1986

Banning the Bomb: Law and Its Limits

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BOOK REVIEW

BANNING THE BOMB: LAW AND ITS LIMITS

NUCLEAR WEAPONS AND LAW. Edited by Arthur Selwyn Miller and Martin Feinrider. Westport, Conn.: Greenwood Press, 1984. Pp. xiii, 415. $39.95.

*Reviewed by Lori Fisler Damrosch**

We can all agree with the contributors to this volume that nuclear weapons present the threat of unimaginable devastation that could bring an end to civilization and even to life on this planet. The grim calculations and stark images come back again and again, but they cannot be repeated too often: over 50,000 weapons in the United States and Soviet arsenals, each with a destructive force dwarfing the explosions at Hiroshima and Nagasaki;'radiation effects producing indescribable suffering and death; environmental damage that defies quantification or prediction; the specter of nuclear winter rendering the earth uninhabitable. No rational being can ponder this threat and be indifferent to the urgency of seeking ways to end it. In this spirit, *Nuclear Weapons and Law* challenges the legal profession to bring all its talents and tools to bear in the struggle against the nuclear menace.

Presumably, the likely readers of this volume do not need much persuasion as to the desirability of mobilizing the resources of the legal discipline in the quest for solutions to the nuclear problem, not just through legal argumentation but by action. They will turn to the volume seeking to learn what lawyers have to contribute, and possibly what they as individuals might do. The volume can be expected to stimulate interest in a wider ranging and deeper treatment of the legal issues involved in controlling nuclear weapons.

The book advocates a single proposition, in two variants. The proposition is that nuclear weapons are illegal; the two versions are that they violate international law and that they are unconstitutional. In analyzing questions of legality, some of the contributors differentiate between actual use and preliminary steps, or among potential uses; but the senior editor's own thesis is that nuclear weapons, by their very nature, are illegal in every possible manifestation, including not just use but also manufacture, deployment, and, apparently, possession.[1]

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1. See, e.g., p. ix ("manufacture, storage, deployment, and possible—some say likely—use of nuclear bombs"), p. 235 ("manufacture, deployment, and use"), p. 241 ("International law merges with constitutional law to proscribe use of such weapons. Once that is seen, *a fortiori* their manufacture and deployment are also outlawed."), p.

The principal premises underlying this view are: First, that any use would be indiscriminate in its effects; second, that the likelihood of escalation means that even an isolated attack on a military target is potentially illimitable in its consequences; and third, that the very existence of these weapons entails an unacceptable probability that they will be used.

The arguments based on international and constitutional law are linked by the proposition that international law is part of United States law. As elaborated in an essay by the junior editor Martin Feinrider entitled *International Law as Law of the Land: Another Constitutional Constraint on Use of Nuclear Weapons*[2] and by several shorter pieces, this concept includes international law among those laws that the President must take care to execute faithfully,[3] and also comprehends a congressional duty to ensure that United States actions comply with international law by virtue of the constitutional provision calling for Congress to "define and punish . . . Offenses against the Law of Nations."[4] The argument further links international and constitutional law by pointing out that, to the extent that such treaties as the United Nations Charter govern United States actions concerning nuclear weapons, those treaties are the supreme law of the land under article VI of the Constitution. In the editors' view, individual responsibility to abide by international law could be enforced not only by the usual judicial mechanisms of domestic law enforcement, but also by a Nuremberg-type tribunal punishing crimes against the peace and crimes against humanity. The editors and some contributors have no doubt that waging nuclear war would constitute both such crimes.[5]

The book is organized to address the international law issues in Part I and the constitutional issues in Part II. (A brief Part III touches on the environmental and medical consequences of nuclear war.) Within the two principal parts there are lead essays and shorter com-

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384 (The "constitutional duty to insure the preservation of the nation . . . can only mean the total elimination of such weapons wherever they may be.").

The junior editor takes a more nuanced approach, acknowledging that there is no a priori basis for "lumping together . . . all types of nuclear weapons and all their possible uses" (p. 93). He goes on to argue, however, that existing law prohibits most if not all uses of nuclear weapons (pp. 93–95), and that a "rule of customary international law outlawing nuclear weapons *per se* is currently in the process of being created" (pp. 95, 106).

2. For a criticism of this argument, see infra notes 28–33 and accompanying text.

3. See U.S. Const. art. II, § 3.

4. Id. art. I, § 8.

5. Assertions to this effect are found in the editors' introduction (pp. ix–x); in Elliott Meyrowitz' *The Laws of War and Nuclear Weapons* (pp. 35–37, 39); in Martin Feinrider's *International Law as the Law of the Land: Another Constitutional Constraint on Use of Nuclear Weapons* (pp. 91, 95, 100); in Richard Falk's *Toward a Legal Regime for Nuclear Weapons* (pp. 110–12); and in Burns Weston's *Nuclear Weapons Versus International Law: A Contextual Reassessment* (pp. 154, 164, 179). In a stronger statement of this thesis, threatening or preparing for nuclear war is also considered a Nuremberg-type crime (e.g., pp. 35–37).

