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NUCLEAR LAW:

The applicability of Canadian and related international public law principles to litigating the issue of nuclear weapons in Canadian courts.

Margaret E. Gouin

Thesis presented in fulfillment of the requirements of the Master of Laws (LL.M.) Degree at the University of Ottawa



Margaret E. Gouin, Ottawa, Canada, 1990



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ABSTRACT

The purpose of this thesis is to examine questions of substantive law raised by the prospect of bringing the issue of nuclear weapons before a Canadian court.

First, the history of litigation of nuclear issues since 1945 will be reviewed, to provide a background on how these issues have been approached to date by different courts in different jurisdictions. Next, the relevant principles of international law will be examined for their application, either direct or indirect, to nuclear weapons issues. There is little international law which addresses nuclear weapons directly. However, there are many general principles and rules of customary international law, now firmly established, which govern both the means and the methods of warfare (international humanitarian law), and these will be studied to see how, if at all, they can be applied to nuclear weapons. Other areas of international public law, such as environmental law, human rights law and international criminal law, will also be examined to see how they may be applied to nuclear weapons. In addition, consideration is given to the effect of such influential aspects of the international system as resolutions of the United Nations and unilateral declarations by states.

This is followed by a study of how and when international law can be applied by a domestic court in Canada.

The next chapter examines principles of Canadian law which may have an application to the issue of nuclear weapons. The primary sources here are the *Canadian Charter of Rights and Freedoms*, the *Constitution Act, 1982* and the Criminal Code.

Finally, the conclusion considers the implications of the above analysis of substantive law for the use of domestic Canadian courts to litigate the issue of nuclear weapons in the future.

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LIST OF ABBREVIATIONS

A.F.L.R.	Air Force Law Review
A.J.I.L.	American Journal of International Law
A.J.I.L. Supp.	American Journal of International Law (Supplement)
Alta. L.R.	Alberta Law Review
Am. Pol. Sci. Rev.	American Political Science Review
B.Y.I.L.	British Yearbook of International Law
Brooklyn J.I.L.	Brooklyn Journal of International Law
Buffalo L.R.	Buffalo Law Review
Bull. Peace Proposal	Bulletin of Peace Proposals
C. de D.	Cahiers de droit
C.H.R.Y.	Canadian Human Rights Yearbook
C.R.	Criminal Reports
C.T.S.	Consolidated Treaty Series
C.Y.I.L.	Canadian Yearbook of International Law
Cal. West. I.L.J.	California Western International Law Journal
Cam. L.J.	Cambridge Law Journal
Can. Bar. Rev.	Canadian Bar Review
Can. T.S.	Canada Treaty Series

Case W. Res. J.I.L.	Case Western Reserve Journal of International Law
Col. J.L. & Soc. Probs.	Columbia Journal of Law and Social Problems
Colum. J. Transnat. L.	Columbia Journal of Transnational Law
Cornell I.L.J.	Cornell International Law Journal
Current Leg. Prob.	Current Legal Problems
Denver J.I.L. & Policy	Denver Journal of International Law and Policy
Fordham L.R.	Fordham Law Review
G.A. Res.	General Assembly Resolution (United Nations)
Ga. J.I. & Comp. L.	Georgia Journal of International and Comparative Law
Geo. Wash. L.R.	George Washington Law Review
Harvard I.L.J.	Harvard International Law Journal
I.C.J. Rep.	International Court of Justice Reports
I.C.L.Q.	International and Comparative Law Quarterly
I.L.M.	International Legal Materials
Int'l J.	International Journal
Int'l Law	International Law
Israel Y.H.R.	Israel Yearbook of Human Rights
J. Peace Research	Journal of Peace Research
J. U.S. Army War College	Journal of the United States Army War College
J.A.G.J.	Judge Advocate General Journal
Jurid. Rev.	Juridical Review

Kansai U. Rev. L. & Pol.	Kansai University Review of Law and Policy
Ky. L.J.	Kentucky Law Journal
L.Q.R.	Law Quarterly Review
Law & Contemp. Prob.	Law and Contemporary Problems
McGill L.J.	McGill Law Journal
Michigan L.J.	Michigan Law Journal
Mil. L.R.	Military Law Review
Minnesota L.R.	Minnesota Law Review
N.Y.L.S.J.I. & Comp. L.	New York Law School Journal of International and Comparative Law
N.Y.L.S.L.R.	New York Law School Law Review
Nordic J.I.L.	Nordic Journal of International Law
Northwestern U.L.R.	Northwestern University Law Review
Ottawa L.R.	Ottawa Law Review
Proc. A.S.I.L.	Proceedings of the American Society of International Law
R. de C.	Recueil de Cours
R.D.H.	Revue de droits de l'homme
R.G.D.I.P.	Revue générale de droit international public
R.J.T.	Revue juridique Thémis
Rev. dr. pén. crim.	Revue de droit pénal et criminel
Rev. dr. pén. mil.	Revue de droit pénal militaire
S. Cal. L.R.	Southern California Law Review
Santa Clara L.R.	Santa Clara Law Review
Stan. J.I.L.	Stanford Journal of International Law

Supreme Court L.R.	Supreme Court Law Review
Syr. J.I.L. & Comm.	Syracuse Journal of International Law and Commerce
Tex. L.R.	Texas Law Review
Trans. Grotius Soc.	Transactions of the Grotius Society
Tul. L.R.	Tulane Law Review
U.K.T.S.	United Kingdom Treaty Series
U.N. Doc.	United Nations Document
U. Cin. L.R.	University of Cincinnati Law Review
U. Malaysia L.R.	University of Malaysia Law Review
U. of T. L.J.	University of Toronto Law Journal
U. Tol. L.R.	University of Toledo Law Review
U.W.O.L.R.	University of Western Ontario Law Review
Va. J.I.L.	Virginia Journal of International Law
Wash. L.R.	Washington Law Review
Yale L.J.	Yale Law Journal
Y.I.L.C.	Yearbook of the International Law Commission

Chapter 1

INTRODUCTION

Since the first atomic bomb was dropped on Hiroshima on 6 August 1945—followed a few days later (9 August) by the larger plutonium bomb dropped on Nagasaki—the legal profession has not distinguished itself by its involvement in the ongoing debate over the place of nuclear weapons in our modern world. Indeed, the profession has appeared to want to distance itself from a topic which it often characterized as political or military, but not legal, in character. In the days following the end of World War II, the war crimes trials in Nuremberg and Tokyo focussed exclusively on the crimes of the defeated Axis powers; activities of the victorious Allies (sometimes referred to as the “United Nations,” not to be confused with the United Nations Organization founded at San Francisco in 1945) were not subjected to any kind of judicial scrutiny.¹

¹For example, in the Indictment for the trial of major war criminals before the International Military Tribunal at Nuremberg, Section (G) of “Count Three—War Crimes” deals with “Wanton Destruction of Cities, Towns, and Villages and Devastation not Justified by Military Necessity.” The section makes no mention of the prolonged

Academic lawyers were also slow to respond to the challenge posed by the existence of nuclear weapons. Perhaps this was due to reluctance to question a weapon which at that time was credited with bringing the Pacific War to a quick end. Perhaps it was because of a more general hesitation to question the actions of a victorious military. And perhaps it was because of lack of knowledge of the long-term effects of nuclear weapons, soon to become so evident as the scars of Hiroshima and Nagasaki refused to heal.

and destructive use of aerial bombardment by Nazi Germany, for example against London and Canterbury in England. Argument condemning such acts would have been singularly difficult to sustain for the Allied forces that destroyed Dresden the same way. See *Trial of the Major War Criminals Before the International Military Tribunal* (Nuremberg, Germany: International Military Tribunal, 1947) v. 1 at 27. In the trials of major war criminals before the International Military Tribunal for the Far East at Tokyo, Judge Pal of India, in a lengthy dissenting judgement, found the whole process by which both Tribunals were established to be fundamentally flawed:

[I]t is beyond the competence of any victor nation to go beyond the rules of international law as they exist, give new definitions of crimes [Crimes Against Peace, War Crimes and Crimes Against Humanity] and then punish the prisoners for having committed offence [sic] according to this new definition. . . .

The Charter [of the International Military Tribunal], we should remember, not only gave ex post facto law but gave it not even for general purposes but for the purposes of trial of the particular prisoners. It was ex post facto law meant not for all people for but a special person or a special group of persons.

Dissenting judgement of Pal J. in B.V.A. Röling & C. F. Rüter (eds.), *The Tokyo Judgment* (Amsterdam: APA-University Press Amsterdam BV, 1977), v. 2 at 549, 1023.

The first major works on legal issues raised by nuclear weapons were Georg Schwarzenberger's *The Legality of Nuclear Weapons*² and Nagendra Singh's *Nuclear Weapons and International Law*.³ These works stood virtually alone for some time: the 1960s and 1970s were the Cold War years, and there was little support for questioning the weapons which were seen as all that stood between a tense and fragile peace on one hand, and total chaos on the other.

The 1980s have seen a considerable resurgence of interest in the legal issues raised by the existence and development of nuclear weapons. The literature has multiplied rapidly, primarily in legal journals, and several law schools have held symposia on the topic.⁴ A number of lawyers' and jurists' organizations have been established specifically to address legal questions implicit in the debate, and an international organization of lawyers has been established to encourage the involvement of the profession worldwide in the discussion.⁵

²London: Stevens, 1958.

³London: Stevens, 1959.

⁴The most significant of these to date are recorded in (1983) 28 McGill L.J., (1983) 9 Brooklyn J.I.L. and (1985) 4 N.Y.L.S.J.I. & Comp. L.

⁵The International Association of Lawyers Against Nuclear Arms (IALANA) is a group whose members are activist lawyers' organizations. The impetus for establishing

Nevertheless, the legal profession has given ample evidence of its traditional conservatism in the slowness of its response to the challenges implicit in assessing the relationship of nuclear weapons to the laws that, prior to 1945, governed activities of States in time of war. In particular, there has been little enthusiasm for questioning government defence policies or other government actions that involve the development, manufacture, stockpiling or possible use of nuclear weapons. This conservatism may also have arisen from the view, held by some, that nuclear weapons have been beneficial insofar as their presence has been seen to exert a stabilizing influence on relations between the United States and the Soviet Union.⁶

IALANA came from a joint initiative in 1987 by the Lawyers' Committee for Nuclear Policy (in the United States) and the Association of Soviet Lawyers.

⁶There are, however, two immediate difficulties with this view in the contemporary context. Firstly, it is suggested that it only holds true in regard to maintaining a balance of power between two superpowers with roughly equal destructive capabilities. It fails to deal adequately with the present proliferation of nuclear weapons (or nuclear capability) among smaller "third world" states. Secondly, as will be examined at greater length below, the policy of mutual deterrence which is seen, in this view, to be beneficial, is arguably in violation of established principles of international humanitarian law which prohibit targeting of civilian populations or terrorizing a civilian population by acts or threats of violence. (See *infra*, nn. 178 and 179 and accompanying text. With regard to possible implications under international law prohibiting genocide, see *infra*, n. 231 and accompanying text.)

The failure to mount legal challenges to nuclear weapons policies may also result in part from the lack of appropriate judicial mechanisms for so doing. It is of little value to prepare a case that has no chance of being heard in any court. And peace groups in general may have regarded the legal profession as too much part of "the Establishment" to be an ally in the battle against progressive nuclearization. However, the increasing involvement of the legal profession in the nuclear debate may indeed give rise to more litigation in this regard.

This thesis proposes to demonstrate that the legality of nuclear weapons is an issue appropriate for litigation in the courts. This being so, the most acceptable vehicle for bringing these issues forward must be established. The following argument will focus on the appropriateness (or otherwise) of using the Canadian domestic judicial system as such a vehicle. In particular, it is necessary to examine whether or not this would put the courts in an invidious position *vis-à-vis* the Parliament of Canada; and whether—either because of or in spite of the tensions which must necessarily be generated by raising the issue in such a forum—the Canadian judicial environment can provide a useful *locus* for new growth in this particular area.

The argument commences by examining what legal proceedings have so far been essayed in this field, and what the results of these attempts have been. Subsequent chapters will deal with principles of international law which are applicable to the issue of the legality of nuclear weapons, the relationship between international law and

domestic law, and the applicable principles of Canadian law in this area. Finally, the implications of the material presented for judicial activity in this regard in Canada will be considered.

The primary concern of this thesis is litigation by interest groups and individuals, which is conducted by resort to domestic courts. The central focus is how the domestic legal system and domestic law can be used in an area of litigation which has never before been broached in Canada, and which up until now has not been considered the field of individuals but more a matter of state. No attempt will be made therefore to discuss the possibility of bringing the issue of the legality of nuclear weapons before the International Court of Justice (ICJ) at The Hague. While it might be argued that this is a more appropriate forum for the matter than a domestic Canadian court, the ICJ is the purview of governments, not individuals, and so involves different considerations from those addressed herein.

It should further be noted that a "broad brush" approach has been adopted, in order to examine the full scope of the issue under discussion. A detailed, in-depth study of the many issues raised by this wide-ranging approach is beyond the scope of the present work.

Chapter 2

LITIGATION OF NUCLEAR WEAPONS ISSUES: AN HISTORICAL OVERVIEW

2.1 International Litigation

2.1.1 The Tokyo War Crimes Tribunal

Following the Allied victory in World War II, two International Military Tribunals were established, at Nuremberg and Tokyo, to try military personnel from the Axis countries (Germany, Italy and Japan) for crimes under the international law governing armed conflicts. These trials were, as noted earlier, an expression of "victor's justice."⁷ Furthermore, and again undoubtedly on the principle of "victor's justice," the Tokyo Trial of Major Japanese War Criminals, which dealt with offences committed in the Pacific theatre, did not afford any opportunity for debate on the legality of the American atomic bombing of Hiroshima and Nagasaki. Nevertheless, Mr. Justice Pal, the Indian member of the International Military Tribunal at Tokyo, delivered a

⁷*Supra*, n. 1.

vehement dissenting judgement in that trial which included the opinion that the atomic bombing of the two Japanese cities was at least equal in atrocity to, if not worse than, any act of which the Japanese war criminals were accused.⁸

2.1.2 The Nuclear Tests Cases

There has to date only been one instance in which the issue of the legality of nuclear weapons has been brought before the International Court of Justice at the Hague (the "ICJ"). Although consideration of international adjudication is beyond the scope of the present paper, mention must be made of this unique event.

⁸Pal J. quoted extracts from a letter written by the German emperor during World War I, outlining what the learned judge said was a "policy of indiscriminate murder to shorten the war" which had subsequently been considered a crime. He then continued:

In the Pacific war under our consideration, if there was anything approaching what is indicated in the above letter of the German emperor, it is the decision coming from the allied powers to use the atom bomb. . . . It would be sufficient for my present purpose to say that if any indiscriminate destruction of civilian life and property is still illegitimate in warfare, then, in the Pacific war, this decision to use the atom bomb is the only near approach to the directives of the German Emperor during the first world war and of the Nazi leaders during the second world war. Nothing like this could be traced to the credit of the present accused.

Dissenting judgement of Pal J. in *The Tokyo Judgment*, *supra*, n. 1 at 982.

In 1973, both Australia and New Zealand challenged France's atmospheric testing of nuclear weapons in the South Pacific.⁹ Each country brought an application before the International Court to have the French tests, as well as all other atmospheric tests conducted by any country, declared illegal under general principles of international law outlawing above-ground nuclear testing, under international principles of "good neighbourliness" forbidding any state from causing avoidable harm to another state or its nationals (in this case by radioactive fallout) and under the well-known principle of state sovereignty, which was interfered with by nuclear fallout and by such security measures related to the explosions as the declaration of security zones on the high seas. The case also had important political overtones, since France had refused to sign the 1963 *Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and Under Water* (the "Limited Test Ban Treaty"), and indeed most other arms control agreements.

The first problem raised by the case was jurisdictional. France had formally accepted the compulsory jurisdiction of the International Court of Justice, but not for disputes involving issues of national defence, which it claimed to be involved in this case. Furthermore, and perhaps more importantly, France objected that the issue raised

⁹By the beginning of 1972, France had conducted twenty-six above-ground (atmospheric) nuclear tests in the South Pacific. All these blasts were conducted under a balloon, and not on the earth's surface.

by the nuclear tests was not in essence juridical, but in fact purely political and therefore not susceptible to resolution by a court.

Without dealing with the issue of jurisdiction, the ICJ on 22 June 1973 granted Orders of Interim Protection to both Australia and New Zealand, requesting the parties to refrain from any action which might aggravate the situation and in particular enjoining the French government from any further atmospheric tests.¹⁰ However, in the course of 1974 the French government publicly announced that it would not be conducting any further atmospheric tests in the South Pacific. Thus on 20 December 1974 the Court issued a judgement which refused to decide the issue on the grounds that the dispute was now moot and there was therefore no reason for it to attempt to exercise any further jurisdiction.¹¹ France subsequently resumed testing, but below ground. The issue of the legality of nuclear weapons or testing has not been brought before the International Court since then.

¹⁰These Orders are reported at [1973] I.C.J. Rep. 99, 12 I.L.M. 749.

¹¹[1974] I.C.J. Rep. 253. For more detailed discussion of these cases, see P. Lellouche, "The Nuclear Test Cases: Judicial Silence v. Atomic Blasts" (1975) 16 Harvard I.L.J. 614; E. McWhinney, "International Law-Making and the Judicial Process: the World Court and the French Nuclear Tests Case" (1975) 3 Syr. J.I.L. & Comm. 9.

2.2 Domestic Litigation: The *Shimoda* Case

In 1955, five Japanese citizens commenced a legal action against the Japanese Government, claiming damages for injuries allegedly suffered as a consequence of the American atomic bombings of Hiroshima and Nagasaki.¹²

The plaintiffs claimed that the use of atomic bombs by the United States violated both conventional and customary international law. They further claimed that what is illegal at international law is also illegal under domestic law. The plaintiffs obviously considered the United States to be the real defendant, as the party responsible for the atomic attacks, and devised their statement of claim to try to avoid the pitfalls of "act of state" and "sovereign immunity," either of which if invoked would act as defences to bar the presentation of their claim.

The plaintiffs further argued that Japan (not the United States) was the proper forum, since the injuries complained of had occurred there, and that Japanese municipal law therefore applied. They further asserted their right as individuals to make a claim based in international law.

¹²Reported in English at (1964) 8 Japan Ann. I.L. 212. A contemporary analysis of the case was made by R.A. Falk in "The Shimoda Case: A Legal Appraisal of the Atomic Attacks Upon Hiroshima and Nagasaki"(1965) 59 A.J.I.L. 759.

However, under Article 19(a) of the peace treaty ending the Pacific war Japan had waived all claims by it or its nationals against the Allied Powers or their nationals arising from the war or actions taken because of the war. The plaintiffs argued strenuously that the government of Japan had acted wrongfully in so waiving the rights of its nationals, and so was responsible for any losses sustained by them.

The case was decided by the District Court of Tokyo on 7 December 1963. The decision is important for the Court's finding that the atomic bombing of Hiroshima and Nagasaki was a violation of international law. The Court courageously refused to accept the argument that because there was no specific prohibition in international law against the use of nuclear weapons, therefore such use must be deemed to be legal.

It can naturally be assumed that the use of a new weapon is legal as long as international law does not prohibit it. However, the prohibition in this context is to be understood to include not only the case where there is an express rule of direct prohibition, but also the case where the prohibition can be implied *de plano* from the interpretation and application by analogy of existing rules of international law (customary international law and treaties). Further, the prohibition must be understood also to include the case where, in the light of principles of international law which are at the basis of these positive rules of international law, the use of a new weapon is deemed to be contrary to these principles, for there is no reason why the interpretation of rules of international law should be limited to literal interpretation, any more than the interpretation of rules of municipal law. . . . Thus, for a weapon to be legal it is not enough that it is a new weapon;

and a new weapon must naturally be subjected to the examination of positive international law.¹³

The Court found that both cities were undefended, and invoked a generally recognized principle of international law respecting air warfare that indiscriminate aerial bombardment extending beyond the bombardment of military objectives to an attack on an undefended city is not permissible.¹⁴ It further noted that aerial bombardment with an atomic bomb, even when the target is confined to military objectives, brings about the same result as a blind aerial bombardment because of the tremendous destructive power of the bomb.¹⁵

The Court also noted the similarity between the effects of nuclear weapons and the effects of poison and poisonous weapons and bacteriological methods of warfare. While acknowledging that there was no established legal opinion on the difference between poisonous and bacteriological weapons of warfare on the one hand, and atomic weapons on the other, it stated:

[I]t can safely be concluded that besides poisons, poisonous gases and bacteria, the use of means of injuring the enemy which cause injury at least as great as or greater than these

¹³(1964) 8 Japan Ann. I.L. 212 at 235-36..

¹⁴*Ibid.* at 238.

¹⁵*Ibid.* at 239.

prohibited materials is prohibited by international law. It is doubtful whether the atomic bomb with its tremendous destructive power was appropriate from the viewpoint of military effect and was really necessary at that time. . . . [I]t is not too much to say that the sufferings brought about by the atomic bomb are greater than those caused by poisons and poisonous gases; indeed the act of dropping this bomb may be regarded as contrary to the fundamental principle of the law of war which prohibits the causing of unnecessary suffering.¹⁶

However, in spite of these findings which were favourable to the plaintiffs, the Court ultimately denied the claim. It did not allow the plaintiffs an individual right to action under international law, asserting that an individual must depend on her country to make a claim for her. Japan having waived that right under the terms of the peace treaty, there was no cause of action available for the plaintiffs to pursue.

The *Shimoda* case represents the first, and for a long time the only, attempt by a domestic court to evaluate the legality of the use of nuclear weapons. As such, it provides an important insight into the difficulties faced by such a court in wrestling with a problem of primarily international law. It remains a valuable example for future legal action in this area.

¹⁶*Ibid.* at 241-42. The principles of international law invoked by the District Court are examined in greater detail in Chapter 3, *infra*.

2.3 Litigation of Nuclear Weapons Issues in Canada

2.3.1 Standing to litigate the issues—the private sector

There is little point in building a legal action on the legality of nuclear weapons if you cannot get into court with it. A primary consideration therefore is whether the court will grant you standing—the right to present the case. In Canada, requirements of standing depend on the remedy sought.

Where the person or property of a plaintiff is or has been threatened, she has an “interest” in an action that gives her a claim to a number of remedies. Where a plaintiff has such a private right to redress, she will have standing to bring an action even though there may also be others who are similarly injured and who have a similar right to the same remedy.¹⁷

Where the plaintiff does *not* appear to have such an “interest” in the traditional sense, the situation is more difficult. The remedy most commonly sought by those challenging the validity of legislation, whose own persons or property are not immediately threatened (i.e., who lack the “interest” that traditionally gives rise to standing), is the

¹⁷This was established in the leading common law case on the declaratory action in public law, *Dyson v. Attorney General*, [1911] 1 K.B. 410, 103 L.T. 707.

declaration, in which a court states the law without changing it in any way.

In Canadian courts, the requirements for standing in declaratory actions on *constitutional* issues have undergone considerable metamorphosis in recent years, resulting in a much more open and flexible procedure, and allowing a broader access to the courts for plaintiffs interested in challenging the constitutionality of legislation.¹⁸

The "Trilogy" Cases

The first of the so-called "Standing Trilogy" is *Thorson v. A.-G. Canada*.¹⁹ The plaintiff, as a federal taxpayer, sought a declaration that the *Official Languages Act* and appropriations made for its implementation were invalid. The action was brought in Ontario, and the Attorney-General for Canada successfully challenged the plaintiff's right to sue.²⁰

¹⁸There is at present only one non-constitutional case which displays this broader approach to standing: *Finlay v. Minister of Finance of Canada* (1983), 48 N.R. 126 (F.C.A.), an administrative law case.

¹⁹[1975] 1 S.C.R. 138, 43 D.L.R. (3d) 1, 1 N.R. 225.

²⁰The Attorney-General's case was based on the Ontario case of *Smith v. A.-G. Ont.*, [1924] S.C.R. 331, [1924] 3 D.L.R. 189, 42 C.C.C. 215. *Smith* stood for the principle that in order to have standing to challenge legislation, a plaintiff must be able to show

In the Supreme Court of Canada, however, by a 6:3 judgement, Thorson was accorded standing to bring his suit. It was pointed out that the granting of standing is a matter within the discretion of the court, and *where there is a justiciable constitutional issue*, the court should always exercise that discretion in favour of giving standing to the plaintiff. Although Thorson based his claim to standing on his financial interest in the matter as a federal taxpayer, Laskin J. (as he then was), writing for the majority, noted that “[i]t is not the alleged waste of public funds alone that will support standing but rather *the right of the citizenry to constitutional behaviour by Parliament where the issue in such behaviour is justiciable as a legal question.*”²¹

One factor in the Supreme Court's decision in *Thorson* was that the *Official Languages Act* did not create any offences or penalties which could directly affect members of the public and give them a traditional “interest” on which to base a legal action. This matter was again debated in *Nova Scotia Board of Censors v. McNeil*,²² the second of the “Trilogy” cases. The plaintiff McNeil was challenging the validity of

actual (as opposed to speculative or hypothetical or possible) harm, and also exceptional prejudice (i.e., the plaintiff suffers a different *kind* of harm as a result of the act or legislation complained of, than do other members of the public generally).

²¹43 D.L.R. (3d) 1 at 19 (emphasis added).

²²[1976] 2 S.C.R. 265, 55 D.L.R. (3d) 632, 5 N.R. 53.

the Act under which the Nova Scotia Board of Censors prohibited the exhibition of films it deemed unsuitable. In this case the Act did create offences and penalties, but these were applicable only to establishments which showed films in violation of the Board's directions, and not to the public at large. The Supreme Court again placed the main focus of its decision to grant standing on the importance of the constitutional issue raised by McNeil's declaratory action, and also noted that he had tried unsuccessfully to raise the issue otherwise. Feeling that the Act had as one of its central aspects an effect on the public at large, and that the matter of the constitutionality of the legislation might not be litigated at all if the plaintiff were denied standing, the Court exercised its discretion in his favour.

In the final "Trilogy" case, *Minister of Justice v. Borowski*,²³ the plaintiff Borowski (suing as a citizen and a federal taxpayer) alleged a conflict between the Criminal Code and the Canadian Bill of Rights in that the former, by allowing therapeutic abortions under certain circumstances, violated a foetus's right to life under the latter. The Supreme Court, by a 7:2 majority, granted standing to the plaintiff. As in *Thorson* and *McNeil*, the primary underlying consideration would appear to be that an important constitutional issue should not fail of judicial review only for want of standing. Martland J., writing for the majority, referred to the two preceding cases and noted:

²³[1981] 2 S.C.R. 575, [1982] 1 W.W.R. 97, 130 D.L.R. (3d) 588.

I interpret these cases as deciding that to establish status as a plaintiff in a suit seeking a declaration that legislation is invalid, if there is a serious issue as to its invalidity, a person need only to show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the Court.²⁴

Standing and the Charter of Rights and Freedoms

The possibility of obtaining standing in challenging the constitutionality of legislation and even of government conduct appears to have been considerably enhanced by the enactment of the *Canadian Charter of Rights and Freedoms* (the "Charter"). The critical section is 24(1):

24.(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.²⁵

²⁴130 D.L.R. (3d) 588 at 606 (emphasis added).

²⁵The implications of this section were very fully canvassed by the Supreme Court of Canada in a case which in fact did not address the issue of standing directly: *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441, 18 D.L.R. (4th) 481, on appeal from (1983) 3 D.L.R. (4th) 192 (F.C.A.) *rev'g* [1983] 1 F.C. 429 (T.D.), hereinafter "Operation Dismantle.". This case will be discussed in more detail in Section 2.3.2, *infra*.

The wording of the section suggests at first glance that a *past* infringement or denial of one of the rights guaranteed by the Charter is necessary. However, there are a number of judicial *dicta* which indicate that an *anticipated or threatened* infringement or denial would be sufficient to invoke this section. In *R. L. Crain Inc. v. Couture*, the Saskatchewan Court of Queen's Bench noted:

If s. 24(1) is interpreted so that persons will be denied access to the courts until their rights have actually been violated, persons will be left without an effective means of enforcing their rights, and the rights will be rights only in theory. . . . [S.] 24(1) refers to rights being "infringed or denied". If the term "infringed" is to add anything to the term "denied" it must contemplate a situation short of an actual denial of rights. In my view, the term "infringed" should be given an independent meaning; the term is broad enough to encompass present threats to a person's rights or freedoms.²⁶

In the *Operation Dismantle* case, Dickson C.J.C. noted that "regardless of the basis upon which the appellants advance their claim for declaratory relief . . . they must at least be able to establish *a threat of violation, if not an actual violation*, of their rights under the Charter."²⁷ In the same case, however, it should be noted that some remarks of Madame Justice Wilson, in her separate concurring judgement,

²⁶(1983) 6 D.L.R. (4th) 478 at 517-18, *per* Schiebel J.

²⁷(1985) 18 D.L.R. (4th) 481 at 487 (emphasis added). Dickson C.J.C. was writing for the majority of the court.

suggest that establishment of a prior violation of a Charter right is necessary to bring s. 24(1) into play:

Where . . . the unconstitutionality of a law or an act is founded upon its conflict with a right, *then the right must be alleged to have been violated. . . .* [S.] 24(1) of the Charter makes the infringement or denial of a right a *pre-condition to obtaining relief in the courts under that section.*²⁸

Notwithstanding this passage in Wilson J.'s judgement, the view most generally held by both courts and commentators appears to follow Dickson C.J.C.'s view that s. 24(1) is wide enough to encompass threatened violations of rights guaranteed by the Charter, although of course the court is always bound to exercise its discretion with care.²⁹

One commentator has suggested that s. 24(1) is the only provision in the Charter that gives rise to remedies under the Charter.³⁰ However, this view has little support and the more prevalent opinion is that s.52 of the *Constitution Act, 1982* also provides a route by

²⁸*Ibid.* at 510-11 (emphasis added).

