



DEPARTMENT OF DEFENSE
UNITED STATES STRATEGIC COMMAND

Reply To:
USSTRATCOM/J0CS
901 SAC BLVD STE 2A5
OFFUTT AFB NE 68113

28 Jun 19
SM# 3053-19



REF: 19-006 USSC

Nautilus Institute for Security and Sustainability
2342 Shattuck Ave. #300
Berkeley CA 94704

Dear 

Thank you for your 19 September 2018 Freedom of Information Act request. We perfected your request on 24 October 2018. As a reminder, U.S. Strategic Command did not stand up until June 1992. Our search located nine responsive documents pertaining to item (1) of your request and two documents for item (2). I am releasing the documents pertaining to item (2) in their entirety.

After carefully reviewing the item (1) documents, I have determined certain portions are releasable. However, there are portions I am withholding. As the Initial Denial Authority, I have determined that certain information I am denying access to is currently and properly classified in the interest of national defense or foreign policy according to Executive Order 13526, *Classified National Security Information*, Sections 1.4(a) and 1.7(e). I have determined certain portions of the document dated 31 October 1995 no longer meet the classification criteria of the Executive Order. Therefore, under my authority as an Original Classification Authority, I have declassified those portions.

I am also denying certain portions, as they are privileged attorney client communications and attorney work products. Although all nine documents qualify as being exempt in their entirety under the deliberative process privilege, I have determined certain portions can be released without harm to the deliberative process and U.S. Strategic Command's operations. Lastly, I am denying access to the names of lower level personnel as release would clearly be an invasion of personal privacy.

In accordance with 5 U.S.C. § 552, Freedom of Information Act, Exemptions 1, 5, and 6 are hereby invoked, and require this information be withheld. If you are not satisfied with this action, you may appeal this response to the appellate authority, Ms. Joo Chung, Director of Oversight and Compliance, Office of the Secretary of Defense. The appellate address is: ODCMO, Director of Oversight and Compliance, 4800 Mark Center Drive ATTN: DPCLTD, FOIA Appeals, Mailbox #24, Alexandria VA 22350-1700. As an alternative, you may use the OSD FOIA request portal at <http://pal.whs.mil/palMain.aspx>; or e-mail your appeal to OSD.FOIA-APPEAL@mail.mil. Your appeal should be submitted within 90 calendar days of this letter and should cite case number 19-006, and be clearly marked "Freedom of Information Act Appeal."

Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, e-mail at ogis@nara.gov; telephone at (202) 741-5770; toll free at 1-977-684-6448; or facsimile at (202) 741-5769.

Sincerely

A handwritten signature in cursive script, reading "Daniel L. Karbler".

DANIEL L. KARBLER
Major General, USA
Chief of Staff

From: (b)(6) USSC STRATCOM J006 (US)

Sent: Tuesday, December 19, 2017 12:19 PM

To: Richard, Charles A VADM USN STRATCOM JCDC (US) (b)(6) USSC

(b)(6) USSC

Subject: Delegation of Authority

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VADM Richard,

In response to the question about delegation of nuclear release authority, I provide the following answer and some background on succession to and authentication of the person exercising the powers of the Office of the President.

(b)(1) Sec 1.4(a) / (b)(5)-Attorney Client Privilege USSC

(U) Section 19 of Title 3, U.S. Code, lays out the line of succession in the event there is neither a President nor a Vice President to execute the powers of the Office of the President by reason of death, resignation, removal, inability, or failure to qualify.

(b)(1) Sec 1.4(a) / (b)(5)-Attorney Client Privilege USSC

(b)(1) Sec 1.4(a) / (b)(5)-Attorney Client Privilege USSC

(U) While Congress is not directly involved in the C2 of nuclear forces, they have taken some actions with respect to nuclear weapons in addition to authorizing their development and procurement by the US Government.

(U) In Section 2121 of Title 42, Congress has granted the President the authority to direct the Department of Energy to transfer nuclear or atomic weapons to the Department of Defense "for such use as he deems necessary in the interest of national defense."

(b)(5)-Attorney Client Privilege USSC

(U) Standing by for follow up questions, sir.

v/r

(b)(6) USSC

Staff Judge Advocate

Classified By: (b)(6) USSC STRATCOM J006 (US) on Tuesday, December 19, 2017
12:19:03 PM.

~~Derived from: Multiple Sources~~

~~Declassify on: Date: 12/19/2042~~

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10 April 2015

SUBJECT: (U) Information Paper – Law of War Restrictions on Targeting Infrastructure

- (U) Under the law of war, civilian objects are protected from attack.
 - (U) U.S. State Dept. says this protection applies to nuclear and conventional conflicts.
 - (U) See Written Statement of the US to the ICJ, dtd 10 Jun 1994.
- (U) When protected objects are used to further military or hostile force objectives, they may lose protected status.
 - (U) Warnings or notice must given to adversary prior to striking a protected object whose status has changed
 - (U) Exceptions to notice requirements (1) for time sensitive targets; or (2) troops in contact with enemy from protected object
 - (U) See CJCSI 3160.01 Encl. C.
- (U) "Military objective" is a legal term: "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, under the circumstances ruling at the time, offers a definitive military advantage."
 - (U) See JP 3-60 App. A. Also see Additional Protocol I to the Geneva Conventions, Art. 52(2)

(b)(1) Sec 1.4(a) / (b)(5)-Attorney Work Product USSC

- (U) "Economic infrastructure" – composed of facilities whose only contribution to the military is the contribution of tax revenue – is normally thought of as civilian. As such, it is normally protected from attack.
 - (U) Targeting such objects is considered lawful when discussed in some DoD law of war desk books and handbooks, but is controversial – the legality of such strikes is challenged internationally by US and Allied law of war expert commentators.
 - (U) Nonetheless, if the US were to plan strikes against such targets, the following factors would need to be determined by intelligence prior to informed decisions from being made:
 - (U) Does the state own the facility and collect all revenue from it?
 - (U) What is the economic impact of the facility?
 - (U) What is the connection between the enemy's military operations and the economic target?
 - (U) What distinguishes it as a tax-generating entity from other civilian objects we are not targeting?
 - (U) What is the military advantage to striking the target?
 - (U) What is the expected damage to civilians and civilian objects (for the proportionality analysis)?
- (U) Analysis should not be based on speculation, but should be driven by intelligence.

PREPARED BY: (b)(6) USSC

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(Updated 7 April 2005)

**Essential Points and Issues
In
Providing Legal Support to the Global Operations Center**

(U) Nuclear Warfare Issues:

- **(U) Legality:** There is no international law that makes the use of nuclear weapons *per se* illegal.
 - (U) We apply the traditional LOAC analysis of *military necessity, proportionality, and minimizing collateral damage*.
 - (U) There are treaties and political agreements that may impact how, when, and where can execute a nuclear attack (see discussion below on the Nuclear Non-proliferation Treaty and Launch Notification Agreements).
 - (U) However, because of the controversy associated with nuclear weapons, the U.S. policy has always been to avoid making a direct threat to use nuclear weapons. The U.S. traditional response to the possibility of Weapons of Mass Destruction (WMD) has been to state that we will "consider all options available to us in response to an attack using WMD."

(b)(1) Sec 1.4(a) / (b)(5)-Attorney Work Product USSC

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(b)(1) Sec 1.4(a) / (b)(5)-Attorney Work Product USSC

- **(U) Overflight Issues:** You often will hear discussion expressing concern (or limitations) of overflight of certain countries. The legal aspects of overflight are as follows:

- (U) *Intercontinental Ballistic Missiles (ICBMs) and Submarine Launched Ballistic Missiles (SLBMs):*

- (U) Since ICBMs and SLBMs travel through space to reach their targets, NO overflight permission is required under international law.

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(b)(1) Sec 1.4(a) / (b)(5)-Attorney Work Product USSC

- (U) *Bombers and Cruise Missiles:*

- (U) Under international law, overflight by these type of aircraft of a country without that country's permission would be a violation of that nation's sovereignty and considered an aggressive act. (Convention on Int'l Civil Aviation (Chicago Conv))

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(b)(1) Sec 1.4(a) / (b)(5)-Attorney Work Product USSC

- **(U) Impact of Risk Reduction Agreements:**

- (U) There are a series of agreements by which the U.S. and Russia have agreed to notify each other in advance of the peacetime launch (and the intended target) of ICBMs and sea launched ballistic missiles SLBMs (NOTE: these agreements do NOT apply to bombers and cruise missiles). (Agreements/Treaties found at <http://www.state.gov/t/vc/trty/> "Agreement on Nuclear Risk Reduction Centers" is good starting point for notification obligations. DoS owns the NRRC.)

--- (U) These agreements are NOT treaties (i.e. they have not been ratified by Congress and are not binding under U.S. law) but are political agreements and are designed to prevent the inadvertent escalation of nuclear warfare

--- (U) Although these agreements designate a specific time-frame in which these advance notifications will be given (usually at least 24-hours to four days before a launch),

(b)(5)-Attorney Work Product USSC

(b)(1) Sec 1.4(a) / (b)(5)-Attorney Work Product USSC

- **(U) Impact of the Nuclear Non-proliferation Treaties and Agreements:**

- (U) The Nuclear Non-proliferation Treaty (NPT) was signed and ratified by the five nuclear weapons states (NWS) at that time (U.S., Great Britain, France, the Soviet Union and China) and non-nuclear weapon states (NNWS). All of the NWS ratified the treaty and many NNWS (including Cuba, **North Korea**, Syria, Libya and Iran, but NOT including Israel, Pakistan and India) also signed the treaty.

--- (U) As part of the NPT, the NWS agreed not to transfer nuclear weapons or nuclear weapon technology to the NNWS.

--- (U) The NNWS agreed in the treaty not to attempt to obtain either nuclear weapons or nuclear weapons technology.

- (U) In order to induce the NNWS to sign the treaty, the NWS each made separate **non-treaty** statements called "negative security assurances" as to their policy on the use of nuclear weapons.

--- (U) In 1995, The U.S. stated, as part of its negative security assurance (NSA) to get NNWS to extend the treaty, that it would not use nuclear weapons against a NNWS except in the case of an invasion or an attack on the U.S., its territories, its armed

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forces, its allies or a State with which the U.S. has a security commitment, carried out or sustained by a NNWS in association or alliance with a NWS.

---- (b)(5)-Attorney Work Product USSC

- (U) However, subsequent to 1995, the U.S. has attempted to restate its NSA to warn NNWS that the U.S. "will not limit the options available to the U.S. in response to an attack by a party using WMD."
- (U) The following are therefore issues associated with the NPT:
 - (U) Can the U.S. modify its NSA and attack treaty NNWS signatories to prevent a biological or chemical attack on the U.S. and its interests?
 - (U) The U.S. position is "yes" (i.e. we never intended to give up our inherent right of self-defense, and the NNWS states can always withdraw if they don't like the new U.S. NSA), but some international bodies have said "no" because the NSA was a promise that induced the other countries to give up their right to seek nuclear weapons.

--- (b)(5)-Attorney Work Product USSC

- (U) Again, the U.S. position is that it has always reserved its inherent right of self-defense and does not have to wait until an actual attack, but can preempt an imminent WMD attack. A nuclear attack must be evaluated using LOW/LOAC principles.

- (U) Nuclear Weapons Free Zones:

- (U) Notwithstanding the NPT, there are three other treaties that could impact the political considerations of a nuclear attack:
 - (U) The Treaty of Tlatelolco established Latin America (all North American countries from Mexico southward and the Caribbean) as a nuclear weapons free zone.
 - (U) The U.S. ratified this treaty and is **legally prohibited under U.S. law** from using or threatening to use a nuclear weapon against a treaty signatory.
 - (U) Again, the U.S. has said it is not bound if a treaty party attacks the U.S. or its territories in association with a NWS.
 - (U) The Treaty of Rarotonga established the South West Pacific nations (including Australia, New Zealand and Fiji) as nuclear free zones. The U.S. signed, but has not ratified this treaty. It is considered *politically* binding, but not binding under U.S. law.
 - (U) The impact of this treaty is that the signatories could refuse to allow the U.S. the ability to transit their territory with nuclear weapons or conduct an attack from territories within the treaty boundaries.
 - (U) The Treaty of Pelindaba established the entire continent of Africa as a nuclear free zone. The U.S. also has signed, but not ratified this treaty.
 - (U) The treaty might impact the political considerations of a U.S. nuclear attack on an African nation and the ability of the U.S. to launch nuclear attacks from countries in Africa or overfly African countries to execute a nuclear attack.

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---- (U) In signing this treaty, the U.S. specifically said that it reserves its right to use all options against a nation that attacks the U.S. or its interests with WMD.

- **(U) Mutual Defense Treaties**

- (U) Sometimes, the question comes up in the context of mutual defense treaties whether we are obligated to respond with nuclear weapons if a signatory is attacked with WMD.
 - (U) There is no provision under international law that allows one country to dictate the manner and method of mutual defense to another. While two major mutual defense treaties (i.e. NATO and Japan) require "appropriate response," the U.S. will determine what response is appropriate under the circumstances.
- (U) Another issue is whether the U.S. can unilaterally invoke a mutual defense treaty without the request or consent of the attacked ally (i.e. NATO treaty).
 - (U) While there may be some discussion on this issue, we would note three observations:
 - (U) Any operation that would propose to overfly or put "boots on the ground" on the national territory of the ally would still require permission of the ally.
 - (U) The U.S. still retains its right to declare when its national interests are in jeopardy and, pursuant to Article 51 of the UN Charter, would reserve the right to respond unilaterally against an aggressor nation if it believes such action is necessary for its own self-defense.
 - (U) While we can justify unilateral response based on our inherent right of national self-defense under Article 51 if U.S. interests (ie. citizens and forces) are threatened, traditional thought is that absent a direct U.S. interest, we would need the request of the attacked country in order to justify application of armed force.

(b)(1) Sec 1.4(a) USSC

(U) Information Operations:

Non-responsive - (b)(5)-Attorney Work Product USSC

Non-responsive - (b)(5)-Attorney Work Product USSC

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Non-responsive - (b)(1) Sec 1.4(a) / (b)(5)-Attorney Work Product USSC

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LOAC and Targeting



Colonel

(b)(6) USSC

Staff Judge Advocate

14 May 2018

This briefing is classified: UNCLASSIFIED

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Commanders Vision and Intent, February 2018

- **The Command's priorities remain:**
 - Above all else, we will provide **Strategic Deterrence**
 - If deterrence fails, we are prepared to deliver a **Decisive Response**
 - We will do this with a resilient, equipped, and trained **Combat-Ready Force**



LOAC and Deterrence

“Deterrence should be based on capability (having the means to influence behavior), credibility (maintaining a level of believability that the proposed actions may actually be employed), and communication (transmitting the intended message to the desired audience) to ensure greater effectiveness (effectiveness of deterrence must be viewed from the perspective of the agent/actor that is to be deterred).” JP 3-0, Joint Operations (2017)

“Another little-understood aspect of the importance of LOAC to STRATCOM is the role it plays in deterrence. Among other things, compliance with LOAC helps to ensure that military personnel would obey an order given to execute a nuclear option. Absent confidence in the lawfulness of such orders, we would invite dissension at a crucial time.” US Strategic Command SJA in 1995



2013 Report on Nuclear Employment Strategy of the United States

“[A]ll plans must also be consistent with the fundamental principles of the Law of Armed Conflict. Accordingly, plans will, for example, apply the principles of distinction and proportionality and seek to minimize collateral damage to civilian populations and civilian objects. The United States will not intentionally target civilian populations or civilian objects.”



2018 Nuclear Posture Review

“If deterrence fails, the initiation and conduct of nuclear operations would adhere to the law of armed conflict and the Uniform Code of Military Justice. The United States will strive to end any conflict and restore deterrence at the lowest level of damage possible for the United States, allies, and partners, and minimize civilian damage to the extent possible consistent with achieving objectives.”



Principles of Joint Operations from JP 3-0

- **Objective**
 - **Offensive**
 - **Mass**
 - **Maneuver**
 - **Economy of Force**
 - **Unity of Command**
 - **Security**
 - **Surprise**
 - **Simplicity**
-
- **Restraint**
 - **Perseverance**
 - **Legitimacy**



Principles of Joint Operations from JP 3-0

- **Objective** - The purpose of specifying the objective is to direct every military operation toward a clearly defined, decisive, and achievable goal. The purpose of military operations is to achieve specific objectives that support attainment of the overall strategic objectives identified to resolve the conflict. This frequently involves the destruction of the enemies' capabilities and their will to fight.
- **Economy of Force** - The purpose of economy of force is to expend minimum essential combat power on secondary efforts in order to allocate the maximum possible combat power on primary efforts.
- **Restraint** - The purpose of restraint is to prevent the unnecessary use of force. A single act could cause significant military and political consequences; therefore, judicious use of force is necessary.
- **Legitimacy** - The purpose of legitimacy is to maintain legal and moral authority in the conduct of operations. Legitimacy, which can be a decisive factor in operations, is based on the actual and perceived legality, morality, and rightness of the actions from the various perspectives of interested audiences.



General Principles of LOAC

- **Military Necessity.** This principle limits those measures not forbidden by international law to legitimate military objectives whose engagement offers a definite military advantage. While military necessity gives commanders great latitude in conducting military operations, it does not authorize all military action and destruction. For instance, under no circumstance would military necessity authorize actions specifically prohibited by LOAC, such as the murder of prisoners of war or the deliberate targeting of innocent civilians.
- **Unnecessary Suffering.** This principle forbids the employment of arms, projectiles, or material calculated to cause unnecessary suffering. This construct also extends to unnecessary destruction of property. Combatants may not use arms that are calculated to cause unnecessary suffering, and may not use otherwise lawful weapons in a manner or with the intent to cause unnecessary suffering.
- **Proportionality.** The principle of proportionality requires that commanders weigh the anticipated loss of civilian life and damage to civilian property reasonably expected to result from military operations with the advantages expected to be gained. The principle of proportionality is weighed by a commander in determining whether, in engaging in an operation, the commander's actions may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, that would be excessive in relation to the concrete and direct military advantage anticipated by those actions. The military advantage anticipated is intended to refer to the advantage anticipated from those actions considered as a whole, and not only from isolated or particular parts thereof. Generally, "military advantage" is not restricted to tactical gains, but is linked to the full context of a strategy.
- **Distinction (Discrimination).** LOAC requires that military forces are directed only against lawful military objectives. To that end, the principle of distinction (discrimination) requires both attacker and defender to distinguish between combatants and noncombatants, as well as between military objectives and protected property, locations, or objects. Defenders are obligated to use their best efforts to segregate noncombatants and to refrain from placing military personnel or materiel in or near civilian objects or locations. Attackers are required to only use those means and methods of attack that are discriminate in effect and can be controlled, as well as take precautions to minimize collateral injury to civilians and protected objects or locations.



LOAC Targeting

- **The United States has accepted the following definition of distinction as reflective of customary international law, and it forms the basis of a LOAC targeting analysis:**
 - Under the principle of distinction, combatants may make enemy combatants and other military objectives the object of attack, but persons, objects, and locations that are not military objectives may not be made the object of attack.
- **Is the proposed target a military objective?**



LOAC Targeting – Military Objectives

- **Two types of objects are categorically recognized as military objectives:**
 - Military equipment and bases
 - Objects containing military objectives
- **If the object is not in one of these categories, we must determine:**
 - Whether by its nature, location, purpose or use, the object makes an effective contribution to the enemy's action, and
 - Whether attacking, capturing, or neutralizing the object offers our forces a definite military advantage
- **Both must be met before the object is a military objective**
- **The reason for one may be the reason for the other, but they are not necessarily related. Definite military advantage has a broader meaning and forms the basis for conducting a proportionality analysis if needed**



LOAC Targeting – Military Objectives

- **By its nature, location, purpose or use, does the object makes an effective contribution to the enemy's action?**
 - Nature, location, purpose or use
 - The contribution need not be direct, need not be proximate and it need not provide immediate operational or tactical gains
 - However, the contribution must be real and not speculative and be supported by available intelligence or other information
- **Will attacking, capturing, or neutralizing the object offer our forces a definite military advantage?**
 - "Military advantage" refers to the advantage gained when considered as a whole, not from isolated or individual parts
 - It is not restricted to tactical or operational gains
 - The military advantage to be gained must not be indeterminate or speculative and be supported by available intelligence or other information
 - Diminishing the morale of civilians or their support for the war does not provide a military advantage
- **Power generating stations, oil refining and distribution facilities, and objects associated with POL products, including production, transportation, storage and distribution facilities are often going to be found to meet the criteria, but this is not categorical.**



LOAC Targeting - Proportionality

- **In accordance with the principle of proportionality, combatants must not exercise the right to engage in attacks against military objectives in an unreasonable or excessive way.**
- **In particular, the following rules apply:**
 - Combatants must take feasible precautions in planning and conducting attacks to reduce the risk of harm to civilians and other persons and objects protected from being made the object of attack; and
 - Combatants must refrain from attacks in which the expected loss of civilian life, injury to civilians, and damage to civilian objects incidental to the attack would be excessive in relation to the concrete and direct military advantage expected to be gained.
- **The principle of proportionality does not impose obligations intended to reduce the risk of harm to purely military objectives**



Proportionality and feasible precautions

- **Feasible precautions in planning and conducting attacks may include, but are not limited to, the following:**
 - assessing the risks to civilians
 - identifying zones in which military objectives are more likely to be present or civilians are more likely to be absent
 - providing effective advance warning before an attack that may affect the civilian population
 - adjusting the timing of an attack
 - cancelling or suspending attacks based on new information raising concerns of expected civilian casualties
 - weaponeering (e.g., selecting appropriate weapons, aim points)



Proportionality and excessive incidental harm

- **The expected loss of civilian life and injury to civilians should be given greater consideration than the expected damage to civilian objects**
- **The expected damage to civilian objects (such as schools, hospitals, and religious facilities) should be given greater consideration when such damage is expected to involve the risk of harming civilians present inside such objects**
- **Expected damage to cultural property should be afforded greater consideration than expected damage to ordinary property**
- **Mere inconveniences or temporary disruptions to civilian life need not be considered in applying this rule**
- **The expected loss of civilian life, injury to civilians, and damage to civilian objects is generally understood to mean such immediate or direct harms foreseeably resulting from the attack.**
- **Remote harms that could result from the attack do not need to be considered in applying this prohibition.**



Proportionality and excessive incidental harm

- **Determining whether the expected incidental harm is excessive does not necessarily lend itself to quantitative analysis, as the comparison is often between unlike quantities and values.**
- **The evaluation of expected incidental harm in relation to expected military advantage intrinsically involves both professional military judgments as well as moral and ethical judgments evaluating the risks to human life.**
 - **On the one hand, striking an ammunition depot or a terrorist training camp would not be prohibited because a farmer is plowing a field in the area**
 - **On the other hand, an extraordinary military advantage would be necessary to justify an operation posing risks of collateral death or injury to thousands of civilians.**
- **In less clear-cut cases, the legal question of whether the expected incidental harm is excessive may be a “highly open-ended” inquiry, and the answer may be “subjective and imprecise.” For this reason, States have chosen to apply a “clearly excessive” standard for determining whether a criminal violation has occurred.**



Compliance with LOAC and Illegal Orders

- Each member of the armed forces has a duty to comply with the law of war in good faith
- Not every individual is responsible for implementing every obligation held by that party. Certain persons have the authority to make necessary decisions and judgments.
- Members of the armed forces must refuse to comply with clearly illegal orders to commit law of war violations.
- Orders should not be construed to authorize implicitly violations of law of war.
- The requirement to refuse to comply with orders to commit law of war violations applies to orders to perform conduct that is clearly illegal or orders that the subordinate knows, in fact, are illegal.
- The duty not to comply with orders that are clearly illegal would be limited in its application when the subordinate is not competent to evaluate whether the rule has been violated
- Subordinates are not required to screen the orders of superiors for questionable points of legality, and may, absent specific knowledge to the contrary, presume that orders have been lawfully issued.
 - For example, if a commander issues an order to attack a town, one should assume that the order directs attacks on military objectives located in that area.
- Subordinates ordinarily do not have an obligation to second-guess the judgments of their superiors in relation to the principle of proportionality. As with other aspects of the law of war, subordinates are not required to screen the orders of superiors for questionable points of legality, and may, absent specific knowledge to the contrary, presume that orders have been lawfully issued.



