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The Nuclear Decision in World War II—Truman's Ending and Avoidance of War

Preface

The nuclear decision in World War II came during efforts to end and avoid war. Germany was defeated, Japan must next be forced to surrender or suffer massive destruction, and Russia had begun to strain the peaceful relations of allies in war. A momentous human decision was to be made—how to use the awesome power of the atom in the context of war and efforts to create a viable peace for all mankind.

This article offers a legal and historical analysis of the decision to use the nuclear bombs on Hiroshima and Nagasaki in August of 1945—a decision which the author believes had been interconnected with an identifiable United States policy to avoid European boundary disputes, which had racked the continent and the rest of the world with the horrors of war, and to create a more lasting, viable peace through the structure of the United Nations. Many of the conclusions reached in this article are the result of imperfect attempts to trace truth, but the paths of exploration are well identified, so that the inquisitive reader might search further with some guidelines for exploration.

The article is divided into two parts: (1) The Shimoda Case—the context of legality and military necessity, and (2) Stopping Aggression—the context of peace and strategic necessity. The reader should not expect “answers” to questions raised—we are exploring the context of a decision and viewing probability. Nevertheless, many of the simplistic viewpoints of varied ideological underpinning can no longer be accepted.

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A. The Shimoda Case—The Context of Legality and Military Necessity

On December 7, 1963, the District Court of Tokyo delivered a lengthy decision which concluded that the dropping of atomic and hydrogen bombs on Hiroshima and Nagasaki on August 6 and 9, 1945, had violated international law.¹ There were several reasons for the court's conclusion but there was no detailed analysis of the historical incidents which led to President Truman's approval of the use of nuclear weapons to end the war with Japan.

In fact, the Tokyo Court handled the "official" United States justification of the use of nuclear weapons² in a rather indirect and conclusionary manner, since the court seemed content with its own conclusions of indiscriminate and severe injury and failed to explore the greater legal question of whether or not such massive suffering and death was "necessary" within the total international law and factual contexts.

It cannot be doubted that death and grotesque suffering took place,³ or that men of concern would find the results of the nuclear usage in war both reprehensible and frightening; but that does not end an inquiry into the legality of nuclear weapon utilization in 1945.

Several legal questions are left floating within the language of the court's opinion; they are useful questions for a court to ask, but they are not woven into a sufficiently tight legal analysis. For instance, the court quite properly focused on three main questions which may be summarized as: (1) were the results "unnecessary," (2) were the uses of the weapons on these cities analogous to blind, uncontrollable or indiscriminate bombardment, and (3) is the use of a nuclear weapon illegal per se;⁴ but the court's conclusions seem trapped inside the narrow perspective it chose to utilize—a perspective which only entailed a view of the balance between civilian death and suffering in those cities and the need to neutralize traditional military targets which existed within those cities.

If one engages only in the rather myopic consideration of the number of civilian casualties as opposed to traditional targets within the cities, then it is quite probable that jurists would conclude that the bomb attacks did not "discriminate" between "proper" targets and civilians, that the effects of

¹See R. Falk, *The Shimoda Case: A Legal Appraisal of the Atomic Attacks upon Hiroshima and Nagasaki*, 59 AM.J.I.L. 759(1965) (hereinafter cited as Falk). The court's opinion is reprinted in full at 8 JAPANESE ANNUAL OF INT'L L. 212-252 (1964).

²So called by Falk, *id.* at 765, citing Stimson, *The Decision to Use the Atomic Bomb*, 194 Harper's Magazine 97(1947), and I. TRUMAN, *MEMOIRS—YEAR OF DECISIONS* 419-420(1955). The "official" justification was that the bombing tended to hasten the end of the war, and thereby reduce the number of deaths and injuries on both sides.

³See Falk, at 760-761.

⁴See also Professor Falk's different outline of the legal questions, *id.* at 776.

the bombs were "blind" and "uncontrollable," and that the resultant death and suffering was "unnecessary."

This, it seems, was exactly what the court did, although it also found enough "evidence" in its myriad of conclusions to take an additional step and declare that the use of nuclear weapons must be illegal *per se* (in any context).⁵ The main criticism of the court's opinion, then, can be found in Professor Falk's own realization:

It must be observed that the opinion makes no effort to examine whether, in fact, the attacks upon Hiroshima and Nagasaki hastened the end of the war and saved lives on both sides.⁶

And to Professor Falk's own words should be added the statement that the proper legal focus should not merely be concerned with whether or not more lives were in fact saved, but also with whether those who made the decision to drop the bombs could have reasonably concluded that more lives would probably have been saved by the use of the weapons even if, in fact, more were or were not. Furthermore, the inquiry should also include a focus on the human suffering involved with each choice, since one of the relevant legal standards is found in the phrase "unnecessary suffering."

Additionally, it should be pointed out that a proper legal focus should concern the permissible scope of precept interpretation which existed at that time (the time of the decision) and in the inhumane circumstance of "total" war. For although there is a great deal of authoritative pronouncement today that the civilian population cannot be made an object of direct attack and that efforts must at all times be made to discriminate between the general population and armed combatants,⁷ such was regrettably not

⁵The court completely ignored the possible uses of a "clean" weapon or a tactical weapon, which would entail a destructive capacity and outcome no greater than conventional bombs.

⁶Falk, at 775.

⁷See, e.g., United Nations G.A. Res. 2444, 23 U.N. GAOR, Supp. 18, at 50, U.N. Doc. A/7218(1969), which adopted Res. XXVIII of the XXth International Conference of the Red Cross at Vienna (1965), reprinted at 75 INT'L REV. OF THE RED CROSS 305 (1967). It should be noted that the U.N. General Assembly refused to adopt part of the Vienna Conference Resolution which would have prohibited the use of nuclear weapons. As stated, however, this norm was somewhat changed by bombing practice since the early twentieth century, see *infra* note 26; but contemporary efforts are being made to regain the comprehensive content of such a norm and to specify greater guidelines for aerial warfare. See ICRC, I BASIC TEXTS, PROTOCOLS I & II (Geneva Jan. 1972). The emerging present consensus will reflect the "true" state of customary international law before the rise of air usage in the Second World War. See U.S. Army, FM 27-10, THE LAW OF LAND WARFARE, para. 25 (1956) (hereinafter cited as FM 27-10), which now states that it is a "generally recognized rule of international law that civilians must not be made the object of attack directed exclusively against them." See also J. Paust, *My Lai and Vietnam: Norms, Myths and Leader Responsibility*, 57 MIL. L. REV. 99, 139-140 n. 156(1972); and H. De Saussure, *The Laws of Air Warfare: Are There Any?*, 23 NAVAL WAR COLL. REV. 35 (1971). Today we can recapture the humane consensus of prohibition against attacks on noncombatants, terror attacks or morale bombings, and attacks on enemy "sympathizers" or "oppressors," but it must be admitted that greater guidelines for decision-makers are still needed.

the nature of the war of the 1940's, nor was there any clear consensus of expectation *at the time* that populations may never be the object of attack for any purpose.⁸

In fact, the only relevant prohibitions concerned the principle of "unnecessary" suffering,⁹ the prohibition against the use of poison,¹⁰ and the principles which emerge from a comparison of Article 25 of the Annex to the 1907 Hague Convention No. IV Respecting the Laws and Customs of War on Land, which prohibited the attack or bombardment of "undefended" towns, villages, dwellings or buildings, and Article 2 of the 1907 Hague Convention No. IX Concerning Bombardment by Naval Forces in Time of War, which allowed the proportionate engagement of or attack on military targets within an undefended city.¹¹

It is true that certain Draft Rules of Air Warfare proposed in 1923 would have changed the legal result, but these were never adopted as a part of international law and it seems that it was rather improper and simplistic for the Tokyo Court to have relied on the draft rules for its conclusions.¹²

For present purposes only the relevant law will be considered, and then, to start the inquiry, only the balance between "unnecessary suffering" and

⁸For example, there was extensive bombardment of London and other allied cities by the Nazi ally of Japan, and there had been extensive bombardment of German and Japanese cities by the Allies prior to August 5, 1945 (e.g., Dresden and Tokyo); and many authors have considered that if norms applied to aerial war they had lapsed as a consequence of persistent violation. See M. McDUGAL, F. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* 640-659 (1961); and SPAIGHT, *AIR POWER AND WAR RIGHTS* (3 ed. 1947). On cities bombed in World War II and the legality of the Allied bombings, see *United States v. Ohlendorf*, IV TRIALS OF WAR CRIMES 466, 467(1948) (hereinafter cited as T.W.C.); FENWICK, *INTERNATIONAL LAW* 678 (4 ed. 1965) (hereinafter cited as Fenwick); and for evidence of Japanese bombings of towns and cities see SPAIGHT, *AIR POWER AND WAR RIGHTS* 280-281(3 ed. 1947) (hereinafter cited as Spaight). On unrestricted practice in World War I see FENWICK, at 676-677; and *infra* note 34.

⁹A principle found in the Hague Convention No. IV, Annex, Article 23(e) (1907), 36 Stat. 2277, T.S. No. 539, League of Nations, Treaty Series vol. XCIV(1929), No. 213 (hereinafter cited as H.C. IV), which was recognized as a principle of customary international law in the Judgment of the IMT at Nuremberg, I TRIAL OF MAJOR WAR CRIMINALS 254 (1947) (hereinafter cited as IMT, Nuremberg and T.M.W.C.).

¹⁰H.C. IV, Annex, Article 23(a). Also relevant here would have been the growing acceptance of legal values found in the 1925 Geneva Gas Protocol; though it has not yet been signed by the United States.

¹¹H.C. IV, Annex, Article 25; and H.C. IX, Article 2, 36 Stat. 2351, T.S. No. 542, 18 Oct. 1907. A notable precedent to each was the 1863 Lieber Code, see *infra*.

¹²See Falk, at 770-772; the draft rules are reprinted at 17 AM. J.I.L., SUPP. 242 (1923). Professor Falk noted that the draft rules were "non-binding;" that the Tokyo Court's conclusion that these rules which were "never even intended for formal ratification" (Falk) became "authoritative" was an undocumented conclusion, and that there was a "consistent pattern of non-adherence to the standards prescribed by the Draft Rules." Indeed, the world seems in no greater security today from a "sanctified" moral evil from the air, for there exists a paucity of authoritative norms to curtail civilian death and suffering—our cities are still the hostages of a nuclear stalemate. See H. DeSaussure, *The Laws of Air Warfare: Are There Any?* *supra* note 7; and H. DeSaussure, *The Laws of Air Warfare: Are There Any?* 5 THE INT'L LAWYER 527(1971). *C.f. supra* note 7.