²⁹See further the argument made by Gibson to support this view: D. Gibson, *The Law of the Charter: General Principles* (Toronto: Carswell, 1986) at 196-98.

³⁰E. G. Ewaschuk, "The Charter, An Overview and Remedies" (1982) 26 C.R. (3d) 54.

which the constitutionality of legislation may be challenged. That section states:

52 (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

It is generally accepted that this section allows the courts to retain their traditional discretion to grant standing in actions for a declaration of invalidity, according to the principles established by the "Trilogy" cases.³¹ Furthermore, the word "laws" in s. 52 has been given a broader meaning than simply statutes or subordinate legislation:

I would like to note that nothing in these reasons should be taken as the adoption of the view that the reference to "laws" in s. 52 of the Charter is confined to statutes, regulations and the common law. It may well be that if the supremacy of the Constitution expressed in s. 52 is to be meaningful, then all acts taken pursuant to powers granted by law will fall within s. 52.³²

³¹See, for example, T. A. Cromwell, *Locus Standi: A Commentary on the Law of Standing in Canada* (Toronto: Carswell, 1986) at 102.

³²*Operation Dismantle*, *supra*, n. 23 at 494, *per* Dickson C.J.C. This suggestion that standing under s. 52 may also include standing to challenge government conduct as unconstitutional is discussed further in D. Gibson, *The Law of the Charter: General Principles*, *supra*, n. 29 at 270.

It may therefore be concluded that the requirements for standing in an action for a declaration that legislation is unconstitutional are now sufficiently broad and discretionary in Canada that a properly prepared case questioning the legality of nuclear weapons could at the very least pass this preliminary hurdle on the way to a full hearing. However, there is still a strong link between the grant of standing and a *prima facie* presumption that the claim being asserted is justiciable—i.e. is susceptible of determination by a court. Absent such a presumption of justiciability, chances of a court granting standing remain slight.

2.3.2 *Operation Dismantle*

To date there has been only one major court challenge in Canada which involves the legality of nuclear weapons. In *Operation Dismantle v. The Queen*,³³ the plaintiff organizations and unions (claiming to represent, by their collective membership, some 1.5 million Canadians) sought a declaration in the Federal Court of Canada that an agreement between Canada and the United States, by which the latter was allowed to test cruise missiles over the territory of the former, was unconstitutional in that it violated the plaintiffs' rights as guaranteed under the Charter. The plaintiffs also sought an

³³*Supra*, n. 25.

injunction to prevent further cruise missile testing in Canada, and damages.³⁴

The defendants, on being served with the Statement of Claim, immediately moved to have it struck out as disclosing no reasonable cause of action. Cattanach J. of the Federal Court Trial Division examined the Statement of Claim using as a guide the ruling principle that "a statement of claim will not be struck out if the allegations of

³⁴The essence of the plaintiffs' claims is found in paragraph 7 of their Statement of Claim:

7. The Plaintiffs state and the fact is that the testing of the cruise missile in Canada is a violation of the collective rights of the Plaintiffs and their members and all Canadians, specifically their right to security of the person and life in that:
- (a) the size and eventual dispersion of the air-launched cruise missile is such that the missile cannot be detected by surveillance satellites, thus making verification of the extent of this nuclear weapons system impossible;
 - (b) with the impossibility of verification, the future of nuclear weapons' control and limitation agreements is completely undermined as any such agreements become practically unenforceable;
 - (c) the testing of the air-launched cruise missiles would result in an increased American military presence and interest in Canada which would result in making Canada more likely to be the target of a nuclear attack;
 - (d) as the cruise missile cannot be detected until approximately eight minutes before it reaches its target, a "Launch on Warning" system would be necessary in order to respond to the cruise missile thereby eliminating effective human discretion and increasing the likelihood of either a pre-emptive strike or an accidental firing, or both;
 - (e) the cruise missile is a military weapon, the development of which will have the effect of a needless and dangerous escalation of the nuclear arms race, thus endangering the security and lives of all people.

fact alleged therein are susceptible of constituting the scintilla of a cause of action."³⁵

The fundamental contention of the defendants was that the decision to permit cruise testing in Canada was made by the Government of Canada in its executive capacity (an exercise of the "royal prerogative") and thus was not reviewable by a court of law. However, Cattanach J. examined the matter in the light of s. 52(1) of the *Constitution Act, 1982* and s. 32(1)(a) of the Charter, which states:

32.(1) This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories;

Reading these provisions together, Cattanach J. concluded:

Thus the basic principle of the unwritten Canadian Constitution heretofore existing as to the supremacy of Parliament is diluted or eroded to the extent that *Parliament and the Government of Canada cannot breach the rights and freedoms guaranteed by the Charter. . . .* It is but a short and logical step to take to conclude that in the light of the clear and unequivocal language of paragraph 32(1)(a) of the Charter that the Charter is applicable to the Government of Canada in the event of an executive decision being taken which is in breach of the rights and freedoms guaranteed by the Charter.³⁶

³⁵[1983] 1 F.C. 429 at 432.

³⁶*Ibid.* at 434-35.

He therefore concluded that "the statement of claim did contain sufficient allegations to raise a justiciable issue,"³⁷ and denied the application to strike out the statement of claim and dismiss the action.

Not surprisingly, the defendants appealed this decision to the Federal Court of Appeal. There, in five separate and concurring judgements, the five-man court allowed the appeal.³⁸ Four of the five justices did not think the plaintiffs/respondents could bring their cause of action within s. 7 of the Charter; two of them held that the issue was by its nature not susceptible to adjudication by a court of law. With respect to the important issue of whether s. 32(1)(a) of the Charter could apply to an exercise of the royal prerogative, three of the five justices held that it could, one held that it could not (especially in the sensitive areas of defence and national security), and one did not consider the issue. Thus although the appeal succeeded, the defendants/appellants were not able to establish that it succeeded because the actions of the Government of Canada in this respect are not subject to judicial scrutiny and review.

³⁷*Ibid.* at 437.

³⁸A concise summary of the wide range of grounds which the various Federal Court of Appeal Justices gave for their decisions is found in the judgement of Wilson J., (1985) 18 D.L.R. (4th) 481 at 496 (S.C.C.).

The plaintiffs appealed the decision of the Federal Court of Appeal to the Supreme Court of Canada. Although they failed in their application, the victory of the defendants has distinctly Pyrrhic overtones.

The appeal was heard by seven justices of the Supreme Court, who were unanimous in dismissing it. The majority opinion was written by Dickson C.J.C., Estey, McIntyre, Chouinard and Lamer JJ. concurring. Wilson J. wrote a separate concurring judgement. (Ritchie J. did not take part in the judgement.) The ground for rejecting the plaintiffs'/appellants' application was that "the causal link between the actions of the Canadian Government, and the alleged violation of appellants' rights under the Charter is simply too uncertain, speculative and hypothetical to sustain a cause of action."³⁹ In other words, the Court saw *evidentiary* concerns, rather than procedural ones, as being determinative in the application.

However, in the course of dismissing the appeal the Supreme Court established a number of important principles which may be of considerable assistance in future Canadian litigation on nuclear weapons issues.

Firstly, all the Supreme Court justices upheld the reviewability of Cabinet decisions under the Charter:

³⁹*Ibid.* at 485, *per* Dickson C.J.C.

I agree with Madame Justice Wilson that Cabinet decisions fall under s. 32(1)(a) of the Charter and are therefore reviewable in the courts and subject to judicial scrutiny for compatibility with the Constitution. I have no doubt that the executive branch of the Canadian Government is duty bound to act in accordance with the dictates of the Charter.⁴⁰

Wilson J. went further, specifically rejecting the "political question" doctrine which has so hampered litigation of this type in the United States:

The question before us is not whether the government's defence policy is sound but whether or not it violates the appellants' rights under s. 7 of the *Canadian Charter of Rights and Freedoms*. This is a totally different question. I do not think there can be any doubt that this is a question for the courts. Indeed, s. 24(1) of the Charter, also part of the Constitution, makes it clear that the adjudication of that question is the responsibility of "a court of competent jurisdiction". While the court is entitled to grant such remedy as it "considers appropriate and just in the circumstances", I do not think it is open to it to relinquish its jurisdiction either on the basis that the issue is inherently non-justiciable or that it raises a so-called "political question" . . . ⁴¹

⁴⁰*Ibid.* at 491, per Dickson C.J.C. The Chief Justice also noted, more specifically, "I have no doubt that disputes of a political or foreign policy nature may be properly cognizable by the courts" (*ibid.* at 494).

⁴¹*Ibid.* at 504.

Secondly, the majority judgement indicates that the infringement or denial of the Charter right on which the action is based need not be actual, but may be hypothetical.⁴² However, the threat of infringement or denial must be more than purely speculative: "It is clearly illustrated by the rules governing declaratory and injunctive relief that the courts will not take remedial action where the occurrence of future harm is not *probable*."⁴³

Thirdly, the principle of supremacy of the Constitution, as embodied in s. 52 of the *Constitution Act, 1982*, is restated.⁴⁴

Although the *Operation Dismantle* case never reached the stage of being argued on its merits, its importance for the future of nuclear issue litigation in Canada must not be underestimated. Besides establishing valuable principles of constitutional supremacy and reviewability of government action, it provides an excellent exposition of the factors a court will consider in examining a plaintiff's statement of claim, and many clues as to how such a statement of claim should be drafted to obtain a hearing.

⁴²See *supra*, n. 25 and accompanying text.

⁴³*Ibid.* at 403, *per* Dickson C.J.C. (emphasis added).

⁴⁴See *supra*, n. 32 and accompanying text.

2.3.3 The Nuclear Weapons Legal Action

Although the result of the *Operation Dismantle* case was disappointing to many in the peace movement, a second initiative is now being mounted to bring the issue of the legality of nuclear weapons to a Canadian court—the *Nuclear Weapons Legal Action* (“NWLA”). The action was proposed by the World Federalists of Canada, and at present has seven co-sponsoring organizations under the general direction and co-ordination of the World Federalists.⁴⁵ At the time of writing, the NWLA has been in existence as an organization for almost two years, although a statement of claim has yet to be filed.

The NWLA is not designed to use the courts as a political arena. Profiting from the lessons of *Operation Dismantle*, the plaintiffs intend to present a carefully structured case which will pose a justiciable issue capable of judicial examination and evaluation. To assist in this, it is probable that the statement of claim will be drawn finely, for example focussing on seeking a declaration that the first use of nuclear weapons is illegal under Canadian law, and that therefore any part of Canadian defence policy which endorses or participates in a first-use

⁴⁵The seven co-sponsors are World Federalists of Canada, Lawyers for Social Responsibility, the National Union of Provincial Government Employees, Veterans Against Nuclear Arms, the Assembly of First Nations, the United Church of Canada and Voice of Women. In addition, there are over two hundred endorsing organizations, including thirteen municipalities.

strategy is illegal under Canadian law. The case will draw on both Canadian and international public law for support.⁴⁶

2.4 Litigation of Nuclear Weapons Issues in Other Jurisdictions

2.4.1 The United States

There has been very little litigation in the United States dealing directly with the issue of the legality of nuclear weapons. There are two aspects of the American legal system which make such litigation particularly difficult.

Firstly, Article III of the American Constitution restricts courts to dealing with actual disputes (the "case or controversy" provision). The plaintiff must show that she has been injured in a particular way (different in kind from any injury received by any other member of the public), that she was injured by the action of the defendant, and that the relief sought in the action will provide either a cure or a redress

⁴⁶It should be noted that the *Operation Dismantle* case did not plead any international law. Irwin Cotler, one of the counsel for the plaintiffs, has remarked that "This was probably a missed 'window of opportunity,' or at least a 'window of vulnerability' was exposed in not asserting this support system for the case." I. Cotler, "The Role of National Law in Relation to Nuclear Weapons" in M. Cohen & M. E. Gouin (eds.), *Lawyers and the Nuclear Debate* (Ottawa: University of Ottawa Press, 1988) 146 at 149.

for the injury. It has been stated, with regard to public interest litigation in the United States, that:

A sincere, vigorous interest in the action challenged, or in the provisions of law allegedly violated, will not do to establish standing if the party's interest is purely ideological, uncoupled from any injury in fact, or tied only to an undifferentiated injury common to all members of the public.⁴⁷

Thus to obtain standing in public interest litigation, plaintiffs must exercise considerable creativity to camouflage their interest as a traditional individual right, acceptable to the court.⁴⁸

Secondly, the United States judicial system has what is known as a "political question" doctrine. This doctrine is based on the constitutionally-established separation of the powers of the executive, the legislature and the judiciary. One branch of government cannot interfere with matters entrusted by the Constitution to another

⁴⁷*Capital Legal Foundation vs. Commodity Credit Corp.*, 711 F. 2d 253 at 258 (1983).

⁴⁸The general interest of all citizens in being governed in accordance with the constitution has not been considered sufficient to give rise to the kind of case or controversy which the court requires. See *Schlesinger vs. Reservists Committee to Stop the War*, 418 U.S. 208 (1974).

branch. Thus, the conduct of foreign policy, which belongs to the executive, has been held to be a matter unsuited to judicial review.⁴⁹

The criteria for determining when a case involves a "political question" have undergone some evolution over the years; nevertheless the statement of the Supreme Court in *Baker vs. Carr* is held to be definitive:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a co-ordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due co-ordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.⁵⁰

⁴⁹"[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions . . . are delicate, complex, and involve large elements of prophecy. . . . They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility." *Chicago & S. Air Lines vs. Waterman S.S. Corp.*, 333 U.S. 103 at 111 (1948).

⁵⁰369 U.S. 186 at 217 (1962).

It would appear that these criteria are sufficiently open to subjective evaluation to allow any judge to "take" or "not take" a case with political implications, depending only on the judge's personal feelings about it; "the reflexive reach for the political question/judicial restraint handle, more often than not, masks the judge's value judgment about the merits of the case."⁵¹

However, as Tribe has pointed out, the allegedly definitive statement in *Baker* in fact combines three elements: classical theory (the court must decide all cases before it unless it is clear the Constitution has committed the determination of the issue *solely* to another branch of government), a prudential view (the court would use the political question doctrine to avoid making a decision on the merits, where this would force it either to compromise an important principle or to undermine its own authority) and functional considerations (such as the difficulty of obtaining evidence from other branches of government).⁵²

It has also been suggested that the political question doctrine does not support the notion that the court must judicially ignore parts of the

⁵¹P. Weiss, "Nuclear War in the Courts" in Dewar et al. (eds.), *Nuclear Weapons, the Peace Movement and the Law* (London: Macmillan, 1986) 178 at 181.

⁵²L. H. Tribe, *American Constitutional Law* (Mineola, N.Y.: Foundation Press, 1978) at 71, n. 1.

Constitution.⁵³ According to this view, “[a] meaningful political question doctrine . . . implies something more and different: that some issues which *prima facie* and by usual criteria would seem to be for the courts, will not be decided by them but, *extra-ordinarily*, left for political decision.”⁵⁴ Thus, the authentic contents of the so-called “political question doctrine” consist of a number of principles of jurisprudence which have general validity in the United States:

1. The courts are bound to accept decisions by the political branches within their constitutional authority.
2. The courts will not find limitations or prohibitions on the powers of the political branches where the Constitution does not prescribe any.
3. Not all constitutional limitations or prohibitions imply rights and standing to object in favor of private parties.
4. The courts may refuse some (or all) remedies for want of equity.
5. In principle, finally, there might be constitutional provisions which can properly be interpreted as wholly or in part “self-monitoring” and not the subject of judicial review.⁵⁵

⁵³See, in particular, L. Henkin, “Is There a ‘Political Question’ Doctrine?” (1976) 85 Yale L.J. 597.

⁵⁴*Ibid.* at 599 (emphasis added).

⁵⁵*Ibid.* at 622-23.

This analysis would tend to deny that there is in fact a political question doctrine which would automatically preclude any judicial review of any matter entrusted to the executive.

The cases themselves tend to indicate that the court's main concern will be whether the constitutional provisions involved confer judicially enforceable rights. Viewed in this light, the political question doctrine loses a great deal of its effect if a plaintiff can articulate a substantive claim—a "case or controversy."⁵⁶ However, in less clear-cut cases, where for example a plaintiff may seek to base her claim in the illegality at international law of an action in the United States, or in arguments about foreign policy, it is very likely that *Baker vs. Carr* may come into play and that the court may refuse to hear the matter. It should be noted that this refusal could as easily be framed in terms of "judicially manageable standards" or other functional considerations as in terms of a "political question."

As a consequence of the above-noted factors, the issue of the legality of nuclear weapons has had little success in getting before an American

⁵⁶"The doctrine of which we treat is one of 'political questions,' not one of 'political cases.' The courts cannot reject as 'no lawsuit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority." *Baker vs. Carr*, *supra*, n. 50 at 217. The court also noted that "[i]t is an error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Ibid.* at 211.

court. Early cases brought by Nobel Laureate Linus Pauling to obtain injunctions against American above-ground nuclear testing in the South Pacific focussed on the harmfulness of the tests, not the illegality of the weapons being tested.⁵⁷

Perhaps the most notable recent case which attempted to bring this issue before an American court is *Greenham Women Against Cruise Missiles vs. Reagan*.⁵⁸ The plaintiffs (an association of women who lived in the Greenham Common area, an American citizen living in London, England, and two United States congressmen) sought an injunction against the deployment of cruise missiles at the United States Air Force Base in Greenham Common, Great Britain. Among other claims, the plaintiffs alleged that the deployment of the missiles would make nuclear war (or accident) more likely, and that therefore it was illegal under customary international law. They also alleged that it subjected them to tortious injury for which they sought a remedy

⁵⁷*Pauling vs. McElroy*, 194 F. Supp. 310 (1958); *Pauling vs. McNamara*, 331 F. 2d 796 (1963). In the latter case, the reason stated by the court (at 798) for dismissing the action was that "decisions in the large matters of basic national policy, as of foreign policy, present no judicially cognizable issues and hence the courts are not empowered to decide them." A far cry from the Supreme Court of Canada decision in *Operation Dismantle*, indeed.

⁵⁸591 F. Supp. 1332 (1984), *aff'd* 755 F. 2d 34 (1985).

under the *Allen Tort Claims Act*.⁵⁹ Their application was rejected on the ground that the issue was a political question and presented a “judicially unmanageable” situation:

The courts are simply incapable of determining the effect of the missile deployment on world peace. . . . [T]he factfinding that would be necessary for a substantive decision is unmanageable and beyond the expertise of the judiciary. . . . The lack of judicially discoverable and manageable standards is not the only reason this case is non-justiciable. The nature of the relief plaintiffs seek directly impinges upon the foreign policy of the United States. . . . The particular delicacy of foreign affairs weighs against intervention by the court. . . . Only the Executive and Legislative branches have the facility for making such policy decisions and for predicting their beneficial or detrimental effects on the international posture of the United States and its allies.⁶⁰

It would appear, at least at first blush, that both *Greenham Women* and *Operation Dismantle* foundered on the anticipated inability of the plaintiffs to prove their case.⁶¹ This might in turn appear to suggest that justiciability is tied to the burden of proof, and that the court will refuse to hear a case where it does not expect the plaintiffs to adduce sufficient evidence to maintain their claim. However, the more likely explanation is that in both cases the issue was held by the court to be

⁵⁹28 U.S.C. §1350.

⁶⁰591 F. Supp. 1332 at 1338-39 (1984).

⁶¹With regard to the latter case, see *supra*, n. 39 and accompanying text.

properly within the jurisdiction of the executive, and the actions of the executive to be properly within their constitutional limits, thereby leaving the plaintiffs no grounds of complaint.

The failure of the *Greenham Women* case has not deterred anti-nuclear activists in the United States from continuing to bring the issue before the courts. Many of the cases are criminal actions against protesters involved in non-violent civil disobedience. The protesters raise issues of international law, including the Nuremberg principles (and the so-called "Nuremberg obligation"),⁶² as part of their defence. Although almost all these cases take place in lower courts, a recent decision is worthy of note.

In *People vs. Jarka*,⁶³ defendants were acquitted of charges relating to a protest against (among other things) the American build-up of offensive nuclear weapons. The acquittal was based on the traditional common law defence of necessity, which is part of the Illinois Criminal Code, and which allows the justification of conduct which would otherwise constitute an offence where the accused reasonably believed her conduct was necessary to avoid or prevent an injury (public or private) greater than that which would result from her own conduct. More importantly, in the course of his charge to the jury the

⁶²See *infra*, section 4.5.1.

⁶³No. 002170 in the Circuit Court of Lake County, Waukegan, Illinois. Judgement was rendered on 15 April 1985.

trial judge instructed them that the use or threat of use of nuclear weapons was illegal as either an actual or attempted war crime, on the basis that any such use would cause unnecessary suffering, be indiscriminate in effect and analogous to the use of poisonous weapons.⁶⁴ Nevertheless, in spite of some limited successes of this nature, the United States judicial system remains fundamentally hostile to the adjudication of nuclear weapons issues.

2.4.2 The United Kingdom

In the United Kingdom, as in the United States, most legal actions that involve nuclear weapons issues are prosecutions under criminal law for offences committed in connection with non-violent civil disobedience. It would appear that the legal system in the United Kingdom gives even shorter shrift to these cases than its American parallel.⁶⁵

⁶⁴For further discussion of the issues of unnecessary suffering, indiscriminate effect and poisonous weapons, see *infra*, chapter 3.

⁶⁵For an informative history of the experience of one particular group—the Greenham Common Women—in the English courts, see R. Johnson, "Alice Through the Fence: Greenham Women and the Law" in Dewar et al. (eds.), *Nuclear Weapons, the Peace Movement and the Law*, *supra*, n. 51 at 158 ff.

United Kingdom courts do not have (or at least do not acknowledge) a “political question” doctrine. Instead, they have maintained the traditional view that actions of royal prerogative, which include the conduct of foreign relations and defence policy, are not reviewable by a court of law. The leading case in this regard (which, incidentally, was quoted at length by the justices of the Federal Court of Appeal in their decisions on the *Operation Dismantle* case) is *Chandler v. Director of Public Prosecutions*.⁶⁶

In *Chandler*, members of the Committee of One Hundred, an organization which sought to further the aims of the Campaign for Nuclear Disarmament by non-violent civil disobedience, were charged for their participation in a demonstration at Wethersfield Airfield, where a United States Air Force squadron was stationed. At trial, a prosecution witness testified that the planned aim of the demonstration—preventing aircraft from taking off or landing for about six hours—was prejudicial to the safety or interests of the State under s. 1 of the *Official Secrets Act, 1911*. The trial judge refused to let the accused cross-examine the witness, or call evidence in support of their contention that their acts would benefit the State or at least were not prejudicial to its safety or interests.

The accused appealed to the Court of Criminal Appeal on the grounds, *inter alia*, that the trial judge was wrong not to let them cross-examine

⁶⁶[1964] A.C. 763, [1962] 3 W.L.R. 694, [1962] 3 All E.R. 142 (H.L.).

or call evidence. That appeal was dismissed, and the accused appealed further to the House of Lords. The further appeal was also dismissed, in part because if an accused had done an act which could be "useful to an enemy" (in the words of s. 3 of the *Official Secrets Act, 1911*), she was not entitled to say or to lead evidence that her purpose (as opposed to her action) was not prejudicial to the safety or interests of the State, since the Crown is the only body entitled to make decisions on matters of defence. Lord Reid noted:

It is in my opinion clear that the disposition and armament of the armed forces are and for centuries have been within the exclusive discretion of the Crown and that no one can seek a legal remedy on the ground that such discretion has been wrongly exercised. . . . Anyone is entitled, in or out of Parliament, to urge that policy regarding the armed forces should be changed; but until it is changed, on a change of Government or otherwise, no one is entitled to challenge it in court.⁶⁷

Viscount Radcliffe also appeared to find the issue non-justiciable for lack of judicially manageable standards:

I can think of few issues which present themselves in a less triable form. . . . The more one looks at it, the plainer it becomes, I think, that the question whether it is in the true interests of this country to acquire, retain or house nuclear armaments depends upon an infinity of considerations, military and diplomatic, technical, psychological and moral, and of decisions, tentative or

⁶⁷[1964] A.C. 763 at 791.

final, which are themselves part assessments of fact and part expectations and hopes.⁶⁸

The hand of *Chandler* has lain heavy on the anti-nuclear movement in Great Britain, and leaves little room for constructive judicial action in this respect. However, a recent decision appears to have removed at least part of the restrictions imposed in *Chandler's* case.⁶⁹

The dispute in this case revolved around whether or not the defendant was under a duty to act fairly towards the plaintiffs—an issue for judicial review. The defendant claimed that her action, an executive action under an Order in Council and not an action mandated by statute, was immune from judicial review because it stemmed from an exercise of royal prerogative. The court held that the determining factor in whether or not an act would be subject to judicial review should not be the source of the power under which the act was

⁶⁸*Ibid.* at 798-99. It is perhaps interesting to note that the learned Law Lord did not include *legal* considerations among the "infinity" to be considered. There seems little chance of judicial review of government action in this field if the judiciary itself does not believe legal principles apply.

⁶⁹*Council of Civil Service Unions v. Minister for the Civil Service*, [1985] A.C. 375, commonly referred to as the "GCHQ" case since the location of the dispute was Government Communications Headquarters.

performed, but the subject matter of the act.⁷⁰ However, it remained the province of the executive, not the court, to decide whether, in any particular case, the requirements of procedural fairness could be outweighed by those of national security.⁷¹ In this particular case, the court felt that the defendant had been able to present sufficient evidence to show that in the situation in dispute considerations of national security had indeed been sufficient to override considerations of fairness.

Although the GCHQ case represents a definite advance in judicial review in English courts, it does not appear to have had any effect so far with regard to litigation of issues involving nuclear weapons.

⁷⁰*Ibid.* at 407, *per* Scarman L.J.:

I believe that the law relating to judicial review has now reached the stage where it can be said with confidence that, if the subject matter in respect of which prerogative power is exercised is justiciable, that is to say if it is a matter upon which the court can adjudicate, the exercise of the power is subject to review in accordance with the principles developed in respect of the review of the exercise of statutory power.

⁷¹"National security is the responsibility of the executive government; what action is needed to protect its interests is . . . a matter upon which those upon whom the responsibility rests, and not the courts of justice, must have the last word. *It is par excellence a non-justiciable question.* The judicial process is totally inept to deal with the sort of problems which it involves." *Ibid.* at 412, *per* Diplock L.J. (emphasis added).

2.4.3 Other European Jurisdictions

Again, in Europe legal action involving nuclear weapons issues usually involves criminal prosecutions for non-violent civil disobedience, often in connection with demonstrations against the American or NATO military presence in Europe, and most frequently in relation particularly to the stationing of cruise missiles. The Western European countries which have seen the most judicial activity in this respect are West Germany, Belgium and the Netherlands.

West Germany

West Germany is an enthusiastic partner in NATO and a firm supporter of American military policy in Europe. This factor may be seen to colour court action taken in recent years which raises the issue of the legality of nuclear weapons. However, the Basic Law (constitution) of Germany provides in Article 25 that "general rules of public international law shall be an integral part of federal law."⁷² This provides a "point of entry" for arguing international law in a domestic West German legal proceeding.

⁷²The general rules of public international law shall be an integral part of federal law. They shall take precedence over the laws and shall directly create rights and duties for the inhabitants of the federal territory." An English translation of the *Basic Law* is found in A. P. Blaustein & G. H. Flanz (eds.), *Constitutions of the Countries of the World* (Dobbs Ferry, N.Y.: Oceana Publications, 1985), binder 6.

In a case before the Constitutional Court decided on 16 December 1983,⁷³ in which the plaintiffs were contesting the legality of stationing Pershing II and cruise missiles on West German soil, the Court was asked to consider not only that nuclear weapons were illegal under international law and thus by virtue of Article 25 under West German law, but also that they were illegal as violating both the right to life guaranteed by Article 2(2) of the Basic Law⁷⁴ and Article 26 banning wars of aggression.⁷⁵

The Court was prepared to take jurisdiction over government actions pursuant to Article 2(2), but found that the plaintiffs' lives were not endangered by any German government action, and that it had no jurisdiction over the actions of any other government. The Court was of the opinion that the primary threat to life came from the possibility of nuclear missiles being used *against* West Germany. It dealt with the

⁷³BVerfGE 66, 39.

⁷⁴"Everyone shall have the right to life and to inviolability of his person. The liberty of the individual shall be inviolable. These rights may only be encroached upon pursuant to a law."

⁷⁵Particularly paragraph (1), "Acts tending to and undertaken with the intent to disturb the peaceful relations between nations, especially to prepare to aggressive war, shall be unconstitutional. They shall be made a punishable offence."

Article 25 argument by finding that the actual behaviour of nuclear-weapon states—both the two superpowers and the smaller nuclear powers of France and the United Kingdom—did not indicate any general state practice or any *opinio juris* to the effect that there was a customary rule of international law prohibiting the defensive stationing of nuclear weapons, especially when the purpose of such stationing was to deter an opponent from using its own nuclear weapons.⁷⁶ The Court did not consider Article 26 at all in its judgement.

