THE NUREMBERG DEFENSE TO CHARGES OF DOMESTIC CRIME: A NON-TRADITIONAL APPROACH FOR NUCLEAR-ARMS PROTESTORS

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It is not intellectually difficult to apply international law to cases of domestic protest against nuclear arms. Perhaps the most difficult hurdle is psychological: applying traditional legal principles in the context of global annihilation.[1] Yet a central purpose of all law, international and domestic, is to control excessive force. The sheer magnitude of force represented by nuclear weapons thus mandates level-headed analysis of legal principles by those who would challenge nuclear arms.

This Article presents a non-traditional, international law defense for United States citizens facing criminal charges stemming from their protest against nuclear weapons. Charges range from misdemeanors, such as trespassing on private property (for those engaged in peaceful protests),[2] to felonious destruction of private and government property (for protests involving violence).[3]

After outlining the traditional forms of the so-called Nuremberg Defense, this article will propound its unconventional variation: the use of international law as a basis for the domestic privilege of crime-prevention.

I. THE TRADITIONAL FORM OF THE NUREMBERG DEFENSE.

Paradoxically, the original Nuremberg Defense and its basis was precisely the opposite of its current and now traditional form. Yet to understand this Article's non-traditional approach, one must be familiar with the traditional Nuremberg Defense. As outlined below, particular attention should focus on the element of individual-citizen responsibility for international crime. This concept will become a key element in the non-traditional defense.

The first Nuremberg Defense arose from proceedings before the International War Crimes Tribunal in Nuremberg, Germany, at the close of World War II. Certain German citizens, accused by victorious Allied powers of international crimes, contended that they could

1. According to Larry Smith, National Security Studies Director at Harvard's Kennedy School of Government, part of the psychological problem is one of scale. A single one-megaton explosion in a large city would kill more people from the heat, blast and radiation than the 650,000 Americans who have ever died in battle in all the wars fought by the United States in the last 200 years. "It's beyond our ability to conceive of such a thing. . . . Just to make the attempt to think about it will take all the imagination and creativity of the human race." L.A. Times, Aug. 4, 1985, at 1, col. 30.

2. *See e.g.*, CAL. PENAL CODE § 602 (Deering 1979) (trespass to private property); N.Y. PENAL LAW § 140.10 (McKinney 1975); Iowa CODE §§ 714.1-.7 (1975).

3. *See e.g.*, CAL. PENAL CODE § 594 (Deering 1983) (destruction of private property); N.Y. PENAL LAW § 145.10, 240.6 (McKinney 1975) (destruction of property and riot); IOWA CODE § 743.9 (1975).

not be held responsible because they were not high government officials. They argued that they had not devised or ordered the alleged criminal activity, but instead had been forced by German domestic law to carry out their country's national policies.[4]

The premise of the Germans' defense derived from principles of nineteenth century international law, from a time when such law dealt primarily with relations between States.[5] In essence, the original Nuremberg Defense argued that State governments were the only proper subjects of international law; individual citizens were merely the objects.[6]

One of the Nuremberg trials, commonly referred to as *The Flick Case*, was prosecuted by the Allies against German industrialists.[7] The major charge was the commission of crimes against peace in violation of international law. In *Flick* the War Crimes Tribunal stated:

> It is urged that individuals holding no public offices and not representing the State, do not, and should not come within the class of persons criminally responsible for a breach of international law. It is asserted that international law is a matter wholly outside the work, interest, and knowledge of private individuals. The distinction is unsound. International law, as such, binds every citizen just as does ordinary municipal law. . . . The application of international law to individuals is no novelty.[8]

Individual responsibility was further buttressed by the 1948 American Military Tribunal (Tribunal VA) decision of *United States v. Von Leeb*:

> International law operates as a restriction and limitation on the sovereignty of nations. It may also limit the obligations which individuals owe to their states, and create for them international obligations which are binding upon them to an extent that they must be carried out even if to do so violates a positive law or directive of state.[9]

Thus when United States Supreme Court Justice Robert H.

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4. 2 THE LAW OF WAR: A DOCUMENTARY HISTORY 1283 (L. Friendman ed. 1972).

5. *See* Manner, *The Object Theory of the Individual in International Law*, 46 AM. J. INT'L L. 428 (1952).

6. *Id.*

7. THE LAW OF WAR, *supra* note 4, at 1281.

8. *Id.* at 1284.

9. *Reported in* 11 TRIAL OF WAR CRIMINALS 462-489 (1950). *See also*, CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL (The Nuremberg Charter), Aug. 8, 1945, 59 Stat. 1544, E.A.S. No. 472. Article VII states: "The official position of defendants, whether as heads of State or responsible officials in government, shall not be considered as freeing them from responsibility or mitigating punishment."

Jackson represented the United States at Nuremberg, he observed that:

> For the first time four of the most powerful nations have agreed not only upon the principle of liablility for war crimes of persecution, but also upon the principle of individual responsibility for the crime of attacking international peace.[10]

It is thus axiomatic that current international law creates rights and obligations for individuals as well as governments.[11] Individual responsibility for crimes under international law has been specifically recognized by the United States Supreme Court. In permitting prosecution of Nazi spies in this country for violating the 1907 Hague Convention,[12] the Court implicitly viewed the personal responsibility issue as resolved by the fact that the defendants were free to choose to violate international law.[13]

Subsequent to the Nuremberg trials were their Asian-theater equivalent, known as the *Tokyo War Crimes Trial Decision*.[14] Combined with those at Nuremberg, principles derived from Tokyo have been interpreted as meaning that "anyone with knowledge of illegal activity and an opportunity to do something about it is a potential criminal under international law unless the person takes affirmative measures to prevent the commission of the crimes."[15]

It is this latter gloss—some would say extension—of war tribunal principles that comprises what is now the traditional form of the Nuremberg Defense. Citizens accused of crimes, usually those involving highly controversial public policy issues like nuclear arms protests, cite the Nuremberg cases and their progeny as creating a citizen privilege to break domestic law lest their action or non-action be later judged criminal in an international tribunal.[16]

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10. Jackson, *Statement of Chief U.S. Counsel Upon Signing of the Agreement*, 19 TEMPLE L.Q. 169 (1946).

11. Jurisdiction of the Courts of Danzig, 1928 P.C.I.J., ser. B, No. 15 (Advisory Opinion of Mar. 3); Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

12. Hague Convention, Oct. 18, 1907, art. XXX, 36 Stat. 2351, T.S. 542.

13. *See generally*, Ex Parte Quirin, 317 U.S. 1 (1942).

14. *Reprinted in* THE LAW OF WAR, *supra* note 4, at 1029.

15. *Id.*

16. C. COHEN, CIVIL DISOBEDIENCE: CONSCIENCE, TACTICS AND THE LAW 208 (1971). One commentator summarizes the basis for such position:

> [T]he very essence of the [Nuremberg] Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State, if the State in authorizing actions moves outside its competence under international law.