"military necessity," since conclusions of "indiscriminate" or "uncontrolled" suffering arise out of the inquiry into the balance between the "unnecessary" and "necessity" and an application of the interconnected rule of proportionality. The prohibition against the use of poison or poisoned weapons will not be considered here since the present author lacks the scientific data necessary for a proper treatment.¹³

However, it should be pointed out that it is a proper question to explore, especially when many of those involved with the decision to drop the bombs on Hiroshima and Nagasaki had before them a report which indicated a bomb potential for certain radioactive effects (though even that radioactive potential may have been insufficient for a conclusion that the weapons whose primary characteristics involved blast, heat and fire were illegal per se or illegal under the circumstances of use).¹⁴ The Tokyo Court did not decide this question either and stated, "there is not an established theory among international jurists in connection with the difference of poison, poison-gas, bacterium, etc. from atomic bombs."¹⁵

As one begins the exploration of the "necessity" involved in the use of the nuclear weapons against Japan, he should discover the general content of the relevant rules of war. As stated, the primary legal consideration involves the principle of military "necessity" as opposed to the counter principle of "unnecessary" suffering—principles which are more easily

¹³See also II OPPENHEIM, *INTERNATIONAL LAW* 348 (7th ed. 1952) (hereinafter cited as II Oppenheim); SCHWARZENBERGER, *THE LEGALITY OF NUCLEAR WEAPONS* (London 1958); and McDUGAL AND FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* 666-667(1961); and M. GREENSPAN, *THE MODERN LAW OF LAND WARFARE* 371-375 (1959). It cannot be doubted that hideous after-effects occurred long after the dropping of the bombs. See, e.g., Spaight, at 275. But are these thrown into the equation which balances death and suffering with necessity, or do they add to the conclusion that the weapon is per se illegal? For a consideration of radioactive effects as "poison" see The Int'l. Law Ass'n., *Report of the Fiftieth Conference held at Brussels, 1962*, at 192 and 219-221 (G. Schwarzenberger rapporteur 1963). It is suspected now that nuclear effects have also led to or aided the growth of cancer. See "38 Survivors of A-Bombing Die in Hiroshima Hospital," N.Y.T. Aug. 5, 1973 at 3, col. 3.

¹⁴See FEIS, *BETWEEN WAR AND PEACE—THE POTSDAM CONFERENCE* 165-171 (1960) (hereinafter cited as Feis, Potsdam), reproducing the Groves Memorandum on the nuclear test of 16 July 1945 (dated July 18th) which was read by President Truman at Potsdam on July 21st. The memorandum stated that radioactive materials were deposited over a wide area, and some were found up to 120 miles from the point of explosion, but that "at no place did it reach a concentration which required evacuation of the population" (indicating that some radioactivity would be high in the target area but not of any real importance outside of that area).

¹⁵See Falk, at 775, quoting the Court's opinion at 241. Since World War II much development in shared expectation and prohibition against certain types of chemical, biological and bacteriological warfare has taken place as evidenced by the Nixon declarations and new treaties. A useful reference to developed and developing norms in this area is Moore, *Ratification of the Geneva Protocol on Gas and Bacteriological Warfare: A Legal and Political Analysis*, 58 VA. L. REV. 419(1972).

stated than applied with any precision.¹⁶ The principle of military necessity had an early recognition as a rule of customary international law and found expression in two notable documents of the nineteenth century.

The 1863 Lieber Code, which had been promulgated by President Lincoln and Major General Halleck to regulate the conduct of United States troops in the field, contained many references to military necessity;¹⁷ but three articles seem to express the nuances of the concept. Article 14 stated that military necessity "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." (emphasis added.)

Articles 15 and 16 added, however, that military necessity "admits of all direct destruction of life or limb of armed enemies," but does not admit of "cruelty" ("suffering for the sake of suffering or for revenge"), "nor of maiming or wounding except in fight," nor of the use of poison, "nor of torture to extort confessions . . . nor the wanton devastation of a district." Article 19 is also relevant in that it allowed the bombardment of a place without warning if such was necessary (though a warning was to be given "whenever admissible" so that noncombatants could leave the area).¹⁸

The 1868 Declaration of St. Petersburg¹⁹ further declared that "the only legitimate object which States should endeavor to accomplish during War is *to weaken the military 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 renders their death inevitable. . . ." (emphasis added.)

These early pronouncements contain important legal concepts, but a *definite* answer to the search by no means leaps out from the words

¹⁶See TAYLOR, NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY 35 (1970), correctly stating that "no form of words can resolve the essential difficulty, which is that 'necessity' is a matter of infinite circumstantial variation."

¹⁷General Orders No. 100, Instructions for the Government of Armies of the United States in the Field (1863). The Lieber Code was considered as exemplifying customary international law in DIG. OPS. OF JAG, ARMY 244 (GPO 1866), and was primarily the result of the works of Dr. Francis Lieber. The Lieber Code later became the basis for the 1899 and 1907 Hague Conventions, but of course none of these were designed to cover aerial warfare (as that had not been experienced). *C.f.* 1907 Hague Declaration prohibiting the discharge of projectiles from balloons.

¹⁸Note that warnings were given to the Japanese concerning the bombings of Hiroshima and Nagasaki by air leaflet, and indirectly by the Potsdam Declaration (warning of prompt and utter destruction). See FIES, THE ATOMIC BOMB AND THE END OF WORLD WAR II, 108 (1970) (hereinafter cited as Feis, Bomb).

¹⁹Quoted in III PHILIMORE, INTERNATIONAL LAW 160-162 (3 ed. 1885) and U.S. DEPT. OF ARMY, PAM. NO. 27-161-2, INTERNATIONAL LAW 277-278 (1962).

themselves,²⁰ since it could be argued that the nuclear bombings of Japanese cities were legal within the normative phraseology, in that the bombings were measures that were "indispensable" for securing the ends of war (one being the return to peace or the end of the war itself), and were not a "wanton" devastation of cities but a destruction with a specific military purpose of weakening the armed forces of the enemy to the point of submission to peace, even though that military objective involved the death of noncombatants.

Later rules of war equally inconclusive for our purpose since Article 23(e) of the Hague Convention No. IV, Annex, prohibited "unnecessary" suffering and Article 25 outlawed any bombardment of "undefended" cities in the context of land combat, but Article 2 of the Hague Convention No. IX allowed a precision or proportionate bombardment of military targets even though they were located within an undefended city in the case of naval involvement (which is more anaologous to air involvement, due to a similar inability of the aircraft commander to land his craft and walk over to the targets to blow them up with a demolition team and then depart).²¹

The present United States position is that military necessity will allow "those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible."²² It is also stated that the loss of life must not be "out of proportion to the military advantage to be gained" (the rule of proportionality);²³ and that the use of atomic weapons is not prohibited per se.²⁴ The

²⁰Perhaps this comes from a lawyer's inability to take the more positive approach of Humpty Dumpty who told Alice that words mean whatever he wanted them to mean—no more, no less, and that it was simply a question of who shall be the master. *See also* McDougal, Feliciano, *LAW AND MINIMUM WORLD PUBLIC ORDER* 5 n. 9 and 103-104 (1961); and McDougal, Lasswell, Miller, *THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER* (1967).

²¹*See* U.S. DEPT. OF ARMY, PAM. No. 27-161-2, *supra* note 19 at 48.

²²FM 27-10, para. 3 a. A more extensive consideration of this principle can be found in Paust, *My Lai and Vietnam: Norms, Myths and Leader Responsibility*, 57 MIL. L. REV. 99(1972); and the comment on command responsibility and military necessity, 26 NAVAL WAR COLLEGE REV. 103-107 (Feb. 1973).

²³FM 27-10, para. 41. For a comprehensive analytical framework for inquiry into the principle of proportionality as it relates to present expectations and developing human rights see McDougal, Lasswell, Chen, *Human Rights and World Public Order: A Framework for Policy-Oriented Inquiry*, 63 AM.J.I.L. 237, 267-268(1969), stating: "The principle of proportionality requires that measures in derogation . . . be limited in intensity and magnitude to what is reasonably necessary promptly to secure the permissible objectives of derogation under the established conditions of necessity. Values must not be unnecessarily destroyed. The requirements of proportionality can be ascertained by relating to the process of responses to crisis . . ." (listing: participants, perspectives, arenas or situations of interaction, base or resource values, strategies employed, outcomes, effects).

²⁴*Ibid.* at para. 35. *See also* U.K., III MANUAL OF MILITARY LAW, THE LAWS OF WAR ON LAND, para. 113 (London 1958); H. Lauterpacht, *The Problem of the Revision of the Law of War*, 29 BRIT. YRBK. I.L. 360, 370 (1952); 11 Oppenheim, at 347-351; and McDougal, Feliciano, at 659-660 and 667.

legal analyst is left, then, with the same types of word inquiry that arise from the normative values of the nineteenth century enactments, *i.e.* whether the nuclear bombings were in proportion to a military objective to end the war as soon as possible, and whether the destruction of populated areas for that purpose was a lawful military objective.

The important question to which the Tokyo Court did not really address itself, was whether a city itself could have constituted a lawful "military objective" or military target within the context of the "total war" of the 1940s. As Professor Falk stated in this regard, "(t)he court, it must be said, seems somewhat confused on this set of issues. For it enumerates 'food, trade' and 'human factors like population, man-power, etc.' as being within the narrower concept of total war to which it subscribes (p. 240). But it is evident that if people are military objectives, then the attacks on Hiroshima and Nagasaki are legitimate within its own terms."²⁵

Indeed, it seems that all of the conclusions as to "unnecessary suffering," the "proportionate" utilization of weaponry, "indiscriminate" attacks, "uncontrollable" weapons (except, perhaps, in connection with radioactivity), and "wanton" or "cruel" devastation in the legal context—to some degree all suffering in war is "cruel" in the moral sense) are really hinged upon the question of what constituted a proper military target under the circumstances.

On this point legal scholars differ,²⁶ and in fact one court stated that in the context of World War II, the Allied bombings of cities were "an act of legitimate warfare," and that the purpose of the air bombardment war to effect the surrender of the bombed nation;²⁷ but one can state that there is

²⁵Falk at 773. See also STONE, *LEGAL CONTROLS OF INTERNATIONAL CONFLICT* 630-631 (1959), concerning the notion of an attack on the enemy's work force. It should be noted that if starvation (attacks on food, trade) of the Japanese people to end the war would have been proper, and scholars traditionally agree that it would have been, it could have involved more death and human suffering before the end result was reached than the nuclear weapons produced; and isn't such a consideration important in the strategic context of what is necessary or involves the least amount of death and suffering and is capable of achieving the military objective? See Bismark's comment on the sieges of Metz and Paris in 1870, in II GARNER, *INTERNATIONAL LAW AND THE WORLD WAR* 337 (he felt that both bombardment and starvation were legitimate and neither more humane *per se*).

²⁶See, e.g., McDougal and Feliciano, at 640-668, and authorities cited; and II Oppenheim, at 349, stating, "(w)hile aerial bombardment may—by complying with the requirement, however widely conceived, of 'military objective'—remain within the orbit of legality, the use of an atomic bomb against a city can comply with that requirement only in very exceptional cases." *C.f.*, Greenspan, *supra* note 13, at 371-372; and Spaight, *supra* note 8, at 274-277.