ments, reflecting the format of the symposia at which the main theses were presented.[6] Although many arguments are introduced for and against the main theses, other issues within the purview of the book's title are not addressed at all. For example, despite the attention given to multilateral treaties as sources of the asserted international law prohibition against nuclear weapons, there is virtually no discussion of the legal issues involved in the United States-Soviet bilateral relationship. Because a large segment of the potential readership may be at least as interested in legal aspects of arms control negotiations as in the authors' illegality thesis, the shortchanging of such issues is bound to cause disappointment.[7]

Let us take a look at the debate as the editors have framed it: the legality, vel non, of nuclear weapons. There will be few volunteers to dispute the appropriateness of most of the adjectives the authors apply to their subject: nuclear weapons are abominable, evil, bad, wrong, monstrous, disgusting. Not everyone would embrace the authors' views that nuclear weapons are inherently immoral: that is a debate that belongs to another forum.[8] But is legality a meaningful concept when applied to nuclear weapons? To explore the question, let us follow the editors' division of the legal universe into the spheres of international law and constitutional law, beginning with the relatively more accessible constitutional sphere.

I. Nuclear Weapons and Constitutional Law

The lead essay on the constitutional issues is by the senior editor of the volume, Arthur Selwyn Miller, Professor Emeritus at the George Washington University National Law Center. He advances four arguments: (1) Current United States nuclear strategy involves a constitutionally impermissible delegation of congressional war power to the President, to subordinate officers, and even to computers; (2) Congress has a duty to implement its constitutional authority to define and punish offenses against the law of nations, including the international legal

6. The senior editor's thesis and comments in response were presented at a Conference on Nuclear Weapons and Law held at Nova University Center for the Study of Law on February 5, 1983. The comments include many thought provoking ideas, but not all have been fully developed for publication and so generally fall short of providing a satisfactory counterweight to the main presentations. The lead-essay/comment structure is probably more suitable for oral presentations than for a book.

7. For examples of such issues, see infra notes 43–49 and accompanying text.

8. Even the Catholic bishops acknowledge that the possession of a strategic nuclear deterrent, and the credible threat of potential use in response to aggression, are morally justifiable for the purpose of keeping the peace in today's world. See The Challenge of Peace: God's Promise and Our Response, reprinted in 13 Origins 1 (1983). Moreover, it is not necessary to accept a moral defense of massive strategic use to acknowledge that tactical battlefield use in response to an overwhelming conventional attack could in some circumstances be morally justifiable.

doctrines that assertedly proscribe nuclear weapons;[9] (3) international law is part of the law that the President must faithfully execute; and (4) the federal government has an affirmative duty to protect both citizenry and posterity from nuclear extinction. These four points are briefly developed following a summary of the author's purposive philosophy of constitutionalism, with the purpose here being fulfillment of the Constitution's preamble: to "secure the Blessings of Liberty to ourselves and *our Posterity*."[10] Later, in a "brief rejoinder" that follows the responses to his essay, he suggests a further theory of "anticipatory" taking and deprivation of life, liberty, and property (pp. 377–84).[11]

Professor Miller both urges judicial implementation of his approach and acknowledges its impossibility. On one hand, he exhorts the Supreme Court to "grasp the nettle and point out to the Executive and the Congress" the contours of their constitutional duty to eliminate the threats posed by nuclear weapons (p. 249). On the other hand, he allows that "[i]t would be naive to expect the Supreme Court to intervene in matters such as are discussed above," because "judges are timorous officers of government" (p. 250). Noting that even the most expansive conceptions of judicial activism would be unlikely to take judges in his preferred direction, Professor Miller properly points out that rights and duties can enjoy constitutional status even without effective mechanisms for judicial enforcement.

Professor Miller's assessment of the dim prospects for judicial action against nuclear arms is correct, but he does not do justice to the reasons for judicial self-restraint. His vision is of a judiciary that would move boldly to dismantle a military structure based on nuclear arms, just as *Brown v. Board of Education*[12] required the dismantling of segregated school systems. *Brown* did not change the world overnight, but it was a spur to action, a rallying cry for revitalizing the political struggle, and ultimately a symbol of our society's commitment to human dignity. Unfortunately for Professor Miller's thesis, the hypothetical case of *Brown v. The Pentagon* could not fill the same bill. It is not just that the law suit would inevitably founder for threshold reasons such as standing, ripeness, or the political question doctrine, as noted in the brief

9. For a discussion of these doctrines see infra Part II.

10. U.S. Const. preamble (emphasis added).

11. Still another line of argument, which Professor Miller welcomes (p. 383 n.33), comes from an unlikely quarter. The General Counsel of the Department of Defense, in a brief comment on Professor Miller's piece (pp. 337–38), cites article IV, § 4 of the Constitution—that the United States "shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion"—as establishing a constitutional duty of the federal government to reduce, and if possible eliminate, the nuclear threat. Of course, the General Counsel and Professor Miller presumably have rather different views on the extent to which the government has complied with this duty.

