

MILITARY LAW REVIEW

CONTEMPORARY INTERNATIONAL LEGAL ISSUES

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MILITARY LAW REVIEW

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NUCLEAR WEAPONS: THE CRISIS OF CONSCIENCE

by Captain Mary Eileen E. McGrath*

*This article examines the impact of nuclear weapons on international law, religion, and Army doctrine and personnel policies. **This** article concludes that principles of international law can be applied to the use of counterforce nuclear weapons and **is** reflected in Army doctrine. Principles of international law can only be applied to countervalue nuclear weapons through the policy of mutual deterrence and a balance of power. The American Roman Catholic Bishops have launched a moral crusade against nuclear weapons. They demand that individuals make moral choices regarding the use of nuclear weapons. Individuals **will** have to make their choices without adequate moral and religious guidance. The Bishops' call for legislative recognition of selective conscientious objection has given moral legitimacy to nuclear pacifism. While selective conscientious objection has been rejected by Congress and the Supreme Court, the Army must prepare to deal with nuclear pacifism.*

In the Paradise of Children dwelt a boy named Epimetheus. Because he lived alone, the gods on Mount Olympus sent him a companion. Her name was Pandora.

In the house of Epimetheus, Pandora spied a large carved chest that was locked. She immediately wanted to know what was in it. The boy told her that the god, Mercury, had brought it and left it with strict instructions never to open the chest, not even to unlock it. Pandora grew more curious.

The Paradise in which they dwelt was perfect. There was no sickness or trouble. Yet each time Pandora spied the chest, the more her curiosity grew.

One day when Pandora was alone she decided to unlock the chest and lift the lid for one quick look. **As** she began to raise the lid very

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slowly, it flew open. There was a great clap of thunder and the room grew instantly dark. A sudden swarm of batlike creatures rushed out of the chest and past her into Paradise. And so it was that anger, sorrow, sickness, despair, and all other evil things came into the world. Then the room grew light again. Pandora gazed into the chest and saw one last, tiny creature of great beauty struggling to fly out. When it gained strength, it, too, flew into Paradise. That last creature was Hope.

A Greek Legend

I. INTRODUCTION

A. *HIROSHIMA AND NAGASAKI: THE TURNING POINT*

Single events have often triggered dramatic changes in the course of civilization. The discovery of fire brought warmth, light, and a greater chance of survival to primitive humanity. Gutenberg's printing press made books available to the average citizen and fostered widespread literacy. The Wright Brothers's short flight paved the way for intercontinental travel and space exploration. In August 1945, the United States decimated Hiroshima and Nagasaki with nuclear weapons. Never before had a single bomb been able to obliterate an entire city and most of its population. While these weapons of mass destruction have never again been used to vanquish the enemy, Hiroshima and Nagasaki represent civilization's entry into a new era. The specter of universal holocaust has emerged from Pandora's box. The potential devastation and carnage of war was transformed from limited to unlimited. If ever unleashed, the present nuclear stockpiles of the United States and the Soviet Union have the potential of destroying civilization. Human beings need no longer work in munitions factories, be enmeshed in the advance of armies, or participate actively in warfare to become targets. Nuclear weapons and the resultant radioactive fall-out make people, those born and unborn, those far from the battle, and those uninvolved in the conflict, vulnerable to nuclear devastation and death.

B. *PUBLIC RESPONSE*

A few Americans participated in the short-lived "Ban the Bomb" movement of the early 1950s. Anti-nuclear movements have gained a stronger foothold in Western Europe and the United States in the 1980s. Mass demonstrations have been conducted in Great Britain

and the Federal Republic of Germany to protest the presence of U.S. nuclear weapons and the deployment of Cruise and Pershing II missiles. Americans have joined in peaceful demonstrations and civil disobedience to protest nuclear missile storage sites, reactors, and the proposed MX missile system. Numerous politicians, church groups, and scientific organizations have joined citizens in the call for nuclear freeze and eventual disarmament. Movies like *On The Beach*, *The Day After*, and *Testament* have focused public attention on the terrifying aftermath of a nuclear holocaust. Such movies have increased both the awareness of the threat and the fear of its occurrence. No sane individual, with even minimal moral scruples, desires to witness universal destruction. At the same time, other concerned politicians, church groups, and citizens believe that the United States must maintain our nuclear arsenal in order to prevent war and provide national security for ourselves and our allies. So the debate rages. Can we live with nuclear weapons? Can we survive without them? Can we limit their use? Is nuclear holocaust avoidable or inevitable?

C. COPING WITH THE CHALLENGE

Nearly 40 years have passed since Hiroshima and Nagasaki ushered in the age of nuclear weapons. Nations have thus far avoided the use of those weapons since that fateful day. The presence of nuclear weapons has presented new and unique challenges to international lawyers, military strategists, the clergy, and individuals. Have these challenges been met, avoided, or denied? If all human institutions and organizations were to be examined, volumes would result. Therefore, the scope of this article will be limited. First, the impact of nuclear weapons on international law will be examined. The second subject will be an analysis of Army doctrine on the limited use of nuclear weapons. Third will be an examination of how the Roman Catholic Church, particularly the American Bishops, have met the challenge. Last will be an examination of how this challenge impacts on individual conscience and Army personnel policies.

11. NUCLEAR WEAPONS

A. BASIC DEFINITIONS

Before nuclear weapons use and policy can be analyzed within the framework of international law, basic concepts and terms must be defined:

Tactical employment of nuclear weapons is the use of nuclear

weapons by the battlefield commander in support of maneuver forces in his command, usually at corps level or below.¹

The Army's tactical nuclear doctrine specifies the manner in which corps and divisions will conduct nuclear operations subject to political and military constraints. Such constraints may include target types, restrictions on delivery systems and yield, time, number of weapons to be used, geographical or political boundaries, and collateral damage preclusion guidance.²

The corps nuclear weapons package is a discrete grouping of nuclear weapons to be used in a specific area during a short time period to support a corps tactical mission.³

Counterforce nuclear weapons are typically small in yield, but highly accurate. The purpose of counterforce strategy is to aim directly at the enemy's military forces as opposed to destruction of the adversary's society in a massive way.⁴

Countervalue weapons and strategies primarily emphasize destruction of industrial bases and population centers. This kind of targeting strategy is best served by using larger yield weapons or multiple warheads.⁵

Target evaluation is an examination of targets to determine the priority for attack and military importance.⁶

Deterrence is the attempt to keep an adversary from taking a particular course of action by insuring that the risks will appear to him to be out of proportion to any gains he may achieve.⁷

Because these terms and concepts will be used throughout this article, it is critical that a precise conceptual basis be established immediately to provide a common basis for examination and evaluation of the issues.

¹U.S. Dep't of Army, Field Manual No. 6-20, Fire Support in Combined Arms Operations, at 6-2 (30 Sept. 1977) [hereinafter cited as FM 6-20].

²*Id.* at 6-3.

³*Id.* at 6-3.

⁴A. Jordan & W. Taylor, American National Security: Policy and Process 221 (1981).

⁵*Id.* at 221-22.

⁶U.S. Dep't of Army, Reg. No. 310-25, Military Publications-Dictionary of United States Army Terms, at 257 (15 Oct. 1983).

⁷H. Kissinger, Nuclear Weapons and Foreign Policy 96 (1957).

B. THE DESTRUCTIVE POTENTIAL OF NUCLEAR WEAPONS

The means and methods of waging war have changed over time as a result of technological discoveries and advances. Prior to World War I, enemies fought each other on land and sea. Land battles were confined to limited areas because armies could not travel far or quickly. They walked to battles or traveled by horseback. Land battles were frequently waged on vast farmlands. Civilians and their homes were rarely the objects of direct attack. During World War I, millions of soldiers fought in trenches and hedgerows far from cities and the civilian population. The use of airplanes was new and limited. Aerial bombardment of civilian population centers only became a common method of waging war during World War II. Technological advances had produced airplanes capable of flying great distances with heavy loads of men, cargo, and bombs. As a result, the war could be easily extended to cities where munitions were produced, rail centers were located, and enemy strategies were planned. Aerial bombardments were at times launched for the purpose of destroying the morale and resolve of the civilian population. Hitler's indiscriminate air raids on London are a prime example. The bombing raids on London, Coventry, Dresden, and Cologne evoke memories of massive destruction of heavily populated areas. The carnage of war engulfed the civilian population on a level not previously experienced.

The vulnerability of the civilian population was magnified further in August 1945, when the first nuclear weapons were dropped on Hiroshima and Nagasaki. Since that time, nuclear weapons have been developed to such a degree that mankind has available the means to destroy civilization.

If countervalue nuclear weapons and strategy were to be employed in a future war, the devastation of human life, property, and the environment that would result would make the carnage of World War II seem insignificant in comparison.

The effects of conventional bombing in World War II were cumulative: "[W]hereas today *one 10 megaton weapon represents five times the explosive power of all the bombs dropped on Germany during four years of war and one hundred times those dropped on Japan.*"⁸ In World War II, the population adjusted to the frequency and timing of bombardments. They could seek safety in shelters and

⁸*Id.* at 70.

increase their chance for survival. A thermonuclear weapon would produce all the direct casualties with a single strike. Combined, all the raids in Germany killed 330 thousand people. A single 10 megaton weapon exploded over Chicago or New York City will kill several times that number.⁹

The conventional bombings of World War II affected only limited parts of a city. Thermonuclear attack would paralyze an entire city with heat and blast. The surrounding countryside would be subjected to the residue of a thermonuclear blast, radioactive fall-out.¹⁰

Differences in explosive power account for different radiological effects. The fireball of a 20 kiloton weapon has a diameter of 1½ miles. The fireball of a 10 megaton thermonuclear weapon has a diameter of 6 miles. Unless exploded at very high altitudes (above 16 thousand feet), it will, therefore come in contact with the ground below. As it does so, the blast of the explosion dislodges millions of tons of the surface. The rising fireball sucks up this debris and converts it into radioactive material which is then swept up into the stratosphere and deposited downwind. As a result, there takes place over a period of days a continual "fall-out" of radioactive material over an elliptically shaped area. The nature and distribution of the fall-out depends on meteorological conditions and the constitution of the surface above which the bomb explodes.¹¹

The effect of fall-out is dependent upon the amount of radiation to which a person or areas is subjected. In general, there are two types of damage. Direct damage leads to illness, death, reduced life expectancy, and genetic defects. Direct damage is caused by the penetration of gamma rays into the skin, which alters the molecular structure of the cells. Alpha and beta rays cause burns and lesions; they cannot do internal damage unless a person ingests contaminated food or water; this constitutes indirect damage. Gamma rays also damage blood cells. Thus, a greater susceptibility to infection is produced. Radiation may produce leukemia and cataracts months after an individual has been exposed to radiation.¹²

As soon as the radiation drops to a level safely tolerable to people, decontamination measures must be taken immediately. Otherwise,

⁹*Id.* at 70-71.

¹⁰*Id.* at 71-73.

¹¹*Id.* at 74-75.

¹²*Id.* at 74-76.

the area may be rendered unproductive for months or even years and the cumulative effects of lingering radiation could make it uninhabitable.¹³

The fall-out will contaminate the water supply and crops. Most livestock will either be killed or contaminated by ingesting radioactive fodder and water. The available food supply will be even more drastically reduced.¹⁴ "In addition to its drastic impact on the social structure and the material well-being of warring nations, an all-out war with modern weapons would produce genetic effects and consequences from long-term fall-out, which might affect all humanity."¹⁵

The cities of London, Coventry, Dresden, and Cologne, though terribly devastated, have been rebuilt. The survivors of the bombing raids did not have to fear the effects of fall-out. Food and water were not contaminated. Genetic defects were not produced in the offspring of the survivors. Cities were rebuilt from rubble; they were not abandoned because there was no means to decontaminate the area. Decontamination was not necessary. The homeless and dispossessed could seek shelter with friends and relatives. Survivors knew that the farms would continue to produce food that could be safely consumed. Widespread countervalue warfare could produce destruction and desparation that would render the cessation of hostilities meaningless and survival a living hell. Societies and individuals may not have the materials and resources necessary for the reconstruction of all that was destroyed. Simple survival may be beyond the reach of many people. Those who survive the nuclear bombs may well envy those who perished instantly. The only law that may survive in a contaminated world is that which promotes personal survival regardless of the cost to others.

C. TREATIES AND INTERNATIONAL AGREEMENTS

For hundreds of years, rules have been devised by nations to control the means of waging war. Some of these rules comprise customary international law principles. Nations often reduce these rules to writing and form a treaty to formally bind themselves and make clear exactly what the rules mean and are supposed to do. Regardless of the form the rules take, their purpose is to regulate warfare so

¹³*Id.* at 77.

¹⁴*Id.* at 78.

¹⁵*Id.* at 79-80.

that it can be made more humane. During the course of a conflict, new weapons may be developed and used that are not covered specifically by treaty. During the conduct of a war, it may not be possible for the parties to reach an agreement regarding the use of the new weapon. Therefore, rules may be developed after the conflict has ceased.

Nuclear weapons were used for the first time in August 1945 when Hiroshima and Nagasaki were bombed. No treaties, prior to 1945, had been concluded regarding the use of nuclear weapons. Clearly, nations could not have regulated a weapon that was non-existent.

Nearly forty years have passed since the destruction of Hiroshima and Nagasaki. Have nations developed any rules or entered into any treaties that regulate the use of nuclear weapons? Do any principles of customary international law regulate the use of nuclear weapons?

The United States has made continuous efforts for 25 years to negotiate limitations on nuclear weapons. In 1959, the United States negotiated The Antarctic Treaty with the Soviet Union. The articles of this Treaty prohibit the use of Antarctica for the establishment of military bases and fortifications, military maneuvers, the testing of weapons, and disposal of radioactive waste material. The United States became bound by this Treaty on June 23, 1961.¹⁶

The United States entered into the Limited Nuclear Test Ban Treaty, a treaty of unlimited duration, on August 5, 1963. The parties to this agreement, including the Soviet Union, proclaimed as their principal aim the expeditious achievement of a total disarmament agreement to be supervised under strict international control in accordance with the objectives of the United Nations. The parties expressed a desire to end the arms race and eliminate the production and testing of weapons, including nuclear arms.¹⁷ Each party to this treaty agreed to prohibit and prevent the testing of nuclear weapons, at any place under its control or jurisdiction in the atmosphere, in outer space, underwater, on the high seas, or in any other environment, if the explosion would cause radioactive material to be present outside the testing state's territorial limits.¹⁸

¹⁶Antarctic Treaty, December 1, 1959, 12 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 71.

¹⁷Treaty Banning Nuclear Weapon Tests In The Atmosphere, In Outer Space, and Under Water, August 5, 1963, 14 U.S.T. 1313, T.I.A.S. 5433, 480 U.N.T.S. 43 (date of entry into force with respect to the United States: October 10, 1963).

¹⁸*Id.* at art. 1.