²⁷United States v. Ohlendorf, IV T.W.C. 466, 467 (1948). *C.f.*, H. Lauterpacht, *The Problem of the Revision of the Law of War*, *supra* note 24, at 378-379, stating that it cannot be a legitimate military objective to terrorize the civilian community with the ultimate aim of transmitting such pressure to the enemy political elite and compelling acceptance of the attacker's political demands, since to accept such morale or terror bombardment would come too close to rendering all law pointless in war. This, of course, is one of the fundamental questions: was terrorism permissible in certain instances within the context of total war and the need to end it?

at least more of a basis for legality than the Tokyo Court was willing to face or seek to disprove.

On a related question of population center targets it should be noted that the bombardment of centers to promote fear in the population and pressure on state elites to surrender has been associated with the prohibition of terrorism in warfare. On the question of terrorism, there is respected authority for the position that the customary law of war and practice have prohibited terrorism as an intentional strategy.²⁸ Moreover, there were at least two commissions established early in the twentieth century for the purpose of articulating the established norms of the law of war and they identified a widespread denunciation of terrorism as well as murder, massacres, torture and collective penalties.²⁹ A third group charged with the investigation of the German control of Belgium in World War I concluded that a deliberate "system of general terrorization" of the population to gain quick control of the region was contrary to the rules of civilized warfare, and that German claims of military necessity and reprisal action were unfounded.³⁰ The pre-World War I German Staff and jurists had openly favored terrorization of civilians in war zones to hasten victory or in occupied territory to insure control of the population;³¹ but these views

²⁸See Q. Wright, *The Bombardment of Damascus*, 20 AM.J.I.L. 263, 273 (1926); ASIL Report, Subcommittee No. 1, *To restate the established rules of international law*, 1921 PROCEEDINGS OF THE ASIL 102, 104 (1921), stating that "treacherous killings, massacres and terrorism are not allowed by the laws of war;" I.J.W. GARNER, INT'L LAW AND THE WORLD WAR 283 (1920); E. STOWELL, H. MUNRO, INT'L CASES 173-176 (1916); and II WHEATON'S ELEMENTS OF INT'L LAW 789-790 (6 ed. 1929). See also the 1818 trial of Arbuthnot and Ambrister, III WHARTON'S DIG. OF THE INT'L LAW OF THE U.S. 326, 328 (1886); and the Code of Articles of King Gustavus Adolphus of Sweden, art. 97(1621), reprinted at Winthrop 907, 913, stating that no man shall "tyrannize over any Churchmen, or aged people, men or women, maidens or children, unless they first take up arms. . . ." This prohibition grew into the customary prohibition of any form of violence against noncombatants. See Winthrop at 778 and 843 (concerning the case of the "anarchist Pallas, tried by a court-martial at Barcelona in September, 1893).

²⁹See Report Presented to the Preliminary Peace Conference by the Commission on the Responsibility of the Authors of the War and on Enforcement and Penalties, List of War Crimes, items no. 1, 3 and 17 (1919) (copy at U.S. Army TJAG School) (members were: U.S., British Empire, France, Italy, Japan, Belgium, Greece, Poland, Romania, Serbia); and ASIL Report, *supra* note 27a. It was not clear whether all forms of violent terrorism (including terrorization of combatants not in force control) was denounced, but a general ban on terrorism was affirmed along with other strategies generally utilized only against combatants or against both combatants and noncombatants (*i.e.*, assassination, use of prohibited weapons, treachery, etc.).

³⁰See Report of the Bryce Committee, 1914, *extract at* E. STOWELL, H. MUNRO, INT'L CASES 173(1916). The Bryce Report added that the murder of large numbers of innocent civilians is "an act absolutely forbidden by the rules of civilized warfare;" *id.* at 176.

³¹For a brief consideration of the German jurists and the Prussian War-book see T. BATY, J. MORGAN, WAR: ITS CONDUCT AND LEGAL RESULTS 176 and 180-181 (London 1915). Karl von Clausewitz in 1832 had favored terrorizing the occupied populace including a spread of the "fear of responsibility, punishment, and ill-treatment which in such cases presses like a general weight against the whole population. . .;" see *id.* at 180 n. 1; and I J.W.

and implementary actions during the War were widely denounced as unlawful strategies.³²

Despite this background on the general prohibition of terrorism, however, Stowell had identified a problem in connection with air bombardment that was of great importance. He placed this problem before the community in 1931 when he stated that he recognized that under inherited expectations "the shocking inhumanity of acts of terrorism was rightly considered to be disproportionate to the military advantage to be derived from their use," but "the conditions of modern warfare as exemplified in the last war have given rise to serious doubts" concerning condemnation of acts against the civilian population "intended to break down the stamina of the civilian population and to cause them to become so weary of further resistance that they would induce their government to sue for peace."³³ He also stated that an "impartial observer must recognize that the last war constitutes a precedent for directing operations against the civilian population in order to make them crave peace, and induce their government to submit."³⁴ But, he added, a study should be made of this problem in terms of these modern conditions of war, the military impact of such usages, the psychological outcomes among the civilians, and the long-term effects of such terrorism "on the post-war survival of natural animosities and bickerings which will render the preservation of peace much more difficult."³⁵

GARNER, *INT'L LAW AND THE WORLD WAR* 278-282 and 328 (1920). Garner added that it was "entirely in accord with the doctrines of the German militarists that war is a contest . . . against the civil population as well, that violence, ruthlessness, and terrorism are legitimate measures, and that whatever tends to shorten the duration of the war is permissible;" *supra* at 328. It is not clear whether Baty and Morgan repudiated the German views; but most other writers did. See J.W. GARNER, *supra*, at 283.

³²See, e.g., E. STOWELL, H. MUNRO, *supra* note 30; J.W. GARNER, *supra* note 31, at 283; II WHEATON'S *ELEMENTS OF INT'L LAW* 789-790 (6 ed. 1929); and France, Ministry of Foreign Affairs, *GERMANY'S VIOLATIONS OF THE LAWS OF WAR, 1914-1915* at 77-215 (J. Bland trans. 1915). Cf. E. STOWELL, *INT'L LAW* 523-526 (1931), arguing for a reconsideration of the German claim of permissible terror in cases where the principle of military necessity applies and warning of a "precedent" for a World War II calamity which he could only dimly envision and would not deny. The 1949 Geneva Conventions would prohibit all acts of terrorism against protected persons regardless of military necessity claims, but Stowell's remarks were significant with respect to certain World War II bombardments which were most likely permissible then but would be condemned today. See McDougal, Feliciano, at 79-80 and 652-657.

³³See E. STOWELL, *INTERNATIONAL LAW* 524 (1931).

³⁴*Id.* at 525. See also J. GARNER, *RECENT DEVELOPMENTS IN INTERNATIONAL LAW* 174 (Calcutta 1925); and J. Garner, *Proposed Rules for the Regulation of Aerial Warfare*, 18 *AM.J.I.L.* 56, 65 (1924) but in each case expressing the desire that such acts be proscribed).

³⁵See STOWELL, *id.* at 524 n. 2, 525 n. 4 and 526. For his view after the dropping of the bombs see Comment, *The Laws of War and the Atomic Bomb*, 39 *AM.J.I.L.* 784, 786 (1945). See also L. Nurick, *The Distinction Between Combatant and Noncombatant in the Law of War*, 39 *AM.J.I.L.* 680 (1945) (at 690, decrying the paucity of rules governing aerial bombardment, citing J. Garner, 3 *AIR. L. REV.* 318 (1932). Today one might cite DeSaussure in the same manner, see *supra* note 12); and J. SPAIGHT, *AIR POWER AND WAR RIGHTS*

Since World War II distinguished authorities have recaptured the need for a peremptory norm which prohibits the intentional terrorization of the civilian population as such or the intentional use of a strategy which produces terror that is not "incidental to lawful" combat operations.³⁶ Underlying these viewpoints are policy considerations involving the need for limiting the types of permissible participants and strategies in the process of armed violence and a shared awareness of the need to prohibit the deliberate terrorization of populations in order to preserve any "vestige of the claim that war can be regulated at all" and to save from extinction the "human rights" limitations on the exercise of armed coercion within the social process.³⁷ As if to reaffirm these trends in expectation the 1949 Geneva Conventions contained a specific peremptory prohibition of "all measures" of "terrorism";³⁸ and numerous humane treatment provisions prohibit these and related acts of violence in all circumstances. It should be noted, however, that one of these authorities, Sir Lauterpacht, had stated that civilians *per se* must never be targets and that "indiscriminate" attacks were outlawed, but that in the context of the Second World War there may have been a distinction between these impermissible acts and the bombing of "civilian centers" for imperative military objectives "in an age of total warfare." He also made a distinction between the peremptory prohibition of "intentional terrorization—or destruction—of the civilian population as an avowed or obvious object of attack" and induced terror which is "incidental to lawful operations."³⁹

What is merely "incidental" to lawful military operations is a key question which should be approached with a comprehensive map of policy and context. Otherwise the community will be drawing fine conclusionary lines

12-13 (London 1933) (warning that the bombing of civilian objectives will be a primary operation of war).

³⁶See H. Lauterpacht, *The Problem of the Revision of the Law of War*, *supra* note 24 at 378-379; McDougal, Feliciano, at 79-80, 652 and 656-658; Carnegie Endowment for Int'l Peace, REPORT OF THE CONFERENCE ON CONTEMPORARY PROBLEMS OF THE LAW OF ARMED CONFLICTS 39, 42(1971); and U.N. S.G. Report, Measures to Prevent International Terrorism Which Endangers or Takes Innocent Human Lives or Jeopardizes Fundamental Freedoms, and Study of the Underlying Causes of Those Forms of Terrorism and Acts of Violence Which Lie in Misery, Frustration, Grievance and Despair and Which Cause Some People to Sacrifice Human Lives, Including Their Own, in an Attempt to Effect Radical Changes, 27 U.N. GAOR, U.N. Doc. A/C. 6/418 (Nov. 2, 1972). See also, J. Paust, *Possible Legal Responses to International Terrorism: Prevention, Punishment and Cooperative Action*, forthcoming, and references cited.

³⁷See *supra* note 36.

³⁸See Geneva Civilian Convention, art. 33. See also J. Pictet (ed.), IV Commentary at 31, 40, 225-226 and 594; and J. Paust, *Possible Legal Responses to International Terrorism*, *supra* note 36.

³⁹See H. Lauterpacht, *The Problem of the Revision of the Law of War*, *supra* note 24, at 365-369.

between attacks on populations *per se* and population "centers," or between "intentional" terror and foreseeable "incidental" terror, in a manner unresponsive to all community values. It is assumed that Professor McDougal would approach the question this way, but it is not clear whether he would now ban outright the "incidental" population terror utilized to coerce state political elites (or is such ever merely "incidental" to a military objective when utilized as an essential component of the process?).⁴⁰ Today, even if the community outlaws all attacks on population "centers" (we still seem to be hostages in a nuclear balance), this question of "incidental" terror in armed conflict seems unavoidable.