I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 545 (2d ed. 1973). The traditional Nuremberg Defense is sometimes combined with the contemporary defense of "civil

II. THE NON-TRADITIONAL APPROACH

The non-traditional Nuremberg Defense propounded by this Article links modern international law principles of individual responsibility to the Anglo-American common law privilege of citizens to prevent crime. Under this defense the various acts of nuclear-arms protestors are regarded as attempts to prevent the actions of others deemed criminal under international law.[17] By linking the crime prevention concept to that of individual responsibility, the traditional Nuremberg Defense is given a novel and significant twist. Instead of regarding *themselves* as international criminals unless they attempt to thwart international crime within their country,[18] advocates of the non-traditional point to *others*—those engaged in making nuclear policy or weapons—as individually responsible for activity made criminal by international law.

A. Genocide and Global Destruction Result From the Use of Nuclear Weapons

Some facts are common to virtually any form of nuclear arms protest. The three presented here are an essential predicate for applying specific provisions of international law. These facts, viewed in the light of international law requirements, support the "reasonableness" of a protestor's perception of the illegality of nuclear weapons, a key component of the non-traditional Nuremberg Defense.[19]

As a practical matter these facts are judicially admissible through either expert testimony or judicial notice. Documentation is

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disobedience," whereby adherents of H.D. Thoreau, J. Gandhi, and M.L. King, Jr., claim a moral or religious compulsion to break a law regarded as immoral itself. Although this approach may appeal to the jury, it contains both internal and external contradictions. By having defendants admit they broke the law, it undermines their crime-prevention claim that they were enforcing the law. Apart from this, laws which nuclear-arms protestors are typically charged with violating are usually unrelated to the issues of nuclear arms, *e.g.*, trespass, destruction of property, and conspiracy.

17. Beyond observing that citizen passivity has never been held tantamount to criminal complicity by an international tribunal, attacking the doctrinal weakness of this position is beyond the scope of this article. *Cf.* COHEN, *supra* note 16, at 208-209.

18. This approach also differs from the defense of civil disobedience commonly associated with nuclear-arms protests. Stemming from acts and writings of Thoreau, Gandhi, and Martin Luther King, Jr., the traditional theory of civil disobedience requires illegal or immoral laws to be violated. In contrast, the defense propounded here has no quarrel with laws of any government (most of which, like trespass, obstructing, and destroying property, are "nuclear neutral"), but rather focuses on the actions of individuals. Rather than rejecting the authority of domestic law, the non-traditional Nuremberg Defense relies upon it.

19. *See infra* notes 95-121 and accompanying text.

provided for the first two facts, the third will, of course, depend on the nature of the target of the nuclear arms protest in question.

First, nuclear weapons instantly destroy virtually everything within several miles of the explosion. The result causes indiscriminate suffering and death among military and civilian populations, and through the after effects of firestorms, deadly radiation and long-term dust clouds can lead to the annihilation of all life on earth.[20]

Second, since 1981 the United States House of Representatives, states, cities, townships, and citizens' groups throughout the world have attempted in vain to halt the nuclear arms race by passing resolutions condemning nuclear arms and calling for a nuclear weapons freeze. Some countries have declared their territory off limits to the installation or passage of nuclear weapons. The United Nations has been passing similar resolutions for the last twenty years.[21]

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20. The single composite "fact" in the text is supported by the following specific factual documentation:

(a) The use of nuclear weapons causes virtually total destruction of everything within several miles of the site of the explosion. U.S. DEPT. OF DEFENSE, THE EFFECTS OF NUCLEAR WEAPONS (1977).

(b) A limited or "counter-force attack" of nuclear weapons would kill up to 20,000,000 people immediately and cause millions more cancer deaths and genetic defects; an all-out attack on a range of military and economic targets using a large fraction of the existing nuclear arsenal would cause up to 160,000,000 immediate deaths and millions more cancer deaths and genetic defects. Efforts of civil defense programs to save lives and provide shelter would, in the wake of such destruction, be meaningless. U.S. CONGRESS: OFFICE OF TECHNOLOGY ASSESSMENT (May 1979).

(c) Residual effects caused by radiation and radioactive fallout create long-term illness and death in a manner analogous to poisoning. U.S. ATOMIC ENERGY COMMISSION, THE EFFECTS OF NUCLEAR WEAPONS 473 (1957).

(d) "[N]uclear weapons [possess] terrible effects [that include] suffering, indiscriminately and inexorably, by military forces and civilian populations alike [and] constitute, through the persistence of the radioactivity they release, an attack on the integrity of the human species and ultimately may even render the whole earth uninhabitable." Treaty for the Prohibition of Nuclear Weapons in Latin America Feb. 14, 1967, preamble, 22 U.S.T. 754, T.I.A.S. No. 7137, 634 U.N.T.S. 281.

(e) Even low-level radiation exposure causes serious increases in the incidence of cancer, leukemia, reproductive failure, genetic defects, diabetes, and cardiac diseases. A. Stewart, *A Survey of Childhood Malignancies*, BRIT. MED. J. 1495-1508 (1958); J. GOFMAN, A. TAMPLIN, POISONED POWER 26 (1971).

21. Similarly to Fact No. 1, this single fact is a composite of the following factual documentation:

(a) The United Nations General Assembly has passed many resolutions proscribing nuclear arms and insisting on cessation of the nuclear-arms race. *See, e.g.*: G.A. Res. 1380, 14 U.N. GAOR Supp. (No. 16) at 4, U.N. Doc. A/4354 (1959); G.A. Res. 1643, 16 U.N. GAOR Supp. (No. 17) at 34, U.N. Doc. A/5100 (1961); G.A. Res. 2162, 21 U.N. GAOR Supp. (No. 16) at 10, U.N. Doc. A/6316 (1966); G.A. Res. 2936, 27 U.N. GAOR Supp. (No. 30) at 5, U.N. Doc. A/8730 (1972); G.A. Res. 2849, 26 U.N. GAOR Supp. (No. 29) at 70, U.N. Doc. A/8429 (1971); G.A. Res. 3246, 29 U.N. GAOR Supp. (No. 31) at 87, U.N. Doc. A/9631

Third, the plant, business, or person protested against is knowingly involved in the research, development, manufacture, stockpiling, use, or threatened use of nuclear weapons.

B. International Law Provides a Reasonable Basis for Believing Nuclear Weapons are Illegal

Former Justice Newman of the California Supreme Court has stated that "[t]he good lawyer ought to be able to work a plausible argument that nuclear warfare inevitably involves aggression and an

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(1974); G.A. Res. 3154, 28 U.N. GAOR Supp. (No. 30) at 34, U.N. Doc. A/9030 (1973); G.A. Res. 35/152, 35 U.N. GAOR Supp. (No. 48) at 69, U.N. Doc A/3548 (1980).

(b) In March 1982 over 150 towns in Vermont adopted resolutions calling for a moratorium on the spread of nuclear weapons. N.Y. Times, Mar. 4, 1982, at A16, col. 3; *see also* N.Y. Times, Mar. 8, 1982 at A18, col. 1.

