Customs of War on Land, Annex to the 1907 Hague Convention (IV), Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539, 1 Bevans 631 [hereinafter cited as 1907 Hague Regulations], which provides in part:

> In addition to the prohibitions provided by special Conventions, it is especially forbidden . . . (b) To kill or wound treacherously individuals belonging to the hostile nation or army; . . . (e) To employ arms, projectiles, or material calculated to cause unnecessary suffering . . . , [and] . . . (g) To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war . . . .

For similar language, see Geneva Protocol I Additional Relating to Victims of Interna-

enhancing their security and minimizing the destruction of attendant values. It is, therefore, less the fact of devastation and suffering than the needlessness, the superfluity, the disproportionality of harm relative to military result that is determinative of illegality. This test, of course, is a function of context, and historically, it appears, "the line of compromise has . . . tended to be located closer to the polar terminus of military necessity than to that of humanity."[29] The relative tolerance heretofore extended to "scorched earth" and "saturation bombing" policies and to incendiary and V-weapons, for example, may well attest to this observation.[30] However, though military necessity may be

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tional Armed Conflict, art. 35(2), Report of the Secretary-General on the Fourth Session of the Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Annex I at 30, U.N. Doc. A/32/144 (*adopted* Dec. 12, 1977, *entered into force* Dec. 7, 1978), *reprinted in* 16 I.L.M. 1391 (1977) [hereinafter cited as 1977 Geneva Protocol I Additional]. This provision prohibits weapons and methods causing "superfluous injury or unnecessary suffering." In addition, see Hague Draft Rules of Aerial Warfare, arts. 22-26, *reprinted in* 17 AM. J. INT'L L. 245 (Supp. 1923); Declaration of Brussels, Aug. 27, 1874, arts. 12-13, *reprinted in* 1 THE LAW OF WAR: A DOCUMENTARY HISTORY 194-96 (L. Friedman ed. 1972); Declaration on the Prohibition of the Use of Nuclear and Thermo-nuclear Weapons, G.A. Res. 1653, 16 U.N. GAOR Supp. (No. 17) at 4, U.N. Doc. A/5100 (1961); Resolution on Respect for Human Rights in Armed Conflicts, G.A. Res. 2444, 23 U.N. GAOR Supp. (No. 18) at 50, U.N. Doc. A/7218 (1968); Resolution on Basic Principles for the Protection of Civilian Populations in Armed Conflicts, G.A. Res. 2675, 25 U.N. GAOR Supp. (No. 28) at 76, U.N. Doc. A/8028 (1970); Fundamental Rules of International Humanitarian Law Applicable in Armed Conflicts, Rule 6, 206 INT'L REV. RED CROSS 248, 249 (1978).

29. M. MCDOUGAL & F. FELICIANO, *supra* note 26, at 523. *See, e.g.*, United States v. List, 11 TRIALS OF WAR CRIMINALS 759, 1253-54 (1950); 8 LAW REPORTS OF TRIALS OF WAR CRIMINALS 34, 65-66 (1948):

> Military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life and money. In general, it sanctions measures by an occupant necessary to protect the safety of his forces and to facilitate the success of his operations. It permits the destruction of life of armed enemies and other persons whose destruction is incidentally unavoidable by the armed conflicts of war; it allows the capturing of armed enemies and others of peculiar danger, but it does not permit the killing of innocent inhabitants for purposes of revenge or the satisfaction of a lust to kill. The destruction of property to be lawful must be imperatively demanded by the necessities of war. Destruction as an end in itself is a violation of international law. There must be some reasonable connection between the destruction of property and the overcoming of the enemy forces. It is lawful to destroy railways, lines of communication, or any other property that might be utilized by the enemy. Private homes and churches even may be destroyed if necessary for military operations. It does not admit the wanton devastation of a district or the willful infliction of suffering upon its inhabitants for the sake of suffering alone.

30. Observing that the mass raids on Hamburg and Dresden, with their "firestorms," are sometimes said to have been on a scale similar to the devastation at Hiroshima,

the leading guide for defining permissible devastation and suffering, its operational scope is not unqualified. Generally speaking, "it . . . is of the proximate military order of *raison de guerre* rather than of the final political order of *raison d'état*";[31] and in any event, especially when delineation between these two orders proves difficult or impossible, it is shaped by what all agree, after Aristotle, is the proper object of war, namely, the bringing about of those conditions that are needed to establish a just and meaningful and lasting peace.

RULE 2. *It is prohibited to use weapons or tactics that cause indiscriminate harm as between combatants and noncombatant military and civilian personnel.*[32]

The historic distinction between combatants and noncombatants (military and civilian) once provided what John Bassett Moore called "the vital principle of the modern law of war."[33] Today, however, after four decades of virtually constant conflict in which belligerents everywhere have flaunted the principle in one way or another, its legal status is mixed. Although Rome and Paris were declared "open" (*i.e.*, undefended) cities during World War II and thereby saved from destruction, ours tends to be an era of "total war" wherein greatly increased civilian participation in "the war effort" and well known developments in the technical arts of war have rendered application of the rule all but impossible in many instances. At any rate, the more vital the target militarily, the more the law will condone incidental civilian damage; and again, as in the case of *Rule l*, considerations of military

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Brownlie writes: "Of course, it does not follow from this that the mass raids were legal, although this is sometimes the intended inference." Brownlie, *supra* note 8, at 449 n.50. Falk, Meyerowitz and Sanderson elaborate on this theme: "The obvious question is whether the practice of states, victorious in a major war in which accepted rules and standards of war were violated, has the effect of a legislative repeal." Falk, Meyerowitz & Sanderson, *supra* note 8, at 565.

31. O'Brien, *Legitimate Military Necessity in Nuclear War*, 2 WORLD POLITY 35, 51 (1960).

32. *See, e.g.*, Geneva Protocol I Additional, *supra* note 28, art. 48, which states: "In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations against military objectives." *See also* Geneva Convention No. IV Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287; 1907 Hague Regulations, *supra* note 28, arts. 25, 27; Resolution on Respect for Human Rights in Armed Conflicts, *supra* note 28; Fundamental Rules of International Humanitarian Law Applicable in Armed Conflicts, *supra* note 28, Rule 7, at 249.

