

## The Unlawfulness of the Use or Threat of Use of Nuclear Weapons

By

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Our current policy is nuclear deterrence, whereby we threaten the use of nuclear weapons against any adversary who uses nuclear, chemical, biological, or even massive conventional weapons against us. I'm going to address the lawfulness of our potential use of nuclear weapons pursuant to that policy.

Both the defenders, including the United States, and the opponents of the nuclear weapons regime agree that the international law rules of discrimination, proportionality, and necessity apply to nuclear weapons:

- The rule of discrimination makes it unlawful to use weapons whose likely or foreseeable effects cannot discriminate between military and civilian targets.
- The rule of proportionality makes it unlawful to use weapons whose probable effects upon combatant or non-combatant persons or objects would likely be disproportionate to the value of the military objective.
- The rule of necessity makes it unlawful to use weapons involving a level of force not necessary in the circumstances to achieve the military objective.

Both the United States and the opponents of the nuclear weapons regime further agree that it is unlawful under these rules to use weapons whose effects will be *uncontrollable*.

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That weapons whose effects are not controllable cannot lawfully be used under international law is recognized in the military manuals of the U.S. armed services, manuals used for training and disciplining of U.S. personnel and often cited by the United States as reliable statements of international law.

### ***Uncontrollability under Rule of Discrimination***

*The Air Force Commander's Handbook* states that weapons that are “incapable of being controlled enough to direct them against a military objective” are unlawful.<sup>1</sup> *The Air Force Manual on International Law* defines indiscriminate weapons as those “incapable of being controlled, through design or function,” such that they “cannot, with any degree of certainty, be directed at military objectives.”<sup>2</sup>

In its military manuals the United States has acknowledged that the scope of this prohibition extends to the *effects* of the use of a weapon. *The Air Force Manual on International Law* states that indiscriminate weapons include those which, while subject to being directed at military objectives, “may have otherwise uncontrollable effects so as to cause disproportionate civilian injuries or damage.”<sup>3</sup> The manual states that “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.”<sup>4</sup> It is noteworthy that this prohibition encompasses the causing of risks, not just injury.

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board of the Lawyers' Committee for Nuclear Policy (LCNP) and a former board member of the Lawyers Alliance for World Security (LAWS).

<sup>1</sup> UNITED STATES DEPARTMENT OF THE AIR FORCE, COMMANDER'S HANDBOOK ON THE LAW OF ARMED CONFLICT 6-2 (Air Force Pamphlet 110-34, 25 July 1980) [hereinafter THE AIR FORCE COMMANDER'S HANDBOOK].

<sup>2</sup> THE UNITED STATES DEPARTMENT OF THE AIR FORCE, INTERNATIONAL LAW—THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS 6-3 (Air Force Pamphlet 110-31, 19 November 1976) [hereinafter THE AIR FORCE MANUAL ON INTERNATIONAL LAW].

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

As a “universally agreed illustration of ... an indiscriminate weapon,” *The Air Force Manual on International Law* cites biological weapons, noting that the uncontrollable effects from such weapons “may include injury to the civilian population of other states as well as injury to an enemy’s civilian population.”<sup>5</sup> *The Naval/Marine Commander’s Handbook* states that such weapons are “inherently indiscriminate and uncontrollable.”<sup>6</sup>

*The Air Force Manual on International Law* further cites Germany’s World War II V-1 rockets, with their “extremely primitive guidance systems” and Japanese incendiary balloons, without any guidance systems.<sup>7</sup> The manual states that the term “indiscriminate” refers to the “inherent characteristics of the weapon, when used, which renders (*sic*) it incapable of being directed at specific military objectives or of a nature to necessarily cause disproportionate injury to civilians or damage to civilian objects.”<sup>8</sup>

As an example of an indiscriminate weapon, *The Air Force Commander’s Handbook* similarly cites the use of unpowered and uncontrolled balloons to carry bombs, since such weapons are “incapable of being directed against a military objective.”<sup>9</sup>

### ***Uncontrollability under Rule of Necessity***

The requirement that the level of force implicit in the use of a weapon be controllable and controlled by the user is a natural implication of the necessity requirement. If a State cannot control the level of destructiveness of a weapon, it cannot assure that the use of the weapon will involve only such a level of destructiveness as is necessary in the circumstances.

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<sup>5</sup> *Id.*

<sup>6</sup> UNITED STATES DEPARTMENT OF THE NAVY ANNOTATED SUPPLEMENT TO THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS 10-21 (Naval Warfare Publication 9, 1987) (With Revision A (5 October 1989), this handbook was adopted by the U.S. Marine Corps as FLEET MARINE FORCE MANUAL (FM FM) 1-10 [hereinafter THE NAVAL/MARINE COMMANDER’S HANDBOOK].

<sup>7</sup> See THE AIR FORCE MANUAL ON INTERNATIONAL LAW, *supra* note 2, at 6-3.

<sup>8</sup> *Id.* at 6-9 n.7.

<sup>9</sup> THE AIR FORCE COMMANDER’S HANDBOOK, *supra* note 1, at 6-1.

*The Air Force Manual on International Law* recognizes as a basic requirement of necessity “that the force used is capable of being and is in fact regulated by the user.”<sup>10</sup>

### ***Uncontrollability under Rule of Proportionality***

So also, if the State using a weapon is unable to control the effects of the weapon, it is unable to evaluate whether the effects would satisfy the requirement of being proportionate to the concrete and direct military advantage anticipated from the attack or to assure such limitation of effects.

*The Air Force Manual on International Law* notes that the requirement of proportionality prohibits “uncontrollable effects against one’s own combatants, civilians or property.”<sup>11</sup>

### **U.S. Position**

It is the formal U.S. position that under these rules of discrimination, proportionality, and necessity some uses of nuclear weapons would be lawful that and others unlawful—and that the lawfulness of any potential use is something that has to be evaluated in the context of that use.

The U.S. position is that the effects of nuclear weapons, or at least of the smaller, ostensibly tactical nuclear weapons, are controllable.

In its written and oral presentations to the International Court of Justice (ICJ) in the recent Nuclear Weapons Advisory Case,<sup>12</sup> defending nuclear weapons, the United States argued that, even if nuclear attacks directed at significant numbers of large urban area targets or at a

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<sup>10</sup> THE AIR FORCE MANUAL ON INTERNATIONAL LAW, *supra* note 2, at 1-6.

<sup>11</sup> *Id.* at 6-2. *See also id.* at 5-10.

<sup>12</sup> *Legality of the Threat or Use of Nuclear Weapons*, International Court of Justice, Advisory Opinion, General List (July 8, 1996) [hereinafter Nuclear Weapons Advisory Opinion]. All but five of the fifteen ICJ opinions, including the holding of the Court, are available at 35 I.L.M. 809 (1996). The remaining five, the declarations of Judges Bedjaoui, Herczegh and Bravo and the individual opinions of Judges Guillaume and Ranjeva, appear at 35 I.L.M. 1343 (1996). The opinions and various of the submissions to the Court are also available at the Court’s own website at <<http://www.icj-cij.org/>> (visited November 18, 2001), and at <<http://www.law.cornell.edu/world/>> (visited November 18, 2001). Some of the same materials are also available in THE CASE AGAINST THE Bomb (Roger S. Clark & Madeleine Sanns eds., 1996).

substantial number of military targets would be unlawful, a small number of accurate attacks by low-yield weapons against an equally small number of military targets in non-urban areas would not be. The United States further argued that nuclear weapons can reliably be targeted at specific military objectives.

***Defense of Small-Scale Use:***

Let's take first the U.S. defense of small scale use. If you look at the U.S. nuclear arsenal, you will see that it is predominately made up of large strategic nuclear weapons, not the small-scale ostensibly tactical nuclear weapons the U.S. defended.