(c) In March 1982 the Kennedy-Hatfield Nuclear Freeze Resolution (S.J. Res. 163) was passed in the United States House of Representatives. N.Y. Times, Mar. 21, 1982, at E5, col. 2; N.Y. Times, Mar. 10, 1982, at 22, col. 1.

(d) In June 1982 700,000 people in New York City's Central Park marked the United Nations Second Special Session on Disarmament. N.Y. Times, June 13, 1982, at 1, col. 2.

(e) In August 1982 the House of Delegates of the American Bar Association approved a resolution recommending principles to guide United States policy on nuclear arms control. Among these principles was a call "that nuclear powers pursue serious and sustained negotiations to end the nuclear arms race and to reduce the number of nuclear weapons." *Report No. 114 to the House of Delegates of the ABA: Section on Individual Rights and Responsibilities, Standing Committee on World Order Under Law*, Aug. 1982, *discussed in* 48 A.B.A. J. 1186 (1982).

(f) On September 14, 1982, Wisconsin adopted, by a margin of three to one, a statewide voter-initiated referendum calling upon the United States government to "work vigoroursly to negotiate a mutual nuclear weapons moratorium and reduction, with appropriate verification, with the Soviet Union and other nations." N.Y. Times, Sept. 16, 1982, at B17, col. 4.

(g) During the November 1982 nationwide elections in the United States, voters endorsed a grass-roots movement, urging the United States and the Soviet Union to adopt a mutual nuclear weapons freeze. N.Y. Times, Nov. 4, 1982, at A22, col. 4.

(h) On December 7, 1982, thousands of women assembled on the Greenham Common, England, then-proposed site of United States cruise missiles, petitioning for disarmament and the barring of nuclear missiles from their country. N.Y. Times, Dec. 13, 1982, at A5, col. 1.

(i) The widely circulated Catholic Bishop's pastoral letter, "The Challenge of Peace: God's Promise and Our Response" condemned the nuclear arms race and offered proposals to reduce the level of nuclear arms. N.Y. Times, Nov. 15, 1982, at A1, col. 1.

(j) On April 5, 1983, the fourth day of demonstrations against the nuclear arms race involved an estimated 400,000 people in Bonn, West Germany. N.Y. Times, Apr. 5, 1983, at A9, col. 4.

(k) The last few years have seen the increased appearance of national professional organizations devoting their expertise towards stopping the nuclear arms race. These include Lawyers Alliance for Nuclear Arms Control, Physicians for Social Responsibility, Union of Concerned Scientists, High Technology Professionals for Peace, Student/Teacher Organization to Prevent Nuclear War, United Campuses to Prevent Nuclear War, Nuclear Weapons Freeze Campaign, Mobilization for Survival, Women's International League for Peace and Freedom, Women's Pentagon Action, and the National Resistance Committee.

illegal breach of the peace."[22] The non-traditional Nuremberg Defense involves proof of both more and less than the above proposition.

Those protesting the research, development, manufacture, stockpiling, and deployment of nuclear arms have a greater burden than demonstrating the illegality of actually using nuclear weapons. Essentially, the argument starts by establishing that the use or threatened use of nuclear arms would unequivocally violate the international law expounded in this section of the Article.

On the other hand, the non-traditional defense need not "conclusively establish" the illegality of any aspect of nuclear arms. Rather, as the argument continues in the next section, defendants need only prove that it is at least "reasonable" to believe that the amassing of such weapons will inevitably lead to their use.[23]

The first step in the defense is to establish that international law is binding on domestic courts in the United States. The Constitution of the United States unequivocally declares that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[24] Accordingly, the United States Supreme Court has held: "International law is part of our law, and must be ascertained and administered by the courts of justice of the appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination."[25]

The status of general international law in domestic cases has been expressed in a similar fashion: "Courts of this country have the obligation to respect and enforce international law not only by virtue of this country's status and membership in the community of nations but also because international law is a part of the law of the United States."[26] In the words of one federal court: "There can be no dispute about the proposition that American courts are bound to recognize and apply the Law of Nations as part of the law of the land."[27]

To determine what constitutes international law, the Supreme

22. L.A. Daily J., Oct. 26, 1982, at 2, col. 1.

23. *See supra* notes 19-21 and accompanying text.

24. Art. VI, cl. 2.

25. The Paquete Habana, 175 U.S. 677, 700 (1900).

26. Banco Nacional de Cuba v. Sabbatino, 193 F. Supp. 375, 381-82 (S.D.N.Y. 1961), *aff'd*, 307 F.2d 845 (2d Cir. 1962), *rev'd on other grounds*, 376 U.S. 398 (1964).

27. United States v. Melekh, 190 F.Supp. 67, 85 (S.D.N.Y. 1960); *see also*, The Nereids, 13 U.S. (9 Cranch) 423 (1815); Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

Court has held that the content of the law of nations "may be ascertained by consulting the works of jurists, writing professedly on public laws; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law."[28]

The Court subsequently explained that,

> where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subject of which they treat.[29]

Turning now to particular treaties, the Statute of the International Court of Justice,[30] is a part of the United Nations Charter and is therefore a treaty binding on the United States.[31] The *Statute* lists the following official sources of international 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 civilized nations;
>
> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means.[32]

In sum, two points should be clear. First, the definition and content of international law is fairly expansive; second, international law is fully binding on United States domestic courts.

Moreover, on grounds of public policy domestic courts should be eager to recognize international law. As one trial judge observed, "The effective method to promote adherence to the standards imposed by international law is to enforce these standards in municipal [for example, domestic] courts, particularly in view of the poverty

28. United States v. Smith, 18 U.S. (5 Wheat) 71, 74 (1820).

29. The Paquete Habana, 175 U.S. at 700 (1900). *See also*, Fernandez v. Wilkinson, 505 F. Supp. 787, 798 (D. Kan. 1980).

30. U.N. CHARTER art. 38.

31. It is unquestioned in federal courts that "[a]s a treaty ratified by the United States, the [United Nations] Charter is part of the supreme law of the land." Balfour, Guthrie & Co. v. United States, 90 F. Supp. 831, 832 (N.D. Calif. 1950). State courts have held the same. *See, e.g.*, Fujii v. State of California, 38 Cal.2d 718, 721, 242 P.2d 617, 619-20 (1952). "It is not disputed that the [United Nations] Charter is a treaty, and our federal Constitution provides that treaties made under the authority of the United States are part of the supreme law of the land and that the judges in every state are bound thereby."

32. U.N. CHARTER art. 38.

and inadequacy of international remedies."[33] In the same case the appellate court added a reminder not to confuse public policy with the narrower concerns of nationalism. "One pitfall into which we could stumble would be the identification as a fundamental principle of international law some principle which is in truth only an aspect of the public policy of our own nation. . . ."[34]

More than two dozen international treaties, conventions, and resolutions apply to the research, development, stockpiling, use, and threatened use of nuclear weapons. The most pertinent language of each such source of international law will be presented in the order in which the documents came into existence.