The Tokyo Court would not consider the argument that a city itself could constitute a valid military objective in connection with the need to end the war as soon as possible,⁴¹ and additionally considered that the cities of Hiroshima and Nagasaki were "undefended" cities (apparently acknowledging a possible justification for obliteration if cities were defended),⁴² and as such were not legally subject to massive bombardment. Actually the Tokyo Court took a rather restrictive view of the nature of a "defended" city since it stated that a defended city is "a city resisting any possible occupation by land forces."⁴³

But it should be added that the traditional view of "defended" incorporates a consideration of the existence of anti-aircraft weapons or enemy planes which constitute potential obstacles to approaching aircraft,⁴⁴ and there was no indication from the court's opinion that Hiroshima and Nagasaki could not have met the latter test for a "defended" city, nor any indication that troops were not within the cities.

The Tokyo Court's judgment was further incomplete, since there was absolutely no consideration of the arguments in favor of reprisal or retali-

⁴⁰See McDougal, Feliciano at 657-658; but compare *id.* at 80 n. 195 and 660 n. 421 with *id.* at 668.

⁴¹See Falk at 773 n. 32 and 775. Possibly because of its reliance on the unadopted 1923 Draft Rules which would prohibit such attacks, the Court would not further explore the question. See Falk, at 772.

⁴²On this legal point compare the rule that military targets within an undefended city must only be attacked with precise fire power, *supra* note 23, with Spaight, at 261, 271 and 273; and Greenspan, *supra* note 13, at 336-337 (concerning "military effectiveness" and the qualified right to bombard a defended city without a great amount of discrimination or by "target-area bombing").

⁴³Falk, at 772.

⁴⁴See, e.g., Spaight, at 273; FM 27-10, para. 40, stating "(d)efended places in the sense of Article 25, HR, include: . . . (b) A city or town surrounded by detached defense positions, which is considered jointly with such defense positions as an indivisible whole, (c) A place which is occupied by a competent military force. . . ."; Greenspan, *supra* note 13, at 336-337; and II Oppenheim at 418 (the answer depends on varied circumstances and is "not always free from doubt").

ation (which allow an otherwise illegal response to an enemy's prior illegal response if certain conditions are met).⁴⁵

Perhaps the most that can be said, however, is that a complete legal analysis of the nuclear destruction of Hiroshima and Nagasaki should involve outcomes of language interpretation and fact application upon which reasonable men can differ; but for purposes of this article, it is necessary to move beyond these difficulties and consider the further question whether it was "necessary" to destroy the cities even if they could have been said to constitute valid military objectives in the total war context of the 1940s.

This is an important consideration for several reasons: (1) it is relevant to conclusions as to whether or not the cities could have properly constituted "military objectives" under the preceeding legal focus; (2) it is relevant to questions of a proportionate or discriminate utilization of the weapons; and (3) it is relevant to the interplay between the policy behind the old rules of "defended" cities, and the broader policies involved with the principle of military necessity (especially the policy involved with the need to end the war quickly with less death and suffering).

And highly relevant to this question of "necessity" is the general rule that belligerents may utilize the most effective means available of accomplishing the military objective with the least sacrifice of time, lives and suffering,⁴⁶ provided that the means are not otherwise prohibited by some positive rule of international law.⁴⁷ In other words, if the bombings of those cities were not otherwise prohibited, can an argument be made that it was necessary to destroy them since their destruction was the most effective means available for ending the war with the least sacrifice of time, life and suffering?

In this connection one should explore a comparison of the losses of life and the suffering which resulted from the utilization of the bombs as opposed to that which would have been predictable from other feasible alternatives, such as starvation (which would probably have involved

⁴⁵For evidence of Japanese bombings which obliterated towns and cities, see Spaight, at 280-281. For the legality of reprisal action, see U.S. DEPT. OF ARMY, PAM. NO. 27-161-2, *supra* note 19, at 64-67; and *United States v. List*, II T.W.C. 757, 1250-1252, and 1270-1271 (1948).

⁴⁶See U.S. WAR DEPT., RULES OF LAND WARFARE, para. 4 (1940); and *United States v. List*, II T.W.C. 757, 1253 (1948). Compare with this the 1863 Lieber Code acceptance of "those measures which are indispensable for securing the ends of the war."

Today the phrase might read: A commander may utilize the most effective lawful means available of accomplishing an otherwise legitimate military mission with the least excess amount of foreseeable death, destruction or suffering. See FM 27-10, paras. 3, 25, 34, 41 and 56 (1956).

⁴⁷See, e.g., FM 27-10, para. 3.a.; and *United States v. List*, II T.W.C. 757, 1255 (1948).

suffering which greatly exceeded that at Hiroshima and Nagasaki since it would have involved most of the population of Japan), or a massive invasion of the main islands of the homeland of Japan; and then further consider whether any of these would have even been necessary in view of the Japanese peace efforts (to be explored hereunder). An analysis of available alternative strategies also provides a more comprehensive focus on the interactions of the war participants and it can provide relevant indicia of objectives (demands for value outcome and expectations) and base values (resources at the disposal of each participant) which are highly useful for a contextually realistic analysis of legality.

No figures are available for the starvation strategy, but estimates were made in connection with the optional massive land invasion of the Japanese homeland. It was estimated by the military strategists under General MacArthur that a landing by force on the main islands would pitch perhaps some 767,000 U.S. Army troops against an excess of 1,700,000 Japanese regulars and more than 3,200,000 civilian defense volunteers (not to mention the involvement of U.S. naval and air force personnel) in perhaps one of the bloodiest battles in the history of war.⁴⁸ Some 83,500 U.S. troops were also to be committed to Korea to embattle a predicted 270,000 Japanese regulars and some 35,000 civilian volunteers.⁴⁹ Secretary of War Stimson and the Chief of Staff, General Marshall, had feared that American casualties alone might amount to hundreds of thousands, and that the Japanese losses would be immense even in relation to allied losses alone.⁵⁰

In contrast, the casualties produced by the nuclear weapons are not precisely known, but estimates range from a total of 566,680 (333,884 killed and 232,796 wounded) to some 226,000 Japanese casualties.⁵¹ It

⁴⁸REPORTS OF GENERAL MACARTHUR, MACARTHUR IN JAPAN: THE OCCUPATION, Supp. at 4 (1966 ed.) (hereinafter cited as MacArthur Report). The exact Allied figures are unknown to this author—the figure 560,500 can be derived from the proposed occupation force under Operation “Blacklist,” which was only part of the proposed Army troop force to be used in the massive invasion or Operation “Downfall,” *infra*; and such figures do not take into account the number of naval and air forces involved. The figure 767,000 troops was derived from Feis, Bomb, at 10 n. 5, where it is stated that General Marshall had predicted the need for 767,000 troops by June 18th for the invasion of Kyushu alone. Churchill talks of a *loss* of a million American lives “and half that number of British—or more if we could get them there . . .” (possibly including army, navy and air forces). CHURCHILL, TRIUMPH AND TRAGEDY 638 (1953).

⁴⁹*Id.* (MacArthur).

⁵⁰See Feis, Bomb, at 11, 12, and 192–193. Compare *id.* at 9 concerning an early estimate of 31,000 U.S. losses in the first 30 days of battle with *id.* at 12 concerning President Truman’s estimate of 500,000 U.S. lives to be lost; and Churchill’s estimate of 1,000,000 U.S. lives, *supra* note 48.

⁵¹See Falk, at 768 n. 19, stating “(t)here is a considerable difference in the casualties reported. The plaintiffs list 260,000 killed at Hiroshima, 73,884 at Nagasaki; similar discrepancies exist for the figures on wounded at each place, the plaintiff contending 156,000 at Hiroshima, 76,796 at Nagasaki, and the defendant 51,408 at Hiroshima, 41,847 at Nagasaki.”

seems that even the high estimates of half a million casualties were fewer in comparison with the then predictable losses (perhaps a million U.S. alone), which would have resulted from a clash at arms with some 2,525,000 Japanese regular troops in the homeland area alone—not to mention the then predictable casualties in Korea or the entry into a massive death contest by an additionally predictable three and one fifth million civilian defense volunteers in the homeland. The losses on both sides might well have been appalling to all except the most ardent and extreme advocates of population control.

One must next inquire into the soundness of the Allied worry over a protracted war and the resultant death and suffering. Was there a desire to end the war quickly and avoid such losses, and was there a reasonable basis for the fear that large casualties would result? There is evidence available that the United States decision-makers predicted a long and costly war which would continue into early 1946 at a minimum.⁵² Operation "Downfall" was the overall plan for the final defeat of Japan and it would entail two phases, "Olympic" and "Coronet."⁵³

Operation "Olympic" would launch an amphibious assault by veteran troops against southern Kyushu, and later Operation "Coronet" would launch United States forces into the heart of the Tokyo Plain. As General MacArthur's report states, "(i)t was expected to be costly. The enemy would be fighting in prepared positions. He would be fighting for his home, his family. He had nothing to gain by surrender, everything to lose by defeat."⁵⁴ Who could accurately predict the death and suffering? It would certainly have been enormous if the two powers met in an obstinate and protracted war in the Japanese homeland.⁵⁵

Note that the defendant's (Japan's) estimates are about 60 percent lower. Other figures are found in COMMAGER, *THE POCKET HISTORY OF THE SECOND WORLD WAR* 561 and 564 (1945), stating that Hiroshima had a population of 343,000 people but only 10,000 were killed (relying on early news releases) and that some 126,000 were killed at Nagasaki; Spaight, at 274, stating that the Japanese issued a statement on 6 September 1945, declaring that 49,221 were killed at Hiroshima and only 21,501 at Nagasaki; and HART, *HISTORY OF THE SECOND WORLD WAR* 696 (1970) (hereinafter cited as Hart), stating that 80,000 people were killed at Hiroshima.

⁵²See MacArthur Report, at 1, stating, "(e)nemy resistance was to be pulverized in an invasion drive that would begin in the fall of 1945 and be continued in a second phase in the spring of 1946." See also Feis, *Bomb*, at 11, 12 and 192-193, for evidence of the concern of Secretary Stimson and General Marshall.

⁵³MacArthur Report, at 1 n. 5. See also Feis, *Bomb*, at 7. Operation "Olympic" had been directed by dispatch on May 25th—target date November 1st, 1945.

⁵⁴MacArthur Report at 1. See also CHURCHILL, *TRIUMPH AND TRAGEDY* 638-639 (1953); at least Churchill, Truman, Marshall and Admiral Leahy had contemplated a protracted war and "desperate resistance by the Japanese."

