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Prof. Monique Chemillier-Gendreau (Paris), Présidente

Thomas Schmidt, Secrétaire Général  
Ross Str. 7, D - 40476 Düsseldorf  
FON + 49 - (0) 211 - 444 001 / 49  
MOBILFON + 49 - (0) 172 - 681 0888  
FAX + 49 - (0) 211 - 444 027  
eMail: info@ejdm.de

**Memorial  
in support of the**

**Application by the General Assembly  
of the United Nations  
for an**

**Advisory Opinion by the International Court of Justice  
on the Legality of the Use of Nuclear Weapons  
under International Law**

**prepared by**

**Professor Dr. Norman Paech**

**in Cooperation with**

**The German Association of Democratic Lawyers  
and the  
European Association of Lawyers for Democracy and World Human Rights**

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## Preface

Ever since the first time nuclear weapons were used in the year 1945, the question of these weapons' legality or illegality has been the subject of heated controversy among legal scholars. With the exception of the Tokyo District Court's verdict in the so-called Shimoda case on 7 December 1963, no court has addressed the issue as of yet. However, the World Health Organization (WHO) Assembly adopted a resolution in May 1993 (Res. 64.40) to request an advisory opinion from the International Court of Justice (ICJ), pursuant to Art. 96 of the UN Charter, on the following issue:

"In view of the health and environmental effects, would the use of nuclear weapons by a State in war or other armed conflict be a breach of its obligations under international law including the WHO Constitution?"

The ICJ granted the request for an advisory opinion and has asked all countries of the world to submit their statements by 10 September 1994.

Independently thereof, on 15 December 1994, the General Assembly of the United Nations adopted a resolution, submitted by the non-aligned movement, to request a further advisory opinion from the ICJ,<sup>1</sup> which states:

"Is the threat or use of nuclear weapons in any circumstances permitted under international law?"

In terms of its language, this request is not only more comprehensive than that of the WHO; it has the additional advantage that, unlike the WHO, the standing of the General Assembly to request an advisory opinion cannot be seriously challenged on legal grounds. As such, the International Court of Justice will provide an authoritative decision in the foreseeable future. Given the decision of the French government to resume their underground nuclear weapons tests, the repeated refusal of various governments to sign the extension of the Non-proliferation Treaty, and the significant role still played by nuclear weapons in the military strategies of the nuclear states, the International Court of Justice's advisory opinion will be of critical importance.

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<sup>1</sup> UNGA Resolution L 36; 78 votes in favor and 43 opposed, with 38 abstentions. Cf. IALANA Newsletter No. 8, The Hague, December 1994.

The legal arguments submitted for the consideration of the International Court of Justice in this memorial discuss all fundamental positions represented in the broad array of international scholarship. However, this memorial cannot claim to include every article ever written worldwide. The critical analyses all lead to the conclusion that the production, stockpiling, threatened use, deployment, and actual use of nuclear weapons cannot be reconciled with prevailing international law under any conceivable circumstances. The unique character of nuclear weapons and the singular dangers which result from their use make them illegal even if the directly-resulting injuries can be mitigated by modern technological developments.

## I. Use of Nuclear Weapons

### 1. Fundamental Legal Principles

In considering the issue of the legality or illegality of the use of nuclear weapons, the analysis usually proceeds from the traditional fundamental principle of international law: that a state can do anything which is not strictly forbidden. The Permanent Court of International Justice affirmed that principle in the so-called Lotus case,<sup>2</sup> according to which a prohibition of international activities may be assumed only in the case of either express or silently implied consent. Accordingly, as early as 1955, Art. 613 of the "United States Naval Instructions" pointed out that:

"there is at present no rule of international law expressly prohibiting states from the use of nuclear weapons in warfare. In the absence of any express prohibition, the use of such weapons against enemy combatants and other military objectives is permitted."<sup>3</sup>

10 years earlier, the Nuremberg Tribunal had been confronted with a similar legal problem when it considered the charges against those responsible for World War II, without the benefit of being able to refer to expressly established norms and definitions of actions constituting crimes against humanity and against peace. Given these circumstances, the court wrote:

"The law of war is to be found not only in treaties, but in customs and practices of states, which gradually obtained universal recognition, and from the general principles of justice

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<sup>2</sup> StICJ Series A, No. 10, 1927.

<sup>3</sup> Cited by Richard Falk, Lee Meyrowitz, Jack Sanderson, Nuclear Weapons and International Law, in: Indian Journal of International Law, 20, 1980, p. 541 et seq., 558.

applied by jurists and practiced by military courts. The law is not static, but by continued adoption follows the needs of a changing world..."<sup>4</sup>

As such, there are two grounds for questioning the provision of Art. 613 of the US Naval Instructions, which on its face seems so clear: 1. Does the lack of a treaty preventing nuclear weapons justify the assumption that there exists no express prohibition whatsoever? and 2. Is the state of international law in 1995 consistent with that of the year 1955?

The legal standard by which these issues must be measured continues to be Art. 38 of the ICJ statute, which provides for three categories of applicable law:

- "a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by the civilized nations."

Given the tendency to afford binding status to general principles of law only when they are recognized by all nations, the distinction between (b) and (c) is disappearing, so that as a matter of fact, the two categories of international treaty law and customary international law remain.<sup>5</sup>

## 2. Attempts to Outlaw the Use of Nuclear Weapons by Treaty.

No general international law treaty exists which expressly prohibits nuclear weapons. However, there have been several attempts to achieve that kind of contractual agreement between the world's nations. Above all, the International Committee of the Red Cross (ICRC) has initiated many attempts to convince the nations of the world to make such an agreement. These have included more than mere urgent requests to contractually prohibit nuclear weapons, as were first made at the XVII International Red Cross Conference in Stockholm.<sup>6</sup> In 1955, the ICRC presented the world's nations with a draft of "Rules for the Protection of Civilian Populations Against the Dangers of Indiscriminate Warfare" for signature; this document contained an unambiguous prohibition of nuclear weapons. One year later, the ICRC added to those rules with the "Rules for the Limitation of the Dangers Incurred by the

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<sup>4</sup> Trials of the Major War Criminals, Vol. 22 (1950), p. 445.

<sup>5</sup> On the details of the legal source doctrine, cf. N. Paech, G. Stuby, *Machtpolitik und Völkerrecht in den internationalen Beziehungen*, Baden-Baden 1994, p. 393 et seq.

<sup>6</sup> For details, cf. Frits Kalshoven, *Arms, Armament and International Law*, in: *Recueil des Cours* 191, 1985 - II, p. 266 et seq., 271 et seq.

Civilian Population In Time of War," which contains a general prohibition on weapons of mass destruction in Art. 14:

"Without prejudice to the present or future prohibition of certain specific weapons, the use is prohibited of weapons whose harmful effects - resulting in particular from the dissemination of incendiary, chemical, bacteriological, radioactive or other agents - could spread to an unforeseen degree or escape, either in space or in time, from the control of those who employ them, thus endangering the civilian population."<sup>7</sup>

The Red Cross did receive the satisfaction of having these rules accepted by majority vote at the XIX International Red Cross Conference in New Delhi in November 1957; for this reason, they are still referred to as the "New Delhi rules." However, they were not incorporated into any internationally binding treaties or system of regulations. Faced with the lack of success of its initiatives, the ICRC became more cautious in terms of its submitted demands and suggestions. But it has never given up its fundamental conviction that nuclear weapons violate international law, and that their prohibition by treaty is necessary.<sup>8</sup>

As a parallel measure, the only success attained was that a few regional restrictions on stationing and deployment were established by treaty. As such, the "Treaty for the Prohibition of Nuclear Weapons in Latin America" of 14 February 1967 (the so-called Treaty of Tlatelolco) established the world's only nuclear-free zone; in a second additional protocol, the nuclear powers agreed to respect that zone by neither threatening the parties to the treaty with nuclear weapons nor using nuclear weapons against them. Further, the Antarctica Treaty of 1 December 1959, which is designed to protect the polar region from militarization of all kinds, prohibits all nuclear detonations, including the military use of nuclear weapons. Additional treaties, such as the Outer Space Treaty of 27 January 1967, the Draft Moon Treaty of 18 December 1979, and the Seabed Arms Control Treaty of 11 February 1971, prohibit only the stationing of nuclear weapons. The Non-proliferation Treaty of 1 July 1968 commits all signatories who are currently not in control of nuclear weapons to renounce the possession and construction of these types of weapons in the future as well; however, it has not been signed by several potential nuclear states.

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<sup>7</sup> Deutsches Rotes Kreuz (1980), p. 68 et seq.

<sup>8</sup> For more details on the legal significance and effects of the First Additional Protocol to the Geneva Conventions of 1949, presented by the ICRC at the Geneva Diplomatic Conference of 1974-77 and approved by the nations attending, cf. *infra*.

Some peace treaties which followed World War II have also prohibited the possession, construction, and testing of nuclear weapons. For example, this is the case for the peace treaties of 1947 with Italy, Romania, Hungary, Bulgaria, and Finland, as well as the 1955 international treaty with Austria. The Federal Republic of Germany renounced the manufacture of nuclear weapons on its territory in the Paris Proclamation of 23 October 1954; it confirmed that renunciation for all of Germany following reunification in the 2+4 Treaty of 12 September 1990. Additionally, by virtue of being a signatory to the Non-proliferation Treaty (BGBl. 1976 II, p. 552), Germany reiterated its renunciation, mandated by international law, of "the manufacture and the possession of nuclear, biological, and chemical weapons, as well as the right to control them."

Only recently, the General Assembly of the United Nations took new steps to bind its member nations to renouncing nuclear weapons by treaty. After its attempt to use the 1990 disarmament conference, which took place during its 54th session, to achieve "agreement on an international convention prohibiting the use or threat of use of nuclear weapons under any circumstances" failed, it passed Resolution 45/59 A on 4 December 1990. This resolution not only confirms the judgment of the use of nuclear weapons as "a violation of the Charter of the United Nations and a crime against humanity," so defined since 1961; in addition, its appendix contains the draft of a convention on the prohibition of the use of nuclear weapons, and recommends that it be negotiated and signed by the member nations. Art. 1 states:

"The States Parties to this Convention solemnly undertake not to use or threaten to use nuclear weapons under any circumstances."

But this convention proposal has not led to any initiatives for negotiations. Just as little attention has been paid to the suggestion for a resolution regarding the commitment to nuclear disarmament contained in Art. VI of the Non-proliferation Treaty, which states:

"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."

Quite the contrary is true: since the demise of the Warsaw Pact, the NATO countries have been discussing new deployment possibilities and have affirmed the importance of nuclear weapons for their military strategy, as the German federal government declared in a statement before the *Bundestag* on 21 April 1993:

"These European-based nuclear weapons continue to play a significant role in the peace-securing comprehensive strategy of the alliance, since conventional forces cannot alone guarantee the prevention of war...as such, the federal government will not push for the removal of these weapons from Germany or Europe. Similarly, the federal government will not push for a renunciation of the option of the alliance to be the first to deploy nuclear weapons should the situation arise....Renouncing the possibility of the first use of nuclear weapons on the part of the NATO alliance would undermine the strategy of war prevention. The possibility of and the ability to wage conventional wars would increase."

It is not the intention of this memorandum to assess this rationale politically, but rather in terms of prevailing international law. Analyzed from that perspective, the policy of the NATO states represents a clear-cut violation of international treaty law (Art. VI of the Non-proliferation Treaty).

### 3. Geneva Additional Protocol I of 1977

The ICRC's last major attempt to adapt the Geneva Conventions of 1949 to the changes brought about by the continuing development of weapons technology, thereby increasing the protection of both the civilian population and combatants by adopting new international treaties (additional protocols), must be considered against the background of the unyielding refusal to give up nuclear weapons as an indispensable part of comprehensive military strategy. At the 1969 XXI. Red Cross Conference in Istanbul, the ICRC was given the assignment of developing a convention draft whose goal was "the reaffirmation and development of international humanitarian law applicable in armed conflicts." The UN General Assembly expressly supported that initiative for the continued development of humanitarian international law.<sup>9</sup> Following four years of intensive preparatory work, the ICRC submitted a draft of two additional protocols to the Geneva Conventions in June of 1973. This formed the basis of discussions for the "Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts," which began in Geneva on 20 February 1974,<sup>10</sup> and culminated in the "Geneva Protocol I Additional Relating to the Protection of Victims of International Armed Conflicts" (Additional Protocol I). That document further develops and codifies customary international law norms dealing

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<sup>9</sup> UNGA Resolution 2677 of 9 December 1970.

