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Nuclear Weapons and Law

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The editors' introduction to this thought-provoking collection of articles is entitled "On the Relevance of Law to Nuclear Weapons." This query into relevance is the threshold question in any attempt to deal, prospectively at least, with the legality of a nation's use of force to resolve international disputes. The Vietnam experience shows that the courts are unwilling to treat such issues as justiciable. Instead, they are left for political evaluation and action by Congress and the electorate. But this, as the editors point out, does not make legal evaluation irrelevant. Law may serve a worthwhile purpose in bringing to the attention of political leaders, and those whom they are elected to serve, the ethical and moral considerations that underlie their actions.

The editors, therefore, discard the contention that law has nothing meaningful to say about the nuclear peril. They point out that the lack of precedent for legal involvement in this field is not a controlling argument: "the history of law is . . . one of growth." They cite the Nuremberg trials and the comment of Robert Jackson, the chief American prosecutor, that if no law existed to punish the Nazi leaders, then it was time to make some law.

However cogent and persuasive the legal arguments are that the possession of these weapons may well be illegal and that their use would certainly be so, it seems highly unlikely that those who now control the foreign and defense policies of the nuclear powers can be persuaded to eliminate their nuclear arsenals. Our nuclear dilemma is, I fear, even more serious than the authors perceive. The immense gulf between much current strategic thinking and these lawyers' briefs on the incom-

† Partner, Clifford & Warnke; Director, U.S. Arms Control and Disarmament Agency, 1977-78.
1. See, e.g., Luftig v. McNamara, 373 F.2d 664 (D.C. Cir.) (per curiam), cert. denied, 387 U.S. 945 (1967)(suit challenging U.S. involvement in Vietnam dismissed because it improperly sought judicial review of political questions); DaCosta v. Laird, 471 F.2d 1146 (2d Cir. 1973)(implementation of President's directive ordering military actions against North Vietnam presents a nonjusticiable political question).
2. P. ix (Introduction).
compatibility of nuclear weaponry with international and American constitutional law is highlighted by the final paragraph of the editors' introduction:

No one likes nuclear weapons, thinks they better the human existence, or should be used. Can't we get rid of them?; and can't law be of some help?\(^3\)

I wish this were so. The sad fact, however, is that nuclear weapons have their fan club. Many strategic thinkers believe that nuclear weapons serve a useful purpose in preserving world peace and that there are circumstances in which they should and would be used. Many others, on what I consider to be much sounder grounds, believe that we cannot get rid of them completely, and that prevention of nuclear war, for the foreseeable future, will depend upon preserving the nuclear stalemate at the lowest possible level of numbers and risk.

The editors categorically reject the deterrence doctrine: “A deterrence justification for American and Soviet nuclear stockpiles is nothing more than circular logic so clearly insane that even its proponents shudder to think of a world perpetually trapped in it.”\(^4\)

I understand their revulsion, but I think they are wrong. Mutual deterrence created by a stable strategic balance is not a crazy theory; it is an inescapable fact of life under the present system of sovereign states. We cannot scrap it and wait for a world government to provide a better solution. Instead, law and lawyers should direct their efforts to the improvement of deterrence and strategic stability.

I believe, however, that before law can be of much help in reducing the nuclear peril, a general consensus will have to be reached on the proposition that nuclear weapons are not really military weapons at all and that their sole purpose is to prevent the use or the plausible threat of the use of nuclear weapons by anyone else. There is no such consensus today.\(^5\) As recently as three years ago, Secretary of Defense Caspar Weinberger said, in his annual report to the United States Congress, that one of the minimum purposes of our nuclear forces is to “impose termination of a major war—on terms favorable to the United States and our allies—even

3. P. xiii (Introduction).
4. Id.
5. The development of consensus is impeded by the frequent turnover of U.S. officials in national security positions. A more retentive institutional memory is badly needed. Lawyers' skills in analysis and in applying relevant precedents can be useful in seeing that the learning process does not have to begin anew whenever an administration changes. For an interesting discussion of how this role is played by the legal advisors to arms control delegations, see McNeill, U.S.-USSR Nuclear Arms Negotiations: The Process and the Lawyer, 79 Am. J. Int'l L. 52 (1985).
if nuclear weapons have been used.”

The United States has also consistently refused to proclaim a policy of no-first-use of nuclear weapons. For example, President Jimmy Carter stated:

[T]o reduce the reliance of nations on nuclear weaponry, I hereby solemnly declare on behalf of the United States that we will not use nuclear weapons except in self-defense; that is, in circumstances of an actual nuclear or conventional attack on the United States, our territories, or Armed Forces, or such an attack on our allies.

The NATO doctrine of “flexible response” contemplates prompt escalation first to tactical, then to strategic nuclear war in the event of a major attack by the Warsaw Pact using only conventional weapons.