My Role as the Senior Legal Counsel

- **On behalf of the commander and in accordance with DoD policy, I:**
 - Provide advice about law of war compliance during planning and execution of exercises and operation
 - Ensure that all plans, policies, directives, and rules of engagement, and those of subordinate commands and components, are reviewed to ensure their consistency with the law of war and DoD policy on the law of war
 - Supervise the administration of those aspects of the command's Law of War program dealing with possible, suspected, or alleged enemy violations of the law of war



Slide # 18

UNCLASSIFIED



Back-up Slides



Slide # 19

UNCLASSIFIED



Justice Jackson's concurring opinion in the Steel Seizure case

- **"A judge, like an executive adviser, may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (concurring opinion).**
 - Justice Rehnquist in *Dames & Moore v. Regan* quoted Justice Jackson and added: "Our decision today will not dramatically alter this situation...."



2018 Nuclear Posture Review

The United States would only consider the employment of nuclear weapons in extreme circumstances to defend the vital interests of the United States, its allies, and partners. Extreme circumstances could include significant non-nuclear strategic attacks.

Significant non-nuclear strategic attacks include, but are not limited to, attacks on the U.S., allied, or partner civilian population or infrastructure, and attacks on U.S. or allied nuclear forces, their command and control, or warning and attack assessment capabilities.

The United States will not use or threaten to use nuclear weapons against non-nuclear weapons states that are party to the NPT and in compliance with their nuclear non-proliferation obligations.

Given the potential of significant non-nuclear strategic attacks, the United States reserves the right to make any adjustment in the assurance that may be warranted by the evolution and proliferation of non-nuclear strategic attack technologies and U.S. capabilities to counter that threat.

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DEPARTMENT OF DEFENSE
UNITED STATES STRATEGIC COMMAND

Reply To:
USSTRATCOM/J060
MEMORANDUM FOR J512

This document dates
back to the late 1990s.
*Note inserted by the
Command FOIA
Manager 19 June 2019.*

Subject: Proposed Targeting Strategies for Nuclear Posture Review (NPR) (U)

(b)(1) Sec 1.4(a) / (b)(5)-Attorney Client Privilege USSC

3. (U) The Department of Defense (DoD) has established an unambiguous policy that US forces will comply with the law of war during all military operations. Department of Defense Directive ("DoDD") 5100.77, *DoD Law of War Program*, dated 9 December 1998, establishes procedures to ensure United States forces comply with our obligations under the law of war. DoDD 5100.77, paragraph 3.1, defines the law of war as:

[t]hat part of international law that regulates the conduct of armed hostilities. . . .
The law of war encompasses all international law for the conduct of hostilities binding on the United States or its individual citizens, including treaties and international agreements to which the United States is a party, and applicable customary international law.

DoDD 5100.77, paragraph 5.3, makes it clear that the Heads of DOD Components will ensure that all members of their components will "comply with the law of war during all armed conflicts, however such conflicts are characterized, and with the principles and spirit of the law of war during all other operations." In order to ensure compliance, DoDD 5100.77, paragraph 5.8.6, requires that "all plans, policies, directives, and rules of engagement issued by the command and its subordinate commands and components are reviewed by legal advisors to ensure their consistency with this Directive and the law of war." Chairman, Joint Chiefs of Staff Instruction (CJCSI) 5810.01A, *Implementation of the DoD Law of War Program*, dated 27 August 1999,

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states that "all operational plans (including preplanned and (b)(1) Sec 1.4(a) USSC targets) are to reviewed by the Command legal advisor . . . to ensure compliance with domestic and international law, this instruction, and the DOD Law of War Program." There are no exceptions for nuclear weapons in either the DoD Directive or the CJCSI.

(b)(1) Sec 1.4(a) / (b)(5)-Attorney Client Privilege USSC

(b)(1) Sec 1.4(a) / (b)(5)-Attorney Work Product USSC

What constituted a legitimate "military objective" was historically based on customary international law until it was defined in the 1977 Additional Protocol I to the 1949 Geneva Convention (hereinafter "Additional Protocol I").

5. (U) Additional Protocol I is an example of a recent attempt to protect civilians from incidental or collateral damage. While many of the rules contained within Additional Protocol I are simply a codification of existing international customary law, the United States and other nations have objected to other rules which they argued went beyond international customary law. As a result of their disagreement with certain provisions, the United States signed, but never ratified, Additional Protocol I. During the interagency review of Additional Protocol I the Joint Staff completed a thorough review (hereinafter "Joint Staff Review"), identifying not only areas of concern, but also those rules which they believed represented international customary law. Since the United States has not ratified Additional Protocol I, we are bound only to the extent that a provision represents current customary international law.

6. (S) (b)(1) Sec 1.4(a) / (b)(5)-Attorney Work Product USSC

(b)(1) Sec 1.4(a) / (b)(5)-Attorney Work Product USSC

limited to 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, offers a definite military advantage.

(b)(1) Sec 1.4(a) / (b)(5)-Attorney Work Product USSC

7. (U) What constitutes a "military objective" is important when reviewing any attack against civilian populations. International customary law requires that an attacker distinguish between combatants and noncombatants, and further requires that an attacker never make civilians the object of attack. Article 51(2) provides that "[t]he civilian population, as well as individual

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civilians, shall not be made the object of attack." Article 51(5) provides that indiscriminate attacks are prohibited. It defines indiscriminate attacks 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 which cannot be limited as required by this Protocol."

8. (S) It is important, particularly for the purpose of this discussion, that the United States and others involved in the negotiation of Additional Protocol I had an understanding prior to the Protocol negotiations that the rules would not apply to nuclear weapons.

(b)(1) Sec 1.4(a) / (b)(5)-Attorney Work Product USSC

(b)(1) Sec 1.4(a) / (b)(5)-Attorney Work Product USSC

(b)(1) Sec 1.4(a) / (b)(5)-Attorney Work Product USSC The United States submission referred to U.S. Army Field Manual 27-10, Change No. 1, The Law of Land Warfare, (1976) (paragraph 25), which states:

"[h]owever, it is a generally recognized rule of international law that civilians must not be made the object of attack directed exclusively against them."

(b)(1) Sec 1.4(a) / (b)(5)-Attorney Work Product USSC

(b)(1) Sec 1.4(a) / (b)(5)-Attorney Work Product USSC

9. (S) Our only other concern is that any review of the proposed

(b)(1) Sec 1.4(a) / (b)(5)-Attorney Work Product USSC

(b)(1) Sec 1.4(a) / (b)(5)-Attorney Work Product USSC

10. (U) We look forward to working with you on these issues. Our POC is

(b)(6) USSC

(b)(6) USSC

(b)(6) USSC

Colonel, USAF
Staff Judge Advocate

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~~Attorney Work Product USSTRATCOM Staff Judge Advocate~~

Targeting

Legal Perspective

Lt Col

(b)(6) USSC

Chief, Operations Law

Office of Staff Judge Advocate

United States Strategic Command



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Existing Targeting Authorities

- **Joint Publication 3-60, Joint Targeting**
- **CJCS 3370.01, Target Development Standards**
- **International law considerations directly affect all phases of the joint targeting cycle**
- **Target planners must understand and be able to apply the basic principles of international law as they relate to targeting**



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Overview

- Brief Overview of the Targeting Methodology
- Discuss “No Strike” entities

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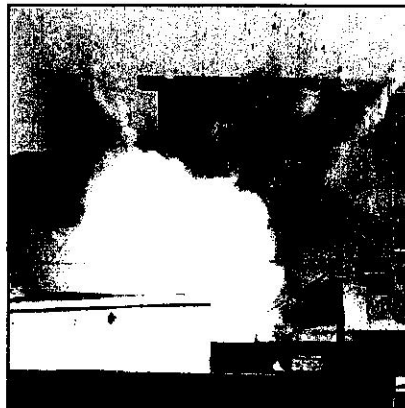
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Legal Requirements

- **Military attacks** will only be directed at **Military Objectives** –
“objects which by their nature, location, purpose, or use make an effective contribution to the military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”
- Civilian populations and civilian/protected objects may not intentionally be target.



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Slide # 4



Continued

- Belligerents must distinguish combatants from civilians, military objects from civilian objects.
- Challenge of Dual Use systems:
 - An object used for both civilian and military purposes
 - Civilian object and a military objective cannot co-exist; an object is either one or the other." Civilian objects can lose their LOW protections.
 - If there is doubt as to the military purpose (*an object making an effective contribution to military action*), then default is to treat as a civilian object.
- Commander must balance military necessity and civilian loss or damage.
 - The anticipated loss of life and damage to property incidental to attacks must not be excessive in relation to the concrete and direct military advantage expected to be gained



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No Strikes Entities

CJCS 3160.01A

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Slide # 6



No Strike Entities

- No Strike entities (NSEs) are those designated by the appropriate authority upon which ***kinetic or non-kinetic operations are prohibited*** to avoid violating international law, conventions, agreements, or damaging relations with coalition partners and indigenous populations. *(They have protected status.)*
- NSEs are categorized based on their sensitivity: CAT I (most sensitive) and CAT II (less sensitive).
- No Strike facilities are represented by MIDB functional category codes (CATCODEs) for the purpose of intelligence production, target development, and standardized description of each functional category.



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Continued

- Generally are not lawful targets under normal circumstances; **however**, *if used to advance military or hostile force objectives, NSEs lose their protected status and may be subject to attack.*
- No Strike categories may be modified by the Secretary of Defense or President as the military or political situation dictates.
- Changes to these categories will be reflected in operation-specific ROE and/or via strategic/operational command guidance.

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Continued

- NSL approval is a Geographic Combatant Commander responsibility, and the procedures governing NSL approval are a command function.
- Once the NSL is created, CCMDs must verify entities on the NSL are not on the JTL or RTL and vice versa.

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Slide # 9



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Continued

- Restricted targets are different from NSEs.
- Restricted targets are valid military objectives while NSEs are not.
- The RTL must be separate and distinct from the NSL.

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Slide # 10



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Economic Targets

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Slide # 11



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Continued

- Generally civilian and protected from attack

Exception:

- Permissible to strike if a nexus exists between the civilian object and the adversary's military operations;
- There is a definitive military advantage to be gained

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Slide # 12



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Continued

- The military advantage to be gained must out-weigh the anticipated collateral consequences.
- The “military advantaged to be gained” is different from “coercive value”.

Recap:

In order to validate an economic target, at minimum, intelligence must exist to support a nexus between the target and the adversary’s military operations. Additionally, a subjective assessment must conclude that the resulting military advantage gained by severing said nexus out-weighs any anticipated collateral consequences.

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Nuclear Targeting

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Slide # 14



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- Nuclear weapons are lawful weapons.
- Neither international customary law nor treaty law contain a per se prohibition on the use of nuclear weapons as such.
- The United States has long shared the view that the law of war governs the use of nuclear weapons, just as it governs the use of conventional weapons.

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Items to Remember

- **Lawful Target**
- **Permissible Under ROE**
- **Approval level**
- **Intelligence to support**
 - Has the case been made?
 - This goes to military necessity and proportionality
- **Proper List (JTL, RTL, NSL)**
- **Conditions for moving target from one list to another**

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Questions?

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Slide # 17



Targeting

Backup Slides



Law of War Overview



Law of War

- LOW Legal Bases: Hague Regulations, Geneva Conventions, Treaty Law & International Customary law
- International law considerations directly affect all phases of the joint targeting process
- Target planners must understand and be able to apply the basic principles of international law as they relate to targeting
- The Law of War rests upon the fundamental principles of military necessity, distinction, proportionality and unnecessary suffering, all of which apply to targeting decisions.



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LOW – Why Comply?

- **Adherence promotes:**

- A discipline , more effective fighting force
- Support for U.S. operations both at home and abroad
- Early end to hostilities
- Reciprocal adherence to LOW by enemy

- **It is the Law:**

- Violations can create an international incident
- War crimes are serious charges
- War crimes embarrass the US and limit policy options

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Why Are We Concerned With LOW?

- Premise of US national security strategy: promote global and regional security and stability in pursuit of peace
- Regulates the use of force and prohibits unlawful conduct
- Armed conflicts, in modern times, are becoming more complex (i.e., civilians, terrorism)
- Directs combat power - target selection
- Legitimacy and moral obligations



LOW – Four Key Principles

- Military necessity
- Proportionality
- Unnecessary suffering
- Distinction



Principle of Military Necessity

- “Measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible”
- Justifies the use of force required to accomplish a lawful mission
- **Military attacks** will only be directed at **Military Objectives** – “objects which by their nature, location, purpose, or use make an effective contribution to the military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”



Principle of Distinction

- Belligerents must distinguish combatants from civilians, military objects from civilian objects. Also called Discrimination.
- Prohibits “indiscriminate attacks.”
- Challenge of Dual Use systems:
 - An object used for both civilian and military purposes
 - “As a matter of law, status as a civilian object and a military objective cannot co-exist; an object is either one or the other.” Civilian objects can lose their LOW protections.
 - If there is doubt as to the military purpose (an object making an effective contribution to military action), then default is to treat as a civilian object.



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Principle of Proportionality

- The anticipated loss of life and damage to property incidental to attacks must not be excessive in relation to the concrete and direct military advantage expected to be gained.
- Commander must balance military necessity and civilian loss or damage.
- Collateral damage is unavoidable at times, but cannot be out of proportion to the military advantage gained. Collateral damage can include indirect effects.
- Just because a target is a lawful military objective, an attack may not meet the proportionality principle.

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Principle of Unnecessary Suffering

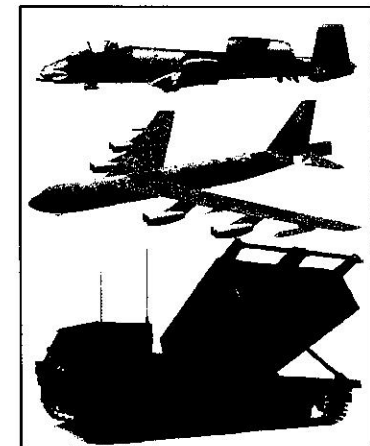
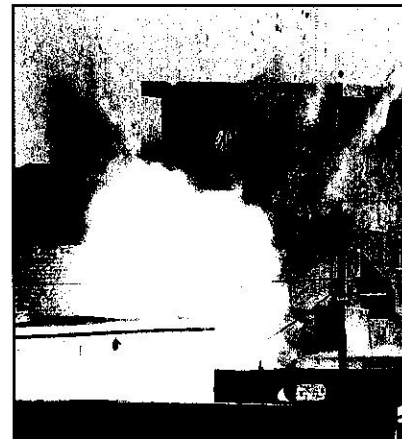
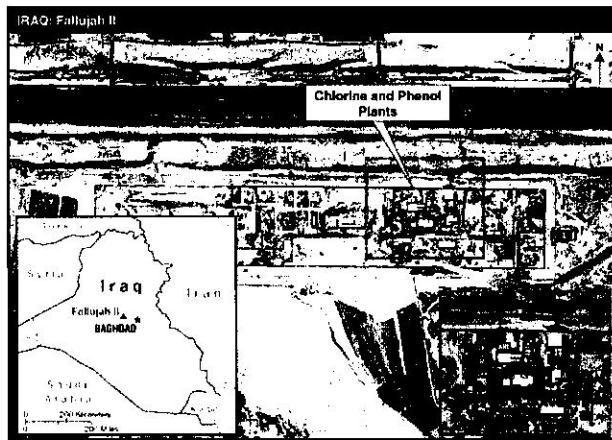
- Military forces should avoid inflicting gratuitous violence on the enemy.
- Military arms (capabilities) should not cause per se suffering, must meet treaty obligations, and must not be used in a manner so as to cause unnecessary suffering.



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Application to Targeting

- Is the proposed object a lawful target?
- Is it necessary to destroy the target?
- What is the appropriate weapon to use?
- Will the attack cause disproportionate collateral damage?



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Additional Considerations

- **Need to know more than the Laws of War**
- **Critical to understand the below and their application to the targeting process:**
 - Rules of Engagement
 - All targeting decisions must be made in light of the applicable ROE.
 - Targeting Guidance

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Target Validation

- **Target Validation** is an operations and legal function.
 - It ensures all vetted targets meet the objectives and criteria outlined in the commander's guidance.
 - Ensures compliance with ROE and LOW.
- A candidate target does not become a "target" until it is validated by the designated validation authority.



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Target Validation

JTL vs. RTL

- If a candidate target is assessed as a valid military target and there are no target restrictions, it is removed from the CTL and placed on the joint target list JTL of the appropriate plan.
- If the target validation authority decides there needs to be restrictions placed on the engagement of a valid target, that target will be removed from the CTL and annotated with specifics of the restriction in a Strike Restriction (RSTR) remark in MIDB and placed on a restricted target list (RTL).

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Target Validation

JTL vs. RTL

- The nature of the restriction placed upon a target can range from a nuanced limitation on the *when or how a target can be serviced*, to specific prohibition on engaging the target due to *operational, political, and or collateral damage concerns*.
- Regardless, these restrictions do not change the fact that targets on the TRL are valid military targets.



Target Validation

- Combatant command staff, components, subordinates, and task forces select targets from the JTL and/or RTL, and compile target nomination lists (TNL) to nominate targets for engagement.
- TNLs are normally reviewed, combined and prioritized at Joint Targeting Coordination Board (JTCB) to form the Joint Integrated Prioritized Target List (JIPTL).
 - Commands with target validation authority are authorized to build and maintain a JIPTL.



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No Strike Entities

- The LOW requires all military personnel to take reasonable precautions to ensure that only military objectives are targeted and to avoid targeting (i.e. attacking) civilian or noncombatant persons or objects.
- NSEs can be both traditional and non-traditional in nature, and consist of objects which are functionally characterized as civilian and/or noncombatant and therefore are protected from attack.
- NSEs are placed on a "No Strike" list (NSL).

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No Strike Entities

- NSE's may include but are not limited to *medical, educational, diplomatic, cultural, religious, and historical sites, or other objects* that **do not** by their very nature, location, purpose, or use, effectively contribute to the enemy's war-fighting or war-sustaining capability.
- These entities generally are not lawful targets under normal circumstances; **however**, *if used to advance military or hostile force objectives, NSEs lose their protected status and may be subject to attack.*
- NSEs that lose their status should be removed from the NSL.

