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## Book Review: Nuclear Weapons and Law (1984)

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## BOOK REVIEW

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

Although physicians and scientists have been debating the wisdom of nuclear weapons policy for quite a while, the legal community has been conspicuously absent from the debate. Why lawyers have remained quiet, though, is not immediately apparent. Certainly in the past they have contributed actively to the development of a jurisprudence of international legal restraints on war, perhaps most notably in the development of the Nuremberg Principles following World War II.<sup>1</sup> According to the foreword of *Nuclear Weapons and Law*, the editors hope that their collection of essays will stimulate the legal community into joining the debate.<sup>2</sup>

The first twelve essays address the legality of nuclear weapons under international law. In his essay, Richard Bilder<sup>3</sup> provides a general description of the problem and outlines the provisions of nuclear arms limitation agreements to date. Although he rejects the idea that nuclear arms are illegal per se, he outlines useful international legal arguments supporting arms control. Another writer, Dinesh Khosla,<sup>4</sup> warns against any hope that the International Court of Justice might declare nuclear weapons illegal. Instead, he suggests that the role of international law and lawyers is to persuade governments both to take responsibility for their actions and to assume the risk of removing nuclear weapons and their concomitant threat to human society.

Elliot Meyrowitz<sup>5</sup> authored a lengthy summary of traditional international law in an attempt to rebut the idea that international law and the laws of war offer no express prohibition against the use

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<sup>1</sup> See *CRIMES OF WAR* 108 (R. Falk, G. Kolko & R. Lifton ed. 1971).

<sup>2</sup> Many of the essays are based on remarks delivered at the Conference on Nuclear Weapons and Law held at the Nova University Center for the Study of Law in February, 1983.

<sup>3</sup> Professor of Law at the University of Wisconsin Law School.

<sup>4</sup> Associate Professor of Law at the City University of New York Law School at Queens College.

<sup>5</sup> Adjunct Professor of Law at the Benjamin N. Cardozo School of Law of Yeshiva University and vice-chairman of the Lawyers' Committee on Nuclear Policy.

of nuclear weapons. He analogizes a number of treaties and conventions which limit the destructive force of weapons, such as chemical and biological warfare, to cover nuclear weapons. Unlike other weapons, he notes, the effects of nuclear warfighting cannot be limited to the combatant nations. Neutral states would suffer from the environmental effects of nuclear war nearly as much as the belligerents—a clear violation of longstanding respect for the welfare of noncombatant states. He then continues beyond the condemnation of first use of nuclear weapons in war and examines whether the state may use nuclear weapons even in exercising its right of self-defense.

John Norton Moore's<sup>6</sup> brief essay is essentially a rejoinder to the preceding one by Professor Meyrowitz. Professor Moore points out several inconsistencies in Meyrowitz's facts regarding international agreements and treaties on the destructive force of weapons which seem to blunt the forcefulness of the agreements' application to nuclear weapons. Moore fears that calling nuclear weapons illegal would lead to destabilization of the current world situation. Instead, he favors deterrence through the maintenance of a nuclear arsenal steadily reduced by further arms control negotiation between superpowers. In keeping with this theme of deterrence as necessity, Harry Almond, Jr.,<sup>7</sup> examines the interrelationship of law, strategy, deterrence, and defense. In his view, arms control and deterrence do nothing to affect the relations between rivals. Rather, he sees arms control and deterrence simply as a way of maintaining a check and balance on the development of military technology between superpowers. Accordingly, until the rivals can improve their trust of each other, nuclear weapons will remain a fact of life.

In an essay which can be best described as a hybrid of the international and constitutional law aspects of nuclear weapons, Martin Feinrider<sup>8</sup> reviews the history of the incorporation of international law into American law. He surveys the international law which now may be used to limit the use or deployment of nuclear weapons. In addition to the international law previously cited by Meyrowitz, Feinrider cites nuclear weapons as a violation of human rights and

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<sup>6</sup> Walter L. Brown Professor and Director of the Center for Law and National Security and the Center for Oceans Law and Policy at the University of Virginia School of Law.

<sup>7</sup> Professor at the National War College, Washington, D.C. and Adjunct Professor at Georgetown University.

<sup>8</sup> Associate Professor of Law at the Nova University Center for the Study of Law.

the natural law right to survival. He also introduces the reader to the concept of the right to peace as a basic human right, a concept which has received much attention in Europe but has emerged only recently in the United States.<sup>9</sup> Despite his arguments against nuclear weapons, his analysis does not rule out all uses of nuclear weapons. Feinrider shifts the burden of persuasion, however, to nuclear weapons proponents to acquire legal sanction for the remaining uses.

In view of the tremendous destructive power of nuclear weapons, Richard Falk<sup>10</sup> rejects Feinrider's idea that legitimizing some uses of nuclear weapons would create a loophole allowing the rationalization of virtually all uses. Indeed, he urges that approval of the use of nuclear weapons under any type of international law creates an acceptability which will promote nuclear warfighting doctrines. Instead, he suggests that all uses of nuclear weapons be viewed as violating international law, essentially making it illegal to base national security on first-use options or threats of use of nuclear weapons.

