Toward a Legal Regime for Nnclear Weapons

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The quickening arms race has prompted widespread public anxiety in North America, Western Europe and Japan, which has increased greatly the normative strain placed upon political leaders since the advent of the nuclear age. The author suggests that legal doubts about the status of nuclear weapons have been present from the tiine the first atomic boinb was used as a weapon of war, but that only now does a climate exist in which to argue forcefully the case for the relevance of international law to nuclear issues. After examining certain problems which make it difficult to apply international law to nuclear weapons, particularly the fact that such weapons are undoubtedly effective, the author nevertheless draws the outline of a legal regime governing nuclear weapons. It is dangerous to condition any regime upon a facile distinction between aggressive or defensive uses of nuclear weapons because of the pervasive subjectivity of international politics. Instead, the author suggests six considerations which must undergird a contemporary *Magna Carta* for the nuclear age. This approach is only an interim position, allowing governments time to mesh their security policies with the emerging consensus that would preclude any reliance upon nuclear weapons. Ultimately, however, no normative regime can prevent the use of nuclear weapons within the present statist world order. Building a permanent nuclear peace will depend, finally, upon drastic global reform and the construction of "a warless world".

L'accélération de la course aux armements a suscité une anxiété publique répandue en Amérique du Nord, en Europe de l'Ouest et au Japon, laquelle a dramatiquement augmenté depuis le début de l'ère nucléaire la pression normative exercée sur les leaders politiques. L'auteur suggère que les doutes juridiques subsistant au sujet du statut des armes nucléaires existent depuis la première utilisation de la bombe atomique en tant qu'arme de guerre; ce n'est qu'aujourd'hui qu'un climat existe permettant de soutenir avec vigueur la pertinence du droit international aux questions nucléaires. Après l'examen de certaines situations rendant difficile l'application du droit international aux armes nucléaires, l'auteur esquisse néanmoins les caractéristiques d'un régime juridique gouvernant ces armes. Il serait dangereux de fonder un tel régime sur la prémisse d'une distinction trop facile entre les usages aggressifs et défensifs d'armes nucléaires, étant donnée la subjectivité inhérente à la politique internationale. L'auteur suggère six considérations devant soutenir une *Magna Carta* contemporaine pour l'ère nucléaire. Cette approche reste intérimaire, permettant aux gouvernements d'ajuster leurs politiques de défense à ce nouveau consensus écartant toute dépendance sur les armes nucléaires. Toutefois, en dernière analyse, aucun régime normatif ne saura empêcher l'usage d'armes nucléaires dans l'ordre étatique mondial existant. L'assurance d'une paix nucléaire permanente dépendra, finalement, d'une réforme globale et de la construction d'un "monde sans guerres".

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Synopsis

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I. The Ultimate Iuternational Law Challenge

Nuclear weapons have inevitably placed a normative strain on political leaders.[1] This strain was "managed" during the first three decades after 1945 in various ways: by periodic calls for disarmament, by a general Western policy that emphasized defense against aggression and by a diplomacy that from the 1960s onwards sought arms control arrangements to abate the arms race and maintain public confidence in the stability of the overall nuclear situation. More recently, the rising costs and dangers of a quickening arms race have given rise to widespread public anxiety in North America, Western Europe and Japan about the relationship of nuclear weapons to the security of states and to the viability of a global political order constituted principally, but not exclusively, by sovereign states.[2]

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[1] "Normative" is used throughout this article to encompass legal, moral, cultural, and biological standards which help draw boundaries between what is morally permissible and appropriate and what is morally impermissible and inappropriate at different levels of societal organization. The focus of this article is upon the interplay between legal norms and the nation-state, in relation to external uses of military power, and more particularly, to reliance on nuclear weapons. In the context of the law of war, there has always been a strong relationship of coherence among these various sources of normative authority. There has also always been a tension between the power orientation of the modern state and the acceptance of normative guidelines in relation to issues of war and peace. This tension has been made more serious in recent decades as a consequence of the steady application of technological innovation to warfare, in a way that makes adherence to normative guidelines strike political leaders as unrealistic. In a sense, this "unrealistic" demand for a modification of such policy prerogatives lies at the core of the current renewed normative inquiry into the status and role of nuclear weapons.

[2] This anxiety also reflects the erosion of the United Nations' position as a source of normative authority, constituted originally to counterbalance and eventually modify the power-centered, fragmented behavior of independent sovereign states and such alliances of these states which aggregate like-minded and partisan political attitudes. The combined effect of the growing dominance of the state over internal political, economic and cultural spheres of action and belief, and its autonomy (or sovereignty) in relation to supranational frameworks, especially in matters of national security, fosters an impression that such states operate in a normative vacuum, especially the superpowers. For a discussion of these depressing dual aspects of the international situation, see Falk, *Nuclear Weapons and the End of Democracy* (1982) 2 Praxis Int'l 1; and Falk, "The Decline of International Order: Normative Regression and Geopolitical Maelstrom" in *Yearbook of World Affairs 1982* (1982) 10.

This anxiety has taken several forms, but includes important normative dimensions, that is, moral/legal objections to the role currently assigned to nuclear weapons in the strategic thought and actions of the superpowers. Part of this concern has centered on the combined unwillingness and inability of the superpowers to stabilize the arms race in terms of either resource outlays or risks. Another part of this concern has centered on the provocative deployment of specific weapons systems, such as Pershing II and SS-20s in Europe, which appear to invite first strikes or preemptive attacks in periods of acute crisis. This concern has generated as well a wider questioning as to whether any reliance on nuclear weaponry can ever appropriately serve the ends of state power. Implicit in such questioning is a critique of the nuclear encroachment upon the sovereign rights of non-nuclear states and junior alliance partners, whose destinies seem to be entrapped in the dynamics of the rivalry between the United States and the Soviet Union; the old possibility of neutral states opting out of belligerency seems to have become meaningless in a world in which even outer space is understood as a dimension of belligerency, and in which the fallout and the global ecological and economic disruption that would be caused by any major nuclear exchange would certainly ignore national boundaries.

These gathering concerns about the prevailing official thinking on nuclear weapons were most powerfully articulated by Jonathan Schell in his *The Fate of the Earth*.[3] Schell emphasizes the threats to human survival contained in the nuclear standoff, as well as the disproportion between tactics and technology, because nuclear destruction far outweighs the state interests supposedly being served by such weapons. This disproportion has been highlighted during the presidency of Ronald Reagan by loose talk about limited nuclear wars, first-strike weaponry and prevailing or winning in a protracted nuclear war. In fairness to the Reagan Administration, their loose talk, in each instance, builds upon earlier entrenched official thinking and war plans about the role nuclear weapons should play in relation to the foreign policy of the United States. There also exists a growing public realization that the scale and quality of the Soviet missile build-up in the 1970s went well beyond reasonable defensive requirements. This build-up has raised doubts about Soviet motivations, leading analysts to question Moscow's reasons for building and deploying so many missiles, especially in relation to Europe, including the frequent replacement of missile systems. Perhaps in partial explanation of that build-up, it should be noted that, earlier, Soviet strategic inferiority produced a diplomatic humiliation for them at the time of the Cuban Missile Crisis (1962) and this undoubtedly gave rise to an attitude of "never again" in the Kremlin which enabled weapons builders to enlarge their

[3] J. Schell, *The Fate of the Earth* (1982).

claims on Soviet resources. Furthermore, the Soviet Union has no "friends", and arguably is surrounded by "enemies", including its East European "satellites" and an antagonistic China with enormous manpower resources and its own growing arsenal of nuclear weapons.[4] Each superpower justifies its own continuous search for more and better weapons by its perception and representation of the other, including profound uncertainties about the other's ultimate and proximate intentions.