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DEPARTMENT OF DEFENSE
UNITED STATES STRATEGIC COMMAND

Reply To:
USSTRATCOM/J060

24 February 2000

MEMORANDUM FOR J5211

Subject: Targeting Issues Relating to (b)(1) Sec 1.4(a) / (b)(5)-Attorney Work Product USSC

- a. J5211 Memorandum, dated 10 February 2000
- b. Joint Staff Review of 1977 Additional Protocol I to the Geneva Convention of 1949

(b)(1) Sec 1.4(a) / (b)(5)-Attorney Work Product USSC

2. (U) Military Necessity. The first issue in any legal review of a target is to determine whether the facility or object to be targeted is a legitimate military target. This concept, also referred to as "military necessity," was first addressed in Hague Convention No. IV, *Respecting the Laws and Customs of War on Land* (1907) (hereinafter "Hague Convention"). Article 23 of the Annex to the Hague Convention stated that a belligerent could not "destroy or seize an enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war." Whether an individual object constituted a legitimate military objective was historically based on customary international law until it was defined in the 1977 Additional Protocol I to the 1949 Geneva Convention (hereinafter "Additional Protocol I"). As the concept of what constitutes a military objective evolved in customary international law, certain facilities were protected from attack by treaty or convention. For example, the Geneva Conventions prohibit attacks against "hospital zones" provided they are properly marked and are being used for their intended purpose. Similarly, the Hague Convention prohibits attacks against cultural or religious buildings, among others, provided they are not being used for military purposes. In recent years the international community has become increasingly concerned with attacks on targets that could cause "severe" incidental or collateral damage to civilians.

3. (U) Additional Protocol I is an example of a recent attempt to protect civilians from incidental or collateral damage. Although all of its principles are not currently accepted by the United States and others, Additional Protocol I highlights the current debate concerning what is a legitimate military objective. (b)(1) Sec 1.7(e) / (b)(5)-Attorney Work Product USSC The Joint Staff completed a thorough review of Additional Protocol I (hereinafter Joint Staff Review), identifying their concerns. While many of the rules contained within Additional Protocol I are simply a codification of existing customary law, the United States and other nations have objected to

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other rules which they argue did not reflect customary law. As a result of this disagreement, the United States signed, but never ratified, Additional Protocol I. More importantly, particularly for the purpose of this discussion, the United States and others involved in the negotiation of Additional Protocol I had an understanding prior to the Protocol negotiations that the rules would not apply to nuclear weapons. Since the United States has not ratified Additional Protocol I, we are bound only to the extent that a provision represents current customary international law.

4. (U) Article 52 of Additional Protocol I defines what constitutes a "military objective." Article 52 provides that "[a]ttacks shall be limited strictly to military objectives." Article 52 goes on to describe a military objective as:

limited to 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, offers a definite military advantage.

While accepting this definition as reflecting customary international law, the Joint Staff Review said that if Additional Protocol I were to be ratified, the United States should include an understanding as part of the ratification that "... the military advantage anticipated from an attack must be considered as a whole and not only from isolated or particular parts of the attack and that incidental civilian losses are excessive only when tantamount to the total disregard for the safety of the civilian population." This is important when considering proportionality.

5. (S) Additional Protocol I is the first treaty or convention (b)(1) Sec 1.4(a) / (b)(5)-Attorney Work Product USSC

The United States had several concerns to Article 56 of Additional Protocol I. The primary concern with Article 56 was that the rule was ambiguous and appeared to be contrary to customary international law. Since there was no concrete definition of what is, or would be

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(b)(1) Sec 1.4(a) / (b)(5)-Attorney Work Product USSC

would be protected under the Protocol. The International Committee of the Red Cross Commentary to Additional Protocol I states that "severe"

is equivalent to "important" or "heavy." As so often in this Chapter, the concept is a matter of common sense and it must be applied in good faith on the basis of objective elements as the proximity of populated areas, the density of the population, the lie of the land, etc.

(b)(1) Sec 1.4(a) / (b)(5)-Attorney Work Product USSC

7. (S) Since, based on current international law, there are no *per se* restrictions on targeting (b)(1) Sec 1.4(a) / (b)(5)-Attorney Work Product USSC the normal rules on targeting apply. First, a Commander must determine if there is a definite military advantage to be gained by attacking the target, in other words, would the destruction or neutralization of the target result in a definite military advantage?

a. (S)

(b)(1) Sec 1.4(a) / (b)(5)-Attorney Work Product USSC

(b)(1) Sec 1.4(a) / (b)(5)-Attorney Work Product USSC

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(b)(1) Sec 1.4(a) / (b)(5)-Attorney Work Product USSC

The only remaining issue is whether the incidental or collateral damage caused by the destruction of these targets clearly outweighs any expected military advantage gained.

8. (U) If the Commander determines that there would be no definite military advantage to be gained by attacking a proposed target, the object would not be considered a legitimate military target. On the other hand, if the Commander determines that the destruction or neutralization of the target would result in a definite military advantage, he must make a further determination regarding proportionality -- is the definite military advantage to be gained clearly outweighed by any incidental or collateral damage?

9. (U) Proportionality The concept of proportionality, which is based primarily on treaty, provides that a belligerent can only use that much force necessary to accomplish the military objective, thereby preventing unnecessary suffering. Article 22 of the Annex to the Hague Convention states that the "right of a belligerent to adopt means of injuring the enemy is not unlimited." Article 23 of the Annex to the Hague Convention stated that the belligerent could not "employ arms, projectiles, or material calculated to cause unnecessary suffering." However, the concept of proportionality recognizes that even the intentional targeting of legitimate military objects could result in collateral or incidental damage to civilians. The question is whether the incidental or collateral damage clearly outweighs the expected military advantage gained. This consideration must necessarily include a consideration of the circumstances surrounding the attack. The Commander has the responsibility to limit incidental or collateral damage.

10. (U) Nuclear Weapons. There are no customary (accepted usage) laws or conventional (treaties) prohibiting the use of nuclear weapons *per se*. In 1995, in response to a request by the United Nations General Assembly, the International Court of Justice (ICJ) issued an advisory opinion on the legality of nuclear weapons. The ICJ, in a written decision, stated that "the Court cannot conclude definitely whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of the state would be at stake." The ICJ unanimously concluded that the

threat or use of nuclear weapons should also be compatible with the requirements of international law applicable in armed conflict, particularly those of the principles and of international humanitarian law, as well as the specific obligations under treaties and other undertakings which expressly deal with nuclear weapons.

It is noteworthy that the ICJ chose not to address the impact of Additional Protocol I, most likely recognizing that Additional Protocol I did not address nuclear weapons. Therefore, while there are no specific prohibitions on the use of nuclear weapons in international law, their use must comply with the principles of military necessity and proportionality, which are discussed above.

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The United States does not dispute the fact that any use of nuclear weapons must comply with these principles and has long taken the position that various principles of international law of armed conflict would apply to the use of nuclear weapons. In addition, the United States has entered into several treaties concerning the use of nuclear weapons. This includes, among others, the Treaty on the Nonproliferation of Nuclear Weapons and various other treaties establishing nuclear-weapon free zones. However, there are no treaties limiting that use of nuclear weapons that are relevant to the targets you have identified in your memorandum.

(b)(1) Sec 1.4(a) / (b)(5)-Attorney Work Product / (b)(6) USSC

13. ~~(G)~~ Conclusion. As discussed above, the United States position is that there are no *per se* legal restrictions on attacking (b)(1) Sec 1.4(a) / (b)(5)-Attorney Work Product. The CINC must make a determination, considering the circumstances surrounding the attack and after all efforts have been made to limit incidental or collateral damage, whether the anticipated incidental or collateral damage clearly outweighs the military advantage to be gained.

(b)(6) USSC Lt Col, USAF
Chief, International and Operations Law

(b)(6) USSC CDR, USN
Acting Staff Judge Advocate

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TARGETING CHEAT SHEET

Military attacks will only be directed at Military Objectives – “objects which by their nature, location, purpose, or use make an effective contribution to the military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”

Attacking Responsibilities:

- * Design and employ lawful weapons and attacks
- * Ensure personnel are trained and abide by LOW
- * Use proper target intelligence
- * Utilize adequate target acquisition
- * Provide warnings, if possible

Defending Responsibilities:

- * Ensure separation btwn civ and mil obj
- * Provide civ protection
- * Remove civ from likely mil target areas

LOW Principles:

Military necessity: Offer definite military advantage.

Proportionality: Direct and concrete military advantage that outweighs civ loss and damage. The anticipated loss of life and damage to property incidental to attacks must not be excessive in relation to the concrete and direct military advantage expected to be gained.

Unnecessary suffering: Must not inflict unnecessary suffering

Distinction: Must target military objectives only. Belligerents must distinguish combatants from civilians, military objects from civilian objects. But can strike dual use.

Targeting Board Analysis:

1. Is the proposed object a lawful target? Does it serve a military purpose (*an object making an effective contribution to military action*)?
2. Is it necessary to destroy the target?
3. What is the appropriate weapon to use? (at weaponeering)
4. Will the attack cause disproportionate collateral damage? (at weaponeering)

Hostile Act: An attack or other use of force against the United States, US forces or other designated persons or property. It also includes force used directly to preclude or impede the mission and/or duties of US forces, including the recovery of US personnel or vital USG property.

Hostile Intent: The threat of imminent use of force against the United States, US forces or other designated persons or property. It also includes the threat of force to preclude or impede the mission and/or duties of US.

Economic Targets: Usually civ and on NST, but: - Permissible to strike if a nexus exists between the civilian object and the adversary's military operations. There is a definitive military advantage to be gained. In order to validate an economic target, at minimum, intelligence must exist to support a nexus between the target and the adversary's military operations. Additionally, a subjective assessment must conclude that the resulting military advantage gained by severing said nexus out-weighs any anticipated collateral consequences.

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**DEPARTMENT OF DEFENSE
UNITED STATES STRATEGIC COMMAND**



FOIA review completed on 28 June 2019.
Portions of this Document no longer meet the
classification standards of EO 13526, Section
1.4. As such, I am downgrading specific portion-
marked paragraphs to "UNCLASSIFIED."
Partial declassification executed by:
DANIEL L. KARBLES
Major General, U.S. Army
Chief of Staff
U.S. Strategic Command

Reply to:
J060 (Stop 6060)

31 October 1995

MEMORANDUM FOR THE STRATCOM SENIOR STAFF

Subject: The Role of the Law of Armed Conflict (LOAC) in USSTRATCOM Operations (U)

I. Introduction

(U) The purpose of this monograph is to provide the senior staff with a very frank appraisal of the role of LOAC in STRATCOM's operations. It is intended to supplement the unclassified information concerning the general applicability of LOAC to nuclear operations that is provided under separate cover. In particular, this monograph is designed to respectfully discuss specific issues in the context of my observations since my arrival at STRATCOM in January 1995. I hope it is the kind of candid input that senior leaders should expect -- and demand -- from their supporting staffs.¹

(U) The reading of this memo and the unclassified material referenced above fulfills the annual LOAC training required by SAI 400-5 and DOD Directive 5100.77.

II. LOAC and the STRATCOM Culture

(U) Because of exceptional support at the senior level, significant progress has been made this year to integrate LOAC concepts into STRATCOM's operational mission. Despite these efforts, however, the role of law in military operations (b)(5)-Attorney Work Product USSC
(b)(5)-Attorney Work Product USSC This is especially so with respect to the application of LOAC to nuclear operations.

(b)(5)-Attorney Work Product USSC

¹ See generally, James Kitfield, *Crisis in Conscience*, *Government Executive*, October 1995, at 14 (discussing, *inter alia*, the dangers to military values occasioned by failure of subordinates to tell the "boss something he doesn't want to hear").

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completion of various arms control agreements, and the restructuring of the Unified Command Plan, STRATCOM finds its responsibilities broadened and its paradigm shifting.

(U) ~~(S)~~ The paradigm shift, and especially the growth of STRATCOM's involvement in theater support operations, requires adjustments to STRATCOM's traditional way of thinking. America's nuclear forces, like the rest of the U.S. military, must be prepared to execute limited missions in support of a wide variety of contingencies. (b)(5)-Attorney Work Product USSC

(b)(5)-Attorney Work Product USSC

(U) Part of the answer arises from the special characteristics of post-Cold War operations. A number of factors – not the least of which are the reduction of the size of the U.S. military as well as the cutback of forward operating locations – has led policymakers to increasingly conduct military operations on a *multilateral* basis. These operations are frequently conducted outside of familiar military structures (e.g. NATO) and require extremely sensitive and often fragile political arrangements. At the same time, advances in communication technologies have made the media, and particularly television, extremely influential in forming national and world opinion.² In addition, Congress has sought to increase its oversight of military and foreign affairs matters through aggressive use of the legislative process.³

(U) All of this has served – for better or worse – to increasingly “legalize” military operations. Furthermore, the United States has promoted the rule of law as a necessary element of world order. Given such a policy, it is unsurprising that law has played such an important role in recent military operations. Coalitions cannot be built nor public support sustained if the perception exists that the U.S. is operating outside of legal norms. Such considerations caused General Colin Powell to observe following the Gulf War that “*Decisions were impacted by legal considerations at every level. Lawyers proved invaluable in the decision-making process.*”⁴

(U) Failure to abide by LOAC, and even the *perception* that LOAC is not being observed, can jeopardize contemporary military operations. For example, following the bombing of the Al Firdos bunker during the Gulf War allied attacks on targets in Baghdad virtually ended for fear that the appearance that coalition forces were killing noncombatants would jeopardize world support for the war.⁵ Likewise, it was widely reported that public reaction to the attack of retreating Iraqi forces on the so-called “Highway of Death” contributed

² See e.g., Timothy J. McNulty, *Television's Impact on Executive Decisionmaking and Diplomacy*, *Fletcher Forum of World Affairs*, Winter 1993, at 63.

³ See e.g., Jeremy D. Rosner, *Congress, the Executive Branch, and National Security: The New Tug of War*, 1995. Congress' oversight of military activities has extended to inquiries as to the compliance with LOAC. See note 27 *infra*.

⁴ As quoted by Steven Keeva in *Lawyers in the War Room*, *ABA Journal*, December 1991, at 52.

⁵ See Michael R. Gordon and Bernard Trainor, *The General's War* (1995), at 324-327.

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to the decision to end the war (even though the attack itself was consistent with LOAC⁶). Indeed, a keen sensitivity to LOAC issues continues: the Wall Street Journal recently reported that in an exercise for an Army regiment preparing to deploy to Bosnia, the precise number of shells to be used in the hypothetical bombardment of a castle had to be 'cleared' through the unit's lawyer.⁷

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III. The Myths

(U) Although I haven't taken a formal survey, anecdotally I find a number of recurring misconceptions about the role of law in STRATCOM operations. Here are a few examples of the kind of comments I've heard:

(U) "LOAC doesn't apply to nuclear operations." This is flatly wrong. The official policy of the United States, as set forth in the June 1994 submission to the International Court of Justice,⁸ is "that various principles of the law of armed conflict *would apply* to the use of

⁶ But see Jean B. Elshtain, *Just War as Politics*, in But Was It Just?: Reflections on the Morality of the Gulf War, David E. Decosse, ed., 1992) at 53. Elshtain argues that attacking soldiers with "no capacity to fight back" violates the principle of *jus in bello*. While it is violative of LOAC to attack soldiers who are *hors de combat*, the attack on the retreating soldiers in this case is completely consistent with LOAC.

⁷ See Thomas R. Ricks, *In Wake of Cold War, An Intellectual Leads Army in New Missions*, Wall Street Journal, October 2, 1995, at A1, A11.

⁸ United States Department of State, *Written Statement of the Government of the United States of America before the International Court of Justice (ICJ)*, dated June 10, 1994, at 26 (emphasis added). [Hereafter referred to as Submission I.] The ICJ case is captioned as follows: "Request by the World Health Organization for an Advisory Opinion on the Question of Legality Under International Law and the World Health Organization Constitution of the Use of Nuclear Weapons by a State in War or Other Armed Conflict." The U.S. reiterated its position concerning the applicability of LOAC in a subsequent submission to the ICJ in the same case. See United States Department of State, *Written Comments of the Government of the United States on the Submissions of Other States*, June 20, 1995, at 23 [Hereafter referred to as Submission II.]

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nuclear weapons as well as to other means and methods of warfare.”⁹ As a reflection of that long-standing position, the Secretary of Defense has included no exception for nuclear weapons in his direction that the “Armed Forces of the United States shall comply with the law of war in the conduct of military operations and related activities in armed conflict, however such conflicts are characterized.”¹⁰ Thus, there is actually no real question that STRATCOM is obliged to conduct its nuclear operations in compliance with LOAC.

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⁹ Citing *International Red Cross Conference Resolution XXVIII*, 20th International Red Cross Conference (1965).

¹⁰ Paragraph E.1.a., DOD Directive 5100.77, *DOD Law of War Program*, dated July 10, 1979.

¹¹ Paragraph 6c, SAI 400-5, *Law of Armed Conflict*, dated 22 Mar 95.

¹² See generally, *The History of the Unified Command Plan 1946-1993*, Joint History Office, Chairman of the Joint Chiefs of Staff, 1995, at 108-109 (discussing the formation of STRATCOM and the incorporation of the JSTPS).

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(U) An oft-heard corollary to the above comment is the widespread overestimation of Presidential powers regarding national security, e.g., "the President as Commander in Chief can do what he wants." This comes up in contexts other than strictly LOAC situations (e.g. when STRATCOM assumes the role of the NMCC), but is still worth some discussion. At one time there was a legal theory that the President, as commander in chief, had very wide latitude to take action in the interest of national defense. In 1952, however, the Supreme Court in *Youngstown Sheet & Tube Co. v. Sawyer*,¹⁴ rejected President Truman's attempt to seize steel factories during the Korean War in the interest of national security. The Court specifically ruled that even during wartime the President could not act on a matter of national security without specific authority in either a statute or the Constitution.¹⁵

(U) Another aspect of the scope of Presidential power is the continuing debate over his authority to engage in armed conflicts absent a declaration of war by Congress. This controversy centers on the constitutionality of the War Powers Resolution.¹⁶ A subpart of that debate concerns nuclear weapons. Specifically, some experts contend that "the decision to use nuclear weapons in and of itself is a decision to broaden the conflict in ways which, because of the destructiveness of nuclear weapons, should require a formal declaration of war."¹⁷ In spite of that, I think it is evident that the President has Constitutional power to "repel sudden attacks"¹⁸ and, if necessary, use nuclear weapons to do so.

(U) Less clear, however, is Presidential authority in a situation where the U.S. territory is not under direct attack, e.g., during a Major Regional Contingency (MRC). Consider the situation where the President and Congress are deadlocked over the application of the War Powers Resolution. Each branch might direct the military to take a different course of action.

¹³ Per telecon with Colonel John Burton, USA, Legal Counsel to the Chairman, Joint Chiefs of Staff, September 1995.

¹⁴ 343 U.S. 579 (1952).

¹⁵ Congress has, however, enacted a wide variety of legislation applicable in times of war or national emergency. See generally, Digest of War and Emergency Legislation Affecting the Department of Defense, General Law Division, Office of the Judge Advocate General, United States Air Force, 1991.

¹⁶ Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified in 50 U.S.C. §§ 1541-1548 (1988)). See e.g., Robert F. Turner, *War and the Forgotten Executive Power Clause of the Constitution: A Review Essay of John Hart Ely's War and Responsibility*, 34 Va. J. of Int'l L. 903 (1994) (arguing the unconstitutionality of the War Powers Resolution) and Louis Fisher, *Presidential War Power* (1995) (arguing the constitutionality of the War Powers Resolution). No President, including the current Commander in Chief, has ever accepted the constitutionality of the War Powers Resolution although most usually comply with it *de facto*. See *Clinton Vow To Provide Troops Revives War Powers Conflict*, Congressional Quarterly Weekly Report, October 14, 1995, at 3158.

¹⁷ Ronald F. Lehman II, *Nuclear Weapons: Deployment, Targeting and Deterrence in National Security Law* (John Norton Moore, et al., eds 1990), at 538.

¹⁸ See Fisher, *supra* note 16, at 12. Fisher, who is otherwise a conservative with respect to the scope of Presidential authority, concedes that this power is inherent in the President's executive authority. See U.S. Const. art. II.

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Putting a military commander in such a dilemma could do immense harm to civil-military relations as well as to our constitutional scheme for civilian control.¹⁹ Nevertheless, subject to the discussion below concerning patently illegal orders, I believe that a military commander in such a quandary could properly presume that the orders of the Commander-in-Chief are lawful and must be obeyed – notwithstanding direction from Congress to the contrary.

(U) Another myth closely related to that of unlimited Presidential power is one that in essence considers legal considerations *irrelevant* to STRATCOM's mission, e.g., "our job is just to execute the NCA decisions." Of course, STRATCOM has the duty to execute the lawful orders of the NCA. Moreover, military personnel may ordinarily presume that the orders they receive are, in fact, lawful.²⁰ But it is equally true that military personnel must not obey *illegal* orders, and an order violating LOAC is an illegal one. The problem with the attitude reflected in the captioned phrase is it insinuates an embrace of what is known as the "Nuremberg defense." During the war crimes trials at Nuremberg following World War II German officers argued that they had an absolute duty to obey orders. Accordingly, they contended that they should not be held accountable for war crimes arising from obedience to orders given by their political leaders.²¹ The Tribunal rejected that defense because the law does not allow military personnel to act in a moral vacuum. Although obedience to orders *is* a defense in most circumstances, it does *not* apply where the order given is patently illegal. This legal concept is now an accepted part of international law.²²

(U) A practical example of the kind of orders that military personnel cannot presume to be lawful is found in the Vietnam-era case of *United States v. 1Lt William L. Calley*.²³ Calley, you may recall, was convicted of premeditated murder of 22 men, women, and children in the 1968 massacre at My Lai. Among other things, Calley argued that he was ordered to kill the people and that he was entitled to presume that this order was legal. The court found that even if Calley actually received such an order, he was, nevertheless, not entitled to presume it was legal. The court held that assuming Calley was "the most ignorant person in the United States Army in Vietnam, he must be presumed to know ...[that] an order to kill infants and unarmed civilians who were so demonstrably incapable of resistance ... is palpably illegal."²⁴ Thus, the presumption of lawfulness does not attach to orders "patently unlawful."²⁵

¹⁹ One commentator believes that if the President and Congress "are in such conflict that they defy each other, the U.S. military can be put in a position in which civilian control – even the Constitution itself – is in jeopardy." See Richard H. Kohn, Eagle and Sword: The Beginnings of the Military Establishment in America (1975), at 8.

