The London Charter, with which the Allies established the international legal basis for the prosecution of German war criminals in Nuremberg, was signed on 8 August 1945; on the very same day in Japan (August 9), American bombers dropped the second atomic bomb on Nagasaki. This coincidence has never been used to pose and explore a crucial contradiction in these two developments. The two sets of plans, one leading to the first use of the most horrible weapon of mass destruction and the other to the first effort to prosecute leaders for violations of international laws defining crimes of war and crimes against humanity, have glided by one another in public consciousness, as if the one had nothing to do with the other [1]. In the years immediately after World War II, the findings of the Nuremberg trial were treated primarily as applying just to judgment of the Nazi criminals, and the race to develop nuclear weapons was engaged with alacrity by the great powers.

It took the national and international controversy occasioned by the Vietnam war to stir a sustained public discussion about the meaning and relevance of Nuremberg to the conduct of international relations and the waging of war. Several legal scholars, including Telford Taylor, Richard Falk, and John H.E. Fried explored this issue in depth [2,3,4,5]. During the 1970s and 1980s, as the nuclear arms race accelerated, the relevance of Nuremberg to the use of nuclear weapons became a further topic of legal exploration. Fried, whose writings on Nuremberg spanned more than 40 years, noted in his essay, "The Positive Message of Nuremberg for the Nuclear Age" [5] that the prohibition of offensive war, which had been agreed to by the major war powers in the Kellogg-Briand pact of 1928, had been condemned by the Nuremberg principles as the most serious international crime. According to Fried, this prohibition is not merely an abstract conclusion applying only to nations. Rather, every individual is responsible for actions that can not be justified by national law or military order: "Crimes against international law are commit ted by people, not by abstract..."
units....The perpetrators cannot hide behind international positions,” states Fried, quoting from the International Military Tribunal at Nuremberg.

Fried notes that this statement from Nuremberg means that when an individual is capable of making moral choices, the person is responsible for making the choice and disobeying orders. This “moral choice” doctrine is of most significance for those he terms the “desk perpetrators”:

The truly great dangers exist not in improvised battlefield orders, but in the long drawn-out bureaucratic deliberations and planning in carpeted offices far from battle, which eventually lead to governmentalized mass atrocities, such as ‘the final solution of the Jewish question,’ the plunder and starvation of territories planned before their occupation, and the slave labor program. None of these huge programs had anything to do with battle—they were discussed, altered, and revised for months and even years....The essence of the Nuremberg superior order doctrine is that persons whose influence could hinder or prevent international criminality have a duty to use that influence to the extent of their ability [5].

In the trials of the war criminals, the American judges did not refuse to consider the defense of following orders nor did they postulate a collective guilt on the part of the entire population due to its leaders. They did not ask that individuals be martyrs. However, they did formulate a responsibility on the part of influential politicians and citizens to recognize the criminal character of certain actions and to attempt to prevent them.

In addition to the “moral choice” doctrine defining individual responsibility, another principle of Nuremberg relevant to the nuclear age is that the boundaries of aggressive war are not determined by that which is technologically possible, but rather by that which has been agreed to as binding in international law. This principle contains both the renunciation of the concept of “total war” as well as the requirement that only that force which is militarily necessary is permitted, even if restraint creates the danger of losing the war:

The claim that the rules and conventions of war can be violated when one of the warring parties is subjected to extreme pressure must be rejected....The rules and conventions of warfare in all phases...also encompass the law in those kinds of emergency situations [6].

Despite the force of precedent and contemporaneous legal argument, however, through out the decades after World War II the power of cold war rivalries succeeded in blocking or severely truncating any international debate regarding the illegality of the development or use of nuclear weapons. A case in point is the imposed silence on this question in the text of the 1977 Protocols to the Geneva Conventions, which explicitly ban a number of weapons of war because of their massive and indiscriminate effects on civilians. Nuclear weapons are not on that list.

The World Court Project

In the 1980s, the growing peace movement in the Atlantic countries supported an increasing number of international legal analyses regarding the illegality of nuclear weapons and nuclear war-fighting strategy [7]. The negative obstinacy with which the Western nuclear powers have consistently voted against UN resolutions attempting to achieve a contractual renunciation of nuclear war has led to requests for an advisory opinion on the permissibility of the use of nuclear weapons from the International Court of Justice (ICJ). Following several futile attempts, the World Health Organization finally decided, on 14 May 1993, to present the following question to the ICJ for the preparation of an advisory opinion:

In view of the health and environmental effects, would the use of nuclear weapons by a State in war or other armed conflict be a breach of its obligations under international law including the WHO Constitution? [8]

Understandably, the most vehement objections against this type of advisory opinion have come from the NATO states. But despite their fervent attempts, they were unable to prevent the General Assembly of the United Nations from requesting an advisory opinion from the ICJ on 16 December 1994 by majority vote (78 43, with 38 abstentions). The request even goes beyond that of the WHO, since it poses the general issue to the ICJ of whether the use and the threatened use of nuclear weapons violates international law. While it may have been possible to question the legality of the WHO’s mandate and competence to request such an advisory opinion from the ICJ pursuant to Article 96, Paragraph 2 of the UN Charter [8], it would be hopeless to attempt such a challenge in the UN General Assembly.