A year later the Constitutional Court was given a further occasion to deal with the issue of the stationing of Pershing II and cruise missiles, in an action brought by the Green Party.⁷⁷ The argument was that the decision to station such missiles in West Germany involved a transfer of sovereignty, since the missiles were under American rather than German control; therefore a statute should have been enacted to give permission for the stationing. The Court held that the various NATO treaties provided a sufficient basis for what it recognized as a transfer of sovereignty (since the cruise and Pershing missiles can be launched

⁷⁶State practice and *opinio juris*—the acceptance that the practice is observed as a matter of legal obligation—are the two essential elements for the formation of a rule of customary international law. See I. Brownlie, *Principles of Public International Law* (3d ed.) (Oxford: Clarendon Press, 1979) at 4-12; also Article 38(1)(b) of the Statute of the International Court of Justice, [1945] Canada T.S. 7.

⁷⁷Decision of 18 December 1988, reported in [1985] N.J.W. 603..

by American or NATO command without the knowledge or consent of the West German Government), and that there was therefore no need to seek an additional mandate by statute from the Federal Parliament. It is interesting to note that this decision deals with the *procedure* for giving permission to station missiles, and does not address substantive issues of illegality.

Although the Constitutional Court has shown a tendency to slide around issues of illegality, at least one lower court was not so hesitant. In a judgement of 19 June 1985, the Frankfurt criminal court acquitted a number of activists, relying largely on Article 26 of the Basic Law.⁷⁸ The judge held that the Pershing II is a first-use nuclear weapon and therefore illegal under public international law, and further that the deployment of such weapons constitutes a threat to use force. The West German Government must be held to be aware of the political intentions of the United States in deploying the missiles, through frequent public statements of the American President, which constitute an "intention to disturb peaceful relations between nations" in the terms of Article 26. Apparently this decision has caused considerable controversy, and may quite possibly be quashed on appeal.

⁷⁸BVerfGe 66, 65.

Belgium

Like West Germany, Belgium is a site for the stationing of cruise and Pershing missiles as part of its rôle as a NATO member state. There appears to have been little legal debate on the issue until 1983, when the Advocate-General of the Military Court in Brussels published an article stating that the use of nuclear weapons is a war crime.⁷⁹ This stimulated discussion among the legal profession, but more in the academic field than in litigation.

A notable exception was a case brought by a group of plaintiffs, both individuals and organizations, after the Belgian Government had decided to deploy the first sixteen (out of 48) cruise missiles on Belgian soil. The case (actually two cases, one before a French chamber of the Conseil d'État and one before a Flemish chamber of the same administrative tribunal) has yet to reach its final resolution.⁸⁰ It is interesting to note that much debate in Belgium has centred on

⁷⁹A. Andries, "L'emploi de l'arme nucléaire est un crime de guerre" (1983) 39 *La Revue nouvelle* 315; also by the same author, "Pour une prise en considération de la compétence des juridictions pénales à l'égard des emplois d'armes nucléaires" (1984) 34 *Rev. dr. pén. crim.* 34.

⁸⁰For a more detailed discussion of the legal debate in Belgium, see C. Van den Wyngaert, "The Legal Debate on the Deployment of Cruise Missiles in Belgium: A *Status Quaestions*" (unpublished, June 1987).

the issue of transfer of sovereignty, as in West Germany; and again as in West Germany, such transfer of sovereignty was acknowledged but held to be sanctioned by various NATO treaties and agreements.

The Netherlands

The Netherlands Council of State issued an Advisory Opinion on 24 January 1984 wherein it stated that the deployment of American cruise missiles in the Netherlands does *not* constitute a transfer of sovereignty.⁸¹ Apart from this, most court actions in the Netherlands involving the legality of nuclear weapons have been either criminal prosecutions against demonstrators or so-called "site watch" cases.

A policy of compulsory military service is in effect in the Netherlands. Conscripts may escape such compulsory service if they are found to be unfit, if there are extenuating circumstances (sole support of family, for example), or if they appeal under the *Conscientious Objection to Military Service Act*. In recent years, many conscripts who do not reject military service as such (and therefore do not appeal under the conscientious objection legislation) have sought to reject any military duties involving nuclear weapons. In particular, they have either objected to, or refused, orders to stand guard on missile sites (hence the term "site watch" cases). There have been many site watch cases,

⁸¹An English translation of this Advisory Opinion may be found in [1985] Netherlands Y.I.L. 320.

and the accused are usually sentenced to a standard three-week military detention.

The accused have based their defences on the *Hague Conventions*, the *Geneva Conventions*, the *1925 Geneva Gas Protocol*, the *Genocide Convention* and, occasionally, the *Non-Proliferation Treaty*. They have also invoked the *Nuremberg Charter*, in particular the principle that orders in violation of international law are unlawful and that therefore disobeying such orders is not an offence.⁸² So far, all these defences have failed, both at the level of the military court and when appealed to the Netherlands Supreme Court.

A new initiative has now been launched by *Stichting Verbiedt de Kruisraketten* (Foundation Against Cruise Missiles). On 18 December 1983, the Foundation issued a Writ of Summons against the State of the Netherlands, based on a claim in tort under paragraph 1401 of the Netherlands Civil Code. As in the American case of *Greenham Women Against Cruise Missiles vs. Reagan*,⁸³ the tort is alleged to arise from violations of international customary and treaty law, in the areas of both armed conflict and human rights. The claim is for a declaration that the deployment of cruise missiles constitutes a tort under

⁸²For a detailed examination of the treaties and principles involved, see *infra*, Chapters 3 and 4.

⁸³*Supra*, n. 58 and accompanying text.

Netherlands law, and for an injunction to restrain deployment of cruise missiles. There is an alternative claim for a declaration against the policy of "first use" of nuclear weapons, and for a government veto on any decision to launch cruise missiles. The State has counter-claimed that the courts are not the appropriate forum for this kind of dispute.

An interesting aspect of this action is that the Foundation advertised its proposed action in newspapers throughout the Netherlands and succeeded in attracting 20,000 individual co-plaintiffs to the action. Although the logistics involved in handling such a crowd must be staggering, this ploy has contributed significantly to mobilising public opinion and sensitising the general public to the international law issues involved. The Writ of Summons, with supporting documentation, has been published as a book, and summaries of the Writ have been circulated to interested individuals (in the legal profession and the public at large) worldwide.

The action will be heard by the Hague District Court. It is felt that even if the case is lost, it will have had an important effect in that it will have forced a legal debate on the issue, and will have required the Netherlands Government to answer the plaintiffs' claims in considerable detail. In this respect it may have an impact similar to that of the *Operation Dismantle* case in Canada.

Chapter 3

PRINCIPLES OF INTERNATIONAL LAW APPLICABLE TO MEANS AND METHODS OF WARFARE

3.1 International Law and Nuclear Weapons: Some General Considerations

There is at present no treaty or convention, no rule of customary international law and no general principle of international law which specifically and comprehensively forbids nuclear weapons in and of themselves (*per se*). It is therefore necessary to argue by analogy from rules applicable to other forms of weapons, to see if they have any bearing upon the legality of nuclear weapons.

There are a number of treaties which forbid the testing of nuclear weapons under certain circumstances,⁸⁴ and still others which forbid

⁸⁴For example, the *Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and Under Water* (the "Partial Test Ban Treaty") (1963) 2 I.L.M. 889 and the *Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Underground Nuclear Weapons Tests* (the "Threshold Test Ban Treaty") (1974) 13 I.L.M. 906.

the emplacement of nuclear weapons in defined areas.⁸⁵ Some treaties have been concluded to limit or exclude the possession of certain kinds of nuclear weapons.⁸⁶ But no such treaty or convention actually forbids the use of nuclear weapons *per se*.⁸⁷ There are a

⁸⁵For example the *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") (1967) 6 I.L.M. 386, the *Treaty for the Prohibition of Nuclear Weapons in Latin America* (the "Treaty of Tlatelolco") (1967) 6 I.L.M. 521 and the *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* (1971) 10 I.L.M. 146.

⁸⁶For example, the *Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems* (the "ABM Treaty") (1979) 11 I.L.M. 784, the *Interim Agreement Between the United States of America and the Union of Soviet Socialist Republics on Certain Measures with Respect to the Limitation of Strategic Offensive Arms ("SALT I")* (1979) 11 I.L.M. 791 and the *Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Elimination of their Intermediate-Range and Shorter-Range Missiles* (the "INF Treaty") (1988) 27 I.L.M. 90.

⁸⁷However, the United Nations General Assembly has declared that the use of nuclear weapons would be "a direct prohibition of the Charter of the United Nations" and "contrary to the rules of international law and to the laws of humanity." *Declaration on the Prohibition of the Use of Nuclear and Thermo-Nuclear Weapons*, G.A. Res. 1653 (XVI), 24 November 1961, paras. 1(a) & 1(b).

number of treaties and conventions which relate to other kinds of weapons—biological, chemical and conventional weapons—which contain elements which may be relevant to the discussion at hand.

Both general principles of law and customary international law contain elements which may be considered to have a bearing on the legality or otherwise of nuclear weapons. Whether or not these elements are sufficient to amount to a general prohibition on the use of nuclear weapons, either in customary law or as a general principle, continues to be a subject of debate in legal, military and political circles. The writings of publicists on the topic are fairly evenly divided between those who consider nuclear weapons inherently legal⁸⁸ and those who see them as illegal by their very nature,⁸⁹ with a wide spectrum of opinion in between.

⁸⁸For example, H. H. Almond, "Deterrence Processes and Minimum Order" (1982-83) 4 N.Y.L.S. J.I. & Comp. L. 283; J. N. Moore, "Nuclear Weapons and the Law: Enhancing Strategic Security" (1983) 9 Brooklyn J.I.L. 263; W. V. O'Brien, "Legitimize Military Necessity in Nuclear War" (1960) 2 World Polity 35. It is, however, important to note that all of these authors envisage some kind of legal framework for the use of nuclear weapons.

⁸⁹For example, F. A. Boyle, "The Relevance of International Law to the 'Paradox' of Nuclear Deterrence" (1986) 80 Northwestern U.L.R. 1407; S. McBride, "The Legality of Weapons for Societal Destruction" in C. Swinarski (ed.), *Studies and Essays in International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*

The rules of customary international law which may have a bearing on the issue of the legality of nuclear weapons are contained within the body of law known as *international humanitarian law*. This law also contains some general principles which may be applicable to the discussion of the legality of nuclear weapons. Some of these principles, it has been suggested, are in the nature of *jus cogens*, peremptory and non-derogable norms of international law.⁹⁰

Finally, there have been a number of resolutions of United Nations organs (in particular the General Assembly) and of other international organizations which are directly relevant.

Each of the above elements—treaties, international humanitarian law, peremptory norms and international resolutions—will be discussed in turn, to examine what light if any they can shed on the state of international law with regard to the legality of nuclear weapons.

(Geneva: Martinus Nijhoff, 1984) 401; G. Schwarzenberger, *The Legality of Nuclear Weapons*, *supra*, n. 2.

⁹⁰Mosler notes that "[t]he essential characteristic of peremptory rules is that their violation affects the international legal community as such, for while it may be that only one State is directly affected by a particular breach, its consequences can extend to the community as a whole." H. Mosler, *The International Society as a Legal Community* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980) at 136.

3.2 Treaties and Conventions Related to Weapons

Over the centuries of man's inhumanity to man, there have developed a number of rules relating to means and methods of warfare, particularly what kinds of weapons may (or, more precisely, may not) be used. As noted above, there are no treaties which specifically forbid nuclear weapons as such. However, there have been a number of treaties dealing with so-called "weapons of mass destruction," which include biological, bacteriological and chemical weapons, and also certain conventional weapons which are considered to be indiscriminate or excessively harmful in their effects. Many of these weapons have become the subject of international agreements. Although these agreements in fact form part of international humanitarian law,⁹¹ they are treated separately here for ease of reference.

3.2.1 Conventional Weapons Causing Unnecessary Suffering

In one of the earliest treaties on weapons use, the 1868 *St. Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 grammes Weight*,⁹² the rationale for regulating weapons used in warfare was clearly set out in the preamble:

⁹¹Discussed *infra*, section 3.3.

⁹²(1907) 1 A.J.I.L. Supp. 95.

Considering that the progress of civilization should have the effect of alleviating the calamities of war;

That the only legitimate object which States should endeavour to accomplish during war is to weaken the forces of the enemy;

That for this purpose it is sufficient to disable the greatest possible number of men;

That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable;

That the employment of such arms would, therefore, be contrary to the laws of humanity; . . .

It had in fact been recognized for centuries that weapons such as barbed lances and arrowheads, which inflicted unnecessarily severe wounds without being any more effective in disabling the enemy than other less harmful weapons, should not be used in warfare. However, in the latter part of the nineteenth century this traditional restraint began to find more common expression in treaty terms.⁹³

⁹³As the St. Petersburg preamble puts it, "having fixed by a common accord the technical limits within which the necessities of war ought to yield to the demands of humanity." The "explosive projectiles" forbidden by the Declaration were newly-developed light explosive or inflammable projectiles, especially explosive rifle bullets. Although light artillery shells of this type might be more effective than ordinary shells, the rifle bullets were no more effective than ordinary rifle bullets, in that they could still only incapacitate one person at a time, but the wounds they caused were much more severe.

The principle also came to be defined in broad general terms that the "laws of war do not allow to belligerents an unlimited power as to the choice of means of injuring the enemy."⁹⁴

⁹⁴*Brussels Conference of 1874: Final Protocol and Project of an International Declaration Concerning the Laws and Customs of War (1873-74)* 65 *British and Foreign State Papers* 1005 [hereinafter the "Brussels Protocol"], Article 12 of the Project. (The Project is also found in (1907) 1 *A.J.I.L. Supp.* 96). This was the first formal enunciation of the principle; it was expanded on as follows: "Article 13. According to this principle are strictly forbidden: . . . (e) The uses of arms, projectiles, or substances (*matières*) which may cause unnecessary suffering, *as well as* the use of projectiles prohibited by the Declaration of St. Petersburg in 1868" (emphasis added). Although the rules embodied in the Brussels Protocol were never adopted in treaty form, they formed the basis for the influential "Oxford Manual," *The Laws of War on Land*, prepared by the Institute of International Law and adopted by it as a statement of the prevailing laws of war in 1880. The Brussels Protocol and the Oxford Manual, in their turn, served as the basis for the Hague Conventions of 1899; see *infra*, section 3.3.2. The general principles were clearly restated in the Regulations annexed to *Hague Convention (IV) with Respect to the Laws and Customs of War on Land* in 1907:

Article 22. Belligerents have not an unlimited right in the choice of means of injuring the enemy.

Article 23. Besides the prohibition established by special conventions, it is particularly forbidden: [. . .]

(e) To employ weapons, projectiles, or substances of such a nature as to cause unnecessary pain.

(1908) 2 *A.J.I.L. Supp.* 90 at 106. The purpose of the Hague Convention, as expressed in its preamble, was "to revise the general laws and customs of war, either in order to define them more precisely, or to set certain limits to them with a view to diminishing their rigors as far as possible." (*Ibid.* at 90-91.) It is now generally accepted that they

A further specific prohibition on a means of warfare was the 1899 Hague Declaration 3 Concerning Expanding Bullets.⁹⁵ These bullets, commonly known as "dum-dums" (after the British Indian arsenal at Dum-Dum, near Calcutta, where they were first manufactured), were so constructed that they could expand or flatten once they penetrated a human body, thus causing more serious wounds than ordinary rifle bullets, and being more difficult to excise. It is interesting to note that these bullets were prohibited by international agreement *even though they were already in use by the armed forces of Great Britain.*⁹⁶

Although the principles first elaborated in the Brussels Protocol (and subsequently codified in the Hague Regulations of 1899 and 1907)

form part of customary international law and therefore are binding on all states, whether or not they are parties to the Conventions.

⁹⁵(1907) 1 A.J.I.L. Supp. 155. This Declaration was made in the context of the First Peace Conference of 1899 at which the Hague Conventions were drafted and signed.

⁹⁶The United States used this fact as an argument against the proposed Declaration. However this objection, and others, were overruled. The United States never signed the Declaration, but Great Britain acceded to it in 1907.

were restated in 1977,⁹⁷ there was little progress in the prohibition of specific conventional weapons until the signature, on 10 April 1981, of the *Convention on Prohibitions and Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects* (the "Conventional Weapons Convention").⁹⁸ The Convention prohibits the use of three kinds of weapons, each of which has its own Protocol annexed to the Convention: weapons whose primary effect is to injure by fragments which cannot be detected in the human body by x-rays (Protocol I); mines, booby traps and other related devices (Protocol II); and incendiary weapons (Protocol III). Small-calibre weapons were also deliberated at the Conference which developed the Convention, but no agreement was reached on including them in another Protocol. It should be noted that the prohibition against fragmentary devices in Protocol I is unqualified; however, Protocols II and III only prohibit

⁹⁷In the *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I)*, Article 35, which states:

1. In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.
2. It is prohibited to employ weapons, projectiles and material or methods of warfare of a nature to cause superfluous injury or unnecessary suffering.

Protocol I will be discussed further in the context of international humanitarian law, *infra*, section 3.3.6.

⁹⁸United Nations General Assembly document A/CONF. 95/15, dated 27 October 1980.

the use of the weapons specified against civilians and in some other limited cases (for example, United Nations peacekeeping forces and missions). The possibility of using these weapons against military objectives remains open.

Given the manner in which the relevant provisions are framed, the applicability of the treaties and conventions discussed above to nuclear weapons would appear to have to rest on an analysis of whether or not nuclear weapons cause unnecessary suffering relative to the effect they produce. It is well known that in addition to the blast effect of a nuclear explosion, there are also thermal and radiation effects which can cause severe burning and radiation poisoning. Even if death does not result instantaneously from a nuclear explosion, both the thermal effect and radioactive fallout can cause extreme suffering which may result in death. The question may be framed, in terms of conventional weapons law, as whether an effect equivalent to the blast effect of a nuclear weapon can be obtained without running the risk of the thermal and radiation effects. In other words, is it possible to achieve a sufficiently large blast with conventional weapons, so that nuclear weapons are not required? In such a case it might be argued that the absence of any advantage to nuclear weapons in terms of military effectiveness would mean that any suffering or injury caused by nuclear weapons which was not caused by the equivalent conventional weapons would be excessive and unnecessary, and therefore unjustifiable under the rules and principles that govern conventional weapons.

If, on the other hand, it were concluded that the kind of blast effect produced by nuclear weapons could *not* be produced by any conventional weapon, so that there would be a military advantage to be gained by using nuclear weapons which could not be matched by any conventional weapon, would the rules and principles governing conventional weapons then allow the use of nuclear weapons? Furthermore, what if the effect(s) sought were in fact the thermal and/or radiation effect(s), which could not be duplicated by a conventional weapon? In either of these cases, the argument might then be that the possible injury or suffering would not be unnecessary or excessive by reference to the effect gained by using nuclear instead of conventional weapons.⁹⁹

As will be seen from this discussion, the regulation of weapons use consists largely in trying to balance the requirements of so-called "military necessity" with concern for both combatants and non-combatants in an armed conflict situation—what the St. Petersburg preamble referred to as finding "the . . . limits within which the necessities of war ought to yield to the demands of humanity." The history of the law of armed conflict reveals over time an increasing tendency to place "the demands of humanity" above "the necessities

⁹⁹For a detailed discussion of the application of the argument of military necessity to the use of nuclear weapons, see W. V. O'Brien, "Legitimate Military Necessity in Nuclear War," *supra*, n. 88.

of war.”¹⁰⁰ One area in which military advantage has been abandoned in the interests of human welfare is chemical and biological weapons, to which the discussion now turns.

3.2.2 Chemical and Biological Weapons

One of the earliest known prohibitions was against the use of poison in warfare. This extended not only to poison by itself, but also to poisoned weapons and the poisoning of water sources.¹⁰¹ This long-standing condemnation found expression in one of the first modern codifications of the law of armed conflict, the 1863 *Instructions for*

¹⁰⁰This can be seen in particular by contrasting the “law of The Hague” (*infra*, section 3.3.2) with the most recent restatement of international humanitarian law in the two Additional Protocols (*infra*, section 3.3.6).

¹⁰¹This ancient prohibition was recognized by Hugo Grotius in his classic treatise, *De jure belli ac pacis* (“The Law of War and Peace”) published in 1625: “. . . from old times the law of nations—if not of all nations, certainly of those of the better sort—has been that it is not permissible to kill an enemy by poison.” (Bk. III, ch. IV, para. XV(1).) He continues:

1. Different in a degree from poisoning of this sort, and more closely allied with the use of force, is the poisoning of javelins. . . . But this also is contrary to the law of nations . . .
2. The poisoning of springs also, though the act either is not secret or does not long remain so, is said by Florus to be not only contrary to ancestral custom but also contrary to the law of the gods; just as we have pointed out elsewhere, writers frequently ascribe the laws of nations to the gods. (Bk. III, ch. IV, para. XVI.)

the Government of Armies of the United States in the Field (also known as the "Lieber Instructions" after their author, Francis Lieber).¹⁰² It was restated in the Brussels Protocol,¹⁰³ and finally attained international acceptance and adherence in the Regulations annexed to *Hague Convention (IV) with Respect to the Laws and Customs of War on Land*: "In addition to the prohibitions provided by special Conventions, it is especially forbidden—(a) To employ poison or poisoned weapons; . . ." ¹⁰⁴

¹⁰²These Instructions were drawn up at the request of President Lincoln, for use by the army of the North (the "United States") in the American Civil War. Although they were specifically prepared for use in a non-international armed conflict, and were in effect an internal military document, the Lieber Instructions are held to be an authoritative statement of the law of war in 1863 and a codification of customary international law. The prohibition of poison is stated in terms of the dichotomy between military necessity and humanitarian concern: "Military necessity does not admit of cruelty. . . . It does not admit of the use of poison in any way . . ." (Article 16). General Orders No. 100, Adjutant General's Office, 1863 (Washington, D.C.: Government Printing Office, 1898); reprinted in L. Friedman (ed.), *The Law of War: A Documentary History* (New York: Random House, 1972), v. 1 at 158.

¹⁰³*Supra*, n. 94. The relevant provision is found in Article 13: "According to this principle are strictly forbidden: (a) The use of poison or poisoned weapons." The "principle" referred to is found in Article 12, that the right of belligerents to choose means of injuring the enemy is not unlimited.

¹⁰⁴*Supra*, n. 94, Article 23.

In addition to the provisions in the Convention, there was a Declaration made at the First Peace Conference at The Hague in 1899 concerning asphyxiating gases, at that time a recent development in military technology.¹⁰⁵ The Declaration prohibited "the use of projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases,"¹⁰⁶ and clearly derived from the rule of customary international law codified in the Hague Regulations. However, it must be noted that it had only very limited application to one particular method of warfare.

The terrifying results of the use of poison gas in World War I, in defiance of the prohibitions in the Hague Convention and Declaration, so shocked the parties to the conflict that the *Treaty of Versailles* which terminated the war contained a specific ban on such use.¹⁰⁷

¹⁰⁵There were three Declarations adopted at The Hague in 1899, in addition to the three Conventions. The first Declaration prohibited the launching of explosives and projectiles from balloons, and was remarkable as the first attempt to regulate air warfare, which had not at that time even become a probability. The second dealt with asphyxiating gases. The third, prohibiting expanding bullets, is discussed *supra*, n. 95 and accompanying text.

¹⁰⁶(1907) 1 A.J.I.L. Supp. 155.

¹⁰⁷(1919) 225 C.T.S. 189. Article 171 states: "The use of asphyxiating, poisonous or other gases and all analogous liquids, materials or devices being prohibited, their

However, it would appear that this prohibition was felt to be inadequate, as a separate Protocol was concluded on the matter in 1925.¹⁰⁸ This Protocol is short and to the point:

THE UNDERSIGNED PLENIPOTENTIARIES, in the name of their respective Governments:

Whereas the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids materials or devices, has been justly condemned by the general opinion of the civilized world; and

Whereas the prohibition of such use has been declared in Treaties to which the majority of Powers in the world are Parties; and

To the end that this prohibition shall be universally accepted as a part of International Law, binding alike the conscience and the practice of nations;

DECLARE:

That the High Contracting Parties, so far as they are not already Parties to Treaties prohibiting such use, accept this prohibition, agree to extend this prohibition to the use of bacteriological methods of warfare and agree to be bound as between themselves according to the terms of this declaration. . . .

There are however a number of drawbacks. Many States are party to the Gas Protocol only on the understanding that it is binding only with respect to other states party to it, and that it ceases to be binding

manufacture and importation are strictly forbidden in Germany." It did not regulate the activities of the victor states in this regard.

¹⁰⁸The 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (1931) 25 A.J.I.L. Supp. 94, commonly referred to as the "Gas Protocol."

once another party has violated its provisions. In other words, the Protocol would allow the use of gas as a reprisal against a previous illegal use. Nevertheless, the Gas Protocol has come, through its wide acceptance and general observation, to be regarded as an expression of customary international law, and gas has been used in armed conflict only three times since it came into force on 8 February 1928.¹⁰⁹

Of significant interest is the fact that the Gas Protocol prohibits *types* of weapons, without detailed definition. The ban on bacteriological weapons was itself an exercise in foresight, since such weapons did not really exist at the time; the prohibition on "*all analogous liquids materials or devices*" provides a potentially wide scope for the evaluation of weapons developed at a later date.¹¹⁰

Biological weapons became the subject of the 1972 *Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their*

¹⁰⁹By Italy against Ethiopia in 1935-36, by Japan against China between 1937 and 1945, and by Iran and Iraq in the Gulf War, 1980-88.

¹¹⁰It has also, unfortunately, allowed some disagreement over what "liquids materials or devices" are covered by the Protocol. The United States, for example, maintains that it does not cover riot control agents (such as tear gas) or herbicides.

*Destruction.*¹¹¹ The preamble of the Convention recognizes the importance and reaffirms the principles of the Gas Protocol,¹¹² and indicates that the aim of the Convention is “for the sake of all mankind, to exclude completely the possibility of bacteriological (biological) agents and toxins being used as weapons.” To this end, as the title of the Convention indicates, it does not prohibit the use of the weapons in question.¹¹³ Rather it forbids the states parties, under all circumstances, “to develop, produce, stockpile or otherwise acquire or retain” these weapons, and requires them “to destroy, or to divert to peaceful purposes” any such weapons in their possession or under

¹¹¹(1972) 11 I.L.M. 309. This Convention (the “Biological Weapons Convention”) entered into force on 26 March 1975.

¹¹²The preamble indicates the extent to which the Gas Protocol had become accepted as *principle*, not just as a treaty, and this helps to confirm that it had in fact become customary law. The preamble reads, in part:

Recognizing the important significance of the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, signed at Geneva on June 17, 1925, and conscious also of the contribution which the said Protocol has already made, and continues to make, to mitigating the horrors of war, Reaffirming their adherence to the principles and objectives of that Protocol and calling upon all States to comply strictly with them, . . .

¹¹³These weapons are defined in Article 1 as:

- (1) Microbial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes;
- (2) Weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict.

their control.¹¹⁴ This approach is quite unusual in weapons conventions.

Can provisions applicable to chemical and biological weapons be made applicable to nuclear weapons? It has been argued that the radiation effects of nuclear weapons are analogous to the effects of poison, and that nuclear weapons are therefore prohibited under the customary prohibition of the use of poison. It has also been suggested that their use is prohibited by analogy under the terms of the Gas Protocol, which forbids "the use in war of asphyxiating, poisonous or other gases, and of *all analogous liquids materials or devices*."¹¹⁵ The similarity between the effects of nuclear weapons and the effects of poison and poisonous weapons and bacteriological warfare was in fact noted by the Tokyo District Court in its judgement in the *Shimoda* case.¹¹⁶ It was also the basis of Schwarzenberger's attack on the

¹¹⁴Articles 1 and 2, respectively.

¹¹⁵*Supra*, n. 108 and accompanying text (emphasis added). It should be remembered in this regard that the Gas Protocol now has the status of customary international law, and is therefore considered to be binding on all states, whether or not they are party to it. However, since some states interpret the Gas Protocol as allowing reprisals in kind against an illegal first use of prohibited means of warfare, this would mean that nuclear weapons could be used legally in a reprisal situation.

¹¹⁶*Supra*, n. 16 and accompanying text.

legality of nuclear weapons, in the first full-length legal study of the issue.¹¹⁷

Although the harmful effects of radiation were known fifty years before the explosion of the first atomic bomb at Alamogordo in 1945,¹¹⁸ our knowledge of the long-term effects of radiation is still incomplete, although it has increased dramatically since the Second World War.¹¹⁹ However, the experience of the citizens of Hiroshima and Nagasaki, of the inhabitants of Utah and Nebraska, of the soldiers who were used as guinea pigs in the American nuclear tests, of the Marshallese and the natives of Bikini Atoll, of the Canadians of Chalk River and the Soviets of Chernobyl—among too many others—suggests that it is not

¹¹⁷G. Schwarzenberger, *The Legality of Nuclear Weapons*, *supra*, n. 2.

¹¹⁸Many of the scientists who worked on the discovery of x-rays, including Marie Curie, died of leukemia resulting from constant exposure to x-rays and other forms of radioactive radiation. And in 1927 workers at the Radium Luminous Material Company sued their employer for injuries resulting from constant exposure to radium contained in the material used to paint luminous dials on wrist watches. P. Pringle & J. Spigelman, *The Nuclear Barons* (New York: Avon Books, 1971) at 184-87.

¹¹⁹Due no doubt to the vastly increased number of subjects to study. A detailed examination of radiation effects, with particular reference to nuclear policy past and present, is found in R. Bertell, *No Immediate Danger? Prognosis for a Radioactive Earth* (Toronto: Women's Educational Press, 1985).

unrealistic to equate the effects of radiation, in both the short and the long term, on both the human organism and the natural environment, with the effects of the use of poison.¹²⁰ In light of the long-standing prohibition in customary international law against the use of poison and poisoned weapons, and of more contemporary conventions embodying similar prohibitions, this could be an important argument to consider in reference to the legality or illegality of nuclear weapons *per se*.¹²¹

It is less likely that these effects would qualify nuclear weapons to come within the terms of the Biological Weapons Convention, although the argument might also be made. In either case, it should be recalled that the Biological Weapons Convention at present does not have the status of customary international law, and thus is not binding on states not party to the convention. Should the Convention be perceived at some future time as having evolved into customary international law, this argument will have to be re-examined.