In 1868 the Declaration of St. Petersburg[35] observed that because "the progress of civilization should have the effect of alleviating, as much as possible, the calamities of war," that "this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable." Accordingly the Treaty declared that "the employment of such arms would, therefore, be contrary to the laws of humanity."[36]

Shortly after the turn of the century, the major nations of the world gathered to produce an historical series of international agreements concerning the conduct of war. The 1907 Hague Convention divided the subject into a series of provisions governing war's different aspects. The preamble to the Hague Convention (War on Land) declared that it is "important to revise the laws and general customs of war" in order to establish "certain limits for the purpose of modifying their severity as far as possible."[37] Moreover, the parties recognized the need to prevent unknown future weapons from violating the principles they were establishing: "The High Contracting Parties clearly do not intend that unforseen cases should, in the absence of a written undertaking, be left to the arbitrary judgment of military commanders."[38] Thus, declared the parties,

> in cases not included in the regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, and from the laws of human-

33. *Banco Nacional de Cuba*, 193 F. Supp. at 382.

34. *Banco Nacional de Cuba*, 307 F.2d at 861.

35. Declaration of St. Petersberg Nov. 29-Dec. 11, 1868, 1 AM. J. INT'L L. Supp. 95.

36. *Id.*

37. Hague Convention, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539. The United States is a signatory.

38. *Id.*

ity, and the requirements of the public conscience.[39]

The importance of this paragraph to the issue at hand is crucial. One international law scholar explains it as follows: "[T]his general rule, known as the Martens Clause, makes the principles of humanity and the dictates of public conscience obligatory by themselves, without the formulation of a treaty specifically prohibiting a new weapon."[40]

The Hague Treaty next narrowed its focus to listing particular practices of war prohibited by the contracting parties: weapons that "poisoned"; weapons that would "kill or wound treacherously"; "projectiles or material calculated to cause unnecessary suffering"; and weapons that would unnecessarily "destroy . . . the enemy's property."[41] The Treaty also outlawed "the attack or bombardment, by whatever means, [of] towns, villages, dwellings or buildings which are undefended" and mandated that "all necessary steps must be taken to spare . . . buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected. . . ."[42] Bombardment from the sea was similarly restricted by the Hague Convention (Naval Bombardment by Naval Forces in Time of War).[43] The final historic segment was the 1907 Hague Convention (Rights of Neutrals), which declared that "The territory of neutral powers is inviolate."[44]

In addition to the unparalleled degree of death and suffering caused by the initial thermal and blast waves, one of the uniquely terrifying aspects of nuclear bombs is the lingering painful death caused by poisonous radioactive fallout.[45] Of course, the widespread and indiscriminate destruction of entire undefended towns, villages, people, and buildings—of combatants and noncombatants, neutral and hostile parties—is also inherent in the detonation of nuclear

39. *Id.*

40. Meyrowitz, *Nuclear Weapons Policy: The Ultimate Tyranny*, 7 NOVA L.J. 93, 97 (1982).

41. Hague Convention, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539. The United States is a signatory.

42. *Id.*

43. Hague Convention Oct. 18, 1907, 36 Stat. 2351, 2363-64, T.S. No. 542. The United States is a signatory.

44. Hague Convention (Rights of Neutrals) Oct. 18, 1907, art. 1, 36 Stat. 2310, 2322, T.S. No. 540. *See also*, Hague Convention (Rights and Duties of Neutral Powers in Naval War) Oct. 18, 1907, art. I, 36 Stat. 2415, 2427, T.S. No. 545. The United States is a signatory to both these conventions.

45. *See supra* note 20 and accompanying text.

weapons.[46] It must, therefore, at the very least be "reasonable" to believe that the use of nuclear weapons violates both the letter and spirit of the *St. Petersburg Declaration* and the *Hague Convention*.

As the world advanced into the Twentieth Century, numerous other declarations of international law were issued and remain relevant to the issue of nuclear weapons. They will be summarized chronologically.

The 1919 Treaty of Peace With Germany repeated the illegality of "asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices."[47] In the 1922 Treaty in Relation to the Use of Submarines and Noxious Gases in Warfare, poisonous devices were regarded as "having been justly condemned by the general opinion of the civilized world."[48] Accordingly the signatories declared the prohibition of such devices was "universally accepted as part of international law binding alike the conscience and practice of nations."[49] The 1925 Geneva Protocol on Poison Gas and Bacteriological Warfare reiterated the international condemnation of weapons consisting of poisonous materials.[50] Without question, the lethal radiation of nuclear weapons—threatening extinction of all planetary life within months of widespread detonation[51]—makes their use a violation of these treaties.

In the 1928 Kellogg-Briand Treaty the major powers of the world entered into an historical agreement to "condemn recourse to war . . . [and to] renounce it as an instrument of national policy."[52] The parties pledged that the resolution of international disputes "shall never be sought except by pacific means."[53] Although Allied participation in World War II may be viewed as a necessary means to survive German and Japanese attacks—and thus not a violation of Kellogg-Briand—the United States official nuclear policy of "mutually assured destruction" is explicitly designed to terminate international disputes by ultimately terminating life on the planet. That

46. *Id.*

47. 1919 Treaty of Peace With Germany, June 28, 1919, art. 171, 2 Bevans 43.

48. Treaty in Relation to the Use of Submarines and Noxious Gases in Warfare, Feb. 6, 1922, art. V, 16 AM. J. INT'L L. Supp. 57.

49. *Id.*

50. 1925 Geneva Protocol on Poison Gas and Bacteriological Warfare, June 17, 1925, 26 U.S.T. 573, T.I.A.S. No. 8061, 94 L.N.T.S. 65.

51. *See supra* note 20 and accompanying text.

52. Kellogg-Briand Treaty: Renunciation of War as a National Policy, Aug. 27, 1928, art. I, 46 Stat. 2343, T.S. No. 796, 94 L.N.T.S. 57. The United States is a signatory.

53. *Id.*

doing so also violates international law becomes a macabre understatement.

The 1940 Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere was a pledge of signatories "to take appropriate measures . . . to prevent the threatened extinction of any given species" as well as its "natural habitat" and "native flora."[54] At first glance this may appear a mere treaty to protect wildlife. Only when one appreciates the capacity of nuclear weapons to devastate the entire planet does one realize that *all* species of flora and fauna—including that of *Homo sapiens*—are jeopardized by atomic weapons. At the very least, research, development, manufacture and stockpiling of nuclear weapons is not an "appropriate measure" for preserving an endangered species.