²⁰ Paragraph 14d(2)(a)(i), Part IV, Manual for Courts-Martial, (M.C.M.) 1994.

²¹ See Geoffrey Best, War & Law Since 1945, 1994, at 188-192.

²² See Principle IV, *Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and Judgment of the Tribunal* (1950) as excerpted in The Laws of War (W. Michael Reisman and Chris T. Antoniou, eds., 1994), at 335.

²³ U.S. v. Calley, 48 C.M.R. 19 (C.M.A. 1973).

²⁴ *Id.*, at 29.

²⁵ See note 20, *supra*.

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(U) What all this means to STRATCOM is that although it is proper to presume that NCA would not intentionally issue illegal orders, the mere fact that an order is issued by the NCA does not relieve individuals of their legal and moral responsibilities. Moreover, STRATCOM bears a special responsibility with respect to nuclear operations because to a great extent this command is the author of the very employment options from which the NCA has to choose. Thus, the mere fact that STRATCOM may receive an order from the NCA cannot absolve us of the obligation to ensure that the options submitted to the NCA are themselves consonant with the law of war. (A specific illustration of how legal considerations arise in the context of theater nuclear support appears in Section V below.)

(U) Finally, there is the myth that a "legal review will delay a time-sensitive operation." Putting aside the fact that if a process is necessary to an operation – as I contend is true with respect to determining the legality of an operation – then the required time must be devoted to it, this is a myth wholly without supporting data. As General Powell's quote concerning the Gulf War indicates, time-sensitive operations in that conflict received legal reviews. Likewise, my own experiences in providing legal reviews for post-Gulf War combat operations against Iraq and in Somalia simply do not support the myth. Again, I think

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IV. LOAC and Deterrence

(U) Another little-understood aspect of the importance of LOAC to STRATCOM is the role it plays in deterrence. Among other things, compliance with LOAC helps to ensure that military personnel would obey an order given to execute a nuclear option. Absent confidence in the lawfulness of such orders, we would invite dissension at a crucial time. In this connection we should keep in mind that the lawfulness of nuclear weapons is by no means a universally accepted proposition. While some religious and moral authorities countenance possessing nuclear weapons for the purpose of deterrence, very few believe that their actual use is moral – under *any* circumstances.²⁶

(U) We should not underestimate the moral issues that might arise among our own forces if tasked to execute a nuclear option. For example, if the U.S. were to deliberately target noncombatants – an act contrary to LOAC²⁷ – we should expect many troops would not

²⁶ See e.g., Michael Walzer, Just and Unjust Wars, 2d Ed. 1992, at 283 ("Nuclear war is and will remain morally unacceptable, and there is no case for its rehabilitation." *Id.* at 283). In 1983 U.S. Catholic Bishops issued a letter entitled *The Challenge of Peace: God's Promise and Our Response* which discussed nuclear war and nuclear deterrence. See reprint in War, Morality, and the Military Profession (Malham M. Wakin, ed., 1986), at 463. Although the bishops accept the morality of the possession of nuclear weapons for deterrence as an interim step towards disarmament, and seem to leave open the possibility that an extremely limited, other-than-first-use employment of nuclear weapons against purely military targets may be moral, they nevertheless say that "there must be no misunderstanding of our profound skepticism about the moral acceptability of any use of nuclear weapons." *Id.*, at 482. For a critique of the bishop's letter see John W. Coffey, *The American Bishops on War and Peace In The Parameters of Military Ethics* (1989) at 28.

²⁷ Such an act would be contrary to the current U.S. interpretation of international law as it applies to nuclear weapons. The U.S. considers it to be "unlawful to make civilians or civilian objects the object of attack as such." See Submission I, *supra* note 8, at 26. See also Department of Defense, *Conduct of*

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carry out such an order not only because it is unlawful, but also because the Catholic Bishops in their 1983 letter explicitly state that "[n]o Christian can rightfully carry out orders or policies deliberately aimed at killing non-combatants."²⁸ This raises the specter of a degradation in our capability if individuals find at the critical moment that they cannot or will not execute orders to employ nuclear weapons. How people will perform in the stress of combat is always problematic, and it is particularly so with respect to the wholly unique prospect of nuclear war.²⁹

the Persian Gulf War, An Interim Report to Congress Pursuant to Title V Persian Gulf Conflict Supplemental Authorization and Benefits Act of 1991 (Public Law 102-25), July 1991:

As a general principle, the law of war prohibits the destruction of civilian objects not imperatively required by military necessity and the intentional attack of civilians not taking part in the hostilities. The United States strictly observes these proscriptions in its development and acquisition of weapons systems, as well as in the employment of weapons systems in combat and the use of force.

Id., at 12-2. Professor George Bunn explains the history of this policy in the context of nuclear weapon targeting:

Air Force and Navy Manuals on the law of war recognize that nuclear weapons may be directed toward military, not civilian populations. U.S. targeting plans were revised to exclude what are called "population *per se*" targets by 1973. This was done in part because State Department lawyers thought international law so required. Earlier plans had not called for killing civilians for the sake of doing so. But until 1973, technology did not exist to permit significant discrimination between population and other targets in our near cities.

George Bunn, *US Law of Nuclear Weapons*, Naval War College Review, 1984, at 58-59 (citations omitted). However, it must be emphasized that the U.S. reserves the right to target noncombatants in reprisal. See Submission I, *supra* note 8, at 31. Reprisals are "lawful acts of retaliation in the form of conduct that would otherwise be unlawful, resorted to by one belligerent response to violations of the law of war by another belligerent." *Id.* Reprisals "may only be taken for the purpose of enforcing future compliance with that law, and must comply with certain rules limiting scope and effect." *Id.*, at 31, n.89 (citing paragraph 497 of U.S. Army Field Manual 27-10, *The Law of Land Warfare*, 1956, at 177). There are few, if any, legal authorities that support the notion that targeting noncombatants -- even in reprisal -- is still permissible under customary international law. (It was explicitly outlawed in Article 51(6) of Additional Protocol I to the Geneva Conventions of 1949.)

²⁸ *Id.*, at 470.

²⁹ One analyst of the bishops' letter notes that approximately thirty per cent of the armed forces are comprised of Catholics and further observes:

Individual soldiers who are Roman Catholic are confronted with a serious choice. If they are going to follow the Bishop's teaching, they will be compelled 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 the question cannot 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 the orders.

Captain Mary E. McGrath, USA, *Nuclear Weapons: A Crisis of Conscience*, 107 Mil. L. Rev. 191, 239 (1985).

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Nevertheless, we should not underestimate the effect that a moral quandary could have on adherence to discipline in a combat environment.³⁰

(U) Consequently, a key reason we pressed so hard this year on LOAC training is to create the fact and – equally important – the *perception* among the troops that STRATCOM is aware of and complies with LOAC. By creating an environment where compliance with LOAC is widely assumed, we believe that we can eliminate one more factor (i.e., questions about the lawfulness of what our troops may be asked to do) that might otherwise raise doubts at the worst possible time. As you know, readiness is an intricate mosaic of many factors which collectively demonstrate to our potential adversaries that STRATCOM is genuinely capable of employing forces if called upon to do so. Considered in this context, compliance with LOAC is another element – like exercises, systems upgrades, and so forth – of our readiness.

(U) Compliance with LOAC also enhances deterrence in another way. If, for example, the U.S. were to announce that it was deliberately targeting noncombatants, such a policy might not only raise problems within our forces as indicated above, it could also undermine the credibility of our deterrent: would Americans support an illegal and immoral deterrence policy? One commentator assesses the impact of law on international affairs and notes:

(U) Americans rightly expect their nation to act lawfully in international affairs...Even in the short run, law serves as a standard of appraisal for national actions and as a means of communicating intentions to both friend and foe, and *perceptions about lawfulness can profoundly influence both national and international support for particular actions*. In the long run only a principled policy rooted in law can ensure the international peace and justice so importantly a part of the national interest of the United States and of all nations.³¹

(U) Another expert contends that conformity with law serves to "legitimize" nuclear deterrence, a critical factor because, as he says, "Americans – Westerners generally – usually need moral justification for going to war and for the possession of the weapons of war."³² Because compliance with LOAC underpins a moral justification for deterrence, it helps to avoid tempting a potential adversary to test our national resolve to execute what otherwise might be considered a manifestly illegal and immoral targeting plan. An enemy might assume that we lack the will to do the unlawful and, therefore, conclude that our deterrent 'threat' is a bluff and proceed upon a provocative course.

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³⁰ For example, Richard Holmes reports in his book, Acts of War: The Behavior of Men in Battle (1985) that such quandaries made otherwise good officers not to obey orders during the Vietnam War: "Sometimes officers' legitimate concern for the safety of their men persuaded them that they were *morally right* in declining to go into action." *Id.*, at 318 (emphasis added). Military law, however, holds that "dictates of a person's conscience, religion, or personal philosophy cannot justify or excuse the disobedience of an otherwise lawful order. Paragraph 14c(2)(d), Part IV, M.C.M., 1994.

³¹ John Norton Moore, Law and the Grenada Mission, 1984, at 1 (emphasis added).

³² Bunn, *supra* note 27, at 47.

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V. Practical LOAC Issues in Theater Support Operations

(U) ~~(S)~~ As suggested above, the application of LOAC principles to STRATCOM operations in support of theater CINCs is especially vital. The recent controversy over the limited use of atomic weapons during World War II illustrates the kind of scrutiny any such employment would engender. We should expect intense investigations in the event nuclear weapons are used, no matter how limited such use may be or how seemingly justified.³³ Consequently, observance of international law and especially LOAC principles in the MRC situation is a major concern. As is detailed in the unclassified annex, to be consistent with LOAC the use of nuclear weapons, like other weapons, must meet the "three major criteria in international law ... the necessity to use them; the proportionality of their use; and the obligation not to cause unnecessary suffering."³⁴

(U) ~~(S)~~ STRATCOM's recent theater support demonstration/exercise presented to the CJCS highlights the very practical way these factors arise. The target in that case was a proper military objective whose destruction was required by military necessity.³⁵ The LOAC issue was the selection of the weapon and delivery platform to be employed. Please note that LOAC does not, *per se*, require that a particular weapon or platform be used in a given situation.³⁶ However, it is "unlawful to carry out any attack that may be expected to cause collateral damage or injury to civilians or civilian objects that would be excessive in relation to

³³ By way of comparison, following the Gulf War Congress required the Department of Defense to submit a report that, among other things, detailed compliance with LOAC. See *Conduct of the Gulf War, An Interim Report to Congress*, *supra* note 27.

³⁴ David Alan Rosenberg, *Nuclear War Planning*, in The Laws of War: Constraints on Warfare in the Western World (Michael Howard, et al., eds, 1994), at 164-165. We believe that the last two criteria are essentially redundant for purposes of the nuclear weapon's analysis as discussed in the unclassified annex.

³⁵ Article 52 (2) of Protocol I Additional to the Geneva Conventions of 1949 states:

Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to 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.

Although the U.S. never ratified Protocol I, this portion is considered part of customary international law and, therefore, applicable to U.S. forces. See *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations* (Naval Warfare Publication (NWP) 9 (Rev.A, 1987), paragraph 8.1.1, n. 8-9 and *International Law—The Conduct of Armed Conflict and Air Operations*, Air Force Pamphlet (AFP) 110-31, paragraph 5-3b. See also Myres S. McDougal and Florentino P. Feliciano, Law and Minimum Public Order, 1961, at 72-73 (discussing the concept of military necessity).

³⁶ Compare, Danielle L. Infeld, *Precision-Guided Munitions Demonstrated Their Pinpoint Accuracy in Desert Storm: But is a Country Obligated to Use Precision Technology to Minimize Collateral Civilian Injury and Damage?* 26 Geo. Wash. J. Int'l L. & Econ. 109 (1992) [Note].

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the military advantage anticipated from the attack." ³⁷ (This is the principle of "proportionality" discussed in detail in the unclassified annex.)

(U) In applying the principle of proportionality LOAC requires commanders to "take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event, minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects." ³⁸ STRATCOM has the unusual capability to model CAS and FAS for a variety of weapons' options. Thus, LOAC precepts would ordinarily compel selecting the option with the fewest CAS/FAS that still achieves the damage expectancy required by military necessity. There are, however, some additional considerations.

~~(S)~~ For example, (b)(1) Sec 1.4(a) / (b)(5)-Attorney Client Privilege USSC

(b)(1) Sec 1.4(a) / (b)(5)-Attorney Client Privilege USSC

(b)(1) Sec 1.4(a) / (b)(5)-Attorney Client Privilege USSC **We have no legal or moral obligation to limit the number of bona fide enemy combatants we kill.)** (b)(1) Sec 1.4(a) / (b)(5)-Attorney Client Privilege USSC

(b)(1) Sec 1.4(a) / (b)(5)-Attorney Client Privilege USSC

~~(S)~~ (b)(1) Sec 1.4(a) / (b)(5)-Attorney Client Privilege USSC

(b)(1) Sec 1.4(a) / (b)(5)-Attorney Client Privilege USSC

~~(S)~~ Another LOAC issue was suggested by the supported CINC's decision. Although

(b)(1) Sec 1.4(a) / (b)(5)-Attorney Client Privilege USSC

³⁷ See Submission I, *supra* note 8, at 27. See generally, Judith Gail Gardam, *Proportionality and Force in International Law*, 87 A.J.I.L. 391 (1993).

³⁸ Article 57 (2)(a)(ii) of Protocol I Additional to the Geneva Conventions of 1949. Although the U.S. never ratified Protocol I, this portion is considered part of customary international law and, therefore, applicable to U.S. forces. See NWP 9, paragraph 8.1.2.1, n.18 and AFP 110-31, paragraph 5-3c(1)(b).

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(b)(1) Sec 1.4(a) / (b)(5)-Attorney Client Privilege USSC

(U) Additionally, in evaluating FAS/CAS we must ensure that the rules of engagement allow attacking enemy forces wherever situated. "Rules of engagement" is terminology of great significance to geographic CINCs

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In any event, we should ensure that the targeted enemy forces have been declared hostile IAW with CJCS Instruction,⁴⁰ and that there are not other limiting factors contained in the ROE applicable to the particular operation STRATCOM is supporting. (By way of information, there are no longer "peacetime" ROE and "wartime" ROE; rather, the Standing Rules of Engagement are applicable across the range of conflicts.⁴¹)

(U) ~~(S)~~ During this exercise the CJCS asked how we would coordinate with the foreign governments prior to the use of nuclear weapons. I would respectfully offer a couple of observations. The management of foreign policy is, of course, the responsibility of the President acting through the Secretary of State.⁴² Obtaining the necessary coordination should be the responsibility of the supported CINC, not STRATCOM. As a practical matter, the geographic CINC would rely on his State Department-assigned political advisor (POLAD) to do the necessary legwork. STRATCOM may wish to include such coordination and permission as an assumption in the planning process.

(S)

(b)(1) Sec 1.4(a) / (b)(5)-Attorney Client Privilege USSC

(b)(1) Sec 1.4(a) / (b)(5)-Attorney Client Privilege USSC

(U) I should emphasize that many, if not most, nations consider nuclear weapons to be unlawful. There have been, for example, four United Nations General Assembly Resolutions that have condemned nuclear weapons as unlawful.⁴³ Similarly, there is a case pending before the International Court of Justice wherein the World Health Organization (a UN entity) is

³⁹ See generally, Sidney Axinn, A Moral Military, 1989, at 163-166.

⁴⁰ See Paragraph 6 and Appendix A to Enclosure A, Chairman of the Joint Chiefs of Staff Instruction (CJCS) 3121.01 (S), *Standing Rules of Engagement for U.S. Forces*, dated 1 October 1994.

⁴¹ *Id.*, paragraph 3c.

⁴² 22 U.S.C. § 2656.

⁴³ See Submission II, *supra* note 8, at 24, n.67.

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seeking a declaratory judgment concerning the lawfulness of nuclear weapons.⁴⁴ Though the United States does not consider these resolutions or a decision by the ICJ (in this instance) as binding,⁴⁵ they are considered authoritative by many countries. The point is that the special character of nuclear weapons (e.g., their effect on the environment⁴⁶) may well lead many nations that would otherwise cooperate with the United States in a military action not to do so with respect to nuclear weapons' operation.

~~(S)~~ That said, STRATCOM

(b)(1) Sec 1.4(a) / (b)(5)-Attorney Client Privilege USSC

(b)(1) Sec 1.4(a) / (b)(5)-Attorney Client Privilege USSC

~~(S)~~ In any event, in either the SIOP situation or the theater support scenario the law is the same with respect

(b)(1) Sec 1.4(a) / (b)(5)-Attorney Client Privilege USSC

(b)(1) Sec 1.4(a) / (b)(5)-Attorney Client Privilege USSC

⁴⁴ See *supra* note 8.

⁴⁵ The United States accepts the jurisdiction of the ICJ in only certain matters. See Restatement (Third) of the Foreign Relations Law of the United States § 903 cmt. c, at 357.

⁴⁶ See e.g. Submission II, at 10-16, *supra* note 8.

⁴⁷ Even in this situation it should be noted that while Article 51 of the United Nations Charter would authorize an armed response as a matter of self-defense, international law does not sanction violations of third country sovereignty to do so.

⁴⁸ See AFP 110-31, paragraph 2-1c and NWP 9, paragraph 2.5.1, *supra* note .

⁴⁹ Article 5, Hague Convention (V), 1907. See also AFP 110-3, paragraph 2-6c and NWP 9, paragraph 7.3.7.1.

⁵⁰ Some experts believe that if an armed action is authorized by a United Nations Security Council Resolution, then "it is doubtful that any State that is a member of the United Nations can decide to 'sit this one out' and claim neutral rights." See Reisman and Antoniou, *supra* note 22, at 134.

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VI. Conclusion

(U) It should be emphasized that when properly applied, LOAC does not diminish our capability to wage war, nuclear or otherwise. In many respects it incorporates classic military axioms such as economy of force and concentration of effort. Moreover, it is essentially Clauswitzian in nature in that it facilitates achievement of the political goals in a given circumstance by, among other things, influencing public opinion. Proper application of LOAC can also avoid the inappropriate and unnecessary restraints due to erroneous assumptions about legal restrictions. It is often erroneously assumed, for example, that the air war in Vietnam was limited by LOAC; actually, in most instances the limitations were not based on law but were instead self-imposed policy constraints.⁵¹

(U) While I believe, as I said earlier, that much progress has been made this year in raising the command's LOAC "consciousness" (primarily because of the Directors' strong support of the LOAC training program), the job is as yet incomplete. As I mentioned, I welcome your advice as to how JO60 might profitably be incorporated into the planning process. In any event, only with your support can we be fully confident that this aspect of STRATCOM's readiness is not compromised.

Very Respectfully,

CHARLES J. DUNLAP, JR.
Colonel, USAF
Staff Judge Advocate

⁵¹ See W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. Rev. 1 (1990).

A Warfighter's Guide to WMD Policy & Agreements

by

Gary D. Brown¹

I. Introduction

Nuclear, chemical and biological weapons, collectively referred to as "weapons of mass destruction," are widely considered to be the greatest current threat to military and civilian targets. The destructive potential of just one of these weapons, as well as the ease with which it might be employed against any target anywhere, make weapons of mass destruction (WMD) a primary concern of US policy-makers.

Recognizing that WMD could be used against the US, at home or abroad, at any time, it is important for commanders fully to understand US rights and responsibilities in the area of nuclear, biological and chemical (NBC) warfare. The conflict in the Persian Gulf, in which the US-led coalition faced an enemy with both chemical and biological warfare capabilities, was a taste of things to come for US commanders.²

The following text presents a brief history of each class of NBC weapons, gives a description of current and historic international agreements in the area and touches on US policy with regard to the weapons.

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² For a detailed discussion of the Iraqi chemical and biological warfare threat and actions taken by the coalition to guard against and combat that threat, see Appendix Q, DoD Final Report to Congress, *Conduct of the Persian Gulf War* (Apr. 1992).

II. Nuclear Weapons

A. Brief History

The race to develop atomic weapons in the 1940s was truly seen as a life and death struggle. Allied leadership believed that the course of W.W.II rode on which side could first field atomic weapons. German deployment of V-type rockets late in the war made the situation even more desperate; they could deliver a weapon at great, if not wholly accurate, distances. Fortunately, the US-led Manhattan Project prevailed in the contest. By July 1945 the US owned the only atomic weapon. To President Truman, who had succeeded to the presidency only a few months before, fell the momentous decision of whether to actually use the "gadget." He determined that it should be used, against a military target in Japan. The first weapon, about fourteen kilotons in yield, was delivered on Hiroshima, Japan on 6 August 1945. A second bomb was dropped on Nagasaki, Japan two days later. Permission to drop the second device was inherent in the order delivered before Hiroshima; it gave military commanders authority to drop additional weapons on the list of targets as they became available. Shortly after the bombing of Nagasaki, however, the Japanese surrendered. These have been, to this point, the only two wartime uses of nuclear weapons. Some nations see the US as lacking credibility in its role as a nuclear peace-maker when it is the only nation that has ever employed nuclear arms.