The United States agreed, in Additional Protocol II to the Treaty for the Prohibition of Nuclear Weapons in Latin America, to abstain from arming Latin American nations with nuclear weapons. The Soviet Union is not a party to this agreement.¹⁹

In 1971, the United States and Soviet Union agreed not to emplant or emplace on the seabed or ocean floors beyond the limit of a seabed zone, any nuclear weapons, structures, launching installations, or any other facilities designed for storing, testing, or using nuclear weapons.²⁰

The United States and the Soviet Union entered into Strategic Arms Limitation Treaty (SALT I) on May 26, 1972. This agreement expired in October 1977.²¹ Although not legally binding, both parties indicated they would abide by the terms of SALT I pending the outcome of the SALT II negotiations. SALT I provided for a halt in the construction of additional fixed land-based intercontinental ballistic missile (ICBM) launchers. The parties agreed not to convert land-based launchers for light ICBMs into heavy land-based ICBM launchers.²² Also limited were the number of submarine-launched ballistic missile launchers (SLBM) and number of operational submarines capable of launching SLBMs.²³

The United States and the Soviet Union, in October 1972, agreed to limit anti-ballistic missile systems (ABM), launchers, interceptor missiles at launch sites, and radar.²⁴

President Jimmy Carter signed the SALT II Treaty with the Soviet Union on June 18, 1979. This treaty, which limits strategic offensive

¹⁹Additional Protocol II to the Treaty for the Prohibition of Nuclear Weapons in Latin America, February 14, 1967, 22 U.S.T. 754, T.I.A.S. 7137, 634 U.N.T.S. 364 (date of entry into force with respect to the United States: May 12, 1971).

²⁰Treaty 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, February 11, 1971, 23 U.S.T. 701, T.I.A.S. 7337 (date of entry into force with respect to the United States: May 18, 1972).

²¹Interim Agreement Between the Union of Soviet Socialist Republics and the United States of America on Certain Measures with Respect to the Limitation of Strategic Offensive Arms with Protocol (SALT I), with Agreed Interpretations, Common Understandings and Unilateral Statements, May 26, 1972, 23 U.S.T. 3462, T.I.A.S. 7504 (date of entry into force with respect to the United States: October 3, 1972).

²²*Id.* at art. 11.

²³*Id.* at art. III.

²⁴Treaty Between The United States of America and The Union of Soviet Socialist Republics on the Limitations of Antibalistic Missile Systems with Agreed Interpretations, Common Understanding and Unilateral Statements, May 26, 1979, 23 U.S.T. 3435, T.I.A.S. 7503 (date of entry into force with respect to the United States: October 3, 1972).

arms, was never given the advice and consent of the United States Senate.²⁵

With regard to these treaties, Secretary of Defense Caspar Weinberger observed:

A melancholy chapter in the troubled history of the last decade or two is that on arms control. Early in the 1960's, after many years of fruitless negotiations, the United States seemed to have reason for high hopes. The Limited Nuclear Test Ban Treaty of 1963 seemed to offer the imminent prospect of a much broader U.S.—Soviet understanding on nuclear arms that would slow down and eventually halt the nuclear competition and make the deterrent forces of both sides more stable and secure. Today, we have come to recognize the full extent of our disappointment. Despite the agreements we negotiated, the Soviet Union steadily increased its investment in nuclear strategic forces even though we reduced ours.²⁶

The United States, despite its disappointment, engaged in the Strategic Arms Reduction Talks (START), nuclear weapons negotiations with the Soviet Union, in Geneva, Switzerland. Shortly after the United States deployed its Pershing II missiles in NATO in 1983, the Soviets broke off the negotiations. One can speculate about the reason for the Soviet action. It may have been due to the deployment of the Pershing II missiles, the failing health of the Soviet leader, Yuri Andropov, a Soviet desire to influence the American Presidential election of 1984, or a combination of these and other reasons.

None of the treaties that have been negotiated have addressed the use of nuclear weapons in time of armed conflict. Therefore, if the use of nuclear weapons during conflict is regulated at all, the source of the regulations must be found elsewhere.

²⁵Treaty Between The United States of America and The Union of Soviet Socialist Republics on the Limitation of Strategic Offensive Arms with Agreed Statements and Common Understanding (SALT 11), June 18, 1979, U.S. Department of State Publication 8984, Selected Documents No. 12A, at 3-50.

²⁶Report of Secretary of Defense Caspar W. Weinberger to the Congress on the FY 1983 Budget, FY 84 Authorization Request and FY 1983-87 Defense Programs, February 8, 1982, 1-19 [hereinafter cited as Weinberger Report].

D. INTERNATIONAL RESTRAINTS ON WAR

While the United States is not a party to any international agreement that specifically outlaws the use of nuclear weapons, it does not follow that it or any other nation is free to use nuclear weapons without restraint. It is the view of the United States:

The use of explosive "atomic weapons," whether by air, sea, or land forces, cannot as such be regarded as violative of international law in the absence of any customary rule of international law or international convention restricting their employment.²⁷

The import of this view is that, absent a particular international convention or customary law, nuclear weapons are legal weapons like conventional bombs, hand grenades, and bayonettes. Their **use**, on the other hand, is subject to recognized principles of international law. What international law principles limit the use of nuclear weapons? Are there other principles of international law that should be extended to regulate the use of nuclear weapons?

After World War II, the nations of the world agreed to form an international forum that was primarily designed to promote peace and avoid the type of conflict that had twice shattered the world in the twentieth century. Thus, the United Nations was born. In Article I of the United Nations Charter,²⁸ the nations formally proclaimed as one of their purposes:

To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression **or** other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.²⁹

²⁷U.S. Dep't of Army, Field Manual No. 27-10, The Law of Land Warfare, para. 35 (July 1956) [hereinafter cited as FM 27-10].

²⁸The Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153; 1963 amendments, 16 U.S.T. 1134, T.I.A.S. 5857, 557 U.N.T.S. 143; 1965 amendment, 19 U.S.T. 5450, T.I.A.S. 6529; 1971 amendment, 24 U.S.T. 2225, T.I.A.S. 7739 (date of entry into force with respect to the United States: October 24, 1945; amendments to Articles 23, 27, 61 of the Charter came into force on August 31, 1965; an amendment to Article 109 of the Charter entered into force on June 12, 1968).

²⁹*Id.* at art. 1.

The United States, a party to this international Charter, has committed itself to a course of conduct that is intended to prevent war, promote peace, and support efforts to peacefully settle disputes.

Article 51 of the Charter recognizes the right of a nation or several nations to act in self-defense against an armed attack. An act of self-defense is to be reported immediately to the United Nations Security Council. That Council may take whatever measures are necessary to maintain international peace and security.³⁰

However, a party is not entitled to attack another nation when an international dispute arises. Article 33 provides that the parties to a dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall first seek a peaceful solution through negotiation, conciliation, arbitration, judicial settlement, or other means of their own choice. When it deems necessary, the Security Council shall call upon the parties to settle their dispute by peaceful means.³¹

If nations resolve their disputes peacefully, questions regarding the use of nuclear weapons will not arise. When a nation attacks another nation, the right to self-defense is triggered.³² A nation that attacks another nation without attempting to resolve the dispute peacefully is in violation of the United Nations Charter.³³ Such an attack would be illegal, regardless of the type of weapons used. If a peaceful settlement cannot be achieved and conflict results or if a nation responds to unjust aggression in self-defense, nuclear weapons may be used during the conflict. What rules of international law would regulate the use of nuclear weapons?

Three basic principles of customary international law govern the use of all weapons, to include nuclear weapons.

The first principle is military necessity. A nation is not free to wield its power without restraint during conflict. A nation is to use only that force or violence which is truly necessary to achieve the military objective. Principles of humanity and chivalry are not to be wholly abandoned.³⁴

The second principle is proportionality. Attacks are to be planned and conducted so that the loss of life and damage to property caused

³⁰*Id.* at art. 51.

³¹*Id.* at art. 33.

³²*Id.* at art. 51.

³³*Id.* at art. 33.

³⁴FM 27-10, para. 3.a.

will not be excessive in relation to the military advantage to be gained.³⁵

The third principle is avoidance of unnecessary suffering. Weapons are not to be used to inflict unnecessary suffering. An example of this is using a substance on a bullet that would cause a wound to become needlessly inflamed. The use of explosive materials is not prohibited.³⁶

While nuclear weapons are not per se illegal under international law,³⁷ their use must be evaluated through the application of these three principles of customary international law.

1. Countervalue Weapons and Strategy

Countervalue nuclear weapons and strategy defy traditional application of the principles of military necessity, proportionality, and avoidance of unnecessary suffering. Countervalue nuclear weapons have enough destructive power to decimate entire cities and civilization. They can be launched from great distances, from Kansas to Moscow or Moscow to Washington, D.C. One of the strategic benefits of such weapons is that they can destroy military targets that cannot be attacked successfully with conventional weapons. Pinpoint targeting is not critical for a successful countervalue nuclear attack as it is for conventional attacks. However, if nuclear weapons were used to attack scattered military targets in a city with a large civilian population, would the resultant death and destruction be disproportionate to the military objective to be obtained? Could military necessity justify the death of thousands of civilians when a few scattered military targets are the object of the attack? Would the effects of fall-out and radiation cause disproportionately prolonged and unnecessary suffering among the survivors and succeeding generations?

One court has addressed these very issues in *The Shirnoda Case*.³⁸

Japanese nationals who survived the attacks on Hiroshima and Nagasaki brought suit for damages against Japan. They claimed compensation for the wounds they suffered and for the deaths of relatives caused by the nuclear weapons. *The Shimoda Case* was decided in Tokyo in December 1963.³⁹ The Tokyo District Court determined

³⁵*Id.* at para. 41.

³⁶*Id.* at para. 34.

³⁷*Id.* at para. 35.

³⁸*Ryuichi Shimoda v. The State*, 8 Japanese Annual of Int'l Law 1964-65 (District Court of Tokyo 1963).

³⁹*Id.* at 212.

that the point at issue was whether the act of bombing of Hiroshima and Nagasaki by the United States was illegal in view of positive international law in force at that time.⁴⁰ The court stated:

Any weapon the use of which is contrary to the customs of civilized countries and to the principles of international law should *ipso facto* be deemed to be prohibited even if there is no express provision in the law; the new weapon may be used as a legal means of hostilities only if it is not contrary to the principles of international law.⁴¹

Hiroshima had a civilian population of 330,000 and Nagasaki 270,000. Each city was defended by anti-aircraft guns and had military installations.⁴²

The court held that there was no military necessity for the indiscriminate bombardments. Only bombardment of military objectives was permissible.⁴³ The court stated that “the distinction between a military objective and a non-military objective cannot be said to have completely disappeared.”⁴⁴

The court also found that the bombings violated the fundamental principle of the law of war that prohibits the causing of unnecessary suffering.⁴⁵ The court drew its conclusion from the following facts and observations:

It is doubtful whether the atomic bomb with its tremendous destructive power was appropriate from the viewpoint of military effect and was really necessary at the time. It is indeed a fact to be regretted that the atomic bombing of the cities of Hiroshima and Nagasaki took away the lives of tens of thousands of citizens, and that among those who have survived are those whose lives are still imperilled owing to its effects even now after eighteen years.⁴⁶

The *Shimoda* court has applied customary international law in a traditional and logical manner. While reason may compel individuals to accept the *Shimoda* court’s conclusions and the logical meaning of

⁴⁰*Id.* at 239.

⁴¹*Id.* at 236.

⁴²*Id.* at 239.

⁴³*Id.* at 236.

⁴⁴*Id.* at 239.

⁴⁵*Id.* at 240.

⁴⁶*Id.* at 241.

military necessity, proportionality, and avoidance of unnecessary suffering **as** applied to countervalue nuclear weapons, the realities of the political arena cannot be overlooked. The United States and the Soviet Union have enough nuclear weapons to create a universal holocaust. They have been unable to conclude long-lasting treaties that limit the number of nuclear weapons. In a climate of mutual distrust, the arms race continues. It is within this context that the defense policy of the United States is formulated.

The Secretary of Defense is responsible for reporting annually to Congress the basic defense policies and goals of the administration. This report is tendered during the preparation period of the annual budget. The basic goal of Secretary Weinberger is to eliminate major weaknesses in our defense and construct a defense that can reduce our present vulnerability and give us a margin of safety necessary to preserve **peace**.⁴⁷ The basic defense posture is that

[t]he United States remains committed to a defensive use of military strength; our objective is to deter aggression or to respond to it should deterrence fail, not to initiate warfare or “preemptive” attacks. In tactics it is often said, the offensive is best, but the defense policy of the United States must remain strictly defensive. This stance has been fundamental to U.S. national security since World War II, indeed before then. From this premise it flows that our military forces must be prepared to react after the enemy has seized the first initiative and react so strongly that our counter attacks will inflict unacceptably high cost on the enemy—a requirement that puts a heavy burden on our readiness and intelligence capability. A defensive strategy must be responsive to the particular threats presented by our potential enemies; in other words, we must adapt our forces and our tactics to the magnitude and character of the threats **as** they evolve over time.⁴⁸

Total reliance on nuclear weapons is not contemplated. Nuclear strength is not regarded **as** a substitute for conventional **strength**.⁴⁹ It is the goal of United States policy to maintain a strategic nuclear force posture such that the Soviet Union will have no incentive to attack the United States or its allies with nuclear weapons. The heart of this goal **is** to create and maintain a nuclear deterrent force that

⁴⁷Weinberger Report, *supra* note 26, at 1-3.

⁴⁸*Id.* at 1-11.

⁴⁹*Id.* at 1-17.

will give the United States an adequate margin of survivability even if the Soviets should first strike and permit the United States to retaliate in such a manner that it would achieve its objectives.⁵⁰ Above all, it is America's purpose to prevent nuclear attack in all contexts and from all possible causes.⁵¹ The nuclear forces of the United States will serve at least four basic purposes: to deter nuclear attack on the United States or its allies; to help deter major conventional attack against U.S. forces and its allies; to impose termination of a major war on terms favorable to the U.S. and its allies and to deter escalation in the level of hostilities, even if nuclear weapons have been used; and to preclude possible Soviet nuclear blackmail against the U.S. or its allies.⁵²

At the same time, the United States is committed to seeking balanced and verifiable arms control agreements that will substantially reduce nuclear arsenals and make a significant contribution to American society and to world peace.⁵³

Implicit in the policy of deterrence is a balance of power and equal threat. If the Soviet Union has the means to destroy the United States with nuclear weapons, then the United States must have the means to destroy the Soviet Union. Each must maintain nuclear parity in order to avoid forced surrender through nuclear blackmail. Should the Soviet Union contemplate the surprise nuclear attack of American cities, it must recognize that a return strike by the United States would render victory meaningless; such an attack would therefore be prevented. Neither the President nor Secretary Weinberger has denounced first use of countervalue weapons or strategy against the Soviet Union. To formulate such a policy would permit the Soviet Union a strategic advantage that could completely undermine United States national security. In order to deter nuclear attack, the United States must be willing to use countervalue weapons.

