

THE UNITED STATES' NUCLEAR FIRST STRIKE POSITION: A LEGAL APPRAISAL OF ITS RAMIFICATIONS

United States Secretary of Defense Schlesinger on July 1, 1975, stated that "[U]nder no circumstances could [the United States] disavow the first use of nuclear weapons."¹ That comment prompted questions concerning the circumstances under which the United States would consider a nuclear first strike.² During a television appearance, Secretary Schlesinger gave an example of what might constitute sufficient grounds for the first use of nuclear weapons by the United States:

[We], of course, [have] been a member of the NATO Alliance. We have indicated for many years that the strategic forces of the United States are available for the protection of the United States and its allies. NATO is a defensive alliance. Only in the case of major aggression in which there

1. Address by James Schlesinger, Secretary of Defense, before Godfrey Sperling Group, July 1, 1970, at 2 (transcript on file with CALIF. W. INT'L L.J.) [hereinafter cited as Schlesinger address]; see also N.Y. Times, July 2, 1975, at 8c col. 7. It would appear that the United States has adopted a first nuclear strike position predicated upon its foreign alliance commitments. An examination of the basis for this position will be necessary before considering the possible legal effects of implementation. News interview by James Schlesinger, Secretary of Defense, before ABC News, Issues and Answers, July 6, 1975, at 4-6 (transcript on file with CALIF. W. INT'L L.J.) [hereinafter cited as Issues and Answers].

In late June, 1975, the United States expressed concern over NATO defensive capability. Having just returned from a meeting of the Nuclear Planning Group of NATO, Secretary of Defense Schlesinger discussed the status of strategic balance. Specific attention was given to recent Soviet military capabilities and their effect upon the balance of power. A few days later, the Secretary of Defense refused to rule out the possibility of a nuclear first use. See news conference by James R. Schlesinger, Secretary of Defense, at the Pentagon, June 20, 1975, at 1-2, 6 (transcript on file with CALIF. W. INT'L L.J.).

2. Schlesinger Address, *supra* note 1, at 3-6. One consideration contributing to a United States' policy of first use was expressed by Admiral Gerald E. Miller before the House Subcommittee of International Security and Scientific Affairs.

I refer to the fact that nuclear weapons have become an integral part of our support forces. These weapons are complementary to our more conventional forces. Our allies count on them . . . [renouncing first use] would force action, by some at least, to seek their own nuclear weapons capability, thereby adding to proliferation and increasing the possibility of nuclear conflict.

First Use of Nuclear Weapons: Preserving Responsible Control: Hearings Before the Subcomm. on Int'l Security and Scientific Affairs, 94th Cong., 2d Sess. 47 (1976) (statement of Vice Adm. Gerald E. Miller) [hereinafter cited as Hearings on Nuclear First Use].

was the threat or the reality of the overwhelming of conventional forces would nuclear weapons have to be employed.³

The Secretary further explained that tactical nuclear weapons designed to be employed solely against military targets have been the emphasis of the United States policy.⁴

The following hypothetical illustrates how such a nuclear defense might occur in the event of a communist block attack on Western Europe. A NATO full alert is activated on May 15, after intelligence sources reveal heavy troop and weaponry activity along the East German and Czechoslovakian borders facing West Germany. Intelligence reports also indicate additional heavy military concentration surrounding the city of West Berlin. Just before dawn on May 16, a simultaneous invasion of Berlin and West Germany is commenced by communist block forces.

It is determined that the invasion force is using only conventional weapons, and in response, a NATO conventional contingency plan is activated.⁵ Within hours, it is determined by the Supreme Allied Commander Europe (SACEUR)⁶ that NATO conventional forces⁷ are inadequate to stop the tide of communist block forces. Because massive troop and armament loss would be inevitable, SACEUR proceeds to obtain authorization for the use of tactical nuclear weapons limited to short and medium range cannons.⁸ Authorization is received, con-

3. Issues and Answers, *supra* note 1, at 6.

4. *Id.* Again, Admiral Miller has expanded on Secretary Schlesinger's comments.

It will become increasingly difficult in the near future to protect U.S. overseas interests with conventional weapons. It may well be that the threat of the use of, at least, tactical nuclear weapons is the only option available to us.

Hearings on Nuclear First Use, *supra* note 2, at 51.

5. See note 26 *infra* and accompanying text. A discussion concerning pentomic warfare by William V. O'Brien has been heavily drawn upon in formulating this hypothetical combat situation. See O'Brien, *Some Problems of the Law of War in Limited Nuclear Warfare*, 14 MIL. L. REV. 1, 12-13 (1961) [hereinafter cited as O'Brien]. Pentomic warfare is the conducting of battle by means of limited nuclear engagements centered around the concepts of firepower, movement and communications. *Id.* at 3.

6. "[T]he Supreme Allied Commander Europe (SACEUR) commands forces of those West European countries which are members of NATO. These forces are under operational NATO command as so-called 'assigned forces'." Moritz, *The Common Application of the Laws of War Within the NATO-Forces*, 13 MIL. L. REV. 1 (1961).

7. For purposes of this discussion, there are no other NATO forces involved in the conflict other than the United States.

