long-term and severe damage to the natural environment." The provision dealing with new weapons, Article 36, is also relevant: "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."

This brief survey of traditional international law has shown that treaty rules and standards, customary legal principles of humanity, and the demands of public conscience have been historically useful in developing and codifying the laws of war in response, often retrospectively, to the challenge of new weaponry. Given the relevance of the principles of humanity to the formulation of the laws of war, an express prohibition on the use of nuclear weapons seems almost unnecessary, at least on the level of legal analysis, because of the relative clarity and bearing of conventional and customary international law. If the traditional limiting goals of the laws of war are to be realized, to any serious degree, then it would seem necessary to conclude that any threat or use of nuclear weapons violates international law. To conclude differently would be to ignore the barbaric character of nuclear warfare. It should be recalled that the laws of war embodied minimum ideas of decency. By exempting nuclear weaponry from such regulatory prohibition, we would be abandoning even this minimum effort.

The spectre of general war, possibly including the use of nuclear weapons, has forced a need for a fundamental reevaluation of the nature and objectives of war in "the nuclear age." The use of nuclear weapons, pursuant to either a doctrine of mutual assured destruction or limited nuclear war or counterforce, would have unpredictable and uncontrollable human and environmental consequences. Moreover, the development of nuclear doctrine has been complemented by technological innovations in weaponry having the potential for producing extensive and indiscriminate suffering for combatants and noncombatants alike. Nuclear war clearly is qualitatively distinguishable from conventional war. Never has any conventional war had the potential for destroying the biological identity, possibly even the reality, of the human race, or the economic and ecological viability of the planet. Indeed, the genetic and environmental effects alone resulting from the use of nuclear weapons provide a compelling moral and humanitarian argument against their legality. The analogy of the effects of a nuclear weapon to a poison, a poison gas or a bacteriological weapon; the indiscriminate nature of the effects of nuclear weapons for the civilian and the combatant; and the unnecessary and disproportionate suffering resulting from nuclear weapons and their consequent fallout, provide a series of grounds each of which is sufficient to prohibit the threat or use of nuclear weapons under existing international law. When taken together, these arguments provide overwhelming support for the conclusion that any threat or contemplated use of nuclear weapons is contrary to the dictates of international law, and constitutes a crime of state, the continuation of which should be enjoined by judicial bodies and opposed by citizens and nongovernmental organizations.

**Remarks by Richard A. Falk***

Professor Falk briefly outlined some other points from their paper. The issue of nuclear weapons and nuclear strategic doctrine is the culmination

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of the broader modern crisis of the law of war having its roots in the inability or unwillingness of governments to attempt to moderate their technological capabilities by reference to more traditional restraints on the use of force built up for centuries of concern with the danger of barbarism being the consequence of unrestricted warfare. Society has been unable to reconcile its inability to eliminate conflict between nations and the idea that this conflict has its own normative limits. The relatively uncontested claim to use nuclear weapons to promote national policy represents a complete breakdown of the effort at minimal restraint on the role of violence in the protected life of international society.

The contrast between today’s enormous preoccupation with small-scale terrorism and indifference to large-scale terrorism is striking. All the arguments leading us to be appalled by small-scale terrorism apply with greater relevance to the role contemplated for nuclear weapons. This is a double standard. We do not accept that small-scale terrorism is an effective instrument for those groups that employ it; a renunciation by them of a claim of the right to engage in indiscriminate violence would be welcomed. What is principally wrong with “terrorism” is its repudiation of these limitations on notions of effectiveness. Yet we accept a state’s unconditional claim to do whatever it wants to do with instruments of violence only as long as it makes a minimal case for effectiveness. This seems to accept the logic of terrorism as a basis of national policy with profound long-term moral and cultural consequences for everyone.

This failure to examine the legal and moral status of the way nuclear weapons have been integrated into our security planning is part of the deferred cost of “victor’s justice” at Nürnberg—the tendency to reserve international legal scrutiny for our adversaries and to exempt ourselves. While we would reply that without victor’s justice there never would have been a Nürnberg, I feel that that shows the role of international law is useful only for partisan purposes. It is a cowardly intellectual stance to fail to acknowledge this conclusion, if my hypothesis is correct.

There is a growing popular concern about the legitimacy of nuclear weapons, particularly outside the nuclear states. Yet in non-Western settings it is not even an interesting question. Those states which rely on nuclear weapons are viewed therefore as morally corrupt and degenerate.

In regard to the suggestion that nuclear weapons are necessary in light of the Soviet threat, there is no response to the contention that nuclear weapons are terroristic weapons. No one would accept an argument that the PLO could rely on terroristic tactics to the extent that its opponents rely on methods and tactics of warfare that depart from moral and legal limitations. More fundamentally, we have never tested the possibility of founding a global security system and a national security policy on a basis not anchored in a virtually unrestricted claim to employ nuclear weapons at times and places of our own choosing.

One explanation for the failure of international lawyers to consider the legality of nuclear weapons is their desire not to manifest the futility of international law. To the extent the illegality of nuclear weapons is demonstrated, the gap between law and state behavior is revealed. That is embarrassing to those wanting to take a legal perspective seriously. It follows that international law lacks the capacity to protect basic moral and physical bases of world order and society. We must face that reality and thereby gain the will to deal with alternatives.