Moreover, much of the nuclear weaponry in the arsenals of the superpowers is designed for nuclear war fighting, not merely for deterrence. Nuclear depth charges, artillery shells, anti-aircraft missiles, and land mines account for thousands of nuclear warheads. The growing capability of strategic-range missiles to target and destroy ICBM silos breeds scenarios of both limited and protracted nuclear conflict. Indeed, the debate between those who attribute actual military potential to nuclear weaponry and those who would eschew any use can be seen in the essays contained in Part I of this volume, “Nuclear Weapons and International Law.”

In one essay, Harry H. Almond, Jr., Professor of International Law at the National War College, argues that “The legality of nuclear weapons has now been fully established through the treaties and international agreements that cover them for arms control and other purposes.” As he sees it:

Both sides are maintaining the weapons that would ultimately be used for war fighting (regardless, here, of the rationality of such a decision). Furthermore, they have both developed the lesser nuclear weapons, weapons with far less destructive force and with accurate targeting capabilities (avoiding the stigma of indiscriminate weapons), and such weapons clearly would have military utility.

In contrast, Richard Falk, Professor at the Woodrow Wilson School of Public and International Affairs at Princeton University, points to the dangers of accepting the arguments of those who would “shape nuclear

8. P. 75.
weapons policies around traditional moral/legal notions of ‘defense’ and ‘military targets’, thereby hoping . . . to reconcile normative considerations with a reliance on nuclear weapons.”10 He concludes, “In effect, taking international law and morality seriously in this manner definitely erodes the crucial firebreak in war-planning that separates conventional and nuclear weaponry, thereby making the outbreak of nuclear war far more likely.”11

These two schools of thought have come to be known pejoratively as “NUTS,” for Nuclear Utilization Theorists, and “MAD,” for adherents of the doctrine of Mutual Assured Destruction. During President Reagan’s first term, the official reports of the Secretary of Defense showed the “NUTS” to be ahead. But then President Reagan, in his State of the Union address in January 1984, came down, rhetorically at least, on the “MAD” side. After repeating the admonition he had given to the United Nations the preceding Fall—that a nuclear war cannot be won and must not be fought—President Reagan stated, “the only value in our two nations possessing nuclear weapons is to make sure that they will never be used.”12 This is classic and undiluted deterrence thinking. It leaves no room for the argument that nuclear weapons can provide “extended deterrence” to prevent conventional war by threatening a nuclear riposte to any who might initiate the use of military force.

Judging from his speech reprinted in this collection, Professor John Norton Moore, of the University of Virginia School of Law, would not accept the President’s doctrine that nuclear weapons are for nuclear deterrence alone. He argues that “to declare a tactical use of nuclear weapons illegal against an overwhelming conventional attack by, for example, the Soviets in Europe, would substantially decrease deterrence and increase the risk of war.”13 In sharp contrast, Elliott Meyrowitz, of the Benjamin N. Cardozo School of Law of Yeshiva University, considers any threat to use nuclear weapons to be “legally and morally bankrupt.”14 I find myself in the curious position of agreeing with President Reagan—or at least with the doctrine enunciated in his State of the Union address—over either of these two views.

The entire rationale of the President’s Strategic Defense Initiative (SDI) is inconsistent with the notion that nuclear weapons can be used to fight and win nuclear wars, and that they serve a valuable purpose in

10. P. 111.
11. P. 112 (emphasis in original).
preventing conventional wars. His argument, and that of his defense advisors, is that creation of nuclear defenses can first discourage the further accumulation of offensive nuclear weapons, and then lead to their substantial reduction and eventual elimination. The Administration's new strategic concept, described by strategic arms negotiation advisor Paul H. Nitze as being at the heart of the American approach to the current arms talks, provides:

During the next ten years, the U.S. objective is a radical reduction in the power of existing and planned offensive nuclear arms, as well as the stabilization of the relationship between offensive and defensive nuclear arms, whether on earth or in space. We are even now looking forward to a period of transition to a more stable world, with greatly reduced levels of nuclear arms and an enhanced ability to deter war based upon an increasing contribution of non-nuclear defenses against offensive nuclear arms. This period of transition could lead to the eventual elimination of all nuclear arms, both offensive and defensive. A world free of nuclear arms is an ultimate objective to which we, the Soviet Union, and all other nations can agree.

Experience has made me more than a little cynical about calls for the total elimination of nuclear weapons. Too often, those who call for "real nuclear disarmament" are simply seeking to mask their opposition to achievable measures of nuclear arms control. When it comes to reducing the risk of nuclear war, the theoretical best may indeed be the enemy of the realizable good. But I prefer to believe that the Reagan Administration rhetoric of the past several months reflects not just verbal legerdemain, but a growing realization that there is no security to be gained in a continuing effort by the two superpowers to gain strategic superiority. Strikingly, President Reagan and his colleagues now espouse the same aspirations as those of the nuclear peace groups. Both speak of their vision of a world that is free of the oppressive horror of nuclear weaponry.

But this theme that strikes so responsive a chord in American breasts casts a chill in those of our European allies. They are not apt to agree with the editors that "no one likes nuclear weapons." The notion of a world without nuclear weapons, or, even worse, one in which the United States is protected from nuclear attack by some magic curtain (Reagan's Strategic Defense Initiative) is, to many Europeans, a world made safe for conventional warfare.