⁵⁵See Feis, *Bomb*, at 110 (Secretary of War Stimson predicted "the inevitable and complete destruction of the Japanese armed forces [nearly 2 million], and just as inevitably the

As historians have indicated there existed a solid basis for the fears of heavy casualties in the prior experience of United States troop engagements with the enemy, when resistance was considered futile. The battles on Iwo Jima and Okinawa had shown military strategists that the Japanese tactics had involved "an obstinate defence-in-depth of the interior"⁵⁶ and desperate but devastating Kamikaze attacks on our warships. The terrible losses in the battle for Okinawa, a battle which lasted three months and up until the dawn of the Potsdam Conference, must have been a major contributing factor to the decision to use the atomic bomb.⁵⁷

The total Japanese losses in that area alone were estimated at 110,000, and Americans had suffered the worst campaign casualties of the war with the loss of 49,000 (of whom 12,500 were killed).⁵⁸ Thirty-four naval vessels had been sunk and 368 damaged by Japanese efforts which had largely been the result of the nearly 1,500 individual Kamikaze attacks.⁵⁹ Furthermore, the United States Strategic Bombing Survey of Japanese Air Power had predicted that some 5,350 planes were ready for suicide use in the homeland battle⁶⁰ and the United States strategists, despite a heavy pounding of the Japanese main islands, still felt that United States naval forces were vulnerable to complete or serious destruction.⁶¹ And General Marshall had estimated on June 18, 1945, that the land invasion alone would be costly to both combatants:

One of the things that appalled me was the cost in casualties of an invasion. . . . To get to the plains would have been a very costly operation in lives. We knew the Japanese were determined and fanatical . . . we would have to exterminate them, almost man by man.⁶²

It appears that by mid-June President Truman had thoroughly consid-

utter devastation of the Japanese homeland" if peace was not somehow reached soon), at 120 ("This sustained the impression that no matter what the odds the Japanese might fight on in their homeland until death"), and at 192-193.

⁵⁶Hart, at 684-686. This was so even though Japanese commanders had a "characteristic dislike of defensive action;" *id.* at 686. See Feis, Bomb, at 11 concerning General Marshall's views.

⁵⁷See *id.* at 686 (Hart); and CHURCHILL, TRIUMPH AND TRAGEDY 638-639 (1953). Note that the "decision" to use the bomb was being initiated in early June. See Feis, Bomb, at 11, 45, 48 (all pages re: June 1st) and 54 (re: June 16th); but see *ibid.*, at 103 (the order for use of the bomb was not finally approved until July 25th). See also Feis, Bomb, at 6 and 10.

⁵⁸Hart, at 686.

⁵⁹*Id.*; Cf. Feis, Bomb, at 192 quoting lower figures "definitely attributable to Kamikaze attack" (emphasis added); *ibid.*, at n. 2.

⁶⁰Feis, Bomb, at 193, adding that about half were training planes.

⁶¹*Id.*, at 192.

⁶²Quoted in Feis, Bomb, at 11; and see Churchill, TRIUMPH AND TRAGEDY 638 (1953). Cf. Feis, Bomb, at 6, stating that "the losses that would be suffered in the invasion were acceptable" (perhaps less than 35% were "acceptable" then, but that doesn't answer the question of death proportionality in connection with land invasion losses vs. bomb losses).

ered the estimates of casualties involved in a homeland invasion,⁶³ and that United States casualties would probably not be as high as the 35 percent figure connected with the Okinawa battle,⁶⁴ but it was known that there were at least two factors which could affect the end results: (1) the Russian participation in Manchuria and Korea, and (2) the type of actual resistance that the Japanese would put up against a land invasion. The possibilities even included the loss of 500,000 lives with an untold amount of human suffering which could have reached the million casualty figure, and would certainly have touched the lives of millions more.⁶⁵

Perhaps we shall never acquire precise figures for the options which were not to take place; but we do know, as Feis states, that one reason for the utilization of nuclear weapons was paramount in the minds of the decision-makers: "that by using the bomb the agony of war might be ended most quickly and lives be saved."⁶⁶

Further problems were involved, however, than the mere balancing of casualties from the two options of the bomb and a land invasion (or the third: starvation). The inquiry as to "necessity" should also focus on other postulated options such as: (1) the starvation strategy plus air assaults; (2) the test-demonstration theory; (3) the postulated notion that the Japanese were on the verge of defeat and would give up if only we waited longer; and (4) the theory that surrender might have followed from a clearer delineation of the surrender terms, or a change in those terms. Some of these are interconnected.

The first postulated option, the starvation and conventional air assault strategy, was actually an incredible proposal as a substitute for the bombs. Incredible in view of the myopic approach to the total human problems involved; for although American lives might well have been saved, the Japanese were to suffer a "suffocating naval blockade and our devastating air assaults,"⁶⁷ with the result that the Japanese would be starved into

⁶³Feis, Bomb, at 8-9, mentioning an awareness of some 31,000 U.S. casualties in only the first 30 days of battle, but not exploring total losses to both the U.S. and the Japanese.

⁶⁴*Ibid.*, at 10. Apparently 35% of all army, navy and air forces involved.

⁶⁵See *ibid.*, at 12, quoting President Truman, "General Marshall told me that it might cost one-half million lives to force the enemy's surrender on his home grounds"; and Secretary Stimson's fear of one million U.S. casualties. The fear of one million U.S. deaths was expressed by CHURCHILL, TRIUMPH AND TRAGEDY 638 (1953). Note that it would be consistent to fear 500,000 lives lost and one million casualties (lives and wounded).

⁶⁶Feis, Bomb, at 192. See also *id.* at 8, 11, 12, 45, and 110 (necessity to avoid utter devastation of Japan). See also Hart at 692, quoting Churchill, "At any rate, there never was a moment's discussion as to whether the atomic bomb should be used or not. To avert a vast, indefinite butchery, to bring the war to an end, to give peace to the world" seemed "a miracle of deliverance."

⁶⁷See *Ibid.*, at 5 concerning the proposal of some senior naval and air officers.

submission or death.⁶⁸ To say that the starvation of the total population of millions on Japan and the long human suffering connected with such an approach to war would have been a viable alternative to the "barbaric weapon at Hiroshima and Nagasaki" seems incredulous on its face. Nevertheless, some seem content with raising the option in an argument over the necessity and proportionality involved with the nuclear decision.⁶⁹

The second postulated option is more difficult to criticize. Perhaps we will never know whether the Japanese would have surrendered after a demonstration, but there are two relevant facts worth mentioning: (1) the Japanese did *not* in fact surrender even after two nuclear bombs had been dropped on their cities (so it would hardly seem likely that any other type of "demonstration" would have been more effective to bring the point home); and (2) the decision-makers felt that a demonstration would be insufficient and might prolong the war.

As Secretary Stimson later stated, there was fear that the mechanism for a drop explosion might not work even though the bomb had in fact been tested in July.⁷⁰ Some scientists had pleaded their desire for a demonstration,⁷¹ but a decision was made to use the weapon in war since no technical demonstration could be proposed by the scientists which would be likely to bring the war to an end.⁷² It was feared that the demonstration might not work, might not impress them if it did work, and might have prolonged the war.

Instead it was decided that we should not give the Japanese any "informative warning" as to the nature of the weapons (we *did* warn the cities of bombardment and Japan of utter destruction), and that we should utilize

⁶⁸See Hart, at 697, stating, "the naval blockade alone would have 'starved the Japanese into submission'—through lack of oil, rice and other essential materials—had we been willing to wait." There is some evidence that we did not want to wait because of the Russians, see *infra*, but that doesn't mean that legality is dissipated—the real question is involved with the balancing of lives in connection with the bomb or starvation or a whole people.

⁶⁹See, e.g., Hart at 697. One might also ask of the proponents of the starvation strategy whether they view starvation as more "discriminate" and "controllable" than the bomb (see text *supra* re: "indiscriminate" suffering and the law; and see Falk at 773 concerning the Tokyo Court's reasoning). See also Mudge, *Starvation as a Means of Warfare*, 4 THE INT'L LAWYER 228–268 (A.B.A. 1970).

⁷⁰See Hart, at 695; and Feis, *Bomb*, at 46–48, 54, and 198–199. This fear was shared by Byrnes, then a member of the Interim Committee on the Atomic Bomb and later Secretary of State.

⁷¹Feis, *Bomb*, at 52–55. Others had indicated skepticism; *ibid.*, at 46.

⁷²*Ibid.*, at 46, 54 and 56 ("the Interim Committee took cognizance of the reply of the Scientific Panel. It was unsuayed by the Franck Committee's exhortation that the bomb be demonstrated before use, unconvinced that it would serve our purposes"). This decision was made on June 1st and apparently was not reconsidered in detail after the successful test in July.

the bombs to shock the Japanese into a quick surrender;⁷³ apparently it was considered that only by shocking the Japanese, could we have avoided the long and costly mile-by-mile battle to control the homeland, for with Iwo Jima and Okinawa as precedents there was little hope of rational submission.

In fact, military strategists who had devised an alternative plan to Operation "Downfall," called Operation "Blacklist," in case of a "sudden collapse or surrender of the Japanese Government and High Command" (emphasis added),⁷⁴ had made detailed plans to occupy strategic areas in case of prolonged localized resistance;⁷⁵ and it was only after Hiroshima, Nagasaki, and the Japanese response that General MacArthur began to shift over from Operation "Downfall" to Operation "Blacklist" even though the command was well aware of the Japanese peace feelers through the embassy in Russia.⁷⁶

Perhaps interrelated is the argument that Japan was really on the verge of defeat and should have readily submitted. Again, this had not been thought, nor had it been the prior battle experience—the prediction of an obstinate mile-by-mile resistance must have seemed all the more nearly correct to decision-makers, as it became evident that the Japanese did not surrender after ten days of extensive area bombardment and the use of incendiaries under the strategy of General LeMay, which devastated Tokyo, Osaka, Kobe and Nagoya from March 9 to 19, 1945, and the continued use of air power into July when the nuclear decision became finalized.⁷⁷

It is true that enemy shipping and air traffic was almost halted, that production and food was incredibly low in many areas,⁷⁸ but still there was no surrender and instead an obstinate refusal to consider the Potsdam Declaration's proposal for peace.⁷⁹ Indeed, there was no surrender forth-

⁷³*Ibid.*, at 47-48 and 198-199. *Cf.* Feis, Bomb, at 201, arguing for test disclosure plus a Potsdam Declaration with more detail. The language used by several writers which relates to a "shock" purpose of the nuclear usage begins to raise the interconnected legal problems of terror bombardment or "terrorism" as a strategy; see *supra* note 27. Here the claim of necessity merges with the terror effect and in the context of World War II those claims were often merged by both sides of the conflict thus bringing in questions of changed expectation and reprisal. See McDougal, Feliciano, *supra* note 27.

⁷⁴Operation "Blacklist" had been in the making since May, but did not appear in top commands until July 16, 1945 (the day of the atomic test in New Mexico) and was changed on July 25th (the day of the bomb orders), and again on August 8th. See MacArthur Report, at 2 and 4.

⁷⁵*Ibid.*, at 4. See also Feis, Bomb, at 191 (lines 4-13).

⁷⁶*Ibid.*, at 2 n. 8.

