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NUCLEAR WEAPONS IN INTERNATIONAL LAW

W. MICHAEL REISMAN*

The papers in this symposium have posed three questions which have not been kept distinct. The first question is what is the law in this matter? The second question is what should the law be? The third is how can we go about changing the law so that it will more nearly approximate our preferences in the future? I suggest that we consider each of these questions separately and be careful not to narcotize ourselves into an imagined bliss by transforming only in our own minds preference into prescription. We no more serve the constituencies to which we are committed in doing that, than we would were we to advise a client, whose life or treasure was in jeopardy, what the law ought to be rather than what it is.

Professor Weston paid Professor McDougal and me a very great compliment by using the methods for determining prescriptions that over a number of years we have developed at Yale. In brief, we recommend that observers looking at any process ask themselves whether or not there are expectations of authority and control supporting a particular policy and whether those expectations are, in fact, held by politically relevant actors in that setting.¹ If the answer to these questions is in the affirmative, we think it useful as scholars, and indispensable as practitioners, to conclude that we are now dealing with law, understood not in a documentary but in a socially meaningful sense. An approach based upon such empirically referential tests is particularly necessary in the international system where law does not emerge from predetermined or easily recognizable institutions, and it is not regularly and authoritatively published in collections like the United States Code or the Corpus Juris. The observer and practitioner must select what is law from a massive flow of communications, much of it masquerading as law but no more than just legislatistic babble. For the observer looking at a particular process, the test is: Are the communications here

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1. See Reisman, *International Lawmaking: A Process of Communication*, 1981 PROC. AM. SOC'Y INT'L L. 101; McDougal & Reisman, *The Prescribing Function in the World Constitutive Process: How International Law is Made*, 6 YALE STUD. IN WORLD PUB. ORD. 249 (1980); see also M. McDOUGAL & W.M. REISMAN, *INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE* (1981).

sustained by authority and control and have they created coordinate expectations? The communication Professor Weston would like to find (indeed, I would too) would affirm that the building, storing and use, under any circumstances, of weapons whose consequences are promiscuously horrible beyond the most deranged imagination, are unlawful.² If we use the methods Professor Weston has adopted, I fear we will reach a negative conclusion, or, at the very best, one much more doubtful than the one he wishes to reach.

Professor Weston has not examined the expectations of contemporary elites.³ Instead, he has selected a variety of older documents and subjected them to textual analysis. Would it not be more appropriate to begin one's investigation with the actual perspectives held by elite members in the United States and the Soviet Union? Would it not be more appropriate to infer certain shared expectations from the fact that these elites are frenetically building, stocking and developing contingency plans for the use of these weapons? If we confirm this behavior and the expectations consistent with it, I think it very perilous to insist that we are not dealing with something that is effectively law.⁴ Let us go a step further and examine a polity in which power is widely shared. If we are to identify the expectations of politically relevant actors in that polity, we must extend our focus of inquiry to include many other community members. I suspect you will discover that in the United States, the vast majority of people who have thought about this problem have routinely assumed that the weapons paid for by their taxes are in fact lawful and will and should be used under certain circumstances. This does not mean that everyone in that aggregate is ecstatic about the prospect of using them. (I think it unwarranted and unfair to assume that these people are a collection of Dr. Strangeloves). My impression is that the policy content shared by politically relevant actors in the United States and the Soviet Union is exactly the opposite of what Professor Weston has suggested.⁵ But I emphasize that I have not conducted intensive or mass surveys.

Professor Weston talked about the authority component, but he did not address the communication flow of effective control or control intention—a point Professor McDougal has raised. Let me make one observation. In a decentralized system, without an effective sheriff on whom we can count to secure the implementation of norms, effective control is dispersed among different actors. We determine whether or

2. See Weston, *Nuclear Weapons and International Law: Prolegomenon to General Illegality*, 4 N.Y.L. SCH. J. INT'L & COMP. L. 227 (1983).

3. *Id.*

4. See *supra* text accompanying note 1.

5. See Weston, *supra* note 2.

not there is adequate, effective control to give effect to particular norms by ascertaining whether certain actors have the capacity and will to support those norms through appropriate patterns of reciprocity and retaliation. Dr. Almond pointed out that retaliation is possible only if you have something akin to what your potential adversary has.⁶ Moreover, you must have it when you are suddenly attacked, for nuclear war is a come-as-you-are war. It is ironic and cruel, but there is a Gresham's Law of weapons in international politics: the stability that one seeks in a decentralized system requires the development and maintenance of the very weapon that threatens us and that we would like to eliminate.