Shortly after W.W.II the relationship between the US and USSR, who had been W.W.II allies, degenerated. In 1948, the USSR blockaded the Western-occupied sector of Berlin. To preserve the city's freedom, the US led the Berlin Airlift, the first major operation of the Cold War. The Soviets exploded their first atomic device in 1949; the Cold War was responsible for the later construction of the tremendous nuclear arsenals of the foes. The Cold War lasted until the demise of the Soviet Union in 1991.

In 1996, the US nuclear arsenal included about 10,000 nuclear warheads. This is a significant reduction from the Cold War peak of over 30,000. Russia still maintained over 11,000.

China maintained 450 nuclear warheads, as of 1996. The other declared nuclear powers, France and the United Kingdom, had 500 and 300, respectively. In 1998, India and Pakistan declared themselves nuclear powers. It is widely considered that Israel also has nuclear weapons. The numbers of weapons held by these three nations are not readily available, although Israel apparently has fewer than 100 nuclear warheads.³

B. International Law

The use of nuclear weapons in armed conflict is not unlawful. Although Article 35 of Additional Protocol I to the Geneva Conventions (Additional Protocol I)⁴ prohibits use of weapons that cause superfluous injury or unnecessary suffering, the US signing of Additional Protocol I was subject to the understanding 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."⁵ Additionally, the US Senate never ratified the agreement. Many of the Additional Protocol I rules are, however, considered customary international law.

Article 23(e) of the earlier Hague Regulations, contains similar language prohibiting weapons that cause unnecessary suffering.⁶ In 1907, of course, there were no nuclear weapons. It is sometimes argued that the US reservations to Protocol I makes the Hague Regulations equally inapplicable to nuclear weapons.

³ *Stockholm International Peace Research Institute (SIPRI) Yearbook* 612 (1996).

⁴ "Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts," Art. 35, para. 2, 16 I.L.M. 1391, (Reprinted in DA Pamphlet 27-1-1 (1979)) (hereinafter Additional Protocol I).

⁵ Reprinted in DA Pamphlet 27-1-1, p. 138 (1979); "Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions," 85 *Am. J. Int'l. L.* 1 (1991).

⁶ "Regulations Respecting the Laws and Customs of War on Land, Annex to the Hague Convention No. IV," 36 Stat. 2277, T.S. No. 539 (18 Oct. 1907), reprinted in DA Pamphlet 27-1, Chapter 2 (1956) (hereinafter Hague IV), .

The United Nations (UN) General Assembly has passed several resolutions purporting to prohibit the use of nuclear weapons.⁷ As the General Assembly lacks legislative powers, however, these resolutions had no binding effect.

More recently, the International Court of Justice (ICJ) issued an advisory opinion addressing the law surrounding the use of nuclear weapons.⁸ The ICJ concluded that use of nuclear weapons would generally be illegal, but that the use might be legal if the survival of a state were at stake. The opinion was merely advisory, not binding, and the conclusion was murky, as a state's "survival" is a slippery concept. Does survival demand that a state continue with the same form or government and economy, or merely continue to exist? The most important point to take from the opinion, for US policy makers, is that the ICJ did not find nuclear weapons in all cases illegal.

General Constraints. Although use of nuclear weapons in armed conflict is not illegal, such use is not totally unconstrained.⁹ Nuclear weapons, like all other weapons, are subject to the general law of war limitations established by the Hague and Geneva Conventions. "The right of belligerents to adopt means of injuring the enemy is not unlimited."¹⁰

Although the US has not ratified Additional Protocol I, it has expressly recognized the requirement to protect civilian populations and civilian objects as a valid component of customary international law.¹¹ Accordingly, no weapons,

⁷ *Declaration on the Prohibition of the Use of Nuclear and Thermonuclear Weapons*, United Nations General Assembly (UNGA) Res. 1653 (XVI), Nov. 24, 1961; *Non-Use of Force in International Relations and Permanent Prohibition of the Use of Nuclear Weapons*, UNGA Res. 2936, Nov. 29, 1973; *Convention on the Prohibition of the Use of Nuclear Weapons*, UNGA Res. 47/53C (1992).

⁸ *Legality of the Threat or Use of Nuclear Weapons*, Gen. List No. 95 (Advisory Op. of the Int'l. Court of Justice, Jul. 8, 1996).

⁹ Charles J. Dunlap, Jr., "Taming Shiva: Applying International Law to Nuclear Operations," 42 *A.F.L. Rev.* 157 (1997); Michael N. Schmitt, "The International Court of Justice and the Use of Nuclear Weapons," *Naval War Coll. Rev.* 91 (Spring 1998); Bunn, "US Law of Nuclear Weapons," *Naval War Coll. Rev.*, (Jul.-Aug. 1984).

¹⁰ Hague IV, *supra* note 6, Art. 22.

¹¹ AFP 110-31, *International Law -- The Conduct of Armed Conflict and Air Operations* 5-7 (Nov. 19, 1976); AFP 110-34, *Commander's Handbook on the Law of Armed Conflict* 3-1 (Jul. 25, 1980); NWP 1-14M, *The Commander's Handbook on the Law of Naval Operations* 11-1 (Oct. 1995).

including nuclear weapons, may be used for the primary purpose of killing, injuring or terrorizing civilians.

Other international agreements have also been cited as prohibiting the use of nuclear weapons. The US does not, of course, recognize the validity of these arguments, but some are summarized below.

An early argument against the use of nuclear weapons was the Hague IV prohibition of the use of poison or poisoned weapons. The reasoning was that radiation was poison, so the use of nuclear weapons was an unlawful use of poison.

Similar rationale was applied to the Geneva Gas Protocol. That convention prohibited poisonous gases and analogous devices, the argument being, of course, that nuclear weapons were *analogous* to poisonous gas.

Both of the poison arguments against nuclear weapons have been rejected for the same reason: poison has an ordinary meaning that does not include nuclear weapons. The term is left undefined in both conventions, so the ordinary meaning applies. Further, poison is most closely associated with chemical weapons, which are considered distinct from nuclear weapons, as evidenced by the term "NBC."

Another argument against the legality of nuclear weapons has centered around Genocide Convention of 1948.¹² The Genocide Convention prohibits actions intended to destroy national, ethnic or other groups. Nuclear weapons *could* be employed in that fashion, but, as they can also be employed in a non-genocidal conflict, this agreement has not been found to totally prohibit nuclear weapons.

The UN Environmental Modification Convention (ENMOD) is sometimes cited as limiting the use of nuclear weapons.¹³ It prohibits military or other actions taken against an enemy that would have a long-lasting or severe effect on the environment. The actions contemplated must persist for about a season

¹² "Convention on the Prevention and Punishment of the Crime of Genocide," 78 U.N.T.S. 277 (Dec. 9, 1948).

¹³ "Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques" (1978).

or affect several hundred square kilometers. Severe is defined as involving significant disruption to human life, resources or other assets. The US has thus far rejected the notion that ENMOD significantly limits nuclear actions. The US ratified the convention in 1979.

C. Specific Treaties and International Agreements

Many treaties and agreements regulate US development, acquisition and use of nuclear weapons. As a result of the dissolution of the Soviet Union, the threat of a massive nuclear exchange between the superpowers is generally thought to have decreased. Many of the bilateral agreements between the US and the USSR are now of largely historical value. They are presented as a reference and to aid in an understanding of evolving international relationships.

The agreements between the US and the USSR have been acceded to by Russia, which is the only nuclear weapons state to emerge from the former Soviet Union.¹⁴

In the nuclear area, nonproliferation treaties and nuclear weapons free zones are still viable; chemical and biological weapons agreements are also of continuing concern. All are discussed below.

1. Nonproliferation Agreements

Nuclear Non-Proliferation Treaty. All the world's declared nuclear powers and nearly all the non-nuclear nations, as well, are signatories of the Treaty on Non-Proliferation of Nuclear Weapons (NPT).¹⁵ Nuclear signatories are prohibited from transferring nuclear weapons or nuclear technology to non-nuclear states. Non-nuclear signatories agree not to attempt to acquire or manufacture nuclear weapons. The NPT was originally effective for 25 years,

¹⁴ "Agreements Establishing the Commonwealth of Independent States, Armenia-Azerbaijan-Belarus-Kazakhstan-Kyrgyzstan-Moldova-Russian Federation-Tajikistan-Turkmenistan-Uzbekistan-Ukraine," 31 I.L.M. 138 (1991).

but in 1995 it was extended indefinitely. There are currently over 180 members of the NPT.

Missile Technology Control Regime. The Missile Technology Control Regime (MTCR) was formed in 1987 by the US and its G-7 economic partners (Canada, Germany, Italy, Japan, France and the UK). Membership in the MTCR has now grown to 29 member nations.¹⁶ The MTCR is not an international agreement but is a voluntary arrangement among countries that wish to reduce the proliferation of missiles, unmanned aerial vehicles and WMD delivery systems. The arrangement seeks to control proliferation of the items through export controls. The controlled items include technologies such as rocket, propulsion and guidance systems, and stealth and nuclear hardening technology and materials.¹⁷

Nuclear Material Convention. The international transport of nuclear materials is safeguarded under this 1987 treaty. The convention provides guidance for cooperation between nations in protecting nuclear materials; and in the recovery of stolen nuclear material. It was ratified by the US.

2. Nuclear Weapons Free Zones

A number of treaties prohibit the placement and use of nuclear weapons in specified areas. This is a vibrant area of nuclear international law. The US supports creation of such zones, subject to the following considerations.

The initiative for creating a nuclear weapons free zone (NWFZ) should come from the region concerned; all major states in the region should participate; the treaty should provide for adequate verification; the zone must not disturb existing security arrangements to the detriment of international peace;

¹⁵ 21 U.S.T. 483, T.I.A.S. No. 6839 (1970). A current list of signatories of the NPT, and of most other treaties in the arms control arena, is available on the Internet at <<http://www.acda.gov>>.

¹⁶ "Agreement on Guidelines for the Transfer of Equipment and Technology Related to Missiles, Canada-France-Federal Republic of Germany-Italy-Japan-United Kingdom-US," 26 I.L.M. 599 (Apr. 7, 1987).

¹⁷ ACDA web site, *supra* note 15.

and the treaty must not interfere with freedoms of navigation.¹⁸ If all these criteria are met, the US will normally support the creation of the zone.

If the US agrees that a NWFZ is properly formed, it will generally participate in treaty protocols by agreeing to abstain from stationing or using nuclear weapons in the covered areas. US agreement to such protocols creates a negative security assurance, discussed below.¹⁹

It is important for commanders to realize that, despite US understandings and declared intentions, some nations may believe that NWFZs preclude navigation of US platforms with nuclear weapons aboard.²⁰ This will not necessarily impede US navigation, but should certainly be taken into consideration.

Latin American Nuclear Weapons Free Zone (Treaty of Tlatelolco). The Treaty of Tlatelolco established the first of the NWFZs. The Brazilian delegate to the United Nations originally proposed the zone in 1962; the US was an early supporter of the zone. The treaty was eventually signed in 1967 in Tlatelolco in Mexico City.

The Treaty of Tlatelolco established Latin America as a nuclear weapons free zone.²¹ Latin American countries signatory to the treaty, agree not to possess, test, use, manufacture, produce or acquire nuclear weapons. The treaty does not prohibit the peaceful use of nuclear technology or material, but member states must permit inspections of their nuclear programs.

Protocol I is open to non-Latin American nations with territory in the treaty area. Signatories of this protocol agree to obey the terms of the base treaty with regard to their Latin American territory. Protocol II is open to nations possessing nuclear weapons. Signatories are prohibited from using or threatening to use nuclear weapons against any treaty party.²²

¹⁸ Zachary S. Davis, "The Spread of Nuclear-Weapon-Free Zones: Building a New Nuclear Bargain," *Arms Control Today* 15 (Feb. 1996).

¹⁹ *Infra* at p. 21.

²⁰ Mark E. Rosen, "Nuclear-Weapons-Free Zones," *Naval War Coll. Rev.* 57 (Autumn 1996).

²¹ "Treaty for the Prohibition of Nuclear Weapons in Latin America, with additional Protocols I and II," 634 U.N.T.S. 281, 6 I.L.M. 521 (Feb. 14, 1967).

²² "Additional Protocol II to the Treaty for the Prohibition of Nuclear Weapons in Latin America," 22 U.S.T. 754, T.I.A.S. No. 7137, 634 U.N.T.S. 364 (Feb. 14, 1967).

The US signed and ratified both protocols, subject to stated understandings.²³ The understandings are that: the US can transport, but not maintain, nuclear weapons through US-controlled areas; other treaty parties can permit the same transportation through their territories; and treaty obligations are void if a treaty party is assisted in an armed attack by a nuclear weapon state. These protocols, like other NWFZ protocols, constitute legally binding negative security assurances.²⁴

South Pacific Nuclear Free Zone (Treaty of Rarotonga). In 1986, a number of South Pacific states entered into the South Pacific Nuclear Free Zone Treaty.²⁵ The treaty is open to South-West Pacific nations, including Australia, New Zealand and Fiji. Within the territory of the member states, the agreement prohibits the stationing or testing of nuclear weapons, and the dumping of nuclear waste. Signatories are also required to cooperate with nuclear non-proliferation goals. Parties to the treaty may grant transit rights to other nations' vessels, regardless of cargo or armament.

The treaty has three protocols. The first applies to nuclear weapons nations controlling territory within the zone; two and three apply to nuclear weapons states. Protocol II prohibits the use or threatened use of nuclear weapons against treaty parties, and Protocol III prohibits nuclear testing with the treaty area. The US has signed but not ratified the protocols.

African Nuclear Weapons Free Zone (Treaty of Pelindaba). This 1996 treaty follows the traditional pattern of nuclear weapons free zones. It prohibits the research, manufacture and possession of nuclear explosive devices. The treaty area includes the entire continent of Africa and several islands that are claimed or controlled by African nations. Protocols I and II of the treaty require signatories to agree not to use or threaten to use nuclear explosive devices against treaty parties, and requires them to abstain from nuclear weapons testing

²³ *Treaty for the Prohibition of Nuclear Weapons in Latin America: Its status and the Status of Additional Protocols I and II*, 28 I.L.M. 1400 (1989).

²⁴ *Infra* at 21.

²⁵ "South Pacific Forum: The South Pacific Nuclear Free Zone Treaty," 24 I.L.M. 1440 (1985).

in the treaty area. All five declared nuclear powers signed the protocols in 1996; the US has not ratified the protocols.

Other Nuclear Weapons Free Zones. A nuclear weapons free zone in Southeast Asia has been completed, but none of the declared nuclear powers are signatories. Several other nuclear weapons free zones are under discussion. The areas under discussion include Central Asia, Mongolia, the Middle East and Central and Eastern Europe.²⁶

Antarctic Treaty. The Antarctic Treaty is a multilateral treaty reserving Antarctica for peaceful purposes. The treaty entered into force in 1961. It forbids the use, deployment or testing of nuclear weapons in the treaty area; i.e., that part of the globe south of the sixtieth parallel.²⁷ Military maneuvers and bases are also prohibited, although military personnel and equipment may be used for scientific purposes. The Antarctic Treaty also includes an inspection regime covering ships and aircraft in the treaty area.

Outer Space Treaty. As early as 1957 the US was proposing the partial demilitarization of outer space. In 1963, the United Nations General Assembly called upon all nations to refrain from placing WMD in space. The Outer Space Treaty, ratified by the US and effective in 1967, prohibited the placement of nuclear weapons or other weapons of mass destruction in orbit, on celestial bodies to include the moon, or in outer space.²⁸ It also prohibited the testing of any weapons on celestial bodies, and prohibited the establishment of military bases and military maneuvers on such bodies.

Seabed Arms Control Treaty. This treaty prohibited the placement of WMD on the ocean floor at any point outside the 12-nautical mile territorial seas.²⁹ The language of the treaty clearly prohibits nuclear land mines on the

²⁶ Roland Timerbayev, "Global Security Through Nuclear-Free Zones?," *Moscow News* 5 (No. 14 April 11-17, 1996); *Nuclear Weapons: A Comprehensive Study* 125 (UN, 1991).

²⁷ "Antarctic Treaty," 12 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 71 (Dec. 1, 1959).

²⁸ "Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies," 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205 (Jan. 27, 1967).

²⁹ "Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof," 23 U.S.T. 701, T.I.A.S. No. 7337 (Feb. 11, 1971).

seabed, but would not prevent the use of other nuclear devices, such as nuclear depth charges and nuclear torpedoes, that are not affixed to the seabed or ocean floor. The multilateral treaty entered into force in 1972; it was ratified by the US.

3. Nuclear War Risk Reduction Agreements

These agreements are between the US and Russia, but most of them were entered into during the tenure of the Soviet Union.

Hotline Agreements. In 1963, the US and USSR, to reduce the danger of accidental nuclear war, acted to ensure more open communications between the two nations. The original agreement established a direct communications line, known as the hotline, between Washington and Moscow. The communications consisted of a wire telegraph circuit and a back-up radio telegraph circuit.³⁰

Since then, the agreement has been updated several times. The hot line system now consists of two satellite circuits with both voice and facsimile capability. The radio telegraph circuit was retained as a back-up capability.³¹

Accidents Measures Agreement. In 1971 the US and USSR agreed on procedures to be followed in the event of an accident involving nuclear weapons.³² The agreement required both nations appropriately to guard against the accidental or unauthorized use of nuclear weapons, and mandated immediate notification of any nuclear weapons incident. Notifications take place over the communications links established by the hotline agreements. Also, the agreement required the nation concerned to take immediate action to destroy the weapon or render it harmless.

³⁰ "Memorandum of Understanding Regarding Establishment of a Direct Communications Link," 14 U.S.T. 825, T.I.A.S. No. 5362, 472 U.N.T.S. 163, 2 I.L.M. 793 (Jun. 20, 1963).

³¹ "Agreement on Measures to Improve the Direct Communications Link," 22 U.S.T. 1598, T.I.A.S. No. 7187, 806 U.N.T.S. 402, 10 I.L.M. 1172 (Sep. 30, 1971); "Memorandum of Understanding on Direct Communications Link," 23 I.L.M. 1393 (1984), as modified by "Exchange of Notes at Washington, DC," 27 I.L.M. 1700 (Jun. 24, 1988).

³² "Agreement on Measures to Reduce the Risk of Outbreak of Nuclear War: Nuclear Accident Measures," 22 U.S.T.S. 1590, T.I.A.S. No. 7186, 807 U.N.T.S. 57, 10 I.L.M. 1172 (Sep. 30, 1971).

The nuclear accident measures agreement also required that, if one of the member state's missile warning systems detect unidentified objects, it notify the other. The agreement for the first time imposed a requirement for prior notification of planned ballistic missile launches if the projected impact point is outside the continental territory of the nation concerned.

Finally, both members agreed to continue working to maintain and improve safeguards against accidental or unauthorized use of nuclear weapons.

Agreement on Prevention of Nuclear War. In 1973, the US and the USSR agreed that preventing nuclear war was a primary element of their foreign policy.³³ Subject only to their inherent right of self-defense, the agreement required urgent consultation between the parties should a situation appear to involve the risk of nuclear conflict. It expressly included situations that could involve nuclear conflict with third countries, making it a bilateral treaty with multilateral implications.

Nuclear Risk Reduction Center Agreement. This 1987 agreement required the US and USSR to establish, in their respective capitals, Nuclear Risk Reduction Centers (NRRCs) to improve information exchange on nuclear weapons issues.³⁴ The satellite communications capability offered at the centers is similar to, but completely separate from, that maintained under the hotline agreements. The NRRCs are used to transmit information about other nuclear agreements, or any issues with nuclear implications, between the US and USSR.

Ballistic Missile Launch Notification Agreement. As noted above, the Nuclear Accident Measures Agreement in part requires that, if the US or USSR plans to launch ballistic missiles whose impact point will be outside the continental territory of the launching country, that nation must provide notice of the launch to the other party. In 1988, a new agreement expanded that requirement to encompass all peacetime launches of intercontinental ballistic

³³ "Agreement on the Prevention of Nuclear War," 24 U.S.T. 1478, T.I.A.S. No. 7654 (Jun. 22, 1973).

³⁴ "Agreement on Establishment of Nuclear Risk Reduction Centers," 27 I.L.M. 76 (Sep. 15, 1987).

missiles (ICBMs) and submarine launched ballistic missiles (SLBMs).³⁵ The Ballistic Missile Launch Notification Agreement requires both nations to give at least 24 hours notice of all ICBM and SLBM launches. The launching nation must indicate the date of the launch, the launch area and the impact area. The notification is effective for four days, but if the delay is more than four days a new notification is required.

Exercise Notification Agreement. This 1990 agreement between the US and USSR permitted both signatories to conduct one major strategic forces exercise each calendar year. The nation conducting the exercise must give at least fourteen days advance notice, through the Nuclear Risk Reduction Centers, of the beginning of the exercise.³⁶

Detargeting Initiatives. In 1994, both the US and Russia announced that in peacetime their nuclear missiles would either contain no targeting data, or would be targeted at the ocean. Shortly thereafter, both China and the United Kingdom entered into similar agreements with Russia.³⁷ These agreements were meant to reduce the threat of an accidental offensive launch. The agreements are largely cosmetic, however, as re-targeting can occur in short order.

4. Arms Control and Disarmament Treaties and Agreements

Anti-Ballistic Missile Treaty. In 1972, the US and the Soviet Union agreed to forgo deploying defenses against strategic nuclear missiles. The main rationale for the agreement was to avoid the deployment of the further nuclear weapons that might have been built to overwhelm any defenses.³⁸ The Anti-Ballistic Missile (ABM) Treaty specifically limits the ABM systems each country

³⁵ "Agreement on Notification of Launches of Intercontinental Ballistic Missiles and Submarine Launched Ballistic Missiles," 27 I.L.M. 1200 (May 31, 1988).