8. U.S. Dep't of Army, Field Manual No. 191-31-3; Nuclear Weapons Employment Effects Data, 7, 9 (1968) [hereinafter cited as Nuclear Effects Manual]. This document provides unclassified information on hypothetical nuclear weapons and delivery systems such as the short and medium range cannon indicated within the text. Other such hypothetical systems contained in that manual are: free flight rocket, light guided missile, medium guided missile, heavy guided missile and aircraft delivered weapons. The short and medium range cannons would deliver relatively small nuclear devices and have a considerably shorter range than the other weapons indicated. See generally *id.*

ditioned upon compliance with humanitarian safeguards set forth by the NATO Nuclear Planning Group (NPG).⁹

United States forces are "conducting a fighting withdrawal."¹⁰ A designated brigade¹¹ maneuvers to draw the advancing aggressor into a position where his tactical ability coupled with the terrain of the area will place those forces in a vulnerable nuclear attack area.¹² With a sizable concentration of enemy troops and armament¹³ in a weak defensive position, a civil affairs representative¹⁴ is consulted to insure that the civilian population is not unduly endangered. Upon confirmation and command authorization, a 0.5 kiloton nuclear projectile,¹⁵ fused to preclude fallout,¹⁶ is fired. The aggressor's momentum is stopped with a minimal effect on the population.

In this hypothetical, the NATO alliance creates a likely arena of confrontation while the Soviet block forces merely represent an easily

9. The Nuclear Planning Group is subordinate to the Nuclear Defense Affairs Committee. NPG is comprised of permanent members consisting of the United States, United Kingdom, West Germany and Italy along with three other NATO states selected on a rotating basis. The decision to form NPG was reached at the North Atlantic Council Meeting, December 15-16, 1966; 56 DEP'T STATE BULL. 49 (1967). The humanitarian safeguards, which are hypothetical in nature, will be discussed later. See note 48 *infra* and accompanying text.

10. O'Brien, *supra* note 5, at 3.

11. *Id.*

12. While maneuvering in such a position, United States' forces must also avoid placing themselves in a position vulnerable to tactical nuclear attack. *Id.* A vulnerable nuclear attack area exists where combatants and armament are in a position which lends itself toward deployment of a tactical nuclear device. Some factors taken into consideration are terrain, weather, noncombatant population and allied troops. *Id.* at 12-15.

13. For purposes of this analysis the troop and armament concentration will be considered 2000 troops and 400 tons of armament. For a discussion of nuclear effects on personnel and property, see Bright, *Nuclear Weapons as a Lawful Means of Warfare*, 30 MIL. L. REV. 1, 6-10 (1965) [hereinafter cited as Bright].

14. The civil affairs representative (also referred to as G-5) would be present to take into consideration factors of a moral, political or legal nature when making a decision to detonate a nuclear device. In discussing the effectiveness of such a representative, Mr. O'Brien states: "[A]n effective G-5 can bring strong pressure to bear on a commanding general when he demonstrates that target selection policies are having a ruinous effect on the civilian situation." O'Brien, *supra* note 5, at 11.

15. One kiloton is equivalent to 1,000 tons of TNT. U.S. ATOMIC ENERGY COMMISSION, *THE EFFECTS OF NUCLEAR WEAPONS* 6 (2d ed. 1964) [hereinafter cited as *ATOMIC ENERGY COMM'N*]. A discussion of the characteristics of nuclear explosions can be found in Bright, *supra* note 13, at 2-13.

16. This type of burst is used for the most effective coverage of damage to the great majority of ground targets of interest to troops in the field. As used in this manual this height of burst will preclude fallout. It is the height of burst most frequently used.

U.S. Dep't of Army, Field Manual No. 101-31-1; Nuclear Weapons Employment Doctrine and Procedures, ch. 2, para. 4(d) (1968) [hereinafter cited as *Nuclear Employment Manual*].

recognized aggressor.¹⁷ The aggressor's use of conventional weapons sets forth the chain of events leading to a nuclear first strike by one side or the other. If major aggression is taking place which apparently is overwhelming conventional forces, the criteria set forth by Secretary Schlesinger would be met.¹⁸

While former Secretary Schlesinger's comments renewed national debate on first use policy, it should be pointed out that the United States has never foreclosed first use of nuclear weapons.¹⁹ Further, there is every reason to believe that this policy will continue under the Carter administration.²⁰ It is likely that such a policy would include concurrently a contingency plan outlining actual implementation procedures²¹ which creates the reality of possible confrontation.

The possibility of a nuclear response to a conventional attack raises the issue of whether such tactical use of nuclear weapons can be sanctioned by present international legal standards. This comment analyzes the relevant international law and concludes that under certain circumstances the use of tactical nuclear weapons will be sanctioned by international law. It is emphasized that the absence of a binding agreement among the nuclear powers fosters the possibility of major nuclear escalation evolving from an initial tactical nuclear strike. In recognizing the United States as a proponent of a nuclear first strike,

17. This is not to suggest the impossibility of another arena or aggressor. While reviewing the Korean situation, National Broadcasting Company's news department on January 6, 1976, depicted a tactical first strike as a strong possibility should major aggression take place there.

18. See Issues and Answers, *supra* note 1, at 3.

19. Six administrations have taken the position that the United States would use nuclear weapons if "nonnuclear defenses proved inadequate." *Hearings on Nuclear First Use*, *supra* note 2, at 99.

Congressman Les Aspin commented:

[T]he United States has never foreclosed the first use of either tactical or strategic nuclear weapons. President Eisenhower, President Kennedy, former Secretary of Defense McNamara and President Nixon have all declined to foreclose the potential first use of nuclear weapons and, in some instances, explicitly expressed the willingness to use strategic or tactical nuclear weapons in the face of a major conventional defeat.

Id. at 193.