¹²⁰In addition to the works cited *supra*, nn. 118 and 119, see also J. G. Fuller, *The Day We Bombed Utah* (New York: New American Library, 1984) and T. H. Saffer and O. E. Kelly, *Countdown Zero: G.I. Victims of U.S. Atomic Testing* (New York: G. P. Putnam's Sons, 1982).

¹²¹Burns Weston specifically relates the rule regarding poison (*supra*, n. 101 and accompanying text) to nuclear weapons in "Nuclear Weapons Versus International Law: A Contextual Reassessment" (1933) 28 McGill L.J. 542 at 559-60.

Nevertheless, the argument that nuclear weapons may fall under either the customary prohibition, or one or both of the Gas Protocol and the Biological Weapons Convention, still deserves to be carefully considered at this time. It is possible that such an argument could be made cogently, if it were supported with clear and apposite expert scientific testimony. The argument is the more important in that it would apply whether or not the nuclear weapons whose use is contemplated is a "miniaturized" nuclear weapon. No matter what the size of the device, harmful radiation will be released by exploding it.¹²²

3.3 International Humanitarian Law

3.3.1 Definitions

Those international legal rules which previously went under the rubric of "laws of war" or "laws of warfare" are now commonly referred to as the "law of armed conflict." This broader term has gained currency in the twentieth century due to the large number of conflict situations which have occurred without being recognized or declared as wars.¹²³

¹²²For a further discussion of the impact of the development of miniaturized nuclear weapons on the legal debate, see *infra*, section 3.3.7.

¹²³This lack of recognition in turn would appear to be the consequence of provisions in the Charters of the League of Nations and the United Nations which "outlaw" war. In order to avoid appearing in outright violation of these Charter provisions, States

The law of armed conflict covers what was previously known as the *jus in bello*, the rules governing the *conduct* of war.¹²⁴ In the twentieth century, it has also come to be known as "international humanitarian law," as it has become more and more concerned with reducing the "calamities of war."¹²⁵

There are two "branches" of international humanitarian law, known as the "law of The Hague" and the "law of Geneva." According to Pictet, "[t]he law of The Hague, or the law of war properly so-called, determines the rights and duties of belligerents in the conduct of operations and limits the choice of the means of doing harm."¹²⁶ It is

members of these organizations have preferred to undertake military operations without a formal declaration of war.

¹²⁴*Jus ad bellum* is the law governing the right to go to war, the declaration of war, etc.

¹²⁵The term "international humanitarian law" was first proposed by Jean Pictet, a member of the International Committee of the Red Cross, and has now gained international acceptance. The object of international humanitarian law is "to regulate hostilities in order to attenuate their hardships." See J. Pictet, *Development and Principles of International Humanitarian Law* (Dordrecht: Martinus Nijhoff, 1985) at 1.

¹²⁶*Ibid.* at 2.

named for the Hague Conventions of 1899 and 1907, which were the culmination of such developments as the Lieber Instructions, the St. Petersburg Declaration, the Brussels Protocol and the Oxford Manual. This branch of law also includes the 1925 Gas Protocol, the 1972 Biological Weapons Convention and the 1981 Conventional Weapons Convention. The law of The Hague is based in part on considerations of military necessity, and in part on humanitarian considerations, primarily expressed in terms of limiting means and methods of warfare perceived as too harmful in relation to their military usefulness.

The law of Geneva, or "humanitarian law properly so-called, tends to safeguard military personnel placed 'hors de combat', [and] persons not taking part in hostilities."¹²⁷ This law, named after the four Geneva Conventions of 1949, has been almost entirely inspired and developed by the International Committee of the Red Cross (the ICRC). It protects combatants who are *hors de combat*, including the sick, wounded and shipwrecked, prisoners of war, and civilians in the hands of the enemy.

These two branches of international humanitarian law—the law of The Hague and the law of Geneva—have tended to converge over time, to the point that they have been combined and restated in the *Protocols*

¹²⁷*Ibid.*

*Additional to the Geneva Conventions of 12 August 1949.*¹²⁸ One of the most important aspects of the Protocols (especially Protocol I) is the emphasis on the protection of civilians in their own countries from the effects of hostilities. It is on the issue of the protection of civilian populations and objects that the following discussion will concentrate.

3.3.2 The "Law of the Hague"

The period of 1850 up to World War I is generally held to be the period of "classical" warfare. The basis for conflict was the ever-changing balance of power in Europe. The states involved shared fundamentally the same civilization, the same social development, and the same science and technology. In this setting, war was not only morally permissible, it was also the accepted method of regulating international arguments. The goal of military operations was to destroy the enemy army; and when one side considered it had lost the war on the military level, a political solution was established based on treaties, cessions of territory, and so forth. Although a great many of the rules of warfare in this period related to means and methods of

¹²⁸There are two Additional Protocols, the first "Relating to the Protection of Victims of International Armed Conflict" (1977) 16 I.L.M. 1391, and the second "Relating to the Protection of Victims of Non-International Armed Conflicts" (1977) 16 I.L.M. 1442. They are discussed in greater detail *infra*, section 3.3.6.

warfare, there also were important provisions with regard to the protection of civilians caught up in the conflict.¹²⁹

The earliest "modern" codification of international humanitarian law was the Lieber Instructions of 1863.¹³⁰ These Instructions corresponded closely to the laws and customs of war at the time, and thus, although they were only binding on the forces of the United States, they formed a basis for subsequent developments in this area of law.

Scattered throughout the articles of the Lieber Instructions are various statements of principle which illuminate the philosophical underpinning of this document, and indeed of the law of armed conflict as understood at that time. Thus it is set down that "[t]he ultimate object of all modern war is a renewed state of peace";¹³¹ but this is immediately followed by the statement, "The more vigorously wars are pursued, the better it is for humanity. Sharp wars are

¹²⁹See generally K. Obradovic, "La protection de la population civile dans les conflits armés internationaux" in A. Cassesse (ed.), *The New Humanitarian Law of Armed Conflict* (Naples: Editoriale Scientifica s.r.l., 1979) 128.

¹³⁰*Supra*, n. 102.

¹³¹Article 29.

brief."¹³² Although this may appear a licence to wage all-out war in the (questionable) interest of getting it over with in a hurry, the subsequent article imposes restrictions based on considerations which appear to have their foundation in chivalry, or civility (as opposed to barbarism):

[W]ar has come . . . to be acknowledged . . . the means to obtain great ends of state, or to consist in defense against wrong; and no *conventional* restriction of the modes adopted to injure the enemy is any longer admitted; *but the law of war imposes many limitations and restrictions on principles of justice, faith, and honor.*¹³³

Therefore it is later stated that "[t]he destruction of the enemy in modern war, and indeed, modern war itself, are means to obtain that object of the belligerent which lies beyond the war. *Unnecessary or revengeful destruction of life is not lawful.*"¹³⁴

¹³²*Ibid.*

¹³³Article 30 (emphasis added).

¹³⁴Article 68 (emphasis added). There is, however, little indication of what might constitute "unnecessary" destruction of life. The principle of "the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms" is recognized, as is the corollary "that the unarmed citizen is to be spared in person, property and honor"—but the latter principle is immediately qualified by the condition, "*as much as the exigencies of war will permit*" (Article 22, emphasis added).

International humanitarian law in general attempts to balance considerations of humanity against considerations of military necessity. The Lieber Instructions state: "Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war."¹³⁵ It must be admitted that this definition is somewhat vague, and could leave quite a lot of leeway to military or political decision-makers for deciding what measures might be "indispensable for securing the ends of war." Indeed, a great deal of damage could be done in the name of military necessity:

Military necessity admits of all direct destruction of life and limb of . . . persons whose destruction is *incidentally unavoidable* in the armed contests of the war; . . . it allows of all destruction of property, . . . and of all withholding of sustenance or means of life from the enemy.¹³⁶

¹³⁵Article 14.

¹³⁶Article 15 (emphasis in the original). Thus, for example, it was considered lawful to starve unarmed citizens, or to prevent them by force from leaving a besieged place, in order to hasten surrender. And although a commander intending to bombard a place *should* warn the enemy of his intention in order to allow non-combatants (especially women and children) to escape, failure to give such a warning would not be "against the common law of war" if surprise were an important element of the attack (Article 16).

Yet “[m]ilitary necessity does not admit of cruelty—[including] . . . the wanton devastation of a district.”¹³⁷ In essence, the overriding concern was to win the war as quickly and as efficiently as possible, but with some regard for the safety of the unarmed citizens of the enemy and their property—as long as this did not interfere unduly with winning the war.

The Lieber Instructions formed the origins of a draft international agreement on international humanitarian law presented by the Russian Government in Brussels in 1874.¹³⁸ Although the Brussels Protocol shared with the Lieber Instructions the notion that the purpose of war is a renewed state of peace, its provisions seem to contain a slightly less “hard line” approach to the primacy of military necessity than the earlier document. It lays down as a matter of principle that “[t]he laws of war do not recognize in belligerents an unlimited power in the adoption of means of injuring the enemy.”¹³⁹ Included among the specific prohibitions is “[a]ny destruction or seizure of the enemy's

¹³⁷Article 16.

¹³⁸*Supra*, n. 94.

¹³⁹Article 12.

property that is not imperatively demanded by the necessity of war."¹⁴⁰

The Brussels Protocol also specifically forbids the attack or bombardment of undefended towns, villages, or "agglomerations of dwellings."¹⁴¹ Furthermore, in the case of a *defended* town, village or "agglomeration," "the officer in command of an attacking force must, before commencing a bombardment, *except in assault*, do all in his power to warn the authorities."¹⁴²

¹⁴⁰Article 13. It is suggested that the word "imperatively" in Article 13(g) was used to impart a more objective aspect to what might otherwise be a somewhat subjective assessment by a military or political decision-maker.

¹⁴¹Article 15. The Lieber Instructions make no distinction between defended and undefended.

¹⁴²Article 16 (emphasis added). The wording here at first glance appears stronger than that in the corresponding article of the Lieber Instructions, where the commander may omit to warn if he wishes to launch a surprise attack. It is submitted that the qualification "except in assault" found in the Brussels Protocol concerns a situation where a military force is openly moving in attack, and therefore the defenders can logically expect a bombardment as part of the attack. This view may be supported by the wording of the corresponding provision of the Oxford Manual, which reiterates the requirement for warning "save in cases of *open assault*" (Article 33, emphasis added).

The Brussels Protocol (and the Oxford Manual) provided the foundation for the Hague Conventions of 1899. In fact, one of the purposes of calling the First Hague Peace Conference of 1899 was declared to be the revision of the Brussels draft convention. The Second International Peace Conference of 1907 was called "to complete and explain in certain particulars the work of the First Peace Conference."

A significant element in the Hague Conventions is a clause, called the "Martens clause" after its author, found in the preamble to the Conventions. This provides that in cases not covered by the Conventions,

populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience . . .

The stated purpose of the inclusion of this clause was, in its own terms, to avoid the possibility "that the cases not provided for should, for want of a written provision, be left to the arbitrary judgment of the military commanders." This would appear to be an indication that the philosophy underlying these Conventions had to some extent rejected perceived military necessity as an overriding consideration in the conduct of armed conflicts. The clause can be seen as an attempt to prevent the possibility of a *non liquet* in international humanitarian law—a situation in which an issue cannot be adjudicated because there is no applicable rule or principle of law for the court to consider. It

also contradicts the statement, often heard even today, that anything not specifically forbidden in international law is therefore permitted.

3.3.3 Between the Two World Wars

World War I marked a new and frightening departure by introducing two new methods of warfare which had profound implications for civilian populations: aerial bombardment and poison gas.

The ability to drop bombs on the enemy's army brought with it the ability to bomb the enemy's rear lines to disrupt his lines of communication and supply; and also the ability to drop bombs on the factories supplying him with war matériel. Unfortunately, factories tended to be located in towns and cities, and to be occupied by civilian personnel; bombing such institutions would inevitably lead to civilian casualties.

Similarly, poison gas was not a discriminating weapon. Once released, it was uncontrollable, and a change in wind direction could blow it into a centre of civilian population, whether or not such was the intent of its users.

Yet in spite of these serious dangers, little was done in the period between 1918 and 1939 to revise international humanitarian law to deal with new methods of warfare. The Gas Protocol was signed in

Geneva on 17 June 1925¹⁴³; but draft *Rules of Air Warfare* drawn up by jurists in The Hague in 1922/23 were never ratified.¹⁴⁴ Perhaps the establishment of the League of Nations, with the object of outlawing the use of force in settling international disputes and instead promoting the use of law, made states reluctant to pursue work on international humanitarian law, in apparent contradiction to the League's work.

Nevertheless, on 30 September 1938, the League of Nations Assembly adopted a resolution concerning the *Protection of Civilian Populations*

¹⁴³*Supra*, n. 108 and accompanying text.

¹⁴⁴(1923) 17 A.J.I.L. Supp. 245. Of particular interest are Article 22, prohibiting "[a]erial bombardment for the purpose of terrorizing the civilian population, of destroying or damaging private property not of a military character, or of injuring non-combatants"; and Article 24, which deals with conditions for bombarding military objectives located in or near centres of civilian population. In the latter respect, considerations of military necessity continued to play an important role; Article 24 reads:

In the immediate neighbourhood of the operations of land forces, the bombardment of cities, towns, villages, dwellings or buildings is legitimate *provided that* there exists a *reasonable presumption* that the military concentration is *sufficiently important* to justify such bombardment, *having regard to* the danger thus caused to the civilian population. (Emphasis added.)

*Against Bombing From the Air in Case of War.*¹⁴⁵ The preamble states unequivocally that the practice of bombarding civilian populations from the air, "for which there is *no military necessity* and which, as experience shows, only causes needless suffering, is condemned under the recognized principles of international law."¹⁴⁶ The resolution then goes on to set down three principles "as a necessary basis for any subsequent regulations":

- (1) The intentional bombing of civilian populations is illegal;
- (2) Objectives aimed at from the air must be legitimate military objectives and must be identifiable;
- (3) Any attack on legitimate military objectives must be carried out in such a way that civilian populations in the neighbourhood are not bombed through negligence.¹⁴⁷

One other major document dealing with this issue in the interwar years was the *Draft Convention for the Protection of Civilian Populations Against New Engines of War*, adopted by the International

¹⁴⁵"Resolutions adopted by the Assembly during its 19th Ordinary Session (12-30 September 1938)" (October 1938) *League of Nations Official Journal, Special Supplement No. 182* 15.

¹⁴⁶Emphasis added.

¹⁴⁷Article 1.

Law Association in 1938.¹⁴⁸ The document contains a blanket prohibition on the bombardment of undefended "towns, ports, villages or buildings."¹⁴⁹ It also embodies provisions on aerial bombardment which closely resemble the Hague draft Rules of 1922/23.¹⁵⁰

The advent of World War II in 1939 put an abrupt halt to any further development in international humanitarian law. The unprecedented brutality and destruction endured by civilian populations in that conflict necessitated a new departure in the evolution of this body of law, a departure characterized by a reversal of the previous primacy of considerations of military expediency over humanitarian concerns.

3.3.4 Outlawing War

Despite the failure of the international community to come to grips with the problems posed by new means and methods of warfare, the interwar period saw a marked movement away from acceptance of an unlimited right of states to use force in their relations with one another.

¹⁴⁸International Law Association, *Report of the Fortieth Conference* (Bungay, Suffolk: Richard Clay, 1939) 41.

¹⁴⁹Article 2.

¹⁵⁰*Supra*, n. 145 and accompanying text.

One of the first great efforts in this direction was the establishment after World War I of the League of Nations. Its purpose, as set out in the preamble of its Covenant, was “to promote international cooperation and to achieve international peace and security by [*inter alia*] the acceptance of obligations not to resort to war . . . ”¹⁵¹

The League did not embody a collective security system, in the sense that it had no central organ with executive power to act to control situations involving the use of armed force. However, Articles 10 to 16 of the Covenant set out important limitations on the rights of members to go to war, particularly the requirement that they submit disputes between them to arbitration, judicial settlement or inquiry by the Council of the League.

The League did not “outlaw” war—in fact it envisaged the continuation of situations where war might occur. The further step of *prohibiting*, rather than *limiting*, war was taken in the 1928 *General Treaty for the Renunciation of War*,¹⁵² to which 63 states became parties. In Article I of the Pact, the parties “condemn recourse to war for the solution of international controversies, and renounce it as an instrument of

¹⁵¹(1919) 13 A.J.I.L. Supp. 128.

¹⁵²(1929) 29 U.K.T.S., Cmd. 310, also known as the “Pact of Paris” and the “Kellogg-Briand Treaty.”

national policy in their relations with one another.” In Article II, they “agree that the settlement or solution of all disputes or conflicts of whatever nature . . . shall never be sought except by pacific means.”

However, the Pact, like the Covenant of the League of Nations, does not appear to prohibit hostile measures short of actual declared “war.” Furthermore, many states made specific reservations of the right of self-defence, which tended to be broadly stated. No attempt was made in the Pact to define the concept of self-defence.

In addition to the League and the Pact of Paris, the period between the two World Wars saw the conclusion of a number of treaties emphasizing co-operation and the peaceful settlement of disputes. Examples include the *Treaty of Mutual Guarantee* between Germany, Belgium, France, Great Britain and Italy signed in 1925¹⁵³ and the *Anti-War Treaty of Non-Aggression and Conciliation* signed by 32 American and European states in 1933.¹⁵⁴

Although the League failed as a world organization, and the various treaties did not prevent the outbreak of another World War, the Allied powers throughout almost the whole of World War II laboured to

¹⁵³(1926) 20 A.J.I.L. Supp. 21, also known as the “Locarno Treaty.”

¹⁵⁴(1934) 28 A.J.I.L. Supp. 79.

construct a new organization which they hoped would succeed where the League had not.

The United Nations was established in 1945 with 51 member states, determined to "save succeeding generations from the scourge of war" and to that end "to unite our strength to maintain international peace and security, and to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest."¹⁵⁵ Among the principles which are to guide members of the U.N. are the peaceful settlement of disputes and the abjuring of the "threat or use of force."¹⁵⁶ The commitment not to use force is however qualified by the reservation of the right of self-defence.¹⁵⁷

¹⁵⁵*Charter of the United Nations*, [1945] Canada T.S. 7, Preamble.

¹⁵⁶Article 2, paragraphs (3) and (4):

3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

¹⁵⁷Article 51:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems

The United Nations Charter is a major departure from all that has gone before in its attempt to assign responsibility for the governing of the use of force to a supranational and impartial body—the Security Council. Unfortunately, as is well known, the Security Council has been unable to fulfil the mandate assigned to it, due to the lack of unanimity between the Great Powers and also the failure of members to provide forces to it in accordance with Article 43 of the Charter.

To some extent the General Assembly of the United Nations has stepped into the breach left by the inability of the Security Council to fulfil the role originally envisaged for it. By means of numerous resolutions over the years, the General Assembly has sought to reinforce and develop the prohibition on the use of force found in Article 2(4).¹⁵⁸

necessary in order to maintain or restore international peace and security.

¹⁵⁸Three such resolutions and declarations are of particular importance, as they seek progressively to define and narrow the scope of the permissible use of force by states: the *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty*, G.A. Res. 2131 (XX), 21 December 1965 (109 votes for, none against, one abstention); the *Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625 (XXV), 24 October 1970 (adopted without vote); and the *Definition of Aggression*, G.A. Res. 3314 (XXIX), 14 December 1974 (adopted without vote). Although General Assembly

3.3.5 The "Law of Geneva"

The four Geneva Conventions of 1949 were a major restatement of international humanitarian law. However, these Conventions, important as they undoubtedly are, have little relevance to the present discussion, as they are primarily concerned with the treatment of various classes of non-combatant, and not with the means and methods of waging war. Furthermore, they are concerned with the plight of the non-combatant found in enemy territory during hostilities, not with the effect of hostilities on non-combatants in their own country.

resolutions do not have legally binding effect, resolutions which reflect state practice or which attract general (if not universal) support may have an impact as evidence of customary international law or general principles. See R. R. Baxter's discussion of this point in "Treaties and Custom" (1970) 129 R. de C. 25 at 70-71. The use of state practice and general support for principles as evidence of a rule of customary international law is discussed in greater detail in R. R. Baxter, "Multilateral Treaties as Evidence of Customary International Law" (1965-66) 41 B.Y.I.L. 275, and A. A. D'Amato, *The Concept of Custom in International Law* (London: Cornell University Press, 1971) at 103-66. See also the *North Sea Continental Shelf Cases*, [1969] 1 I.C.J. Rep. 3 at 43.

3.3.6 The Additional Protocols¹⁵⁹

Of the two Protocols, the first is the most significant for purposes of the present discussion. It begins by stating, in terms strikingly reminiscent of the Martens clause of the Hague Conventions:

In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.¹⁶⁰

Many of the provisions subsequently embodied in Protocol I are restatements of well-established rules of armed conflict: for example, the prohibition on employing "weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering,"¹⁶¹ and the preservation of the basic distinction between military and non-military persons and objects.¹⁶² However,

¹⁵⁹*Supra*, n. 128 and accompanying text.

¹⁶⁰Article 1.2.

¹⁶¹Article 35.2; *cf.* St. Petersburg Declaration, *supra*, n. 92 and accompanying text, Brussels Protocol, *supra*, n. 94 and accompanying text.

¹⁶²Article 48; *cf.* Lieber Instructions, *supra*, n. 102 and accompanying text.

there are a number of significant new provisions in Protocol I which have major implications for military strategy in time of armed conflict.

Part III of Protocol I deals with "Means and Methods of Warfare" and makes specific provision for the future development of new weapons:

In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party.¹⁶³

Part IV of Protocol I deals with "Civilian Population"; Chapter II of Section I ("General Protection Against Effects of Hostilities") is particularly concerned with "Civilians and Civilian Population." Herein it is firmly stated that "[t]he civilian population and individual civilians shall enjoy general protection against dangers arising from military operations."¹⁶⁴ It is further stated that "[t]he civilian population as

¹⁶³Article 36. It is worth noting that this provision does not appear to apply to weapons already in the possession of the state party. Nor, in fact, is there any indication of what course of action the state party should undertake if its investigation reveals a prohibited employment.

¹⁶⁴Article 51.1. This would appear finally to displace the "classical" attitude that protection for the civilian population was subject to the overriding imperatives of military necessity. It should be noted here that the provisions of this Chapter appear to

such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited."¹⁶⁵ As early as 1922/23, the Hague draft Rules of Air Warfare had sought to prohibit *aerial* bombardment intended to terrorize the civilian population; but the present prohibition, being unlimited, would appear to be against *any* act of violence designed primarily to terrorize and, moreover, also against the *threat* of any such act.

Protocol I also reaffirms and expands the concept of indiscriminate attacks, which are prohibited. They are defined as:

- (a) those which are not directed at a specific military objective;
 - (b) those which employ a method or means of combat which cannot be directed at a specific military objective;
 - or
 - (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol;
- and consequently, in each case, are of a nature to strike military objectives and civilians or civilian objects without discrimination.¹⁶⁶

reflect quite closely the *Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War*, proposed by the ICRC in 1956.

¹⁶⁵Article 51.2.

¹⁶⁶Article 51.4.

A subsequent illustrative (but not exhaustive) listing of types of indiscriminate attacks includes “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, *which would be excessive in relation to the concrete and direct military advantage anticipated.*”¹⁶⁷

In dealing with protection to be accorded to civilian objects (i.e., all those objects which are not military objectives), complete protection is afforded to “objects indispensable to the survival of the civilian population, such as foodstuffs . . .” where the specific purpose for attacking them is to deny them “for their sustenance value” to the civilian population or the adverse party, for whatever reason.¹⁶⁸ This is a prohibition on anything resembling a “scorched-earth” policy, and is a variation of the prohibition against making the civilian population an object of attack (albeit, in this case, an indirect attack).

¹⁶⁷Article 51.5(b) (emphasis added). It should be noted here again that humanitarian considerations appear to take precedence over concerns of military advantage. An attack which would involve the civilian population would have to be justified in terms of an anticipated “concrete and direct” military advantage. A *possible or hoped-for* military advantage would not be sufficient to justify civilian loss of life (or even a certain degree of damage to civilian property).

¹⁶⁸Article 54.2.

Other "civilian objects" granted special protection are "works and installations containing dangerous forces." These are defined, apparently exhaustively, as "dams, dykes and nuclear electrical generating stations." Even if they meet the definition of "military objective," they are not to be the object of attack "if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population."¹⁶⁹

¹⁶⁹Article 56. It should be noted that the phrase is "*may* cause the release," not "*will* cause." It is sufficient to show the mere *probability* of such a release of dangerous forces to raise the prohibition against the attack. Furthermore, a similar prohibition applies to attacks against other military objectives located near the said works and installations, "if such attack may cause the release of dangerous forces from the works and installations and consequent severe losses among the civilian population." Such protection may nonetheless cease if, *and only if*, any of the objectives "are used in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support." Notwithstanding that provision, "[i]n all cases, the civilian population and individual civilians shall remain entitled to all the protection accorded them by international law" including, in the case of targets identified in Article 56.1, the taking of "all practical precautions to avoid the release of dangerous forces." Clearly, here again military advantage is subordinated to the life and safety of the civilian population, as a group and as individuals.

3.3.7 International Humanitarian Law and Nuclear Weapons

In any discussion of international humanitarian law, Protocol I must be taken as the most complete and contemporary statement of the law. It is a milestone in the development of international humanitarian law as it relates both to the means and methods of warfare and to the protection of civilian populations. Its provisions indicate a considerable heightening of standards to be met by parties to armed conflicts, and clearly make the conduct of armed conflict much more difficult thereby.

However, the Protocol makes no mention of specific weapons, least of all nuclear weapons,¹⁷⁰ and there is a strong current of opinion that

¹⁷⁰In fact it was never intended to include nuclear weapons in the Additional Protocols. In preparing for the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, which took place in Geneva from 1974 to 1977 and at which the Additional Protocols were developed and drafted, the ICRC stated that "[p]roblems relating to atomic, bacteriological and chemical warfare are subjects of international agreements or negotiations by governments, and in submitting these draft Protocols the ICRC does not intend to broach these problems." See M. Bothe, K. Partsch & W. Solf, *New Rules for Victims of Armed Conflicts* (The Hague: Martinus Nijhoff, 1982) at 188.

the *new* rules established in the Protocols¹⁷¹ do not apply to nuclear weapons.¹⁷² However, even those who hold this opinion admit that the rules of customary international law codified in the Protocols are, by their customary nature, binding on all states (including those not party to the Protocols) in respect of warfare waged with nuclear weapons.

In the absence of any explicit prohibition on nuclear weapons themselves, or on their development, manufacture or stockpiling, it becomes necessary to consider the legality or illegality of the use of

¹⁷¹In Protocol I, these are the rules against damaging the environment and also the ban (in Articles 51.6 and 64.4) on reprisals against civilians or objects indispensable to the survival of the civilian population.

¹⁷²Protocol I was adopted by consensus. At that time, the United States made the following declaration:

From the outset of the Conference, it has been our understanding that the rules to be developed have been designed with a view to conventional weapons. During the course of the conference we did not discuss the use of nuclear weapons in warfare. We recognize that nuclear weapons are the subject of separate negotiations and agreements, and further that *their use in warfare is governed by the present principles of international law*. It is the understanding of the United States 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.

(M. Bothe, K. Partsch & W. Solf, *New Rules for Victims of Armed Conflicts*, *supra*, n. 170 at 182, emphasis added.) The United Kingdom and the Netherlands have made similar declarations to the effect that the *new* rules in the Protocols have no bearing on nuclear weapons.

nuclear weapons under international humanitarian law. If it is accepted, as the United States declared, that “[the] use [of nuclear weapons] is governed by the present principles of international law,”¹⁷³ are there any uses which would be prohibited under those principles?

The guiding principles of international humanitarian law, as can be seen from the preceding discussion, are that parties to the conflict must not use weapons which cause excessive suffering or unnecessary harm relative to the military advantage they bring, and that civilians and civilian objects may not be made the object of attack (combatants must be clearly distinguished from non-combatants). These twin pillars of international humanitarian law are known respectively as the principles of *proportionality* and *discrimination*.

It has been repeatedly argued that nuclear weapons are neither proportional nor discriminating. In the first case, the amount of damage and suffering inflicted by any use of nuclear weapons would be so extreme (and long-lasting) that no military advantage from such use could be justified.¹⁷⁴ In the second case, it is argued that the effects of

¹⁷³*Supra*, n. 172.

¹⁷⁴The only examples of the actual military use of nuclear weapons—the bombing of Hiroshima and Nagasaki—are held to be illustrative of this argument.

a nuclear explosion would be so widespread and uncontrollable that it would be impossible to protect civilians from them.¹⁷⁵

Against this argument is the counter-argument that advances in nuclear technology are allowing the development of much smaller, more precise nuclear weapons (sometimes also called "clean" or "miniaturized" nuclear weapons) which can be very carefully directed to hit only small targets (a single military installation, a single submarine). It is argued that the use of such a miniaturized nuclear weapon against a military installation in a remote area such as the Sahara, or against a submarine on the high seas, would not violate the requirements of either proportionality or discrimination.¹⁷⁶

¹⁷⁵This argument rests not only on the immediate radioactive fallout from any such explosion, but also on the fact that radioactive dirt and dust would be shot high into the earth's atmosphere, where it would be circulated by prevailing wind currents to areas very remote from the original blast sight. See the discussion of environmental law, *infra*, section 4.1. It should be added that the uncontrollability of fallout would almost inevitably cause the violation of neutral territories. It is difficult to imagine, for example, that fallout from a nuclear explosion in Germany would completely miss Switzerland.