<sup>10</sup> For a detailed discussion of the history and progression of the Conference, see Michael Bothe, Knut Ipsen, Karl Josef Partsch, *Die Genfer Konferenz über humanitäres Völkerrecht*, in: *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 38, 1978, p. 1 et seq.



with the protection of the civilian population from the effects of armed conflicts for the first time in treaty form; it is of key significance for the use of nuclear weapons as well. For example, Art. 51 prohibits reprisal attacks on the civilian population (Art. 51 II 1, 51 VI) as well as indiscriminate attacks (Art. 51 IV) and attacks where the collateral damages are disproportionate (Art 51 V). Art. 35 standardizes the recognized principles which do not afford the parties involved in a conflict "the unlimited right to select the methods and materials of warfare" (Art 35 I), and prohibits causing superfluous injury or unnecessary suffering (Art. 35 II). Further, Art. 35 III and 55 prohibit attacks which cause long-term and severe damage to the natural environment. The international law literature is virtually unanimous in concluding that the use of nuclear weapons is irreconcilable with these rules and therefore violates international law.<sup>11</sup> However, whether Additional Protocol I is indeed applicable as a treaty covering the use of nuclear weapons is a matter of intense dispute.<sup>12</sup>

Additional Protocol I went into effect on 7 December 1978. Currently, 120 countries are signatories, including all NATO countries with the exception of the USA, France, and Great Britain. To date, these countries have not ratified Additional Protocol I because of the nuclear weapons issue. For the same reasons, Germany's federal government hesitated for quite some time before presenting Additional Protocol I to the *Bundestag* for ratification. The government didn't submit the draft law until March of 1990; it was approved by the *Bundestag* on 20 September 1990 and ratified by the President on 14 February 1991. It took effect in the Federal Republic of Germany on 14 August 1991. The Federal Republic included the following statement with its ratification:

"The Federal Republic of Germany interprets the regulations on the use of weapons, introduced by Additional Protocol I, as being drawn up to apply only to conventional weapons, notwithstanding other international laws regulating further types of weapons."<sup>13</sup>

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<sup>11</sup> Cf. Horst Fischer, *Der Einsatz von Nuklearwaffen nach Art. 51 des I. Zusatzprotokols zu den Genfer Konventionen von 1949*, Berlin 1985, p. 242 et seq.; Hans-Michael Empell, *Nuklearwaffeneinsätze und humanitäres Völkerrecht*, Heidelberg 1993, p. 29; Henri Meyrowitz, *La stratégie nucléaire et le Protocole additionel I aux Conventions de Genève de 1949*, *Revue générale de droit international public* 83 (1979), p. 905 et seq., 913.

<sup>12</sup> For an overview of the literature containing the differing opinions, see Marco Sassòli, *Bedeutung einer Kodifikation für das allgemeine Völkerrecht*, Basel, Frankfurt a.M. 1990, p. 513 et seq.

<sup>13</sup> Bundesrat. Printed material 64/90 (2 Feb. 1990), 132; BGBl. 1991/II, p. 968.

With this statement, the government revised the basic position of the German delegation, which had assumed during the negotiations that Additional Protocol I applied to nuclear weapons:

"It is correct that Additional Protocol I does not contain any specific prohibition of weapons; it does not prohibit nuclear weapons either. It regulates only the effects of weapons, not the type of weapons. The use of every weapon is to be measured against its effect; as such, the language of the protocol is also applicable to nuclear weapons. While it doesn't prohibit them, it definitely has [an] effect on and regulates their use."<sup>14</sup>

With its statement upon ratification, the Federal Republic followed the lead of its three western allies; they had stated both upon termination of the Geneva negotiations on 9 June 1977 and upon signing Additional Protocol I on 12 December 1977 that according to their understanding, the Additional Protocol had no effect on nuclear weapons.<sup>15</sup> Great Britain stated:

"The new rules introduced by the Protocols were not intended to have any effect on and did not regulate or prohibit the use of nuclear....weapons."<sup>16</sup>

At the end of the Conference, France declared,

"The rules of the Protocols do not apply to the use of nuclear weapons."<sup>17</sup>

The concluding statement of US delegate Aldrich, which he repeated upon signing, was more explicit:

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<sup>14</sup> Quote by the former member delegate Knut Ipsen from an internal report of the delegation, in: K. Ipsen, *Zur Ratifizierungs-Bedürftigkeit des Genfer Zusatzprotokolls I von 1977*. Transcript of a hearing of the SPD delegation in the *Bundestag* on 23 September 1985 in Bonn, *Bundeshaus*, Bonn 1985, p. 42. While Ipsen maintained this view regarding the Additional Protocol which was approved and took effect, another delegate, Michael Bothe, proceeds from the assumption that Additional Protocol I does not apply to nuclear weapons; cf. Michael Bothe, K. Ipsen, K.-J. Parsch (cf. *supra*, fn. 10), p. 43 et seq.

<sup>15</sup> For a detailed documentation of the individual statements, as well as those of other nations, see Fischer and Empell (cf. *supra*, fn. 11).

<sup>16</sup> Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974 - 1977), *Berne* 1978, Vol. I - XVII (OR), V, p. 134, OR VII, p. 203.

<sup>17</sup> Cf. OR VII, p. 193.

"From the outset of the conference it had been his understanding that the rules to be developed had been designed with a view to conventional weapons. During the course of the Conference, there had been no discussions of the use of nuclear weapons in warfare. He recognized...that their use in warfare was governed by the present principles of international law. It was his Government's understanding that the rules established by the Protocol were not intended to have any effect on, and did not regulate or prohibit the use of, nuclear weapons."<sup>18</sup>

Even before the Conference began, the nuclear states had made their participation dependent upon the assurance that the negotiations would not address the issue of nuclear weapons.<sup>19</sup> As such, The ICRC believed that, for the success of the Conference and the improvement of the protection of the countless victims of the wars following World War II, it would be better to leave the problematic issue of nuclear weapons out of the negotiations. In the introduction to its protocol draft, it wrote:

"Problems relating to atomic, bacteriological and chemical warfare are subjects of international agreements or negotiations by governments, and in submitting these draft Additional Protocols the ICRC does not intend to broach those problems."<sup>20</sup>

There were contrary statements made regarding Art. 35 as well, for example those of India, in which it especially stressed Art. 35's applicability to atomic, bacteriological and chemical weapons.<sup>21</sup> China, Albania, Romania, Iraq, North Korea, and the Philippines were also of the opinion that the Conference should prohibit the use of nuclear weapons.<sup>22</sup> Nonetheless, the Conference did not negotiate the issue. In only one case did a debate ensue, when Romania moved to expand the mandate of the ad hoc committee to the nuclear question; this motion

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<sup>18</sup> Cf. OR VII, p. 295, OR XIV, p. 441.

<sup>19</sup> Cf. Henri Meyrowitz, *Le statut des armes nucléaires en droit international*, in: *German Yearbook of International Law* 25 (1982), p. 219 et seq., 229.

<sup>20</sup> In its own commentary to the draft Protocols, the language is less clear: "It should be recalled that, apart from provisions of general nature, the ICRC has not included in its drafts any rules governing atomic, bacteriological and chemical weapons." From this, some authors have concluded that the ICRC simply wanted to prevent the Additional Protocols from containing a prohibition of specific weapons. See, e.g., Bernhard Graefrath, *Zum Anwendungsbereich der Ergänzungsprotokolle zu den Genfer Abkommen vom 12. August 1949*, in: *Staat und Recht* 29 (1980), p. 133 et seq., 138.

<sup>21</sup> Cf. OR VII, p. 115; Martin C. Ney, *Der Einsatz von Atomwaffen im Lichte des Völkerrechts*, Frankfurt a.M., Berne, New York 1985, p. 208.

<sup>22</sup> China: OR V, p. 90, 120, OR XVI, p. 26; Albania: OR XIV, p. 70, OR XVI, p. 27; Romania: OR XVI, p. 28; Iraq: OR V, p. 123, North Korea: OR XIV, p. 241; Philippines: OR IX, p. 258.

was rejected 68 to 0 with 10 abstentions, and its limitation to conventional weapons was established.<sup>23</sup> The report of the ad hoc committee to the plenary session states:

"Nuclear weapons...were...the most destructive. In that connection, some delegates rejected the view that the debate on those weapons and their possible prohibition should be left to the disarmament discussion, and they urged that the Conference include them in its programme of work. Another delegation expressed its regret at the decision not to consider these weapons. Many other delegations, however, accepted the limitation of the work of this Conference to conventional weapons. As it was pointed out by some, nuclear weapons in particular, had a special function in that they act as deterrents preventing the outbreak of a major armed conflict between certain nuclear powers."<sup>24</sup>

This *prima facie* inconsistency between the language of Additional Protocol I and the unrelenting will on the part of the western nuclear powers and their allies not to accept any limitation of their nuclear strategies by way of Additional Protocol I has resulted in an as yet unresolved discussion on the legal significance and effect of these statements. Initially, we must bear in mind that, since the three western nuclear powers have never ratified Additional Protocol I, they are not bound by treaty to its provisions in any event. Additionally, several authors are of the opinion that the statements amounted to a consensus that the issue of nuclear weapons was to be left out.<sup>25</sup> Other authors interpret the statements as expressing reservations, the permissibility and effect of which are, in turn, a subject of vehement dispute.<sup>26</sup>

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<sup>23</sup> Cf. OR V, p. 82 et seq.

<sup>24</sup> Cf. OR XVI, p. 454.

<sup>25</sup> The first to espouse that view was Henri Meyrowitz (fn. 11), p. 905 et seq.; *ibid.*, (fn. 19), p. 219 et seq.; *ibid.*, *Kriegsrecht und Kernwaffen. Zur Diskussion über die Ratifizierung des I Zusatzprotokolls zu den Genfer Konventionen von 1949*, in: *Europa Archiv* 22, 1981, p. 689 et seq. See also Michael Bothe, Karl Joseph Partsch, W. A. Solf, *New Rules for Victims of Armed Conflicts - Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, 1982, p. 188 et seq.; F. Kalshoven, *Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, in: *Netherlands Journal of International Law*, 9, 1978 (1979), p. 10 et seq., 108 et seq.; M.C. Nye (fn. 23), p. 195 et seq. On the inclusion of nuclear weapons use, see, e.g., K. Ipsen, in: M. Bothe, K. Ipsen, K.-J. Partsch (fn. 10), p. 43 et seq.; B. Graefrath (fn. 20), p. 136 et seq.; H.-M. Empell (fn. 11), p. 157 et seq., with additional authority.

<sup>26</sup> The following authors consider the reservations expressed to be inadmissible as irreconcilable with the letter and purpose of Additional Protocol I (Art. 19 of the Vienna Convention on the Law of Treaties): B. Graefrath, (fn. 20), p. 139; H. Fischer (fn. 11), p. 229 et seq.; Hizakazu Fujita, *Statute of Nuclear Weapons in International Humanitarian Law*, in: *Kansai University Review of Law and Politics*, 7, 1986, p. 28; Nicholas Grief, *The Legality of*

As hotly contested as the theoretical discussion may be, the decisive factor in terms of the significance of Additional Protocol I as an international treaty applicable to the use of nuclear weapons is the fact that the majority of nations controlling nuclear weapons, like their (NATO) allies, reject its applicability to the use of nuclear weapons. As mentioned above, the three western nuclear powers have thus far not ratified Additional Protocol I. The opposing opinion expressed by scholars in the literature<sup>27</sup> has had and continues to have little authoritative influence on those nations' position. As such, Additional Protocol I cannot be viewed as an authoritative international law treaty regulating nuclear weapons.

#### 4. Fundamental International Law and the Use of Nuclear Weapons

This does not, however, resolve the issue of whether any statements whatsoever regarding the prohibition of nuclear weapons are contained within fundamental international law, and whether Additional Protocol I is also irrelevant to that question.

##### 4.1. The Shimoda Judgment

To date, only one court decision has addressed the issues addressed in this memorandum. On 7 December 1963, the District Court of Tokyo condemned the atomic bombing of Hiroshima

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Nuclear Weapons, in: *Nuclear Weapons and International Law*, New York 1987, p. 22 et seq., 35; H.-M. Empell (fn. 11), p. 182, who nevertheless considers the reservations to be valid because they were not contradicted (Art. 20 IV of the Vienna Convention on the Law of Treaties), p. 183. A similar argument is advanced by M. Sassòli (fn. 12), p. 518.

<sup>27</sup> Including, among others, the current president of the ICJ, Mohammed Bedjaoui, *Humanitarian Law at a Time of Failing National and International Consciousness*, in: *Modern Wars, The Humanitarian Challenge, A Report for the Independent Commission of International Humanitarian Issues*, London, New Jersey, 1986, p. 1 et seq. Also, Phillippe Bretton, *Les Protocoles de 1977 additionnels aux Conventions de Genève sur la protection des victimes des conflits armés internationaux et non internationaux dix ans après leur adoption*, in: *Annuaire français de droit international* 23/1987, p. 540 et seq.; H. Fischer (fn. 11), p. 93 et seq.; H. Fujita (fn. 26), p. 174 et seq.; B. Graefrath (fn. 20), p. 135 et seq.; K. Ipsen in: M. Bothe, K. Ipsen, K.-J. Partsch (fn. 10), p. 43 et seq.; Elmar Rauch, *The Protocol Additional to the Geneva Conventions for the Protection of victims of International Armed Conflicts and the United Nations Convention of the Law of the Sea: Repercussions on the Law of Naval Warfare*, Berlin 1984, p. 71 et seq.; Gerd Seidel, Hans-Andreas Schönfeldt, *Das Verbot des Ersteinsatzes von Nuklearwaffen durch das Völkerrecht*, *Neue Justiz* 41/1987, p. 472 et seq.; Stefan Forch, Raimund Harndt, *Neue Regeln für den Einsatz von Kernwaffen? Zur Bedeutung des Zusatzprotokolls zu den Genfer Abkommen vom 12. August 1949 über den Schutz der Opfer internationaler bewaffneter Konflikte*, in: *Juristische Rundschau* 1986, p. 45 et seq.

and Nagasaki as contrary to international law.<sup>28</sup> In 1955, a full 10 years after the bombs were dropped, five survivors, one of whom was named Shimoda and gave the case its name, filed an action against the Japanese government. It defended the suit on the grounds that dropping the atomic bombs was not illegal, since at the time, those weapons were too new to be covered by the existing laws of international armed conflicts. Further, the atomic bomb deployment brought the war to a quick end and therefore saved Japanese lives -- although this argument was also used by President Truman, it was clearly erroneous in historical terms.<sup>29</sup> After eight and a half years, the Court held that even at the time they were dropped in 1945, these weapons violated fundamental international law as codified in The Hague Conventions for the Protection of Civilian Populations. According to the Court, these weapons constituted "blind" weapons which did not differentiate between military targets and the civilian population, and that even more than poisonous gases, they caused unnecessary suffering proscribed by Art. 23 e IV of The Hague Conventions (The Hague Land War Regulations).