In the 1941 Atlantic Charter the United States and the Soviet Union, *inter alia*, recognized that "no further peace can be maintained if land, sea or air armaments continue to be employed by nations which threaten . . . aggression outside of their frontiers."[55] The two countries also agreed "that the disarmament of such nations is essential."[56] Accordingly, they pledged to "aid and encourage all other practical measures which will lighten for peace-loving people the crushing burden of armaments."[57]

Of more than passing significance is the world's preeminent international legal document, the 1945 *United Nations Charter*. In it the United States and others pledged to "refrain in their international relations from the threat or use of force . . . ."[58] In the United States, however, the increased production of various missiles designed to deliver atomic warheads and the production of nuclear weapons for such purpose violates both the spirit and letter of this treaty.

In the 1945 Nuremberg Charter the United States agreed that "planning [or] preparation of a . . . war in violation of international treaties, agreements, or assurances" constituted a "crime against peace."[59] The Charter also stated that "violations of the law or customs of war . . . , [including] wanton destruction of cities, towns or

54. Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere, Oct. 12, 1940, preamble, 56 Stat. 1354, T.S. No. 981, 3 Bevans 630.

55. Atlantic Charter, Declaration of Principles, Aug. 14, 1941, 55 Stat. 1603, E.A.S. No. 236. The United States is a signatory.

56. *Id.*

57. *Id.*

58. Chapter I, art. 2, sec. 4.

59. The Nuremberg Charter, *supra*, note 9. The United States is a signatory.

villages . . ." was a "war crime."[60] It next declared that "extermination . . . and other inhumane acts committed against any civilian population, before or during war . . ." were "crimes against humanity."[61] Finally, it asserted that official sanctioning of such international law violations by government would not absolve an individual from responsibility for such crimes.[62]

The conclusion appears quite reasonable—given the unparalleled capacity for wanton destruction of cities and extermination of civilian populations—the use of nuclear weapons would violate the Nuremberg Charter.

Turning particularly to the subject of genocide, its occurrence has long been regarded as a core human rights violation whose illegality under international law is unquestioned.[63]

In 1948 the United Nations Convention on the Prevention and Punishment of the Crime of Genocide included in its domain acts such as "killing members of the group; causing serious bodily injury or mental harm; inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; [and] imposing measures intended to prevent births. . . ."[64] Can it be gainsaid that nuclear weapons cause genocide in violation of this treaty?

The 1949 Geneva Convention pledges protection for civilians during war "against acts of violence or threats thereof . . ." and prohibits "any measure of such character as to cause physical suffering or exterminations."[65] The violence, pain, and civilian extermination caused by nuclear weapons make them a violation of this convention as well. Referring to this treaty, one scholar of international law has stated:

> Given the evidence developed by doctors and scientists as to the medical and environmental consequences of nuclear weapons, it is clear that it would be impossible under conditions of nuclear war to carry out the obligations of the Geneva Conventions, just as it

60. *Id.*

61. *Id.*

62. *Id.*

63. Blum & Steinhardt, *Federal Jurisdiction Over International Human Rights Claims*, 22 HARV. INT'L L.J. 53 (1981); *See also*, Edwards, *Contributions of the Genocide Convention to the Development of International Law*, 8 OHIO N.U.L. REV. 300 (1981).

64. Convention on the Prevention and Punishment of the Crime of Genocide, art. II, Dec. 9, 1948, 78 U.N.T.S. 277. Although over a hundred nations are signatories to this convention, the United States is not.

65. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 27, art. 32, 6 U.S.T. 3516, T.I.A.S. No. 3365, 911 U.N.T.S. 376. The United States is a signatory.

> would also be impossible to live up to the dictates of the Hague Conventions—both of which aim at preserving the minimum requirements for the continued survivability and viability of all societies involved in armed conflict.[66]

The use or threat of force is thus no longer a matter of discretion to be left in the hands of individual States, but is subject to international legal control.

Consistent with this well-established principle, a 1961 UN Resolution declares that nuclear weapons violate the *UN Charter*; their use is contrary to the laws of humanity and constitutes a crime against mankind.[67] Is this not a clear expression of the international illegality of nuclear arms?

In 1963 the Treaty Banning Nuclear Weapon Tests urged the "speediest possible achievement of an agreement on general and complete disarmament . . . which would put an end to the armaments race."[68] It also sought "to put an end to the contamination of man's environment by radioactive substances."[69] Five years later the Protocol to the Treaty for the Prohibition of Nuclear Weapons in Latin America endorsed a "total prohibition of the use and manufacture of nuclear weapons."[70] The parties recognized the following:

> That the incalculable destructive power of nuclear weapons has made it imperative that the legal prohibition of war should be strictly observed in practice if the survival of civilization and of mankind itself is to be assured.
>
> That nuclear weapons, whose terrible effects are suffering, indiscriminately and inexorably, by military forces and civilian populations alike, constitute, through the persistence of the radioactivity they release, an attack on the integrity of the human species and ultimately may even render the whole earth uninhabitable. . . .[71]

It is hard to imagine stronger international condemnation of the nuclear arms race and more official recognition of the capacity of nuclear weapons to annihilate mankind's existence.

Similarly the 1968 Non-Proliferation Treaty feared the "devas-

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66. Meyrowitz, *supra* note 40, at 99-100.

67. G.A. Res. 1653, 16 U.N. GAOR Supp. (No. 17) at, U.N. Doc. A/4942/Add. 3 (1961).

68. Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, Aug. 5, 1963, United States-Great Britain-U.S.S.R., preamble, 14 U.S.T. 1313, T.I.A.S. 5433, 480 U.N.T.S. 43.

69. *Id.*

70. Treaty for the Prohibition of Nuclear Weapons in Latin America, Feb. 14, 1967, preamble, 22 U.S.T. 754, T.I.A.S. 7137, 634 U.N.T.S. 326.

71. *Id.*

tation that would be visited upon all mankind by a nuclear war" and that "the proliferation of nuclear weapons would seriously enhance the danger of nuclear war."[72] The United States and other signatories declared "their intention to achieve at the earliest possible date the cessation of the nuclear arms race and to undertake effective measures in the direction of nuclear disarmament."[73] Moreover, the Treaty's stated objective was the "cessation of the manufacture of nuclear weapons, the liquidation of all their existing stockpiles, and the elimination from national arsenals of nuclear weapons and the means of their delivery. . . ."[74] The parties pledged to "pursue negotiations in good faith" relating to ending the nuclear-arms race and commencing nuclear disarmament.[75]

Over fifteen years have passed since this Treaty was signed. As yet there has been no cessation of the nuclear arms race, no commencement of nuclear disarmament—only a terrifying increase in the amount of nuclear arms, threats to use them, and the consequent probability of nuclear holocaust by accident or design.[76]

The 1971 Agreement to Reduce the Risk of Nuclear War underscored the "devastating consequences that nuclear war would have for all mankind."[77] However, the document focused only on organizational and technical arrangements" to prevent accidental nuclear war.[78] In that same year the Treaty on the Prohibition of Seabed Nuclear Weapons optimistically considered itself "a step towards a treaty on general and complete disarmament."[79]

Although there are as yet no legal instruments commanding general nuclear weapons disarmament, in 1972 another weapons proscription was established by international law. This occurred through the Convention on the Development, Production and Stock-

72. Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, preamble, 21 U.S.T. 483, T.I.A.S. No. 6839, 729 U.N.T.S. 160. The United States is a signatory.