15. In my view, however, President Reagan's SDI would almost inevitably mean more offensive weapons and less stability.


17. The difference between European and North American perceptions became vividly
For Europeans, prevention of nuclear war is not enough. Deterrence of any war must be as complete as possible, even if this means a greater risk of nuclear war if deterrence fails. Accordingly, the shortage of European lawyers among the contributors to *Nuclear Weapons and Law* is not surprising. Professor B. V. A. Röling of the Netherlands has contributed a scholarly dissertation arguing for a total prohibition of war, and stating that, while he does not believe that the first use of nuclear arms is as yet prohibited by international law, such use should be banned.\(^{18}\) He concludes, however, that “[t]he question whether all possession of nuclear arms needs to be banned can be left out of consideration for now.”\(^ {19}\) And he notes that such a decision can be made by succeeding generations “in view of the existing political climate and the military technology of the time.”\(^ {20}\)

In contrast, the more typical reaction of our NATO allies to no-first-use proposals is to complain that the issue is too controversial and too dangerous even to be discussed. This unwillingness to entertain a declaratory policy of no-first-use, however, does not necessarily forecast what European reaction would be if faced with an actual decision to convert a conventional conflict into a nuclear war. NATO’s declared policy of flexible response, including escalation to use of nuclear weapons in the event of a conventional attack, is intended largely for Soviet consumption.

My major quarrel with the content of this volume is its preoccupation, to the point of tiring reiteration, with the debate about whether any and all use of nuclear weapons should be deemed illegal. Some of the authors might usefully have noted their legitimate moral and legal doubts as a context in which to consider some promising proposals that would significantly lessen the risk of nuclear war. For example, some attention could well have been given to the report of the Independent Commission on Disarmament and Security Issues, better known as the Palme Commission Report.\(^ {21}\) The Commission is composed of present and former gov-

\(^{18}\) Pp. 184-85.
\(^{19}\) P. 199.
\(^{20}\) *Id.*
\(^{21}\) THE INDEPENDENT COMMISSION ON DISARMAMENT AND SECURITY ISSUES, COMMON SECURITY: A BLUEPRINT FOR SURVIVAL (1982).
ernment officials from many countries, including Cyrus Vance, former Secretary of State, and Giorgi Arbatov, head of the Soviet Institute on the United States and Canada. Among its recommendations is the establishment of a battlefield-nuclear-weapon-free-zone in Central Europe. Within a zone of 150 kilometers on each side of the east-west dividing line, neither nuclear munitions nor storage sites for such arms would be permitted.

This plan would not, of course, guarantee that tactical nuclear weapons could not be used. They could be redeployed into the central European zone with relative ease. But the decision to return the nuclear munitions to a forward position would be a difficult one to take, posing as it would grave dangers of aggravating a crisis situation. The existence of the nuclear-free-zone would lessen the chance that border incidents, mistake, or miscalculation might lead to early use of nuclear weaponry before it could be overrun and captured. Experience indicates, moreover, that weaponry removed and stored away from the potential battlefront would come to be seen as of little value and perhaps not worth the cost of maintenance.

It does not require complete acceptance of the arguments that nuclear weapons and nuclear doctrine offend principles of international and constitutional law to reach the conclusion that their early use would be criminal folly. Included in this collection of legal analyses is the letter from William H. Taft, IV, then the general counsel of the Department of Defense and now the Deputy Secretary. Mr. Taft recognizes “the existence of the constitutional duty to reduce and, if possible, eliminate the threat that nuclear weapons pose to the individual freedom and rights of Americans set out in the Constitution.”

Widespread recognition of this duty, as exhibited in Part II of the book, “Nuclear Weapons and Constitutional Law,” should lend strong support to the cogent constitutional argument developed by Jeremy J. Stone, Director of the Federation of American Scientists, that the President of the United States does not have the sole authority to initiate the use of nuclear weapons in conventional wars. Some contributors to the volume believe that the Constitution imposes more stringent restrictions on the President than those outlined by Stone. For example, Professor Arval A. Morris, of the University of Washington, believes that the President has legitimate unilateral power only “to repel a nuclear attack on the United States that is in process. . . .”

22. P. 338.
Book Review

For too many years, the American public has been unduly passive about nuclear weapons and plans for their use. Nuclear arms have been treated as if they raised no new questions, but simply provided "more bang for the buck." The assumption that they are nothing more than newer and better munitions has led to the futile chase for strategic superiority and unthinking acceptance of the principle that more of them means more security.

The dichotomy in strategic thinking and the present lack of a consensus as to the inutility of nuclear weapons for military purposes make it virtually unthinkable that the nuclear powers will soon adopt the proposition that nuclear weapons are presumptively illegal and their use conclusively so. As I have suggested, however, this does not make essays like those written for this book a wholly academic exercise. They can encourage useful reformation in the way that countries view nuclear weapons and develop strategic plans for their possible use. The compelling arguments presented here can reinforce promising initiatives that would significantly lessen the risk of nuclear war.