A paradox appears. The strategy of mutual deterrence is a reverse application of customary international law. It can be concluded that military necessity compels nations to maintain a balance of countervalue nuclear weapons so that one nation cannot blackmail another into total surrender or decimate its adversary with impunity. The principles of proportionality and avoidance of unnecessary suffering

⁵⁰*Id.* at 1-17.

⁵¹*Id.* at 1-17.

⁵²*Id.* at 1-18.

⁵³*Id.* at 1-21-22.

prompt nations to build and maintain nuclear arsenals equal in destructive power *so* that the use of these weapons would be equally devastating and *so* costly that they will never be used. The application of these principles within the context of deterrence is a preventative application of customary international law. However, if the concept of deterrence fails, the application of these three principles will most likely vanish in the blast of exploding countervalue nuclear weapons.

What if deterrence should fail? One of the purposes of United States nuclear forces is to impose termination of a major war on terms favorable to the United States and its allies and to deter escalation in the level of hostilities. The United States could determine, for example, that the best way to achieve this objective would be through targeting and attacking the Soviet Union's military control center in Moscow. The goal could be to create internal chaos in the Soviet Union, disorganize its military forces, and promote peaceful negotiation. But would this strategy comport with United States policy and international law?

It is United States policy to attack only military objectives which include:

[C]ombatants, and 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—are permissible objects of **attack**.⁵⁴

This policy is in accord with customary international law. The United States also recognizes that “[c]ustomary international law prohibits the launching of attacks (including bombardment) against the civilian population **as** such or individual civilians **as** such.”⁵⁵

The United States' military commanders must attempt to control incidental damage during an attack:

Those who plan or decide upon an attack, therefore, must take all reasonable steps to ensure not only that the objectives are identified **as** military objectives or defended places within the meaning of the previous paragraph but also that these objectives may be attacked without proh-

⁵⁴FM 27-10, para. 40c.

⁵⁵*Id.* at para. 40a.

able losses in lives and damage disproportionate to the military advantage anticipated.⁵⁶

The distinction between targeting military objectives and civilians disappears in connection with the use of countervalue nuclear weapons. The Kremlin would be a proper military objective, but St. Basil's Church would not be. In terms of results, it would make no difference if the Kremlin were targeted or St. Basil's Church. Most of the civilian population would die as a direct result of the blast and many more would die later from fall-out and radiation exposure. A commander who ordered the launch could not reduce this incidental damage. Under the *Shimoda* rationale, such an attack could not be justified under international law principles.

On the other hand, long-term political objectives might be used to justify such an attack. If Moscow were attacked by countervalue nuclear weapons and five million civilians died, it could be argued that international law would be vindicated by a quicker resolution of the conflict and the protection of even more civilians. The military necessity of destroying Moscow's military objectives would be ultimately proportional and avoid unnecessary suffering.

The problem with the *Shimoda* view is that nations could cloak military objectives with immunity from attack because they are located in cities. If such objectives were located in the heart of the Soviet Union, it would be extremely difficult to reach them even with precision, conventional bombs.

The second view is also flawed; it does not take into account the risk of nuclear escalation and potential universal holocaust. How many cities would have to be destroyed and how many civilians killed with countervalue nuclear weapons before military necessity could no longer justify the death and destruction?

Neither view can comport with customary international law or political reality. Countervalue nuclear weapons are too terrible to fit within the framework of international law, a law that was developed to make conflict as humane as possible. The application of customary international law makes sense only within the context of mutual deterrence.

On a different level, the attitude of nations appears to be schizophrenic when dealing with conventional warfare. Nations have attempted to regulate warfare and provide increased protection to the

⁵⁶*Id.* at para. 41.

civilian population. This evolutionary process made its first advance in 1907 with the adoption of the Hague Convention No. IV.⁵⁷ The parties agreed that the means of injuring the enemy is limited.⁵⁸ It is particularly forbidden to use arms, projectiles, or material to inflict unnecessary suffering⁵⁹ and to destroy enemy property unless demanded by the necessity of war.⁶⁰ The attack or bombardment of undefended cities and towns is prohibited.⁶¹ However, the Convention did not define "undefended." Attackers are to take all necessary measures to spare, **as** far as possible, religious, historic, artistic, scientific, and charitable buildings and hospitals.⁶²

World War II vividly demonstrated the inadequacy of these protections. A new Geneva Convention⁶³ was negotiated in 1949 to remedy the problems that had emerged in World War II. Greater and more specific protections were accorded to civilians. The parties agreed:

Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth, or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment.⁶⁴

⁵⁷Hague Convention No. IV Respecting the Laws and Customs of War on Land, October 18, 1907, 36 Stat. 2227, T.S. 639, Bevans 631 (date of entry into force with respect to the United States: January 26, 1910).

⁵⁸Hague Convention No. IV Respecting the Laws and Customs of War on Land, October 18, 1907, Annex to the Convention, art. 22, 36 Stat. 2227, T.S. 539, Bevans 631.

⁵⁹*Id.* at art. 23.c.

⁶⁰*Id.* at art. 23.g.

⁶¹*Id.* at art. 25.

⁶²*Id.* at art. 27.

⁶³Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949 - Feb. 12, 1950, 6 U.S.T. 3516, T.I.A.S. 3365, 75 U.N.T.S. 287 (date of entry into force with respect to the United States: February 2, 1956).

⁶⁴*Id.* at art. 3(1).

During conflict, parties are encouraged to negotiate neutral areas to which civilians, the sick, wounded, and infirm can go to avoid the effects of war.⁶⁵

This Convention did not specifically address the issue of aerial bombardment of cities. The indiscriminate bombing of cities during World War II produced enormous casualties among the civilian population.

A Diplomatic Conference convened in Geneva, Switzerland in 1974 to draft protocols to already existing conventions on the conduct of warfare. In 1977, Protocol I, relating to the protection of victims of international armed conflicts, was adopted.⁶⁶ There was a tacit understanding among the states that the new rules of warfare established by the Protocol would not regulate the use of nuclear weapons.⁶⁷ While the United States Senate has yet to give its advice and consent to the proposed Protocol I, the United States made the following reservation at the time of signature:

with regard to Protocol I

It is the understanding of the United States of America that the rules established by this protocol were not intended to have any effect on and do not regulate or prohibit the use of nuclear weapons.⁶⁸

Protocol I is important to consider with regard to countervalue nuclear strategy because it clearly demonstrates the confused attitude of nations with respect to the conduct of war. Protocol I is the newest attempt by nations to make conflict more humane and to further extend protection to civilians. Article 35 of Protocol I provides that, in any armed conflict, the right of the Parties to the conflict to choose means or methods of warfare is limited. It is prohibited to employ means and methods of warfare of a nature that causes superfluous injury or unnecessary suffering. It is also prohibited to use means or methods of warfare that are intended to or may be expected to cause widespread, long term damage to the environment.⁶⁹

Article 51 provides protection to the civilian population and individual civilians from the dangers arising from military operations.

⁶⁵*Id.* at art. 15.

⁶⁶Protocol I Additional to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts with Annexes, December 12, 1977, Vol. XVI International Legal Materials 1391 (1977), UN Document A/32/144 of August 16, 1977.

⁶⁷J. Goldblat, Arms Control Agreements 84-86 (1983).

⁶⁸Protocol I, Declarations.

⁶⁹*Id.* at art. 35.

The civilian population and individual civilians are not to be made objects of attack or threats of violence intended to spread terror among the population.⁷⁰ Indiscriminate attacks on civilians are prohibited. Indiscriminate attacks are defined as:

- a. those which are not directed at a specific military objective;
- b. those which employ a method or means of combat which cannot be directed at a specific military objective; or
- c. those which employ a method or means of combat the effect of which cannot be limited as required by this protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.⁷¹

Article 51 further defines indiscriminate and prohibited attacks as:

- a. an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village, or other area containing a similar concentration of civilians or civilian objects; and
- b. an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.⁷²

Additionally, attacks against the civilian population or civilians by way of reprisal are prohibited.⁷³ Article 85 declares that a grave breach of the Protocol will be committed when the civilian population or individual citizens are made the direct object of attack or when an indiscriminate attack affecting the civilian population is launched with the knowledge that such attack will cause excessive loss of life, injury to civilians, or damage to civilian objects in relation to the military advantage anticipated.⁷⁴

⁷⁰*Id.* at art. 51(2).

⁷¹*Id.* at art. 51(4).

⁷²*Id.* at art. 51(5).

⁷³*Id.* at art. 51(6).

⁷⁴*Id.* at art. 85(3).

Protocol I exemplifies a rational attempt by nations to remove the threat of indiscriminate bombing of cities and civilians from future conventional wars. Nations have agreed in principle to reject tactics that were practiced in World War II. The very carnage nations desire to minimize and avoid in conventional warfare they threaten to perpetrate on a wider scale with countervalue nuclear weapons. The era following World War II taught that nations can be rebuilt from the ashes of devastation. That possibility may not be present if the nuclear arsenals of the United States and Soviet Union were unleashed. If logic were the only factor to be considered in the question of regulating the means of waging war and selecting targets, countervalue nuclear weapons would be the first weapons to be regulated because they can cause universal holocaust. Principles of customary international law can be applied to countervalue nuclear weapons prospectively to insure that they are never used. Mutual deterrence is the only alternative. Conventional weapons, as destructive as they may be, do not threaten universal holocaust. As a consequence, nations can agree to regulate them because less is at stake. Nations can agree to limit that which has limited destructive potential. International law is incapable of regulating the unlimited. The contradictory policy of regulating conventional methods of war, but exempting countervalue nuclear weapons from all regulation is demanded by political reality. What appears to be an illogical and insane method of international relations is the only logical and sane method available in the face of the threat of the destructive potential of countervalue nuclear weapons.

Principles of international law are rendered impotent and irrelevant by the threat of the use countervalue weapons and strategy. Nations have difficulty in negotiating arms limitations. To limit use of those weapons would require trust. Unlike numbers or types of weapons, trust cannot be monitored, counted, or verified. Even if nations agree not to produce countervalue weapons and destroy the ones they have in their arsenals, knowledge is still present. One nation could never be sure that its adversary is not secretly building such weapons so that it can insure victory.

The ultimate threat to civilization cannot be disarmed by law; only a transformation of individuals and civilization can do that. Until nations can achieve mutual trust, we may be relegated to Dr. Kissinger's observation and conclusion:

The new technology thus increases our dangers at the precise moment when our commitments have never been greater. For the first time in our history we are vulnerable to a direct hostile attack. No remaining margin of indus-

trial and technological superiority can remove the consciousness of our increasing vulnerability from the minds of our policy makers who have to make the decision of peace or war. But perhaps our dangers offer us at the same time a way out of our dilemmas. As long **as** the consequences of all-out thermonuclear war appear **as** stark to the other side **as** to us, they may avert disaster, not through a reconciliation of interests but through mutual terror. Perhaps our identification of deterrence with retaliatory power, however faulty its historical analogies, provides the basis for achieving a durable peace, after all?⁷⁶

2. *Counterforce Nuclear Weapons and Tactical Nuclear Doctrine*

While countervalue nuclear weapons eviscerate customary international law, perhaps counterforce nuclear weapons can be used in accord with those principles. Counterforce nuclear weapons, unlike countervalue nuclear weapons, are smaller in yield and less destructive. They are more accurate but can cover a much more limited distance. Do military plans for use of counterforce (tactical) nuclear weapons comport with customary international law?

Whether nuclear weapons are to be utilized and how they would be used are strategic decisions made, not by commanders in the field, but by high level political and military **authorities**.⁷⁶

Release, or the authority to use nuclear weapons, will be granted by the National Command Authority (NCA). National Command authorities are the President and The Secretary of Defense. To dampen the escalatory effects of using nuclear weapons, release normally will be approved for *preplanned packages* of weapons to be fired within a *specified timeframe* and within *specified geographical areas*. Approval to employ nuclear weapons is granted after consideration of the predicted military effect, the strategic impact, and the overall political objectives.⁷⁷

The corps nuclear package is planned prior to hostilities and refined during hostilities **as** the battle progresses and new intelligence data is gathered. Aimpoints are planned outside civilian population

⁷⁶Kissinger, *supra* note 7, at 84-86.

⁷⁶FM 6-20, at 6-20, 6-2, 6-3.

⁷⁷*Id.* at 6-5.

centers in areas that the enemy must use to accomplish the mission. All weapons, or the smallest number necessary to accomplish the mission, are fired in the shortest possible time to convey to the enemy that nuclear weapons are being used in a limited manner.⁷⁸

Nuclear packages are planned and refined using a combination of two nuclear target analysis techniques. Preclusion-oriented analysis seeks to avoid excessive damage to population and facilities while employing yields that will give the greatest effect on the probable enemy locations within the remaining areas. Target-oriented analysis requires a known target, location, size, and composition. Using this technique, weapon yields can be selected to achieve specific target coverage within use constraints.⁷⁹

Military victory and objectives no longer are the sole considerations taken into account when the decision is made to use nuclear weapons. Political considerations may bar use of nuclear weapons, even if use would benefit the military objective. The types of nuclear weapons to be used and their yield will not be unlimited. Selection of aimpoints, weapons, and yield will be determined by taking into account military objective, avoiding unnecessary destruction of property, and minimizing danger to civilians and allies.

The Army's Nuclear Planning Guidance incorporates fundamental principles of customary international law. The objective in using nuclear weapons is to decisively alter the tactical situation. The use of nuclear weapons may be compelled offensively, to destroy enemy forces or regain lost territory; defensively, where the mission cannot be accomplished without them; or in response to enemy first use.⁸⁰ This Army plan implies engagement in a limited war in which counterforce nuclear weapons may be useful, **as** opposed to all-out war which implies the use of countervalue strategy and weapons. Limited use of counterforce nuclear weapons **is** designed to limit damage, confine and shorten conflict, and reduce the **risk of** nuclear holocaust:

A limited war is fought for a specified political objectives which, by their very existence, tend to establish a relationship between the force employed and the goal to be attained. It reflects an attempt to affect the opponent's will, not to **crush** it, make the conditions to be imposed

⁷⁸*Id.* at 6-3.

⁷⁹*Id.* at 6-3.

⁸⁰*Id.* at 6-3.

seem more attractive than continued resistance, to strive for specific goals and not for complete **annihilation**.⁸¹

. . . .