20. Long standing precedent in conjunction with President Carter's apparent high regard for James Schlesinger's advice leads to a reasonable conclusion that the first use policy will continue under the present administration. The possibility further exists that Mr. Schlesinger will sit on the National Security Council in his position as energy advisor. *TIME*, Dec. 20, 1976, at 12; *TIME*, Dec. 27, 1976, at 6.

21. A contingency plan is an order to operational forces setting out procedures to be followed should certain events take place. In this case, the contingent event would be a full scale attack by an aggressor and the procedure to be followed would involve use of tactical nuclear weapons. It is impossible to confirm the existence of the contingency plan because of the security classification of such an order.

this comment urges that state to take the initiative in encouraging such an agreement.

I. THE WEAPON: ITS CHARACTERISTICS AND PREDICTABILITY

A. *Strategic and Tactical Use of Nuclear Weapons*

Strategic nuclear weapons are those which are deployed against a major target considered strategically valuable to the enemy.²² These weapons are often associated with intercontinental ballistic missiles (ICBM) such as Polaris, Poseidon, Titan and Minuteman.²³

Tactical nuclear weapons, on the other hand, are those which are normally used on the field of battle in shorter range delivery systems and which produce a relatively small atomic yield.²⁴ These particular weapons are intended for use in situations similar to the hypothetical advanced earlier in which troops would maneuver to attack a vulnerable target. Use of a tactical nuclear weapon would be especially likely in support of an infantry maneuver involving friendly troops in close proximity to the explosion.²⁵ In such a case, it would be necessary for the detonation to be small and result in little, if any, radiation fallout. The residual effects would have to be kept to a minimum to protect the fighting capability of friendly forces.

B. *The Explosion and Height of Burst*

A nuclear explosion results in the release of energy measured in terms of kilotons or megatons.²⁶ Initial blast, thermal radiation and nuclear radiation are the three destructive effects of an explosion.²⁷ The magnitude of the last-named effect will be determined by the

22. For an overall discussion of strategic nuclear weapons and associated policy considerations, see generally H. KAHN, *ON THERMONUCLEAR WAR* (2d ed. 1969).

23. Rathjens, *The Dynamics of the Arms Race*, in *THE USE OF FORCE* 480 (1971).

24. M. HALPERIN, *DEFENSE STRATEGIES FOR THE SEVENTIES* 5 (1971).

25. O'Brien, *supra* note 5, at 7.

26. Energy release of nuclear detonations is measured in terms of comparative explosive force of TNT. One kiloton is equal to one thousand tons of TNT, while a megaton is equal to one million tons of TNT. *ATOMIC ENERGY COMM'N*, *supra* note 15, at 5-6. The explosion results from either fission, fusion or both where a rapid release of tremendous energy will result in a rather small area by the fission or fusion of atomic nuclei. *Id.* at 12-13.

27. *Id.* at 29-30, 44-46. The initial explosion causes a blast wave to move away from the explosion and is considered the most destructive portion of a nuclear detonation. *Id.* at 42-43. Thermal radiation comprises one third the energy release and creates temperatures estimated in the millions of degrees. *Id.* at 7-8. Nuclear radiation has been divided into initial radiation which occurs the first minute of release after the explosion and residual radioactivity release which is the subsequent radioactive contamination. *Id.* at 8, 414.

amount of debris which is uplifted by the explosion, contaminated²⁸ and eventually distributed back to earth creating fallout.²⁹ The amount of fallout is determined primarily by the yield of the weapon and the height of the burst.

There are four categories into which the burst of nuclear weapons may be divided: high altitude, air, surface and subsurface. High altitude bursts are those which occur above 100,000 feet. Fallout at that altitude is widely dispersed, however, there is no immediate hazard on the surface from residual nuclear radiation.³⁰ An explosion below 100,000 feet, but high enough to prevent the fireball³¹ from touching the ground is referred to as an air burst.³² Few surface materials are drawn up into the fireball, and the radioactive particles which are produced are lighter, with the result that much radioactivity is lost by the time the particles reach the surface of the earth.³³ The low air burst has been determined to be the most effective for military targets while assuring negligible fallout.³⁴ The surface and subsurface bursts create the greatest fallout effect. By touching the earth, the surface burst picks up large quantities of dirt and debris which become radioactive. Prevailing winds may carry the radioactive debris considerable distances. The fallout created by a subsurface blast will depend upon the detonation's proximity to the surface.³⁵ If the underground explosion is sufficiently near the surface there will be significant radioactive debris expelled into the air.³⁶

28. This is a process by which neutrons transfer the weapon's materials, the nitrogen and oxygen in the atmosphere, and the elements present in soil and water. *Id.* at 436-37.

29. *Id.* at 39-40, 704.

30. *Id.* at 11. There are no surface materials that come in contact with the radiation at that altitude. That contamination which does exist will remain in the atmosphere a sufficient length of time to lose most of its radioactive potency.

31. A fireball results with "the sudden release of immense quantities of energy." Nuclear Employment Manual, *supra* note 16, Ch. 2, para. 2. As the fireball rises, it develops into a mushroom cloud in which "the weapon residues incorporate material from the surrounding medium and form an intensely hot and luminous mass" ATOMIC ENERGY COMM'N, *supra* note 15, at 10.

32. ATOMIC ENERGY COMM'N, *supra* note 15, at 10.

33. *Id.* at 414-15.

34. "The low air height of burst has been shown to give the best 'across-the-board' damage to most tactical targets . . . while having a 99 percent assurance of not producing fallout." Nuclear Effects Manual, *supra* note 8, at 3.