In early 1983, normative concerns about nuclear weapons are evident in a variety of forms. There is, first of all, a continuing major Western European grassroots effort to prevent the deployment by NATO of 572 Pershing II and cruise missiles. Additionally, there is Ronald Reagan's somewhat bizarre espousal of an array of twenty-first century advanced defensive weapons, suitably dubbed "Reagan's star wars strategy", which could supposedly provide societies with secure protection against nuclear attack while superseding reliance on deterrence, which is acknowledged for the first time at a leadership level to rest on morally dubious threats to devastate foreign societies.[5] The final adoption of the much discussed Pastoral Letter of the American Catholic bishops, which places the teaching of the Catholic Church on war as applied to nuclear weaponry in direct opposition to many of the principal tenets of prevailing nuclear weapons strategy that have been accepted by NATO and the United States since 1945, also reflects a rising consciousness of these issues.[6]

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[4] One justification that has been advanced for the Soviet build-up in the European theater is to discourage any Western impulse to intervene in Eastern Europe in the event of future challenges directed at Soviet hegemony.

[5] For the Reagan text, see *President's Speech on Military Spending and a New Defense*, The New York Times (24 March 1983) A 20. The normative aspiration to substitute secure defensive capabilities for current threats to devastate whole societies with weapons of mass destruction is certainly admirable, but there is little reason to suppose that it can ever be made to work with sufficient reliability. Even Reagan talks of this high frontier scenario as a goal for the twenty-first century. We are left with the need for a normative framework that can guide our national security policies at the present time, and lead us toward a safer future. To the extent that high frontier thinking is an alternative to peace and disarmament thinking, it represents one more misguided effort to overcome normative problems by proposing another technological fix. For opposing assessments of the feasibility of such developments, see Teller, *Reagan's Courage*, The New York Times (30 March 1983) A 31; and Garwin, *Reagan's Riskiness*, The New York Times (30 March 1983) A 31.

[6] For a partial text of the Pastoral Letter, *The Challenge of Peace: God's Promise and Our Response*, see The New York Times (5 May 1983) B 16. For earlier assessments from a Catholic perspective, see W. Stein, ed., *Nuclear Weapons and Christian Conscience* (1961). For skeptical assessment, see Voorst, *The Churches and Nuclear Deterrence* (1983) 61 Foreign Affairs 827.

Until this broader political and normative public ferment emerged, international lawyers had been comparatively quiet on these momentous issues. Over the years since 1945 there have been, to be sure, a few scholarly discussions pro and con about the legality of nuclear weaponry, but somehow until the 1980s, the debate never was treated in international law circles as very significant.[7] This neglect has several explanations. The legal issues were clouded from the beginning by the original "popular", and in this sense, legally "non-controversial" use of atomic bombs "to save lives" and bring peace in the closing days of World War II, generally regarded by the victorious powers as a "just" war.[8] It also seemed futile to mount a legal case against weapons so obviously useful and powerful, because of the prevailing realities and track record of geopolitics. Specifically, the inability of the West to develop sufficient non-nuclear means to defend Europe and other vital interests on the Asian mainland, in light of a perceived threat resting upon an overall Soviet superiority in conventional forces, and reinforced by the logistical advantages of Soviet dominance of the Asian land mass, made it seem self-denying for Western powers to question the legal status of nuclear weapons. Furthermore, aside from a brief movement in England a couple of decades ago, there was no political pressure mounted by way of a grassroots normative attack. Defending the legality of nuclear weapons is such a thankless task that it undoubtedly seemed to most international lawyers, who meant to be upholding official policies, to be more desirable to maintain a discreet silence on the subject, as long as this was politically possible. All of these elements contributed to the repression of "the legal question". Nevertheless, it is instructive to realize that legal doubts about the status of nuclear weapons have been objectively "present" ever since the Hiroshima explosion. The importance of posing questions now, in 1983, should not be understood only as a response to a new and more aggravated stage in the nuclear arms race, but also as a belated attempt to consider serious legal issues that, but for the historical circumstances surrounding the original uses, would have been addressed as soon as the first atomic bomb was used as a weapon of war.

If Germany or Japan had developed and used atomic bombs in World War II against the inhabited cities of the victors, the war crimes trials held in Nuremberg or Tokyo would certainly have investigated, and in all probability, condemned, the use of this weapon, and would have punished the

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[7] Earlier works on the subject include G. Schwarzenberger, *The Legality of Nuclear Weapons* (1958); N. Singh, *Nuclear Weapons and International Law* (1959); and Brownlie, *Some Legal Aspects of the Use of Nuclear Weapons* (1965) 14 Int'l & Comp. L.Q. 437.

[8] A useful depiction of the official thinking surrounding the decision to use the atomic bomb against Japan was made by the influential Secretary of War at the time, Henry L. Stinson. See *The Decision to Use the Atomic Bomb* (1947) 194 Harper's Magazine 97.

officials responsible as war criminals, even had due mitigating account been taken of Allied strategic bombing of Axis cities.[9] The magnitudes of the blasts and the fallout from those original fission bombs would, in my judgment, have led impartial international law experts to regard the atomic attacks on the Japanese cities as having been perpetrated by illegal weapons, or at least as having involved an illegal tactic of war, despite the plausibility of arguments from military necessity and the prior disregard by planners of strategic bombing patterns of the traditional limits of the laws of war. Indeed, the only court that ever investigated the legal arguments surrounding the American attacks on Hiroshima and Nagasaki came clearly and persuasively to the conclusion that they violated international law as it existed in 1945.[10] Nevertheless, despite several relatively obscure legal condemnations over the years, which took place in a variety of international settings, the legal questioning of nuclear weapons has been totally ignored until recently by political leaders and military planners in the nuclear powers, as well as by their publics.

At this time, the international law dimension of the nuclear age is at last becoming prominent, at least in professional and policy-planning circles. A great deal of scholarly work is appearing on all aspects of the topic. International law, as a general rule, is responsive to fluctuations in the political environment, and the last few years have firmly established a climate in which inquiry into the legal status of nuclear weaponry appears "natural", if not unavoidable. The publication of this symposium in the *McGill Law Journal* is one indication of this new prominence.