12. 347 U.S. 483 (1954).

comments following Professor Miller's piece.[13] Nor is it that judges are temperamentally resistant to becoming involved in controversial issues or breaking new ground, as some of Professor Miller's characterizations imply. More basically, the problem is that in the unlikely event of a judicial hearing on what to do to preserve the human race from nuclear disaster, judges would have to find a principled basis for endorsing some solution in place of the policies developed by executive and congressional officials, who presumably are committed to that very effort. Professor Miller asserts that he makes no plea for unilateral disarmament (p. 238), but that would seem to be the only relief that a court persuaded by his argument could order. Surely the Supreme Court could not supervise the conduct of negotiations for mutual reductions, or even decide whether space-based defenses are likely to render nuclear weapons impotent. The constitutional responsibility to prevent the horror of nuclear war must lie where the constitutional power is[14]—with Congress and the President.

Professor Miller's sketch of a constitutional argument, while doubtless creative, is unsatisfying because it fails to confront, and indeed obscures, the serious constitutional issues inherent in the reality of living with nuclear weapons. No lawyer's brief or judicial declaration can make nuclear weapons disappear, and thus the constitutional dialogue should grapple with how best to control them, not just how to condemn them. The proposition that "nuclear weapons are unconstitutional" may be an attention-getting slogan, but it does not go very far toward addressing the real problems of governance that concerned constitutional lawyers should have on their agenda.

The heart of the constitutional conundrum of nuclear weapons is whether our instruments of democratic governance are capable of lowering the risk of nuclear conflict. Since the judiciary has little if any role to play in that endeavor,[15] we must turn in the first instance to the political branches of government and ultimately to grass-roots forms of political initiative. Fortunately, Professor Miller seems to recoguize that the locus of constitutional responsibility for setting nuclear policy is with Congress and the President (pp. 243–47, 383–84), and there is considerable force to his criticism of Congress for having abdicated its share of that responsibility (p. 246). But it is not enough to chastise

13. For example, see Ovid Lewis' response in *Commentary on the Constitutional Debate* (pp. 266–67).

14. Cf. New York Times Co. v. United States, 403 U.S. 713, 728 (1971) (Stewart, J., concurring) ("The responsibility must be where the power is.") (footnote omitted).

15. Not surprisingly, United States courts have declined various invitations to change the nation's nuclear policy. See, e.g., Greenham Women Against Cruise Missiles v. Reagan, 755 F.2d 34 (2d Cir. 1985). It is not hard to perceive the reasons for the judicial hands-off attitude. In one of the pieces in this volume, Thomas Franck points out that a judicial declaration of unconstitutionality of the use of nuclear weapons would be tantamount to unilateral disarmament and might encourage the Soviet Union to use force against United States interests (p. 364).

Congress for passivity or excessive deference to the executive: after all, Congress has been *actively* involved in the authorization of successive nuclear programs throughout the postwar era.[16] The real concerns are whether anything can be done within our constitutional system to enhance the role of Congress in efforts toward arms *limitation*. Are there institutional disabilities—such as inadequate information or expertise, vulnerability to breaches of security, or porkbarrel politics—that prevent Congress from assuming this role? If so, then the legal profession should rise to the challenge of designing constitutional, statutory, or legislative rule-making techniques to make Congress a more effective participant in restraining the arms race.[17]

The essays by Professor Miller and pieces by other contributors attack the constitutional legitimacy of the existing system for initiation of nuclear conflict solely on presidential authority (pp. 243–46, 339–54, 378).[18] Of course, since Miller's principal contention is that *any* resort to nuclear weapons would be unconstitutional, questions of allocation of constitutional power between Congress and the President cannot really be a central concern in his conceptual framework; nowhere does he suggest that the perceived constitutional defects could be cured by an express congressional declaration of war coupled with a specific authorization to the President to make a particular use of nuclear weapons.

Nonetheless, the roles of the President and Congress in making the fateful decision as to whether and how nuclear weapons might ever be used deserve thorough constitutional analysis. Ironically, one of the most stimulating contributions to the constitutional discussion of presidential and congressional responsibilities for nuclear decision making has come from a nonlawyer (not represented in this volume), Jeremy

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16. This point is briefly made in an essay in the volume by Jack Goldklang (p. 356). If one were to attempt a thorough catalogue of all the actions of Congress endorsing expansion of United States nuclear arsenals, the cumulative effect would be formidable. Goldklang also points out (pp. 358–59) that in the Arms Control and Disarmament Act of 1961, 22 U.S.C. § 2573 (1982), Congress has prohibited the President from incurring commitments to disarm or to limit or reduce United States armaments except pursuant to treaty or affirmative legislation.

17. For a recent inquiry into why democratic societies have fallen short of democratic ideals with respect to complex policy decisions such as those involving nuclear weaponry, see R. Dahl, Controlling Nuclear Weapons: Democracy v. Guardianship (1985).