The purpose of limited war is to inflict losses or to pose risks for the enemy out of proportion to the objectives under dispute. . . . An attempt to reduce the enemy to impotence would remove the psychological balance which makes it profitable for both sides to keep the war limited. Faced with the ultimate threat of complete defeat, the losing side may seek to deprive its opponent of the margin to impose its will by unleashing a thermonuclear holocaust.⁸²

The weapons system for a limited war must be flexible and discriminating. In a limited war, the problem is to apply graduated amounts of destruction for limited objectives and also to permit the necessary breathing space for political **contacts**.⁸³

Armies are becoming increasingly mobile and self-sufficient. The focus of most of the conflict would shift from cities to the opposing forces if limited use is made of nuclear weapons. Interdiction of communication centers in cities and transportation lines may lose much of its former significance. With conventional technology a decisive victory on the battlefield could be achieved only by using quantities of arms too large to stockpile. Munitions and weapons constantly have to be supplied out of current production. Under conditions of nuclear plenty, weapons can be more decisively used against opposing forces than against production centers.⁸⁴

Much argument against limited nuclear war proceeds from the premise that there will be indiscriminate use of high-yield weapons against a stabilized front and behind enemy lines. Such a situation is unlikely. Small mobile detachments will operate in opposing territory. There will be greater rewards for weapons with relative discrimination and greater accuracy. Use of such low-yield weapons will minimize danger of fall-out and avoid destroying friendly forces **as well as** the civilian population. Use of such weapons may keep enemy troops dispersed and less effective. The enemy would find it more difficult to hold areas and more dangerous to remain in groups.

⁸¹Kissinger, *supra* note 7, at 140.

⁸²*Id.* at 146.

⁸³*Id.* at 156-57.

⁸⁴*Id.* at 183.

It would be more effective to utilize low-yield, accurate nuclear weapons to destroy enemy mobile units whose success or failure would ultimately decide the control of territory.⁸⁵

The limited use of counterforce nuclear weapons on the battlefield could further the objects of international law. Opposing troops, not cities and their attendant civilian population, would be the focus of the weapons. Counterforce nuclear weapons could create a shorter conflict and limit the areas in which damage is done. Opposing forces would gain no strategic advantage by using high-yield weapons, for such weapons would produce radiation and fall-out that would endanger their own soldiers and allies. The object of using low-yield nuclear weapons would be to scatter opposing forces and to keep them scattered and disorganized so that they could not gain or maintain control over territory. The span of the conflict could be shortened. In such an event, there is little or no need to destroy munitions factories, roads, communication centers, railroads, and other military targets within the enemy's borders. Thus, the danger to civilian lives and property is reduced. A short, limited counterforce nuclear war may be less costly to both sides than a prolonged conventional war that is carried to the cities of the parties. If United States forces do not enter enemy airspace, it is unlikely that the enemy will conclude that the U.S. intends to use nuclear weapons against enemy cities. Limited nuclear war, in which counterforce weapons are used, should obviate any need to destroy military targets in the enemy's territory.

If, for example, the Soviet Union were to invade the Federal Republic of Germany, NATO Forces could utilize low-yield, accurate nuclear weapons to halt the Soviet advance, break large units into small groups, loosen their hold on territory, and drive them back beyond the border. Swift, decisive action could cause the Soviets to come to the negotiating table and reach a political solution to the conflict. A portion of the Federal Republic of Germany would sustain damage as a result of the conflict. However, a prolonged conventional war could well cause more destruction of property and many more civilian casualties. A limited nuclear war, in which low-yield nuclear weapons are used, could keep the conflict away from cities, reduce total destruction, and minimize the loss of civilian lives.

The United States Army's plan for the use of counterforce nuclear weapons of low-yield comports with principles of customary interna-

⁸⁵*Id.* at 187.

tional law. Only targets with military significance are focal points for attack. Aimpoints will be chosen and weapons and yield selected that will accomplish the mission, minimize damage to allies and civilians, and reduce the risk of unnecessary suffering. However, the more indiscriminate and inaccurate the weapon and the more powerful its yield, the more likely that the use of the weapon will violate customary international law. First use of low-yield nuclear weapons would not be unlawful if necessary for defense and would assist the defended in stopping the enemy's progress and scattering its forces.

It is necessary for diplomats to convey to potential opponents what is meant by limited nuclear war, or at least what limitations are acceptable. Unless nations establish these concepts of limitation in advance, miscalculation and misinterpretation of the opponent's intentions may cause an all-out war even if both sides intend to limit it.⁸⁶

The use of nuclear weapons does not have to be an-all-or nothing proposition. Nor does the use of some types of nuclear weapons constitute a breach of customary international law:

A power which is prepared to unleash all-out holocaust in order to escape defeat in a limited nuclear war would hardly be more restrained by an initial distinction between conventional and nuclear weapons. The argument that neither side will accept defeat amounts to a denial of the possibility of limited war, nuclear or other, an argument which is valid only if nations in fact prefer suicide to a limited withdrawal.⁸⁷

The use of counterforce nuclear weapons, as planned by the United States Army, comports with the principles of military necessity, proportionality, and avoidance of unnecessary suffering.

How and when to use nuclear weapons are not questions confined to the spheres of international law, United States policy, and Army doctrine. Nuclear weapons could not be launched without human action. One person orders the launching of a missile, another complies with the order. Concepts of customary international law may be irrelevant to individuals when the order to launch is given. However, they may think deeply about the morality of using nuclear weapons. The potential of destroying many innocent civilians and

⁸⁶*Id.* at 185.

⁸⁷*Id.* at 186.

property may present dilemmas of significant proportions, when the order to launch nuclear weapons is issued, that were merely abstract during time of peace. What are these moral questions? How do they impact on the military?

111. THE AMERICAN ROMAN CATHOLIC BISHOPS AND NUCLEAR WAR

American domestic public opinion influences the waging of war. During World War II, the citizens of the United States stood four-square behind their armed forces and government. Rationing of food, clothing, and gasoline was accepted by civilians so that the soldiers would have what they needed to defeat the enemy. Women went to work in factories so supplies to Europe and the Pacific would be plentiful. This patriotic moral support helped to win the war. Twenty years later, when the Vietnam War was raging, public support waned and later turned into a demand to bring the soldiers home. The lack of popular support and the disillusionment of the citizenry were major factors in the government's decision to end the conflict without achieving victory.

Various political, social, and religious groups influence the beliefs and values of individual citizens and groups. In turn, those beliefs and values formed during times of peace can determine how individuals will act during time of war.

Examination of all groups that have addressed the subject of nuclear weapons would require volumes. The examination here will be confined to one particular group, the American Roman Catholic Bishops. Roman Catholics comprise a large segment of the American population. Of the 226,505,000 people in the United States, approximately 50,450,000 are Roman Catholics, or about twenty percent of the population.⁸⁸ Moral doctrine and guidance from their church's leaders shape their consciences, lives, and decisions. The actions and beliefs of such a large segment of society can greatly influence the actions, decisions, and policy of the government.

In **May 1983**, the Bishops issued a comprehensive pastoral letter on nuclear weapons entitled "The Challenge of Peace: God's Promise and Our Response."⁸⁹ All Roman Catholic Bishops in the United States had gathered to discuss the threat and terror posed by nuclear

⁸⁸Statistical Abstract 1982-83, at 55 (103d ed. 1983).

⁸⁹U.S. Bishops' Pastoral Letter, *The Challenge of Peace: God's Promise and Our Response* (May 19, 1983) [hereinafter cited as *Bishops' Letter*].

weapons and the arms race. This pastoral letter was issued by the Bishops because

[a]s bishops and pastors ministering in one of the major nuclear nations, we have encountered this terror in the minds and hearts of our people—indeed, we share it. We write this letter because we agree that the world is at a moment of crisis, the effects of which are evident in people's lives. It is not our intent to play on fears, however, but to speak words of hope and encouragement in time of fear.⁹⁰

The Bishops desired to encourage people of faith to seek a world free of the nuclear threat, which is neither tolerable nor necessary.⁹¹ They challenged Catholics in the United States to join with others in shaping the choices and policies necessary to save humanity.⁹²

The letter is comprised of several parts. The first part is dedicated to an examination of the Roman Catholic Church's teaching on war and peace. The second part is a discussion of public policy, strategy, and issues regarding nuclear weapons. Finally, the Bishops discussed pastoral approaches for promoting peace in the modern world.

This letter provides one framework in which it is possible to compare the Bishops' approach to that of international law, United States policy, and Army plans and doctrine. Also, in speaking to Catholics, the Bishops are requiring choices from their people who are not only members of a particular religious organization, but who are also citizens of the United States. This letter, along with its demands, could have a great impact on individuals now serving in the Army and those who may serve in the future.

A. REVIEW OF THE ROMAN CATHOLIC CHURCH'S TEACHING ON WAR

Because it is nearly 2000 years old, the Roman Catholic Church has built up a rich deposit of teaching that has been born of earthly events, change, challenge, and trauma. The teaching of the Church is always rooted in the Gospel of Jesus. The subject of war stands as

⁹⁰*Id.* at 1.

⁹¹*Id.* at 2.

⁹²*Id.* at 2.

one topic among many. Major and minor theologians have devoted much time writing about war and the Christian's relationship to it.

In order to understand the American Bishop's letter, it is necessary to examine the teaching of the Church upon which the first part of their letter is based.

1. *St. Augustine of Hippo*

The earliest major theologian to address the subject of war was St. Augustine of Hippo.⁹³ Augustine felt the shockwaves caused by the sack of Rome by the Visigoths under Alaric in 410.⁹⁴ In the last years of his life, he had witnessed the advance of barbarian hordes across North Africa and, when he died in **430**, his own city of Hippo was under siege by the Vandals.⁹⁵ The teachings of Augustine on war have been a touchstone for the Church throughout the years, even to the present time.

Augustine wrote that, when an individual kills during the course of a war that has been declared by lawful authority and in accordance with God's laws, he does not commit murder.⁹⁶ He further stated that it is beneficial for good men to wage war against an evil nation in order to replace the evil with goodness, justice, and peace.⁹⁷ He cautioned men to remember that the fullness of peace and life are to be found only in eternal union with God. If men forget to follow God after they have conquered evil nations, only misery and endless war will befall them.⁹⁸

Augustine observed that all wars are waged for the attainment of peace and glory. Those men who interrupt peace to wage war on other nations do so, not because they hate peace, but because they only wish to spread the brand of peace which suits them best.⁹⁹ The peace of unjust men is never peace regardless of how it is defined.¹⁰⁰

Augustine formulated the requirements of just war in these principles: war must be declared by lawful authority; war must be waged for a reason flowing from God's law; war is to be waged against evil

⁹³St. Augustine of Hippo, *The City of God* (M. Dods translation 1950) [hereinafter cited as St. Augustine].

⁹⁴H. Deans, *The Political and Social Ideals of St. Augustine* 154 (1963).

⁹⁵*Id.* at 154.

⁹⁶St. Augustine, *supra* note 93, Bk. I, Ch. 21, at 27.

⁹⁷*Id.* at Bk. IV, Ch. 14, at 123.

⁹⁸*Id.* at Bk. XV, Ch. 4, at 482.

⁹⁹*Id.* at Bk. XIX, Ch. 12, at 687.

¹⁰⁰*Id.* at 689.

and unjust men; and the goal of war must be to prevent such men from ruling the just who follow God's law and desire to abide in peace and justice.

2. *St. Thomas Aquinas.*

St. Thomas Aquinas, the great Dominican theologian and philosopher of the Middle Ages, was the next major contributor to the Church's thoughts on war.¹⁰¹ He wrote that three things are necessary in order for a war to be just:

First, the authority of the sovereign by whose command the war is to be waged. For it is not the business of a private individual to declare war, because he can seek redress of his rights from the tribunal of his superior. Moreover it is not the business of a private individual to summon together the people, which has to be done in wartime. And **as** the care of the common weal is committed to those who are in authority, it is their business to watch over the common weal of the city, Kingdom, or province subject to them. And just **as** it is lawful for them to have recourse to the sword in defending the common weal against internal disturbances, when they punish evil-doers, . . . so too, it is their business to have recourse to the sword of war in defending the common weal against external enemies.¹⁰²

. . . .

Secondly, a just cause is required, namely that those who are attacked deserve it because of some fault. A just war avenges wrongs, when a nation refuses to make amends for the wrongs inflicted by its people or to restore that which has been unjustly **seized**.¹⁰³

. . . .

Thirdly, it is necessary that the belligerents have the right intention, namely the advancement of good and avoidance **of** evil. Wars are not to be fought for aggrandisement or cruelty, but rather with the object of securing peace, punishing evil doers, and uplifting the good.¹⁰⁴

¹⁰¹St. Thomas Aquinas, *Summa Theologica* (Fathers of the English Dominican Province translation 1916)[hereinafter cited **as** Aquinas].

¹⁰²*Id.* at Pt. II, Ques. 3 XL, at 501.

¹⁰³*Id.* at 501-02.

¹⁰⁴*Id.* at 502.

Aquinas parallels Augustine in his thoughts. In order for a war to be just it must be declared by lawful authority; declared for a just cause; be waged with a just and proper intention; and be waged with just means. Aquinas better explained that the war is to be fought for the protection of the common good of the nation's citizens, not for the gain of a few individuals. In his second requirement, Aquinas seemed to imply that peaceful means for the redressing of the wrong should be exhausted before resort is made to armed conflict.

St. Thomas distinguished between acts of treachery and lawful combat tactics.¹⁰⁵ He stated that certain rules of warfare develop and that one side should not pretend to follow those rules and act in a manner contrary to fool the enemy and gain advantage. Such concepts are embodied in international law today with respect to improper use of flags of truce,¹⁰⁶ treachery or perfidy,¹⁰⁷ and improper use of the Red Cross emblem.¹⁰⁸ Thus, the means of waging war must be just.

The ideas of Augustine and Aquinas form the core of Roman Catholic teaching on war. This moral teaching has remained untouched and secure, until the advent of nuclear weapons.

3. *The Modern Popes and Second Vatican Council*

While the teachings of St. Augustine and St. Thomas Aquinas have continued to guide the Roman Catholic Church's teaching on war, the advent of nuclear weapons have presented a new challenge to the Church. This challenge has been specifically addressed by the popes of the nuclear age and Vatican Council II. Throughout the history of the Church, traditional teaching has been applied to moral issues that have arisen in new ways. The pope is the primary teacher of faith and morality in the Church. It is his duty to teach the faithful how to live and cope with specific moral problems that are part of their daily lives. He also acts as a spiritual mediator among nations when he pleads with government leaders to conform their internal and external policies with principles of peace and justice. When the bishops, together with the pope, gather as a council, they exercise as a unity the roles of teacher and mediator. Pope Pius XII, Pope John XXIII, Pope Paul VI, Pope John Paul I, and Vatican Council II have addressed the moral issues of nuclear holocaust and the arms race,

¹⁰⁵*Id.* at 507-08.

¹⁰⁶FM 27-10, para. 53.

¹⁰⁷*Id.* at para. 50.

¹⁰⁸*Id.* at para. 55.

issues that were non-existent before Hiroshima and Nagasaki. It is necessary to understand what they have taught because the American Bishops are bound to follow the teachings of these popes and Vatican Council II.