In fact, some of this legal questioning is coming from strange sources. There exists a hawkish school of nuclear strategists, which has for years wanted to shape nuclear weapons policy around traditional moral/legal notions of "defense" and "military targets", thereby hoping to overcome normative inhibitions against an aggressive foreign policy and also hoping to reconcile normative considerations with a reliance on nuclear weapons. Proponents of this approach emphasize the "immorality" of city-busting

[9] Of course, the "criminal" character of the bombing itself was never considered because of "the victors' justice" limitation on the war crimes proceedings; in other words, to have been condemned, the atomic attacks would have had to have been carried out *only* by the losing side. Victor's justice was not extended in an extreme form to punish the losers for war methods *also* used by the victors. For an excellent discussion of the issue, see R. Minear, *Victors' Justice: The Tokyo War Crimes Trial* (1971). For a more sympathetic construction, see T. Taylor, *Nuremberg and Vietnam: An American Tragedy* (1970).

[10] *The Shimoda Case* decided by the District Court of Tokyo on 7 December 1963, reprinted in [1964] Jap. Ann. Int'l L. 212. For comment and interpretation, see Falk, *The Shimoda Case: A Legal Appraisal of the Atomic Attacks Upon Hiroshima and Nagasaki* (1965) 59 Am. J. Int'l L. 759.

weaponry that threatens the indiscriminate devastation of the urban centers of an enemy society, and the "immorality" of apocalyptic thinking that takes no steps to maximize chances of survival should a nuclear war occur. These "normative" critics of mutual terror do not consider abandoning our reliance on nuclear weaponry, but rather argue on behalf of strategic postures which rest upon a provocative mix of civil defense programs (shelters), defensive technologies and accurate weaponry that can concentrate its destructive effect on the enemy's military capabilities, including its command structure.[11] The normative paradox here is evident: this type of reconciliation of nuclear weapons doctrine and weaponry with the core conceptions of the law of war and international morality tends toward a speeding up of the arms race, the design and deployment of first-strike weapons systems, and the adoption of attitudes and doctrines that favor nuclear war-fighting options. 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.

Such a perspective has been recently introduced into international law discourse by a widely noted RAND study.[12] The RAND report has proved irresistible to those international lawyers who are opposed to the legality of nuclear weapons; it seems almost too good to be true. It appears to establish the central point that even a think tank closely aligned with the Pentagon is driven to the conclusion that the principal existing doctrine governing the use of nuclear weapons rests upon a flagrant defiance of international law. In the words of the RAND study, "[d]estruction of societies, destruction as an end in itself, would appear to be directly opposed to the most fundamental principles of international law governing armed conflict".[13] More pointedly: "The concept of Assured Destruction and its derivatives (e.g. economic recovery targeting) appear to be directly opposed to international law and, hence, contrary to both domestic law and DOD directives governing individual actions affecting the acquisition, procurement, and use of weapons."[14] The RAND authors disclose their purpose as being "to help close the chasm that now yawns between international law and U.S. strategic nuclear policies".[15]

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[11] A clear and influential instance of this perspective is Iklé, *Can Nuclear Deterrence Last Out this Century?* (1973) 51 Foreign Affairs 267. See also C. Gray, *Strategic Studies and Public Policy* [:] *The American Experience* (1982); and K. Payne, *The BMD Debate: Ten Years After* (1980) (a Hudson Institute monograph).

[12] C. Builder & M. Graubard, *The International Law of Armed Conflict: Implications for the Concept of Assured Destruction* (1982) (RAND Publication Series R-2804-FF).

[13] *Ibid.*, vii.

[14] *Ibid.*, ix.

[15] *Ibid.*, xiii.

Indeed, these are extraordinary conclusions, considering their source. In effect, the RAND authors acknowledge an underlying illegality governing United States policy and practice since Hiroshima, a policy and practice characteristic of the United States, of NATO and of Soviet national security.

But it should be noted that this analysis of international law confines itself to a legal condemnation of the doctrine of Mutual Assured Destruction [MAD], and has not been applied to the weapons themselves. The RAND study proposes that "[a]ctual (as opposed to declaratory) U.S. targeting, strike plans, and military forces should be designed only for attacks against military targets and war-supporting activities (i.e. they should be as discriminate as reasonably possible, consistent with their military purposes). What constitutes war-supporting activities is subject to interpretation; but a safe interpretation under the law would not include civilians or civilian industry unless or until they are converted to military activities that could have a direct effect upon the conflict then being waged (i.e. economic recovery targeting would seem a dubious concept under the international law of armed conflict)." [16] The authors spell out the implications for military research and development as leading to an emphasis on "discriminate, militarily effective weapons".[17] The RAND study never genuinely clarifies the extent to which the operational impact of allowing nuclear weapons to be used against military targets is consistent with the fundamental objectives and principles of the law of war. Surely the cumulative effect of nuclear megatonnage and the wide scope of lethal effects creates "problems" for any general validation of nuclear weapons under international law.

The RAND study establishes some important common grounds for inquiry. It affirms the relevance of international law to strategic planning, and it even insists that policymakers and government international lawyers "closely examine" the consistency of "strategic planning concepts... with the law of armed conflict".[18] Beyond this, it alerts "defense intellectuals outside the government, in universities and corporations, to appreciate the essentials, if not the details, of the international law as it applies to strategic planning" and urges them to conform their behavior accordingly and on the basis of their opportunity "to be more independent" than those playing official roles. Such a mandate relies expressly on United States Department of Defense official policy, outlined in DOD Instruction 5500.15 which includes the following language: "All action of the Department of Defense with respect to the acquisition and procurement of weapons, and their intended use in armed

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[16] *Ibid.*, 48.

[17] *Ibid.*, 51. Builder's extremely assertive strategic views confirm this interpretation. See Builder, *Why Not First-Strike Counterforce Capabilities* [1979] Strategic Rev. 35.