35. ATOMIC ENERGY COMM'N, *supra* note 15, at 65-66.

36. Mr. Bright has warned: "[T]he actual extent of radioactive contamination would depend on the depth of the burst, the nature of the soil, the atmospheric conditions and the energy yield of the explosion." Bright, *supra* note 13, at 12 (footnotes omitted). See also ATOMIC ENERGY COMM'N, *supra* note 15, at 436.

C. Predictability of Effects of Individual Weapons

Today it would appear possible to predict with great accuracy the effects of a specific nuclear explosion³⁷ by taking into account such variables as yield, fusing,³⁸ weather and height. Thus, safety distances, accuracy, radius of effect, property and personnel damage can be predetermined.³⁹

In the beginning hypothetical, for example, a 0.5 kiloton projectile would be chosen as most appropriate to a tactical combat situation in which friendly troops are near a relatively small military target.⁴⁰ The data in an appropriate manual would indicate the distance that a projectile will travel and the radius of its explosion.⁴¹ Also, fusing the weapon for a low air burst would minimize fallout.⁴² Consequently, through careful control of the weapon's applications, the military objective can be attained while both friendly forces and the civilian population are protected. These factors are critical in determining whether a particular use of a weapon should be considered legal under international law.

II. INTERNATIONAL LEGAL CONSIDERATIONS

The history of war has led the international community to develop minimum standards to govern the conduct of hostile confrontations between states.⁴³ Some standards are derived from conventions which address specific aspects of warfare.⁴⁴ Others have evolved, through general acceptance among states, into customary international law.⁴⁵

37. Data concerning hypothetical nuclear weapons is provided in Nuclear Employment Manual, *supra* note 16. It is meant to provide unclassified data for target analysis while training staff officers. United States forces are not to use that manual for field exercises while non-United States forces may do so. This is in contrast to the Staff Officers' Field Manual; Nuclear Weapons Employment Effects Data, FM 101-31-2, which contains "classified defense information concerning the nuclear weapons in the U.S. stockpile." *Id.* at 1-2. That manual has been designed for use in "active nuclear combat, field training exercises (FTX), and command post exercises (CPX)." *Id.*

38. Fusing is the process of setting a weapon to detonate at a specified time or height. Nuclear Effects Manual, *supra* note 8, at 7.

39. See generally Nuclear Employment Manual, *supra* note 16; and Nuclear Effects Manual, *supra* note 8.

40. For an example of the use of low yield nuclear weapons in a close combat situation, see O'Brien, *supra* note 5, at 12-13.

41. See Nuclear Effects Manual, *supra* note 8, at 12.

42. See note 34 *supra*.

43. See Mallison, *The Laws of War and Juridical Control of Weapons of Mass Destruction in General and Limited Wars*, 36 GEO. WASH. L. REV. 308, 332 (1967) [hereinafter cited as Mallison].

44. *Id.* at 310-11.

45. J. BRIERLY, *THE LAW OF NATIONS* 59 (6th ed. 1963) [hereinafter cited as BRIERLY].

Still another category is referred to as the general principles of law, which are the sources "to which international courts have instinctively referred in the past."⁴⁶

A. *Basic Principles: Humanity and Military Necessity*

It has been suggested that any amount or kind of force may be applied in overpowering an opponent during a conflict.⁴⁷ However, the prevailing principles of international law require some standards that restrain combatants from exercising disregard for the ancillary effects of their actions. A foundation for such restrictive standards can be found within the concepts of humanity and military necessity.

The international concept of humanity includes the principle that war or hostilities should be conducted with the least possible destruction to human and material values.⁴⁸ That principle has been said to prohibit "the employment of any kind of degree of force not necessary for the purpose of war, [that is], for the partial or complete submission of the enemy with the least possible expenditure of time, life and physical resources."⁴⁹ For example, it would be contrary to this principle for troops to destroy needlessly any property or to indiscriminately kill when occupying a village after a battle. Such acts would not be necessary for the purposes of the war and certainly would constitute unnecessary taking of life.

The principle of military necessity limits destruction to that necessary for attaining lawful military objectives.⁵⁰ The United States Army's official publication on land warfare supports this interpretation:

The prohibitory effect of the law of war is not minimized by "military necessity" which has been defined as that principle which justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible. Military necessity has been generally rejected as a defense for acts forbidden by the customary and conventional laws of war in as much as the latter have been developed and framed with consideration for the concept of military necessity.⁵¹

46. *Id.* at 63.

47. See 2 L. OPPENHEIM, INTERNATIONAL LAW: DISPUTES, WAR AND NEUTRALITY 208-09 (7th ed. Lauterpacht 1952).

48. M. MCDUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION 529-30 (2d ed. 1967).

49. U.S. Dep't of Navy Law of Naval Warfare § 220(b) (1955) (footnotes omitted).

50. Mallison, *supra* note 43, at 312.

51. U.S. Dep't of Army Field Manual No. 27-10, The Law of Land Warfare 4 (1956) [hereinafter cited as Land Warfare].

An armed force may not commit actions violative of the laws of war under the guise of military necessity. Destructive acts should be ordered only when indispensable to the objective of the war and necessary to protect the safety of the forces concerned.⁵² At the Nuremberg War Crimes Tribunal subsequent to World War II, certain defendants attempted to invoke a defense of military necessity for acts committed in an occupied territory.⁵³ In *United States v. List*,⁵⁴ a United States Military Tribunal refused to accept that defense and held:

The destruction of property to be lawful must be imperatively demanded by the necessities of war. Destruction as an end in itself is a violation of international law. There must be some reasonable connection between the destruction of property and the overcoming of the enemy forces.⁵⁵

Upon a belligerent's attempt to attain victory at all costs, humanity and military necessity then become a limiting factor. To complement these principles, the customary concepts of proportionality and respect for the noncombatant should be analyzed next.