The Japanese court's judgment is both interesting and significant,<sup>30</sup> since its reasoning can be expanded to include all conceivable uses of nuclear weapons, and since it was based on the law of international armed conflicts, to which this type of weapon was still completely unknown. Neither the Geneva Conventions of 1949 and Additional Protocol I, nor "judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law," as stated by Art. 38 d) of the International Court of Justice statute, was available to base the opinion on. The basis of the Court's judgment was not founded on a direct prohibition of nuclear weapons by virtue of fundamental customary international law, but rather on their irreconcilability with the law of international armed conflicts (international humanitarian law). In the meantime, more than thirty years have passed, during which the development of international law has taken place against the background of the permanent danger of a conflict involving nuclear weapons. As such, the judgment of the Tokyo court may have been the point of departure for a legal

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<sup>28</sup> The Shimoda case; cf. Japanese Annual of International Law 1964, p. 212 et seq. (English translation). German excerpts in Steinberger, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 24 (1964), p. 711.

<sup>29</sup> Hisakazu Fujita, *Réconsideration de l'Affaire Shimoda. Analyse juridique du bombardement atomique de Hiroshima et Nagasaki*, *Revue de droit pénal militaire et de droit de la guerre* 1980, p. 49 et seq.

<sup>30</sup> See, e.g., Richard A. Falk, *The Shimoda Case: A Legal Appraisal of the Atomic Attacks upon Hiroshima and Nagasaki*, in: *American Journal of International Law* 59 (1965), p. 759 et seq.

conviction on the part of the world's nations, which has developed into a prohibition on the use of nuclear weapons as a matter of customary international law.<sup>31</sup>

#### 4.2. Fundamental Customary International Law

The requisite elements for the development of customary international law are no longer the subject of serious dispute in the scholarly literature. Two elements are required: the objective element, which consists of a long-term concurrent practice by the nations involved; and the subjective element, which compels the nations' conviction that they are legally bound to that practice.<sup>32</sup> On a case-by-case basis, the only disputed issue is that which can be recognized as established practice and legal conviction, respectively.

The practice of the nations involved - the objective element - seems to be relatively easy to determine, since the world's nations have abstained from the use of nuclear weapons for 50 years to date. However, commentators limit this statement with the observation that the Korean War has presented the only real opportunity to use nuclear weapons.<sup>33</sup> This assessment is erroneous, since the USA considered using nuclear weapons in Vietnam; the Cuban Missile Crisis also definitely could have escalated into a conflict involving nuclear weapons. In this context, the important focus must clearly be on the practice of those nations which control nuclear weapons. However, it could be difficult to document that the legal conviction stems from legal grounds because the US administrations feel themselves bound by international law, rather than from political or military concerns. In truth, the western nuclear powers have emphasized again and again the legality of the use of nuclear weapons. In 1954, France and Great Britain submitted a motion to the United Nations Subcommittee on Disarmament which concisely outlines their position:

"The States members of the Sub-committee regard themselves as prohibited in accordance with the terms of the Charter of the United Nations from the use of nuclear weapons except in defence against aggression."<sup>34</sup>

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<sup>31</sup> See, e.g., Richard A. Falk, Lee Meyrowitz, Jack Sanderson, Nuclear Weapons and International Law, in: *Indian Journal of International Law* 20 (1980), p. 571 et seq., 574.

<sup>32</sup> For individual cases, cf. Norman Paech, Gerhard Study, *Machtpolitik und Völkerrecht in den internationalen Beziehungen*, Baden-Baden 1994, p. 383 et seq.

<sup>33</sup> F. Bright, Nuclear Weapons as a Lawful Means of Warfare, in: *Military Review* 30 (1965), p. 1 et seq., 26; M. C. Ney (fn. 23), p. 76.

<sup>34</sup> UN, *A Comprehensive Study of the Origin, Development and Present Status of the Various Alternatives Proposed for the Prohibition of the Use of Nuclear Weapons*, Working Paper Prepared by the Secretariat, 19. VIII 1977, UN Doc. A/AC 187/71, p. 3.

This determination merely reiterates valid international law. Pursuant to Art. 2, line 4 of the UN Charter, all use of force is forbidden. This also applies to the use of conventional weapons. The only exception made is for the defense against aggression. As such, the content of the statement must be construed as a declaration that those two governments hold the use of nuclear weapons to be legal. The USA confirmed this view in the US Field Manuals of 1955/56, of which the following provisions have retained their validity to date:

"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."

"The use of explosive "atomic weapons," whether by air, sea, or land forces, cannot as such be regarded as violative of international law in absence of any customary rule of international law or international convention restricting their employment."<sup>35</sup>

In comparable military regulations, which were collected by the UN in 1973, The Federal Republic of Germany, France, England, Austria, The Netherlands, and Switzerland also proceed from the assumption that the use of nuclear weapons is not prohibited.<sup>36</sup>

US-American military doctrines - which include the Kennedy administration's doctrine of "massive retaliation," the Johnson administration's doctrine of "mutual assured destruction" and NATO's doctrine of "flexible response," the Nixon administration's "Schlesinger Doctrine," the Carter administration's Presidential Directive 59, and the Reagan/Bush administration's Strategic Defense Initiative (SDI)<sup>37</sup> -without exception assume the fundamental legality of the employment of nuclear weapons.<sup>38</sup>

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<sup>35</sup> The Navy Field Manual NWIP 10-2: The Law of Naval Warfare, and the Army Field Manual 27-10: Law of Land Warfare, cited by Francis A. Boyle, The Relevance of International Law to the "Paradox" of Nuclear Deterrence, in: Northwestern University Law Review, 80 (1986), p. 1407 et seq., 1411; R. A. Falk, L. Meyrowitz, J. Anderson (fn. 30), p. 545 et seq. Additional military regulations in M. Sassóli (fn. 12), p. 521, fn. 2580.

<sup>36</sup> UN, Existing Rules of International Law Concerning the Prohibition or Restriction of Uses of Specific Weapons, UN Doc. A/9215, 7 November 1973.

<sup>37</sup> Cf. Robert Scheer, Und brennend stürzen Vögel vom Himmel. Reagan und der 'begrenzte' Atomkrieg, Munich 1983.

<sup>38</sup> Cf. also Robert C. Aldridge, Ersts Schlag! Die Strategie des Pentagon für den Atomkrieg, Munich 1984.



Regarding this issue, neither the "counterproliferation" strategy of Les Aspin, the Clinton administration's first Secretary of Defense, nor NATO's new planing have brought about any change of heart.<sup>39</sup> The fact that no nuclear weapons have been used for the last fifty years cannot in itself constitute a customary international law prohibition against them.

On the other hand, however, the unfailing practice on the part of the General Assembly of the United Nations to adopt resolutions must be taken into account. In fact, beginning with the first Resolution 1653 (XVI) of 24 November 1961 and culminating in Resolution 46/37 D of 6 December 1991, that body denounced the use of nuclear weapons as "a violation of the Charter of the United Nations and a crime against humanity" in numerous declarations spanning a period of 30 years.<sup>40</sup> In its first fundamental resolution, the General Assembly declared:

"(a) The use of nuclear and thermonuclear weapons is contrary to the spirit, letter and aims of the United Nations and, as such, a direct violation of the Charter of the United Nations;

(b) The use of nuclear and thermonuclear weapons would exceed even the scope of war and cause indiscriminate suffering and destruction to mankind and civilization and, as such, is contrary to the rules of international law and to the laws of humanity;

(c) The use of nuclear and thermonuclear weapons is a war directed not against an enemy or enemies alone but also against mankind in general, since the peoples of the world not involved in such a war will be subjected to all the evils generated by the use of such weapons;

(d) Any State using nuclear and thermonuclear weapons is to be considered as violating the Charter of the United Nations, as acting contrary to the laws of humanity and as committing a crime against mankind and civilization."

While this resolution garnered only 55 affirmative votes, with 20 opposed and 26 abstentions, twenty years later 82 nations voted for a resolution in which the General Assembly, among other things, declared:

"States and statesmen that resort first to the use of nuclear weapons will be committing the gravest crime against humanity...Any doctrines allowing the first use of nuclear weapons and

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<sup>39</sup> Cf. DER SPIEGEL 3/1995, p. 129.

<sup>40</sup> The language of the various resolutions can be found in: IALANA, Völkerrecht gegen Kernwaffen, Marburg 1993.

any actions pushing the world towards a catastrophe are incompatible with human moral standards and the lofty ideals of the United Nations."<sup>41</sup>

Two years thereafter, 93 nations voted for a "Condemnation of Nuclear War;" they also condemned

"the formulation, propounding, dissemination and propaganda of political and military doctrines and concepts intended to provide 'legitimacy' for the first use of nuclear weapons and in general to justify the 'admissibility' of unleashing nuclear war"

as violative of international law. All states were called upon

"to unite and redouble their efforts aimed at removing the threat of nuclear war, halting the nuclear-arms race and reducing nuclear weapons until they are completely eliminated."<sup>42</sup>

The International Human Rights Committee also considered the danger posed by nuclear weapons from the aspect of the right to life, pursuant to Art. 6 of the Universal Declaration of Human Rights, and unanimously passed a resolution in 1986 which, *inter alia*, includes the following:

"3. The committee remains deeply disturbed about the loss of human life brought about by the use of conventional weapons in armed conflicts. However, it has also learned that, during successive sessions of the General Assembly, representatives from all geographic regions have expressed their growing concern over the development and proliferation of more and more horrible weapons of mass destruction. These weapons not only pose a threat to human life, but also devour resources which could be used for vital economic and social purposes, especially for the benefit of the developing countries, and as such, to promote and secure human rights for all.

4. The Committee shares these concerns. It is obvious that the designing, testing, manufacture, possession, and deployment of nuclear weapons are among the greatest threats to the right to life which confront mankind today. This threat is compounded by the danger that the actual use of such weapons may be brought about, not only in the event of war, but even through human or mechanical error or failure.

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<sup>41</sup> Resolution 36/100 (1981), with 19 opposing votes (the NATO states except Greece, and also Japan, Australia, New Zealand, and Israel) and 41 abstentions.

<sup>42</sup> Resolution 38/75 (15 December 1983), with 19 opposing votes and 30 abstentions.

5. Furthermore, the very existence and gravity of this threat generate a climate of suspicion and fear between States, which is itself antagonistic to the promotion of the universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter of the United Nations and the International Covenants on Human Rights.

6. The manufacture, testing, possession, deployment, and use of nuclear weapons should be prohibited and recognized as a crime against humanity."

Since then, the only opposition against the resolution practice of the UN General Assembly has come from the core NATO states, who are joined by a few other nations without nuclear potential on a case-by-case basis. Over the past 30 years, an ever greater majority of states have, at regular intervals, condemned the use of nuclear weapons; this is a strong indication that the requisite legal conviction has been formed. Further, it is recognized that customary international law norms can result from this process.<sup>43</sup> As such, Falk, Meyrowitz and Sanderson are among those who believe that this history of resolutions, also underscored by the UN's unrelenting efforts to achieve agreement on a treaty which would, at the very least, defuse the permanent threat of the employment of nuclear weapons by banning their use on a regional basis or undermining it through disarmament, has developed into a customary international law prohibition.<sup>44</sup>

However, these scholars have not found a great deal of support for their view, since the opposition on the part of exactly those states against whom the prohibition is directed is, in legal terms, more than merely a minor flaw. In the "North Sea Continental Shelf" case, the International Court of Justice expressed the opinion that, in the case of mere short-term practices, an indispensable requirement is that, during the time period in question, the practice of States, including those States whose interests are affected to the greatest extent, must have been extensive and factually uniform.<sup>45</sup>

Although that language can initially be construed as applying only to cases of short-term practice, it possesses a broader significance. This is because it is recognized at the same time that nations who unwaveringly object to the legal binding character of a practice, thereby preventing it from attaining customary international law validity (so-called persistent

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<sup>43</sup> Cf. Ian Brownlie, *Principles of Public International Law*, Oxford 1979, p. 695; Nguyen Quoc Dinh, Patrick Daillier, Alain Pellet, *Droit International Public*, Paris 1992, No. 213, 254.

<sup>44</sup> Cf. fn. 30, p. 575 et seq.