33. J.B. MOORE, INTERNATIONAL LAW AND SOME CURRENT ILLUSIONS viii (1924).

necessity appear to have outweighed considerations of humanity. Nevertheless, demonstrating anew how notions of humanity or proportionality temper claims of military necessity, *Rule 2* appears to pose a genuine legal challenge for at least the following: direct, as distinguished from incidental, attacks upon civilian populations and upon noncombatant sick and wounded armed forces personnel; raids upon target areas wherein civilian resources and uses of special value (such as cultural, humanitarian and religious institutions) significantly outbalance military and militarily related resources and uses; assaults upon undefended population centers manifesting little or no effective base of enemy power; and "terror bombardment" purely or primarily for the purpose of destroying enemy morale.[34] It is, furthermore, appropriate to note Article 6(c) of the Nuremberg Charter declaring the extermination of a civilian population, in whole or in part, to be "a crime against humanity."[35]

RULE 3. *It is prohibited to effect reprisals that are disproportionate to their antecedent provocation or to legitimate military objectives, or disrespectful of persons, institutions and resources otherwise protected by the laws of war.*[36]

The requirement of proportionality in respect of reprisals[37] is but another manifestation of the interplay of the principles of humanity and military necessity. Accordingly, as in the case of *Rule 1* relative to the limits of permissible destruction in the name of self-defense in general, what constitutes a legitimate reprisal is largely a function of con-

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34. McDougal and Feliciano write: "To accept as lawful the deliberate terrorization of the enemy community by the infliction of large-scale destruction comes too close to rendering pointless all legal limitations on the exercise of violence." M. MCDOUGAL & F. FELICIANO, *supra* note 26, at 657.

35. Charter of the International Military Tribunal, Oct. 6, 1945, art. 6(c), 59 Stat. 1555, 1556, E.A.S. No. 472, 13-14 (1945).

36. *See, e.g.*, 1977 Geneva Protocol I Additional, *supra* note 28, arts. 20, 51, 53, 55. *See also* 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, art. 4(4), 249 U.N.T.S. 215; Convention No. I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces of the Field, Aug. 12, 1949, art. 46, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31; Convention No. II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, art. 47, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85; Convention No. III Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 13, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135; Convention No. IV Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 33, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

37. This concept refers to otherwise unlawful acts of retaliation carried out in response to prior illegal acts of warfare and intended to force compliance with the laws of war.

text. Of course, in a legal system dominated by processes of autointerpretation, this fact affords a ready excuse for law evasion by unscrupulous belligerents. Nevertheless, patently disproportionate reprisals, *i.e.*, reprisals that are extreme in relation to their provocation or that lack a reasonable connection with the securing of legitimate belligerent objectives, are contrary to U.N. Charter Article 51 as well as to international law in general. Moreover, reprisals must be directed at the co-belligerent state, with no adverse impact upon states not party to the conflict;[38] and they may not, besides, be directed against the following persons and objects, among others: wounded and sick persons (military and civilian) who are in need of medical care and who refrain from any act of hostility; the personnel of medical units and establishments, including chaplains; noncombatant civilians and civilian populations; cultural property and places of worship; and works or installations containing dangerous forces such as dams, dykes, and nuclear electrical generating stations.[39] Finally, inasmuch as reprisals are extreme measures to be used only as a last resort, every effort must be made, save where military necessity *clearly* compels otherwise, to regulate the conflict by other means.

RULE 4. *It is prohibited to use weapons or tactics that cause widespread, long-term and severe damage to the natural environment.*[40]

This prohibitory rule, a new "basic rule" added to the laws of war by the 1977 Protocol I Additional to the 1949 Geneva Conventions,[41] is emphatically a product of the worldwide environmental reawakening that has taken place since the advent of Sputnik and Rachael Carson's *Silent Spring*. However, with none of the major powers having yet ratified the Protocol and some not even having signed it, its status as general international law is open to some doubt. On the other hand, in view of the 62 signatures and 27 ratifications and accessions to date,[42]

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38. *See* D. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 167-81 (1958). See also the discussion of Rule 5 beginning *infra* note 44.

39. *See* 1977 Geneva Protocol I Additional, *supra* note 28, art. 56.

40. 1977 Geneva Protocol I Additional, *supra* note 28, art. 35(3) states: "It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment." *See also id.*, art. 55(1); Stockholm Declaration of the United Nations Conference on the Human Environment, Report of the U.N. Conference on the Human Environment, Principles 2 & 26, U.N. Doc. A/Conf./48/14 at 4, 7 (June 5-16, 1972), *reprinted in* 11 I.L.M. 1416 (1972).

41. *See supra* note 28.

42. Information supplied in communications from the Office of the Legal Advisor, U.S. Department of State.

plus the "common convictions" set forth at the 1972 United Nations Conference on the Human Environment[43] and the mounting efforts since that time to preserve and enhance the human environment for present and future generations, it probably is correct to say that the prohibition is in at least the incipient stage of becoming law and certainly is a guide to desired conduct.

RULE 5. *It is prohibited to use weapons or tactics that violate the neutral jurisdiction of non-participating states.*[44]

For all the vicissitudes that the law of neutrality has suffered over the years, from the bodyblows of maritime warfare during World War I, to the coming into being of the United Nations collective security system, to the more-or-less routine overflight of planes, rockets, and satellites for intelligence retrieval and space exploration purposes, two key claims continue to be honored in substantial measure: (1) the claim that belligerents have no warrant to carry their hostilities into the territory of a nonparticipating state; and (2) the accompanying claim that nonparticipating states have the right to exclude the entry of belligerent forces into their territory. During both world wars, for example, it was uniform practice for nonparticipants to forbid the entry, deliberate or inadvertent, of belligerent military aircraft into neutral airspace.[45] Of course, as everywhere in the law, different contextual factors make for different applications of the general rule; hence such slippery terms as "absolute neutrality," "nonbelligerence," "qualified neutrality," and the like. On balance, however, the notion that nonparticipants have a legal right to freedom from harm and injury to their territory resulting from interbelligerent activities, and a consequent right to compensation for damages attending violations of that right, appear to have withstood the test of time.

RULE 6. *It is prohibited to use asphyxiating, poisonous, or other gases, and all analogous liquids, materials, or devices, including bac-*

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43. *See supra* note 40.

44. *See* Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Oct. 18, 1907, arts. 1, 2, 3, 4 & 10, 36 Stat. 2310, T.S. No. 540, 1 Bevans 654. Article 1 states the basic rule: "The territory of neutral Powers is inviolable." *See also* Hague Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War, Oct. 18, 1907, arts. 1 & 2, 36 Stat. 2415, T.S. No. 545, 1 Bevans 723.

45. *See, e.g.*, 7 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 549-57 (1943); J. SPAIGHT, AIR POWER AND WAR RIGHTS 420-29 (3d ed. 1947).

teriological methods of warfare.[46]

Due partly to fear of retaliation, but also to the opprobrium that surely would attach to the admitted or discovered use of chemical and biological weapons, this prohibition, which is today derived primarily from the Geneva Gas Protocol of 1925,[47] has been remarkably well observed since the widespread use of poison gas during World War I. When it has not, as when Italy used poison gas against Ethiopia in 1935-36, or when unobservance is suspected, as presently in the case of the Soviet Union in Afghanistan, the aversion and indignation aroused has been substantial. At any rate, given the large number of states that have become party to the 1925 Protocol (including the Soviet Union in 1928 and the United States in 1975), the majority view now seems to be that the prohibition should be regarded as part of customary international law, embracing all states whether or not they have formally adhered to the Protocol itself. Broad though its prescriptive foundation may be, however, there is some question about the prohibition's substantive scope. For example, some states (the United States included) have taken the position that it does not extend to nonlethal control agents and chemical herbicides.[48] Additionally, because a number of state parties have attached reservations to the effect that the Protocol shall be binding upon them only to the extent that it is respected by the other state parties, some maintain that the prohibition is addressed

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46. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, T.I.A.S. No. 8061, 94 L.N.T.S. 65 [hereinafter cited as 1925 Geneva Gas Protocol], states:

> Whereas the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices has been justly condemned by the general opinion of the civilized world; and
>
> Whereas the prohibition of such use has been declared in Treaties to which the majority of Powers of the world are Parties; and
>
> To the end that this prohibition shall be universally accepted as a part of International Law, binding alike the conscience and the practice of nations;
>
> Declare:
>
> That the High Contracting Parties, so far as they are not already Parties to Treaties prohibiting such use, accept this prohibition, agree to extend this prohibition to the use of bacteriological methods of warfare and agree to be bound as between themselves according to the terms of this declaration.