***Precision Targeting***

The U.S. position on its ability to control the effects of nuclear weapons through precision targeting also does not withstand analysis.

First of all, our ability to hit specific targets with precision is only statistical. We can deliver a warhead to a particular target with startlingly high probability, but where any particular warhead will end up is far from certain.

Even more importantly, even if we deliver the nuclear warhead with precision to the intended target, we cannot control the radiation effects. They are subject to natural forces of the environment, wind and weather. This applies to even the use of a so-called small-scale nuclear weapon.

The most cogent argument the proponents of nuclear weapons make is that under certain circumstances the effects of nuclear weapons might be controllable because of the remote area of use and the limited nature of the weapons used.

Michael Matheson, sitting to my left, one of the chief lawyers representing the United States before the ICJ in the Nuclear Weapons Advisory Case, has pointed in his writings to an

example given by the U.S. judge on the court, Judge Schwebel, now the President of the court, in his opinion in the Nuclear Weapons Advisory Case—the use of a nuclear depth charge to destroy a submarine that is about to fire nuclear-armed missiles.

It seems to me that that kind of argument fundamentally misses the point as to the risks of nuclear weapons use and as to nature of the challenge to the rule of law that nuclear weapons present.

Mr. Matheson and Judge Schwebel are correct that if one hypothesizes a laboratory type circumstance in which there are no other factors, just the submarine about to launch nuclear weapons and our ability to take the submarine out before the use, and assumes a remote environment where civilians will not be at risk, such a use sounds as if it must be lawful.

But is it not clear that such a scenario is unrealistic to the point of not being a legitimate basis upon which to ground the legal analysis?

For if the adversary State has one submarine with nuclear weapons, it most likely has other submarines carrying nuclear weapons; if the adversary State has nuclear weapons in submarines, it most likely has other nuclear weapons which it is capable of delivering by land and sea-based missile, by aircraft, and otherwise; if the adversary State has such nuclear weapons and the means to delivery them, it may well have chemical and biological weapons and the means to deliver *them*; and if the adversary State has nuclear weapons, it will likely have allies or potential allies who have nuclear, chemical, and/or biological weapons. In addition, in the real world, any use of nuclear weapons, in the types of circumstances in which we might resort to such weapons, would likely carry with it a high risk of escalation; our adversaries would likely respond with nuclear, biological, or chemical weapons.

So in the real world, this hypothesized strike on the submarine will likely not be as limited as it at first appeared. In real terms, this scenario will potentially put us right in the middle of widescale use by us and our adversaries of nuclear, chemical, and biological weapons. The kind of situation that threatens effects of a apocalyptic nature.

Outside the courtroom, the United States recognizes the potential uncontrollability of the effects of nuclear weapons. This can be seen from the Chairman of the Joint Chief's *Joint Pub 3-12, Doctrine for Joint Nuclear Operations*, setting forth the current operational planning for the integrated use by U.S. forces of nuclear weapons in conjunction with conventional weapons:<sup>13</sup>

[T]here can be no assurances that a conflict involving weapons of mass destruction could be controllable or would be of short duration.<sup>14</sup>

Outside the courtroom, the United States has also recognized the disproportionate nature of the damage U.S. nuclear policy threatens. The Joint Chief of Staff's *Nuclear Weapons Joint Operations* manual states:

US nuclear forces serve to deter the use of WMD [“weapons of mass destruction,” including chemical, biological, and nuclear weapons] across the spectrum of military operations. From a massive exchange of nuclear weapons to limited use on a regional battlefield, US nuclear capabilities must confront an enemy with risks of unacceptable damage and disproportionate loss should the enemy choose to introduce WMD into a conflict.<sup>15</sup>

I submit that virtually any use of nuclear weapons would be unlawful under these rules, such that the use of nuclear weapons is *per se* unlawful. I submit that it's clear that the effects of nuclear weapons are uncontrollable and hence that the use of such weapons would be unlawful.

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<sup>13</sup> JOINT CHIEFS OF STAFF, JOINT PUB 3-12, DOCTRINE FOR JOINT NUCLEAR OPERATIONS i, (Dec. 15, 1995), available at <[http://www.dtic.mil/doctrine/jel/new\\_pubs/jp3\\_12.pdf](http://www.dtic.mil/doctrine/jel/new_pubs/jp3_12.pdf)> (visited November 7, 2001). See CHARLES J. MOXLEY, NUCLEAR WEAPONS AND INTERNATIONAL LAW IN THE POST COLD WAR WORLD Chapters 26, 27; Chapter 2, note 75, Chapter 17, notes 38–53, Chapter 18, note 56, and accompanying text (2000).

<sup>14</sup> DOCTRINE FOR JOINT NUCLEAR OPERATIONS, *supra* note 13, at i, I-6–7 (emphasis omitted).

<sup>15</sup> DOCTRINE FOR JOINT NUCLEAR OPERATIONS, *supra* note 13, at I-2 (emphasis omitted).

I further submit that, by our defense of the potential lawfulness of our limited use of small-scale tactical nuclear weapons against remote targets, we are not only justifying a huge arsenal of strategic nuclear weapons not addressed by our legal theory but also raising the level of risk of possible widescale use of nuclear weapons.

Rather than recognizing that the scale of the effects of these weapons exceeds what could be unlawful under any view of the law, we are *legitimizing* the possession, threat of use, and the potential actual use of these weapons.

To the argument, again made by Mr. Matheson, that the threat of use of these weapons can itself protect us against some other State's use of nuclear, chemical, and biological weapons, I submit that, while the point may valid in limited circumstances, the potential gain from such deterrence is substantially outweighed by the risks created by our legitimization of these weapons.

Mr. Matheson's support of threats is also inconsistent with the legal rule that it is unlawful to threaten that which it is unlawful to do. As the ICJ stated, "If an envisaged use of weapons would not meet the requirements of humanitarian law, a threat to engage in such use would also be contrary to that law."<sup>16</sup> The Court noted that "[N]o State--whether or not it defended the policy of deterrence--suggested to the Court that it would be lawful to threaten to use force if the use of force contemplated would be illegal."<sup>17</sup> The United States, as well as not disputing the unlawfulness of a threat to commit an unlawful act, stated to the Court:

[E]ach of the Permanent Members of the Security Council has made an immense commitment of human and material resources to acquire and maintain stocks of nuclear weapons and their delivery systems, and many other States have decided to rely for their security on these nuclear capabilities. *If these weapons could not lawfully be used in individual or collective self-defense under any circumstances, there would be no*

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<sup>16</sup> Nuclear Weapons Advisory Opinion, at pt. VI, 35–36, No. 95, ¶ 78, at 28, 35 I.L.M. at 827. *See also id.* at ¶ 47, at 19, 35 I.L.M. at 823.

<sup>17</sup> *See id.* at pt. VI, 35–36, No. 95, ¶ 47, at 19, 35 I.L.M. at 823.

*credible threat of such use in response to aggression and deterrent policies would be futile and meaningless.* In this sense, it is impossible to separate the policy of deterrence from the legality of the use of the means of deterrence.<sup>18</sup>

Our legitimization of these weapons has innumerable effects of the most dire sort:

- We develop, purchase, and maintain such weapons for use, often on a fast trigger;
- We threaten that we will use the weapons, causing other States to develop, purchase, and maintain their own nuclear, chemical, and biological weapons, often on even more of a hair trigger;
- We foster proliferation;
- By training our personnel and setting contingency plans in place for use of these weapons, we raise the likelihood of intentional, unintentional, and mistaken use, and, by emphasizing nuclear weapons, we may even hold back from developing conventional capabilities, or stockpiles, that would both better serve our military needs, and provide the means for the lawful conducting of armed conflict.

