NUCLEAR OBLIGATIONS

NUREMBERG LAW, NUCLEAR WEAPONS, AND PROTEST

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by

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Abstract

Nuclear weapons use and deployment and nonviolent anti-nuclear protest are evaluated in light of Nuremberg and other international law.

Use of nuclear weapons would constitute war crimes and crimes against humanity as defined in both the Nuremberg Charter and Allied Control Council Law No. 10 and applied by the International Military Tribunal and other Nuremberg courts. Strategic and atomic bombing during World War II did not set a precedent for use of nuclear weapons. The consequentialist argument for World War II bombing fails and the bombing has also been repudiated by codification of the law of war in Protocol I to the 1949 Geneva Conventions.

The legality of deploying nuclear weapons as instruments of geopolitical policy is questionable when measured against the Nuremberg proscription of planning and preparation of aggressive war, war crimes, and crimes against humanity and the United Nations Charter's proscription of aggressive threat of force. While states' practice of deploying the weapons and the arms-control treaties that regulate but do not prohibit mere possession provide some support for legality, those treaties recognize

the imperative of preventing nuclear war, and the Nuclear Non-Proliferation Treaty commits nuclear-armed states to good-faith negotiation of nuclear disarmament. Governments thus are obligated not to plan and prepare for nuclear war; in particular, they are obligated not to deploy first-use and first-strike weapons that increase the risk of war.

The constraints on use and deployment are supported by the Enlightenment conception of the ideal of peace articulated by Vattel, Kant, and Rawls. The Nuremberg trials and creation of the United Nations may be a turning point in evolving an international order that institutionalizes the ideal of peace.

Nonviolent anti-nuclear protest affirms and extends the Nuremberg principle of individual responsibility. Only partially accounted for by the liberal conception of civil disobedience of Rawls, Dworkin, and Habermas, the protest is justified as a means of developing nations' commitment to compliance with international law. When deciding protest cases, courts should not reason in ways that erode the assessment of nuclear weapons policies under international law.

Frank C. Newman 29 Mar. 1991

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If you want peace, prepare for peace.

- Olzhas Suleimenov

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PREFACE AND ACKNOWLEDGEMENTS

This dissertation is the product of work undertaken in connection with anti-nuclear weapons protest beginning in the late 1970s and extending to the present, years during which development of United States and Soviet nuclear arsenals continued essentially unabated. Recent dramatic changes in Soviet and European politics have given cause for hope that the Cold War is winding down, the threat of nuclear war diminished, and prospects for nuclear disarmament improved. Unfortunately, the adjustments in superpower arsenals made and now contemplated do not alter the basic character of the nuclear predicament. The United States is particularly resistant to efforts to halt and reverse the arms race. In January 1991 the United States blocked an amendment to the Limited Test Ban Treaty that would have banned all nuclear testing.[1] As I write in March 1991, the U.S. Department of Energy is unveiling plans to "modernize" the aging, contaminated nuclear weapons production complex.[2] The analysis advanced here remains, I believe, acutely relevant.

The Gulf crisis and war unfolded after I had completed the bulk of writing. Except in passing, I have not attempted to address the many implications for the international legal order, the conduct of warfare, and issues of nuclear proliferation and disarmament.

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I thank Frank Newman, professor emeritus of international law at Boalt Hall Law School, University of California at Berkeley, and David Lieberman, professor of law in the Jurisprudence and Social Policy Program, Boalt Hall Law School, for their guidance and support.

I thank my parents, Robert and Mary Elizabeth Burroughs, who taught me to value peace.

Finally, I thank my colleagues at Western States Legal Foundation,[3] Jacqueline Cabasso and Andrew Lichterman (now a professor at New College of Law, San Francisco). Andy and I were the principal authors of a lengthy international law brief defending protesters arrested in 1983 at the Lawrence Livermore National Laboratory. Jackie and I have worked closely together in defending protesters, helping organize demonstrations at the Nevada Test Site, and connecting with the new, grassroots Soviet anti-testing movement. I have discussed nuclear weapons issues with Jackie and Andy many times. Their contributions to this work have been invaluable.

INTRODUCTION

The Trident Submarine Base, Bangor, Washington

Hood Canal extends from Puget Sound into the Olympic Peninsula. The scene is representative of many coastal areas in the Pacific Northwest. Evergreens rise on both sides of the Canal, and the skies are often overcast. The Canal is well known as a good spot to collect shellfish. It once was home to coastal Indians.

On the Hood Canal near the small town of Bangor, Washington, the United States Navy maintains a submarine base. The base is one of two U.S. ports for the nuclear-armed Trident and Poseidon submarines. Each submarine based at Bangor carries up to 24 Trident I ballistic missiles.[1] Each missile can deliver, over a distance of 4,000 miles, eight 100-kiloton warheads to separate targets.[2] The bombs with which the United States destroyed Hiroshima and Nagasaki were in the 15-kiloton range.

On October 28, 1979, in sunny but cool weather, several hundred persons of mixed age and appearance gathered in a meadow not far from Bangor for a rally in opposition to the Trident missile. In the late afternoon those intending to display their opposition more dramatically, including me, walked two miles to the base. We spent the night on the side of the road, near the base's fence, mostly in tents. Early the next morning small groups clustered at the fence, helping individuals climb

over the fence. The groups, known as "affinity groups," had been formed in anticipation of the action, notably at an all-day "nonviolence training session" held two weeks earlier. Once over the fence we walked, in groups, a hundred yards or so into the base. At that point members of the Pan American Security Forces, a private business under contract with the Navy to provide "security services," took each individual by the arm and handcuffed him or her with plastic handcuffs. Over 100 individuals so apprehended were then held in nearby buses and, later, in a large gymnasium. By the end of the day we all had been booked and given notice of a charge of unlawful entry onto a naval installation.[3]

About a year and one-half earlier, on the evening of May 21, 1978, another gathering opposed to the deployment of Trident missiles held an all-night candlelight vigil near the base. The next morning several hundred climbed the fence surrounding the base. After being taken into custody by Pan American Security police the protesters were given letters signed by the base commander barring reentry. On May 23, 261 individuals again climbed the fence and this time were charged with unlawfully reentering a naval installation.[4]

The spirit of those gatherings and actions would be hard to capture. Some groups and individuals had been profoundly influenced by the decentralized communitarianism of the anti-nuclear power movement, a movement centered

upon nonviolent "occupations" of nuclear power plant sites. Another influence was feminism which, like the anti-nuclear power movement, was opposed to hierarchical or authoritarian personal relations and supportive of consensually based, small group politics. Another influence went under the label "ecology." The deep appreciation of the outdoors at the heart of this movement was well suited to the magnificent natural environment of the Pacific Northwest. Yet it was not only these new movements, made up of mostly younger persons, that contributed to the community of opposition that came together, however transiently. There were also individuals with a history of involvement in liberal or leftwing causes. And there were significant numbers of individuals and groups believing it to be their Christian duty to oppose Trident missiles, as well as some who believed it was their Buddhist duty to do so. Finally, some who participated were not readily identifiable in terms of any tradition or movement.

Defendants in the trial arising out of the October 1979 action offered several defenses based on necessity, international law, First Amendment rights of freedom of expression and religion, and public trust. All these defenses present profound issues, certainly in the context of opposition to nuclear weaponry. For example, the argument that the United States holds the land on which the base is located in public trust, and that deployment of

nuclear weaponry is in violation of that trust, might seem trivial or facile save for the nature of the underlying problem at issue. My special interest, though, is in the international law defense. The deployment of nuclear weapons is an action directed at other nations, and international law raises the issue of whether that action violates international obligations of the United States.

The defense trial brief on international law began with the factual claim that the Trident missile is a first-strike weapon, capable of use against Soviet nuclear forces. It then argued that the system is contrary to law in several respects. First, that deployment of a first-strike weapon amounts to preparation for an aggressive war, barred as a crime against peace by the Nuremberg Charter, and inconsistent with the United Nations Charter prohibition of the use or threat of force except in self-defense. Second, that the second use of Trident in response to the first use of nuclear weapons by another nation would violate the law of war because it would, inter alia, cause indiscriminate harm to civilian populations. Third, that its deployment is in violation of the U.S. commitment made in the Non-Proliferation Treaty to negotiate nuclear disarmament in good faith. The brief then cited the Nuremberg principle of individual responsibility, that "individuals have international duties which transcend the national obligations of obedience," and argued that the defendants in the case had the right and

the duty to terminate their complicity with the deployment unlawful nuclear weapons systems.

The trial judge rejected the defense, stating that:

> Even if production of the Trident missile system violates international law - an issue we do not decide here - no reasonable person could expect that in violating the regulations promulgated here such action could produce a different view or policy of nuclear warfare than that heretofore adopted by the Congress of the United States.[5]

He also rejected the other defenses and convicted defendants of the offense of unlawful entry onto a military installation. First-time offenders were sentenced to a suspended term of 60 days, a $50 fine, and three years probation; repeat offenders were given terms of up to six months.

The judge's attitude toward the international law defense reflected the position taken by federal courts in nuclear weapons protest cases. The most widely cited case arose out of an appeal of convictions of defendants in the earlier May 1978 action at the Trident base. The appellate court hearing the case offered these reasons for its rejection of the defense:

> The connection between what the defendants did and their claims that the Trident system is designed solely for the waging of aggressive war, and is therefore illegal, is so tenuous as not to give them any basis for asserting the defense. They can assert no harm to themselves from the allegedly illegal conduct of the government that is greater than, or different from, the potential harm that might affect every other person in the United States.
>
> We do not sit to render judgments upon the legality of the conduct of the government at the request of any person who asks us to because he happens to think that what the government is doing is wrong. He must

> be able to show some direct harm to himself, not a theoretical future harm to all of us that may or may not occur. To consider defendants' arguments would put us in the position of usurping the functions that the Constitution has given to the Congress and to the President....
>
> * * *
>
> In Schlesinger v. Reservists Committee and Ex parte Levitt, the plaintiffs were seeking to maintain actions as "private attorneys general," attacking government programs or laws. In the case before us, the defendants seek to mount a similar attack through the back door, by using it as a defense to a charge that they deliberately brought on themselves, one that bears no genuine relationship to the government program that they seek to attack. The approach is different, but the result must be the same. The defendants deliberately flouted a valid law - a law that would be equally valid if there were no Trident system. They must take the consequences.[6]

Other federal courts hearing nuclear weapons protest cases have employed similar reasoning. In addition the "Nuremberg defense," the argument that the principle of individual responsibility to comply with international law justifies protest of nuclear weapons, also has explicitly been rejected. One court made it plain that it viewed the principle as authorizing disobedience to an order to commit an act illegal under international law but not as justifying affirmative intervention to resist an illegal government program. In United States v. Montgomery,[7] defendants were convicted of depredation of government property for hammering and pouring blood on nuclear missiles. They had cited Nuremberg precedents, including The Justice Case,[8] for the proposition that they were required to act "to insulate themselves from personal

responsibility for United States nuclear military policy."[9] In The Justice Case a U.S. Nuremberg tribunal found that German jurists had employed judicial process to effect racial persecution and murder and convicted them of war crimes and crimes against humanity. The Montgomery court rejected defendants' invocation of Nuremberg law, explaining:

> Defendants here misperceive the persons for whom such a Nuremberg "defense" is appropriate.... [T]he German defendants [in The Justice Case] were in positions which required them to participate in sentencing dissidents to death or in utilizing slave labor because domestic law or superior authority ordered them to do so. The question is whether what they were required to do by domestic law could escape international criminal proscription. The War Crimes Tribunal ruled, however, that in certain circumstances those defendants were charged with a duty not to act in accordance with domestic law to avoid liability under international law. Defendants in this case before us stand this doctrine on its head in arguing that a person charged with no duty or responsibility by domestic law may voluntarily violate a criminal law and claim that violation was required to avoid liability under international law. The domestic law simply did not require defendants to do anything that could even arguably be criminal under international law. The attempt to transfer the Nuremberg defense out of context to the case before us was properly rejected by the district court.[10]

The Lawrence Livermore National Laboratory

The Lawrence Livermore National Laboratory, located in California not far from San Francisco, is one of two laboratories in the country that designs and tests nuclear weapons. Along with the other laboratory in Los Alamos, New Mexico, it is managed by the University of California under contract with the Department of Energy. Livermore is

a pleasant, medium-sized town, set in a valley surrounded by brownish hills, with little to distinguish it from many California cities.

Beginning in the late 1970s large numbers of people periodically gathered at the Laboratory to demonstrate their opposition to nuclear weapons. By 1982 this opposition had reached a high point. On June 21, 1982, a protest at the Lab ended with the arrest of over 1300 individuals.[11] A year later the numbers again were large. Jackie Cabasso and Susan Moon describe the scene in their book, Risking Peace:

> A jubilant mood prevailed on June 20, 1983, as thousands of demonstrators filled the streets and intersections around the Livermore Laboratory, with their banners and balloons aloft. A large contingent of elders and juveniles led a procession that included a marching band, nuns, punks, and doctors. Hundreds of "affinity groups" participated in the attempt to shut down the Lab, using a variety of means. One group erected a windmill in the middle of the road, and a small forest of tree people came dressed in branches. Blockaders joined hands and stretched out across the roadways to block incoming cars. Some sang and danced, others meditated or prayed. Support people took possession of backpacks and other personal belongings; watched, cried, and called out words of encouragement as their friends were arrested, handcuffed, and loaded onto waiting buses.
>
> Tension punctuated the arrests, as some blockaders went limp in acts of passive resistance, and had their wrists painfully twisted by police officers who wanted to force them to walk. Other protesters walked voluntarily with their arresting officers, attempting to engage them in dialogue about the perils of the arms race and their deep concern for the future of life on this planet. By the end of the day, 1008 demonstrators had been arrested. Smaller demonstrations at the Lab on the two following days brought the total number of arrestees to 1066.

> After being held on buses for many hours, those who had been arrested were booked and transported to Santa Rita Jail in Pleasanton, where huge red and white striped circus tents had been erected to house them all.[12]

A two-week struggle then ensued between the arrestees and local authorities. In charting their course, the protesters relied on the "non-hierarchical decisionmaking process [they] had used to organize the demonstration,"[13] also widely practiced in other anti-nuclear weapons actions. In this process, known as "consensus," the attempt is made to elicit each person's assessment of a proposed course of action and to obtain his or her agreement to or at least acquiescence in the proposal.[14] If agreement cannot be reached the proposal is rejected if even one individual insists that it is unacceptable for reasons that he or she considers to be morally decisive. This procedure partly represents a means of gaining the assent of those who will carry out the decision, an objective thought to be especially appropriate regarding voluntarily undertaken and risky actions inherent in a protest in which arrest is possible, or in refusing to cooperate with authorities after arrest. The procedure also reflects a belief that a group decision in which the views of each participant are carefully considered is likely to be more sound. From the group's perspective, the intent is not to persuade or (still less) coerce individuals into a declaration of support for the group's decision, but rather to ensure that the group fully takes

account of each person's position. But perhaps most importantly, the procedure reflects a deep commitment to eliciting, valuing, considering and responding to the contribution of each participant. This is sought to be achieved by providing an intellectually and emotionally supportive context in which each individual is encouraged to reveal and articulate ideas and emotions. The value of each individual's input is affirmed, and any notion that any participant has a privileged understanding to which others must defer is denied.

The result of the decision-making was that most of those being held refused to arraign themselves (that is, to enter a plea) because they felt the terms proposed for entry of a "no contest" plea, two days in jail, a $250 fine, and two years probation, were too harsh.[15] The local authorities discovered that 1000 arrestees, though "in custody," had a certain amount of bargaining power. By the end of the two weeks the probation condition and the two days in jail had been dropped, and the $240 fine could be worked off in jail-time.[16]

While most arrestees chose this altered "no contest" option, about a quarter of the original number chose to plead "not guilty."[17] At their trial, held for all on the basis of a trial of "representative defendants," the defense was prepared to present the testimony of persons knowledgeable about nuclear weapons and their effects, the role of the Laboratory, and the relevance of international

law.[18] The district attorney objected the moment the first witness, University of California physics professor Charles Schwartz, was called to the stand.[19] After arguing to the judge (not the jury) that testimony should be admissible under defenses of necessity, international law, and state of mind, the defense submitted lengthy trial briefs supporting the claims. The international law brief,[20] of which I was a co-author,[21] made arguments similar to those presented in earlier Trident cases: that "the design of nuclear weapons with a first-strike capability is participation in the planning and preparation for a war of aggression";[22] that "the design and development of both defensive and offensive nuclear weapons at Livermore Lab violate international law" because it comprises planning and preparation to commit war crimes and crimes against humanity;[23] that a "right of reasonable resistance to international crimes" is implied by Nuremberg law.[24]

The next day the judge ruled out the international law and other defenses. Regarding the international law defense he explained:

> Now, it seems to me that your assertions about the international law in your brief are far-reaching; and whether or not your assertions are that our presidents are criminals, and all persons determining policies are criminals - including Judges in making decisions - is something for another forum to decide.
>
> * * *
>
> Suppose that [advocates of weapons modernization] went out to the Lawrence Laboratory and protested and sat in the street or did other things and said, "Our acts are justified. We don't feel that the Lawrence Livermore Lab is doing enough to maintain a deterrent

> or keep the peace." These people feel their actions are right. Also, suppose that they could find authority and support for their position.
>
> So, now, where does this end? When you've started allowing the rules of law to deteriorate, what happens then? Are there going to be encroachments on our right to freedom of speech?[25]

The response of the defendants to the judge's disallowance of any defense was to decline to put on any testimony.[26] After three hours of deliberation the jury convicted defendants of blocking the road.[27] The judge sentenced them to 15 days in jail, with 15 days credit for time already served.[28]

When the sentence was imposed, defendants were permitted to speak freely. They invoked many reasons in support of the act of protest: concern for their families and children, a sense of religious duty, a concern for humanity, a concern for the natural environment. But some chose to focus on legality of U.S. nuclear weapons, and the Nuremberg precedent was often cited. One defendant told the judge:

> Judge, I'd like to ask you some questions. Do you know, sir, that it's the United States that refused to ratify SALT II? Do you know it's the United States that refuses to sign the Comprehensive Test Ban Treaty? Do you also know that it's the United States that has refused to sign a statement saying that it will not use nuclear weapons first? And do you know that Lawrence Livermore Lab and Los Alamos Lab lobby to defeat the Comprehensive Test Ban Treaty?
>
> Your Honor, a number of German soldiers were hung by the neck until dead, following the Nuremberg Trials, as they were told they were responsible to a higher law than the law of their country ... The United States cannot have it both ways. If Germans after World War II

> were responsible to higher laws, then the American soldiers guilty of slaughtering women and children at My Lai should have also been responsible. The designing of weapons at Lawrence Livermore Lab that could end all life on earth is evil, an abomination and a crime against humanity. We, too - you, I and all of us - must answer to that higher law.[29]

Another stated:

> In 1946 I went to Germany to work for the War Crimes Commission as a stenographer. I followed the trials there. Our government and the governments of other countries of the world were trying German officials and German officers for what they called crimes against humanity. These people gave as their defense that they were obeying orders of their government, but the reply was that if you perform acts that are against international law, you are a criminal. And our government now and other governments in this world are breaking international law. They are creating weapons which would kill many more than the millions of people that were killed in Germany. So it is, I believe, the duty, the patriotic duty, of every person to protest against that.[30]

The remarks of one more:

> This trial has caused me to think about the crucial difference between justice and law, between what is just and what is legal. The deployment of first-strike missiles in Western Europe brings us all unbearably close to a nuclear holocaust, and yet this U.S. policy is legal. The Livermore Labs not only design first-strike weapons, but they lobby vigorously to prevent the success of arms limitation talks, and again this practice is legal. But it's illegal for citizens to block the entrance of a laboratory which designs weapons that certainly constitute a crime against humanity. With legal and illegal as they are, I'm afraid no court in the land could possibly serve justice ...
>
> ... Since hope is all I have to allow me to stay sane in this insane world, I hoped for a more courageous and aware court, that could have served humanity and justice by providing a powerful forum for exposing the crimes against humanity perpetuated by the Lab and the

> leadership of this country that think they can win a nuclear war. I will continue to fight. It's the only choice I have.[31]

The defense appealed, arguing in part that the judge should have permitted expert testimony as to the defenses, and specifically that the international law defense found support in the California statutory provision authorizing "lawful resistance to the commission of a public offense." The appellate department of the superior court found the argument to be lacking. It upheld the exclusion of expert testimony, stating in an unpublished decision that:

> No California statute or case law has been presented and presumably none exists to support the defendants contention that an otherwise criminal act is excused because the act of a third party (here the Radiation Laboratory) violates a principle of international law.[32]

Two higher appellate courts, including the California Supreme Court, then refused to consider the case.

While the local authorities succeeded in gaining convictions of protesters the trial generated substantial publicity, much of it concerning the justifications offered for the action.[33] Moreover, the next time protesters were prosecuted the defense was able to obtain a transfer away from Livermore to avoid prejudice arising from the Laboratory's deep roots in the local community. The response of authorities to the subsequent, smaller protests at the Laboratory was either not to prosecute or to prosecute for traffic infractions not requiring a jury trial. Evidently there was an unwillingness to engage in

the kind of public confrontation afforded by a jury trial or to see the case transferred out of the local jurisdiction.

In the meantime, protest at another nuclear weapons facility led to the issuance of a California appellate court decision, this time in published form, again ruling out the international law defense.[34] Defendants had entered the property of the Lockheed Missiles and Space Corporation, in Sunnyvale, California, to distribute anti-nuclear weapons leaflets to Lockheed employees.[35] At trial, the judge barred defendants from presenting expert testimony on defenses of necessity and international law, convicted them of trespass, and imposed sentence of 45 days in jail or payment of a $150 fine.[36] The appellate court upheld the trial court, distinguishing the issue of illegality from that of justification in the court of history or morality:

> Both amici curiae in support of petitions contend that the court should have permitted the necessity defense on the ground that international law compelled petitioners' actions. They interpret development of the Trident Missile system as a violation of international law and contend that any person who does not seek to prevent the violation, by his or her inaction, violates international law. Accepting, for purposes of analysis, the premises that development of the Trident violated international law and that international law requires affirmative action by all citizens to prevent such violation, it still does not follow that affirmative <u>illegal</u> action is justified. Again, the issue turns on the availability of lawful means for accomplishing political change. Neither petitioners nor amici cite authority for the proposition that a free and democratic society must excuse violation of its laws by those seeking to conform their country's policies to international law. Compliance with international

> law must be sought through the ballot box, or, where appropriate, by court action. Illegal conduct designed to influence policies cannot be considered "necessary" where such lawful avenues are available.
>
> We do not mean to ignore or trivialize this country's history of civil disobedience (e.g., the Boston Tea Party, the Underground Railroad, Freedom Marches in the South, and some of the Vietnam War protests). From the perspective of history many unlawful acts may be seen as justified or even "necessary." Some have been rendered lawful by finding constitutional defects in the prohibitory enactments. But the determination that these actions were "necessary" can only be made from a distance, and then not with legal precision. Unless the laws are held unconstitutional, those challenging or defying them must be prepared to bear the short-term consequences of their actions in the hope that society will benefit and that historians will look charitably upon them.[37]

The courts' approach in the Livermore Laboratory and Lockheed cases generally mirrors that of other state courts around the country. There is a reluctance explicitly to recognize an international law defense. However, in contrast to federal courts, a handful of unusual protest cases admitting testimony as to international law does exist in state courts. Only one of the cases, though, concerned nuclear weapons.[38] In that case the judge instructed the jury that:

> The use or threat of use of nuclear weapons is a war crime or an attempted war crime because such use would violate international law by causing unnecessary suffering, failing to distinguish between combatants and noncombatants, and poisoning its targets by radiation.[39]

The jury was also instructed to consider whether the defendants' action met the requirements of the Illinois statutory defense authorizing the commission of an illegal

act to prevent a greater harm.[40] The jury then acquitted defendants of a charge of criminal trespass arising from a protest at a naval base in opposition to both nuclear weapons and U.S. Central America policy.[41]

If there is in small degree more openness to international law in the state courts than in the federal, there most certainly is a pattern of accommodation between local authorities and the protest movement. That pattern is indicated by the history of declining readiness to prosecute protesters at the Livermore Laboratory, and it is readily apparent in the recent history of protests at the Nevada Test Site.

The Nevada Test Site

60 miles northwest of Las Vegas, the little town of Mercury serves as an entrance to the Nevada Test Site. The landscape is stunning pure desert, with magnificent purplish mesas and mountains rising to interrupt the vista of barren desert floor stretching in all directions. The Test Site is where all underground testing of U.S. nuclear warheads has been conducted since the conclusion of the 1963 Limited Test Ban Treaty that prohibited atmospheric testing.

In 1957, 11 people were arrested for trespassing onto the Test Site.[42] A long hiatus then ensued, and it was not until the 1980s that arrests again were made. In the early 1980s a religious group founded by Franciscans, the Lenten

Desert Experience, held several protests in which small numbers were arrested. By 1985 American Peace Test, a group that spun off from the Nuclear Weapons Freeze Campaign, was sponsoring protests drawing larger numbers. The Freeze was the national organization that promoted the idea of ending further design, development, testing, production and deployment of nuclear weapons through lobbying Congress, public education, and ballot initiatives. Although supporting those forms of activity, American Peace Test sought to add the dimension of nonviolent protest to the campaign.

In 1985 an American Peace Test action resulted in 113 arrests. Defendants were convicted of trespassing and sentenced to a $150 fine or 6 days in jail for a first offense. A June 1986 protest resulted in a trial and conviction of approximately 60 individuals; the trial court, upheld on appeal, rejected an international law defense. The pace of actions increased as American Peace Test was joined by other organizations, notably the American Public Health Association (139 arrests on September 30, 1986). The actions took place against the backdrop of the 18-month Soviet moratorium on testing, initiated in August 1985. In the face of United States refusal to reciprocate, the Soviet Union announced in the summer of 1986 that it would resume testing when the U.S. conducted another test explosion. The U.S. publicly scheduled a test for February 5, 1987. In conjunction with

other groups American Peace Test planned a protest for that day. (In the event, the test was conducted two days earlier.)

The day before the action American Peace Test held an hours-long organizing session, aimed mostly at persuading people who had arrived from all over the country to join in the "scenario" for protest and to observe principles of nonviolence (for example, showing respect for the arresting officer). At an evening press conference held in the evening, Ramsey Clark, former U.S. Attorney General, was asked how the event related to the 1960s.[43] Clark said that perhaps it was a reflection of his age, but that his first reference point would be the 1950s and the civil rights movement. The next day, at a Test Site rally attended by two thousand, Tim McDonald, head of the Southern Christian Leadership Conference, also cited the civil rights movement as an important precedent and invoked the biblical imagery employed by that movement.

Speakers at the press conference and rally mostly concentrated on nuclear danger and the need for principled opposition to U.S. policy. But there was reference to international law and to the nuts and bolts of U.S. politics and nuclear strategy. Clark, like other speakers standing under a large sign on the rally platform proclaiming "Nuremberg Requires That We Act," spoke of the need to move beyond sovereign nations and their "positive law" to build global structures of peace based on

"universal law." Carl Sagan pointed to a pervasive disregard for international law and global public opinion in U.S. foreign policy. He observed that U.S. officials who were continuing nuclear testing in the face of the Soviet moratorium and who were intent on violating the Anti-Ballistic Missile Treaty by testing space-based anti-ballistic missile systems were also supporting the Nicaraguan counter-revolutionaries in violation of the ruling of the International Court of Justice. One of several members of Congress who spoke at the rally, Representative Pat Schroeder from Colorado, talked about the push in the House to force the Reagan Administration to halt testing. Owen Chamberlain, Nobel Laureate in physics and nuclear-weapons designer during World War II, told the crowd that if the Soviet Union launched a tank attack that overwhelmed Germany and France, the proper response of NATO would be to regroup in Spain and Portugal, not to resort to first use of nuclear weapons.

When the time came for the protest an organizer directed protesters to gather separately, while supporters and "peacekeepers" were to line the highway entering the Test Site.[44] A disorderly column of protesters, including me, slowly made its way down the highway, finally arriving at a cattleguard marking the entrance where stood a line of sheriff's deputies. A soft-spoken officer politely warned each person who reached the cattleguard that he or she would be arrested for trespass upon entry into the Test

Site. Once arrested we were handcuffed, placed on a bus, driven to a community center in a nearby town, booked, and released within a few hours. That day 438 individuals were arrested for crossing the cattleguard.

The district attorney for Nye County chose to prosecute protesters individually. Thus individuals from all over the country were required to return, one by one, to Nye County to have their case heard by a local justice of the peace. He eventually removed himself from the cases because his son was the arresting officer. The new justice continued to convict for trespassing but departed from the established schedule of sentencing ($150 or 6 days in jail for the first offense, more for subsequent offenses) and imposed only $10 in court costs. In early April the Nye County Commissioners passed a resolution stating that it was the policy of the commission not to prosecute further due to the "severe financial crisis" caused by costs of prosecution and incarceration.[45] Nye County receives federal money under a contract to provide police services at the Test Site, but the contract does not cover costs of prosecuting or incarcerating protesters.[46] The district attorney then said he would not honor the resolution because "they have no authority to tell me who to prosecute or to tell the sheriff who to arrest - that's why we have a separation of powers."[47]

Late in April 1987 several defendants representing themselves handed the justice of the peace an international

law memorandum I had authored opposing the district attorney's motion to strike affirmative defenses. The memorandum cited Nevada statutory law permitting "lawful resistance to the commission of a public offense" and the handful of cases from state courts around the country recognizing a similar defense in the context of nonviolent protest of U.S. foreign policy. Daniel Ellsberg, another defendant representing himself, submitted papers in support of a necessity defense. The justice ruled that she would need several weeks to consider whether to allow testimony in support of the international law and necessity defenses.

Three days after the memorandum was submitted, and the day after Ellsberg's appearance, the district attorney dropped all outstanding charges, numbering over 400 from the February and previous actions, and announced a non-prosecution policy as to all future arrests made on the Test Site perimeter.[48] He explained as follows:

> I have often said the action of the protesters is nothing more than an adult tempter tantrum committed to get attention. They want to be arrested and prosecuted. They get upset if they are not jailed and act up in court if we dismiss charges.[49]
>
> They have filed numerous motions that try to turn the courts into political forums. While I'm sure I could win those cases, it could take two or three years in the court system for all those cases. We're dealing with a crime so serious that the judge gives the defendants a $10 fine and tells them to go home.[50]

The non-prosecution policy remains in effect as I write in March 1991. It was observed in relation to several major actions, each involving the arrest of hundreds of people at

a time.[51] In the largest such action, over 1200 participants in 1988 were detained en masse and transported 150 miles before release[52] but were charged neither then or later.

Meanwhile, in February 1989 a grassroots, anti-nuclear testing movement with overwhelming popular support emerged in the Soviet republic of Kazakhstan, site of the principal Soviet testing ground near Semipalatinsk.[53] Employing diverse tactics, including the election of anti-testing representatives to the Kazakhstan and Soviet parliaments, and mass demonstrations (not involving arrests) at the Semipalatinsk Test Site, the movement helped force a one-year halt to Soviet testing beginning in October 1989.[54] The Kazakhstan campaign was named the Nevada-Semipalatinsk Movement, after the principal U.S. and Soviet test sites, and in solidarity with protests at the Nevada Test Site. Olzhas Suleimenov, member of the Supreme Soviet and leading Kazakh poet, is president of the Movement. He has declared that in the face of the nuclear predicament humanity must reject the defense conception of the Roman Empire, "if you want peace, prepare for war," and adopt the view which serves as the epigraph for this dissertation, "if you want peace, prepare for peace."[55] In January 1991 Suleimenov spoke to a rally of several thousand people at the Nevada Test Site.[56]

Nuclear Weapons Protest and International Law

In the 1980s, at the Nevada Test Site and elsewhere, there have been many protests involving the arrests of thousands of protesters every year. The above-described protests include the largest of the actions and are representative of the main current of the movement. (There is a distinct class of protests, not addressed here, with its own ethos and mode of action known as Plowshares actions, in which individuals or small groups damage or pour blood on nuclear weapons systems.[57]) Many participants regard their actions as a means of complying with international law. The movement ebbs and flows but is likely to persist in some form so long as nuclear weapons are prominent in the U.S. global posture.

What is the significance of nuclear weapons protest justified on international law grounds? Legal discourse mostly focuses on rulings of courts, and that record is easily summarized. Federal courts that have discussed the question have unanimously rejected the international law defense as irrelevant to protest that results in violation of otherwise valid statutes or regulations outlawing trespass, destruction of property, obstruction of traffic, etc. The picture in the state courts is similar, though in a few cases involving prosecution for foreign policy protest the defense has been allowed. Also, there is a pattern of accommodation of local authorities and judges to ongoing protest. Charges are dropped; jury trials are

avoided; jury acquittals are obtained on the apparent ground that the prosecution has not technically proved its case; sentences are light; and in at least one notable instance, that of the Nevada Test Site, prosecution has been foresworn altogether.

If the attitude of courts is the main concern the range of topics to be addressed is relatively narrow. There is the traditional topic of when, if ever, justification and excuse should be allowed as defenses to prosecution. There are issues of justiciability and of the "political" role of courts, much controverted in other contexts and relevant to courts' typical refusal to consider the international law defense. There is the issue of the place of international law within the national law, an issue not usually reached in protest cases. Further, there are the phenomenon of accommodation to protest by local officials and evidence that any judicial challenge to U.S. foreign policies (so far muted and confined to a handful of courts) will come only in state courts. In short, there are a number of issues and intriguing developments that arise out of a negative stance, i.e., judges' general refusal to acknowledge an international law justification for protest aimed at U.S. nuclear weapons and other foreign policies.

Those issues are important, and I address them in Chapter Four. However, regardless of the attitudes of judges, nuclear weapons inherently raise crucial questions

regarding the obligations of citizens and governments. That is familiar territory for international lawyers, whose discussion often is conducted without reference to judicial decisions. Their work has long concerned not only international agreements but also the practices of governments that, when coupled with a sense of legal obligation, comprise customary international law. In an approach to issues as to nuclear weapons deployment and use that concentrates on international agreements and on the conduct and attitudes of governments, the story would seem at first to be relatively short. Governments have deployed nuclear weapons in a fashion to indicate no doubts whatsoever about the legality of deployment except as specifically proscribed by treaty. Moreover, studies of U.S. consideration of resort to first use of nuclear weapons, in a number of "crises" over the years, reveal little evidence that international-law restraints played a significant role in decision-making.[58]

Indeed, the official U.S. position is that use of nuclear weapons in self-defense is permissible, as is the employment of any other weapon whose use is not explicitly prohibited by international law (primarily, chemical and bacteriological weapons). Thus U.S. military publications on the law of war comment that no rule of treaty or customary law prohibits use of nuclear weapons per se. The clause found in Army Field Manual 27-10, The Law of Land Warfare, is representative:

> 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.[59]

A subsidiary theme, also found in the armed forces publications,[60] is that use of nuclear weapons is subject, like any other mode of warfare, to the constraints of the law of war. In 1982 Eugene Rostow, then director of the Arms Control and Disarmament Agency and professor of international law, summed up the U.S. view:

> [T]he possible use of nuclear weapons under Article 51 [of the U.N. Charter] - that is, for purposes of individual or collective self-defense - remains legal, subject to the usual rules of necessity, proportionality, etc.[61]

Given that position, the legality of deployment of nuclear weapons, absent explicit treaty restrictions, is a foregone conclusion. In addition, the fact of deployment itself, a "practice" of states, is cited as evidence of its legality as a matter of customary law. Thus Rostow, as paraphrased by a rapporteur, stated that:

> In regard to the legality of nuclear weapons, these have not been singled out by nations as illegal in treaties or other formal documents of international law. The weapon has been the subject of treaties which deal with the regulation of the weapon but which do not outlaw it as such.[62]
>
> [The] Latin American Nuclear Free Zone documents and the Outer Space Treaty [are] examples wherein nuclear weapons were acknowledged as having a legally regulated status. But these documents, as well as others, did not outlaw the weapon. [The rules of the law of war] had not been effective; witness the use of weapons and tactics of great destruction in both World Wars. This was deplorable, but nonetheless a fact. [A] number of countries had filed

> understandings and reservations to various treaties in which the signatory party specifically exempted nuclear weapons from the prohibitions of the treaty in question. [A] 1977 understanding filed by the Carter Administration to Protocols I and II to the Geneva Conventions ... sought to remove nuclear weapons from the scope of the protocols. Thus ... practice over the past 35 years had clearly indicated that nuclear weapons were not regarded as illegal per se by the states in the international system.[63]

There is much more to be said, though, concerning the legality of nuclear weapons and their use. To open this subject fully, however, we must consider implications of the Nuremberg precedents. We must also measure the actions of actors other than courts or the executive and legislative branches in the arenas of law and politics, namely protesters. Here I take seriously the phenomenon of citizens' protest of nuclear weapons understood as an enterprise of upholding international law.

Participants in nuclear weapons protests personally confront the possibility of human extinction or the disintegration of human society that is embodied in the brutal physical and political reality of nuclear weapons deployed as if they might one day be used. In that confrontation they draw upon their deepest sense of what it means to be human. The experience is one of a powerful, sometimes transcendent, sense of rightness. Yet it can also be an experience of boundless moral subjectivity, as the sense of rightness finds no means of expression. For the observer of protest, the experience may remain inaccessible because not articulated. Or if partially

understandable, it may seem irrelevant to the political-legal realities of which nuclear weapons now sometimes appear a permanently irremovable part. The appeal to international law by the protest movement is in part an attempt to articulate the experience of confrontation between humanity and possible annihilation. Thus it is an effort to move beyond the moral subjectivity of profoundly felt but mute refusal to acquiesce. It is also in part an attempt to gain some leverage within the political-legal arena, by invoking a kind of normative discourse that on occasion, as at Nuremberg or in the negotiation to arms-control treaties, takes on some of the conventional attributes of law - prosecution of criminals, formation of contracts.

The effort to articulate the meaning of nuclear weapons protest has been aided and inspired by the emergence within the United States of a critical scholarly view of the legal framework for nuclear weapons policy. The view has its roots in analyses undertaken in the aftermath of World War II.[64] The analyses, advanced by scholars mostly outside the U.S., were occasioned by the atomic attacks on Hiroshima and Nagasaki and also by the buildup of superpowers' nuclear arsenals that at the close of World War II was already perceived as a likely outcome, and that by the 1950s had become a reality. The conclusion generally put forth was that use of nuclear weapons probably or inevitably violates the international law of

war. The exception cited by some scholars was reprisal, one nation's retaliatory use in response to another nation's first use and aimed at deterring further illegal use by the initiating nation.[65] Beginning in 1961, non-nuclear weapons states not closely aligned with NATO countries joined by Soviet bloc states endorsed the view that use of nuclear weapons is illegal in a series of General Assembly resolutions.[66]

In the United States, however, those few scholars addressing the matter largely concluded that nuclear use under some circumstances, not confined to reprisal, would be permissible.[67] It was not until the early 1980s that a new, critical view emerged, affirming and developing the earlier conclusions of non-U.S. scholars.[68] An initial contribution to the trend was that of Richard Falk, Lee Meyrowitz, and Jack Sanderson in their Nuclear Weapons and International Law.[69] The analysis was subsequently elaborated by additional scholars, notably Burns Weston, Francis Boyle, John Fried, and Daniel Arbess[70], and was promoted by a newly formed organization, The Lawyers' Committee on Nuclear Policy. At about the same time, other groups critical of superpower nuclear weapons policies began to be heard, including professional groups (notably Physicians for Social Responsibility) and religious groups (notably the Catholic Bishops).[71] Another roughly contemporaneous phenomenon was the emergence of widespread nonviolent protest of nuclear weapons. A direct link was

established with the critical view as its proponents testified, or sought to testify, in trials of protesters.

Three features of the critical view were innovative and significant: 1) the legality of nuclear use is studied contextually, in possible settings of actual use; 2) the legality of strategic planning and deployment (not mere use) of nuclear weapons is considered, leading to contentions that planning and deployment are illegal; 3) international law is alleged to authorize or mandate nonviolent protest of nuclear weapons design, manufacture, and deployment.

As to the first point, the basic contention is that uses of nuclear weapons contemplated in superpowers' plans would constitute war crimes, crimes against humanity, and, possibly, genocide, because they would attack or amount to attacks on civilians or would cause damage to life, property, and the environment vastly disproportionate to the achievement of any legitimate military objective. The contention is made not as a matter of abstract analysis but in relation to the settings and strategies that now are part of superpower planning. These include "first strike," an attack aimed at disabling the enemy's nuclear capability; "first use," the "limited" use of nuclear weapons in a battlefield or theater (e.g., Europe) setting, probably during an ongoing conventional war; "counterforce," an attack whether limited or massive aimed at enemy military, especially nuclear, targets;

"countervalue," an attack aimed at enemy civilians and cities. Burns Weston systematically has considered possible variations of use of nuclear weapons (counterforce first strike, retaliatory countervalue second strike, first and second uses in battlefield settings, etc.) and concludes that in virtually all cases, and presumptively in all cases, nuclear use would be contrary to the requirement of proportionality and other constraints of the law of war.[72] Daniel Arbess reaches the same result regarding the principal options in U.S. plans, a "decapitating" first strike aimed at Soviet nuclear command and control capability, a counterforce first strike aimed at preempting an anticipated Soviet strike, and "limited" use of nuclear weapons in Europe to prevent Soviet defeat of NATO conventional forces.[73] He concludes:

> [A] contextual analysis of nuclear warfare which takes into account currently existing weapons and strategies yields the same practical conclusion as a finding of intrinsic illegality: although nuclear weapons are not illegal <u>per se</u>, their likely effects and the absence of any mechanism to control the escalatory spiral once the firebreak is crossed render virtually any use inconsistent with the fundamental objectives and principles of war. The use of nuclear weapons would therefore be unlawful, even during a war of legitimate self-defense.[74]

As to the legality of deployment, the basic contention, advanced by some but not all scholars who argue the illegality of nuclear use,[75] is that deployment of nuclear weapons, especially in contemplation of first use or first strike, constitutes planning, preparation and

conspiracy to commit international crimes in violation of the Nuremberg Charter. Daniel Arbess has cogently argued this analysis. Because the threat of first use, also known as "extended deterrence," is not limited to deterring a nuclear attack, but rather makes the nuclear threat a central instrument of U.S. policy, it necessarily consists in the adoption of strategy (planning) and acquisition of capability (preparation) aimed at making the threat credible in numerous possible conflict situations.[76] Moreover, he argues, the enterprise of making the nuclear threat credible entails the deployment of nuclear weapons in ways that increase the chance of actual use. Most importantly, counterforce capability increases pressure for preemption during crisis because of fears that the opposing side may attempt a disarming first strike. Arbess writes:

> [E]xtended deterrence increases the <u>degree</u> of preparedness - the promise that its threats will be carried out - to an almost irrevocable level. At the battlefield level this is the case because the integration of highly selective and mobile nuclear artillery and warheads into conventional forces designed to insure "victory at every level of contemplated violence" means that, in the event of a conflict, the losing side would be forced to use its forces to avoid having them overrun. At the strategic level, an extended deterrent war-winning strategy encourages the production and threatened use of quicker and more accurate counterforce weapons. In a crisis situation, it could increase pressures for preemption.[77]

A third distinguishing feature of the critical view is that its proponents argue the lawfulness of nonviolent protest against nuclear weapons. The contention is that

protest is authorized by the Nuremberg principle that individuals' duties under international law supersede national obligations of obedience. Thus Francis Boyle is prepared to testify that:

> The judgment of the International Military Tribunal at Nuremberg severely punished individuals who acting pursuant to national authority had committed international crimes as defined by the Charter. By implication, the Nuremberg judgment privileges citizens to act reasonably to help prevent the commission of international crimes. Especially when recourse to traditional channels has proved to be insufficient, non-violent protest is a reasonable means of seeking to help abate and terminate ongoing international offenses.[78]

In addition to the Nuremberg precedents, Frank Newman has cited the Universal Declaration of Human Rights on behalf of protesters. He has argued that:

> Destruction of civilian populations is inconsistent with the principle that "human rights should be protected by the rule of law...." Peaceful protest of threatened destruction vindicates the rule of law while avoiding the extreme step of "recourse ... to rebellion against tyranny and oppression." Peaceful protest fulfills also the responsibility to strive for the "recognition and observance" of human rights and promotes the attainment of a "social and international order in which rights and freedoms set forth in this Declaration can be fully realized."[79]

The affinity of the critical view for protest arises in part from a conviction that the superpowers and especially the United States are currently so committed to nuclear weapons that nothing less than dramatic changes in consciousness spurred by a determined social movement can shake that commitment. The affinity also is based on the assumption that international law is presently too-weakly

institutionalized and too-little respected as a source of normative authority in relation to fundamental matters of war and peace, effectively to regulate the superpowers' nuclear weapons policies. In this setting, it is argued, a movement engaging in protest can usefully, and, in principle, lawfully act to hold governments accountable to international law.[80]

Thus as nuclear weapons protesters have sought to justify their actions as compliance with international law, scholars critical of U.S. policy have aligned themselves with protest. In this study I seek to explain and assess the claims made by these related anti-nuclear movements, one political, one scholarly. In the next two chapters I examine the argument that use (Chapter One) and deployment (Chapter Two) of nuclear weapons is contrary to requirements of international law. In Chapter Three I defend the conclusions reached regarding use and deployment in a broader philosophical and historical perspective. Finally, in Chapter Four I assess the international law justification of protest from the standpoints of law and political theory, discuss and criticize judicial responses, and offer some concluding reflections. Throughout the focus is on a body of international law centrally relied upon by both scholars and protesters opposed to nuclear weapons - the law of Nuremberg.

CHAPTER ONE

NUREMBERG LAW AND USE OF NUCLEAR WEAPONS

Both protesters and scholars opposed to nuclear weapons invoke the Nuremberg Charter[1] and the Judgment of the International Military Tribunal[2] and subsequent Nuremberg judgments[3] in criticizing superpower policies and justifying protest. Why this is so is not difficult to understand. The enormity of the crimes committed by the Nazis - mass murder of vast numbers of Jews and other groups; systematic killing of Soviet citizens for ideological reasons; establishment of slave labor camps filled by citizens imported from occupied countries - seems comparable to the depravity of widespread use of nuclear weapons. The trial of German officials for crimes of state - the assessment of the rightness or wrongness of the acts of individuals - exemplifies a profound moral imperative cutting through the usual divisions of personal and political responsibility, an imperative that seems appropriate to the evaluation of nuclear terror. It also seems to represent the application of a universal justice suitable to the assessment of weapons systems whose use could have universal consequences. The affirmation of the principle of individual responsibility, that individuals have international duties transcending the national obligations of obedience, seems to support the felt rightness of individuals' attempt directly to act in

opposition to nuclear weapons.

For some international lawyers, to be sure, Nuremberg law does not have such pride of place. Indeed, for some, Nuremberg law is almost an anomaly in the body of international law, limited to its historical circumstances - the depravity of the Nazis, the imposition of punishment by the victorious alliance. Some challenge the value of the Nuremberg precedents. They are said merely to represent victors' justice, or to be illegitimate because based on the application of ex post facto law, or to be limited by its terms and its character as justice dispensed out by a military tribunal to the circumstances for which the Charter was established and no others.[4] Other lawyers accepting the theoretical relevance of the Nuremberg precedent to use of nuclear weapons - and many do - may nonetheless see its invocation as politically unhelpful and legally not relevant to the deployment of nuclear weapons.

For scholars and protesters opposed to nuclear weapons, the Nuremberg precedents are emphatically not an anomaly. They rather are at the center of a framework of analysis - legal, moral, and political - for the assessment of state actions, including those having to do with the use of armed force going to the core of sovereignty. Historically they are understood, along with the formation of the United Nations, to be at the foundation of the post-World War II international order. The more technical

objections to the value of the precedents are dismissed as incorrect, as legalistic quibbling, or as irrelevant now even if arguable in relation to the original proceedings.

The Charter and Judgment thus provide an excellent entryway into the evaluation of the critical view of nuclear weapons policy outlined in the Introduction. Assessment of the reliance on Nuremberg law is essential to that evaluation. Moreover, the assessment provides a useful perspective, grounded in the actualities of a global war and of trials of war criminals, on the stream of post-World War II law, official statements, and practices with respect to nuclear weapons. Finally, unlike some materials - scholarly writings, General Assembly resolutions, declarations of international conferences, etc. - whose status as secondary sources of international law is acknowledged but whose implications for statement of binding rules are controversial, the relevance and bindingness of Nuremberg rules cannot be denied by major nuclear-armed states (the United States, the Soviet Union, Great Britain, and France) that subjected leading Nazis to prosecution for violation of those rules.

