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The Legality of Nuclear Weapons: A Response to Corwin

Eric J. G. McFadden*

I. Introduction

In an article published in the Spring, 1987 issue of this journal,¹ author David Corwin presents a cogent and thought-provoking argument in support of his contention that the use of nuclear weapons is illegal under international law. Corwin's article is one of the latest in a series of works in recent years that have advanced this argument in one form or another.² While I share these writers' revulsion of nuclear weapons, I must part company with their contention that current principles of international law render the possession or use of such armaments illegal under all circumstances. Corwin's comprehensive analysis provides an excellent framework for examining the validity of these arguments. It will be my contention in this article that text of relevant treaty provisions, principles of customary international law and state practice rebut Corwin's assertion that the use of nuclear weapons is circumscribed under international law.

At this point, the reader may fairly ask the question: assuming, *arguendo*, that nuclear weapons can be legally deployed and used in battle, what purpose is served by presenting such a discouraging message in a public forum? It is my belief that the efforts of the

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1. Corwin, *The Legality of Nuclear Arms Under International Law*, 5 DICK. J. INT'L L. 271 (1987).

2. See, e.g., C. WEERAMANTRY, *NUCLEAR WEAPONS AND SCIENTIFIC RESPONSIBILITY* (1987); Arbes & Sahaydachny, *Nuclear Deterrence and International Law: Some Steps Toward Observance*, 17 ALTERNATIVES 83 (1987); *NUCLEAR WEAPONS AND LAW* (A. Miller & M. Feinrider eds. 1984) [hereinafter Miller & Feinrider]; Rubin, *Nuclear Weapons and International Law*, FLETCHER FORUM 45 (Winter 1984); Weston, *Nuclear Weapons Versus International Law: A Contextual Reassessment*, 28 MCGILL L. REV. 342 (1984); Falk, *Is Nuclear Policy A War Crime?*, 11 HUMAN RIGHTS 18 (1983); Fried, *International Law Prohibits The First Use of Nuclear Weapons*, 16 REVUE BELGE DE DROIT INTERNATIONAL 33 (1981-82); Fujita, *First Use of Nuclear Weapons: Nuclear Strategy vs. International Law*, 3 KANSAS U. REV. L. & POL. 57 (1982); Falk, Meyrowitz & Sanderson, *Nuclear Weapons and International Law*, 20 INDIAN J. INT'L L. 541 (1981) [hereinafter *Nuclear Weapons and International Law*]. For an excellent summary of legal analyses on this issue in the last forty years, see Meyrowitz, *The Opinions of Legal Scholars on the Legal Status of Nuclear Weapons*, 24 STAN. J. INT'L L. 111 (1987).

world community to create a safer and saner world through nuclear arms control negotiations would actually be enhanced by reconciling itself to the fact that international law, at least in its current state of development, does not render nuclear weapons illegal. This is true for two reasons.

First, those who steadfastly insist that nuclear weapons are illegal might do well to heed the admonition of Sophocles that "What you cannot enforce, do not command."³ Even if we accept the proposition that nuclear weapons are "illegal," the brutal fact remains that superpowers and their allies have blatantly and consistently defied this precept. The United States and the Soviet Union currently possess approximately 50,000 nuclear weapons between them,⁴ and both sides have stated their intention to use these weapons under certain circumstances.⁵ China, while maintaining a relatively small arsenal of only approximately 300 to 400 warheads, has embarked on a program to modernize and expand its forces at the rate of 10-20% per year.⁶ In Europe, Great Britain and France maintain substantial stockpiles of nuclear weapons and both nations have launched modernization programs in recent years.⁷ Finally, a number of other nations have developed, or are on the threshold of developing, the capability to produce nuclear weapons. This growing list includes Israel,⁸ India,⁹ Argentina,¹⁰ Brazil,¹¹ Iraq,¹² Pakistan,¹³ and South Africa.¹⁴

3. SOPHOCLES, OEDIPUS AT COLONUS.

4. Forsberg, *The Freeze and Beyond*, in *THE FUTURE OF ARMS CONTROL* (D. Ball & A. Mack, eds. 1987), at 70, NUCLEAR WEAPONS DATABOOK WORKING PAPER 87-2, U.S. Nuclear Stockpile 1980-1987 (1987).

5. See, e.g., Rubin, *supra* note 2, at 50 n.10; Rosas, *Negative Security Assurances and Non-Use of Nuclear Weapons*, 25 GERMAN Y.B. INT'L L. 199, 201-02 (1982).

6. SIPRI, WORLD ARMAMENTS AND DISARMAMENT YEARBOOK 67 & 103 (1986).

7. *Id.* at 60-67; see also NATIONAL ACADEMY OF SCIENCES, NUCLEAR ARMS CONTROL: BACKGROUND AND ISSUES 16 (1985).

8. Mordechai Vanunu, a former technician in Israel's nuclear program claims that Israel may currently possess between 100 and 200 nuclear weapons and began producing a form of advanced nuclear weapon that relies on thermonuclear fusion, the principle of hydrogen bombs, in the early 1980s. Spector, *Nuclear Proliferation: Who's Next?*, BULL. ATOM. SCI., May 1987, at 17; see also Cohen & Frankel, *Israel's Nuclear Ambiguity*, BULL. ATOM. SCI., Mar., 1987, at 15.

9. One recent study projects that within several years India may have the capability to produce 6-20 weapons annually. L. SPECTOR, NUCLEAR PROLIFERATION TODAY 55-56 (1984); see also Thomas, *India's Nuclear Programs And The Nuclear Non-Proliferation Treaty*, 5 WIS. INT'L L.J. 108, 109 (1986); Hazarika, *India Tests Its Own Surface-to-Surface Missile*, N.Y. Times, Feb. 26, 1988, at A5. By 1991, India may possess more than 100 bombs of the size that destroyed Hiroshima. Spector & Stahl, *Cooling The Arms Race In South Asia*, BULL. ATOM. SCI., April, 1988, at 32.

10. Nye, *The Logic of Inequality*, 59 FOREIGN POL'Y 126 (1985); see also, Poneman, *Nuclear Proliferation Prospects For Argentina* 27 ORBIS 876 (1984).

11. Myers, *Brazil: Reluctant Pursuit of the Nuclear Option*, 27 ORBIS 906 (1984); see also Redick, *Latin America: Reducing The Threat of Nuclear Proliferation*, 5 WIS. INT'L L.J. 79, 94-96 (1986).

12. L. SPECTOR, *supra* note 9, at 188.

13. Pakistan may currently have the capability to produce three nuclear warheads per year. Kumar, *Nuclear Nexus Between Peking and Islamabad: An Overview of Some Signifi-*

One recent study has projected that as many as twenty nations may have a nuclear weapons capability by 1995.¹⁶ Most of the newcomers to the "nuclear club" have pursued the development of nuclear weapons as a response to perceived threats from inveterate regional enemies.¹⁶ In the face of this reality, any claim that nuclear weapons are illegal only breeds disrespect for the international legal system, as its impotence to enforce this purported legal principle is demonstrated daily.

Second, polemics by national policy makers devoted to the legality or illegality of nuclear weapons diverts their attention from efforts to develop viable arms agreements that may enhance strategic stability and world security. As one commentator has recently concluded, the "moralized conception of nuclear weaponry . . . has militated against diplomacy. It has deflected attention from the possibility of collaboration based on mutual interests (such as the prevention and management of regional crises) by its stress on the alleged incompatibility of fundamental values."¹⁷ As disheartening as the fact may be, the international legal system is likely to have virtually no influence over the military decision-making of a nation that considers the possession of nuclear weapons to be an indispensable component of national security.

This Article will attempt to demonstrate that the use of nuclear weapons is a legal method of warfare under a broad range of circumstances. It is my hope that by demonstrating the futility of the line of reasoning pursued by Mr. Corwin and others, I can encourage a reorientation of efforts in the direction of meaningful negotiations to reduce the peril of the nuclear arms race. In this pursuit, I will first address Mr. Corwin's contention that certain international treaties, as well as principles of customary international law, render the use of nuclear weapons illegal under virtually all circumstances. Second, I will examine the inapplicability of principles of international law in the context of nuclear weapons. Finally, I will suggest some alternative proposals that might more efficaciously contribute to

cant Developments, 21 ISSUES & STUDIES 143 (1985); see also Kapur, *Nuclear Proliferation: A False Threat?*, 10 INT'L PERSP. 9 (1984). By 1991, it has been estimated that Pakistan could have as many as 15 devices the size of that which destroyed Hiroshima. Spector & Stahl, *supra* note 9, at 32.

14. "With its own uranium enrichments plants, South Africa may now have the capability to produce 15-25 devices, soon maybe 40, the same size as the U.S. arsenal in 1948." SPECTOR, *supra* note 9, at 304-05; see also Kapur, *supra* note 13, at 7-8; Pabian, *Reviewing The Evidence on South Africa And The Bomb*, BULL. ATOM. SCI., April, 1988, at 47.

15. Sakamoto, *Reversing Militarized Proliferation in the Asia-Pacific Region*, 2 NON-ALIGNED WORLD 400 (1984).

16. McFadden, *Nuclear Weapons Free Zones: Toward An International Framework*, 16 CAL. W. INT'L L.J. 217, 219 (1986).

17. Malcomson, *Moral Virtue and Nuclear Strategy*, 2 PEACE & SECURITY, Autumn, 1987, at 4-5.

helping the world retreat from the abyss of a nuclear holocaust.