⁷⁷See Hart, at 691.

⁷⁸*Ibid.*, at 691 and 696 ("use of the atomic bomb was not really needed to produce this result"). See also Feis, Bomb, at 3 and 119.

⁷⁹See COMMANGER, *THE POCKET HISTORY OF THE SECOND WORLD WAR* 561 (1945); and Feis, Bomb, at 109-110, 119-120, 179, and 199-200.

coming after the dropping of the bomb on Hiroshima on August 6th—it took another bomb on Nagasaki to move the power structure towards acceptance.⁸⁰

In fact, after the dropping of the second bomb on August 9th, the Japanese could not make a final decision to accept peace or continue the war, until a dramatic decision of the Emperor on August 10th;⁸¹ and that decision was put in jeopardy on August 12th by a heated dispute among Japanese officials which might have ended in a continuation of the war and utter devastation, had not the Emperor stood firm against the military dissenters.⁸² It was not until August 14th that the Japanese communicated acceptance of the offer for peace.

One final question has been asked, however, and that concerns the speculation surrounding a proposed joint bomb demonstration and more detailed statements of United States surrender policy and willingness to allow the continuance of the Japanese Monarchy.⁸³ It seems true that the Japanese desire for a continuation of the Emperor's position held up peace efforts, but it is speculative as to whether or not it was the only drawback (even if the bomb's potential for devastation had been communicated and the willingness to allow the Emperor to continue was made known).

Feis seems to have the best insight (or hindsight); but even he is unsure as to whether it would have worked in July or August,⁸⁴ but declares that it would not have worked before July.⁸⁵ Furthermore, some of the military leaders seemed undeterred by the bomb attacks on Hiroshima and Nagasaki or any type of peace proposal, and looked "for a chance to retrieve the situation," and to inflict great losses on the American side from counter offensives (apparently utilizing the Kamikaze attacks on our warships).⁸⁶ As Churchill wrote:

... power still lay almost entirely in the hands of a military clique determined to commit the nation to mass suicide rather than accept defeat. The appalling destruction confronting them made no impression on this fanatical hierarchy,

⁸⁰See Feis, *Bomb*, at 119–120, 139–141, and 199–200. The military structure minimized the bomb reports and started to issue announcements of counter measures. This irrational enemy was perhaps most to blame for the nuclear usage. Feis concluded, *ibid.*, at 179, that the Japanese would never have surrendered *before* July, and President Truman's repeated warning on August 6th was to no avail, *ibid.*, at 123 and 125.

⁸¹See *ibid.*, at 130–132.

⁸²*Ibid.*, at 139–142.

⁸³The question was first raised, it seems, by Secretary Stimson and Under Secretary Grew in 1947. See Feis, *Bomb*, at 179.

⁸⁴*Ibid.*, at 189 and 201.

⁸⁵*Ibid.*, at 179.

⁸⁶See *ibid.*, at 120, 131, and 139–141. The military leaders of Japan, it seems, would have also refused any Allied occupation even if surrender terms providing for the retention of the Emperor were more specific.

who continued to profess belief in some miracle which would turn the scale in their favor.⁸⁷

It is impossible to speculate with any greater degree of accuracy, but in view of the obstinacy of the Japanese military leaders, the reasonable predictions of casualties, and the outlined view of the war and peace probabilities held by United States decision-makers, it seems that a conclusion can be drawn that the viewpoint that nuclear weapons were necessary to end the war and save lives and human suffering, was a reasonable one. Perhaps even a clearer declaration at Potsdam would not have helped (anyway that is not as directly relevant to legality which is tested primarily by consideration of the decision-maker's viewpoint in context).

From the legal point of view, then, if cities could constitute valid military objectives in the total war situation, one could reasonably conclude that the bombings were reasonably predicted as the most effective means available for ending the war with the least expenditure of time, lives and suffering, and were not calculated to bring about any "unnecessary" or indiscriminate suffering (purpose-wise).

The following part of this article focuses on a related question of strategic benefits connected with the use of the nuclear weapons against Japan. It should be pointed out that if other purposes entered into the decision to use the bombs, that would not mean the dissipation of a legality of usage based on the need to end the Japanese war with less of a human cost. In fact, most important governmental decisions seem to have multifarious bases in purpose — that doesn't necessarily affect legal determinations.

B. Stopping Aggression — The Context of Peace and Strategic Necessity

1. Russian Expansion and Normative Precepts

As the normative values of Articles 2(4) and 51 of the United Nations Charter were being enacted into international law, there were occurring in much of Europe threats or uses of force against the territorial integrity of nations, against the political independence of nations, and in manners which seemed inconsistent with the purposes of the United Nations Charter, which include: (1) the need to maintain international peace and security; (2) the taking of collective measures for the suppression of acts of aggression; (3) the utilization of peaceful means to adjust or settle disputes or situations which might lead to a breach of the peace; (4) the development of friendly relations among nations based upon respect for the

⁸⁷CHURCHILL, *TRIUMPH AND TRAGEDY* 641 (1953).

principle of equal rights and self-determination of peoples; and (5) to achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights.⁸⁸

Later the International Military Tribunal at Nuremberg was to condemn aggressive war, and declare before the world that the aggressive acts of Nazi Germany were violative of international law. But there was no open discussion outside of the government circles in Washington and London, of a new aggression which threatened the very concepts of peace and self-determination for which the United States had fought on foreign soil twice in half a century. A new aggression that did not exactly fit into the scheme of adopted international precepts, but which seemed quite clearly to ignore the pledges at San Francisco contained in the United Nations Charter.⁸⁹

With as much "justification" as can be found in Hitler's excuses for expansion under the "living space" theory, Russia was now expanding her control and frontiers through a "self defense" or paranoid type of aggression (defensive aggression). For Russia, fearing a western attack on the communist existence, thought it must acquire control of a living buffer belt

⁸⁸See U.N. CHARTER, arts. 1-2; cf art. 51 ("armed attack"). The United Nations Charter was ratified by the U.S. Senate on July 28, 1945; and it had been signed on June 25th—in the time context of Russian expansion and the nuclear decision. For a comprehensive analysis of the relevant shared expectations and content of Article 2(4) of the Charter in 1945 see McDougal, Feliciano at 177-179. The prohibition against the use or threat of force was quite broad—much more so than most writers verbalize today in connection with the incomplete phrase: "territorial integrity and political independence." Moreover, Stalin's concept of "self" determination was well known to the West and was courageously challenged by some socialist/communists such as Rosa Luxemburg; now it is even chastised by the Soviet Communist Party. Cf *infra* note 91.

⁸⁹See U.N. CHARTER, *supra* note 88; and compare the Russian actions in Eastern Europe outlined in Feis, Potsdam. The IMT at Nuremberg used aggressive "war" as its legal referent, and did not criminally charge the defendants directly for the invasions of Austria and Czechoslovakia (which were before the British declaration of war). See TAYLOR, C.E.I.P., NUREMBERG TRIALS—WAR CRIMES AND INTERNATIONAL LAW 263 n. 31 (1949) (hereinafter cited as TAYLOR, C.E.I.P.). But the Judgement of the IMT stated at 186 (T.M.W.C.), "(t)he first acts of aggression referred to in the Indictment are the seizure of Austria and Czechoslovakia;" and at 192, that the "invasion of Austria was a pre-meditated aggressive step in furthering the plan to wage aggressive wars against other countries" (emphasis added). Moreover, during the subsequent proceedings conducted by the United States "crimes against peace" were defined to include "invasions" as well as "wars." See at 273, and IMT FOR THE FAR EAST, CHARTER, Article 5(a) defining "crimes against peace" to include declared or "undeclared wars." Article 2(4) of the U.N. Charter changed the focus from wars to the "threat or use of force," and although some criteria of "aggression" remain unclear, there might have been enough to label the Russian take-overs as violative of international precepts under the Charter even though the action was taken in "occupation" of territory. For newer developments see The Draft Convention of the Offenses Against Peace and Security of Mankind, 6 U.N. GAOR, Supp. 9, U.N. Doc. A/1858 (1951); and the Draft Convention on the Definition of Aggression, U.N. Doc. A/AC.77/L.4 (1956); and McDougal, Feliciano at 29-30.

of former nations and control the "self" determination of a great many people in strategic "self defense."⁹⁰

After noting the Russian paranoia and an obstinate quest for dominance of Poland, Herbert Feis wrote with insight: "How closely aggression twines around fear; how frequently it feigns to be fear! It is in this dark tunnel in the nature of nations that peace is most often lost."⁹¹ And how revealing are the words of Sir John Wheeler-Bennett on the complexities of the needed course toward peace and the combating of paranoid aggression through a "proper" appeasement:

... to appease, to placate—to agree with an adversary while we are in the way with him—becomes a fundamental purpose of all diplomacy, because it is a necessary condition of our civilized order which it is the purpose of that diplomacy to preserve and develop. At the same time, in any but a strictly pacifist society, the use of force is regarded as legitimate, at any rate for self-defense, and a successful foreign policy must, therefore, oscillate between these two apparently opposite poles. . . . The passionate will to peace—so right, so laudable, so understandable in itself; that same will which had, in Britain, prompted a unilateral reduction of armaments to a point barely compatible with the needs of national defense—now became the progenitor of a profound desire, not to prevent aggression, but to avoid war, and,

⁹⁰See Feis, Potsdam, at 31. Perhaps paranoia runs deeper when you are ruthless yourself. The Soviets had signed a pact with Hitler in 1939, and it was the Soviets that had to be constantly assured of no separate peace attempts by the western allies. See *ibid.*, at 3-5. Perhaps there was some of the feeling that as Russia had entered into agreement with Hitler to take some of Poland upon Hitler's advance, perhaps the west would be as ruthless in its advance—Churchill had devised the percentage deal with the Soviets for a division of Europe that was hardly in consideration of the aspirations of peoples' self determination. See Feis, Potsdam. Were the Soviets counting on a British "ruthlessness" in their eyes—an attempt to regain the Empire and dominate Europe? Mistrust and mutual misconception might have some play here, but the Russians didn't wait to apply the principles of the U.N. Charter which had just been signed; in fact, they ignored them and sought unilateral control of countries—there was no effort to apply the Charter principles at Potsdam.