This chapter examines the bearing of the Nuremberg Charter and Law No. 10, which state the law, and the IMT Judgment and subsequent Nuremberg decisions, which apply the law, to the distinct questions of the legality of use and deployment of nuclear weapons. Careful execution of this task is demanded, for the relevance of Nuremberg

should be neither overstated or understated. Much of the rhetoric of the nuclear threat employed by the United States has referred back to the experience of World War II. Just as Nazi totalitarianism was defeated at incalculable cost after the debacle of Munich so, it is said, Soviet totalitarianism must be contained, by means of the nuclear threat, and Munich-style appeasement avoided. Many believe, as do I, that this use of history, especially its alleged justification of the nuclear threat, is tragically misguided. However, it is also important to be alert to the opposite error, that of finding another aspect of World War II, Nuremberg, to provide the definitive insight into the nuclear situation.

The Status of Nuremberg Law

The Agreement For The Prosecution And Punishment Of The Major War Criminals Of The European Axis was signed at London, August 8, 1945, by France, the Soviet Union, the United Kingdom, and the United States.[5] 14 other countries acceded to the Agreement later in 1945.[6] Its preamble recited the Moscow Declaration of October 30, 1943. That declaration provided that German officers and members of the Nazi Party responsible for crimes and atrocities would be tried in the countries in which the acts were committed; and further stated that this provision was without prejudice to the case of major criminals whose offenses had no particular location and who would be punished by joint

decision of the Allies. The London Agreement thus was intended to carry out the Allies' promise to punish major criminals. It provided that the major criminals would be tried by a tribunal whose constitution was set forth in the Charter of the International Military Tribunal annexed to the Agreement.[7] It is that instrument which has come to be known as the Nuremberg Charter.

The Charter regulated all matters pertaining to the trial. It provided for the number, jurisdiction and powers of the judges; the formation of an inter-Allied committee for investigation and prosecution of the major criminals; and establishment of safeguards for a fair trial. It also set forth the general principles of law under which the accused would be tried. Article 6 reads:

> The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.
>
> The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:
>
> > (a) Crimes Against Peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing:
> >
> > (b) War Crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied

> territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity:
>
> (c) Crimes Against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.
>
> Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

After a trial of 22 accused, lasting most of a year, the International Military Tribunal rendered judgment on September 30, 1946. Three of the accused were acquitted; 12 were convicted and sentenced to death by hanging; seven were convicted and sentenced to lesser punishment. Twelve trials of other major criminals subsequently were held before U.S. tribunals under authority of Law No. 10 enacted by the Control Council for Germany, a body consisting of the military commanders of the four occupied zones.[8] Law No. 10 essentially reproduced the codification of international offenses set forth in Charter of the International Military Tribunal. In addition to the Judgment of the IMT, the 12 subsequent trials, commonly referred to by their popular names (The High Command Case, The Hostage Case, etc.), are a major source of Nuremberg

law, and will be discussed frequently here. Finally, numerous trials of lesser criminals were held by the Allies in occupied Germany and also by nations where the crimes were committed.[9]

On December 11, 1946 the United Nations General Assembly, on the basis of a proposal submitted by the United States, unanimously adopted a resolution stating that the Assembly:

> Affirms the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal;
>
> Directs the Committee on the codification of international law established by the resolution of the General Assembly of 11 December 1946, to treat as a matter of primary importance plans for the formation, in the context of a general codification of offenses against the peace and security of mankind, or of an International Criminal Code, of the principles recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal.[10]

In 1950 the International Law Commission, acting pursuant to General Assembly direction, adopted a set of principles reiterating the major elements, including the definitions, of the Nuremberg Charter as applied by the International Military Tribunal.[11]

This historical background, while brief, is adequate to supply the answer to the question of the legal status of the Charter, the Judgment, and the subsequent trials of major war criminals.

A preliminary observation is that the Charter viewed alone does not establish law applicable to future individual and state conduct alleged to be criminal. To be

sure, the Charter is part of a valid international agreement, the London Agreement. Within U.S. national law, the London Agreement has at least the status of an executive agreement, that is an agreement concluded by the president without advice and consent of the Senate. The London Agreement arguably also has the same status as a treaty.[12] As part of an executive agreement, the Charter is part of federal law, superseding state law and valid in the absence of a contrary federal statute or perhaps a subsequent authoritative act of the president.[13] If considered to be part of an agreement with the status of a treaty, the Charter is part, along with federal statutes and the constitution itself, of the supreme law of the land, subject only to prohibitory constitutional rules and valid in the absence of any subsequent federal statute not fairly reconcilable with the Charter or whose purpose to supersede the Charter is clear.[14]

Nonetheless the Charter cannot be cited as an instrument authorizing trial and punishment of individuals other than those of the Axis states. In Article 6, the Charter limits the jurisdiction of the International Military Tribunal (hereinafter "IMT" or "Tribunal") to "the trial and punishment of the major war criminals of the European Axis countries." Moreover, the IMT itself, in determining its jurisdiction, in addition to relying upon the Charter, stated that its jurisdiction arose out of the governance of a defeated nation by the nations to which it

had unconditionally surrendered.[15] The Judgment of the International Military Tribunal similarly does not directly apply to conduct other than that of Nazis alleged to be criminal. As the judgment of a military tribunal the decision arguably is not incorporated as a precedent into domestic law of the various nations.[16] Indeed, the designation of "military tribunal" apparently was adopted partly in order to avoid any such direct effect.[17] Moreover, the decisions of international tribunals are not accorded any stare decisis effect within international law; strictly speaking, they are binding only with respect to the matter before the tribunal.[18] Such decisions, of course, do operate as a precedent in a practical sense, assuming they are perceived as authoritative and persuasive.[19]

Two points have been made so far. One is the obvious point that the Charter authorized the establishment of a tribunal only for purpose then at hand, the trial of Nazis. The other is the less obvious point that the Judgment may not be binding as a precedent on domestic courts, and does not have a stare decisis effect on future international tribunals.

These points, however, are only so much ground breaking prior to the establishment of the main proposition: the general principles enunciated in the Charter and Law No. 10, applied by the IMT and subsequent U.S. tribunals, approved by the United Nations, and

reformulated by the International Law Commission, are indisputably at the core of contemporary international law. Because the Charter may not have the formal status of a treaty within U.S. national law and limits the application of the principles to the trial of Axis criminals, and because no subsequent treaty has restated the principles, the principles are not clearly part of treaty law. However, in view of their approval by the nations signing and acceding to the Charter and by the United Nations and the International Law Commission, and their recognition by scholars and nations worldwide, the principles are unquestionably part of customary law. According to the Restatement (Third) of Foreign Relations Law:

> Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.[20]

The term practice has a broad reference, comprehending a wide variety of governmental acts and statements of policy.[21] It certainly includes the acts and statements of governments and international organizations both in elaborating the Charter and conducting the trials and in subsequently endorsing the trials and the principles of the Charter. Moreover, as the Restatement notes, "international agreements constitute practice of states and as such can contribute to the growth of customary law."[22]

The Tribunal itself conceived the Charter as contributing to the articulation of customary law, stating

that the Charter "is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law."[23] U.S. Supreme Court Justice Robert Jackson, the chief U.S. prosecutor, similarly though more robustly proclaimed the role of the Charter and Tribunal in developing customary law:

> International Law is more than a scholarly collection of abstract and immutable principles. It is an outgrowth of treaties or agreements between nations and of accepted customs. But every custom has its origin in some single act, and every agreement has to be initiated by the action of some state. Unless we are prepared to abandon every principle of growth for International Law, we cannot deny that our own day has its right to institute customs and to conclude agreements that will themselves become sources of a newer and strengthened International Law. International Law is not capable of development by legislation, for there is no continuously sitting international legislature. Innovations and revisions in International Law are brought about by the action of governments designed to meet a change in circumstances. It grows, as did the Common-Law, through decisions reached from time to time in adapting settled principles to new situations.[24]

The tribunal in one of the subsequent trials of major war criminals, The Justice Case, explicitly adopted the analogy to the common law, stating that:

> International law is not the product of statute. Its content is not static. The absence from the world of any governmental body authorized to enact substantive rules of international law has not prevented the progressive development of that law. After the manner of the English common law it has grown to meet the exigencies of changing conditions.[25]

Scholars echoed the view that the Charter and the Judgment served to clarify and advance customary law much the same way that judicial decisions clarify and advance the common law.[26] The subsequent affirmation of the principles found

in the Charter and Judgment by the United Nations and the International Law Commission confirms the Tribunal's conception of its role.

The International Law Commission and other authoritative commentators, including the Restatement (Third) of Foreign Relations Law, have continued to acknowledge the secure place of Nuremberg law within international law.[27] Since Nuremberg law is discussed here in relation to U.S. nuclear weapons policy, it is especially relevant to note that the Nuremberg offenses are incorporated into United States Army Field Manual 27-10, The Law of Land Warfare. The manual provides that:

> Any person, whether a member of the armed forces or a civilian, who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment. Such offenses in connection with war comprise: a) crimes against peace; b) crimes against humanity; c) war crimes....[28]

The manual is published for the guidance of U.S. Army officers in leading and training soldiers under their command, and for courts and tribunals applying the law of war. It does not itself establish procedures or tribunals or the binding law for the trial and punishment of international offenses. It is, however, an authoritative source to be used in determining and applying customary international law. As the manual notes, its provisions not reproducing statutes or treaties "should not be considered binding upon courts and tribunals applying the law of war [but] are of evidentiary value insofar as they bear upon

questions of custom or practice."[29]

The settled status of Nuremberg law within international law, and its consequent incorporation into national law, is further reflected by the fact that the law now exists, subject to certain limitations, for conducting trials and imposing punishment for the commission of Nuremberg and related offenses. Because U.S. courts have long held that there are no federal common law crimes in the United States, any such trial and punishment of U.S. nationals in the United States probably must be pursuant to federal statute.[30] Under the Uniform Code of Military Justice, providing for military tribunals authorized to apply the law of war, members of the armed forces are liable to punishment for the commission of war crimes as defined in the Charter and adjudicated by the International Military and other Nuremberg tribunals.[31] In addition, any U.S. national is now criminally liable for the commission of genocide pursuant to the federal statute implementing the Genocide Convention.[32] The proscription of genocide, the intentional destruction in whole or substantial part of national, ethnic, racial or religious groups, represents a partial codification of the Nuremberg offense of crimes against humanity.[33] Finally, though the trial of U.S. nationals on charges of crimes against humanity and crimes against peace may be barred by the absence of a federal statute specifically proscribing those crimes, the trial of <u>enemy</u> nationals for those crimes, as well as war crimes,

probably is authorized.[34] In general, U.S. nationals similarly would be subject to trial for commission of all three Nuremberg offenses by courts and tribunals of other nations or international tribunals.

In summary, the status of Nuremberg law as binding customary international law is not open to doubt. Beyond that, it is clear that at least certain elements of Nuremberg law are considered to be so fundamental as to have achieved the status of jus cogens, or peremptory norms. Peremptory norms are those rules of international law recognized by the international community as a whole as non-derogable.[35] That is, they are recognized as rules which may not be altered by otherwise legitimate international lawmaking processes. Thus, while the conclusion of treaties entails the alteration of pre-existing international legal regimes, a treaty in violation of peremptory norms is void from the outset.[36] Similarly, while customary international law evolves partly through state practice that violates existing customary law, state practice in violation of peremptory norms is prohibited.[37] Peremptory norms can be analogized to constitutional law at the national level, which operates as basic law controlling the validity of all other law and which can be changed only (if at all) by extraordinary law-making processes. The Restatement (Third) of Foreign Relations Law identifies two categories of peremptory rules, "the principles of the United Nations Charter prohibiting the use of force,"[38] and

customary human rights law prohibitions of genocide, slavery or slave trade, murder or causing the disappearance of individuals, torture or other cruel, inhuman, or degrading punishment, prolonged arbitrary detention, and systematic racial discrimination.[39] As the Restatement analysis indicates, central elements of the Nuremberg offense of crimes against humanity, the prohibitions of genocide and murder, as well as systematic racial discrimination, are unquestionably peremptory law.[40] Other elements of the Nuremberg offenses, including the prohibition of aggressive war[41] (part of the crime against peace) also have attained that status. Indeed, the Nuremberg offenses in their entirety arguably are peremptory law.[42]

In Chapter Three I address philosophical and historical issues raised by reliance on Nuremberg law in assessing nuclear weapons policies. For now, it suffices to note that there are substantial considerations of fairness underlying the status of the Nuremberg principles as binding law applicable to nuclear weapons policies and other state conduct. The Allies could hardly try Nazis under the principles and subsequently deny their applicability to acts committed by themselves. This is especially persuasive in relation to the United States. It is doubtful that there would have been any trial, and certainly not the elaborate one replete with safeguards of the rights of the accused that in fact took place, had the

United States not lobbied hard for that eventuality. It was the U.S. proposal, as advocated by Robert Jackson, that provided the essentials of the Charter.[43] After the trial it was the United States which proposed to the United Nations General Assembly that the Assembly affirm the Nuremberg principles.[44] Jackson showed a keen awareness that to be considered law, the Nuremberg principles must be applicable to nations other than Germany. In his opening address to the International Military Tribunal, he stated that "while this law is first applied against German aggressors, the law includes, and if it is to serve a useful purpose it must condemn aggression by any other nation, including those which now sit in judgment."[45] During the inter-Allied negotiations over the establishment of the Tribunal, Jackson resisted Soviet pressure to limit the definition of aggression to acts committed by the Axis. Jackson averred:

> If certain acts in violation of treaties are crimes, they are crimes whether the United States does them or whether Germany does them, and we are not prepared to lay down a rule of criminal conduct against others which we would not be willing to have invoked against us.[46]

The U.S. tribunal in The Ministries Case similarly declared that it would hold Germans only to standards also applicable to citizens of other nations:

> We may not, in justice, apply to these defendants because they are Germans standards of duty and responsibility which are not equally applicable to the officials of the Allied Powers and to those of all nations. Nor should Germans be convicted for acts or conducts which, if committed by Americans, British, French, or Russians would not subject them to legal trial and conviction.[47]

For all of the above reasons, the status of the Nuremberg principles as binding international law is clear. That still leaves the issue of the significance of the principles in assessing state conduct since World War II. How relevant are the principles in assessing particular policies or acts? What weight is to be attached in comparison to other law? These questions are in part answerable only in the context of the particulars of the conduct in controversy. That is the task to which I now turn, in relation to the superpowers' nuclear weapons policy. This policy will be considered under two main headings: the legality of the use of nuclear weapons, discussed in the remainder of this chapter; and the legality of the deployment of nuclear weapons, the subject of Chapter Two.

Nuremberg Law and Use of Nuclear Weapons

The Charter provisions most relevant to the assessment of use of nuclear weapons are those proscribing war crimes and crimes against humanity. The Charter defined war crimes as follows:

> War Crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

In its brief discussion of the legal status of this provision, the IMT referred only to treaty law preexisting the Charter which governed the treatment of civilians in occupied territories and of prisoners of war, citing articles contained in the section of the Hague Land Warfare Regulations entitled "Military Authority Over The Territory Of The Hostile State,"[48] and in the 1929 Geneva Convention on Prisoners of War[49].[50] This discussion reflects the emphasis the IMT gave these matters in its findings, which are summarized below. However, the IMT elsewhere did make a memorable general pronouncement relevant to the potential scope of the prohibitions of "wanton destruction", "devastation not justified by military necessity", and "violations of the laws and customs of war" also found in the Charter definition:

> 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 practised by military courts. This law is not static, but by continual adaptation follows the needs of a changing world. Indeed, in many cases treaties do no more than express and define for more accurate reference the principles of law already existing.[51]

As to crimes against humanity, the Charter definition is as follows:

> Crimes Against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

The IMT relied solely on this Charter provision as the source of binding law. The IMT noted that it was "of course bound by the Charter, in the definition which it gives both of war crimes and crimes against humanity," and, in contrast to war crimes, offered no further analysis of the basis for crimes against humanity.[52]

Such analysis can be found in other Nuremberg-related materials. The indictment cited national penal codes and the general principles of criminal law as derived from the criminal law of civilized nations as sources for the offense.[53] The reference is to the prohibition of murder, assault, and like offenses within national legal systems. The tribunal in The Einsatzgruppen Case explained that international jurisdiction over crimes against humanity arises when a state is incapable or unwilling to enforce such internal law and principles:

> It is to be observed that insofar as international jurisdiction is concerned the concept of crimes against humanity does not apply to offenses for which the criminal code of any well-ordered State makes adequate provision. They can only come within the purview of this basic code of humanity because the State involved, owing to indifference, impotency or complicity, has been unable to or has refused to halt the crimes and punish the criminals.[54]

Another source for the proscription of crimes against humanity was cited by the tribunal in The Justice Case: the history of international condemnation of atrocities and racial or ethnic persecution, condemnation occasionally accompanied by the armed intervention of other nations.[55] Finally, in a report on preparation for the trials of major war criminals, Robert Jackson cited the Martens Clause, contained in the preamble to the Hague Land Warfare Convention.[56] The Clause provides that in cases not covered by the rules established by the Convention, protection is afforded the inhabitants of belligerent countries by "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."

While the International Military Tribunal did not comment on the legal basis for the Charter's definition of crimes against humanity, the Tribunal did briefly clarify the nature of the offense. The Tribunal stated that war crimes "committed on a vast scale" were also crimes against humanity.[57] The Tribunal also stated that insofar as they were not war crimes, inhumane acts committed after the beginning of the war were crimes against humanity.[58] This

category comprises inhumane acts committed against German nationals or nationals of non-belligerent states, as a state or its agents cannot commit war crimes against its citizens or against nationals of countries with which it is not at war.[59]

The element of state policy is implicit in the IMT's characterization of war crimes committed on a vast scale against the inhabitants of occupied territories as crimes against humanity; such crimes could not be committed without the participation of the state.[60] The element of state policy is still more relevant to the commission of crimes against German nationals. Given the invasion of sovereignty inherent in finding acts committed within a nation to be international crimes, crimes committed, not against civilians in occupied territories, but againsht German or non-belligerent nationals were viewed as crimes against humanity only where committed on a large scale as a matter of state policy. Thus in his opening statement to the IMT, Robert Jackson stated that:

> How a government treats its own inhabitants generally is thought to be no concern of other governments or of international society. Certainly few oppressions or cruelties would warrant the intervention of foreign powers. But the German mistreatment of Germans is now known to pass in magnitude and savagery any limits of what is tolerable by modern civilization. Other nations, by silence, would take a consenting part in such crimes.[61]

This reasoning is reflected in the limitations imposed upon crimes against humanity by the tribunal in The Justice Case, which stated:

> We hold that crimes against humanity as defined in [Control Council Law 10] must be strictly construed to exclude isolated cases of atrocity or persecution whether committed by private individuals or by governmental authority. As we construe it, that section provides for punishment of crimes committed against German nationals only where there is proof of conscious participation in systematic government organized or approved procedures amounting to atrocities and offenses of the kind specified in the act and committed against populations or amounting to persecutions on political, racial, or religious grounds.[62]

Crimes against humanity thus included a) crimes committed against German and non-belligerent nationals on a systematic basis as a matter of state policy; and b) war crimes committed against the civilian populations of other countries, on a vast scale, as a matter of state policy.

Applying the Charter definitions, the IMT found the following policies and acts to be war crimes and crimes against humanity:

1) Nazi Germany systematically killed the Jews of Europe under a policy known as the "final solution." Special units known as the Einsatzgruppen conducted mass killings by shootings in the occupied territories of the East. The ghetto in Warsaw was systematically destroyed and burned. Jews were gathered from all of occupied Europe into concentration camps. There they were forced to engage in slave labor and killed in gas chambers if not able to work. The IMT cited the estimate of Adolf Eichmann "that

the policy pursued resulted in the killing of 6,000,000 Jews, of which 4,000,000 were killed in the extermination institutions."[63]

2) Nazi Germany murdered and ill-treated the civilian populations of occupied territories as a matter of policy. Members of opposition groups were confined to concentration camps, where they were subject to systematic cruelty and "where the conditions under which they worked made labor and death almost synonymous."[64] Other suppression measures included the mass killings of hostages and destruction of entire towns; the killing or confinement of members of the family of an individual suspected of resistance; third degree interrogation of persons thought to be able to provide information on resistance activities; and disappearance under the Nacht and Nebel decree of persons accused of offenses against Germany. In the Soviet Union and Poland, Einsatzgruppen units engaged in mass killings of communist functionaries, members of resistance groups or local populations the Nazis associated with resistance, and Jews.[65] In those countries, the IMT said, "the mass murders and cruelties ... were part of a plan to get rid of whole native populations by expulsion and annihilation, in order that their territory could be used for colonization by Germans."[66] This plan was executed by removal of civilians to slave labor camps, by expulsion, and by economic exploitation reducing the population, in the words of Nazis quoted by the IMT, to the bare minimum

for existence or to starvation.[67]

3) Nazi Germany deported at least 5,000,000 persons from the occupied territories to Germany to work as slave laborers, in many cases under "brutal and degrading" conditions, subject to confinement in correction or concentration camps if they attempted to leave.[68] The conscription of labor for deportation to Germany "was accomplished in many cases by drastic and violent methods," along with less forcible measures.[69]

4) Nazi Germany systematically plundered public and private property, including both agricultural and industrial goods, in occupied territories in support of the German war effort in complete disregard of local needs. "Widespread starvation" resulted in Poland.[70] Nazi Germany also plundered cultural objects from occupied territories.

5) Nazi Germany murdered and ill-treated prisoners of war. Members of Allied Commando units, escaped POWs, and Allied airmen were executed as a matter of policy. Soviet prisoners of war were treated with "particular inhumanity."[71] Soviet POWs considered to be political functionaries were executed; large numbers died of exposure or starvation; many were subjected to "cruel and inhuman" medical experiments.[72]

To recite the findings of the IMT is a sobering exercise. It also indicates why the IMT Judgment is cited as the singly most important precedent in confronting the threat of nuclear war. The enormity of the atrocities

committed against the civilians of countries conquered by the Nazis and against the European Jews seems incapable of parallel or analogy. Yet the major use of nuclear weapons would have comparable effects. It too would cause the extermination of civilian populations. Invocation of Nuremberg serves to highlight that parallel. On this level, legal guilt is not the main issue, for the trial and punishment of responsible officials in the aftermath of genocide offers little consolation or satisfaction. Rather, the lesson is that nothing comparable must happen again.

In light of this terrible lesson, and notwithstanding the complications (addressed later in this chapter) arising from the failure of any international tribunal to adjudicate the legality of strategic and atomic bombing during World War II, it is equally clear that provisions of the Charter prohibit the use of nuclear weapons as contemplated in the superpowers' plans for major nuclear war. The civilian populations primarily vulnerable to the use of nuclear weapons are those in enemy, or "belligerent," nations. The most salient provision in the Charter definitions of international crimes is the prohibition of murder, extermination, or the commission of inhumane acts against <u>any</u> civilian population as crimes against humanity. This provision was applied by the IMT and other Nuremberg tribunals largely to condemn criminal acts committed against civilians in occupied territories,

i.e. civilians in territories under German control, not nations still resisting the Nazi onslaught, and civilians in Germany and its allies. As applied by the IMT, Egon Schwelb explains:

> [the crime against humanity] serves to cover cases not covered by norms forming part of the traditional 'laws and customs of war". It denotes a particular type of war crime, and is a kind of clausula generalis, the purpose of which is to make sure that inhumane acts violating general principles of the laws of all civilized nations committed in connexion with war should not go unpunished.[73]

Moreover, it largely was applied to acts committed against groups, above all the Jews, which the Nazis sought to partially or wholly annihilate on ideological grounds not directly related to conduct of the war.

Nonetheless, by its terms the offense of crimes against humanity also protects the civilian populations of enemy nations (not only in occupied territories) who are vulnerable to criminal acts committed for reasons of war. Read in light of the basic imperative expressed by the Nuremberg Charter and trials, that nothing comparable must happen again, it therefore prohibits the use of nuclear weapons to attack cities or populations. It also prohibits nuclear attacks on military targets such as military command centers, military production facilities, or nuclear weapons facilities, where those attacks, due to the scale of destruction, are effectively also directed at civilian populations. A recent study concluded that "a large-scale attack on strategic forces would cause so many civilian

casualties that it would be difficult to distinguish from a deliberate attack on the population."[74] A decision-maker cannot be heard to say that extermination of civilians foreseeably resulting from nuclear attacks "aimed" at military targets is incidental or unintentional.[75]

Also relevant is the Charter's proscription of the wanton destruction of cities as a war crime. A "wanton act," according to Black's Law Dictionary, is one "evincing a reckless indifference to consequences to the life, or limb, or health, or reputation or property rights of another."[76] Webster's defines wanton as "manifesting heedless disregard of justice or of the rights, safety, and feelings of other: brutally insolent: merciless, inhumane; having no just foundation or real provocation."[77] Counterpopulation use of nuclear weapons could hardly be other than "wanton destruction." Putting aside the terrible problem of the anticipatory first strike, which I address later, the same conclusion is also warranted as to counterforce use.

There are other large implications to be drawn from the IMT Judgment. Of great importance is the IMT's repudiation of the Nazi conception of total war and related Nazi justifications of unrestricted warfare for reasons of "necessity" and ideology.[78] As to total war, the IMT stated:

> . . . War Crimes were committed on a vast scale, never before seen in the history of War. They were perpetrated in all the countries occupied by Germany, and on the High Seas, and were attended by every conceivable circumstance of cruelty and horror. There can be no doubt that the majority of them arose from the Nazi conception of "total war," with which the aggressive wars were waged. For in this 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. Everything is made subordinate to the overmastering dictates of war. Rules, regulations, assurances, and treaties all alike are of no moment; and so, freed from the restraining influence of international law, the aggressive war is conducted by the Nazi leaders in the most barbaric wary. Accordingly, War Crimes were committed when and wherever the Fuehrer and his close associates thought them to be advantageous. They were for the most part the result of cold and criminal calculation.[79]

The IMT thus affirmed that, contrary to the conception of total war, the scope of permissible methods of warfare is not boundless, but rather is limited by specific constraints of the law of war.

Inherent in the broad rhetorical sweep of the IMT's statement is a more technical rejection of the purported justification of "necessity" that overrides the positive rules of war. Thus the only principle of necessity admitted as lawful by the Nuremberg tribunals is that of "military necessity," referred to in the Charter prohibition of "devastation not justified by military necessity" as a war crime. Military necessity authorizes the waging of war <u>in accordance with the rules of war</u> only as appropriate to achieving legitimate military objectives. As stated by the tribunal in <u>The Hostage Case</u>:

> Military necessity has been invoked by the defendants as justifying the killing of innocent members of the population and the destruction of villages and towns in the occupied territory. 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 the 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.[80]
>
> * * *
>
> [T]he 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.[81]

Other tribunals also rejected the notion that necessity justifies overriding the rules. The tribunal in The Krupp Case declared:

> [T]he contention that rules and customs of war can be violated if either party is hard pressed in war, must be rejected... It is the 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 for all phases of war. They comprise the law for such emergency. To claim that they can be wantonly - and at the sole discretion of any one belligerent - disregarded when he considers his situation to be critical, means nothing more or less than to abrogate the laws and customs of war entirely.[82]

The tribunal in The High Command Case similarly rejected the view advanced by "German writers" that "military necessity includes the right to do anything that contributes to the winning of a war," stating that:

> [S]uch a view would eliminate all humanity and decency and all law from the conduct of war and it is a contention which this Tribunal repudiates as contrary to the accepted usages of civilized nations.[83]

The implication for nuclear weapons is straightforward: they cannot be used contrary to the laws of war and humanity no matter what end their use is designed to secure. Thus they may not be used contrary to law to avoid defeat in a conventional battle or war, much less to conquer or occupy another country.

If the winning of a battle or a war is no justification for violation of the law of war, still less persuasive are ideological reasons. They were, however, persuasive to Germans during the war. The Commissar order issued by the Fuehrer Headquarters directed the liquidation of political commissars as part of the "fight against bolshevism" and stated that "leniency and considerations of

international law are out of place in dealing with these elements."[84] At a preparatory conference, according to notes of one of those present, Hitler made a "crushing denunciation of bolshevism, identified with asocial criminality," and stated that "a Communist is no comrade before nor after the battle. This is a war of extermination."[85] The tribunal in The High Command Case described the Commissar Order as "one of the most obviously malevolent, vicious, and criminal orders ever issued by any army of any time."[86] Another example of the Nazi invocation of anti-communism involves what the IMT characterized as "ruthless regulations" for Soviet prisoners of war.[87] Fieldmarshal Keitel approved the regulations, noted the IMT, on the ground that "this is the destruction of an ideology."[88] The IMT's conviction of Keitel, and The Hostage Case tribunal's conviction of military officers who cooperated in the implementation of the Commissar Order, illustrate the Nuremberg tribunals' repudiation of ideology, and specifically anti-communism, as a rationale for disregarding the law of war. The implication for any contemplated use of nuclear weapons is that it cannot be justified, nor should it be in any way encouraged, by the idea it is directed against ideological adversaries, "communists" or "imperialists."

The Nuremberg tribunals' clear condemnation of total war, war justified on ideological grounds, and war justified on the ground of an alleged necessity overriding

the law of war, is especially important because such justifications have figured prominently in discussions of nuclear war. It has been argued in the West that the use of nuclear weapons, in a limited war and perhaps in a general war, would be justifiable if necessary to the defeat of "totalitarianism" and the defense of "democracy." The values sought to be protected would, in this view, essentially be immeasurable, and thus incommensurate to any damage, however devastating. Myres McDougal and Norbert Schlei's defense of the possible use of thermonuclear weapons, written at the height of the Cold War in the 1950s, exemplifies this kind of argument:

> [T]he decision-makers of the world community have never been able to become very precise about the "legitimate objectives" of violence or, hence, about the degree of destruction permissible under "military necessity"; and in the contemporary bipolar world, with totalitarians and proponents of the dignity of man confronting each other in mortal struggle, agreement on these fundamentals seems less likely than ever. It is not necessarily a mark of moral superiority, but perhaps rather of suicidal arrogance, to suggest that no possible uses of the hydrogen bomb could conceivably be within the scope of "military necessity" for objectives legitimate by standards of respect for human dignity. It would appear the most rational course to withhold blanket judgment and to appraise each specific use of nuclear weapons, as most other weapons and destructive practices are appraised, in the total context of such specific use.
>
> It is not the particular physical modality of destruction that is relevant to law and policy but rather the purposes and effects of the destruction and the relation of these purposes and effects to the values of a free world society.[89]

Due to its discounting of the constraints imposed by the

law of war, its neglect of the prohibition of deliberate attacks on civilians imposed, inter alia, by the Nuremberg proscriptions of crimes against humanity and the wanton destruction of cities, and its vague reference to "standards of human dignity" - a formula that is partisan, certainly as applied, to liberal democracy as institutionalized in the West - this analysis reduces to the kind of consequentialist calculus of values condemned by the Nuremberg tribunals. A more recent example is provided by Joseph Nye in his Nuclear Ethics.[90] Nye argues that defense of the (Western) values at stake justifies the risks of escalation to global devastation inherent in maintaining the posture of threatened first use of nuclear weapons against the Soviet Union, and implicitly accepts that first use would be warranted in some circumstances.[91] To reiterate, under Nuremberg law, any such calculus of values is forbidden: regardless of its purported justification, war must be conducted so as to conform to the laws of war and humanity.

So far we have seen that the relevance of Nuremberg law to the use of nuclear weapons consists in the condemnation of incredible atrocities comparable, however, to those that would be unleashed by nuclear war; the textual prohibitions of the commission of inhumane acts against any civilian population, and of wanton destruction of cities, effectively outlawing most uses of nuclear weapons; the rejection of the Nazi conception of total war,

a conception implied by contemplation of use of nuclear weapons; and the related rejection of invocation of "necessity" or ideology as rationales for disregarding the laws of war and humanity. Those propositions, standing alone, suffice to establish the Nuremberg Charter and Law No. 10 and the trials of major war criminals as the paramount framework for the assessment, and repudiation, of the use of nuclear weapons as contemplated by the superpowers.

Those large conclusions do, however, require further defense because of the failure of any international tribunal to find the strategic and atomic bombing practiced in World War II to be unlawful. That failure has two consequences: it undermines the assessment of the use of nuclear weapons in light of Nuremberg law; and it supports the contention that World War II bombing operates as a precedent for the lawfulness of certain future acts of war, notably resort again to nuclear weapons. The legal status of World War II bombing therefore deserves careful consideration.

World War II Strategic and Atomic Bombing

To analyze the implications of the failure of the Nuremberg or any international tribunals to find strategic bombing (including the atomic bombings) to be unlawful, it seems first appropriate briefly to review the nature of that bombing. I then consider 1) the responses of

Nuremberg tribunals to the bombing; 2) contemporary law that was in principle applicable to the bombing; 3) the consequentialist argument that the bombing was justified because of the results achieved; 4) the argument that the bombing became a recognized practice of states and therefore lawful; 5) post-World War II law applicable to strategic bombing; and 6) implications of the foregoing for the legality of use of nuclear weapons.

It is estimated that over one million German and Japanese civilians died as a result of this bombing.[92] British civilian losses also were staggering. By June 1941 the civilian deaths resulting from German air attacks on London numbered 41,000.[93] The extremes to which Allied bombing in Europe was carried are illustrated by two of the most notorious cases. In July 1943, the British bombed Hamburg in two raids carried out on successive nights by nearly 1600 bombers.[94] On the second night, as Richard Rhodes relates in his The Making of the Atomic Bomb, the bombing ignited a firestorm that "completely burned out some eight square miles of the city, an area about half as large as Manhattan.... Bomber Command killed at least 45,000 Germans that night, the majority of them old people, women and children."[95] In February 1945, 1400 British bombers executed a night-time attack on Dresden that again caused a firestorm.[96] The following day 1,350 U.S. heavy bombers once more launched an indiscriminate attack on the city, now covered with cloud and smoke.[97] The civilian

deaths from the bombings were on the order of 100,000.[98]

At about the same time the United States began incendiary bombing of Japanese cities. A firestorm induced by such bombing burnt 16 square miles of Tokyo, killed more than 100,000 people, injured a million more, and deprived a million of their homes.[99] The United States proceeded to firebomb Nagoya, Kobe, and Osaka, causing tens of thousands more civilian deaths.[100] On August 6, 1945 the United States devastated Hiroshima with an atomic bomb. By the end of 1945, it is estimated that 140,000 had died as a result of the bombing, on the order of half of those then living in the city; at the end of a five-year period, the number had reached 200,000.[101] The subsequent atomic bombing of Nagasaki caused the deaths of 70,000 by the end of 1945 and 140,000 over a five year period.[102]

The extensive civilian deaths caused by Allied strategic bombing were intended. There was certainly some deceptiveness about the presentation of the strategy to the public, and perhaps a degree of self-deception on the part of decision-makers as well. But the objective of killing civilians was manifest, not only in the execution of the strategy but also in its very articulation. British city-bombing was known as "area bombing," and its principal targets were officially declared to include the "morale" of the industrial workers and the civilian population generally.[103] Working class residential areas were specifically targeted[104]; their destruction was said to be

an attack on German "industry" and "industrial morale."[105] Indeed, British bombers were directed to aim at residential areas instead of military targets.[106] The operation order for the raids on Hamburg exemplifies the way in which the British framed deliberate attacks on cities and civilian populations. It identified the "total destruction of the city" as the objective. Accomplishment of this objective, the order stated, would reduce the "industrial capacity of the enemy's war machine"; and this, "together with the effect on German morale, which would be felt throughout the country, would play a very important part in shortening and winning the war."[107] Towards the end of the war Churchill acknowledged, in a note to the responsible military officers, that British bombing was intended to terrorize German civilians:

> It seems to me the moment has come when the question of bombing German cities simply for the sake of increasing the terror, though under other pretexts, should be reviewed. Otherwise we shall come into control of an utterly ruined land. We shall not, for instance, be able to get housing materials out of Germany for our own needs because some temporrarry provisions would have to be made for the Germans themselves. The destruction of Dresden remains a serious query against the conduct of Allied bombing.[108]

As to the U.S. incendiary and atomic attacks upon Japanese cities, the U.S. Strategic Bombing Survey made clear that Japanese civilians were among the major targets:

> There may be those who feel that civilian morale is a matter which can be ignored in the strategic planning of war. But among the great majority of military men, and among other citizens as well, morale has come to be recognized as one of the primary targets

> of attack and an essential consideration in the organization of defense.
>
> * * *
>
> The war against Japan exemplified clearly a number of the distinguishing characteristics of modern warfare. The attack was directed against the nation as a whole -not only the army, the fleet, the factories and the supply lines, but also against the entire population and its ability and will to resist. Thus the people of Japan were directly and indirectly involved in the fight. American bombs were aimed at them and their homes because of their critical importance to the fighting strength of the enemy.[109]

The target zone for the attack on Tokyo was a densely populated working class district.[110] Exemplifying the self-deception as well as public obfuscation (attacks upon civilians were aimed at "enemy morale") characteristic of strategic bombing, the responsible Air Force general, Curtis LeMay, years later could portray the target as industrial:

> All the people living around that Hattori factory where they make shell fuses. That's the way they disperse their industry: little kids helping out [at home], working all day, little bits of kids.[111]

Hiroshima was the site of the 2nd Army headquarters and housed around 43,000 soldiers.[112] There was no concentration of major industrial facilities in Hiroshima. According to the U.S. atomic targeting committee's report, completed before the bombing, industrial areas should be neglected as "pin point targets" in Hiroshima and other selected cities, because they "are small, spread on fringes of cities and quite dispersed."[113] Despite this finding regarding Hiroshima and other cities selected as possible

targets, the decision of the cabinet-level committee to recommend use of the bomb stated that "it should be used on a war plant surrounded by workers' homes."[114] In fact, as McGeorge Bundy records:

> while every city proposed [including Hiroshima] had quite traditional military objectives inside it ... the true object of attack was the city itself. The planners placed the aiming point, in every case, at the center of the built-up area.[115]

Responses of Nuremberg Tribunals to World War II Bombing

Much of Allied strategic bombing and the atomic bombings were intended to and did constitute massive attacks on cities and civilian populations. The Nuremberg tribunals had little to say concerning this bombing, primarily because accused Germans were not charged with crimes arising out of German aerial warfare. Thus the original indictment did not charge, and the IMT did not consider, the legality of German strategic bombing of Britain. Undoubtedly this was because the Allies too engaged in extensive aerial warfare. The sensitivity to the problem of charging Germans with crimes for which the Allies would equally be responsible was indicated by the IMT's treatment of the violations of rules governing submarine warfare. While the IMT found that Admiral Doenitz had violated the rules, it declined to consider the violations in assessing his sentence.[116] During the trial

Doenitz had succeeded in showing, including by affidavit of U.S. Admiral Nimitz concerning U.S. submarine warfare in the Pacific, that the Allies had engaged in practices comparable to those with which he was charged.[117] Based on the record of the IMT trial, the prosecution chose not to charge defendants in the subsequent trials with crimes arising out of aerial or submarine warfare.[118]

Indeed, the Nuremberg tribunals were generally silent, not only on the subject of strategic bombing, but also regarding the protection afforded civilian populations in belligerent nations in respect of any means of warfare. In adjudicating crimes against humanity the Nuremberg tribunals focussed on crimes committed against civilians in Germany, its allies, or occupied territory, not in belligerent nations. As to war crimes the Charter's protection of civilians in belligerent nations is less direct than that provided by the definition of crimes against humanity. The first three clauses of the war crimes provision protect the civilian population in occupied territories and prisoners of war, hostages, and "persons on the seas." The second three clauses, barring plunder of public or private property, wanton destruction of cities, towns, or villages, and devastation unjustified by military necessity, do not specifically identify civilians in enemy nations as a protected class. However, on their face they are certainly broad enough to provide some protection against deliberate or indiscriminate

attacks. The IMT focussed on crimes committed against the groups protected by the first three clauses, especially civilians in occupied territories and prisoners of war. The IMT provided no extensive discussion of the second three clauses providing general protection to civilians in belligerent nations. The IMT does state that "cities and towns were wantonly destroyed without military justification or necessity."[119] The rest of the Judgment contains, though, only a few passing references to such destruction: the burning of the Warsaw ghetto, which occurred in occupied territory[120]; the burning of houses in Norway in the course of retreat; the contemplated destruction of Moscow and Leningrad.[121] The later trials of major war criminals offer little more. In The Hostage Case, the tribunal's catalog of war crimes included the burning of villages because they were administered by communists or in retaliation for acts of resistance (again, in occupied territory).[122] The tribunal also found the use of scorched earth policies to delay pursuit by Soviet forces in Norway to be permissible.[123] Aside from these scattered instances, as Telford Taylor summarizes, "in all 12 of the trials under Law No. 10 taken together, charges arising out of combat operations of any kind played only a very small part."[124]

Ironically, what discussion there was of strategic bombing and of the protection of civilians in belligerent nations occurred when three of the U.S. tribunals responded

to the attempt of German accused to raise the issue of the legality of Allied methods of warfare. Because the issue of strategic bombing was not actually adjudicated by the tribunals, the remarks are important only to the extent they are persuasive. Nonetheless, as the only analysis of bombing offered by Nuremberg tribunals they merit close examination.

The tribunals responded in part by noting that the issue was not before them. They also, however, indicated that Allied bombing conformed to the law of war because carried out in reprisal or because aimed at the accomplishment of military objectives. In The Hostage Case the defense pointed to Allied aerial warfare in attempting to avoid conviction for mass killings of hostages and destruction of villages in reprisal for acts of resistance in occupied territories. The tribunal rejected this defense as follows:

> It also has been stated in the evidence and argued to the Tribunal that the rules of war have changed and that war has assumed a totalitarian aspect. It is argued that the atom bombings of Hiroshima and Nagasaki in Japan and the aerial raidings upon Dresden, Germany in the final stages of the conflict afford a pattern for the conduct of modern war and a possible justification for the criminal acts of these defendants. We do not think the argument is sound. The unfortunate pattern adopted in the Second World War was set by Germany and its allies when hostilities were commenced. The methods of warfare employed at Rotterdam, Warsaw, Belgrade, Coventry, and Pearl Harbor can aptly be said to provide the sources of the alleged modern theory of total war. It is not our purpose to discuss the lawfulness of any of these events. We content ourselves with the statement that they can give no comfort to these defendants as recriminatory evidence.[125]

In The Farben Case German defendants argued that the international law regarding economic exploitation of occupied territories was uncertain and "outmoded by the concept of total warfare," and therefore no basis for their conviction.[126] In its response the tribunal suggested that changes in methods of warfare may have rendered portions of the law of war applicable to strategic bombing uncertain and obsolete:

> Technical advancement in the weapons and tactics used in the actual waging of war may have made obsolete, in some respects, or may have rendered inapplicable, some of the provisions of the Hague Regulations having to do with the actual conduct of hostilities and what is considered legitimate warfare.... [However, that] grave uncertainties may exist as to the status of the law dealing with such problems as bombings and reprisals and the like, does not lead to the conclusion that provisions of the Hague Regulations [governing the conduct of the military occupant towards inhabitants of occupied territory], protecting rights of public and private property, may be ignored.[127]

Finally, in The Einsatzgruppen Case German defendants contended that the shooting of civilians in occupied territory was excusable because it was no worse than the killing of civilians by the atomic bombings.[128] The tribunal responded first that the bombings were justifiable because undertaken in self-defense against aggression:

> [I]t was submitted that the defendants must be exonerated from the charge of killing civilian populations since every Allied nation brought about the death of noncombatants through the instrumentality of bombing. Any person, who, without cause, strikes another may not later complain if the other in repelling the attack uses sufficient force to overcome the original adversary. That is fundamental law between nations as well.

> It has already been adjudicated by a competent tribunal that Germany under its Nazi rulers started an aggressive war. The bombing of Berlin, Dresden, Hamburg, Cologne, and other German cities followed the bombing of London, Coventry, Rotterdam, Warsaw, and other Allied cities; the bombing of German cities succeeded, in point of time, the acts discussed here.[129]

The tribunal further stated that Allied bombings were directed at military objectives, not non-combatants, with the aim of overcoming enemy military resistance and obtaining capitulation. The motives of the German defendants in massacring Jews, the tribunal concluded, were not comparable. The tribunal reasoned as follows:

> But even if it were assumed for the purpose of illustration that the Allies bombed German cities without Germans having bombed Allied cities, there still is no parallelism between an act of legitimate warfare, namely the bombing of a city, with a concomitant loss of civilian life, and the premeditated killing of all members of certain categories of the civilian population in occupied territory.
>
> A city is bombed for tactical purposes; communications are to be destroyed, railroads wrecked, ammunition plants demolished, factories razed, all for the purpose of impeding the military. In these operations it inevitably happens that nonmilitary persons are killed. This is an incident, a grave incident to be sure, but an unavoidable corollary of battle action. The civilians are not individualized. The bomb falls, it is aimed at the railroad yards, houses along the tracks are hit and many of their occupants killed. But that is entirely different, both in fact and in law, from an armed force marching up to these same railroad tracks, entering those houses abutting thereon, dragging out the men, women, and children and shooting them.
>
> It was argued in behalf of the defendants that there was no normal distinction between shooting civilians with rifles and killing them by means of atomic bombs. There is no doubt that the invention of the atomic bomb, when used, was not aimed at non-combatants. Like any other aerial bomb employed

> during the war, it was dropped to overcome military resistance.
>
> Thus, as grave a military action as is an air bombardment, whether with the usual bombs or by atomic bomb, the one and only purpose of the bombing is to effect the surrender of the bombed nation. The people of that nation, through their representatives, may surrender and, with the surrender, the bombing ceases, the killing is ended. Furthermore, a city is assured of not being bombed by the law-abiding belligerent if its is declared an open city. With the Jews it was entirely different. Even if the nation surrendered they still were killed as individuals.
>
> It has not been shown through this entire trial that the killing of the Jews as Jews in any way subdued or abated the military force of the enemy, it was not demonstrated how mass killings and indiscriminate slaughter helped or was designed to help in shortening or winning the war for Germany.[130]

Contemporary Law Applicable to World War II Bombing

In considering the implications of the general silence of Nuremberg tribunals concerning strategic and atomic bombing, and the scattered defenses of its legality at least as practiced by the Allies, it must first be emphasized that law existed under which such bombing was legally condemnable. Most centrally, to the large extent that the bombing involved deliberate attacks upon civilian populations it constituted murder, extermination, and other inhumane acts committed against any civilian population - that is, crimes against humanity. It also constituted war crimes because of violation of the prohibition of wanton destruction of cities and the general protection afforded enemy civilians by the Charter war crimes provision. In

discussing atomic bombings the Einsatzgruppen tribunal did not come squarely to grips with the main issue: may civilians be deliberately and massively attacked with the intent of directly achieving overarching military objectives such as winning the war? The answer provided by the Charter prohibitions of crimes against humanity and wanton destruction of cities is, simply, "No." Contrary to the suggestion of the Einsatzgruppen tribunal, the fact that strategic and atomic bombing was carried out, not simply for the purpose of killing the civilians, as in the case of German extermination programs, but for larger objectives of winning the war, is no refutation. The tribunal was also factually mistaken in its general defense of conventional strategic bombing as directed at military objectives, for much of that bombing was deliberately aimed at civilian populations instead of military objectives.

These conclusions can be reinforced and extended by reference to the law of war which the Nuremberg tribunals were authorized to apply by the Charter and Law No. 10. The Charter defined war crimes generally as "violations of the laws or customs of war," and then enumerated specific but not exclusive prohibitions, including those that provided general protection to enemy civilians. Underlying the "laws and customs of war" - and also the proscription of crimes against humanity - is the principle of civilian immunity. As stated by a leading authority, Waldemar Solf, former Chief of the International Affairs Division, Office

of the Judge Advocate General of the U.S. Army, that principle requires parties engaged in armed conflict "to distinguish between military targets and civilians and civilian objects and to direct their military operations only against military objectives."[131] The principle was not codified as such in the Charter war crimes provision or in the Hague rules of land and naval warfare of 1907. Yet it is assumed in the Charter prohibitions of "wanton destruction of cities, towns or villages, or devastation not justified by military necessity." It is similarly assumed in the Hague rules of land and naval warfare, which inter alia prohibit attack on undefended cities open to seizure by ground forces, provide for advance notice of bombardment on defended cities, and require that precautions be taken to avoid destruction of religious, cultural, and medical buildings.[132] The principle was also embodied in Arts. 1 and 2 of the Hague Land Warfare regulations, which designate persons with the status of combatants; they were understood to be the sole subjects and objects of warfare.[133] A statement of the principle of civilian immunity in the Hague rules may be absent because warfare inflicting significant casualties and damage on civilians and civilian objects was not contemplated. As Solf explains:

> [I]n 1907 civilians were generally considered to be relatively secure from the effects of battle action. The relative security of the civilian population was probably a reason for omitting any explicit statement of the principle of civilian immunity from direct

> attack in any of the Hague Conventions. It is nevertheless a fundamental principle of positive international law.[134]

Consequently, to the large extent strategic bombing involved deliberate attacks on civilian populations, it violated the principle of civilian immunity at the foundation of the law of war.