With the dread events of September 11, we have now seen the effects of weapons of mass destruction or something approximating them, at first hand, have looked them in the face, breathed the air. And what we have seen are effects, sickeningly horrific as they are, that are far less than the destruction to civilians and civilian society that could result from uses of nuclear weapons we are threatening every day and have for over fifty years by our policies of nuclear deterrence and mutual assured destruction.

Indeed, to the extent our policy is or at times has been mutual assured destruction, we threaten or have threatened just this kind of thing. The very reason given by the Bush Administration pre-September 11, for national missile defense—that our policy of mutual assured destruction, which the Administration seemed to be assuming is our current policy, is immoral and unacceptable—makes the point. Mutual assured destruction is a policy of terror.

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<sup>18</sup> See ICJ Hearing for the Nuclear Weapons Advisory Opinion, November 15, 1995, at 78 (emphasis added) available at the Court's own website at <<http://www.icj-cij.org/>> under decisions—advisory decisions—*Legality of the Threat or Use of Nuclear Weapons*—Oral Pleadings, or <[http://www.icj-cij.org/icjwww/icasess/iunan/iunan\\_cr/iUNAN\\_iCR9534\\_19951115.PDF](http://www.icj-cij.org/icjwww/icasess/iunan/iunan_cr/iUNAN_iCR9534_19951115.PDF)> (visited November 27, 2001).

I don't mean to suggest that we would ever intentionally conduct a nuclear strike against large civilian buildings in the middle of an urban area, but the effects of these weapons are so vast and so uncontrollable and so many military targets are located in the vicinity of urban areas, that, under our current policies, military personnel training, and contingency plans, we could end up causing such effects in the course of strikes aimed at military targets.

By our legitimization of the potential use of nuclear weapons, we are fostering proliferation and the other types of effects I alluded to earlier—and increasing the likelihood that at some time, under some set of circumstances, intentional or not, these weapons will be used on a broadscale and escalatory basis by combatants in war, causing catastrophic damage that could make the survivors nostalgic for the limited strikes of September 11 and the limited nature of the current anthrax attacks. Our current policies contribute to the risk that eventually some states will use nuclear weapons against major urban centers.

Here is the U.S. Joint Chiefs of Staff setting forth our potential uses of nuclear weapons:

The Joint Chief of Staff's *Doctrine for Joint Theater Nuclear Operations*, issued as recently as February 1996, states:

Nuclear operations can be successful in achieving US military objectives if they are used in the appropriate situation and administered properly.<sup>19</sup>

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Nuclear weapons have many purposes, but should only be used after deterrence has failed.<sup>20</sup>

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The purpose of using nuclear weapons can range from producing a political decision to influencing an operation.<sup>21</sup>

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<sup>19</sup> JOINT CHIEFS OF STAFF, JOINT PUB 3-12.1 DOCTRINE FOR JOINT THEATER NUCLEAR OPERATIONS v (Feb. 9, 1996), as set forth at <[http://www.dtic.mil/doctrine/jel/new\\_pubs/jp3\\_12\\_1.pdf](http://www.dtic.mil/doctrine/jel/new_pubs/jp3_12_1.pdf)> (viewed November 7, 2001) (emphasis omitted).

<sup>20</sup> *Id.* at vi (emphasis omitted).

<sup>21</sup> *Id.*

The manual identifies types of situations where the use of nuclear weapons may be “favored over a conventional attack” or otherwise preferred:

- Level of effort required for conventional targeting. If the target is heavily defended such that heavy losses are expected, a nuclear weapon may be favored over a conventional attack.
- Length of time that a target must be kept out of action. A nuclear weapon attack will likely put a target out of action for a longer period of time than a conventional weapon attack.
- Logistic support and anticipation of delays caused by the “fog and friction” of war. Such delays are unpredictable and may range from several hours to a number of days.<sup>22</sup>

As to the purpose for using nuclear weapons, the manual states:

The purpose of using nuclear weapons can range from producing a political decision at the strategic level of war to being used to influence an operation in some segment of the theater. Operations employing nuclear weapons will have a greater impact on a conflict than operations involving only conventional weapons.<sup>23</sup>

The manual identifies “enemy combat forces and facilities that may be likely targets for nuclear strikes:”

- WMD [“weapons of mass destruction,” including chemical, biological, and nuclear weapons] and their delivery systems, as well as associated command and control, production, and logistical support units
  - Ground combat units and their associated command and control and support units
  - Air defense facilities and support installations
  - Naval installations, combat vessels, and associated support facilities and command and control capabilities.
  - Nonstate actors (facilities and operation centers) that possess WMD
  - Underground facilities<sup>24</sup>

### **Additional Issues**

There are some other legal issues implicated in this overall question which I do not have time to go into in detail but which I believe deserve much more attention than they have gotten, and which I would like to address briefly.

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<sup>22</sup> *Id.* at III-4 (emphasis omitted).

<sup>23</sup> *Id.* at I-2 (emphasis omitted).

In its written and oral presentations to the International Court of Justice (ICJ) in the recent Nuclear Weapons Advisory Case, defending nuclear weapons, the United States expressed or assumed the following positions:

- The United States contended that the anticipated effects from the use of nuclear weapons would have to *necessarily* and *inevitably* be unlawful before the use would be unlawful.<sup>25</sup>
- The United States ignored the *mens rea* issues as the lawfulness of the use of nuclear weapons, ignoring the potential for unlawfulness based upon less than strict intentionality.<sup>26</sup>
- The United States argued that unlawfulness could only arise from conventional or customary international law and not from general principles of international law.<sup>27</sup>
- The United States assumed that 100% applicability is necessary before *per se* unlawfulness may incept.<sup>28</sup>
- The United States assumed that the principles of risk analysis are irrelevant to the lawfulness of the use of nuclear weapons.<sup>29</sup>
- The United States argued that the use of nuclear weapons could be lawful as reprisals.<sup>30</sup>

### **Unlawful Effects As Not Inevitable**

The U.S. argument that unlawful effects would not be *inevitable* begs the question. While the quantum of likelihood that must be present for unlawfulness to incept is not an issue that appears to have been broadly addressed or precisely defined in international law, there seems no basis for imposing a standard of inevitability.<sup>31</sup> The rules of discrimination, necessity, and proportionality are rules of reason designed to limit the use of weapons, before their use, based on their likely effects in light of applicable military factors. The rules of international law as to the

<sup>24</sup> *Id.* at III-6–7.

<sup>25</sup> See MOXLEY, *supra* note 13, at Chapter 2 notes 58–62, 74, 88, and accompanying text.

<sup>26</sup> See *id.* at Chapter 2 notes 104–106, and accompanying text.

<sup>27</sup> See *id.* at Chapter 2 notes 40, 42, 43–46, 50–53, and accompanying text.

<sup>28</sup> See *id.* at Chapter 2 notes 48, 49, 57, 59, 67–69, 74, 88, and accompanying text.

<sup>29</sup> See *id.* at Chapter 2 notes 71–74, 89, and accompanying text.

<sup>30</sup> See *id.* at Chapter 2, notes 57, 129, and accompanying text.

<sup>31</sup> See *id.* at Chapter 1 notes 161, 172, 282, 286, Chapter 8, notes 6–53, and accompanying text.

*mens rea* or mental state necessary for war crimes culpability are inconsistent with the assumption that inevitability must be present before culpability incepts.

## Mens Rea

The lawfulness of our use of nuclear weapons involves issues as to such lawfulness *vis-à-vis* the United States as actor and *vis-à-vis* the U.S. civilian, military, industrial, and other leadership as actors. Ultimately, it is individuals, not States, who are imprisoned or executed.