<sup>45</sup> ICJ Reports 1969, p. 43.

objectors),<sup>46</sup> cannot be held to the norms it espouses. This is based upon the premise that, in the final analysis, customary law is founded upon the consensus and agreement of all nations.<sup>47</sup>

In conclusion, it cannot be maintained that the resolution practice of the UNGA in itself creates any prohibition of the use of nuclear weapons as a matter of fundamental customary international law.<sup>48</sup>

#### 4.3. Law of International Armed Conflicts

The traditional law of international armed conflicts, so-called international humanitarian law, is for the most part based on customary international law as well. However, its central principles are founded in international law treaties, to which most of the major war powers are signatories as well. The most fundamental of these include the Declaration of St. Petersburg of 1868, The Hague Conventions of 1899 and 1907, the Geneva Gas Protocol of 1925, The Nuremburg Principles of 1945, The Genocide Convention of 1949, the Geneva Conventions of 1949, The International Covenant on Civil and Political Rights of 1966, and finally, Additional Protocol I to the Geneva Conventions of 1949. Only a very few isolated voices deny the applicability of these conventions, and the customary international law which has developed from them, to nuclear weapons.<sup>49</sup> All nuclear powers, as well as most if not all other states, assume that the law of international armed conflicts applies to nuclear weapons.<sup>50</sup> At its Vienna Conference in 1965, the International Red Cross determined that:

"The general principles of the conventions of war are to be applied to atomic and comparable weapons."<sup>51</sup>

Applicability is not limited by the fact that, at the time the fundamental norms were established by the conventions, the existence of nuclear weapons was not even foreseeable. As early as at the turn of the century, the inexorable and ever-accelerating weapons development

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<sup>46</sup> I. Brownlie (fn. 39), p. 10 et seq.

<sup>47</sup> Cf. N. Paech, G. Stuby (fn. 5), p. 383 et seq.

<sup>48</sup> For the likely prevailing view, cf. Dietrich Rauschning, Nuclear Warfare and Weapons, in: Encyclopedia of Public International Law, Instalment IV, 1982, p. 44 et seq.; 45 et seq.

<sup>49</sup> Authorities cited in M. C. Ney (fn. 21), p. 151.

<sup>50</sup> Cf. John H. E. Fried, Ersteinsatz von Atomwaffen - Bestehende Verbote im Völkerrecht, in: Demokratie und Recht, 9/1981, p. 243 et seq., 255; H. Meyrowitz (fn. 19), p. 233.

<sup>51</sup> Resolution XXVIII, Protection of Civilian Populations against the Dangers of Indiscriminate Warfare, Vienna 1965, p. 22.

was perceived as a problem by the parties to the treaty. In order to avoid having to consider every convention as outdated on its effective date simply due to continual weapons development, Russian international law scholar Martens formulated a clause - later named after him - which was included in the preamble of The Hague Regulations Respecting the Laws and Customs of War on Land (IV. Hague Convention of 1907):

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

This so-called Martens Clause is directed at the main principle of the treaty, which is formulated as follows in Art. 22:

"The right of belligerents to adopt means of injuring the enemy is not unlimited."

This idea of providing protection independently of the development of weapons technology, which amounts to a principle assuming the continued validity of older rules, is taken up again in Art. 36 of Additional Protocol I of 1977:

"In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party."

As such, it is clear that in legal terms, no clean slate exists which would arbitrarily permit the manufacture of any weapon.

The Martens Clause is directed at new developments in weapons, and therefore also applies to nuclear weapons.<sup>52</sup> It was also included into Additional Protocol I of 1977 (Art. 1 II), which underscores its normative power and present-day validity.<sup>53</sup> For nuclear weapons, however,

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<sup>52</sup> Cf. Knut Ipsen, *Bewaffneter Konflikt und Neutralität*, in: Eberhard Menzel, K. Ipsen (Eds.), *Völkerrecht*, Munich 1979, p. 505 et seq., 536.

<sup>53</sup> "In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law

the only norms possibly applicable are those which do not refer to specific weapons, but rather those that deal with certain characteristics and effects of weapons or the protection of possible targets. However, the effect of these norms on the use of nuclear weapons is not a settled issue. In the following pages, this issue will be analyzed in the context of existing literature, mostly Anglo-American and German.<sup>54</sup>

Burns H. Weston has summarized the state of the law of international armed conflicts in six rules:<sup>55</sup>

"Rule 1. It is prohibited to use weapons or tactics that cause unnecessary or aggravated devastation and suffering.

Rule 2. It is prohibited to use weapons or tactics that cause indiscriminate harms as between combatants and noncombatant military and civilian personnel.

Rule 3. It is prohibited to use weapons or tactics that cause widespread, long-term and severe damage to the natural environment.

Rule 4. It is prohibited to effect reprisals that are disproportionate to their antecedent provocation or to legitimate military objectives, or disrespectful of persons, institutions and resources otherwise protected by the laws of war.

Rule 5. It is prohibited to use weapons or tactics that violate the neutral jurisdiction of nonparticipating States.

Rule 6. It is prohibited to use asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices, including bacteriological methods of warfare."

#### 4.4. Prohibition Against Excesses

The prohibition against excesses mandated by the law of international armed conflicts (Rule 1), which is designed to prevent warring parties from inflicting unnecessary suffering and excessive damage to one another, is one of the earliest rules of war ever formulated. It is already contained in the 1868 Declaration of St. Petersburg, which states:

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derived from established custom, from the principles of humanity and from the dictates of public conscience."

<sup>54</sup> For example, with the exception of H. Meyrowitz, the nuclear question plays an extremely minor role in the scholarly literature in France.

<sup>55</sup> Burns H. Weston, *Nuclear Weapons versus International Law: A Contextual Reassessment*, in: *McGill Law Journal* 28/1983, p. 543 et seq., 554 et seq.

"That this object [weakening the military force of the enemy] would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable."

Art. 23 e of the Hague Regulations of War on Land makes that prohibition more precise, covering weapons, projectiles or materials "of a nature to cause unnecessary suffering." But whether or not this includes only the protection of combatants, since the civilian population is protected by other regulations,<sup>56</sup> is not a decisive factor. Rather, the key is that the infliction of useless, superfluous, and excessive suffering and damage - regardless of which military measure causes them - fall under an international law prohibition, which constitutes customary law even for those countries which have not adopted the Hague Regulations. The validity of "Rule 1" as a matter of customary law is confirmed by the fact that it is once again included in Art. 35 II of Additional Protocol I:

"It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering."

The international law literature recognizes the prohibition of unnecessary suffering as a principle of international customary law. However, there are objections to the view that the use of nuclear weapons would cause unnecessary suffering in every case, therefore falling under the prohibition. Menzel was one of the first to refer to Hiroshima and Nagasaki and the radioactive fallout, which is still causing injury and suffering to the population decades later.<sup>57</sup> These effects go beyond the legitimate goal of making the enemy incapable of continuing combat. A large majority of the international law scholars share this opinion.<sup>58</sup> Objections are based upon the notion that military targets and necessities might exist where the effects of a nuclear strike would appear to be neither superfluous nor unnecessary. Even in the Preamble of the St. Petersburg Declaration, military necessity is given precedence over humanity if the two must be weighed against one another.<sup>59</sup>

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<sup>56</sup> This is the argument of Eberhard Menzel, *Legalität oder Illegalität der Anwendung von Atomwaffen*, Tübingen 1960, p. 47.

<sup>57</sup> E. Menzel (fn. 56), p. 48 et seq.; *ibid.*, *Atomwaffen und völkerrechtliches Kriegsrecht*, in: *Abschreckung und Entspannung*, Berlin 1977, p. 148 et seq., 160.

<sup>58</sup> Authorities listed in Wolfgang Däubler, *Stationierung und Grundgesetz*, Reinbek 1982, p. 45.

<sup>59</sup> William B. Hearn, *The International Legal Regime Regulating Nuclear Deterrence and Warfare*, in: *British Yearbook of International Law* 61/1990 (1991), p. 199 et seq., 234.

"That the only legitimate object which states should endeavour to accomplish during war is to weaken the military force of the enemy;

That for this purpose, it is sufficient to disable the greatest possible number of men;..."

The author neglects to give examples of what would require such a precedence of military necessity over humanity. Equally incomprehensible is his assessment of the St. Petersburg Declaration, especially since he accepts the illegality of dum-dum projectiles and those filled with glass splinters, but yet attempts to salvage the legality of nuclear weapons. He cites Rauschning<sup>60</sup> as an authority, in whose view not even the fact that, although nuclear weapons might not cause instant death, they may inflict genetic damage, is sufficient to compel a prohibition pursuant to Art. 23 e of the Hague Regulations. The only weapons whose use is forbidden are those which cause disease following a considerable period of time, without immediately disabling the enemy. Hearn attempts to bolster this view by attributing a subjective element to the principle of "no unnecessary suffering." According to that requirement, either the weapons themselves or their use must be specifically geared toward inflicting unnecessary suffering. However, he stands alone with this interpretation, which finds no support either in the language or the history of the Hague Regulations.<sup>61</sup> Long-term effects of war injuries, such as invalidity and infirmity, can be the result of any and all weapons; in the case of nuclear weapons, they are simply unavoidable, and also typical given the very nature of the weapons. In any case, their use would go beyond the acceptable military goal of disabling the enemy from further combat; they are therefore violative of Rule 1.

#### 4.5. Protection of the Civilian Population

Another of the fundamental principles of the customary law of international armed conflicts is the differentiation between the military and the civilian population, and the limitation of attacks to military targets (Rule 2). It is based on the Hague Regulations, although it is mentioned only implicitly in that document in Articles 25 and 27, and on the IV. Geneva Convention Relative to the Protection of Civilian Persons in Time of War.<sup>62</sup> Art. 48 et seq. of Additional Protocol I expresses the principle in concrete form. The basic rule of Art. 48 states:

"In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and

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<sup>60</sup> D. Rauschning (fn. 48) p. 48.

<sup>61</sup> Cf. N. Grief, *The Legality of Nuclear Weapons*, in: Pogany (Ed.), *Nuclear Weapons and International Law*, 1987, p. 22.

<sup>62</sup> BGBl 1954, II p. 917, 1956 II, p. 1586, Sartorius II No. 54.



combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."

As settled as this principle may be,<sup>63</sup> it has suffered greatly in the face of the increasing totality of weapons use in modern warfare. Direct attacks on the civilian population or on defenseless troops, medical, cultural or religious institutions do not cause problems in terms of legal analysis. For example, the Japanese District Court in the Shimoda case held that the cities of both Hiroshima and Nagasaki were not permissible military targets.<sup>64</sup> These days, the problems begin with determining what constitutes a "military target" (munitions factories, transportation systems, ports, etc.?) and how the often inescapable side and collateral effects on the civilian population are to be assessed. Which standard of measure is to be used in judging proportionality? Art. 51 II - IV of Additional Protocol I attempts to operationalize the fundamental concept of proportionality with legal definitions of that what constitutes "undifferentiated attacks." However, it is disputed whether this constitutes new law not applicable to nuclear weapons use,<sup>65</sup> or whether it is merely the concrete expression of long-recognized customary international law.

It is generally accepted that in modern warfare, injuries are being inflicted upon the civilian population, especially in highly populated areas. Still unclear is in what scope this is still tolerable. While a US-American Military Field Regulation states that the "fundamental rule for the prevention of collateral injury is that more than five percent casualties (among the civilian population) in the area surrounding the conquered area is to be avoided,"<sup>66</sup> other authors point out that collateral injury must be measured against military necessity. The bigger, more important, and more complex the military target, the more inevitable and the worse the collateral injury to civilians will be.<sup>67</sup> Applying that rule to the use of nuclear weapons, they would recognize only a prohibition on detonating nuclear weapons in the megaton range on the Earth's surface. In cases where the civilian population would not be

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<sup>63</sup> Cf. Resolution 2444 (XXII), of 18 December 1968, passed unanimously by the UN General Assembly, which states that, "a 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."

<sup>64</sup> Japanese Annual of International Law, 8/1964, p. 212.

<sup>65</sup> Cf. *supra* Section I 3; specifically, France, Great Britain, Canada, and the Federal Republic of Germany have made statements against Art. 51, to the effect that they could not accept it as a limitation of their right to self-defense. Cf. H.-M. Empell (fn. 11), p. 112 et seq.

<sup>66</sup> Quoted by W. Däubler (fn. 58), p. 43.

<sup>67</sup> Cf. W. R. Hearn (fn. 59), p. 235 et seq.; D. Rauschnig (fn. 48), p. 49.

significantly endangered, such as with use against a warship on the high seas,<sup>68</sup> in the desert or in the Arctic circle,<sup>69</sup> or where only minimal casualties can be expected among the civilian population due to low explosive force and exact target precision, their use must be permissible. Rule 2 is kept much too vague and general to be able to create an absolute prohibition of nuclear weapons.

In contrast, however, it must be pointed out that the protection of the civilian population can no longer be assumed even in the case of low-calibre tactical nuclear weapons. According to calculations made by a UN nuclear weapons study, the detonation of 10 tactical nuclear weapons with between 1 and 10 kt explosive force against four military divisions with approximately 80,000 soldiers and 100 fighter planes in a rural, relatively low-populated area would result in a total of 215,000 victims, of which 35,000 would be soldiers and 180,000 civilians.<sup>70</sup> In any case, losses among the civilian population would be many times higher than among military personnel. The examples posed by Kimminich and Euler are typical legal constructions designed to evade a general prohibition. Given the current state of weapons technology, meaning the explosive force and precision of conventional weapons, it is completely incomprehensible why nuclear weapons would be used in these kinds of special cases, since conventional weapons are just as effective in bringing about the complete submission of the targets. This was proven both by the Exocet missiles in the Falkland/Malvinas War and by the Stealth bombers in the Gulf War.

The artificial construction of unusual factual situations leaves the humanitarian approach of the international laws of war by the wayside, although they themselves strive to envision typical situations consistent with the probable reality of armed conflicts. Low-yield tactical nuclear weapons (e.g., nuclear mines) are manufactured for use in populated areas. No matter how densely populated they are, radioactive fallout will not be confined to within the borders of the detonation site. At least in the USA, technological development is so advanced that low-yield nuclear weapons with a perfectly exact aim can be delivered to a military target. But this is not the case for all nuclear powers. It would go against the general validity of the norms of international law for them to apply to one nation but not another, depending on the state of their technological development. Further, the use of "permitted" nuclear weapons would

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<sup>68</sup> Example by Otto Kimminich, *Der Einfluß des humanitären Völkerrechts auf die Kernwaffenfrage*, in: Ingo von Münch, *Festschrift für Hans Joachim Schlochauer*, Berlin, New York 1981, p. 407 et seq., p. 413.