³⁶ "Agreement on Reciprocal Advance Notification of Major Strategic Exercises," 28 I.L.M. 1436 (Jun. 12, 1989).

³⁷ Marco de Andreis & Francesco Calogero, *The Soviet Nuclear Weapon Legacy* 67 (1995).

³⁸ "Treaty on the Limitation of Anti-Ballistic Missiles," 23 U.S.T. 3435, T.I.A.S. No. 7503 (May 26, 1972).

may deploy. ABM systems include interceptor missiles, launchers and ABM radars.

Initially, the treaty limited each side to deployment of no more than two ABM systems, one centered on each country's national capital and a second on an area containing ICBM silo launchers.

In 1974, the US and Soviet Union completed a protocol to the ABM Treaty further limiting the deployment of ABM systems.³⁹ The protocol reduced the number of permissible ABM systems from two to one, with the categories remaining the same. The USSR chose Moscow as the site of its one permitted system; the US chose Grand Forks AFB in North Dakota.

The US asserted that ABM rules did not preclude it from working to develop President Reagan's Strategic Defense Initiative. Similar questions have arisen with regard to recent work on theater missile defenses, and to the work being done to develop a national missile defense.⁴⁰

US strategists see a need for a theater ballistic missile defense (TMD) to protect forward-deployed troops against a potential tactical threat. One such system under development is the US Army's Theater High-Altitude Area Defense (THAAD). The US has argued that tactical missile defenses are not prohibited by the ABM treaty. On the other hand, the US is also researching and developing a new national missile defense, and is seemingly intent on ending its compliance with the ABM treaty. Both of these issues have raised concerns in Russia.⁴¹

Strategic Arms Limitation Talks (SALT) I AND II. In the 1970s, the US and USSR engaged in the Strategic Arms Limitation Talks. There were early disagreements on what weapons should be included, caused by the differing focus of the two nations. The US had treaty obligations requiring it to defend far-flung allies; the Soviet allies were generally located near USSR borders.

³⁹ "Protocol to the Treaty on the Limitation of Anti-Ballistic Missile Systems," 27 U.S.T. 1645, T.I.A.S. No. 8276 (Jul. 3, 1974).

⁴⁰ Lisbeth Gronlund, "ABM: Just Kicking the Can," *The Bulletin of the Atomic Scientists*, 15 (Jan./Feb. 1998).

⁴¹ SIPRI, *supra* note 3, at 650-55 (1996).

In any event, the talks ultimately resulted in two agreements, SALT I and SALT II. The purpose of the agreements was to limit the number of offensive strategic weapons held by each nation. SALT I prohibited the modernization of several types of nuclear weapons systems, and also limited numbers of submarine-launched ballistic missiles.⁴² SALT I was an interim agreement that was designed to last only five years, but both the US and USSR agreed to continue to observe the limitations even after the agreement expired.⁴³

SALT II was signed in 1979, but the US never ratified the treaty. After the Soviet invasion of Afghanistan, President Carter asked the Senate to delay consideration of the treaty. Like SALT I, it was designed to address strategic offensive arms limitations, but it was not to be temporary.⁴⁴ Despite its failure to ratify SALT II, the US continued to abide by the treaty terms. In 1986, after the Soviet Union repeatedly failed to abide by SALT II guidance, President Reagan announced that the US was no longer bound by the SALT agreements. The US stated policy became the maintenance of whatever nuclear force was necessary to counter the actual Soviet threat, although the intention to maintain a strategic balance with, rather than superiority over, the USSR was expressed.⁴⁵

Intermediate-Range Nuclear Forces (INF) Treaty. With the 1987 signing of the INF by the US and USSR, intermediate-range nuclear missiles, those with a range of 500-5500 kilometers, were to be eliminated.⁴⁶ Agreements to permit inspection of missile sites in Warsaw Pact nations, and of US missile sites in NATO countries, were also executed, as were agreements to permit the inspection of production facilities.⁴⁷ This agreement marked the first time an entire class of nuclear missiles was eliminated.

Strategic Arms Reduction Treaty (START) I. Negotiations for START I began early in the Reagan Administration. It was the first treaty that provided for

⁴² "Interim Agreement on Certain Measures with Respect to the Limitation of Strategic Offensive Arms, with Protocol," 23 U.S.T. 3462, T.I.A.S. No. 7504 (May 26, 1972).

⁴³ 77 *Dept. State Bulletin* 642 (1977).

⁴⁴ "Treaty on the Limitation of Strategic Offensive Arms" (Jun. 18, 1979).

⁴⁵ *Department of State Bulletin* at 36-43 (Aug. 1986).

⁴⁶ "Treaty on the Elimination of Intermediate-Range and Shorter-Range Missiles," 27 I.L.M. 84 (Dec. 8, 1987).

⁴⁷ Copies of the agreements may be found at 27 I.L.M. 58, *et. seq.*

the reduction of levels of strategic nuclear armaments. It called for a phased reduction in nuclear weapons, and limited the number of deployed ICBMs, SLBMs and heavy bombers. START I further limited the total number of nuclear warheads, and limited the payload of ballistic missiles.⁴⁸

Ratification of START I was jeopardized by the break-up of the Soviet Union in 1991 and the resulting emergence of four new nuclear nations: Russia, Ukraine, Kazakhstan and Belarus. Fortunately, all four nations assumed USSR responsibilities under the treaty, and then the three smaller nations rid themselves of their nuclear weapons.⁴⁹ The three have become non-nuclear signatories of the NPT. The US ratified START I, and it entered into force in 1994. It called for reductions to under 4900 total ballistic missile warheads.

START II. START II, ratified by the US in 1996, called for nearly two-thirds cuts in the strategic nuclear arsenals of both the US and USSR.⁵⁰ The agreement called for the eventual elimination of all land-based strategic ballistic missiles equipped with multiple, independently-targeted re-entry vehicles, and the elimination of all heavy ICBMs. The number of warheads deployed on submarines were also reduced by about fifty percent. The final number of warheads is limited to no more than 3500.

If the Russians ratify START II, the US must re-ratify to approve the intervening changes to the agreement, and then the treaty will be in force.

START III. The US and Russia have agreed that, once START II enters into force, they will begin negotiations on START III. The next START agreement would, among other things, work to establish lower numbers of nuclear warheads for each side and to increase the transparency of nuclear inventories and required warhead destructions.⁵¹

Cooperative Threat Reduction Act. Responding to a perception that the break-up of the Soviet Union had the potential to unleash nuclear materials and expertise on the world, the US passed the Cooperative Threat Reduction Act,

⁴⁸ "Treaty on the Reduction and Limitation of Strategic Offensive Arms," Art. II (Jul. 31, 1991).

⁴⁹ "Protocol to the Treaty between the US and the USSR on the Reduction and Limitation of Strategic Offensive Arms (Lisbon Protocol)," (May 23, 1992).

⁵⁰ "Treaty on Further Reduction and Limitation of Strategic Offensive Arms" (Jan. 3, 1993).

also known as Nunn-Lugar.⁵² Funds were appropriated to assist in storing, safeguarding and disposing of elements of the Soviet nuclear arsenal in Russia and other former Soviet republics.

Although some of the spending under the act has been controversial, it is generally thought to have helped reduce the risk of nuclear proliferation.

Open Skies Treaty. The purpose of the 1992 Open Skies Treaty was to increase the transparency among nations of military forces and activities.⁵³ By providing a means directly to gather information about the military forces and activities of other participants, the treaty is intended to increase trust among member countries. The treaty gives each member state the right to make a certain number of observation flights over any part of the territory of other parties, without providing any exceptions for "national security." Observation flights are conducted with unarmed, fixed-wing aircraft. All data collected during an observation flight must be provided to the observed state and be made available for purchase by other signatories to the treaty.

President Bush's Nuclear Initiatives. In 1991, President Bush announced a number of initiatives affecting US nuclear weapons. The three most important of them are outlined below.

One initiative eliminated ground-launched theater nuclear weapons. Another removed tactical nuclear weapons from attack submarines, surface ships and naval aircraft bases. The third stood down strategic bombers from alert, and removed their nuclear weapons for storage in secure areas.⁵⁴

5. Nuclear Weapons Testing Agreements

Limited Test Ban Treaty (LTBT). This first nuclear weapons testing agreement came about only after years of debate. The need for a treaty was

⁵¹ *Joint Statement on Parameters of Future Nuclear Reductions* (Helsinki Mar. 21, 1997).

⁵² Pub. Law 103-160, Title XII, 107 Stat. 1777 (Nov. 30, 1993); Pub. Law 103-337, Title XII, 108 Stat. 2282 (Oct. 5, 1994).

⁵³ US Department of State, Bureau of Public Affairs, Fact Sheet, *Open Skies Treaty* (Mar. 26, 1992).

⁵⁴ *Presidential Initiative on Nuclear Arms*, White House Press Release (Sep. 27, 1991).

first pointed up by the 1952 and 1953 explosions of hydrogen devices by the US and the USSR, respectively. These devices resulted in much higher yields than prior weapons, as evidenced by a 1954 US test explosion at Bikini Atoll. That device yielded, at 15 megatons, almost twice what had been expected. The fallout contaminated a Japanese fishing vessel, *Lucky Dragon*. A later Soviet hydrogen explosion spread radioactive fallout on Japan.

Two major obstacles stood in the way of a test ban treaty. One was reliable verification, the other was the linkage demanded by Western nations between nuclear testing and conventional arms reductions. Both of these issues were eventually worked through, and the LTBT was ratified by the US in 1963 after eight years of discussions. The USSR and UK were also treaty parties.

The treaty prohibited all nuclear weapons tests and all nuclear explosions in the atmosphere, in outer space or anywhere underwater, including on the high seas.⁵⁵ LTBT did not prohibit underground testing, but it did prohibit test explosions that would result in the spread of radioactive debris outside the testing nation's national boundaries. Finally, LTBT parties may not encourage other nations to conduct, nor may they assist or participate in, nuclear explosions covered by the treaty conducted by another state. The LTBT does not apply in time of war, as withdrawal is allowed with three months notice if "supreme interests" are threatened and, by its terms, the treaty prohibits only test explosions, not shots fired in anger.

Threshold Test Ban Treaty (TTBT). The purpose of the TTBT was to narrow the gap left by LTBT by limiting underground nuclear weapons tests.⁵⁶ The TTBT prohibited those tests with yields greater than 150 kilotons. The treaty was between the US and USSR. Both nations also agreed to limit underground nuclear weapons tests to a minimum. A treaty protocol provides for verification

⁵⁵ "Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space, and under Water," 14 U.S.T. 1313, T.I.A.S. No. 5433, 480 U.N.T.S. 43 (Aug. 5, 1963).

⁵⁶ "Treaty on Limitation of Underground Nuclear Weapon Tests," 13 I.L.M. 906 (Jul. 3, 1974).

of the treaty obligations.⁵⁷ The treaty did not apply to explosions carried out for peaceful purposes.

The US and USSR both agreed in 1976 to follow the 150 kiloton limit, although the treaty was not ratified until the nations agreed on the companion Peaceful Nuclear Explosions Treaty. The TTBT entered into force in 1990.

Peaceful Nuclear Explosions Treaty (PNET). This 1976 treaty covered the peaceful explosions not addressed by the TTBT. Peaceful explosions do not include those for the purpose of researching nuclear weapons. PNET, between the US and the USSR, prohibited explosions in excess of 150 kilotons in yield, and required minimum depths for the explosions. It also required advance notice.⁵⁸ A protocol establishing verification requirements was completed in 1990.⁵⁹ The US ratified the PNET in 1990.

Comprehensive Nuclear Test Ban Treaty (CTBT). The CTBT forbids each party from carrying out any nuclear test explosions. It also requires them to prohibit any nuclear explosions at any place under its control, and to refrain from encouraging or participating in the carrying out of any nuclear explosion. The treaty has not yet been ratified by the US, although it has been signed.

The strict CTBT regime will create a challenging situation for the US as it tries to maintain proper stewardship of its nuclear stockpile, but Department of Energy experts will undoubtedly rise to the challenge.

D. United States Law and Policy

In addition to international constraints on the possession and use of nuclear weapons, US nuclear weapons policy is circumscribed by domestic law and policy. To ensure that it takes appropriate actions in the arms control area,

⁵⁷ "Verification Protocol to the Treaty on the Limitation of Underground Nuclear Weapon Tests," 29 I.L.M. 969 (1990).

⁵⁸ "Treaty on Underground Nuclear Explosions for Peaceful Purposes," 15 I.L.M. 89 (May 28, 1976).

⁵⁹ "Verification Protocol to the Treaty on Underground Nuclear Explosions for Peaceful Purposes," 29 I.L.M. 1025 (1990).

the US established the Arms Control and Disarmament Agency.⁶⁰ The primary focus of US policy is to avoid the further proliferation of NBC weapons. This policy is clearly in the interest of the US, but is also strongly supported by the international community. The US has incorporated nonproliferation policies into domestic law.⁶¹

The US has also taken a series of actions to prevent the unauthorized employment of its nuclear arsenal. One is an electronic locking system on warheads and on nuclear bomb bay doors. Others are increased security requirements, such as the Personnel Reliability Program, to ensure that individuals dealing with nuclear weapons are stable and reliable.⁶² When nuclear weapons are present, procedures require two individuals to launch a weapon, and the launch code must be communicated to them from higher in the chain of command.⁶³ In addition to all the other listed safety precautions, only the US president may authorize a use of nuclear weapons.⁶⁴

1. Security Assurances

In the nuclear arena, the US has made several security assurances to other nations. The more important of these are negative security assurances (NSAs). Negative security assurances have been made in two contexts.

First, the US has made given a NSA to all non-nuclear NPT signatories. The US has agreed not to use nuclear weapons against such states except in the case of an attack on the US or its allies by a non-nuclear signatory in association with a nuclear power.⁶⁵ These political statements are still in effect, although they have arguably been weakened by recent US assertions that it

⁶⁰ 22 U.S.C. § 2551, *et. seq.* (1990).

⁶¹ 22 U.S.C. § 3201, *et. seq.* (1990).

⁶² See Bunn, *supra* note 9, at 57; DoDD 5210.42, *Nuclear Weapon Personnel Reliability Program* (May 25, 1993).

⁶³ Nuclear Weapons 20 (UN, 1991)

⁶⁴ AFP 110-31, *supra* note 11; NWP 1-14M, *supra* note 11; Joint Pub. 3-12, *Doctrine for Joint Nuclear Operations II-1* (Dec. 18, 1995).

⁶⁵ First extended in 1978, the pledge was renewed in 1995. Both are reprinted in George Bunn, "Expanding Nuclear Options: Is the U.S. Negating Its Non-Use Pledges?," *Arms Control Today* 7 (May/Jun. 1996).

might use nuclear weapons to respond to any use of weapons of mass destruction.⁶⁶

The second type of NSA are those ascribed to in protocols to NWFZs. These assurances have the binding effect of any treaty. They require the US to avoid the use, and threats to use, nuclear weapons against treaty participants.

Positive security assurances are less frequently discussed. These are agreements by nuclear weapons states to go to the aid of non-nuclear weapons states that are victims of nuclear attacks or threats.⁶⁷

2. First Use of Nuclear Weapons

With respect to the actual use of nuclear weapons, it is important to note that despite almost five decades of nonuse, no declared US policy would preclude a first use of nuclear weapons.⁶⁸ US statements do indicate that nuclear weapons would only be used in self-defense, but that is very different than precluding a first use. The US maintains that customary international law recognizes the right of anticipatory self-defense, i.e., the possibility of taking hostile defensive measures without waiting for the first enemy blow to strike.⁶⁹

III. Chemical Weapons

A. Brief History

Chemical weapons have earned a prominent place in the history of warfare. As early as the fourth century BC Scythian archers used poisoned arrows against their enemies. The poison, possibly dipped from a small cup on

⁶⁶ Spurgeon M. Keeny, "Nuclear Policy in Disarray," *Arms Control Today* 2 (Apr. 1996).

⁶⁷ UN Security Council Resolution 255 (1968), reaffirmed Apr. 5, 1995.

⁶⁸ Bunn, *supra* note 9, at 56-57.

⁶⁹ Ian Brownlie, *International Law and the Use of Force by States* 257 (1963).

the archers' belt buckles, was a horrifying mixture of putrefied human blood and dung, mixed with the poison of decomposed adders.⁷⁰

Chemical weapons gained modern prominence in W.W.I, during which conflict they were first used on 22 April 1915 when German forces released chlorine gas near Ypres, France. Both sides eventually engaged in gas warfare. The most lethal agent employed was mustard gas, used for the first time by the Germans in mid-1917.⁷¹

The appalling effects of chemical weapons ultimately led to agreement on the Geneva Gas Protocol, and the widespread use of chemical weapons has since been largely avoided. The one exception was during the Iran-Iraq conflict (1980-88), when Iraq used chemical weapons; Iran was also accused of using chemical munitions, but the evidence was equivocal.⁷² The US-led coalition was on the wrong side of a near-exception to the rule in the Persian Gulf Conflict. Inspections have since revealed that Iraq had stockpiled hundreds of tons of chemical agents, including sarin, VX and mustard gas.⁷³ Fortunately, there is no definitive evidence that Iraq employed chemical munitions, despite the belief of some that they might have been a cause of Gulf War Syndrome.

B. International Law

Chemical weapons are subject to the same general constraints as any other weapons; they cannot indiscriminately be employed against civilian populations and non-military targets.⁷⁴ Further, all activities concerning these weapons are constrained by international agreements.

⁷⁰ Adrienne Mayor, "Dirty Tricks in Ancient Warfare," *Military History Quarterly* Vol. 10, No. 1, 32, 34 (Autumn 1997).

⁷¹ Martin Gilbert, *The First World War* 144, 204 (1994).

⁷² Leonard A. Cole, *The Eleventh Plague* 91 (1997). There have been threats and allegations, such as in Bosnia and Angola, but no definitive, large-scale uses. *SIPRI Yearbook*, 323-326 (1994).

⁷³ SIPRI, *supra* note 3, at 697.

⁷⁴ *Supra* at 5.

Geneva Gas Protocol. The 1925 Geneva Gas Protocol prohibited the use in armed conflict of asphyxiating, poisonous or other gases.⁷⁵ The US ratified the agreement in 1975, but reserved the right to respond in kind if an enemy violated the treaty prohibitions, leaving the US with a "no first use" policy.

The Geneva Gas Protocol restricted the use of deadly chemical weapons, but it did not prohibit the development, production or possession of chemical weapons of any sort, including lethal weapons.⁷⁶

Verification and Destruction of Chemical Weapons Agreements. In 1989, the US and USSR agreed to a temporary verification regime to test whether a ban on chemical weapons could be enforced.⁷⁷ The agreement required an exchange of chemical weapons data, and verification inspections. In 1990, the two nations initiated the first agreement calling for the destruction and non-production of chemical weapons.⁷⁸

The Chemical Weapons Convention. When it was bound only by the Geneva Gas Protocol, the US continued to maintain a chemical weapons capability for deterrence and as a possible response to chemical use by enemy forces. This capability continued until the early 1990s. With the 1997 ratification of the Chemical Weapons Convention (CWC), any possibility of regaining that capability was disallowed.⁷⁹

The CWC prohibited parties from developing, producing, acquiring, stockpiling and using or preparing to use chemical weapons. The CWC further

⁷⁵ "Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare," 26 U.S.T. 571, T.I.A.S. No. 8061, 94 U.N.T.S. 65 (Jun. 17, 1925).

⁷⁶ NWP 1-14M, *supra* note 11, at 10-2. See also "Arms Control: Declaration of the Paris Chemical Weapons Conference-Final Declaration of the Paris Conference on the Prohibition of Chemical Weapons," 30 *Harv. Int'l. L.J.* 495, 496 n. 11 (Spring 1991).

⁷⁷ "Agreement Regarding a Bilateral Verification Experiment and Data Exchange Related to Prohibition of Chemical Weapons," 28 I.L.M. 1438 (Sep. 23, 1989).

⁷⁸ "Agreement on Destruction and Non-Production of Chemical Weapons and on Measures to Facilitate the Multilateral Convention on Banning Chemical Weapons," 29 I.L.M. 932 (Jun. 1, 1990). For a discussion of the impact of this agreement, see "Arms Control and Chemical Weapons - Agreement on Destruction and Non-Production of Chemical Weapons," 32 *Harv. Int'l. L.J.* 497 (Spring 1991).

⁷⁹ "Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction" (Jan. 13-15, 1993).

required the destruction of existing chemical weapons stocks and production facilities.

The CWC also prohibited the use of riot control agents (RCAs) as a method of war. Appropriate inspections are authorized to verify compliance by each party to the convention.

C. US Policy

The US has specific policies governing the use of chemical agents, divided into wartime and peacetime uses.

During wartime, the president must approve any use of RCAs or chemical herbicides. The US will engage in first use of RCA only in a defensive mode in order to save lives. It will use chemical herbicides first only on base defensive perimeters or consistent with domestic regulations.⁸⁰

In peacetime, herbicides will be used only consistent with host nation laws. RCAs will only be used when US troops are not parties to a conflict (i.e., are acting as peacekeepers), or on US installations or embassies for protection.