Pope Pius the XII was the first pope of the nuclear age. He recognized that a nation has the legitimate right to self-defense. He promised to work tirelessly to bring about international agreements that would proscribe and banish atomic, biological, and chemical warfare.¹⁰⁹ He asked the following question:

[H]ow long will men continue to withdraw themselves from the saving light of the Resurrection and persist in expecting security from the deathdealing explosions of new tools forever? How long will they oppose their designs of hatred and death to the precepts of love and to the promise of life offered by the Divine Saviour? When will the rulers of nations understand that peace does not exist in the exasperating and costly relationship of mutual terror? Rather does peace lie in that greatest of Christian virtues—universal charity. And especially is it found in the virtue of justice—a justice voluntarily observed rather than extorted by force, and in confidence which is truly inspired rather than a mere pretence.¹¹⁰

Nine years later, a new pope, John XXIII issued his encyclical *Pacem in Terris*¹¹¹ He echoed Augustine when he wrote that civil authorities derive their right to command from God; if they act contrary to the will of God, their commands do not bind citizens of conscience. God must be obeyed rather than man.¹¹² Thus, it follows that citizens may resist going to war if the authorities do not wage the war for reasons that accord with God's law.

He wrote on the relationship of nations:

Our predecessors have constantly maintained, and we join them in reasserting, that political communities are reciprocally subjects of rights and duties. This means that their relationships also must be harmonized in truth, in justice, in an active solidarity and in freedom. The same

¹⁰⁹Pope Pius XII, *Easter 1954 and the Threat of ABC Warfare*, The Pope Speaks Second Quarter 134 (1954).

¹¹⁰*Id.* at 134.

¹¹¹Pope John XXIII, *Pacem in Terris*, The Gospel of Peace and Justice 201 (J. Gremillion ed. 1976) [hereinafter cited as Pope John XIII].

¹¹²*Id.* at para. 51, at 212.

moral law which governs relations between individual human beings serves also to regulate the relations of political communities with one another.¹¹³

Nations have the right to exist and develop. They have a right to share in the means and resources necessary to progress. Nations also have the corresponding duty of respecting the rights of others and avoiding any act of violation.¹¹⁴ When disagreements arise between nations, they must be settled by negotiation and equitable reconciliation, not by force, deceit, or trickery.¹¹⁵ This moral call for negotiation and peaceful settlement of disputes reflects the principles set forth in the Charter of the United Nations.¹¹⁶ This demand for peaceful resolution may find its roots in the testament of Thomas Aquinas.¹¹⁷

Pope John next turned to the question of the arms race and disarmament. He noted with deep sorrow the vast outlay of intellectual and economic resources that are spent on the enormous stocks of armaments.¹¹⁸ He observed that the reasons given by nations for this stockpiling are deterrence and maintaining the balance of power.¹¹⁹ He observed that people fear nuclear war with good cause, for the arms of war are ready at hand:¹²⁰

Justice, right reason and humanity, therefore, urgently demand that the arms race should cease; that the stockpiles which exist in various countries should be reduced equally and simultaneously by the parties concerned; that nuclear weapons should be banned; and that a general agreement should eventually be reached about progressive disarmament and an effective method of control.

All must realize that there is no hope of putting an end to the building up of armaments, nor of reducing the present stocks, nor still less of abolishing them altogether, unless the process is complete and thorough and unless it proceeds from inner-conviction; unless, that is, everyone sincerely co-operates to banish the fear and anxious ex-

¹¹³*Id.* at para. 80, at 218-19.

¹¹⁴*Id.* at para. 91, at 221.

¹¹⁵*Id.* at para. 93, at 221.

¹¹⁶The Charter of the United Nations, art. 33.

¹¹⁷Aquinas, *supra* note 101, at Pt. II, Ques. XL, at 501-02.

¹¹⁸Pope John XXIII, *supra* note 111, at para. 109, at 224.

¹¹⁹*Id.* at para. 110, at 224.

¹²⁰*Id.* at para. 111, at 224.

pectation of war with which men are oppressed. If this is to come about, the fundamental principle on which our present peace depends must be replaced by another, which declares that the true and solid peace of nations can consist, not in equality of arms, but in mutual trust alone.¹²¹

. . . .

We believe that this can be brought to pass, and we consider that it is something which reason requires, that is eminently desirable in itself and that it will prove to be the source of many **benefits**.¹²²

John XXIII ended this section of his encyclical with a plea to all governments to work together in trust and sincerity and negotiate agreements that will rid the world of **terror**.¹²³

On his trip to the United States, Pope Paul VI echoed the thoughts of Pius XII and John XXIII to the United Nations General Assembly.¹²⁴ He said: "You are expecting us to utter this sentence, and we are well aware of its gravity and solemnity: *not some* people *against* others, never again, never **more!**"¹²⁵ The first step to peace is that of **disarmament**.¹²⁶ The very weapons that men possess ferment bad feelings and cause nightmares, distrust, and dark **designs**.¹²⁷ He reminded the United Nations that it was founded to promote peace, not war. He challenged the nations to remember the past so that the future may be different:

It suffices to remember that the blood of millions of men, that numberless and unheard of suffering, useless slaughter and frightful ruin, are the sanction of the past which unites you with an oath which must change the future history of the world: No more war, war never again! Peace, it is peace which must guide the doctrines of peoples and **all mankind**.¹²⁸

¹²¹*Id.* at para. 112, at 226.

¹²²*Id.* at para. 113, at 226.

¹²³*Id.* at para. 118, at 226.

¹²⁴Pope Paul VI, *Address of His Holiness Paul VI to the General Assembly of the United Nations October 4, 1965, The Gospel of Peace and Justice* (J. Gremillion ed. 1976).

¹²⁵*Id.* at para. 19, at 383.

¹²⁶*Id.* at para. 22, at 384.

¹²⁷*Id.* at para. 23, at 384.

¹²⁸*Id.* at para. 19, at 383.

Pope John Paul II has spoken about the dangers of war, the need for disarmament, and the responsibilities of nations and individuals in establishing peace. When speaking to the United Nations General Assembly in October 1979, he urged nations to search for the roots of hatred, destructiveness and contempt—the roots that produce the temptation to war, not so much in the hearts of the nations **as** in the inner determination of the systems that decide the history of whole societies. He insisted that one of the facets of peace is the recognition of the inalienable rights of man: life, liberty, security of person, food, clothing, shelter, health care, rest, leisure, freedom of expression, education, culture, thought, conscience, and **religion**.¹²⁹

John Paul II traveled to Hiroshima, where he observed that war is the work of man. He made this pilgrimage out of the conviction that to remember the vast suffering of the past is to commit oneself to the future.¹³⁰ In viewing the past and future he said:

I bow my head **as** I recall the memory of thousands of men, women and children who lost their lives in that one terrible moment, or who for long years carried in their bodies and minds those seeds of death which inexorably pursued their process of destruction. The final balance of the human suffering that began here **has** not been fully drawn up nor has the total human cost been tallied, especially when one sees what nuclear war has done—and could still do—to our ideas, our attitudes and our civilization.¹³¹

He repeated John XXIII's call for peaceful resolution of differences and conflicts. He called upon governments to make decisions in economic and social fields in accordance with the demands of peace, not narrow self-interest. He, **as** others before him, challenged the nation's leaders to work untiringly for nuclear **disarmament**.¹³²

In 1982, John Paul II sent a special message to the United Nations Assembly's special session on disarmament. He made absolutely clear the Church's stand on nuclear **weapons**.¹³³ He wrote:

The Catholic Church's teaching is thus clear and

¹²⁹Pope John Paul II, On *Pilgrimage—The U.N. Address 2 October 1979* to the U.N. General Assembly, Origins, October 11, 1979, at 26.

¹³⁰Pope John Paul II, *War Is Death—The Pope at Hiroshima*, Origins, March 12, 1981, at 619.

¹³¹*Id.* at 619-20.

¹³²*Id.* at 620.

¹³³Pope John Paul II, *The Necessary Strategy for Peace*, Origins, June 24, 1982, at 84 [hereinafter cited as *Strategy for Peace*].

coherent. It deplores the arms race, it demands at least progressive, mutual, verifiable arms reduction **as well as** greater precautions against possible errors in the use of nuclear weapons. At the same time, the Church claims respect for the independence, the liberty, and the rightful security of every nation.

Under present conditions, discussion based on equilibrium—certainly not **as** an end in itself but as a stage on the way to progressive disarmament—can still be judged to be morally acceptable. However, to ensure peace it is indispensable not to be content with a minimum which **is** always fraught with a real danger of explosion.¹³⁴

Again, he urged nations to engage in honest negotiations. He added a new note: "Disarmament negotiations could not be complete if they ignored the fact that 80 percent of armaments expenditures are for conventional weapons."¹³⁵

Pope John Paul II diagnosed the cause of production and possession of armaments **as** the result of an ethical crisis growing into society in all directions, political, social, and economic. Peace results from the respect for ethical principles. Any efforts made to negotiate arms limitations and total disarmament will fail if not paralleled by ethical **recovery**.¹³⁶

John Paul II has made clear to Christians what their role is in establishing peace. He stated that the object of dialogue for peace cannot be reduced to a condemnation of the arms race. The individual has a large role in this **dialogue**.¹³⁷

Finally, I must address myself to every man and woman and also to you, the young: **You** have many opportunities to break down the barriers of selfishness, lack of understanding and aggression by your way of carrying on a dialogue every day in your family, your village, your neighborhood, in the associations in your city, your region, without forgetting the non-governmental organizations. Dialogue for peace is the task of everyone.

Now, I exhort you especially, the Christians, to take your part in this dialogue in accordance with the responsi-

¹³⁴*Id.* at 84-86.

¹³⁵*Id.* at 85.

¹³⁶*Id.* at 86.

¹³⁷Pope John Paul II, *Peace for Our Time*, 28 *The Pope Speaks* 139 (1983).

bilities that are yours, to pursue then with that quality of openness, frankness and justice which is called for by the charity of Christ, to take them up again ceaselessly, with the tenacity and hope which faith enables you to have. You also know the need for conversions and prayer because the main obstacle to the establishment of justice and peace is to be found *in man's heart, in sin*, as it was in the heart of Cain when he refused dialogue with his brother, Abel. Jesus has taught us how to listen, to share, to act toward other people as one would wish for oneself, to settle differences while on travels together, to pardon. Above all, by His death and resurrection, He came to deliver us from the sin which sets up one against the other, to give us His peace, to breakdown the wall which separates the peoples.¹³⁸

In all of his talks, John Paul II has given the most comprehensive plan for peace among the popes of the nuclear age. It is his belief that, if people and nations do not reform their ethical lives, peace is not possible. His challenge is not solely aimed at governments which will reflect the ethics of their people. Governments alone cannot make peace, even if there is total disarmament, unless justice, charity, and human rights are given to and respected by all people.

The most important document on war, for the nuclear age Church, issued from Vatican Council II.¹³⁹ The Church, which consisted of the universal bishops and the pope, spoke as one for and to the Church and to the world. The Council began by recognizing that peace is not merely the absence of war.¹⁴⁰ Because men are sinful, the threat of war will always hang over them until the return of Christ. But to the extent that men overcome sin by living as Christ taught, they will overcome violence as well.¹⁴¹

The Council stated that international agreements, particularly those with respect to the conduct of war, must be observed and improved upon by all nations so that the frightfulness of war will be restrained.¹⁴² Nations are called upon to make humane laws for the case of those persons who for reason of conscience refuse to bear

¹³⁸*Id.* at 140-41.

¹³⁹*Gaudiam et Spes: Pastoral Constitution on the Church in the Modern World, The Second Vatican Council, December 7, 1966, The Gospel of Peace and Justice* (J. Gremillion ed. 1976) [hereinafter cited as *Gaudiam et Spes*].

¹⁴⁰*Id.* at para. 78, at 314.

¹⁴¹*Id.* at para. 78, at 316.

¹⁴²*Id.* at para. 79, at 316.

arms, provided they accept some other form of **service** to the human community.¹⁴³

Governments cannot be denied the right to legitimate defense once every means of peaceful settlement has been **exhausted**.¹⁴⁴

But it is one thing to undertake military action for the just defense of the people, and something else **again** to seek the subjugation of other nations. Nor does the possession of war potential make every military or political use of it lawful. Neither does the mere fact that war **has** unhappily begun mean that all is fair between the warring **parties**.¹⁴⁵

The need to exhaust peaceful solutions to conflicts, the right to defend one's people, and the limits placed on means and methods of making war **as** enunciated by the Council give added moral **weight** and authority to the United Nations Charter, The Geneva **and Hague** Conventions, and Protocol I.

The Council stated that men cannot follow and **will** not be morally excused from following orders issued by any authority that are **criminal** and in contravention of universal natural law. **An** example **of** such criminal action is **genocide**.¹⁴⁶

The Council had this to say to soldiers:

Those who are pledge to the service of their country **as** members of its armed forces should regard themselves **as** agents of security and freedom on behalf of their people. As long **as** they fulfill this role properly, they are making a genuine contribution to the establishment of peace.¹⁴⁷

Unfortunately, the Council did not provide any guidelines regarding the soldier's proper role, particularly in time of war. However, one may conclude that a soldier, acting in proper defense of his nation and who observes international law in the conduct of war and obeys legitimate orders, is acting properly. This must be deduced from what the Council stated regarding the conduct of nations and superiors.

¹⁴³*Id.*

¹⁴⁴*Id.*

¹⁴⁵*Id.*

¹⁴⁶*Id.* at *parr.* 70, at 316.

¹⁴⁷*Id.*

The Council then addressed the potential of total war:

The horror and perversity of war are immensely magnified by the multiplication of scientific weapons. For acts of war involving these weapons can inflict massive and indiscriminate destruction far exceeding the bounds of legitimate defense. Indeed, if the kind of instruments which can now be found in the armories of great nations were to be employed to their fullest, an almost total and altogether reciprocal slaughter of each side by the other would follow, not to mention the widespread devastation which would take place in the world and the deadly after-effects which would be spawned by the use of such **weapons**.

All these considerations compel us to undertake an evaluation of war with an entirely new attitude.

With these truths in mind, this most holy synod makes its own the condemnation of total war already pronounced by recent Popes, and issues the following declaration:

Any act of war aimed indiscriminately at the destruction of entire cities or of extensive areas along with their population is a crime against God and man himself. It merits unequivocal and unhesitating condemnation.¹⁴⁸

The Council paralleled in this declaration Articles 51 and 85 of Protocol I. Logically piecing together portions of this document leads to the conclusion that, to the Council fathers, it would be a horrendous crime for a superior to order an individual to engage in indiscriminate bombing of cities by any means and it would be equally wrong for the individual to follow the order. Blind obedience cannot excuse those who issue or follow such orders. Roman Catholics, universally, are bound by the moral declaration and teaching of this "Constitution on the Church." The Council, unlike nations, draws no distinction between conventional and nuclear weapons. Indiscriminate destruction by means of conventional weapons is equally as criminal as destruction by nuclear weapons. They naturally apply customary international law principles to nuclear weapons. The entire context of the Council's condemnation of total war appears to give a wider meaning to the term indiscriminate destruction. The Council clearly

¹⁴⁸*Id.* at para. 80, at 316-17.

stated that it was compelled to evaluate war with an entirely *new* attitude. If indiscriminate destruction is evaluated within this context, it can be concluded that the Council condemned the targeting of military objectives in cities if the destruction of those targets would produce enormous casualties among the civilian population. Use of countervalue nuclear attacks would thus be morally forbidden. If this is the conclusion the Council intended, the individual Roman Catholic may find himself caught between the demands of Church and state. For a Roman Catholic of good conscience, the only choice available is to follow the Church's teaching and take whatever consequences may follow from disobedience of state authority.