The law is clear that strict intentionality is not required for criminal culpability for violation of the law of armed conflict. Willfulness, recklessness, gross negligence, and even mere negligence are potential bases for culpability.<sup>32</sup> The actor need not have intended the unlawful effects from the use of nuclear weapons; it will potentially be a sufficient ground for war crimes culpability if he used such weapons notwithstanding the known risks—and the risks of nuclear use or certainly known today.

Thus, *The Air Force Manual on International Law* recognizes the sufficiency of gross negligence or deliberate blindness.<sup>33</sup> The manual quotes Spaight's statement of the rule:

In international law, as in municipal law intention to break the law—*mens rea* or negligence so gross as to be the equivalent of criminal intent is the essence of the offense. A bombing pilot cannot be arraigned for an error of judgment ... it must be one which he or his superiors either knew to be wrong, or which was, *in se*, so palpably and unmistakably a wrongful act that only gross negligence or deliberate blindness could explain their being unaware of its wrongness.<sup>34</sup>

It is also clear that the law of armed conflict generally recognizes recklessness and other mental states less than strict intentionality as a basis for war crimes liability.<sup>35</sup> The Geneva conventions extensively provide for criminal culpability for violations committed willfully,<sup>36</sup> a state

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<sup>32</sup> See *id.* at Chapter 1 notes 286, 289–295, and accompanying text; Chapter 8 *passim*.

<sup>33</sup> THE AIR FORCE MANUAL ON INTERNATIONAL LAW, *supra* note 2, at 15-3; 15-8 n.13 (citing SPAIGHT, AIR POWER AND WAR RIGHTS 57, 58 (1947)).

<sup>34</sup> *Id.* at 15-8 n.13.

<sup>35</sup> See MOXLEY, *supra* note 13, at Chapter 8 notes 6–15 and accompanying text. See generally *id.* Chapter 8.

<sup>36</sup> See *id.* at Chapter 8, notes 8–14 and accompanying text; THE AIR FORCE MANUAL ON INTERNATIONAL LAW, *supra* note 2, at 15-1 to 15-2; 15-8 n.12 (quoting Geneva Convention for the Amelioration of the Condition of the

of mind broadly recognized as encompassing recklessness.<sup>37</sup> The law of armed conflict similarly recognizes criminal culpability for acts of wantonness and of wanton destruction, acts also not reaching the level of strict intentionality.<sup>38</sup>

Similarly, in imposing war crimes culpability for “an attack which may be expected to cause” certain impermissible effects, as prescribed, for example, in Protocol I to the Geneva Conventions, Article 51(5), or for acts that are “intended, or may be expected, to cause” certain impermissible effects, as prescribed, in Protocol I, Article 35(3), the law again recognizes

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Wounded and Sick in Armed Forces in the Field, adopted Aug. 12, 1949, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, adopted Aug. 12, 1949, 75 U.N.T.S. 85, and other Geneva Conventions).

<sup>37</sup> See MOXLEY, *supra* note 13, at Chapter 8, notes 6–18 and accompanying text. See generally *id.* Chapter 8. See also GLANVILLE WILLIAMS, CRIMINAL LAW, THE GENERAL PART § 22, 59–62 (1953); ICRC Commentary to Article 85 of Protocol I (para. 3474), *quoted in* Amnesty International—Report—IOR 40/10/98 May 1998 United Nations (UN), The International Criminal Court Making the Right Choices—Part V Recommendations to the Diplomatic Conference, <<http://www.web.amnesty.org/ai.nsf/index/IO400101998>> (visited November 7, 2001); Commentary on Protocol Additional (No. I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), concluded at Geneva 8 June 1977, Part V: Execution of the conventions and of this protocol: Section II—Repression of breaches of the conventions and of this protocol, Art. 85—Repression of breaches of this Protocol, available at <<http://www.icrc.org/ihl.nsf>>, under Treaties and Commentary, 1949 Conventions and 1977 Protocols <commentary>, “Protocol Additional... (Protocol I)”, Art 85 (visited November 18, 2001).

<sup>38</sup> See Art. 3(b), International Criminal Tribunal for the Former Yugoslavia, Statute of the International Tribunal (Adopted 25 May 1993) (as amended 13 May 1998) <<http://www.un.org/icty/basic/statut/statute.htm>> (visited November 12, 2001); Jordan J. Paust, *International Law Association—American Branch: Committee on a Permanent International Criminal Court: The Preparatory Committee’s “Definition of Crimes”—War Crimes*, 8 CRIM. L.F. 431, 438–441 (1997) (emphasis removed) (citing, *inter alia*, U.N. Doc. A/CONF. 95/15 (1980), reprinted in 19 I.L.M. 1523; Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704 & Add. 1 (1993), Annex, arts. 2(d), 3(b); Prosecutor v. Karadzic, Case No. IT-95-5-I (Int’l Trib. for Former Yugo., Indictment, July 24, 1995), PP27, 41, 44; Report of the International Law Commission on Its Second Session, 5 June–29 July 1950, 5 U.N. GAOR, Supp. No. 12, at 11–14, P99, U.N. Doc. A/1316 (1950); 11 TRIALS OF WAR CRIMINALS 757 (1948); Report of Justice Robert H. Jackson to the President of the United States, released June 7, 1945, reprinted in PAUST ET AL. INTERNATIONAL CRIMINAL LAW 1027 (1996); Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, Apr. 24, 1863, arts. 16, 44, [Lieber Code]; Responsibilities Commission of the Paris Peace Conference, List of War Crimes (1919); Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, adopted Aug. 12, 1949, art. 50, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, adopted Aug. 12, 1949, art. 51, 75 U.N.T.S. 85).

potential culpability for war crimes committed with a mental element of less than strict intentionality.<sup>39</sup>

So also, the law of armed conflict recognizes an extremely scope of potential commander culpability for war crimes based on what the commander “knew or should have known.”<sup>40</sup>

While the ICJ in the Nuclear Weapons Advisory Opinions did not focus on the question of the general *mens rea* requirements under the law of armed conflict, a number of the judges made the point that information as to the potential effects of nuclear weapons is so widely known and available as to provide a basis for war crimes based on the use of such weapons.

Judge Weeramantry in his dissenting opinion stated:

[“By-products” or “collateral damage”] are known to be the necessary consequences of the use of the weapon. The author of the act causing these consequences cannot in any coherent legal system avoid legal responsibility for causing them, any less than a man careering in a motor vehicle at a hundred and fifty kilometers per hour through a crowded market street can avoid responsibility for the resulting deaths on the ground that he did not intend to kill the particular person who died.<sup>41</sup>

Judge Weeramantry added, “The plethora of literature on the consequences of the nuclear weapon is so much part of common universal knowledge today that no disclaimer of such knowledge would be credible.”<sup>42</sup>

To the argument that the rule of moderation—the prohibition of the use of arms “calculated to cause unnecessary suffering”—requires specific intent, Judge Weeramantry cited the “well-known legal principle that the doer of an act must be taken to have intended its natural

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<sup>39</sup> Paust, *supra* note 38, at 438–441 (emphasis omitted) (citations omitted).

<sup>40</sup> *Id.* (citing, *inter alia*, 11 TRIALS OF WAR CRIMINALS 757 (1948)).

<sup>41</sup> Dissenting opinion of Judge Weeramantry to the Nuclear Weapons Advisory Opinion, at 43, 35 I.L.M at 901.