18. Arval A. Morris, in particular argues:

> (1) that the President has no constitutional power to order a pre-emptive, nuclear first-strike and thereby initiate nuclear war; (2) that the President has no constitutional power to order a nuclear attack solely in response to reports of an incoming wave of missiles, and (3) that the President has no emergency power to "repel" a nuclear attack already fully completed. If the President has any power, it would only be to repel a nuclear attack on the United States that is in process by authorizing a responding nuclear attack after the United States actually has been attacked. (P. 350).

Stone of the Federation of American Scientists. Dr. Stone's recent article, provocatively entitled *Presidential First Use Is Unlawful*,[19] develops in detail the propositions that he and the Federation have been asserting for more than a decade: that the existing system of presidential control is unconstitutional, and that in any event Congress should exert its constitutional prerogatives to enact a legally binding mechanism for ensuring that congressional leaders participate in any United States decision to cross the nuclear threshold. One need not abandon a healthy skepticism about the merits of Dr. Stone's concept to recognize that he and other nonlawyers have made a valuable contribution in spurring legal debate over where the responsibility for nuclear decisions should lie in a constitutional framework.[20] *Nuclear Weapons and Law* would have been considerably enriched by the addition of one or more articles addressed to these difficult problems of bringing constitutional analysis to bear on actual problems of command and control.

But the constitutional analysis should also go beyond a critical assessment of the responsibilities of the branches of the federal government concerning nuclear matters. If we are to accept the editors' premise of a purposive, pervasive constitutionalism transcending the usual paradigms of judicially enforceable restraints on governmental action, then we will have to understand how this view of the Constitution affects the rights and obligations of all citizens. Professor Miller and his colleagues tell us both that the government has affirmative duties to protect the citizenry from the threat of nuclear destruction and that the existing state of affairs only perpetuates and aggravates that threat. If our political leaders are as derelict in their duties as these authors imply, then our constitutional system should provide a means of redressing our collective grievance. Political science literature is already grappling with the reasons why nuclear problems seemingly elude democratic control.[21] Can constitutional law help find ways to reassert, or to begin to assert, such control?

Since not even the authors realistically expect the courts to involve themselves in the control of nuclear weapons, then constitutional power must be found at its source—with the people. The people in a

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19. Stone, Presidential First Use Is Unlawful, 56 Foreign Pol'y 94 (1984). For a summary of earlier statements of the Federation's position going back to 1972, see id. at 100–01. Dr. Stone's challenge to the community of constitutional lawyers has elicited response from various quarters, most recently at the Federation's initiative, a conference of constitutional lawyers was held from November 15–17, 1985, at which a dozen scholarly papers supporting and opposing various aspects of his proposal were presented. See Contending Imperatives: Nuclear Policy and Constitutional Values, F.A.S. Pub. Interest Rep., Jan.–Feb. 1986, at 1 (1986). Publication of the papers in book form is expected within the coming year.

20. For a political scientist's analysis of delegation of and succession to the President's power to order the use of nuclear weapons, see P. Bracken, The Command and Control of Nuclear Forces 179–237 (1983).

21. See R. Dahl, supra note 17.

democratic society are of course capable of giving explicit constitutional status to their renunciation of nuclear weapons, just as they may forswear such weapons by treaty or by declared public policy. Professor Miller and his colleagues would derive a similar constitutional value from the framers' creation of 1787, not on the basis of its words or the framer's intentions, to be sure, but rather as implicit in their purpose to create a lasting democratic society. The problem with basing a constitutional argument against nuclear weapons on the desire for self-preservation is that no one has yet devised a better way to defend the United States against nuclear destruction than through the maintenance of a credible nuclear force to deter the execution of external threats. The story is told that a proposal at the Constitutional Convention to place a limit on the number of men in the United States army and naval forces was rejected when General Washington pointed out that the Constitution would likewise have to prohibit any foreign force from invading the United States with more than that number.[22] The suggestion of a prohibition inherent in the Constitution against the very weapons targeted at us by another superpower has a similar ironic quality.

But the implausibility of this line of constitutional reasoning by no means suggests that constitutional concerns are irrelevant to involving the public in nuclear policy. Far from it. Just as with the issue of congressional and executive responsibility, the role of the people in making the excruciating choices of what to do about nuclear weaponry raises constitutional issues of the highest interest. Scores of localities in the United States have declared themselves "nuclear-free zones"; impressive campaigns have been mounted to prevent the basing of nuclear-armed or nuclear-powered ships in local ports; citizen boycotts and disinvestment campaigns against military contractors are increasingly well organized. All of these activities involve difficult constitutional issues. Again, since the editors' principal goal is to build an argument against nuclear weapons per se, they give scant attention to the aspects of constitutional law that bear on the tension between the federal commitment to massive nuclear programs and grass-roots initiatives aimed at stopping the arms race. On one hand is the well-entrenched constitutional concept of federal preemption of matters implicating national security and foreign affairs, as nuclear weapons indisputably do; on the other are the claims of local governments and citizens' organizations to exercise control, or at least leverage, over traditional local concerns such as health, safety, and land and resource management, that nuclear weapons also raise. The mere declaration that "nuclear weapons are unconstitutional" provides little realistic ammunition for grass-roots activists grappling with these complex conflicts.