A second, closely related, general constraint of the law of war, the principle of proportionality, rendered condemnable attacks which, though truly directed at military targets, nonetheless had disproportionate effects upon civilians. Solf explains and formulates the principle as follows:

> [I]n directing attacks against military objectives, some incidental injury to civilians or damage to civilian objects is likely, at times, to result. Accordingly, customary international law interposed the further requirement under what is commonly termed the "rule of proportionality," that attacks against military objectives cannot be made when the injury to civilians and the damage to civilian objects that is likely to occur is out of proportion to the military advantage reasonably to be expected.[135]

Like the principle of civilian immunity, the principle of proportionality was assumed in the Hague Land Warfare Regulations, notably Art. 22, providing that "the right of belligerents to adopt means of injuring the enemy is not unlimited," and Art. 23, prohibiting the employments of arms "calculated to cause unnecessary suffering."[136] It also found some reflection in the Charter prohibitions of "wanton destruction" and "devastation not justified by

military necessity." Wantonness implies a disregard for consequences. The authorization of the infliction of violence necessary to defeat the enemy provided by the principle of military necessity is subject, inter alia, to limits of reasonableness. Thus in the previously quoted discussion of the principle of military necessity in The Hostage Case, the tribunal noted that military necessity permits the infliction of "incidental" civilian casualties and requires a "reasonable connection" between the destruction of property and the achievement of military objectives.[137]

Between the two wars, an important attempt was made to elaborate a set of rules articulating foundational principles of civilian immunity and proportionality in relation to aerial bombardment. The Draft Hague Rules of Air Warfare[138] were formulated in 1923 by prominent jurists and military experts representing their respective countries including the United States, whose representative was the well-known international lawyer John Bassett Moore. Although never adopted in treaty form, until the outbreak of World War II they were accorded "considerable status" by military officers and others.[139] While the rules did not even achieve the status of customary law, they do evidence the continuing relevance of the underlying principles articulated.[140] Arts. 22 and 24(1) reflect the principle of civilian immunity. Art. 22 prohibits "aerial bombardment for the purpose of terrorizing the civilian population, of

destroying or damaging private property not of military character, or of injuring non-combatants." Art. 24(1) provides that "[a]erial bombardment is legitimate only when directed at a military objective, that is to say, an object of which the destruction or injury would constitute a distinct military advantage to the belligerent." Other provisions of Art. 24 reflect the principle of proportionality. Art. 24(3) forbids aerial bombardment of military objectives such as military depots or factories producing arms "where they cannot be bombarded without the indiscriminate bombardment of the civilian population." Art. 24(4) forbids bombardment where there is no "reasonable presumption that the military concentration is sufficiently important to justify such bombardment, having regard to the danger thus caused to the civilian population."

In summary, the customary and conventional law of war which the Nuremberg tribunals were authorized to apply is premised upon principles of civilian immunity and proportionality. Accordingly a tribunal could have found much of the strategic bombing, and the atomic bombings, to be not only crimes against humanity but also contrary to the law of war. The absence of condemnation seems plainly due not to lack of relevant law but to the political circumstance that post-World War II tribunals were established by prevailing nations who did not care to have the legality of bombing adjudicated. In contrast, a court

in Japan, a defeated nation, did reach the issue and did condemn the atomic bombings, in the Shimoda case.[141] The setting was a suit for damages brought by survivors of the atomic bombings against Japan in its capacity as representative, by agreement, of the United States in all war damages claims. Citing, inter alia, Arts. 22 and 24 of the Hague Rules of Air Warfare, which it declared to have the status of customary law, the District Court of Tokyo found the bombings to be illegally indiscriminate. In particular, Hiroshima and Nagasaki did not contain a concentration of military objectives sufficient to justify the death and injury to civilians and destruction of the two cities.[142]

The Consequentialist Argument for World War II Bombing

The fact that no international tribunal adjudicated the legality of World War II strategic or atomic bombing has left the issue in a sort of limbo. It also has opened the field to arguments in support of legality, including those advanced by Nuremberg tribunals. One argument that has not fared well was advanced by the tribunal in The Einsatzgruppen Case, that Allied strategic bombing was justified because inflicted in response to aggression. The law of war binds equally all belligerents, regardless of the rightness or wrongness of their cause. It could hardly be otherwise. If the rules applied only to nations who

believe themselves to have engaged wrongly in war, they would apply to nobody. The tribunal in The Hostage Case thus was correct in stating that:

> Whatever may be the cause of a war that has broken out, and whether or no the cause be a so-called just cause, the same rules of international law are valid as to what must not be done, may be done, and must be done by the belligerents themselves in making war against each other ...[143]

A second argument also not well-received is the justification of bombing of German cities as reprisal. Unlike the first, this argument is not logically flawed but rather factually incorrect. It is widely understood that, as Telford Taylor, chief U.S. prosecutor in the subsequent trials of major war criminals, has stated:

> If the first badly bombed cities - Warsaw, Rotterdam, Belgrade, and London - suffered at the hands of the Germans and not the Allies, nonetheless the ruins of German and Japanese cities were the results not of reprisal but of deliberate policy ...[144]

An argument that has been influential is that Allied bombing was justified because carried out in defense of human decency against Nazism or to save lives by ending the war quickly. As to British strategic bombing, the argument is that the United Kingdom had to employ every available means, especially an allegedly efficacious means, of striking at a morally intolerable enemy seemingly on the verge of victory.[145] Thus J. M. Spaight wrote that the loss of civilian life "must be held to have been justified by the 'proportionate cause' which was at stake. This was the

ending of the regime responsible for the horrors of Buchenwald, Belsen, Dachau, etc."[146] The argument is different as to incendiary and atomic bombing of Japanese cities. The emphasis is not on the morally intolerable nature of Japan; nor could there be any appeal to the avoidance of imminent defeat. Rather the contention is that, given the objective of unconditional surrender and the probable loss of hundreds of thousands or millions of U.S. and Japanese lives in an invasion to secure that objective, the attack on civilians prevented far greater loss of life. Churchill, for instance, praised the atomic bombings as a "miracle of deliverance" averting "a vast, indefinite butchery."[147]

While arguments of a consequentialist[148] character framed in terms of values defended or lives saved have gained currency, they are flatly inconsistent with Nuremberg law. In stating the principle of military necessity, and in condemning total and ideological war, the Nuremberg tribunals were clear that military violence may be inflicted only within the framework of law. "The rules of international law must be followed even if it results in the loss of a battle or even a war."[149] In particular, while a belligerent nation is justified in inflicting force necessary to obtain prompt submission of the enemy, it can do so only subject, inter alia, to the dictates of the prohibition of crimes against humanity and the principles of civilian immunity and proportionality.

The principle of proportionality authorizes bombing only when civilian casualties and damage to civilian objects are not disproportionate to the expected military advantage. Evidently, effects on civilians and civilian objects cannot be part of the calculus of military advantage, for that would eviscerate the protection of civilians, a principal aim of the requirement of proportionality. Justification of World War II bombing, however, took exactly this form; effects on "morale" and vaguely defined "industry" were cited as benefits of the bombing. The reality, evidenced by the illegitimate rationale and by the foreseeable effects of the bombing, is that much of the strategic bombing, and certainly the atomic bombings, though ostensibly aimed at military objectives, were intended, and sometimes solely intended, to destroy cities and civilian populations. That bombing could not be justified by the principle of proportionality. Moreover, it violated the proscription of crimes against humanity and the principle of civilian immunity. It accordingly cannot under Nuremberg law be justified as necessary to the defeat of a morally intolerable enemy or to the avoidance of larger and future loss of life.

That is so, it bears emphasizing, even if the purported justifications were in fact both factually sound and defensible in consequentialist terms, of course a matter of dispute, as is inevitable given the uncertainty inherent in such rationales as applied to large-scale human

events. The nature of the disputes can be illustrated with reference to the atomic bombings.[150] They may have had a decisive role in the Japanese surrender. That position was taken by the Japanese government in the Shimoda case.[151] However, in light of the imminent Soviet entry into the war and Japan's weakened military posture, many argue that a Japanese surrender on terms then acceptable to the United States was likely, absent either the atomic bombings or an invasion.[152] If the assessment is correct, the bombings (and certainly the bombing of Nagasaki) arguably were contrary to the principle of military necessity, which forbids violence beyond that required to achieve the enemy's prompt submission.[153] Moreover, as Michael Walzer has argued, assuming that the bombings were necessary to save lives that would have been lost in an invasion to secure complete victory, then the objective of complete victory should have been discarded. Japan's expansionism had already been contained; and conditional surrender was in sight.[154]

It is further argued that the bombings were carried out to preempt Soviet entry into the Pacific War and to signal the Soviets that the United States possessed an awesome new weapon that it was prepared to use.[155] To the extent the argument is true it illustrates the depravity to which consequentialist calculations lend themselves, for surely Japanese civilians should not have been sacrificed to the attainment of U.S. global objectives.[156]

Yet it may be useful to assume that the rationale officially offered for the atomic bombings was both factually well-founded and defensible in consequentialist terms: that the incineration of Hiroshima and Nagasaki saved a much larger number of lives that would have been lost on both sides in a U.S. invasion to obtain unconditional surrender and that unconditional surrender was desirable in order to repudiate Japanese aggression and reconstruct the Japanese and Pacific political orders. Under Nuremberg law the rationale is not admissible. The civilian deaths and destruction of the cities - and it was those effects, not any impairment of Japanese military capability, which made the bombings impressive - cannot be part of the calculation of "military advantage" under the principle of proportionality. Further, in view of foreseeable effects of the bombings, they cannot be understood as anything other than deliberate attacks on civilian populations. They therefore were war crimes because contrary to principles of civilian immunity and proportionality and the prohibition of the wanton destruction of cities, as well as crimes against humanity because contrary to the prohibitions of murder, extermination, and commission of inhumane acts against civilian populations.[157]

The arguments regarding the atomic bombings illustrate the importance of obligatory norms that restrict the scope of calculations of "values defended" or "lives

saved." By obligatory norms I mean morally and legally binding prescriptions for conduct with which one ought to comply in any circumstance.[158] They include fundamental prohibitions protecting the rights of others like the Nuremberg rules: do not wage wars of aggression; do not kill civilians. Philosophical justification of obligatory norms traditionally is of a non-consequentialist, "deontological" character, exemplified by Kant. I later argue that Nuremberg and other international law should be understood in light of the ideal of peace prescribing constraints on resort to war and means of warfare articulated by Kant among others.[159] Though consequentialism is most closely associated with the view that moral acts sometimes involve violation of norms, consequentialist arguments can also be made for obligatory norms,[160] and indeed a powerful one can be based on the atomic attacks on Hiroshima and Nagasaki. Assuming the best case for the bombings in terms of values defended and lives saved, as outlined above, it remains true that they set a precedent for nuclear warfare as now contemplated in superpower war plans. For that reason they are condemnable violations of norms even from a consequentialist standpoint: compliance with norms such as the proscription of crimes against humanity and the principles of civilian immunity and proportionality prevents the establishment of precedents undesirable in the long run though apparently justifiable in a non rule-bound calculus at a given moment.

Theologian John Ford, writing during World War II before the atomic bombings, trenchantly stated this argument with respect to Allied strategic bombing:

> Even if obliteration bombing did shorten this war (and if the war ends tomorrow we shall never know whether it was this type of bombing that ended it), and even if it did save many military lives, we still must consider what the result for the future will be if this means of warfare is made generally legitimate.
>
> Can we afford to justify from this time forward obliteration bombing as a legitimate instrument of war? Once it is conceded that this is a lawful means of waging war, then it is equally available to our enemies, present and future. They will have just as much right to use it against us as they have to use guns against our soldiers. I do not believe any shortening of the present war, or any saving of the lives of our soldiers (problematic at best) is a cause sufficient to justify on moral grounds the use of obliteration bombing in the future.
>
> For in practice, though one may adhere verbally to the distinction between innocent and guilty, the obliteration of great sections of cities, including whole districts of workers' residences, means the abandonment of that distinction as an effective moral norm. When the innocent civil population can be wiped out on such a large scale very little is left practically of the rights of the innocent. Each new and more terrifying procedure, with more and more loss of innocent life, can always be defended as a mere extension of the principle, justified by the desperate military necessities of the case. The wiping out of whole cities is a reversion to barbarism as far as civilian rights are concerned.[161]

Ford's remarks presaging the atomic bombings of Hiroshima and Nagasaki are relevant to how we should now view those bombings: they were criminal.

The Argument for Strategic Bombing as a Recognized Practice of Nations

Another argument advanced to support the legality of strategic bombing, again influential, is closely related to the absence of judicial condemnation of the bombing. It rests on the view, as stated by Telford Taylor, that "aerial bombardment of cities and factories has become a recognized part of modern warfare as carried on by all nations."[162] In this circumstance, it is argued that, absent treaty prohibitions or judicial pronouncements, strategic bombing may not be viewed as illegal within a legal framework, that of international law, built upon the practices of nations.

The asserted acceptance of strategic bombing is said to reflect peculiarly modern developments. One is the availability of increasingly devastating weapons with the capability of striking at an enemy's industrial capability.[163] A second is the perceived need to strike at industrial capability, including civilian workers, supporting the war effort; "[a]t the same time that the weapons of war have been perfected, the civilian population and the economy of nations have made themselves increasingly vulnerable to legitimate attack by these weapons by the extent of their participation in the conduct of war."[164] Evidently, these "developments" are corrosive of the distinction between combatants and non-combatants fundamental to the law of war. If they are accepted, at

least as to strategic bombing, the inference is that customary law of war predating World War II has fallen into desuetude and is not binding. Even more strongly, the inference is that the bombing represents an incipient "custom" to be affirmatively recognized by international law.

William V. O'Brien is representative of the first school of thought. He concluded that the principles of civilian immunity and proportionality did not survive World War II and at best now serve as goals or guidelines.[165] The U.S. Navy manual on the law of war implicitly represents the second school of thought. While affirming that "belligerents are forbidden to make noncombatants the target of direct attack in the form of bombardment, such bombardment being unrelated to a military objective," the manual also states that "the presence of noncombatants in the vicinity of military objectives does not render such objectives immune from bombardment for the reason that it is impossible to bombard them without causing indirect injury to the lives and property of noncombatants."[166] The manual confirms that the weakness of the statement is intentional, citing "growth of the number of combatants; growth of numbers of noncombatants engaged in war preparation; the development of aerial warfare; economic measures; and the advent of totalitarian states" as well as "the development of guided missiles and atomic and thermonuclear weapons" as reasons why "the restriction of

hostilities to the armed forces of a belligerent is therefore now valid subject only to far-reaching qualifications, particularly with respect to the conduct of aerial warfare."[167] Thus the manual not only reflects the view that customary regulation of strategic bombing has been rendered non-binding by World War II developments but seems to assume that the bombing is now an accepted practice of nations that international law affirmatively recognizes as lawful.

In fact, no contention that strategic bombing now constitutes or is becoming a recognized custom of nations is supportable. To begin with, that strategic bombing was conducted by victorious nations in World War II and, for that reason, was not subjected to judicial condemnation, does not suffice to establish its lawfulness.[168] Moreover, for state practice to qualify as customary law, it must be recognized, by states, to be lawful; mere practice is not enough.[169] The claims advanced on behalf of strategic bombing during World War II fall short of evidencing a belief that deliberate or indiscriminate attacks killing civilians were lawful.[170] Official rationales for the bombings asserted that they were directed at military targets; attacks on civilians, though sometimes more or less acknowledged (as in references to the need to undermine "morale") was also obfuscated (as in references to "industrial" objectives). Moreover, British bombings were in part defended as reprisal for German bombing of

British cities.[171] That rationale indicates that the bombing itself is conceded to be contrary to law, for reprisals are otherwise illegal acts taken for the purpose of enforcing the enemy's compliance with law. In addition, the British practice of conducting bombing in German-occupied territories (e.g., France) so as to limit civilian damage and casualties manifests awareness of the governing law. The British directive guiding the bombing required that attacks be made against identifiable military objectives, with reasonable precautions for avoiding undue losses in the civilian population; if doubt existed as to whether the objective could be attacked with precision, or whether there was risk of serious damage to a populated zone, the bombing should not be undertaken.[172] The directive noted that these rules were not applicable to the bombing of Axis homelands because of the adoption of unlimited aerial warfare by those powers, i.e., because the Allied bombing was executed as a matter of reprisal.[173]

That the conclusions reached in the 1955 Navy manual were not compelled by the experience of World War II is illustrated by the posture taken 20 years later by the U.S. Air Force pamphlet, International Law - the Conduct of Armed Conflict and Air Operations.[174] The pamphlet, published in 1976, anticipates and indeed is partially based on preliminary drafts of the 1977 Protocol I to the Geneva Conventions, a multilateral treaty codifying the law of war. While noting that "major cities" were

"substantially destroyed" by World War II bombing, the pamphlet nonetheless maintains that the "Allies did not regard civilian populations and their housing as proper targets."[175] It attributes indiscriminate bombing in part to deficiencies in the technology of delivering bombs and in part to the escalation of "reprisals."[176] The pamphlet also maintains that post-World War II conflicts in Korea, Vietnam, and elsewhere "indicate an increased interest in avoiding civilian casualties from aerial bombardment."[177] According to the pamphlet:

> Efforts have been made to assert distinct military advantages as the goal of specific aerial bombardments; to emphasize the limited nature and duration of the attacks; and to demonstrate the taking of all necessary precautions to avoid or minimize injury to the civilian population or damage to civilian objects.[178]

That is a selective reading of history, certainly as to World War II, focused more on the rhetoric than the reality of the bombing. Yet it manifests a refusal to regard World War II bombing as a precedent for indiscriminate attacks.

The refusal was reaffirmed by the United States' portrayal of the bombing campaign in the Gulf War as consisting of attacks that accurately and discriminately killed or injured Iraqi troops and damaged or destroyed military targets while minimizing Iraqi civilian casualties. Undoubtedly that portrayal does not represent the whole truth about effects of the bombing on Iraqi society.[179] But taking it at face value, the constraints on

bombing implicitly acknowledged by the United States are the principles of civilian immunity and proportionality.

Like the U.S. Army and Navy manuals the Air Force publication is not itself a codification of law binding on military personnel or tribunals. It is, however, a guide which stands as "evidence" of binding law. It is significant, therefore, that the Air Force set forth an elaborate and far-reaching statement of the principles and rules of the law of war applicable to aerial bombardment, including the use of nuclear weapons. Unlike the Navy manual, which suggests that the law of war has been rendered essentially obsolete with respect to strategic bombing, or the Army manual, which barely addresses the matter, the Air Force publication recognizes severe restrictions on bombing, including comprehensive formulations of the principles of civilian immunity and proportionality.[180]

Whether the Air Force pamphlet, standing alone, accurately states law now binding as a matter of national law in the United States is doubtful, especially as to nuclear weapons, for several reasons. The armed forces publications are not codifications of law, and they differ greatly among themselves. In addition, as will be shown, the Air Force statement is far more restrictive and comprehensive than that endorsed by U.S. officials in international and scholarly forums, notably with respect to nuclear weapons.

Resolution of the issue of the status of the Air Force statement is, however, not necessary. A source of binding law, eclipsing previous scholarly writings or armed forces publications, now exists, namely the multilateral treaty on which the Air Force statement was partially based, Protocol I to the Geneva Conventions.

Protocol I demonstrates that the international community does not regard the strategic bombing practiced during World War II as an established custom. It further demonstrates that, while customary law may have fallen into desuetude due to the failure to achieve a treaty on aerial warfare in the inter-war years and the unchallenged practice of strategic bombing during World War II, that state of affairs has been rectified: there is now both treaty and customary law regarding strategic bombing. There are problems, addressed below, regarding the applicability of Protocol I to use of nuclear weapons. At this point our concern is with the relevance of Protocol I to conventional bombing.

Protocol I to the Geneva Conventions: A Repudiation of World War II Bombing

The 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of victims of International Armed Conflicts (Protocol I), is the first comprehensive codification of the law of armed conflict since the Hague land and naval

warfare conventions of 1907.[181] It also is a supplementary codification of the law protecting victims of armed conflict, e.g., prisoners of war, civilians under the control of an occupying powers, contained in the 1949 Geneva Conventions. The principal impetus for codification was a desire to affirm and strengthen the protection of civilian populations during armed conflicts. That protection was not explicitly set out though it certainly did underlay earlier treaties, notably the Hague conventions. World War II had clearly demonstrated the need to elaborate a regime of protection for civilians during war.[182]

Protocol I was negotiated and signed by over 100 nations including the United States, the Soviet Union, and other major powers. U.S. negotiators played a leading role in the drafting. Though the Soviet Union has ratified the treaty, it has not yet been ratified by several of the major NATO powers, including the United States. The Reagan and Bush Administrations have refused to submit the treaty to the Senate for advice and consent, a stance that does not foreclose the matter for the future. Though it has not entered into force as a treaty binding the United States, Protocol I unquestionably stands as very strong evidence of customary law of armed conflict, particularly though not exclusively as to those rules and principles which preexisted the treaty and were reaffirmed in its drafting and adoption.

A principal achievement of Protocol I is its statement of the customary principles of proportionality and civilian immunity. As previously explained, those principles were assumed, though not explicitly stated, in earlier codifications of the law of war, notably the Hague Land Warfare Regulations of 1907. The principle of civilian immunity is set out in Article 48:

> 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 only against military objectives.

Supplementary rules are set out inter alia in Article 51(2) and (3):

> 2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.
>
> 3. Civilians shall enjoy the protection afforded by this Section [against indiscriminate attacks and against reprisals], unless and for such time as they take a direct part in hostilities.

The principle of proportionality is codified in Article 51(4) and (5) and in Article 57, especially (2)(a)(ii) and (iii):

> Article 51 - Protection of the civilian population
>
> 4. Indiscriminate attacks are prohibited. Indiscriminate attacks are:
>
> (a) those which are not directed at a specific military objective;
>
> (b) those which employ a method of means of combat which cannot be directed at a specific military objective;

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

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

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

(a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and
(b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

Article 57 - Precautions in attack

2. With respect to attacks, the following precautions shall be taken:

(a) those who plan or decide upon an attack shall:

(ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects;

(iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated; ...

Protocol I thus represents a comprehensive and restrictive codification of the principles of proportionality and civilian immunity. It closely resembles the Hague Rules on Air Warfare, which also sought to regulate strategic bombing but never achieved treaty

status. Protocol I is an uncompromising repudiation of the practice of strategic bombing during World War II. That is evident throughout the section concerning protection of the civilian population, beginning with the straightforward prohibition of deliberate attacks on civilian populations. The provision that civilians are protected except when they take direct part in hostilities is particularly important, for it rejects the World War II identification of industrial workers as legitimate objects of attack. Concretely, contrary to World War II practice it means that while civilians may suffer casualties while working in facilities that are legitimate targets (e.g., munitions factories) they may not otherwise be attacked, as in their homes.[183]

Repudiation of strategic bombing is especially plain in a clause drafted with World War II experience in mind, Article 51(5)(a), prohibiting area bombardment. As the chief U.S. negotiator, George Aldrich, has confirmed, that "provision was intended to prohibit target-area bombardment in cities as practiced during the Second World War."[184] Another provision particularly relevant to World War II bombing is the formulation of the principle of proportionality, in Article 51(5)(b), to require that civilian losses caused by an attack be weighed against the "concrete and direct military advantage anticipated." That rules out judging a military operation against nebulous criteria of weakening the enemy's "resolve" or "will" or by

reference to overarching objectives such as forcing negotiations or defeating an ideological (e.g., "totalitarian" or "imperialist") adversary.[185] Thus repudiated are methods of total war such as the strategic bombing of Germany during World War II whose impact on civilians population was justified as weakening the enemy's "morale."

Bombing is not to be assessed in light of such nebulous criteria, which too easily translate into a rationale for attacks on the civilian population. Rather, whether injury to civilians is permissible is judged in comparison with the military advantage gained by attacks on specific and identifiable military objectives. Further, the provision renders impermissible acts such as the atomic bombings of Hiroshima and Nagasaki, undertaken not because of concrete military gains (e.g., destruction of troops or war-industry facilities) but rather to force consideration of surrender and perhaps, as some have averred, to influence post-War U.S. relations with the Soviet Union.

Accordingly, Protocol I operates as a rectification and reaffirmation of the law of war in relation to World War II practices.[186] So far as U.S. armed-forces publications are concerned, it vindicates the restrictive view in the Air Force pamphlet, not the permissive one in the Navy manual. In light of Protocol I's unambiguous repudiation of World War II strategic bombing, it no longer is tenable, if it ever was, to regard that bombing as a

precedent for subsequent bombing so indiscriminate as effectively to be aimed at civilians. The Protocol in effect is a retrospective judgment of the international community as to the illegality of World War II strategic bombing, filling the vacuum created by the absence of any decision by an international tribunal to that effect. As to nuclear weapons in particular, Protocol I means that World War II practices cannot stand as a precedent for their use.

Against that background, one would expect Protocol I not only to represent a repudiation of World War II bombing, and a restrictive regime for future conventional bombing, but also to provide a framework for regulation verging on proscription of use of nuclear weapons. Unfortunately, the Protocol was negotiated on the understanding that it was not intended directly to regulate the use of weapons of mass destruction, nuclear, chemical, and biological. The result is that the treaty supplies evidence as to the legal regime regulating the use of nuclear weapons, but does not itself regulate such use. Before drawing any conclusions, some background is in order.

Protocol I and Nuclear Warfare

The International Committee of the Red Cross (ICRC) stated with reference to a draft of Protocol I that:

> Problems relating to atomic, bacteriological and chemical warfare are subjects of international agreements or negotiations by governments, and in submitting these draft Protocols does not intend to broach these problems. It should be borne in mind that the Red Cross as a whole at several International Red Cross Conferences has clearly made known its condemnation of weapons of mass destruction and has urged governments to reach agreements for banning their use.[187]

That posture had its roots in an earlier attempt to negotiate a prohibition of the use of weapons of mass destruction as part of a larger regime for protecting civilian populations in time of war. As Solf records, the attempt "was not successful and halted progress toward the more limited goal of more explicit rules for mitigating casualties and damage to civilians resulting from the use of conventional means of warfare."[188]

During negotiation and at the signing of the Protocols the United States reiterated this understanding. Following the consensus adoption of the Protocols, the U.S. stated:

> From the outset of the conference, it has been our understanding that the rules to be developed have been designed with a view to conventional weapon. During the course of the conference we did not discuss the use of nuclear weapons in warfare. We recognize that nuclear weapons are the subject of separate negotiations and agreements, and further that their use in warfare is governed by the present principles of international law. It is the understanding of the United States that the rules established by this Protocol were not intended to have any effect on and do not regulate or prohibit the use of nuclear weapons. We further believe that

> the problem of regulation of nuclear weapons remains an urgent challenge to all nations which must be dealt with in other forums and by other agreements.[189]

The statement that "rules established by this Protocol ... do not regulate or prohibit the use of nuclear weapons" was repeated in the U.S. declaration at the signing of the Protocol.[190] The United Kingdom also declared at the time of signing that "the new rules introduced by the Protocol are not intended to have any effect on and do not regulate or prohibit the use of nuclear weapons"[191]; and France made similar statements during the drafting.[192] During the negotiations most other nations, including the Soviet Union, affirmed or acquiesced in this understanding, and with the exception of India made no statements to the contrary at the time of signing or ratification.[193]

The ICRC understanding as to the premise on which the treaty was negotiated, that it did not apply to weapons of mass destruction, thus was affirmed by NATO nuclear powers with respect to nuclear weapons and accepted by most nations participating in the conference. The understanding could not, of course, eviscerate the restraints of preexisting law on the conduct of nuclear warfare. To the extent that Protocol I codified customary law or restated conventional law (notably the Hague rules), it does indeed control use of nuclear weapons.[194] The United Kingdom statement that the new rules in the Protocol are not applicable to nuclear use contemplates that existing rules codified in the Protocol are applicable. The U.S. position

that nuclear use is regulated by "the present principles of the law of war" though not by the "rules established by the Protocol" also contemplates that Protocol's codification of existing law is applicable to nuclear use. As George Aldrich explained, the conference "operated on the understanding that the new rules it was developing would not deal with nuclear weapons and their effects."[195]

Due to the uncertain state of customary law as to strategic bombing prior to Protocol I, and to the inevitable intermingling of new and old elements in the Protocol I codification, room for controversy is opened up as to which of the Protocol I rules represent codification or restatement, as opposed to "development" or "extension", of existing customary and treaty law. It is not necessary here, however, to enter into scholarly controversies concerning the matter. An essential component of customary law is the views of states. The view of the United States, which so far has refused to ratify the Protocol, undoubtedly represents a minimalist understanding of the extent to which Protocol I restates customary law. For that reason one can be confident that the U.S. view does not go beyond the bounds of consensus regarding the state of customary law. Moreover, because the issues posed by contemplated major uses of nuclear weapons do not require a great deal of subtlety in stating the governing law, a minimalist view seems all that is needed to reach important conclusions.

A representative of the State Department, Deputy Legal Adviser Michael Matheson, has addressed the topic of customary law at a conference on "Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions." He stated in relation to Part IV ("Civilian Population") Section 1 ("General Protection Against Effects of Hostilities") that:

> The next section of the Protocol deals with the critical subject of the protection of the civilian population, which was the focus of much of the work of the Diplomatic Conference. Here again, much of this part of the Protocol is useful and deserving of treatment as customary law, although certain provisions present serious problems and do not merit such treatment. We support the principle that the civilian population as such, as well as individual citizens, not be the object of acts or threats of violence the primary purpose of which is to spread terror among them, and that attacks not be carried that would clearly result in collateral civilian casualties disproportionate to the expected military advantage. These fundamental principles can be found in article 51.[196]

He thus affirmed that the principle of proportionality is part of customary law, though he did not employ the Protocol's formulation. In endorsing the principle of proportionality, Matheson also necessarily signalled U.S. recognition of the principle of civilian immunity, for the proportionality requirement operates as a protection of civilians. The principle of civilian immunity also is embodied, though not exhausted, in the rule he explicitly cited, that civilians are not to be the object of attacks intended to create terror. In addition, the United States had earlier accepted the principle of civilian immunity as

formulated in the U.N. resolution that was part of the groundwork for the Protocol.[197] Resolution 2444, adopted in 1968 and supported by the United States, provided that the General Assembly:

> 1. Affirms resolution XXVIII of the XXth International Conference of the Red Cross held at Vienna in 1965 which laid down, inter alia, the following principles for observance by all governmental and other authorities responsible for action in armed conflicts:
>
> (a) That the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited;
>
> (b) That it is prohibited to launch civilian attacks against the civilian populations as such;
>
> (c) That distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible.[198]

Commenting, U.S. representative Jean Pickering stated that the principles are a "reaffirmation of existing international law" that the United States respects and that "apply as well to the use of nuclear and similar weapons."[199] By supporting Resolution 2244 the United States endorsed the principle of civilian immunity essentially as later codified in Protocol I, in Articles 48 and 51(2).

Protocol I thus codifies principles of civilian immunity and proportionality accepted by the United States as binding law. These principles underlay the law of war that Nuremberg tribunals were authorized to apply, a body of law under which much of the bombing carried out during World War II was legally condemnable. The principle of

civilian immunity is inherent also in the prohibitions of crimes against humanity and the wanton destruction of cities. Both principles impose severe restrictions on the use of nuclear weapons. As Burns Weston and others have persuasively argued, they forbid counterpopulation and counterforce uses of nuclear weapons as contemplated in superpower plans for nuclear war.[200] It is equally important, as those scholars have also argued, that the principle of proportionality rules out "limited" nuclear uses. Notably, due to the spread of radioactivity from a nuclear explosion it is not possible to limit to combatants the effects of nuclear use to combatants. Moreover, "limited" use runs the risk of escalation to unlimited war. The United States has implicitly, if paradoxically, accepted those conclusions in remarks made by the U.S. representative concerning Resolution 2444:

> Civilian populations may not be attacked as such, but we recognize that the co-location of military targets and civilians may make unavoidable, certain injury to civilians. Moreover, we should recognize soberly, that none of these principles offers any significant protection to civilians, in the catastrophic event of nuclear war.[201]

Her remarks indicate that the United States at one and the same time refuses to renounce use of nuclear weapons and yet recognizes that use is violative of the law of war.

The importance of Protocol I is twofold. First, it operates as a repudiation of the precedent for nuclear weapons allegedly set by the judicially unchallenged

practice of strategic and atomic bombing during World War II. Second, in its reaffirmation of the principles of civilian immunity and proportionality, it serves to reinforce existing limits on nuclear warfare.

The Relevance of Nuremberg Law: A Summary

In light of the rejection of arguments for the legality of World War II strategic and atomic bombing, as well as the development of post-World War II treaty law bearing on strategic bombing and the use of nuclear weapons, the relevance and significance of Nuremberg law can now be summarized. As will appear, to focus only on the issue of use is inadequate; it is also necessary to come to grips with the deployment of nuclear weapons.

Assessing the relevance of Nuremberg law to the use of nuclear weapons is complicated and ambiguous. I address in Chapter Three the philosophical and historical issues raised by reliance on Nuremberg law. Some broad observations can be made now. At a most basic level the Nuremberg condemnation of exterminations of civilians as war crimes and crimes against humanity argues strongly that the widespread use of nuclear weapons would be contrary to international law. Yet the failure of the Nuremberg or other international tribunals to adjudicate the legality of strategic bombing contributed to the uncertain legal status of use of nuclear weapons. One consequence is that many have seen the actuality and pervasiveness of the bombing as

weighing heavily in favor of legal permissibility. Another consequence is that many still downgrade the Nuremberg trials as lacking authority because of failure to address Allied crimes; the trials represented, in this view, merely victors' justice.

We should be very reluctant to adhere to either of these lines of reasoning. The suggestion that the absence of any international judicial condemnation of World War II bombing establishes its legal permissibility tends in the morally abhorrent direction of sanctifying states' conduct simply because it occurred.[202] Moreover, in view of the arguable precedent World War II strategic bombing sets for use of nuclear weapons we should think long and hard before concluding that the bombing was legal. Finally and importantly, the international community has repudiated World War II bombing in the new codification of the law of war, Protocol I. The suggestion that Nuremberg represented only victors' justice devalues the universal condemnation of German atrocities. It also detracts from the enterprise of bringing law to bear on the use of force by nations, a critical need in our era of nuclear weapons.

Accordingly the best conclusion is that uses of nuclear weapons contemplated in superpower war plans would be contrary to the Nuremberg prohibitions of crimes against humanity and the wanton destruction of cities, and to the principles of civilian immunity and proportionality basic to the law of war. Nuremberg law is further relevant to

the nuclear predicament because it so clearly condemns "total war"; war and means of warfare justified on ideological grounds; and warfare rationalized on grounds of an alleged necessity overriding the positive law of war. Nuremberg law thus rules out a consequentialist calculus of values, in which the imperative of resisting a morally intolerable enemy is cited as justification for nuclear war.

It would be naive and even foolish, however, to take much comfort from those conclusions standing alone. It is true that nuclear weapons have not been used since the U.S. attacks on Hiroshima and Nagasaki, which has given rise to the suggestion that there is now a tradition of non-use.[203] It might be argued that non-use is ripening into a custom recognized by law, in accordance with the process described by the U.S. Air Force pamphlet:

> Upon occasion, a prohibition [of particular weapons or methods of warfare] is confirmed by the practice of states in refraining from the use of a weapon because of recognition of excessive injury or damage to civilians or civilian objects which will necessarily be caused by the weapon.[204]

However, the pervasive deployment of nuclear weapons by the superpowers and the frequent resort to both general and specific threats of nuclear use suggest a willingness to use the weapons under certain circumstances and by no means evidence any renunciation of nuclear use. Moreover, international law considerations seem to have played a small role indeed in decisions about targeting and

execution of nuclear threats.

The attitude expressed in the early days of U.S. atomic monopoly probably reflects a basic attitude of decision-makers at least as to the constraints of international law, if not as to the casualness with which nuclear use is advocated. A National Security Council directive in 1948, NSC-30, occasioned in part by the Soviet blockade of Berlin, confined authority to use atomic bombs to the President alone and stated, "the Soviets should in fact never be given the slightest reason to believe that the U.S. would even consider not using atomic weapons against them if necessary."[205] In a memorandum to Truman commenting on NSC-30, W. Walton Butterworth, Director of the Office of Far East Affairs, stated:

> [T]he question to be decided is not whether we should or should not use atomic weapons... The question is rather when and how such weapons should be used... This question should be answered not so much on the basis of humanitarian principles as from a practical weighing of the long-run advantage to this country.[206]

International law considerations may have played a role in the move in nuclear targeting from the doctrine of "massive retaliation," directed against civilian populations, to the doctrine of "counterforce" today. For example, two Rand analysts, Carl Builder and Morlie Graubard, writing in the early 1980s argued that counterforce targeting should be adopted because consonant with the requirements of the law of war.[207] That argument is specious, certainly as to most contemplated nuclear uses.[208] Targeting aside, there is no

evidence that international law criteria have entered into decision-making concerning whether to execute threats of nuclear use.

For the foregoing reasons, a realistic analysis of the problem of nuclear use cannot rely on the absence of use since World War II. The analysis must rather address the centrality of nuclear weapons to superpower politico-military policy apparent in the declared willingness to resort to nuclear use. In fact, scholars advancing the critical view did not produce flat legalistic statements regarding the prohibition of most uses; they grappled with the problem of use in the context of actual strategies and deployments of nuclear weapons now part of superpower policy. The issues can be summarized as that of deployment as opposed to use. An entryway into analysis of Nuremberg and other law bearing on deployment is provided by two scenarios of use, reprisal and anticipatory first strike, as to which the law prohibiting most nuclear uses is not altogether adequate.

Reprisals and the Importance of No First Use

In The Hostage Case the tribunal found that in principle, though not as practiced by the Germans, reprisals against civilians for acts of resistance to occupying forces were permitted, subject to stringent conditions, by the law of war. The tribunal offered the following definition:

> A reprisal is a response to an enemy's violation of the laws of war which would otherwise be a violation on one's own side. It is a fundamental rule that a reprisal may not exceed the degree of the criminal act it is designed to correct. Where an excess is knowingly indulged, it in turn is criminal and may be punished.[209]

The tribunal reluctantly reached the conclusion that reprisals against civilians in occupied territories are in principle justifiable, and recommended its reversal by the international community. The reversal was in fact achieved by the 1949 Geneva Conventions, which forbid the infliction of reprisals against civilians in occupied territories as well as other categories of non-combatants, including the sick and wounded, prisoners of war, and medical personnel.[210] However, the Geneva Conventions did not prohibit reprisals against civilians in belligerent (non-occupied) nations. This step was taken by Protocol I, which contains a series of prohibitions of reprisals. The most important here are found in article 51(6) and the first sentence of article 52(1):

> 51(6). Attacks against the civilian population or civilians by way of reprisals are prohibited.
>
> 52(1). Civilian objects shall not be the object of attacks or reprisals.

The Protocol prohibitions seem effectively to rule out reprisals under any circumstances. The United States opposed this result, commenting when the Protocol was adopted:

> In the event of massive and continuing violations of the Conventions and the Protocol, this series of prohibitions of reprisals may prove unworkable. Massive and continuing attacks directed against a nation's civilian population could not be absorbed without a response in kind. By denying the possibility of a response and not offering any workable substitute, the Protocol is unrealistic and, in that respect, cannot be expected to withstand the test of future armed conflict.[211]

Scholars have sought to avoid Protocol I's apparent flat prohibition of reprisals by reading the Protocol not to forbid reprisals in kind - that is otherwise illegal acts taken in response to similar or identical acts of the adversary[212]; or by reading the Protocol not to forbid reprisals where the adversary has engaged in "material breaches" of the Protocol[213]; or by suggesting that ratification of the Protocol be accompanied by a reservation as to the reprisal provisions.[214]

Assuming the Protocol is read in a straightforward manner to forbid reprisals generally, the question arises whether it represents a codification of preexisting law, or an innovation in the law. This is important due to the exemption of the use of nuclear weapons from rules established by the Protocol; it is only law preexisting the Protocol that governs nuclear use. It is certain that prohibition of reprisals against civilians is consistent with the Nuremberg prohibition of crimes against humanity, which admits of no exceptions to the ban on the murder, extermination, or commission of inhumane acts against civilian populations. The prohibiting of reprisals against

civilians also reflects the principle of civilian immunity. Governments negotiating Protocol I, however, as well as some interested scholars, have regarded the reprisal provisions as an innovation in doctrine. The view is supported by the fact that the 1949 Geneva Conventions forbid reprisals against identified classes of persons, not including civilians in territory controlled by the enemy. Consequently, while the proscription of crimes against humanity is relevant, it must be concluded that the specific prohibition of reprisals against civilian populations in Protocol I did represent an innovation. Thus its applicability to use of nuclear weapons would certainly be contested by governments subscribing to the understanding of Protocol I as exempting use of nuclear weapons from the newly established rules.

It must be emphasized, though, that customary law predating the Protocol indisputably and severely restricts resort to reprisals, notably by subjecting them to the test of proportionality. The law is summarized by Waldemar Solf as follows:

> Under customary international law, reprisals against persons [e.g., enemy civilian not in occupied territory] and objects not protected against reprisals can be legally justified if they meet certain criteria, including the following:
>
> (a) other reasonable means to secure compliance must have been undertaken and have failed,
>
> (b) reprisals are acts of State and must be undertaken only at the direction of the appropriate political authority of the Party to the conflict,
>
> (c) there must be reasonable warning that reprisals will be taken unless the illegal acts are halted,

> (d) reprisals must be proportionate to the illegal act complained of and not excessive to the goal of ensuring enemy compliance with the law, and
> (e) reprisals must be terminated when the adverse Party abandons its unlawful policy.[215]

In light of that customary law, the only law incontrovertibly applying to use of nuclear weapons in retaliation for a prior nuclear use, the second use of nuclear weapons, if it meets the test of proportionality, cannot be ruled out if undertaken to force the adversary to halt further nuclear use. Yet the difficulty of meeting the proportionality test in any nuclear use, especially in light of the danger of escalation, in most or all circumstances would render nuclear reprisals unjustifiable, a result consistent with the Protocol's innovative prohibition. Moreover, attacks against or with indiscriminate effects on civilian populations, even in reprisal, would constitute crimes against humanity and violate the principle of civilian immunity at the core of the law of war. We must recognize, though, that once nuclear weapons are used, especially against cities or in other ways seriously affecting civilian populations, there will be strong pressures to retaliate. The pressures may be resistant to considerations of rationality and prudence, let alone law, especially international law for which there is no effective supranational enforcement mechanism. That points emphatically to the overriding need to prevent first use of nuclear weapons, a need with important implications for the legality of deploying nuclear weapons with the aim

of making a threat of first use possible.

The Problem of the Anticipatory First Strike

In coming to grips with the nuclear dilemma, we confront another terrible situation in which international norms do not clearly outlaw nuclear use and in any event may be ignored. That is when superpower leaders become convinced, or determine that in light of the risks at stake that they must assume, that the adversary has decided to launch a massive nuclear attack. In this circumstance, an anticipatory first strike aimed at destroying or minimizing the nuclear capability of the opposing power may be decided upon in order to avert or limit the devastation of absorbing a first strike. Such an attack arguably could meet the requirement of proportionality because, if directed solely at disabling the enemy's nuclear capability, the military advantage sought, limiting the devastation from the anticipated strike, would justify the devastation to the enemy society that would accompany a first strike.

A comparison with the bombings of Hiroshima and Nagasaki is relevant. There the result assertedly achieved, Japanese unconditional surrender, was due not to any significant impairment of Japanese military capability but to the shock inflicted by the destruction of cities and mass killing of civilians. In contrast, in an anticipatory first strike, the result hypothetically sought, limiting

the devastation from an enemy nuclear strike, is achieved by impairing enemy military capability. If proportionality is understood, consistent with the Hague Air Rules and Protocol I, to require that concrete gains resulting from damage to military objectives are to be expected from an attack, it still could be argued in contrast to the World War II atomic bombings that the requirement of proportionality is satisfied. That is because objectives targeted, the individual components - missiles, nuclear command and control centers, etc. - of enemy nuclear capability, unlike the relatively insignificant military objectives in the Hiroshima and Nagasaki bombings, taken together, and in some cases, separately, pose an overwhelming threat to the nation launching the first strike. Even Burns Weston, who is concerned to vindicate the relevance of the law of war to the nuclear predicament and who argues that virtually all scenarios for use of nuclear weapons are impermissible, cannot bring himself to conclude that a <u>defensive</u> anticipatory first strike is unambiguously prohibited.[216]

Nonetheless, because an anticipatory counterforce first strike would foreseeably devastate the opposing civilian society in much the same way as a counterpopulation strike, it remains the case that such a first strike, like the Hiroshima and Nagasaki bombings, would constitute a crime against humanity and would violate the requirement of civilian immunity of the law of war.

Decision-makers convinced, however, that they face an imminent first strike might disregard the norms. They might, like World War II planners of strategic and atomic bombings, believe launching a first strike is normatively justified by a consequentialist calculus similar to that involved in the assessment of proportionality. Or they may believe that, out of duty to their society, which is thought to face the prospect of extinction, they must act criminally and immorally in the service of a grim necessity. Michael Walzer has depicted the initial years of British bombing of the German population in like terms. A criminal means of defending one's own society may be chosen, he argues, where it is perceived as the only alternative, not to defeat, but to moral extinction as a political community.[217] His reasoning is not acceptable from the standpoint of law but nonetheless is evocative of the dilemmas posed when an enemy nuclear strike is believed to be imminent.

The terrible problem of the anticipatory first strike is one that goes to the heart of the nuclear predicament. It makes clear that nuclear weapons must be deployed, if at all, in ways that minimize the likelihood of first use and first strike. The next chapter examines that imperative in light of Nuremberg and other law.

CHAPTER TWO

NUREMBERG LAW AND DEPLOYMENT OF NUCLEAR WEAPONS

War law traditionally was divided into two branches. The jus ad bello, associated with just war theory, consists of rules governing when the resort to war is justified. The jus in bello, known variously as the law of war, the law of armed conflict, or humanitarian law, consists of rules applying to the conduct of war. The arguments of scholars and protesters opposed to nuclear weapons sound largely in jus in bello. By contrast, when addressing the legal status of nuclear weapons the United States has emphasized jus ad bello. The U.S. position is that the use of nuclear weapons in a non-aggressive war of self-defense is justifiable, as is resort to any other weapon whose use is not explicitly prohibited by international agreement (primarily chemical and bacteriological weapons).

The official view begins with rules contained in the United Nations Charter[1] that regulate resort to war. Articles 2(4) and 51 of the Charter proscribe the use or threat of force against the territorial integrity or political independence of other nations, except in self-defense in response to an armed attack.[2] As noted in the Introduction, the United States cites self-defense as a justification for nuclear use.[3] That has long been the official U.S. view. Thus in 1962 the General Assembly called for the convening of a conference to negotiate a

treaty prohibiting nuclear use. Opposing the initiative, Secretary of State Dean Rusk stated:

> The defense system of the United States and its allies, freely arrived at in accord with the United Nations Charter, includes nuclear weapons. This must continue to be the case as long as it is impossible to be certain through measures of verification that other States, which could use such weapons for aggressive purposes, do not retain a similar array of weapons in their national arsenals. The United States, like other free nations, must be fully prepared to exercise effectively the inherent right of individual and collective self-defense as provided in the United Nations Charter.
>
> The Charter of the United Nations makes a distinction, not between one weapon and another, but between the use of force for aggression and for defense. This distinction is critical.[4]

We have already seen (in Chapter 1) that jus in bello constraints on the conduct of warfare effectively rule out use of nuclear weapons as contemplated in superpower war plans. That conclusion of course directly contradicts the U.S. position that the weapons may be employed consistent with the U.N. Charter in a war of self-defense. If use is barred, whether it is defensive is irrelevant. Still further, the conclusion that nuclear use is impermissible in time of war undermines the U.S. position that nuclear weapons may be maintained in readiness for use in time of peace. Some scholars argue that the incompatibility of use with constraints on the conduct of warfare means that even preparing for nuclear war violates the Nuremberg Charter prohibitions of planning and preparation to commit international crimes. That argument escapes the confines

of the jus in bello, which regulates the conduct of armed conflict, and implicates the jus ad bello, the rules that govern the transition from peace to war. Thus is raised the issue of the legality of nuclear weapons' deployment in peacetime as well as their use in wartime. As already discussed, the issue of deployment is at the core of the nuclear predicament, due to the problems of the anticipatory counterforce first strike and retaliatory escalation to major war arising from "limited" first use.[5]

The IMT Judgment and Inchoate Crimes

The starting point for evaluating the critical view of deployment is the International Military Tribunal's application of the Nuremberg Charter's inchoate crimes provisions to acts of the Nazi defendants. Inchoate crimes are incipient crimes generally leading to the commission of other crimes; in national criminal law the offenses of attempt, solicitation, and conspiracy are prime examples. The Charter defines crimes against peace as follows:

> Crimes Against Peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of the foregoing.