See also Hague Declaration 2 Concerning Asphyxiating Gases, July 29, 1899, *reprinted in* DOCUMENTS ON THE LAWS OF WARS 35 (A. Roberts & R. Guelff eds. 1982); 1 THE LAW OF WAR: A DOCUMENTARY HISTORY 249 (L. Friedman ed. 1972); 1907 Hague Regulations, *supra* note 28, art. 23(a); Resolution on the Question of Chemical and Bacteriological (Biological) Weapons, G.A. Res. 2630A, 24 U.N. GAOR Supp. (No. 30) at 16, U.N. Doc. A/7630 (1969).

47. *See supra* note 46.

48. *See* DOCUMENTS ON THE LAWS OF WAR 138 (A. Roberts & R. Guelff eds. 1982).

only to the first use of chemical, biological and equivalent weapons.[49] This is probably a correct interpretation insofar as these reserving states are concerned, but judging from the all-encompassing tenor of U.N. General Assembly Resolution 2603A (XXIV), which interprets the 1925 Protocol, such a construction doubtless should be applied as restrictively as possible.[50]

THUS, despite an obvious erosion over the years of legal inhibitions regarding the conduct as well as the initiation of war, there remains today an inherited commitment to standards of humane conduct within which the reasonable belligerent can operate.[51] Contrary to the repudiated *Kriegsraison* theory of the German war criminals,[52] there remains the fundamental principle from which all the laws of war derive, including the humanitarian rules of armed conflict noted here, namely, that the right of belligerents to adopt means and methods of warfare is *not* unlimited.[53]

Now when applying this principle in light of the prohibitory rules summarized above, one obviously is not led inevitably to the proposition that nuclear weapons are illegal *per se*—except, I would argue, within the terms of *Rule 6*, prohibiting the use of chemical, biological, and "analogous" means of warfare. Perhaps not all nuclear weapons which are conceivable, but certainly all nuclear weapons now deployed or planned, including the so-called "neutron bomb" or "enhanced radi-

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49. *Id.*

50. Resolution on the Question of Chemical and Bacteriological (Biological) Weapons, *supra* note 46, declares "as contrary to the generally recognized rules of international law," embodied in the 1925 Geneva Gas Protocol, *supra* note 46, the use in international armed conflicts of:

> (a) Any chemical agents of warfare—chemical substances, whether gaseous, liquid or solid—which might be employed because of their direct toxic effects on man, animals or plants;
>
> (b) Any biological agents of warfare—living organisms, whatever their nature, or infective material derived from them—which are intended to cause disease or death in man, animals or plants, and which depend for their effects on the ability to multiply in the person, animal or plant attacked.

51. For a formulation somewhat different but nonetheless paralleling and complementing the six prohibitory rules summarized above, see *Fundamental Rules of International Humanitarian Law Applicable in Armed Conflicts*, 206 INT'L REV. RED CROSS 248, 249 (1978).

52. This approach argues that the "necessities of war," or military necessity, override and render inoperative the ordinary laws of war (*Kriegsmanier*). *See* M. GREENSPAN, THE MODERN LAW OF LAND WARFARE 279 (1959).

53. *See, e.g.*, 1907 Hague Regulations, *supra* note 28, art. 22, which provides: "The right of belligerents to adopt means of injuring the enemy is not unlimited." *See also* 1977 Geneva Protocol I Additional, *supra* note 28, art. 35(1); Resolution on Respect for Human Rights in Armed Conflicts, G.A. Res. 2444, 23 U.N. GAOR Supp. (No. 18) at 50, U.N. Doc. A/7218 (1968).

ation" (ER) weapon and the "reduced residual-radiation" (RRR) or "minimum residual-radiation" (MRR) weapon, manifest radiation effects, consisting in the transmission of gamma rays, neutrons, beta particles and some alpha particles, that for all intents and purposes are the same as those that result from poison gas and bacteriological means of warfare.[54] 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.[55] But in the absence of a specific prohibition, one is led, instead, 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?[56] And in most if not all nuclear warfare situations, I believe, the answer must be *no*. 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. Given these observations, not to mention 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 anything but contrary to the core precepts of international law.

The point of this article, however, is not to deal in generalities, as important as the generalities are. Rather, it is to demonstrate that the aforementioned humanitarian rules of armed conflict do in fact apply

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54. *See, e.g.*, P. Lindop & J. Rotblat, *Consequences of Radioactive Fallout*, in THE FINAL EPIDEMIC—PHYSICIANS AND SCIENTISTS ON NUCLEAR WAR 117 (R. Adams & S. Cullen eds. 1981). *See also* N. SINGH, *supra* note 8, at 154-66. For details concerning the so-called "second generation nuclear weapons" mentioned here, including the EMP Bomb (enhanced electromagnetic pulse warhead), see Gsponer, *The Neutron Bomb and Other New Limited Nuclear War Weapons*, 13 BULL. PEACE PROPOSALS 221, 222-23 (1982). The same article briefly describes "third generation direct energy weapons" (laser beam, microwave beam, and particle beam weapons) as well. *Id.* at 223-25.

55. *See* E. CASTREN, *supra* note 8, at 207; M. GREENSPAN, *supra* note 8, at 372-73; G. SCHWARZENBERGER, *supra* note 8, at 37-38; N. SINGH, *supra* note 8, at 162-66; Falk, Meyrowitz & Sanderson, *supra* note 8, at 563; H. Meyrowitz, *supra* note 8, at 842.

56. Article 36 of the 1977 Geneva Protocol I Additional, *supra* note 28, extends this inquiry to the longer term, with obvious implications for defense policymakers and operators:

> 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 its employment would, in some or all circumstances, be prohibited by any other rule of international law applicable to the High Contracting Party.

to nuclear weapons and warfare, and then, at another place and time, to investigate how and to what extent this "policy content" actually operates in concrete contexts.[57] Thus, it is appropriate to turn now to McDougal and Reisman's second "communication flow," the authority signal.

B. Authority Signal

It is one thing to postulate and quite another to establish that the humanitarian rules of armed conflict, both conventional and customary, do extend to or cover nuclear weapons and warfare. A communication of policy content unaccompanied by an authority signal, let alone a communication of control intention, is not law.