22. See C. Warren, The Making of the Constitution 483 (1947).

Finally, a satisfactory constitutional analysis of nuclear weapons issues requires elaboration of a theory of the rights and duties of individuals in the face of governmental policies that they believe to be illegitimate. If, as some of the contributors to this volume maintain, preparing for or waging nuclear war would entail Nuremberg-type liability for crimes against the peace or crimes against humanity, then responsible individuals would have a duty not to participate in such preparations.[23] To which officials (or employees in defense industries, or other categories of personnel) and to what kinds of activity would that duty pertain? On one view, at least those officials sworn to support the Constitution, including the President, members of Congress, and other officers,[24] would have to renounce any involvement in nuclear planning in order to be faithful to the doctrine that "nuclear weapons are unconstitutional." Professor Miller himself asserts that the constitutional oath would be "mere *brutum fulmen*" unless it comprehends a duty to bring about "the total elimination of such weapons wherever they may be" (p. 384). But so long as there is no magic solution to eliminate such weapons in hostile hands, the constitutional oath holds out no alternative to the strategy of deterrence that for the last four decades has been the ultimate defense against foreign enemies.

Another kind of civil disobedience, comparable to that involved in the civil rights movement and resistance to the Vietnam War, would entail violation of existing law in an effort to bring about change in governmental policies. Again, some of the book's contributors advocate this approach, on the grounds of obedience to a higher law under which nuclear weapons are illegitimate (pp. 125, 212). Antinuclear civil disobedience has been in the news for some time, encompassing such activities as withholding tax payments, trespassing in restricted areas, and even attempting physical acts against nuclear facilities on a spectrum between symbolism and sabotage. This volume addresses these forms of civil disobedience, when at all, only in their moral context, without a candid examination of legal issues that might have led in some less than hopeful directions. To date, the defense of obedience to a higher law has not had overwhelming success in criminal prosecutions for antinuclear activity in violation of positive law.[25] A more fully developed treatment of legal aspects of civil disobedience would have enhanced the book.

Another context in which issues of individual rights relate to nu-

23. See supra note 5.

24. See U.S. Const. art. VI, cl.3.

25. See United States v. Allen, 760 F.2d 447, 452 (2d Cir. 1985) (rejecting defenses of antinuclear protesters convicted of damaging B-52 bomber). But cf. Illinois v. Jarka, No. 002170 (Cir. Ct. Lake County Ill. Apr. 15, 1985), discussed in *Illinois v. Jarka*: Bringing International Law to Bear, The Lawyers' Committee on Nuclear Policy Newsletter, Summer–Fall 1985, at 3 ("For the first time on record, a jury has been instructed by a State judge that the use or threatened use of nuclear weapons violates international law, and on that basis has rendered an acquittal based on the defense of necessity.").

clear activity is that of the first amendment. Recall the *Progressive* case,[26] in which the government obtained a temporary restraining order but ultimately failed in its effort to prevent publication of an article which, according to the government's affidavits, contained the technical data for building a hydrogen bomb. Constitutional lawyers have divided on this issue, with some contending that the first amendment prohibits prior restraint even of this sort of publication and others convinced that the secrets of the hydrogen bomb present the kind of clear and present danger that may justify suppression.[27] It would be interesting to see a reexamination of the *Progressive* issues in light of the proposition that the construction of nuclear weapons is itself an unconstitutional act. This would not be an argument concerning advocacy of illegal activity, but rather an effort to confront the first amendment implications of the authors' position that the Constitution prohibits the exploitation of nuclear weapons technology. Since the *Progressive* case is one concrete instance in which constitutional concerns have already arisen in litigation involving nuclear weapons, the absence of any discussion of how those concerns relate to the authors' principal thesis is perplexing.

II. Nuclear Weapons and International Law

The essays challenging nuclear weapons under international law are more substantial than the lead constitutional essay, which Professor Miller himself characterizes as a "brief outline" (p. 235) and a "preliminary foray" (p. 377). Not only are the international law points more fully developed and better presented, but in some ways they are also substantively more satisfying. This is somewhat anomalous, because international law tends to be perceived as an underdeveloped and ineffective system, while constitutional law is usually thought of as a rigorous field. But questions must still be raised when a system of international law generates internally coherent bodies of doctrine purportedly making illegal an activity that the major powers refuse to abandon. Can such legal doctrines be credible or meaningful in today's world? If so, what are the implications of the fact that actual United States strategic doctrines and policies run counter to asserted international norms?

The editors of this volume, of course, prefer not to acknowledge any gap between what international law prohibits and what our constitutional system permits. But they would bridge any such gap by maintaining that constitutional doctrine requires observance of international law.[28] This argument calls for more careful analysis. It is true that in-

26. United States v. Progressive, Inc., 467 F. Supp. 990 (W.D. Wis.), appeal dismissed, 610 F.2d 819 (7th Cir. 1979).

27. For a variety of views on the issues raised by the *Progressive* litigation, see the recent symposium issue, National Security and the First Amendment, 26 Wm. & Mary L. Rev. 715 (1985).