The inchoate elements are "participation in a common plan and conspiracy" and "planning and preparation." The other two offenses, war crimes and crimes against humanity, did not include those elements, but the last sentence of Article 6 could have been read either to clarify the scope

of liability for crimes against peace or to extend the common plan and conspiracy charge to all offenses. It provided:

> Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

The ambiguity apparently was the result of disagreement among the drafters of the Charter concerning the proper scope of the conspiracy charge.[6] The Tribunal chose to read the clause restrictively, applying it only to the charge of a common plan or conspiracy to commit crimes against peace contained in Art. 6(a).[7] Similarly, though Law No. 10 clearly contemplated liability for participation in a plan or enterprise to commit any of the three offenses,[8] the U.S. tribunals followed the IMT and considered the planning element only as to crimes against peace.[9] Because the charge of a conspiracy or common plan to commit crimes against peace and the planning and preparation element of crimes against peace were hardly distinguishable, the IMT discussed them together though they were charged in two separate counts in the indictment, finding that "they are in substance the same."[10]

The IMT found 12 of the 22 defendants individually responsible for crimes against peace because they were participants at a policy-making level in a plan to prepare, initiate, and wage aggressive war.[11] In subsequent trials, in only The Ministries Case, also involving high officials,

were there convictions for crimes against peace.[12] Moreover, two acquittals demonstrate that the IMT was not prepared to convict individuals of crimes against peace for even an eminent role in directing German rearmament and wartime arms production. Regarding Hjalmar Schacht the Tribunal stated:

> It is clear that Schacht was a central figure in Germany's rearmament program, and the steps which he took, particularly in the early days of the Nazi regime, were responsible for Nazi Germany's rapid rise as a military power. But rearmament of itself is not criminal under the Charter. To be a crime against peace under Article 6 of the Charter, it must be shown that Schacht carried out this rearmament as part of the Nazi plans to wage aggressive wars.[13]

Regarding Albert Speer:

> He became the head of the armament industry well after all of the wars had been commenced and were under way. His activities in charge of German Armament Production were in aid of the war effort in the same way that other productive enterprises aid in the waging of war; but the Tribunal is not prepared to find that such activities involve engaging in the common plan to wage aggressive war as charged under Count I or waging aggressive war as charged under Count II.[14]

The indictment charged a common plan dating back to the formation of the Nazi Party in 1919, but the Tribunal declined to read the Charter so expansively, stating:

> The Prosecution says, in effect, that any significant participation in the affairs of the Nazi Party or government is evidence of a participation in a conspiracy that is in itself criminal. Conspiracy is not defined in the Charter. But in the opinion of the Tribunal the conspiracy must be clearly outlined in its criminal purpose. It must not be too far removed from the time of decision and of action. The planning, to be criminal, must not rest merely on the declarations of a party program, such as are found in the twenty-five points of the Nazi Party, announced in 1920, or the political affirmations expressed in "Mein Kampf" in later years. The Tribunal must

> examine whether a concrete plan to wage war existed, and determine the participants in that concrete plan.[15]

The time period thus was started much later, in November 1937. Basing its conclusion on records of a Hitler meeting with close associates,[16] the IMT stated "[t]hat plans were made to wage wars, as early as November 5th 1937, and probably before that, is apparent."[17] In any event, "[i]f any doubts had existed in the minds of any of his hearers in November 1937, after March of 1939 there could no longer be any question that Hitler was in deadly earnest in his decision to resort to war."[18]

While the International Military Tribunal thus closely tied the planning and preparation element to initiating and waging war, it did not insist that war actually have occurred for an offense to be established. Thus the IMT observed that the occupation of Austria was an aggressive act serving to increase German military power:

> It was contended before the Tribunal that the annexation of Austria was justified by the strong desire expressed in many quarters for the union of Austria and Germany; that there were many matters in common between the two peoples that made this union desirable; and that in the result the object was achieved without bloodshed.
>
> These matters, even if true, are really immaterial, for the facts plainly show that the methods employed to achieve the object were those of an aggressor. The ultimate factor was the armed might of Germany ready to be used if any resistance was encountered. Moreover, none of these considerations appear from the Hossback account of the meetings of the 5th November 1937 to have been the motives which actuated Hitler, on the contrary, all the emphasis is there laid on the advantage to be gained by Germany in her military strength by the annexation of Austria.[19]

The IMT also noted that "the threat of war - and war itself if necessary - was an integral part of Nazi policy."[20]

The war proscribed by the definition of crimes against peace was a war of aggression or a "war in violation of international treaties, agreements, or assurances." There was no definition of aggression, and the IMT did not supply one; in effect the finding was that, whatever the precise meaning of aggression, the acts committed by Nazi Germany surely exemplified that concept. Having found that a war of aggression was established, the IMT discussed German violation of treaties only briefly.[21] It is apparent from that discussion, however, that in the context of German actions the IMT viewed war of aggression and war in violation of treaties as identical. The treaties referenced call for recourse to arbitration or mediation in the settlement of international disputes, declaration of war before commencing hostilities, and maintenance of the territorial status quo. The two treaties that received any attention were the Treaty of Versailles and the Kellogg-Briand Pact. The former set out a number of restrictions on German action in relation to neighboring territories and cities (the Rhineland, Austria, Danzig, and others) which the IMT found Germany to have violated.[22] The Kellogg-Briand Pact, also known as the Pact of Paris, is the principal authority, aside from the Charter itself, for the crime against peace.[23] Article I of that treaty provided:

> The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies and renounce it as an instrument of national policy in their relations to one another.

In finding that Germany had breached the Treaty of Versailles, the Kellogg-Briand Pact, and other treaties, agreements, and assurances, the Tribunal relied on the acts that established the existence of a war of aggression.

Basic Features of Nuclear Weapons Deployment

The foregoing survey of relevant aspects of the IMT Judgment is sufficient for assessment of the Nuremberg-based critique of superpowers' current deployment of nuclear weapons as planning and preparation for international crimes. The first and most important point to be made is that the critique is highly relevant to the central reality of superpower policy, which is that nuclear weapons are deployed in ways that incur serious risks of precipitating nuclear war. I have previously referred to this reality in discussing the problem of the anticipatory counterforce first strike and escalation risks inherent in "limited" first use. It can be described in terms of the following basic facts:

First, nuclear weapons are deployed not only to establish retaliatory deterrence - that is, the prevention of an adversary's first use by means of a threat of second use - but also to enable the threat of limited first use under a myriad of circumstances against many possible

targets to achieve geopolitical ends. The aim of having ability to threaten limited first use becomes less plausible if there are no scenarios whatever for "prevailing" in a general war. Moreover, if all-out nuclear war is perceived as inevitable, "limiting damage" inflicted by the enemy becomes an objective. For those and other reasons the second basic fact is that deployment is also aimed at establishing ability to engage in a first strike partially or wholly destroying the adversary's nuclear capability. A third basic fact is that a first strike which limits the retaliatory damage that could be inflicted by the adversary to "acceptable" levels is unattainable for the present and the foreseeable future. Those basic facts about deployment are well documented in 1980s literature about the nuclear situation.[24]

As this description of fundamental features of nuclear weapons deployment indicates, a tension between the policies of retaliatory deterrence and threatened first use runs through U.S. policy. A central tenet, certainly since the Soviet Union acquired significant nuclear capability, is that nuclear war is prevented by the threat of "mutual assured destruction." The principle of mutual assured destruction was enshrined in the Anti-Ballistic Missile (ABM) Treaty of 1972. In the treaty the United States and the Soviet Union agreed not to deploy ballistic missile defenses to protect national territory. The rationale reflected the underlying policy of mutual assured

destruction. First, if such defenses were deployed a nation's confidence in the efficacy of the threat of retaliation would be undermined. In particular, if one side were to engage in a first strike damaging the other side's offensive capability, an anti-ballistic missile system theoretically could reduce the damage from an already diminished second strike to "acceptable" levels. The advantage would thus pass to the side undertaking a first strike, and the stability of the deterrence regime would be eroded. Second, deployment of ABM systems could set off an offensive arms/defensive systems spiral, as each side sought to accomplish some or all of the following objectives: to ensure an adequate second-strike capability; to gain a theoretical first-strike advantage; to build effective defensive systems. Again, stability of the deterrence regime would be eroded. On the basis of these two related reasons the United States was able to persuade the Soviet Union, at first reluctant, that the understandable impulse to build defensive systems was in fact counterproductive and dangerous. In view of these policy considerations, conclusion of the ABM Treaty is regarded as the major accomplishment of the whole arms-control process and the cornerstone of the retaliatory deterrence regime.

A competing element in U.S. policy has been the effort to obtain the ability to threaten credibly the first use of nuclear weapons. Although not popularly understood,

U.S. readiness to use nuclear weapons first has long been stated policy. For example, President Carter announced that the United States would not bar the use of nuclear weapons in response to a non-nuclear attack on U.S. allies:

> To reduce the reliance of nations on nuclear weapons I hereby solemnly declare on behalf of the United States that we will not use nuclear weapons except in self-defense; that is, in circumstances of an actual nuclear or conventional attack on the United States, our territories or armed forces or such an attack on our allies.[25]

The policy was defended in 1982 by Eugene Rostow, director of the Arms Control and Disarmament Agency, in these terms:

> In regard to the relationship between conventional weapons and nuclear arms, I cite the hypothetical example of a massive Soviet conventional attack on West Germany. The current administration reserves the right to use nuclear weapons first in such a context as part of its overall deterrence posture. If we were to do as Professor Falk advises - foreswear the first use of nuclear weapons absolutely - then we would undermine our conventional war deterrence and cause our allies to doubt our resolve and/or ability to protect them. The post-World War II resurgence of Europe, Japan, and the rest of the non-Communist world has rested on the nuclear deterrent strength of the United States, and the possibility that it would use nuclear weapons if necessary even to prevent a conventional attack.[26]

Because it is doubtful that the United States would undergo "assured destruction" as a price for nuclear response to a Soviet conventional attack on Europe, nuclear planning and acquisition of nuclear capability have been driven along two related paths. One is to attempt to make credible the idea of limited nuclear war, in the setting of a

battlefield, or a "theater," i.e., Europe. Because limited war, much more than "peacetime" nuclear deterrence, carries a high risk of escalation to inter-continental, general war, the second path has been to acquire the capability to threaten credibly a first strike on Soviet strategic, intercontinental capability that would reduce the damage from a second strike to "acceptable" levels. Indeed, the possibility of an anticipatory counterforce strike was implicitly acknowledged in Carter's statement that the U.S. reserves the right to use nuclear weapons "in circumstances of" a nuclear attack on the U.S. or its allies; i.e., not in response to an actual attack.

The history of superpower resort to threats of nuclear use, which recently has received serious attention from scholars, amply demonstrates that nuclear arsenals are not deployed merely for retaliatory deterrence. They also form the basis for threats of first use and, implicitly, first strike threats which are central instruments of geopolitical policy.[27] The fact that deployment has served, not only to establish retaliatory deterrence, but as the basis for the ability to threaten first use and first strike suggests that some day that threat may be carried out where the geopolitical stakes are considered high enough. While a single first use arguably may meet the requirements of proportionality and civilian immunity, depending on the circumstances including the extent of radioactive fallout, it may also trigger nuclear escalation

with incalculable consequences. In addition, as already noted, the ability to threaten first use depends in some degree on the ability to threaten a first strike to limit damage caused by retaliation, if not completely to destroy the adversary's nuclear capability. The existence of strategies and capabilities underpinning a threat of first strike, in turn, raises the specter of an anticipatory counterforce first strike under conditions of crisis - an action perhaps consistent with some readings of the law of war, yet amounting to a global catastrophe.

The conclusions seem inescapable that 1) the deployment of nuclear weapons so as to enable the threat of first use and first strike is a central characteristic of superpower policy; and 2) first-use and first-strike deployment is morally and prudentially intolerable because it makes nuclear use, including all-out nuclear war, more probable. Accordingly, the contention that superpower nuclear deployment constitutes planning and preparation for international crimes seems justified, if not with respect to all deployment at least in relation to deployment and strategic planning aimed at enabling the threat and possible resort to first use and first strike.[28]

Problems With The Inchoate Crimes Analysis

In legal analysis both "facts" and "law" dictate the conclusions reached, or at least determine their range. The facts of current nuclear deployment makes the Nuremberg

inchoate crimes prohibition acutely relevant. There are significant problems, however, not with "facts" but with "law," in relying on the inchoate crimes analysis, relating the IMT's application of the Charter in the Judgment, and to law regulating nuclear weapons that has developed since World War II.

To begin with the Judgment, the first problem is that the IMT's analysis was based on jus ad bello, international law regulating the resort to war; the finding was that the defendants had planned, prepared and waged wars of aggression. The IMT's conclusion that Germany had undertaken war in violation of treaties, agreements and assurances essentially replicated the finding of aggression. There was no finding that defendants had planned and prepared to engage in war that would violate treaties setting forth laws of war. Not only did the IMT focus on planning and preparing for aggressive war, it also refused to extend the common plan or conspiracy charge to war crimes and crimes against humanity. The International Law Commission's statement of the Nuremberg principles similarly restricted that element to the crime against peace.[29] The Judgment supports the condemnation of nuclear weapons deployment that constitutes planning and preparation for their aggressive use. It does not, however, support the condemnation of deployment as planning and preparation for war crimes and crimes against humanity by use of nuclear weapons whether defensive or aggressive.

It first bears emphasis that, standing alone, the Charter proscription as limited by the IMT forbids planning and preparation of a first nuclear use or strike as an opening act of aggressive war. Beyond that, arguably it forbids planning and preparation of any first use or strike. It is true that first use could, and likely would, occur not as an opening act of war but rather in the context of an ongoing conventional war. Moreover, the state resorting to nuclear weapons would not necessarily be the aggressor state responsible for the outbreak of war; this appears as the stated premise of U.S. threats of first use. Yet nuclear war is qualitatively different than conventional war because it could have catastrophic consequences for the species and the planet. Any first use in a war between the superpowers could escalate to all-out nuclear war. For that reason, a nuclear response to conventional aggression, and certainly a first strike, seems so disproportionate as to itself be aggressive.[30]

It is also important that the IMT's interpretation need not be accepted as the only reading of the Charter. There is adequate textual support in the Charter for condemning nuclear policy as a common plan to commit war crimes and crimes against humanity. The Charter prohibits planning and preparation for a "war in violation of international treaties, agreements, or assurances." Nuclear war would be war that inevitably comprehended the violation of clauses regulating the conduct of war,

including war crimes provisions of the Hague Regulations of 1907 and the Charter itself, as well as the Charter proscription of crimes against humanity. Moreover, the Charter's providing for criminal liability of participants in a "common plan or conspiracy to commit any of the foregoing crimes" supports a prohibition of planning to commit war crimes and crimes against humanity (clauses 2 and 3) as well as waging aggressive war (clause 1). Also, Law No. 10 unambiguously prohibits participation in plans to commit any of the three offenses. The IMT Judgment's interpretation of rules set forth in the Charter, while entitled to great weight, is not conclusive. The Charter was understood by its drafters - the United States, the Soviet Union, France, and Great Britain - to set forth general principles of law. It is true that Art. 6 created IMT jurisdiction only to try accused Axis war criminals. However, the definition of crimes was deliberately framed, over Soviet objections, in general terms.[31] General statements of law obviously must be adapted to concrete circumstances in which legal controversies arise - here the controversy over deploying nuclear weapons.

Another problem the IMT Judgment poses for the inchoate crimes argument is that the Tribunal stressed the need for a finding of a concrete plan to wage war close in time to the actual waging of war or at least the aggressive employment of the threat of war, as in the case of Austria. In view of 45 years of non-use of nuclear weapons, and the

fact that the existence of strategies and capabilities does not, in itself, prove an intent to employ those strategies and capabilities, it is hard to maintain that a plan to wage nuclear war exists in the sense in which the IMT found that Hitler and his associates planned to invade neighboring countries. Hitler, the IMT found, intended to carry out his aggressive plans; the question at most was when, and how, within a relatively short period. A comparable plan, intended to be carried out and not too far removed from consummation, cannot be established for the superpowers. In addition the IMT's finding that rearmament standing alone, even where useful only for aggressive war, did not constitute illegal preparation, weakens the argument that deployment whose apparent mission is first use or first strike is itself illegal preparation for unlawful war. But there are countervailing considerations. First, as noted above, the IMT's application of the Charter to the Nazi crimes does not necessarily control how the Charter applies to different facts. Second, the superpowers on occasion have threatened resort to nuclear weapons in order to seek or achieve geopolitical objectives. Moreover, it is well established that the superpowers have mapped out various strategies and have attempted to deploy the requisite weaponry for engaging in first use or first strike. Especially in view of the scale of catastrophe that is risked, whether a nuclear war occurs next year or decades from now seems of little relevance to

assessing the plans that make that eventuality possible.

Another obstacle to reliance on the Nuremberg inchoate crimes provisions is that they have not been authoritatively affirmed since the years immediately after World War II. However, the inchoate crimes analysis is consistent in important respects with U.N. Charter provisions. The relevant history begins with a 1947 General Assembly resolution directing the International Law Commission to formulate the principles recognized in the Nuremberg Charter and IMT Judgment and to prepare a draft code of offences against the peace and security of mankind "indicating clearly the place to be accorded" the Nuremberg principles.[32] In 1950 the ILC adopted a text setting forth the Nuremberg principles which included the proscription of planning and preparation to wage a war of aggression or a war violating international agreements.[33] In 1954 the ILC adopted a draft code of offences against the peace and security of mankind.[34] The offences enumerated included:

> The preparation by the authorities of a State of the employment of armed force against another State for any purpose other than national or collective self-defence or in pursuance of a decision or recommendation of a competent organ of the United Nations.[35]

The project of establishing a code of offences against peace and security, while still active, has not yet been completed. For years it was mired in disputes over the definition of aggression. That difficulty then was removed by the 1974 General Assembly "Definition of Aggression"

resolution.[36] The resolution contained, however, no reference to inchoate crimes; it focused on acts of aggression such as invasion, bombardment, and blockade amounting to "use of armed force by a State against the sovereignty, territorial integrity or political independence of another State." The definition in place, the ILC began again to draft a code of offenses against peace and security. The draft "provisionally adopted" by the ILC at its 1989 session follows the "Definition of Aggression" resolution in prohibiting aggression as a crime against peace.[37] No reference is made to planning and preparation. The draft also prohibits "threat of aggression" as a crime against peace, similarly omitting those elements. The prohibition reads:

> Threat of aggression consisting of declarations, communications, demonstrations of force or any other measures which would give good reason to the Government of a State to believe that aggression is being seriously contemplated against that State.[38]

The ILC has continued to acknowledge the Nuremberg principles as an accepted part of international law.[39] However, since the 1950 formulation of the principles and the 1954 draft code there has been no independent reaffirmation of the Nuremberg inchoate crimes prohibitions. The proposed proscription of "threat of aggression" as a crime against peace reflects not the Nuremberg but the United Nations Charter, to which we now turn.

The U.N. Charter prohibits "threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations" (Art. 2(3)) except in self-defense against an armed attack (Art. 51). Some international lawyers have cited the prohibition of the threat of force as relevant to the problem of nuclear weapons deployment. Nonetheless, as is indicated by the ILC's proposal as to "threat of aggression," the U.N. Charter's prohibition of threat of force refers most plainly to the employment of a threat which the offending nation is evidently and imminently ready to carry out in order to achieve unlawful ends; for example, another state's renunciation of portions of its territory or change in its form of government. Indeed, that is the meaning implied by the IMT's condemnation of Germany's takeover of Austria, executed under threat of war, as an act of aggression. It also is relevant that, given the difficulty of enforcing the prohibition of use of force, amply demonstrated by the inadequate response of the United Nations to the Iran-Iraq War, the prohibition of threat of force has received relatively little attention since World War II, from either nations or scholars.

Yet the U.N. Charter prohibition of threat of force does appear relevant to the deployment of nuclear weapons, and to reinforce the Nuremberg planning and preparation prohibition, in these respects. First, it bars a threat of

imminent force to achieve unlawful ends, whether that threat is nuclear or conventional. Second, and more importantly here, it lends support to the condemnation of deployment of first-use and first-strike weapons as contrary to the Nuremberg inchoate crimes prohibition. Deployment of weapons ready for instantaneous use is a permanent threat of force against the targeted nation.[40] In the apt phrase, it is a kind of "cold war." The U.S. rationale that the threat is permissible because the weapons are deployed only for use against conventional or nuclear attack is a formally plausible invocation of the Charter provision for self-defense. But substantively it lacks persuasiveness, certainly as to deployment of first-use and first-strike weapons. Deployment aimed not at deterring but at enabling the threat of initiating and "prevailing" in nuclear war hardly seems a matter of self-defense. Because of the unique risks to humanity and the planet posed by nuclear war, first nuclear use, and certainly a first strike, seems disproportionate and aggressive even where the projected setting is one of response to conventional attack.[41] In addition, first-use and first-strike deployment dramatically increasing the risk of nuclear war also seems a threat of force contrary to the purposes of the United Nations, which include the maintenance of international peace and security (Art. 1(1)). Finally, to the extent the deployment is aimed at exerting continuous pressure, both military and economic,

upon the opposing state to alter its political doctrines and institutions, lawful relations with other nations, it is a threat of force undermining that state's political independence.

Post-World War II Treaty and Customary Law Regarding Deployment of Nuclear Weapons

A major objection to the inchoate crimes analysis is that there is no treaty or widely recognized customary rule prohibiting deployment of nuclear weapons. That point is made in the U.S. armed forces publications[42] and also by scholars such as Henri Meyrowitz and Burns Weston. Nearly 30 years ago Meyrowitz argued that there is precedent for a distinction between the illegality of use, which he affirmed with regard to most nuclear uses, and the illegality of possession.[43] That precedent is the prohibition of use of chemical and biological weapons, part of international law since the 1907 Hague Regulations and the 1925 Geneva Gas Protocol.[44] The prohibition is understood not to proscribe possession of chemical weapons, the purpose of possession being to retain the ability to threaten or engage in reprisal in the event of an illegal first use of such weapons by another nation. (The possession of biological weapons was prohibited by the 1972 Bacteriological Weapons Convention.[45])

The analogy between the international regime regulating chemical weapons and that regulating nuclear

weapons is misleading and unpersuasive for reasons already addressed.[46] Nuclear weapons are deployed as central instruments of the superpowers' geopolitical strategy; they are poised, in a variety of delivery systems, for virtually instantaneous use; and they enable the superpowers to make threats of first use and first strike, seriously increasing the risks of nuclear war. Almost nothing of the kind can be said of chemical weapons. The superpowers appear to maintain their arsenals to enable threats of retaliatory use, not as instruments of geopolitical or military strategy. But comparing nuclear with chemical weapons once again points to the need to focus, not merely on the existence of weapons of mass destruction, but on the nature of their deployment and accompanying strategies.

While the analogy to chemical weapons fails, it is true that the absence of an explicit rule prohibiting possession of nuclear weapons is reflected in the arms-control treaty regime. Evidently that regime prohibits the possession and deployment of certain categories of nuclear weapons (e.g., space-based) or of numbers of weapons beyond stated limits (e.g., the limit on number of warheads deliverable by land-based ballistic missiles). Conversely, however, it seems to recognize as lawful the possession and deployment of nuclear weapons not so regulated. Thus Meyrowitz states that the legality of deployment and threat of use inherent in deployment "results from the clearness of arms control treaties relative to the possession (or

non-possession), to the characteristics, or to the deployment of all categories of strategic nuclear missiles, each of which carries a specific threat."[47]

As to customary law, the practice of states in deploying nuclear weapons and in proclaiming that deployment to be permissible also tends to demonstrate the absence of a customary rule prohibiting deployment. Thus the West German Constitutional Court, in its 1983 denial of a request for an injunction against the stationing of Pershing II and cruise missiles in West Germany, stated that:

> the factual behaviour of nuclear powers such as the Soviet Union, the United States of America, France or Great Britain is evidence that no general usage and opinio iuris exist which create a general rule of public international law that nuclear missiles may not be held in readiness for defence purposes, especially in order to prevent an opponent, who himself has nuclear weapons, from using these.[48]

Note, however, the emphasized portion of the court's statement; it indicates that the court was not prepared to go so far as to declare deployment for purposes of threatened first use and first strike lawful.

Drawing on the practice of deployment and the elaboration of an arms-control treaty regime, Meyrowitz has created a theoretical framework out of the distinction between deployment and use. He argues that the regime of deterrence based on deployment is an accepted part of international politics and recognized implicitly, as above outlined, by international law; in contrast he insists that

a different regime, the regime of the law of war, applies to the actual use of nuclear weapons and outlaws most uses. Meyrowitz's rejection of the argument of internationalists associated with the Lawyers Committee on Nuclear Policy (he has Falk and his associates in mind) is worth quoting in full:

> Certain moralists, notably in the United States, have more difficulty in accommodating themselves to the normative disparity between deterrence and use. For them, the criminal character of an action renders equally criminal the threat of taking the action. They think accordingly that deterrence should be modeled on what the law of war permits to be done. Positive international law, however, has opted not for the concordance between deterrence and use of atomic weapons, but for contradiction. To affirm the legality of threats of nuclear deterrence, it is not necessary to recall the consensus of Geneva [at the conference on Protocol I] concerning atomic weapons. This legality results from the clearness of arms-control treaties relative to the possession (or non-possession) as to characteristics or deployment of all categories of strategic nuclear missiles, each of which carries a specific threat. This same international law which recognizes, in the order of peace, the legality of deterrence, regulates, in the order of war, the use of nuclear arms in a very restrictive way, prohibiting practically in the large majority, indeed in the quasi-totality of cases the execution of the most meaningful strategic nuclear threats.[49]

Weston similarly, though reluctantly, has adopted a distinction between deterrence and use. He writes:

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

> also a second counterforce strike as well as most tactical second strikes would fit this logic.
>
> A distinct problem with this thesis, however, is that nothing in the traditional rules of warfare prohibits the preparation, in contrast to the actual use of weapons and weapon systems. Also, it flies in the face of the deterrence doctrines which are said to have kept the peace, at least between the superpowers, for the last thirty-odd years .... [B]ecause of the widespread perception, however much open to debate, that the prevention of widespread conflict rests on nuclear deterrence and that this system is, in turn dependent on credible nuclear threat, it would be difficult to conclude that measures short of actual use would violate the humanitarian rules of armed conflict as presently understood.[50]

The Obligation to Negotiate Nuclear Disarmament in Good Faith

Evidently the fact of states' deployment of nuclear weapons in accordance with an arms-control treaty regime provides substantial support for arguments for the legality of deployment, as opposed to use, of nuclear weapons. In assessing the arguments, however, two fundamentals must be kept in mind. First, the arms-control treaties themselves recognize the need to prevent nuclear war and for nuclear disarmament. Second, neither the practice of deployment, nor the arms-control treaties, can render lawful the deployment of nuclear weapons for unlawful purposes.

As to the first point the preamble to the Limited Test Ban Treaty of 1963, reads in part as follows:

> The Governments of the United States of America, the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics, hereinafter referred to as the "Original Parties," Proclaiming as their principal aim the speediest

> possible achievement of an agreement on general and complete disarmament under strict international control in accordance with the objectives of the United Nations which would put an end to the armaments race and eliminate the incentive to the production and testing of all kinds of weapons, including nuclear weapons.
>
> Seeking to achieve the discontinuance of all test explosions of nuclear weapons for all time, determined to continue negotiations to this end, and desiring to put an end to the contamination of man's environment by radioactive substances.... Have agreed as follows ...[51]

Article VI of the Nuclear Non-Proliferation Treaty repeated the commitment to negotiation of nuclear disarmament:

> Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.[52]

The obligation to negotiate nuclear disarmament in good faith was again affirmed in the preamble of perhaps the most important of agreements limiting deployment, the Anti-Ballistic Missile Treaty:

> The United States and the Union of Soviet Socialist Republics, hereinafter referred to as the Parties,
>
> Proceeding from the premise that nuclear war would have devastating consequences for all mankind, ...
>
> Proceeding from the premise that the limitation of anti-ballistic missile systems ... would contribute to the creation of more favorable conditions for further negotiations on limiting strategic arms,
>
> Mindful of their obligations under Article VI of the Treaty of Non-Proliferation of Nuclear Weapons,
>
> Declaring their intention to achieve at the earliest possible date the cessation of the nuclear arms race and to take effective measures toward reductions in strategic arms, nuclear disarmament, and general and complete disarmament, ... have agreed as follows ...[53]

Other treaties affirm the need to prevent use that is implicit in the call for nuclear disarmament contained in the limited test ban and non-proliferation treaties. The Treaty for the Prohibition of Nuclear Weapons in Latin America contains this preambular language:

> Recalling that the United Nations General Assembly, in its Resolution 808 (IX), adopted unanimously as one of the three points of a coordinated programme of disarmament "the total prohibition of the use and manufacture of nuclear weapons and weapons of mass destruction of every type,"
>
> * * *
>
> Convinced:
>
> That the incalculable destructive power of nuclear weapons has made it imperative that the legal prohibition of war should be strictly observed in practice if the survival of civilization and of mankind itself is to be assured,
>
> That nuclear weapons, whose terrible effects are suffered, indiscriminately and inexorably, by military forces and civilian population alike, constitute, through the persistence of the radioactivity they release, an attack on the integrity of the human species and ultimately may even render the whole earth inhabitable, ...[54]

Similarly, an executive agreement between the Soviet Union and the United States, "Agreement on the Prevention of Nuclear War," setting forth commitments to avoid confrontations that risk use of nuclear weapons, stated in its preamble:

> The United States and the Union of Soviet Socialist Republics ...
>
> Conscious that nuclear war would have devastating consequences for mankind,

> Proceeding from the desire to bring about conditions in which the danger of an outbreak of nuclear war anywhere in the world would be reduced and ultimately eliminated, ...[55]

The statement that "nuclear war would have devastating consequences for mankind," was repeated in the Intermediate Nuclear Forces Treaty concluded by the superpowers in 1988.[56] The treaty also stated that the United States and the Soviet Union were "mindful of their obligations under Article VI" of the Non-Proliferation Treaty.

In view of the fact that the conclusion of these and other agreements has been accompanied by ever-increasing deployment of nuclear weapons, in both kind and number, it is easy to dismiss statements of the need for nuclear disarmament and prevention of nuclear use as mere rhetorical adornments largely confined to preambular statements. That is not a correct understanding for at least this reason: The obligation to negotiate nuclear disarmament is set forth in Article VI of the Non-Proliferation Treaties, a substantive clause of a multilateral treaty central to the global arms-control regime. Moreover, the treaty's negotiating history demonstrates that Article VI was not a mere formal addition of pleasing language. Rather it was part of a bargain between the nuclear and non-nuclear powers at the heart of the treaty - if the nuclears disarmed, the non-nuclears would refrain from acquiring nuclear weapons.

As the U.S. Arms Control and Disarmament Agency explained:

> Throughout the negotiations most nonnuclear states held that their renunciation of nuclear weapons should be accomplished by a commitment on the part of the nuclear powers to reduce their nuclear arsenals and to make progress on measures of comprehensive disarmament.[57]

Since the NPT has been in force, non-nuclear powers have continued to emphasize the nuclear powers' obligation to negotiate nuclear disarmament, maintaining that the 25-year renewal of the treaty is contingent upon the fulfillment of that obligation. The Arms Control and Disarmament Agency describes this position as follows:

> While the nonnuclear-weapon states have welcomed the SALT talks and agreements reached to date, they have noted that the number of nuclear weapons has increased on both sides since the NPT came into force. A Comprehensive Test Ban Treaty prohibiting the testing of nuclear explosives is viewed by many non-nuclear-weapon states as a sine qua non for preventing the emergence of additional nuclear-weapon states and for preserving the NPT regime.[58]

The arms-control treaty regime thus in principle acknowledges the following realities and imperatives: nuclear war would be a global catastrophe; nuclear disarmament is a global imperative and a specific, affirmative obligation of nuclear powers party to the NPT; the prevention of proliferation making nuclear war more likely is dependent on the reversal of the arms race between the superpowers. Thus in rhetorical form, if not in the actuality of deployment of weapons permitted by the

treaties, the arms-control regime is consistent with the Nuremberg prohibition of planning and preparation for the commission of war crimes and crimes against humanity by waging nuclear war.

Nuclear Weapons Deployment and Peremptory Law

As to the reality of nuclear weapons deployment underlying the arm-control treaties, it is true that law, oriented as it is partly to considerations of order as well as to justice, is strongly pulled in the direction of sanctioning the conduct of states. That lends force to the argument that deployment is not contrary to customary law because that law is based on the practices of states regarded by states as lawful. The argument does not render the Nuremberg prohibition of planning and preparation irrelevant, however, for two reasons.

First, Nuremberg law, also is unquestionably part of customary law.[59] It, too, is based upon the practices and views of states, that is, the Charter, the trials of Nazi leaders, and the subsequent formal approval of the Charter and IMT Judgment by the United Nations. While states that deploy nuclear weapons obviously do not condemn the deployment as contrary to Nuremberg law, that stance recently has been declared by the U.N. Committee on Human Rights.[60] The Committee stated that "the production, testing, possession development and use of nuclear weapons should be prohibited and recognized as crimes against

humanity." U.S. citizens engaged in nonviolent opposition to nuclear weapons similarly have invoked Nuremberg law. Citizen initiatives and proclamations of international agencies, conferences, and the like traditionally have had little stature, when compared to the views and acts of states, in determining international law. Nonetheless, as Burns Weston and many others have argued, they are not without relevance to a law increasingly oriented towards individuals and a broad conception of the appropriate participants in the law-making process, especially as to problems that states often seem ill-equipped adequately to address.[61]

Second, Nuremberg law contains peremptory rules (jus cogens) that cannot be superseded either by state practice or international agreement. While the Nuremberg prohibition of inchoate crimes perhaps may not qualify, the Nuremberg offense of crimes against humanity is one of the peremptory norms. A treaty committing its signatories to the commission of crimes against humanity would be void from the outset. In that light the arms-control treaties must be understood as aimed in principle at the prevention of nuclear war and not, despite the apparent validation of deployment, as conferring any kind of legitimacy on nuclear weapons. Nor does a state practice of committing crimes against humanity demonstrate that the norm forbidding the crimes is no longer binding.[62] Because use of nuclear weapons would constitute crimes against humanity, neither

arms-control treaties nor the practice of deploying weapons may be understood as in any way making nuclear use permissible. On the contrary, the peremptory prohibition of the use of nuclear weapons renders the legality of deployment in contemplation of their use, especially first use, highly questionable. Here it is relevant that the proscription of crimes against humanity applies in time of peace as well as war.[63] For that and other reasons, deployment that increases risk of nuclear war seems condemnable as threatened crimes against humanity.[64]

This reasoning is consonant with the reluctance wholeheartedly to endorse deployment as legal as a matter of customary law in the West German Constitutional Court's statement that "defensive" deployment, especially for the purpose of preventing another state's nuclear use, is permissible. The court thus left open the question of the legality of deployment for the purpose of threatening or engaging in first use or first strike. The court's opinion therefore is consistent with the argument that such deployment is contrary to the Nuremberg prohibition of planning and preparation for the international crimes.

Legality of Deployment: Summary and Implications

The foregoing analysis can now be summarized. The most compelling argument in favor of condemning deployment as contrary to the Nuremberg prohibition is its acute relevance to the reality of superpower deployment that

enables threats of first use and first strike and accordingly risks precipitating nuclear war. Against the argument must be balanced a number of considerations, not necessarily decisive but certainly relevant: the IMT in applying the Charter required a concrete plan to engage in aggressive war, and excluded war crimes and crimes against humanity from the scope of the illegal planning; the Nuremberg prohibition of inchoate crimes has not solidly been built into the structure of international law since Nuremberg; arms-control treaties and the practice of deployment provide some support for the legality of deployment; deterrence - especially retaliatory deterrence aimed at preventing another power's first use - can be distinguished from actual use of nuclear weapons, as illustrated by the international regime that prohibits use but permits possession of chemical weapons.

To those considerations must be added another not yet mentioned. Nuremberg law concerns the commission of international <u>crimes</u>. While characterization of deployment of nuclear weapons as criminal answers to a need for intense moral condemnation of the prospect of nuclear war, it also can have a rhetorical, hollow, ring in the absence of international or national institutions presently capable of or committed to the prosecution of inchoate crimes. In the United States, in addition to the current lack of political will to undertake that task, it seems doubtful, absent statutes so providing, that U.S. nationals in fact

are now subject to prosecution for Nuremberg inchoate crimes.[65] Moreover, their proof is inherently difficult. Accordingly, as Yoram Dinstein has noted with respect to crimes against peace, "it is not easy to contemplate indictment and prosecution of persons accused only of conspiracy, planning and preparation for aggression, when the war is a matter of conjecture and not of historical record."[66]

In light of those competing considerations, especially the last-mentioned one, it is preferable, in the context of nuclear weapons deployment (though not actual use) to think of the Nuremberg prohibition of planning and preparation for international crimes not merely as an applicable rule of criminal law, but also as a more general element of international law imposing an obligation not to plan and prepare for nuclear war. As Frank Newman has observed in another context:

> [A] main contribution of the relevant [international] criminal law is its proscribing of illegal conduct. What does that mean? It means that nearly all conduct proscribed in terms of criminal responsibility is also proscribed in terms of civil responsibility, civil liability, etc.
>
> Why is that important? For many reasons. A crucial fact is that too many people, once the word "Nuremberg" is mentioned for example, immediately begin discussing criminal intent, proof beyond a reasonable doubt and related concepts of penal law. Because those topics are labyrinthine, we tend to forget that governments and government officials may well have committed illegal acts whether or not the acts also were criminal.

> That is exactly what happened, for example, in numerous discussions of "Nuremberg and Vietnam". The cost to human rights law was not that possibly guilty individuals escaped prosecution. The greater cost was that, too often, all the talk of criminality left undiscussed and unsettled the basic issues as to whether the new and brutal techniques of warfare that were used in Vietnam were illegal or not.
>
> When issues as momentous as those are left undiscussed and unsettled (and there are many parallels to Vietnam), progress in civil and political rights is not encouraged.[67]

As Newman's remarks suggest, it does matter that Nuremberg law imposes an obligation, whether or not feasibly enforceable as criminal law, that governments not plan and prepare for nuclear war. The obligation supports national initiatives, popular or official, to implement its mandate, for example, the enactment of federal statutes forbidding planning and preparing or initiating first resort to nuclear weapons. At the international level, the obligation mandates the rejection of the threatened use of nuclear weapons as an instrument of foreign policy. It requires (1) the adoption of a no first-use policy, both as a matter of declared strategy and as a matter of actual deployment of weapons systems,[68] (2) the adoption of a posture of minimal retaliatory deterrence[69] as a <u>transition</u> to a denuclearized world, and (3) the eventual achievement of denuclearization. The Soviet and Chinese pledges of no first use are steps in the right direction.[70] A further implication is that despiralling the arms race in the direction of denuclearization must go hand in hand with

strengthening the capability of international institutions to resolve disputes, so as to minimize the occasions for armed conflict in which nuclear weapons might be used.[71]

This view of Nuremberg law is wholly consistent with the commitment the nuclear powers have made in arms-control treaties to prevent nuclear war and negotiate nuclear disarmament. It is also supported by a recent trend in scholarly analysis. In response to two salient features of international law - first, the difficulty of its enforcement and the related willingness of governments to ignore or distort it in pursuing their ends, and second, the fact that government nonetheless do pervasively articulate and guide their decisions and actions with reference to international law - scholars, notably Francis Boyle, have developed an analysis focussing on relative degrees of illegality.[72] In this approach it is argued that while governments in fact may violate international law they also are restrained by it, so that the "least illegal" course of action may be taken. An example is that during the Cuban missile crisis the United States defined the Soviet action as a breach of regional security requiring a response by the regional alliance, the Organization of American States, and not as a use of armed force to which self-defense was a legitimate response under Article 51 of the United Nations Charter.[73] The United States also implemented a "quarantine" of Cuba, i.e. an inspection of Soviet ships headed for Cuba to ensure they contained no

missiles, as opposed to a full blockade, or airstrike or invasion. The choice of quarantine may have been influenced by the legal definition of the situation.[74] While the U.S. resort to the Organization of American States to legitimize the quarantine, and the quarantine itself, are of doubtful legality under the United Nations Charter, nonetheless, it is argued, the United States did not choose to justify its actions in terms contemptuous of the Charter (i.e., self-defence against an armed attack), and it chose the least aggressive military option available.[75] In short, the argument is that the United States took the "least illegal" course, thereby lowering the risk of nuclear war with the Soviet Union.[76]

Boyle contrasts this mode of analysis, which he labels "functionalist," with a dichotomous, "positivist" mode in which government actions are said to be either legal or illegal under clearly defined international rules. He writes:

> [I]nternational legal positivism impedes the ability of an analyst to comprehend and operationalize the undeniable fact of international political life that in real-world situations, and especially in times of international crisis, government decisions makers must often choose the least bad as good.... Rejecting the typical legal positivist approach to international relations, this author would like to postulate the existence of a spectrum of incremental degrees in legality or illegality for the purpose of analyzing international political behavior.
>
> ... A functionalist analysis could indicate to government decision makers that some contemplated policies are better or worse than others; that some proposed policies should be rejected out of hand; and that other policy options should be vigorously pursued. A functionalist analysis would enable

> government decision makers to select that policy or combination of policies which could move their decision-making process along this incremental spectrum of legality/illegality in the direction away from egregious illegality and towards perfect legality.[77]

The "functionalist" analysis can be applied to the issues of nuclear use and deployment. Most contemplated uses of nuclear weapons are illegal, indeed criminal, as a matter of positive law; a "positivist" analysis is quite adequate. Deployment of nuclear weapons in general cannot be said to be so plainly illegal as a matter of positive law. However, deployment for the purpose of enabling threats and possible resort to first use and first strike, though only arguably criminal, is contrary to international law, notably the Nuremberg prohibition of planning and preparation for international crimes. Accordingly, governments are under an obligation, as an element of the enterprise of constructing a more rational and law-governed international order, to render their nuclear weapons policies less illegal, first, by deploying weapons and negotiating treaties so that nuclear postures serve only the purpose of retaliatory deterrence (that is, threatened second use); and second, by eventually reducing nuclear arsenals to extremely minimal or zero levels.

CHAPTER THREE

NUREMBERG LAW IN PHILOSOPHICAL AND HISTORICAL PERSPECTIVE

To this point I have analyzed the grave issues posed by use and deployment of nuclear weapons within the framework of international law with a particular focus on Nuremberg law. The first conclusion is that most contemplated uses of nuclear weapons would constitute war crimes and crimes against humanity and, possibly, genocide. The second is that nuclear weapons powers are obligated to negotiate and otherwise achieve nuclear disarmament. Most urgently, they are obligated to negotiate and otherwise achieve the disarming of first strike and first use nuclear weapons.

The conclusions, though well-founded, are contestable and have indeed been contested. It is therefore appropriate to consider arguments for the conclusions going beyond the normal framework of legal reasoning. Two types of argumentation come into play: first, an appeal to universally applicable principles of justice or natural law; second, an appeal to history and specifically to recent momentous developments including World War II, the Nuremberg trials, the formation of the United Nations, and the advent of nuclear weapons, as demonstrating that adherence to a strengthened international law is now both possible and necessary. Since the critical view of nuclear weapons relies heavily on Nuremberg law, we begin with

justifications offered for the Nuremberg trials. The secure place of Nuremberg law within international law has already been described, mostly with reference to legal considerations.[1] That description can now be reinforced by considering the claims of Nuremberg law on our thinking as a matter of justice and of history.

The Dialectic of Legality and Justice

The enunciation and application of the Nuremberg principles, and their subsequent approval by the United Nations, were animated by a sense that the principles articulate an underlying universal justice applicable to all nations and to individuals acting on their behalf. Because the trial of the major criminals before the International Military Tribunal was a legal proceeding, the emphasis necessarily was on the discernment and formulation of legal standards by which conduct was judged. This was especially so in view of the desire to refute the charge that certain aspects of the offenses charged, especially that of individual responsibility for governmental acts of aggression, as well as offenses of planning and waging aggressive war (the crime against peace) and the systematic harming of one's own nationals (included in the crime against humanity), were new developments of which defendants had no proper notice. Nonetheless the appeal to an underlying sense of justice was clearly evident in the pioneering work of Robert Jackson, chief advocate for the

U.S. view of the basic architecture of the Charter of the International Military Tribunal, a view eventually accepted by the other Allies. In a report submitted while drafting the Charter was still underway, he stated that "pitfalls" of "doctrinal disputes" and "voluminous particulars of wrongs committed by individual Germans" could be avoided,

> if our test of what legally is crime gives recognition to those things which fundamentally outraged the conscience of the American people and brought them finally to the conviction that their own liberty and civilization could not persist in the same world with the Nazi power.
>
> Those acts which offended the conscience of our people were criminal by standards generally accepted in all civilized countries, and I believe that we may proceed to punish those responsible in full accord with both our own traditions of fairness and with standards of just conduct which have been internationally accepted. I think also that through these trials we should be able to establish that a process of retribution by law awaits those who in the future similarly attack civilization. Before stating these offenses in legal terms and concepts, let me recall what it was that affronted the sense of justice of our people.[2]

Similarly, concluding his opening remarks to the Tribunal, Jackson stated:

> The refuge of the defendants can be only their hope that international law will lag so far behind the moral sense of mankind that conduct which is crime in the moral sense must be regarded as innocent in law.
>
> Civilization asks whether law is so laggard as to be utterly helpless to deal with crimes of this magnitude by criminals of this order of importance.[3]

Not surprisingly, given the concern for projecting an aura of legality, the IMT was not so liberal in its references to the sense of justice underlying the enunciation and application of Nuremberg principles. Thus

it limited the scope of application of the offense, crimes against humanity, for which there was no basis in international instruments other than the Charter and yet which clearly codified an elementary requirement of justice. The Tribunal declined to apply the prohibition of crimes against humanity to acts conceded to be "revolting and horrible" but committed before the onset of the war, and it generally characterized acts committed after the war as war crimes as well as crimes against humanity.[4] Despite its commitment to depiction of the proceeding as an application of pre-existing law, by arguing that the failure of treaties to impose individual liability for aggression (the crime against peace) did not compel the conclusion that no such liability exists, the Tribunal, both explicitly in its reference to "general principles of justice," and implicitly in its invocation of law able to adapt to changed circumstances, referred as follows to the underlying sense of justice:

> 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 practised by military courts. This law is not static, but by continual adaptation follows the needs of a changing world.[5]

The U.S. tribunal in The Justice Case,[6] one of the subsequent trials of major war criminals, was more forthcoming in acknowledging the weight of underlying principles of justice. In that case high officials in the Ministry of Justice, public prosecutors, and judges were

convicted of war crimes and crimes against humanity for enforcement of Nazi law and policy mandating religious and ethnic prosecution and extermination of Jews and Poles, and secret trials, maltreatment, and murder of civilians in occupied territories who resisted German forces.