B. Customary International Law: Proportionality and Protection of the Noncombatant

It is a well recognized doctrine of international law that loss of life must be in proportion to the value of the military objective.⁵⁶ The *Law of Land Warfare* states that "loss of life and damage to property must not be out of proportion to the military advantage to be gained."⁵⁷ This concept suggests that balancing must take place before a specific weapon is employed. Certainly the injury would not be proportional to the military gain in the case of indiscriminate bombing of a large city having little military significance. This custom should apply not only to conventional, but also to tactical nuclear weapons. The same values and considerations supporting the customary rule regarding conventional weapon use would appear to be equally applicable to the use of tactical nuclear weapons. Proportionality will be determined by the individual circumstance as it applies to military necessity.

52. Mallison, *supra* note 43, at 313.

53. *United States v. List*, 11 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Law No. 10, 757, 1253-54 (1947) [hereinafter cited as *Trials of War Crimes*].

54. *Id.*

55. *Id.*

56. Bright, *supra* note 13, at 33.

57. *Land Warfare*, *supra* note 51, at 19.

There is a close relationship between the custom of proportionality and the custom of immunity of noncombatants. Throughout the history of war, unarmed civilians have suffered because their cities, factories or transportation systems were attacked. The problem is actually one of determining whether the dangers to civilians are disproportionate to the value of the target sought. The location of military targets within heavily populated areas will not erase the combatant's obligation to evaluate the proportional relationship between the probable injury to the population and the military exigencies of the action.⁵⁸

Both nuclear and conventional weapons should be subjected to these standards of humanity, military necessity, proportionality and effect upon noncombatants. To categorize all nuclear use as disproportionate and inhumane would be an oversimplification. The weapon must be judged according to its particular capabilities and the factual setting. The nuclear weapon's yield, fusing and other factors have been shown to be determinative in controlling its destructive capabilities.⁵⁹

The nuclear device detonated in the hypothetical combat situation described at the beginning of this comment would certainly comply with the above standards. The low yield of the weapon and its height of burst would preclude significant fallout. Thus, noncombatants outside the immediate target area would not be affected. Further, the lack of civilian casualties in that conflict certainly would render civilian injury proportional to the military significance of the target.

C. Conventions: Attempts to Delineate Standards for the Conduct of War

There are no treaties or conventions specifically addressing the legality of the use of nuclear weapons during hostilities.⁶⁰ Most con-

58. Mallison, *supra* note 43, at 322-23.

59. See text accompanying notes 37-42 *infra*.

60. Mallison, *supra* note 43, at 332. It should be noted, however, that the United States and the United Kingdom entered into the Latin American Nuclear Free Zone Treaty wherein those states agreed not to use nuclear weapons against contracting parties. The Treaty for the Prohibition of Nuclear Weapons in Latin America, Feb. 14, 1967, Additional Protocol II, 22 U.S.T. 754, T.I.A.S. No. 7137, 634 U.N.T.S. 364.

The nonproliferation treaties do not address the legality or limitations of nuclear use, but attempt to limit the numbers of strategic nuclear weapons and distribution of nuclear materials. The first strike policy affects the issue of nonproliferation in that if the United States were to renounce its first use policy, nonnuclear third powers might develop independent nuclear arsenals of their own. For a discussion of nonproliferation aspects in regard to first use policy, see *Hearings on Nuclear First Use*, *supra* note 2, at 97-141.

ventions cited by international legal writers were formulated before the advent of the nuclear device as a means of warfare. Consequently, some speculation is necessary in correlating existing conventions with nuclear warfare.

The United Nations has attempted to take a strong stand against the use of nuclear devices. In 1961, the General Assembly passed a resolution declaring the use of nuclear weapons to be in violation of the United Nation's Charter.⁶¹ That resolution further set forth the proposition that nuclear detonation is contrary to the laws of humanity because it causes unnecessary suffering and is indiscriminate against noncombatants.⁶² It should be noted, however, that the United Nations cannot bind its members through a resolution.⁶³ Moreover, it would be difficult to argue that the resolution exemplifies accepted customary law.⁶⁴ The better approach would be to evaluate the propriety of any nuclear application with specific regard to all the circumstances surrounding the detonation.

61. G.A. Res. 1653, 16 U.N. GAOR Supp. (No. 17) 4, U.N. Doc. A/5116 (1961).

62. *Id.*

63. As one scholar writes:

Of course, the General Assembly does not have the legislative powers to bind all members by a resolution of this nature. Furthermore, a resolution does not have the effect of a formal treaty upon even the members voting for it; it is a statement of policy, rather than positive international law. But a resolution, which is no more than a recommendation of the General Assembly, is an important instrument in weighing world public opinion, particularly as to official positions of the individual nations voting on the resolution.