¹⁷⁶This point is made by Yoram Dinstein, "Existing Legal Constraints on Nuclear Proliferation," in M. Cohen & M. E. Gouin (eds.), *Lawyers and the Nuclear Debate*, *supra*, n. 46, 61 at 62-63.

Thus the argument that the use of nuclear weapons must be illegal because of the effects produced thereby, must be made with great caution, and with considerable attention to the technology involved. In recent years the United States has developed a strategy of a "winnable" nuclear war, based on "limited" use of nuclear weapons which, it is claimed, will leave the world more or less intact—as opposed to apocalyptic views of nuclear war that see it as being synonymous with the complete destruction of the planet. If indeed it could be *shown* that nuclear weapons could be used in such a way as *not* to cause indiscriminate and disproportionate damage, the task of establishing the illegality of nuclear weapons under international humanitarian law would become much more difficult.¹⁷⁷

Another important issue arising from the provisions of Protocol I (and from customary international law) is that "[t]he civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread

¹⁷⁷An interesting point here has to do with evidence. Would it be possible to obtain the technical evidence necessary to show that the effects of miniaturized or "clean" nuclear weapons would be neither disproportionate or indiscriminate? Or would all that material be classified? If the evidence is classified, what weight (if any) could be given to the unsupported testimony of military experts that such a thing is possible? It has already been revealed that the Pentagon "has engaged in wholesale rigging of weapons tests to yield better results than could be expected on the battlefield." ("Rigged tests make U.S. weapons look good," *The Ottawa Citizen*, 27 July 1988.)

terror among the civilian population are prohibited.”¹⁷⁸ Thus it could be argued that the nuclear policy of mutual assured destruction (“MAD”), which involves targeting significant numbers of nuclear weapons on the cities of the so-called “enemy,” is illegal since it makes the civilian population the object of attack (and arguably is designed to spread terror among the civilian population). Equally, any carrying out of the threat embodied in the “MAD” policy is clearly illegal since by definition it would involve sending nuclear weapons against civilian rather than military objectives.¹⁷⁹

However, in all of international humanitarian law, the problem remains that arguments for the illegality of nuclear weapons must be made by analogy and by extension, from effects back to causes. And for every argument that can be made against nuclear weapons on such a ground, there is likely to be a counter-argument. There is no point in claiming that nuclear weapons *must* be illegal because they are so horrible or their effects are so devastating. At the moment at least they are *not* illegal under any instrument of international humanitarian law or weapons law.

¹⁷⁸Article 51.2.

¹⁷⁹*Supra*, section 3.3.2.

Chapter 4

OTHER APPLICABLE PRINCIPLES OF INTERNATIONAL LAW

4.1 The Emerging International Law of the Environment

Although there is not, properly speaking, a customary international law of the environment, there are several sets of international rules that have considerable relevance to the environment.

Firstly, rules relating to state responsibility suggest that "[w]hen a State causes, maintains or fails to control a source of harm to other States, or to the nationals of other States, then existing principles of State responsibility provide bases of liability no less sophisticated than those of systems of municipal law."¹⁸⁰ In effect, the same rule of territorial sovereignty that preserves the territorial integrity of one state against interference by another also imposes the obligation on

¹⁸⁰I. Brownlie, "A Survey of International Customary Rules of Environmental Protection" in L. A. Teclaff & A. E. Utton (eds.), *International Environmental Law* (New York: Praeger, 1974) 1 at 2.

that state to ensure that nothing it does with its own territory causes harm to the territory (or inhabitants) of another state.

This is particularly important with reference to the contamination of "peripatetic" or "intra-territorial" environmental elements such as air currents, rainfall, percolating water sources and rivers, mobile glacial material and sand and soil distributed by known regional wind action, water currents or natural drainage systems.¹⁸¹

A further important element relates to the development of the concept of freedom of the seas, which has given considerable impetus to the evolution of environmental law. Although much of the law of freedom of the seas has been concerned with sharing resources rather than conserving them, it has still embodied "elements of reasonable

¹⁸¹It will be remembered that one of the claims made by the plaintiffs in the *Nuclear Tests Cases* was that radioactive fallout from the French nuclear tests would be carried by prevailing winds to the territory of the plaintiffs and cause harm to the plaintiffs' inhabitants. *Supra*, section 2.1.2. In March 1954, the above-ground explosion in the South Pacific by the United States of "Bravo," a fifteen-megaton bomb (the first "deliverable" hydrogen bomb, that is, the first H-bomb that could be used as a weapon), caused the first officially-acknowledged fallout catastrophe when the wind shifted only a few degrees and carried a highly radioactive cloud of pulverized coral over the inhabited Marshall Islands (see P. Pringle & J. Spigelman, *The Nuclear Barons*, *supra*, n. 118 at 243-45). The Marshall Islanders are still suffering the effects of above-ground nuclear testing in their area, although such tests were discontinued 25 years ago.

user and non-exhaustive enjoyment which approach standards for environmental protection."¹⁸²

A significant step towards codification of international environmental law was made in 1970 when the United Nations General Assembly adopted the *Declaration on the Human Environment* (the "Stockholm Declaration").¹⁸³ It is interesting to note that the Declaration makes specific mention of the environmental impact of nuclear weapons,

¹⁸²I. Brownlie, "A Survey of International Customary Rules of Environmental Protection," *supra*, n. 180 at 1.

¹⁸³(1972) 11 I.L.M. 1416. Principles 21 and 22 restate and clarify the concepts outlined above:

21. States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

22. States shall co-operate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction.

For a detailed discussion of the history of the Declaration, and a point-by-point commentary on its Principles, see L. Sohn, "The Stockholm Declaration on the Human Environment" (1973) 14 *Harvard I.L.J.* 423.

although primarily within the framework of encouraging disarmament agreements.¹⁸⁴

Although the principles of the Stockholm Declaration are broadly stated, and although the Declaration does not have binding legal effect, its general tone is one of strong dedication to the development of international environmental law. As the *Universal Declaration of Human Rights* provided the impetus for the promulgation, some twenty years later, of the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*,¹⁸⁵ so it is not unreasonable to expect that the Stockholm Declaration will in turn give rise to more detailed and binding international environmental law agreements in the future.

A major step was taken on 18 May 1977, when the *Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques* (the "ENMOD Convention")¹⁸⁶ was signed at

¹⁸⁴Principle 26: "Man and his environment must be spared the effects of nuclear weapons and all other means of mass destruction. States must strive to reach prompt agreement, in the relevant international organs, on the elimination and complete destruction of such weapons."

¹⁸⁵(1949) 43 A.J.I.L. Supp. 127, (1967) 6 I.L.M. 360 and (1967) 6 I.L.M. 368, respectively.

¹⁸⁶(1977) 16 I.L.M. 90.

Geneva. It entered into force on 5 October 1978. The basic commitment of the parties is set forth in Article 1.1:

Each State Party to this Convention undertakes not to engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party.¹⁸⁷

The definition of "environmental modification techniques" included in the Convention is broadly drawn, and offers the possibility of applying the terms of the Convention to situations not conceived of at the time of its drafting.¹⁸⁸

¹⁸⁷There are a number of "Understandings Relating to the Convention" which are not incorporated into the Convention but which form part of the negotiating record and provide definitions of some of the terms used in the Convention. The "Understanding Relating to Article 1" states:

It is the understanding of the Committee that, for the purposes of this Convention, the terms, "widespread", "long-lasting" and "severe" shall be interpreted as follows:

- (a) "widespread": encompassing an area on the scale of several hundred square kilometres;
- (b) "long-lasting": lasting for a period of months, or approximately a season;
- (c) "severe": involving serious or significant disruption or harm to human life, natural and economic resources or other assets.

It is further understood that the interpretation set forth above is intended exclusively for this Convention and is not intended to prejudice the interpretation of the same or similar terms if used in connexion with any other international agreement.

¹⁸⁸The definition, and the Understanding relating to it, are as follows:

Article 2: As used in article I, the term "environmental modification technique" refers to any technique for changing—through the deliberate manipulation of natural processes—the dynamics, composition or structure of the Earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space.

It may be suggested that the impetus for the ENMOD Convention was the well-publicized effects of napalm and Agent Orange in the Vietnam conflict. Awakening ecological consciousness throughout the world may also have been a factor. Certainly the pervasiveness of the notion of protecting the environment from the effects of armed conflict may be suggested by the fact that Protocol I, following close on the heels of the ENMOD Convention,¹⁸⁹ also contains provisions on this subject.

Understanding Relating to Article 2: It is the understanding of the Committee that the following examples are illustrative of phenomena that could be caused by the use of environmental modification techniques as defined in Article II of the Convention: earthquakes; tsunamis; an upset in the ecological balance of a region; changes in weather patterns (clouds, precipitation, cyclones of various types and tornadic storms); changes in climate patterns; changes in ocean currents; changes in the state of the ozone layer; and changes in the state of the ionosphere.

It is further understood that all the phenomena listed above, when produced by military or any other hostile use of environmental modification techniques, would result, or could reasonably be expected to result, in widespread, long-lasting or severe destruction, damage or injury. Thus, military or any other hostile use of environmental modification techniques as defined in Article II, so as to cause those phenomena as a means of destruction, damage or injury to another State Party, would be prohibited.

It is recognized, moreover, that the list of examples set out above is not exhaustive. Other phenomena which could result from the use of environmental modification techniques as defined in Article II could also be appropriately included. The absence of such phenomena from the list does not in any way imply that the undertaking contained in Article I would not be applicable to those phenomena, provided the criteria set out in that article were met. (Emphasis added.)

¹⁸⁹*Supra*, n. 97. Protocol I was signed on 12 December 1977, and entered into force on 7 December 1978.

In fact, in Protocol I the prohibition on “means and methods of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment” is given the status of a “basic rule” and placed on an equal footing with the oldest and most widely accepted customary rules of international humanitarian law.¹⁹⁰ The prohibition is restated, and reinforced, in Article 55, which in addition forbids “[a]ttacks against the natural environment by way of reprisals.” It should be noted that the phrase “may be expected [to]” in Articles 35.3 and 55.1 import an objective evaluating factor into what might otherwise be a very subjective issue of intent.

The prohibition in Article 35.3 of Protocol I is repeated in identical terms in the preamble to the 1981 Conventional Weapons Convention.¹⁹¹ This is related to Article 2.4 of Protocol III to the Convention, which forbids making “forests or other kinds of plant cover the object of attack by incendiary weapons *except when* such

¹⁹⁰The prohibition, which echoes closely the terms of Article 1.1 of the ENMOD Convention, is found in Article 35.3 of Protocol I. The two other “basic rules” are that “the right of the Parties to the conflict to choose methods or means of warfare is not unlimited” (Article 35.1), and that “[i]t is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering” (Article 35.2).

¹⁹¹*Supra*, n. 98 and accompanying text.

natural elements are used to cover, conceal or camouflage combatants or other military objectives, *or are themselves military objectives.*"¹⁹²

Rules regarding the protection of the environment from the effects of hostilities are obviously of very recent date, and it is difficult to claim that they have obtained the status of international customary law. The record of ratification of and accession to the international instruments discussed above does not indicate a high degree of state agreement with their aims. In particular, with regard to Protocol I, it has been reaffirmed on a number of occasions that the rules regarding the environment are "new" law, as opposed to a codification of existing rules of customary international law. It has however been argued in the context of Protocol I that the rules in question indicate "evolving" international law, and that they may be regarded as part of the customary international law which protects civilians and civilian objects.¹⁹³

¹⁹²Emphasis added.

¹⁹³Such a view has been expressed by Yves Sandoz of the International Committee of the Red Cross:

Probablement que les règles concernant l'environnement peuvent être assumées même par les États qui affirment que le *Protocole* n'introduit pas de nouvelles règles concernant l'usage des armes nucléaires. Par rapport à ce qu'ils ont dit également dans d'autres forums, je ne crois pas que ces États prétendent avoir le droit d'utiliser des moyens de guerre dont on peut s'attendre à ce qu'ils causent des dommages étendus, durables et graves (conditions cumulatives) à l'environnement naturel et compromettant, de ce fait, la santé et la survie de la population.

À cet égard, on peut donc se demander s'il n'y a pas une coutume en voie de formation, pour laquelle le *Protocole* ne donne qu'une indication, parmi d'autres. On ne peut d'ailleurs également se demander

In spite of the uncertain status of rules of international law designed to protect the environment, some mention of their relationship to the effect of nuclear weapons must be made.

The United States, the United Kingdom and the Soviet Union have all ratified the ENMOD Convention.¹⁹⁴ It could be argued that the use of nuclear weapons would necessarily violate the Convention.

A nuclear explosion might well be considered an "environmental modification technique" under the terms of the Convention; it would definitely cause upsets in regional ecological balances, changes in climate patterns, and changes in the state of the ozone layer, at the very least.¹⁹⁵

sérieusement se cette restriction n'est pas déjà implicitement contenue dans les règles protégeant les civils.

Y. Sandoz, "International Humanitarian Law and the Law of Armed Conflict: Its Relevance to the Nuclear Challenge" in M. Cohen & M. E. Gouin (eds.), *Lawyers and the Nuclear Debate*, *supra*, n. 46, 105 at 107.

¹⁹⁴*Supra*, n. 186 and accompanying text.

¹⁹⁵See *supra*, n. 188, especially the text of the Understanding Relating to Article 2 of the Convention. An example of a change in climate patterns is the "nuclear winter" predicted by some scientists. According to this theory, a series of nuclear explosions such as might occur in a nuclear war would throw huge quantities of debris up into the higher reaches of the earth's atmosphere. This debris would form a pall over the whole

If this argument is accepted, at least three nuclear powers—including the two superpowers—face an obstacle to the use of nuclear weapons in the form of their adherence to this Convention.

It has already been noted¹⁹⁶ that the development of miniaturized nuclear weapons has blunted the force of earlier arguments against nuclear weapons. If these weapons are no longer overwhelming or indiscriminate in their effects, but rather capable of careful and effective targeting, what arguments remain to raise against their development, proliferation and use?

The arguments of environmental law, properly supported and applied, may in fact prove to be the leading edge in international law governing nuclear weapons. Whether a nuclear weapon is massive or miniaturized, its use will inevitably release radioactivity. And the effects of that radioactivity—even if the amount is small—are still likely to be severe and long-lasting. They are also likely to be widespread,

planet, cutting off sunlight to the earth's surface. The consequent deprivation of heat and light would lead to a period of dark and cold during which, it is suggested, all plant and animal life on the earth would perish. A seminal article on the "nuclear winter" theory is R. Turco, C. Sagan, et al., "Nuclear Winter: Global Consequences of Multiple Nuclear Explosions" (23 Dec/83) *Science* 1283.

¹⁹⁶*Supra*, section 3.3.7.

given the tendency for radioactive fallout to be carried far afield by peripatetic resources.

The environmental aspect of international law as it relates to nuclear weapons merits careful examination. It is possible that creative pleading based in international environmental law and supported by carefully researched medical and scientific evidence may have an even greater role to play in the future of the debate than international humanitarian law.

4.2 International Human Rights Law

4.2.1 The Right to Life

The right to life is enshrined in the *Universal Declaration of Human Rights*¹⁹⁷ and, in treaty form, in the *International Covenant on Civil and Political Rights*.¹⁹⁸ It is in fact likely that these provisions—

¹⁹⁷*Supra*, n. 185 (hereinafter the "Universal Declaration"). Article 3 states simply: "Everyone has the right to life, liberty and security of person."

¹⁹⁸*Supra*, n. 185 (hereinafter the "ICCPR"). There are similar provisions in the *African Charter on Human and Peoples' Rights* (1982) 21 I.L.M. 58 (Article 4), the *American Convention on Human Rights* (1970) 9 I.L.M. 99 (Article 4), and the *Convention for the Protection of Human Rights and Fundamental Freedoms* (1951) 45 A.J.I.L. Supp. 24 (the "European Convention on Human Rights") (Article 2). The provisions of the ICCPR are more detailed than those of the Universal Declaration. Article 6(1) states: "Every

especially Article 6(1) of the ICCPR—should not be viewed as dispositive, but rather as declaratory of customary international law.¹⁹⁹

As with a similar provision in the Canadian *Charter of Rights and Freedoms*,²⁰⁰ the problem is that the “right to life” is a vague and nebulous concept that has not received any firm definition. In general, however, it is viewed as a “retention right”—i.e. the right is to remain alive, *not to be deprived* of life by the actions of another (for example, through termination of pregnancy, euthanasia, medical experimentation or capital punishment). Nevertheless, it has also been argued, particularly in recent years, that the right to life is in fact a “positive right to reciepience.”²⁰¹ In this view, the right to life

human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.” The following subsections of the article deal with the exception of capital punishment, and indicate that the exception does not allow any derogation from obligations assumed by a state party under the *Convention on the Prevention and Punishment of the Crime of Genocide*.

¹⁹⁹Y. Dinstein, “The Right to Life, Physical Integrity, and Liberty” in L. Henkin (ed.), *The International Bill of Rights* (New York: Columbia University Press, 1981) 114 at 115.

²⁰⁰*Infra*, section 6.2.2.

²⁰¹H. J. McCloskey, “The Right to Life” (1975) 84 *Mind* 403 at 417.

includes not only the right not to be killed and the right not to be allowed to die, but also the right to be saved if one wants to be saved, and "a right to have one's life made secure against the ravages of nature and disease as well as against the consequences of human actions in so far as this is practically possible."²⁰²

If the "positive" approach to the right to life were adopted, the argument might be made that *any* weapon, not a just nuclear weapon, is a threat to the right to life. However, the argument against nuclear weapons is often framed in "right to life" terms.²⁰³ Whatever might be

²⁰²*Ibid.* at 421. McCloskey notes that respect for the right to life in this sense could involve "very drastic interference by the state" in the lives of individuals, above and beyond welfare legislation.

²⁰³It has also been related to the difficulty of interfacing the rules of international humanitarian law with the protection of the right to life guaranteed by the international human rights instruments in a situation where nuclear weapons might be used:

How effective would be the humanitarian law provisions in ensuring the right to life in the case of thermonuclear war? . . .

[W]hat would be the real operational value of this basic rule of humanitarian law [the protection of civilians from the effects of hostilities] . . . when there practically would be no distinction between civilian population and combatants, between civilian objects and military objectives? . . .

[T]he ensuring of the right to life in its most general form implies, in our view, the following: first, consolidation of the provision declaring an employment of mass-destruction weapons, particularly the first use of nuclear weapons, a crime against humanity and peace, a negation of the inherent right of everyone to life; second, a general and complete prohibition of production, deployment and testing of mass-destruction weapons, with a subsequent transition to their limitation, reduction, and liquidation.

the logical purity of this point of view, it would be difficult to argue. It is accepted that the right of self-defence may legitimately be placed in opposition to the right to life, and it could be argued that, by extension, the requirements of a country's national defence might well be held sufficient to justify the maintenance of weapons which could threaten the right to life of persons in other countries. However, it could also be argued *contra* that in this case the difference in degree is so great as to amount to a difference in kind.

4.2.2 The Right to Security of the Person

It would be equally difficult to argue that the right to "security of the person" includes a right to be kept secure from a nuclear holocaust. The right of security of the person has so far been understood to mean the right to be secure from arbitrary or unreasonable arrest or detention; there is as yet no strong body of opinion which would support the more creative interpretation outlined above. Even if such an interpretation were to be accepted, it would have to be realized that for every argument that nuclear weapons must be declared illegal and abolished in order to maintain our individual "security," there will be a counter-argument that our "security" would in fact be

A. A. Tikhonov, "The Inter-relationship Between the Right to Life and the Right to Peace; Nuclear Weapons and Other Weapons of Mass Destruction and the Right to Life" in B. G. Ramcharan (ed.), *The Right to Life in International Law* (Dordrecht: Martinus Nijhoff, 1985) 97 at 109-10.

unreasonably threatened by a failure to maintain nuclear deterrence. The entire argument would appear to be too nebulous for credible presentation in a court of law.

4.2.3 The "Right to Peace"

Human rights evolve over time. The universal franchise and the prohibition against discrimination on grounds of race or sex are of relatively recent development. Is there then an emerging "right to peace"?²⁰⁴ This is generally seen as a derivation from, or corollary to, the right to life and is usually placed firmly in the context of the nuclear arms race.

There appears to be little agreement at present, either among states or among academics in the field, as to whether or not a right to peace is even in the early stages of development. However, the foundation for the recognition of such a right has been laid within the United Nations, especially in the work of the Human Rights Commission.²⁰⁵

²⁰⁴See, for example, C. Bay, "The Right to Peace and the Right to Critical Political Knowledge," paper presented at the IPSA Congress, Moscow, 1979 [unpublished]; E. V. Rostow, "Peace as a Human Right" (1983) 4 N.Y.L.S.J.I. & Comp. L. 215; A. A. Tikhonov, "The Inter-relationship Between the Right to Life and the Right to Peace; Nuclear Weapons and Other Weapons of Mass Destruction and the Right to Life," *supra*, n. 203.

²⁰⁵Resolution 5 (XXXII) of the Human Rights Commission (27 February 1976) proclaims that "everyone has the right to live in conditions of international peace and security"

4.3 Peremptory Norms

Only two international human rights instruments state that no derogation to the right to life is allowed under the instrument.²⁰⁶ Other agreements allow for derogation to the right either in cases of capital punishment (provided proper judicial procedure is observed), self-defence or lawful state actions to enforce the law or quell a riot or insurrection.²⁰⁷ It has been stated by the United Nations Human Rights Commission that:

(at 1). Resolution 4 (XXXIII) of the same organization, dated 21 February 1977, recommended (at 4) to the Economic and Social Council:

to invite the Secretary-General, in cooperation with the United Nations Educational, Scientific and Cultural Organization and the other competent specialized agencies, to undertake a study on the subject of 'the international dimensions of the right to development as a human right in relation with other human rights based on international cooperation, including the right to peace.'

²⁰⁶The *American Convention on Human Rights* (*supra*, n. 198) in Article 27(2), and the ICCPR (*supra*, n. 185) in Article 4.

²⁰⁷The *European Convention on Human Rights* (*supra*, n. 198), in Article 15, allows for derogation "[i]n time of war or other public emergency threatening the life of the nation." This is the only instrument which explicitly takes cognizance of the intrusion of a state of war upon a human rights régime.

[t]he right to life is . . . a fundamental right in any society, irrespective of its degree of development or the type of culture which characterizes it, since this right forms part of *jus cogens* in international human rights law. The preservation of this right is one of the essential functions of the State and numerous provisions of national legislation . . . establish guarantees to ensure the enjoyment of this right.²⁰⁸

Even a peremptory norm may be subject to exceptions, provided they are well defined and carefully controlled. Self-defence and capital punishment are examples. However, certain violations of the right to life—such as genocide, war crimes and crimes against humanity—may be held to be violations of a peremptory norm under all circumstances.

It may also be possible to argue that under Article 60 of the *Vienna Convention on the Law of Treaties*,²⁰⁹ “provisions relating to the

²⁰⁸Document A/37/564, para. 22.

²⁰⁹(1969) 8 I.L.M. 679 (entered into force 27 January 1980). Article 60, which deals with “Termination or suspension of the operation of a treaty as a consequence of its breach,” reads as follows:

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.
2. A material breach of a multilateral treaty by one of the parties entitles
 - (a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:
 - (i) in the relations between themselves and the defaulting State, or
 - (ii) as between all the parties;
 - (b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

protection of the human person contained in treaties of a humanitarian character” are peremptory norms as defined in that treaty.²¹⁰

(c) any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

3. A material breach of a treaty, for the purposes of this article, consists in:

(a) a repudiation of the treaty not sanctioned by the present Convention; or

(b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.

5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.

²¹⁰Article 53 of the Vienna Convention defines “peremptory norm” and indicates the importance attached to it by the signatories: “A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” It was the opinion of the signatories that even if only *part* of a treaty were in conflict with a peremptory norm of international law, the *whole* treaty was void (International Law Commission, “United Nations Report of the International Law Commission covering the Work of its Fifteenth Session, May 6-July 12, 1963” (1964) 58 A.J.I.L. 241 at 266). However, even if a treaty embodying a peremptory norm of international law is declared invalid, the

Thus these provisions may be treated not only as rules of customary international law but also as peremptory laws, from which no derogation is possible. However, the impact of this conclusion on the legality of nuclear weapons is open to debate. Whether or not the use of nuclear weapons would constitute a violation of a peremptory norm might in fact hinge on whether such use would amount to genocide, a war crime or a crime against humanity.²¹¹ It simply has not yet been established that the use of nuclear weapons in an armed conflict situation would, in and of itself, be in contravention of a rule of *jus cogens*.

peremptory norm itself still holds, i.e. the parties to the (void) treaty cannot escape the obligation to observe it. It could be argued that article 60, paragraph (5) implies that the said provisions have a stronger, more binding force than the treaty itself, and must continue to apply even if the treaty is otherwise void or suspended. Therefore by analogy it could be further argued that the said provisions have the force of peremptory norms. The "overarching" status of peremptory norms may be seen from Verdross' often-quoted statement on rules having the character of *jus cogens* (peremptory norms): "The criterion for these rules consists in the fact that they do not exist to satisfy the needs of the individual states but the higher interest of the whole international community." (A. Verdross, "Jus Dispositivum and Jus Cogens in International Law" (1966) 60 A.J.I.L. 55 at 58.) Verdross believed that "all rules of general international law created for a humanitarian purpose" have the status of peremptory norms (*ibid.* at 59).

²¹¹*Infra*, section 4.7.

4.4 United Nations Resolutions

It is an obligation of United Nations membership, embodied in the Charter, that members shall "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any states, or in any other manner inconsistent with the Purposes of the United Nations."²¹² Over the years the United Nations has made a number of declarations and resolutions relating to weapons and armed conflict. Most of these have restated or reaffirmed already recognized principles of international humanitarian law. A notable exception was the *Declaration on the Prohibition of the Use of Nuclear and Thermo-Nuclear Weapons*.²¹³ This Declaration recognized the cataclysmic effect of nuclear weapons on civilian populations and, referring to previous declarations and agreements (St. Petersburg, the Brussels Protocol, the Hague Conventions and the Geneva Gas Protocol of 1925), declared *inter alia* that:

(b) the use of nuclear and thermo-nuclear weapons would exceed even the scope of war and cause indiscriminate suffering and destruction to mankind and civilization and, as such, is contrary to the rule of international law and to the laws of humanity;

(c) the use of nuclear and thermo-nuclear weapons is a war directed not against an enemy or enemies alone but

²¹²Article 2(4). See generally *supra*, section 3.3.4.

²¹³*Supra*, n. 87.

also against mankind in general, since the peoples of the world not involved in such a war will be subjected to all the evils generated by the use of such weapons . . . ²¹⁴

In 1965, the Twentieth Conference of the Red Cross in Vienna adopted Resolution XXVIII on the "Protection of Civilian Populations Against the Dangers of Indiscriminate Warfare."²¹⁵ This Resolution established four principles as a *minimum* to be observed in armed conflicts:

- that the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited;
- that it is prohibited to launch attacks against the civilian population as such;
- that distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible;
- that the general principles of the Law of War apply to nuclear and similar weapons.

²¹⁴It should be noted, however, that the Declaration, like so many international instruments, refers only to the *use* of these weapons. It makes no reference to the development, manufacture, testing, stockpiling or deploying of them. The Resolution was passed by the relatively narrow vote of 55 for, 20 against and 26 abstentions. Of the five nuclear powers, four (the United States, the United Kingdom, France and China) voted against the resolution; the U.S.S.R. voted for it.

²¹⁵Reprinted in D. Schindler & J. Toman (eds.), *The Laws of Armed Conflicts* (Leiden: A. W. Sijthoff, 1973) at 187.

Three of these four principles were subsequently enshrined by the United Nations General Assembly in Resolution 2444 (XXIII) on *Respect for Human Rights in Armed Conflicts*.²¹⁶ Although this Resolution does not mention nuclear weapons, it has been suggested that this omission was in fact due to the matter having been comprehensively dealt with already in 1961 by the *Declaration on the Prohibition of the Use of Nuclear and Thermo-Nuclear Weapons*.²¹⁷

In 1972, the United Nations General Assembly for the first time linked the non-use of force with the prohibition of the use of nuclear weapons. In a resolution on the *Non-Use of Force in International Relations and Permanent Prohibition of the Use of Nuclear Weapons*, the General Assembly:

1. Solemnly declares, on behalf of the States members of the Organization, their renunciation of the use or threat of force in all its forms and manifestations in international relations, in accordance with the Charter of the United

²¹⁶The Resolution was adopted on 19 December 1968 by a unanimous vote of 111 to none; there was no roll-call vote. It specifically indicates that it affirms the Red Cross Resolution XXVIII, mentioning in particular, "for observance by all governmental and other authorities responsible for actions in armed conflicts," the first three of the four principles set out in the Red Cross Resolution.

²¹⁷F. Kalshoven, *Constraints on the Waging of War* (Geneva: International Committee of the Red Cross, 1978) at 22.

Nations, and the permanent prohibition of the use of nuclear weapons; . . . ²¹⁸

There is a continuing debate as to whether or not United Nations resolutions have a law-making function in the international community.²¹⁹ It is submitted that it would be unrealistic to ascribe the force of law to the above-noted resolutions, although they may be seen as a valid expression of world opinion.