[18] Builder & Graubard, *ibid.*, 57.

conflict, shall be consistent with the obligations assumed by the United States Government under all applicable treaties, with customary international law, and, in particular, with the laws of war." [19] In fact, of course, the United States Government position has rested mainly on a facile and unpersuasive application of *Lotus* reasoning, namely, that states are permitted to do anything not expressly prohibited by rules resting on consent, and that in the absence of an express treaty prohibition, joined by the United States, nuclear weapons may be legally employed.[20] It seems ludicrous to extend the reasoning of the *Lotus* case of 1927, developed to assess a very narrow question of jurisprudential competence in a criminal negligence controversy arising out of a collision on the high seas, to the drastically different circumstances surrounding the consideration of the legal status of nuclear weapons. For one thing, on a jurisprudential level, the issue of whether or not a given activity is prohibited by pre-existing rules is partly a matter of how *general* is the level of appraisal chosen. For instance, while nuclear weapons are not the explicit subject of any agreement binding nuclear weapons states, the main instruments of the pre-existing laws of land warfare prohibit *all* methods of warfare having the characteristics associated with contemplated uses of nuclear weapons. The *Lotus* view of the legal status of new weapons and methods of warfare also flies in the face of the "Martens Clause" inserted in the Preamble to *Hague Convention No. IV* of 1907, concerning the Laws and Customs of War on Land, and is itself generally regarded as a binding element of customary international law. The Martens Clause requires governments to assess "cases not covered by the rules adopted by them" by reference to "the general principles of the law of nations, derived from the usages established among civilized peoples, from the laws of humanity, and from the dictates of public conscience".[21] On such a basis, the overwhelming normative consensus now

[19] See also United States Dep't of the Air Force, *International Law—The Conduct of Armed Conflict and Air Operations* (1976) 6-11 (AFP. 110-31). The RAND study also relies on the language of art. 36 of 1977 Geneva Protocol I Additional to the 1949 *Geneva Conventions*, which puts parties to the agreement "under an obligation to determine whether" the employment of a new weapon or method of warfare would "in some or all circumstances" violate international law. The study does not note that the United States representative in the treaty negotiations explicitly ruled out the applicability of Protocol I Additional to nuclear weapons. For discussion of the United States Government view on the non-applicability of Protocol I Additional to nuclear weaponry, see Erickson, *Protocol I: A Merging of the Hague and Geneva Law of Armed Conflict* (1979) 19 Va J. Int'l L. 557, 560. For the text of 1977 Geneva Protocol I Additional Relating to the Protection of Victims of International Armed Conflicts, see U.N. Doc. A/32/144, Annex I, reprinted in (1977) 16 I.L.M. 1391.

[20] United States Dep't of the Navy, *U.S. Naval Instructions* (1955), art. 613. See also United States Dep't of the Army, Field Manual 27-10, *The Law of Land Warfare* (1956) 18. For the text of the *Lotus* case, see *The Case of the S.S. "Lotus"* (France v. Turkey) (1927) P.C.I.J., Ser. A., No. 10.

[21] *Hague Convention* [No. IV] *Respecting the Laws and Customs of War on Land*, 18 October 1907, 36 Stat. 2277, T.S. No. 539, 1 Bevans 631, Preamble. For reasoning on the

operative in international society would *legally* condemn all contemplated roles for nuclear weapons, except "possession" as a hedge against nuclear blackmail; not even a retaliatory use of nuclear weapons could be easily reconciled with most interpretations of the laws of war, given the properties of the weaponry and the difficulty of reconciling any actual use with such principles as "necessity", "proportionality", "discrimination", and "humanity".[22]

Official American strategic doctrine and war plans, despite the apparent embrace of Mutual Assured Destruction, has in fact always emphasized military targeting, and hence has been relatively consistent with the position argued in the RAND study. The service manual formulations with regard to legal status validate nuclear weapons only "against enemy combatants and other military objectives". To the extent that existing doctrines and plans rest on a conception of deterrence based on threats to civilian non-combatants and non-military objectives, these would be illegal under even this narrowest definition of the applicability of international law. However, applying such guidelines, the atomic attacks against Hiroshima and Nagasaki should have been clearly repudiated. Furthermore, current counterforce targeting, while it superficially repudiates city-busting options, and therefore is formally consistent with restricting the role of nuclear weapons to military objectives, is in fact deeply misleading in this crucial respect. Because of the magnitude and properties of current nuclear weapons (involving many times the destructiveness of the atomic bombs of World War II), and because of their contemplated use in and around cities (there are, for instance, sixty-two military objectives targeted within the city limits of Moscow!), the cumulative blast and fallout effects from multiple nuclear explosions, the number of targets regarded as "military", and the clustering of military targets near population centers, even an official policy that limits the use of nuclear weapons by reference to the military character of the target is not different in effect from an overtly indiscriminate targeting policy. Furthermore, the World War II experience with the unrestricted bombardment of cities and with unrestricted submarine warfare suggests that a self-limiting framework of policies and tactics confining deliberate destruction to the enemy's military targets gives way in wartime to considerations of battlefield effectiveness, understood to include strikes against cities to weaken the resolve of the enemy society. Either the restriction implicit in counterforce strategy is meaningless, because "military

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relevance of the Martens Clause to this issue, see Falk, Meyrowitz & Sanderson, *Nuclear Weapons and International Law* (1980) (Occasional Paper No. 10, Princeton World Order Studies Program), reprinted in (1980) 20 Indian J. Int'l L. 541.

[22] For formulations of these principles, see the General Introduction to International Commission to Enquire into Reported Violations of International Law by Israel During its Invasion of the Lebanon, *Israel in Lebanon* (1983) xi.

target" is given such a loose definition that it includes everything pertaining to a war effort, even civilian morale, or the confining effect of a restricted definition is overlooked under pressure, as was the case with the atomic attacks in World War II, whose rationale rested on their overall role in helping to end the war successfully. No serious attempt has ever been made to determine whether the contemplated uses of the atomic bomb might be in violation of the law of war despite the justification provided. Without a more focused inquiry into what is permitted and prohibited by law, the general public conception that *some* uses of nuclear weapons are legal has the primary effect of providing a rationalization or loophole for virtually *any* use of such weapons.

The present affirmation of the applicability and stature of international law is a challenge to prevailing statist attitudes both within and without government.[23] Let the existing situation be clearly stated. The use of atomic bombs against Hiroshima and Nagasaki was never evaluated in relation to this international law framework by planners and leaders, nor has the subsequent diplomacy of the nuclear age, which has included some twenty documented threats to use nuclear weapons, been in any way sensitive to such legal criteria.[24] In the voluminous literature devoted to the Cuban Missile Crisis, only international lawyers have regarded the international law dimension of the crisis as important, except as it was considered in the detailed planning which was associated with the actual carrying out of the strategic decision.[25]

A climate now exists in which to argue the case for the relevance of international law to nuclear issues. This case can be reinforced by action on the part of those who are politically and morally committed to minimizing the role of nuclear weapons. For reasons of state policy, the Soviet Union seems prepared to lend its official support to most efforts to delegitimize nuclear weapons.[26]

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[23] See sources cited *supra*, note 2; and Falk, *Some Thoughts on the Decline of International Law and Future Prospects* (1981) 9 Hofstra L. Rev. 399.

[24] These uses are documented carefully in an exceptionally important article: Ball, *U.S. Strategic Forces* [:] *How Would They be Used* (1982-83) 7 Int'l Security 31, 41-4 (No. 3).

[25] For a legal maximalist interpretation of the relevance of international law to nuclear weapons that manages to avoid being a legal polemic, see A. Chayes, *The Cuban Missile Crisis* [:] *International Crises and the Role of Law* (1974).