Undoubtedly because jurists were on trial, the tribunal was especially concerned to establish the legality of the proceeding. Like the IMT, the tribunal sought to show that the law to be applied was largely a codification of pre-existing international law. However, it was implicitly acknowledged that certain of the crimes against humanity charged, those involving persecution of German nationals, did not preexist the Nuremberg trials. As to those, the tribunal observed that the law creating its jurisdiction, Control Council Law No. 10, duly enacted by the four powers that had assumed authority within defeated Germany, was a sufficient basis for the proceeding.[7] It also stated that "justification [of Law No. 10] must ultimately depend upon accepted principles of justice and morality, and we are not content to treat the statute as a mere rule of thumb to be blindly applied."[8] One such principle, the tribunal noted, requires that defendants have adequate notice of crimes with which they are charged. In international law, the tribunal stated:

> that principle requires proof before conviction that the accused knew or should have known that in matters of international concern he was guilty of participation in a nationally organized system of injustice and persecution shocking to the moral sense of mankind, and that he knew or should have known that he would be subject to punishment if caught.[9]

The tribunal found that notice was provided inter alia by the Allies' repeated warnings of retribution.[10] Yet it seems clear that the real finding was that the acts proved as crimes against humanity were so inherently wrongful that notice must be presumed. "Whether or not [atrocities against German nationals] constitute technical violations of laws and customs of war," the tribunal stated, "they were acts of such scope and malevolence, and they so clearly imperiled the peace of the world that they must be deemed to have become violations of international law."[11]

It is the invocation of the demands of justice by Jackson and by The Justice Case tribunal, and not the IMT's depiction of its trial as founded on law pre-existing the Charter, that best captures the nature of the Nuremberg trials. The legal bases aside from the Charter and Law No. 10 for international criminal proceedings were doubtful, certainly as to crimes against peace and crimes against humanity. Indeed, that is so even as to war crimes. Prior to Nuremberg those crimes had been adjudicated by national tribunals with respect to members of the armed forces of opposing or defeated nations typically charged with individual acts of pillage, rape, killing of prisoners,

espionage, etc., and not with the formulation or execution of policy.[12] Prosecutors and judges in Nuremberg trials sought to portray the proceedings as not unprecedented but based on law giving defendants adequate notice of potential criminal liability; and defendants, with reason, vigorously contested this portrayal. But viewed from a distance and not from the perspective of those concerned to establish the consistency with principles of legality, the issue of notice of potential criminal liability is a secondary consideration as to crimes against humanity and systemic war crimes. The argument that defendants did not know they might be convicted for acts of such magnitude pales in comparison to the judgment that they must have known or be presumed to have known that such acts were gravely wrong and accordingly punishable.

The issue of notice is perhaps more troubling regarding the charge of planning and waging aggressive war. The fact of aggression, however, was plain; the Nazis had no plausible pretexts, e.g. self-defense or recovery of stolen territory. Moreover, aggressive war was planned and waged in conjunction with condemnable policies of extermination and racial domination.

In short, in view of evils committed by the Nazis, justice demanded that they be brought to account regardless of precedent or whether they had adequate notice of potential liability.[13] If the trials had been conducted unfairly the significance of the calling to account would

have been undermined. But in fact they were conducted fairly. Convictions were based on facts duly established in court, and defendants were given adequate opportunity to refute the prosecution on both facts and law.

Most will concede the appropriateness of judging Nazis under principles which at bottom represented the requirements of universal justice. That does not settle the issue of the significance of the principles in assessing state conduct since World War II. If the IMT and subsequent trials are seen as virtually unique, the relevance of the principles is minimized and their legal status called into question. The isolating of the Nuremberg episode was not, however, the intent of many who framed the Charter and Law No. 10 and conducted the trials. Participants were highly cognizant of the historical opportunity afforded by the disturbance of the international order caused by World War II for its reformation. They also understood the Charter and Law No. 10 as an essential aspect of that reformation.

Jackson, in a report submitted prior to negotiation of the Charter, remarked on the opportunity presented by the prevailing international disorder:

> Any legal position asserted on behalf of the United States will have considerable significance in the future evolution of International Law. In untroubled times, progress toward an effective rule of law in the international community is slow indeed. Inertia rests more heavily upon the society of nations than upon any other society. Now we stand at one of those rare moments when the thought and institutions and habits of the world have been shaken by the impact of world war on the lives of countless millions. Such

> occasions rarely come and quickly pass. We are put under a heavy responsibility to see that our behavior during this unsettled period will direct the world's thought toward a firmer enforcement of the laws of international conduct, so as to make war less attractive to those who have governments and the destinies of people in their power.[14]

In his opening address to the IMT, Jackson described the trial as part of the effort to reconstitute the international order:

> The usefulness of this effort to do justice is not to be measured by considering the law or your judgment in isolation. This trial is part of the great effort to make the peace more secure. One step in this direction is the United Nations Organization, which may take joint political action to prevent war if possible, and joint military action to insure that any nation which starts a war will lose it. This charter and this trial, implementing the Kellogg-Briand Pact, constitute another step in the same direction - juridical action of a kind to insure that those who start a war will pay for it personally.[15]

The trials of the Nazis thus were justified in two ways: as an application of universally applicable principles of justice, and as the exploitation of exceptional historical circumstances to institute a more just and secure international order.

The vindication of the relevance of Nuremberg and other international law to the threat of nuclear weapons parallels that justification of the Nuremberg trials. The threat is assessed in light of an overriding morality, reflecting a conception of the ideal of peace as imposing severe restrictions, universally applicable, upon the resort to war and the means of warfare. It also is seen as a new political circumstance that invites and demands the

development of an international order that institutionalizes the ideal of peace.

The Enlightenment Conception of the Ideal of Peace

The ideal of peace received its modern philosophical articulation by 18th-century Enlightenment figures such as Emmerich de Vattel, a founder of modern international law, Jean Jacques Rousseau, Immanuel Kant, and others. In his Humanity in Warfare, Geoffrey Best depicted what he labels the "Enlightenment consensus."[16] The ideal of peace governs both the aims of war and means for waging it. The aims must ultimately be founded on protecting a nation's security; the means must be limited to the attainment of those ends. Thus Vattel held that "[n]ecessity alone justifies Nations in going to war; and they should all refrain from, and as a matter of duty oppose, whatever tends to render war more disastrous."[17] Stated explicitly in the writings of Enlightenment figures were the principles of law now known as the proportionality and civilian immunity. Quoting Vattel, Best summarizes the jus in bello as stated in the 18th century as follows:

> a mixture of, on the one side, prohibitions of acts which are 'essentially unlawful and obnoxious' such as 'the massacre of an enemy who has surrendered and from whom there is nothing to fear', acts which 'in [their] own nature and independently of circumstances, contribute nothing to the success of our arms and neither increase our strength nor weaken the enemy', and, on the other, permission or at any rate toleration of every act of force against enemy persons or property 'which in its essential nature is adapted to attaining the

> end of the war, [not stopping] to consider whether the act is unnecessary, useless, or superfluous in a given case unless there is the clearest evidence that an exception would have been made in that instance...."[18]

The prohibition of violence against an enemy "from whom there is nothing to fear" reflects the underlying principle of civilian and, more generally, noncombatant immunity. Thus Vattel held that there is no right of violence against "enemies who offer no resistance," meaning "in general all unarmed people."[19] The sanctioning of violence "adapted to attaining the end of the war" in accordance with military necessity implies that acts not so adapted are proscribed, in accordance with the principle of proportionality.

The Enlightenment view that war is justified only when it protects a nation's security rules out many other rationales, including oft-invoked ones of ideology, glory, and expansion of national political or economic power.[20] Nonetheless, in the setting of often hostile relations among sovereign nations, the view tolerates purported justification of war in many circumstances. Kant's discussion well illustrates the point. Unlike contemporaries concerned more with limiting the ravages of war than with its abolition, Kant truly abhorred it and advocated reformation of the international order to make possible "perpetual peace." Yet he felt compelled to concede that, absent a reformed international order, war could be justified under a variety of circumstances. In A Strategy for Peace, which argues the relevance of Kant's

moral philosophy to the nuclear situation, Sissela Bok states that "Erasmus, Kant, and other advocates of projects for lasting peace were once among the few who held self-defense to be the only legitimate reason for a nation's engaging in war".[21] This contention seems correct as to Perpetual Peace, an essay Kant wrote late in his life. There Kant prescribes principles for nations to follow within, or as a means of developing, a condition of "international right" among nations associated in a "federation of free states."[22] Unlike Vattel and other international lawyers who sought to explicate the jus gentium, the law of nations, Kant believed these principles to be justified on moral grounds, not because they were found in an international law which he believed illusory. His bleak assessment of relations among nations absent a world state, which he held to be impossible,[23] or the federation he advocated, is set out in The Metaphysics of Morals.

In that work Kant described relations among nations as a "state of nature" in which a state believing that it has been injured by another state cannot "gain satisfaction through legal proceedings, the only means of settling disputes in a state governed by right".[24] He depicted the state of nature as a "condition devoid of right" that is "one of war (the right of the stronger), even if there is no actual war or continuous active fighting (i.e. hostilities)".[25] He outlined the permissible occasions for

resort to war in this condition as arising from another state's aggression or threats, including threats posed by "military preparations," or an "alarming increase of power," or simply superior military capability.[26] He also averred that, in the state of nature, states have "the right to maintain a balance of power" to avoid the threat posed by more powerful states.[27]

Kant's remarks reflect the endorsement given by other Enlightenment figures to preventive war and war to preserve a balance of power. For example, Vattel held justifiable, inter alia, wars to repel attacks, preventive wars aimed at "warding off a threatened danger", and, more generally, wars aimed at preserving the balance of power created by the formation of defensive alliances.[28] That Kant found the propensity to war despicable is certain:

> Although it is largely concealed by governmental constraints in law-governed civil society, the depravity of human nature is displayed without disguise in the unrestricted relations which obtain between the various nations."[29]

Moreover, once a permanent and free association of nations obtained (a condition of international right), the reasons for resort to war cited by nations in the circumstance of international anarchy (the state of nature) could no longer properly be invoked. For example, the right to attack a state grown so powerful as to be perceived as threatening (endorsed in the above-quoted passage) would not be countenanced.[30] But Kant's description of relations of nations absent a federation of states, and Vattel's general

Enlightenment view endorsing preventive wars and wars aimed at preserving the balance of power, encompass justifications for war going beyond self-defense against direct attack. It bears emphasis, however, that for Enlightenment writers the sole purpose of war is the security of the attacked or threatened nation; peaceful relations among independent nations is the ideal state of affairs.[31]

The ideal of peace, moreover, is the premise for the principle that war is to be conducted so as to respect nations' independence and preserve the possibility of peace. A passage from Kant's The Metaphysics of Morals expresses the rationale for limiting the conduct of war so as to make possible a condition of international right in which independence of nations is respected within the framework of a federation of states:

> The most problematic task in international right is that of determining rights in wartime. For it is very difficult to form any conception at all of such rights and to imagine any law whatsoever in this lawless state without involving oneself in contradictions (inter arma silent leges). The only possible solution would be to conduct the war in accordance with principles which would still leave states with the possibility of abandoning the state of nature in their external relations and of entering a state of right.[32]

The principles Kant prescribes regulate the aims of wars; they must be consistent with the independence of nations. Thus in The Metaphysics of Morals Kant held that wars should not be fought to punish, exterminate, subjugate, or acquire territory. The principles also

regulate the means of warfare. "A state must not use such treacherous methods as would destroy that confidence which is required for the future establishment of a lasting peace."[33] Here Kant refers to what in light of 20th century history seem relatively innocuous tactics of espionage, employment of poisoners and assassins, and spreading of false reports. His argument, amplified in Perpetual Peace, is that states must not employ political stratagems that make the establishment of peace impossible; otherwise hostilities would continue indefinitely in a "war of extermination." He did not mention, but surely would have condemned, means of destruction that would render the conduct of civilized life during peacetime difficult or impossible. Indeed, as Sissela Bok has stressed,[34] Perpetual Peace makes observations regarding wars of extermination all too relevant to the nuclear predicament:

> [A] war of extermination, in which both parties and right itself might all be simultaneously annihilated, would allow perpetual peace only on the vast graveyard of the human race. A war of this kind and the employment of all means which might bring it about must thus be absolutely prohibited.[35]

The significance Kant ascribed to principles regulating the means of warfare is indicated by his apparent belief that a state violating those principles should lose its status as a sovereign entity. He acknowledged the generally accepted view disfavoring interference in states' internal affairs.[36] Moreover, as noted above, he required respect for the independence of

other nations as a limitation on the conduct and aims of warfare. Yet some remarks suggest that states could forfeit their immunity from outside interference by employing prohibited means of warfare:

> The attacked state is allowed to use any means of defence except those whose use would render its subjects unfit to be citizens. For if it did not observe this condition, it would render itself unfit in the eyes of international right to function as a person in relation to other states and to share equal rights with them.[37]

In addition to his endorsement of constraints on both the occasions for resort to war and the means of warfare, Kant also prescribed reforms at the international and national level that he believed to be conducive to peace. His international prescription, a federation of states committed to complying with international law, has already been mentioned. At the national level, he argued that a republican form of government would serve to diminish the likelihood of war. Exactly what he meant by "republic" is not clear.[38] However, clarity is not necessary here, for the thrust of his argument regarding the relation of the republican form of government to peace is clear. In Perpetual Peace he wrote:

> The republican constitution ... offers a prospect of attaining the desired result, i.e., a perpetual peace, and the reason for this is as follows. - If, as is inevitably the case under this constitution, the consent of the citizens is required to decide whether or not war is to be declared, it is very natural that they will have great hesitation in embarking on so dangerous an enterprise. For this would mean calling down on themselves all the miseries of war....[39]

Similarly The Metaphysics of Morals maintained that:

> [A] citizen must always be regarded as a co-legislative member of the state (i.e. not just as a means, but also as an end in himself), and he must therefore give his free consent through his representatives not only to the waging of war in general, but also to every particular declaration of war. Only under this limiting condition may the state put him to service in dangerous enterprises.[40]

The Enlightenment conception of the ideal of peace has recently been reformulated by John Rawls. Unlike the Enlightenment thinkers, Rawls eschews optimistic theological and teleological assumptions about the progress of humankind towards achievement of the ideal. Rather he defends it as the product of contractarian reasoning that yields principles of justice among nations. He holds that such reasoning justifies the conclusions that nations have a right of "self-determination" and "a right of self-defense against attack, including the right to form defensive alliances to protect this right"; that "even in a just war certain forms of violence are strictly inadmissible"; and that

> [t]he aim of war is a just peace, and therefore the means employed must not destroy the possibility of peace or encourage a contempt for human life that puts the safety of ourselves and of mankind in jeopardy.[41]

While "at least some" of the principles of justice among nations "presumably" are embodied in treaties,[42] they are standards for evaluation of a state's conduct whether or not recognized by nations as binding law. As stated in the passage above, constraints on the conduct of warfare

serve to preserve the possibility of peace and maintain respect for human life. As to the latter aim, Rawls holds that the constraints promote the observance of "natural duties," for example the duty not to cause unnecessary suffering, owed others in their capacity as moral beings rather than their capacity as members of particular societies. He explains that:

> [Natural duties] hold between persons irrespective of their institutional relationships; they obtain between all as equal moral persons. In this sense the natural duties are owed not only to definite individuals, say to those cooperating together in a particular social arrangement, but to persons generally. This feature in particular suggests the propriety of the adjective "natural." One aim of the law of nations is to assure the recognition of these duties in the conduct of states. This is especially important in constraining the means used in war, assuming that, in certain circumstances anyway, wars of self-defense are justified.[43]

In short, the constraints are universally applicable; they protect persons in any historical or social circumstance.

Rawls also advances a version of Kant's argument that the advent of republican states will make war less likely. He holds that a "just state," one in which, inter alia, the liberty of its citizens is the highest value, may not resort to war except in the defense of liberty.[44] A just state, he writes:

> will aim above all to maintain and to preserve its just institutions and the conditions that make them possible. It is not moved by the desire for world power or national glory; nor does it wage war for purposes of economic gain or the acquisition of territory. These ends are contrary to the conception of justice that defines a society's legitimate interest, however prevalent they have been in the actual conduct of states.[45]

Accordingly, "[t]he basic liberty of citizens cannot be interfered with to achieve" such ends.[46] Though Rawls, unlike Kant, makes no predictions as to the extent to which these prescriptions will be observed in practice, nonetheless the implication is that a political order committed in principle to the liberty of its citizenry will in fact be less likely to engage war.

To summarize, in the Enlightenment view, as restated by Rawls, the governing ideal is one of a just peace among independent and equal nations. War is justified only in self-defense (here Rawls narrows the Enlightenment view that war is justified to protect the security of the threatened nation). War is to be conducted so as to promote the observance of natural duties towards others and to preserve the possibility of a just peace.

The evolution of international law in this century, and particularly the Nuremberg laws and trials, represent an institutionalization of the Enlightenment view of proper restrictions on the resort to and conduct of war. The International Military Tribunal's conviction of high Nazi officials for the crime of peace embodied the judgment that

their initiation of war could not be justified by considerations of self-defense or the security of the German nation. More generally, the codification of crimes against peace and its application in the trials of major war criminals, while not defining aggression, clearly signalled that wars are not to be fought for national aggrandizement or ideological reasons.

Convictions for war crimes and crimes against humanity committed against enemy nationals represented the judgment that the means of warfare are subject to fundamental limits. Convictions for crimes against humanity against German nationals and the nationals of non-belligerent states did represent an innovation within the Enlightenment framework, which disfavored intrusion into the internal affairs of nations. The convictions are, however, supported by the mandate to respect human life even in wartime; they are supported also by Kant's suggestion that states' employment of certain means of warfare may render them "unfit in the eyes of international right to function as a person in relation to other states."[47]

Further, other elements of current international law also represent codifications of the Enlightenment view. Restrictions on the conduct of war are contained in the 1907 Hague Land Warfare Regulations[48] and the Geneva Protocols[49]; the humanitarian protections for prisoners, wounded combatants, and civilians in occupied territory

provided by the Geneva Conventions[50]; and the prohibition of intentional destruction of national, racial, and other groups in the Genocide Convention.[51] Restrictions on resort to war are contained in the United Nations Charter[52], which generally requires the peaceful resolution of international disputes[53] and prohibits threat or use of force against the political independence or territorial integrity of another state except in self defense.[54] Indeed, the Charter may be understood as the framework for the federation of states which Kant believed to be the basic condition, short of a world state, enabling a regime of international right in which nations abide by international law.

In summary, present-day law encompasses a codification of principles and constraints prescribed by the ideal of peace. The critique of the superpowers' nuclear weapons policies as contrary to international law, particularly Nuremberg law, is accordingly also an invocation of that ideal, particularly its prescription that war is to be conducted in ways that respect life and preserve the possibility of a civilized peace.

The Ideal of Peace in the Nuclear Era

The significance of the invocation of a philosophical conception in support of the critical view of nuclear weapons can of course be contested. One can deny that nuclear weapons deployment or use is inconsistent with the ideal of peace. For instance, it can be argued that

deployment of the weapons or their use under certain circumstances is essential to protecting a nation's security and thus authorized by the Enlightenment view. That argument goes to the complicated issues of strategies and potential consequences connected with nuclear weapons deployment and use. It already has been aired and rejected, particularly as to first use and the deployment of first-use and first-strike weapons, in previous chapters.

Other possible arguments partially or comprehensively deny that nations should follow principles prescribed by Enlightenment conceptions. A commonly advanced partial denial concerns the justification for resort to war. In the Enlightenment view invocation of ideology to justify war is ruled out; self-defense or, more broadly, protection of a nation's security is the only permissible rationale for war. The invocation of ideology also was rejected by the International Military Tribunal in its repudiation of the notion of total war and is inconsistent with the United Nations Charter authorization of self-defense to protect a nation's territorial integrity and political independence. Against the Enlightenment view and the requirements of current law, it has been maintained that the preservation of values associated with certain forms of political life would justify overriding constraints on warfare. More specifically, it has been argued that limited use of nuclear weapons carrying the risk of escalation to all-out

war would be warranted if necessary to the defense of liberal democracy.[55]

A comprehensive denial of the Enlightenment view on a political level is that the effects of the ideal of peace and its embodiment in international law have been relatively trivial; that the real lesson of this century is that nations can be expected to act inhumanely and aggressively; and that nations must therefore protect their security and values without regard to the putative restraints of law and the ideal of peace. The denial can be based not only on an assessment of the history and current state of international relations, but also on an alternative philosophical conception: the Hobbesian view that, in the absence of a world state, nations are necessarily in a condition of anarchy, a war of all against all.

On a philosophical level, a comprehensive objection would be that nothing entitles nuclear weapons opponents to present the Enlightenment conception of the ideal of peace as anything more than their subjective political preference.

One strategy for replying to the above-noted counterarguments would be to argue that a particular version of the Enlightenment conception of peace is correct as a matter of philosophical analysis. For example, one could defend Rawls' application of contractarian reasoning to the derivation of principles regulating conduct among

nations. If philosophical demonstration of the truth of a version of the Enlightenment conception is a feasible project, it is not one I can attempt.

A relatively simple but persuasive argument on behalf of the Enlightenment conception that can be made here is that, practically speaking, it is preferable to its alternatives. The argument, well stated by Sissela Bok, is the invocation of the potentially catastrophic consequences - in particular, nuclear war - of failure to be guided by and to institutionalize the ideal of peace.[56] Put another way, by acting as if international relations are subject to no constraints, or as if promotion of liberal democracy or Marxist-Leninist socialism or other political doctrines is the supreme criterion in decision-making, nations run far greater risks of catastrophe than they do by acting as if principles and constraints prescribed by the ideal of peace were binding. Indeed, both prospective and actual events - the devastation inflicted during World War II by both sides, the crimes against humanity and genocide committed by the Nazis, and the potential disaster of nuclear war - argue strongly for acceptance of those principles and constraints. Henri Meyrowitz had this point firmly in mind in his eloquent explanation of the basis and acute modern relevance of the principle of civilian immunity underlying the law of war and prescribed by the ideal of peace:

> The true foundation of civilian immunity is objective. It resides in the necessity of this principle, in what one could call the necessity of the long run, the necessity of beyond-war, or simply civil necessity.... [T]he principle of the immunity of civilian persons represents an indispensable barrier, which, due to its nature as a recognizable threshold, constitutes the unique means preparing civilization to survive in resisting the destructiveness, potentially unlimited, of modern war.[57]

Another response to objections to the ideal of peace is to point to the mutually supportive relationship between present-day international law and the principles prescribed by the ideal of peace. On the one hand international law, particularly as codified in the wake of World War II, testifies to a widely shared judgment that principles implied by that ideal are principles by which the conduct of nations should be measured. It therefore provides support for (though does not demonstrate) the normative desirability of the ideal. On the other hand, the consistency of post-World War II law with those principles provides support for (though does not demonstrate) the bindingness of the law. Invocation of this mutual relationship returns us, however, to assessing the significance of international law in regulating the conduct of nations. If, as skeptics maintain, its impacts are relatively trivial and the real lesson of this century is that nations can be expected to act inhumanely and aggressively, then the force of invoking of the relationship between international law and the principles of the ideal of peace is lessened.

The Nuremberg Trials: A Turning Point In Development of the International Legal Order?

The heart of the matter is whether the Nuremberg trials and the formation of the United Nations were, as Jackson claimed, a turning point in the development of the international legal order. Roberto Unger has described the elements of such turning points or constitutive moments when political regimes are formed. The moments, occurring at times of great historical disorder and transition, are crucial in the definition of ethos governing periods of apparent stability, periods during which some elements of the ethos seem to some as anomalous, even aberrational. That is the case for revolutions which restructure political and social orders. The political and legal statements of normative patterns underlying the new orders may seem irrelevant, or be pervasively ignored, during later periods of stability. Yet the statements still shape routine practices and ordinary culture prevalent during such periods. Moreover, the statements are appealed to in confronting problems and controversies arising within the context of stability and routine.[58]

Many have found Jackson's and others' understanding of the Nuremberg trials as a constitutive moment for the international order to be implausible even in the post-war turmoil and refuted by subsequent events. As has been previously noted, no international tribunal adjudicated charges of crimes of war against the Allies, notably with

respect to counter-population bombing. Nor did any tribunal address crimes against humanity committed by the Stalinist regime against Soviet citizens in years immediately preceding World War II. Indeed, the Soviets may have insisted upon defining that offense in the Charter so as to foreclose the contention that it could be so applied.[59]

No international criminal tribunal has been established since World War II, on either a temporary or permanent basis. Yet the establishment of such a tribunal was and is viewed by many supporters of the Nuremberg trials as an essential element of international order; that indeed was implied in Jackson's remarks about the historical significance of Nuremberg. Moreover, there plainly have been many occasions since World War II for the adjudication of charges of international crimes. The United Nations, seen by Jackson as the means for political implementation of principles judicially affirmed by the Nuremberg trials, similarly has failed to become the guarantor of international peace envisaged in his remarks. Though it has made contributions to the resolution or prevention of the many civil wars, wars of intervention, and other conflicts since World War II, as by the stationing of peacekeeping troops in the Middle East and elsewhere, the United Nations has never acted decisively to halt these conflicts. Moreover, though the United Nations assisted in its eventual termination, it did not act to end

the one major inter-state war comparable in scope to World War II, the Iran-Iraq conflict. One could conclude, therefore, and many have, that the Nuremberg trials were a highly unusual though warranted event, or even a mere exercise of victors' justice, rather than a formative moment in the development of an international order. In this perspective, the principles applied at Nuremberg would remain aspirational rather than binding, demands of justice rather than demands of law; or, more skeptically still, assertions of mere political preference of the victorious nations.

To the extent those objections rest on the claim that the trials were an exercise of victors' justice, they may be rejected outright. That view relies on a comparison of Nuremberg law, allegedly tainted by the Allies' occupation of an unconditionally defeated Germany, with law allegedly rendered legitimate by its application within national political orders. However, one merit of an understanding of law and other elements of national political culture as decisively formed by normative patterns set in constitutive moments is that it makes clear the dependence of law on political circumstances; namely, those circumstances prevailing when the political regime is formed. Such circumstances evidently can and do include conquest, war, social domination, and other conditions which at bottom do not serve to distinguish the application of Nuremberg law from the application of law within national orders, however

stable and accepted they may appear subsequent to their formation. Nuremberg law and law applied within national political orders must ultimately be assessed not by whether they are legitimated by insertion within an existing and stable order, but in terms of their normative desirability. Thus as international law and politics must be evaluated in light of the ideal appropriate to relations among nations - the ideal of peace - so national law and politics must be evaluated in light of ideals appropriate to the internal organization of nations, such as those of justice, democracy, or social emancipation.

However, the defense of the Nuremberg trials only partially addresses the question of whether post World War II law (including Nuremberg law) and the underlying ideal of peace form a new legal order for the relations of nations in light of which nuclear weapons policy can realistically be assessed. For it is possible to grant the rightness and legality of the Nuremberg trials and yet maintain that they represent an isolated historical episode. The assessment of the post-World War II international legal order thus raises the question of the efficacy of the United Nations and other international institutional frameworks (e.g, the Organization of American States). This question can be put: does the history of the organizations support the proposition that forms of association short of a world state can provide the institutional background for binding law? Framed another

way, does their history support Kant's view that a federation of nations could supply the foundation for an international "state of right" or a Hobbesian view that a condition of anarchy must prevail in the absence of a supranational agency with effective powers of enforcement?

Evidently the enterprise of assessing nuclear weapons policy in light of international law requires an affirmation of Kant's view and rejection of the Hobbesian view. In particular, it makes little sense to invoke Nuremberg law if there is no institutional setting in which nations take that law seriously at least as a statement of relevant standards if not as an internationally enforceable code. An attempt to support Kant's view with reference to the history and current state of international relations is beyond the scope of this essay.[60] It can be said, though, that the assessment of the Nuremberg trials and the formation of the post-World War II international legal order is in part a matter of choice. Whether a historical event is an important, constitutive moment, depends in part on how it is subsequently viewed. That must necessarily be the case for the international order which is so much less defined and structured than national orders.

For opponents of nuclear weapons, the reliance on Nuremberg and other international law is required by the great challenge of the period of relative stability and routine in the international order since World War II: the superpowers' reliance on nuclear weapons as a central

instrument of politico-military strategy. The nature of the challenge itself demands that the Nuremberg trials and the establishment of the United Nations be understood as formative events defining binding normative frameworks. The partial nature of the application of Nuremberg principles to the practice of warfare during World War II and to the crimes of totalitarianism is acknowledged but not accepted as a decisive objection to their relevance to future conduct. This is so especially in view of the fact that it is the states that together condemned the Nazis that are now primarily responsible for deploying nuclear weapons as instruments of geopolitical policy.

Thus while it is doubtful that the course of events since World II conclusively demonstrates that Nuremberg and the formation of the United Nations are a turning point in the development of the international legal order, the contention in part is that the trials and the establishment of the United Nations ought to be considered such a turning point. Consonant with a recognition that the articulation and application of law are vitally dependent on political circumstance, the practice of militant opposition to nuclear weapons may be interpreted (though not necessarily so understood by participants in protest) as an effort to create one of the political circumstances under which international law is considered binding - that is, national political communities committed to complying with that law. Without losing sight of the hard issues raised but only

partially addressed in this chapter, I now turn from the assessment of nuclear weapons policies to consider the justification for protest against nuclear weapons.

CHAPTER FOUR

THE INTERNATIONAL LAW JUSTIFICATION FOR NUCLEAR WEAPONS PROTEST

The international law justification for nonviolent direct action against nuclear weapons has two basic components: (1) condemnation of current policy as contrary to the requirements of international law and (2) vindication of protest as a proper means of upholding those requirements. The first has been the subject of this study so far; description and evaluation of the second are the task of this chapter, beginning with the Nuremberg principle of individual responsibility, widely relied on by protesters.

The Nuremberg Principle of Individual Responsibility

The Nuremberg principle of individual responsibility, narrowly stated, is that individuals are liable for the commission of or complicity in international offenses, regardless of whether their acts were required or authorized by national law or policy or a superior's order. The principle animates the Charter of the International Military Tribunal, which was enacted to authorize and govern the trial and punishment of Nazi officials for their individual acts. It provides that acts constituting offenses the Charter defines "are crimes coming within the jurisdiction of the Charter for which there shall be

individual responsibility".[1] It provides further that an individual's position as an official, or the fact that he or she acted pursuant to a command, is no shield against criminal liability.[2] Regarding crimes against humanity, which include acts against nationals of the perpetrator's nation or ally, it provides that those acts are crimes "whether or not in violation of the domestic law of the country where perpetrated."[3] Thus, as the Tribunal famously recorded, "the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state".[4]

The international duties referred to by the IMT include the duty not to be complicit in international crimes. The Charter provided that:

> Leaders, organizers, instigators and accomplices participating in the formulation or execution to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.[5]

The IMT found that clause to be applicable only to a crime against peace; its purpose, according to IMT, is to establish the responsibility of persons participating in a common plan to prepare, initiate and wage aggressive war.[6] The IMT's remarks concerning the common plan implicitly identify the elements of complicity, knowledge of and cooperation with the criminal course of conduct:

> Hitler could not make aggressive war by himself. He had to have the co-operation of statesmen, military leaders, diplomats, and business men. When they, with knowledge of his aims, gave him their co-operation, they made themselves parties to the plan he had initiated.[7]

Included among the International Law Commission's formulation of principles of law recognized in the Nuremberg Charter and IMT Judgment is the following:

> Complicity in the commission of a crime against peace, a war crime, or a crime against humanity ... is a crime under international law.[8]

The proscription of complicity was further developed in the twelve subsequent trials of major war criminals held by U.S. tribunals. Though the term "complicity" was not used it was effectively prohibited, in broad terms, by Control Council Law No. 10, the Occupied Zone ordinance authorizing subsequent trials.[9] Art. II(2) provided:

> Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this Article [crimes against peace, war crimes, crimes against humanity] if he was (a) a principal or (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission or (e) was a member of any organization or group connected with the commission of any such crime or (f) with reference to paragraph 1(a), if he held a high civil or military (including General Staff) position in Germany or one of its allies, co-belligerents or satellites, or held high position in the financial, industrial, or economic life of any such country.

In subsequent trials held pursuant to Control Council Law 10, as summarized by Richard Falk, Lee Meyrowitz and Jack Sanderson in their monograph Nuclear Weapons and International Law, the liability of "secondary leaders

turned on whether they voluntarily aided and abetted illegal acts in a situation in which they had, or should have had, adequate knowledge of the nature of these acts."[10] As Art. II(2) provided, that liability also extended to civilians not holding official position. Thus in The Flick Case German industrialists who had supported the SS politically and financially were convicted as accessories to war crimes.[11] In addition, in The Zyklon B case held before a British tribunal under the law of war (not the Charter or Law No. 10), civilians who knew or should have known that prussic acid they distributed was used in extermination programs at Auschwitz and other camps were convicted on the principle that "any civilian who is an accessory to a violation of the laws and customs of war is himself also liable as a war criminal."[12]

Those cases show that the Nuremberg and other tribunals were prepared to convict individuals who held civilian, governmental, or military positions of responsibility who had knowledge of and materially cooperated with policies entailing the commission of war crimes and crimes against humanity. Moreover, tribunals in Allied and occupied countries and also the newly constituted Federal Republic of Germany convicted Germans who did not hold positions of responsibility but who directly participated in war crimes such as killing of prisoners of war or crimes against humanity including the mass killings in death camps.[13]

The Nuremberg tribunals, though, seemed reluctant to find apparently culpable individuals in positions of responsibility complicitous in the crime against peace - planning, preparing, initiating, and waging aggressive war. In the IMT trial, though all 22 defendants were charged with crimes against peace or participation in a common plan to commit crimes against peace, only 12 were convicted on one or both of those counts. As noted in Chapter Two, the IMT acquitted Hjalmar Schacht, "the central figure in Germany's rearmament effort," on both counts on the ground that his knowledge of aggressive plans was not sufficiently demonstrated.[14] The IMT also acquitted Albert Speer, the head of Germany's armament industry during the latter part of the war, on both counts.[15] He was not involved in planning and initiating the war and, according to the U.S. judge, Francis Biddle, the IMT wanted to restrict the scope of liability for waging the war so as not to inculpate every participant, including the ordinary soldier, in the war.[16] The IMT was particularly circumspect in convicting on the common plan or conspiracy count.[17] In its analysis of the law, the IMT treated the counts of participation in a common plan or conspiracy to commit the crime against peace and the crime itself, which includes elements of planning and preparation, as essentially identical.[18] Yet in assessing the guilt of individuals, the IMT required a close connection with Hitler to convict on the common plan and conspiracy count. All defendants were charged on that

count, but the IMT convicted only eight. As Telford Taylor summarizes:

> All were either close personal or Party confidants of Hitler (Goering, Hess, Ribbentrop, and Rosenberg) or were top military or diplomatic figures who were privy to the most secret plans and attended conferences where Hitler personally revealed his intentions (Goering, Ribbentrop, Keitel, Raeder, Jodl and von Neurath).[19]

In the 12 U.S.-conducted subsequent trials of major war criminals, in only one case, The Ministries Case, were there convictions for the crime against peace,[20] and the tribunal refused to convict on the common plan and conspiracy count.[21] In The High Command Case[22], the tribunal took a very restrictive view of the scope of the crime against peace in acquitting top military officers. The officers knew of the plans for aggressive war and indeed were present at planning conferences with Hitler.[23] Nonetheless, the tribunal held the officers not guilty of the crime against peace because they were "not on the policy level."[24] "Mere knowledge," the tribunal stated,

> is not sufficient to make participation even by high ranking military officers in the war criminal. It requires in addition that the possessor of such knowledge, after he acquires it shall be in a position to shape or influence the policy that brings about its initiation or its continuance after initiation, either by furthering, or by hindering or preventing it.[25]

Again, in The Farben Case,[26] where credible evidence showed that Farben had closely collaborated with Hitler and his associates in planning for and supplying the war and in exploiting industries in countries overrun by Nazis,[27] the

tribunal justified its refusal to convict directors and officers as follows:

> The defendants now before us were neither high public officials in the civil government nor high military officers. Their participation was that of followers and not leaders. If we lower the standard of participation to include them, it is difficult to find a logical place to draw the line between the guilty and the innocent among the great mass of German people. It is, of course, unthinkable that the majority of Germans should be condemned as guilty of committing crimes against peace. This would amount to a determination of collective guilt to which the corollary of mass punishment is the logical result for which there is no precedent in international law and no justification in human relations. We cannot say that a private citizen shall be placed in the position of being compelled to determine in the heat of war whether his government is right or wrong, or, if it starts right, when it turns wrong.[28]

Given those judgments it is abundantly clear that for the Nuremberg tribunals, the ordinary soldier, war-industry worker, or tax-paying civilian was well beyond the net of liability for participation in aggressive war. In the view of the tribunals, there was no act that an ordinary civilian, worker, or soldier could commit that would constitute a crime against peace. The crime was exclusively one of policy-making.

To summarize: Individuals may be criminally liable for the commission of or complicity in international crimes; knowledgeable and material cooperation in war crimes and crimes against humanity by individuals in positions of public or private responsibility constitutes complicity; culpability for planning and waging aggressive wars (crimes against peace) is limited to individuals

involved in policy-making at the highest levels of the government.

An argument on behalf of nuclear weapons protesters does not automatically follow. To be sure, the recognition of individuals' duties under international criminal law implies the right to refuse to engage in a course of conduct, participation or complicity in international crimes, that may expose one to criminal liability.[29] Indeed "the Nuremberg rule that obedience to superior orders is not a defense is recognized in [U.S.] military law."[30] Individuals thus have a right to terminate or avoid criminal liability by refusing to obey unlawful orders and otherwise acting to extinguish their complicity. That conclusion is not without relevance to use of nuclear weapons: a military officer has a right to refuse to obey an order to employ nuclear weapons in violation of the law of war.[31]

The right to extinguish complicity does not, though, justify citizens' affirmative acts of protest against criminal policies, for Nuremberg law is clear that the scope of liability for such policies does not extend to mere citizens. The precedents would support prosecution and conviction of those who knowingly participate on any level in the commission of war crimes or crimes against humanity by use of nuclear weapons. The liability might extend as well to those who had participated in their design, production, and deployment. What the precedents

refute is any contention that ordinary citizens could be found liable for policies of extermination, aggression, or employment of indiscriminate means of warfare by use or preparation for use of nuclear weapons. Liability for a policy of aggression was restricted to Hitler's inner circle; liability for war crimes and crimes against humanity was restricted to those who actually committed the prohibited acts, including ordinary soldiers, or those in public or private positions of responsibility who were complicitous in the criminal policies or acts. Consequently, the right to terminate one's criminal complicity does not, standing alone, authorize acts of protest by citizens not involved in the formulation and execution of nuclear weapons policy.

In one of the cases discussed in the Introduction, United States v. Montgomery,[32] a federal court seized on this point in upholding the convictions of protesters who had hammered and poured blood on nuclear missiles. The court insisted that the Nuremberg principle of individual responsibility is applicable only where individuals are required to engage in acts contrary to international law. In that setting, the court indicated, potential criminal liability under international law would support a defense to criminal prosecution for violation of national law.[33] However, where individuals are not themselves required to act in violation of international law, they may not "voluntarily violate a criminal law and claim that

violation was required to avoid liability under international law."[34] As stated by the court, the defendants had argued that:

> their attempt to halt the manufacture of nuclear missile components, admittedly in violation of domestic law, was an effort to insulate themselves from United States nuclear military policy which defendants believe is in violation of international law.[35]

In rejecting the argument and upholding the convictions for depredation of government property, the court concluded that defendants had no potential criminal complicity to terminate, stating that:

> [t]he domestic law simply did not require defendants to do anything that could even arguably be criminal under international law. The attempt to transfer the Nuremberg defense out of context to the case before us was properly rejected by the [trial] court.[36]

The concept of complicity nonetheless points in the direction of an argument from the principle of individual responsibility on behalf of nuclear weapons protesters. As citizens and taxpayers in a mature democracy, and as participants in an advanced industrial system producing the nuclear weapons, protesters (and other citizens) bear some measure of responsibility for the actions of their government and nation. They accordingly are acting to advance the Nuremberg principle of individual responsibility by terminating their <u>political</u> complicity in nuclear weapons policy and demanding that their government fulfil its obligation to rectify the unlawful situation created by development and deployment of nuclear weapons,

especially the first-strike and first-use weapons. That assumption of responsibility is fully consonant with the crucial affirmation underlying Nuremberg law: individuals as well as nations are responsible for their actions in the international sphere, at least as to matters regulated by international criminal law. It is this affirmation, not the narrower concept of criminal liability, that lends power to protesters' invocation of the principle of individual responsibility.

Citizens' assumption of responsibility to oppose nuclear weapons policy is also supported by a body of law related to Nuremberg law, international human rights law. It is true that, as is the case with Nuremberg law, there is no provision of human rights law straightforwardly authorizing militant, nonviolent opposition to international crimes. While the relevant provisions of human rights instruments may in time be interpreted differently from comparable provisions of the U.S. Constitution, still governments are given as much or more latitude reasonably to regulate freedoms of speech and assembly as obtains in U.S. law. For example, the protection given peaceful assembly in Article 21 of the International Covenant on Civil and Political Rights[37] expressly identifies several grounds, including "national security", for governmental regulation of assembly:

> The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Consequently the significance of human rights law, at least as currently interpreted, for nuclear weapons protest consists not so much in application of specific provisions as in the altered framework it creates for assessment of the proper roles of individuals and governments in relation to fundamental matters of international concern. In developing the Nuremberg recognition of individuals as having international responsibilities, and consistent with the Nuremberg prohibition of a government's commission of crimes against humanity against its nationals, human rights law has proclaimed that individuals have internationally recognized rights as against their governments. Both the elemental prohibition of crimes against humanity and the more elevated assertion of a full panoply of rights are intrusions into the relationship between government and citizens once largely shielded by the doctrine of sovereignty.

In the Senate report on legislation implementing the Genocide Convention, itself a partial codification of the Nuremberg prohibition of crimes against humanity, the foundational role of Nuremberg law, especially the prohibition of a government's systematic crimes against its

nationals, for human rights law was acknowledged. The report stated that:

> the Nuremberg Tribunal, of which the United States was a principal architect ... gave the rule of law as applied to criminal violations of human rights a firm foundation. In November 1946, President Truman remarked that the "undisputed gain" of Nuremberg was precisely "the formal recognition that there are crimes against humanity." The tribunal was a watershed in international criminal law, as it eroded the previously accepted principle of exclusive domestic jurisdiction in the area of human rights.[38]

The insistence that individuals have internationally recognized rights against their government provides general support for the lawfulness of nonviolent though militant opposition to the commission or threatened commission of international crimes. Human rights law also recognizes the import of a rational international order. Article 28 of the Universal Declaration of Human Rights,[39] which some see as supporting the recognition of a "right to peace" and a "right to the rule of law," states:

> Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

Moreover, human rights law is built on the proposition that the safeguarding of rights of citizens against governments promotes rational social change:

> [I]t is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law ...[40]

Where citizens are nonviolently though militantly opposing the commission or threatened commission of international

crimes by their government, their conduct is consistent with the commitment of human rights law to rational social change, a rational international order and, most fundamentally, the safeguarding of individuals' life and liberty.[41]

The force of the argument that nuclear weapons protest is an assumption of responsibility to uphold law consonant with both Nuremberg and human rights law is perhaps better appreciated by considering examples from other contexts. Before World War II, neither human rights law or the principle of individual responsibility had been established in anything resembling their present form. However, the Martens Clause of the 1907 Hague Land Warfare Convention declared that the "laws of humanity and the dictates of the public conscience" regulate the conduct of nations in time of war as to matters not covered by codifications of the law of war.[42] If Germans had blocked trains carrying Jews and members of other condemned groups to the death camps, should they have been convicted of violations of German law or rather acquitted as acting to uphold the "laws of humanity and the dictates of the public conscience"? Or again, apartheid is widely condemned, has been found by the International Court of Justice to violate human rights law and the United Nations Charter,[43] has been repeatedly declared contrary to the U.N. Charter by the Security Council,[44] and has been declared by the General Assembly to be a crime against humanity.[45] Should South

African protesters assembled in violation of local law be convicted or acquitted as acting under human rights law and the Nuremberg principle of individual responsibility?[46]

Thus there are conceivable circumstances of principled confrontation with evil state conduct in which the argument that individuals prosecuted for action taken in direct opposition to that conduct should be acquitted does seem persuasive. Nuclear weapons protesters are attempting to evoke this scenario of principled confrontation with evil by measuring nuclear weapons policy against Nuremberg and other international standards and by asserting that their actions are compelled by the Nuremberg principle of individual responsibility and human rights law. In so doing they present themselves as the advocates of justice and legality, and attempt to place courts that convict them in the position of collaborating with governmental policies so wrongful as to merit comparison with Nazi atrocities.

Conviction of protesters, to be sure, is a highly attenuated form of such collaboration. If U.S. law and policy mandated judicial commission of international crimes, Nuremberg precedent would squarely support a refusal of courts to participate. In particular, The Justice Case makes clear that judges and other jurists are criminally liable for implementation of law and policy that violate international criminal law. As previously mentioned, the jurists were convicted for persecution and

extermination of Jews and Poles, and also for secret deportation, trial, murder and maltreatment of civilians in occupied territories accused of resistance to German forces.[47] U.S. courts which convict protesters are not truly comparable to the German courts condemned in The Justice Case. They are not themselves implementing nuclear weapons policy; the policy itself, while a serious breach of U.S. international obligations, is only arguably criminal; and procedures by which courts handle cases involving nuclear weapons protest probably are not contrary to international law. Nonetheless, in convicting protesters, U.S. courts inevitably are implicated, if only indirectly, in the policy that protesters oppose. Accordingly, in offering an international law defense, protesters are inviting courts to join them in terminating political, if not strictly legal, complicity in preparing for the commission of international crimes.

Nuclear Weapons Protest and the Liberal Conception of Civil Disobedience

So far I have focussed on protesters' invocation of the Nuremberg principle of individual responsibility. The field of inquiry can now be widened to consider nuclear weapons protest in relation to the prevailing liberal conception of civil disobedience. The relationship is an uneasy one. On the one hand, protesters are plainly relying upon the legitimacy of civil disobedience within

liberal political discourse as a means of attempting desirable social and political change. On the other hand, protesters also claim their acts are legally justified for reasons that are only partially captured within the received liberal understanding of civil disobedience.

In the conception advanced by prominent liberal political theorists such as John Rawls, Ronald Dworkin, and Jurgen Habermas, and widely subscribed to throughout the United States and Western Europe in the wake of civil rights and anti-Vietnam War protests, civil disobedience is primarily understood to be the deliberate violation of law in order to oppose policies or laws thought to be unjust, immoral, or so unwise as to be wrongful or evil. The objective is to draw attention dramatically and publicly to the wrongness of the policy or law opposed, and so to promote its abolition or modification in accordance with demands of justice, morality, and prudence. The action is affirmative; one seeks opportunities for deliberate violation of law, as by trespassing on military facilities in anti-Vietnam War protests or marching in violation of local ordinances in civil rights protests. While law is violated, care is taken to be civil, to be respectful of other persons and their property, and generally to act so as to encourage reasoned discourse and to convey a stance of adherence to the legal order as a whole though not the challenged law or policy. A related kind of conduct is the refusal to comply with legal directives believed to be

wrongful, such as an induction order or a law requiring the surrender of fugitive slaves. This conduct, labelled "conscientious refusal" by Rawls[48] and "integrity-based disobedience" by Dworkin,[49] is based on the desire to avoid personal complicity in injustice or evil, though it may also be associated with the desire to promote change that underlies affirmative acts of civil disobedience.

To understand this conception of civil disobedience, it must be placed within the spectrum of forms of opposition to law or policy believed wrongful. The spectrum has been clearly described by Rawls.[50] At one end are forms of opposition which do not violate law, for example a march and rally staged in accordance with local regulations. At the other end are militant forms which aim at the overturning of a political order believed to depart so pervasively from the proclaimed normative conception as to be irredeemable or to be justified by an unacceptable conception. The militant forms of opposition, including revolution, unlike civil disobedience are not predicated on an underlying adherence to the prevailing legal order and do not necessarily accept the restrictions of civility, including the principle of nonviolence or the attempt to engage public debate.

On the spectrum defined by legal forms of opposition at one end and militant forms at the other, civil disobedience lies closer to the legal forms. Law is deliberately violated in order to appeal to normative

principles underlying the legal order. The intensity of the appeal is expressed by the willingness to contravene a part of an otherwise valued legal order. Refusal to comply with legal directives in "conscientious refusal" often will be closer to militant opposition because it typically involves acts of disobedience, such as non-compliance with a draft-induction order, carrying the risk of severe sanctions.

That brief account is sufficient to highlight two important features of the prevailing liberal conception of civil disobedience. One is that it centrally involves deliberate violation of law. Rawls states that:

> The law is broken, but fidelity to law is expressed by the public and nonviolent nature of the act, by the willingness to accept the legal consequences of one's conduct.... We must pay a certain price to convince others that our actions have, in our carefully considered view, a sufficient moral basis in the political convictions of the community.[51]

Similarly, Habermas argues against proposals to "legalize" civil disobedience by extension of freedoms of speech and assembly or codification of moral justifications as defenses to criminal prosecution, stating that:

> [T]he undesirable effects of normalizing the extraordinary argues against the legalization of civil disobedience. If all personal risk is eliminated, the moral foundation of the illegal protest becomes questionable; its effectiveness as an appeal is damaged as well. Civil disobedience must remain suspended between legitimacy and legality; only then does it signal the fact that the democratic constitutional state with its legitimating constitutional principles reaches beyond their positive-legal embodiment.[52]

A tension is invoked between justice and morality, on one side, and law or social practice, on the other; between the ideal and the actual. The violation of law is intended to heighten that tension so as eventually to reduce it. While it is acknowledged that some acts of deliberate violation of law may be found lawful, as by invalidation on constitutional grounds of the allegedly violated law,[53] still the main point is that law is violated and punishment accepted so as to promote the desired change.