28. See supra notes 2–5 and accompanying text.

ternal law cannot be invoked on the international plane as justification for a violation of international law;[29] and the proposition that "[i]nternational law is part of our law" finds support in Supreme Court decisions and other eminent authority.[30] Yet the same cases and authorities recognize that it is within the constitutional competence of the political branches to place the United States in violation of international law, and that the courts will not compel them to comply with international law.[31] Naturally, one can still debate whether our constitutional jurisprudence is right to accord priority to decisions of the federal political branches when they conflict with international law;[32] but instead of explaining why the trends of the last century should be reversed, the authors seem to disregard them.[33]

The principal statements of the international law arguments

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29. See, e.g., Restatement of Foreign Relations Law of the United States (Revised) § 131 (Tent. Final Draft 1985); Vienna Convention on the Law of Treaties, May 23, 1969, art. 27, U.N. Doc. A/CONF./39/27.

30. See, e.g., The Paquete Habana, 175 U.S. 677, 700 (1900); Restatement of Foreign Relations Law of the United States (Revised) § 135 comment b, § 311(3) (Tent. Final Draft 1985). The quoted proposition serves as a source of law for the courts where there is no statute or other governing federal rule to the contrary.

31. See, e.g., Restatement of Foreign Relations Law of the United States (Revised) § 135 comment a, reporters' notes 1 & 3 and cases cited therein (Tent. Final Draft 1985); L. Henkin, Foreign Affairs and the Constitution 188 (1972) ("But the Constitution does not forbid Congress or the President to exercise their powers in disregard of customary international law as it does not invalidate their violations of treaties and international agreements."); id., 221–22; cf. The Paquete Habana, 175 U.S. 677, 700 (1900) (courts will give effect to international law where there is "no controlling executive or legislative act").

The doctrinal basis for the position that Congress is free to violate international law is reflected in the long series of cases establishing that a subsequent statute takes priority over an inconsistent treaty. See, e.g., The Chinese Exclusion Case, 130 U.S. 581, 597, 599 (1889); Whitney v. Robertson, 124 U.S. 190, 195 (1888); Head Money Cases, 112 U.S. 580, 588–89 (1884). If the Constitution barred Congress from violating international law, then these cases would necessarily have been decided the opposite way. The Supreme Court's reference in *Paquete Habana* to a "controlling executive act," 175 U.S. at 700, suggests that certain presidential actions may similarly be undertaken under the President's constitutional powers even in the face of an international law prohibition, although the case and its progeny do not definitively establish what constitutes a "controlling executive act." Recent litigation is beginning to probe the contours of this doctrine, and might lead to a more nuanced or limited approach. For example, in Garcia-Mir v. Meese, No. 86-8010 (11th Cir. appeal docketed Jan. 3, 1986), it has been argued that the federal courts should enforce international law as regards the acts of lower-level executive officers or actions taken without knowledge that such actions would violate international law. See Brief of *Amicus Curiae* in support of Appellees at 11–16, *Garcia-Mir*.

32. Other constitutional systems reverse this priority and hold that international law prevails over any conflicting domestic policy. The constitution of the Netherlands, for example, establishes the precedence of international law. See Grw. Ned. art. 94.

33. The advocacy pieces in this volume acknowledge the existence of authority contrary to their position only in insubstantial footnote references (pp. 84 n.7, 88 n.20, 90 n.29).

against most, if not all, potential uses of nuclear weapons are found in essays by Elliott L. Meyrowitz, Richard Falk, and Burns H. Weston, as well as in several shorter pieces. A recurring approach focuses on elements of the laws of war and other doctrines governing the use of force, as elaborated in the St. Petersburg Declaration of 1868,[34] the Hague Convention of 1907,[35] the Geneva Gas Protocol of 1925,[36] the 1977 Geneva Protocol on Humanitarian Law Applicable in Armed Conflict,[37] and other international instruments. In addition, the authors invoke the United Nations Charter, which prohibits states from resorting to the threat or use of force in their international relations, subject only to a right of self-defense against armed attack which is not unlimited but must be exercised in accordance with the Charter and other relevant rules of law.[38] From these bodies of law the authors identify a series of norms accepted by states to regulate their conduct in wartime, including the following:

(1) a prohibition against causing excessive, unnecessary, or aggravated suffering;

(2) a prohibition against causing indiscriminate harm as between combatants and noncombatants;

(3) a rule of proportionality with respect to the provocation and to legitimate military objectives; and

(4) a prohibition on violating the jurisdiction of neutral states.

The authors apply these general principles to nuclear warfare and have no difficulty concluding that virtually any use of nuclear weapons would cause indiscriminate and excessive suffering, would transgress all bounds between military and civilian populations and between belligerent and neutral territory, could not be contained within any degree of proportionality to military objectives, and would inevitably constitute an impermissible punitive attack rather than a legitimate measure of self-preservation.[39]

These essays force the reader to rethink preconceptions concerning not only the legitimacy of nuclear weapons but also the way that international legal norms are made and unmade. One basic issue of the international lawmaking process is the extent to which a state's acceptance or acquiescence is required before it can be bound by emerging

34. Dec. 11, 1868, 138 Parry's T.S. 297.

35. Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539, 1 Bevans 631.