<sup>69</sup> Example posed by Alexander Euler, *Die Atomwaffe im Luftkriegsrecht*, Cologne, Berlin 1960, p. 145.

<sup>70</sup> UNO-Studie: *Kernwaffen*, Munich 1982, p. 87 et seq.

inevitably be followed by the use of "prohibited" nuclear weapons. In turn, this could lead to the absurd result that "permitted" nuclear weapons could be permissibly used only against those countries which control either only "permitted" nuclear weapons as well, or none at all.

As such, the only reasonable result, and the one supported by a majority of scholars,<sup>71</sup> is that the protection of the civilian population prohibits the use of all nuclear weapons.

#### 4.6. Protection of the Natural Environment

The protection of the natural environment (Rule 3) was not introduced as a prohibitive norm into the law of international armed conflicts until 1977, with Additional Protocol I. It is mentioned in two different places - Art. 35 III and 55 I. The language of the basic rule is as follows:

"It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment." (Art. 35 III).

Additionally, Art. 55 I line 2 states:

"...This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population."

This is not a concrete expression of already-existing customary international law; rather, it is new treaty law. It is doubtful that a generally-recognized and therefore binding customary international law standard has developed since 1977. Therefore, we must assume that this treaty law does not cover the use of nuclear weapons.<sup>72</sup> The ungratifying result of this is that, while it is prohibited to cause long-term and severe damage to the environment with conventional weapons, it would be permissible with nuclear weapons to the extent that they are not prohibited by other regulations.

#### 4.7. Reasonableness of Reprisals

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<sup>71</sup> B. H. Weston (fn. 55), p. 556, 582 et seq., 586 et seq.; J. H. E. Fried (fn. 50), p. 247; R. A. Falk, L. Meyrowitz, J. Sanderson (fn. 31), p. 565; W. Däubler (fn. 58), p. 44.

<sup>72</sup> Cf. *supra*, Section I 3.

Applying the requirement of proportionality to reprisals (Rule 4) serves to limit the scope of permissible reprisals and even expressly prohibits certain retaliatory actions. The prohibition against using unlimited means to defend against an attack is at the foundation of Art. 51 of the UN Charter, which codifies the right to self defense.<sup>73</sup> The defense measures must be proportionate to the provocation and must not involve excessive means. One defending against an attack is not absolved from the rules of the law of international armed conflicts. Defenders can claim neither that their actions would bring the war to a quick end, thereby lessening the suffering of the population, as the Americans justified the destruction of Hiroshima and Nagasaki,<sup>74</sup> nor that their actions would ward off a threatened military defeat. That argument was rejected by the Nuremberg Military Tribunal in the Milch case.<sup>75</sup>

In fact, Art. 51 of the UN Charter already represents a break with the prohibition against violence contained in Art. 2, line 4 of the UN Charter, but it does not absolve the defender from the remaining rules of international law. It may seem to contradict the fundamental principle of proportionality for a nation attacked with illegal means and methods not to be able to defend itself with the same means and methods - and there are voices which accept this kind of "reprisal in kind" regardless of its legality.<sup>76</sup> However, Däubler correctly points out that this view represents the "legal reflection of the deterrence theory"<sup>77</sup> with its threat that "those who shoot first die next." Independently of the fact that the only relevant enemy has disappeared due to the downfall of the Soviet Union, the accidental triggering of a nuclear attack<sup>78</sup> could result in catastrophes which would make any further reliance on international law superfluous. As such, the strict prohibition against illegal methods even for victims of attack is completely in keeping with the humanitarian ideals and universal validity approach of international law; its binding character remains and cannot be set aside even in the case of an antecedent act of aggression.

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<sup>73</sup> Cf. Albrecht Randelzhofer, Art. 51, Speaker 37, in: Bruno Simma (Ed.), *Charta der Vereinten Nationen, Kommentar*, Munich 1991.

<sup>74</sup> This is discussed in detail in E. Menzel (fn. 56), p. 56 et seq.

<sup>75</sup> Cf. Nagendra Singh, *Nuclear Weapons and International Law*, London 1959, p. 83.

<sup>76</sup> Authorities discussed in W. Däubler (fn. 58), p. 53.

<sup>77</sup> W. Däubler (fn. 58), p. 52.

<sup>78</sup> Example of potential nuclear accidents are documented in the SIPRI-Yearbooks 1968/69, p. 261; 1977, pp. 52, 65; 1981/82, p. 203 et seq. Cf. also Peter Koch, *Wahnsinn Rüstung*, Hamburg 1981, p. 133; K. Haefner, *Weit höhere Fehlerrate als bei den Kernreaktoren, Frühwarn- und Entscheidungssysteme in Europa*, in: *Naturwissenschaftler gegen Atomrüstung*, Hamburg 1983, p. 114 et seq.; *Strategic Warning System. False Alerts*. Hearings before the Committee on Armed Services, House of Representatives, 96th Congress, 2nd Session, June 14, 1980, Committee Report No. 96-97, p. 4 et seq.

Reprisal attacks are a form of exercising the right to self-defense, and have the goal of stopping the aggressor's illegal behavior and returning it to within the confines of international law. The *Institut de Droit International* has formulated a generally-accepted definition:

"Reprisals are sanctions, generally prohibited by valid international law, which are undertaken by a state in response to illegal acts perpetrated against it by another state, in order to force the aggressor to abide by the law through causing injury."<sup>79</sup>

In these cases, the same principles of proportionality as those developed for self-defense are applicable. Further, there are some additional limitations which have been agreed to in various international law treaties; in the meantime, they have attained binding status as a matter of customary law. For example, the III. Geneva Convention of 1949 prohibited reprisals against prisoners of war (13 III), and the IV. Geneva Convention banned reprisals against the civilian population in occupied areas (Art. 33 III). Additional Protocol I of 1977 then expanded that ban to the entire civilian population (Art. 20, 51 VI). At the same time, the prohibition was elaborated to include numerous other objects in order to protect historic monuments, works of art, and cultural sites (Art. 53), objects indispensable to the civilian population (Art. 54), the natural environment (Art. 55), and "works and installations containing dangerous forces" (Art. 56), such as dams, dykes, and nuclear electrical generating stations. Art. I 1 of the 1977 UN "Convention on The Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques" forbids "military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party."

Whether or not the prohibition of reprisals against the civilian population forms part of the general standards of customary international law, and has therefore merely been confirmed and put into concrete form by Additional Protocol I, is subject to dispute;<sup>80</sup> however, the protection of the remaining objects must clearly be considered to be new law. Here, new areas of protection are dealt with; in Additional Protocol I, these areas were afforded international law protection for the first time. The 1977 UN Convention deals with attacks which are directed specifically at the environment, or which use the environment itself as a weapon, such as in the case of Iraqi soldiers igniting the Kuwaiti oil fields upon their retreat. Various authors have commented that this concerns "emerging principles of customary international

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<sup>79</sup> Cited by Karl Jürgen Partsch, *Repressalie*, in: Karl Strupp, Hans Jürgen Schlochauer (Eds.), *Wörterbuch des Völkerrechts*, Vol. 3, 1962, p. 104 [English translation].

<sup>80</sup> Cf. M. Sassóli (fn. 12), p. 428 et seq.

law;"<sup>81</sup> In any case, the prohibition cannot yet be considered generally-recognized customary law. As such, for the time being, the above-stated rules are binding only between the signatories to the convention, and can therefore not be applied to nuclear weapons.

Some attempt to qualify and minimize the significance of the prohibition on reprisals against the civilian population for the use of nuclear weapons by pointing to the so-called "mini-nukes," low-calibre nuclear weapons,<sup>82</sup> which cause limited physical damage and supposedly have only minor effects on the civilian population.<sup>83</sup> However, this is not the case:

"The employment of even a fraction (depending on the war situation, approximately 2 - 10%) of the nuclear weapons present in Europe would mean a devastating attack for the Federal Republic of Germany. This would also be the case if use were limited to a only a fraction of tactical nuclear weapons -as well as if only a fraction of strategic weapons were used."<sup>84</sup>

This would be true both in the case of an uncontrollable escalation to a total confrontation following the regional use of tactical nuclear weapons, as well as in the case of limited use. For example, a US Army textbook scenario for general staffers in Fort Leavenworth, Kansas called for combat use limited to the area of Fulda against a conventional attack from the East. This would have necessitated 132 nuclear warheads from the 155 mm-artillery, from nuclear mines to the Nike-Hercules anti-aircraft missile, with a total explosive force of 52.6 kilotons, which would detonate within the territory of the Federal Republic in the area surrounding Fulda.<sup>85</sup>

It must be pointed out that this scenario proceeds from the assumption, not very realistic at the time, that the enemy -The Soviet Union - would not have employed any nuclear weapons for its part. As a comparison: in 1945, an atom bomb of not more than 20 kt was dropped. Of the approximately 400,000 inhabitants, about 100,000 died immediately, and between 130,000 and 150,000 more were dead before the end of the year 1945. As late as 1980/81, almost

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<sup>81</sup> Cf. N. Grief (fn. 61), p. 34.

<sup>82</sup> On developmental tendencies, cf. the UN Study: Nuclear Weapons (fn. 70), p. 45 et seq.

<sup>83</sup> According to W. R. Hearn (fn. 59), p. 244 et seq.

<sup>84</sup> Philipp Sonntag, *Mathematische Analysen der Wirkungen von Kernwaffenexplosionen in der Bundesrepublik Deutschland*, in: Carl Friedrich von Weizsäcker (Ed.), *Kriegsfolgen und Kriegsverhütung*, Munich 1971, p. 198.

<sup>85</sup> Calculated according to the information in: Ulrich Albrecht, *Kündigt den Nachrüstungsbeschluß*, Frankfurt 1982, p. 111 et seq.

3,000 people died of the effects of the atomic bomb explosion. In Japan today, there are about 400,000 people suffering from various injuries inflicted by the use of the atomic bomb.<sup>86</sup>

Weston aptly describes these attempts to make low-yield nuclear bombs "presentable," meaning acceptable in terms of international law: "'Clean bombs' and 'surgical strikes,' especially in relation to strategic warfare, exist more in the minds of military planners than they do in reality."<sup>87</sup>

In an earlier study by the WHO on the effects of a nuclear war on health and health services, the reader is warned about the illusion that smaller nuclear detonations will be able to be coped with somehow. The summary states:

4. It is obvious that no health service in any area of the world would be capable of dealing adequately with the hundreds of thousands of people seriously injured by blast, heat or radiation from even a single 1-megaton bomb. Even the death and disability that could result from an accidental explosion of one bomb from among the enormous stockpiles of weapons could overwhelm national medical resources. 5. It is difficult to comprehend the catastrophic consequences and the human suffering that would result from the effects of nuclear explosions in the second and third scenarios that are considered (limited war with small tactical nuclear weapons, and full-scale nuclear war). Whatever remained of the medical services in the world could not alleviate the disaster in any significant way. 6. To the immediate catastrophe must be added the long-term effects on the environment. Famine and diseases would be widespread and social and economic systems around the world would be totally disrupted. 7. Therefore the only approach to the treatment of health effects of nuclear explosions is primary prevention of such explosions, that is, the prevention of atomic war."<sup>88</sup>

The recent disclosures regarding the use of depleted uranium (uranium apprauvi) in the manufacture of conventional munitions and the continuing radiation effects among the civilian population following their massive use by the US-American military in the so-called 2nd Gulf

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<sup>86</sup> Figures from NIHON HIDANKYO (Japanese Federation of Atomic Bomb Victim Societies), 5-31-7 Shinbashi Minatoku, Tokyo 105, Japan.

<sup>87</sup> B. H. Weston (fn. 55), p. 586.

<sup>88</sup> World Health Organisation, Thirty-Sixth World Health Assembly, Effects of Nuclear War on Health Services, Geneva 1984 (Resolution WHA 36.28 adopted on 16 May 1983).

War have clearly established that even weapons with low individual radioactivity can cause dangerous injuries to health in the case of their massive performance use.<sup>89</sup>

As discussed above with reference to Rule 2,<sup>90</sup> the exception must not be allowed to determine the general and binding rules regarding types of weapons and their typical effects.

There are a series of authors who, while conceding a general prohibition of nuclear weapons, would accept their employment as a reaction to an illegal nuclear strike.<sup>91</sup> However, they run into difficulties in reconciling this with their own arguments that "the use of nuclear weapons destroys the foundations of the humanitarian rules of warfare, and possibly all of civilization."<sup>92</sup> As such, Weston believes that only a counterforce second strike with tactical nuclear weapons might be justifiable;<sup>93</sup> but at the same time, he points out the difficulty of determining the proportional and permissible scope of such a retaliatory strike. Weapons employed for counterforce strikes will never be identical to those used in an attack; thus, it will be difficult to reconcile international law prohibitions against illegal attacks and legal reprisals using illegal nuclear weapons. This is because very few nations possess the US-American state of technology which includes carrier systems with small warheads of the highest precision, exact targeting, and controllable effects. Further, a spiral of escalation would be virtually unavoidable. There is no reason to assume that a counterstrike with nuclear weapons would deter the enemy from further employment of his nuclear potential and lead him to change over to conventional weapons.