But there is, I think, sufficient evidence to confirm that the requisite authority signal is present. The widespread and essentially unqualified adoption of the four 1949 Geneval Conventions on the humane conduct of war four years *after* the advent of the nuclear age;[58] U.N. General Assembly Resolution 1653 (XVI) of November 24, 1961, declaring the use of nuclear weapons to be, *inter alia*, "contrary to the rules of international law and to the laws of humanity";[59] the 1963 *Shimoda Case*, holding that the bombing of Hiroshima and Nagasaki were contrary to international law in general and the laws of war in particular;[60] resolutions of the International Red Cross;[61] the writings of the vast majority of publicists knowledgeable in the field[62]—these and other communications are expressive of a far-flung community consensus that nuclear weapons and warfare do not escape the judgment of the humanitarian rules of armed conflict. True, some will challenge this assertion on the grounds that certain of the communications relied upon are not "true sources" of law, or, in more functional terms,

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57. *See supra* note 12 for articles which explore how and to what extent this "policy content" actually operates in concrete contexts.

58. Convention No. I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces of the Field, *supra* note 36; Convention No. II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, *id.;* Convention No. III Relative to the Treatment of Prisoners of War, *id.;* and Convention No. IV Relative to the Protection of Civilian Persons in Time of War, *id.*

59. *See* Declaration on the Prohibition of the Use of Nuclear and Thermo-nuclear Weapons, G.A. Res. 1653 (XVI), *supra* note 21 and accompanying text. For details relevant to this resolution, see *infra* note 98 and accompanying text.

60. *See supra* note 25 and accompanying text.

61. *See, e.g.*, Resolution XXVIII, Protection of Civilian Populations Against the Dangers of Indiscriminate Warfare, INTERNATIONAL CONFERENCE OF THE RED CROSS, RESOLUTIONS (Vienna 1965), declaring at 22: "The general principles of the law of war apply to nuclear and similar weapons."

62. *See, e.g.*, publicists cited *supra* notes 8 and 27.

that their communicators do not have the authority to prescribe. This would be to imply, erroneously I submit, that only state actors have the competence to prescribe internationally respecting issues or values of major and universal significance, a viewpoint that contrasts sharply with the widespread understanding, certified in the famous Martens Clause of 1907 Hague Convention IV and reaffirmed in the four 1949 Geneva Conventions and the two 1977 Geneva Protocols Additional, that the laws of war are in part a function of "the dictates of the public conscience."[63] Moreover, it is to beg the question of those sources that *are* acceptable by statist standards.

In sum, except as noted below, there is little in the authoritative literature to indicate, either explicitly or implicitly, that nuclear weapons and warfare are not or should not be subject to the humanitarian rules of armed conflict. Indeed, there is a great deal to indicate that they are and should be. The world community has in no way consented to the abolition of these rules in order to legitimize nuclear war. As Professor Fried has stated emphatically: "[i]t is scurrilous to argue that it is still *forbidden* to kill a *single* innocent enemy civilian with a *bayonet*, or wantonly to destroy a *single* building or enemy territory by *machine-gun* fire—but that it is *legitimate* to kill *millions* of enemy non-combatants and wantonly to destroy entire enemy cities, regions and perhaps countries (including cities, areas or the entire surface of *neutral* States) by *nuclear* weapons."[64]

Despite all this evidence, however, at least three negative arguments are heard to deny that the humanitarian rules of armed conflict apply to nuclear weapons and warfare. They merit acknowledgment and rebuttal, if only to demonstrate further the force of what has just been said.

First is the argument that these rules do not apply because, for the most part, they predate the invention of nuclear weapons or otherwise fail to mention them by name. The argument is easily dismissed. As a variant of the spurious thesis that nuclear weapons uses are without legal constraint in the absence of an explicit treaty ban, it fails to heed the multifaceted nature of the international law-creating legal system,

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63. The Martens Clause of 1907 Hague Convention IV, *supra* note 28 is quoted in full in the text accompanying note 68 *infra*. The 1949 versions may be found in Article 63 of Convention No. I, *supra* note 36; Article 62 of Convention No. II, *id.*; Article 142 of Convention No. III, *id.*; and Article 158 of Convention No. IV, *id.* The 1977 versions may be found in Article 1 of Geneva Protocol I Additional, *supra* note 28, and the Preamble to Geneva Protocol II Additional Relating to the Protection of Victims of Non-International Armed Conflicts, *adopted* Dec. 12, 1977, *entered into force* December 7, 1978, U.N. Doc. A/32/144, Annex II, *reprinted in* 16 I.L.M. 1442 (1977).

64. Fried, *supra* note 8, at 28.

taking a view of legal process that no one would dare accept in the domestic sphere. Moreover, legal rules typically are interpreted to encompass matters not specifically mentioned—often not even contemplated—by their formulators. The Commerce Clause of the United States Constitution is a well-known case in point.[65] As stated by the 1945 Nuremberg Tribunal when called to adjudicate complaints about previously undefined "crimes against humanity" and other crimes, "[the law of war] is not static, but by continual adaptation follows the needs of a changing world."[66] Finally, confirming the first point, the well-known Martens Clause, partially quoted above,[67] was formulated exactly to cover such lacunae, and accordingly bears quotation in full:

> Until a more complete code of the laws of war has been issued, the high contracting parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.[68]

Weapons and tactics not specifically dealt with in the various texts articulating the laws of war thus remain nonetheless constrained by the principles of international law, including the counterbalancing principles of humanity and military necessity and—not to be forgotten—"the dictates of the public conscience."

Another negative argument, a variant of the first but not as broad-sweeping, is that certain of the humanitarian rules of armed conflict do not apply or are not authoritative simply because they are open to exempting interpretation. For example, notwithstanding that the radiation effects of nuclear weapons (initial and residual) produce symptons and results essentially indistinguishable from the short- and long-term disease and genetic consequences of poison gas and bacteriological weapons,[69] and despite the fact that the omnibus language of the 1925

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65. Written in the late Eighteenth Century, before railroads, automobiles and airplanes, the United States Constitution's Commerce Clause (art. I, § 8, cl.3) has nonetheless repeatedly been held to regulate virtually every aspect of modern technology operating across federal and state lines. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 232-44 (1978).

66. 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 464 (1948).

67. *See supra* text accompanying note 63.

68. Preamble, 1907 Hague Convention (IV), *supra* note 28. For more up-to-date versions, see the references cited *supra* in note 63.

69. *See supra* note 53 and accompanying text.