<sup>42</sup> *Id.*

and foreseeable consequences.”<sup>43</sup> He also stated that reading into the law a requirement of specific intent would not “take into account the spirit and underlying rationale of the provision—a method of interpretation particularly inappropriate to the construction of a humanitarian instrument.”<sup>44</sup>

Making a point that, as we saw above, is confirmed by the United States’ military manuals,<sup>45</sup> Judge Weeramantry added that nuclear weapons “are indeed deployed ‘in part with a view of utilizing the destructive effects of radiation and fall-out.’”<sup>46</sup>

As noted above, Judge Weeramantry reached a similar conclusion with respect to the rights of neutrals: “The launching of a nuclear weapon is a deliberate act. Damage to neutrals is a natural, foreseeable and, indeed, inevitable consequence.”<sup>47</sup>

Judge Weeramantry also emphasized the element of intent contained in the policy of deterrence: “Deterrence needs to carry the conviction to other parties that there is a real intention to use those weapons ... it leaves the world of make-believe and enters the field of seriously-intended military threats.”<sup>48</sup>

Judge Weeramantry concluded that the policy of deterrence provides the element of intent:

[D]eterrence becomes ... stockpiling with intent to use. If one intends to use them, all the consequences arise which attach to intention in law, whether domestic or international. One intends to cause the damage or devastation that will result. The intention to cause damage or devastation which results in total destruction of one’s

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<sup>43</sup> *Id.* at 48, 35 I.L.M at 904.

<sup>44</sup> *See* MOXLEY, *supra* note 13, at Chapter 3, note 313 and accompanying text.

<sup>45</sup> *See id.* at Chapter 29, notes 38–40, Chapter 30 notes 14–22, and accompanying text.

<sup>46</sup> Dissenting opinion of Judge Weeramantry to the Nuclear Weapons Advisory Opinion, at 48, 35 I.L.M at 904 (citing Ian Brownlie, *Some Legal Aspects of the Use of Nuclear Weapons*, 14 INT’L & COMP. L. Q. 445 (1965)). *See also* MICHAEL WALZER, *JUST AND UNJUST WARS, A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* 273–283 (New York 1968); *DOCTRINE FOR JOINT NUCLEAR OPERATIONS*, *supra* note 13, at I-2.

<sup>47</sup> Dissenting opinion of Judge Weeramantry to the Nuclear Weapons Advisory Opinion, at 50, 35 I.L.M. at 905.

<sup>48</sup> *Id.* at 78, 35 I.L.M. at 919 (citations omitted).

enemy, or which might indeed wipe it out completely, clearly goes beyond the purposes of war.<sup>49</sup>

The challenging aspect of the evaluation of the lawfulness of the use of nuclear weapons is the fact that—unlike the legal determinations made at Nuremberg or in war crime trials generally—with nuclear weapons it is obviously not a prudently available strategy to wait until after the weapons are used to make the evaluation. While war crimes charges seem to have rarely been brought based on risk taking that did not result in illicit effects, nuclear weapons pose a threat that requires full and effective advance evaluation and compliance if the applicable law is to be given effect.<sup>50</sup>

That is perhaps the best way to conceptualize the nuclear threat: that the rules of the law of war applicable to nuclear weapons will be frustrated—in effect nullified—if they are not applied in advance.

### **War Crimes Culpability under General Principles of Law**

The law is clear that the rules of discrimination, proportionality and necessity are binding as established principles of international law. The United States is bound by these rules; if, under these rules, the use of nuclear weapons would be unlawful, the United States is bound by such unlawfulness. It is not necessary that it independently agree by convention, custom, or otherwise to such unlawfulness or even that it agree with the conclusion that the rules of discrimination, proportionality, or necessity render use unlawful.

*The Air Force Manual on International Law* thus states that the use of a weapon may be unlawful based not only on “expressed prohibitions contained in specific rules of custom and

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<sup>49</sup> *Id.*

<sup>50</sup> The need for prudence in planning in this area goes also to the need for adequate procurement of conventional weapons, so the United States will not find itself in a position of needing to use nuclear weapons. See MOXLEY, *supra* note 13, at Chapter 1, notes 91–101, Chapter 17, notes 29–36, 45–50, Chapter 18, note 5, and accompanying text.

convention,” but also on “those prohibitions laid down in the general principles of the law of war.”<sup>51</sup>

Similarly, in discussing how the lawfulness of new weapons and methods of warfare is determined, the manual states that such determination is made based on international treaty or custom, upon “analogy to weapons or methods previously determined to be lawful or unlawful,” and upon the evaluation of the compliance of such new weapons or methods with established principles of law, such as the rules of necessity, discrimination and proportionality.<sup>52</sup>

The manual notes that the International Military Tribunal at Nuremberg in the case of the *Major War Criminals* found that international law is contained not only in treaties and custom but also in the “general principles of justice applied by jurists and practiced by military courts.”<sup>53</sup>

The Army’s *Law of Land Warfare* states “[t]he conduct of armed hostilities on land is regulated by the law of land warfare which is both written and unwritten.”<sup>54</sup>

Based on the foregoing, it seems clear that the use of nuclear weapons can be unlawful *per se* regardless of whether there is a treaty or custom establishing such unlawfulness.

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<sup>51</sup> THE AIR FORCE MANUAL ON INTERNATIONAL LAW, *supra* note 2, at 6-1, 6-9 n.3 See MOXLEY, *supra* note 13, at Chapter 1, notes 14–18, 24, Chapter 2, notes 42–49, and accompanying text.

<sup>52</sup> See THE AIR FORCE MANUAL ON INTERNATIONAL LAW, *supra* note 2, at 6-7; MOXLEY, *supra* note 13, at Chapter 1, note 25 and accompanying text.

<sup>53</sup> THE AIR FORCE MANUAL ON INTERNATIONAL LAW, *supra* note 2, at 1-6. See MOXLEY, *supra* note 13, at Chapter 1, note 26 and accompanying text.

<sup>54</sup> UNITED STATES DEPARTMENT OF THE ARMY, THE LAW OF LAND WARFARE 3 (FM27-10/18 July 1956) with Change No. 1 (15 July 1976) [hereinafter THE LAW OF LAND WARFARE]. See MOXLEY, *supra* note 13, at Chapter 1, note 3 and accompanying text.

### Prerequisites for a *Per Se* Rule

The question also arises as to what level or extent of unlawfulness must be present for a *per se* rule to arise. The United States contended,<sup>55</sup> in a position that the ICJ ostensibly accepted *sub silentio*,<sup>56</sup> that 100% illegality—the unlawfulness of all uses of nuclear weapons—would be necessary before a rule of *per se* illegality could arise. To the extent one concludes, as I have, that all or “virtually all” uses of nuclear weapons would be unlawful, either because the resultant effects, particularly radiation and escalation, would be uncontrollable, or because any such use would be likely to precipitate impermissible effects, or would involve the risk of precipitating extreme impermissible effects, the issue of whether unlawfulness in 100% or virtually 100% of cases is required is not reached.

If one concludes, however, that the U.S. position—that some uses could potentially be lawful—has merit, one reaches the question of the prerequisites for a *per se* rule.

The ICJ ostensibly assumed that the use of nuclear weapons could be held *per se* unlawful only if all uses would be unlawful in all circumstances. This appears, for example, from the Court’s conclusions that it does not have sufficient facts to determine that nuclear weapons would be unlawful “in any circumstance,”<sup>57</sup> that the proportionality principle may not in itself exclude the

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<sup>55</sup> See MOXLEY, *supra* note 13, at Chapter 1, notes 314–320, Chapter 2, note 26, and accompanying text; THE AIR FORCE MANUAL ON INTERNATIONAL LAW, *supra* note 2, at 6-3; THE NAVAL/MARINE COMMANDER’S HANDBOOK, *supra* note 6, at 10-2; ICJ Hearing for the Nuclear Weapons Advisory Opinion, November 15, 1995, *supra* note 18, at 90.