The second important feature is that civil disobedience is understood as characteristic and possible where a liberal democratic regime is widely accepted as worthy of allegiance by the citizenry. In Rawls' terms that is where a "reasonably just democratic regime" is established in which one may appeal to a public conception of justice;[54] in Habermas' terms, as the last quote indicates, where a "democratic constitutional state" is established in which one may appeal to "legitimating constitutional principles".[55] Thus the conception of justice or the legitimating principles are an element of the democratic regime because substantially built into the legal order and animating the allegiance of the citizenry. In those circumstances the civilly disobedient act is understood, by other citizens and the government, as an appeal to political principle, and not as an act inviting either revolt or repression. The assumption of a public conception of justice or widely accepted legitimating

principles as an element of the democratic regime stands in uneasy juxtaposition with the expectation of divergence between justice and social practice occasioning civil disobedience. Civil disobedience, then, is possible where the political order is basically acceptable, yet where a dramatic appeal to ideals contravened by social practice is capable of galvanizing desired change.

The liberal conception of civil disobedience may be contrasted with another, perhaps unfamiliar, view that also is helpful in understanding the nature of nuclear weapons protest. Strictly speaking it is not a conception of civil disobedience, certainly not as a positive phenomenon. Its basic thesis is that one ought always to act lawfully.[56] Disobedience predicated upon deliberate violation of law, as in the liberal conception, is therefore fundamentally wrong. On the surface the view might seem to express a simple-minded sort of repressive mentality, often associated with demands for rigorous prosecution and punishment of protesters and with rejection of aspirations as well as of methods of protesters.[57] A criticism of the view would be that it encourages that mentality.

Nonetheless the mandate always to act lawfully is not logically inconsistent with at least a limited endorsement of the societal aims associated with protest. It of course admits promotion of those aims within legal channels. More importantly, especially assuming that individuals are granted a certain autonomy in making judgments about what

law requires,[58] it is supportive of acts often seen as defiance or rebellion or protest. Thus if one believes a war to be unconstitutional or violative of international law, one can rightfully refuse to participate so as to avoid engaging in what are believed to be unlawful acts. Or if one takes a seat at the front of the bus or uses a public library in contravention of local practice or ordinance enjoining racial exclusion but in accordance with the Constitution or, more generally, with the idea of non-discrimination inherent in the concept of law, one again is acting lawfully. What the approach excludes is engaging affirmatively in acts which in themselves are not conceived as lawful but which are considered justified because they are believed to promote desired change. An example is trespass at a military facility in opposition to what is believed to be wrongful intervention in another country. The act of trespass is not one which any citizen may do lawfully on a proper view of the law, as is entering a public building to register to vote or sitting on an available seat in a bus. Its justification is in its desired effect of manifesting principled and intense opposition to the policy of intervention. That is the justification rejected in the "always act lawfully" approach, simply because one never should act unlawfully whatever the justification.

There is an affinity though not an exact overlay between endorsing individual judgments to engage in lawful

acts not conventionally perceived as lawful (refusing induction in an aggressive war, defying segregationist practice) and the liberal theorists' category of "conscientious refusal" or "integrity-based disobedience". There is also the recognition of liberal theorists that acts intended as deliberate violations of law may sometimes in the end be declared legal by courts. Yet the "always act lawfully" approach diverges from the liberal conception sharply in its rejection of deliberate violation of law, as in the case of trespass at a military facility. The basic tenet of the approach is that to act morally one must act lawfully. The legal order is seen as a valuable social good whose integrity must carefully be safeguarded; any intentional violation of law detracts from that integrity.

How does nuclear weapons protest justified on international law grounds relate to the above-sketched conceptions of civil disobedience? A preliminary observation is that many persons who engage in direct opposition to nuclear weapons understand their actions as instances of civil disobedience more or less accurately described by leading liberal theorists. That is, they understand their actions as deliberate violations of law aimed at promoting desired change through dramatic appeal to considerations of justice, morality, and prudence. The understanding need not be framed and often is not framed in terms of international law, by protesters or liberal theorists. Thus Habermas seems to see civilly disobedient

opposition to the deployment of Pershing II and cruise missiles as best justified by a prudential calculus concerning the likelihood of increased risk of nuclear war. Dworkin similarly describes such opposition as based on the prudential judgment that the deployment is "unwise, stupid and dangerous."[59]

But the international law justification advanced by many nuclear weapons protesters also can figure within the liberal conception of civil disobedience. Thus Rawls includes within his definition of civil disobedience acts in which local law is violated to protest foreign policy believed to be contrary to the requirements of international law. He defines civil disobedience "as a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government."[60] He elaborates as follows:

> A preliminary gloss on this definition is that it does not require that the civilly disobedient act breach the same law that is being protested. It allows for what some have called indirect as well as direct civil disobedience. And this a definition should do, as there are sometimes strong reasons for not infringing on the law or policy held to be unjust. Instead, one may disobey traffic ordinances or laws of trespass as a way of presenting one's case. Thus, if the government enacts a vague and harsh statute against treason, it would not be appropriate to commit treason as a way of objecting to it, and in any event, the penalty might be far more than one

> should reasonably be ready to accept. In other cases there is no way to violate the government's policy directly, as when it concerns foreign affairs, or affects another part of the country.[61]

In Rawls' theory the proper occasion for civilly disobedient opposition to a given foreign policy is when the policy is contrary to principles of justice among nations, some of which are assumed to be embodied in international law that nations acknowledge as binding. If it is conscientiously believed that a nation is acting contrary to those principles, acts in violation of law aimed at promoting rectification of the wrongful conduct are justified. Rawls' theory, then, accounts for the component of justification of protest that condemns nuclear weapons policy as contrary to international law and, more broadly, the ideal of peace. It does not, though, contemplate an international law basis (e.g., the Nuremberg principle of individual responsibility) for acts of protest that serves to render them lawful.

Especially in view of the placement of the ideal of peace within the conception of justice and the awareness of the centrality of that ideal to opposition to foreign policies believed wrongful, Rawls' theory provides powerful insight into the nature and meaning of nuclear weapons protest. It captures a good measure of how protesters invoking international law understand their actions. Perhaps even more so, Rawls' account, and particularly the tension built into his account between the demands of law

and the demands of justice, describes how some officials in the legal system understand nuclear weapons protests. Many judicial responses to nuclear weapons protest echo the contrast between law and justice, in effect holding that courts of law cannot consider matters which are properly before the "courts" of public opinion or history. Thus in the opinion quoted in the Introduction, Judge Clinton White stated:

> We do not mean to ignore or trivialize this country's history of civil disobedience (e.g., the Boston Tea Party, the Underground Railroad, Freedom Marches in the South, and some of the Vietnam War protests). From the perspective of history many unlawful protests may be seen as justified or even "necessary". Some have been rendered lawful by finding constitutional defects in the prohibitory enactments. But the determination that these actions were "necessary" can only made from a distance, and then not with legal precision. Unless the laws are held unconstitutional, those challenging or defying them must be prepared to bear the short-term consequences of their actions in the hope that society will benefit and that historians will look charitably upon them.[62]

What White's opinion rejects, and what Rawls' account of civil disobedience fails to capture, is the conviction experienced and advocated by many nuclear weapons protesters, that their nonviolent direct opposition to a policy believed to be unlawful and wrongful constitutes a rightful and lawful upholding of the law. As in the liberal conception of civil disobedience, these protesters see their actions as extraordinary ones vindicating demands of morality and justice ignored by the political order. Yet they also see their actions not only as a means to

promoting desired change, but also as rightful in and of themselves. The desire to have one's acts recognized as rightful translates into the desire to have one's acts recognized as proper within the shared normative language of law. One way this desire is expressed is through the invocation of the Nuremberg principle of individual responsibility. The termination of political complicity in policies believed deeply wrongful and unlawful is also conceived to be an act not violating, but upholding the law. The reliance on the principle of individual responsibility thus displays the attraction of the proposition that to act rightly is to act lawfully. Though nuclear weapons protest is not compatible with the strictures of the "always act lawfully" school of thought, due to the typically predominant intent of violating local law,[63] it is this proposition that lends power to the question rhetorically posed through the reliance on Nuremberg law and specifically on the principle of individual responsibility: how can principled confrontation with evil state conduct be declared illegal?

While not intelligible in terms of Rawls' account of civil disobedience, reliance on the principle of individual responsibility can be clarified in light of his category of militant action. In that category, acts of resistance or disruption aimed at the overturn of a political order may be premised on the view that the order's guiding normative conception is unjust or on the view that it departs

pervasively and irredeemably from a desirable normative conception.[64] The latter rationale is surely relevant to the international law justification of nuclear weapons protest. Protesters advancing the international law critique of the superpowers' nuclear weapons policies believe those policies to be comprehensively and fundamentally at odds with the international law standards to which the superpowers claim to adhere. However, these protesters (for the most part) are not calling for the overthrow of the present political order. Moreover, their methods are those Rawls attributes to civil disobedience. They are committed to principled use of means for achieving social change within the existing political order signified by the commitment to nonviolence, and the attempt is made to engage public discourse concerning the requirements of international law. Still, protesters' aspirations go beyond the objective of achieving certain substantial reforms within an already basically just society that Rawls associates with civil disobedience, and have some affinities with the category of militant action. The protesters may be understood as acting on behalf of a potential national and international political order only partially realized in the present, an order in which compliance with the basic requirements of international law is paramount. More specifically, they may be understood as acting on behalf of an international order framed by the Nuremberg Charter and trials and the formation of the

United Nations in which nations are to act - and to constitute themselves so as to be capable of acting - in accordance with the constraints and principles prescribed by the ideal of peace.

To summarize the foregoing remarks: Nuclear weapons protest justified on international law grounds represents a combination of the aspiration for the transformation of political order associated with militant action with the commitment to taking principled and publicly justifiable action within the present political order associated with civil disobedience. Against this background, the insistence that acts of direct opposition to nuclear weapons are lawful becomes more intelligible. For the acts are justified not so much within the normative framework of a presently constituted political order conceived as "nearly just", but rather within the framework of a projected national and international political order only partially realized within the present order. Nuclear weapons protesters, while of course directing the appeal for recognition of their acts as rightful and lawful to existing authorities, are invoking the symbolic participation of a possible future national political community committed to complying with basic requirements of international law and upholding the ideal of peace.

Nuclear Weapons Protest in the Courts

The foregoing understanding of nuclear weapons protest justified on international law grounds provides a useful perspective on the refusal of courts, described in the Introduction, to countenance that justification. As Martin Shapiro has insisted in Courts, courts function as an integral part of the political order.[65] In particular, they ordinarily function as part of the political order as presently constituted, and not in anticipation of any its desired future incarnations. Barring unusual historical circumstances or deep social or political divisions, courts are reluctant to facilitate or even consider fundamental challenges to the political order, including those that seek to vindicate or advance elements of the prevailing normative conception, as does the international law justification.[66] Of special relevance here is the refusal of U.S. courts to adjudicate the lawfulness of the Vietnam War in cases of prosecution for refusal of induction orders.[67] Where courts do adjudicate a basic challenge to the political order, they may support or even initiate change, as in Brown v. Board of Education.[68] But they may also come out resoundingly in favor of the status quo, as in the Dred Scott decision affirming the legality of slavery,[69] or the decision of the German constitutional court declaring the legality of Pershing II and cruise missile deployment.[70] Consistent with the reluctance to facilitate fundamental challenges to the political order,

already scarce judicial, prosecutorial, and custodial resources, a burden that can be avoided or lessened by the adoption of policies of non-prosecution or light sentencing.

The Bindingness of International Law

I now consider how courts' political response to protesters' invocation of international law has been expressed doctrinally. As noted in the Introduction, protesters' reliance on the Nuremberg principle of individual responsibility has met with little success, and none whatsoever in the federal courts. (For the most part, the human rights argument has yet to be made.) The most straightforward rejection is one which takes the invocation of the principle of individual responsibility on its own terms. In this view, advanced by the United States v. Montgomery[71] court, the principle of individual responsibility, while supporting refusal to participate in criminal policy, does not authorize affirmative illegal acts taken to obstruct the policy by individuals having no theoretical criminal liability for its conception and execution.

The reasonableness of the rejection seems strongly dependent on how the policy opposed is perceived. To repeat the point already made, what if the development and deployment of nuclear weapons (or particular types of nuclear weapons, e.g. first-strike) were widely thought to

be deeply wrongful or criminal in nature, so as to be comparable to preparation for genocide or to apartheid? Given that perception, does not conviction of protesters amount to collaboration with evil? However, from the standpoint of the international law critique of nuclear weapons, there are positive aspects to the court's opinion in Montgomery. It implicitly grants that there are international law standards by which nuclear weapons policy is to be measured. It further grants that a defense of refusal to commit or be complicit in international crimes may be cognizable by a court where the accused was required by national law or policy or superior's order to take actions in furtherance of an enterprise alleged to be criminal. The opinion thus is consistent with invoking the principle of individual responsibility by a military officer prosecuted for refusal of an order to use nuclear weapons; or its invocation by an official who, like Daniel Ellsberg in relation to the Vietnam War in the Pentagon Papers case, is prosecuted for revealing secret information about nuclear weapons policy alleged to demonstrate the policy's criminality.[72]

In stark contrast to the relatively benign refusal of the Montgomery court to extend the Nuremberg principle of individual responsibility, the most condemnable judicial responses to nuclear weapons protest directly undermine the developing of a political order committed to compliance with basic requirements of international law. The worst

among these is the holding that protesters may not rely on the international law critique of nuclear weapons because the political branches may violate international law with domestic impunity. One federal court relied on this rationale, among others, in upholding the conviction of protesters who had damaged B-52 bombers, declaring that:

> Moreover, as we stated in United States v. Pinto-Mejia, 720 F.2d 248, 259 (2d Cir. 19883), modified on other grounds, 728 F.2d 142 (2d Cir. 1984), "in enacting statutes, Congress is not bound by international law.... If it chooses to do so, it may legislate [in a manner contrary to the limits posed by international law]." We do not suggest that the deployment of nuclear armament systems does violate international law, but merely that Congress has the power to protect government property by statute.[73]

The rationale thus employed, albeit tentatively and illogically, by the court is based on the "last in time" doctrine. That doctrine holds that as between inconsistent statutes and treaties, the more recently enacted or concluded prevails. Thus while as a matter of international law the government may be held accountable for treaty violations by other nations, as a matter of domestic law enforceable within the United States a statute enacted by Congress takes precedence over prior treaty obligations. In the setting of nuclear weapons protest the statutes believed to control prior inconsistent international obligations presumably are congressional appropriation of funds for development and deployment of nuclear weapons systems.

The invocation of the last-in-time doctrine in the context of basic matters of war and peace governed by international criminal law is both morally reprehensible and inconsistent with doctrinal developments in international law. The invocation takes place in the context of protest of deployment of nuclear weapons reasonably believed to be unlawful but whose criminality is less clear. But reliance on the last-in-time doctrine admits of the morally and legally unacceptable statement that the political branches may use nuclear weapons, and thereby commit war crimes and crimes against humanity, without fear of interference from the judicial branch of government. After the Nuremberg trials it is or should be clear not only that nations and responsible persons acting on their behalf may not violate international criminal law but also that officials within the legal system may not collaborate in such violations.

Most notably, in The Justice Case the tribunal was acutely aware that the accused jurists were enforcing domestic law that under German legal doctrine took precedence within Germany over international law. The tribunal thus took special care to emphasize that the jurists nonetheless could be held responsible before a properly constituted international tribunal. "It is true, as defendants contend," the tribunal stated,

> that German courts under the Third Reich were required to follow German law (i.e., the expressed will of Hitler) even when it was contrary to international law. But no such limitation can be applied to this Tribunal. Here we have the paramount substantive law, plus a Tribunal authorized and required to apply it notwithstanding the inconsistent provisions of German local law. The very essence of the prosecution case is that the laws, the Hitlerian decrees and the Draconic, corrupt, and perverted Nazi judicial system themselves constituted the substance of war crimes and crimes against humanity and that participation in the enactment and enforcement of them amounts to complicity in crime. We have pointed out that governmental participation is a material element of the crime against humanity. Only when official organs of sovereignty participated in atrocities and persecutions did those crimes assume international proportions. It can scarcely be said that governmental participation, the proof of which is necessary for conviction, can also be a defense to the charge.[74]
>
> * * *
>
> The conclusion to be drawn from the evidence presented by the defendants themselves is clear: In German legal theory Hitler's law was a shield to those who acted under it, but before a tribunal authorized to enforce international law, Hitler's decrees were a protection neither to the Fuehrer himself nor to his subordinates, if in violation of the law of the community of nations.[75]

Though the tribunal does not so state, and though it emphasized the special circumstances under which it ruled, the implication is that "German legal theory" was mistaken in endorsing the violation of international criminal law if required by domestic law. The alternate implication, that jurists and others will be held accountable for the commission of international crimes only under circumstances of unconditional surrender, is evocative of victors'

justice, not law. Moreover, as chief architect of the IMT trial and sole convener of The Justice Case, the United States is no position to deny the proposition on which those cases were founded, that individuals, including jurists, must comply with the fundamental rules of international criminal law.

An important federal case[76] sheds light on the doctrinal issues at stake and lends support to the argument that certain norms of international law may not, as a matter of law enforceable in U.S. courts, be overridden. U.S. citizens residing in Nicaragua and others asked the court to enjoin U.S. support for the Contras as contrary to international law. The request had two principal grounds, the ruling of the International Court of Justice (ICJ) that U.S. support for the Contras violated international norms prescribing non-intervention and the non-use of force, and the provision of the United Nations Charter requiring compliance with ICJ decisions. The court dismissed the lawsuit, finding congressional appropriation of support for the Contras subsequent to the ICJ ruling to be unassailable for two reasons. First, "unless Congress makes clear its intent to abrogate a treaty, a court will not lightly infer such intent but will strive to harmonize the conflicting enactments."[77] Because the United States claimed never to have consented to ICJ jurisdiction in the Nicaragua case, the court noted without deciding the issue that Congress may not have intended to violate the treaty obligation

under Art. 96 of the U.N. Charter to comply with ICJ rulings.[78] Second, if Congress did intend to violate that obligation in appropriating money for the Contras, its action was valid as a matter of domestic law under the last-in-time rule.[79] The court reached the same conclusion regarding related violations of customary international law entailed by support for the Contras.[80]

However, in so deciding the case the court also acknowledged and implicitly endorsed the contention that certain norms of international law do override national law and are enforceable in domestic courts, namely peremptory norms, or jus cogens.[81] The court noted that there is a strong inference that norms whose violation is condemned in the international sphere and which may not be altered by international lawmaking processes also merit enforcement by domestic courts as law overriding contrary statutes. In the court's words:

> Such basic norms of international law as the proscription against murder and slavery may well have the domestic legal effect that appellants suggest. That is, they may well restrain our government in the same way that the Constitution restrains it. If Congress adopted a foreign policy that resulted in the enslavement of our citizens or of other individuals, that policy might well be subject to challenge in domestic court under international law. Such a conclusion was indeed implicit in the landmark decision in Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980), which upheld jurisdiction over a suit by a Paraguayan citizen against a Paraguayan policy chief for the death by torture of the plaintiff's brother. The court concluded that "official torture is now prohibited by the law of nations." Id. at 884 (footnote omitted). The same point has been echoed in our own

> court. Judge Edwards observed in Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984), cert. denied, 470 U.S. 1003 (1985), that "commentators have begun to identify a handful of heinous actions - each of which violates definable, universal, and obligatory norms," id. at 781 (Edwards, J. concurring), and that these include, at a minimum, bans on governmental "torture, summary execution, genocide, and slavery." Id. at 791 n. 20.[82]

In the controversy before it the court found that the obligation to comply with decisions of the ICJ does not have the status of a peremptory norm.[83] Accordingly the court did not actually decide the issue of the domestic enforceability of peremptory norms. The court's discussion, however, is fully consonant with the view that the Nuremberg precedents foreclose any contention that the political branches may commit international crimes with domestic impunity. As explained in Chapter One key elements of the Nuremberg legacy, including prohibitions of aggression, genocide, and murder, are peremptory in nature.[84] Beyond the issue of which elements of Nuremberg law have become peremptory, the thrust of the court's reasoning is that, as to fundamental matters of international criminal law, governments cannot expect to escape national as well as international accountability.

The immediate issue in nuclear weapons protest cases, to be sure, is the legality of deployment, not use, of nuclear weapons. The international obligations relevant to deployment are those mandating the negotiation of nuclear disarmament in good faith, forbidding the threat of force,

and barring planning, preparing and conspiring to commit international crimes. Whether any of the obligations has attained the status of a peremptory norm is doubtful. However, they relate to matters of utmost gravity governed by international criminal law, and are part of the Nuremberg legacy. A court may be reluctant to decide the legality of U.S. policy with respect to the obligations for prudential reasons, including the desire to avoid denigrating the value of international law by making pronouncements likely to be ignored and the desire to preserve the institutional stature of the judiciary. Indeed, for similar reasons and also in light of the rule of construction that treaties and statutes are to be construed to be harmonious where possible, a court may be inclined to proclaim the bindingness of the obligations and to presume that the United States is in compliance. But a court should not endorse the violation of the obligations with blanket, morally reprehensible, and legally insupportable statements to the effect that the political branches may violate international law as to fundamental matters without domestic consequence.

To date federal judges are plainly of the opinion that nuclear weapons protest cases are not appropriate vehicles for adjudicating the lawfulness of U.S. policy. However, the time and circumstance may come, in a protest or other case or as to other issues of U.S. foreign policy, when such adjudication is appropriate. The courts'

unwillingness to come to grips with the legal issues raised by nuclear weapons in protest cases must not be allowed to distort the applicable international law. That law is relevant today to assessing the morality and legality of nuclear weapons policies ongoing in forums other than the courtroom, and may someday be relevant in the courtroom.

Justiciability of the International Law Defense

Those considerations are relevant to another rationale courts have employed in rejecting the international law justification for nuclear weapons protest. That is the holding that the defense is non-justiciable, i.e., not a matter which can properly be considered by courts. Justiciability doctrine requires an adjudicable controversy to be sharply posed, concrete, and within the constitutional authority and judicial competence of a court to decide. In the leading case finding the international law defense to be non-justiciable, United States v. May,[85] a federal court found it had no constitutional power to adjudicate the defense because "to consider defendants' arguments would put us in the position of usurping the functions that the Constitution has given to the Congress and to the President."[86]

That reasoning is both wrong and pernicious. For reasons referred to above, international law as to war and peace is law that binds the political branches of the government and that may on occasion be adjudicated. In a

case falling within their sphere of responsibility courts are authorized to adjudicate that law, and adjudication of criminal prosecutions are within that sphere. Moreover, an acquittal of protesters on international law grounds would not directly interfere with operations of other branches of government as would, for example, an injunction forbidding deployment of weapons systems. Thus as to the core issue of responsibilities of the branches of government it is incorrect to conclude that the international law justification for protest is not the concern of judges.

Courts may decline to address international law justification for other more supportable reasons. It can plausibly (not irrefutably) be maintained that courts are incompetent to make the requisite factual and legal determinations.[87] It may be believed, as noted above, that non-adjudication paradoxically serves to insulate the repute of international law or the stature of the judiciary. But in finding that the defense is non-justiciable, courts must avoid any implication that there are no international standards binding on the political branches or that there are no circumstances in which courts will enforce those standards.[88] The May opinion quoted above is open to this interpretation. In declining to consider the international law defense the court invokes the "constitutional functions" of the political branches and cites clauses of the Constitution granting authority over matters of foreign and military policy to the

legislative and executive branches.[89] No mention is made of the obligation to comply with international law, law which both the Constitution and judicial decisions declare to be part of U.S. law, or of the constitutional provisions relevant to the obligation, e.g., the clause requiring the President to "take Care that the Laws be faithfully executed."[90] The implication of endorsement or toleration of government lawlessness in the international sphere must be rejected. Indeed, the need to avoid implicit endorsement of government lawlessness is especially important to the extent highly dubious arguments of constitutional allocation of authority are invoked. The United States v. Montgomery opinion, while not relying on justiciability, is praiseworthy in this regard. Considering and rejecting the argument from the Nuremberg principle of individual responsibility on its merits, the opinion implicitly assumed both the applicability of international standards to government conduct and their adjudicability in other contexts.

Courts and the Logic of Protest

The holding that the political branches may flout international law with national impunity, and certain forms of finding that protesters' defense is non-justiciable, deserve condemnation because they undercut or repudiate the measuring of nuclear weapons policy (and other foreign policy) against international standards. Another judicial

rationale for rejecting the defense concerns not the status of international law but the nature of the act of protest. Its premises are that (1) acts of protest present no real challenge to nuclear weapons policy but are merely symbolic; and (2) resort to conventional political process is a viable means for opposing nuclear weapons. Accordingly, it is contended, there is no occasion to consider the legality of the challenged policy.

The doctrinal expression of that reasoning is to hold that defendants may not rely on doctrines of justification, specifically the affirmative defenses of necessity or crime prevention. Those defenses authorize otherwise illegal acts in order to prevent or terminate acts or situations whose evil or criminal nature far outweighs the social disutility of the acts to prevent or terminate. Both require a showing that the acts in controversy are reasonably aimed at preventing or terminating the evil or criminal act or situation. The necessity defense also requires, among other elements,[91] a showing of exhaustion of legal alternatives to the act of prevention or termination. While the requirement is not specifically included among the elements of the crime prevention defense, it unquestionably has influenced how courts have viewed the claim that protesters act to prevent international crimes.[92] Nuclear weapons protesters, courts often hold, have failed to meet the requirements of reasonableness and exhaustion.

Thus United States v. May found that defendants had failed to demonstrate reasonableness of their actions:

> The trial judge found that the defendants had failed to satisfy all of the elements of the necessity defense because there was no reasonable belief that a direct consequence of their actions would be the termination of the Trident program. The judge was obviously right.
>
> As with the defense of necessity, so also with the defense of violation of international law and treaties. The connection between what the defendants did and their claims that the Trident system is designed solely for the waging of aggressive war, and is therefore illegal, is so tenuous as not to give them any basis for asserting the defense.[93]

Similarly in United States v. Montgomery, rejecting a necessity defense, the court found that defendants had failed to show exhaustion of alternatives and reasonableness:

> Although defendants sought to offer evidence that "the normal political processes have been rendered ineffective to meet the dangers created by nuclear arms build-up," it is clear that defendants had reasonable legal alternatives to the destruction of Government property, including peaceful protests and petitioning Congress or the President. Their purpose was to confront the political leaders with their message. People are not legally justified in committing crimes simply because their message goes unheeded. Defendants could not hold a reasonable belief that a direct consequence of their actions would be disarmament.[94]

Finally, in In re Weller Judge White relied upon the exhaustion requirement in rejecting a defense of preventing international offenses:

> Accepting, for purposes of analysis, the premises that development of the Trident violated international law and that international law requires affirmative action

> by all citizens to prevent such violation, it still does not follow that affirmative illegal action is justified. Again, the issue turns on the availability of lawful means for accomplishing political change. Neither petitioners nor amici cite authority for the proposition that a free and democratic society must excuse violation of its laws by those seeking to conform their country's policies to international law. Compliance with international law must be sought through the ballot box, or, where appropriate, by court action. Illegal conduct designed to influence policies cannot be considered "necessary" where such lawful avenues are available.[95]

The courts' reasoning as to the reasonableness and exhaustion requirements is certainly contestable. Protesters have a plausible argument that by taking extraordinary actions to raise public awareness of the immorality and illegality of nuclear weapons development and deployment, they make an indispensable contribution to the broader campaign to change nuclear policy. The argument is not that nonviolent confrontation is the only possible action or that other acts via recognized channels are futile. Rather it is that nonviolent action is a necessary complement to other forms of oppositional activity, as is demonstrated by the prominent role of civil disobedience in other, at least partially successful, social movements such as those advancing unionization in the 1930s and civil rights in the 1950s and early 1960s, or opposing U.S. intervention in Vietnam in the later 1960s and early 1970s.

Based on a wealth of personal experience, both from the standpoint of a high U.S. official and as a participant

in protest, Daniel Ellsberg has made those arguments forcefully in his testimony in protest cases. He is emphatic that nonviolent direct action in support of change is an indispensable complement, not a substitute, for other methods of promoting change:

> In my understanding as both a student of and participant in such campaigns, in none of these cases is the public movement, and specifically the tactic of civil disobedience, properly to be seen as an "alternative" to, or a substitute for, the more traditional and unarguably legal processes of our political system, but as a sometimes necessary complement to such processes, stimulating and reinforcing them in a way that is not infrequently essential to achieving urgent, legitimate public ends.
>
> In my own experience, participants in civil disobedience virtually never conceive of these particular actions as the sole effective means, by themselves, of averting specific harms, or as sufficient in themselves to do so. The issue, from the perspective of these actors, is not whether other approaches, unchallengeably legal, exist to further their aims, but whether these unquestionably necessary approaches, by themselves and excluding dramatic campaigns of civil disobedience, are <u>adequately</u> effective, whether they can "work" or work <u>in time</u> to avoid great harm without the historically proven catalyst of committed, conscientious, risk-taking exemplary action.[96]

His conclusion is that "exemplary action" has had an indisputably significant effect on the formation of public opinion and public policy. He writes that his decision to release the Pentagon Papers to inform public debate was inspired by acts of protest for which severe punishment was imposed.[97] He also describes a protest at the Nevada Test Site in which participants traveled far into the Site to delay, by their presence, the execution of a nuclear test

which the Soviet Union had stated would occasion the termination of its own unilateral moratorium on testing.[98] He states that he was told by congressional insiders that the protest galvanized already existing opposition to U.S. testing within the House of Representatives and thus played a role in a 1987 House vote to cut off funds for testing nuclear weapons with a yield of more than one kiloton.[99] (The House subsequently dropped the measure in response to the President's argument that it would detract from the U.S. negotiating position at the Icelandic Summit.)[100]

Nonetheless, the counterarguments against the view that nuclear weapons protests have not satisfied the elements of reasonableness and exhaustion ultimately have been unavailing. First, they call upon the courts to engage in the inherently difficult task of determining whether protests are making a causal contribution to change in the opposed policy. The task seems difficult enough in historical perspective as to previous movements which resorted to illegal actions, from the abolitionists to opponents of the Vietnam War; and it is all the more difficult as to a struggle still in progress. Second, and more fundamentally as Ellsberg himself acknowledges, the efficacy of protest in changing policy depends in large part on presumed illegality and on the risk of prosecution and punishment assumed by protesters. One cannot logically assert the legality of an action on the basis of an argument that assumes its illegality.

At bottom, the courts' rejection of the international law defense as ill-suited to merely symbolic opposition to nuclear weapons policy reflects judicial awareness of underlying political realities. In finding the defense to be non-adjudicable because protesters' acts have no reasonable or necessary connection to termination of the challenged policy, courts also register the perceived lack of a historical context for judicial intervention.

The foregoing discussion supports these conclusions: From the perspective of courts, the best argument for acquitting protesters is not one narrowly based on the justification defenses of necessity and crime prevention. Nor is it the simple invocation of the Nuremberg right to refuse to participate in criminal policy by individuals having no theoretical criminal liability. Rather it is a broader and more complex argument that acts of protest represent a termination of political complicity in policy which is in serious breach of U.S. international obligations, in pursuit of the aim of developing a national political community committed to compliance with fundamental requirements of international law. The argument represents an affirmation and an advancement of the Nuremberg principle of individual responsibility, that individuals have international duties transcending national obligations of obedience, and the basic thesis of human rights law that individuals have internationally protected rights in relation to their governments. Therefore,

especially where protest is principled and nonviolent and presents little threat to other judicially protected values, courts should refuse to convict protesters, or should afford juries the opportunity to do so.[101] Like the act of protest itself, acquittals would terminate, in accordance with the spirit if not the letter of Nuremberg precedents, judicial complicity in U.S. defiance of serious international obligations. Courts that do convict protesters should take care to do so in ways that do not undermine the assessment of U.S. policy against international standards.

From the perspective of protesters, it again must be underlined that protest should be understood as part of a larger project of evolving a national political community committed to compliance with basic requirements of international law. Only in that perspective does the claim that protests are lawful make sense. Moreover, the understanding is demanded by a responsible appraisal of the underlying political realities to which the courts are responding. Protest divorced from the larger project will remain marginalized, and arguments on its behalf will obtain little recognition either from the courts or from the nation whose policies are sought to be changed. Finally, it must be emphasized that the importance of the international law justification is not diminished by judicial hostility or indifference. Its importance lies in the contribution it makes to the self-understanding of

opponents of nuclear weapons, and to the larger political discourse about nuclear weapons, whose range is not restricted to the courtroom, and indeed whose more significant audiences perhaps are elsewhere, among the citizenry, or in the political branches of government, or even in other nations, as the emergence of a popular anti-testing movement in the Soviet Union proclaiming its solidarity with U.S. protesters suggests.

Concluding Reflections:
The Double Impulse Towards Universality

In this dissertation I have assessed the relevance of Nuremberg and other international law to the nuclear predicament and anti-nuclear protest. The conclusions reached are that use of nuclear weapons is illegal; nations are obligated to refrain from planning and preparing for nuclear war, especially by deploying first-use and first-strike weapons; and nonviolent but militant anti-nuclear protest is justified as a means of developing national political orders committed to compliance with basic requirements of international law. In closing, I offer some unsystematic but deeply felt reflections about philosophical issues raised earlier but not fully resolved, the styles of organization that have emerged in anti-nuclear protest, and the intensely personal nature of protest.

Nuclear weapons protest justified on international

law grounds is a frontal assault on the problem of subjective value. That problem consists of the pervasive dismissal or discounting of political positions as mere expressions of individuals' personal preferences. It is illustrated by the objection noted in Chapter Three that nothing entitles nuclear weapons opponents to present the ideal of peace as anything more than their subjective preference. The willingness to act and to take personal risks in acting to demand compliance with universal standards represents a strong statement that convictions about nuclear weapons policy are not experienced as mere opinions or preferences but as objectively binding political and moral imperatives. It also represents a complex assessment that includes these elements: that compliance with universal standards can in the end be achieved only where national political communities are institutionally committed to compliance and that the institutional commitments can result only from political struggle. Thus the charge that opposition to nuclear weapons policy (or other foreign policy) is based simply on subjective values of the opponent is acknowledged and sought to be overcome through action on behalf of creating a political order expressly committed to those values.

The problem of subjectivity of values is also addressed in the commitment within much of the nuclear weapons protest movement to eliciting and valuing the contribution of each participant. The commitment is

implemented in many ways, including traditional ones of common courtesy and the like. But it is exemplified by the formal or informal adoption by many of the small (and occasionally larger) nuclear weapons protest groups of innovative, non-hierarchical, consensus-based styles of organization and decision-making described in the Introduction. One of the aims is to enable participants to achieve the self-understanding and self-affirmation necessary to form their own judgments and to act in accordance with them.

To be sure, neither the willingness to engage in acts of protest or a movement style believed conducive to judgments and actions based on genuine self-understanding demonstrates the correctness of that opposition. Willingness to engage in acts of protest does signal that the convictions held by protesters deserve to be taken seriously. It also signals a realism about the necessity for political struggle to institutionalize the ideal of peace that similarly deserves to be taken seriously. Moreover, to the extent protest is conducted in a principled manner in which (among other things) persons within and without the protest are respected and acts taken are publicly justified, the protest itself exhibits some indicia (not conclusive) of the correctness of the ideals and values sought to be upheld. Again, to the extent the modes of organization and decision-making within the nuclear weapons protest movement do in fact help to

facilitate the formation of individuals' judgments which are based on genuine self-understanding, the processes perhaps also provide some indicia of the correctness of the ideals and values sought to be upheld.[102] In the end, however, while both the fact and the means of protest are relevant, the appraisal of militant opposition to nuclear weapons policy must turn on the assessment of the publicly advanced rationale for that opposition - hence the assessment, and ultimately the endorsement, of one such often advanced rationale, the international law justification.

I have spoken of nuclear weapons protest justified on international law grounds as an assault on the problem of subjective value. Another way of understanding the protest is as the expression of a double impulse towards universality. On the one hand, the impulse is expressed in a critical assessment of nuclear weapons policy against standards applicable to all nations. On the other hand, the impulse is expressed at the level of the individuals who act and take personal risks to demand compliance with universal standards. In the Enlightenment conception of the ideal of peace, as articulated by Kant and recently by Rawls, it is held that a form of government respectful of citizens' liberties is also more likely to abide by basic principles governing the conduct of nations and less likely to engage in war. What is glimpsed here, however obscurely, is a connection between universality and peace.

A kind of politics respectful of the universality to be found in each individual is also conducive to the observance of universal principles governing the conduct of nations, and thus to peace. In acting personally to demand their nation's compliance with standards of international law, protesters help reveal the connection between universality and peace.

NOTES

Notes to Preface and Acknowledgements

1. See J. Wurst, On Hold: Test Ban Amendment Conference, Conducted in the Shadow of War, Fails to Achieve a CTB But Dodges Bush's Bullets, 9 Nuclear Times 7 (Spring 1991); W. Epstein, January meeting keeps hope alive, 47 The Bulletin of the Atomic Scientists 10 (April 1991).

2. B. Knickerbocker, Huge Cleanup Awaits Arms Plants, Christian Science Monitor, March 15, 1991.

3. Western States Legal Foundation is a non-profit organization based in Oakland, California that provides legal support to peace and environmental activists with an emphasis on nuclear issues.

Notes to Introduction

1. R. Aldridge, Nuclear Empire 77 (1989).

2. Id. at 55, 78.

3. This account is based on my recollection of the events. See also United States v. Lowe, 654 F.2d 562, 564 (9th Cir. 1981).

4. See United States v. May, 622 F.2d 1000, 1002-1003 (9th Cir. 1980).

5. United States v. David Armour et al., Nos. CR79-332M etc., Judge Gordon Thompson (W.D. Wa. 1980). The quotation is from a draft of Judge Thompson's unpublished decision that was distributed to defendants. It is available from Western States Legal Foundation, Oakland, California.

6. United States v. May, 622 F.2d 1000, 1009-1010 (9th Cir. 1980).

7. 722 F.2d 733 (11th Cir. 1985).

8. United States v. Josef Alstoetter et al. (The Justice Case), 3 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 (1951).

9. U.S. v. Montgomery, 722 F.2d at 737.

10. 722 F.2d at 737-38 (citations omitted).

11. J. Cabasso and S. Moon, eds., Risking Peace: Why We Sat In The Road 3-4 (1985).

12. Id. at 3-4.

13. Id. at 7.

14. One version of consensus procedure is described in "Consensus Decision-Making," an outline available from Western States Legal Foundation, Oakland, California.

15. Risking Peace at 8.

16. Id. at 10.

17. Id. at 11.

18. Id. at 13.

19. Id. at 15.

20. Defendants' Memorandum of Points and Authorities in Support of Their Right to Present Evidence on International Law as a Defense to the Charges Against Them, People v. Brannon, No. 326171-0, Municipal Court, Alameda County, Dept. 3, Livermore-Pleasanton Judicial District (1983). The brief is available from Western States Legal Foundation, Oakland, California.

21. Andrew Lichterman was the other principal author of the brief.

22. Id. at 12, 16-18.

23. Id. at 20-22.

24. Id. at 24-30.

25. Trial Transcript, People v. Brannon, No. 326171-0, Municipal Court, Alameda County, Dept. 3, Livermore-Pleasanton Judicial District, Judge Clifford Bachand 179-181 (1983). The transcript is available at Western States Legal Foundation, Oakland, California.

26. Risking Peace at 17-18.

27. Id. at 18.

28. Id.

29. Id. at 35.

30. Id. at 35-36.

31. Id. at 52-53.

32. People v. Brannon, No. 1699, Superior Court Appellate Dept., Alameda County, at 12 (1985). The opinion is available from Western States Legal Foundation, Oakland, California.

33. Risking Peace at 19.

34. In re Weller, 164 Cal.App.3d 44 (1985).

35. Id. at 45.

36. Id. at 45-46.

37. Id. at 49-50.

38. People v. Jarka, No. 002170, Lake County Circuit Court, Illinois (1985), discussed in F. Boyle, Defending Civil Resistance Under International Law 9-10 (1987).

39. Id.

40. Id. at 9.

41. Id.

42. This figure and ensuing numbers for arrests at the Test Site are drawn from information supplied by American Peace Test, P.O. Box 26725, Las Vegas, NV 89126.

43. The following account of the press conference and rally is based on my notes.

44. This account is based on my notes. See also 438 Arrested in Nevada At Nuclear Testing Site, New York Times, Feb. 6, 1987, at 6; Protesters Invade Nuclear Test Site, San Francisco Chronicle, Feb. 6, 1987, at 1; 2,000 Protest Nuclear Test; 437 Arrested, Los Angeles Times, Feb. 6, 1987, at 1.

45. See Resolution nixes NTS arrests, Las Vegas Review-Journal, April 10, 1987, at 5B.

46. Id.

47. Id.

48. Charges against 400 demonstrators dropped, Las Vegas Sun, May 1, 1987; Nye County DA softens stand on anti-nuke protesting, Las Vegas Review-Journal, May 1, 1987, at 2F.

49. Charges against 400 demonstrators dropped, Las Vegas Sun, May 1, 1987.

50. Nye County DA softens stand on anti-nuke protesting, Las Vegas Review-Journal, May 1, 1987, at 2F.

51. Most recently, on January 5, 1991, over 750 Test Site protesters were taken into custody. 750 nuke test foes arrested, Las Vegas Review-Journal, January 6, 1991, at 1A.

52. 1,200 arrested at test site protests, Las Vegas Review-Journal, March 13, 1988, at 1.

53. I became familiar with the Nevada-Semipalatinsk Movement, as the anti-testing campaign is known, when I attended the International Citizens' Congress for a Nuclear Test Ban, held May 24-27, 1990, in Alma Ata, capitol of Kazakhstan, co-hosted by the Movement and the International Physicians for the Prevention of Nuclear War.

54. The Soviet test that broke the one-year de facto moratorium was conducted at the Arctic island of Novya Zemlya. Soviets Stage Underground Test, The Washington

Post, October 25, 1990, at A30. In view of strong popular opposition, it is unlikely that further testing will be conducted in Kazakhstan. The Soviet government has already stated that it will end testing there within three years. Soviets to End Nuclear Tests At Asian Site, San Francisco Chronicle, March 10, 1990.

55. See Draft Charter of the Global Anti-Nuclear Alliance, January 10, 1991, available from Western States Legal Foundation, Oakland, California.

56. See 750 nuke test foes arrested, Las Vegas Review-Journal, January 6, 1991, at 4A.

57. One Plowshares action was recounted in United States v. Montgomery, 772 F.2d 733 (1985), discussed above in the text accompanying notes 7-10:

> Early on the morning of Easter Sunday, 1984, eight members of the group "Pershing Plowshares," which is opposed to the production and spread of nuclear weapons, cut through a fence surrounding the Martin-Marietta Aerospace Corporation's defense plant in Orlando, Florida. Entering a building within the compound, they hammered and poured blood onto both nuclear and conventional missile launchers and components belonging to the United States Army, hung banners and distributed pictures and documents condemning nuclear weapons around the scene, and remained on the premises singing and praying until they were taken into custody. The incident caused an estimated $23,266 in actual damages. 772 F.2d at 735.

The protesters were each sentenced to three years imprisonment plus five years probation to be served consecutively to the imprisonment and ordered to make restitution of $2,908. Id.

58. See Chapter One, text accompanying notes 205-208.

59. U.S. Army Field Manual 27-10, The Law of Land Warfare ¶ 35 (1956). See also U.S. Department of the Navy, The Law of Naval Warfare ¶ 613 (1955) ("There is at present no rule of international law expressly prohibiting states from the use of nuclear weapons in warfare. In the absence of express prohibition, the use of such weapons against enemy combatants and other military objectives is permitted."); U.S. Air Force Pamphlet 110-31, International Law - The Conduct of Armed Conflict and Air Operations (1976) ¶ 6-5 ("Nuclear weapons can be directed against military objectives as can conventional weapons.").

60. A U.S. Army pamphlet quotes an unpublished annotation to Paragraph 35 of the Army manual offering an explanation of the conclusion that the use of nuclear weapons "as such" is permissible:

> The weapon has already been used, it is with us and the major powers are virtually committed in an operational sense to its use in a future war.... The weapon has gained such acceptance that it is spoken of in the context of disarmament rather than illegality.

U.S. Army Pamphlet 27-161-2, 2 International Law 43 (1962). The pamphlet also, however, referred to prohibitions on weapons that employ poison or analogous materials or cause unnecessary suffering, stating that they "may control the use of nuclear weapons." Id. at 42. The pamphlet specifically commented that use of nuclear weapons solely for their radiation effects may violate the prohibition of the use of poison. Id. at 43. Finally, the pamphlet noted that use of nuclear weapons is to be guided by the principle of proportionality stated in ¶ 41 of the Army manual, "that the loss of life and damage to property must not be out of proportion to the military advantage to be gained." Id. See also The Law of Naval Warfare ¶ 613 n.8 ("The employment, however, of nuclear weapons is subject to the basic principles [of the law of war stated elsewhere in the manual]".); International Law - The Conduct of Armed Conflict and Air Operations Chapter 6, especially ¶ 6-2 ("any weapon may be used unlawfully") and ¶ 6-3 ("International law ... does restrict weapons whose foreseeable effects result in unlawful disproportionate injury to civilians or damage to civilian objects.").

61. 76 Proceedings of American Society of International Law 26 (1982). Rostow's remarks are paraphrased by the rapporteur for the conference.

62. Id.

63. Id. at 33-34.

64. See E. Meyrowitz, The Opinions of Legal Scholars on the Legality of Nuclear Weapons, 24 Stanford J. Int. L. 111, 114-145 (1987).

65. E.g., H. Meyrowitz, Les Juristes Devant L'Arme Nucleaire, 67 Revue Generale de Droit International Public 820, 858 (1963).

66. The initial 1961 resolution, since reaffirmed many times, declared that use of nuclear weapons is contrary to "the laws of humanity" and "the rules of international law" and is a "crime against mankind and civilization." G.A.

Res. 1653, 16 U.N. GAOR Supp. (No. 17) 4, U.N. Doc. A/5100 (1961). A 1972 resolution declared a "permanent prohibition of the use of nuclear weapons." G.A. Res. 2936, 27 U.N. GAOR Supp. (No. 30) 5, U.N. Doc. A/8730 (1972). For analysis of the voting pattern, see B. Weston, Nuclear Weapons Versus International Law: A Contextual Reassessment, 28 McGill L. J. 542, 569-570 (1983). General Assembly resolutions evidence, to a greater or lesser extent depending on the circumstances, but ordinarily do not establish customary international law. See Restatement (Third) of Foreign Relations Law § 102 reporters' note 2 (1987). Their status as evidence of binding law as to use of nuclear weapons is diluted because of the opposition of Western nuclear powers and allied states.

67. E.g., E. Stowell, The Law of War and the Atomic Bomb, 39 Amer. J. Int. L. 784 (1945); M. McDougal and N. Schlei, The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security, 64 Yale L. J. 648, 689-690 (1955); W. O'Brien, Legitimate Military Necessity in Nuclear War, II World Polity 35 (1960). But see M. Greenspan, The Modern Law of Land Warfare 367-377 (1959). See also Meyrowitz, The Opinions of Legal Scholars at 112-114, 119-124, 145-150.

68. I will sometimes refer to the new school of thought as the "critical view." Although scholarly opposition to nuclear weapons and the "Critical Legal Studies" school of analysis of law have in common a readiness to adopt a critical standpoint towards society, I do not mean to suggest by use of this label that the two legal trends necessarily share a common methodology.

69. R. Falk, L. Meyrowitz, and J. Sanderson, Nuclear Weapons and International Law (1981).

70. Weston, Nuclear Weapons Versus International Law; F. Boyle, The Relevance of International Law to the "Paradox" of Nuclear Deterrence, 80 Northwestern U. L. R. 1407 (1986); D. Arbess, The International Law of Armed Conflict in Light of Contemporary Deterrence Strategies: Empty Promise or Meaningful Restraint?, 30 McGill L. J. 89 (1984); J. Fried, The Nuclear Collision Course: Can International Law Be Of Help?, 14 Denver J. Int. L. & Policy 97 (1985).