73. *Id.*

74. *Id.*

75. *Id.*

76. As an example, over a single eighteen-month period, the United States Department of Defense admitted experiencing 151 false alarms of enemy attack, at least four of which placed United States missile and bomber crews on increased alert. N.Y. Times, Oct. 10, 1980 at A10, col. 2.

77. Agreement on Measures to Reduce the Risk of Outbreak of Nuclear War Between the U.S. and U.S.S.R., Sept. 30, 1971, United States-Soviet Union, 22 U.S.T. 1590, T.I.A.S. No. 7186.

78. *Id.*

79. Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof, Feb. 11, 1971, preamble, 23 U.S.T. 701, T.I.A.S. No. 7337, 955 U.N.T.S. 115.

piling of Bacteriological and Toxic Weapons.[80] Its terms prohibit "microbial or other biological agents or toxins whatever their origin."[81] Because plutonium released from nuclear weapons is the single most lethal microbial or biological agent known to mankind,[82] this post-nuclear convention further emphasizes the illegality of atomic weapons under international law.

The 1973 Agreement Between the U.S. and the USSR on the Prevention of War reiterated the premise that "nuclear war would have devastating consequences for mankind."[83] This was followed by the 1977 Geneva Protocol on Humanitarian Law, which prohibited "methods or means of warfare which . . . cause widespread, long-term and severe damage to the natural environment."[84] Also proscribed were weapons or tactics that cause indiscriminate harm to both combatants and noncombatants.[85] Thus even within the last decade international law has sought to avoid nuclear holocaust by creating agreements based on the premise that the use of nuclear arms is illegal.

Turning now to sources of international law other than treaties and conventions, the first example of judicial condemnation of nuclear weapons was Japan's 1964 *Shimoda* case.[86] After an exhaustive analysis—touching on many of the points previously mentioned here—the court held that the atomic bombing of Hiroshima and Nagasaki in 1945 was prohibited under international law:

> It is a deeply sorrowful reality that the atomic bombing on both cities of Hiroshima and Nagasaki took the lives of many civilians, and that among the survivors there are people whose lives are still imperilled owing to the radial rays, even today 18 years later. In this sense, it is not too much to say that the pain brought by the atomic bombs is severer than that from poison and poison-gas, and we can say that the act of dropping such a cruel bomb is contrary to the fundamental principle of the laws of war that unnecessary

80. 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxic Weapons and on their Destruction, Apr. 10, 1972, 26 U.S.T. 583, 587. The United States is a signatory.

81. *Id.*

82. H. CALDICOTT, NUCLEAR MADNESS (1982).

83. Agreement Between the United States of America and the Union of Soviet Socialist Republics on the Prevention of Nuclear War, June 22, 1973, 24 U.S.T. 1478, T.I.A.S. 7654.

84. 1977 Geneva Protocol on Humanitarian Law Applicable in Armed Conflict, Aug. 15, 1977, U.N. Doc. A/32/144, 16 I.L.M. 1391.

85. *Id.*

86. *Reported in*, THE JAPANESE ANNUAL OF INTERNATIONAL LAW 212-52 (No. 8, 1964).

pain must not be given.[87]

The court reached the above conclusions of illegality despite arguments that the bombing was not illegal because no law at that time specifically proscribed nuclear weapons.[88]

In accord with *Shimoda*, numerous international law texts addressing the status of nuclear weapons have supported the "reasonable" conclusion of their illegality.[89] In discussing *Shimoda*, a leading international law scholar has made the following observation about the illegality of atomic weapons:

> [A] prohibition need not be direct or express to be applicable. By interpreting the spirit of existing rules or by extending their coverage through analogical reasoning it is possible to say that a new development is embraced within the earlier prohibition. Furthermore, wider principles of international law underlie the specific rules, and, if the use of the new weapon violates these principles, it violates international law without requiring any specific rule. Thus a court is free to conclude that atomic warfare violates international law, at least under certain circumstances, even in the absence of an express prohibition.[90]

Another international scholar summarized arguments concerning the use or threatened use of nuclear weapons and concluded:

> [T]he legality of nuclear weapons cannot be judged solely by the existence or non-existence of a treaty rule specifically prohibiting or restricting their use. Any reasonable analysis must take into consideration all the recognized sources of international law—treaties, custom, general principles of law, judicial decisions and the writing of qualified publicists. Of particular relevance in evaluating nuclear weapons are the many treaties and conventions which limit the use of weapons in war; the fundamental distinction between combatant and non-combatant; and the principles of humanity including the prohibition of weapons and tactics that are especially cruel and cause unnecessary suffering. A review of these basic principles supports the conclusion that the threat or use of nuclear weapons pursuant to either a doctrine of massive retaliation, mutual assured destruction, counterforce, or limited nuclear

87. *Id.* at 241-42.

88. *Id.*

89. *See e.g.*, R. Falk, L. Meyrowitz, & J. Sanderson, *Nuclear Weapons and International Law*, World Order Studies Program Occasional Paper No. 10, 27-71 Center of International Studies, Princeton University, (1981); Meyrowitz, *The Status of Nuclear Weapons Under International Law*, 38 GUILD PRACTITIONER 65 (1981).

90. Falk, *The Shimoda Case: A Legal Appraisal of the Atomic Attacks Upon Hiroshima and Nagasaki*, 59 AM. J. INT'L L. 759, 771 (1965).

war, is illegal under international law.[91]

Moreover, from an entirely different standpoint the use of nuclear arms can be reasonably labeled illegal. Fundamental principles of international law require that in any context—including war or the threat of war—the use of force be subject to the criterion of proportionality.[92] By what stretch of the imagination can the genocidal forces released by nuclear weapons be deemed proportional? For example, the *Shimoda* case, held that the twelve kiloton bombs dropped on Hiroshima and Nagasaki were illegal under international law.[93] Yet compared to the size of nuclear bombs carried in each of today's cruise missiles, the military regards the Hiroshima-Nagasaki weapons as merely "tactical."[94]

A final consideration is a basic premise of international law, that controlling the wantonly destructive forces of war will hasten the return to a peaceful condition. Since the use of nuclear weapons will, in all probability, leave no habitable planet on which to experience a peaceful condition, it should at the very least be "reasonable" to regard the use of nuclear weapons as illegal under international law.

C. Domestic Law Recognizes the Citizen's Privilege to Take Reasonable Steps to Prevent the Commission of Crime

The crime prevention privilege is summarized in one standard treatise of Anglo-American criminal law:

> [A]ny unoffending person may intervene for the purpose of preventing the commission or consummation of any crime if he does so without resorting to measures which are excessive under all the facts of the particular case.[95] The question is not whether force may be used but only under what circumstances and to what

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91. Meyrowitz, *supra* note 40, at 96-97.