II. Nuclear Weapons and the Laws of War

A. Overview

At the outset of his article, Corwin correctly observes that "no treaty explicitly addresses the legality of all uses of nuclear weapons."¹⁸ Indeed, as several commentators have observed, there is no treaty of a global character that bans the use of nuclear weapons under *all* circumstances.¹⁹ This fact is particularly problematical for Corwin's analysis in light of the Permanent Court of International Justice's decision in *The Case of the S.S. Lotus*.²⁰ In the *Lotus* case, the government of Turkey sought to prosecute the captain of a French steamer that collided with a ship flying the Turkish flag on the high seas. The French government contended that Turkey could not claim jurisdiction over a French citizen in an accident that occurred on the high seas absent "some title to jurisdiction recognized by international law in favour of Turkey."²¹ The Turkish government countered this argument by contending that it could properly assume jurisdiction absent proof that this act would contravene a principle of international law.

In upholding Turkey's assumption of jurisdiction, the World Court established the now universally-recognized principle that a nation is permitted to take any action that is not explicitly proscribed under principles of international law. The Court based its holding on the consensual nature of international law, averring:

International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between those co-existing independent communities or with a view to the achieve-

18. Corwin, *supra* note 1, at 272.

19. See, e.g., Rosas, *Negative Security Assurances and Non-Use of Nuclear Weapons*, 25 GERM. Y.B. INT'L L. 199, 201 (1982); Bring & Reimann, *Addressing A Wrong Question: The 1977 Protocols Additional To The 1949 Geneva Conventions And The Issue of Nuclear Weapons*, 33 NETH. INT'L L. REV. 99, 99 (1986); DeGarmo & Richards, *Are Nuclear Weapons Illegal?*, 5 CAL. LAW. 9, 9 (1985). While several international agreements bar use of nuclear weapons in limited geographical areas, such as the Treaty for the Prohibition of Nuclear Weapons in Latin America, Feb. 14, 1967, 22 U.S.T. 754, T.I.A.S. No. 7137, 634 U.N.T.S. 281, the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S.L. 205, and the Treaty on the Prohibition of the Employment of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and Ocean Floor, Feb. 11, 1971, 23 U.S.T. 701, T.I.A.S. No. 7337, 995 U.N.T.S. 115, none of these agreements declare that nuclear weapons are illegal in a general sense. Bring & Reimann, at 100 n.1.

20. (1927) P.C.I.J., ser. A, No. 9 (France v. Turkey) [hereinafter *S.S. Lotus*].

21. *Id.* at 21.

ment of common aims. Restrictions upon the independence of States cannot therefore be presumed.²²

Finding no principle of international law that limited the freedom of a nation to assume jurisdiction under the circumstances of the case, the Court held that Turkey could legitimately try the French national in its courts.²³

The overarching principle established in the *Lotus* case is germane to the determination of the legality of nuclear weapons. The absence of an explicit agreement by the nations of the world to render nuclear weapons illegal establishes a strong presumption against any assertion that such a rule exists.

Corwin seeks to counter this contention by maintaining that several treaties and principles of customary international law restrict the use of nuclear weapons because of "the inevitable consequences and effects that would stem from any use of nuclear weapons."²⁴ At this point, Corwin is certainly on unsteady ground, as he is reduced to arguing that nuclear weapons are, at the most, only *impliedly* rendered illegal by international agreements and customary principles of international law.

Additionally, it is difficult to conceive of a more paramount attribute of national sovereignty than the right to protect the State's security interests. As a consequence, the *Lotus* court's admonition that restrictions on sovereignty should never be presumed is particularly salient in the context of the debate about the legality of nuclear weapons.²⁵

B. *Unnecessary Suffering*

Corwin argues at the outset of this section of his article that international law requires combatants to "minimize the degree of suffering and destruction caused to opposing forces," citing the 1868 Declaration of St. Petersburg and the Hague Convention in 1907.²⁶

22. *Id.* at

23. *Id.* at

24. Corwin, *supra* note 1, at 272-73.

25. See also Almond, *Nuclear Fear Shall Make Us Free* 11 HUMAN RIGHTS, Winter, 1983, at 24 [hereinafter Almond, *Nuclear Fear*]. Additionally, domestic courts are usually chary to give a liberal construction to statutes that carry criminal penalties because of the gravity of the sanctions attendant to conviction. Similarly, *jus in bello* principles should be narrowly construed as individual combatants found to have violated such laws are subject to criminal conviction as war criminals. See, e.g., Baxter, *So Called 'Unprivileged Belligerency': Spies, Guerrillas and Saboteurs*, 23 BRIT. Y.B. INT'L. 323 (1951); *Ex Parte Quirin*, 317 U.S. 1, 31, 34, 36 (1942). As a consequence, we should be hesitant to read "implied" limitations on the use of certain weapons into such laws absent compelling evidence that such conduct was intended to be proscribed.

26. Corwin, *supra* note 1, at 273-74; see also St. Petersburg Declaration, 1868, reprinted in 1 AM. J. INT'L L. 95-96 (Supp. 1907); see also The Hague Convention Respecting the Law and Customs of War on Land 1907, art. 23, 36 Stat. 2277, T.S. No. 539 (effective Feb. 28, 1910) [hereinafter Hague Convention].

Corwin also cites the prohibition of means of warfare that result in "treacherous killing" or "unnecessary suffering" outlined in the Hague Convention.²⁷ While Corwin vows to apply only the "literal meaning" of these documents,²⁸ the long history of disputes between States involving treaty interpretation demonstrates the fact that "cases when . . . the unambiguity of the text is so much beyond doubt as to make any further investigation unnecessary, are extremely rare."²⁹ The Hague Convention and the Declaration of St. Petersburg are well-recognized customary principles of international law. However, Corwin immediately runs into trouble when he strives to apply the broad language of these principles in the context of nuclear weapons. First, he is forced to admit that the term "unnecessary suffering" in Article 23 of the Hague Convention is an "inherently pliable" concept that is simply too vague to render the use of nuclear weapons in combat expressly illegal:

The standard used to determine whether or not the use of a particular weapon constitutes unnecessary suffering has never been authoritatively set forth . . . The most common standard of "unnecessary suffering" balances the harm caused by the weapon against the necessity of the military goals sought to be achieved . . . An argument can be made that the use of nuclear weapons does not violate either standard. A nation can point to the necessity of a particular usage of nuclear arms using traditional national defense and national security justifications . . . [T]he great elasticity of this standard suggests that this defense would be invoked as a matter of course, no matter what degree of destruction was wrought upon a particular population.³⁰

While Corwin seeks to salvage this argument by asserting that any combatant's invocation of military necessity to justify the use of nuclear weapons would have to be tested on a case-by-case basis, this is a substantial retreat from his overarching contention that nuclear weapons are illegal *per se*.

Corwin's invocation of the Hague Convention's "unnecessary suffering" language is infirm for two additional reasons. First, while Corwin charitably terms this language "inherently pliable," in reality it establishes no standard at all by which to test standards of conduct in times of war. While the term "unnecessary" perhaps was left undefined in the Hague Convention to avoid controversy among treaty signatories, some have suggested that a reasonable definition of the concept would be any suffering which is unnecessary "in rela-

27. Corwin, *supra* note 1, at 274.

28. Corwin, *supra* note 1, at 273.

29. G. HARASZTI, SOME FUNDAMENTAL PROBLEMS OF THE LAW OF TREATIES 94 (1973).

30. Corwin, *supra* note 1, at 274-75.

tion to the military advantage to be derived from the use of the weapon."³¹ This definition closely parallels the customary *jus in bello* principle of proportionality which requires that "the loss of life and damage to property must not be out of proportion to the military advantage to be gained."³² The problem posed by this balancing test is that one is compelled to weigh two unlike quantities and values. How does one weigh the saliency of a military objective against the possible loss of life that might occur in pursuing that objective? The simple fact is that this section of the Hague Convention is ill equipped to provide meaningful criteria for the conduct of armed conflict.

A second problem with invoking this language to question the legality of nuclear weapons is that the section explicitly provides that only the use of weapons or materials "calculated" to cause unnecessary suffering is prohibited.³³ This provision embodies the intention of the drafters to prohibit only the use of weapons that inflict superfluous injury while furthering no valid military objective:

This provision was intended to prohibit the use of weapons which just added gratuitous suffering or pain to a wounded person while serving no valid military purpose. The reasoning behind this provision was that if one had already put a man out of action by putting a projectile through him, there was no military utility in altering the projectile or putting poison on the projectile so that the disabled soldier would die a horrible death from the effect of the poison or the alteration . . . Whether or not one agrees with the reasoning, one must, I believe, concede that the draftsmen of the Conventions were trying to draw a sensible line between what was militarily necessary and what caused injury

31. Mallison, *The Laws of War and Juridical Control of Weapons of Mass Destruction in General and Limited Wars*, 36 GEO. WASH. L. REV. 308, 33 (1967).

32. U.S. DEP'T OF ARMY, FIELD MANUAL NO. 7-10, THE LAW OF LAND WARFARE (1956); D. BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW 53 (1958). McDougal and Feliciano's formulation of the proportionality standard suggests that a "reasonableness" standard should be utilized to construe Art. 23(e) of the Hague Regulations:

[T]he fundamental policy of minimum unnecessary destruction may be seen to underlie questions of legitimacy . . . [W]here the suffering or deprivation of values incidental to the use of a particular weapon is not excessively disproportionate to the military advantage accruing to the belligerent user, the violence and the weapon by which it is effected may be regarded as permissible. All war instruments are "cruel" and "inhuman" in the sense that they cause destruction and human suffering. It is not, however, the simple fact of destruction, nor even the amount thereof, that is relevant in the appraisal of such instruments; it is rather the needlessness, the superfluity of harm, the gross imbalance between the military result, and the incidental injury that is commonly regarded as decisive of illegitimacy.