71. Regarding the Catholic bishops' view, see National Conference of Catholic Bishops, The Challenge of Peace (1983).

72. Nuclear Weapons Versus International Law at 574-587.

73. The International Law of Armed Conflict in Light of Contemporary Deterrence Strategies at 115-121.

74. Id. at 121.

75. Those arguing this position include R. Falk, L. Meyrowitz, and J. Sanderson, Nuclear Weapons and International Law at 63, 71 ("Those who plan or endorse [counterforce and limited nuclear war] strategic options seem to be in violation of the Nuremberg guidelines"); Boyle, The Relevance of International Law to the "Paradox" of Nuclear Deterrence at 1417-1419 and 1443-1446; Arbess, The International Law of Armed Conflict in Light of Contemporary Deterrence Strategies at 121-130. Burns Weston rejects arguments for the illegality of deployment in Nuclear Weapons Versus International Law at 587-588. However, relying on the United Nations Charter prohibition of the threat of force, he modifies this position in People of the Earth v. China, France, U.S.S.R., U.S et al. 27-29 (1988). People of the Earth contains opinions of three scholars, Francis Boyle, Alfred Rubin, and Burns Weston, concerning the legality of use and deployment of nuclear weapons.

76. Arbess writes:

> [T]he assignment of nuclear weapons to protect a broad range of geopolitical interests necessarily requires the United States to "plan" to use nuclear weapons in a vast array of circumstances. As extended deterrence is enhanced by the ability to deliver more flexible nuclear weapons to those areas in which interests are perceived to be at stake, nuclear threats become more subtle, more widely relied upon, and more credible, thereby increasing the degree of "preparation" for purposes of the Nuremberg Charter. Whereas in the 1950s the United States communicated its nuclear threats verbally and fairly infrequently, by the Yom Kippur war of 1973 the emplacement of US ICBM forces at an increased level of alert sent a clear message to the Soviet Union that the United States was prepared to use nuclear weapons to respond to Soviet interference in the Middle East. In the 1980s the mere dispatch of nuclear-capable naval or land forces to a given geographic region constitutes a clear indication of preparedness to use nuclear weapons.

International Law Revisited: Meeting the Legal Challenge of Nuclear Weapons, 16 Bulletin of Peace Proposals 105, 110 (1985). See also The International Law of Armed Conflict and Contemporary Deterrence Strategies at 123-127.

77. International Law Revisited, 16 Bulletin of Peace Proposals at 110.

78. Affidavit of Francis A. Boyle, prepared for State of Nevada v. Jessie Cocks and Peter Bergel, No. 1449, Fifth Judicial District, Nye County, at 4 (1987). The affidavit is available from Western States Legal Foundation, Oakland, California.

79. Declaration of Frank Newman in Support of Defendants, People of the State of California v. David Wylie et al., No. E8849052, Santa Clara County Municipal Court, at 10 (1989). The declaration is available from Western States Legal Foundation, Oakland, California.

80. Thus Falk, Sanderson and Meyrowitz write:

> In view of the failure of formal institutions of international authority to uphold [international law in relation to nuclear weapons policy] there exists a dangerous institutional vacuum. To some extent, individuals and grassroots groups, alive to these concerns, have claimed the responsibility and right to impose "the law" on the state. Such claims have been made, especially, here in the United States where a tradition of citizens' resistance exists - a tradition that includes a Constitutional procedure allowing citizens to make petitions for the redress of grievances. It includes, as well, the sanction of nonviolent civil disobedience. Of course, to the extent that the argument to international law and the Nuremberg Principles holds, resistance to crimes of the state in relation to nuclear weapons policy constitutes, in a strict sense, an instance of 'civil obedience' - a case of insisting on respect for law rather than a case of violating the law in the course of expressing disapproval toward state policy.

International Law and Nuclear Weapons at 73-74.

Notes to Chapter One

1. Charter of the International Military Tribunal, 59 Stat. 1546 (1945).

2. The United States of America, The French Republic, The United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics v. Hermann Wilhelm Goering et al. (Judgment), 22 Trial of the Major War Criminals before the International Military Tribunal 411 (1947). The Judgment is also found at 6 F.R.D. 69 (1946), and all citations here are to that source.

3. Twelve trials of major war criminals conducted under U.S. auspices, the most commonly cited cases other than the IMT Judgment, are reported in Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, October 1946 to April 1949, 15 vols. (hereinafter "Trials of War Criminals").

4. See, e.g., H. Kelsen, Will the Nuremberg Trial Constitute A Precedent, 1 International L. Q. 153 (1947); G. Schwarzenberger, The Judgment of Nuremberg, 21 Tulane L. R. 328 (1947).

5. 59 Stat. 1544 (1945).

6. D. Schindler and J. Toman, The Laws of Armed Conflicts 919 (1988).

7. 59 Stat. 1546 (1945).

8. Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 3 Official Gazette Control Council for Germany 50 (1946), reprinted in 2 L. Friedman, The Law of War 908 (1972).

9. See T. Taylor, Nuremberg Trials, War Crimes and International Law, International Conciliation No. 450 255-256 (1949).

10. G.A. Res. 95, U.N. Doc. A/64/Add.1, at 188 (1946).

11. Report of the International Law Commission, 2nd. session, 5 U.N. GAOR Supp. (No. 12) 11, U.N. Doc. A/1316 (1950), reprinted in [1950] 2 Y.B. Int'l L. Comm'n 374, U.N. Doc. A/CN.4/SERA/1950/Add.1.

12. See Weinberger v. Rossi, 456 U.S. 25 (1982) (construing an executive agreement permitting preferential hiring at U.S. military base in the Philippines as a treaty for purposes of a statute prohibiting employment discrimination unless allowed by treaty); United States v.

Mitchell, 386 U.S. 972, 973 (1966) (Douglas, J., dissenting) ("this case presents the questions: (1) whether the Treaty of London is a treaty within the meaning of Art. VI, cl. 2 [the supremacy clause]").

13. See Restatement (Third) of Foreign Relations Law (1987) [hereinafter "Restatement (Third)"] § 115 and accompanying comments and reporters' notes, especially comment c and notes 3 and 5.

14. See id. § 115.

15. 6 F.R.D. at 107.

16. See G. Schwarzenberger, The Judgment of Nuremberg, 21 Tulane L. R. 328, 332-333 (1947).

17. See id. at 333.

18. Id. at 341 ("the Judgment is merely a precedent in a non-technical sense; for international law has not accepted the principle of stare decisis").

19. Id.

20. Restatement (Third) § 102(2). See also Art. 38(1)(b) of the Statute of the International Court of Justice, an annex to the United Nations Charter, 59 U.S. Stat. 1031 (1945):

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: ... b. international custom, as evidence of a general practice accepted as law; ...

21. Id. § 102 comment e. Cf. F. Newman and D. Weissbrodt, International Human Rights 594-595 (1990); R. Lillich and F. Newman, International Human Rights: Problems of Law and Policy 65-66 (1979).

22. Restatement (Third) § 102 comment i.

23. 6 F.R.D. at 107.

24. R. Jackson, Justice Jackson's Report To President Truman On The Legal Basis For Trial of War Criminals, 19 Temple L. Q. 144, 153 (1946).

25. United States v. Josef Alstoetter et al. (The Justice Case), 3 Trials of War Criminals 966 (1951).

26. See, e.g., Q. Wright, The Law of the Nuremberg Trial, 41 American J. Int. L. 38, 58-59 (1947).

27. Report of the International Law Commission, 28th session, 31 U.N. GAOR Supp. (No. 10) at 243 and n.441, U.N. Doc. A/31/10 (1976), reprinted in [1976] 2 Y.B. Int'l L. Comm'n (Pt. 2) at 103 and n.467, A/CN.4/SER.A/1976/A.1 (Pt. 2) ("today international law imposes upon States the obligation to punish crimes known as 'crimes under international law' ('crimes de droit international'); this single category includes 'crimes against peace', 'crimes against humanity' and 'war crimes' in the strict sense," citing the Nuremberg principles as codified by the Commission); Restatement (Third) § 702 reporters' note 1 (citing Nuremberg Charter and the affirmation of the Nuremberg principles by the General Assembly); Y. Dinstein, War, Aggression, and Self-Defence 112-119 (1988) (binding character of the Nuremberg proscription of crimes against peace).

28. U.S. Army Field Manual 27-10, The Law of Land Warfare ¶ 498 (1956).

29. Id. ¶ 1.

30. United States v. Hudson, 11 U.S. (7 Cranch) 32, 3 L.Ed. 259 (1812); B. Forman, The Nuremberg Trials and Conscientious Objection to War: Justiciability Under United States Municipal Law, 63 Proceedings of the American Society of International Law 161 (1969); Restatement (Third) § 111 comment i and reporters' note 6.

31. Forman, The Nuremberg Trials and Conscientious Objection to War at 161. While not writing in his official capacity, Benjamin Forman was at the time Assistant General Counsel (International Affairs), Department of Defense.

32. The Genocide Convention Implementation Act of 1987 (The Proxmire Act), 18 U.S.C. §§ 1091-1093, implementing the International Convention on the Prevention and Punishment of the Crime of Genocide, entered into force January 12, 1951, 75 U.N.T.S. 277.

33. See Restatement (Third) § 702 reporters' notes 3 (genocide "was in fact considered a 'crime against humanity' in the indictments brought under the Nuremberg Charter").

34. Forman, The Nuremberg Trials and Conscientious Objection to War at 161.

35. Restatement (Third) § 331 comment e, citing art. 53, Vienna Convention on the Law of Treaties, entered into force January 27, 1980, U.N. Doc. A/Conf.39/27, 8 I.L.M. 679 (1969). Art. 53 provides:

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

While the United States has not ratified the Vienna Convention, the United States generally regards the Convention as a codification of binding customary law. The Department of State has stated that "[a]lthough not yet in force, the Convention is already generally recognized as the authoritative guide to current treaty law and practice." S. Exec. Doc. L., 92d Cong., 1st sess. (1971) at 1, cited in Restatement (Third) Part III, Introductory Note at 145. See also U.S. Citizens Living in Nicaragua, 859 F.2d 929, 940 (D.C. Cir. 1988) (definition of peremptory norm in Vienna Convention "reflects the common understanding of the term").

36. See Restatement (Third) § 331(2)(b): "An international agreement is void if at the time the agreement is concluded, it conflicts with a peremptory norm of general international law". See also note 35, this chapter.

37. See id. § 102 comment k (peremptory rules "prevail over and invalidate international agreements and other rules of international law in conflict with them").

38. Id. ("It is generally accepted that the principles of the United Nations Charter prohibiting the use of force ... have the character of jus cogens.")

39. Id. § 702 comment n (1987).

40. Restatement (Third) § 702 reporters' note 3 observes that genocide "was in fact considered a 'crime against humanity' in the indictments brought under the Nuremberg Charter." As previously stated in the text, the Restatement includes genocide among the violations of human rights whose proscription is peremptory. Id. § 702 comment n.

In Art. 19(3)(c) of the Draft Articles on State Responsibility, the International Law Commission (ILC) has identified genocide as an "international crime." "International crimes" in the ILC's usage comprise a special category applying to states not including other crimes under international law applicable to individuals (e.g., war crimes, crimes against humanity). They are

defined in Art. 19(2) as acts resulting "from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole." Report of the International Law Commission, 32d session, 35 U.N. GAOR Supp. (No. 10) at 64, U.N. Doc. A/35/10 (1980), reprinted in [1980] 2 Y.B. Int'l L. Comm'n (Pt. 2) at 32, U.N. Doc. A/CN.4/SER.A/1980/Add.1 (Pt. 2). The rules whose breach results in "international crimes" are largely drawn from peremptory norms. Report of the International Law Commission, 28th Session, 31 U.N. GAOR Supp. (No. 10) at 287-290, U.N. Doc. A/31/10 (1976), reprinted in [1976] 2 Y.B. Int'l L. Comm'n (Pt. 2) at 120-121, A/CN.4/SER.A/1976/A.1 (Pt. 2).

41. As previously stated in the text, the Restatement (Third) includes "the principles of the United Nations Charter prohibiting the use of force" among peremptory norms. Id. § 102 comment k. The Charter prohibition of the use of force against the territorial integrity or political independence of another state except in self-defense is at the core of the Definition of Aggression passed by General Assembly resolution in 1974, currently the most authoritative text concerning the meaning of aggression. G. A. Res. 3314, 29 U.N. GAOR Supp. (No. 31) 142, U.N. Doc. A/9631 (1974). See Dinstein, War, Aggression and Self-Defence at 121-122.

In the Draft Articles on State Responsibility, the International Law Commission has included aggression as an example of one category of international crimes, "a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression." Report of the International Law Commission, 32d session, 35 U.N. GAOR Supp. (No. 10) at 64, [1980] 2 Y.B. Int'l L. Comm'n. (Pt. 2) at 32. For the ILC's definition of international crimes and their relationship to peremptory norms, see note 40, this chapter.

42. See Report of the International Law Commission, 28th session, 31 U.N. GAOR Supp. (No. 10) at 246, [1976] 2 Y.B. Int'l L. Comm'n (Pt. 2) at 104 (citing the Nuremberg offenses as included among those obligations "whose breach entails the personal punishment of the perpetrators" and which "correspond largely to the obligations imposed by certain rules of jus cogens"). Cf. Restatement (Third) § 702 reporters' notes 1 ("that customary international law protects some human rights was suggested in the Nuremberg Charter, under which the Nazi defendants were charged, inter alia, with: CRIMES AGAINST HUMANITY").

43. A. Tusa and J. Tusa, The Nuremberg Trial 50-91 (1984).

44. Restatement (Third) § 702 reporters' notes 1; M. Kaufman, Statements, Declarations, and Agreements Leading to the War Crimes Trials at Nurnberg, Germany, and Relevant Documents, 25 Guild Practitioner 91-92 (1966).

45. R. Jackson, The Nurnberg Case 93 (1947).

46. Tusa and Tusa, The Nuremberg Trial at 81, quoting transcript for July 23, 1945, U.S. Department of State, International Conference on Military Trials, Pub. No. 3080 (1949); also quoted in United States v. Mitchell, 386 U.S. 972 (1966) (Douglas, J., dissenting).

47. United States v. Ernest Von Weizsaecker et al. (The Ministries Case), 14 Trial of War Criminals 317 (1952).

48. Section III, 1907 Hague Regulations Respecting the Laws and Customs of War on Land, Annex to the 1907 Hague Convention [No. IV] Respecting the Laws and Customs of War on Land, entered into force January 26, 1910, 36 Stat. 2277, T.S. 539, 1 Bevans 631. To give one example of the articles cited by the IMT, Article 46 provides:

> Family honor and rights, the lives of persons and private property, as well as religious convictions and practice, must be respected.

49. Convention Relative to the Treatment of Prisoners of War, 47 Stat. 2021, 2 Bevans 932, entered into force June 19, 1931.

50. 6 F.R.D at 130.

51. Id. at 109.

52. Id. at 130.

53. The indictment recited that the "methods and crimes" charged as crimes against humanity "constituted violations of International Conventions, of internal penal laws, of the general principles of criminal law as derived from the criminal law of all civilized nations and were involved and part of a systematic course of conduct." R. Jackson, The Case Against the Nazi War Criminals 174 (1946); United States Department of State, Trial of War Criminals 60-61 (1945). The reference to "international conventions" likely includes the Martens Clause of the Hague Land Warfare Convention, discussed in the text accompanying note 56, this chapter.

54. United States v. Otto Ohlendorf et al. (The Einsatzgruppen Case), 4 Trials of War Criminals 498.

55. United States v. Josef Alstoetter et al. (The Justice Case), 3 Trials of War Criminals 979-982 (1951).

56. Justice Jackson's Report to President Truman at 152.

57. 6 F.R.D. at 131.

58. Id. The IMT declined to find that "revolting and horrible crimes" committed before the onset of the war were crimes against humanity, stating that "it has not been satisfactorily proved that they were done in execution of, or in connection with, any [crime within the jurisdiction of the Tribunal]". Id. That requirement is included in the Charter definition of crimes against humanity. It is not, however, included in the Law No. 10 definition. Nonetheless, the U.S. tribunals handling the 12 subsequent trials of major war criminals also did not find acts committed before the outset of the war to be crimes against humanity, though two indicated such a finding was possible. See Taylor, Nuremberg Trials, War Crimes and International Law at 342-344.

59. See R. Woetzel, The Nuremberg Trials in International Law 177-178 (1960).

60. See Forman, The Nuremberg Trials and Conscientious Objection to War at 159.

61. The Nurnberg Case at 63.

62. United States v. Josef Alstoetter et al. (The Justice Case), 3 Trials of War Criminals 982 (1951).

63. 6 F.R.D. at 130.

64. Id. at 118.

65. Id. at 119.

66. Id.

67. Id. at 120.

68. Id. at 125.

69. Id.

70. Id. at 122.

71. Id. at 114.

72. Id. at 116.

73. E. Schwelb, Crimes Against Humanity, 23 The British Year Book of International Law 206 (1946).

74. F. von Hippel, B. Levi, T. Postol, and W. Daugherty, Civilian Casualties from Counterforce Attacks, 259 Scientific American 36-37 (September 1988).

75. A comparison of crimes against humanity and genocide is instructive in this regard. Art. II of the Genocide Convention prohibits specified acts, including "killing" and "causing serious bodily or mental harm," committed "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such." As implemented in the United States, "specific intent" to destroy a group "in whole or in substantial part" must be shown. 18 U.S.C. § 1091(c). Specific intent requires proof that the accused acted "with the intent to accomplish the precise act which the law prohibits." Black's Law Dictionary 727 (5th. ed. 1979). The requirement of specific intent could be read to exclude conviction for acts which, while deliberately committed and foreseeably resulting in the destruction of protected groups, are intended to accomplish other results only. One might argue, therefore, that the use of nuclear weapons with the foreseeable consequence of partially or wholly obliterating a society, but aimed solely at disabling enemy nuclear capability, would not be genocide.

A comparable argument could be made as to crimes against humanity, which may be understood to require a debased motive, e.g. political, racial, religious, or cultural intolerance. See Art. 2(11), Draft Code of Offenses Against the Peace and Security of Mankind, Report of the International Law Commission, 6th session, 9 U.N. GAOR Supp. (No. 9) at 11, U.N. Doc. A/2693 (1954), reprinted in [1954] 2 Y.B. Int'l L. Comm'n. at 151-152, A/Cn.4/SER.A/1954/Add.1 (offenses against peace and security of mankind include "inhuman acts such as murder, extermination, enslavement, deportation or persecutions, committed against any civilian population on social, political, racial, religious or cultural grounds"). Some members of the International Law Commission, including the Special Rapporteur on the Draft Code, have taken this view. Report of the International Law Commission, 41st session, 44 U.N. GAOR Supp. (No. 10) at 151-152, U.N. Doc. A/44/10 (1989). The Rapporteur also offered a definition of the intentional element of any criminal act as the "conscious will to commit an act, desiring and seeking the consequences." Id. at 152. Certainly in the circumstance considered here, the better view is that crimes against humanity are established by the deliberate commission of acts whose foreseeable consequences include mass killings of civilians. Cf. Black's Law Dictionary at 336 ("criminal intent ... [i]ncludes those consequences which ... are

known to be substantially certain to result, regardless of desire"). In any event, as illustrated by Cold War rationales for deployment and threatened nuclear attack, major use of nuclear weapons probably would be undertaken due to political, ideological, or racial intolerance and not only as a result of a "rational" strategic calculus.

76. Id. at 1419.

77. Webster's Third New International Dictionary (1981).

78. In the following discussion of these matters I am indebted to John H.E. Fried's The Significance of "Nuremberg" For Peace In The Nuclear Age, a paper presented to the International Conference on Nuclear Weapons and International Law, New York, August 29-31, 1987 and available from the Lawyers' Committee on Nuclear Policy, New York. Fried was a professor emeritus of political science at the City University of New York and served as Special Legal Consultant to the Judges of the U.S. War Crimes Tribunals, Nuremberg.

79. 6 F.R.D. at 112-13.

80. United States v. Wilhelm List et al. (The Hostage Case), 11 Trials of War Criminals 1253-1254 (1950).

81. Id. at 1272 (emphasis added).

82. United States v. Alfried Krupp et al. (The Krupp Case), 9 Trials of War Criminals 1347 (1950).

83. United States v. Wilhelm von Leeb et al. (The High Command Case), 11 Trials of War Criminals 541 (1950).

84. Id. at 517.

85. Id. at 516.

86. Id. at 515.

87. 6 F.R.D. at 154.

88. Id.

89. M. McDougal and N. Schlei, The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security, 64 Yale L. J. 648, 689-690 (1955). As the authors had previously discussed the use of nuclear weapons in reprisal, it is clear that this passage contemplates first use of nuclear weapons.

90. J. Nye, Nuclear Ethics (1986).

91. Id. at 101-102 and passim. Nye writes that "the argument against extended deterrence [i.e., threatened first use] fails to establish strong consequential reasons to believe that the goal of preserving the political freedoms of Western democracies is disproportionate to the likely results of trying to pursue it."

92. H. Meyrowitz, Le bombardement strategique d'apres le Protocole additionnel I aux Conventions de Geneve, 41 Zeitschrift Fur Auslandisches Offentliches Recht Und Volkerrecht 1, 3 (1981).

93. Id. at 17.

94. R. Rhodes, The Making of the Atomic Bomb 472 (1988).

95. Id. at 474.

96. Id. at 593.

97. Id.

98. Id. at 599; M. Walzer, Just and Unjust Wars 261 (1977).

99. Rhodes, The Making of the Atomic Bomb at 599.

100. Id. at 600.

101. Id. at 734.

102. Id. at 740.

103. Meyrowitz, Le Bombardement Strategique at 15.

104. Walzer, Just and Unjust Wars at 256.

105. Meyrowitz, Le Bombardement Strategique at 15.

106. Walzer, Just and Unjust Wars at 255-256.

107. The order is quoted in Rhodes, The Making of the Atomic Bomb at 471.

108. Quoted in G. Quester, Deterrence before Hiroshima 156 (1966). At the request of the Chief of Air Staff, Churchill "withdrew" the note. Id.

109. The United States Strategic Bombing Survey, The Effects of Strategic Bombing on Japanese Morale 9 (1947).

110. Rhodes, The Making of the Atomic Bomb at 596.

111. Id.

112. Id. at 713.

113. Id. at 639.

114. Id. at 651.

115. M. Bundy, Danger and Survival 67 (1988) (emphasis added).

116. 6 F.R.D. at 169.

117. Id.

118. See T. Taylor, Final Report To The Secretary Of The Army On Nuernberg War Crimes Trials Under Control Council Law No. 10 65 (1949).

119. 6 F.R.D. at 113.

120. Id.

121. Id. at 176-177.

122. United States v. Wilhelm List et al. (The Hostage Case), 11 Trials of War Criminals 1278, 1307 (1950).

123. Id. at 1295-1297.

124. Taylor, Final Report To The Secretary Of The Army at 65-66.

125. United States v. Wilhelm List et al., 11 Trials of War Criminals at 1317.

126. United States v. Carl Krauch et al. (The Farben Case), 8 Trials of War Criminals 1137 (1952).

127. Id. at 1138.

128. United States v. Otto Ohlendorf et al. (The Einsatzgruppen Case), 4 Trials of War Criminals at 466.

129. Id. at 466-467.

130. Id. at 467.

131. M. Bothe, K. Partsch, and W. Solf, New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949 276 (1982). Solf is the author responsible for the matters discussed here. See the Preface and Contents, id. at v, ix-x.

132. Arts. 25-28, Hague Land Warfare Regulations; Arts. 1-3, 1907 Hague Convention [No. IX] Concerning Bombardment By Naval Forces In Time of War, entered into force January 26, 1910, 36 Stat. 2351, 1 Bevans 681.

133. See Meyrowitz, Le Bombardement Strategique at 5.

134. Solf, New Rules for Victims of Armed Conflict at 275 and n.2. The first sentence quoted is from Solf's text; the second and third sentences are from his note 2.

135. Id. at 276.

136. See id. at 194-195 (principle of proportionality underlies Arts. 22 and 23 of the Hague Regulations and the restatement of those articles in Art. 35 of Protocol I to the Geneva Conventions of 1949).

137. Solf directly incorporates the requirement of proportionality into the principle of military necessity, which he defines as follows:

> The principle of necessity justifies those measures of military violence, and only those measures, not forbidden by international law which are relevant and proportionate to securing the prompt submission of the enemy with the least possible expenditure of economic or human resources.

Id. at 194-195. He notes, however, that other definitions do not include the proportionality requirement.

138. Reprinted in Schindler and Toman, The Laws of Armed Conflict 207.

139. G. Best, Humanity in Warfare 273 (1980).

140. Schindler and Toman describe the status of the Hague air rules as follows:

> Although these rules were never adopted in legally binding form they are of importance "as an authoritative attempt to clarify and formulate rules of law governing the use of aircraft in war" (Oppenheim/Lauterpacht, International Law, 7th ed., Vol. 2, p. 519). To a great extent, they correspond to the customary rules and general principles underlying the conventions on the law of war on land and at sea.

The Laws of Armed Conflict at 207. See also Meyrowitz, Le Bombardement Strategique at 6 (noting that the rules were drafted by representatives of governments).

141. Shimoda et al. v. Japan, judgment of December 7, 1963, District Court of Tokyo, 8 Jap. Ann. Int. L. 212 (1964).

142. Shimoda is summarized and discussed in R. Falk, The Shimoda Case: A Legal Appraisal of the Atomic Attacks Upon Hiroshima and Nagasaki, 59 Amer. J. Int. L. 759 (1965).

143. United States v. Wilhelm List et al. (The Hostage Case), 11 Trials of War Criminals (1950) 1247. The quoted statement was made by international lawyer L. Oppenheim and adopted by the tribunal.

144. Taylor, Final Report to the Secretary of the Army at 65. Taylor's full statement is as follows:

> If the first badly bombed cities - Warsaw, Rotterdam, Belgrade and London - suffered at the hands of the Germans and not the Allies, nonetheless the ruins of German and Japanese cities were the results not of reprisal but of deliberate policy, and bore eloquent witness that aerial bombardment of cities and factories has become a recognized part of modern warfare as carried on by all nations.

145. Michael Walzer states and assesses this argument, suggesting that it may have been justified in the early years of war, not because it was consistent with the law of war, but because the prospect of Nazi victory constituted a "supreme emergency" mandating resort to criminal means of defense. Just and Unjust Wars at 255-262.

146. Quoted in Meyrowitz, Le bombardement strategique at 24.

147. W. Churchill, Triumph and Tragedy 639 (1953):

> To avert a vast, indefinite butchery, to bring the war to an end, to give peace to the world, to lay healing hands upon its tortured peoples by a manifestation of overwhelming power at the cost of a few explosions, seemed, after all our toils and perils, a miracle of deliverance.

148. Samuel Scheffler describes consequentialism as follows:

> Consequentialism in its purest and simplest form is a moral doctrine which says that the right act in any given situation is the one that will produce the best overall outcome, as judged from an impersonal standpoint which gives equal weight to the interests of everyone. Somewhat more precisely, we may think of a consequentialist theory of this kind as coming

> in two parts. First, it gives some principle for ranking overall states of affairs from best to worst from an impersonal standpoint, and then it says that the right act in any given situation is the one that will produce the highest-ranked state of affairs that the agent is in a position to produce. "Introduction" to S. Schleffler, ed., Consequentialism and Its Critics 1 (1988).

Consequentialism is most closely associated with the view that while observance of norms is often appropriate, the morality of an act is judged by its consequences, not its conformity with norms, and in some cases a moral act involves violation of norms. For a discussion of the tension between an "absolutist" view that requires compliance with norms and a view that requires violation of norms when justified by a consequentialist calculation, see T. Nagel, War and Massacre, in M. Cohen, T. Nagel, and T. Scanlon, War and Moral Responsibility (1974). Much of Michael Walzer's Just and Unjust Wars is also concerned with the tension between the two views.

149. United States v. Wilhelm List et al. (The Hostage Case), 11 Trials of War Criminals at 1272.

150. Similar disputes have arisen with respect to strategic bombing of Germany. The contribution of the attacks on German civilians to the achievement of military ends was speculative at the time, and later questioned by the U.S. Strategic Bombing Survey. The Survey found that while the bombing undermined civilians' "belief in ultimate victory or satisfactory compromise, and their confidence in their leaders ... they continued to work efficiently." United States Strategic Bombing Survey, Overall Report (European War) 108 (1945). Moreover, the Survey found that attacks on targets other than "city areas" were more efficacious in disrupting the German war effort:

> The importance of careful selection of targets for air attack is emphasized by the German experience. The Germans were far more concerned over attacks on one or more of their basic industries and services - their oil, chemical, or steel industries, or their power, or transportation networks - than they were over attacks on the armament industry or the city areas. Id.

151. 8 Jap. Ann. Int. L. at 226 (1964). Immediately following the bombings, however, Japan protested to the United States that they violated the law of war, noting that the atomic bomb "exceeds by far in the indiscriminate and cruel character of its efficiency the poison and other weapons" whose use the United States had declared to be

illegal. A. Cassese, Violence and Law in the Modern Age 23 (1986).

152. See, e.g., United States Strategic Bombing Survey, Japan's Struggle to End the War 13 (1946). Indeed, the Survey found that Japan was likely to surrender absent not only the atomic bombings but also Soviet entry into the Pacific war:

> 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. Id.

153. This prohibition is implied in the previously quoted formulation of military necessity advanced by The Hostage Case tribunal:

> 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. United States v. Wilhelm List et al., 11 Trials of War Criminals at 1253.

It is explicitly stated in Solf's formulation authorizing only the violence minimally required to achieve the enemy's submission:

> The principle of necessity justifies those measures of military violence, and only those measures, not forbidden by international law which are relevant and proportionate to securing the prompt submission of the enemy with the least possible expenditure of economic or human resources. New Rules for Victims of Armed Conflict at 194-195.

154. Just and Unjust Wars at 266-268.

155. See G. Alperovitz, Atomic Diplomacy (1965). See also Churchill, Triumph and Tragedy at 639 (ability to use atomic bombs meant "we should not need the Russians"). For a critical assessment, see Bundy, Danger and Survival at 88-89.

156. See Walzer, Just and Unjust Wars at 268, note 33.

157. For a recent assessment reaching a similar conclusion, see A. Cassese, Violence and Law in the Modern Age 8-29 (1988) (bombing of Hiroshima violated principles forbidding use of means of warfare that are indiscriminate or inflict unnecessary suffering).

158. Cf. J. Rawls, A Theory of Justice 114-115 (1971) (discussing "natural duties," e.g., "the duty not to harm or injure another," as basis of principles of justice among nations); Walzer, Just and Unjust Wars at 53-54, 134-135 (individuals' right to life and liberty at foundation of moral judgments about war).

159. See Chapter Three.

160. Cf. T. Scanlon, Rights, Goals, and Fairness, in S. Scheffler, ed., Consequentialism and Its Critics.

161. J. Ford, The Morality of Obliteration Bombing, in R. Wasserstrom, War and Morality 38-39 (1970).

162. Taylor, Final Report to the Secretary of the Army at 65.

163. See R. Baxter, The Role of Law in Modern War, 47 Proceedings of the American Society of International Law 91-92 (1953).

164. Id. at 92.

165. W. O'Brien, The Nuremberg Principles, in 3 R. Falk, ed., The Vietnam War and International Law 219-221 (1972).

166. U.S. Department of the Navy, The Law of Naval Warfare ¶ 621(b) (1955).

167. Id. ¶ 221(b) n.15. Paragraph 221(b) is similar to the provision, ¶ 621(b), quoted in the text. It states that "it is forbidden to make the noncombatants the object of a direct attack by the armed forces of a belligerent, if such attack is unrelated to a military objective."

168. See, e.g., Weston, Nuclear Weapons v. International Law at 555, 572-573; R. Falk, L. Meyrowitz, and J. Sanderson, Nuclear Weapons and International Law, 20 Indian J. Int. L. 541, 556, 590 (1980). Cf. F. Newman, Problems in the Application and Interpretation of Civil and Political Rights, in K. Vasak and P. Alston, The International Dimensions of Human Rights 142 (1982).

169. Restatement (Third) § 102(2).

170. This point is made by Meyrowitz, Le bombardement strategique at 15-16.

171. See id.

172. Id. at 16.

173. Id.

174. U.S. Air Force Pamphlet 110-31 (1976). Unlike the Navy and Air Force publications, the Army manual contains little that bears on strategic bombing. A minimalist statement of the principle of proportionality is included. U.S. Army Field Manual 27-10, The Law of Land Warfare ¶ 41 (1956) ("loss of life and damage to property must not be out of proportion to the military advantage to be gained"). See also note 60 to the Introduction.

175. International Law - The Conduct of Armed Conflict and Air Operations ¶ 5-2(e).

176. Id.

177. Id. ¶ 5-2(f).

178. Id.

179. See Lewis, U.N. Survey Calls Iraq's War Damage Near-Apocalyptic, The New York Times, March 22, 1991 at A1, col. 6.

180. Id. ¶ 5-3. The thrust of the pamphlet may be judged by the following statement of the prohibition of the use of indiscriminate weapons or methods of warfare, a statement that effectively bars use of nuclear weapons and in addition seems inconsistent with strategic bombing as practiced during World War II.

> Weapons are not unlawful simply because their use may cause incidental casualties to civilians and destruction of civilian objects. Nevertheless, particular weapons or methods of warfare may be prohibited because of their indiscriminate effects.... Indiscriminate weapons are those incapable of being controlled, through design or function, and thus they can not, with any degree of certainty, be directed at military objectives. For example, in World War II German V-I rockets, with extremely primitive guidance systems yet generally directed towards civilian populations, and Japanese incendiary balloons without any guidance systems were regarded as unlawful. Both weapons were, as deployed, incapable of being aimed specifically at military objectives. Use of such essentially unguided weapons could be expected to cause unlawful excessive injury to civilians and damage to civilian objects.... In addition, some weapons, though capable

> of being directed only at military objectives, may have otherwise uncontrollable effects so as to cause disproportionate civilian injuries or damage. Biological warfare is a universally agreed illustration of such an indiscriminate weapon. Uncontrollable effects, in this context, may include injury to the civilian population of other states as well as injury to an enemy's civilian population. Uncontrollable refers to effects which escape in time or space from the control of the user as to necessarily create risks to civilian persons or objects excessive in relation to the military advantage anticipated. International law does not require that a weapon's effects be strictly confined to the military objectives against which it is directed, but it does restrict weapons whose foreseeable effects result in unlawful disproportionate injury to civilians or damage to civilian objects. Id. ¶ 6-3(c).

181. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), entered into force December 7, 1978, U.N. Doc. A/32/144, Annex I, reprinted in 16 I.L.M. 1391 (1977).

182. Solf, New Rules for Victims of Armed Conflict at 275.

183. Cf. Michael Walzer's discussion of civilians who may be attacked:

> The relevant distinction is not between those who work or the war effort and those who do not, but between those who make what soldiers need to fight and those who make what they need to live, like all the rest of us. When it is militarily necessary, workers in a tank factory can be attacked and killed, but not workers in a food processing plant. The former are assimilated to the class of soldiers - partially assimilated, I should say, because these are not armed men, ready to fight, and so they can be attacked only in their factory (not in their homes), when they are actually engaged in activities threatening and harmful to their enemies. Just and Unjust Wars at 146.

Walzer's account, like Protocol I, rejects the World War II identification of working class residential areas as legitimate targets. Perhaps out of a desire to avoid academic niceties that obscure the reality of war, Walzer goes too far in accepting the breakdown of the distinction between combatant and non-combatant. Workers are vulnerable to casualties when they work in a facility that is a legitimate target of attack, not because they have

become quasi-combatants and are therefore themselves targets.

The passage also raises an important issue I have not addressed, identification of the elements of enemy society that may be attacked. Protocol I contains a number of provisions bearing on that issue: Art. 52(2) defines military objectives as objects that "make an effective contribution to military action" and whose destruction "offers a definite military advantage"; Art. 52(3) provides that in case of doubt whether objects normally dedicated to civilian purposes such as houses or schools are being used to make an effective contribution to military action, they are presumed not to be; Art. 53 protects cultural objects and places of worship from attack; Art. 54 protects foodstuffs, water supplies, and other "objects indispensable to the survival of the civilian population" from attack intended to deny them "for their sustenance value to the civilian population or to the adverse Party"; Art. 56 protects dams and nuclear power plants from attack if the attack may cause "severe losses among the civilian population."

184. G. Aldrich, Progressive Development of the Laws of War: A Reply to Criticisms of the 1977 Protocol I, 26 Virginia J. Int. L. 693, 713 (1986).

185. See Meyrowitz, Le bombardement strategique at 60-61.

186. This is the burden of Meyrowitz's argument in Le bombardement strategique.

187. The ICRC statement is quoted in Solf, New Rules for Victims of Armed Conflict at 188-189.

188. Id. at 188.

189. Id. at 189.

190. Id. at 190.

191. Id. at 722.

192. Aldrich, Progressive Development of the Laws of War at 719.

193. H. Meyrowitz, Le statut des armes nucleaires en droit international - 1e part, 25 German Yearbook of International Law 219, 230-231 (1982).

194. See id. at 232-238.

195. G. Aldrich, New Life for the Laws of War, 75 American J. Int. L. 764, 781 (1981). Aldrich's statement regarding the provision of Protocol I prohibiting target area bombardment also reflects the view that existing law as codified in the Protocol does regulate the use of nuclear weapons. "To the extent that it expands the preexisting restrictions on bombardment," he writes, the prohibition of target area bombardment would not "affect the targeting and use of nuclear weapons by the United States." Id.

196. M. Depuis, J. Heywood, and M. Sarko (rapporteurs), The Sixth Annual American Red Cross - Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, 2 Amer. U. J. Int. L. and Policy 415, 426 (1987).

197. See E. Collier, International Law on the Use of Nuclear Weapons and the United States Position, Congressional Research Service Report No. 79-28 F 17-18 (1979).

198. G.A. Res. 2444, 23 U.N. GAOR Supp. (No. 18) 50, U.N. Doc. A/7218 (1968).

199. Collier, International Law on the Use of Nuclear Weapons and the United States Position at 19-20.

200. Weston, Nuclear Weapons Versus International Law at 575-587; D. Arbess, The International Law of Armed Conflict in Light of Contemporary Deterrence Strategies: Meaningful Constraint or Empty Promise?, 30 McGill L. J. 89, 105-121 (1984).

201. Collier, International Law on the Use of Nuclear Weapons and the United States Position at 19.

202. See Newman, Problems in the Application and Interpretation of Civil and Political Rights at 142.

203. See Bundy, Danger and Survival at 586-688.

204. Pamphlet 110-131 ¶ 6-3(c).

205. M. Kaku and D. Axelrod, To Win A Nuclear War 51 (1987).

206. Id. at 51-52.

207. C. Builder and M. Graubard, The International Law of Armed Conflict: Implications for the Concept of Assured Destruction (1982).

208. Weston is persuasive on this point. See Nuclear Weapons Versus International Law at 579-587.

209. United States v. Wilhelm List et al., 11 Trials of War Criminals at 1248-1249.

210. Solf, New Rules for Victims of Armed Conflict at 311-312.

211. Id. at 315.

212. Meyrowitz, Le statut des armes nucleaires en droit international at 191-195.

213. This position is described, but not advocated, in Solf, New Rules for Victims of Armed Conflict at 314.

214. G. Aldrich, Progressive Development of the Laws of War at 710. See also Solf, New Rules for Victims of Armed Conflict at 315.

215. Id. at 312.

216. Weston, Nuclear Weapons Versus International Law at 581:

> [An anticipatory first strike] designed to preempt, say, an imminent devastation of equivalent or greater dimension, conceivably could meet the test of proportionality precisely because it would be directed, pursuant to counterforce doctrine, against only military targets.... This logic ... suffers from all the disabilities concerning proportionality that we noted in connection with both the preemptive countervalue strike and the initiating counterforce strike. Again, it is reasonable to conclude that the test of proportionality would not be met or that, at the very least, those who would leash the preemptive counterforce strike would have the burden of proving otherwise.

217. Just and Unjust Wars at 251-261.

Notes to Chapter Two

1. 59 Stat. 1031 (1945).

2. Art. 2(4) provides:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

Art. 51 provides:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

3. See Introduction, text accompanying notes 59-61.

4. United States Arms Control and Disarmament Agency, Documents on Disarmament 1962 630 (1963); U.N. Doc. A/5174, Annex II at 78-80 (1962).

5. See Chapter One, text accompanying notes 209-217.

6. A. Tusa and J. Tusa, The Nuremberg Trial 83, 86 (1984).

7. 6 F.R.D. at 112.

8. Art. I of Law No. 10 defined crimes against peace, war crimes, and crimes against humanity as in the IMT Charter except in two respects. One, not relevant here, is that the requirement of connection with other crimes was omitted from the definition of crimes against humanity. See Chapter One, note 58. The second is that the "common plan or conspiracy" clause, the last sentence of the Charter's Art. 6, was omitted. Instead, Art. I(2) provided:

> 2. Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this Article, if he was (a) a principal or (b) was an accessory to the commission of any such crime or

> ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission or (e) was a member of any organization or group connected with the commission of any such crime or (f) with references to paragraph 1(a) [crimes against peace], if he held a high political, civil or military (including General Staff) position in Germany or in one of its Allies, co-belligerents or satellites, or held high position in the financial, industrial or economic life of any such country.

9. See T. Taylor, Nuremberg Trials, War Crimes and International, International Conciliation No. 450 346-347 (1949).

10. 6 F.R.D. at 111.

11. See Taylor, Nuremberg Trials, War Crimes and International Law at 269.

12. The United States of America v. Ernest Von Weizsaecker et al., 14 Trials of War Criminals 323-435 (1952).

13. 6 F.R.D. at 166.

14. Id. at 182.

15. Id.

16. Id. at 89-90.

17. Id. at 111.

18. Id. at 89.

19. Id. at 91 (emphasis added).

20. Id. at 111.

21. Id. at 106-107.

22. Id. at 106.

23. Id. at 108-109.

24. R. Jervis, The Illogic of American Nuclear Strategy (1984); Stanford Arms Control Group, C. Blacker and G. Duffy, eds., International Arms Control: Issues and Agreements (1984); M. Kaku and D. Axelrod, To Win A Nuclear War (1987); R. Bowman, Star Wars: Defense or Death Star? (1985); R. Betts, Nuclear Blackmail and Nuclear Balance (1987); M. Bundy, Danger and Survival (1988); J. Newhouse, War and Peace in the Nuclear Age (1989).

25. Washington Post, October 5, 1977 at A8 (official text) (emphasis added).

26. 76 Proceedings of the American Society of International Law 26 (1982) (emphasis added).

27. Two recent studies giving detailed accounts of consideration and threats of nuclear use are Kaku and Axelrod, To Win A Nuclear War, and Betts, Nuclear Blackmail and Nuclear Balance. Betts summarizes the multiplying studies of nuclear threats by both the Soviet Union and the United States, focussing especially on evidence of the process of decision-making during "crises." Kaku and Axelrod rely on a number of hitherto unavailable, recently declassified, official documents including memoranda summarizing high-level meetings, to provide a detailed picture of when and how the United States has contemplated the use of nuclear weapons.

28. As noted in the Introduction, this contention is advanced by a number of scholars, including Richard Falk, Francis Boyle, and Daniel Arbess, and is most cogently argued by Arbess. See D. Arbess, The International Law of Armed Conflict in Light of Contemporary Deterrence Strategies: Empty Promise or Meaningful Restraint, 30 McGill L. J. 89, 121-127 (1984); International Law Revisited: Meeting the Legal Challenge of Nuclear Weapons, 16 Bulletin of Peace Proposals 105, 109-110 (1985).

29. Report of the International Law Commission, 2nd. session, 5 U.N. GAOR Supp. (No. 12) at 13-14, U.N. Doc. A/1316 (1950), reprinted in [1950] 2 Y.B. Int'l L. Comm'n at 376-378, U.N. Doc. A/CN.4/SERA/1950/Add.1.

30. See F. Boyle, The Relevance of International Law to the "Paradox" of Nuclear Deterrence, 80 Northwestern U. L. R. 1407, 1440-1441 (1986). Cf. I. Pogany, Nuclear Weapons and Self-Defence in International Law, 2 Conn. J. Int. L. 97, 99 (1986). The International Court of Justice's opinion in Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States) recognized that whether a response to an attack is lawful "depends on observance of the criteria of the necessity and proportionality of the measures taken in self-defence." 1986 I.C.J. 14, 103.

31. Tusa and Tusa, The Nuremberg Trial at 81, 86.

32. G.A. Res. 177, U.N. Doc. A/519 at 111-112 (1947).

33. Report of the International Law Commission, 2d session, 5 U.N. GAOR Supp. (No. 12) at 13, [1950] 2 Y.B. Int'l L. Comm'n at 376.

34. Draft Code of Offenses Against the Peace and Security of Mankind, Report of the International Law Commission, 6th session, 9 U.N. GAOR Supp. (No. 9) 9, U.N. Doc. A/2693 (1954), reprinted in [1954] 2 Y.B. Int'l L. Comm'n 149, A/Cn.4/SER.A/1954/Add.1.

35. Art. 2(3), 9 U.N. GAOR Supp. (No. 9) at 13, 2 [1954] Y.B. Int'l L. Comm'n at 151.

36. G. A. Res. 3314, 29 U.N. GAOR Supp. (No. 31) 142, U.N. Doc. A/9631 (1974).

37. Report of the International Law Commission, 41st session, 44 U.N. GAOR Supp. (No. 10) at 177-178, U.N. Doc. A/44/10 (1989).

38. Id. at 178.

39. Report of the International Law Commission, 28th session, 31 U.N. GAOR Supp. (No. 10) at 243, U.N. Doc. A/31/10 (1976), reprinted in [1976] 2 Y.B. Int'l L. Comm'n (Pt. 2) at 102, A/CN.4/SER.A/1976/A.1 (Pt. 2).

40. See generally Burns Weston's discussion of the threat of force prohibition in F. Boyle, A. Rubin, and B. Weston, People of the Earth v. China, France, U.S.S.R., U.S et al. 27-29 (1988). Weston writes that "it is reasonable to presume as unlawful even the commonplace advance preparation of nuclear missiles for immediate launch," id. at 27, and concludes that:

> international law establishes a rebuttable presumption against the legality of the threat of use of nuclear weapons at least insofar as such threat represents an imminent possibility of the illegal use of nuclear weapons [i.e., virtually all uses contemplated in superpower strategy]. Id. at 29.

41. See note 30 and accompanying text, this chapter.

42. See Introduction, note 59 and accompanying text.

43. H. Meyrowitz, Les Juristes Devant L'Arme Nucleaire, 67 Revue Generale de Droit Public International 820, 833 (1963).

44. Article 23(a), 1907 Hague Regulations Respecting the Laws and Customs of War on Land, Annex to the 1907 Hague Convention [No. IV] Respecting the Laws and Customs of War on Land, entered into force January 26, 1910, 36 Stat. 2277, T. S. 539, 1 Bevans 631; Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other

Gases, and of Bacteriological Methods of Warfare, entered into force February 8, 1928, 26 UST 571, TIAS 8061.

45. Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, entered into force March 26, 1972, 26 UST 583, TIAS 8062.

46. Meyrowitz has not pressed the analogy in recent articles, and stresses instead what he argues to be the unique place of nuclear weapons in a system of deterrence that is part of the regime of peace, not war. Le statut des arms nucleaires en droit international - 1e partie, 25 German Yearbook of International Law 219, 221-226 (1982).

47. Le statut des armes nucleaires en droit international -1e partie, 25 German Yearbook of International Law 219, 224 (1982) (my translation).

48. Judgment of December 16, 1983, Bundesverfassungs-gericht, W. Ger., 66 BVerfGE 39, 65, discussed and translated in relevant part in G. Offcors and M. Ruete, Law and Peace in West Germany, in J. Dewar, A. Paliwala, S. Picciotto, and M. Ruete, Nuclear Weapons, The Peace Movement, and the Law 227 (1986).

49. Le statut des armes nucleaires en droit international - 1e partie at 224.

50. B. Weston, Nuclear Weapons Versus International Law: A Contextual Reassessment, 28 McGill L. J. 542, 587-588 (1983). Weston since has suggested that deployment is contrary to the U.N. Charter prohibition of aggressive threat of force. See note 40, this chapter.

51. Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and Under Water, entered into force October 10, 1963, 14 UST 1313, TIAS 5433.

52. Treaty on the Non-Proliferation of Nuclear Weapons, entered into force March 5, 1970, 21 UST 483, TIAS 6839.

53. Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems, entered into force October 3, 1972, 23 UST 3435, TIAS 7503.