It is, furthermore, difficult to treat them as evidence of evolving customary international law. Such law requires the dual elements of state practice and *opinio juris* for its formation.²²⁰ Whereas each of the three resolutions discussed was passed by a majority of the General Assembly, it is important to note that the majority of nuclear powers either voted against or abstained from two of them. It would be difficult to argue that there was an evolving rule of customary

²¹⁸Resolution 2936 (XXVII), adopted 29 November 1972. The recorded vote shows that 73 U.N. members voted for the resolution, with four against and 46 abstaining. The U.S.S.R. was the only nuclear power that voted for the resolution; China voted against; and France, the United Kingdom and the United States abstained.

²¹⁹But see *supra*, n. 158.

²²⁰*Supra*, n. 76 and accompanying text.

international law on the prohibition of nuclear weapons, when the majority of nuclear states do not support such a rule.

However, the fact that nuclear weapons already exist, and even that they are the subject of a number of regulating treaties and conventions, does not therefore mean they are legal, although this point of view has its defenders.²²¹ "Dum-dum" bullets were outlawed even after they had entered into the regular arsenal of Great Britain;²²² although there is a certain discrepancy in magnitude between the two weapons, the principle surely holds true. The fact that a thing exists, even that it is used, does not mean it "must" therefore be legal—any more than the fact that the effects of a weapon may be more horrible than anything known heretofore means that it "must" therefore be illegal.

²²¹See, for example, E. V. Rostow, "Is There a Legal Basis for Nuclear Deterrence Theory and Policy?" in M. Cohen & M. E. Gouin (eds.), *Lawyers and the Nuclear Debate*, *supra*, n. 46, 175 at 176.

²²²*Supra*, n. 96 and accompanying text.

4.5 International Criminal Law

4.5.1 The Nuremberg Judgement

Throughout the history of the law of armed conflict, there has been civil and criminal litigation involving the laws of war.²²³ The best known war trials of recent years were those of major war criminals following the Second World War, held by the International Military Tribunals at Nuremberg and Tokyo.²²⁴

The mandate of the International Military Tribunal at Nuremberg was set out in its Charter, which defines jurisdiction over both persons and offences:

Article 6. The Tribunal . . . shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes:

²²³Usually, after the termination of hostilities, the victors have tried specific persons among the armed forces of the defeated state for crimes committed during the hostilities.

²²⁴*Supra*, n. 1 and accompanying text. The following discussion will discuss the Charter and the principles of Nuremberg; the same principles were used in the Tokyo trials.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) Crimes against Peace: namely, planning, preparation, initiation, or waging of a war of aggression, or a war in violation of international treaties, agreements, or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing:

(b) War Crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment, or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity:

(c) Crimes against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Leaders, organizers, instigators, and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.²²⁵

In its judgement, the Tribunal states that War Crimes as defined in Article 6(b) of the Charter were "already recognized as War Crimes

²²⁵*Trial of the Major War Criminals before the International Military Tribunal, supra*, n. 1, v. 22 at 413-14.

under international law."²²⁶ Furthermore, the "principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal" were affirmed by the United Nations.²²⁷

What are the implications of these principles for the legality of nuclear weapons? Would the development of nuclear-war-fighting strategies (i.e., strategies for conducting hostilities using nuclear weapons) constitute a crime against peace as the "planning [or] preparation of ... a war in violation of international treaties, agreements, or assurances"? If so, of which such treaties, agreements or assurances? What if the person (or state) accused of such a crime against peace were not party to treaties, agreements or assurances which would be violated by such a strategy? The definition does *not* indicate that a

²²⁶The Tribunal indicated that the category of "war crime" was established by the Hague Conventions; it further stated that "by 1939 those rules laid down in the convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war which are referred to in Article 6(b) of the Charter" (and therefore binding on states *not* party to the Hague Conventions, such as Germany). *Ibid.* at 497.

²²⁷United Nations General Assembly resolution 95(I) adopted 11 December 1946. In 1950, the United Nations' International Law Commission adopted a statement formulating the principles, [1950] 2 Y.I.L.C. 374-80. The definitions of the crimes concerned used language almost identical to that of the Nuremberg Charter.

crime against peace would occur where a war was planned or prepared for which would be in violation of the *customary international law* of armed conflict.

“War Crimes” include violations of customary international law, but would appear to be limited only to acts committed during hostilities (since that is the only time that the “laws or customs of war” apply). However, the final paragraph of Article 6 of the Charter speaks of “conspiracy to commit any of the foregoing crimes”: is it possible to qualify the development of a nuclear-war-fighting strategy as a “conspiracy to commit” a war crime? It appears that this argument might founder against the counterclaim that a nuclear-war-fighting strategy envisaging the use of miniaturized or “clean” nuclear weapons would not give rise to the “murder ... of civilian population” or “wanton devastation of cities, towns, or villages, or devastation not justified by military necessity.”

Would the development of strategies that envisage the use of nuclear weapons constitute a “crime against humanity” as a conspiracy to commit “extermination ... against any civilian population”? Again, that assumes that *any* use of nuclear weapons would of necessity be on a large and indiscriminate scale, and fundamentally uncontrollable. Would the use of miniaturized nuclear weapons really have such an effect?

As with other arguments for or against the legality of nuclear weapons, much would depend in this case on the technical evidence available. If

a miniaturized nuclear weapon could be used in a combat situation in such a way that there would be no "wanton devastation" of property or "extermination" of civilians, it is arguable that the Nuremberg principles could not be used, and there would be no grounds for declaring the preparation of nuclear-war-fighting strategies, or the use of nuclear weapons in an armed conflict situation, illegal under these principles.

The imposition of individual responsibility for crimes under Article 6 of the Nuremberg Charter has in turn given rise to the "Nuremberg defence." The desire to avoid being liable for conviction of an Article 6 offence is used as a defence for either refusing to obey orders of a military superior²²⁸ or for taking civil disobedience action which is claimed to be aimed at preventing military action in violation of the Nuremberg Charter.

4.5.2 Genocide

The United Nations *Convention on the Prevention and Punishment of the Crime of Genocide* (the "Genocide Convention")²²⁹ was one result of the worldwide revulsion at the practices of Hitler's government

²²⁸As, for example, in "site watch" cases in the Netherlands: *supra*, n. 82 and accompanying text.

²²⁹(1951) 45 A.J.I.L. Supp. 7.

before and during the Second World War. Although it is not, strictly speaking, part of the law of armed conflict, it has particular relevance to wartime situations.

It has been argued that the Genocide Convention provides a basis for declaring nuclear weapons illegal; but, as with other arguments so far explored, this claim is not without pitfalls. The Convention provides for a wide range of acts to be punishable besides simply genocide itself.²³⁰ The problem arises from the definition of the term "genocide" found in Article 2:

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

The difficulty lies with that part of the definition which states that the act(s) must be "*committed with intent to destroy, in whole or in part,*

²³⁰Article 3 states that "The following acts shall be punishable: (a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide."

a national, ethnical, racial or religious group, as such." It appears to make the whole definition of genocide depend on a subjective intent on the part of the person or persons committing the act, rather than on the act itself. If one state launched a nuclear weapon against a military objective in another state, and it missed and wiped out all or even most of the population of the target state, it would *not* be genocide because the weapon had not been launched with the intent to eliminate the "group." On the other hand, if the first state attempted to launch a nuclear weapon against the "group," but the weapon misfired or otherwise failed to accomplish its objective, the first state would still have committed genocide because the *intent* to destroy the group was there, even though the act was never accomplished.

Could a strategy based on counter-value targeting—for example, Mutual Assured Destruction and its deliberate targeting of population centres—be considered a "conspiracy to commit genocide" under Article 3(b)? Possibly; but it must be shown that the *intent* of such a strategy was actually to "destroy, in whole or in part, a national, ethnical, racial or religious group, *as such.*" It could be argued that the purpose of the strategy was only to "scare" the other government into inaction, and that there never was any intent actually to harm civilians.²³¹

²³¹Of course, if this really were the case, then there wouldn't be any "scare" value in the threat. MAD only works on the assumption that the parties are willing to carry through on the massive destruction they threaten.

Thus any argument against nuclear weapons based on their genocidal capabilities would have to address the fact that genocide is a matter of intent and not a matter of effect. Again, the problem of miniaturized nuclear weapons of limited scope would mitigate against an argument that nuclear weapons "must" be genocidal because of their uncontrolled effect.

Chapter 5

THE NEXUS OF INTERNATIONAL LAW AND DOMESTIC LAW IN CANADA

5.1 Introduction

In arguing the legality of nuclear weapons in a Canadian court, it will not be sufficient to plead Canadian law. There is a great deal of international law which is directly relevant to the issue. The question then arises of how, if at all, this international law can be pleaded in a Canadian court.

There are, in the common law jurisdictions, two traditional methods by which international law can be brought into the domestic law: adoption and implementation. *Adoption* indicates the complete acceptance of the principle of international law, *qua* international law, as part of the law the municipal judge may consider. Rules of customary international law are usually applied directly to the domestic situation unless they conflict with domestic statutory law²³²

²³²See *infra*, section 5.3.3.

or with a fundamental constitutional principle. *Implementation* requires a specific act by the legislative body of the country concerned to create a norm of municipal law which parallels the existing international law norm.²³³

The difference is significant in that a norm of international law which is adopted remains international law and thus, like the rest of international law, is not subject to the operation of the doctrine of precedent. However, a norm of municipal law created to parallel a rule of international law is subject to the operation of precedent, as is any other principle of municipal law, and can only be changed by further legislative activity.

International law is generally held to arise from three primary sources: general principles, customary international law and treaty (or conventional) law. Following the English example, Canada uses different approaches to considering international law in its courts, depending on the source of the law.

²³³R. St.J. Macdonald, "The Relationship between International Law and Domestic Law in Canada" in R. St.J. Macdonald, G. L. Morris & D. M. Johnston (eds.), *Canadian Perspectives on International Law and Organization* (Toronto: University of Toronto Press, 1974) 88 at 92-93 (hereinafter "Macdonald").

The use of international law in Canadian courts has been exhaustively studied elsewhere;²³⁴ it is not the intention of the present paper to repeat the analysis. However, it is appropriate at this juncture to review Canadian practice in this regard, in order to provide a useful reference point for the discussion of the substantive law further on.

5.2 Treaty Law

5.2.1 The General Rule

In both English and Canadian law, the general rule is that the terms of treaties entered into with other countries must be transformed into municipal law by an act of *implementation*, i.e. legislation under

²³⁴See, in particular, Macdonald, *supra*, n. 233; F. Rigaldies & J. Woehrling, "Le juge interne canadien et le droit international," (1980) 21 C. de D. 293 (hereinafter "Rigaldies & Woehrling"); and D. C. Vanek, "Is International Law Part of the Law of Canada?" (1949-50) 8 U. of T. L.J. 251 (hereinafter "Vanek"). With specific reference to treaty law, see A. Jacomy-Millette, *Treaty Law in Canada*, T. Helwig trans. (Ottawa: University of Ottawa Press, 1975). The *Canadian Charter of Rights and Freedoms* has provided a major focus for applying international law in Canadian courts, and a number of important articles have appeared in this respect: see in particular J. Claydon, "The Application of International Human Rights Law by Canadian Courts" (1981) 30 Buffalo L.R. 727 and M. Cohen & A. Bayefsky, "The Canadian Charter of Rights and Freedoms and Public International Law" (1985) 61 Can. Bar Rev. 265 (hereinafter "Cohen & Bayefsky").

domestic law, which creates a municipal norm parallel to the international norm. This municipal norm then becomes subject to the normal processes of domestic adjudication.²³⁵

The rule with respect to implementation of treaties results from the application of the rule of Parliamentary supremacy: the power to conclude international treaties rests with the executive branch of government, while the power to make laws for the country's citizens rests with the legislative branch. If treaties were adopted directly into domestic law, the executive would in effect be creating laws affecting the private rights of citizens, by-passing the legislature. The requirement of implementation prevents this from happening.

5.2.2 Exceptions

Like most rules, the requirement of implementation has exceptions, and the most significant one relates to Parliamentary supremacy as

²³⁵See C. C. Emanuelli & S. Slosar, "L'application et l'interprétation des traités internationaux par le juge canadien" (1978) 13 R.J.T. 69 at 73: "[D]ans la mesure où l'adoption d'une loi de transformation est sujette au processus législatif ordinaire, il peut exister une disparité entre le texte du traité et celui de la loi de transformation. Dès lors, le juge canadien n'applique plus le droit international, mais une interprétation de celui-ci. L'écart entre la norme originale et sa «traduction» législative dépend entièrement de la technique par laquelle le traité international est transformé dans le droit interne canadien."

discussed above.²³⁶ In some situations, the executive concludes treaties that affect only its own prerogative powers. Although there is some confusion as to whether or not this exception applies to treaties of peace,²³⁷ it may be suggested that it *does* apply to treaties affecting belligerent rights.

This exception is important for the present discussion. "Belligerent" is defined as "engaged in lawful war";²³⁸ belligerent rights are therefore the rights which prevail in a situation of lawful war, or *jus in bello* (the law governing the conduct of hostilities and the means of warfare). There are many international agreements governing the *jus in bello* to which Canada is a party, but which have not been implemented in domestic law by specific legislation. An exception

²³⁶Section 5.2.1.

²³⁷In support of this view, see *Secretary of State of Canada v. Alien Property Custodian for United States*, [1931] S.C.R. 169, [1931] 1 D.L.R. 890, and *Ritcher v. R.*, [1943] Ex.C.R. 64, [1943] 3 D.L.R. 541. However, in *Mastini v. Bell Telephone Co. of Canada* (1971), 18 D.L.R. (3d) 215 (Ex.C.R.), Jackett P. held that the provisions of the *Treaty of Peace with Italy* (which Canada had ratified on 15 September 1947) could not be applied to the case at bar as nothing had been done to legislate its provisions into domestic law.

²³⁸*Bowler's Law Dictionary Unabridged*, Rawle's Third Edition; *Black's Law Dictionary*, 5th ed., 1979.

with respect to belligerent rights might indicate that these agreements could be pleaded in a domestic court even in the absence of such legislation.²³⁹

²³⁹Judicial sanction for this view is found in *Francis v. R.*, [1956] S.C.R. 618, 3 D.L.R.

(2d) 641 at 647, *per* Rand J.:

Except as to diplomatic status, and certain immunities *and as to belligerent rights*, treaty provisions affecting matters within the scope of municipal law, that is, which purport to change existing law or restrict the future action of the Legislature, including, under our Constitution, the participation of the Crown, and in the absence of a constitutional provision declaring the treaty itself to be law of the state, as in the United States, must be supplemented by statutory action.

(Emphasis added.) R. St.J. Macdonald suggests that "this statement accurately reflects the rule in Canada with the caveat that one must read 'the transfer of sovereignty over property' as restricted to the transfer of property to which Canada itself had title." "International Treaty Law and the Domestic Law of Canada" (1975) 2 Dalhousie L.J. 307 at 313. This point was also made in the English case of *Porter v. Freudenberg*, [1915] 1 K.B. 857 (C.A.), where the Court considered the effect of Regulation 23(h) annexed to the *Hague Convention of 1907 concerning Laws and Customs of War on Land*. The Convention had been ratified by the United Kingdom, but not implemented in any way by domestic legislation. The Court found the regulation inapplicable to the issue at hand, but did not question whether or not it should consider the non-implemented Convention; indeed, it appeared to consider the Convention one of the matters which had to be considered in deciding the case. If a treaty entered into by the executive affecting only executive powers automatically becomes part of the domestic law of Canada without implementation, *quaere* whether it is not thereby subject to review under the Charter?

If a treaty simply embodies (is declaratory of) existing international customary law, without adding any new provisions, then it does not need implementing legislation. The customary norm itself is applicable in a domestic court without legislation.²⁴⁰ In general, however, it must be concluded that any treaty which affects the private rights of citizens must be implemented by appropriate legislation. If the subject matter of the treaty lies within the domain of the executive power, it can be enforced by the executive without such legislation.

5.2.3 Conflicts between Treaty Law and Domestic Law

It remains a principle of Parliamentary supremacy that Parliament may legislate in violation of international law.²⁴¹ However, as with customary international law, the presumption is that any domestic

²⁴⁰See *infra*, section 5.3.

²⁴¹Some writers, however, maintain that in fact international law is supreme over domestic law: "The most fundamental of all principles of international law is undoubtedly the principle . . . that declares the supremacy of international law: states possess freedom within and not beyond the limits fixed by the law of the international community. The duty of each state to permit the operation of international law as part of the law of the land is directly related to this overriding principle . . ." Vanek, *supra*, n. 234 at 297. This view is not accepted by the English and Canadian common law tradition. With regard to the problems inherent in a federal system such as Canada's in this regard, see *infra*, n. 244 and accompanying text.

statute conflicting with an international obligation will be interpreted as far as possible in accord with the obligations set out in the treaty. If there is no possibility of conformity, the domestic legislation will prevail.

In attempting to determine whether or not a domestic provision is in violation of an international obligation, it would appear sensible to allow the court to have recourse to the terms of the international agreement in question. However, there appears to be some support in Canada for a traditional rule of interpretation which requires there to be some ambiguity apparent in the wording of the domestic statute before the international provision may be resorted to. It is submitted that this has been an unfortunate tendency in Canadian judicial practice, and very limiting to the application of international law by Canadian judges, but there is some evidence that it is being gradually undermined, particularly where interpretation of the *Charter of Rights and Freedoms* is concerned.²⁴²

²⁴²In *Capital Cities Communication Inc. v. Canadian Radio-Television Commission* (1977), 82 D.L.R. (3d) 609, Laskin C.J.C., writing for the majority, refused to consider the effect of the *Inter-American Radio Communications Convention* of 1937, to which Canada is a party, in interpreting the provision of Canada's *Broadcasting Act*: "I do not find any ambiguity that would *require* resort to the Convention, . . . and certainly the Convention *per se* cannot prevail against the express stipulations of the Act . . ." (*ibid.* at 631, emphasis added). But in the same case, Pigeon J., dissenting (Beetz and de Grandpré JJ. concurring), strongly maintained that the Convention was a treaty binding on Canada and the CRTC could not issue licences in violation of Canada's

What would the situation then be if a government undertook an international obligation and subsequently failed to implement it by domestic legislation? Many treaties include clauses requiring the signatories to bring their domestic law into accord with the obligations undertaken in the treaty. Sometimes a country may seek to avoid this obligation by affirming that in fact its domestic law is already harmonious with the treaty requirements.²⁴³ It seems quite

treaty obligations. He did not find it necessary for there to be some ambiguity in the domestic statute before the intent of the treaty could be taken into account (*ibid.* at 638-43). See also the dissent of Pigeon J. in *Ernewein v. Minister of Employment and Immigration* (1980), 103 D.L.R. (3d) 1 at 14-18, regarding the interpretation of the *Immigration Act, 1976* in the light of Canada's obligations as a signatory to the *United Nations Convention on the Status of Refugees*. In a recent dissenting judgement, Dickson C.J.C. (Wilson J. concurring) put international law on an equal footing with Canadian case law, decisions of the Judicial Committee of the Privy Council, and United States case law as an important jurisprudential source for interpreting the Charter. See *infra*, nn. 283-86 and accompanying text, and n. 341 and accompanying text.

²⁴³For example, Canada has signed and ratified the *International Covenant on Civil and Political Rights*, which among other things prohibits slavery. Canada has thus committed itself to prohibit slavery, but has no laws on its books to this effect. However, the existence of Criminal Code offences such as kidnapping and forcible confinement prevent slavery from arising, and indicate that Canada is not in violation of its obligations in this regard under the *International Covenant*. For further

possible that a domestic court would refuse to accept an action against a government for failing to perform its international obligations in this regard—at least in Canada, where the principle of Parliamentary supremacy prevails.

A serious difficulty in this respect is inherent in Canada's federal system. The situation may arise where a treaty made by the federal government deals with a subject under provincial jurisdiction. The federal government may not legislate for domestic implementation because it would be *ultra vires*. Yet if one or more of the provinces refuses to implement the legislation, the federal government is in violation of its international obligations. Although the question is not directly relevant to the present paper, the issue is important to note, and has not yet been satisfactorily resolved in Canada.²⁴⁴

discussion of the issue of Canada's compliance with its international obligations in the area of human rights, see D. Matas, "Domestic Implementation of International Human Rights Agreements" [1987] C.H.R.Y. 91.

²⁴⁴For further discussion, see Macdonald, *supra*, n. 233 at 119; Rigaldies & Woehrling, *supra*, n. 234 at 311; and G. V. LaForest, "May the Provinces Legislate in Violation of International Law?" (1961) 39 Can. Bar Rev. 78. The solution over time so far in Canada has been the development of "co-operative federalism." The legal issue is remitted to the political arena, for the various levels of government to work out an agreement.

5.3 General Principles and Customary International Law

5.3.1 The General Rule

It is a firmly established principle of English law that customary international law is part of the law of the land.²⁴⁵ The classic statement on the subject is found in Blackstone's *Commentaries on the Laws of England*:

[T]he law of nations (wherever any question arises which is properly the object of its jurisdiction) is here adopted in its full extent by the common law, and is held to be a part of the law of the land. And those acts of parliament which have from time to time been made to enforce this universal law, or to facilitate the execution of its decisions are not to be considered as introductory of any new rule, but merely as declaratory of the old fundamental constitutions of the kingdom; without which it must cease to be part of the civilized world.²⁴⁶

This clearly indicates that the process of *adoption* is used, which simply imports the entire international principle into the domestic law and allows the municipal judge to apply the international principle

²⁴⁵The earliest recorded cases to this effect are *Barbuit's Case* (1737), *Cases t. Talbot* 281, 25 E.R. 777, and *Triquet v. Bath* (1764), 3 Burr. 1478, 97 E.R. 936, both of which concerned the effect of the doctrine of sovereign immunity on actions brought in English courts.

²⁴⁶Book IV, Chapter 5, at 67.

in domestic adjudication. It also allows the conclusion to be drawn that where a treaty is simply declaratory of the existing customary international law, it does not require further implementation to become part of the domestic law, since by virtue of being customary international law it already is a part of the municipal legal system.²⁴⁷

Canadian case law is more ambivalent than the English case law, but the general conclusion is that Canadian courts use an adoptionist approach as far as customary international law is concerned.²⁴⁸

²⁴⁷The principle was restated in 1905 by Lord Alverstone C.J.:

It is quite true that whatever has received the common consent of civilized nations must have received the assent of our country, and that to which we have assented along with other nations in general may properly be called international law, and as such will be acknowledged and applied by our municipal tribunals when legitimate occasion arises for those tribunals to decide questions to which doctrines of international law may be relevant.

West Rand Central Gold Mining Co. v. R., [1905] 2 K.B. 391 at 406-407.

²⁴⁸The leading Canadian cases are *The Ship "North" v. R.* (1905), 11 Ex.C.R. 141, *aff'd* (1906), 37 S.C.R. 385; the *Reference as to the Powers of the Corporation of the City of Ottawa and the Corporation of the Village of Rockcliffe Park to Levy Rates on Foreign Legations and High Commissioners' Residences* (the "Foreign Legations Reference"), [1943] S.C.R. 208, [1943] 2 D.L.R. 481, and the *Reference as to Whether the Members of the Military of Naval Forces of the United States of America are Exempt from Criminal Proceedings in Canadian Criminal Courts* (the "Armed Forces Reference"), [1943] S.C.R. 483, [1943] 4 D.L.R. 11. These cases are discussed at length by Macdonald, *supra*, n. 233 and Cohen & Bayefsky, *supra*, n. 234.

5.3.2 Evolution of International Law

As stated above,²⁴⁹ the adoptionist approach means that rules of customary international law are applied directly by municipal courts but retain their international character. As international principles, they are not subject to the operation of precedent. Thus, as the international principle changes or evolves over time, the domestic law also changes and evolves.

A significant example is the evolution of the doctrine of sovereign immunity which gave rise to the earliest expression of the adoptionist approach.²⁵⁰ As states became more involved in commercial enterprises, the doctrine of absolute immunity began to give way to that of restrictive immunity. This was a subject of some judicial investigation, as states sought to protect a variety of enterprises from litigation. In both English and Canadian courts, it was established that courts are not bound to apply outdated rules of customary international law.²⁵¹

²⁴⁹Section 5.1.

²⁵⁰*Supra*, n. 245.

²⁵¹This is in fact a pragmatic approach based on the requirement of finding state practice to establish a rule of customary international law. The principle was established in Canada by the Supreme Court of Canada in *Municipality of the City and*

5.3.3 Exceptions

Customary international law will not be applied in Canada if there is a conflicting statutory principle covering the matter in issue. Although this is the most important exception, there are two other possibilities. If there is a decision of a domestic court to the contrary, or if the customary international law conflicts with fundamental constitutional principles, legislation would be required to allow the international principle to prevail.²⁵²

County of Saint John, Logan and Clayton v. Fraser-Brace Overseas Corp. (1958), 13 D.L.R. (2d) 177 at 182 (*per Rand J.*), and has been restated more recently in England in *Trendtex Trading Corporation v. Central Bank of Nigeria*, [1977] 1 All E.R. 881 (C.A.) at 889-90 (*per Lord Denning M.R.*).

²⁵²See the statement by Atkin L.J. in *Chung Chi Cheung v. R.*:

The Courts acknowledge the existence of a body of rules which nations accept among themselves. On any judicial issue they seek to ascertain what the relevant rule is, and, having found it, they will treat it as incorporated into the domestic law, *so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals.*

[1939] A.C. 160 at 167-68 (*emphasis added*). The *Chung* case was cited extensively by the Supreme Court of Canada in both the Foreign Legations Reference and the Armed Forces Reference (*supra*, n. 248) as authority for the adoptionist approach to customary international law. As the United Kingdom does not have a written constitution, its courts are less likely to be concerned with constitutional provisions; for the Canadian context in this respect, see Macdonald, *supra*, n. 233 at 111.

The problem of conflicting statutory provisions is to some extent mitigated by the canon of statutory interpretation which states that, in the absence of a clearly expressed intent to the contrary, a government is presumed to legislate in accordance with its international obligations. Thus where there appears to be a conflict between a statute and a principle of international law, the court will attempt to read the statute in such a way as to give effect to the international norm.²⁵³ It has even been suggested that there might be an *obligation* on states not to legislate in violation of international law.²⁵⁴

²⁵³See *Re Arrow River & Tributaries Slide & Boom Co.*, [1931] 2 D.L.R. 216 (Ont.C.A.) at 217 *per* Riddell J.A.:

[T]he Sovereign will not consider enacting anything that will conflict with his plain duty, unless the language employed in the statute is clear and explicit, admitting of no other interpretation. . . . The King cannot be thought of as violating his agreement with the other contracting Power; and, if the legislation can fairly be read in such a way as to reject any imputation of breaking faith, it must be so read.

Although the decision was subsequently reversed by the Supreme Court of Canada ([1932] 2 D.L.R. 250), this pronouncement of Riddell J.A. was not touched.

²⁵⁴See *The Ship "North" v. R.* (1906), 37 S.C.R. 385 at 398, *per* Idington J.:

Paradoxical as it may seem, the recognition of a right that international law gives should precede the municipal legislation. No prudent sovereign power would willingly, in these modern times, invite conflict with a neighbour by enacting a statute directing that to be done which international law had clearly forbidden or that which had been denied as an inherent right. The statute now in question must be read in light of the well known, recognized, customary or international law that has preceded it, and is yet in force, and receive interpretation thereby.

5.4 Judicial Notice

It is an established principle of Canadian jurisprudence that foreign law must be proved by expert evidence in a Canadian court, when it is pleaded in support of a claim or defence. However, it is equally well established that international law does *not* need to be proved; rather, the court may take judicial notice of any and all principles of international law without the requirement of formal proof.²⁵⁵

5.5 Conclusion

The above discussion indicates that there is a clear, direct and necessary link between Canada's international legal obligations and its domestic legal system. The two do not exist in mutually-exclusive "bubbles." The obligations Canada undertakes internationally by means of treaty and convention, or that are imposed on it by the constantly evolving flow of customary international law and peremptory norms, must be reflected in and implemented by domestic legislation, and taken into account in domestic adjudication.

²⁵⁵See Macdonald, *supra*, n. 233 at 113. Vanek (*supra*, n. 234 at 258) goes farther and states that judicial notice *must* be taken of international law rules, as of any other common law and statute rules.

There are few barriers *in law* to pleading international law in a Canadian court. Not only is customary international law automatically part of our body of common law (in the absence of contrary statute law of constitutional principles, which would arise rarely, it is submitted, in the issue under discussion); not only are treaties affecting only the government's executive powers an exception to the general rule requiring implementation by domestic legislation. But most important for the matter at hand, it is submitted, is the argument that Parliament must be held to legislate in accordance with its international obligations, as specified in international treaties and conventions and as more generally understood under customary international law.

Although the use of international provisions in interpreting Canadian legislation has been unduly circumscribed by adherence to the so-called "ambiguity" rule and other manifestations of regrettable judicial timidity, there are encouraging signs that this unfortunate tendency is declining in Canadian judicial practice.^{255a} It is submitted that all possible appropriate steps must be taken to hasten this process. The habit of thought appears to be deeply ingrained in both the judiciary and the legal profession that international law is at best an optional "frill" to a legal argument and at worst an irrelevant nuisance. Notwithstanding the warming effect of Charter litigation in this regard, much remains to be done, by Bench and Bar alike, to restore the sense of international law as a viable part of the daily

^{255a} See *supra*, n. 242 and accompanying text.

functioning of Canada's legal system, and to promote the perception that Canada's domestic legal system must harmonize with its legal obligations within the international community.