⁹¹Feis, Potsdam, at 31. For evidence of a related Soviet elitism and paranoia in search of a justification for the totalitarian oppression of the proletariat (which, in theory, was itself to "self" determine the course of all classes instead of allowing a full sharing and shaping of power by all persons or the free determination of an aggregate self and the full participation of all persons in governmental and other processes) see e.g., H. MARCUSE, *SOVIET MARXISM—A CRITICAL ANALYSIS* (1961); and B. MOORE, *TERROR AND PROGRESS USSR* (1954). See also "Solzhenitsyn Assails Liberals in West—Says They Use a Dual Morality in Attacks on Oppression," N.Y.T., Sept. 12, 1973, at 3, col. 4 (warning of the danger of appeasement, the violence of the state and the challenge to human rights); and subsequent press statements of Sakharov and Solzhenitsyn. It is not surprising that the Soviets still view authority as emanating from the "will of the ruling class" rather than from the people; still view international law as only comprising the "will of states" (which is "essentially the will of [their] ruling class"); and continue this totalitarian, reactionary ideology in their claims that the "legal position of individuals is determined by national and not international law" (i.e., the "will of the ruling class") and that documented human rights must be "observed" in accordance with the laws of the state (i.e., the "will of the ruling class"). See, e.g., U.S.S.R., *Contemporary International Law* 32-33, 164, 167, 239 and 241, *passim* (Moscow 1970).

if war should come, to keep out of it. . . . It is a tragic irony of history that this very will for peace was among the most important contributory factors to the Second World War. . . . In the name of peace and of appeasement they condoned injustice and aggression. . . .⁹²

How difficult the proper choice for peace; and, it seems, this quest for peace in the face of aggression must have perplexed President Truman from his assumption of office in April, to the decision to use the nuclear weapons on Japan in August, 1945, and for many years thereafter. By June 1945, Russia had been making her real intentions concerning a postwar Europe quite evident. She had no difficulties to balance, for she sought unilaterally to obtain all the guarantees she needed—treaties and international structures had not stopped aggressive attacks against the Soviet homeland in the past.

But Russia, the President knew, was doing more—she was herself breaking all the promises made at Yalta just a few months before, and she was undermining efforts to create an effective world organization at the San Francisco Conference. What is worse, she was sending in armies under the guise of “occupation” and the defeat of the Germans, to control the will of much of the peoples of eastern Europe in violation of the Declaration of Liberated Europe made at Yalta that February—a most important part of U.S. policy.⁹³

President Truman had realized the Russian attempts at take-over in Hungary, Romania, Bulgaria, Czechoslovakia, and Poland as early as May 2, 1945;⁹⁴ but he saw no effective way of preventing it short of war.⁹⁵ Austria was to have been free and independent⁹⁶ and Czechoslovakia, it had been agreed, was not to remain occupied territory,⁹⁷ but Russia was

⁹²WHEELER-BENNETT, *MUNICH—PROLOGUE TO TRAGEDY* 3–6 (1948). President John F. Kennedy was aware of the need for a viable peace and the dangers to peace. At the Berlin Wall, June 26, 1963, he said: “. . . if there is one path above all others to war it is the path of weakness and disunity . . . we seek peace but we shall not surrender . . .”; and during his Inaugural Address, January 20, 1961: “. . . the same revolutionary beliefs for which our forebears fought are still at issue around the globe. . . . Let every nation know . . . that we shall pay any price, bear any burden, meet any hardship . . . to assure the survival and the success of liberty. United there is little we cannot do in a host of cooperative ventures . . . divided, we have no peace.”

⁹³See Feis, *Potsdam*, at 62. The American government placed a great deal of emphasis on the Declaration as agreed policy for a post-war Europe (as it did on all principles as opposed to blatant force or the old world politics which had led so often only to war).

⁹⁴See *ibid.*, at 19–20 (Austria and Czechoslovakia), 31–38 (Poland), 63–64 (Hungary, Bulgaria and Romania). See also *ibid.*, at 190 (Hungary), 191 (Romania), and 192 (Bulgaria) for later developments. These had been the countries which Russia had sought to capture before, but had failed. See e.g., L. TROTSKY, *TERRORISM AND COMMUNISM* v–xvi (Ann Arbor 1969).

⁹⁵See Feis, *Potsdam*, at 64.

⁹⁶*Ibid.*, at 49 (from the Moscow Declaration of Nov. 1, 1943).

⁹⁷*Ibid.*, at 18–19.

sending in troops in a way that aroused a fear for the validity of the Russian promises of thus recent months.⁹⁸

After more tensions over Poland and the pressures building up to the point of open war between western and eastern allies as a result of Yugoslavian action, President Truman made two stands to pressure Tito and to avoid war. On April 11, 1945 he developed a resolve to stop communist take overs;⁹⁹ and told Churchill that Tito should be informed that the "doctrine of solution by conquest and by unilateral proclamation of sovereignty through occupation, the method used by the enemy with such tragic consequences, has been definitely and solemnly repudiated by the Allied Governments. . . ."¹⁰⁰ And on May 19-20 President Truman stood firm against Tito's unilateral acts and intransigent refusal to engage in a cooperative effort at peace.¹⁰¹

Churchill had now been advocating a show of force to the Russians and to Tito,¹⁰² but Truman did not want a show of force which might lead to open war,¹⁰³ and on May 14th turned aside Churchill's appeals for force to stop the iron curtain from coming down. We were appeasing, placating and oscillating between the two poles of "evil" appeasement and force. Perhaps we had been misunderstood by the Soviets and a show of force not to mention war) would not be desirable at this time since (1) it might harm efforts to make a more viable and lasting peace through the United Nations structure; (2) we might need the Soviet army to help in the defeat of Japan; (3) we did not want to keep large American armies in Europe; (4) it would be ineffective because the Soviet armies were already in position to shut us out of eastern Europe by force; and (5) some have postulated that we were waiting for the bomb.¹⁰⁴

On May 25th President Truman sent Harry Hopkins to Moscow to test the Soviet intentions and to get Russia to settle the crisis in the U.N.¹⁰⁵ After all, most American officials "were at one with the American people

⁹⁸*Ibid.*, at 18-21. Officials were becoming estranged—they (western) were "worried over what Communist Russia had in mind for those parts of Europe and the Far East where it might extend its influence or control."

⁹⁹*Ibid.*, at 47. The author uses "resolve" to stop communist take-overs, but at this point Truman did not know how it would be done—at the conference table, at war, or in some other way. Earlier, April 23rd, he had told Molotov that friendship with Russia must be on the basis of mutual observance of agreements, not on the basis of "a one way street." Feis, *Bomb*, at 36. He must have been bothered by Russian disregard of that declaration.

¹⁰⁰Feis, *Potsdam*, at 47. *Cf. supra* note 76. Truman adopted the new approach.

¹⁰¹*Ibid.*, at 49-50.

¹⁰²*Ibid.*, at 74-76.

¹⁰³*Ibid.*, at 44 ("I wish to avoid having American forces used to fight Yugoslavs or being used in combat in the Balkan arena") and 76.

¹⁰⁴See *ibid.*, at 76, 78, 80-81, 85, 88, 176, 233, and 259.

¹⁰⁵See *ibid.*, at 80-81, 96, 97-101, 111-112, and 122.

in believing this [the U.N. structure to maintain peace] more meaningful than the troubles over European frontiers or the alignment of the smaller European states.

History would have its willful way with these, as it always did, and its way would be war-bringing unless nations could join in a new form of association, in which justice and humaneness would be parents of peace."¹⁰⁶

This, was the Truman Doctrine before Potsdam and was still ever in his mind as he unleashed the fury of nuclear power against Japan. Our most important effort must be toward the establishment of an effective world organization, and Soviet cooperation was deemed essential. We had hastened to make amends for the "inadvertent" slash in Lend-Lease earlier in May, 1945.¹⁰⁷

We had avoided troop confrontations as the European war was ending; and now Hopkins would push our policy again before we agree with the bold appeals of Sir Winston. A rare Russian counter "appeasement" was made—Truman was somewhat relieved that now (June, 1945) the Russians were coming around a bit—maybe Britain had also been somewhat to blame for the Russian paranoid intransigence.¹⁰⁸ These illusions of peace would dissipate at Potsdam, but for now our desired form of peace looked more promising and the U.N. Charter had been signed—June 25, 1945.

Now one began to plan for the Potsdam meeting (a meeting which had been put off probably to explore the Soviet intentions, to let the western allied troops return to their zones, and to await the final testing of the

¹⁰⁶*Ibid.*, at 85. The kind of peace F.D.R. had wanted (and presumably Truman had chosen to follow) was described in a speech quoted in COMMAGER, *THE POCKET HISTORY OF THE SECOND WORLD WAR* 566 (1945) ("Today we seek a moral basis for peace. . .") President Truman, in his closing address to the San Francisco Conference, had also declared: "The Charter is dedicated to the achievement and observance of human rights and fundamental freedoms. Unless we can attain those objectives for all men and women everywhere . . . we cannot have permanent peace and security in the world." 1 U.N.C.I.O. Docs. 717(1945). See also M. McDougal, G. Behr, *Human Rights in the United Nations*, 58 AM.J.I.L. 603, 612-613(1964).

¹⁰⁷*Ibid.*, at 26-28. This slash in aid had aroused Russian suspicion of the value of agreements with the U.S. See *ibid.*, at 100-101. Revisionists might call it a suspicion (U.S.), mistrust (U.K.) and (U.S.S.R.)—perhaps the latter should be, however, paranoia (U.S.S.R.).

¹⁰⁸See *ibid.*, at 126 (Davies to Truman). See also Eisenhower's views; *ibid.*, at 80-81 n. 2. No doubt we were experiencing our own Munich euphoria to some degree, and a faith in agreements in the Locarno tradition. See WHEELER-BENNETT, *DISARMAMENT AND SECURITY SINCE LOCARNO 1925-1931*(1932); and *THE PIPE DREAM OF PEACE* (1935) (mutual distrust and suspicion shattered the dream). Nevertheless, Truman had set off for Potsdam with a sober will. Feis, *Potsdam*, at 159. Cf. *ibid.*, at 122-123. It seems that Truman knew that hope was better than war, but hope was not enough—what more was needed though it seems he did not know for sure, and would have to find later that not a conference, not a bomb would do, while America set out for collective security and massive aid to Europe as the next effort.

bomb).¹⁰⁹ The U.S. should avoid boundary disputes at the conference and give prime importance to initiation of the peace settlements in Europe.¹¹⁰ But when the U.S. delegation arrived it found the Soviets even more intransigent against a cooperative and viable European peace, and relations became strained beyond repair. Truman now would realize that the honeymoon was over—Stalin had not only violated the norms of the F.D.R./Churchill/Stalin accords, but now he went back on the Hopkins/Stalin promises in an affront to Truman. The President must now have grown despondent; was there now no hope for a viable peace through the United Nations and apart from the old world politics which had resulted in a succession of European wars?¹¹¹

2. *Truman Decides at Potsdam*

Throughout the agonizing efforts at achieving a cooperative Russian postwar policy, the decision to use the bomb against Japan had been emerging. By June 1, 1945, it seemed that that decision was fairly set in policy,¹¹² but hopes were still tied to a successful test of the weapon later in July. The test was successfully made on July 16th and on the 17th President Truman received the first two messages of test success;¹¹³ but upon receiving a more complete report of the bomb, the Groves Memorandum, on July 21st, the President became "tremendously pepped up . . . and said that it gave him an entirely new feeling of confidence;¹¹⁴ the bomb would be ready for use against Japan in early August. As Churchill expressed, the relief came from the fact that now we would not need the Russians for the war against Japan (one of the primary factors in U.S. appeasement policy or conciliation at Potsdam) and as he thought:

The array of European problems *could therefore be faced on their merits and according to the broad principles of the United Nations*. We seemed suddenly to have become possessed of a merciful abridgment of the slaughter in the East and of a far happier prospect in Europe. I have no doubt that these thoughts were present in the minds of my American friends (emphasis added.)¹¹⁵

¹⁰⁹See *ibid.*, at 139 and 80 (Secretary Stimson had advocated in May that we postpone a meeting until the bomb was developed).

