

# COMMENTARY AND CORRESPONDENCE

Professor Alfred P. Rubin considers his paper on the position of international law toward the possession and use of nuclear weapons (*The Fletcher Forum*, Winter 1984) not as a definitive analysis but a plea for the one still to come. The plea is most valuable; the analysis is so wide-ranging and challenging — even beyond his June 1983 West Point conference version — that it must stimulate comments *pro* and *con*, on the numerous aspects of the crucial question he discusses. The remarks that follow deal only with his most central finding: he shows convincingly that, precisely because *specific* rules for nuclear weapons do *not* exist, the existing *general* rules and restrictions of international law, such as the 1907 Hague Regulations, apply also to nuclear warfare. With this basic premise, I fully agree.<sup>1</sup>

But grave doubts are raised by the “two alternative” conclusions he draws from those general norms, which forbid, *i.a.*, the causing of “unnecessary destruction and [unnecessary] suffering” (p. 58 and *passim*).

The first alternative accepts the above finding of the applicability of the law of war to nuclear weapons; rejects use of nuclear weapons for what he views as quasi-genocidal purposes such as the destruction of the enemy as a nation (p. 55); but permits their use in three situations: against “military targets,” on “isolated battlefields,” and “as an anti-submarine weapon at sea, where the risk of injury to noncombatants and civilian property is small in relation to a valid military object.” (p. 58) However, military targets include, as a minimum, the opponent’s nuclear missiles in their fortified silos, all other weapons, military forces, command centers and other military installations, ammunition factories, airfields and transportation systems. These targets are so numerous and widely dispersed that, as has often been pointed out, their destruction by nuclear arms would require such large numbers of them as to cause civilian casualties and obliteration of civilian property hardly smaller than those envisaged by the MAD doctrine of direct attack on population centers. As regards isolated battlefields, they do not exist in the presumed European areas, and the uncontrollable winds can in any case carry the fallout from even

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1. For the conclusions I draw from this premise, see John H.E. Fried, “Law and Nuclear War” in: *The Bulletin of the Atomic Scientists*, 38/6 (June 1982), 67-68, and “International Law Prohibits the First Use of Nuclear Weapons” in: *Revue Belge de Droit International*, 1/81-82, 34-52.

relatively low-yield nuclear weapons<sup>2</sup> to the adversary's population centers as well as to nearby neutral states. Finally, the radiation effects of nuclear anti-submarine warfare would poison the waters, fauna and flora of the oceans, with catastrophic consequences for civilians of coastal areas of belligerent and neutral countries; the calamity would threaten particularly the coasts of the United States, in whose vicinity the Soviet submarines would have to be targeted.

Furthermore, the proposed legitimization of these three types of limited nuclear warfare assumes that nuclear warfare, once unleashed, can remain limited. Top military experts have warned against such assumption.<sup>3</sup>

We come now to Professor Rubin's second alternative conclusion. (pp. 59-61). It recedes from his basic premise that the laws of war apply equally to conventional and nuclear arms. Instead, it assumes that nuclear warfare is "unregulated," because "international law does not yet contain rules appropriate to nuclear warfare." He calls this legal vacuum theory "inconsistent with the *universally* applicable humanitarian principles of the Hague Convention and Regulations," and insists that only the types of limited nuclear warfare he considers compatible with those principles be planned by the U.S.A. However, the vacuum theory cannot be altogether dismissed: "If there is such a vacuum," a separate convention on nuclear weapons would have to be negotiated at a conference — asserting that such conference "nobody with nuclear weapons seems to want except the Soviet Union and the People's Republic of China . . . for purposes of propaganda."

Yet, should the disastrous "vacuum" theory, which fills Mr. Rubin with horror, even be ventilated? It implies as a legal axiom that the law forbids any act only if it enumerates the methods for its commission. By this absurd logic, any domestic Criminal Code *permits* murder with any instrument it does not specify.

Nevertheless, Mr. Rubin's elaborate analysis of the vacuum theory shows how far the obsession with nuclear war can go. All the more is it to be

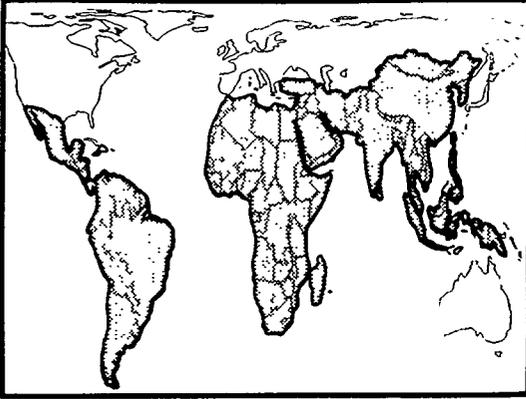
2. Concerning radiation dosages for tactical conventional-nuclear operation, the 1976 Army Field Manual 100-5 states: "A soldier exposed to 650 rads . . . can be expected to die in a few weeks . . . Exposure in the 100 rad region usually has little effect. Accordingly, in conventional-nuclear combat it would be prudent to subject front line enemy to 3,000-8,000 rads or more, enemy to the rear to 650-3,000 rads, and avoid subjecting friendly forces and civilians to an unacceptable level (100 or more rads)." (p. 10-3)
3. See, at random: "as an inevitable consequence of a limited nuclear war between the superpowers the holocaust would come, the organized national societies would cease to function . . ." (George B. Kistiakowsky, "Can a Limited Nuclear War be Won?" in: *The Defense Monitor*, Oct. 2, 1981, p. 3-4) adding that this view is shared "by a large majority of senior statesmen and military leaders."

hoped that his own — fortunately not definitive — permissions of limited nuclear war will be absent in his definitive work.

John H.E. Fried  
Professor of Political Science, City Univ.  
of New York (emeritus)

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