Chapter 6

APPLICABLE PRINCIPLES OF CANADIAN LAW

6.1 Introduction

As noted earlier,²⁵⁶ there has so far been only one attempt to litigate the legality of nuclear weapons in Canada. The *Operation Dismantle* case²⁵⁷ was based on an argument using Section 7 of the *Canadian Charter of Rights and Freedoms*.²⁵⁸ The plaintiffs were unsuccessful in bringing their argument into court, as the action was dismissed on a preliminary motion. However, a number of important points were established, significantly that the courts could review executive action taken pursuant to the royal prerogative over defence and foreign policy matters. Specifically, Chief Justice Dickson, writing for the concurring majority, noted:

²⁵⁶*Supra*, section 2.3.2.

²⁵⁷*Supra*, n. 25.

²⁵⁸The *Constitution Act, 1982*, Part I.

I agree with Madame Justice Wilson that Cabinet decisions fall under s. 32(1)(a) of the Charter and are therefore reviewable in the courts and subject to judicial scrutiny for compatibility with the Constitution. I have no doubt that the executive branch of the Canadian Government is duty bound to act in accordance with the dictates of the Charter.²⁵⁹

Chief Justice Dickson also noted, in broader terms, that "I have no doubt that disputes of a political or foreign policy nature may be properly cognizable by the courts."²⁶⁰

It is obvious from these statements that not only did the Supreme Court find a basis in the Charter for reviewing these executive acts, it also found a basis in a broader concept of *constitutionality*—that is, that the executive is accountable with respect to the Constitution as a whole, not just the Charter. This could be significant for any plaintiff desiring to undertake litigation of the legality of nuclear weapons in a Canadian court.

However, there do not appear to be many Canadian legal principles that may be called in aid of such litigation. There are no provisions in Canadian law which are directly on point. Apart from the Charter and the Constitution in general, the only other possibility presently

²⁵⁹*Operation Dismantle v. R.* (1985), 18 D.L.R. (4th) 481 at 491.

²⁶⁰*Ibid.* at 494.

available may arise from sections in the Criminal Code. Each of these will be considered below, in turn.

6.2 The Canadian Charter of Rights and Freedoms

6.2.1 General Considerations

The Charter, of course, contains no provision dealing directly with nuclear weapons or national defence. It is a statement of guiding principles which are to shape and inform the legislation and practices of the country, both federally and provincially. The rights and fundamental freedoms enunciated in the Charter are set out in vague and general terms. This was no doubt to allow for an unfettered evolution in the meaning of the legal concepts embodied therein, but also means that a greater degree of judicial elucidation is required than for "regular" legislation. Furthermore, constitutions tend to be long-lived, and thus may eventually come to be applied in situations not even envisaged when they were first written.

It has also been established that the interpretation of a constitution should be broader and more generous than might be the case with "regular" legislation. The Charter is not a statute, but part of the Canadian constitution, and the Supreme Court of Canada has recognized that interpreting a constitution calls for a different approach.²⁶¹ With specific reference to the Charter, the Court stated:

²⁶¹In *Hunter v. Southam*, the Court noted:

[T]he proper approach to the definition of the rights and freedoms guaranteed by the Charter [is] a purposive one. . . . [T]his analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which is it associated within the text of the Charter. The interpretation should be . . . a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection.²⁶²

Even a cursory study of the debates over the drafting of the Charter reveal that there was considerable consultation of international law (particularly international human rights law) in preparing the final document. However, there are no specific references in the Charter

The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of government power and, when joined by a Bill or a Charter of rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the Constitution and must, in interpreting its provisions, bear these considerations in mind.

(1984) 11 D.L.R. (4th) 641 at 649.

²⁶²*R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295 at 34, 18 D.L.R. (4th) 321 at 359-60, per Dickson C.J.C.

to any international instrument.²⁶³ Although there has been strong support for the idea of using international human rights law to clarify and define Charter provisions, there has not been a widespread tendency in the courts to abandon their traditional reluctance to use international law in interpreting domestic legislation. It will therefore behoove any counsel, intending to introduce a Charter argument into litigation on the legality of nuclear weapons, to construct her argument with careful ingenuity and close attention to the judicial record in this respect.

²⁶³There is in fact only one reference to international law in the whole Charter:

11. Any person charged with an offence has the right [. . .]
 - (g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the *general principles of law recognized by the community of nations*. (Emphasis added.)

However, Claydon has noted that "Canada's international human rights obligations served not only as the necessary and pervasive context in which the Charter of Rights was introduced and adopted, but also as the direct inspiration for amendments designed to strengthen the human rights protection provided." J. Claydon, "International Human Rights Law and the Interpretation of the Canadian Charter of Rights and Freedoms" (1982) 4 Supreme Court L.R. 287.

6.2.2 Substantive Rights — Sections 7 and 26

Section 7

7. *Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.*

In addressing the issue of the legality of nuclear weapons, which are somewhat notorious for their adverse effect on life, this section appears to be a ready support. In fact, in their Statement of Claim, the *Operation Dismantle* plaintiffs claimed under this section that cruise missile testing was not only a violation of their right to life, but also of their right to security of the person, in that the testing increased international tension and contributed to the escalation of the arms race.²⁶⁴

In reality, however, the section is very complex, not only because the rights enshrined therein are difficult to delimit, but also because there does not seem to be judicial agreement on whether the section embodies one right, or two, or three, or four, and whether it is a procedural protection only or involves substantive considerations.

The *Operation Dismantle* plaintiffs alleged that the section gave a substantive right—to life, liberty and the security of the person—and a

²⁶⁴The relevant paragraph of the Statement of Claim is reproduced *supra*, n. 34.

procedural right—not to be deprived thereof except in accordance with the principles of fundamental justice. In the Federal Court of Appeal decision, four of the five judges held that the section embodied *one* right only, and a procedural one at that: the right not to be subjected to arbitrary arrest or detention (or execution) without due process of law (“in accordance with the principles of fundamental justice”). The section was seen as a procedural protection only, giving no ground for considering the substance of the legislation being challenged. Furthermore, and unfortunately, the Supreme Court of Canada did not consider the scope of the section in its judgement,²⁶⁵

²⁶⁵The Supreme Court commented on the scope of the section in *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, 17 D.L.R. (4th) 422 (shortly before the *Operation Dismantle* decision), where it noted that *even if* the section embodies only one right, each element (life, liberty and security of the person) has meaning, and a deprivation of any one element constitutes a deprivation of the whole right. The court further stated that “fundamental justice” includes as a *minimum* the notion of procedural fairness. Later in the same year the Supreme Court had further occasion to consider section 7 in the *Reference re. Section 94(2) of the Motor Vehicle Act* (1985) 24 D.L.R. (4th) 536 (the “Motor Vehicle Reference”). Writing for the concurring majority, Lamer J. stated that “[t]he principles of fundamental justice ... are not a protected interest, but rather a qualifier of the right not to be deprived of life, liberty and security of the person.” (*Ibid.* at 548.) In other words, the right protected was not the right to life etc., but the right not to be deprived of life, liberty and security of the person. Lamer J. did not consider the content of the words “life” or “security of the person,” and confined the content of “liberty,” in the context of the case, to the fact that “imprisonment is a deprivation of liberty” (*ibid.*). The analysis indicates at least that Lamer J. and his

although Wilson J. in her concurring judgement rejected the plaintiffs' contention that there were two rights, one substantive and one procedural, guaranteed by the section.

This rejection was based on two considerations. One was the judicial interpretation given to Section 1(a) of the *Canadian Bill of Rights* (which speaks of "the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law"), which interpreted it as providing one right only. The other was the French text of the section, which to Madame Justice Wilson (following Marceau J. in the Federal Court of Appeal) appears to mention specifically only one right ("Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale").

It nonetheless could be argued that a reading of the section following the normal rules of English grammar would support the interpretation that there are two separate and equal objects of the verb "has" (namely, "the right to life, liberty and security of the person" and "the right not be be deprived thereof ..."), and that therefore the section sets out two related but distinct rights, one substantive and one

concurring brethren found the right not to be deprived of life, liberty and security of the person divisible into three discrete component elements.

procedural.²⁶⁶ A corresponding reading of the French version of the section (again according to the normal rules of grammar) is not defeated by the substitution of a semicolon for the conjunction "et."

Even if one accepts the view that the only right found herein is procedural, there is some suggestion that a court might nonetheless find grounds in the section for a review of the substance of the challenged legislation.²⁶⁷ An argument could be made that "principles of fundamental justice" include not only procedural safeguards but also what international law knows as *jus cogens*, those substantive tenets which are held to be fundamental and incontrovertible, and which in the domestic legal system are the basic principles of the common law.

This was indeed the position taken by Lamer J. in the *Motor Vehicle Reference*, where he stated:

[T]he principles of fundamental justice are to be found in the basic tenets and principles, not only of our judicial process, but also of the other components of our legal system. . . . [M]any of the principles of fundamental justice are procedural in nature. . . . This is not to say, however,

²⁶⁶The same applies to a reading of Section 1(a) of the *Canadian Bill of Rights* according to normal rules of grammar. Section 1(a) appears to make an even stronger case by reiterating the word "right"—"the *right* of the individual ... and the *right* not to be deprived thereof ... " (emphasis added).

²⁶⁷See *supra*, n. 265 with regard to the interpretation given this issue in *Singh*.

that the principles of fundamental justice are limited solely to procedural guarantees. Rather, the proper approach to the determination of the principles of fundamental justice is quite simply one in which . . . "future growth will be based on historical roots" . . . ²⁶⁸

Wilson J. in her separate concurring judgement appears to go even further, and in a direction different from that she had adopted in the *Operation Dismantle* case.²⁶⁹ She gives her opinion that "it is hard to see why one's life and liberty should be protected against procedural injustice and not against substantive injustice" in the Charter, and expresses "grave doubts that the dichotomy between substance and procedure which may have served a useful purpose in other areas of law such as administrative law and private international law should be imported into s. 7 of the Charter."²⁷⁰

²⁶⁸*Supra*, n. 265 at 557. Dickson C.J.C., Beetz, Chouinard and LeDain JJ. all concurred with Lamer J.; McIntyre J. and Wilson J. each wrote separate concurring judgements. The whole Court, however, was in agreement on this point. For a detailed analysis of the judgement, which challenges Lamer J.'s interpretation, see P. J. Monahan & A. Petter, "Developments in Constitutional Law: The 1985-85 Term" (1987) 9 Supreme Court L.R. 69 at 78-102.

²⁶⁹See *supra*, text accompanying n. 265.

²⁷⁰*Supra*, n. 265 at 570, 571.

In the *Motor Vehicle Reference*, the Supreme Court was asked to consider a challenge to the B.C. Motor Vehicle Act. Section 94(1) of that Act made it an offence to drive while prohibited or while under suspension, with a minimum penalty of seven days' imprisonment. Section 94(2) further provided that the offence set out in s. 94(1) was "an absolute liability offence in which guilt is established by proof of driving, whether or not the defendant knew of the prohibition or suspension." The Supreme Court ruled that s. 94(2) violated the constitutional right not to be deprived of liberty except in accordance with the principles of fundamental justice. The issue was not one of whether the substantive rule of conduct violated the Charter, but of whether the *means* by which the substantive goals were pursued violated the Charter.

Such an approach, although obviously procedural and not substantive, is definitely broader than the narrow procedural interpretation of section 7 of the Charter, which restricts its application to adjudicative procedures only. An even more expansive approach to the term "procedure" was taken by the Supreme Court in *Morgentaler, Smoling and Scott v. R.*^{270a} This case involved a constitutional challenge to then s. 251 of the Criminal Code, which provided that abortions would be illegal unless performed in an "accredited or approved hospital" after certification by a "therapeutic abortion committee" of the

^{270a} [1988] 1 S.C.R. 30, 44 D.L.R. (4th) 385, hereinafter "Morgentaler."

hospital that the abortion was necessary to preserve the life or health of the pregnant woman.

In striking down the legislation for contravention of section 7 of the Charter, only Wilson J. based her decision on substantive grounds.^{270b} The other majority judges (Dickson C.J.C., Beetz, Estey and Lamer JJ.) found the contravention to lie in the *procedures* which the legislation set out for the authorization and performance of abortions. Without examining whether or not Parliament should legislate to confine abortions to therapeutic ones only, and to ensure the safety of the women patients by restricting them to “accredited or approved hospitals,” the majority judges took exception to the overall procedural scheme Parliament had put in place to achieve this substantive goal.

Beetz J. found the requirement that abortions take place in hospitals to be arbitrary and without medical justification.^{270c} Dickson C.J.C. found other procedural deficiencies, including vagueness as to the standard of “danger to health” and the illusory nature of the defence

^{270b} 44 D.L.R. (4th) 385 at 483-97.

^{270c} *Ibid.* at 446-50. See especially his conclusion on this point at 449-50:

Although the protection of health of the woman is the objective which the in-hospital rule is intended to serve, the requirement that all therapeutic abortions be performed in eligible hospitals is unnecessary to meet that objective in all cases. In this sense, the rule is manifestly unfair and offends the principles of fundamental justice.

of therapeutic purpose for many women due to the administrative barriers to obtaining an abortion.^{270d}

The importance of the *Morgentaler* decision is in its re-drawing of the distinction between "substance" and "procedure." In essence, "substance" is limited to the social goal of the legislation in question. "Procedure" would then cover all the legislated rules of conduct which are designed to achieve that goal.^{270e} The scope of review for procedural fairness under section 7 of the Charter is thereby dramatically increased, and indeed it becomes a matter of major importance to explore how far the courts will take this trend.^{270f}

Apart from the difficulties of dealing with the nature and meaning of the phrase "principles of fundamental justice," and its implications for the nature and meaning of the section as a whole, it must be noted that the first part of the section, which guarantees "the right to life, liberty and security of the person," is also unclear.

^{270d} *Ibid.* at 410-12 and 412-14, respectively.

^{270e} As Dickson C.J.C. commented, "Simply put, assuming Parliament can act, it must do so properly." *Ibid.* at 414.

^{270f} For a detailed discussion of this development in section 7 adjudication, see E. Colvin, "Section Seven of the Canadian Charter of Rights and Freedoms" (1989) 68 Can. Bar Rev. 560.

These rights have not been judicially defined. There appears to be a general consensus that the right to liberty and security of the person relates to protection from arbitrary arrest and detention, and this interpretation is supported by related provisions in international instruments.²⁷¹ It has been held in Canadian courts that the right to liberty does not include the right to make a living,²⁷² and that the

²⁷¹See, for example, Article 6 of the *African Charter on Human and Peoples' Rights* (*supra*, n. 198): "Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained." Article 5 of the *European Convention on Human Rights* (*supra*, n.198) is similar and sets out not only the general principle but also a number of specific cases where the deprivation of liberty would be allowable under the Convention. It is interesting to note that a unanimous 1988 ruling of the British Columbia Court of Appeal in *Wilson v. Medical Services Commission of B.C.* states that the right to liberty in section 7 of the Charter has a broader meaning than mere freedom from restraint, and includes "individual freedom of movement, including the right to choose one's occupation and where to pursue it" (53 D.L.R. (4th) 171 at 187). The decision is being appealed by the provincial government, and has been subject to severe criticism: see M. D. Lepofsky, "Constitutional Law—Charter of Rights and Freedoms, Section 7—A Problematic Judicial Foray into Legislative Policy-Making: *Wilson v. B.C. Medical Services Commission*" (1989) 68 Can. Bar Rev. 615.

²⁷²*Re. Abbotsford Taxi Ltd. and Motor Carrier Commission* (1985), 23 D.L.R. (4th) 365 (B.C.S.C.).

right to security of the person does not include the right to enjoyment of the ownership of property.²⁷³

The right to life, although universally recognized, is not without difficulty when it comes to establishing its content.²⁷⁴ It is generally defined in terms of preventing the deprivation of life (abortion, euthanasia, capital punishment), i.e. as a "negative" or "retention" right. Although the issue has not yet been raised in a Canadian court, it would appear that the courts' rejection, in connection with the right to liberty and security of the person, of the argument that "economic rights" come under this section could be extended to hold that the right to life does not include the so-called "welfare rights," rights to the necessities of life (e.g. food and shelter).²⁷⁵

²⁷³ *The Queen in right of New Brunswick v. Fisherman's Wharf Ltd.* (1982), 135 D.L.R. (3d) 307, 40 N.B.R. (2d) 42 (N.B.Q.B.), *aff'd* on other grounds, 144 D.L.R. (3d) 21 (N.B.C.A.) *sub. nom. The Queen in right of New Brunswick v. Estabrooks Pontiac Buick Ltd.*

²⁷⁴ For a discussion of the content of the right to life in international human rights law, see *supra*, section 4.2.1.

²⁷⁵ The antecedent section (s. 1(a)) of the *Canadian Bill of Rights* included "the right of the individual to life, liberty, security of the person and enjoyment of property" (emphasis added). Since the drafters of the Charter chose to exclude the enjoyment of property from section 7 it is plausible to conclude that they intended thereby to exclude the issue of economic rights from the section.

International instruments are not immediately helpful in defining the right to life. In general, it is stated in bare terms without any indication of what its content is believed to be or should be.²⁷⁶ However, it is interesting to note that with the exception of the 1948 *Universal Declaration of Human Rights*,²⁷⁷ every subsequent international human rights instrument has made a clear distinction between the right to life, and the right to liberty and security of the person.²⁷⁸

The right to life is seen as a primary (if not *the* primary) human right, more important even than the right to liberty and security of the person.²⁷⁹ It is set out in all the international instruments, and in all

²⁷⁶There is of course a considerable literature on the subject. See generally the discussion in section 4.4.1, *supra*.

²⁷⁷Article 3: "Everyone has the right to life, liberty and security of person." *Supra*, n. 185.

²⁷⁸See *African Charter on Human and Peoples' Rights*, articles 4 and 6; *American Convention on Human Rights*, articles 4 and 7; *European Convention on Human Rights*, articles 2 and 5; *International Covenant on Civil and Political Rights*, articles 4 and 6. (Cites to all instruments are found *supra*, n. 198.)

²⁷⁹ Human rights aim at promoting and protecting the dignity and integrity of every individual human being. If there are any rights more

cases embodies a procedural protection against arbitrary state action *in addition to* the guarantee of the right itself. The procedural protection is stated in a separate sentence, which strengthens the interpretation that in fact two rights are provided, one substantive and one procedural.²⁸⁰

fundamental than others for achieving that aim, surely they are the rights to life, to physical integrity, and liberty. On these, all other rights depend; without these, other rights have little or no meaning. . . . The right to life is incontestably the most important of all human rights. Civilized society cannot exist without legal protection of human life. . . . [I]f there were no right to life, there would be no point in the other human rights.

Y. Dinstein, "The Right to Life, Physical Integrity, and Liberty" in L. Henkin (ed.), *The International Bill of Rights* (New York: Columbia University Press, 1981) at 114.

²⁸⁰ *African Convention on Human and Peoples' Rights*, article 4: "Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right." *American Convention on Human Rights*, article 4: "(1) Every person has the right to have his life respected. This right shall be protected by law, and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life." *European Convention on Human Rights*, article 2: "(1) Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law." (Subsection (2) sets out three other specific situations where deprivation of life will be held not to be in contravention of this article.) *International Covenant on Civil and Political Rights*, article 6: "(1) Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." (Cites to all instruments are found *supra*, n. 198). Of course, it remains a matter of speculation at

The importance of the right to life has been restated on numerous occasions in the United Nations,²⁸¹ and it has also been indicated by the United Nations Human Rights Committee that the right should be interpreted broadly and positively.²⁸² The impact these factors might have on a Canadian court is still a matter of speculation. It would undoubtedly be interesting to frame an argument for the interpretation (or reinterpretation) of section 7 of the Charter based in detail on international human rights instruments—both those to which Canada is a party and those to which it is not—but it must be realized that such an argument would be asking the court to range far into the fields of judicial creativity.

present whether a Canadian court would accept this as evidence that the *Operation Dismantle* contention was correct and that section 7 of the Charter does in fact embody both substantive and procedural rights.

²⁸¹See, for example, resolutions of the United Nations Commission on Human Rights nos. 1982/7 (19 February 1982) and 1983/43 (9 March 1983).

²⁸²"[T]he right to life has often been too narrowly interpreted. The expression 'inherent right to life' cannot properly be understood in a restrictive manner and the protection of this right requires that States adopt positive measures." Quoted in B. G. Ramcharan, "The Concept and Dimensions of the Right to Life" in B. G. Ramcharan (ed.), *The Right to Life in International Law* (*supra*, n. 203) 1 at 5.

There are hopeful signs that the Supreme Court of Canada at least may be prepared to range so far. In a lengthy and cogent dissenting judgement in the *Reference re. Public Service Employee Relations Act, Labour Relations Act and Police Officers Collective Bargaining Act* (the "Alberta Labour Reference"),²⁸³ Dickson C.J.C. (Wilson J. concurring) referred extensively to international treaties and conventions in analyzing the term "freedom of association" found in section 2(d) of the Charter, and noted that it was generally important to use such sources in interpreting Charter provisions:

A body of treaties (or conventions) and customary norms now constitutes an international law of human rights under which the nations of the world have undertaken to adhere to the standards and principles necessary for ensuring freedom, dignity and social justice for their citizens. The Charter conforms to the spirit of this contemporary international human rights movement, and it incorporates many of the policies and prescriptions of the various international documents pertaining to human rights. The various sources of international human rights law—declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms—must, in my opinion, be relevant and persuasive sources for interpretation of the Charter's provisions.²⁸⁴

He went on to link the interpretation of Charter provisions to the necessity of fulfilling Canada's international human rights obligations:

²⁸³[1987] 1 S.C.R. 313, 38 D.L.R. (4th) 161.

²⁸⁴38 D.L.R. (4th) 161 at 184.

Furthermore, Canada is a party to a number of international human rights conventions which contain provisions similar or identical to those in the Charter. Canada has thus obliged itself internationally to ensure within its borders the protection of certain fundamental rights and freedoms which are also contained in the Charter. The general principles of constitutional interpretation require that these international obligations be a relevant and persuasive factor in Charter interpretation.²⁸⁵

However, he was also careful to note that international legal norms do not *bind* Canadian courts in interpreting the Charter.²⁸⁶

In addition to the problem of defining the content of the right to life, liberty and security of the person (and it is submitted that such definition is necessary before it can be determined whether or not anyone has been deprived of that right, according to the principles of fundamental justice or otherwise), there is the equally thorny problem of establishing some kind of link between the plaintiff and the act complained of, so as to bring the operation of section 7 into play. It was in fact on this latter point that the plaintiffs in the *Operation Dismantle* case had their Statement of Claim struck out. As Dickson C.J.C. noted,

Section 7 of the Charter cannot reasonably be read as imposing a duty on the government to refrain from those

²⁸⁵*Ibid.*

²⁸⁶*Ibid.* at 185.

acts which *might* lead to consequences that deprive or threaten to deprive individuals of their life and security of the person. A duty of the federal Cabinet cannot arise on the basis of speculation and hypothesis about possible effects of government action. Such a duty only arises, in my view, where it can be said that a deprivation of life and security of the person could be proven to result from the impugned government acts. . . . *[R]emedial action will not be justified where the link between the action and the future harm alleged is not capable of proof.*²⁸⁷

Wilson J. put considerable weight on the *intention* of the drafters of the Charter:

[T]he concept of "right" as used in the Charter must take account of the fact that the self-contained political community which comprises the state is faced with at least the possibility, if not the reality, of external threats to both its collective well-being and to the individual well-being of its citizens. In order to protect the community against such threats it may well be necessary for the State to take steps which incidentally increase the risk to the lives or personal security of some or all of the State's citizens. Such steps, it seems to me, *cannot have been contemplated by the draftsmen of the Charter as giving rise to a violation of s. 7. . . .* At the very least, it seems to me, there must be a strong presumption that governmental action which concerns the relations of the State with other states, and which is therefore not directed at any member of the immediate political community, was never *intended* to be caught by s. 7 even although such action may have the incidental effect of increasing the risk of death or injury that individuals generally have to face.²⁸⁸

²⁸⁷*Supra*, n. 259 at 491-92 (emphasis added).

²⁸⁸*Ibid.* at 517-18 (emphasis added).

It is indeed curious that Wilson J. put so much weight on interpreting the Charter according to the established canon of "legislative intent," when in a subsequent judgement the Supreme Court held that the intent of the framers of legislation was not determinative of what the legislation meant.²⁸⁹ The *Operation Dismantle* decision, in a number of its aspects, raises the question of whether in fact the Court was (perhaps unintentionally) cutting its judicial coat to fit the political cloth.

The foregoing discussion illustrates the difficulties that will be encountered in pleading section 7 of the Charter in support of an argument that nuclear weapons are illegal. The lack of definition of the rights embodied in the section, and the difficulty in establishing a link between government defence policy and the alleged deprivation of section 7 rights, indicate that considerable barriers must be overcome before the courts will consider the question. Moreover, it is suggested that any such plea will have to depend heavily on international human rights law, which itself raises further issues of

²⁸⁹In the *Motor Vehicle Reference*, *supra*, n. 265 at 550-55, Lamer J. rejected the clearly expressed intention of the framers of section 7 with regard to the interpretation of the term "principles of fundamental justice." For further commentary, see P. J. Monahan & A. Petter, "Developments in Constitutional Law: The 1985-86 Term," *supra*, n. 268. Nevertheless, legislative motivation can be a compelling argument when it is clear—as, for example, the legislative motivation behind section 23 of the Charter respecting language rights.

how to encourage a domestic court to take account of international law.²⁹⁰ However, a perceptible trend in broadening the scope of procedural review under this section^{290a} is a hopeful sign that this section may be more adaptable for purposes of review than initially appeared.

Section 26

26. The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.

This section appears to be intended to preserve any rights existing at common law which were not specifically included in the Charter. For example, it has been held by one court that the right of access to the courts is a common law right which falls under the Charter by virtue of this provision.²⁹¹ On the other hand, an equivalent court has held that this section does not incorporate into the Charter any other rights and freedoms than those specifically guaranteed; rather, it is a

²⁹⁰On the subject of the nexus between international and domestic law, see generally *supra*, Chapter 5.

^{290a} *Supra*, nn. 270a-270f and accompanying text.

²⁹¹ *Re. British Columbia Government Employees' Union and A.-G. B.C.* (1985), 20 D.L.R. (4th) 399 (B.C.C.A.).

“cautionary” provision which was included simply to indicate that the Charter should not be construed as taking away any *existing* undeclared rights and freedoms.²⁹²

The latter decision appears to rest on interpreting the words “that exist in Canada” (“qui existent au Canada”) as meaning “that exist in Canada *at the time the Charter comes into force.*” In other words, it is tied to a specific date. Any undeclared right or freedom that existed in Canada on or before 17 April 1982 would be brought under the Charter by virtue of this section; any undeclared right or freedom that comes into existence after that date would not.

It could equally be argued that the use of the present tense indicates the drafters meant “that exist *from time to time* in Canada.” This would allow for a much broader and more evolutionary approach to interpreting the rights and freedoms embodied in the Charter. Unfortunately, the Supreme Court of Canada has not yet had occasion to comment on this section. The general approach of the Supreme Court, however, appears to be to avoid fixing Charter definitions in time.²⁹³

²⁹² *Léger v. City of Montreal* (9 June 1986, Que. C.A.).

²⁹³In the *Motor Vehicle Reference*, Lamer J. writing for the concurring majority held that minutes and proceedings of the Special Joint Committee of the Senate and the House of Commons on the Constitution are admissible as extrinsic aids to interpret the Charter, but are of limited weight. In addition he noted that the danger of interpreting a

International human rights law is very evolutionary in character. One hundred years ago, it was considered in some countries that owning slaves was a right. Now no country in the world holds this view. Equally, the right not to be discriminated against on the basis of race, age or sex is of recent development, but now firmly entrenched in the lexicon of international human rights. Other rights are in the process of evolving; for example, there is now some support in the international community for the existence of a "right to peace."²⁹⁴

If such a right were to become accepted in the international community, the question arises of whether its general acceptance makes it part of international customary law. If so, as international customary law it automatically becomes the law of Canada (in the

section (such as section 7, which was in issue in this case) in terms of comments made at the Committee hearings was that the definition of the right(s) involved would thus become "frozen in time at the moment of adoption," leaving little or no possibility for evolution, development and change according to the changing needs and attitudes of society. *Supra*, n. 265 at 554.

²⁹⁴See, for example, F. Przetacznik, "The Philosophical Concept of Peace as a Basic Collective Human Right" (1987) 26 *Rev. dr. pén. mil.* 361; E. Rostow, "Peace as a Human Right" *supra*, n. 204; J. Packer, "The Right to Peace" (March 1987) *Ploughshares Monitor* 13. See also *supra*, section 4.2.3.

absence of any statute or judicial decision to the contrary).²⁹⁵ Does section 26 then give that "new" right Charter status and protection? It is submitted that this argument should be pursued, although again it raises the vexed question of the use of international law in Canadian courts.

The enormous potential of section 26 for integrating evolving rights within the international legal community into Canada's domestic legal system must be explored persistently, but also with sensitivity and care. The difficulties which may arise in invoking section 26 should not, however, be allowed to discourage its use. It is submitted that this section can play a crucial role in the development of rights and freedoms, in harmony with the Supreme Court's understanding that a constitution "is drafted with an eye to the future" and "must ... be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers."^{295a}

²⁹⁵*Supra*, section 5.3.

^{295a} *Supra*, n. 261. See also *supra*, n. 262 and accompanying text. For a detailed analysis of section 26, see K. Benyekhlef, "L'article 26 de la *Charte canadienne*: une négation constitutionnelle du positivisme juridique" (1989) 34 *McGill L.J.* 983.