92. *See* McDougal, *The Soviet-Cuban Quarantine and Self-Defense*, 57 AM. J. INT'L L. 597-98 (1963); 12 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 46 (1971); J. SCOTT, THE HAGUE CONVENTIONS AND DECLARATIONS OF 1899 AND 1907 (1915); G. DRAPER, THE RED CROSS CONVENTIONS (1958).

93. *Supra* note 86.

94. J. SCHELL, THE FATE OF THE EARTH 36 (1982).

95. R. PERKINS & R. BOYCE, CRIMINAL LAW 1108-09 (3d ed. 1982).

"One, not necessarily a police officer, is justified in using reasonable force to prevent or terminate what he reasonably believes to be the commission of a misdemeanor amounting to a breach of the peace or of a felony." W. LA FAVE & A. SCOTT, CRIMINAL LAW 403 (1972).

Although this Article deals only with the prevention of crime under international law, there is a related privilege that may be concurrently invoked:

> Important privileges overlap. They are the privilege (1) to intervene for the purpose of preventing the perpetration of crime and (2) to defend person or property. To the extent of the overlap both privileges are available to the one thus benefited. "It is not necessary that he should intervene solely for the purpose of protecting the public

> extent. Any amount of such force is privileged if reasonably believed to be necessary for this purpose.[96]

Virtually all jurisdictions within the United States recognize this privilege either through statute or case law.[97] In fact, there is a statutory trend to increase the scope of the privilege beyond its common law limits.[98]

Of the various elements of the non-traditional Nuremberg Defense, the crime prevention component is the least susceptible to argument from precedent. This is partly because crime prevention is a novel defense in protest cases, but also because the crime prevention privilege itself relies heavily upon the concept of reasonable belief. Although it is axiomatic that a reasonable belief is one honestly entertained and created by attendant circumstances,[99] reasonableness itself is an elastic term, depending upon a multitude of considerations and circumstances.

As a general rule courts will find a belief to be reasonable if a positive correlation exists between an actor's perception of his or her surroundings and his or her knowledge of what has gone before.[100] In cases of protest against nuclear arms, a positive correlation must be demonstrated between the increasing numbers, types, and availability of nuclear arms and the increasing likelihood that such weapons will, by design or accident, be detonated. Put simply, it must be shown that it is reasonable to believe that the arms race inevitably leads to the arms use.

To be sure, some correlations forming ingredients of the nuclear arms issue have been so tested in tort litigation that their reasonableness is regarded as axiomatic, for example, that explosives are dan-

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> order or of protecting the private interests imperiled. His act, though a single one, may well be done for both purposes. If so, either privilege is available to him."

PERKINS & BOYCE, *supra*, at 1108, *quoting* RESTATEMENT (SECOND) OF TORTS, Scope Note to ch. 5, topic 2, at 250 (1965).

The privilege to defend one's property appears under various labels: "duress;" "coercion;" "compulsion;" "justification;" "necessity;" (conceptually synthesized under California law in *People v. Pena*, 149 Cal. App. 3d Supp. 14 (1983)); and "the choice-of-evils" defense.

96. PERKINS & BOYCE, *supra* note 95, at 1109.

97. *See, e.g.*, CAL. PENAL CODE §§ 692-94 (crime-prevention privilege generally); 197 (privilege to take human life) (Deering 1983); N.Y. PENAL LAW §§ 35.00-35.25 (McKinney 1975); IOWA CODE §§ 704.1-704.9 (1975).

98. PERKINS & BOYCE, *supra* note 95, at 1111. The trend would allow the privilege to prevent non-violent crimes against property as well as those threatening bodily harm and a breach of the peace. *Id.* *See, e.g.*, MODEL PENAL CODE § 3.07(5).

99. Howard v. State, 110 Ala. 92, 20 So. 365 (1896).

100. *See* RESTATEMENT (SECOND) OF TORTS § 289 (1965).

gerous,[101] that heavy objects fall,[102] that fire burns[103] and will cause flammable objects to catch fire,[104] and that in certain situations fellow citizens have a propensity toward negligence and crime.[105] Courts have also deemed reasonable an assortment of beliefs concerning human capacities, reactions and normal habits.[106]

But correlating the nuclear arms race with nuclear arms use cannot be done by stitching together truisms of physics and psychology. Rather, it requires the court to take a broad, common sense view of history. It must be kept in mind, however, that the burden is not to prove the correlation absolute—or that what protesters believe to be true is in fact true—but merely that the belief in such a correlation was reasonable. As Perkins and Boyce point out:

> [A]lthough it is possible to find an occasional suggestion indicating otherwise, the reasonable mistake of fact doctrine applies to such [crime prevention] cases and the privilege to use force, and the degree of permissible force, are determined not by the actual facts in this regard, but by the reasonable belief of the intervenor as to the crime being committed or attempted and the force needed for its prevention.[107]

Of course, the arguments here will be as varied as the beliefs of each person involved. Summarized in rhetorical form, however, the following points are basic to most protests against nuclear arms: (1) Since the invention of crossbows, gunpowder, machine-guns, poison-gas, airplanes, and submarines, when has any weapon ever been adapted for military purposes and *not* used in warfare? (2) Was the nuclear bombing of two Japanese civilian centers a mistake? (3) Would any nation, especially of the character of the United States or the Soviet Union, be likely to surrender in war when it possessed weapons capable of destroying the enemy? (4) Would any military

101. City of Waco v. Dool, 254 S.W. 353, 354 (Tex. Civ. App. 1923).

102. Blomberg v. Trupukka, 210 Minn. 523, 299 N.W. 11 (1941).

103. Gates v. Boston & M.R.R. Co., 255 Mass. 297, 151 N.E. 320 (1926).

104. Lillibridge v. McCann, 117 Mich. 84, 75 N.W. 288 (1898); Gates v. Boston & M.R.R. Co., 255 Mass. 297, 151 N.E. 320 (1926).

105. *See*, RESTATEMENT (SECOND) OF TORTS §§ 290, 302 (1965). Accordingly, courts have deemed it *un*reasonable to be ignorant of certain scientific advances as they become available. *See e.g.*, Marsh Woods Products Co. v. Babcock & Wilcox Co., 207 Wis. 209, 240 N.W. 392 (1932); Zesch v. Abrasive Co., 353 Mo. 558, 183 S.W. 2d 140 (1944). It maybe drawn from this latter point that the scientific evidence concerning nuclear winter is so well documented and available to the public, that either the court's or jury's failure to recognize the correlation between nuclear-arms detonation and global annihilation would be so unreasonable as to amount to "negligence" on the part of the factfinder.

106. RESTATEMENT (SECOND) OF TORTS § 290 (1965).

107. PERKINS & BOYCE, *supra* note 95, at 1111.

field commander be likely to see his position overrun, his army captured, while still in possession of sixty-pound "tactical" nuclear weapons?[108] (5) With numerous "mistakes" occurring with United States nuclear weapons in the last twenty years, isn't it increasing likely that some future mishap may trigger an inter-continental nuclear exchange?