[26] The Soviet position on the nuclear arms race in general has been described well by Soviet dissenters, Roy and Zhores Medvedev, *A Nuclear Samizdat on America's Arms Race*, The Nation [magazine] (16 January 1982) 38. Soviet adoption of an unconditional no-first-use of nuclear weapons pledge is contained in former Communist Party Chairman Brezhnev's "Special Message" of 15 June 1982 to the United Nations General Assembly Second Special Session on Disarmament. The pledge has been reaffirmed by the current Soviet leader, Yuri Andropov.

There remain, however, several serious preliminary difficulties involved in the application of international law to nuclear weapons. First of all, nuclear weaponry is possessed by rival states in a world characterized by acute and pervasive distrust; nuclear disarmament, beyond certain fairly high thresholds, continues to be viewed as unrealistic, because it would create unacceptable political temptations and vulnerabilities. As a consequence of this practical constraint, rival states are likely to retain offsetting nuclear weapons capabilities for the indefinite future, and to insist on at least a posture of minimum deterrence, that is, their possession and a threat, implied at least, to retaliate with nuclear weapons against nuclear attack. Even this form of minimization of the role of nuclear weapons is likely to sustain some type of nuclear arms race, as each side will want to be confident that its nuclear weapons capability and its overall capability for response do not become vulnerable to surprise attack as a result of secret machinations by its rival.[27]

Secondly, as the underlying technology needed to produce nuclear warheads becomes more familiar and refined, the possibility of additional political actors, including dissident armed groups, or even criminal gangs, acquiring nuclear weapons will grow greater. In relation to these prospects of nuclear proliferation, the existing nuclear weapons states are unlikely to give up their hedges against nuclear blackmail by altogether renouncing both nuclear possession and use options. In any event, as long as the teehnological base persists for producing nuclear weapons, their production and reintroduction into defense arsenals can never be reliably ruled out.

Thirdly, and perhaps most disturbingly, as long as nuclear weapons remain under the control of governments, and as long as armed conflict persists in international relations, there exists a grave danger that any available weapon or tactic, regardless of its normative status, would be introduced into battle, if it were perceived by the leaders involved to be centrally decisive. Throughout the history of modern warfare, going at least as far back as the futile effort to banish the crossbow, weapons that are effective on the battlefield or in relation to defeating an enemy society have been used without consideration of legal (or moral, or cultural) restrictions.[28] Nuclear weapons,

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[27] The case for nuclear deterrence along present lines is developed ably by Mandlebaum, "International Stability and Nuclear Order: The First Nuclear Regime" in D. Gompert & M. Mandlebaum, *Nuclear Weapons and World Politics* (1977) 13.

[28] Modern war has grown into an unconditional contest of wills, in which every means and tactic of destruction will be used by political leaders with "a clear conscience". The ideological grounding for this secular absolutism is formulated most clearly in the writings of Machiavelli and Clausewitz. For an analysis of this relation, see W. Gallie, *Philosophers of Peace and War* (1978) 37-65; and R. Lifton & R. Falk, *Indefensible Weapons: The Political and Psychological Case Against Nuclearism* (1982) 239-43. Despite the normative doubts now being raised about

whatever else they might be, are regarded as effective, at least in their threat role as guardians of political survival. Indeed, it would be easy to contrive rationalizations that "illegal" *threats* to use nuclear weapons against cities and civilians "save lives", safeguard the prospects of "human survival" and make indispensable peacekeeping contributions by way of the prevention of war. Post-1918 efforts to prohibit the use of poison gas weaponry do not provide much reassurance to the contrary. It is true that the legal prohibition may have operated as a marginal factor in discouraging the use of such weapons and in building moral/legal inhibitions in world leaders against use in wartime. Nevertheless, the evidence suggests overwhelmingly that the non-use of these weapons in major conflicts that have taken place since World War I is related more importantly to doubts about their "effectiveness" under battlefield conditions, and to the existence of alternative methods of carrying out belligerent missions. In essence, the argument I am making rests on the central proposition that because of the way states wage war — the unconditionality of the means they use whenever issues of victory and defeat arise — it is unlikely in the extreme that international law constraints on nuclear weapons by themselves will hold up in times of severe international crisis. Because a large number of these weapons will be retained, under the best of foreseeable circumstances, these weapons will be likely to be used to the extent that it seems to leaders that the outcome of a war is at stake. Countries such as Israel, France and Great Britain presumably possess nuclear weapons as a warning to their enemies not to push them too far, and there is every reason to suppose that rather than accept military defeat, such weapons would be used, regardless of their legal status. To put the matter differently, international law cannot hope to regulate the pursuit of decisive military state interests, and nuclear weapons are manifestly weapons of military decisiveness.

Fourthly, and more obscurely, the indirect reliance on nuclear weaponry to assist in achieving a variety of foreign policy goals is deeply embedded in bureaucratie thinking, at least in the United States and the NATO countries, about upholding "national security" at "acceptable" costs. To relinquish such a reliance will require very determined political leadership in the two superpowers, especially in the West, where first-use nuclear options remain con-

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nuclear weapons, there has, as yet, been no serious challenge directed at these unrestricted war-making prerogatives of states, and without a "*Magna Carta* for the nuclear age", the legal doubts being currently raised about the status of nuclear weapons, even if they come to be embodied in some authoritative form, will be cast aside in time of emergency. These doubts may, nevertheless, be functional, to the extent that they prompt policies and weapons deployments that operate *as if* these weapons were illegitimate; in effect, the legal challenge may contribute to the replacement of "early use" scenarios, and this by itself would reduce greatly the risks and anxieties associated with the existence of nuclear weapons.

scious premises of existing foreign policy.[29] Nuclear weapons apologists, including those who reaffirm the explicit relevance of international law to such decision making, argue for "defensive" roles for these weapons (against "aggression") and "military" uses (against silos, bases and command centers). These lines of argument are consistent with an *abstract* application of the traditional international law of war to nuclear weapons and tactics in the spirit of the Martens Clause. The strategic implications of such an application are to encourage the development and deployment of neutron bombs, ABM and "high frontier" weaponry, civil defense preparations, increasing the accuracy of weapons, and provocative political plans and strategies. The net effect of such strategies is to overcome inhibitions on the first use of nuclear weapons in a conflict situation, because the inhibitions of terror associated with MAD are weakened.[30] In effect, the nuclear/non-nuclear firebreak is eroded, if not cast aside. The ironic result seems to be that taking international law seriously, given the accompanying implausibility of getting rid of nuclear weapons or of transforming international relations in a more pacific direction, may actually clear the path for nuclear war-fighting doctrines, policies and capabilities.[31] This is the main operative effect of the RAND study, especially

[29] For an indication of the extent of reliance on first use options, see Payne, *Deterrence, Arms Control, and U.S. Strategic Doctrine* (1981) 25 Orbis 747. In opposition to such reliance lies the main importance of no-first-use proposals and pledges. A main consequence of renouncing first-use policy options is the refashioning of foreign policy in two directions: reducing the overall nuclear undertaking (that is, precluding any credible defense for certain kinds of attacks on foreign societies) or upholding an earlier commitment by reliance on the sufficiency of non-nuclear military capabilities. To what extent, for instance, are current NATO force requirements for the non-nuclear defense of Western Europe being exaggerated by way of a myth of conventional inferiority? How real, in any event, is the threat of a Soviet armed attack upon Western Europe? Even if denuclearization is the exclusive goal, tactical choices are not self-evident because a process of realignment within NATO could produce the opposite results by restoring first-use options by way of a West German decision to develop its own nuclear strike force. For recent discussion of these issues, see Bundy, Kennan, McNamara & Smith, *Nuclear Weapons and the Atlantic Alliance* (1982) 60 Foreign Affairs 753. For a skeptical response, see Kaiser, Leber, Mertes & Schulze, *Nuclear Weapons and the Preservation of Peace* (1982) 60 Foreign Affairs 1157.