M. MCDUGLAS & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 7 (1961).

33. The precise language of article 23(e) of the Hague Convention reads: "[I]t is especially forbidden: (e) to employ arms, projectiles, or material calculated to cause unnecessary suffering." Hague Convention, *supra* note 26, art. 23(e).

that had no military advantage.³⁴

Corwin would be hard-pressed to argue that nuclear weapons were designed with the intent to inflict superfluous injury on the battlefield, or that their use would necessarily produce this result. Nuclear weapons have been integrated into the battle plans of those nations who possess them to fulfill discrete military objectives. The use of nuclear armaments in combat would undoubtedly inflict substantial pain and suffering on opposing combatants. However, the Hague Convention was not drafted to proscribe the use of *any* weapon that causes suffering, rather only those armaments that are designed solely to cause damage beyond that necessary to pursue the legitimate objectives of combat.

Corwin next attempts to bolster his position by invoking an alternative interpretation of the term "unnecessary suffering."³⁵ Under this argument, the "indiscriminate destruction" caused by nuclear weapons would almost necessarily result in unnecessary suffering and thus would violate the Hague Convention.³⁶ Corwin seeks to extend this argument by contending that any nuclear weapon exploded near a civilian population would cause incidental civilian casualties, and thus "even the smallest of nuclear arms would be inherently incapable of avoiding destruction unnecessary to the military goal."³⁷

This line of reasoning is flawed for several reasons. First, this incredibly rigid standard, apparently condemning *any* attack that may cause incidental civilian casualties, would render the use of most contemporary weapons illegal. In short, this is an impossible standard that would necessarily and summarily be rejected by nations because it precludes virtually all forms of modern combat.

Second, Corwin's portrayal of *jus in bello* principles is simply misguided. As one commentator recently stated, "[t]he legality of attacks during wartime is not restricted to those that might cause damage exclusively to legitimate military objectives, because this would be impossible. Some civilian casualties must be anticipated or indirect damage incurred."³⁸

The scope of permissible military targets has expanded in the Twentieth Century to include military installations located near or within urban areas, as well as industrial sites located in cities.³⁹ This

34. Cummings, *The Role of Humanitarian Law*, 9 BROOKLYN J. INT'L L. 269, 71 (1983).

35. This interpretation is suggested to Corwin by Falk, Meyorwitz & Sanderson in their 1980 article on nuclear weapons. *Nuclear Weapons and International Law*, *supra* note 2; see also Corwin, *supra* note 1, at 274.

36. *Nuclear Weapons and International Law*, *supra* note 2, at 542-43.

37. Corwin, *supra* note 1, at 275.

38. Almond, *Nuclear Weapons, Nuclear Strategy and Law*, 15 DEN. J. INT'L & POL'Y 283, 287 (1987) [hereinafter Almond, *Nuclear Weapons*].

39. Stowell, *The Laws of War And The Atomic Bomb*, 30 AM. J. INT'L L. 784, 785

expansion of the purview of legitimate military objectives reflects the belief that: "today the whole nation is in arms and the victory is won by breaking the will of the whole nation to continue the fight;" and "practically every phase of national activity contributes to the support and success of warfare."⁴⁰ While this new orientation necessarily makes incidental civilian casualties inevitable, the world community has come to recognize the legality of such actions. Thus, while it is illegal under relevant principles of international law to make civilians the *direct* target of a military attack, an attack on a legitimate military target which results in incidental civilian deaths would not constitute a breach of the Hague Convention. This distinction was explicated in the decision of the United States Military Tribunal in *United States v. Ohlendorf*:

A city is bombed for tactical purposes; communications are to be destroyed, railroad wrecked, ammunition plants demolished, factories razed, all for the purpose of impeding the military. In these operations it inevitably happens that nonmilitary persons are killed. This is an incident, a grave incident to be sure, but an unavoidable corollary of battle action. The civilians are not individualized. The bomb falls, it is aimed at the railroad yards, houses along the tracks are hit and many of their occupants killed. But that is entirely different, both in fact and in law, from an armed force marching up to the same railroad tracks entering those houses abutting thereon, dragging out the men, women, and children and shooting them.⁴¹

While the Nuremberg Tribunal prosecuted a few military officers for aerial bombing of civilian sites during World War II, it "summarily rejected cases in which the target included military objectives."⁴² Article 52 of the 1977 Protocol I to the Geneva Conventions⁴³ similarly provides that military attacks must be strictly limited to "military objectives," which is defined as "those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."⁴⁴ However, Article 57 recognizes that incidental civilian casualties are an inevitable byproduct of such an attack on military objectives, and requires only that every

(1945).

40. *Id.*

41. 1 INTERNATIONAL MILITARY TRIBUNAL, TRIAL OF MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 467 (1947).

42. Note, *The United States' Nuclear First Strike Position: A Legal Appraisal Of Its Ramifications*, 7 CAL. W. INT'L L.J. 508, 521 (1977).

43. Protocols Additional to the Geneva Convention of 1949 (Protocols I & II), *opened for signature* Dec. 12, 1977, *reprinted in* 16 INT'L LEGAL MATERIALS 1391, 1444 (1977).

44. *Id.* at Art. 57, para. 2.

effort must be made to minimize such incidental losses of civilian lives and civilian objects. This provision further provides that combatants must refrain from launching attacks which would likely cause incidental losses of civilian lives, injuries, or property damage "which would be excessive in relation to the concrete and direct military advantage anticipated."⁴⁵ Thus, once again, military decisions are to be controlled by a standard of reasonability and proportionality.

By no means, would I argue that the standards outlined above give nations that possess nuclear weapons *carte blanche* to use such armaments under any circumstances that they may see fit. For example, the principle of proportionality and the need to balance military objectives against loss of life would most likely prohibit any decision to use nuclear weapons in an urban area if the sole objective was to strike at a small number of military or industrial facilities within the perimeter of the city. However, it is less likely that the use of tactical weapons against a more isolated military command post, or the use of strategic nuclear forces against ICBM silos in an area somewhat removed from a civilian population area, would be considered illegal under the Hague Convention or general principles of proportionality.

Consistent with Corwin's thesis, his probable response to this line of reasoning would be to argue that any "limited" use of nuclear weapons that might comport with international standards for the conduct of war would almost inevitably escalate into an uncontrollable conflagration that would assuredly violate such principles. The critical flaw in this line of reasoning is that it fails to differentiate between illegality *per se* and illegality through misuse:

While there is grave risk that the use of tactical nuclear weapons, or the impacts of massive force imposed by conventional weapons, or even military doctrine, might lead to a large scale use nuclear weapons of greater destructive force, none of these facts alone enables us to condemn such weapons under the existing law. Misuse of nuclear weapons, such as uses contrary to the legal principle of military necessity, are violations of the law of war, as is the use of other weapons under these conditions.⁴⁶

45. *Id.* at Art. 57, para. 2(iii).

46. Almond *Nuclear Weapons*, *supra* note 37, at 288. The U.S. Air Force's treatise on international law and armed conflict also emphasizes this distinction, stating:

The extent to which a weapon discriminates between military objectives and protected persons and objects depends usually on the manner in which the weapon is employed rather than on the design qualities of the weapon itself. Where a weapon is designed so that it can be used against military objectives, its employment in a different manner, such as against the civilian population, does not make the weapon itself unlawful. Indiscriminate weapons are those incapable

Thus, I contend that, contrary to Corwin's assertion, nuclear weapons are not illegal *per se* under international law. Rather the legality standard is dependent upon the manner in which the weapons are militarily utilized.

C. *Nuclear Weapons and the Geneva Protocol*

Corwin's next argument in support of the illegality *per se* of nuclear arms under international law is that use of such weapons would violate the Geneva Gas Protocol of 1925.⁴⁷ Under the Convention, the use in war of "asphyxiating, poisonous or other gases, and of all analogous liquid, materials or devices" is prohibited.⁴⁸ Corwin seeks to discount the fact that the treaty does not explicitly prohibit nuclear weapons by arguing that the general language of the Protocol mandates a broad interpretation.⁴⁹ Beyond the fact that Corwin cites no express authority for this purported rule of treaty interpretation, he once again ignores the World Court's admonition in the *Lotus* case that restrictions on national sovereignty should not lightly be assumed absent clear evidence of consent.⁵⁰

Several commentators have argued that the radiation produced by a nuclear blast would constitute a "poisonous" substance, thus rendering nuclear weapons illegal under the Protocol.⁵¹ As Corwin observes, this argument has been "vigorously disputed."⁵² In advancing the contention that nuclear weapons do not fall within the Geneva Gas Protocol, one commentator begins with a commonly accepted definition of poison as "any agent which, introduced . . . into an organism, may chemically produce an injurious or deadly effect."⁵³ While acknowledging that nuclear radiation would produce an injurious chemical effect upon those exposed to an atomic blast, it is then questioned whether radiation constitutes an "agent," which is defined as "an active principle; a substance of element capable of

of being controlled, through design or function, and thus they cannot, with any degree of certainty, be directed at military objectives.

DEPT. OF THE AIR FORCE, AFP 110-31, INTERNATIONAL LAW: THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS 6-3 (1976).

47. 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 Geneva Gas Protocol].