Bright, *supra* note 13, at 28 (footnotes omitted). See BRIERLY, *supra* note 45, at 109-10, where in his famous treatise, *THE LAW OF NATIONS*, he discusses the functions and powers of the United Nations General Assembly:

The specific functions of the General Assembly, which consists of all the members of the Organization, are to discuss any matter within the scope of the Charter and to make recommendations thereon either to the members of the United Nations or to the Security Council or to both, but this is subject to the proviso that it must refer to the Security Council any question relating to international peace on which action is necessary, and that it may not make any recommendations on a dispute or situation which is being dealt with by the Security Council [A]part from its control over the budget, all that the General Assembly can do is to discuss and recommend and initiate studies and consider reports from other bodies. It cannot *act* on behalf of all the members, as the Security Council does, and its decisions are not directions telling the member states what they are or are not to do.

Id.

64. As Bright states:

While an argument may be made that such a resolution reflects an international custom against the use of nuclear weapons, the concern of states over armaments is certainly distinguishable from a custom against using them. The position which the various states took in voting on the resolution may be considered as some evidence of their official view towards the legality of the use of nuclear weapons, but the mere consensus of a majority of the members voting on the resolution is not declaratory of customary international law, unless such a custom has, in fact, been established.

Bright, *supra* note 13, at 28-29.

Even though nuclear weapons had already been employed by the end of World War II, the Geneva Convention of 1947⁶⁵ failed to address the issue of nuclear warfare and its impact upon the laws of war. The convention dealt with three humanitarian problems of war: treatment of the wounded and sick, care of the prisoner of war and the protection of civilians.⁶⁶ Further protection for the civilian was expounded in the suggestions set forth by the International Committee of the Red Cross in 1956. An example of these suggestions can be found in the following:

The person responsible for ordering or launching an attack shall, first of all: (a) make sure that the objective, or objectives, to be attacked are military objectives within the meaning of the present rule and duly identified. When the military advantage to be gained leaves the choice open between several objectives, he is required to select the one, an attack on which involves least danger for the civilian population. . . .⁶⁷

Restrictions such as those above can be applied equally to conventional or to tactical nuclear weapons. Computations involving the factors previously discussed⁶⁸ would be helpful in determining which detonations would create the least hazard to civilian populations.

Attempts have been made to demonstrate a relationship between nuclear radiation, poison and gas. The Hague Convention No. IV of 1907⁶⁹ forbade the use of poison or poisoned weapons in conducting war.⁷⁰ Also, the Geneva Gas Protocol⁷¹ condemns the use of "asphyxiating, poisonous or other gases and of all analogous liquids, materials or devices."⁷² Relying on these conventions, various authors have

65. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick Armed Forces in the Field, Aug. 12, 1949 [1956], 6 U.S.T. 3114, T.I.A.S. No. 3362; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949 [1956], 6 U.S.T. 3217, T.I.A.S. No. 3363; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949 [1956], 6 U.S.T. 3516, T.I.A.S. No. 3365.

66. *Id.*

67. International Committee of the Red Cross: Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War, art. 8(a) (1956).

68. See generally textual discussion in division I C, *supra*.

69. Convention with Other Powers Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. 539 (effective Feb. 28, 1910) [hereinafter cited as Land War Convention].

70. *Id.* at 2301-02.

71. Protocol Prohibiting the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 94 L.N.T.S. 67 [hereinafter cited as Geneva Gas Protocol].

72. *Id.*

argued that there is an assimilation of radiation and radioactive fallout into "poison."⁷³ That conclusion is based on the internal effects radiation can produce within the body and similarities between the effects of radiation and poison.

There is also support for the contrary position.⁷⁴ One author concludes that most radiation affects the external portion of the body and does not involve ingestion within the system. He further argues that delayed fallout loses its radioactivity fairly rapidly and will produce "little, if any, injurious results."⁷⁵

Regardless of which view is accepted, a case can be made that tactical nuclear devices should be exempt from the poison classification. A low yield, low altitude detonation would result in blast and radiation effects within the same geographic area.⁷⁶ There would be negligible fallout and most injuries would result from the blast effect.⁷⁷ It is the incidental nature of radiation injury which makes it improper to classify such injury as identical to the damage resulting from the deliberate emission of poisons into the environment.

Whether or not a tactical nuclear weapon is considered "poisonous," there is still an argument that its use would result in "treacherous killing" or in "causing unnecessary suffering." This would constitute a violation of article 23(b) and (e) of the Hague Convention No. IV of 1907 which provides:

[I]t is especially forbidden: . . . (b) to kill or wound treacherously individuals belonging to the hostile nation or army (e) to employ arms, projectiles, or material calculated to cause unnecessary suffering.⁷⁸

How is a weapon employed to "treacherously" wound or kill an individual? Article 23(b) conceivably applies to all weapons, for any weapon is capable of being employed treacherously. A high yield nuclear device detonated to create large scale fallout probably would

73. See, e.g., N. SINGH, *NUCLEAR WEAPONS AND INTERNATIONAL LAW* 156-60 (1959); G. SCHWARZENBERGER, *THE LEGALITY OF NUCLEAR WEAPONS* 27 (1968).

74. Bright, *supra* note 13, at 19.

75. *Id.* at 18.

76. See generally *Nuclear Effects Manual*, *supra* note 8.

77. A fission weapon detonated at an air burst altitude will typically distribute the following approximate energy release: blast, 50 percent; thermal radiation, 35 percent; initial radiation, 5 percent; with residual nuclear radiation, 10 percent. A thermonuclear weapon will release reversed percentages between the initial and residual radiation. ATOMIC ENERGY COMM'N, *supra* note 15, at 8-9. For radius effects data, see generally *Nuclear Effects Manual*, *supra* note 8.