The Council concluded by stating that peace is born of mutual trust. Nations must not attempt to impose peace on other nations through fear of weapons. All must work to end the arms race and begin to disarm, not unilaterally, but by proceeding on an equal basis according to agreement, supported by authentic and workable safeguards.¹⁴⁹

B. THE AMERICAN ROMAN CATHOLIC BISHOPS PASTORAL LETTER

The American Roman Catholic Bishops' letter is important for several reasons. While they reiterated the teaching of the popes and Vatican Council II, they also made moral judgments about the use of nuclear weapons and counseled Catholics to seriously consider **their** judgments when making moral **decisions**.¹⁵⁰ The letter **has** been made available to Catholics throughout the United **States**. Bishops and priests have conducted meetings at local churches to foster **and** spread loyalty to their principles among the laity. Catholics are **being** influenced by this letter and, **as** a consequence, their actions in war could well be changed by the counsel of the Bishops. **This** could present a challenge to the Army and the other military **services** on a scale larger than that experienced during the Vietnam War. **Individuals** fled to Canada and went to jail because they viewed Vietnam **as** an unjust war. The military may have to meet the challenge of what **appears** to be a new tradition of nuclear pacifism.

It must be noted that the Bishops are not the only clergymen to oppose nuclear weapons. As a group, they have formulated the most

¹⁴⁹*Id.* at para. 82, at 318.

¹⁵⁰U.S. Bishops Pastoral Letter. *supra* at I, p. 3.

comprehensive letter on this subject. They have also received the most publicity. Other religious groups, for example the Episcopal Diocese of Southern Virginia,¹⁵¹ have embraced the Bishops' views. The impact of the anti-nuclear movement on individuals is not confined to Roman Catholics.

What do the Bishops say about the use of nuclear weapons? What do they recommend that governments do about the arms race and the threat of nuclear holocaust? Do they give specific moral guidance to individuals with respect to military service and the use of nuclear weapons? Do the principles and policies conflict with customary international law and Army policy? It is within the context of these questions that the pastoral letter will be examined.

1. *The Bishops on the Morality of the Use of Nuclear Weapons*

In Part I of the Letter, entitled Peace in The Modern World: Religious Perspectives and Principles, the Bishops set forth the basic teaching of the Church on **war**.¹⁵² The principles discussed find their basis in Augustine, Thomas Aquinas, the popes of the nuclear age, Vatican Council II, and modern theological refinements of the Just War doctrine.¹⁵³ The Bishops noted that nations have often perverted the notions of just **war** and just cause. Careful analysis of such claims must be employed. However, blatant aggression from without and subversion from within are readily identifiable **as** just cause.¹⁵⁴ The Bishops stated that governments threatened by armed, unjust aggression must defend their **peoples**.¹⁵⁵ However, "[j]ust response to aggression must be discriminate; it must be directed against unjust aggressors, not against innocent people caught up in a war not of their own **making**."¹⁵⁶ A nation's response to aggression must not exceed the nature of the aggression. To destroy civilization by waging total war would be a disproportionate response to aggression on the part of any **nation**.¹⁵⁷

With this background in mind, the Bishops next focused on the subject of nuclear weapons in particular. It is at this point in the letter, Part II, entitled War and Peace in the Modern World: Problems and Principles, that the Bishops began to apply moral teachings to specific **cases**.¹⁵⁸ Early in the letter the Bishops stated:

¹⁵¹The Catholic Virginian, March 26, 1984, at 1.

¹⁵²Bishops' Letter, *supra* note 89, at I, at 3.

¹⁵³*Id.* at 8-12.

¹⁵⁴*Id.* at I.C.3. at 10.

¹⁵⁵*Id.* at I.C.1, at 9.

¹⁵⁶*Id.* at I.C.3, at 11.

¹⁵⁷*Id.* at I.C.3, at 11.

¹⁵⁸*Id.* at II, at 13.

When making applications of these principles we realize—that prudential judgments are involved based on specific circumstances which can change or which can be interpreted differently by people of good will (e.g., the treatment of “no first use”). However, the moral judgments that we make in specific cases, while not binding in conscience, are to be given serious attention by Catholics as they determine whether their moral judgments are consistent with the Gospel.¹⁵⁹

In considering the effect of an all-out nuclear war, the Bishops made two conclusions. First, nuclear war must be prevented. Second, they rejected nuclear war and called upon all people to refuse to legitimize the idea of nuclear war.¹⁶⁰

The first idea they addressed was that of deterrence, which they found to be a political paradox that strains moral conception:

Today military preparations are undertaken on a vast scale, but the declared purpose is not to use the weapons produced. Threats are made which would be suicidal to implement. . . . The presumption of the nation-state system that sovereignty implies an ability to protect a nation’s territory and population is precisely the presumption denied by the nuclear capacities of both superpowers. In a sense each is at the mercy of the other’s perception of what strategy is “rational,” what kind of damage is “unacceptable,” how “convincing” one side’s threat is to the other.¹⁶¹

The Bishops highlighted from their moral perspective the paradoxical mentality that nations exhibit in their application of the principles of international law to conventional warfare and to the isolation of countervalue nuclear weapons from those same principles of law. The Bishops rejected the concept of nuclear war as a strategy for defense and called upon the public to resist that defense strategy. The public was exhorted to influence the actions of their respective governments in setting limits on nuclear policy.¹⁶² At the same time, the Bishops concurred with Pope John Paul II in stating that deterrence based on balance of forces as a step on the way

¹⁵⁹*Id.* at I, at 3.

¹⁶⁰*Id.* at II.A, at 13.

¹⁶¹*Id.* at II.A, at 14.

¹⁶²*Id.* at II.B, at 14.

toward progressive disarmament may still be judged to be morally acceptable.¹⁶³ The dilemma of deterrence is exhibited by the danger of nuclear war with its human and moral costs, the extreme distrust among nations, and the duty to prevent nuclear war while protecting and preserving justice, freedom, independence, and personal and national dignity.¹⁶⁴ In order to resolve these paradoxes, the Bishops recommended the following as steps toward nuclear and conventional disarmament:¹⁶⁵ support for immediate, bilateral, verifiable agreements to halt the testing, production and deployment of new nuclear weapons systems; support for negotiated bilateral deep cuts in the arsenals of both superpowers, particularly those weapons systems which have destabilizing characteristics; support for early and successful conclusion of negotiations of a comprehensive test ban treaty; removal by all parties of short-range nuclear weapons which multiply dangers disproportionate to their deterrent value; removal by all parties of nuclear weapons from areas where they are likely to be overrun in the early stages of war, thus forcing rapid and uncontrollable decisions on their use; and strengthening of command and control over nuclear weapons to prevent inadvertent and unauthorized use.¹⁶⁶ The Bishops rejected the idea of nuclear war and nuclear superiority. Nuclear deterrence must be used as a step toward progressive disarmament.¹⁶⁷

The Bishops addressed three particular uses of nuclear weapons and their moral implications.

The first is counterpopulation warfare. The Bishops reiterated the teaching of Vatican Council II in condemning the indiscriminate use of any type of weapon that produces mass slaughter in the destruction of population centers.¹⁶⁸ The Bishops go one step further and stated their belief that

[r]etaliatory action, whether nuclear or conventional, which would indiscriminately take wholly innocent lives, lives of people who are in no way responsible for reckless actions of their government, must also be condemned. This condemnation, in our judgment, applies even to retaliatory use of weapons striking enemy cities after our

¹⁶³*Id.* at II.D.2, at 17; *Strategy for Peace*, *supra* note 133, at 84-85.

¹⁶⁴Bishops' Letter, *supra* note 89, at II.D.2, at 17.

¹⁶⁵*Id.* at III.A.3, at 21.

¹⁶⁶*Id.* at II.D.2, at 18-19.

¹⁶⁷*Id.* at II.D.2, at 18.

¹⁶⁸*Id.* at II.C.1, at 14-15.

own have already been struck. No Christian can rightfully carry out orders or policies deliberately aimed at killing non-combatants.¹⁶⁹

The Bishops parallel here the prohibition in Protocol I, against attacking the civilian population or civilians by way of reprisal. Although Protocol I has yet to be given the advice and consent of the U.S. Senate, this same rule of reprisal is applicable through previously adopted international agreements and customary international law.¹⁷⁰ The United States does not target civilians.

The Bishops further made clear what Vatican Council II seemed to imply:

A narrow adherence exclusively to the principle of non-combatant immunity as a criterion for policy is an inadequate moral posture for it ignores some evil and unacceptable consequences. Hence, we cannot be satisfied that the assertion of an intention not to strike civilians directly or even the most honest effort to implement the intention by itself constitutes a “moral policy” for the use of nuclear weapons.

The location of industrial or militarily significant economic targets within heavily populated areas or in those areas affected by radioactive fallout could well involve such massive civilian casualties that in our judgment such a strike would be deemed morally disproportionate, even though not intentionally indiscriminate.¹⁷¹

The Bishops articulated their view that nations cannot morally justify a nuclear attack on military objectives in cities. Targeting military objectives is in essence a moral charade. Whether or not the intended target is legal, the results will be the same. The consequent civilian casualties cannot be morally justified.

Second, with respect to the initiation of nuclear war the Bishops opined:

We do not perceive any situation in which the deliberate initiation of nuclear warfare on however restricted a scale can be morally justified. Non-nuclear attacks by another state must be resisted by other than nuclear means. There-

¹⁶⁹*Id.* at II.C.1, at 15.

¹⁷⁰FM 27-10, para. 497.

¹⁷¹Bishops' Letter, *supra* note 89, at II.D.2, at 18.

fore, a serious moral obligation exists to develop non-nuclear defensive strategies as rapidly as possible.

We find the moral responsibility of beginning nuclear war not justified by rational political objectives.¹⁷²

The Bishops based this conclusion on evidence given to them that field commanders would not be able to exercise strict control over nuclear weapons that the number of weapons used would increase rapidly, that targets would expand beyond the military, that the level of civilian casualties would rise enormously, and, finally, that mass escalation could follow leading to unlimited nuclear war.¹⁷³

World War II clearly demonstrated how devastating a long-term conventional war is to civilians and military personnel. First and limited use of nuclear weapons may bring about a quick resolution of hostilities. Infinitely greater civilian and military casualties and destruction may be avoided. The possibility exists that first and limited use could comply with customary international law. The Bishops recognize that a debate is under way on this issue, but find the danger of escalation so great as to make unjustifiable the initiation of nuclear war in any form.¹⁷⁴

The third point addressed by the Bishops was that of limited nuclear war. They realized that this issue is real, not theoretical. They posed a series of questions which go to the heart of the actual meaning of the word "limited."¹⁷⁵ Would leaders have sufficient information to monitor and keep limited the nuclear exchange? Would commanders be able to maintain discriminate targeting? Could computer error be avoided? Would not casualties run in the millions? How limited would be the long-term effects of radiation, famine, social disorganization, and economic disruption?¹⁷⁶ They concluded that, unless these questions can be properly answered, they will continue to remain skeptical about the true meaning of "limited."¹⁷⁷ The Bishops stated within this context that a nuclear response to either a conventional or nuclear attack that goes beyond legitimate defense is not justified.¹⁷⁸

¹⁷²*Id.* at II.C.2, at 15.

¹⁷³*Id.* at II.C.2, at 15.

¹⁷⁴*Id.* at II.C.2, at 15.

¹⁷⁵*Id.* at II.C.3, at 15.

¹⁷⁶*Id.* at II.C.3, at 15-16.

¹⁷⁷*Id.* at II.C.3, at 16.

¹⁷⁸*Id.* at II.C.3, at 16.

The Bishops, while asking numerous questions, condemned counterforce strategy and nuclear weapons under certain circumstances:

We are told that some weapons are designed for purely “counterforce” use against military forces and targets. The moral issue, however, is not resolved by the design of weapons or the planned intention for their use; there are also consequences which must be assessed. It would be perverted political policy or moral casuistry which tried to justify using a weapon which “indirectly” or “unintentionally” killed a million innocent people because they happened to live near a “military significant target”¹⁷⁹

While it appears that the Bishops claimed “to remain skeptical”¹⁸⁰ about limited nuclear war, they in fact seemed to reject any possibility that counterforce nuclear strategy can be conducted morally and in accordance with the principles of military necessity, proportionality, and avoidance of unnecessary suffering. They glossed over the fact that aimpoints are planned outside civilian population centers; the number and yield of weapons used will be kept at the level necessary to accomplish the mission; and preclusion-oriented analysis is used to avoid excessive damage to population, environment, and facilities.

On these three points, the Bishops took stands and asked penetrating questions that are consistent with the international law principles of military necessity, proportionality, avoidance of unnecessary suffering, the prohibition on indiscriminate attacks, and retaliation. They highlighted that the use of nuclear weapons could violate all notions of morality and international law.

In summary, the Bishops have asserted that governments must defend their people from threats of armed aggression. Nuclear war must be prevented and rejected. Nuclear deterrence based on a balance of forces may be judged to be morally acceptable **as long as** it remains a step on the way toward progressive disarmament. Nuclear weapons cannot be used offensively, defensively, or in retaliation to destroy cities or produce **mass** slaughter of civilians. The deliberate initiation of nuclear warfare on however restricted a scale cannot be morally justified. A nuclear response to either a conventional or nuclear attack that goes beyond legitimate defense is not justified.

¹⁷⁹*Id.* at II.D.2, at 19.

¹⁸⁰*Id.* at II.C.3, at 16.

Finally, while they reserve judgment on the limited use of counter-force nuclear weapons, they will remain skeptical about such use until many questions are answered.

The Bishops did not completely ignore political reality when they condemned nuclear war and called for negotiation and disarmament:

The fact of a Soviet threat, as well as the existence of a Soviet imperial drive for hegemony, at least in regions of major strategic interest, cannot be denied. The history of the Cold War has produced varying interpretations of which side caused the conflict, but whatever the details of history illustrate, the plain fact is that the memories of Soviet policies in Eastern Europe and recent events in Afghanistan and Poland have left their mark in the American political debate. Many people are forcibly kept under communist domination despite their very manifest wishes to be free. Soviet power is very great. Whether the Soviet Union's pursuit of military might is motivated primarily by defensive or aggressive aims might be debated, but the effect is nevertheless to leave profoundly insecure those who must live in the shadow of that might.

Americans need have no illusions about the Soviet system of repression and the lack of respect in that system for human rights or about Soviet covert operations and pro-revolutionary activities.