48. *Id.*

49. Corwin, *supra* note 1, at 277.

50. For a discussion of the *Lotus* case and its reasoning, see *supra* text accompanying notes 20-23.

51. See, e.g., Meyrowitz, *The Laws of War and Nuclear Weapons*, in Miller & Feinrider, *supra* note 2, at 29; G. SCHWARZENBERGER, INTERNATIONAL LAW AND ORDER 194 (1971).

52. Corwin, *supra* note 1, at 277; citing Comment, *The United States' Nuclear First Strike Position: A Legal Appraisal of its Ramifications*, CAL. W.L. REV. 508, 524 (1977).

53. Bright, *Nuclear Weapons As A Lawful Means of Warfare*, 30 MIL. L. REV. 1, 17 (1965).

producing a reaction."⁵⁴

Under this analysis, the initial radiation produced by the detonation of a nuclear weapon is composed primarily of neutrons and gamma rays, neither of which constitute a "substance."⁵⁵ Although it is acknowledged that residual nuclear radiation — such as radioactive fallout — is composed of solid particles, most of the physiological damage from these substances occurs from sources *outside* of the body. Thus, insofar as such substances do not produce internal reactions in human beings, they do not constitute "poisons."⁵⁶

Corwin further argues that the Protocol's prohibition of the use in war of substances that are "analogous" to poisonous gases would also render nuclear weapons illegal.⁵⁷ This contention does very little to strengthen Corwin's position. Given the preceding analysis, we must conclude that the hazardous effects of nuclear weapons are created by forces that are fundamentally different than "poisonous" substances. To that extent, it is difficult to see how nuclear weapons could be construed to be "analogous" to poisonous gases.

Second, forty-one of the States that have ratified the Protocol, including all five permanent members of the U.N. Security Council, have reserved the right to retaliate in kind to a chemical attack.⁵⁸ Thus, if nations possessing nuclear weapons are subject to the Protocol, it arguably only prohibits the first use of such weapons.⁵⁹

D. *Combatant and Noncombatant Distinction*

Corwin's next argument is that the use of nuclear weapons would obviate the distinction between combatants and civilians provided for in the Hague Draft Rules on Aerial Warfare and the 1977 Geneva Protocol.⁶⁰ Because this contention is essentially a reiteration of Corwin's earlier argument that the use of nuclear weapons would cause unnecessary suffering, cross application of those argument applies equally well here. As discussed earlier, the line between warfare which affects combatants and that which affects civilians is an am-

54. *Id.*

55. *Id.*

56. *Id.* at 18. Bright also addresses the effects of delayed fallout hazard, which produces harmful physiological effects through direct ingestion of radioactive materials into the body. Because radioactivity's injurious effects rapidly decline, Bright concludes that the harm to individuals from delayed fallout would be *de minimis*. *Id.* Corwin's only response to Bright's well-developed argument is that the issue remains "vigorously disputed." Despite this admission, he blithely concludes that nuclear weapons are poisonous agents under the Protocol.

57. Corwin, *supra* note 1, at 277.

58. Westing, *Towards Eliminating the Scourge of Chemical War*, 16 BULL. PEACE PROP. 117, 117-18 (1985).

59. Shaw, *Nuclear Weapons and International Law*, in NUCLEAR WEAPONS AND INTERNATIONAL LAW 1, 15 (I. Pogany ed. 1987).

60. Corwin, *supra* note 1, at 278; *see also* Hague Rules of Aerial Warfare (1923) art. 24(3); *see also* Geneva Protocol I Additional Relation to the Protection of Victims of International Armed Conflicts (1977) [hereinafter 1977 Geneva Protocol].

biguous one.⁶¹

Additionally, as Corwin admits, neither the Hague Convention nor the Geneva Protocol are binding international agreements. Corwin seeks to minimize the significance of this fact by arguing that both treaties "reflect the present state of customary international law."⁶² This contention is questionable for several reasons. First, neither of the authorities that Corwin cites to support this proposition⁶³ unequivocally state that either treaty constitutes customary international law. One source is only willing to contend that the Hague Draft Rules on Aerial Warfare "provide some evidence" that customary international law precludes the use of weapons that would cause indiscriminate suffering to a civilian population.⁶⁴ The other commentator is even more equivocating, maintaining only that it is "probable" that the 1977 Protocol is declaratory of "emerging customary law."⁶⁵

Additionally, it is important to examine the actual practice of States in armed conflict to determine if the principles outlined above realistically govern their conduct in times of war. It has been observed that:

In no other field of international law is practice so important; the stakes involved are humanitarian standards. But attempts to apply the principle beyond the actual practice of States in armed conflict would be tantamount to raising illusions. Resort to barbarous practices in a major conflict between the major States would amount to a retreat from the humanitarian standards so far attained. But the realities of such circumstances would compel us to apply lower standards to the practical application of the principle and rules of law of war. The treaties, codifications of rules in international agreements, and international agreements in general which seek to impose greater reasonableness and higher standards of humanity all depend in their application and their outcomes upon practice. This is what "respect" for the law of war is all about.⁶⁶

An analysis of state practice seriously undermines Corwin's assertion that nations have come to accept limits on the right to target civilian population centers. During World War I, air warfare was initially restricted to military objectives in the actual theatre of operations. As the war progressed, the scope of targets expanded to in-

61. See *supra* text accompanying notes 24-46.

62. Corwin, *supra* note 1, at 279.

63. See *id.* at n.36.

64. *Nuclear Weapons and International Law*, *supra* note 2, at 565.

65. Weston, *supra* note 2, at 567.

66. Almond, *Law and Armed Conflict: Some of the Shared Policies*, 9 CASE W. RES. J. INT'L L. 175, 186 (1977). See also Nurick, *The Distinction Between Combatant and NonCombatant In The Law Of War*, 39 AM. J. INT'L L. 680, 683 (1945).

clude factories and communication centers. By the end of the conflict, both the Allied and Axis powers were bombing urban areas in an effort to undermine civilian morale.⁶⁷ At the very least, the major actors in the war clearly deemed it legitimate to attack military targets without regard for incidental civilian casualties that might occur: “[I]n general one principle seems to have been followed in the war: that military objectives could be bombed wherever found, regardless of their location, and, it seems regardless of the injury to non-combatants and private property.”⁶⁸

In the period between the two world wars, several endeavors were made to establish guidelines to protect civilian lives and property during armed conflict, including the drafting of the Hague Regulations on Aerial Warfare and the efforts of the League of Nations Disarmament Commission.⁶⁹ Despite these efforts, the distinction between combatants and noncombatants was all but obliterated in World War II.

Under the British Directive on Air Warfare in October of 1942, the Cabinet authorized bombing of civilian targets in Japan, Germany and Italy as a means of undermining “enemy morale.”⁷⁰ Similarly, the Combined Chiefs of Staff in the Casablanca Directive of 1943 authorized the “progressive destruction and dislocation of the German military, industrial and economic system and the undermining of the morale of the German people to a point where their capacity for armed resistance is fatally weakened.”⁷¹

Thus, the practice of belligerent states in World War II was marked by an almost total disregard for the protection of civilian populations:

By the time that the [atomic] weapons were used, the Second World War had produced enormous destruction from conventional weapons and the destruction had been continuing for over four years. Tolerances had already developed with respect to the bombing of major Japanese and European cities. The destruction resulting from those massive conventional attacks was greater than that caused by the atomic bombs at Nagasaki and Hiroshima. The targeting of cities as “strategic” and legitimate military targets had been fully established, and the Nuremberg Tribunal did not address such attacks, nor declare them to be unlawful. Accordingly, reciprocal tolerances, already established, led to an acceptance of the attacks with nuclear

67. Nurick, *supra* note 66, at 694.

68. S. ROYSE, AERIAL BOMBARDMENT 193 (1928); *see also* C. HYDE, INTERNATIONAL LAW 663 (1922).

69. L. OPPENHEIM, INTERNATIONAL LAW 413 (1940).

70. INTERNATIONAL RED CROSS COMMITTEE, DRAFT RULES FOR THE LIMITATION OF THE DANGERS INCURRED BY THE CIVILIAN POPULATION IN TIME OF WAR 163 (1956).

71. W. CRAVEN & L. CATE, 2 THE ARMY AIR FORCES IN WORLD WAR II 305 (1949).

weapons.⁷²

State practice subsequent to World War II has, tragically, only reinforced this conception of total war. Post World War II treaties, including the Geneva Conventions of 1949 for the Protection of War Victims,⁷³ the Hague Convention of 1954 on the Protection of Cultural Property in the Event of Armed Conflict⁷⁴ and the Draft Rules for the Limitation of the Dangers Incurred by Civilian Population in Time of War⁷⁵ provide very little protection for civilian populations in time of war.⁷⁶ State conduct in armed conflicts in recent years, including the bombing of major civilian population centers by both sides in the Iraqi-Iranian conflict,⁷⁷ evince no intention to recognize the sanctity of noncombatants. The reality is that:

[L]egitimate targets are no longer limited to military objectives, even if extensively interpreted, but extend to centres of communications, large industrial administrative establishments of any kind and any area likely to become important for the conduct of war . . . If the principle of the immunity of non-combatants is limited to those categories of the civilian population who, from the point of view of the war effort, are irrelevant and are located in areas of which the same can be said, this principle appears to represent a correct, but hardly any longer significant, abstraction from the relevant rules of warfare.⁷⁸

The breakdown of the distinction between combatants and civilians severely undermines Corwin's analysis. While independent principles, such as proportionality, would prevent the use of nuclear weapons in a wholly indiscriminate fashion, it is clear that they are not rendered illegal *per se* simply because their use might result in incidental civilian casualties.