6.2.3 Application — Section 32(1)

32. (1) *This Charter applies*

(a) *to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and*

(b) *to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.*

It was established by the Supreme Court of Canada in the *Operation Dismantle* case that this section gives the courts authority to review executive action taken pursuant to the royal prerogative over defence and foreign policy matters, where the denial or infringement of a Charter right can be established.²⁹⁶ Thus this section may be available to bring the issue of the legality of nuclear weapons into a Canadian court in the context of a challenge to government defence policy, *if* a link can be established between that policy and the infringement or denial of a Charter right.²⁹⁷

6.2.4 Remedies — Section 24(1)

24. (1) *Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply*

²⁹⁶*Supra*, n. 40 and accompanying text.

²⁹⁷*Supra*, n. 43 and accompanying text.

to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

This section relates to the requirement for standing to bring an action for an alleged infringement or denial of a Charter right.²⁹⁸ It has been determined by the Supreme Court of Canada that this section will also apply to an anticipated or threatened infringement or denial of a Charter right.²⁹⁹

Although traditionally the grant of standing has been a matter for the discretion of the court, it has been suggested that in fact section 24(1) gives a non-discretionary right to standing for members of the public who claim their rights and freedoms under the Charter have been interfered with.³⁰⁰ Again, however, it is essential to establish that there is an actual or threatened violation of a Charter right.

²⁹⁸For a more detailed discussion of the problem of standing, see *supra*, section 2.3.1.

²⁹⁹See *Operation Dismantle v. R.*, *supra*, n. 25 at 487 per Dickson C.J.C. writing for the majority. Although Madame Justice Wilson's concurring judgement appears to require an actual infringement or denial (*ibid.* at 510-11), the accepted view now appears to be that s. 24(1) will come into play if there is a *threatened* violation of a Charter right or freedom, although the threat must amount to more than a simple hypothesis or speculation.

³⁰⁰See D. Gibson, "Enforcement of the Canadian Charter of Rights and Freedoms" in W. S. Tarnopolsky & G.-A. Beaudoin (eds.), *The Canadian Charter of Rights and Freedoms:*

6.2.4 Limitations — Sections 1 and 33(1)

1. *The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.*

33. (1) *Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.*

These two provisions contain the possibility of conflict. Section 33(1) indicates that the federal parliament or a provincial legislature can, by following the appropriate procedures set out in the various paragraphs of that section, override the rights and freedoms guaranteed by the Charter by simple legislation. This is in spite of the fact that the

Commentary (Toronto: Carswell, 1982) 489. Gibson notes that the drafters of the Charter must have been familiar with the "Trilogy" cases on standing, yet did not include any statement about "discretion" in section 24 (1); thus "the right of standing before the courts given by s. 24(1) to anyone whose Charter rights have been interfered with is unrestricted and non-discretionary." (*Ibid.* at 496.) He adds, however, that "[t]he Court clearly does not bestow standing on persons who are in no way personally affected, even as members of the general public, by the allegedly unconstitutional law or action." (*Ibid.*)

Charter is a constitutional document and thus, in theory at least, of greater significance than any mere statute.³⁰¹

Section 1 further complicates matters, since it indicates that any limits on the guaranteed rights and freedoms must be "reasonable," "prescribed by law" and "demonstrably justified in a free and democratic society." How do these provisions interact with the provisions of section 33(1)? The latter section makes no requirements as to the contents of the legislative override, only as to form and procedure. Can a legislative override under section 33(1) (i.e. a limit "prescribed by law") be effective even if it is *not* "reasonable" or "demonstrably justified in a free and democratic society"? If it cannot, why does section 33(1) exist at all, as it must then be held to be irrelevant and unworkable, the only limitations possible being already set out in section 1?³⁰²

³⁰¹This is especially confusing in light of the long debate over the status of the *Canadian Bill of Rights*, whose importance was consistently impugned by Canadian courts on the ground that it was "only" a statute, and not a constitutional document. The Charter is a constitutional document, intended in part to be used to challenge inconsistent legislation, which can in fact be overridden and made inoperative by that very inconsistent legislation. A conundrum.

³⁰²The Supreme Court of Canada, in *A.-G. Que. v. Quebec Association of Protestant School Boards* (1984), 10 D.L.R. (4th) 321, has stated that section 1 cannot legitimize laws that are in direct conflict with rights and freedoms guaranteed by the Charter, nor justify laws that in effect amend the Charter. Exceptions and amendments, the Court

A further complication is introduced when one inquires what exactly, under section 1, would be considered "reasonable" and "demonstrably justified in a free and democratic society." It has been suggested that section 1 imposes a fairly strict level of judicial scrutiny in examining reasonable limits.³⁰³ The Supreme Court of Canada has determined that there are two central criteria which must be met for a limit to be "justified": firstly, the objective of the limiting measure must be sufficiently important to override the Charter guarantee; and secondly, the party invoking section 1 must show that the means chosen to override the guarantee are "reasonable" and "demonstrably justified," which involves a form of proportionality test. The significant components of such a proportionality test are that the measure(s) adopted must be carefully chosen, and not arbitrary or unfair, that they should impair the guaranteed right or freedom as little as possible, and that there must be proportionality between their effects and the

indicated, can only be effected through the mechanisms provided in sections 33 and 38 (the section setting out the amending formula). This appears to indicate that section 33 overrides not only sections 2 and 7 to 15, but also section 1. Nowhere in the Charter is this intention made clear.

³⁰³"[F]or the reasons to be demonstrable, the evidence or grounds for the restriction must be shown to have existed *prior to or at the time of* the limitation of a guaranteed right or freedom." W. E. Conklin, "Interpreting and Applying the Limitations Clause: An Analysis of Section 1" (1982) 4 Supreme Court L.R. 75 at 82.

objective which has been identified of overriding importance.³⁰⁴ It has also been suggested that the measures chosen for achieving the objective must be shown to be preferable to any other means.³⁰⁵

In considering the effect of these provisions on section 7, it must also be asked to what extent the rights guaranteed by that section can be subject to derogation. If the right to life is indeed the primary human right, can it be limited? The *American Convention on Human Rights* and the *International Covenant on Civil and Political Rights* both have provisions forbidding derogation to the right-to-life provisions.³⁰⁶ The latter instrument was an important source document for the

³⁰⁴See *R. v. Oakes*, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200.

³⁰⁵See *Re. Reich and College of Physicians and Surgeons of the Province of Alberta* (1984), 8 D.L.R. (4th) 696, 31 Alta. L.R. (2d) 205 (Q.B.).

³⁰⁶Articles 27 and 4, respectively.

Charter.³⁰⁷ Is there then an argument that if the right to life is non-derogable at international law, it must also be so in domestic law?³⁰⁸

It has been suggested that if the constitutional standard in section 7 is not restricted to matters of procedure but does in fact extend to substantive law,³⁰⁹ then it may not be possible to justify an infringement or denial of a section 7 right by recourse to section 1:

It seems improbable that a Court would hold a provision to be substantively unjust but demonstrably justified. . . . In short, it would seem that section 7 is one of the provisions of the *Charter* which should be applied without recourse to section 1; the sort of derogation contemplated by section

³⁰⁷"Both a textual comparison and a review of the evidence before the Special Joint Committee of the Senate and the House of Commons on the Constitution, 1981-82, confirm that the *International Covenant on Civil and Political Rights* was an important source of the terms chosen." *R. v. Videoflicks* (1984), 14 D.L.R. (4th) 10 (Ont. C.A.), *per* Tarnopolsky J.A.

³⁰⁸For a discussion of the right to life as an imperative (non-derogable) right in international law, see B. G. Ramcharan, "The Concept and Dimensions of the Right to Life," *supra*, n. 282 at 14-17.

³⁰⁹As was apparently accepted by Lamer J. in the *Motor Vehicle Reference*, *supra*, n. 265 and accompanying text.

1 properly forms part of the initial process of determining "fundamental principles of justice."³¹⁰

This view has gained the support of the Supreme Court of Canada in the *Motor Vehicle Reference*,³¹¹ where Madame Justice Wilson, in a separate judgement concurring with the majority of the Court, noted that a limit on a section 7 right which has been imposed in violation of the principles of fundamental justice cannot be either reasonable or demonstrably justified in a free and democratic society. She added that if the limit is found to be within the principles of fundamental justice, it must still meet the section 1 test.

6.2.6 Conclusion

It can be seen from the above discussion that using the Charter in litigating the issue of legality of nuclear weapons in a Canadian court is an enterprise fraught with pitfalls. A party challenging the legality of government defence policy and executive action in relation to it must meet the difficult test of finding a sufficiently close link between the

³¹⁰J. D. Whyte, "Fundamental Justice: The Scope and Application of Section 7 of the Charter" in Canadian Institute for the Administration of Justice, *The Canadian Charter of Rights and Freedoms: Initial Experience, Emerging Issues, Future Challenges* (Cowansville, Qué.: Les Éditions Yvon Blais, n.d.) 21 at 31.

³¹¹*Supra*, n. 265.

government action and a threatened infringement or denial of a Charter right. A party defending in such an action must meet the equally uncertain test of showing what is within the principles of fundamental justice (not fully defined) and/or reasonable and demonstrably justified in a free and democratic society (not fully defined and possibly subject to evolution and adjustment). In any event, Charter arguments in such a cause will have to be carefully thought through and constructed with close attention. It is inevitable that such arguments, at least insofar as giving substance to the Charter rights is concerned, will depend on international human rights law—treaty law, customary law and general principles. Therefore the parties would have to address both the issue of judicial creativity in Charter litigation, and the issue of encouraging the Court to expand and develop the use of international law in a domestic litigation context.

6.3 The Constitution Act, 1982 — Section 52(1)

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

This section sets out the fundamental principle that the constitution is supreme.³¹² As noted in the earlier discussion on standing,³¹³ it is

³¹²See *R. v. Big M Drug Mart*, *supra*, n. 262.

generally accepted that this section protects the courts' traditional discretionary power to grant standing under the principles established in the "Trilogy" cases.³¹⁴

The term "any law" will of course include existing statutory law and subordinate legislation. It has also been interpreted to include the common law, on the ground that to construe the section to exclude from Charter application the whole of the common law, which to a large extent governs the rights and duties of individuals in society, would be completely unrealistic and unfeasible.³¹⁵ If the whole of the common law is caught in section 52(1), then international customary law (which is adopted into and forms part of the common law) is also caught under this section. This could conceivably permit a party to plead rights developed under international customary law in support of gaining standing to litigate the issue of the legality of nuclear weapons (or of government defence policy or executive action with respect to nuclear weapons) in a Canadian court.

³¹³*Supra*, at 15-16.

³¹⁴See the discussion on standing, *supra*, section 2.3.1.

³¹⁵See *Retail, Wholesale & Department Store Union, Local 580 v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, 33 D.L.R. (4th) 174.

It has furthermore been suggested by Dickson C.J.C. in the *Operation Dismantle* case that “any law” would include “all acts taken pursuant to powers granted by law ... ” (i.e. government conduct).³¹⁶ This does provide a certain potential for a broader challenge to government defence policy, while avoiding the potentially fatal difficulty of linking government action to the threatened or actual infringement or denial of a Charter right.³¹⁷

6.4 The Criminal Code — Genocide and War Crimes

There are two separate aspects of the Criminal Code which might be used to bring the issue of the legality of nuclear weapons into a Canadian court. These deal with the crime of genocide and with war crimes.³¹⁸ In both cases, however, the first difficulty to be dealt with

³¹⁶*Supra*, n. 259 at 494. See also *supra*, n. 32 and accompanying text.

³¹⁷It is interesting for example to speculate whether, following the example in *Thorson*, a federal taxpayer could challenge the appropriations made by the government for funds to purchase nuclear-powered submarines, on the grounds that such submarines would violate Canada's international obligations under the *Non-Proliferation Treaty* and therefore are contrary to the rule of law and the “right of the citizenry to constitutional behaviour by Parliament.” See *supra*, section 2.3.1.

³¹⁸For a more detailed discussion of these subjects in international law, see *supra*, section 4.5.

will be who to charge, since none of the provisions involved are susceptible of being invoked against a corporate entity or indeed any other legal person than an individual.

Canada is a signatory to the *Convention on the Prevention and Punishment of the Crime of Genocide*,³¹⁹ which by terms of its article 1 commits the parties to prevent and punish genocide. However, the crime of genocide is not itself prohibited by the Criminal Code. Instead, the Code prohibits the *advocacy* of genocide,³²⁰ and the crime of murder. It is felt that these provisions are sufficient to fulfil Canada's obligations under the Genocide Convention.

The possibility exists for an argument that a defence policy involving or promoting the use of nuclear weapons constitutes advocating genocide, in light of the widespread, uncontrollable and devastating effects of any armed conflict involving the use of nuclear weapons.

The Criminal Code has recently been amended to include war crimes and crimes against humanity.³²¹ These crimes are defined in terms that closely follow the definitions found in the Nuremberg

³¹⁹*Supra*, n. 229.

³²⁰R.S.C. 1970, c. C-34, s. 281.1.

³²¹The new provisions are found in s. 6, subsections 1.91 to 1.97.

Principles,³²² and like the Nuremberg Principles include not only "acts and omissions" but also "for greater certainty, attempting or conspiring to commit, counselling any person to commit, aiding or abetting any person in the commission of, or being an accessory after the fact in relation to, an act or omission." It should be noted that these provisions apply only to acts committed outside Canada. There are also limitations in terms of the nationality of either the person charged with the war crime or crime against humanity or the victim of the alleged crime, and in terms of the presence in Canada of the person charged (a jurisdictional provision).

In spite of the limitations on the definition of the two crimes—war crime and crime against humanity—the possibility does exist of bringing military commanders and/or defence officials within the ambit of these provisions, given a relatively creative framing of the charges. However, in spite of the broad wording of the new subsections, it is generally agreed that the provisions are intended only to catch war criminals from the Second World War,³²³ and it is likely that a Canadian court would not be very receptive to the notion

³²²*Supra*, n. 225 and accompanying text.

³²³In fact, the only charges laid so far under the new provisions, in December 1987, are against one Imre Finta who is accused of war crimes and crimes against humanity in 1944 related to the seizing of Jews in Hungary for transportation to death camps, and the death of some of the Jews on the transportation trains.

of tarring a Canadian defence official with the same brush as a Rauca or a Barbie. Furthermore, proceedings under these provisions can only be commenced with "the personal consent in writing of the Attorney General or Deputy Attorney General of Canada, and such proceedings may only be conducted by the Attorney General of Canada or counsel acting on behalf thereof."³²⁴ This procedural requirement may provide more of a barrier to using these sections than any difficulty in framing a charge in terms of the substantive requirements of the section.

In sum, the Criminal Code does not appear to be of any great assistance in litigating the legality of nuclear weapons in a Canadian court. However, it may be useful as a "back-up" to claims based on the Charter or on the broader provisions of section 52(1), and it is also useful as an example of the implementation of Canada's international obligations (both under treaty and under international customary law) in Canada's domestic statutes.

³²⁴Section 6 (1.95).

Chapter 7

CONCLUSION

The foregoing analysis makes it clear that litigating the legality of nuclear weapons is an undertaking fraught with pitfalls, and raises the question of whether such an undertaking is viable at this stage in the evolution of the law addressing such an issue.

Can the issue of the legality of nuclear weapons be litigated in a Canadian court? Part of the answer to this question must depend on whether the cause of action is framed in constitutional or international law terms, and whether one is stronger than the other.

If a plaintiff can establish that one (or some) of her rights as protected by the Charter and/or the Constitution has been violated, then a Canadian court must act, as it is obliged to apply the Constitution.³²⁵ If, on the other hand, the plaintiff's claim is only that the

³²⁵See s. 24(1) of the Charter and s. 52(1) of the *Constitution Act, 1982*: *supra*, sections 6.2.4 and 6.3, respectively.

government's policy is politically unwise, the courts should not deal with it.

Certainly even a Charter/constitutional case would present difficulties. According to the "Standing Trilogy" cases,³²⁶ a plaintiff may be granted standing to litigate an issue of public interest where a justiciable issue of constitutionality has been raised. The *Operation Dismantle* case³²⁷ would appear to have established that executive action with respect to defence and foreign policy matters is reviewable before a Canadian court where there is a question as to the constitutionality of such action, and particularly where it is alleged that such action has infringed or denied a Charter right of the plaintiff(s). Furthermore, the case also indicates that such reviewability may arise in connection with an *anticipated* or *threatened* infringement, not just an actual (past) denial of the right,³²⁸ although it is clearly understood that purely hypothetical or speculative scenarios will not be entertained by the court.

It is arguable therefore that any plaintiff bringing an action with respect to the legality of nuclear weapons, particularly on the ground

³²⁶*Supra*, section 2.3.1.

³²⁷*Supra*, section 2.3.2.

³²⁸*Supra*, n. 42 and accompanying text.

that nuclear weapons violate (even prospectively) the rights of the plaintiff as guaranteed by the *Canadian Charter of Rights and Freedoms*, may be able to pass the initial hurdle of being granted standing by the court to pursue the action. However, what can prevent such a plaintiff from coming to grief over the issue of showing a "reasonable cause of action"—the stumbling block that kept the *Operation Dismantle* case from ever being heard in court?

One of the greatest difficulties facing a plaintiff trying to test the legality of nuclear weapons in a Canadian court may be in finding a connection between the government action complained of (such as participating in a defence plan which envisages the first use of nuclear weapons) and the alleged violation of the plaintiff's rights (either as an individual or as a member of the general public) on which the case is based. There are a number of interesting arguments which could be made for using principles of domestic law such as the right to life (section 7 of the Charter) or inchoate rights (section 26 of the Charter),³²⁹ but could a plaintiff succeed in establishing a nexus of cause and effect sufficient to allow a court to find a "reasonable cause of action"? The fate of the *Operation Dismantle* action indicates that, even without resort to a "political question" doctrine, the courts will take a very cautious approach indeed towards this issue.

³²⁹*Supra*, section 6.2.2.

The fact that the Charter rights available to the plaintiffs may require the creative use of international law to give them sufficient content, by itself raises difficulties for the plaintiffs. Unless and until Canadian courts show a more open and responsive attitude towards using international law to interpret and give substance to domestic legislation, the paucity of domestic law applicable to these issues may prove a severe hindrance.

Given the difficulties of basing an action on the Charter or the *Constitution Act, 1982*, would it be possible to commence an action in a Canadian court based solely on Canada's obligations under international law? Could a plaintiff raising the issue of the legality of nuclear weapons in a Canadian court rest her case primarily on international law, as adopted by or implemented in domestic law?

If the plaintiff is seeking a declaration—perhaps the most obvious remedy in public-interest legislation—then it is quite possible that, as a matter of Canadian law, a court can speak, since it is open to the court to make a declaration on the state of Canadian law, which may include elements of international law.³³⁰

The question raises two subsidiary problems: whether a Canadian court would in fact be prepared to hear a case whose principal (if not

³³⁰See generally *supra*, Chapter 5, on the interrelationship between international and Canadian domestic law.

sole) basis is in international rather than domestic law; and whether in fact the international law available to a Canadian court, either as international customary law forming part of the Canadian legal system or as treaty law implemented in the domestic system by appropriate legislation, would be susceptible of providing the nexus between the action complained of (government policy) and the alleged violation of rules of international law binding on Canada.

As discussed at length above,³³¹ there is no international law that specifically and in terms declares nuclear weapons to be illegal *per se*. Arguing for the illegality of nuclear weapons under international law involves arguing by extension and analogy, from effects back to causes—and, at times, from positions based on moral outrage back to general principles of law which may bear more resemblance to wishful thinking than to established jurisprudence.

A significant problem in using international law to argue the illegality of nuclear weapons is that the principle body of law on which such arguments are usually based—international humanitarian law³³²—

³³¹*Supra*, chapters 3 and 4.

³³²*Supra*, section 3.3.

applies only in time of armed conflict,³³³ and thus is not really available to be used in a peacetime action.³³⁴

However, the numerous treaties and conventions on the means and methods of warfare have evolved over time from the early prohibitions on specific weapons³³⁵ to prohibitions on *types* of weapons, arising as a function of the effects which may be expected to follow from the use of the weapon rather than from the specific description of the weapon itself.³³⁶ This development allows the argument to be made that

³³³As is indicated by its historical latin name, *jus in bello*—law in war, applicable during armed conflict to regulate the conflict.

³³⁴A reply often heard to this—and which has some merit—is that there is not likely to be much chance to judge the legal merits of nuclear weapons in a conflict which would involve their use, since the time frame would probably be far too short. It is contended as well that there would be even less opportunity for the niceties of litigation in a post-nuclear world.

³³⁵For example, the St. Petersburg Declaration, *supra*, n. 92.

³³⁶See in particular the provisions in Additional Protocol I, *supra*, n. 128, relating to new weapons (Article 36) and to protection of the natural environment (Article 55). Both articles appear to be framed in deliberately non-specific terms to allow for their application to means and methods of warfare which did not exist at the time the Protocol was drafted.

“prospective” litigation is possible—that is, litigation which occurs prior to there being any use of the weapon in question, in order to adjudge whether in fact such use would be legal within the existing rules of international law.

A considerable body of law has developed with respect to the means and methods of warfare, international crimes related to warfare and the protection of human rights during armed conflict. But this law has not as yet given rise to any specific rules with respect to the legality (or illegality) of nuclear weapons *per se*. There is no consensus in the international legal community on the issue, nor is there likely to be in the foreseeable future. The differences between the staunch defenders of nuclear weapons, who see the existing régime of arms control and disarmament treaties as sanctioning the existence of nuclear weapons, and the detractors who maintain that the effects of any conceivable use of nuclear weapons are so horrible that they cannot possibly come under any aspect of legality, appear to be so far apart as to admit of no reconciliation.

In addition, it must be noted that the literature pertaining to the *illegality* of nuclear weapons has not kept pace with technological developments in this branch of weaponry. In general such literature tends to focus on the widespread and indiscriminate effects of any use of nuclear weapons. It has failed to come to terms with recent development which allow for miniaturized (“clean”) nuclear weapons which, their proponents claim, can be accurately targeted and whose effects can be limited and contained (leading to the elaboration of the

concept of a "winnable" nuclear war).³³⁷ This shortcoming in the existing literature at present contributes to a serious weakening of the case against nuclear weapons, and must be addressed in a thoughtful and positive way.

Given the difficulties apparent in the debate over nuclear weapons and international humanitarian law, it is important to consider other areas of international law which may prove relevant, or even preferable as a basis for a cause of action. Undoubtedly, environmental law has a considerable—and as yet largely unexplored—role to play.³³⁸ Whether a nuclear explosion is large or small, "dirty" or "clean," there will be an effect on the environment. That effect, even if it is small initially, will last a long time and, as Hiroshima and Nagasaki have so bitterly demonstrated, the long-term effects on human life will extend far beyond the immediate results of the explosion.

Although there is a large and growing body of scientific literature on the effects of nuclear explosions and radiation on the environment, the legal community as a whole has not yet made any coherent and concerted effort to integrate this scientific knowledge into the legal framework. This is an important area for developing the law.

³³⁷For a discussion of the impact of the development of miniaturized nuclear weapons on the legal debate, see generally *supra*, n. 177 and accompanying text.

³³⁸See *supra*, section 4.1.

Equally important—and equally neglected, from the legal point of view—is the evidence being amassed by the medical community on the immediate and long-term effects on human beings of nuclear explosions, particularly the ravages caused by low-level radiation.³³⁹ This medical evidence has important ramifications for developing arguments on the legality of nuclear weapons based in environmental law, international human rights law, and possibly international (and domestic) criminal law. However, it appears that legal developments, at present anyhow, lag sadly far behind those in the scientific and medical fields. This poses a serious difficulty for those seeking to conduct litigation on nuclear weapons issues, for the international law structure is not yet sufficiently developed, even conceptually, to support the arguments that could, and should, be made. It also poses a stimulating challenge to creative jurists to begin at once the required process of collaboration with other professionals and synthesis of findings.

This is to some extent an area of “soft” law—law which is in the process of evolution and development but which is not as yet embodied in specific international instruments. Thus even if

³³⁹In this regard, the work of the International Institute of Concern for Public Health, located in Toronto, Ontario, is of particular importance. A seminal work is *No Immediate Danger? Prognosis for a Radioactive Earth*, by Rosalie Bertell, Director of the Institute (*supra*, n. 119).

international public law principles were to be invoked in a Canadian court in the course of litigating the legality of nuclear weapons—or, even more, as the basis for such an action—there must be some concern as to whether *at this time* there are principles sufficiently clear to be argued, either before or against the legality of nuclear weapons *per se*.

As the foregoing analysis has demonstrated, international law has over the years developed many such principles. Moreover, the majority of these principles relating to humanitarian considerations in the conduct of armed conflicts have gained the universally-applicable status of principles of customary international law, and some—for example the prohibitions against genocide and war crimes—have the overriding force of peremptory norms. Indeed, the general lack of attention which the legal community has accorded to the issue of the legality of nuclear weapons should not be allowed to conceal the fact that there is in fact an impressively large and established body of law available to the lawyer prepared to boldly go where no lawyer has gone before in arguing this issue before a Canadian court.

This of course also raises the question of whether a Canadian court would in fact even hear a case which was grounded in international rather than domestic law.³⁴⁰ The possibility must be faced that in the

³⁴⁰Where international law is pleaded in a domestic case, it is generally in support of (or in opposition to) domestic legislation, usually by way of providing an explanation or interpretation of the domestic rule.

event such an action were launched, a Canadian court might simply refuse to hear it, on the ground that such a case should be heard by the International Court of Justice rather than by a domestic tribunal. It is submitted that such an attitude is quite simply incorrect at law, as it is based on a false dichotomy that sees international and domestic legal systems as fundamentally mutually exclusive. The principle is well established that international law has a valid place in the Canadian legal system. Indeed, quite apart from the numerous relevant international treaties and conventions which Canada has signed and ratified, general principles and customary rules of international law relevant to the issue form part of our domestic common law.³⁴¹

Nevertheless, Canadian courts have shown a regrettable reluctance in availing themselves of this particular aspect of law.³⁴² Such reluctance must not be allowed to persist. Not only does it fail to recognize the undeniable, continuous interaction of the international and domestic legal systems; it is also less and less tenable in the face of such developments as the obvious and repeated impact of international law

³⁴¹See generally *supra*, Chapter 5, and in particular section 5.3.

³⁴²Although Dickson C.J.C. made eloquent use of international law in his judgement in the *Alberta Labour Reference*, it must be remembered that he was dissenting; the majority of the court did not support his approach. *Supra*, nn. 283-86 and accompanying text.

embodied in trade agreements such as the *General Agreement on Tariffs and Trade* and the *Canada-United States Free Trade Agreement* on Canadian domestic legal procedures and domestic adjudication.

What if a legal action based on customary international law and/or the Charter resulted in a decision which conflicts with Canada's treaty obligations? What if, for example, a court determined that under Canadian law nuclear weapons are illegal and therefore Canada's participation in NATO—which includes supporting NATO's policy of first use of nuclear weapons—is illegal under Canadian law? Although the situation may seem remote, it remains a possibility. Legal imperatives and political concerns may come into conflict. What resolution would then be possible?

But indeed, should the issue of the legality of nuclear weapons be in a court at all? Is such a course of action, at the moment at least, at best premature and at worst pointless. Those who believe that existing law in this area is too "soft" might argue that it is too soon to try to base an action on it. The vagueness of the connection between government defence policy and violations of individual rights is so pervasive that any court faced with an action positing such a connection may simply refuse to deal with the issue on the ground that it is too speculative and hypothetical to be "judicially manageable."

As has been shown,³⁴³ there are good arguments in both Canadian constitutional and international law (especially the latter) which may be applied to the vexed debate over the legality of nuclear weapons. And these arguments, as has also been shown,³⁴⁴ are to a large extent available to Canadian domestic courts and to public interest groups who wish to bring the issue before these courts. Further careful and thoughtful development of these legal principles and rules is of course necessary, but there is already a firm foundation and a growing structure in existence. The fact that it has not been done before does not mean it cannot be done at all.

Also, it must be questioned intensively and repeatedly whether Canadian courts should be allowed to disregard this body of law, or to avoid considering it where it is appropriately pleaded and relevant to the case at bar. The failure to date of various courts—including the Supreme Court of Canada—to apply international law where it is pertinent, where it can clarify and/or support domestic law, hints at a subtle, perhaps even unconscious, influence of political or otherwise non-legal considerations on the judicial process. This must be challenged.

The law can be clarified and developed precisely by means of legal actions which seek, carefully and deliberately, to use every means

³⁴³*Supra*, chapters 3, 4 and 6.

³⁴⁴*Supra*, chapter 5.

properly available to counsel to advance arguments which utilize all the tools available to the legal profession. The law does have a vital role to play here, even though this role is emerging only slowly. And the law may be an instrument of political pressure, particularly should the legal process of argument and decision reveal inconsistencies between the laws the Canadian government claims to uphold, on the one hand, and its policy decisions in the national and international arenas, on the other. While the courts should never be used simply as a means to a purely political end, there is no doubt that legal opinion carries weight in the political decision-making process.

There needs to be more evolution in the law governing the means and methods of warfare, especially a development of legal arguments appropriate to address the constantly changing technological realities of nuclear weapons. There needs to be more study of environmental, medical and other scientific evidence to integrate their findings into the legal dossier. There needs to be more informed debate in the profession, and fewer polemics. There needs to be a more creative approach to existing norms of international law—general, customary and conventional—to see what application, if any, they may have for the legality of nuclear weapons. Above all, there needs to be a recognition by the legal profession worldwide that this is a legal issue, requiring a legal solution, and that it is no longer appropriate—if indeed it ever was—for us to ignore it as “someone else’s problem.”

APPENDICES

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