¹¹⁰*Ibid.*, at 155.

¹¹¹See *ibid.*, at 80 and 85.

¹¹²See Feis, *Bomb*, at 47–48. British consent was given July 4th. See CHURCHILL, *TRIUMPH AND TRAGEDY* 639 (1953).

¹¹³*Ibid.*, at 74–75.

¹¹⁴Feis, *Potsdam*, at 171, quoting Stimson. For the language of the Groves Memorandum see *ibid.*, at 165–171. Churchill seems to have stated that the Memo was received on the 18th, *TRIUMPH AND TRAGEDY* 638, but it was received on the 21st.

¹¹⁵CHURCHILL, *TRIUMPH AND TRAGEDY* 639 (1953).

Present they must have been—but what was Truman's strategy for the use of the bomb? How did it relate to the Russians? In exploring this last aspect of the nuclear decision we should consider three interrelated questions: (1) Was the bomb to be used as a threat to the Russians to settle European boundary and self-determination disputes now flaring up at Potsdam?; (2) Was the bomb to be used as a threat to keep the Russians out of Manchuria and to leave the Far East subject to our dominance?; or (3) Was the bomb to be used so as to make the Russians more willing to participate in the United Nations and to make it a viable institution for peace (the avoidance of war)?

Whatever the answers were, there remains the perplexing reality of the Truman efforts at Potsdam. After he had obtained knowledge of the fact that the United States alone possessed a tremendous power, and though he was determined to use it against Japan if peace initiatives were not productive, the fact remains that President Truman did not use the bomb in a direct threatening manner so as to force the Russians to agree to U.S. proposals at Potsdam.¹¹⁶ He now stood up to the Russian demands and “in a most emphatic manner” told them “that they absolutely could not have certain demands . . .”¹¹⁷ but there were no direct threats. Feis states that “the Americans at Potsdam either did not know how to use their command of the new weapon effectively as a threat, or chose not to use it in that way;”¹¹⁸ but he later indicates what his answer to our question would be:

Was not the American government resting the whole structure of its policy on a conviction that situations and disputes were to be settled only by peaceful means and orderly procedures? . . . Even if Russia could be frightened or coerced by the bomb to give in against its will on matters before the conference, would the West be well served if in consequence it turned against the United Nations? Such, in so far as I can gather, was the trend of the sober reflections of those who guided American diplomatic and military decisions in Potsdam.¹¹⁹

This, as has been alleged before, seems to have been the Truman Doctrine—that we must make the United Nations viable and peace lasting.

Truman had been warned that the Russians might possibly develop the weapon in a few years,¹²⁰ and a show of force might be the end of efforts to

¹¹⁶See Feis, *Potsdam*, at 179. Churchill, it seems, was more in favor of using the bomb to force the Russians toward agreement at Potsdam. See Feis, *Potsdam*, at 172 and 175; and Feis, *Bomb*, at 87 (Churchill told Stimson that he was rather inclined to use the bomb as an “argument” in our favor). See also *ibid.*, at 58–59 (Churchill to Byrnes).

¹¹⁷Feis, *Bomb*, at 87.

¹¹⁸Feis, *Potsdam*, at 179.

¹¹⁹*Id.*

¹²⁰Feis, *Bomb*, at 43–44 (some thought in 3–5 years; Byrnes had thought it would be longer), and 51; and see Feis, *Potsdam*, at 178.

achieve nuclear disarmament.¹²¹ It was agreed that the Russians should be told something about the bomb; but since they were acting contrary to a nation ready to participate in a viable U.N., and a cooperative effort in postwar Europe, the decision was made to casually tell Stalin about the existence of the bomb and to not inform him of its nature until an agreement could later be reached for international control and inspection.¹²²

A delicate situation—the “S-I was a royal straight flush, and we must not play it foolishly . . . let our actions speak for themselves,” had been the opinion of Secretary Stimson.¹²³ Feis notes that the bomb *was* left to make its own impress, and questions that decision;¹²⁴ but perhaps others shared the view of Stimson that “the new discovery made it compulsory for nations to behave differently to each other than ever in the past,”¹²⁵ and maybe the decision-makers thought that our actions against Japan would “speak for themselves” and force the Soviets to seek a cooperative disarmament.

If so, we had overplayed the hope and Truman would have to learn that conferences plus bombs do not alone make a peace—we would have to seek collective security, nuclear deterrence, and an economically sound Europe in the years to come as the Russians refused to budge and an arms race began.

These developments indicate that the United States did not want to use the new weapon as a threat to achieve Russian acceptance of our boundary demands and self-determination desires, though the explosion was thought to make the Russians less obstinate and unilateral in their thinking. As stated earlier, we wanted to avoid boundary disputes—the U.N. was more important than the troubles over European boundaries.¹²⁶ We were willing to bargain on these issues (before and after knowledge of the bomb tests).¹²⁷ As Feis notes, a casual disclosure that we had a new weapon was hardly the way to make an effective threat (to play your “royal straight flush” if your purpose was tied to the European frontier disputes).

Similarly, I doubt that the strategy had been to use the bomb as a threat

¹²¹Official opinion from the start had emphasized the need for international inspection and control; Feis, Potsdam, at 174 and 176; and see *ibid.*, at 88. See also Feis, Bomb, at 38, 49, 52 and 55.

¹²²See Feis, Bomb, at 100–101; and Feis, Potsdam, at 176. As Truman left Potsdam he was firmly resolved not to share the knowledge with the Russians until there was a satisfactory accord for control and inspection; *ibid.*, at 321–322. Still a reliance on accords? Had not Truman gone to Potsdam with more hope?

¹²³Feis, Potsdam, at 80.

¹²⁴Feis, Bomb, at 49–50 and 103.

¹²⁵*Ibid.*, at 50 (words of Feis).

¹²⁶Feis, Potsdam, at 85, 155, 233, and 259.

¹²⁷*Id.* at 80, 199 and 259 (Byrnes proposals), 234 (Truman boldly offered to bargain off Western concessions on the one hand for Soviet concessions on the other), and 318.

to keep the Russians out of Manchuria, though the problem of Russian dominance there might be solved by an explosion over Japan if it would make the Russians less obstinate, and a quick end of the Japanese war before the Russian troops moved on the 8th of August would make their dominance by "occupation less likely." President Truman had been told that the bomb could be ready by August 1st and the Russians had declared that they would be ready to move into Manchuria on August 8th.

After the Groves Memorandum had been read, Truman initiated the order to use the weapons on July 25th unless Japan would respond in an acceptable fashion.¹²⁸ Test flights had been made on July 20th, air leaflets were dropped on Japan on the 27th, and on the 30th Japan refused the Potsdam surrender ultimatum ignoring the warning of a "prompt and utter destruction;" but a storm had slowed up the schedule which could have placed the bomb on Hiroshima by July 31st before the Potsdam Conference had ended and the Russians could act.¹²⁹

There could be no doubt that some United States decision-makers did not want to prompt the Russians into troop movements¹³⁰ and that most all feared Russian intentions in the Far East. Truman was surprised at the Russian request to enter the war on July 29th;¹³¹ was Truman counting on ending the war before the Russians had officially entered and could move their troops into Manchuria? Did Truman share the views of Byrnes concerning the strategic necessity involved in the timing of the nuclear decision?

At least he later wrote that our position on Japanese occupation had been formulated "some time ago," and that he was "determined that the Japanese occupation should not follow in the footsteps of the German experience. . . ."¹³² Furthermore, Secretary Stimson had warned Truman on the 16th of July that the Soviets were training one or two divisions of Koreans to probably accompany the Red Army advance into Korea, and of his anxiety over Soviet domination—or as he wrote, of "the Polish question transplanted to the Far East."¹³³

Though there were fears of Russian dominance in the Far East, I do not think that the bomb was used to constitute the basis for a direct threat to Soviet expansion, but to end the war quickly before it (Soviet dominance) could get underway. General MacArthur had earlier warned that you

¹²⁸Feis, *Bomb*, at 103.

¹²⁹*Ibid.*, at 114.

¹³⁰See *id.* at 101 and 111 n.84 (views of Byrnes).

¹³¹*Ibid.*, at 110–111.

¹³²*Ibid.*, at 137. See also *id.* at 133 and 194.

¹³³*Ibid.*, at 165.

couldn't stop the Russians from gaining control over Manchuria, Korea and part of northern China anyway,¹³⁴ and this was told to Secretary Stimson by General Marshall on July 23rd (after knowledge of the bomb test and its potential for devastation).¹³⁵

The strategy was to end the war suddenly before Russia could move in with ease, and to demonstrate the need for a cooperative attitude on their part so that the war allies could avoid boundary disputes and old world politics and start mankind on the journey to a more lasting, viable peace through the United Nations structure; but Stalin proved incapable of changing from old world theory to that of the new.¹³⁶ It was thought, though, that with this terrible weapon now a fact, man must rationally agree to live in a workable peace—and a workable peace was our highest desire, our strongest intention.¹³⁷

After the explosion of the first bomb at Hiroshima President Truman stated to the world:

I shall recommend that the Congress of the United States consider promptly the establishment of an appropriate commission to control the production and use of atomic power within the United States. I shall give further consideration and make further recommendations to the Congress as to how atomic power can become a powerful and forceful influence toward the maintenance of world peace.¹³⁸

We would, and must, try.

¹³⁴*Ibid.*, at 13 (February 1945).

¹³⁵*Ibid.*, at 89. Stimson presumably was to tell this to the President.

¹³⁶See *ibid.*, at 50 and 196.

¹³⁷See Feis, Potsdam, at 85, 88, 176, 179, 233, and 259; and Feis, Bomb, at 124.

¹³⁸Feis, Bomb, at 124; see also WHEELER-BENNETT, *MUNICH—PROLOGUE TO TRAGEDY* 7(1948), "What, then, is the answer, since all must be agreed that 'to avoid war must be the highest ambition of statesmanship'? It lies surely, first, in the proposition that disarmament must follow—and not precede—the establishment of an effective system of security." For a somewhat different and comprehensive inquiry into the modern complexities of nuclear power for peace see WILLRICH, *GLOBAL POLITICS OF NUCLEAR ENERGY* (1971); Boskey, Willrich(eds.), *NUCLEAR PROLIFERATION: PROSPECTS FOR CONTROL* (1970); and WILLRICH, *NON-PROLIFERATION TREATY: FRAMEWORK FOR NUCLEAR ARMS CONTROL*(1969).