The refusal of the nuclear powers to submit to negotiations on complete nuclear disarmament cannot be reconciled with Article VI of the Nuclear Weapons Non-Proliferation Treaty. Substantial reasons exist in favor of

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making the use of nuclear weapons a violation of international law and those reasons—
enumerated in various publications—are summarized here.

Illegality of Nuclear Weapons: The Legal Foundation
A variety of multilateral treaties, which have as their goal the limitation of warfare and the potential effects of weapons, provide legal foundation. They date back as far as the St. Petersburg Declaration of the year 1868, where certain weapons, including newly discovered explosive projectiles, were prohibited for the first time. The general principles contained in the preamble establish that the only legitimate goal of war is merely to weaken the combat forces of the enemy, and that the use of weapons that unnecessarily increase the suffering of the defenseless enemy or necessarily lead to his death goes beyond that goal and constitutes a crime against humanity.

The Hague Conventions
This idea of preventing unnecessary suffering is maintained throughout all following conferences and conventions in an attempt to limit the horror of war. This was the case in the Fourth Hague Convention of 1907, the appendix to which is titled “Order of Laws and Customs for Land War.” Article 22 et seq. of the so-called Hague Land War Order limits the means available to damage the enemy. It applies not only to certain cruel weapons, such as poisons and methods that cause unnecessary suffering, but also to treacherous practices, the destruction of uninvolved property and undefended cities and towns; it also limits the targets of occupation and bombardment. In the Fifth Hague Convention, the territory of neutral states was declared inviolable.

The 1925 CWC and the 1948 Genocide Convention
The Geneva Convention on Chemical Weapons from the year 1925, which was not ratified by the U.S. until 1975, expands the prohibition against poisons of Article 23a) of The Hague Land War Order and makes it more precise. It is binding on all nuclear powers since they have all ratified it. We can assume that it is established as a matter of common law. Nonetheless, the prohibition’s applicability to nuclear weapons, advocated by Fried and others [9], remains disputed.

The Convention on the Prevention and Punishment of the Crime of Genocide of 1948 prohibits intentionally killing or causing serious bodily or mental harm to members of racial, national, religious, or ethnic groups.

The 1949 Geneva Conventions and the 1977 Protocols
The Geneva Conventions of 1949 were adopted four years after the first deployment of an atom bomb and went into effect only one year later. The Fourth Agreement for the Protection of the Civilian Population, in a series of regulations (Article 13 et seq.), encompasses a comprehensive network of norms designed to reduce the effects of war on the civilian population. As such, special respect is to be accorded to hospitals and security zones for wounded and sick people, the elderly, and children. Armed forces are the only allowable targets of a military attack, and the only permitted tactics and weapons are those which do not indiscriminately hit soldiers and civilians.

In the year 1974, the International Committee of the Red Cross (ICRC) called the nations together in Geneva for a diplomatic conference in order to expand the existing principles of humanitarian international law and make them more precise. In 1977, two additional protocols to the Geneva Conventions of 1949 resulted. The first affirms prohibitions against weapons that cause unnecessary suffering, and weapons and methods that indiscriminately hit both military and civilians, and adds further prohibitions (e.g., against weapons and methods that—even unintentionally—cause large numbers of casualties among the civilian population or long-term severe damage to the environment). While Article 55 deals with the protection of the natural environment in concrete form, Article 51 contains a comprehensive directive on the protection of the civilian population. In addition to the protective regulations mentioned above, the definition of an indiscriminate attack in paragraphs 4 and 5 is especially noteworthy:

4. Indiscriminate attacks are prohibited. Indiscriminate attacks are: (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 can not be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

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

It is hardly imaginable that the government representatives, in formulating these passages, did not have in mind the effects of the use of nuclear weapons.

**The Medical Effects and the Law**

In 1984, the WHO published a report that contained the following opinion of medical experts:

The detonation of even a single 1-megaton bomb over a large city would kill more than 1.5 million people and injure as many. A “limited” nuclear war with smaller tactical nuclear weapons totalling 20 megatons, aimed at military targets in a relatively densely populated area would exact a toll of about 9 million dead and seriously injured, of whom more than 8 million would be civilians. An all-out nuclear war...would result in more than 1,000 million deaths and 1,000 million injured people...Therefore, the only approach to the treatment of health effects of nuclear explosions is primary prevention of such explosions, that is, the prevention of atomic war [10].

The WHO’s application to the ICJ requesting an advisory opinion on the legality of the use of nuclear weapons is an attempt to achieve that kind of prevention.

In constructing this advisory opinion, the World Court will have to wrestle most directly with the question as to whether or not the First Protocol to the Geneva Conventions can be applied to nuclear weapons. The nuclear powers can be expected to argue vehemently that it cannot be. The legal arguments will be dense.

What is clear is that the weight of international law would suggest that the consequences of the use of nuclear weapons requires that their use be defined as illegal. What is not clear is whether the World Court can withstand the arguments from the nuclear powers that just because the use of nuclear weapons may be determined to be illegal, the development, possession, and deployment is not. It is also the case that we cannot expect international law to solve the nuclear question, which encompasses not only the weapons themselves but also strategies of security and prevention, as well as questions of armament and power. Still, the banning of nuclear weapons in the context of international law would be a tardy but still timely victory for the Nuremberg Principles.

**References**