72. Almond, *Deterrence and a Policy-Oriented Perspective on the Legality of Nuclear Weapons*, in Miller & Feinrider, *supra* note 2, at 59. The total disregard for noncombatants was also demonstrated by the practice of unrestricted submarine warfare against neutral shipping by both sides in the war. As a consequence, while the German admirals Doenitz and Rader were convicted before the International Military Tribunal at Nuremberg for this practice, no sentence was imposed because of similar practices on the part of the Allied powers. JUDGMENT OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE TRIAL OF GERMAN MAJOR WAR CRIMINALS 107-112 (1946).

73. 75 U.N.T.S. 287 (1950).

74. 249 U.N.T.S. 240 (1954).

75. D. Schindler & J. Toman, *THE LAWS OF ARMED CONFLICT* 187 (1982) citing *Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War*, International Committee of the Red Cross, Geneva (2d ed. 1958).

76. G. SCHWARZENBERGER, *supra* note 51, at 192.

77. *Missile Message*, *Economist*, Mar. 5, 1988, at 44; Trainor, *Iraq: Missile With Extended Range Is New Peril To Iran's Cities and Oil*, *N.Y. Times*, May 1, 1988, at 10.

78. G. SCHWARZENBERGER, *supra* note 51, at 192.

E. Inviolability of the Territoriality of Neutrals

In this section, Corwin asserts that the use of nuclear weapons would violate the territorial rights of neutral third party nations, citing article 1 of the Hague Convention for this proposition. He further suggests that only "most limited" potential uses of nuclear weapons would not contravene this principle.⁷⁹

These contentions are dubious for several reasons. First, Corwin incorrectly asserts, without any substantiation, that only the use of a very limited number of nuclear weapons would fail to affect the interests of neutral nations. In reality, the efforts of both the Soviet Union and the United States to develop a pentomic⁸⁰ combat strategy has resulted in the deployment of thousands of tactical nuclear weapons with warhead yields as low as 0.01 kilotons.⁸¹ The use of limited numbers of such weapons on the battlefield of Europe, for example, would not threaten neutral nations with radioactive fallout or residual blast effects. Both NATO and the Warsaw Pact are currently working on a new generation of battlefield munitions that would produce damage not much greater than that for many conventional armaments. These weapons would also minimize collateral damage to surrounding populations.⁸² Even one of the most respected proponents of the theory that nuclear weapons are illegal under most circumstances concedes that the limited use of nuclear weapons on the battlefield might avoid encroaching on the rights of neutral States.⁸³ While Corwin might contest the probability that a tactical nuclear exchange would remain "limited," this is, at most, a question of the possible *misuse* of such weapons and does not implicate their legality *per se*.

Additionally, even an exchange involving higher-yield strategic nuclear weapons would not necessarily threaten third party nations. As several analysts have explained, the airburst of a nuclear warhead at slightly less than 100,000 feet would prevent the production of significant amounts of radioactive fallout that could drift over the

79. Corwin, *supra* note 1, at 279.

80. O'Brien, *Some Problems Of The Law Of War In Limited Nuclear Warfare*, 27 MIL. L. REV. 1, 1 (1961). The term "pentomic" refers to the development of nuclear and conventional forces which could operate under the conditions of a limited war. One of the important elements of a pentomic strategy is the deployment of tactical nuclear weapons. *Id.*

81. SIPRI, *supra* note 6, at 44-53. Weapons deployed by the United States in this category include approximately 2400 low yield artillery nuclear shells that can be launched from howitzers or towed guns and 200 low yield atomic demolition munitions (ADMs). *Id.* at 44. The United States also deploys about 1400 antisubmarine weapons (ASWs) in this category also. *U.S. Nuclear Weapons Stockpile*, BULL. ATOM. SCI., June, 1987, at 56. Soviet tactical weapons are also deployed as artillery and ADMs. Additionally, the Soviets deploy tactical nuclear weapons as antisubmarine weapons. SIPRI, *supra* note 53.

82. Klare, *Leaping The Firebreak*, in THE NUCLEAR READER 169-71 (C. Kegley & E. Wittkopf eds. 1985).

83. Weston, *supra* note 2, at 583.

border into neutral nations.⁸⁴ Indeed, one study estimates that a low air burst would provide a "99 percent assurance of not producing fallout."⁸⁵ Both the Soviet Union and the United States are developing a new generation of nuclear weapons designed for this low air burst detonation. For example, the new Soviet SS-21s, 22s and 23s are designed for one or two kiloton air bursts that would produce negligible fallout.⁸⁶ It has been estimated that such weapons may disperse radiation no more than 500 yards from their targets.⁸⁷ Given the fact that low air burst explosions of nuclear warheads would produce "the best 'across the board' damage to most tactical targets,"⁸⁸ these weapons could most likely be utilized in an internationally legal manner.

Finally, the rights of innocent third party nations to be free from the incidental harm that could result from a nuclear exchange between combatants must be weighed against the inherent right of States to insure their own survival. This right of national survival has been recognized throughout history: "traditional international law, adapting itself to the political necessities of international life, and basing itself on the principle of self-preservation, permits States a wide range of action to ensure the protection of their own rights, safety and existence."⁸⁹ The Nuremberg tribunal also acknowledged the primacy of this right, stating that "[T]he principle of self-preservation, in its various manifestations, is so fundamental that no system of law can possibly ignore it."⁹⁰

Given the saliency of this interest, the right to use nuclear weapons, even in derogation of the rights of third party states, would arguably be permitted under certain circumstances. Consider, for example, the following scenario. Nation X has launched a limited first strike against Nation Y, resulting in millions of deaths in Nation Y. Nation X has communicated its intention to launch further strikes against Y in a short period of time, with the apparent intention of annihilating the population of that nation. Under the principle of self-preservation, a good argument could be made that Nation Y would have the right to launch a counterforce second strike on State X's nuclear installations in an effort to eliminate that nation's capability to launch another strike against Y. While Y's second strike would probably result in some incidental casualties in nations bor-

84. Bright, *supra* note 50, at 11; Note, *supra* note 41, at 513.

85. U.S. Dep't of Army, Field Manual No. 191-31-3, *Nuclear Weapons Employment Effects Data* 3 (1968).

86. Gallois & Train, *When A Nuclear Strike Is Thinkable*, THE NUCLEAR READER 101 (C. Kegley & E. Wittkopf, ed. 1985).

87. *Id.*

88. *Id.*

89. Weightmann, *Self Defense In International Law*, 37 VA. L. REV. 1095, 1114 (1951).

90. *German Major War Criminals Case*, 1 I.M.T. (Nuremberg) 171, 220 (1946).

dering State X (and perhaps State Y), the right of national self-preservation would arguably outweigh the neutral nation's interest. While it is beyond argument that this would be a tragic consequence of State Y's decision, the alternative of acquiescing in the obliteration of a nation appears far worse.

F. Defenses

1. *Military Necessity and Proportionality*.—Corwin suggests that the doctrine of military necessity is mediated by the principle of proportionality which “balances the legitimacy of military ends against the means used to achieve these ends.”⁹¹ While touting proportionality as a “useful framework for evaluating the lawfulness of all military tactics,”⁹² Corwin is forced to acknowledge that the “balancing test” that inheres to this concept necessarily requires highly subjective interpretations of data and the weighing of principles that cannot easily be compared with any kind of exactitude.⁹³ Despite these imposing problems with the proportionality test, Corwin somehow proceeds to apply the standard and concludes that nuclear weapons would be illegal under most plausible scenarios because of the “inhumane quality” of radioactive fallout, and the purportedly greater amount of destruction that such weapons would cause in comparison with conventional weapons.⁹⁴

Corwin's conclusions are troubling for several reasons. First, he fails to acknowledge the possibility that nations might choose to use air burst detonations of nuclear weapons, virtually negating the hazard of radioactive fallout.⁹⁵ Second, the fact that the use of nuclear weapons might cause greater damage than conventional counterparts is simply not germane to the question of proportionality. As indicated earlier in this paper, the doctrine of proportionality requires the balancing of the saliency of the military objective against the loss of human life and property that is likely to result from a contemplated military action.⁹⁶ It does not require, as Corwin implies, a comparison with other available means to reach the same objective.

Additionally, while it is unassailable that virtually any *single* strategic nuclear weapon would produce more destruction than a *single* conventional weapon, it is inconceivable that conventional arms would be used in such a limited fashion. Thus, the relevant consideration must be a comparison of plausible combat scenarios in which nuclear weapons or conventional armaments might be used. For ex-

91. Corwin, *supra* note 1, at 281.

92. *Id.*

93. *Id.* at 282.