[30] The full implications of the main alternative strategic positions are discussed in Keeny & Panofsky, *MAD Versus NUTS* [:] *Can Doctrine or Weaponry Remedy the Mutual Hostage Relationship of the Superpowers?* (1981) 60 Foreign Affairs 287.

[31] At some level of jurisprudential reflection, this "ironic effect" of international law analysis suggests a defect or bias in the RAND rendering of the law of war *vis-à-vis* nuclear weaponry. See Builder & Graubard, *supra*, note 12. One way out, of course, is to condemn nuclear weaponry as illegal *per se*, because of its attributes, rather than to focus analysis, as had been traditional prior to nuclear weapons, on the probable contexts of their use, that is, on the targets. Another way out would be to formulate a new kind of analysis based upon an interpretation of the hierarchy of objectives pursued by the international law of war in the nuclear age, placing the avoidance of any use of nuclear weapons at the pinnacle of the hierarchy.

in light of the policy directions of those who are presently urging an accelerated arms race and the development and deployment of destabilizing weapons systems.[32]

The complexity of the fifth obstacle to the application of international law to these weapons is as follows: some minimalist variant of MAD provides, arguably, the best hope of avoiding any future use of nuclear weapons and of slowing down the arms race, and yet MAD is presently most flagrantly in violation of international law, as this law has been generally understood.[33] Furthermore, MAD does provide potential adversaries with reassurances that nuclear weapons are being held only against the remote contingency of the necessity of retaliation against prior nuclear attack. The essence of deterrence is to make the potential nuclear attacker anticipate with as much certainty as possible the devastation of his own country. If deterrence is made more compatible with the RAND reading of international law, then all or some of the following effects could come about: deterrence would in fact be hypocritical in its application (that is, because of the nature of the attacking weapons and of the locations and variety of military targets, counterforce limitations will not in fact save either cities or the civilian population from nuclear devastation); MAD would be less effective as a deterrent (that is, the attacker might regard the prospect of retailiation against those of his military targets that are separated geographically from places of civilian habitation as an acceptable and even rational risk to be counted as part of the cost of a nuclear surprise attack and victory); finally, deterrence would prove less and less reassuring to a rival in a period of acute crisis (that is, if the other side might reasonably attack, then pressure to stage a preemptive first strike necessarily grows).

There may be no fully satisfactory way to circumvent entirely this fifth obstacle. However, I think there is a line of analysis that more validly uses the international law heritage to minimize the role of nuclear weapons in diplomacy. The jurisprudential "concession" that will enable this reformulation is a variant of Catholic "just war" moral reasoning, which allows the choice of a lesser evil under certain circumstances of belligerency.

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[32] Indeed, overt doctrine since 1974 has emphasized military targeting, under such rubrics as "flexible response" and "counterforce". See Leitenberg, *Presidential Directive (P.D.) 59: United States Nuclear Weapon Targeting Policy* (1981) 18 J. Peace Research 309; Beres, *Tilting Toward Thanatos: America's "Countervailing" Nuclear Strategy* (1981) 34 World Politics 25; and L. Beres, *Mimicking Sisyphus: America's Countervailing Nuclear Strategy* (1983).

[33] The illegality of nuclear weapons is a firm conclusion of the RAND study. See Builder & Graubard, *supra*, note 12. This assessment is reinforced by the analysis of the Catholic Bishops' Pastoral Letter. See *supra*, note 6.

It should be evident by now that serious reflection on the relevance of international law to the status of nuclear weapons will be unavoidably controversial at this stage, and also, that it is, to some extent, both inconclusive and tragic. One is not proceeding on the basis of a clean slate. Thousands of nuclear weapons exist, many thousands more are in the planning and development stages, and it is almost inconceivable that the expenditure of so many billions of dollars and the resulting accumulation of towering structures of bureaucratic influence can be overcome easily. At the same time, the overall normative dimension provides firm grounds upon which to premise a critique of existing nuclear weapons policy and practice. Definite improvements can be made in present policies, and in public expectations governing the use of nuclear weapons without waiting for the darkness of catastrophe or the lightness of utopia to come upon us. Such improvements might increase the prospects for a peaceful transition over time to a denuclearized world.

II. Toward an International Law Regime for the Nuclear Age

The quest for a legal regime rooted in the dynamics of the state system of world order is adversely conditioned by the continuing predominance of a Machiavellian tradition of political leadership.[34] That is, war as an option of national policy cannot be ruled out by legal fiat, and the legalist efforts of this century to do so, by way of renouncing "aggressive war" options, largely constitute a fraud on the public's consciousness and moral concerns. Because the governments of sovereign states are the highest decision-makers, especially if the political institutions of the United Nations are either inoperative or are discounted as partisan, self-serving interpretations of the legal status of controversial uses of force are made. These circumstances are the rule, not the exception. That is, politically congenial uses of force are routinely characterized as "defensive", whereas politically hostile uses of force are condemned as "aggressive". To some extent, this incoherence flows from polemical uses of the law to serve the interests of state power, but to some extent, it also genuinely reflects a "misperception" that follows from the diversity of perspectives of different states, with different accesses to information, and different ideologies, cultures and worldviews.

This pervasive subjectivity in international politics makes it exceedingly dangerous to tie any restraint on methods of warfare to a characterization of the context of the war as "defensive".[35] The extension of the aggression/

[34] See R. Tucker, *Politics as Leadership* (1981) 114-57; and Lifton & Falk, *supra*, note 28, 239-43.

[35] Note that under post-1928 international law, only defensive uses of force in international affairs are "legal". It is also the case that the international law of war is impartial as between the

defense framework to the dimension of nuclear weapons policy is seriously flawed on both conceptual and policy grounds: on conceptual grounds, it regressively merges *jus ad bello* analysis with a determination of relative *jus in bello* rights (that is, it allows the self-styled defending state to use nuclear weapons proportionately and with discrimination);[36] on policy grounds, it weakens the inhibition on the recourse to nuclear weapons, and also dilutes incentives to plan non-nuclear defense strategies.