<sup>56</sup> See MOXLEY, *supra* note 13, Chapter 3, notes 237–245 and accompanying text; Nuclear Weapons Advisory Opinion ¶¶ 42, 48, 95, at 32, 35 I.L.M. at 822, 823, 829; dissenting opinion of Judge Higgins to the Nuclear Weapons Advisory Opinion, at 5, 35 I.L.M. 809, 937; dissenting opinion of Judge Weeramantry to the Nuclear Weapons Advisory Opinion, at 70, 35 I.L.M. at 915.

<sup>57</sup> Nuclear Weapons Advisory Opinion ¶ 95, at 32, 35 I.L.M. at 829. See MOXLEY, *supra* note 13, Chapter 3, notes 9, 30, 43, 237, 245, 249, and accompanying text.

use of nuclear weapons in self-defense “in all circumstances,”<sup>58</sup> and that, for the threat to use nuclear weapons implicit in the policy of deterrence to be unlawful, it would have to be the case that such use would “necessarily violate the principles of necessity and proportionality.”<sup>59</sup>

However, the Court’s approach may have been affected by the wording of the question referred to it by the General Assembly: “Is the threat or use of nuclear weapons in any circumstance permitted under international law?”<sup>60</sup>

This issue deserves more attention. There are numerous bases for inferring that, under widely accepted principles of law, a *per se* rule can arise under circumstances of less than 100% applicability,<sup>61</sup> and that this is particularly appropriate where unlawfulness would exist in the vast majority of cases and the potential benefits of avoiding the repercussions of unlawful uses exceed the benefits of using such weapons in instances of putative lawfulness.<sup>62</sup> A number of the judges of the ICJ, in their individual opinions, addressed the issue. Judge Shahabuddeen stated, “[I]n judging of the admissibility of a particular means of warfare, it is necessary, in my opinion, to consider what the means can do in the ordinary course of warfare, even if it may not do it in all circumstances.”<sup>63</sup>

Judge Weeramantry, addressing the issue from the perspective of nuclear decision-making, concluded that nuclear weapons should be declared illegal in all circumstances, with the proviso

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<sup>58</sup> Nuclear Weapons Advisory Opinion ¶ 42, at 18, 35 I.L.M. at 822. See MOXLEY, *supra* note 13, Chapter 3, notes 30, 62, 237–242, 303 and accompanying text.

<sup>59</sup> Nuclear Weapons Advisory Opinion ¶ 48, at 19, 35 I.L.M. at 823.

<sup>60</sup> *Id.* ¶ 1, at 4, 35 I.L.M. at 811 (question presented to the Court by U.N. General Assembly resolution 49/75 K, adopted on December 15, 1994).

<sup>61</sup> See, e.g., MOXLEY, *supra* note 13, Chapter 4, notes 3–13 and accompanying text.

<sup>62</sup> See Christopher H. Schroeder, *Rights Against Risks*, at 503–506 (citing R. SARTORIUS, *INDIVIDUAL CONDUCT AND SOCIAL NORMS* 59–68 (1975)) (“In general prophylaxis is a plausible strategy whenever; (1) most, but not all, acts belonging to the class are wrong, and (2) attempts to pick right acts in the class from wrong ones are unreliable.”). See also MOXLEY, *supra* note 13, Chapter 4, notes 3–5, 10, 25–31, 37–39, and accompanying text.

<sup>63</sup> Dissenting opinion of Judge Shahabuddeen to the Nuclear Weapons Advisory Opinion, at 17, 35 I.L.M. at 869.

that if such use would be lawful “in some circumstances, however improbable, those circumstances need to be specified.”<sup>64</sup> Judge Weeramantry stated:

A factor to be taken into account in determining the legality of the use of nuclear weapons, having regard to their enormous potential for global devastation, is the process of decision-making in regard to the use of nuclear weapons.

A decision to use nuclear weapons would tend to be taken, if taken at all, in circumstances which do not admit of fine legal evaluations. It will, in all probability, be taken at a time when passions run high, time is short and the facts are unclear. It will not be a carefully measured decision taken after a detailed and detached evaluation of all relevant circumstances of fact. It would be taken under extreme pressure and stress. Legal matters requiring considered evaluation may have to be determined within minutes, perhaps even by military rather than legally trained personnel, when they are in fact so complex as to have engaged this Court’s attention for months. The fate of humanity cannot fairly be made to depend on such a decision.

Studies have indeed been made of the process of nuclear decision-making and they identify four characteristics of a nuclear crisis. These characteristics are:

1. The shortage of time for making crucial decisions. This is the fundamental aspect of all crises.
2. The high stakes involved and, in particular, the expectation of severe loss to the national interest.
3. The high uncertainty resulting from the inadequacy of clear information, *e.g.*, what is going on?, What is the intent of the enemy?; and
4. The leaders are often constrained by political considerations, restricting their options.<sup>65</sup>

Judge Weeramantry further concluded that, even if there were a nuclear weapon that totally eliminated the dissemination of radiation and was not a weapon of mass destruction, the Court, because of the technical difficulties involved, would not be able “to define those nuclear weapons which are lawful and those which are unlawful,” and accordingly that the Court must “speak of legality in general terms.”<sup>66</sup>

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<sup>64</sup> Dissenting opinion of Judge Weeramantry to the Nuclear Weapons Advisory Opinion, at 70, 35 I.L.M. at 915.

<sup>65</sup> *Id.* (citing Conn Nugent, *How a Nuclear War Might Begin*, in PROCEEDINGS OF THE SIXTH WORLD CONGRESS OF THE INTERNATIONAL PHYSICIANS FOR THE PREVENTION OF NUCLEAR WAR 117).

<sup>66</sup> *Id.* at 84, 35 I.L.M. at 922.

Even using the U.S. formulation of requiring 100% unanimity, there is room for “sub-classes” of *per se* unlawfulness. Based on the Court’s decision, there is a basis for concluding that the use of strategic nuclear weapons and the wide scale use of tactical nuclear weapons or their use in urban areas, would be *per se* unlawful.<sup>67</sup> As far as equipment is concerned, this would ostensibly render unlawful the use of something on the order of 80% of the nuclear weapons in the United States’ active arsenal. As far as circumstances are concerned, this would ostensibly render unlawful a very large portion of the instances in which the United States might use such weapons.

To the objection that such piecemeal illegalization would be incomplete or unworkable, the answer is that we already have something analogous in practice and that, in any event, social and political evolution, like chance in catastrophe theory,<sup>68</sup> work in sequential steps as well as jumps. Incrementalism in the right direction is not necessary bad, and can be infinitely better than nothing, particularly if it is the most that is available at a particular point in time.

As to the workability of partial limitations, the United States has already undertaken numerous such limitations. In addition to the pledge not to use nuclear weapons against non-nuclear adversaries,<sup>69</sup> the United States has agreed not to use nuclear weapons, subject to certain conditions:

- in Latin America, pursuant to the Treaty of Tlatelolco of February 14, 1967;<sup>70</sup>

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It is unclear whether Judge Koroma in his dissenting opinion, in concluding that the use of nuclear weapons would be unlawful “in any circumstance,” was assuming that *per se* illegality required every possible use be unlawful. See dissenting opinion of Judge Koroma to the Nuclear Weapons Advisory Opinion, at 1, 35 I.L.M. at 925.

<sup>67</sup> See MOXLEY, *supra* note 13, Chapter 3, notes 10–11 and accompanying text. See, e.g., Nuclear Weapons Advisory Opinion ¶¶ 95, 105. E., at 36, 35 I.L.M. at 829, 835.