As an example, the Soviet Union had stated unequivocally from the very beginning that, immediately following nuclear weapons strike, it would undertake a retaliatory nuclear strike against the territory where the attack originated. For its part, it publicly renounced the first use of nuclear weapons. In a warning statement released on 1 December 1982, the Soviet news agency *Nowosti* pointed out:

"currently, a situation is developing which would inevitably require immediate counteractions by the USSR if a nuclear missile should show up in the air space bordering the Soviet Union ... the few flight minutes that it takes a Euromissile to reach the borders of the Soviet Union

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<sup>89</sup> Cf. Naïma Lefkir-Laffitte, Roland Laffitte, *Armes radioactives contre l'ennemi irakien*, in: *Le monde diplomatique*, April 1995, p. 22.

<sup>90</sup> Cf. *supra*, Section 4.5. et seq.

<sup>91</sup> Authorities cited in W. Däubler (fn. 58), p. 50 et seq.; M. C. Ney (fn. 21), p. 263.

<sup>92</sup> W. Däubler (fn. 58), p. 54.

<sup>93</sup> B. Weston (fn. 55), p. 586 et seq.



rules out the possibility of preventing a conflict, should it be started, with non-military measures. Since the time for early warning is shrinking more and more, a nuclear counterstrike is the only possibility. There is no alternative."

The Soviet Union also left no doubt that this counterstrike would not be confined to those countries where the American nuclear weapons were stationed; rather, it would also be directed against the territory of the USA itself, since it retained control over the weapons and was the only one who could order their use. At that time, former Secretary of Defense Robert S. McNamara, who was reportedly involved in pushing through the "flexible response" doctrine of NATO, responded as follows:

"The West Germans have to be clear that, if they continue to hold onto the NATO strategy, their culture will be completely wiped out."<sup>94</sup>

Following the disintegration of the Soviet Union and the Warsaw Pact, this escalatory mechanism is no longer acute. However, every new confrontation between nuclear powers will bring this counterstrike model back to the surface. The way to resolve all of these problems can only be to extend the prohibition against the use of nuclear weapons to reprisals as well.<sup>95</sup>

#### 4.8. Protection of Neutral Countries

The prohibition against violating the territorial integrity of neutral states (Rule 5) is also recognized as a matter of customary international law. It was first codified on 18 October 1907 in Art. 1 of the V. Hague Convention Respecting the Rights and Duties of Neutrals in War on Land:

"The territory of neutral Powers is inviolable."<sup>96</sup>

Despite several violations of the neutrality principle in both World Wars, two of that principle's elements have retained their status as binding rules: combatants do not have a license to carry their hostilities over to the territory of an uninvolved country, while

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<sup>94</sup> Translated from an article in *Frankfurter Rundschau*, 10 October 1983, p. 2.

<sup>95</sup> In support of this position, cf. e.g., R. A. Falk, L. Meyrowitz, J. Sanderson (fn. 31), pp. 568, 591; Francis A. Boyle (fn. 35), p. 1407 et seq., 1440 et seq.; N. Grief (fn. 61), p. 30 et seq.

<sup>96</sup> A similar provision is contained in the XIII. Hague Convention Concerning the Rights and Duties of Neutral Powers in Naval War, 18 October 1907.

nonparticipating nations have the right to prohibit encroachments and the entry of combat forces onto their territory.

Applying that principle to the use of nuclear weapons, it initially prohibits their direct use within the territory of an uninvolved state. But radioactive fallout constitutes territorial encroachment as well, which no state not involved in warfare should be required to tolerate. This has been one of the fundamental principles of international environmental law for quite some time; it is founded on the verdict of an American-Canadian arbitration panel in 1941 regarding the border-crossing emissions of sulphur dioxide gases. In the so-called Trail Smelter case, the court held that than a negligible amount of pollution of a foreign jurisdiction can constitute a violation of international law.<sup>97</sup> This has become an established principle of customary law, and therefore also governs radioactive fallout from nuclear power plants or from a nuclear explosion.<sup>98</sup> Further, due to the winds which often carry far (e.g., the reactor accident at Chernobyl in 1986), its validity extends beyond the relationship between two directly adjacent states to include non-neighboring countries as well.

In order to qualify this prohibition, it is argued that the potential target countries of nuclear weapons use, at least for the present, are surrounded by nations which would not be neutral in a conflict involving nuclear weapons.<sup>99</sup> That may have been the case during the block-building era of NATO and the Warsaw Pact, but it has no application to the new concepts of "counterproliferation."<sup>100</sup> That strategy calls for the preemptive use of nuclear weapons against individual countries who are suspected of possessing nuclear, biological, and chemical weapons. Only in extremely rare cases will neighboring states participate in that kind of conflict by virtue of a military pact or comparable accord. Additionally, reference is made to smaller nuclear weapons with relatively low radioactive fallout when exploded in the air. However, since these authors also represent the view that nuclear reprisals are legal, escalation virtually goes without saying. As such, it is imperative that even the first step be considered illegal.<sup>101</sup>

#### 4.9. Prohibition Against Poisons

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<sup>97</sup> Judgment of 11 March 1941 in: Report of International Arbitral Awards (RIAA), Vol. 3, p. 1905 et seq., 1965; Heintschel von Heinegg, Internationales öffentliches Umweltrecht, in: K. Ipsen (Ed.), Völkerrecht, Munich 1990, p. 852 et seq.

<sup>98</sup> Cf. C. M. Ney (fn. 21), p. 238.

<sup>99</sup> Argued by C. M. Ney (fn. 21), p. 239.

<sup>100</sup> Cf. DER SPIEGEL 3/1995, p. 129.

<sup>101</sup> Cf. W. Däubler (fn. 58), p. 46.

The prohibition against using any form of poison in warfare (Rule 6) is not only one of the oldest prohibitions; it has also been adhered to most strictly, with a few exceptions (Germany in World War I, Italy in the Ethiopia War of 1935/36, the USA in the Vietnam War, and Iraq in the 1st Gulf War). Since the Hague Declaration on Gas Projectiles of 29 July 1899, which prohibits the use of projectiles whose only goal is to disseminate asphyxiating and dangerous gases, the community of nations has left no stone unturned in perfecting this prohibition and making it air-tight in all respects. As such, it is prohibited by Art. 23 a of the Hague Land War Regulations of 1907 "to employ poison or poisoned weapons." All Paris peace treaties following World War I contained a provision forbidding the manufacture of poisonous gases. Art. 171 of the Versailles Treaty<sup>102</sup> provides:

"The use of asphyxiating, poisonous, or other gases, and all analogous liquids, materials, or devices being prohibited, their manufacture and importation are strictly forbidden in Germany."

This regulation clearly shows that, immediately following World War I, the community of nations proceeded from the assumption that the use of poisons in warfare was prohibited by customary law. A few years later, this norm was reconfirmed in the Geneva Gas Protocol of 1925, without doubt the most important treaty governing the use of poison.<sup>103</sup> There exists bitter dispute as to whether the prohibition against poisons can be applied to nuclear weapons; for this reason, the significant passage is quoted in full:

"Whereas the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids materials or devices, has been justly condemned by the general opinion of the civilised world; and

Whereas the prohibition of such use has been declared in Treaties to which the majority of Powers of the world are Parties; and

To the end that this prohibition shall be universally accepted as a part of International Law, binding alike the conscience and the practice of nations;

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<sup>102</sup> Text contained in RGBl 1919, p. 687 et seq.; provisions with comparable content can be found in the treaties of St. Germain (Art. 135), Neuilly (Art. 82), Trianon (Art. 119), and Sèvres (Art. 176); cf. Michael Bothe, *Das völkerrechtliche Verbot des Einsatzes chemischer und bakteriologischer Waffen*, 1973, p. 90.

<sup>103</sup> Geneva Protocol of 17 June 1925 for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, RGBl 1929 II, p. 174 et seq.

DECLARE:

That the High Contracting Parties, so far as they are not already Parties to Treaties prohibiting such use, accept this prohibition, agree to extend this prohibition to the use of bacteriological methods of warfare and agree to be bound as between themselves according to the terms of this declaration."

Since all nuclear powers have ratified the Geneva Gas Protocol,<sup>104</sup> they are bound to that prohibition as a matter of treaty law. While they all expressed reservations upon ratification, these did not address themselves to the Protocol's applicability to nuclear weapons, as was the case for Additional Protocol I of 1977. For a long time, it was disputed whether and how radioactive fallout was to be subsumed within Art. 23 a of the Hague Regulations and the Geneva Gas Protocol. Today, it is generally recognized that the harmful radiation caused by a nuclear explosion qualifies as a poison both within the meaning of Art 23 a of the Hague Regulations and as an "analogous method" within the meaning of the Geneva Gas Protocol.<sup>105</sup> Quite independently of the scientific authorities which confirm that poison and nuclear radiation cause either identical or comparable effects on human beings, significant legal authority supporting analogous treatment exists as well.

In the Paris Treaties of 23 October 1954, in which the Federal Republic of Germany renounced the manufacture of A-, B-, and C-weapons, Art. 23 a of the Hague Regulations is expanded to cover nuclear weapons for the parties to the treaty. According to Appendix I to Protocol III,<sup>106</sup> a nuclear weapon includes:

"any weapon which contains, or is designed to contain or utilise, nuclear fuel or radioactive isotopes and which, by explosion or other uncontrolled nuclear transformation of the nuclear fuel...is capable of mass destruction, mass injury or mass poisoning."

Additionally, the German Federal Supreme Court, in a verdict from the year 1960,<sup>107</sup> stated in dicta that harmful radiation constituted a "poison or analogous material" within the meaning of § 229, Sec. 1 of the StGB [Criminal Code], since it is "designed to destroy health."

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<sup>104</sup> On 10 April 1975, the USA was the last state in possession of nuclear weapons to ratify the Protocol.

<sup>105</sup> Authorities cited in W. Däubler (fn. 58), p. 40 et seq.; M. C. Ney (fn. 21), p. 181 et seq.

<sup>106</sup> Cf. BGBl. 1955 II, p. 269.

<sup>107</sup> BGHSt 15, p. 113 et seq., 115.

Despite this, two objections are repeated again and again in order to salvage nuclear weapons from a general prohibition. First of all, Art. 23 a of the Hague Regulations is interpreted narrowly to require that the poisonous effect must be the main goal and the primary effect of the use of the weapons; but if at all, harmful radiation could be considered the primary effect only of neutron and cobalt bombs. The fallout caused by "normal" nuclear weapons is a typical secondary effect which many other types of weapons have as well.<sup>108</sup> Secondly, it is argued that the constant reduction in the size of warheads serves to lessen residual radiation more and more, especially in the case of air detonations at sufficient altitude and underwater detonations at sufficient depth.<sup>109</sup>

The first argument is erroneous, as was shown by the only employment of nuclear weapons in Hiroshima and Nagasaki, as well as by countless nuclear weapons tests in the Nevada desert. To be sure, the blast waves and heat claim the most victims initially. But long-term damage to health, which cannot be dismissed as trivial neither quantitatively nor in terms of medical severity, is certainly primarily due to harmful radiation. The recently-made-public documents and films on US-American nuclear weapons testing have made clear that radiation was to be researched as the primary cause of long-term injuries to health by placing military personnel at various distances from the center of the blast. The unique thing about nuclear weapons is that they have a second primary effect in addition to the immediate destructive effect of the blast and heat waves. This, in the long term, causes everything from death and serious disease to genetic damage. These long-term effects are of a totally different type and gravity than is the case for conventional weapons. This is exactly why nuclear weapons cannot be considered as just another conventional weapon with unique secondary effects. Due to the type and duration of the uncontrollable effects, the only allowable comparison is with poisonous or bacteriological weapons. As such, the absolute and binding customary law prohibition of their use must also be applied to nuclear weapons.<sup>110</sup>

#### 4.10. Post-war Obligations and the Genocide Convention

The ever-diminishing size of nuclear warheads has reduced their explosive force to a level of destruction which has long been attained by conventional warheads. As such, they would have been superfluous if not for the fact that the nuclear contamination of the areas where they are employed constitutes an additional impact, both psychological and in terms of military

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<sup>108</sup> Argued by, e.g., Otto Kimminich (fn. 68), p. 407 et seq., 418.

<sup>109</sup> Cf. M. C. Ney (fn. 21), p. 189.

<sup>110</sup> This is the majority opinion in the literature: cf. W. Däubler (fn. 58), p. 41 et seq.; B. H. Weston (fn. 55), p. 561 with additional authorities.

strategy - an effect shared only with that of poisonous gases. The smaller the explosive force, the more significant the radiation effect will be. The rare exceptional cases when no fallout is to be created (underwater detonations at great depth) cannot be allowed to transform a general prohibition into general permission which includes a prohibition on certain weapons (cobalt and neutron bombs). Neither Art. 23 a of the Hague Regulations nor the Geneva Gas Protocol have ever articulated any exceptions, for example the "small-scale" use of poison or bacteria.

In addition to these rules of international humanitarian law identified by Weston, further prohibitions are also discussed by the commentators. For example, attention is called to the fact that the obligation to provide care to the survivors, which both The Hague and Geneva Conventions impose upon the victorious side, is completely illusory in the case of a nuclear conflict.<sup>111</sup> Art. 56 of the IV. Geneva Convention of 1949 Relative to the Protection of Civilian Persons in Time of War provides:

"To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring and maintaining, with the cooperation of national and local authorities, the medical and hospital establishments and services, public health and hygiene in the occupied territory, with particular reference to the adoption and application of the prophylactic and preventive measures necessary to combat the spread of contagious diseases and epidemics."