It is one thing to recognize that the people of the world do not want war. It is quite another thing to attribute the same good motives to regimes or political systems that have consistently demonstrated precisely the opposite in their behavior. There are political philosophies with understandings of mortality so radically different from ours that even negotiations proceed from different premises, although identical terminology may be used by both sides. This is no reason for not negotiating. It is a very good reason for not negotiating blindly or naively.¹⁸¹

The United States actively pursues negotiation with the Soviet Union. In the absence of mutual and verifiable nuclear disarmament, it has practiced nuclear deterrence. In order for nuclear deterrence

¹⁸¹Bishops' Letter, *supra* note 89, at III.B.2, at 23-24.

to work, it must be mutual. If the United States were to reject its present policy and embrace the Bishops' views, deterrence would become unilateral. The United States would no longer be able to forestall or keep in check the Soviet threat. The Soviet Union and other nations with nuclear capability would have the power to blackmail the United States and its allies with nuclear weapons. The preventative threat of mutual destruction would vanish. The conventional power of the United States would be overshadowed by the nuclear power of the Soviet Union. In rejecting the means necessary to avert such aggression on moral grounds, the United States would be powerless to fulfill its moral obligation to defend its people from unjust aggression. This position is politically untenable.

The Bishops have made absolutely clear to nations that they condemn nuclear war and demand that nations engage in bilateral, verifiable nuclear disarmament.

The Bishops spoke not only to nations and political leaders, but also to individuals. What do the Bishops ask of people? What moral challenge is the individual soldier asked to face? Did the Bishops give the necessary moral guidance for people to make the choices they request?

These questions have great implications for the military. Roman Catholics comprise thirty percent of the Army, Navy, Air Force, and Marine Corps.¹⁸² Forty percent of the students at the service academies are Roman Catholic.¹⁸³ **The** Bishops have issued their moral challenge to these individuals **as** members of their faith.

Individual soldiers who are Roman Catholic are confronted with a serious choice. If they are going to follow the Bishops' teaching, they will be compelled in conscience to disobey an order to fire a countervalue nuclear weapon. An individual may have no crisis of conscience during times of peace. If, however, he is serving in a position in which he could be ordered to launch a countervalue nuclear weapon, how would he respond if the order were issued? Until the time arrives, the answer to that question will not be known. By the same token, no Roman Catholic can morally issue an order to launch countervalue nuclear weapons. The same choices, tensions, and questions apply to those issuing orders.

¹⁸²Interview with Monsignor Markham, Military Ordinariate, 1011 1st Avenue, New York, New York.

¹⁸³*Id.*

The Bishops failed to enlighten individual soldiers on how to discern before attack whether the use of counterforce nuclear weapons will comport with the moral principle of proportionality and whether the consequences of the attack will be morally acceptable. The Bishops have created moral questions for individuals about limited, counterforce nuclear war without giving them any clear, practical guidance on how to act morally or make moral judgments within this context.

At the beginning of their letter, the Bishops stated that Catholic teaching on war and peace has two purposes: to help Catholics form their consciences and to contribute to the public policy debate about the morality of war.¹⁸⁴ In fulfilling the demands of their pastoral ministry, they are required to speak to Catholics in a specific way and to the political community regarding public policy.¹⁸⁵ With regard to the latter, the Bishops have addressed public policy in a comprehensive, lucid manner. The Bishops have failed to give Catholics clear, specific guidance regarding numerous questions. For example: If it is immoral to use nuclear weapons against cities, can a Roman Catholic serve in a position, in the peacetime Army, Navy, or Air Force, that calls for training in and the readiness to use such countervalue nuclear weapons? If the United States becomes engaged in a conflict and uses nuclear weapons first, would it be immoral for a Roman Catholic to continue to participate in its nation's defense in any capacity? Are there any circumstances in which a Roman Catholic can work directly or indirectly with nuclear weapons? Would it be immoral for a Roman Catholic to launch a nuclear weapon whose target and destination are unknown to him? Would it be immoral for a military attorney, who is a Roman Catholic, to give a commander legal advice regarding the use of counterforce nuclear weapons? Would a military chaplain be bound to promulgate the Bishops' teaching or would he be permitted to remain silent, particularly if he ministers to a nuclear-capable unit?

In addressing the men and women who work in defense industries, the makers of nuclear weapons, the Bishops stated:

We do not presume or pretend that clear answers exist to many of the personal, professional and financial choices facing you in your varying responsibilities. In this letter we have ruled out certain uses of nuclear weapons,

¹⁸⁴Bishops' Letter, *supra* note 89, at I., p. 3.

¹⁸⁵*Id.* at I., at 4.

while also expressing conditional moral acceptance for deterrence.¹⁸⁶

As long as deterrence is a morally acceptable step along the way toward mutual disarmament, it is plausible that individuals may morally manufacture nuclear weapons. If arms negotiations are not being conducted and are not contemplated, does deterrence then become morally unacceptable? If deterrence becomes unacceptable, what are the moral ramifications for individuals, civilians as well as military personnel? The Bishops do not even allude to these questions or pose answers.

To men and women in the military service the Bishops stated:

It is surely not our intention in writing this letter to create problems for Catholics in the armed forces. Every profession, however, has its specific moral questions and it is clear that the teaching on war and peace developed in this letter poses a special challenge and opportunity to those in the military profession.¹⁸⁷

The Bishops have raised specific moral problems that strike at the very heart of the military profession. Can individuals prepare to do in peace that which would be immoral to do in war? How can individuals serve in the military morally, obediently, and loyally, particularly if there is a limited, counterforce nuclear war? It is in this realm that the Bishops have hedged, opening a Pandora's Box for Catholic soldiers without giving them the wherewithal to answer these pressing moral questions. This lapse is a fundamental flaw in the letter. It is the primary responsibility of the Bishops to give concrete moral guidance to their followers, not to give political advice to government leaders. The Bishops have failed to give to their people what is needed, have failed to fulfill their primary responsibility and goal. They have talked at great length about God's challenge, but have failed to address realistically, clearly, and honestly the individual's response.

2. The Bishops and Selective Conscientious Objection

The overall moral position the Bishops have implicitly advocated is nuclear pacifism. How does this impact on the individual who elects to embrace that moral position? How does nuclear pacifism relate to United States law and Army personnel regulations?

¹⁸⁶*Id.* at IV.C, at 29.

¹⁸⁷*Id.* at IV.C., at 28.

The Bishops stated that they accept “the right in principle of a government to require military service of its citizens provided the government shows it is necessary.”¹⁸⁸ “At the same time, no state may demand blind obedience.”¹⁸⁹ The Bishops reiterated their support for general conscientious objection and for selective conscientious objection to participation in a specific war “either because of the ends being pursued or the means being used.”¹⁹⁰ They called for legislative recognition and protection of both classes of objectors.¹⁹¹

The Bishops advanced beyond Vatican Council II in respect to selective conscientious objection. The Council had called for general recognition and protection of persons who for reason of conscience refuse to bear arms, provided that they accept some other form of service to the human community.¹⁹²

The United States has made provision for conscientious objectors from its birth as a nation. In 1775, the Continental Congress announced its resolve to respect the beliefs of people who from religious principles could not bear arms in any war.¹⁹³ This exemption from military service was made during the Civil War, World War I, and World War II.¹⁹⁴ The refusal to participate in war in any form has remained the basis of this exemption ever since.¹⁹⁵

The United States Congress has determined that it is more essential to respect a man’s religious beliefs and opposition to war in any form that to force him to serve in the armed forces.¹⁹⁶ It is also true that exemption from military service based on conscientious objection is dependent upon the will of Congress and not upon the beliefs of the individual.¹⁹⁷ At no time has Congress recognized selective conscientious objection.

United States law at this time does not require any person to be subject to combatant training and service in the armed forces if the person, by reason of religious training and belief, is conscientiously opposed to participation in war in any form.¹⁹⁸ Army regulations fur-

¹⁸⁸U.S. Bishops Pastoral Letter, *supra* note 89, at III.A.6, at 22.

¹⁸⁹*Id.* at III.A.6, at 22.

¹⁹⁰*Id.* at III.A.6, at 22.

¹⁹¹*Id.* at III.A.6, at 22.

¹⁹²*Gaudium et Spes*, *supra* note 139, at para. 79, at 316.

¹⁹³*United States v. Gillette*, 401 U.S. 437, 443 n.8 (1971).

¹⁹⁴*Id.*

¹⁹⁵*Id.*

¹⁹⁶*Id.* at 443 n.5. (citing Dep’t of Defense, Directive No. 1300.6 (May 10, 1968)).

¹⁹⁷*United States v. Macintosh*, 283 U.S. 605, 623 (1931).

¹⁹⁸50 U.S.C. App. § 456(j) (1982).

ther implement this statute by providing that no person in the Army will be granted conscientious objector status based solely upon policy, pragmatism, expediency, or objection to a particular war.¹⁹⁹ In the case of *Gillette v. United States*,²⁰⁰ one of the petitioners was a Roman Catholic who objected to being drafted because he felt for moral reasons that the Vietnam war was unjust.²⁰¹ The Court upheld the Selective Service Act of 1967 and the law's provision that requires objection to war in all forms.²⁰² The Court stated:

Apart from the Government's need for manpower, perhaps the central interest involved in the administration of conscription laws is the interest in maintaining a fair system for determining "who serves when not all serve." When the Government exacts so much, the importance of fair, evenhanded, and uniform decision making is obviously intensified. The Government argues that the interest in fairness would be jeopardized by expansion of § 6(j) to include conscientious objection to a particular war. Their contention is that the claim to relief on account of such objection is intrinsically a claim of uncertain dimensions, and that granting the claim in theory would involve a real danger of erratic or even discriminatory decision making in administrative practice.

A virtually limitless variety of beliefs are subsumable under the rubric, "objection to a particular war."

Moreover, the belief that a particular war at a particular time is unjust is by its nature changeable and subject to nullification by changing events.²⁰³

At the time of induction, those who are opposed to war in all forms can make their scruples known. If it is discovered that their beliefs are sincere, they will not be compelled to serve. However, if the Bishops's proposal for selective conscientious objection to both unjust wars and unjust means of warfare were implemented, numerous difficulties would arise. A conflict may begin as purely conventional. Mr. Smith is drafted and sent to Germany. After his arrival, counterforce nuclear weapons are used. The just war in which he was will-

¹⁹⁹U.S. Dep't of Army, Reg. No. 600-43, Personnel-General-Conscientious Objection, para. 1-7a (1 Aug. 1983).

²⁰⁰*Id.* 401 U.S. 437 (1971).

²⁰¹*Id.* at 440.

²⁰²*Id.* at 443.

²⁰³*Id.* at 455-56.

ing to serve and which had theretofore utilized only just means has been markedly changed. He can no longer serve because he believes unjust means, nuclear weapons, are being used. What does the Army do with Mr. Smith now? What can be done if there are a thousand Mr. Smith's in the theater of war?

Who will be responsible for determining whether a war is just or not? Who will determine whether or not the means of waging war are just? Would the Bishops contend that nuclear weapons are the only unjust means? Would the use of napalm be unjust? If the United States were in a conflict with Mexico, would that be an unjust war for Mexican-Americans? The potential basis for selective conscientious objection are inexhaustible. The Selective Service System would collapse under the multitude of claims of selective conscientious objection. The system could not operate in a fair and objective manner. The Bishops have not ventured to suggest how Congress should draft a practical law enacting selective conscientious objection.

Congress has seen fit to grant an exemption from military service to those who normally believe it is wrong to engage in any war. This is an exemption, not a right, that could be repealed should circumstances necessitate such an action. Unlike selective conscientious objection, it is not based on exterior circumstances that can change from day to day. Conscientious objection is based on a solid, interior conviction that war is wrong. It is an unchanging belief. That is the moral conviction Congress has chosen to protect and respect.

Selective conscientious objection based on a claim of the use of unjust means would undermine the mission of the armed forces, particularly during combat. A soldier could presumably always find a reason to object. If given a dangerous assignment, he might.

For all the reasons stated in *Gillette*, selective conscientious objection must be rejected. Selective conscientious objection based on unjust means presents a more serious threat because it is so dependent on ever changing circumstances. Objection based on unjust means of waging war injects uncertainty into the armed forces. The excellent soldier of today may become an objector and a liability tomorrow because he disapproves of the use of a particular weapon.

Selective conscientious objection is not an alternative because it depends on the particular whims and idiosyncracies of each individual.

The Bishops have stated that a nation has the moral obligation to defend its people from unjust aggression. Individual soldiers are the

very instruments of that defense. If the United States is to fulfill that moral obligation, it must have soldiers who are disciplined, predictable, and dependable to carry out the mission. Selective conscientious objection would undermine cohesion, discipline, and reliability.

Nuclear pacifism, while not recognized by Congress or the courts, is a movement that is gaining momentum. Does nuclear pacifism present problems to the armed forces? What challenges lie ahead for the Army due to this moral position?

3. *The Army and Selective Conscientious Objection*

Army regulations provide that, in order to receive an appointment **as** a Commissioned or Warrant Officer in the Regular Army, the individual must be willing to give unrestricted service to the United States. With the exception of a few categories of officers, a person cannot be a conscientious objector and must be willing to bear arms.²⁰⁴

A newly commissioned officer will be designated in an initial specialty at the time of appointment. Appointment to a particular branch and specialty is made according to the needs of the Army. The individual's desires are taken into account, but are not **controlling**.²⁰⁵

The enlisted ranks are filled by individuals who voluntarily enlist or are drafted when the Selective Service System is operational. Persons who profess conscientious objection or religious scruples at the time of application, which preclude unrestricted assignment, and who desire to enlist **as** noncombatants are disqualified from enlisting but may request a waiver from the Commanding General, United States Army Recruiting **Command**.²⁰⁶ An individual's desires will be considered **as much as** possible in determining a Primary Military Occupational Specialty. However, the needs of the Army will come first.²⁰⁷

²⁰⁴U.S. Dep't of Army, Reg. No. **601-100**, Personnel Procurement-Appointment of Commissioned and Warrant Officers in the Regular Army, para. **1-16** (16 Aug. **1981**) [hereinafter cited **as** AR **601-1001**].

²⁰⁵U.S. Dep't of Army, Reg. No. **611-101**, Personnel Selection and Classification-Commissioned Officer Specialty Classification System, para. **1-14** (1 Jan. **1982**) [hereinafter cited **as** AR 611-101].

²⁰⁶U.S. Dep't of Army, Reg. No. **601-210**, Personnel Procurement-Regular Army and Army Reserve Enlistment Program, Table **4-1** (1 Sept. **1982**).

²⁰⁷U.S. Dep't of Army, Reg. No. **600-200**, Personnel-General-Enlisted Personnel Management System, para. **2-11** (C1, **28** Oct. **1981**) [hereinafter cited **as** AR **600-200J**].