Geneva Gas Protocol ("all analogous liquids, materials or devices") is comprehensive enough to proscribe any weapon whose effects are similar to chemical and biological means of warfare,[70] it still is argued that Article 23(a) of the 1907 Hague Regulations (forbidding poison or poisoned weapons)[71] and the Protocol's omnibus language do not apply to nuclear weapons. It is said that the former reflects an historic revulsion for clandestine instruments of war, which nuclear weapons clearly are not,[72] and that the weapons banned by the latter (presumably the chemical and bacteriological weapons) harbor factual and policy aspects somehow distinguishable from radiological weapons.[73] Similarly, it has been suggested that the radiological consequences of nuclear weapons, far from having any central military importance, are but the "incidental side effects" of nuclear weapons explosions,[74] thus removing nuclear weapons from the reach of such rules as Hague Regulation 23(e) forbidding the use of weapons "*calculated* to cause unnecessary suffering."[75] But such interpretative arguments are, I think, self-serving and evasive. As usefully observed by Ian Brownlie, the first argument (relative to chemical and biological weapons) is rather "[like] interpreting older statutes on road traffic in such a way as to confine the word 'vehicle' to the horse and cart."[76] The second argument (relative to the "incidental" versus "calculated" dichotomy) simply ignores that most nuclear weapons, certainly those in the strategic and high yield tactical classes, are deployed, to quote Brownlie again, "in part with a view to utilizing the destructive effects of radiation and fallout."[77] On final analysis, these and like arguments tend to beg rather than to justify the conclusions put forward, and are scarcely less preposterous than contending that civil defense arrangements such as air raid shelters make a city defended and thereby beyond the protection of, say, Article 25 of the 1907 Hague Regulations prohibiting attacks upon "undefended" towns, villages, dwellings, or buildings.[78]

Finally, there is the argument that the humanitarian rules of armed conflict do not extend to nuclear weapons and warfare insofar as they are newly expressed in the 1977 Protocol I Additional to the four

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70. *See supra* note 55 and accompanying text.

71. *See supra* note 28.

72. *See* M. McDOUGAL & F. FELICIANO, *supra* note 26, at 662-63.

73. *See id.* at 664-65.

74. *See* Phillips, *Air Warfare and Law*, 21 GEO. WASH. L. REV. 395, 409, 410, 414 (1953).

75. *Supra* note 28 (emphasis added).

76. Brownlie, *supra* note 8, at 444.

77. *Id.* at 445.

78. 1907 Hague Regulations, *supra* note 28.

1949 Geneva Conventions. The underlying rationale is twofold: first, that the Protocol has not yet been ratified by the nuclear weapon states, although it has been signed by the majority of them;[79] and second, that, at the time of signature, the United Kingdom and the United States stipulated formal "understandings" that the rules established or newly introduced by the Protocol would not regulate or prohibit the use of nuclear weapons, only conventional ones.[80] Now it is true that failure of ratification of a treaty ordinarily prevents its application against a non-ratifying state. It also is true that a declaration of understanding, like a reservation, may sometimes effectively qualify a treaty to the degree that it is not incompatible with the treaty's object and purpose. Thus, it is arguable that the Protocol's provisions relative to the protection of the natural environment[81] and of civilian populations as a whole,[82] which are among those that supplement and extend the laws of war as previously articulated, may not in fact cover nuclear weapons and warfare at the present time. However, it also is true, that a state consenting to a treaty subject to ratification—*e.g.* the United Kingdom, the United States, and the U.S.S.R. in the instant case—is obliged to refrain from acts which would defeat the treaty's object and purpose (at least until such time as it makes clear its intention not to become a party to the treaty),[83] and that a declaration of understanding, in contrast to a reservation, is seen to be essentially a unilateral act and therefore presumptively not binding on parties that fail to object to it.[84] Moreover, in view of such instruments as the 1970 Stock-

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79. *See* DOCUMENTS ON THE LAW OF WAR 459-60 (A. Roberts & R. Guelff eds. 1982).

80. Although not yet a signatory of the Protocol, France apparently took the same position during the course of the Protocol's deliberations. *See* 1977 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 919 (1979). *See also* M. BOTHE, K. PARTSCH & W. SOLF, NEW RULES FOR VICTIMS OF ARMED CONFLICTS—COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949, at 189 (1982).

81. The 1977 Geneva Protocol I Additional, *supra* note 28, art. 35(3) expressly proscribes methods or means of warfare which are intended or can be expected to cause wanton destruction of the environment. *See also id.*, art. 55(1).

82. *See* 1977 Geneva Protocol I Additional, *supra* note 28, pt. IV.

83. *See* Vienna Convention on the Law of Treaties, art. 18, *opened for signature* May 23, 1969, *entered into force* Jan. 27, 1980, U.N. Conf. on the Law of Treaties Off. Rec., First and Second Sess., U.N. Doc. A/CONF. 39/27 at 289, *reprinted in* 8 I.L.M. 679 (1969). As of August 23, 1983, 44 states had become parties to the Vienna Convention. The United States has signed but not yet ratified the Convention.

84. *See, e.g.*, 1 D. O'CONNELL, INTERNATIONAL LAW 239 (2d ed. 1970). The point is important to bear in mind in view of the fact that sixty-two countries besides the United Kingdom and the United States have so far signed the Protocol apparently without formally objecting to the British and American "understandings," but also, it must be noted, without seeking similarly to limit the reach of the Protocol in relation to nuclear weapons. India contradicted the views of the United States in a written statement in the

holm Declaration on the Human Environment and the 1978 Red Cross Fundamental Rules of International Humanitarian Law Applicable in Armed Conflicts,[85] it is probable that the Protocol's environmental and civilian population protection provisions are declaratory of an emerging customary law and therefore, arguably, unaffected by the nonratifications and declarations of understanding in question.[86] Finally, because 1977 Geneva Protocol I Additional is directed at the minimization of destruction and suffering in *modern* warfare "without any adverse distinction based on the nature or origin of the armed conflict,"[87] and because it regrettably is easy to imagine the use of nuclear weapons in such warfare, it is not unreasonable to conclude that the United Kingdom and United States declarations vitiate the fundamental objects and purposes of the Protocol and therefore are invalid.[88] At the very least, as remarked by Professor Fujita, "[t]his separation of fields of regulation between conventional warfare and nuclear warfare will produce an odd result not easily imaginable, because conventional weapons and nuclear weapons will be eventually used at the same time and in the same circumstances in a future armed conflict."[89] In sum, the legal effects of nonratifications and declarations of understanding, matters of not a little bewilderment at any time, do not find themselves unequivocally on one side of the present debate. This third argument is highly ambiguous at best, and of course it does not negate any of the prohibitions that predate the Protocol.[90]

On final analysis, then, the humanitarian rules of armed conflict may be said to apply to nuclear weapons and warfare. The counterarguments reviewed represent not a challenge to the essential authoritativeness of this conclusion, but, indeed, an acknowledgment of such

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final Plenary of the diplomatic conference which negotiated the Protocol. *See* M. BOTHE, K. PARTSCH & W. SOLF, *supra* note 80, at 189-90.

85. For the Stockholm Declaration, see *supra* note 40; for the Red Cross Fundamental Rules, see *supra* note 28.

86. *Cf.* M. BOTHE, K. PARTSCH & W. SOLF, *supra* note 80, at 572. It appears, indeed, that the United Kingdom and United States declarations of understanding were perceived as extending only to the Protocol's provisions regarding the use of weapons, *i.e.*, Articles 35(2), (3), and to no others. *Id.* at 190-92.