94. *Id.*

95. See note 84 and accompanying text.

96. See note 32 and accompanying text.

ample, a nation might choose to drop a single nuclear bomb on a city to exact terms of surrender, such as the attacks on Hiroshima and Nagasaki in 1945.⁹⁷ Alternatively, that nation might choose to launch a massive bombing raid with conventional armaments. Under these circumstances, it is not a foregone conclusion that the nuclear attack would necessarily cause more casualties. For example, as one commentator has observed:

We must not forget for a minute that other kinds of weapons also are capable of destroying people by the millions. Even during World War II, a conventional raid on Tokyo with high explosive and incendiary bombs killed more people in one night than either of the nuclear attacks on Hiroshima or Nagasaki.⁹⁸

Similarly, during three bombing raids on Hamburg from July 24 to July 30, 1943, 700 Allied planes delivered about 1,300 tons of high-explosive bombs, 500 tons of oil incendiaries and 600 tons of magnesium incendiaries. One of these raids resulted in an estimated 50-60,000 fatalities, approaching the carnage at Hiroshima.⁹⁹

Finally, as Corwin once again admits, it is chimerical to attempt to "weigh" the value of a "military objective" against the loss of lives and property damage because no objective weight can be assigned to the former concept. The principle of proportionality thus remains hostage to the wholly subjective assessments of sovereign nations, precluding any definitive determination of the legality of nuclear weapons. Indeed States have failed to arrive at a minimal common understanding of the meaning and scope of fluid concepts such as "military objectives" or "necessity":

The fundamental policy which underlies the various analogies invoked with respect to nuclear weapons, as well as the prohibitions with respect to all other weapons and indeed the law of war generally, is the minimum destruction of values—that is, the balancing of "military necessity" or "legitimate objectives" against "humanitarianism" and the disproportionate or irrelevant destruction of values. The Achilles heel in this policy is . . . that the decision-makers of the world community have never been able to become very precise about the "legitimate objectives" of violence, or hence, about the degree of destruction permissible under "military necessity" . . .¹⁰⁰

97. DeGarmo & Richards, *supra* note 19, at 9.

98. *Id.*

99. Postol, *Possible Fatalities From Superfires Following Nuclear Attacks In Or Near Urban Areas*, in *THE MEDICAL IMPLICATIONS OF NUCLEAR WAR* (National Academy of Science, 1985) at 51-52.

100. McDouglas & Schlei, *The Hydrogen Bomb Test In Perspective: Lawful Measures For Security*, 64 AM. J. INT'L L. 648, 689 (1955); see also Dunbar, *Military Necessity in War Crimes Trials* 29 BRIT. Y.B. INT'L L. 442 (1952).

2. *Reprisals and Self-defense.*—In his treatment of the law of reprisals and self-defense, Corwin correctly contends at the outset that the United Nations Charter has obviated the traditional right of nations to launch reprisals in response to the unlawful actions of other nations.¹⁰¹ However, his subsequent assertion that nuclear weapons could never be used as a means of self-defense simply fails to comport with relevant principles of international law. Under Article 51 of the Charter, a nation or collective group of nations may exercise the right of self-defense “if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”¹⁰²

Corwin argues that there are three principal scenarios under which nuclear weapons could be used in self-defense, concluding in each case that the utilization of these weapons would be an illicit response. The first hypothetical that he poses is an attack upon a nation with conventional weapons. Invoking the principle of proportionality, Corwin contends the “vast disparity in magnitude between any nuclear weapons and any conventional means of warfare” would render any nuclear response disproportionate to the initial attack.¹⁰³

There are several serious flaws in Corwin’s analysis. First, as early as World War II, it was possible to launch an attack with highly destructive conventional weapons that could result in more casualties and damage to property than an attack with nuclear weapons.¹⁰⁴ This scenario has become even more plausible in recent years as nations have initiated development of conventional weapons with damage potentials commensurate with many nuclear arms.¹⁰⁵

Additionally, Corwin once again proffers the unfair comparison of an attack with a single conventional weapon and a single nuclear weapon in his hypothetical. Consider, for example, the far more credible scenario of an offensive against Western Europe by the Warsaw Pact. Such an attack would involve hundreds of thousands of troops, tens of thousands of tanks and thousands of ground-attack and land-combat aircraft,¹⁰⁶ and would obviously imperil the lives of tens of millions in Western and Eastern Europe. Under such circumstances, Corwin would be hard pressed to argue that a counterattack with low yield battlefield tactical weapons could

101. Corwin, *supra* note 1, at 283 citing U.N. Charter, art. 51.

102. U.N. Charter, art. 51.

103. Corwin, *supra* note 1, at 284.

104. See *supra* text accompanying notes 99-101.

105. Klare, *supra* note 82, at 171.

106. Borawski, *Practical Steps for Building Confidence in Europe*, 18 *ARMS CONTROL TODAY*, Mar., 1988, at 17; INTERNATIONAL INSTITUTE FOR STRATEGIC STUDIES, *THE MILITARY BALANCE* 224-27 (1986); J. STEELE, *SOVIET POWER* 76-78 (1984).

not be plausibly considered a proportionate response.¹⁰⁷

The second scenario presented by Corwin involves a nuclear response to a nuclear attack. While admitting that this situation presents the "strongest case" for permitting the use of nuclear weapons, Corwin ultimately rejects their legitimacy even under these circumstances.¹⁰⁸ Corwin contends that the right to self-defense is limited to preventing further attacks on the State and thus would preclude reprisals, including attacks on civilian populations. Thus, he asserts that a nation could only launch a full scale counterforce assault in response to a nuclear attack, which would be disproportionate under virtually all circumstances, or a more limited counterstrike, which would not achieve the objective of self-defense because it would not obviate the opponent's ability to launch a second-strike.¹⁰⁹

Corwin's conception of self-defense and nuclear strategy is both muddled and fundamentally incorrect. First, a nuclear strike by State Y against State X's civilian population in response to a nuclear strike by State X could be construed as an act of self-defense, rather than reprisal, if there was a reasonable basis to believe that this would deter State X from launching any further attacks because of the horrible consequences of further countervalue responses by State Y. Of course, State Y's contemplated action would still have to be analyzed under other relevant principles of international law. However, the point to be made here is that there is nothing in the text of the United Nations Charter,¹¹⁰ or the *travaux preparatoires*,¹¹¹ that limits a nation's responses to an attack to military targets.

Second, it is also plausible that State Y might launch a limited first strike against State X and then present an ultimatum of surrender, a scenario that defense analysts have often suggested.¹¹² Under such circumstances, Article 51 of the United Nations Charter¹¹³ would appear to permit State X to launch a proportionate second strike in an effort to deter any further use of nuclear weapons by State Y—a quintessential example of self-defense. In order to prop-

107. Corwin also fails to acknowledge that the limited use of nuclear weapons might be deemed a proportionate response to an attack with chemical or biological agents, both of which could be used as weapons of mass destruction. See, e.g., McFadden, *The Second Review Conference Of The Biological Weapons Convention: One Step Forward, Many More To Go*, 24 STAN. J. INT'L L. 85, 109 (1987); Hoerber, *The Neglected Threat of Chemical Warfare*, 3 INT'L SECURITY 55, 60 (1978).

108. Corwin, *supra* note 1, at 284.

109. *Id.* at 284-85.

110. Article 51 of the Charter provides, in part, that "nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations U.N. Charter, art. 51.

111. McDougal & Feliciano, *supra* note 32, at 233-36.

112. Meinel, *Fighting MAD*, TECH. REV., Apr., 1984, at 34.

113. See *supra* text accompanying notes 101-02.

erly defend itself, it is by no means certain that a nation would be compelled to launch an all out second strike that would cripple an opponent's nuclear forces to avert further attacks by the opponent. A simple demonstration of the resolve to escalate, if necessary, might prove to be an adequate means of defense, and would appear to be sanctioned by Article 51. Corwin's failure to account for this possibility renders his discussion of this scenario incomplete and tenuous.

The final scenario contemplated by Corwin is the use of nuclear weapons in anticipatory self-defense. Corwin argues that nuclear weapons could not be used under these circumstances because Article 51 of the Charter limits the right of self-defense to armed attacks. Additionally, he contends that the horrible implications of a nuclear strike mandate that nations should be discouraged from initiating the use of such weapons.¹¹⁴

Corwin's contention that Article 51 only justifies the use of force in response to an "armed attack" is by no means universally accepted. Several commentators have argued that Article 51's provision for "the inherent right of individual or collective self-defense"¹¹⁵ reflects the intent of the framers to preserve the broad traditional right to self-defense formulated by Secretary of State Daniel Webster in the *Caroline* incident,¹¹⁶ which has been interpreted to include the right to engage in anticipatory self-defense under certain circumstances.¹¹⁷ Corwin's position on this issue is internally inconsistent. After embracing Webster's conception of self-defense at the outset of this section, and hence recognizing the legitimacy of anticipatory self-defense in some cases, Corwin inexplicably argues later

114. Corwin, *supra* note 1, at 285.

115. U.N. Charter, art. 51.

116. The 1837 *Caroline* incident involved the decision of Great Britain to cross into American territory to destroy a ship that was transporting personnel and equipment to rebels in Canada. The British claimed that its actions were justified as an act of reasonable and anticipatory self-defense. In a letter of protest to the British, Webster stated that self defense could only be invoked as justification for the use of force where the necessity was "instant, overwhelming, and leaving no choice of means and no moment for deliberation." 2 J. MOORE, DIGEST OF INTERNATIONAL LAW 409-14 (1906).

117. See, e.g., Mallison & Mallison, *The Israeli Attack of June 7, 1981, Upon The Iraqi Nuclear Reactor: Aggression Or Self Defense?*, 15 VAND. J. TRANSNAT'L L. 417, 421 (1982); McDougal, *The Soviet-Cuban Quarantine and Self-Defense*, 57 AM. J. INT'L L. 597, 599 (1963); Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 RECUEIL DES COURS (II) 455, 495, 499 (1952).