36. June 17, 1925, 26 U.S.T. 571, T.I.A.S. No. 8061, 94 L.N.T.S. 65.

37. June 8, 1977, 16 I.L.M. 1391.

38. U.N. Charter art. 2, para. 4; id. art. 51.

39. Other principles of international law such as the prohibition against genocide are also invoked in condemnation of nuclear weapons. The Genocide Convention, Dec. 9, 1948, 78 U.N.T.S. 277, although not yet ratified by the United States, is considered in its normative provisions to reflect the customary international law that had already been applied by the Nuremberg Tribunal. See Restatement of Foreign Relations Law of the United States (Revised) § 702(a) reporter's note 3 (Tent. Final Draft 1985).

norms of customary law.[40] For example, if the asserted prohibition against nuclear weapons is a new rule that began to evolve after 1945, then the United States could argue that it has never accepted the purported rule and indeed has been a "persistent objector" during the entire nuclear era.[41] Furthermore, because the purported new rule has been opposed by most or all states that the rule would restrain—those with nuclear weapons capability—the case for finding the existence of a rule of customary law under traditional theory would be weak. The authors of the lead international law articles in *Nuclear Weapons and Law* overcome the problem of acceptance by pointing out that long before 1945, the United States accepted general norms about war such as those banning the use of poisonous gases, and that those norms have not ceased to exist just because weapons of an even more poisonous character have since been created (p. 149–57). In order to escape the applicability of these norms to nuclear weapons, it is necessary for the nuclear powers to make arguments such as the following: That nuclear weapons are qualitatively different from the weapons against which the norms were directed, or that the norms became obsolete with the era of "total war" or with the advent of nuclear weapons, or that the nuclear powers can preserve some semblance of "law" only by holding each other in a balance of nuclear terror under which any power contemplating a trespass against the rules of the non-use of force must reckon with the possibility of a nuclear sanction. The lead authors have responses to each of these positions, and their arguments are well worth reading and thinking about seriously.

But even if we find these arguments convincing, at least as applied to some potential uses of nuclear weapons, we are still left with the 64,000-megaton question: Can international law assist in any meaningful way in preventing or reducing the risk of use of these weapons? Unless there is some credible basis for an affirmative answer to this question, the most cogently reasoned brief on the illegality of nuclear weapons is just so many words.

The authors of the international law essays are sensitive to this concern, but do not leave the reader with much ground for optimism as to the instrumental possibilities of international law. On the broadest plane, they hope that a consensus against nuclear weapons among the peoples of the world will emerge and eventually work to effect major changes in nuclear policy (pp. 49–50, 124–25, 158–59). As a tactic to help achieve this objective, certain authors suggest that international

40. See generally O. Schachter, International Law in Theory and Practice: General Course in Public International Law 32–39 (1985) (summarizing differing approaches to problem of whether the system of international law, or changes in international legal rules, are dependent upon the will of states).

41. On the "persistent objector" problem generally, see Stein, The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law, 26 Harv. Int'l L.J. 457 (1985).

law can supply the justification for nonviolent forms of civil disobedience or at least for a principled refusal to participate in the furtherance of pro-nuclear trends (pp. 124–25, 212). One might feel more comfortable with these suggestions if there were some semblance of symmetry between the superpower blocs regarding the extent to which public opinion can shape national policy.[42] The Soviet Union, of course, remains keenly interested in encouraging Western publics to turn against nuclear weapons, as evidenced by its extensive, if not ultimately successful, efforts to exploit public opinion against the deployment of intermediate-range nuclear missiles in Western Europe after its own comparable weapons were in place. The authors do not make clear how an appeal to international public opinion can effect changes in Soviet policies.

Another proposal, advocated most directly by Richard Falk (pp. 124–25), emphasizes the obligation that the nuclear weapons states undertook in the 1968 Treaty on the Non-Proliferation of Nuclear Weapons[43] to negotiate, in good faith, toward cessation of the nuclear arms race and on effective measures relating to nuclear disarmament. Surprisingly, the uses of international law in international negotiation and treaty implementation receive relatively little attention in this volume. The Non-Proliferation Treaty, the Anti-Ballistic Missile Treaty,[44] and SALT I[45] and II[46] are mentioned only a few times and never become the subject of sustained discussion. This is too bad, because many readers will share this reviewer's belief that the greatest contribution international law could make toward mitigating the nuclear threat is by contributing to the process of negotiating limitations and reductions on nuclear weaponry. Once again, apparently, the editors' and contributors' wish to delegitimize nuclear weapons takes precedence over analysis of bodies of law that, of necessity, accept the existence of nuclear weapons and implicitly cast doubt on the idea that they are per se illegal. Because these are the bodies of law that provide the most realistic hope for controlling nuclear weapons, it is disappointing not to see an in-depth treatment of them here.