In articulating the contours of an international law regime responsive to the nuclear age, three goals of policy seem to be paramount: (a) avoiding nuclear war; (b) minimizing crisis instability;[37] and (c) reducing the arms race. These three overriding objectives are phrased so as to take account of the international political setting. Also, they are complementary, but they are not necessarily consistent with one another in all applications. For instance, promoting objective (b) crisis stability, may in certain circumstances require increased defense outlays to maintain an assured invulnerability of retaliatory capabilities to a surprise attack and, hence, represents a setback for objective (c).

Also, each of these objectives requires extensive interpretation to be made operational, and interpretation is necessarily susceptible to a variety of good faith outcomes. One interpreter might argue that the way to avoid nuclear war is to achieve decisive superiority over the other side, because it alone threatens the international *status quo*. Another equally sincere interpreter might contend that only by renouncing all political violence in international affairs is it possible to avoid nuclear war, because participation in any armed conflict contains unacceptable risks of escalation. In effect, this latter position moves in the direction of conceiving the realization of objective (a) as dependent upon the construction of an overall global peace system. Acknowledging these difficulties with the operationalization of these objectives, this framework for a legal regime helps to organize and focus inquiry; it cannot hope to resolve all policy differences, except to the extent that it acts as a value-oriented appeal to a community of scholars and policy-makers to renounce the use of nuclear weapons altogether.

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permissible tactics relied upon by "aggressor" and "defender". In effect, the law of peace (*jus ad bello*) renounces "aggressive" uses of force, while the law of war (*jus in bello*) accepts a shared framework of restraining rules, principles and agreements.

[36] This is the consequence of Eugene V. Rostow's and John Norton Moore's analyses of these issues. For Rostow's view, see (1982) 76 Proc. Am. Soc. Int'l L. (forthcoming). Moore's views can be found in (1983) 9 Brooklyn J. Int'l L. (forthcoming).

[37] That is, minimizing the temptation in a period of heightened international tensions to have recourse to war or to nuclear weapons, either because it looks as if an advantage could be seized or a dangerous vulnerability neutralized; mutuality as between nuclear rivals is better assurance of stability than military superiority, especially forms of superiority that might be nullified or reduced by a surprise attack.

In order to evolve a useful legal framework for nuclear weaponry, account must also be taken of two features of the international political world: a tendency for states to risk virtually any level of self-destruction in warfare in order to avoid military defeat, and a general willingness by states to use military power to secure positions of privilege, power and wealth in human affairs. There is no way to establish a realistic legal regime that is not sensitive to these geopolitical features of international life, as well as to the three previously delineated specific objectives associated directly with nuclear weapons. That is, given the existence of nuclear weaponry, it is difficult to imagine a major state that possesses such weapons reconciling itself to defeat in a conventional war affecting its perceived core interests. The adoption of nuclear weapons prohibitions, in certain forms, could possibly make the outbreak of major warfare more probable in international life, thereby entailing high human costs, and even quite unintentionally creating an increased net risk that nuclear weapons would in fact come to be used.

Furthermore, in contouring a legal regime for nuclear weapons, the starting point must be the basic principles constituting the customary international laws of war. These principles, emphasizing discriminate and proportionate warfare, seem impossible to reconcile with a nuclear weapons regime that is responsive to our overall guidelines for nuclear weapons. That is, the possession of a small number of invulnerable, inaccurate missiles (second-strike weapons) seems at present the best calculated way to minimize the danger of nuclear war, encourage crisis stability and minimize nuclear arms race incentives. With reasonably credible conventional defensive capabilities, and with the formulation of foreign policy goals in restrained terms, the dangers associated with nuclear weapons would be significantly reduced — but there is a major catch. This type of minimization of initial threat rests on the claim of last resort to engage finally in indiscriminate destruction, at least in a post-attack situation where its execution would be vindictive in the extreme. However, if nuclear weapons are reduced in number, while at the same time they are made accurate enough to strike at military targets, then it is difficult to maintain either crisis or arms race stability, because the nuclear weapons retained by both sides could be used for offensive as well as defensive purposes. If restraining notions were seriously implemented, they might not deter high-risk war and foreign policy initiatives because a probability of military targets being destroyed could still be coupled with a projected favorable outcome of a war. Leaders with intense ambitions or great desperation might conceivably be persuaded to gamble on the unwillingness of an attacked enemy to strike back pointlessly with nuclear weapons, or the attacker might even be prepared to absorb some nuclear retaliation in exchange for a prospect of political victory. Because scenario reasoning (projecting hypothetical future situations) is far-fetched, the uncertainties of political behavior in the nuclear age have been allowed to discourage value-oriented breakthroughs on matters of security.

A legal regime responsive to this background must build upon several interrelated aspects of the existing situation: the possession and retention of some nuclear weapons for use in extreme situations; the mutual distrust of adversary states, and a corresponding lack of sufficient confidence in international institutions that disallows any transfer of control over nuclear weapons beyond the level of the sovereign state; and the authority retained by governments to determine for themselves the occasions warranting recourse to the right of self-defense.

Against this background, a beneficial international law regime for nuclear weapons would have to rest on the following considerations:

(a) public support for the idea that *any* actual use of nuclear weapons would violate the international law of war and would constitute a crime against humanity;

(b) public support for the rule that a first use of nuclear weapons, even in a defensive mode in response to or in reasonable anticipation of a prior non-nuclear armed attack, would violate international law and would constitute a crime against humanity;

(c) it follows from (b) that weapons systems (even at the research and development stage), war plans, strategic doctrines, and diplomatic threats that have first-strike characteristics are *per se* illegal, and that those political leaders, engineers, scientists, and defense workers knowingly associated with such "first-strike" roles are engaged in a continuing criminal enterprise;

(d) a definite consensus that second or retaliatory uses of nuclear weapons against cities and primarily civilian targets violate international law and constitute a crime against humanity;[38]

(e) a clear obligation, recognized by all nuclear weapons states and by other states as well, to pursue arms control in the direction of minimizing the role of nuclear weapons in conflict behavior through negotiations in good faith; this obligation is a provision, art. VI, of the

[38] There exists a definite normative tension between the legal framework most likely to minimize the risks of the use of nuclear weapons and the legal framework guiding acceptable uses of political violence. The latter framework is most consistent with a *total* prohibition against nuclear weapons, and secondarily, with a prohibition on any use of them directed at non-military targets. The minimizing framework, in contrast, reserves the option for the most legally unacceptable use as the best practical means to avoid any use, and as well, to eliminate arms race pressures and crisis instabilities. This "tension" expresses the impossibility of "living with" nuclear weapons, and highlights the current tragic reality associated with no longer being able to live without them.

widely-ratified *Non-Proliferation Treaty*,[39] and is embodied in general terms as well in the *Charter* of the United Nations and in a variety of formal resolutions adopted over the years by the General Assembly; and

(f) a definite mandate directed toward citizens to take whatever steps are available to them to achieve a law-oriented foreign policy for their own country, including, as both conscience and good sense dictate, non-violent acts of civil disobedience, and efforts to persuade members of all branches of government to overcome the gap that separates the normative consensus of the public as to the illegality of the use of nuclear weapons from prevailing official policies.