<sup>68</sup> See MOXLEY, *supra* note 13, Chapter 22, notes 46–59 and accompanying text.

<sup>69</sup> See *id.* Chapter 30 note 75 and accompanying text.

<sup>70</sup> See Nuclear Weapons Advisory Opinion ¶ 59(a), at 22, 35 I.L.M. at 824. Other nuclear States imposed further limitations on their ratification of the Protocol. See MOXLEY, *supra* note 13, Chapter 3, notes 127–133 and accompanying text.

- in the South Pacific, pursuant to the Treaty of Rarotonga of August 6, 1985;<sup>71</sup>
- in Southeast Asia, pursuant to the Southeast Asia Nuclear-Weapon-Free Zone Convention of December 15, 1995;<sup>72</sup>
- in Africa, pursuant to the nuclear weapons free zone convention signed on April 1, 1996,<sup>73</sup> and
- in the Antarctic, pursuant to the Antarctic Treaty of 1959.<sup>74</sup>

So also, the United States, in its appearance before the ICJ in the Nuclear Weapons Advisory case, strongly reassured the Court that the U.S. doctrine of nuclear deterrence is purely of a defensive nature, such that the United States would never use such other weapons other than in a defensive mode.<sup>75</sup>

It could be said that this issue as to the prerequisites for a *per se* rule is semantic, since many *per se* rules are themselves generally subject to exceptions and qualifications.<sup>76</sup> Nonetheless, on the assumption that law matters, it seems clear that, were the United States to recognize the *per se* unlawfulness of the use of nuclear weapons, in whole or in part, even if there were qualifications and footnotes to the recognition, a powerful step would have been taken.

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<sup>71</sup> See Nuclear Weapons Advisory Opinion ¶ 59(b), at 22–23, 35 I.L.M. at 824–25.

<sup>72</sup> See *id.* ¶ 63, at 25, 35 I.L.M. at 826.

<sup>73</sup> See *id.*

<sup>74</sup> See *id.* ¶ 60, at 24, 35 I.L.M. at 825.

<sup>75</sup> See ICJ Hearing for the Nuclear Weapons Advisory Opinion, November 15, 1995, *supra* note 18, at 86. See also MOXLEY, *supra* note 13, Chapter 2, notes 130–135 and accompanying text.

<sup>76</sup> See MOXLEY, *supra* note 13, at Chapter 4; Chapter 4, notes 3–5, 10–13, 16–30, 41–42, and accompanying text. See also *id.* Chapter 30 note 151 and accompanying text.

### Risk Analysis

To what extent may any one State put protected persons and indeed the whole human venture at risk in an attempt to further the State's own military objectives, even its survival?

In any such circumstance in which these weapons might be used, whether intentionally or by mistake, is it not ineluctably the case that there would be some risk of the occurrence of extreme effects, given the potential destructiveness of the weapons, the inherent uncontrollability of radiation,<sup>77</sup> and the overall potential for escalation, misperception, and loss of command and control?<sup>78</sup>

This is clear, I submit, even from Judge Schwebel's example of the use of "tactical nuclear weapons against discrete military or naval targets so situated that substantial civilian casualties would not ensue."<sup>79</sup>

The ICJ in its decision referenced similar arguments the United States and Great Britain had made:

91. ... The reality ... is that nuclear weapons might be used in a wide variety of circumstances with very different results in terms of likely civilian casualties. In some cases, such as the use of a low yield nuclear weapon against warships on the High Seas or troops in sparsely populated areas, it is possible to envisage a nuclear attack which

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<sup>77</sup> See *id.* Chapter 29, notes 41–124 and accompanying text.

<sup>78</sup> See *id.* Chapters 15, 25, 26; Chapter 2, notes 63–87, Chapter 15, notes 1–14, 33–43, 58–89, 99, 102–108, Chapter 16, notes 32–38, and accompanying text; NATO HANDBOOK ON THE MEDICAL ASPECTS OF NBC DEFENSIVE OPERATIONS, Part I, Chap. 1, §102(a) (A MedP-6(B) 1996), adopted as Army Field Manual 8-9, Navy Medical Publication 5059, Air Force Joint Manual 44-151; INTERNATIONAL PHYSICIANS FOR THE PREVENTION OF NUCLEAR WAR, BRIEFING BOOK ON NUCLEAR WAR (1992); Carl Sagan, *Nuclear War and Climatic Catastrophe: Some Policy Implications*, 62 FOREIGN AFF. 257, 273 (Winter 1983/1984); U.S. Congress, Office of Technology Assessment, *The Effects of Nuclear War* 16–17 NTIS order no. PB-296946 (Washington, DC: U.S. Government Printing Office, May 1979). See also MOXLEY, *supra* note 13, at Chapters 7–9, on weighing risks and the legal relevance of risks.

The escalation risk is particularly extreme, as has been recognized by the civilian and military leadership of the United States and by defense experts throughout the nuclear era. See MOXLEY, *supra* note 13, at Chapters 24, 25.

<sup>79</sup> Dissenting opinion of Judge Schwebel to the Nuclear Weapons Advisory Opinion, at 7, 35 I.L.M. at 839.

caused comparatively few civilian casualties. It is by no means the case that every use of nuclear weapons against a military objective would inevitably cause very great collateral civilian casualties.<sup>80</sup>

These examples, and the ones used by the United States and Great Britain before the ICJ, appear to assume one of two things:

- that the submarine in the ocean and the army in the desert or other such remote targets would exist independently of the rest of the world, rather than being affiliated with a State that either itself or with its allies has nuclear, chemical or biological weapons that it is likely to use in response to nuclear attack, and that the State using the nuclear weapons has no other enemies that might find the attack provocative and retaliate; or
- that the potential escalation by the attacked State or other party is not relevant to the analysis.

Neither assumption seems reasonable. As the United States has recognized, the legality evaluation is to be made in light of all available facts as to potential risk factors.<sup>81</sup> Although it may be possible that there could be a scenario where the submarine or the army in the desert and the related conflict existed independently of the rest of the world, such a prospect seems so remote as to preclude its constituting the basis, on any rational level, for the overall lawfulness of the use of nuclear weapons.

Interestingly, Judge Schwebel recognized the legal point that if a use of nuclear weapons could cause severe effects, it would be unlawful:

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<sup>80</sup> Nuclear Weapons Advisory Opinion ¶ 91 at 31, 35 I.L.M. at 829 (citing United Kingdom, Written Statement ¶ 3.70 at 53, and United States of America, Oral Statement, CR 95/34 at 89–90). See MOXLEY, *supra* note 13, at Chapter 1, note 29 and accompanying text.

<sup>81</sup> See MOXLEY, *supra* note 13, at Chapter 1, notes 84–93, 109–120, 161, Chapter 5, notes 3–4, Chapter 6, notes 26–27, Chapter 29, notes 125–127, and accompanying text; THE AIR FORCE MANUAL ON INTERNATIONAL LAW, *supra* note 2, at 1-8 to 1-9 (citing SPAIGHT, AIR POWER AND WAR RIGHTS 57, 58 (1947)); THE NAVAL/MARINE COMMANDER'S HANDBOOK, *supra* note 6, at 8-5 to 8-6; THE AIR FORCE COMMANDER'S HANDBOOK, *supra* note 1, at 3-3, 6-1; THE LAW OF LAND WARFARE, *supra* note 54, at 23–24. See also Vienna Convention on the Law of Treaties Article 32, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679; J.L. BRIERLY, THE LAW OF NATIONS 67 (1963) (1928); XI INT'L ENCYCLOPEDIA OF COMPARATIVE LAW § 2-114 (1983).