On balance, despite the strong normative appeal of the international law arguments against nuclear weapons, the reader digests them and is still hungry for something more. One final example will suffice. The symposium at which a large number of these collected papers were

42. Professor Falk tackles this problem in oblique fashion, concluding that "Soviet *state* interests also appear to support minimizing the role of nuclear weapons, and in this critical regard, do not depend upon responsiveness to democratic pressures" (p. 127 n.41) (emphasis in original).

43. July 1, 1968, 21 U.S.T. 483, T.I.A.S. No. 6839, 729 U.N.T.S. 161.

44. May 26, 1972, United States–U.S.S.R., 23 U.S.T. 3435, T.I.A.S. 7503.

45. Interim agreement, Limitation of Strategic Offensive Arms, May 26, 1972, United States–U.S.S.R., 23 U.S.T. 3462, T.I.A.S. No. 7504.

46. Treaty on the Limitation of Strategic Offensive Arms, June 18, 1979, United States–U.S.S.R., S. Exec. Rep. No. 14, 96th Cong., 1st Sess. 319.

presented was held just a few weeks before President Reagan made his "Strategic Defense Initiative" (SDI) speech. If the international law methodology advocated in this book provides a valid basis for distinguishing between legitimate and illegitimate weaponry, then it ought to be possible to apply that methodology to SDI to determine whether the concept of destroying destructive weapons is itself consistent with international law. Only one of the authors (Falk) has added so much as a sentence of text and a short footnote to address this issue; he applauds the "normative aspiration to substitute secure defensive capabilities for current threats to devastate whole societies," but ends up criticizing the proposal as "one more misguided effort to overcome normative problems by proposing another technological fix" (p. 109 n.5). To this reviewer, the customary international law arguments that so trenchantly condemn massive indiscriminate uses of nuclear destructive force are practically indeterminate when it comes to assessing SDI's legality under the same body of international law. Of course, the argument that anything more than research toward SDI would violate the Anti-Ballistic Missile Treaty[47] has been ably presented in many other publications;[48] but since the United States could withdraw from that treaty on a mere six months' notice,[49] it is critical to consider whether other more broadly normative concepts of international law in any way constrain the development, deployment, or use of space-based antimissile defenses. Knowing the authors' views on nuclear policy in general, it is easy to speculate where most of them would come out on this issue. Yet their legal methodology could be applied on one hand to justify space-based destruction of nuclear missiles in order to prevent them from inflicting maximum damage, or on the other hand to condemn yet another round of nuclear escalation.

CONCLUSION

Nuclear Weapons and Law challenges the legal reader to think creatively about how to use law to bring an end to the threat of nuclear weapons. There is no more important responsibility for the profession. Yet many readers who sympathize deeply with the editors' and contributors' objectives will remain unpersuaded by their legal arguments and tactical recommendations.

Fortunately, with the growing number of lawyers who are taking a serious interest in this crucial field, we can look forward to further contributions to the debate that will both build on this effort and develop new directions. Indeed, in the period since the essays in *Nuclear Weap-*

47. May 26, 1972, United States–U.S.S.R., 23 U.S.T. 3435, T.I.A.S. No. 7503.

48. See, e.g., Arbess, Star Wars and Outer Space Law, Bull. Atom. Scientists, Oct. 1985, at 19; Bundy, Kennan, McNamara & Smith, The President's Choice: Star Wars or Arms Control, 63 Foreign Aff. 264, 273–77 (1984–85).

49. Anti-Ballistic Missile Treaty, May 26, 1972, United States–U.S.S.R., art. XV, para. 2, 23 U.S.T. 3435, 3446 T.I.A.S. No. 7503, at 12.

ons and Law were written, the editiors and contributors, and those who share their approach, have addressed some of the issues raised in this review in further writing, and their efforts to stimulate legal debate and activism will continue.[50] Other lawyers have also been devoting considerable attention to the role of the legal profession in promoting United States–Soviet negotiations for arms control.[51] Lawyers may reasonably differ over how best to apply legal techniques and analysis toward reducing the nuclear threat, but as *Nuclear Weapons and Law* makes clear, indifference is not an acceptable option.

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50. As this review goes to press, an announcement has been received of the forthcoming publication of F. Boyle, Defending Civil Disobedience Under International Law (1986), which, according to the publisher's description, deals with the issues raised in the text accompanying note 25, supra. Professor Boyle, like the editors of *Nuclear Weapons and Law*, is a member of the Consultative Council of the Lawyers' Committee on Nuclear Policy. Recent newsletters of the Lawyers' Committee have also announced the forthcoming publication of a handbook on nuclear-free zone litigation, which should cover issues raised in the text accompanying notes 22–23, supra. A bibliography of other recent publications is available from the Lawyers' Committee.

51. The projects of the Lawyers' Alliance on Nuclear Arms Control have made substantial contributions in this direction. See also Achieving Effective Arms Control, 41 Rec. A.B. City N.Y. 253 (1986) (report of the Committee on International Arms Control and Security Affairs).