IV. Biological Weapons

A. Brief History

There are two classic historic uses of biological weapons in the history of warfare. The first took place in 1346 when the Mongols laid siege to the impenetrable Crimean seaport of Kaffa. Frustrated by three year's of failing to penetrate the city's defenses, the Mongols began hurling the plague-infested

⁸⁰ Chairman of the Joint Chief of Staff Instruction (CJCSI) 3110.07A, *Nuclear, Biological and Chemical Warfare; Riot Control Agents; and Herbicides* (Jul. 3, 1995).

corpses of their comrades over the city walls. The Genoese occupants were eventually forced to give up the city to flee the plague.⁸¹

The other classic historical case is Lord Jeffrey Amherst's infestation of American Indians with smallpox. In 1763, after a rebellion, he ordered his subordinates to deliver blankets infected with the disease to the natives. Smallpox later broke out among the Indians and caused many deaths.⁸²

Germany was accused of attempting purposely to spread disease in W.W.I, but it was W.W.II that saw the first real preparation to use biological warfare. Japanese experiments resulted in the deaths of thousands of prisoners of war. Gruinard Island off the coast of Scotland was infected with anthrax from British tests with biological bombs, and was considered unsafe to visit for over 50 years.⁸³

Iraq, as a result of a program starting in 1974, had stockpiled thousands of liters of botulinum toxin, anthrax and aflatoxin.⁸⁴

B. International Law

Because of their indiscriminate and uncontrollable nature, use of biological weapons has long been prohibited by international law.⁸⁵ DoD defines biological agents as materiel that projects, disperses or disseminates a microorganism that causes disease in personnel, plants or animals or causes the deterioration of materiel.⁸⁶

Geneva Gas Protocol. In addition to prohibiting gas warfare, the Geneva Gas Protocol bans use of bacteriological methods of warfare.⁸⁷ In agreeing to the protocol, the US accepted this prohibition, so use of such weapons by US

⁸¹ Jeanne McDermott, *The Killing Winds* 21 (1987); Erhard Geissler, *Biological and Toxin Weapons Today* 7 (1986).

⁸² McDermott, *supra* note 81, at 21-22.

⁸³ Robert Harris & Jeremy Paxman, *A Higher Form of Killing* 68, 74 (1982); SIPRI, *supra* note 3, at 687.

⁸⁴ SIPRI, *supra* note 3, page 698.

⁸⁵ AFP 110-31, *supra* note 11, at 6-4; NWP 1-14M, *supra* note 11, at 10-4.

⁸⁶ Joint Publication 1-02, *Department of Defense Dictionary of Military and Associated Terms* (Jun. 10, 1998).

⁸⁷ 1925 Geneva Gas Protocol, *supra* note 4.

forces is prohibited.⁸⁸ The US also considers the prohibition against biological warfare to include use of toxins.⁸⁹ Toxins are not living organisms and could be categorized as chemicals, but the US and most other countries consider them biological agents. Further, because the prohibition against biological warfare is now part of customary international law, the US position is that the ban applies to all nations, whether or not they are parties to the 1925 Geneva Gas Convention.⁹⁰

Biological Weapons Convention. In 1972, a new multilateral convention was initiated to place further restrictions on biological weapons.⁹¹ The convention prohibited signatories from developing, producing, stockpiling, acquiring or retaining biological agents.⁹² The same rules apply to toxins. Any existing stockpiles of biological weapons were also required to be destroyed. The convention had no effective enforcement provisions.

C. United States Law and Policy

The US renounced its offensive biological program in 1969.⁹³ It maintains only a defensive capacity to, for instance, develop vaccines. US law restricts the transportation, open air testing, deployment and disposal of biological weapons.⁹⁴

V. Conclusion

This is an ever-changing area. New threats are identified, and new solutions sought, at frequent intervals. A brief understanding of where we are,

⁸⁸ AFP 110-34, *supra* note 11; FM 27-10, *The Law of Land Warfare* 3 (Jul. 18, 1956, w/ C1, Jul. 15, 1976); NWP 1-14M, *supra* note 11, at 10-4.

⁸⁹ FM 27-10, *supra* note 88, at 3.

⁹⁰ NWP 1-14M, *supra* note 11, at 10-2.

⁹¹ "Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction," 26 U.S.T. 583, T.I.A.S. No. 8062 (Apr. 10, 1972).

⁹² *Id.*, Article I.; FM 27-10, *supra* note 88, at 3.

⁹³ 18 U.S.C. § 175 (1999).

⁹⁴ 50 U.S.C. §§ 1512, 1513 (1991).

along with some historical context, should stand commanders in good stead to scan the future landscape for significant changes.

WMD Treaties & Agreements

Anti-Ballistic Missile (ABM) Treaty (1972). US-USSR treaty limiting the defensive nuclear weapons capability of each side. Missiles, launchers, and radar systems are affected.

African Nuclear Weapons Free Zone (1996). Multilateral treaty, with protocols, prohibiting development, use or deployment of nuclear weapons in Africa.

Antarctic Treaty (1961). Multilateral treaty prohibiting use or deployment of nuclear weapons in Antarctica.

Biological Weapons Convention (1972). Multilateral treaty prohibiting the development, production, stockpiling, acquisition or retention of biological agents

Chemical Weapons Convention (1993). Multilateral convention banning development, production, stockpiling and use of chemical weapons and requiring their destruction.

Biological Weapons Convention (1972). Multilateral convention outlawing biological weapons.

Exercise Notification Agreement (1989). Agreement between the US and USSR requiring 14 days notice of major strategic exercises.

Geneva Gas Protocol (1925). Multilateral convention prohibiting gas and biological warfare. US has reserved right to use chemical weapons in response

to an enemies use of the same, but has made no such reservation with respect to biological weapons.

Intermediate-Range Nuclear Forces (INF) Treaty (1988). US-USSR treaty eliminating intermediate-range and shorter-range nuclear missile forces.

Latin American Nuclear Weapons Free Zone (1967). Multilateral treaty, with protocols, prohibiting use or deployment of nuclear weapons in Latin America.

Launch Notification Agreement (1988). US-USSR agreement requiring 24 hours advance notice of all peacetime ballistic missile launches.

Nuclear Non-Proliferation Treaty (1970). Multilateral treaty prohibiting transfer of nuclear weapons and nuclear weapons technology to non-nuclear weapon states.

Nuclear Weapons Free Zone. See African Nuclear Weapons Free Zone, Latin American Nuclear Weapons Free Zone and South Pacific Nuclear Free Zone. See *also* Antarctic Treaty, Outer Space Treaty and Seabed Arms Control Treaty.

Open Skies Treaty (1992). Multilateral treaty establishing a regime of unarmed aerial observation flights over the territory of its signatories. Its purpose is to decrease international tension and the potential for armed conflict by promoting openness and transparency of military forces and activities.

Outer Space Treaty (1967). Multilateral treaty prohibiting placement of nuclear weapons in orbit, on the moon, or in outer space.

Seabed Arms Control Treaty (1972). Multilateral treaty prohibiting placement of nuclear weapons on the seabed or ocean floor.

South Pacific Nuclear Free Zone (1986). Multilateral treaty, with protocols, prohibiting use or deployment of nuclear weapons in the South Pacific.

Strategic Arms Reduction Treaty (START) I (1991). US-USSR treaty limiting number of deployable strategic nuclear delivery vehicles and the number of nuclear warheads; includes a verification and inspection regime. Later agreed to by nuclear CIS states after dissolution of USSR.

START II (1993). US-Russian Federation treaty limiting the number of strategic nuclear weapons.

Treaty of Pelindaba. See African Nuclear Weapons Free Zone.

Treaty of Rarotonga. See South Pacific Nuclear Free Zone.

Treaty of Tlatelolco. See Latin American Nuclear Weapons Free Zone.

US-USSR Chemical Weapons Agreement (1990). Bilateral agreement calling for non-production of chemical weapons and destruction of existing stocks.

Treaty Terms

Accession. When a state expresses its consent to be bound by a convention drafted by other states through a procedure the acceding state did not participate in or when the state did not sign the convention. Accession must be permitted by the treaty, at least by implication.

Initialing. May be either the equivalent of signature or, more frequently, a preliminary step that stabilizes a negotiated text so that it can be referred to higher authority.

Party to a treaty. A nation that has consented to be bound by a convention and for whom the convention is in force.

Ratification. Approval of an international agreement after it has been signed. For the US, this action is taken by the president with the advice and consent of the Senate.

Signature. Usually is not binding as it is normally subject to later ratification. Instead, it signifies political approval and engenders a moral obligation to seek ratification.

Succession. Arises when a given state is replaced by another. Whether the new state succeeds to the predecessor's treaties is a question answered on a case-by-case basis.

More detailed information on treaty terminology is available at the sources of this summary: THE FOREIGN RELATIONS OF THE UNITED STATES, RESTATEMENT OF THE LAW § 312 (3d ed. 1987) and the VIENNA CONVENTION ON THE LAW OF TREATIES.

Taming Shiva: Applying International Law to Nuclear Operations

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I am become death, the destroyer of worlds.

Scientist J. Robert Oppenheimer quoting from the Hindu text, the Baghavid-Gita, at the first atom bomb test in from the Hindu text, the 1945. /1/

I. INTRODUCTION

Like the Hindu deity Shiva, a nuclear weapon has inherent duality: it can be a "destroyer," as was demonstrated at the end of World War II, or a "creator," as has been proven thereafter. /2/ Specifically, since the advent of these weapons in 1945, an era has been produced that is free of the kind of savage *global* conflicts that twice visited the world this century - conflicts whose monstrous cost totaled more than 87 million lives. /3/

Despite the relative peace of the nuclear-weapons' age, General George Lee Butler, the former Commander in Chief (CINCSTRAT) of United States Strategic Command (USSTRATCOM), declared in a December 1996 interview with the *Washington Post* that nuclear weapons were "morally indefensible. /4/ Although General Butler later incongruously maintained that he was not calling for immediate, unilateral nuclear disarmament, /5/ his assertion, nevertheless, should be of great concern not only to judge advocates practicing operations law, but indeed to all members of the armed forces.

General Butler's allegation of moral indefensibility, if unanswered, has the dangerous potential to undermine America's nuclear deterrent. While persons subject to the Uniform Code of Military Justice are obliged to obey lawful orders even if they conflict with their individual consciences, /6/ Butler's assertion questions the very legality of such orders.

Even more troubling, his manifesto assaults the ethos of our armed forces - an ethos upon which America's future warfighting success depends. The Chairman of the Joint Chiefs of Staff predicts in *Joint Vision 2010* that "success [in future conflicts] will depend ... upon the ... moral strengths of the individual soldier, sailor, airman, and marine We will build upon the enduring foundation of... core values and high ethical standards." /7/

For a variety of reasons, nuclear weapons already present profound moral issues with the potential to impact military operations /8/ Obviously, when a military leader of General Butler's stature makes such a claim that he did, the situation becomes more even more exacerbated and conceivably divisive. In its worst extrapolation, moral uncertainty is introduced into the

minds of thousands of conscientious and honorable men and women upon whom America's nuclear deterrent relies uncertainty that could manifest itself at the worst possible time for the Nation. /9/

What might such uncertainty mean for deterrence? The experts tell us that "[t]o deter a nuclear attack, retaliation must be perceived as likely. . . ." /10/ If an enemy perceives that our forces /11/ are too psychologically encumbered by the kind of moral dilemma General Butler's pronouncement encourages to fully respond to an attack, then the adversary may discern an advantage in making one.

Consequently, this article has three purposes: first, it intends to counter General Butler's claim of moral indefensibility by explaining the legal and ethical norms within which U.S. nuclear forces operate. Second, it aims to briefly introduce the practitioner to some of the major legal issues associated with nuclear weapons, as well as to the procedures by which legal advice is incorporated into the planning process. Third, it will discuss practical lessons learned from GLOBAL GUARDIAN 97, America's premier strategic nuclear exercise. This article will conclude by contending that a robust mechanism is in place to ensure that the moral and ethical standards of the rule of law are fully inculcated into America's nuclear deterrent. /12/

II. LEGALITY OF NUCLEAR WEAPONS

As many practitioners know, the United States has always insisted that nuclear weapons are not inherently unlawful instrumentalities of armed conflict." From time to time, however, elements of the international community have questioned this premise. For example, the United Nations General Assembly has passed a number of non-binding resolutions that have condemned nuclear weapons. /14/

Importantly, the International Court of Justice (ICJ), the judicial arm of the United Nations, issued an advisory opinion in 1996 that addressed the legality of the threat or use of nuclear weapons. /15/ While the ICJ decision does not create a binding precedent in the same sense as a U.S. appellate court, /16/ it is influential in the court of world opinion and, indeed, may be accepted by a considerable number of countries as an expression of customary international law. /17/

The ICJ determined that no existing rule of international law prohibits the use of nuclear weapons in conflict. /18/ Although it concluded that their employment would "generally be contrary to rules of international law applicable to armed conflict," the court nevertheless found it could not say that such use was necessarily illegal "in self-defense in which the very survival of a State would be at stake." /19/ Of interest to the practitioner is the court's use of the phrase "a State" instead of "the State." This suggests that the use of nuclear weapons is not limited to the survival of the nuclear-weapons state itself, but that they also could be employed in appropriate circumstances in the collective self-defense of a non-nuclear ally. /20/

More problematic is determining exactly what circumstances and at what point along the continuum of conflict does the "survival" of a state become at stake. /21/ Moreover, what precisely does "survival" of a state mean? Though beyond the scope of this article, one might fairly conclude that, given the UN Charter's emphasis on self-determination and support for the rule of law, "survival" could reasonably be interpreted broadly enough to include freedom from the intense coercion arising from any use of weapons of mass destruction or from an overwhelming conventional threat. Therefore, the ICJ's decision is not necessarily at odds with U.S. doctrine. /22/

The most important implication of the ICJ case for U.S. legal advisors and planners is its reflection of the international community's widely differing views as to the propriety of nuclear weapons. Some allies or coalition partners in a given campaign might, for example, decline to support a nuclear mission under some or any circumstances despite the fact that they are full, cooperative partners in conventional operations. /23/

III. THE LAW OF ARMED CONFLICT (LOAC)

However ambiguous the ICJ was in other areas, there was no equivocation on its conclusion that any use of nuclear weapons must conform to applicable requirements of international law, and these would include the LOAC concepts of discrimination, military necessity, and proportionality. /24/ This presents little difficulty for American planners as the United States has "long taken the position that various principles of the international law of armed conflict would apply to the use of nuclear weapons as well as other means and methods of warfare." /25/

Still, any discussion of nuclear weapons is complicated by the widespread but mistaken belief that their destructive potential makes it impossible to apply LOAC principles. Actually, modern technologies and methodologies afford planners a number of tools helpful to LOAC compliance. /26/ For example, Joint Publication 3-12.1, *Doctrine for Joint Theater Nuclear Operations* /27/ notes that by reducing weapon yield, improving accuracy through delivery system selection, employing multiple small weapons (as opposed to a single, large device), adjusting the height of burst, and offsetting the desired ground zero, collateral damage can be minimized consistent with military objectives. /28/ A working knowledge of these planning options, along with a general understanding of nuclear weapons themselves, /29/ is extremely helpful to judge advocates tasked to provide LOAC advice for these highly-complex operations.

Additionally, USSTRATCOM's Strategic War Planning System (SWPS) can, among other things, model the probability of arrival, probability of damage, and overall damage expectancy of a given weapon delivered on a selected target by a designated platform. Of particular importance to practitioners, the system can also project expected numbers of casualties, fatalities, and population-at-risk based on information drawn from the Joint Resource Assessment Data Base. /30/ However, SWPS operates within certain parameters and, consequently, the legal advisor must understand its limitations and evaluate the data accordingly. Modeling and decision support systems do not - and must not - supplant the commander's intuition in the execution of the warfighting art. It is vital that the practitioner avoid an overly mechanistic application of computer modeling data; it must not become a substitute for a holistic LOAC analysis. /31/

Despite such efforts it is nevertheless true that attacks on certain targets would likely result in sizable civilian casualties. It should be recalled, however, that LOAC places responsibilities for minimizing civilian casualties not just on the attacker, but on the *defender* as well. That responsibility extends to exercising "care to separate individual civilians and the civilian population as such from the vicinity of military objectives." /32/ Where the defender fails to exercise such care, the primary culpability for collateral civilian casualties lies with him, so long as the attacker continues to work to minimize civilian casualties as much as is practicable under the circumstances.

Legal advisors should likewise be aware that while the U.S. does not target populations per se, /33/ it reserves the right to do so under the limited circumstance of belligerent reprisal. /34/ The U.S. (along with other declared nuclear powers) insists that Protocol I to the Geneva Conventions /35/ does not apply to nuclear weapons. /36/ Hence, prohibitions contained in Protocol I forbidding reprisals against civilians are not, in the U.S. view, applicable to nuclear operations. /37/

Parenthetically, James W. Child observes in *Nuclear War: The Moral Dimension* that "people have a duty to restrain their government from committing nuclear aggression and if they fail in that duty, their absolute immunity as noncombatants is undermined." /38/

Finally, legal advisors must understand the special political and psychological dimensions of nuclear weapons. Although using nuclear - or any other - weapons merely to terrorize noncombatant civilians is contrary to international law, affecting the mental state of an adversary, degrading his morale, and eroding his will to continue the conflict, can all constitute legitimate military objectives. /39/ The difficulty, as Geoffrey Best notes, is reliably quantifying such amorphous and often quite culturally-specific psychological concepts to the point where one could reasonably conclude before the attack that

a "definite military advantage" would be achieved. /40/

To avoid such dilemmas, Joint Pub 3-12.1 considers, for example, affecting an adversary's "[p]erception of US will and resolve" as an *employment* (as opposed to targeting) consideration. /41/ In other words, under U.S. doctrine a particular target must first be justified in orthodox military terms independent of the psychological or political 'message' the use of nuclear weapons might produce.

IV. SPECIAL ISSUES

The exceptional nature of nuclear weapons raises special issues of international law that are beyond the usual LOAC considerations. These include:

A. Arms Control and Related Agreements.

A myriad of international agreements exist which in some way touch upon nuclear weapons. /42/ In particular, the Strategic Arms Reduction Treaty (START I)/43/ sets specified limits on the kinds of nuclear strategic systems the U.S. may possess. /44/ Other agreements place restrictions as well. The Outer Space Treaty, /45/ for example, forbids the orbiting or installation (but not transit) of nuclear weapons in space. Similarly, a growing number of terrestrial nuclear-weapon-free zones (NWFZ) agreements have been concluded. /46/

The U.S. is a party to NWFZ agreements which exist for Antarctica, Latin America, Africa, the South Pacific, and the sea-bed. /47/ Usually the U.S. and other nuclear weapons states commit "not to test nuclear weapons inside the zone, not to use or threaten to use the weapons against any treaty or protocol party inside its territory or territorial sea, and not to station, develop, or manufacture nuclear weapons inside the zone." /48/ The U.S., however, considers that none of these agreements compromise freedom of navigation, overflight, and similar rights which otherwise exist. /49/ Nevertheless, judge advocates should be aware that some nations have a different interpretation in this regard. /50/

As noted above with regard to NWFZ agreements, the Nuclear Nonproliferation Treaty (NPT), which was extended for an indefinite period in 1995, presents the rather unique issue of "negative security assurances. /51/ Separate from the text of the treaty itself, the U.S. and other nuclear weapons states foreswore - subject to certain conditions - the use of nuclear weapons against non-nuclear treaty parties. Specifically, the U.S. version of the declaration provided in connection with the NPT extension states:

The United States reaffirms that it will not use nuclear weapons against any non-nuclear-weapon States Parties to the Treaty on the Non Proliferation of Nuclear Weapons except in the case of invasion or any other attack on the United States, its territories, its armed forces, its allies, or on a State towards which it has a security commitment, carried out or sustained by such non-nuclear-weapon State in association or alliance with a nuclear weapons State. /52/

While this statement represents U.S. declaratory policy, it does not equate to a binding international agreement although at least one expert argues to the contrary.^{/53/} Nor does it preclude the application of the belligerent reprisal doctrine /54/ in the event, for example, of the use by a treaty party of a non nuclear but unlawful weapon of mass destruction. /55/

B. Overflight

As with any military operation, judge advocates must be concerned with overflight issues. Violations of national airspace are an infringement of the overflown nation's sovereignty and may be opposed by force. Moreover, nations asserting neutrality in a given conflict may feel obliged to take military action against intruders in order to preserve their neutral status. /56/ Still, such encroachments generally do not constitute acts of aggression within the meaning of Article 2(4) of the United Nations Charter. Thus, overflight violations - even as part of a military combat operation - do not per se sustain a Nuremberg-like charge of aggression. /57/

Ordinarily, of course, overflight permission will be sought. /58/ For many of the reasons suggested above, this effort may be complicated by the international community's divergent views of the legality of nuclear weapons. When nuclear operations are in support of a geographic combatant command, it is the responsibility of that organization to ensure that the necessary overflight permissions are obtained. The supported command also must secure any overseas staging authorizations that a particular plan might require.

A further problem is presented by the overflight of ballistic missiles because there is no universally accepted definition of the upward extent of national sovereignty. /59/ There appears to be consensus, however, that systems in orbit are beyond the territorial jurisdiction of particular states.^{/60/} Accordingly, overflight of ballistic missiles, at least to the extent they are traversing space at an altitude above the lowest point at which artificial satellites can be placed in orbit without free-falling to earth, is more of a political than legal issue. Legal advisors must, therefore, be well-versed in the relevant political-military environment.