87. 1977 Geneva Protocol I Additional, *supra* note 28, Preamble.

88. *See* Vienna Convention on the Law of Treaties, *supra* note 83, art. 19.

89. Fujita, *supra* note 8, at 77.

90. *Cf.* M. BOTHE, K. PARTSCH & W. SOLF, *supra* note 80, at 190. Mr. George H. Aldrich, Chairman of the United States delegation to the diplomatic conference which drew up and adopted the Protocol, himself observed, at the fourth and final session, that the American stand on nuclear weapons applied only to the rules of warfare newly established by the Protocol (in particular, Article 55 on the protection of the natural environment) and not to the already existing customary and conventional laws of war. *See* 1977 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 919 (1979).

authority and a consequent attempt to escape it. Considering the horrifying stakes involved, it seems a misplaced exercise.

C. *Control Intention*

What we have just observed *vis-à-vis* arguments disputing the applicability to nuclear weapons of the humanitarian rules of armed conflict—namely, that they constitute not a plea of unauthoritativeness but a confession of avoidance—is of course grist for the proposition that the world community has little or no expectation of allowing the rules of war to regulate the use of nuclear weapons. However solid the authority signal, it would be argued, the intention to make that authority controlling simply does not exist.

This proposition, it must be acknowledged, is no idle one, at least insofar as the nuclear weapon states are concerned. Despite abundant rhetoric to the contrary, they appear determined to fight delaying actions against a general legal control of nuclear weapons and warfare. In the name of self-defense and self-preservation, they have built and continue to build enormous nuclear arsenals which presumably they would use if sufficiently provoked. Mutually fearful of evasion, they have shown themselves unable to agree on a comprehensive instrument of prohibition or severe restriction. Except for the Soviet Union, they have declined to renounce the option of first use. And, as noted earlier in connection with the 1977 Geneva Protocol I Additional, some of these states have sought to exempt nuclear weapons from important provisions of the most recent formal statement on the protection of victims of international conflicts.[91] On the basis of such facts, there can be genuine doubt about the extent to which the major powers actually have assimilated into their operational codes the authority signal that nuclear weapons and warfare are to be judged according to the humanitarian rules of armed conflict.

This doubt is not, however, the end of the matter, although to make the opposite case is not easy, for one must rely for evidence more on acts of omission than on acts of commission. Nevertheless, also germane are three clusters of countervailing factors which, though frequently and perhaps deliberately omitted from the balance of relevant considerations, nonetheless recommend that this third communication flow in law-making relative to nuclear weapons and warfare is not as one-sided as at first it may seem. A control intention on the part of the global community as a whole is by no means absent.

First, and perhaps most conspicuous at the present time, are the

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91. *See supra* text following note 78.

initiatives of essentially nonformal members of the international legal community. Emboldened by a variety of inducements, such as the collapse of SALT II, a quantum leap in arms race expenditures, a growing fear of nuclear confrontation in Europe, the Nuremberg precedent, religious teachings and secular humanism, increasing numbers of diverse individuals and groups, especially in the West where traditions of petition and redress prevail, have been demanding, if not the complete abolition of nuclear weapons, then the implementation of norms designed to control them. The Stockholm Declaration of the U.N. Conference on the Human Environment issued in June, 1972[92] and the Delhi Declaration of the International Workshop on Disarmament issued in March, 1978[93] are illustrative. So, too, are the assertions of Vatican II[94] and, more recently, the Pastoral Letter on War, Armaments and Peace of the National Conference of Catholic Bishops of the United States.[95] But perhaps most apposite is the work of the International Committee of the Red Cross (ICRC) which has come to play an important and respected quasi-official role in the implementation as well as the clarification and development of the humanitarian laws of war.[96] Overwhelmingly, the intention is universally manifest to curtail the growing menace of nuclear militarism and to fashion or reinforce rules of humanitarian conduct in time of war.

Second, a control intention is evident in the attitudes and behaviors of the non-nuclear weapon states. Although without the nuclear

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92. 1977 Geneva Protocol I Additional, *supra* note 28.

93. For the text, see B. WESTON, R. FALK & A. D'AMATO, BASIC DOCUMENTS IN INTERNATIONAL LAW AND WORLD ORDER 406 (1980).

94. *See Pastoral Constitution on the Church in the Modern World (Gaudium Et Spes)*, in THE DOCUMENTS OF VATICAN II 199-308 (W. Abbott, S.J. ed. & Very Rev. Msgr. J. Gallagher trans. 1966). "Hence everyone must labor to put an end at last to the arms race, and to make a true beginning of disarmament, not indeed unilateral disarmament, but one proceeding at an equal pace according to agreement. . . ." *Id.* at 296 (*citing* POPE JOHN XXIII, PACEM IN TERRIS 287 (1963)).

95. *See* NAT'L CONF. CATHOLIC BISHOPS, THE CHALLENCE OF PEACE: GOD'S PROMISE AND OUR RESPONSE (Pastoral Letter on War, Armaments and Peace), 13 ORIGINS—NC DOCUMENTARY SERVICE No. 1 (May 19, 1983) (copy of Pastoral Letter on file at N.Y.L. Sch. J. Int'l & Comp. L. office).

96. The ICRC played a major role, as is well known, in the drafting and negotiation of the four 1949 Geneva Conventions, *supra* note 36, and the two 1977 Geneva Protocols Additional to the 1949 Conventions, *supra* notes 28 and 63. For further indication of the ICRC's extensive involvement, see G. DRAPER, *supra* note 8; D. FORSYTHE, HUMANITARIAN POLITICS: THE INTERNATIONAL COMMITTEE OF THE RED CROSS (1977); J. PICTET, *supra* note 27; J. PICTET, THE PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW (undated; available from the ICRC). *See also* ICRC, SOME INTERNATIONAL RED CROSS CONFERENCE RESOLUTIONS ON THE PROTECTION OF CIVILIAN POPULATIONS AND ON WEAPONS OF MASS DESTRUCTION (1981); ICRC, REPORT ON THE WORK OF EXPERTS ON WEAPONS THAT MAY CAUSE UNNECESSARY SUFFERING OR HAVE INDISCRIMINATE EFFECTS (1973).

hardware to prove their restraint unequivocally, still they may be seen to intend the regulation of nuclear weapons and warfare according to the humanitarian rules of armed conflict. For example, under the aegis and with the cooperation of the United Nations, they have on numerous occasions expressed their resolve either to prohibit nuclear weapons *in toto* or to restrict their use severely according to the laws of war.[97] A good illustration, one we already have encountered, is found in U.N. General Assembly Resolution 1653 (XVI) of November 24, 1961, providing, *inter alia*, that the use of nuclear weapons would be "contrary to the rules of international law and to the laws of humanity."[98]