Appropriate responses to such questions may be provided through judicially noticeable facts as well as experts in weapons, computers, military history, sociology, and psychiatry. It is necessary to identify the basis of each individual's reasons for believing the availability of nuclear arms will lead to their use. In this connection it is important to point out that just as those with superior knowledge of certain fields have their reasonableness judged by standards of other experts in the field,[109] so should the beliefs of protestors who have participated in scholarly study of the history and politics of the nuclear arms race.

As shown at the outset of this section, the second prong of the crime prevention privilege consists of showing the actor's crime prevention *means* were reasonable. Most cases of nuclear protest involve persons whose crime prevention efforts consisted of drawing public attention to and exerting political pressure upon nuclear arms facilities through their use of peaceful trespass or passive blockades. Thus, it appears quite plausible that, compared to the global annihilation threatened by nuclear arms, a passive protestor's means of prevention is reasonable.

But even more violent actions have a valid claim to the crime prevention privilege. Since the law deems even deadly force reasonable to prevent the commission of crime likely to cause death or serious bodily harm,[110] *a fortiori* any action short of deadly force should be reasonable to prevent nuclear Armageddon. Indeed, as has been observed by leading commentators on the use of force in Anglo-American law, where the threatened harm is especially great, reasonable preventive action may consist of greater precautions than may be normally required.[111]

As with the issue of reasonable belief, examples of reasonable

108. For nearly thirty years United States Army manuals have instructed commanders that the use of nuclear weapons would not violate international law. *See* DEPARTMENT OF THE ARMY FIELD MANUAL, 27-10, para. 35 (1956).

109. RESTATEMENT (SECOND) OF TORTS § 289, COMMENT M (1965).

110. PERKINS & BOYCE, *supra* note 95, at 111-12.

111. *See* RESTATEMENT (SECOND) OF TORTS § 302A (1965). Although this section concerns actions *required* of a tort plaintiff to qualify as reasonable, the same rationale appears to

means vary with the circumstances of the situation. Yet here, too, common points can be suggested in rhetorical form. (1) In light of the fact that incoming intercontinental missiles give at the most thirty minutes warning to United States citizens, how can any preventive action be effective if one waits for the civil-defense sirens? (2) To be reasonable, must not any preventive action take place well in advance of that time?[112] (3) What can be more reasonable in a media conscious democracy than informing industrial and governmental officials that they are in violation of international law? (4) Were not significant strides in racial and sexual justice accomplished during the last thirty years by just this type of action?

The defense may be confronted with the argument that "other means are more reasonable" than those undertaken. Here, however, the degree of reasonableness, measured on some sliding scale of alternative activity, is not the legal standard. The issue is whether the actions were reasonable,[113] not whether some other hypothetical actions would have been. Nevertheless, it may still be necessary to point out the many United Nations Resolutions demanding the stop of the nuclear arms race,[114] similar resolutions passed by over 150 towns in one state alone,[115] the nationwide passage of a nuclear-weapons-freeze resolution in 1982,[116] the Nuclear Weapons Freeze Resolution passed by the House of Representatives,[117] and the scores of domestic and international demonstrations involving millions of citizens protesting nuclear arms.[118] Because none of these actions has been successful in halting the continued research, development, stockpiling, and deployment of nuclear arms, protest actions should appear at least reasonable.

It is also important to note that individuals have no access to the

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apply to *permissible* actions. The late Professor Prosser expressed this concept with the following formula:

> The duty to take precautions against the negligence of others [is] merely a matter of the customary process of multiplying the probability that such negligence will occur by the magnitude of the harm likely to result if it does, and weighing the result against the burden upon the [other party] of exercising such care.

W. PROSSER, LAW OF TORTS 172 (4th ed. 1971).

112. *See* Environmental Defense Fund v. Environmental Protection Agency, 465 F.2d 528 (D.C. Cir. 1972) (preventative action intended to protect the planet and its environment requires more "lead time" than mere hours or days).

113. PERKINS & BOYCE, *supra* note 95 at 1108-9.

114. *See supra* note 21(a) and accompanying text.

115. *See supra* note 21(b) and accompanying text.

116. *See supra* note 21(f) and accompanying text.

117. *See supra* note 21(c) and accompanying text.

118. *See supra* note 21 and accompanying text.

International Court of Justice;[119] that it is unlikely the United States government will prosecute its own officers or contractors in any forum as international criminals; and that after the actual use of nuclear weapons it is extremely unlikely that anyone will remain to prosecute or be prosecuted for committing crimes against peace, war or humanity. In the light of such futile forensic alternatives, any protest actions should be viewed as reasonable.

Ultimately the question of reasonableness is a question of fact to be determined by a jury of the protestors' peers.[120] No judicial finding of the illegality of nuclear arms is required in order to exonerate the nuclear-arms protestors.[121]

III. CONCLUSION

Today's criminal courts increasingly see defendants who have protested the research, manufacturing, deployment, and threatened use of nuclear weapons. The legal system must squarely and rationally face the terrifying issue these cases present; the potential annihilation of all life on the planet. The non-traditional Nuremberg Defense provides a viable approach to this issue. Under this defense protestors rely on the conventional crime prevention privilege, but link it to international law to show that the target of their protest was involved in international crime. Thus the central issue becomes whether it was reasonable for the defendants to believe that the research, manufacture, deployment, or threatened use of nuclear arms was in violation of law. That this issue is largely one of fact to be resolved by a jury enables courts to avoid the constitutional pitfalls of political questions and of separation of powers. Because a central

119. Statute of the Int'l Court of Justice, Art. 34.1 (1945).

120. *See, e.g.*, People v. Williams, 75 Cal. App. 3d 731, 142 Cal. Rptr. 704 (1977) (the issue of reasonableness of force is a question of fact for the jury to determine); People v. Young, 214 Cal. App. 2d 641, 646, 29 Cal. Rptr. 595 (1963); Lowry v. Standard Oil Co., 54 Cal. App. 2d 782, 790-91 (1941) (The jury must determine whether "a reasonable man, situated as defendant was, seeing what he saw, and knowing what he knew, would be justified in believing himself in danger.").

121. To the judge who invokes the doctrines of political question or separation of powers, it should be pointed out that no judicial holding is required concerning the legality of nuclear arms. *See* Baker v. Carr, 369 U.S. 186, 209 (1962). Rather the defense requests the simple and uniquely judicial function of admitting evidence so that the jury can determine as a matter of *fact* whether the defendants believed and acted upon bases that were *reasonable.* To the judge who challenges the defendant's "standing" to bring such a defense, it should be observed that standing is a concept used in the limited jurisdiction of federal courts to dismiss plaintiffs' civil actions. *See, e.g.*, Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976); Flast v. Cohen, 392 U.S. 83 (1968), (not criminal defendants with the constitutional right under the Fifth Amendment to present their defense).

function of the judicial system is to control the use of force, and nuclear arms represent mankind's ultimate force, the resolution of this issue may well be the courts' ultimate challenge.