The second question is what should the law be? Our most general preference is for a world public order of human dignity in which there is an abundant production and a wide distribution of all the values human beings want;⁷ a public order in which those life opportunities, now available to a relatively small stratum of the world's population, are shared much more generously and democratically.⁸ Such a public order system requires a low expectation of violence or unauthorized coercion.⁹

Alas, that expectation eludes us. Without a centralized method for securing it, what has been gerryrigged is the so-called system of deterrence, already described and discussed at this symposium. In a system of deterrence, nuclear weapons serve a function unique to a very small category of weapons. The function, as Dr. Almond's important paper makes clear, is not to be used or, as our German colleagues would put it with enviable precision, to be "not-used." Their function is to deter, to deter comparable use of the same weapon and to deter the initiation of changes in the political balance between parties so substantial that they would force one party to resort to these weapons because it felt its vital interests were being threatened.

This is one hell of a dangerous and anxiety producing way to maintain minimum order! Strategists have yet to come up with something as effective. We lawyers should certainly contribute what we can. The law should seek to banish these weapons. But, as Dr. Almond has emphasized, doing this will involve looking not simply at the weapon

6. See Almond, *Deterrence Processes and Minimum Order*, 4 N.Y.L. SCH. J. INT'L & COMP. L. 283 (1983).

7. These values include power, wealth, enlightenment, skill, well-being, affection, respect and rectitude. See M. McDUGAL, H. LASSWELL & L. CHEN, *HUMAN RIGHTS AND WORLD PUBLIC ORDER* 84-86 (1980).

8. *Id.*

9. *Id.* at 46-47, 118, 439, 690, 817-19, 858.

but at the entire war system of which the weapon is an integral part.¹⁰ Social systems, economic systems, political systems and personality systems, in addition to the weapon itself, must be changed.

All of us, Americans and Russians alike, wish, in some way compatible with our security, to put this dreadful genie we have released back in the bottle. The third question is how can we go about doing it? Legal fiat will not banish the weapons and their supporting systems. One part of the problem, as a number of papers have pointed out, is the deep reciprocal distrust the superpowers have for each other.¹¹ Even if that distrust is tempered in a period of relative détente, security specialists must continue to be wary. Documents are generally drawn with the expectation that the amicable context prevailing at the time of their conclusion will continue and will sustain the designated behavior in the future.¹² But Professor McDougal has taught us that a critical variable of which to take account in trying to predict future behavior is "crisis," the unanticipated expectation that values critical to an individual or group are at stake in high degree.¹³ The intervention of the variable of crisis on agreements means that the terms of agreement presupposing amity are less and less likely to be followed. Hence, even the negotiation and conclusion of documents that limit future arms or disarm and even the inception of processes toward that end, must be accompanied by a cogent, effective and verifiable regime providing the basic deterrence that the current, plainly unsatisfactory system provides. In addition, it must also ward off future crises likely to rend the security system.

Even if there is no norm prohibiting resort to nuclear weapons,¹⁴ international lawyers, by concerted effort, could contribute to fashioning one. Doctrinal writers have long been recognized as a subsidiary source of international law.¹⁵ Before we undertake that responsibility, however, we must ask ourselves first whether the new norm we are proposing is likely to contribute to the realization of the goals of public order in the context I mentioned earlier. Second, will minimum order be enhanced by symmetrical changes urged on both of the major par-

10. See Almond, *supra* note 6.

11. For an elaboration of this concept, see the other commentaries presented in this issue.

12. See M. McDougal, H. Lasswell & J. Miller, *Interpretation of Agreements and World Public Order*, 63, 262-63 (1967).

13. See McDougal, Lasswell & Chen, *Human Rights and World Public Order: Principles of Content and Procedure for Clarifying Community Policies*, 14 *Va. J. Int'l L.* 387, 390 (1974).

14. See *supra* text accompanying notes 7-8.

15. See *Statute of the International Court of Justice*, art. 38(1)d.

ties? In his paper, Professor Boyle observes that superficially symmetrical relationships may, in terms of the goals sought, be fundamentally asymmetrical.¹⁶ Norms devised to achieve minimum order may have to take that into account.

I agree with Professor Meyrowitz. Many of the basic conceptions on which the norms of the laws of war rest are obsolete.¹⁷ But I do not think they were rendered obsolete in 1945. They began to obsolesce with the French Revolution and the rise of the French Republic. The prototypical modern nation state is one in which citizen-soldiers are regularly recruited from the entire population and in which the entire nation mobilizes to provide an ongoing flow of people and treasure for the war machine. In that situation, the important distinction between combatant and non-combatant begins to blur; the more integrated the people and the war effort become, the harder it is to maintain that distinction. And, of course, the entire doctrine of proportionality, necessity and capacity to discriminate has, at best, strained application to a deterrence system based on nuclear weapons.

16. See Boyle, *Nuclear Weapons and International Law: The Arms Control Dimension*, 4 N.Y.L. SCH. J. INT'L & COMP. L. 257 (1983).

17. Elliot L. Meyrowitz, Adjunct Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University, was a guest speaker at the symposium on Nuclear Arms and World Public Order. For some of the propositions posited by Professor Meyrowitz, see Meyrowitz, *The Status of Nuclear Weapons Under International Law*, 38 NAT'L LAW. GUILD PRAC. 65 (1981).