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97. *See, e.g.*, the 1961 Declaration on the Prohibition of the Use of Nuclear and Thermo-nuclear Weapons, G.A. Res. 1653 (XVI), *supra* note 28, the first occasion in which the non-nuclear weapon States expressed their views via the United Nations. The recorded vote (analyzed in some detail in note 98 *infra*) was 55 in favor, 20 opposed and 26 abstentions. For General Assembly resolutions on the same themes since 1961, see Resolution on the Non-use of Force in International Relations and Permanent Prohibition on the Use of Nuclear Weapons, G.A. Res. 2936 (XXVII), *supra* note 24 (73 in favor, 4 opposed, 46 abstentions); Resolution on Non-use of Nuclear Weapons and Prevention of Nuclear War, G.A. Res. 33/71B (XXXIII), 33 U.N. GAOR Supp. (No. 45) at 48, U.N. Doc. A/33/45 (1978) (103 in favor, 18 opposed, 18 abstentions); Resolution on the Non-use of Nuclear Weapons and Prevention of Nuclear War, G.A. Res. 34/83G (XXXIV), 34 U.N. GAOR Supp. (No. 46) at 56, U.N. Doc. A/34/46 (1979) (112 in favor, 16 opposed, 14 abstentions); Resolution on Non-use of Nuclear Weapons and Prevention of Nuclear War, G.A. Res. 35/152D (XXXV), 35 U.N. GAOR Supp. (No. 48) at 69, U.N. Doc. A/35/48 (1980) (113 in favor, 19 opposed, 14 abstentions); Resolution on Non-use of Nuclear Weapons and Prevention of Nuclear War, G.A. Res. 39/92 I (XXXVI), U.N. Doc. A/Res/36/92, at 12-13 (1981) (121 in favor, 19 opposed, 6 abstentions). It is significant that the number of States which have voted against the legality of nuclear weapons has substantially increased since 1961.

98. *Supra* note 21, para. 1(b). The resolution was passed by a vote of fifty-five to twenty with twenty-six abstentions, which suggests a much smaller consensus than in fact was the case. As Brownlie points out,

> [t]he only vote cast against the resolution from Africa and Asia was that of Nationalist China. The Latin-American States largely abstained, as also did the Scandinavian States, Austria, and certain political associates of the West in Asia. What is interesting about the voting pattern is, however, the fact that States representing a variety of political associations are to be found in the majority vote. This was drawn from the "non-aligned" African and Asian States, some African and Asian States with Western leanings such as Nigeria, Lebanon and Japan, Mexico . . . and the Communist States. Members of NATO (apart from Denmark and Norway) together with Australia, Ireland, New Zealand, Spain [under Franco], South Africa, three Central American republics and Nationalist China, voted against the resolution.

Brownlie, *supra* note 8, at 437-39. In other words, except for the United States and countries allied with or significantly dependent on the United States, most of the rest of the world voted *for* the resolution. Compare the voting patterns in the resolutions cited in note 97 *supra*. Increasingly the non-nuclear weapon States may be seen to oppose the legality of nuclear weapons.

Also instructive is the history surrounding General Assembly Resolution 2444 (XXXIII) of December 19, 1968,[99] involving the deletion, at the request of the Soviet delegation, of a provision "that the general principles of war apply to nuclear and similar weapons." The deletion was allowed, but only over the objections of the United States representative who maintained that the laws and principles of war "apply as well to the use of nuclear and similar weapons," and only on the understanding that the remaining provisions would apply regardless of the nature of the armed conflict "or the kinds of weapons used."[100] But perhaps most telling has been the uniform disinclination of the non-nuclear weapon states to hedge on any of the provisions of the 1977 Geneva Protocol I Additional in respect of nuclear weapons, as did the United Kingdom and the United States.[101] As far as is known, not one has followed suit and none appears inclined to do so. The non-nuclear weapon states, it seems, are variously committed to the wholesale prohibition of nuclear weapons or, in the alternative, to their regulation according to the laws of war as most recently articulated.

Finally, and arguably most importantly, are the words and deeds of the nuclear weapon states themselves. Even while escalating nuclear capabilities and tensions to the point where responsible observers are predicting a nuclear conflagration before the year 2000, the nuclear powers appear to take for granted that nuclear weapons do not escape the scrutiny of the humanitarian rules of armed conflict. For example, a certain responsiveness to these rules, or in any event to the importance of not transgressing them, appears to have been at work, however perversely, in the bombings of Hiroshima and Nagasaki. Each were justified officially on grounds of military necessity.[102] Similarly, the responsiveness seems present, to some extent at least, in the complete non-use of nuclear weapons in Korea, Vietnam, Afghanistan, and the Falkland/Malvinas Islands where, manifestly, they could have been unleashed,[103] and, to some degree, in the growing interest among United States and Soviet strategists in counterforce doctrine and capabilities for damage limitation.[104] But perhaps most unmistakably, the control

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99. Resolution on Respect for Human Rights in Armed Conflicts, G.A. Res. 2444, 23 U.N. GAOR Supp. (No. 18) at 50, U.N. Doc. A/7218 (1968).

100. As recounted in U.S. DEP'T OF THE AIR FORCE, INTERNATIONAL LAW—THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS 5-17 n.18 (AFP. 110-31, Nov. 19, 1976).

101. *See* Cassese, *A Tentative Appraisal of the Old and the New Humanitarian Law of Armed Conflict*, in THE NEW HUMANITARIAN LAW OF ARMED CONFLICT 461, 475-76 (A. Cassese ed. 1979). *See also supra* notes 80, 84 and 86 and accompanying text.

102. See generally the authorities cited *supra* note 2.

103. *Accord* H. Meyrowitz, *supra* note 8, at 835.

104. *See, e.g.*, J. ROSE, THE EVOLUTION OF U.S. ARMY NUCLEAR DOCTRINE, 1945-1980 (1980). This work includes a discussion of Soviet as well as American doctrine.

intention to make the humanitarian rules of war applicable in nuclear settings is evident in the military manuals of the major powers, manuals whose purpose it is, *inter alia*, to advise military personnel (particularly those in command positions) on how to comport themselves in time of war. While denying the illegality of nuclear weapons *per se*, the military manuals of the United States and the United Kingdom, for example, consistently instruct that nuclear weapons are to be judged according to the same standards that apply to other weapons in armed conflict.[105]

Thus, there is more to the issue of control intention in the instant context than at first meets the eye. The huge emphasis given by the nuclear weapon states to their policies of nuclear deterrence and defense is, of course, theoretically complicating, certainly for anyone who believes law to be no mere body of rules, but a complex process of controlling as well as authoritative decision—and the more so when it is appreciated how difficult it is for the rest of the world to do much about it. Similarly troublesome, certainly for anyone who accepts the positivist assertion that only states can make, interpret, and enforce international law, is any claim of control intention that relies to a significant extent upon the words and deeds of actors having uncertain or no formal status in the international system *as traditionally conceived.* But it is crucial to remember that legal norms are prescribed and endure because violators of fundamental community policies do exist; that control intention, as a credible communication, can embrace inducements and pressures not confined to the threat or use of the force we typically associate with power elites; and that, in this burgeoning human rights era especially, respecting an issue that involves potentially the fate of human civilization itself, it is not only appropriate but mandated that the legal expectations of all members of human society, official and non-official, be duly taken into account.[106] It is, for example, and by way of analogy, exceedingly difficult to imagine anyone but officials in Pretoria seriously contending that South Africa is not an international outlaw *vis-à-vis* Namibia because the World Court's