78. *Land War Convention*, *supra* note 69, at 2302.

be considered "treacherous."⁷⁹ Conversely, if a tactical nuclear device is employed in a manner which precludes significant fallout and ancillary civilian destruction,⁸⁰ it should not be called "treacherous." "[T]he mere fact that a weapon is capable of being used treacherously certainly does not support the proposition that its every use is necessarily treacherous."⁸¹

With regard to the difficult task of defining "unnecessary suffering", Professor Mallison has suggested that a reasonable definition would be: any suffering which is unnecessary "in relation to the military advantage to be derived from the use of the weapon."⁸² This seems to call for an application of the principle of proportionality, in which a state must weigh the suffering and destruction a weapon will cause against the military objective and its degree of necessity. Under this analysis, the use of any nuclear weapon should not be considered as categorically prohibited by article 23(e).

III. JUDICIAL APPLICATION OF STANDARDS LIMITING THE USE OF WEAPONS

There is a paucity of international judicial precedent bearing on the application of international legal principles, customs and conventions pertaining to nuclear use. This circumstance calls for close scrutiny of the few existing cases.

The Charter of the International Military Tribunal at Nuremberg provided that the "wanton destruction of cities, towns or villages, or devastation not justified by military necessity" were to be considered war crimes.⁸³ However, the Tribunal only prosecuted a few persons for mass killing of noncombatants by aerial bombings, and summarily rejected cases in which the target included military objectives.⁸⁴

79. See Bright, *supra* note 13, at 323. That commentator has advanced an unusual analogy as to what might constitute a treacherous violation of article 23(b):

If a nuclear weapon were employed in such a manner as to permeate intentionally cloud masses with radioactive material, resulting in a subsequent contamination rainout on the unsuspecting enemy, such an act would probably constitute treachery in violation of Article 23(b).

Id.

80. Professor Mallison has emphasized that ancillary civilian destruction must be considered in making "An accurate appraisal of lawfulness . . ." Mallison, *supra* note 43, at 346.

81. Bright, *supra* note 13, at 323. Mr. Bright holds the view that a weapon is an inanimate object and is "incapable of being *per se* treacherous." *Id.*

82. Mallison, *supra* note 43, at 323. Professor Mallison supports the proposition that a weapon should not be outlawed because of its efficiency measuring device advanced in the text.

83. Charter of Int'l Military Tribunal, art. 6(b) in 1 Int'l Military Tribunal 11 (1947).

84. The United Nations War Crime Commission rejected cases of alleged illegal aerial bombardment where military objectives were present at the targets bombed. Digest of Laws and Cases, 15 Repts. U.N. Comm'n 110 n.2.

In *United States v. Ohlendorf*,⁸⁵ the Tribunal was faced with the prosecution of members of the special task forces used by Nazi Germany in liquidating "elements of the civilian population regarded as 'racially' inferior or 'politically undesirable'."⁸⁶ The defendants argued that their actions could not be distinguished from the United States killing of civilians through the atomic detonations in Japan.⁸⁷ However, the specific process by which the defendants had confronted and destroyed noncombatants was distinguished easily by the Tribunal from the atomic bombings of Japan. The judgment indicated that tactical purposes such as the destruction of communications, transportation systems, and factories are objectives directed at impeding the military. It was reasoned that nonmilitary casualties such as those resulting from the use of atomic weapons in Japan, are the inevitable consequence of these bombing operations and are "an unavoidable corollary of battle action."⁸⁸ Thus, even though the *Ohlendorf* tribunal was not called on to determine the legality of the United States' atomic bombings in Japan, the case strongly suggests that the bombings would be defensible, given the significance of military objectives within the target cities.⁸⁹

*Shimoda v. Japan*⁹⁰ is the only judicial decision which squarely addresses the issue of nuclear weapon employment during warfare. Although rendered by a municipal court, such a decision is not without international effect, in the absence of a conflicting principle of international law.⁹¹

85. The Einsatzgruppen Case, 4 Trials of War Crimes 1 (1947).

86. *Id.* at 3.

87. *Id.* at 466-67.

88. *Id.* at 467.

89. Henry L. Stimson, Secretary of War during World War II, discussed the military objectives in *The Decision to Use the Atomic Bomb*, 194 HARPER'S MAGAZINE, Feb. 1947, at 97. Criticism of that decision appears in Sack, *ABC-Atomic, Biological, Chemical Warfare in International Law*, 10 LAWYERS GUILD REV. 161 (1950).

90. Tokyo District Court, No. 2914 of 1955 and No. 4177 of 1957, Civil Affairs, 24th Department, Dec. 7, 1963; the decision has been translated into English and reprinted in full in THE JAPANESE ANNUAL OF INT'L L. 212 (1964) [hereinafter all citation is to translation]. See also Falk, *The Shimoda Case: A Legal Appraisal of the Atomic Attacks upon Hiroshima and Nagasaki*, 59 AM. J. INT'L L. 759 (1965).

91. I.C.J. STAT. art. 38, para. d. In addressing the subject of article 38(d) of the I.C.J., Brierly has written:

Article 38 of the Statute of the Court directs it to refer to "the general principles of law recognized by civilized nations." The phrase is a wide one; it includes, though it is not limited to, the principle of private law administered in national courts where these are applicable to international relations. Private law, being in general more developed than international law, has always constituted a reserve store of principles upon which the latter has been in the habit of drawing.

BRIERLY, *supra* note 45, at 62 (footnotes omitted).