At one extreme is the use of strategic nuclear weapons in quantities against enemy cities and industries. This so-called “countervalue” use (as contrasted with “counterforce” uses directly only against enemy nuclear forces and installations) could cause an enormous number of deaths and injuries, running in some cases into the millions; and, in addition to those immediately affected by the heat and blast of those weapons, vast numbers could be affected, many fatally, by spreading radiation. Large-scale “exchanges” of such nuclear weaponry could destroy not only cities but countries and render continents, perhaps the whole of the earth, uninhabitable, if not at once then through longer-range effects of nuclear fallout. It cannot be accepted that the use of nuclear weapons on a scale which would—or *could*—result in the deaths of many millions in indiscriminate inferno and by far-reaching fallout, have profoundly pernicious effects in space and time, and render uninhabitable much or all of the earth, could be lawful.<sup>82</sup>

The ICJ, as we have seen, concluded that it had not been given sufficient facts to resolve the issue:

95. ... [N]one of the States advocating the legality of the use of nuclear weapons under certain circumstances, including the “clean” use of smaller, low yield tactical nuclear weapons, has indicated what, supposing such limited use were feasible, would be the precise circumstances justifying such use; nor whether such limited use would not tend to escalate into the all-out use of high yield nuclear weapons. This being so, the Court does not consider that it has a sufficient basis for a determination of the validity of this view.<sup>83</sup>

The Court declined to engage in risk analysis:

43. Certain States ... contend that the very nature of nuclear weapons, and the high probability of an escalation of nuclear exchanges, mean that there is an extremely strong risk of devastation. The risk factor is said to negate the possibility of the condition of proportionality being complied with. The Court does not find it necessary to embark upon the quantification of such risks; nor does it need to enquire into the question whether tactical nuclear weapons exist which are sufficiently precise to limit those risks: it suffices for the Court to note that the very nature of all nuclear weapons and the profound risks associated therewith are further considerations to be borne in mind by

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<sup>82</sup> Dissenting opinion of Judge Schwebel to the Nuclear Weapons Advisory Opinion, at 7, 35 I.L.M. at 839 (emphasis added). See MOXLEY, *supra* note 13, Chapter 1, note 38 and accompanying text.

<sup>83</sup> Nuclear Weapons Advisory Opinion ¶ 94, 35 I.L.M. at 829. See MOXLEY, *supra* note 13, Chapter 3, note 31 and accompanying text.

States believing they can exercise a nuclear response in self-defense in accordance with the requirements of proportionality.<sup>84</sup>

This issue of risk analysis would appear to be the heart of the matter. In a milieu in which the dominant policy of nuclear deterrence is inherently provocative, the question of the extent to which any State may subject the rest of the world, or any appreciable portion of it, to the risk of severe, even apocalyptic, effects would appear to be one that must be addressed if the law in this area is to be meaningful.

The applicability of risk analysis would seem to be recognized by the U.S. statement of the proportionality test to the ICJ:

Whether an attack with nuclear weapons would be disproportionate depends entirely on the circumstances, including the nature of the enemy threat, the importance of destroying the objective, the character, size and likely effects of the device, and the magnitude of the risk to civilians.<sup>85</sup>

### **Deferred Legal Evaluation as Risking Abnegating the Rule of Law**

Our current approach that each potential use of nuclear weapons must be evaluated in the context of the particular use has the effect of largely vitiating the rule of law. In the circumstances of a war where nuclear weapons might be resorted to, the situation will likely be extremely volatile; the fog of war will be thick (maybe even thicker than in wars of the past, given the extent to which we are dependent on computer controls); information will be incomplete and possibly inaccurate; passions will be high; time will be short. The likelihood of reasoned application of the law of armed conflict will be slight.

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<sup>84</sup> Nuclear Weapons Advisory Opinion ¶ 43, 35 I.L.M. at 822. See MOXLEY, *supra* note 13, Chapter 6, note 8 and accompanying text. See also Nuclear Weapons Advisory Opinion ¶¶ 18, 32, 33, 36, 95, 97, respectively at 35 I.L.M. 819, 821, 821, 822, 829, and 830.

Our failure to come to grips with these the legal issues of nuclear weapons now puts not just the rule of law but the continuation of human civilization at risk. The United States is the indispensable leader; it alone can start the process of change in this area.

Not by expecting quick success. Not by expecting a situation in which we can quickly rid ourselves of these weapons or expect other nuclear States to do so—but committing ourselves to a process that, in perhaps our children’s or grandchildren’s time, will see the de-legitimization of these weapons and progress on the road to ridding the world of them.

### **Unlawfulness of Second Use/Reprisals**

The concept of reprisal is one of justifying actions that would otherwise be unlawful. But the United States recognizes as a requirement for lawful reprisal that the strike be limited to that necessary to force the adversary to cease its unlawful actions and that it satisfy proportionality.<sup>86</sup> If my factual conclusion is correct that the effects of nuclear weapons are uncontrollable, it would seem that lawful reprisal would not be possible.

The probabilities are overwhelming that the second use would be designed to punish the enemy and, not incidentally, in the case of a substantial nuclear adversary, to use one’s own nuclear assets before they could be preemptively struck by the adversary, and to attempt to preemptively strike the adversary’s nuclear assets (many of which would likely be “co-located” with civilian targets) before they could be used. Even assuming adequate command and control, crucial decisions would have to be made within a very short time and would likely be dictated largely by existing war plans contemplating nuclear weapons use. The notion of a second strike as limited to the legitimate objectives of reprisal seems oxymoronic.

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<sup>85</sup> U.S. ICJ Memorandum/GA App. at 23 (citing the Army’s *THE LAW OF LAND WARFARE* at 5). *See* MOXLEY, *supra* note 13, Chapter 1, notes 75–108, Chapter 2, notes 88–91, and accompanying text.

In addition, the United States, while it disputes the applicability to nuclear weapons of the limitations upon reprisals imposed by Protocol I,<sup>87</sup> recognizes that the law of armed conflict, including that as to reprisals, is subject to the limitations inherent in the purposes of the law of armed conflict, such as preserving civilization and the possibility of the restoration of the peace, purposes that would likely be exceeded by the use of nuclear weapons.

Even if it were assumed that certain second uses of nuclear weapons, although otherwise unlawful, might be legitimized as reprisals, such legitimization—like the lawfulness of the limited use of a small number low-yield nuclear weapons in remote areas asserted by the United States before the ICJ—would only affect a small portion of the potential uses for nuclear weapons contemplated by U.S. policy and planning. It would leave unaffected the unlawfulness of the vast bulk of potential uses and virtually the totality of *likely* possible uses, including first uses against conventional, chemical and biological weapons targets, second uses intended to defeat and destroy the enemy, disproportionate second uses, and other high-megatonnage nuclear strikes with likely extreme effects.

### **Our National Interest**

Paradoxically, all of this is in even our short term interest. We no longer need these weapons. Not only do they pose more of a risk than a solution to any military threat, we can in fact, with our greatly expanded conventional weapons and particularly with the precision with which we can deliver payloads, now achieve with conventional weapons potentially all of the military missions for which we might previously have considered resorting to nuclear weapons.

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<sup>86</sup> See discussion of the application of the law of reprisal to nuclear weapons in MOXLEY, *supra* note 13, Chapter 29, notes 227–242 and accompanying text.

<sup>87</sup> See *id.* Chapter 1, notes 274–277 and accompanying text; Chapter 2, notes 127–129 and accompanying text. See also Chapter 3, notes 246–249 and accompanying text.

I submit that virtually any use of nuclear weapons would be unlawful—and that the lessons of September 11 should unify us in a broad determination to the delegitimization of all uses of weapons threatening terroristic effects.