Several other arguments have been proffered to counter the contention that Article 51 limits the right of self-defense to cases where an armed attack has already occurred. For example, several commentators have cited the French text of Article 51 which justifies self-defense in response to "armed aggression," as "giv[ing] weight to the theory that there was no intention to cut down the general international law right of self defense against an imminent threat." THOMAS & THOMAS, NONINTERVENTION 123-24 n.89 (1956); Waldock, *General Course On Public International Law*, 91 RECUEIL DES COURS (II) 1, 234 (1962). Waldock also argues that the French text of the relevant portion of Article 51 for the purposes of this issue is not expressed in the form of a condition, suggesting that the English term "if" was intended to express a hypothesis rather than a condition. *Id.* at 235.

in the section that the right to self-defense is limited to cases where an armed attack has already occurred.¹¹⁸

I am much more sympathetic to Mr. Corwin's contention that the international community should not allow anticipatory self-defense in this context because of the possibility of mistake or abuse of the right as pretext for aggression. However, it should be noted that these are *policy* arguments that do not necessarily have the force of law.

3. *Other Considerations in Applying the Proportionality Test.*—Corwin next argues that a realistic application of the proportionality test in this context must consider that a nuclear war perhaps would not remain limited, and that the effects of nuclear weapons are not wholly predictable.¹¹⁹ In terms of the former contention, relevant principles of international law distinguish between the potential misuse of weapons, which may constitute a war crime, and the determination of whether a weapon's use would be illegitimate under all circumstances, rendering it illegal *per se*.¹²⁰ To the extent that nuclear weapons could be used under certain circumstances without violating *jus in bello* principles, Corwin's "Pandora's Box" argument¹²¹ is simply not germane.

In terms of the unpredictability of nuclear weapons, Corwin further argues that it is uncertain that nuclear weapons can be delivered with accuracy on their intended targets, and that unpredictable climactic conditions may aggravate the harm caused by radioactive fallout.¹²² Corwin concludes that both these factors must be considered in determining whether a particular use of nuclear weapons would comport with the principle of proportionality.

While Corwin's line of reasoning is unassailable, it is basically tautological in that it states little more than: The use of nuclear weapons is illegal unless legal principles for use are observed. This premise fails given that an air burst detonation of a nuclear warhead would virtually obviate the threat of radioactive fallout.¹²³ Additionally, the accuracy of nuclear warheads, including high yield strategic missiles, has increased dramatically in recent years. For example, the Soviet Union's new SS-21s, 22s, and 23s have only a 100 meter circular error probable,¹²⁴ as does the proposed American MX mis-

118. Corwin, *supra* note 1, at 284-85.

119. *Id.* at 286.

120. See *supra* Section IIB of this text.

121. Corwin, *supra* note 1, at 286.

122. *Id.*

123. See notes 84-88 and accompanying text.

124. The "circular error of probability" is a measure of missile accuracy which represents the radius of a circle, centered on a target, within which 50% of the weapons aimed at the target are expected to fall. Gallois & Train, *supra* note 86, at 101.

sile.¹²⁵ Finally, the use of any weapons, including conventional armaments, is likely to result in unintended, incidental damage. The basic question is whether the projected effects of any proposed means of combat are likely to be so indiscriminate as to violate relevant principles of international law. Corwin's arguments in this section, phrased only in the most general of terms, do not support this likelihood and thus fail to adequately demonstrate the illegality of nuclear weapons *per se*.

4. *Other Sources of Evidence for Determining Customary International Law.*—Corwin's final argument is that judicial precedents and pronouncements by the U.N. General Assembly provide further evidence that the use of nuclear weapons would violate customary international law. In terms of judicial precedent, Corwin cites the *Shimoda* case which he admits is the only case in which a judgment as to the legality of nuclear weapons has been rendered.¹²⁶ *Shimoda* involved a suit brought by five Japanese citizens against the Japanese government to recover damages for injuries sustained as a consequence of the atomic bombings of Hiroshima and Nagasaki. The plaintiffs contended that the use of atomic weapons violated conventional and customary principles of international law, citing international agreements that prohibit the use of poisonous gas; restrict the use of aerial bombardment and attacks on civilians; and forbid the use of weapons that cause unnecessary suffering.¹²⁷ As Corwin indicates, the Court upheld the plaintiffs' claims that the bombings were indiscriminate, caused unnecessary suffering, violated the Geneva Protocol and were not justified by principles of military necessity.¹²⁸

Despite its holding, the *Shimoda* case is a frail reed for Corwin to lean on for several reasons. First, as several commentators and Corwin have observed, the Court took pains to emphasize that its decision was limited to the facts of the case at bar.¹²⁹ As a consequence, it would be hazardous to invoke the Court's holding to draw more general conclusions about the legality of nuclear weapons. Second, while the "cumulative effect of uniform decisions of the courts of the most important States"¹³⁰ may provide evidence of interna-

125. *Id.*

126. Corwin, *supra* note 287; see also Tokyo District Court, No. 2914 of 1955 and No. 4177 of 1957, Civil Affairs, 24th Department, Dec. 7, 1963, translated and reprinted in JAPANESE ANNUAL OF INT'L L. 212 (1964) [hereinafter *Shimoda*].

127. *Shimoda*, *supra* note 126.

128. Corwin, *supra* note 1, at 288; see also *Id.*

129. Falk, *The Shimoda Case: A Legal Appraisal Of The Atomic Attacks Upon Hiroshima and Nagasaki*, 59 AM. J. INT'L L. 759, 769 (1965); see also Corwin, *supra* note 1, at 289.

130. L. OPPENHEIM, INTERNATIONAL LAW 31-32 (8th ed. 1955).

tional custom, it is difficult to accord equal salience to one isolated case decided by a lower municipal court over thirty years ago.¹³¹ Corwin acknowledges the authoritative weaknesses of the *Shimoda* case, but ultimately cites it as a potential "building block" for developing a consensus as to the illegality of nuclear weapons.¹³² Unfortunately, the massive buildup of nuclear weapons by the world's superpowers in the last thirty years, as well as the decision of many other nations to pursue this option, weakens this "building block" to the point where it can provide only the most perilous of foundations for Mr. Corwin's arguments. Thus, the significance of the *Shimoda* case in addressing the issue at hand is open to serious debate.

Corwin's final argument is that the United Nations General Assembly's adoption of Resolution 1653 (XIV), condemning the use of nuclear weapons, provides additional evidence that such weapons are illegal under customary international law.¹³³ Corwin acknowledges that U.N. resolutions are not in themselves declaratory of customary international law. He suggests, however, that the absence of any use of nuclear weapons since Hiroshima and Nagasaki is evidence that this principle is now considered customary; and, at the very least, the resolution provides evidence of the "present state of customary international law."¹³⁴

Corwin's first argument, which essentially asserts that a principle of customary international law can arise by the mere absence of contrary state action, fails to comport with generally-recognized standards for establishing the existence of a principle of customary international law. In order for a new rule of international customary law to be reorganized, two elements must be proven: 1) "The practice of States, including those whose interests are specially affected, must have been substantially or practically uniform;"¹³⁵ and 2) "[State practice] must also be such, or carried out in a way, as to be evidence of belief that this practice is rendered obligatory by the evidence of a rule of law requiring it . . . States . . . must therefore feel that they are conforming to what amounts to a legal obligation."¹³⁶ This latter requirement is usually referred to as "*opinio juris*."¹³⁷

131. See also Falk, *supra* note 132, at 781 ("premature to discuss the relevance of *Shimoda* to an evolving international law of war applicable to the conditions of nuclear warfare.")

132. Corwin, *supra* note 1, at 289.

133. Corwin, *supra* note 1, at 288; see also G.A. Res. 1653, 16 U.N. GAOR Sup. (no. 17) 4, U.N. Doc. A/5166 (1961) [hereinafter U.N. Resolution].

134. Corwin, *supra* note 1, at 289.

135. *Fisheries Jurisdiction* (U.K. v. Ice.), 1974 I.C.J. 1, 89-90 [hereinafter *Fisheries*]; see also *Asylum Case* (Columbia v. Peru), 1950 I.C.J. Reps. 266, 276-77.

136. *Fisheries*, *supra* note 135.

137. Jimenez, *General Cause In Public International Law*, 107 RECUEIL DES COURS (I) 1, 22 (1978).

Thus, the mere fact that a State has consistently acted, or not acted, in a given way, is clearly insufficient to establish a new principle of customary international law in the absence of proof of *opinio juris*. As the International Court of Justice declared in the *North Sea Continental Shelf* judgment:

Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, ie. the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough.¹³⁸

Moreover, Corwin never demonstrates that nuclear States *have* abstained from the use of nuclear armaments as the consequence of a subjective belief that this action would violate a principle of international law. Rather, most commentators suggest that the world has been spared the ravages of nuclear war because of the perception that a nuclear attack would be responded to in kind, the principle of "mutually assured destruction."¹³⁹

Corwin's second argument, that the U.N. Resolution is evidence of customary international law, fares no better upon close scrutiny. First, even assuming that a single resolution can constitute "consistent state practice" for the purposes of establishing a new principle of customary international law, the fact that forty-six nations either voted against the Resolution or abstained, negates any claim that State practice is "practically uniform."

[T]o regard such resolutions [1653 (XVI) and other similar resolutions] as creative of law *simpliciter* is naive and misleading. They reflect widespread concern and political force and not, as yet at least, a legal consensus. The fact that the leading nuclear powers (with the arguable exception of the Soviet Union) are strongly opposed to such formulations as law is of the greatest importance in the process of customary law formation. It may, of course, be that in the course of time and in the light of modified attitudes on the part of the major nuclear weapons powers, such Assembly resolutions may reflect or constitute a customary rule, but it would be premature to state that this had

138. 1969 I.C.J. 42.