105. *See, e.g.*, U.S. DEP'T OF THE AIR FORCE, *supra* note 100, at 5-17 n.18; 2 U.S. DEP'T OF THE ARMY, INTERNATIONAL LAW 42-44 (DA PAM 27-161-2, Oct. 13, 1962); U.K. MANUAL OF MILITARY LAW para. 113 (1958); U.S. DEP'T OF THE ARMY, *supra* note 4, at para. 35 (especially the unpublished annotation discussed in 2 U.S. DEP'T OF THE ARMY, INTERNATIONAL LAW 42-44, *supra*); U.S. DEP'T OF THE NAVY, LAW OF NAVAL WARFARE § 613 n.1, *reprinted in* R. TUCKER, THE LAW OF WAR AND NEUTRALITY, Appendix (1955). *See also* H. MEYROWITZ, *supra* note 8, at 836-38.

106. The point would seem validated by the principle established in the famous Martens Clause that the laws of war are to be determined in part by "the dictates of the public conscience." *See* text at *supra* note 68. In this spirit, one is tempted to paraphrase American revolutionary patriot Patrick Henry: No incineration without representation!

South West Africa decision[107] has not been accompanied by a credible communication that the world community intends to and can make the decision controlling. In any event, if recent Western—particularly United States—protests against the Soviet Union in Afghanistan and Israel in Lebanon for violations of the laws of war are any indication, it is exceedingly difficult to imagine the United States not decrying as a heinous violation of the humanitarian rules of armed conflict an atomic attack by Imperial Japan against the United States or Allied territory during World War II and notwithstanding the "saturation bombings" visited by American air forces at other times during that terrible conflict. Write Falk, Meyrowitz and Sanderson in a recent essay, "[a] perspective of role reversal is helpful in orienting our understanding of the present status of nuclear weaponry and strategic doctrine."[108]

Thus, recalling, *inter alia*, the instructions of the military manuals of the major powers and the fact that the incineration of Hiroshima and Nagasaki were officially rationalized on grounds of military necessity, it is reasonable to conclude that the large-scale commitment of the nuclear weapon states to their unprecedented destructive arsenals reflects neither a repudiation of the humanitarian laws of armed conflict nor a refusal to make them controlling in respect of nuclear weapons. Rather, it implies an interpretation that nuclear weapons and the laws of war are not necessarily incompatible; that the nuclear weapon is, in a sense, "just one more weapon," only somewhat more destructive.

III

Based on the foregoing "communication flow" analysis, we arrive, then, at the following three conclusions: *first*, that the humanitarian rules of armed conflict, though somewhat eroded over the years and obviously susceptible of evasive interpretation, continue as a vital civilizing influence upon the world community's warring propensities; *second*, that these rules, as contemporaneously understood, are endowed with an authority signal that communicates their applicability to nuclear as well as to conventional weapons and warfare; and *third*, that there exists on the part of the world community as a whole (evidenced, thankfully, more in words than in deeds) an unmistakable intention to cause the humanitarian rules of armed conflict to govern the use of nuclear weapons should ever that terrible day arrive again. To be sure,

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107. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (S. Afr. v. S.W. Afr.) 1971 I.C.J. 16 (Advisory Opinion of June 21).

108. Falk, Meyrowitz & Sanderson, *supra* note 8, at 590.

there is manifest a certain ambiguity about the extent to which this 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.

In the first place, a control *intention* is not synonymous with an unconditional control *capacity,* even though some tangible leverage must be present to make the intention credible. Were it otherwise, many rules we unquestioningly accept as law would not be law at all. Ours, it is well to remember, is a more-or-less—not an either-or—world.

Second, in an essentially voluntarist community such as the present world community, one is well advised to stress the authority over the control component of prescription, at least in cases where such common inclusive interests as the survival of all or substantial segments of the community itself are fundamentally threatened, and especially when, in such cases, the community's principal power elites are themselves the cause or source of the threat. Otherwise, assuming the community survives, the danger is very real that the law will become little more than the expression of the will of the strongest. It is true that in minimally integrated communities control may be, as McDougal and Reisman have theorized, "the primary characterizing and sustaining element of prescription" in some, possibly many, instances.[109] But as these scholars also observe, attesting to the more-or-less world in which we live, "[t]he relative importance . . . of the control and authority components [in prescription] may vary with, among other things, the type of prescription being communicated, the level of crisis, and the nature of the community. . . . The interplay between the authority and control elements of prescription is complex and variable."[110]

Finally, 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 seems only sensible that any doubts about whether they are subject to the humanitarian rules of armed conflict as a matter of law should be answered, as a matter of policy, unequivocally in the affirmative. Such a response seems mandated, in any event, by a world public order of human dignity, in which values are shaped and shared more by persua-

109. McDougal and Reisman, *supra* note 13, at 251.
110. *Id.*

sion than by coercion. It is in keeping, too, with the major trends of an evolving planetary civilization—for example, the persistent, if uncertain quest for nuclear arms control and disarmament, and the accelerating struggle for the realization of fundamental human rights, including the emerging right to peace implicitly chartered in Article 28 of the Universal Declaration of Human Rights.[111] Also, it is consistent with the spirit if not always the letter of the judgment at Nuremberg, the Genocide Convention and, not least, the United Nations Charter.

The burden of proof, in other words, is upon those who would contend otherwise; for, while no treaty or treaty provision specifically forbids nuclear warfare *per se,* except in certain essentially isolated whereabouts,[112] 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 rules of armed conflict, in particular the cardinal principle of proportionality. As, I believe, a conscientious contextual application of these rules makes clear, 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, relatively "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.

Applying the humanitarian rules of armed conflict to different nuclear weapons options or uses, in short, tends to prove rather than disprove the illegality of these weapons generally. To be sure, ambiguities exist, 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. Overall, however, the law opposes resort to these instruments of death,

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111. Article 28 reads: "Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized." International Bill of Human Rights, Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71, 76 (1948).

112. *See supra* text accompanying notes 19-20.

especially in relation to the standard strategic and tactical options which dominate United States and Soviet nuclear policy; and to argue otherwise on the basis of the arguable permissibility of some essentially restricted use is to engage, in my judgment, in the highest form of sophistry.

Of course, 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. It is as Albert Einstein once rued, "the unleashed power of the atom has changed everything save our modes of thinking and we thus drift towards unparallel catastrophes."[113] Yet that is precisely the point. To protect humankind from drifting further, we must change our modes of thinking, including our ways of thinking about how law is made and how the international legal system is structured. To this end, it is important to expose the incompatability of nuclear weapons with the core precepts of a world public order of human dignity and thereby challenge the popular assumption that no legal barriers exist.

113. *See* Lapp, *The Einstein Letter that Started it All*, N.Y. Times, Aug. 2, 1964, § 6 (Magazine), at 13.