These legal conclusions, taken in conjunction with the background of present political circumstances and the general objectives of a stable world order, underscore the importance of reinforcing the firebreak separating conventional and nuclear weapons. Only by minimizing reliance on nuclear weapons can the destabilizing geopolitical interactions surrounding their possible use be reduced. In this regard, a formal no-first-use pledge, coupled with comprehensive plans for a non-nuclear defense of vital interests, would be the best overall indication that the normative implications of nuclear weaponry are being taken seriously by policy-makers.

The most direct consequence of taking the normative dimension seriously (and law and morality are mutually reinforcing with respect to nuclear weapons), would be to make it "illegal" and "immoral" for a country to seek *any* advantage or positive role for nuclear weapons in relation to national security. From the moral/legal perspective, it is "illegal" to rest national security plans, doctrines or weapons deployments on first-use options or threats, and it is "immoral" for a country to undertake security commitments without developing adequate non-nuclear capabilities. This development of non-nuclear capabilities assumes great importance because no country will accept defeat if that defeat seriously encroaches upon its political independence and territorial integrity. In such a case, it is likely, regardless of the legal status of nuclear weapons, that such weapons would be used, because of overwhelming pressure, if it was thought that their use would alter the outcome of the war, and therefore, rules of prohibition need to be reinforced by making the prohibited activity as unnecessary as possible.

[39] *Treaty on the Non-Proliferation of Nuclear Weapons*, 1 July 1968, 21 U.S.T. 483, T.I.A.S. 6839, 729 U.N.T.S. 161.

Furthermore, there already exist "legal" instruments to moderate the arms race and to convey reassurances to other countries that foreign policy and national security planning are based on an unconditional renunciation of nuclear weapons as legitimate instruments of war. Measures of arms control, such as a mutually verifiable freeze, including a comprehensive test ban treaty, seem essential instruments of this approach.

Finally, so long as nuclear weapons are possessed by states, it is important that their possessor act so as not to make these weapons vulnerable to a surprise attack, a theft or a terrorist attack. Making sure that a nuclear retaliatory capability is resonably secure against enemy attack further helps to prevent international situations arising in which the risks of nuclear war are increased.

Within the framework of the present structure of international relations, law and morality cannot do more than to minimize the dangers of nuclear war and the use of nuclear weapons, assuming that strategic conflict is kept within manageable limits. However, if geopolitical rivalry produces a world war, then there is little reason to be hopeful that nuclear weapons will not be introduced into it, either to win an ongoing war more easily or to avoid losing it. In the end, over time, assurances against the "illegal" use of nuclear weapons will depend upon drastic global reform.[40] A legal regime could never purport to supply unconditional protection. It can only help to establish a series of conditions that would make it less likely that international actors will depart from underlying moral and legal guidelines. In this case, the destructive, even ultimate, consequences of a violation make the task of a legal regime for nuclear weapons unique. Its success will depend upon the internalized values, beliefs and interests of political leaders, military bureaucracies and the public. Constructing such a legal regime will depend upon popular pressure, aided by supportive religious groups and changing cultural perspectives. The survival imperatives of our situation suggest the importance of pushing our own leaders, as much as possible, in the direction of adherence to international law guidelines in foreign policy, especially with respect to strategic doctrine and planning. The need for such a framework could perhaps be usefully formulated as a popular demand for a *Magna Carta* for the Nuclear Age. This call is part of a wider conviction on my part that the citizens

[40] For some perspectives on this issue, see R. Johansen, *Toward an Alternative Security System* (1983) (Princeton — World Policy Institute Study Paper No. 24); and R. Falk, *A Study of Future Worlds* (1975).

of democratic societies have a selfish interest in assuring that their leaders and institutions adhere to a constraining regime of law, as fully in foreign policy spheres as in domestic domains of public policy.[41] Even such a dramatic resetting of the constitutional order as I have been suggesting here can only hope to achieve, at best, a transitional arrangement, a holding operation. The terrible consequences of the potential use of nuclear weapons place enormous burdens upon our preventive efforts, but even beyond these efforts, building a permanent nuclear peace will depend upon the construction of "a warless world".

Conclusion

A haunting question hovers over the foregoing analysis: Is it possible to reconcile *any* reliance on nuclear weapons simultaneously with minimum security functions and with applicable normative traditions, particularly those contained in the international law of war? The legal regime proposed above confines absolutely the role of nuclear weapons to retaliatory uses and even with respect to such retaliations, offers only a very reluctant, tentative and ambiguous endorsement. The possession of the weapons for purposes of threatening retaliation seems like an unavoidable transitional adjustment, but the normative strain emerges as soon as the character of the threat is specified. If retaliation is restricted in advance to a few *isolated* military targets, then the security function of deterrence is undermined, whereas if it is not so restricted then it seems to be exaggeratedly vindictive and indiscriminate in a manner that is most manifestly at odds with the law of war.

The Catholic Bishops' Pastoral Letter is only "a centimetre of ambiguity" away from an unconditional rejection of nuclear weapons. As the final text emerged, it did leave some political space for a continuing reliance on a much narrowed conception of deterrence, at least for now. In effect, a certain degree of normative incoherence must be accepted in both legal and just war settings, in deference to the realities of our present reliance on nuclear weapons, but with the strong proviso that such deference is a temporary

[41] Of course, citizens of non-democratic societies share a similar selfish interest, but realistically, their prior goal, in the nature of a precondition, is to secure for themselves democratic rights. In this regard, the struggle for the democratization of the relations between state and society in the Soviet Union is intimately related to the struggle for the avoidance of nuclear war, yet at the same time, it is partly separable from the preliminary effort needed to construct a legal regime pertaining to nuclear weaponry. This separability arises from the fortunate circumstance 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.

expedient that can be justified even on this qualified basis only if a far stronger effort is made by governments to achieve arms control and nuclear disarmament.[42] If this disarmament effort fails to materialize within this decade, then the burden of persuasion would seem to shift in support of the unconditional prohibition of the threat, use and possession of nuclear weapons, almost regardless of national security claims. The interim position adopted here, in effect, provides governments with a final opportunity to get their normative house in order, by adapting their security policies to an emergent normative consensus that appears to preclude *any* reliance on nuclear weapons.

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[42] For instance, Bishop Maurice J. Dingman is quoted as saying: "We said this country can keep deterrence only if it works vigorously for arms control. If that isn't achieved, I believe we'll take a far stronger stand." *Is the Pastoral Letter on Nuclear Weapons Only a Beginning?*, The New York Times (8 May 1983) E 5.