The case involved a suit by five Japanese citizens who personally suffered injury or were survivors of victims of the atomic bombings of Hiroshima and Nagasaki. These plaintiffs claimed that the detonation of the atomic weapons by the United States was in violation of international law.⁹² Also, it was argued that they had been deprived of their right to recover damages when the government of Japan waived all claims of the state and its nationals in the peace treaty at the end of the war.⁹³ The court denied recovery and indicated that the government of Japan had acted within its powers in waiving its nationals' claims through the treaty. Finally, it was determined by the Japanese court that the claimants lacked standing under international law.⁹⁴

The legality of the bombings was addressed by the court in *dicta*. In concluding that international law had been violated, the court determined that both cities had been undefended, that the atomic deployment had constituted indiscriminate aerial bombardment,⁹⁵ and that the bombs caused unnecessary suffering in violation of article 23(e) of the Hague Regulations.⁹⁶

It has been suggested that the *Shimoda* opinion is of little significance "to the development of the international laws governing weaponry."⁹⁷ That conclusion was founded upon three bases: The relevant portions of the opinion are considered as *dicta*; the court's opinion relates only to the factual situation present in that particular case; and the opinion was rendered by "a domestic court of the sovereign of the complaining parties."⁹⁸

The contrary position, which regards the civilian destruction to have been disproportionate to the value of the military goals achieved, seems more compelling. The estimated combined casualties were over 106,000 killed and more than 97,000 injured.⁹⁹ The targets were in high density population zones where a ninety percent fatality rate resulted.¹⁰⁰ Any such expression of hostility, whether undertaken through tactical, strategic or conventional means, flies in the face of the relevant principle, expressed by one author as the following customary rule.

92. *Shimoda v. Japan*, THE JAPANESE ANNUAL OF INT'L L. 212, 213-14 (1964).

93. *Id.* at 218.

94. *Id.* at 250.

95. *Id.* at 252.

96. Land War Convention, *supra* note 69, at 2301-02.

97. See Bright, *supra* note 13, at 37.

98. *Id.* at 36-37.

99. *Id.* at 8. The chart on page eight of that article depicts a three zone breakdown for such city and population effect within the zones.

100. *Id.*

Noncombatants may not be attacked directly consistent with the law of war and it is not lawful to employ highly destructive methods against them.¹⁰¹

IV. THE NUCLEAR FIRST STRIKE: AN APPRAISAL OF LAW AND POLICY

The United States has endorsed a limited first strike policy. Even though deterrence was probably the controlling motive for adopting such a position, it would seem that the United States would not be without international legal alternatives in the event that circumstances directed the implementation of the policy.

There is no legal basis in existing international law to support the conclusion that the use of nuclear weaponry would be unlawful *per se*. A nuclear deployment, consistent with the rules governing conventional warfare, need not be held to a different standard. If a nuclear response appears militarily necessary and undertaken without violating the principles of humanity, proportionality, and the protection of the noncombatant, it would not be unreasonable to suggest that international legal concern be focused upon the ends which result, rather than the means through which those ends were achieved. Even a small weapon, when used against a heavily populated target, can cause ancillary civilian destruction which is disproportionate to the military objective sought. However, the sophistication of technology has made it possible to employ a nuclear weapon with almost "surgical" precision. The effects of cautious and deliberate nuclear use would not be legally distinguishable from the effects of conventional warfare.

It is not the purpose of this comment to promote the use of tactical nuclear weaponry, but rather to encourage a full appreciation of the difference between a limited tactical nuclear engagement and an unlimited strategic strike. Concerning limited nuclear warfare it has been said:

Atomic warfare can be kept limited only if the world—friend and foe alike—knows the types and small sizes of weapons which could be used and understands the vast difference between *precision atomic warfare* and *mass destruction warfare*.¹⁰²

The international community would be safer if all nuclear devices were banned and realistic controls established. Unfortunately, such a

101. Mallison, *supra* note 43, at 309.

102. Cagle, *A Philosophy for Naval Atomic War*, 83 NAVAL INST. PROC. 249, 254 (1957), reviewed, Patterson, 83 NAVAL INST. PROC. 659 (1957).

prospect is unlikely in the immediate future. As a realistic alternative, the nuclear powers should begin to negotiate towards an agreement which would delineate standards by which these weapons may be employed. The stakes are too high to leave to chance or supposition the probability that the "other side" in a conflict will utilize the same standards for nuclear deployment. A multilateral agreement setting forth those standards would contribute at the least to avoidance of a high yield strategic retaliation in response to a low yield tactical first use. Because the United States has announced a nuclear first strike policy,¹⁰³ it would be significant for that government to initiate negotiations for such an agreement. If states continue to proclaim policies and prepare for possible implementation of initial retaliatory nuclear strikes, the world community will be subjected to the possibility of nuclear extinction. This possibility will be avoided only by agreement; adherence to at least the minimal standards of humanity and proportionality demanded by international law suggests itself as a starting place which would be effective, inoffensive to international law, and sufficiently modest to be achievable.

William G. Lee

103. President Carter made the latest proclamation on United States nuclear first strike policy as this article went to press. While addressing the United Nations General Assembly, President Carter stated:

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

N.Y. Times, Oct. 5, 1977, at A12, col. 6.

This enunciated policy conforms with Mr. Schlesinger's previous statements and former administration positions. It has been noted that "the pledge was worded so it would not exclude the use of nuclear weapons to retaliate if, for example, an ally such as West Germany were to be attacked with even conventional arms." N.Y. Times, Oct. 5, 1977, at A13, col. 1.