All of these responsibilities, which range from the constitution of non-political courts and maintenance of legal institutions (Art. 66 et seq.) to the satisfaction of religious needs (Art. 58), could obviously not be met in the case of an explosion of nuclear weapons.

Also of significance is the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948,<sup>112</sup> the so-called Genocide Convention, which, *inter alia*, prohibits the killing of, or infliction of serious physical or psychological harm on, members of all races, nationalities, religions, and ethnic groups. However, a necessary element is specific intent to cause the injury; this intent cannot necessarily be inferred from the use of nuclear weapons.

#### 4.11. Initial Conclusion

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<sup>111</sup> Cf. John H. E. Fried (fn. 49), p. 248.

<sup>112</sup> BGBl 1954 II, p. 730.

Initially, we can conclude that the use of nuclear weapons is not devoid of legal regulation due to the lack of express international law rules; rather, it is subject to the general customary law principles of international humanitarian law. This conclusion is not called into question by any of the states possessing nuclear weapons. In the course of its development, the law of international armed conflicts has created ever more specific and comprehensive prohibitive rules, which strive to limit the consequences of weapons with ever more sophisticated technology. It is beyond any doubt that nuclear weapons, by their very nature, violate many of these prohibitions, and that their use therefore violates prevailing law. This result, which is generally recognized in the literature,<sup>113</sup> is disputed only in two points: nuclear weapons with low explosive force and precise carrier systems, and the use of nuclear weapons as a reprisal measure. It would be folly to accept these exceptions, since special cases of this kind would undermine and hollow out the general prohibition in an uncontrolled manner.

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<sup>113</sup> Stephan Oeter is forced to recognize this in one of the most recent German publications, although he is of the opinion that a prohibition of the use of nuclear weapons cannot be extrapolated from either treaty or customary law: "Viewed purely from the aspect of quantitative criteria, the above-mentioned (official) position of the Federal Republic of Germany, like that of the other Western states [the legality of nuclear weapons, *author's note*] can almost be viewed as a minority position, since the number of scholarly works in the international law literature which speak in favor of an absolute prohibition of nuclear weapons have become legion in the meantime." St. Oeter, ABC-Kampfmittel, in: Dieter Fleck (Ed.), *Handbuch des humanitären Völkerrechts in bewaffneten Konflikten*, Munich 1994, No. 428.

## II. Manufacture, Stockpiling, and Threatened Use of Nuclear Weapons

The conclusion that the use of nuclear weapons, like that of poisonous gases, is prohibited in all cases does not necessarily lead to the logical conclusion that their manufacture, stockpiling, and threatened use is likewise prohibited. After all, the threatened use of nuclear weapons in order to deter use by other parties seeks to prevent armed conflict. As such, no logical inconsistency exists in the position that "nuclear deterrence, including threatened attacks which would violate international law,...cannot be prohibited by international humanitarian law..."<sup>114</sup> The German Federal Constitutional Court is apparently in agreement with that position, since it concluded:

"The actual conduct of those states which currently possess nuclear weapons, for example, the Soviet Union, the United States of America, France, or Great Britain, does not currently constitute a general practice and legal conviction that they are prevented, as a matter of general international law, from standing at the ready with warhead-equipped missiles for purposes of defense, especially with the goal of deterring an enemy also possessing nuclear weapons from using those nuclear weapons."<sup>115</sup>

However, rationalizing "that the phenomenon of nuclear deterrence is not included within the scope of validity of international humanitarian law, since that is applicable only to armed conflicts,"<sup>116</sup> is untenable. It clearly creates an international legal void where anything goes which is not expressly prohibited. The potential problems inherent in this are demonstrated by the author himself, who notes in conclusion:

"Conversely, however, the legality of nuclear deterrence and the fact that in the past 40 years, it has prevented at least one war in Europe, can never go as far as leading to carrying out the threat in the case of its failure; it cannot rationalize going beyond that which is generally permitted by international law.<sup>117</sup> The fact that the dissuasion (deterrence) consists of a threatened action whose realization is basically prohibited and would often constitute a war crime, is one aspect of the nuclear paradox with which mankind must cope as long as nuclear weapons are not done away with completely."

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<sup>114</sup> M. Sassòli (fn. 12), p. 530 [English translation].

<sup>115</sup> BVerfGE 66, pp. 39 et seq., 65 [English translation].

<sup>116</sup> M. Sassòli (fn. 12), p. 530 [English translation].

<sup>117</sup> The author recognizes nuclear reprisals as legal.



A retreat to the reliance on a paradox might be possible in the context of philosophical discourse; it is not acceptable when dealing with the critical real-life issue of nuclear deterrence. Whoever uses any means whatsoever, even only in self-created isolated cases (for example, underwater detonations at great depths), to "save" the use of nuclear weapons from the prohibitions of international humanitarian law cannot dispute the legality of their production, stockpiling, or threatened use. This is no paradox; it is a logical consistency. One paradox remains: that numerous effects of weapons on humans and the environment are prohibited only when they are caused by conventional weapons, but not if they stem from the employment of nuclear weapons. This paradox is detrimental to and inconsistent with both the universal nature and humanitarian approach of the international law of armed conflicts, and also with humanity itself. The *ius in bello* (rights in warfare) go under when the *ius ad bellum* (right to wage war) is resurrected. The only way out of this dilemma is to link the general prohibition of the use of nuclear weapons to their manufacture, stockpiling, and threatened use as well.<sup>118</sup>

It is correct that the traditional international rules of warfare are formally limited to the use of weapons in armed conflicts, and that manufacture and stockpiling as a deterrent does not necessarily constitute use. However, this does not mean that international law protection begins only when armed conflict definitively starts, thereby excluding all up-front preparatory and arms build-up measures from international law consideration. Art. 2, Clause 4 of the UN Charter forbids any

"...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."

#### 1. Threat of Force Through Manufacture and Stockpiling

While the term "force" clearly encompasses any direct or indirect form of military force,<sup>119</sup> the term "threat" is more difficult to define. Intensive war propaganda, the organization of irregular troops, and the massing of troops at the border in areas of tension are all considered prohibited threats.<sup>120</sup> One of the UN General Assembly's most important declarations, the so-

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<sup>118</sup> Cf. B. H. Weston (fn. 55), p. 587.

<sup>119</sup> Cf. A. Randelzhofer, Art. 2 Clause 4, Speaker 21 et seq., in: B. Simma (Ed.), *Die Charta der Vereinten Nationen*, Munich 1991; N. Paech, G. Stuby (fn. 5), p. 462 et seq.

<sup>120</sup> Cf. Joachim Arntz, *Der Begriff der Friedensbedrohung in Satzung und Praxis der Vereinten Nationen*, Berlin 1975.

called Declaration of Principles of 1970,<sup>121</sup> established the duty of States to refrain from war propaganda, as well as "organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State." Likewise, reprisals involving the use of force are acceptable only to the extent permitted within the boundaries of the right to self-defense pursuant to Art. 51 of the UN Charter.

In isolated cases, however, the ICJ has dictated that all factors be balanced before a decision is reached.<sup>122</sup> This is also true for the term "threat," which can be defined more precisely only in the context of securing peace, codified in the UN Charter as the foremost goal of the UN. As such, it becomes clear that the meaning given to the term "peace" is not limited to a so-called "negative peace" where simply the absence of armed conflict suffices.<sup>123</sup> A look at Art. 55, which defines economic and social goals "with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations...", clearly shows that the UN Charter proceeds from a positive understanding of the term "peace." This understanding emphasizes social and economic equality as well as political and cultural freedom within nations, thereby addressing the fundamental prerequisites necessary for peaceful cooperation among nations. This is further underscored by both the Preamble, which speaks of the firm determination to "save succeeding generations from the scourge of war," and Art. 1, which states the primary purpose of the United Nations as follows:

"To maintain international peace and security, and to that end: to take effective collective measures or the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes which might lead to a breach of the peace."

Both regulations certify the intention of creating a preventive mechanism for securing peace, which seeks to deprive possible violent confrontations of their basis even before they begin. Thus, Art. 2 Clause 3 commits all member nations to solving their international conflicts by peaceful means. From this, it follows that the determination of what would constitute an impermissible "threat" within the meaning of Art. 2 Clause 4 must be subjected to a broad

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<sup>121</sup> Declaration on the Fundamental Principles of International Law regarding Friendly Relations and Cooperation between Nations in Accordance with the Charter of the United Nations of 24 October 1970, UN Resolution 2526 (XXV). For the complete content of this resolution, cf. N. Paech, G. Stuby (fn. 5), p. 201 et seq.

<sup>122</sup> Judgment of the ICJ in the Nicaragua case, ICJ Reports 1986, p. 186.

<sup>123</sup> Cf. N. Paech, G. Stuby (fn. 5), p. 428 et seq.

rather than a narrow interpretation. The efforts to prevent even the creation of a situation which would promote the outbreak of armed conflict speak in favor of not waiting to prohibit the threat of force until there is virtually no possibility of preventing the use of weapons. Rather, the prohibition must be in force at an earlier stage. This broad construction is also favored by Art. 6 (a) of the statute of the Nuremberg International Military Tribunal, which defines a "crime against peace" as follows:

"(i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;  
(ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i)."

It is not always possible to precisely distinguish between (permissible) preparations for self-defense and (impermissible) preparations for an attack. The so-called "preemptive defense" against a threatened attack, which occurs again and again although it is not permitted,<sup>124</sup> can be avoided only if the prohibition is expanded to include planning and threats in order to remove any motive for preemptive strikes. Further, stationing of weapons undertaken purely for reasons of self-defense can, due to the weapons' scope and type, develop a threatening character to the extent that neighboring states feel substantially limited in terms of their sovereign range of activities. These types of "defense preparations" are forbidden as well if we consider the language of the CSCE (Conference on Security and Cooperation in Europe) Final Act of 1975, Par. II of the so-called Declaration of Principles:

"The participating States will refrain from any intervention, direct or indirect, individual or collective, in the internal or external affairs falling within the domestic jurisdiction of another participating State, regardless of their mutual relations. They will accordingly refrain from any form of armed intervention or threat of such intervention against another participating State. They will likewise in all circumstances refrain from any other act of military, or of political, economic or other coercion designed to subordinate to their own interest the exercise by another participating State of the rights inherent in its sovereignty and thus to secure advantage of any kind. Accordingly, they will, inter alia, refrain from direct or indirect assistance to terrorist activities, or to subversive or other activities directed towards the violent overthrow of the regime of another participating State."

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<sup>124</sup> Cf. N. Paech, G. Stuby (fn. 5), p. 476 et seq.; I. Pogany, Nuclear Weapons and Self-Defence in International Law, in: I. Pogany (Ed.), Nuclear Weapons and International Law, Aldershof, Brookfield USA, Hong Kong, Singapore, Sydney 1987, p. 63 et seq.

Even if the Final Act does not in itself constitute international law, it does reflect the substantial consensus of the participating nations. In this context, it is interesting to note the use of the term "armed intervention or threat of such intervention": any limitation of a state's sovereignty is prohibited; an actual violation of its territory is not even necessary. In these cases, there is no longer any correlation at all between a threat and an attack; but the threat is still not permitted. Of course, weapons of mass destruction are especially likely to constitute a perceived threat.

In 1984, the UN Human Rights Commission addressed the issue of the manufacture and stockpiling of nuclear weapons; these actions, along with deployment and use, were characterized as a crime against humanity, and the Commission recommended their prohibition to its members on the following grounds:

"The designing, testing, manufacture, possession and deployment of nuclear weapons are among the greatest threats to the right to life which confront mankind today. This threat is compounded by the danger that the actual use of such weapons may be brought about, not only in the event of war, but even through human or mechanical error or failure. Furthermore, the very existence and gravity of this threat generate a climate of suspicion and fear between States, which is itself antagonistic to the promotion of universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter of the United Nations and the International Covenants on Human Rights."<sup>125</sup>

The international law environment within which the term "threat" is to be defined therefore requires a broad interpretation which would define illegal actions as beginning far before an actual attack. The goal would be to secure peace, and the less danger of threatened attack resulting from the threat of force, whether by way of self-defense measures, errors, or rash reactions, the more secure peace would be. If this conclusion is applied to the stockpiling and deployment of nuclear weapons, it is important to consider not only the character and technological standard of the weapons, but also above all the military/strategic concepts associated with their deployment. Of course, these two things have an integral relation to one another.

## 2. Military/strategic Deployment Concepts

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<sup>125</sup> General Comment 14 (23) on Article 6 of the International Covenant on Civil and Political Rights, paras. 4 and 5, passed on 2 November 1984, in: UN General Assembly Official Records, 40. Session, Supp. No. 40 (Doc. A/40/40), Report of the Human Rights Committee, p. 162, Annex VI.

In the eighties, the focus was on replacing the nuclear missiles which had been stationed on the territory of the Federal Republic of Germany, with a range of approximately 1,000 km. They were equipped with warheads of megaton size and were not very accurate. The new Pershing II and Cruise missiles had the advantage of having a longer range (in order to reach the Soviet Union), higher accuracy, less explosive force but higher penetration capability and destruction probability.<sup>126</sup> All of their technological characteristics established that these were not weapons to be used for a second strike following an - illegal - attack with nuclear weapons, but rather weapons to be used following an - also illegal - attack with conventional weapons; or possibly even for a first strike.<sup>127</sup> This follows from the military/strategic concepts which prevailed at the time.