54. Treaty for the Prohibition of Nuclear Weapons in Latin America, entered into force April 22, 1968, 22 UST 762, TIAS 7137. While not a contracting party to the treaty, which is an agreement among Latin American nations, the United States has approved the treaty, and is a party to two protocols binding signatory nuclear weapons powers to respect the denuclearization regime established by the

treaty. See U.S. Arms Control and Disarmament Agency, Arms Control and Disarmament Agreements: Texts and Histories of Negotiation 59-63, 76-77 (1982).

55. Agreement Between the United States of America and the Union of Soviet Socialist Republics on the Prevention of Nuclear War, entered into force June 22, 1973, Arms Control and Disarmament Agreements at 31.

56. Treaty on the Elimination of Intermediate-Range and Shorter Range Missiles, entered into force June 1, 1988, 27 I.L.M. 90 (1988).

57. Arms Control and Disarmament Agreements at 86.

58. Id. at 90. At the 1990 NPT review conference, a group of non-nuclear states led by Mexico strongly reiterated the importance of achieving a comprehensive test ban to the 1995 renewal of the treaty, and blocked agreement on a consensus final statement because the United States refused to commit to expeditious negotiation of the ban. See L. Spector and J. Smith, Deadlock Damages Nonproliferation, and W. Epstein, Conference a Qualified Success, 46 The Bulletin of the Atomic Scientists 39 and 45 (December 1990). In January 1991, at the same time the United States relied on Iraq's alleged development of nuclear capability as a rationale for war, it also refused to join with the Soviet Union and other nations to ban all nuclear testing by amending the Limited Test Ban Treaty. See J. Wurst, On Hold: Test Ban Amendment Conference, Conducted in the Shadow of War, Fails to Achieve a CTB but Dodges Bush's Bullets, 9 Nuclear Times 7 (Spring 1991); W. Epstein, January meeting keeps hope alive, 47 The Bulletin of the Atomic Scientists 10 (April 1991).

59. See Chapter One, text accompanying notes 20-34.

60. Letter from the Chairman of the U.N. Committee on Human Rights to the Secretary General (April 9, 1986), A/41/40 at 120.

61. Weston, Nuclear Weapons Versus International Law at 547, 572.

62. See F. Newman, Problems in the Application and Interpretation of Civil and Political Rights, in 1 K. Vasak and P. Alston, The International Dimensions of Human Rights 142 (1982).

63. As previously noted, Control Council Law No. 10, pursuant to which 12 trials of major war criminals were held by U.S. tribunals, omitted the requirement of the IMT Charter that crimes against humanity be committed in execution of or connection with war crimes and crimes

against peace. See Chapter One, note 58. Art. 2(11) of the 1954 Draft Code of Offences Against the Peace and Security of Mankind also omitted the requirement. Report of the International Law Commission, 6th session, 9 U.N. GAOR Supp. (No. 9) at 11, U.N. Doc. A/2693 (1954), reprinted in [1954] 2 Y.B. Int'l L. Comm'n. at 151-152. As the Special Rapporteur on the draft code observed in 1989:

> First linked to the state of belligerancy, the concept of a crime against humanity gradually became autonomous and today this concept was quite separate from that of a war crime. Thus not only the 1954 draft, but even conventions which had entered into force (on genocide or apartheid) no longer linked this concept to the state of war. Report of the International Law Commission, 41st Session, 44 U.N. GAOR Supp. (No. 10) at 148-149, U.N. Doc. A/44/10 (1989).

64. See Declaration of Frank Newman in Support of Defendants, People of the State of California v. David Wylie et al., No. E8849052, Santa Clara County Municipal Court (1989). The declaration is available from Western States Legal Foundation, Oakland, California.

65. See Chapter One, text accompanying notes 30-34.

66. Y. Dinstein, War, Aggression and Self-Defence 128 (1988).

67. Newman, Problems in the Application and Interpretation of Civil and Political Rights at 166.

68. See M. Bundy, G. Kennan, R. McNamara, G. Smith, Nuclear Weapons and the Atlantic Alliance, 60 Foreign Affairs 753 (1982) (urging adoption of no first-use policy in Europe).

69. In this posture, nuclear weapons are deployed and perceived to be deployed solely for the purpose of threatening retaliation to the adversary's possible nuclear attack. As Daniel Arbess has explained, establishment of a posture of minimal deterrence entails among other things a declaration or treaty establishing a no first use obligation; conventional and nuclear redeployment consistent with that obligation; elimination of accurate, fast, counterforce, first-strike weapons; removal of various kinds of nuclear and dual-capable weapons such as the sea-launched cruise missile from their integrated role in conventional forces; termination of the drive to develop and deploy space-based ABM systems; and a halt to nuclear testing and negotiation of a comprehensive test ban. The International Law of Armed Conflict in Light of Contemporary Deterrence Strategies at 130-137.

70. See H. Meyrowitz, Le statut des armes nucleaires en droit international - 2e partie, 26 German Yearbook of International Law 161, 163-169 (1983). In principle, because though unilateral they were intended to be binding, the pledges impose a legal obligation of no first use. See Nuclear Tests Case (Australia v. France), 1974 I.C.J. 253, 267. But Meyrowitz questions the import of the obligation, at least as to the Soviet Union, maintaining that it is easily revocable due to the NATO position that the Soviet pledge is meaningless, NATO adherence to a policy of threatened first use in response to Soviet aggression, and possible changes in the strategic situation. Id. at 168-169. See also A. Cassese, Violence and Law in the Modern Age 57 (1988) (the commitment to no first use "seems to be of greater political than legal value").

71. Examples of reforms aimed at strengthening the ability of international institutions to engage in dispute resolution and minimize the recourse to political violence are increased reliance on U.N. and other international peacekeeping forces, and agreement of the superpowers, under U.N. auspices, to refrain from intervention in the internal affairs of other nations. See Arbess, The International Law of Armed Conflict in Light of Contemporary Deterrence Strategies at 137-141.

72. F. Boyle, World Politics and International Law (1985).

73. See A. Chayes, The Cuban Missile Crisis 41-68 (1974).

74. Id. at 40.

75. Boyle, World Politics and International Law at 68, 74.

76. Id. at 258.

77. Id. at 165-167.

Notes to Chapter Three

1. See Chapter One, text accompanying notes 20-47.

2. Justice Jackson's Report To President Truman On The Legal Basis For Trial of War Criminals, 19 Temple L. Q. 144, 150 (1946).

3. R. Jackson, The Nurnberg Case 94 (1947).

4. United States et al. v. Goering et al. (Judgment of the International Military Tribunal), 6 F.R.D. 69, 131 (1946). As previously noted, the IMT claimed to be constrained by the Charter's definition of crimes against humanity, which provided that crimes against humanity were offenses committed in execution of or in connection with other crimes within the IMT's jurisdiction. See Chapter One, note 58; Chapter Two, note 63.

5. 6 F.R.D. at 109.

6. United States v. Josef Alstoetter et al. (The Justice Case), 3 Trials of War Criminals (1951).

7. As the tribunal stated:

> All of the war crimes and many, if not all, of the crimes against humanity as charged in the indictment in the case at bar were, as we shall show, violative of preexisting principles of international law. To the extent to which this is true, C. C. Law 10 may be deemed to be a codification rather than original substantive legislation. Insofar as C. C. Law 10 may be thought to go beyond established principles of international law, its authority, of course, rests upon the exercise of the "sovereign legislative power" of the countries to which the German Reich unconditionally surrendered. Id. at 966.

8. Id. at 963.

9. Id. at 977-978.

10. Id. at 978.

11. Id. at 982. The tribunal elsewhere quoted with approval the comments of Sir David Maxwell-Fyfe:

> With regard to "crimes against humanity," this at any rate is clear. The Nazis, when they persecuted and murdered countless Jews and political opponents in Germany, knew that what they were doing was wrong and

> that their actions were crimes which had been condemned by the criminal law of every civilized state. When these crimes were mixed with the preparation for aggressive war and later with the commission of war crimes in occupied territories, it cannot be a matter of complaint that a procedure is established for their punishment. Id. at 976 (footnote omitted).

12. Thus in Ex Parte Quirin, 317 U.S. 1 (1942), the U.S. Supreme Court held that Germans apprehended within the United States while engaged in espionage could be tried before a U.S. military tribunal for alleged violations of the law of war.

13. Judith Shklar has urged the view taken in this paragraph. However, Shklar's position is that only the charge of crimes against humanity, including what the IMT chose to see as systematic war crimes, and not the charge of crimes against peace, justifies the trial before the IMT. She sees the latter offense as too problematic to apply to individuals in view of the diversity of occasions for war and the difficulties in determining causation of historical events of that scale. Nonetheless she concedes that in the case of the Nazis it was possible to assess individual responsibility for the war's outbreak. J. Shklar, Legalism 153-179 (1964).

14. Report to President Truman at 155.

15. Jackson, The Nurnberg Case at 93.

16. G. Best, Humanity in Warfare: The Modern History of the International Law of Armed Conflicts 31-74 (1980).

17. E. Vattel, Le droit des gens ou principes de la loi naturelle, appliques a la conduite, et aux affairs des nations et des souverains, C. Fenwick trans. 289 (1916), quoted in Best, Humanity in Warfare at 50.

18. Humanity in Warfare at 53, quoting Le droit des gens at 295.

19. Le droit des gens at 282-283, quoted in Humanity in Warfare at 55.

20. Cf. J. Rawls, A Theory of Justice 379 (1971): A just state "is not moved by the desire for world power or national glory; nor does it wage war for purposes of economic gain or the acquisition of territory." Rawls' reformulation of the Enlightenment view is discussed below.

21. S. Bok, A Strategy for Peace 135 (1989). Bok cites two passages from Kant's Perpetual Peace, in H. Reiss, ed., Kant's Political Writings 95, 103 (1970), neither of which fully supports her contention though they certainly show Kant's approval of self-defense and disapproval of aggression.

22. Perpetual Peace at 102-105.

23. Id. at 102, 105; The Metaphysics of Morals, in Kant's Political Writings at 171.

24. The Metaphysics of Morals at 167.

25. Id. at 165.

26. Id. at 167.

27. Id.

28. Le droit des gens at 14, 251. Vattel's views in this regard are summarized in Best, Humanity In Warfare at 44-45.

29. Perpetual Peace at 103.

30. Id. at 128.

31. See Best, Humanity in Warfare at 49-50.

32. The Metaphysics of Morals at 168.

33. Id. at 168.

34. A Strategy for Peace at 32.

35. Perpetual Peace at 96.

36. Id. at 96.

37. The Metaphysics of Morals at 168.

38. See Hans Reiss, "Introduction" to Kant's Political Writings at 29-30.

39. Perpetual Peace at 100.

40. The Metaphysics of Morals at 166-167.

41. A Theory of Justice at 378-379.

42. Id. at 380.

43. Id. at 115.

44. Id. at 380.

45. Id. at 379.

46. Id. at 381.

47. The U.S. tribunal in The Justice Case cited the following remarks of the Paris Commission, a body established to assess responsibility for crimes committed in World War I:

> [C]ertain forms or degrees of harsh treatment of [a state's own nationals] may be deemed to attain an international significance because of their direct and adverse effect upon the rights and interests of the outside world. For that reason it would be unscientific to declare at this day that tyrannical conduct, or massacres, or religious persecutions are wholly unrelated to the foreign relations of the territorial sovereign which is guilty of them. If it can be shown that such acts are immediately and necessarily injurious to the nations of a foreign state, grounds for interference by it may be acknowledged. Again, the society of nations, acting collectively, may not unreasonably maintain that a state yielding to such excesses renders itself unfit to perform its international obligations, especially in so far as they pertain to the protection of foreign life and property within its domain. United States v. Josef Alstoetter et al., 3 Trials of War Criminals at 980 (emphasis added).

The emphasized statement echoes that made by Kant.

48. 1907 Hague Regulations Respecting the Laws and Customs of War on Land, Annex to the 1907 Hague Convention [No. IV] Respecting the Laws and Customs of War on Land, entered into force January 26, 1910, 36 Stat. 2277, T. S. 539, 1 Bevans 631.

49. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), entered into force December 7, 1978, U.N. Doc. A/32/144, Annex I, reprinted in 16 I.L.M. 1391 (1977); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), entered into force December 7, 1978, U.N. Doc. A/32/144, Annex II, reprinted in 16 I.L.M. 1391 (1977).

50. Geneva Convention [No. IV] Relative to the Protection of Civilian Persons in Time of War, entered into force October 21, 1950, 6 U.S.T. 3516, T.I.A.S. 3365, 75 U.N.T.S. 287; Geneva Convention [No. III] Relative to the Treatment of Prisoners of War, entered into force October 21, 1950, 6 U.S.T. 3316, T.I.A.S. 3364, 75 U.N.T.S. 135; Geneva Convention [No. II] for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, entered into force October 21, 1950, 6 U.S.T. 3517, T.I.A.S. 3363, 75 U.N.T.S. 85; Geneva Convention [No. I] for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, entered into force October 21, 1950, 6 U.S.T. 3114, T.I.A.S. 3362, 75 U.N.T.S. 31.

51. Convention on the Prevention and Punishment of the Crime of Genocide, entered into force January 12, 1951, 78 U.N.T.S. 277. The Convention was implemented in the United States by the Genocide Convention Implementation Act of 1987 (The Proxmire Act), 18 U.S.C. §§ 1091-1093.

52. 59 Stat. 1031 (1945).

53. Art. 2(3).

54. Art. 2(4); Art. 51.

55. See, e.g., J. Nye, Nuclear Ethics (1986). Undoubtedly the parallel argument that nuclear war waged to defend Marxist-Leninist socialism is justifiable also has its proponents in the Soviet Union. Cf. Meyrowitz, Le statut des armes nucleaires en droit international - 2e partie at 165-167.

56. A Strategy for Peace, passim.

57. H. Meyrowitz, Le bombardement strategique d'apres le Protocole additionnel I aux Conventions de Geneve, 41 Zeitschrift Fur Auslandisches Offentliches Recht Und Volkerrecht 26 (1981) (my translation).

58. R. Unger, The Critical Legal Studies Movement, 96 Harv. L. R. 563, 649, 663-665 and passim (1983); Social Theory: Its Situation and Task 88-89 and passim (1987).

59. Article 6(c) of the IMT Charter was modified by a protocol signed on October 6, 1945, 58 Stat. 1586, which changed the English and French texts to conform to the Russian text by substituting a comma for the semicolon following the words "before or during the war." As amended, Art. 6(c) reads:

> Crimes Against Humanity: namely, murder, extermination, enslavement, deportation, and other

> inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

The effect of the change was to limit the definition of "murder ... and other inhumane acts committed against any civilian population" to offenses committed "in connection with any crime within the jurisdiction of the Tribunal." The IMT subsequently declined to adjudicate charges of crimes against humanity as to acts committed before the onset of the war in 1939, finding that as to such acts the connection with war crimes and crimes against peace had not been "satisfactorily proved." Judgment of the IMT, 6 F.R.D. at 131.

Georg Schwarzenberger remarks that the change "suggests at least one of the signatories to the original Agreement felt strongly about having admitted, perhaps unwittingly, the existence of a crime against inhumanity which consists in the violation of minimum standards regarding the treatment of human beings anywhere." G. Schwarzenberger, The Judgment of Nuremberg, 21 Tulane L. R. 329, 352 (1947). Also, as the result of a compromise struck with the Soviets, who originally had wanted the crimes to be defined as acts committed by the Axis powers, the jurisdiction conferred by the Charter on the Tribunal was that of trying and punishing the major war criminals of the European Axis. See T. Taylor, The Nuremberg Trials, 55 Col. L. R. 488, 499 (1955). Due to the limitation on the IMT's jurisdiction and crimes against humanity to offenses committed in connection with crimes against peace and war crimes, none could claim, had they wanted to, that the IMT had authority over inhumane acts against civilian populations committed under Stalin.

The requirement of connection with other crimes was not included in the Control Council Law No. 10 definition of crimes against humanity, nor was it included in the Genocide Convention. It therefore seems clear that crimes against humanity need not be committed during wartime or in connection with other international crimes. See Chapter Two, note 63.

60. For one recent and notable effort to this end, see F. Boyle, World Politics and International Law (1985). Boyle argues, on the basis of case studies, that international law considerations have been a significant factor in decision-making in international disputes.

Notes to Chapter Four

1. Art. 6.

2. Arts. 7 and 8.

3. Art. 6(c).

4. United States et al. v. Goering et al. (Judgment of the International Military Tribunal), 6 F.R.D. 69, 110 (1946) (emphasis added).

5. Art. 6.

6. Judgment of the IMT, 6 F.R.D. at 111-112.

7. Id. at 112.

8. Report of the International Law Commission, 2nd. session, 5 U.N. GAOR Supp. (No. 12) at 14, U.N. Doc. A/1316 (1950), reprinted in [1950] 2 Y.B. Int'l L. Comm'n at 377, U.N. Doc. A/CN.4/SERA/1950/Add.1.

9. Control Council Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, Berlin, December 20, 1945, 3 Official Gazette Control Council for Germany 50 (1946), reprinted in 1 L. Friedman, The Law of War 908 (1972).

10. R. Falk, L. Meyrowitz, and J. Sanderson, Nuclear Weapons and International Law 112 (1981).

11. United States v. Friedrich Flick et al. (The Flick Case), 6 Trials of War Criminals 1216-1223 (1952). The tribunal explained its finding as follows:

> It seems clear that mass extermination of the Jews, mass murders in the guise of experiments in concentration camps such as described in the judgment in Case 1 recently decided by Tribunal I, and other atrocities referred to generally in the above quotation from the IMT judgment, were crimes against humanity and war crimes well recognized by international law quite independent of the legislation of the four powers embodied in the Charter and Law No. 10. An organization [the SS] which on a large scale is responsible for such crimes can be nothing else than criminal. One who knowingly by his influence and money contributes to the support thereof must, under settled legal principles, be deemed to be, if not a principal, certainly an accessory to such crimes. Id. at 1217 (emphasis added).

12. Trial of Bruno Tesch and Two Others Before British Military Court (The Zyklon B Case), 1 Law Reports of Trials of War Criminals 1193 (1947), reprinted in 2 Fried, The Law of War at 1498.

13. Mary Kaufman, a prosecuting attorney in one of the subsequent trials of major war criminals, notes that there were "thousands of war crimes trials conducted in Germany and in all of the countries that had been occupied by the Nazis." She describes these trials as follows:

> These trials were conducted by military courts, by civilian courts, and by special tribunals. They were national trials and not international trials and were tried either by the countries in which the atrocities had occurred or by the four occupying powers of Germany at the close of World War II.

M. Kaufman, Judgment at Nuremberg: An Appraisal Of Its Significance On Its Twentieth Anniversary, 25 Guild Practitioner 66, 86 n.17 (1966). See also T. Taylor, Nuremberg Trials, War Crimes and International Law, International Conciliation No. 450 255-256 (1949).

14. Judgment of the IMT, 6 F.R.D. at 165-167.

15. 6 F.R.D. at 182.

16. Kaufman, Judgment at Nuremberg at 79.

17. See Taylor, Nuremberg Trials, War Crimes and International Law at 269.

18. 6 F.R.D. at 111-112.

19. Id. at 269.

20. United States v. Ernest Von Weizsaecker et al., 14 Trial of War Criminals 323-435 (1952).

21. Id. at 435-436.

22. United States v. Wilhelm von Leeb et al., 10 Trials Of War Criminals (1950).

23. Id. at 414-415. See also Taylor, Nuremberg Trials, War Crimes and International Law at 327.

24. 10 Trials of War Criminals at 491.

25. Id. at 488.

26. United States v. Carl Krauch et al. (The Farben Case), 8 Trials of War Criminals (1952).

27. See Taylor, Nuremberg Trials, War Crimes and International Law at 313-316.

28. 8 Trials of War Criminals at 1126. The sentence following the passage quoted in the text becomes almost atavistic:

> We would not require the citizen, at the risk of becoming a criminal under the rules of international justice, to decide that his country has become an aggressor and that he must lay aside his patriotism, the loyalty to his homeland, and the defense of his own fireside at the risk of being adjudged guilty of crimes against peace on the one hand, or of becoming a traitor to his country on the other, if he makes an erroneous decision based upon facts of which he has but vague knowledge. To require this of him would be to assign to him a task of decision which the leading statesmen of the world and the learned men of international law have been unable to perform in their search for a precise definition of aggression. Id.

29. See, e.g., B. Forman, The Nuremberg Trials and Conscientious Objection to War: Justiciability Under United States Municipal Law, 63 Proceedings of the American Society of International Law 157, 164 (1969); R. Falk, The Nuremberg Defense in the Pentagon Papers Case, 13 Col. J. Transnational L. 208 (1974). Though not writing in an official capacity, Benjamin Forman at the time was Assistant General Counsel (International Affairs) of the Department of Defense. His specific formulation is that "an individual who refuses to obey a specific combat order or to carry out a specific combat mission on the ground that the action ordered is contrary to the laws and customs of war not only has standing to raise [the Nuremberg] defense but cannot be punished for violation of orders if that contention be proven."

30. Forman, The Nuremberg Trials and Conscientious Objection to War at 164, citing U.S. Army Field Manual 27-10, The Law of Land Warfare ¶ 509 (1956), and Manual for Courts-Martial United States ¶ 216d (1968). The cited section of Field Manual 27-10 provides that:

> (a) The fact that the law of war has been violated pursuant to an order of a superior authority, whether military or civil, does not deprive the act in question of its character of a war crime, nor does it constitute a defense in the trial of an accused individual, unless he did not know and could not reasonably have been expected to know that the act ordered was unlawful. In all cases where the order is held not to constitute a defense to an allegation

of war crime, the fact that the individual was acting pursuant to orders may be considered in mitigation of punishment.

(b) In considering the question whether a superior order constitutes a valid defense, the court shall take into consideration the fact that obedience to lawful military orders is the duty of every member of the armed forces; that the latter cannot be expected, in conditions of war discipline, to weigh scrupulously the legal merits of the orders received; that certain rules of warfare may be controversial; or that an act otherwise amounting to a war crime may be done in obedience to orders conceived as a measure of reprisal. At the same time it must be borne in mind that members of the armed forces are bound to obey only lawful orders (e.g., UCMJ, Art. 92).

31. See F. Boyle, The Relevance of International Law to the "Paradox" of Nuclear Deterrence, 80 Northwestern U. L. R. 1407, 1429-1431 (1986).

32. 772 F.2d 733 (11th Cir. 1985)

33. Id. at 737. The court stated:

> Defendants here misperceive the persons for whom such a Nuremberg "defense" is appropriate. There the German defendants were in positions which required them to participate in sentencing dissidents to death or in utilizing slave labor because domestic law or superior authority ordered them to do so. See generally R. Woetzel, The Nuremberg Trials in International Law 11-122 (1960); Falk, The Nuremberg Defense in the Pentagon Papers Case, 13 Colum. J. Transnat'l L. 20, 229-232 (1974).

34. Id. at 738.

35. Id. at 737.

36. Id. at 738. See also State of Hawaii v. Marley, 500 P.2d 1095, 1110-1111 (Haw. 1973). In Marley the Hawaii Supreme Court held that the reliance of nonviolent civilian protesters against Vietnam War on a Nuremberg defense was "frivolous" because they were not subject to any criminal liability. The court also rejected the assertion of the defense by an AWOL sailor who participated in the protest, stating that "it would seem that mere membership in the Armed Forces does not, under any circumstances, create criminal liability," and the "Nuremberg Military Tribunals established nothing to the contrary".

37. Entered into force March 23, 1976, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) 52, U.N. Doc. A/6316 (1966). The United States has not ratified the Covenant. However, at least certain parts of the Covenant have achieved the status of customary international law.

38. Senate Report (Judiciary Committee) No. 100-333, May 11, 1988, at 3.

39. G.A. Res. 217A, U.N. Doc. A/810 at 71 (1948). The Universal Declaration is not a treaty. However, it is widely regarded as an authoritative interpretation of the human rights clauses contained in Arts. 55 and 56 of the United Nations Charter, a treaty to which the United States is a party. See R. Lillich and F. Newman, International Human Rights 66 (1979). In addition the Universal Declaration evidences customary law. Id. at 65-67; Filartiga v. Pena-Irala, 630 F.2d 876, 882-883 (2d Cir. 1980).

40. Preamble, Universal Declaration of Human Rights.

41. Professor Frank Newman, representing Human Rights Advocates (HRA), a U.N.-recognized, non-governmental organization, has urged the interpretation of human rights law to afford added protection of nonviolent protest. In a statement submitted to the U.N. Subcommission on Prevention of Discrimination and Protection of Minorities, "Demonstrations, Other Protests, and the Right to Freedom of Expression and Opinion," E/CN.4/Sub.2/1988/NGO/14, 17 August 1988, HRA commented that:

> 4. ... We deem it indisputable that, as channels for exercising one's "freedom to ... impart information and ideas of all kinds, either orally ... or through any other media" (Article 19(2) of the [International Covenant on Civil and Political Rights]), countless demonstrations and other protests indeed have become as important as, e.g., picket lines, posters, handbills, newspapers, other journals, and brochures....
>
> 5. Are further measures at national and international levels required to promote and safeguard the right peacefully to protest? The answer is Yes. Why? Because too many Governments continue to prohibit demonstrations and other protests. Matters of time, place, and manner may be regulated reasonably; but prohibition, on nearly all occasions, is unjustifiable, as are penalties for "failure to disperse".
>
> 6. The Commission [on Human Rights], in resolution 1986/4, expressed a deep concern as to "unrestrained

use of violence, including lethal force, in dealing with unarmed demonstrators and legitimate protests against the policies of apartheid" (paragraph 56) and demanded that South Africa repeal "its ban on the popular organizations so as to afford the masses ... access to legitimate vehicles for expressing their ... aspirations" (paragraph 11). In resolution 1986/24, the Commission "Strongly condemn[ed] the wanton killing of peaceful and defenseless demonstrators" (paragraph 9).

7. Those words suggest that government officials, merely by decreeing "Illegal!", should not have unfettered discretion to interfere with demonstrations. By no means does South Africa stand alone. In the United States, for instance, notwithstanding the famed First Amendment of its Constitution, nearly all government officials assume that they may take action against mere trespassers. This year, illustratively, 1,000 demonstrators were apprehended for peaceful protest (and countless others were deterred by threats) at a nuclear test-site.

Compare this excerpt from the letter of 9 April 1986 addressed by the Chairman of the Human Rights Committee to the Secretary-General: "[The Committee formulated a general comment expressing the view that] the production, testing, possession, development and use of nuclear weapons should be prohibited and recognized as crimes against humanity" (A/41/40, p. 120; emphasis added).

8. Paragraphs 63 and 64(c) of E/CN.4/Sub.2/1988/2 note that gross violations of freedom of expression and association directly correlate with threats to peace and security. Demonstrations and other protests certainly have become prominent occasions for those violations.

9. Reporting to the Commission this year on "further measures ... to promote and safeguard" the right to freedom of opinion and expression, should not the Sub-Commission [on Prevention of Discrimination and Protection of Minorities] indicate an intent to inquire into some of the complex human rights problems that seem inevitably to arise in connection with demonstrations and other protests?

42. 1907 Hague Convention [No. IV] Respecting the Laws and Customs of War on Land, entered into force January 26, 1910, 36 Stat. 2277, T. S. No. 539, 1 Bevans 631.

43. Advisory Opinion on the Continued Presence of South Africa in Namibia (South West Africa), 1971 I.C.J. 16. The Court's opinion concerned the legality of policies of racial discrimination in Namibia, a "territory having an international status." Nonetheless, it plainly was applicable as well to the same policies as applied in South Africa.

44. E.g., Res. 181, 18 U.N. SCOR Supp. (July-Sept. 1963) at 73, U.N. Doc. S/5386 (1963) ("policies of South Africa in its perpetuation of racial discrimination [are] inconsistent with the principles contained in the Charter of the United Nations"); Res. 418, 32 U.N. SCOR Supp. (Res.) at 5 (1977) (reaffirming Res. 181 and imposing a mandatory arms embargo against South Africa).

45. International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted by G.A. Res. 3068, 28 U.N. GAOR Supp. (No. 30) at 75 (1973), entered into force July 18, 1976.

46. Cf. Security Council Res. 417, 32 U.N. SCOR Supp. (Res.) at 4 (1977), demanding, inter alia, that South Africa "[r]elease all persons imprisoned under arbitrary security laws and all those detained for their opposition to apartheid" and "[c]ease forthwith its indiscriminate violence against peaceful demonstrators against apartheid." See also note 41, this chapter.

47. The latter program for the suppression of alleged civilian resistance was implemented pursuant to Hitler's Nacht und Nebel (Night and Fog) decree. In that program,

> civilians in occupied territories accused of alleged crimes in resistance activities against German occupying forces were spirited away for secret trial by special courts of the Ministry of Justice within the Reich [and] the victim's whereabouts, trial, and subsequent disposition were kept completely secret, thus serving the dual purpose of terrorizing the victim's relatives and associates and barring recourse to evidence, witnesses, or counsel for defense. If the accused was acquitted, or if convicted, after serving his sentence, he was handed over to the Gestapo for "protective custody" for the duration of the war. These proceedings resulted in the torture, ill treatment, and murder of thousands of persons.

United States v. Josef Alstoetter et al., 3 Trials of War Criminals at 1031-1032. The tribunal affixed responsibility for this program squarely on the officials and institutions of the legal system:

> The evidence establishes beyond a reasonable doubt that in the execution of the Hitler NN decree the Nazi regime's Ministry of Justice, Special Courts, and public prosecutors agreed to and acted together with the OKW and Gestapo in causing to be arrested, transported to Germany, tried, sentenced to death and executed, or imprisoned under the most cruel and inhumane conditions in prisons and concentration camps, thousands of the civilian population of the countries overrun and occupied by the Nazi regime's military forces during the prosecution of its criminal and aggressive war. Id. at 1046.

It apparently was the officials of the Ministry of Justice whom the tribunal primarily held responsible for the Nacht und Nebel procedure. Although the opinion is not altogether clear on this point, the convictions of the judges seem largely to have turned upon their participation in racial persecution and murder. However, at least one judge, Curt Rothenberger, the president of a district court of appeal who supervised other judges, was held "guilty of taking a minor but consenting part in the Night and Fog program." Id. at 1118. Moreover, as the passage quoted above illustrates, the opinion is clear that the courts generally were culpable for their part in the scheme.

Though the tribunal in The Justice Case seems to touch on the point only rhetorically, it undoubtedly is true that many of the civilians accused of resisting German occupying forces actually were resisting German commission of international crimes. In United States v. Montgomery, 772 F.2d 733, 737 (11th Cir. 1985), the court characterizes The Justice Case as holding that German "jurists were not justified in punishing private individuals pursuant to domestic law who had acted to impede or escape Nazi programs that were in violation of international law." It is true that the Justice Case tribunal condemned the Nazi practice of sentencing to death Poles who sought to escape from forced labor in Germany. 3 Trials of War Criminals at 1027-1028, 1120-1128, esp. at 1123. Moreover, Nuremberg tribunals found that forced labor constituted war crimes and crimes against humanity. E.g., United States v. Alfred Krupp et. al, 9 Trials of War Criminals (1950). However, The Justice Case focusses on the criminality of the Nacht und Nebel program and of judicially implemented racial persecution and murder, not on whether civilian resistance in occupied or German territory was directed against German violations of international law. Nonetheless, one could argue an analogy between those who resisted the Nazis and protesters who oppose nuclear weapons. With regard to this analogy, first the obvious must be plainly stated:

protesters are not exposed to risks at all comparable to those faced by civilians who engaged in resistance activities and other groups which were targets of the Nazis. Moreover, while nuclear weapons protesters are opposing what is potentially an evil of the magnitude of Nazi atrocities, nuclear war, that evil is not actually occurring. Thus protesters are opposing preparation for the commission of international crimes by deployment of nuclear weapons. Such deployment, certainly of first-use and first-strike weapons, constitutes, or so it has been argued here, serious breaches of U.S. international obligations. Its criminality, while arguable, is less clear.

48. J. Rawls, A Theory of Justice 368-371 (1971).

49. R. Dworkin, A Matter of Principle 107 (1985).

50. A Theory of Justice at 367-368.

51. Id. at 366-67.

52. J. Habermas, Civil Disobedience: Litmus Test for the Democratic Constitutional State, trans. J. Torpey, 30 Berkeley Journal of Sociology 95, 106 (1985).

53. A Theory of Justice at 365; A Matter of Principle at 115-116.

54. A Theory of Justice at 365.

55. Civil Disobedience at 106.

56. Cf. M. Kadish and S. Kadish, Discretion to Disobey 96 (1973). The authors describe one possible model for citizens' attitudes towards the law as follows:

> According to the law-and-order model, the citizen's obligation consists of unqualified compliance with the mandatory rules of the state. That those rules do or do not accord with the citizen's own sense of justice is immaterial: he is not to judge the law but to obey it.

They add a point which is not part of the model set forth in the text here:

> To depart from the rule amounts in principle to an act of rebellion, and though such an act might at times be justified morally, it can never be justified by the legal system being rebelled against.

In the "always act lawfully" model evoked in the text, where there is an established political community generally

deserving of allegiance, a rule departure is never justified.

57. Habermas' remarks regarding the "law is law" mentality are relevant:

> Anyone who pays attention to the tenor of our present-day press releases from governments and parties, of television discussions and leading articles, and who consults the prevailing opinion among the jurists, can hardly mistake the "law is law" mentality. The dogma of the loyalists stands on sturdy legs. It says: those who break laws under appeal to their conscience arrogate to themselves rights which our democratic constitutional order can afford to no one in order to insure the security and freedom of all citizens. Those who commit civil disobedience in the constitutional state threaten one of the highest and most fragile cultural achievements by endangering the tranquillity of the legal order [Rechtsfrieden]. As [Heiner] Geissler puts it, those people "take an axe to democracy."

Civil Disobedience at 101 (footnote omitted).

58. Dworkin describes such autonomy in Taking Rights Seriously 210-216 (1977).

59. Habermas, Civil Disobedience at 108-109; Dworkin, A Matter of Principle at 107. Neither Dworkin nor Habermas address the international law justification for nuclear weapons protest, though Habermas does state summarily that in deploying the Pershing II and cruise missiles "the government cannot be accused of intentionally violating the obligation to safeguard international peace." Civil Disobedience at 108. Dworkin contends that opposition to deployment of missiles in Europe represents "policy-based civil disobedience" based on the belief that the deployment is "unwise, stupid and dangerous" for the entire society. A Matter of Principle at 107. In Dworkin's view, policy-based civil disobedience is to be contrasted with "justice-based" civil disobedience as practiced, for example, by the civil rights movement and the anti-Vietnam War movement. In this latter kind of civil disobedience the violation of the rights of individuals, minorities, or other nations is opposed. Id.

Why Habermas and Dworkin fail thoroughly to consider the international law justification for nuclear weapons protest is unclear. It is true that there are many issues raised by the deployment of nuclear weapons relating to effects upon the deploying nation which are not the main concern of international law. The use of nuclear weapons likely would have disastrous consequences for the initiating nation, due

to retaliatory nuclear use, or absent retaliation, such factors as the spread of radioactivity or climate changes. Deployment of certain types of nuclear weapons may increase the likelihood of use of nuclear weapons against the deploying nation. Aside from the use of nuclear weapons, the development and deployment of nuclear weapons also has deleterious effects on citizens' safety and health. Due to perceived and actual requirements of security, development and deployment also adversely affects the openness and democratic character of the political process.

For these and other reasons, justification of acts of protest on grounds relating to the well-being and political process of the deploying nation may well be sound. Nonetheless, nuclear weapons are designed for use against other nations. Their deployment and use bears on relations among nations in fundamental issues of war and peace regulated by international law. In particular, their use would have catastrophic effects on civilian populations in other nations, a matter regulated by the laws of war and humanity. In Dworkin's terms, the "rights of other nations" are therefore at issue. The international law justification of nuclear weapons protest accordingly is the ground for protest which most squarely addresses the fundamental issues.

60. A Theory of Justice at 364.

61. Id. at 364-365 (emphasis added).

62. In re Weller, 164 Cal.App.3d 44, 49-50 (1985).

63. A case can be made that certain acts of protest, considered aside from any instrumental, educational effect achieved through the violation of local law, are in themselves rightful and therefore lawful. Examples include leafleting workers inside a nuclear weapons facility after being told to leave, or blocking workers from entering such a facility. If it is granted that the nuclear weapons production is part of an overall policy in serious breach of international obligations, such acts may be interpreted as attempts to prevent workers from collaborating in an unlawful and at least potentially criminal enterprise. In this light, the acts are not simply "deliberate violations of law" aimed at dramatizing opposition to nuclear weapons, but are also intended to help stop in a direct way the wrongful production of nuclear weapons. At least in the respect that the acts have their own meaning, their own integrity, apart from any educational effect, they are comparable to taking a seat at the front of the bus in defiance of segregationist practice, refusing a draft order for an aggressive war, or harboring a fugitive slave.

64. A Theory of Justice at 367-368.

65. M. Shapiro, Courts: A Comparative and Political Analysis (1981).

66. See J. Dugard, The Judiciary in a State of National Crisis - With Special Reference to the South African Experience, 44 Washington and Lee L. R. 477 (1987). In this article John Dugard canvasses the failure of courts in the United States, the United Kingdom, Nazi Germany, and South Africa to oppose programs "involving the suppression of basic human rights and the departure from accepted principles of legality." Id. at 477. With respect to the United States, while acknowledging that the Warren Court "outlawed racial segregation," he cites Dred Scott and other decisions affirming the legality of slavery, judicial validation of the internment of Japanese Americans during World War II, judicial acquiescence in anti-leftwing policies following World I and World War II, and the judicial refusal to adjudicate the lawfulness of the Vietnam War. Id. at 479-481.

67. For example, in Mitchell v. United States, 246 F. Supp. 874 D. Conn. 1965), aff'd 369 F.2d 323 (2d Cir. 1966), cert. denied 386 U.S. 972 (1967), the defendant, charged with refusal to comply with an induction order, argued that the United States was committing crimes against peace as defined in the Nuremberg Charter by waging aggressive war in Vietnam. The trial judge instructed the jury that the Charter did not interfere "in any manner in respect to this defendant fulfilling his duty under this order." 386 U.S. at 972. Citing Robert Jackson's statement that "if certain acts in violations of treaties are crimes, they are crimes whether the United States does them or whether Germany does them," Justice Douglas dissented from the Supreme Court's refusal to consider the case. 386 U.S. at 973.

68. 347 U.S. 483 (1954).

69. Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857).

70. Judgment of December 16, 1983, Bundesverfassungs-gericht, W. Ger., 66 BVerfGE 39, 65, discussed and translated in relevant part in G. Offcors and M. Ruete, Law and Peace in West Germany, in J. Dewar, A. Paliwala, S. Picciotto, and M. Ruete, Nuclear Weapons, The Peace Movement, and the Law 227 (1986).

71. 772 F.2d 733 (11th Cir. 1985).

72. Indeed, the court cites Richard Falk's article urging the recognition of the Nuremberg defense in Ellsberg's and comparable cases. Id. at 738, citing R. Falk, The Nuremberg Defense in the Pentagon Papers Case, 13 Col. J. Transnational L. 208 (1974).

73. United States v. Allen, 760 F.2d 447, 454 (2d Cir. 1985) (brackets in original).

74. United States v. Josef Alstoetter et al. (The Justice Case), 3 Trials of War Criminals at 984.

75. Id. at 1011.

76. Committee of U.S. Citizens Living In Nicaragua et al. v. Reagan et al., 859 F.2d 929 (D.C. Cir. 1988).

77. Id. at 936-937.

78. Id. at 936.

79. Id. at 937.

80. Id. at 939.

81. Id. at 939-942. The nature and status of peremptory rules in international law are discussed in Chapter One, text accompanying notes 35-42.

82. Id. at 941.

83. Id. at 941-942.

84. See Chapter One, text accompanying notes 35-42.

85. 622 F.2d 1000 (9th Cir. 1980).

86. Id. at 1009.

87. Resolution of likely factual issues such as the likelihood of nuclear war, or whether particular nuclear weapons systems are deployed to reinforce a retaliatory deterrence capability or to achieve a first-strike capability, would require a far-reaching inquiry into complicated and technical matters not readily available to public review. Moreover, resolution of the legal issue of whether the United States has seriously breached its international obligations with respect to deployment of nuclear weapons would require the consideration of international law standards which are unfamiliar to most courts and whose formulation and application are intensely controversial among those who do have expertise.

The prospect of controversy is especially pertinent because of the doctrine, recognized by the United States Supreme Court, that the bindingness of international law depends in part on a showing of international consensus as to the standards claimed to apply. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964). "It should be apparent," the court stated, "that the greater the degree

of codification of consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice." Id. There are, of course, counterarguments, including that courts have demonstrated in other contexts, e.g. anti-trust cases, their ability to come to grips with highly complex factual and legal matters.

The question may also be raised whether a domestic court is capable of exercising impartial judgment as to the acts and policies of the government of which it is part. It was for reasons of this kind that Judge Wyzanski declined to consider an international law defense proffered by an individual prosecuted for refusal to comply with a draft induction order in the Vietnam era. United States v. Sisson, 294 F. Supp. 515, 517-518 (D. Mass. 1968). He concluded that only a disinterested international tribunal could impartially and persuasively address the defendant's claim that U.S. conduct of the war violated the laws of war, explaining that:

> At its strongest, the defendant's case is that a survey of the military operations in Vietnam would lead a disinterested tribunal to conclude that the laws of war have been violated and that, contrary to international obligations, express and implied, in treaty and in custom, the United States has resorted to barbaric methods of war, including genocide. If the situation were as defendant contends, the facts would surely be difficult to ascertain so long as the conflict continues, so long as the United States government has reasons not to disclose all its military operations, and so long as a court was primarily dependent upon compliance by American military and civilian officials with its judicial orders. It should be remembered that the tribunal at Nuremberg, probably because it had a Russian judge, was unable to face up to the problems tendered by the Katyn massacres. Moreover, neither at Nuremberg nor at Tokyo, tribunals upon which an American judge sat, was there any attempt to resolve the problems raised by the nuclear bombing of Hiroshima and Nagasaki. It is inherent in a tribunal composed partly of judges drawn from the alleged offending nation that a wholly disinterested judgment is most unlikely to be achieved. With effort, self-discipline, and

> judicial training, men may transcend their personal bias, but few there are who in international disputes of magnitude are capable of entirely disregarding their political allegiance and acting solely with respect to legal considerations and ethical imperatives. If during hostilities a trustworthy, credible international judgment is to be rendered with respect to alleged national misconduct in war, representatives of the supposed offender must not sit in judgment upon the nation. An analogous path of reasoning must lead one to conclude that a domestic tribunal is entirely unfit to adjudicate the question whether there has been a violation of international law during a war by the very nation which created, manned, and compensated the tribunal seized of the case. 294 F. Supp. at 517.

Wyzanski presents a sobering examination of the obstacles to adjudicating a defense challenging a nation's conduct of a war. Some of the same obstacles would stand in the way of adjudication of a defense challenging the deployment of nuclear weapons.

88. Jules Lobel has forcefully made this argument, in The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law, 71 Virg. L. R. 1071, 1157-1166 (1985).

89. 622 F.2d at 1009. Benjamin Forman, counsel to the Department of Defense, provides another example of the possible conjunction of justiciability doctrine and tolerance of the violation of international law as a matter of domestic law. He writes:

> [T]hose questions which involve the exercise of a discretion constitutionally committed to the Executive or the Congress are political questions. Clearly, the decision to conduct military operations against hostile forces is a matter vested by the Constitution exclusively in the Congress and the President. Indeed, since as a municipal law matter, no treaty outlawing aggressive war can derogate from the constitutional powers of the Congress and the President to wage war, and since no United States statute provides that planning, initiating, or waging aggressive war is a crime, even were the Executive Branch and the Congress to embark knowingly on an admitted aggressive war, that decision would belong in the domain of political power and not be subject to judicial intervention.

The Nuremberg Trials and Conscientious Objection to War at 162.

90. Art. II, § 3.

91. The necessity defense is a defense at common law and has also been codified in many states. The elements included vary from state to state. Under the stringent California common law formulation of the defense, the accused must prove that:

1) The act charged as criminal must have been done to prevent a significant evil;

2) There must have been no adequate alternative to the commission of the act, and the evil sought to be prevented must have been imminent;

3) The harm caused by the act must not be disproportionate to the harm avoided;

4) The accused must entertain a good faith belief that his or her act was necessary to prevent the greater harm;

5) Such belief must be objectively reasonable under all the circumstances; and

6) The accused must not have substantially contributed to the creation of the emergency.

See People v. Pena, 149 Cal.App.3d Supp. 14 (1983).

92. The defense of crime prevention is defined in a standard treatise of criminal law, R. Perkins and R. Boyce, Criminal Law 1108 (3d. ed. 1982), as follows:

> [A]ny unoffending person may intervene for the purpose of preventing the commission or consummation of any crime if he does so without resorting to measures which are excessive under all the facts of the particular case.

The defense was recognized in a case involving nonviolent foreign policy protest justified on international law grounds, State of Hawaii v. Marley, 500 P.2d 1095 (Haw. Sup. 1973). Individuals who had engaged in peaceful protest on the premises of a military contractor were charged with trespass. In a "completely nonviolent" fashion, they had entered the premises of Honeywell Corporation, talked to employees, sung, and hung pictures on the wall, all to publicize what they believed to be the

war crimes of Honeywell in supplying the American war in Vietnam. 500 P.2d at 1099. The trial court instructed the jury that:

> The United States has entered into treaties which prohibit as war crimes the use of weapons which cause unnecessary and indiscriminate injuries or death to non-combatant civilians, whether done by persons singly or in cooperation with others. You are further instructed that under law, an individual citizen or citizens may use reasonable means to prevent, or seek the prevention, of the commission of a crime only if such crime is being committed, or is about to be committed in such citizen's or citizens' presence. (500 P.2d at 1105-1106.)

The Hawaii Supreme Court endorsed the trial court's submission of a prevention of crime defense to the jury, stating that:

> Reasonable action, even if technically a violation of criminal statutes, if taken to prevent or terminate the commission of a crime by another, is, in certain circumstances, completely defensible. (500 P.2d at 1109.)

As the formulations of these authorities indicate, the defense includes, at a minimum, a requirement that the action taken to prevent or terminate the crime be reasonable. These and other formulations do not include the element of a showing of exhaustion of legal alternatives that is required by the necessity defense. However, courts may believe that the exhaustion requirement is implied by the requirement of reasonableness or is part of the theory of justification encompassing both defenses.

93. 622 F.2d at 1008-1009.

94. 772 F.2d at 736.

95. 164 Cal.App.3d at 49.

96. Declaration of Daniel Ellsberg at 18, People v. Wylie et al., No. E8849052, Municipal Court of California, Santa Clara County (1989). Available from Western States Legal Foundation, Oakland, California.

97. Id. at 6-11.

98. Id. at 19-20.

99. Id. at 20-22.

100. Id. at 22.

101. Though the political and doctrinal considerations addressed in the text are relevant to nuclear weapons protest in general, I have not sought to provide a complete account of ways in which international law can be employed in defending protesters. Two points should be noted.

First, the elements of the offense with which protesters are charged may afford the opportunity to make international law arguments. Most promisingly in some offenses, typically the more serious ones, proof of intent to commit a wrongful or illegal act is required. The requirement is to be distinguished from the "general" intent required for most crime, that is, that the acts on which the charge is predicated are committed consciously or deliberately and not while asleep or hallucinating, by accident, etc. In such cases, evidence of protesters' awareness of arguments regarding the illegality of nuclear weapons can be argued to raise a reasonable doubt as to whether the prosecution has proved its case.

Second, where protesters are charged with an offense affording a right to trial by jury it can be plausibly maintained (though this argument has met with little success in the federal courts) that whether protesters have met the elements of affirmative defenses, or whether international law considerations rebut the elements of the offense to be proved by the prosecution, are questions for the jury. On a practical level a judge may be more likely to accept this argument, which puts the decision to convict or acquit in the hands of the jury, than arguments that require the judge to take the political responsibility of acquitting protesters. For a discussion of the wide range of doctrinal issues pertinent to the defense of foreign policy protesters, see F. Boyle, Defending Civil Resistance Under International Law 1-49 (1987).

102. On a skeptical view, decision-making within small groups committed to "consensus" may be regarded as potentially yielding sectarian conclusions, resulting perhaps from an implicit group or individually-based authoritarianism. For the most part, my experience within the nuclear weapons protest movement is that such skepticism is unwarranted, that sectarianism and authoritarianism are minimal, and that respect for and valuing each individual's contribution is the norm. Even eschewing such skepticism, it of course is the case that no mode of decision-making can guarantee the correctness of the results reached. Democratic modes of decision-making, respectful of each person's contribution, certainly can yield results which other persons, after mature consideration in the context of similar processes, cannot accept as morally correct.

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