C. Civilian Control

U.S. nuclear forces operate under strict civilian control. Directing the employment of U.S. nuclear weapons "requires the explicit decision of the President." /61/ In this respect, American practice aligns with that of most nuclear weapons states as historian Martin van Creveld observes:

So far as we know, in every country that built the [nuclear] bomb the existing chain of command was bypassed or modified in favor of direct control by the head of state. Either the nuclear arsenal was entrusted to a separate organization considered politically reliable . . . or else technical arrangements, known as Positive Action Links ... were introduced so that the military could not fire them on their own initiative even if they wanted to. /62/

Absent Presidential direction, U.S. military forces cannot use nuclear weapons, even in self-defense. The Atomic Energy Act adds a further measure of security by mandating civilian control over every aspect of nuclear weapons production. /63/

V. PRACTICUM

Following a classified 1995 study by the USSTRATCOM legal staff, a number of steps were taken to improve the incorporation of legal advice into the nuclear planning process. These changes culminated in what CINCSTRAT called an "unparalleled" level of integration of law into GLOBAL GUARDIAN 97, the strategic nuclear exercise which took place in November 1996. A number of important lessons learned emerged from that exercise.

A. Operators must be aware of the specific obligations to incorporate legal reviews into nuclear operations planning on the same basis as conventional operations planning.

DOD policy has never made any distinction between conventional and nuclear operations when it required compliance with the law of war in the conduct of military operations. /64/ The practical application of this policy, however, was greatly facilitated by the new edition of a Chairman, Joint Chiefs of Staff instruction which specifically requires combatant command legal advisors to review "pre-planned and adaptively planned strategic targets." /65/ This review covers compliance with DOD policy, as well as domestic and international law.

The February 1996 publication Joint Pub 3-12.1 /66/ was also helpful. That document is replete with references to the applicability and importance of LOAC and, accordingly, it served to orient planners and operators to the role of legal advisors.

B. The special nature of nuclear operations requires customized training for both operators and legal staffs.

Because of the many unique applications of international law in the nuclear operations' context, USSTRATCOM's LOAC training was completely revamped prior to GLOBAL GUARDIAN 97. A classified advanced curriculum aimed at operators and others directly involved in nuclear operations augmented the traditional LOAC briefing. Overall, 96% of command personnel were trained prior to the exercise. Specialized training was also provided to senior officers at USSTRATCOM's Task Force commanders' conference in October 1996.

Like the operators, judge advocates and other legal personnel needed additional training to support nuclear operations. Besides being trained as to the special issues already mentioned, designated personnel also needed to become familiar with the policy guidance applicable to nuclear strikes found in such documents as National Security Directives, the Policy Guidance for Nuclear Weapons Employment, and the Joint Strategic Capabilities Plan (Annex C), as well as theater-specific plans.

To meet the requirement for specialized training for its legal personnel, USSTRATCOM conducted in-house training sessions, sometimes with the assistance of representatives of the Plans and Policy Directorate. In addition, that Directorate produced a customized glossary of terms and acronyms applicable to nuclear operations. USSTRATCOM judge advocates, in turn, provided

telephonic briefings (along with selected nuclear-operations oriented legal materials) to their counterparts on the legal staff of the supported geographic combatant command.

C. In order to provide timely advice, legal advisors must be immediately available to planners and others responsible for nuclear operations.

During the actual exercise, judge advocate and paralegal representation was found on USSTRATCOM's Senior Battle Staff, the Mobile Consolidated Command Center and, on a 24-hour basis, the Support Battle Staff. Judge advocates were also inaugurated into meetings of the Nuclear Planning Element (NPE).⁷⁰ The NPE composition includes the weapons systems experts who build from the bottom up the required technical information for an attack. Constant interaction with these warfighters was especially critical as it afforded the opportunity to provide planners with real-time advice for the adaptive planning process.

Of particular note was USSTRATCOM's employment, for the first time, of a reserve judge advocate to help man the Support Battle Staff. This required a taxing months-long process to obtain the necessary security clearances but proved essential to providing the necessary coverage. It once again underlines how important it is for all operational lawyers, active and reserve, to initiate the process to obtain elevated security clearances as early as possible.

D. Effective legal support of theater nuclear operations requires the involvement of the legal staffs of the supported geographic CINC.

While USSTRATCOM legal advisors are primarily responsible for the review of the Single Integrated Operation Plan (SIOP),⁷⁰ meeting the legal needs of theater support operations require a coordinated effort of USSTRATCOM legal advisors and their counterparts on the staff of the supported geographic commands.

During GLOBAL GUARDIAN 97, judge advocates were included in the exercise cell of the supported geographic CINC. This development vastly enhanced the flow of information concerning legal issues peculiar to nuclear weapons. In particular, it helped to secure appropriate LOAC assessments and ensured that the special issues that arise in the nuclear operations arena were highlighted in a timely manner to the geographic command staff. The theater CINC's legal staff was also a critical source of theater-specific information required by US STRATCOM's legal staff.

VI. CONCLUSION

This article demonstrates that nuclear weapons, like other sophisticated instrumentalities of modern war, are amenable to the law of armed conflict in both a theoretical and practical sense. This by no means downplays the horrific capability of these weapons; rather, it serves to remind us of the awesome responsibilities legal advisors must bear. It is crucially important that all military personnel involved with America's nuclear deterrent understand that a structure exists that ensures that plans involving nuclear weapons conform with the rule of law.

Of equal importance is explaining that there is, in fact, a direct relationship between conformance with the rule of law and moral rectitude. Professor Best spells this out: "It must never be forgotten that the law of war, wherever it began at all, began mainly as a matter of

religion and ethics ... It began in ethics and it has kept one foot in ethics ever since."" In short, where society's law is observed, one may rightly contend that society's moral standards are likewise respected.

Clearly, whether or not nuclear weapons are "morally indefensible" as General Butler claims wholly depends upon the purpose for which they might be employed and the manner of such employment. Having discussed the latter we must consider the former - is there anything worth defending with a nuclear weapon? What moral rights do we have? Professor Child offers this analysis of the nuclear conundrum:

We have a right to protect ourselves and preserve our society and its traditions. No matter the enormity of harm a potential aggressor might heap upon us and the rest of the planet, that right is not expunged. It is morally correct to put any such aggressor on notice. We know our rights to defend ourselves and shall exercise them. Knowing what we believe about our moral rights, any potential aggressor will know which course prudence dictates. So in the end, this deeper moral understanding of our position might help prevent the most colossal of all catastrophes. /72/

In a very real sense, the issue General Butler raises goes to the more fundamental question of the morality of war itself. For some, war is never morally defensible; others live by the motto "live free or die " /73/ John Stuart Mill captured the essence of this dichotomy in the following passage:

War is an ugly thing, but not the ugliest of things: the decayed and degraded state of moral and patriotic feeling which thinks nothing worth a war, is worse A man who has nothing which he cares about more than he does about his personal safety is a miserable creature who has no chance of being free, unless made and kept so by ... better men than himself. /74/

Fortunately for the nation, there are yet such "better" men - and women - manning the Nation's nuclear deterrent. It is their dedication that serves as a clear warning to potential adversaries not to miscalculate the resolve of the U.S. military. Should deterrence fail, our forces are - and must continue to be - ready to immediately execute orders of the national command authorities to employ nuclear weapons. Those that carry this gravest of responsibilities are entitled to be secure in the knowledge that plans they must execute honor the highest ideals of the country they have sworn to defend. They deserve nothing less from their leaders.

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1 As quoted in THE MACMILLAN DICTIONARY OF POLITICAL QUOTATIONS 459 (Lewis D. Eigen and Jonathan P. Siegel, Eds. 1993).

2 For a discussion of the duality of Shiva as a "destroyer" and "creator" see THE WORLD'S GREAT RELIGIONS 16 (Sam Welles et al., eds., 1957).

3 Military historian Martin Van Creveld observes that, ironically, "in every region where [nuclear weapons] have been introduced, large-scale, interstate war has as good as disappeared." Martin Van

Crevel, *Technology and War II*, in THE OXFORD ILLUSTRATED HISTORY OF MODERN WAR 304 (Charles Townsend, ed., 1997) (emphasis in original).

4 General Butler stated that "Nuclear weapons are inherently dangerous, hugely expensive, militarily inefficient, and morally indefensible." See R. Jeffrey Smith, *Retired Nuclear Warrior Sounds Alarm on Weapons*, THE WASHINGTON POST, December 4, 1996, at A1.

5 George Lee Butler, *The General's Bombshell*, THE WASHINGTON POST, January 12, 1997, at C1.

6 MANUAL FOR COURTS-MARTIAL UNITED STATES, ch. IV, para. 14c(2)(a)(iii) (1995) states that "dictates of a person's conscience, religion, or personal philosophy cannot justify or excuse the disobedience of an otherwise lawful order."

7 Chairman of the Joint Chiefs of Staff, JOINT VISION 2010 28, 34 (1996).

8 For example, in 1983, U.S. Catholic Bishops issued a letter entitled *The Challenge of Peace. God's Promise and Our Response* which discussed nuclear war and nuclear deterrence reprinted in WAR, MORALITY, AND THE MILITARY PROFESSION 463 (Malham M. Waikin, ed. 1983). Although the bishops accept the morality of the possession of nuclear weapons for deterrence as an interim step towards complete disarmament, and seem to leave open the possibility that an extremely limited, other-than-first-use employment against purely military targets may be moral, they nevertheless say that "there must be no misunderstanding of our profound skepticism about the moral acceptability of any use of nuclear weapons." Id., at 482. For a critique of the Bishops' letter see John W. Coffey, *The American Bishops on War and Peace* in PARAMETERS OF MILITARY ETHICS (Lloyd J. Matthews, ed., 1989), at 28.

9 To illustrate a circumstance where a moral conundrum might emerge, one analyst of the Bishops' letter notes that approximately thirty percent of the armed forces are comprised of Catholics, and further observes:

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 to disobey an order to fire a countervalue nuclear weapon. An individual may have no crisis of conscience during time of peace. If, however, he is serving in a position in which he could be ordered to launch a countervalue, how would he respond if the order were issued? *Until the time arrives, the answer to the question cannot 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 the orders.

Captain Mary E. McGrath, *Nuclear Weapons: A Crisis of Conscience*, 107 MIL. L. REV. 191, 239 (1985) (emphasis added).

10 Edward Luttwak and Stuart L. Koehl, THE DICTIONARY OF MODERN WAR 166 (1991).

11 In addition to adverse effects on military forces, public support for deterrence can also be eroded if there is a perception that it is based on an immoral and unlawful means. Compare W. Michael Reisman and Chris T. Antoniou, THE LAWS OF WAR xxiv (1994):

In modern popular democracies, even a limited armed conflict requires a substantial base of public support. That support can erode or even reverse itself rapidly, no matter how worthy the political objective, if people believe that the war is being conducted in an unfair, inhumane, or iniquitous way.

Id.

12 An established goal and objective of USSTRATCOM is to "[e]mphasize the role of law as a guiding force in our national security strategy." *USSTRATCOM Goals and Objectives*, para. B.4 (1996) (on file with the author).

13 See e.g., U.S. Air Force Pamphlet (AFP) 110-31, *International Law - The Conduct of Armed Conflict and Air Operations*, para. 6-5 (1976).

14 See e.g., *Declaration on the Prohibition of the Use of Nuclear and Thermonuclear Weapons*, United Nations General Assembly (UNGA) Res. 1653 (XVI), Nov. 24, 1961; *Non-Use of Force in International Relations and Permanent Prohibition of the Use of Nuclear Weapons*, UNGA Res. 2936, Nov. 29, 1973; and *Convention on the Prohibition of the Use of Nuclear Weapons*, UNGA Res. 47/53C (1992).

15 *Legality of the Threat or Use of Nuclear Weapons*, General List No. 95 (Advisory Opinion of the International Court of Justice, July 8, 1996) [hereinafter ICJ op.]. For an excellent analysis of the case see Michael N. Schmitt, *The International Court of Justice and the Use of Nuclear Weapons* (1997) (draft, forthcoming in the *NAVAL WAR COLLEGE REVIEW*, Fall 1997).

16 See Restatement (Third) of the Foreign Relations Law of the United States § 903 cmt. H, illus. 12 (advisory opinions are binding only when the parties agree that they will be decisive).

17 For a discussion of "customary international law" see Reisman and Antoniou, *supra* note 12, at xix-xxi.

18 ICJ op., *supra* note 15, at para. 105(2)B (emphasis added).

19 *Id.* at para. 105(2)E.

20 See *The International Court of Justice and Nuclear Weapons*, U.S. Air Force *THE REPORTER*, September 1996, at 21-22.

21 Schmitt, *supra* note 15, at 42-43.

22 Chairman of the Joint Chiefs of Staff, Joint Publication 3-12, *Doctrine for Joint Nuclear Operations*, December 1995, at [hereinafter cited as Joint Pub 3-12] states that "the fundamental purpose of US nuclear forces is to deter the use of weapons of mass destruction (WMD), particularly nuclear weapons, and to serve as a hedge against the emergence of an overwhelming conventional threat." *Id.* at v.

23 See Colonel C. Robert Kehler, *Nuclear Armed Adversaries and the Joint Commander*, *NAVAL WAR COLLEGE REVIEW*, Winter 1996, at 7, 9.

24 ICJ op. *supra* note 15, at para. 105(2)D. See also Written Statement of the Government of the United States of America before the International Court of Justice, June 14, 1994 (Request by the World Health Organization for an Advisory Opinion on the Question of the Legality Under International Law of the Use of Nuclear Weapons by a State in War or Other Armed Conflict), at 26-31) (discussing the application of various LOAC principles to nuclear operations) [hereinafter U.S. ICJ stmt.].

25 U.S. ICJ stmt. *supra* note 24, at 26. Accord L.C. Green, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 124-126 (1993). For an overview of nuclear weapons in the context of legal and policy issues see Ronald F. Lehman II, *Nuclear Weapons: Deployment, Targeting and Deterrence in NATIONAL SECURITY LAW* (John Norton Moore et al. Eds., 1990) at 485.

26 George Bunn, the former general Counsel for the Arms Control and Disarmament Agency, argues that until the early 1970s, the U.S. lacked the technology to "permit significant discrimination between population and other targets in or near cities." See George Bunn, *US Law of Nuclear Weapons*, *NAVAL WAR COLLEGE REVIEW*, Fall 1984, at 58-59.

27 Chairman of the Joint Chiefs of Staff, Joint Publication 3-12.1, Doctrine for Joint Theater Nuclear Operations, 9 February 1996, [hereinafter Joint Pub 3-12.1].

28 *Id.*, at 111-2 and 111-3.

20 For a very brief explanation of nuclear weapons technology see Luttwak and Koehl, *supra* note 10.

30 These terms have specific definitions. For example, "casualties" are defined as the "estimated number of people who die or receive injuries that require medical treatment due to short term effects (6 months) of nuclear detonations." "Population at Risk" is defined as the "total civilian population in danger of dying, independent of shelter, from short term (6 months) effects of nuclear detonations." See Memorandum, Acronyms/Definitions Used in SIOP Analysis(U), USSTRATCOM Plans and Policy Directorate, Force Assessment Branch (April 1997) (on file with author).

31 Compare Glenn E. James, CHAOS THEORY: THE ESSENTIALS FOR MILITARY APPLICATIONS 57-95 (Newport Paper No. 10, Naval War College, 1996) (discussing the limitations of computer modeling).

32 W. Hays Parks, Air War and the Law of War, 32 A.F. L. REV. 1, 168 (1990).

33 For a historical overview of U.S. doctrine concerning population targeting, see Jeffrey Richelson, Population Targeting and U.S. Strategic Doctrine, in STRATEGIC NUCLEAR TARGETING (Desmond Ball and Jeffrey Richelson, eds., 1986) 234-249.

34 See U.S. ICJ Stmt, *supra* note 24, at 26, 31. "For the purpose of the law of armed conflict, reprisals are retaliation in the form of conduct that would otherwise be unlawful, resorted to by one belligerent in response to violations of the law of war by another belligerent." *Id.*, at 31. Moreover, "[u]nder the customary law of armed conflict, reprisals may only be taken for the purpose of enforcing future compliance with [the] law, and must comply with certain rules limiting scope and effect" *Id.*, citing U.S. Army, Field Manual 27-10, Law of Land Warfare (1956), at 177.

35 Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, U.N. Doc. A/32/144, 16 I.L.M. 1391 [hereinafter Protocol I].

36 U.S. ICJ stmt. *supra* note 24, at 28-29. The U.S. reiterated and detailed this position in a later submission to the ICJ. See Written Comments of the Government of the United States of America on the Submissions of Other States before the International Court of Justice, June 20, 1995 (Request by the World Health Organization for an Advisory Opinion on the Question of the Legality Under International Law of the Use of Nuclear Weapons by a State in War or Other Armed Conflict) at 23-30.

37 *Id.* at 31. See generally, Matt C.C. Bristol III, The Laws of War and Belligerent Reprisals Against Enemy Civilian Populations, 21 A.F. L. REV. 397 (1979).

38 James W. Child, NUCLEAR WAR: THE MORAL DIMENSION 171-172 (1986).

39 See U.S. Navy, Annotated Supplement to the Commander's Handbook of the Law of Naval Operations, Naval Warfare Publication (NWP) 9 (Rev.A) (1989) para. 8.5.1.2 (discussing the prohibition on the bombardment for the sole purpose of terrorizing civilians) and Parks, *supra* note 32, at 142 (discussing the general proposition of psychological purposes as military objectives).

40 See Geoffrey Best, LAW AND WAR SINCE 1945 274-275 (1994).

41 Joint Pub 3-12.1, *supra* note 27, at III-7.

42 For a listing of some of these agreements see Joint Pub 3-12 *supra* note 22 at Appendix A.

43 Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Reduction and Limitation of Strategic and Offensive Arms, July 31, 1991 reprinted in U.S. Dep't of State Dispatch Supplement (1991).

44 See generally Stewart M. Powell, Nuclear Arms Reductions Roll On, *AIR FORCE MAGAZINE*, December 1996, at 57.

45 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies (The Outer Space Treaty), 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205, 27 January 1967. See also Treaty on the Prohibition of the Emplacement of Nuclear Weapons on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof, 23 U.S.T. 701, 955 U.N.T.S. 115, Feb. 11, 1971.

46 See e.g., Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, 402 U.N.T.S. 71; Treaty for the Prohibition of Nuclear Weapons in Latin America (Treaty of Tlatelolco), Feb. 14, 1967, 22 U.S.T. 762, 634 U.N.T.S. 762; South Pacific Nuclear Free Zone Treaty (Treaty of Rarotonga), Aug. 6, 1985, 24 I.L.M. 1442 (1985), and its Protocols; and the African Nuclear-Weapon-Free Zone (Pelindaba Text), May, 1996, 35 I.L.M. 698 (1996). See generally, Mark E. Rosen, Nuclear-Weapons-Free Zones, *NAVAL WAR COLLEGE REVIEW*, Autumn 1996, at 44.

47 Rosen, *Id.*

4⁸ *Id.*, at 47.

49 Lehman, *supra* note 25, at 542-546.

50 Rosen, *supra* note 46, at 57 (discussing claim of the former USSR that allowing transit was incompatible with a NWFZ).

51 Treaty on the Non-Proliferation of Nuclear Weapons (NPT), July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161.

52 Dep't of State, Statement of Secretary of State Warren Christopher, April 5, 1995.

53 See George Bunn, Expanding Nuclear Options: Is the U.S. Negating Its Non-Use Pledges?, *ARMS CONTROL TODAY*, May/June 1996, 7, 9-10.

54 See *supra* note 34.

55 Contra Bunn *supra* note 53.

56 Compare Green, *supra* note 25, at 260-261.

57 Ian Brownlie, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES*, 362-363 (1963).

58 It has been widely reported that cruise missiles flew through Iranian airspace during the Gulf War without the explicit permission of the Iranian government. See Michael R. Gordon and General Bernard E. Trainor, *THE GENERALS' WAR* 116 (1995).

59 AFP 110-31, *supra* note 13, at para. 2-1h.

60 *Id.*

61 See Joint Pub 3-12 *supra* note 22, at II-1. See generally Lehman *supra* note 25, at 501-503 (discussing command and control of U.S. nuclear forces).

62 Van Creveld *supra* note 3, at 305.

63 See e.g. 42 U.S.C. §2121 *et seq.*

64 Dep't of Defense Directive 5100.7, DOD Law of War Program, July 10, 1979, at para. E. La.

65 Chairman Joint Chiefs of Staff Instruction (CJCSI) 5810.01, Implementation of the DOD Law of War Program, (August 1996), at para. 5c(4) (emphasis added).

66 *Supra* note 27.

67 For a general overview of nuclear war planning policies, see David Alan Rosenberg, Nuclear War Planning in THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD 160-190 (Michael Howard, George J. Andreopoulos, and Mark R. Shulman, eds., 1994).

68 See *supra* note 30.

69 For a discussion of the mission and organization of the Senior Battle Staff, the Support Battle Staff, and the Nuclear Planning Element see USSTRATCOM Directive 506-4, Crisis Staffing Procedures of the United States Strategic Command Fixed Command Center, 1 March 1996.

70 The Director for Operational Plans and Interoperability (J-7) also has this responsibility. CJCSI 5810.01 *supra* note 66, at para. 5a(2)(d). The SIOP is the "U.S. contingency plan for strategic nuclear war. The SIOP provides the president and the national command authorities with a variety of attack options, each with its own targets, timing, tactics, and force requirements." Luttwak and Koehl, *supra* note 10, at 533-534.

71 Best, *supra* note 40, at 289.

72 Child, *supra* note 38, at 173.

73 "Live free or die" is motto of the State of New Hampshire.

74 John Stuart Mill in *Dissertations and Discussions*, "The Contest in America" (1859), as quoted in THE COLUMBIA DICTIONARY OF QUOTATIONS (Microsoft Bookshelf ed. 1993) (emphasis in original).