Even for the missiles of the older type, the SPD party's military expert at the time, Helmut Schmidt, assumed that they were suitable only for a first strike:<sup>128</sup>

"The American medium-range missiles in Europe are suited only for a surprise strike or a preemptive strike, but by no means for a second strike....but at the same time, that type of development would constitute a definite aggressive provocation against the Soviet leadership, since it is common knowledge that in the meantime, all medium-range missiles installed in Europe are suitable only for a first strike, and never for a second strike."

In the eighties, the prevailing doctrine was that of "flexible response," which was assumed by NATO in 1967.<sup>129</sup> This made possible a strategy of limited war amounting to less than "mutual assured destruction" (mad), which had been the core of the nuclear strategy until that point. It was designed to open up the largest possible number of interim steps between secured peace and full-scale war, along with various reactions to the entire spectrum of possible threats. However, the core of this new doctrine continued to be the first strike (against attacks with conventional weapons) with nuclear weapons. A nuclear war limited to Europe was tested in NATO manoeuvres, for example the "WINTEX" manoeuvres beginning in 1971. Another requirement was so-called escalation dominance, meaning the capability to escalate the war to new stages thanks to dominance on every level of development. According to this doctrine,

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<sup>126</sup> More details and additional literature on the missiles of the eighties in W. Däubler (fn. 58), p. 68 et seq.; and N. Paech, *Grundgesetz kontra Raketen*, Cologne 1983, p. 2 et seq.

<sup>127</sup> This was evident by considering their technological characteristics; cf. the literature mentioned in fn. 126.

<sup>128</sup> Helmut Schmidt, *Verteidigung und Vergeltung*, Stuttgart 1961, p. 96 et seq., 108 [English translation].

<sup>129</sup> Cf. Dieter A. O. Wolf, *Die Entscheidung über den Einsatz von Nuklearwaffen*, in: *Aus Politik und Zeitgeschichte*, Supplement B 18 to Das Parlament.

any potential enemy must be absolutely certain that escalation with nuclear weapons will take place; it should remain uncertain at what point those nuclear weapons will be employed. Despite widespread public criticism of this "flexible response" doctrine,<sup>130</sup> it was the official NATO strategy until the Warsaw Pact was dissolved in 1990.

Nonetheless, since about 1979, intensive consultations within the US government had led to placing the element of strategic superiority and as such, the option of first strike capability, into the foreground of military-political planning. Following the inauguration of President Reagan, one of the most important advisors to the State Department and Arms Control Commission outlined the concept as follows:

"The uses of strategic superiority may be summarized as the possession of freedom of diplomatic action in peacetime, the ability to wage crises in expectation of achieving acceptable political outcomes; and the capability, if need be, to wage and survive war at any level...Central to the concept of strategic superiority is the idea both that Soviet political-military power and designs be defeatable and that essential US-Western values be survivable."<sup>131</sup>

In another article during that era, he added that it was important

"to put the United States in the position of risking and winning a general nuclear war in an extreme case (in this context, "winning" means that the United States attains its political goal while the Soviet Union does not)."<sup>132</sup>

In this concept, nuclear weapons are weapons just like all others; as such, they can or even must be employed:

"If American nuclear power is to support U.S. foreign policy objectives, the United States must possess the ability to wage nuclear war rationally."<sup>133</sup>

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<sup>130</sup> Cf., e.g., McGeorge Bundy, George F. Kennan, Robert S. McNamara, Gerald Smith, *Kernwaffen und Atlantisches Bündnis*, in: *Europa Archiv* 1982, p. 183 et seq.

<sup>131</sup> Colin Gray, *The Idea of Strategic Superiority*, in: *Air Force Magazine*, March 1982, pp. 62, 63.

<sup>132</sup> Colin Gray, D. Brennon, *Gemeinsame Interessen als Grundlage für Rüstungskontrolle?* In: U. Nerlich (Ed.), *Sowjetische Macht und westliche Verhandlungspolitik im Wandel militärischer Kräfteverhältnisse*, Baden-Baden 1982, p. 535 [English translation].

<sup>133</sup> C. Gray, K. Payne, *Victory is Possible*, in: *Foreign Policy*, No. 39, Summer 1980, p. 14.

The adviser to the government concludes that not even nuclear armament, but rather a nuclear war itself represented the supreme guarantee of peace for the western world:

"The first real progress towards a substantial change for the better regarding the question of how populations ensure their security will not come about as a result of the development of a nuclear-armed world, but more likely as the result of a nuclear war."<sup>134</sup>

In this context, it is important to point out that these observations transformed the deterrence strategy, which is how the "flexible response" doctrine was always characterized, into an open war-waging strategy. The US Secretary of State at the time justified this transformation on the ground that

"it should be recognized that strategic parity still can constrain the freedom of action of the United States;" as such, the goal was "to improve our capacity to influence the course of events and to make effective use of the entire spectrum of our available moral resources in pursuing our interests."

As such, building up a first strike capacity had to become the main idea behind military-political thinking.<sup>135</sup> This new doctrine was officially expressed in two documents, which were confidential for a long time although they had already been cited in US press reports. These included a study by the National Security Council, as well as a Master Plan presented to the President for signature by the Pentagon; it was a document of guidelines for military policy from 1984 - 1988, which demanded the capacity for "decapitation" of the Soviet Union, with the goal of "wiping out the complete Soviet (and those allied with the Soviet Union) military and political power structure," as well as securing the annihilation of "the nuclear and conventional-equipped combat forces" of the Socialist countries.<sup>136</sup>

Within that declared goal, a second document titled "Operational Concept for the Airland Battle and Corps Operations 1986" formulates the concept of "integrated" warfare on an "expanded battlefield" for the deployment of American air and land combat troops (Airland

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<sup>134</sup> C. Gray, *Arms Control in a Nuclear Armed World?* In: *The Annals of the American Academy of Political and Social Science*, March 1977, p. 121.

<sup>135</sup> Alexander Haig, *The Alliance in the 1980's*, in: *Washington Quarterly*, Winter 1980, p. 134 et seq.

<sup>136</sup> *Fiscal Year 1984/88 Defense Guidance*, in *The New York Times* of 30 May 1982.

Battle Doctrine - ALB).<sup>137</sup> In this ALB Doctrine, which according to Otis was the current doctrine of the US Army and at the time, was also valid for "operations anywhere in the world,"<sup>138</sup> there is, in contrast to "flexible response," not even theoretically any particular threshold left for the use of nuclear and chemical weapons as opposed to conventional weapons. There is "no distinction between first strike and retaliation in the nuclear arena."<sup>139</sup> The term "'integrated' within this article will apply to the 'use of the full range of weapons' at the disposal of the US Commander - that is, conventional, chemical, and nuclear."<sup>140</sup> As such, the use of means of mass destruction is contemplated virtually at war's begin. Indeed, the inner logic of ALB proceeds from the notion of the surprise attack of the so-called "preemptive strike;" the US combat forces would have to "take advantage of the enemy's unreadiness."<sup>141</sup> There can be absolutely no doubt that the ALB doctrine is irreconcilable with prevailing international law.

However, it is not clear whether this doctrine, which in its offensive formulation strives to make a nuclear war capable of being waged, limited, and successfully ended - to introduce it as an especially effective variety of conventional war, as it were - actually represented NATO strategy. In any case, a series of bilateral programs were initiated between the USA and the FRG which were consistent with the strategic demands of ALB, such as, for example, the "Prepositioned Overseas Material Outfigured in Unit-Sets-Program," which served to stockpile heavy war machinery on European NATO territory,<sup>142</sup> and the "Wartime Host Nation Support Program," which commits the allies to ensuring the security of the bases of the additionally deployed American units and to solving supply and repair problems.

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<sup>137</sup> Cf. G. K. Otis, *The Airland Battle*, in: *Military Review*, Fort Leavenworth/Kansas, 5/1982. From 1983 on, Otis was the commanding officer of the American land forces in Europe, the 7th US Field Army in the Federal Republic, and the NATO Army Group.

<sup>138</sup> H. W. Czege, L. D. Holder, *The New F.M. 100-5*, in: *Military Review* 7/1982, p. 53 et seq., 56.

<sup>139</sup> W. G. Hanne, *The Integrated Battlefield*, in: *Military Review* 6/1982, p. 34 et seq.

<sup>140</sup> W. G. Hanne (fn. 139), p. 46.

<sup>141</sup> H. W. Czege, L. D. Holder (fn. 138), p. 53 et seq.

<sup>142</sup> Cf. B. T. Caine, *Total Force Modernization; Life in the Bottom of the Totem Pole*, in: *Military Review* 1/1983, p. 17 et seq. The 572 medium-range Pershing II and Cruise Missiles were a part of the program as well.



Further, the so-called Rogers Plan, which became known under the key words "Conventionalization of the Strategy and Arms of NATO," served only to improve the so-called Triad, consisting of conventional and both tactical and strategic nuclear weapons.<sup>143</sup>

In military-strategic terms, then, the Federal Republic was dealing with two varieties of the so-called deterrence theory. While the USA was striving for first-strike capacity with the option of a first strike, meaning the preemptive use of nuclear weapons, the prevailing NATO doctrine proceeded from the mere possibility of first use. The Pershing II, stationed in the Federal Republic since the decision of the federal government on 22 November 1983, completely met the demands of both concepts.

Contrary to the expectations of many observers, there has apparently been no fundamental change in nuclear weapons deployment strategies to accompany the cessation of the confrontation between East and West due to the dissolution of the Soviet Union and the Warsaw Pact. The steps taken in the USA since 1991 to develop a new nuclear doctrine have not led any further than the Defense Counterproliferation Doctrine (DCI) of Defense Secretary Les Aspin, which was approved by US President Bill Clinton in October of 1993. The core of this doctrine includes not only the use of both low- and high-yield nuclear weapons and securing escalation dominance; it also embraces the first use of nuclear weapons against conventional attacks in regional conflicts, as well as preemptive first strikes against states which threaten to use weapons of mass destruction. Paul Schäfer quotes from a paper which the US Joint Chiefs of Staff published on 29 April 1993 with the title "Doctrine for Joint Nuclear Operations;" this paper documents the adherence to all varieties of nuclear weapons as well as their first use.<sup>144</sup>

"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 weapons of mass destruction in a conflict....A selective capability of being able to use lower-yield (nuclear) weapons in retaliation,...is a useful alternative for the US National Command Authorities."

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<sup>143</sup> Cf. B. W. Rogers, *Sword and Shield: ACE - Attack of Warsaw Pact Follow on Forces*, in: *NATO's Sixteen Nations*, 1/1983, p. 20; Adalbert Weinstein in: *Frankfurter Allgemeine Zeitung*, 26 November 1982.

<sup>144</sup> Paul Schäfer, *Nuklearwaffen ohne Zukunft? Zur Rolle der Nuklearwaffen nach dem Ende des Kalten Kreiges*, in: *Wissenschaft und Frieden* 1/95, p. 4 et seq. Cf. also Hans Kristensen, Joshua Handler, *Changing Targets: Nuclear Doctrine from the Cold War to the Third World*, Paper of Greenpeace International, 26 January 1995.

The only new aspects represented in this doctrine are its orientation to regional conflicts and the blurring of the line dividing strategic and tactical nuclear weapons. However, given the disintegration of the Soviet Union, the redefinition of the nuclear doctrine has no relevance to the question of whether the threat with those types of weapons is reconcilable with international law. The only important point to consider is that stockpiling has always been and continues to go hand in hand with the threat of first use, and that potential use is not limited to warheads with low explosive force and supposedly minor collateral injuries to the civilian population, the environment, and infrastructure. Rather, it also encompasses larger nuclear weapons. But first use of these types of weapons is clearly violative of international law in every case; their manufacture, stockpiling and threatened use can likewise not be reconciled with prevailing international law.<sup>145</sup>

### III. Conclusion

The question posed by the General Assembly of the United Nations, "Is the threat or use of nuclear weapons in any circumstances permitted under international law?" must clearly be answered in the negative. Both the actual use of nuclear weapons and their manufacture, stockpiling and threatened use cannot be reconciled with prevailing international law. While there currently exists no international treaty which contains such a prohibition, customary international law and, above all, international humanitarian law (the laws of international armed conflict) have developed a comprehensive system of regulations which strive to protect humanity and, more recently, the natural environment, from the most cruel methods, means, and effects of warfare.

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<sup>145</sup> Sean McBride expressed this opinion in: *The Threat of Nuclear War. Illegality of Deployment of Nuclear Weapons*, Dublin 1983.

The singular and unique character of nuclear weapons - whether the smallest available or the most destructive; and regardless of whether developed for first use or a preemptive strike - make them a means of warfare which violates fundamental principles of customary international law. These include the prohibition against causing unnecessary suffering and excessive damage (the prohibition of excesses), the prohibition against indiscriminate attacks on the military and civilian population (protection of the civilian population), the rule of proportionality of retaliation (reprisals), the protection of neutral states, the prohibition against poisons, the prohibition against genocide, and finally, the obligation to provide care to survivors. All of these principles and prohibitions are violated by the use of nuclear weapons.

Neither can the manufacture, stockpiling, and threatened use of nuclear weapons be reconciled with binding international law. The special character of nuclear weapons, as well as the military-strategic concepts of their deployment, mean that their production and stockpiling, as well as their deployment, constitute an automatic threat. Since international law makes no distinction between nuclear weapons being employed for first use and for a preemptive strike - both violate international law - their threatened use by means of manufacture and stockpiling is also inconsistent with international law (Art. 2 Clause 4 of the UN Charter).

Prof. Dr. Norman Paech  
Hamburg School of Economics and Politics