By regulation, the Army provides a means of assessing the reliability of individuals being considered for and assigned to nuclear duty positions.²⁰⁸ This program applies during peacetime and hostilities.²⁰⁹ The U.S. Army Nuclear Surety Program, of which the Personnel Reliability Program is a part, was established to provide policies and procedures and responsibilities for the safety, *security*, and reliability of nuclear weapons in the custody of the Army.²¹⁰ Commanders are required to remove from the nuclear surety program an individual whose reliability is *suspect*.²¹¹ In the absence of disqualifying evidence, selection for training and assignment to nuclear duty will be based on a positive attitude toward duties involving nuclear weapons and the objectives of the Personnel Reliability Program.²¹² The person who has been tentatively selected for nuclear duties will be interviewed by the immediate commander or designated representative. The commander must determine whether the individual has a positive attitude toward nuclear-related duties.²¹³ The individual is under an obligation to report promptly any factors or conditions that may adversely affect his performance or that of a fellow worker.²¹⁴ Disqualification from the Personnel Reliability Program will neither be considered an adverse personnel action nor an adverse reflection upon the individual²¹⁵

Nuclear pacifism, a form of selective conscientious objection, does not comport with Army personnel policies. Individuals who desire to serve in the Regular Army must be willing to give unrestricted service.²¹⁶ Nuclear pacifism and unrestricted service are mutually exclusive and incompatible. If, at the time of enlistment or appointment, an individual gives no thought to nuclear weapons, moral scruples or objections should be expressed during the required Personnel Reliability Program suitably *interview*.²¹⁷ An individual may involuntarily find himself assigned to a specialty and **Branch**²¹⁸ or Military Occupational Specialty²¹⁹ that requires him to perform duty

²⁰⁸U.S. Dep't of Army, Reg. No. 50-5, Nuclear and Chemical Weapons and Material-Nuclear Surety, para. 3-1 (1 June 1983) [hereinafter cited as AR 50-5].

²⁰⁹*Id.* at para. 3-3.

²¹⁰*Id.* at para. 1-1.

²¹¹*Id.* at para. 3-3.

²¹²*Id.* at para. 3-11.

²¹³*Id.* at para. 3-13.

²¹⁴*Id.* at para. 3-16.

²¹⁵*Id.* at para. 3-20.

²¹⁶AR 601-100, para. 1-15.

²¹⁷AR 50-5, para. 3-13.

²¹⁸AR 611-101, para. 1-14.

²¹⁹AR 600-200, para. 2-11.

related to nuclear weapons. If an individual is opposed to performing nuclear-related duties, it is incumbent upon him to be honest and direct about his moral scruples during the suitability interview.²²⁰ If an individual, already in the Personnel Reliability Program, develops a nuclear pacifist position, then his moral principles should dictate that he report, **as** required by **regulation**,²²¹ that he no longer can serve in such a position. If an individual discloses these moral scruples during the suitability interview or should the scruples develop after admission to the Personnel Reliability Program, his disqualification will not be considered an adverse personnel action or reflect adversely upon **him**.²²² The Army provides individuals with the opportunity to make their moral scruples known without fear of punishment or retribution. It is the individual's responsibility to be forthright. If an individual is later discovered to have been dishonest during the suitability interview or while in the Personnel Reliability Program, then punitive or adverse administrative action would be appropriate. Nuclear pacifists in nuclear-related duty positions undermine security and the mission.

Nuclear pacifism appears to be a growing phenomenon. It is not a movement restricted to Roman Catholics or other religious groups. Many of these individuals may be willing to serve in positions that are of a conventional nature. When applying for enlistment or appointment, an individual is not asked if he is opposed to the use of any or all nuclear weapons. Individuals in the Volunteer Army may be filling nuclear-related duty positions for the sake of job and material security; they may have no intention **of** launching a nuclear weapon if ever ordered to do *so*. If conscription is ever again used to fill the ranks of the military, individuals may fill nuclear positions deliberately to insure that nuclear weapons are not launched. Some individuals will not think about the consequences of firing nuclear weapons until they are ordered to launch them. It may be then that they realize they are in fact nuclear pacifists. In order to safeguard its mission, it may be necessary for the Army to develop questions to be asked of **all** persons applying for enlistment or a commission respecting moral or religious scruples about nuclear weapons.

Law and Army regulations do not recognize any form of selective conscientious objection. Assignment of personnel to duty positions ultimately must serve the needs of the Army, not the individual.

²²⁰AR 50-5, para. 3-13.

²²¹*Id.* at para. 3-16.

²²²*Id.* at para. 3-20.

However, if nuclear pacifism becomes widespread, the Army may be required to reassess its personnel policies so that it can at least use nuclear pacifists in conventional warfare roles during time of war.

The Bishops' advocacy of selective conscientious objection is impractical and begs many serious questions. Who is to determine if a war is just or unjust in nature? Who is to determine if the means of waging the war are just or unjust? If all Christians in the Western World opt for total pacifism, who will protect our nation and allies from "aggression, oppression, and **injustice**"?²²³ If the Bishops do not begin to answer these questions, and more, give clear moral guidance to their people, and thereby give legislators and the military a clear idea of how to carry out their duties and attempt to accommodate those with religious or moral scruples, then the answers may not be forthcoming.

IV. CONCLUSION

The challenge presented by nuclear weapons has not been met, although it can be observed that forty years have passed since Hiroshima and Nagasaki and nuclear weapons have not been used again. At least the nations of the world have avoided nuclear holocaust thus far.

Principles of customary international law, military necessity, proportionality, and avoidance of unnecessary suffering apply in different manners to countervalue nuclear weapons and counterforce nuclear weapons.

With respect to countervalue nuclear weapons, the policy of mutual deterrence is an inverse application of these principles. These rules of customary law keep nations in a stalemate. They make sense only in the context that mutual destruction is not worth unleashing the destructive forces of countervalue weapons. These rules of customary international law have always been applied during war to reduce destruction and carnage, to make conflict as humane as possible. For the first time these rules are being applied during an era of peace, or at least during the absence of conflict between superpowers. If the nuclear arsenals of the United States and Soviet Union are unleashed, customary international law will be powerless to control countervalue warfare. Such rules of law only

²²³Bishops' Letter, *supra* note 89, at I.C.3, at 9.

matter to nations and governments that will survive war. Nuclear holocaust eviscerates law and morality. The only international legal value in countervalue nuclear weapons lies in their application through the practice of a balance of power and deterrence. Until nations can learn to trust each other and dismantle the countervalue nuclear stockpiles, the only safe alternative is to apply customary international law through the practice of mutual deterrence.

Counterforce nuclear weapons could be utilized in accord with principles of military necessity, proportionality, and avoidance of unnecessary suffering. Army planning has incorporated these principles in its tactical nuclear doctrine. Such weapons may further the aims of international law. A conflict could be more limited in scope, area, and duration. A nation may quickly decide that it is better to negotiate than to risk a long-term war or nuclear holocaust. Nations must establish means of communicating prospectively so that, if conflict ensues and counterforce nuclear weapons are used, the adversary will not mistakenly instigate countervalue nuclear war.

The American Roman Catholic Bishops' pastoral letter is an important omen to observe and study because it influences many people and voices opinions shared by many outside their Church. In their application of theological and moral doctrine to countervalue nuclear warfare, the Bishops parallel the traditional application of customary international law principles. However, they do not see how those same principles function through the policy of mutual deterrence. They are willing to accept deterrence only as a step toward mutual disarmament. Even if the nuclear stockpiles are reduced to nothing, how long can lack of trust and the knowledge of how to construct such weapons be kept in Pandora's Box? With respect to counterforce nuclear weapons, the Bishops doubt that their use could be controlled. They doubt that they could be used proportionally and without causing disproportionate loss of civilian life and damage to the environment. Plans have been drawn up for their use, plans devised according to principles of customary international law. Being limited in capacity, imperfect human beings can only make plans that fall short of absolute certainty. If the Bishops are awaiting certainty before they decide to absolutely condemn or absolve limited, counterforce nuclear weapons, they will have to wait forever. All that people can hope for is that nations will adopt Protocol I and apply its rules not only to conventional warfare, but to limited, counterforce nuclear warfare as well

People are terrified of nuclear holocaust and nuclear weapons. They are looking for guidance on what to do as individuals in peace and war. The Roman Catholic Church has been an institution that

has given people concrete moral directives for centuries. The American Roman Catholic Bishops wrote their letter to give guidance to their people. They failed. They hedged and hid behind words like "we do not presume."²²⁴ They stated: "It is surely not our intention in writing this letter to create problems for Catholics in the armed forces."²²⁵ Nearly twenty years ago, Vatican II taught that Christians cannot engage in countervalue warfare of any kind. The Bishops only echoed that teaching. The Bishops set out to give moral guidance to individuals but created instead only more confusion. While individuals of conscience would rejoice over disarmament and the removal of the nuclear threat, they realize that, if it is ever to occur, it will take many years. While living with the threat, many many wonder what will happen to their immortal souls if they must order nuclear missiles to be launched or must carry out the order. They look to their religious leaders for answers so they can make the choice responsibly. These people may fear death in no matter what guise it comes, but going to meet their God, having violated his law, is the ultimate fear. The Bishops are charged, within their Church and faith, with guiding the immortal souls of individuals. The Bishops gave a lucid commentary on theology as applied to politics and military strategy. They devised a marvelous schema for demolishing all means of warfare, conventional and nuclear. In the final analysis, they failed because they left their people stranded in uncertainty.

The Bishops came very near to openly advocating nuclear pacifism; it is implied in ail that they write. However, short of an open declaration of that position, they advocated legislation exempting selective conscientious objectors from wars that they deem to be unjust and wars in which unjust means are employed. American law does not recognize selective conscientious objection. It is a solution that is unworkable. It has been rejected by the Supreme Court and Congress. Personnel who have moral scruples about nuclear weapons are not assigned to nuclear related duties for reasons of security. Army personnel who screen individuals before admitting them to the Personnel Reliability Program and who monitor individuals in the program cannot read minds. It is, therefore, incumbent upon individuals to express their moral reservations.

The Army's personnel regulations and Personnel Reliability Program are sound, when isolated from the question of nuclear

²²⁴*Id.* at IV.C, at 29.

²²⁵*Id.* at IV.C, at 28.

pacifism. The Army has promulgated the Personnel Reliability Program in order to insure the security and reliability of its nuclear mission. The screening procedure is not a recognition of nuclear pacifism; individuals are dropped from the program for drug and alcohol abuse as well. It is a program aimed simply and solely at maintaining security and reliability. Those excluded or dropped from the program are not released from military service. They are re-assigned to other military duties, duties that could demand from them active service during armed conflict.

However, the Army must prepare to deal with soldiers who emerge as nuclear pacifists during time of armed conflict. This concern should not be focused solely on Roman Catholics because the anti-nuclear movement transcends religious groups and particular faiths.

Nuclear pacifism will not threaten the military mission and national security if the conflict is of a conventional nature. If nuclear weapons of any type are used, soldiers who are nuclear pacifists could create numerous problems. Some may be willing to serve in positions totally divorced from nuclear weapons. Others may lay down their weapons and refuse to serve in any capacity. The latter group will believe that if they participate in any way they will be indirectly supporting the use of nuclear weapons. Indirect support is as morally culpable to them as direct support. Some soldiers may refuse to launch counterforce and countervalue nuclear weapons. Others may refuse to deliver supplies to nuclear-capable units. Some will refuse to serve at all. In the midst of conflict, such dissent could spell disaster for the military.

The destructive potential of nuclear weapons evokes a wide range of human emotions. The thought of killing thousands of civilians at the touch of a button gives many people pause. Before the advent of nuclear weapons, individuals did not have to deal with such thoughts. Conventional warfare, as devastating as it can be, permits survival. Because nuclear weapons could produce universal holocaust, individuals view future war from a different perspective. The Army and the other services must be prepared to deal with the emotion, doubts, and moral questions that surround the use of nuclear weapons. Ignoring these questions will not make them disappear.

Nuclear pacifists are not exempt from military service; they are not opposed to all wars. Therefore, they do not come under the legislative exemption granted to conscientious objectors by Congress. These individuals will not give unrestricted service because of their moral convictions. The only personnel in the Army who are ques-

tioned about their attitudes regarding nuclear weapons are those who are going to be assigned to nuclear-related duties. The attitudes of all other personnel are not questioned or probed. If nuclear pacifists refuse to perform duties, the moral dissidents will appear in all branches and military occupational specialties.

Moral dissent may be stronger among nuclear pacifists. If they believe that they are going to perish in nuclear holocaust, they will be more resolute in defending their moral beliefs. If they believe they are going to die, they will want to die knowing they can face their God without having betrayed their beliefs.

The military cannot wait to confront nuclear pacifism and its variations until they surface during armed conflict. The military must act prospectively. All those who want to voluntarily join the military and those who may be drafted should be questioned about their attitudes regarding the use of nuclear weapons. Would they be willing to serve if countervalue weapons were used? Would they be willing to serve if counterforce weapons were used? Would they refuse to serve in any capacity if nuclear weapons were used? It must also be recognized that some soldiers will not know the answers to such questions. They may be searching for clear moral guidance so that they can resolve their moral dilemma.

The anti-nuclear movement is growing. The American Roman Catholic Bishops exemplify one fraction of that cause. The military cannot afford to ignore it.

International law will be of no help if countervalue nuclear weapons are unleashed. However, the same principles of international law can be used to regulate counterforce nuclear strategy. The Army's strategic planning for the use of counterforce weapons measures well against international law. The policymakers of the United States who seek mutual deterrence have applied international law principles well, although in a novel manner. They have kept nuclear holocaust at bay for nearly forty years. Law and policy with regard to conscientious objection is fair, sensible, and practical. The greatest failure to be noted is in the field of morality. The problems have been raised, but real guidance has not been forthcoming. If war should come, it is the individual soldier of conscience who will suffer the most. He will want to be moral, do his duty, and do that which is right. He will not know what his ultimate duty is or what is morally right. His loyalties, emotions, and thoughts will be torn asunder. The American Roman Catholic Bishops have told the individual soldier that his nation must defend its people against unjust aggression. At the same time, he knows that the Bishops say

nuclear weapons should not be used against civilians, nor should they be used under other circumstances. What exact circumstances? He **has** not been told. So, he is torn between one moral duty, to defend his nation, and the moral duty to defend it only with just means. Had the Bishops fulfilled their moral obligation to give clear moral guidance, even if that meant openly embracing nuclear pacifism, the individual soldier would at least have had a clearly defined choice.

This crisis of conscience may not occur until a war has begun and nuclear weapons are used. The soldier will then face, not an abstract crisis, but one that is real and demands some choice. He will have to decide in a virtual vacuum because his spiritual mentors would not presume to give guidance. This uncertainty could threaten national security.

The ultimate challenge of nuclear weapons, to live in peace or die, has not been met. The challenge may have only been postponed. If nations are to survive, their leaders must continue to negotiate, but they all must learn to do so in honesty and trust. They must renounce foisting their brand of peace on other nations. They must ultimately learn to define the words peace, justice, and human rights in the same way. The more time that passes without such agreements, the more likely it is that nations and their peoples will come to accept this ultimate threat as the status quo and become complacent and falsely secure in the notion that it hasn't happened yet so it never will.

Since 1945, nuclear weapons have not been used. There is still time for nations to disarm so that they will never be used again. Let it not be forgotten, that amidst all the horrors that escaped from Pandora's **Box**, the last spirit to emerge was Hope.

By Order of the Secretary of the **Army**:

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