139. See, e.g., B. BUZAN, AN INTRODUCTION TO STRATEGIC STUDIES 167-68 (1987); Nye, *Ethics And The Nuclear Future*, 42 THE WORLD TODAY Aug./Sept. 1985, at 151; Almond, *Deterrence Processes and Minimum Order*, 4 N.Y. L. SCH. J. INT'L & COMP. L. 283, 286 (1983); Y. HARKAKI, NUCLEAR WAR AND NUCLEAR PEACE 2-3 (1966).

already occurred.¹⁴⁰

Also, most scholars contend that in addition to proof of virtual uniform practice, a principle cannot be said to constitute customary international law in the absence of "consent of an overwhelming majority of States of each group — socialist, developed capitalist and developing countries."¹⁴¹ United Nations Resolution 1653 (xvi), rejected by several important Western nations — including Britain, France and the United States — clearly does not meet these requirements. Finally, as the International Court of Justice indicated in the *Fisheries* case, it is particularly important that those nations whose interests are "specially affected" by an emerging principle of customary international law accept the principle.¹⁴² In the context of nuclear weapons, this would obviously require those nations that currently possess such weapons to acknowledge that their use would be illegal. In reality, virtually all nations who possess such weapons, including the United States, Britain, France and the Soviet Union, have consistently expressed the intention to use them under at least some circumstances.

III. The Interface of Nuclear Weapons and International Law

I have attempted to demonstrate in the previous section of this article that current principles of international law simply do not render the possession or use of nuclear weapons *per se* illegal. In this section, I will suggest that in the current world climate, it would be both chimerical and counterproductive to continue to attempt to invoke this "law" against the nations of the world.

While it is often rather disheartening to admit, the ultimate viability of international law continues to rest on the often precarious foundation of the voluntary consent of sovereign nations:

Consent is a crucial element in the overall functioning of effective international law, and any theory that disregards it is certain to experience severe problems in compliance, when looked at from the normative viewpoint, and in accuracy, when looked at from the descriptive viewpoint. This is so because, without organs of magisterial competence, international law must avoid unilateral commands and gain compliance by eliciting the support of States. This is the reason for the heavy reli-

140. Shaw, *supra* note 59, at 13. See also Lisle, *Nuclear Weapons: A Conservative Approach to Treaty Interpretation*, 9 BROOKLYN J. INT'L L. 275, 277 (1983).

141. Alexidze, *Legal Nature of Jus Cogens*, 110 RECUEIL DES COURS 227, 247 (1981); see also *Arbitral Award on the Merits in Dispute between Texaco Overseas Petroleum Company and the Government of the Libyan Arab Republic*, 17 I.L.M. 1, 28 (1978); Lazarev, *International Legal Custom At A Contemporary Stage*, 19 INDIAN J. INT'L L. 511, 513 (1980).

142. *Fisheries*, *supra* note 135, at 89-90.

ance on consent in the traditional theory.¹⁴³

Thus, international legal scholars often attempt to generate new norms of international law solely on the basis of "the self-evident improvement to mankind that would result from a centralised system of enforcement,"¹⁴⁴ with little regard for the actual predisposition of sovereign States to consent to these principles. It is thus relevant to seek to determine if the pursuit of Corwin, and others, to render nuclear weapons "illegal" is likely to be fruitful at any time in the near future.

It has been suggested that any purported principle of international law must be tested for "credibility," this being defined as the current willingness of national actors to consent to be bound by the principle, and the likelihood that they will continue to adhere to this principle in the future.¹⁴⁵ A three part test to determine the credibility of an alleged international legal principle formulated by Schwarzenberger is particularly germane to this pursuit. While the test is framed in the context of international treaties, the principles that are established therein are generalizable to the operation of the international law system as a whole. These elements are:

1) *The Degree of Integration of the Environment of Treaties*: Does a particular draft comport with the existing international legal environment, or is its realization contingent on a dramatic change in the structure of the environment?

2) *Homogeneity of the Contracting Parties*: Does the realization of the draft depend on homogeneous actor in spheres such as constitutional law or cultural norms?

3) *Minimal Ethical Common Denominator*: What is requisite minimal ethical common denominator that will ensure effective operation of the agreement?¹⁴⁶

Application of the first two of these factors clearly demonstrates why it is futile to make the claim that nuclear weapons are "illegal" in the absence of international support for such a principle.

A. *Integration of the Legal Environment*

The transition from a world pervaded by nuclear weapons to one in which such weapons are acknowledged to be illegal would require a dramatic transformation of attitudes by many important na-

143. Watson, *A Realistic Jurisprudence of International Law*, Y.B. WLD. AFF. 265, 274 (1980) [hereinafter Watson]; see also Tammes, *The Life Of The International Obligation And Of Its Subjects*, 31 NETH. INT'L L. REV. 1, 5 (1984).

144. Watson, *supra* note 120, at 268.

145. Schwarzenberger, *The Credibility of International Law*, Y.B. INT'L AFF. 292, 292-93 (1983).

146. This is a paraphrase of Schwartzberger's articulation. *Id.*

tional actors in the contemporary international legal environment. The dominant interests of the contemporary State are its "existence, independence and territorial integrity."¹⁴⁷ Tragically, the world's superpowers, as well as several other nations, have deemed it essential to develop a nuclear weapons' capability to adequately protect these interests. Given the seemingly intractable mistrust that surrounds the relations of some of the most important nuclear states, it is highly unlikely that we can expect a fundamental change in attitudes any time in the near future.¹⁴⁸ Without the assent of these nations, any effort to declare nuclear weapons "illegal" will necessarily amount to nothing more than an empty aspiration.¹⁴⁹

B. Homogeneity of the Relevant State Actors

The primary adversaries in the nuclear arms race today — NATO and the Warsaw Pact — represent polarized ideological systems that are often in direct conflict throughout the world. Such a charged environment is hardly conducive to the serious negotiations that would be necessary to establish a consensus that nuclear weapons are illegal. Beyond the superpowers and their allies, nations in conflict such as Israel and Iraq; India and Pakistan; and Brazil and Argentina completely lack the cultural or political homogeneity that would engender meaningful cooperation in this context. Thus, under a "real world-oriented" definition of "international legal principle," the theory that nuclear weapons are illegal, or may become so in the near future, is unfortunately erroneous.

IV. Nuclear Weapons and the Realistic Role of International Law

The conclusions that I have drawn in this article are by no means intended to imply that there is no legitimate role for international law, or lawyers, in our efforts to rid the world of the scourge of nuclear weapons. Rather, I have merely attempted to demonstrate that efforts to effectuate this result by attempting to ascertain the "legality" or "illegality" of nuclear weapons are likely to be futile.

147. Bos, *Will and Order in The Nation-State System: Observations on Positivism and Positive International Law*, in *THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY DOCTRINE* 51, 60 (R. MacDonald & D. Johnston, eds. 1984).

148. See, e.g., Roling, *International Law, Nuclear Weapons, Arms Control and Disarmament*, in Miller & Feinrider, *supra* note 2, at 183:

However, if one party disarms, the weapons of the opponent become usable once more, for the fear of retaliation no longer exists. The nation-at-arms now has an absolute superiority of force. This is an unacceptable situation. History teaches us that states are inclined to misbehave in proportion to their power, hence the need to possess nuclear arms in order to maintain a power balance and ensure that the opponent's weapons remain unusable.

149. De Vree, *The Political Conditions Of International Law*, 26 *NETH. INT'L L. REV.* 46, 56 (1979).

Relevant principles of international law simply do not render nuclear weapons illegal and thus are a direct reflection of the belief of many nations that possession of nuclear weapons remains necessary in a world where the use of force is far too often the primary instrument of "law." Moreover, efforts to determine the legal status of nuclear weapons simply detract from pursuing other options that might be more viable.

In recent months, the Soviet Union and the United States achieved a dramatic breakthrough in nuclear arms negotiations when they agreed to scrap their respective intermediate nuclear weapons force in Europe.¹⁵⁰ However, there is no evidence that this agreement was effectuated because of a belief that such weapons were illegal. Rather, it appears that both sides perceived that the agreement would enhance stability in Europe and establish the groundwork for future negotiations on strategic arms. In short, appeals to self-interest are the primary dynamic in successful arms negotiations in the contemporary world.

Thus, the "table skills" of attorneys may play an important role in negotiating effective arms control agreements that can help to reduce the risk of nuclear war in the future.¹⁵¹ The conclusions of an international lawyer provide perhaps the most realistic and encouraging perspective on the future role of attorneys in this process:

From a lawyer's perspective, I must say that I do not think our time is most usefully spent assessing the status and legitimacy of nuclear weapons under international law. This brings to mind the remark of a representative from a developing country in response to a proposed United Nations resolution which would have condemned the use of nuclear weapons as a crime against humanity. In a few and well chosen words, he expressed his disbelief that grown men were debating the legal implications of the destruction of the world. I too believe we have something more urgent to do with our time. We need to meet the nontheoretical challenge of designing realistic agreements that are verifiable and designing mechanisms for ensuring compliance and resolving disputes. Little by little, we may then be able to build the confidence in the effectiveness of arms control agreements which is essential to the negotiation of other agreements.¹⁵²

150. Wanke, *INF Treaty A Good Start*, Bull. Atom. Sci. (Mar. 1988) at 18; Guldin, *As Expected, Supreme Soviet Gives INF Treaty Warm Welcome*, Arms Control Today, Apr. 1988, at 22.

151. Weston, *Answering the Nuclear Question: The Modern Lawyer's Role*, 9 BROOKLYN J. INT'L L. 201, 207 (1983).

152. Hoinkes, *The United Nations Second Special Session on Disarmament: A Progress Report*, 9 BROOKLYN J. INT'L L. 219, 225-26 (1983).