Michael Reisman<sup>11</sup> offers a brief caveat to claims of illegality of nuclear weapons. Rather than looking to old cases and texts of the laws of war, Reisman examines the present situation—namely the actions of politicians who are building nuclear weapons and the popular perception that to do so must be acceptable. He sides with Professor Almond's idea that in order to get rid of these weapons, the entire system will have to change. He suggests that a nuclear weapons ban will require not only a treaty that is verifiable in peace but also one that works in a crisis situation.

Burns Weston<sup>12</sup> concentrates on whether nuclear weapons comport with the laws of war. In an exhaustive analysis of the legality of weapons use, Weston examines a wide variety of nuclear warfighting scenarios. He rebuts arguments that humanitarian rules of war do not apply to nuclear weapons. Indeed, he finds that the laws of war do apply and that they severely restrict the use of

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<sup>9</sup> For articles discussing the right to peace, see Morehouse, *The Right to Peace or the Right to Live*, 6 *HOLDSWORTH L. REV.* 120 (1981); Nanda, *Nuclear Weapons and the Right to Peace under International Law*, 9 *BROOKLYN J. INT'L L.* 283 (1983). See also *Symposium — Nuclear Weapons: A Fundamental Legal Challenge*, 9 *BROOKLYN J. INT'L L.* 199-335 (1983).

<sup>10</sup> Albert G. Milbank Professor of International Law and Practice at Princeton University.

<sup>11</sup> Hohfeld Professor of Jurisprudence at Yale Law School.

<sup>12</sup> Bessie Dutton Murray Professor of Law at the University of Iowa College of Law.

nuclear weapons. Continuing in this vein, B.V.A. Roling<sup>13</sup> reviews the right of states to start a war, the laws of war, and the role of international law in arms control and disarmament. He proposes that the United Nations take a more active role in outlining arms control and disarmament agreements. He views the emergence of nuclear weapons as strengthening the need for a total prohibition of war.

The section of international law essays closes with a hortatory tract by Saul Mendlovitz<sup>14</sup> urging lawyers to join with the general public in creating a political climate which will allow the world to begin to move away from nuclear weapons and toward peace. The essays are followed by Carol Roehrendbeck's<sup>15</sup> bibliography which lists materials regarding international law and nuclear weapons. The bibliography is annotated and provides a useful collection of resources for persons wishing to pursue this topic.

The second main section of the book covers nuclear weapons and American constitutional law. The format differs slightly from that of the first section; the essays are all written as responses to an initial essay by Arthur Selwyn Miller.<sup>16</sup> In the lead piece, Professor Miller presents possible constitutional arguments against the use of nuclear weapons. Although he states that the Constitution cannot be used to find nuclear weapons illegal per se, he does find a number of ways in which the Constitution might be brought to bear on the subject. He focuses on congressional war powers, on the power of Congress to punish offenses against the law of nations, on the incorporation of international law into United States law, and on the affirmative duty of government to enact laws which protect its citizens.

Two of the respondents supplement Miller's constitutional arguments with ideas of their own. Aviam Soifer<sup>17</sup> begins his discussion not on the main text of the Constitution but on the preamble's call to secure "the blessing of liberty to ourselves and our posterity." He interprets this passage as morally binding the current generation to preserve the inheritance of those who follow. He also points to the privileges and immunities clause of the fourteenth amend-

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<sup>13</sup> Professor Emeritus of International Law and Polemology (peace research) at the University of Groningen in the Netherlands.

<sup>14</sup> Professor of Law at the Rutgers (Newark) S.I. Newhouse Center for Law and Justice.

<sup>15</sup> Associate Professor of Law and Director of the Law Library at the Nova University Center for the Study of Law.

<sup>16</sup> Professor Emeritus at the George Washington University National Law Center.

<sup>17</sup> Professor of Law at Boston University School of Law.

ment as a promising area for study in protecting the rights of future citizens. According to Milner Ball's<sup>18</sup> essay, the question is not whether nuclear weapons are constitutional; rather he describes them as deconstitutionalizing or anti-constitutional, that is, that the use of them would end law. He urges that lawyers examine the procedural aspects of the deployment and use of nuclear weapons.

Most of the essayists reject Professor Miller's ideas outright. Stanley Brubaker<sup>19</sup> finds that Professor Miller's constitutional arguments are wholly improper for judicial enforcement. He also rejects the applicability of international law since the Supreme Court has stated that Congress has the authority to violate international law and even international treaties. Jack Goldklang<sup>20</sup> continues along this same theme, pointing out that in spite of what is known about the effects at Hiroshima and Nagasaki, Congress has continued to appropriate money for all types of nuclear weapons systems. He also believes that when the President and Congress are acting so closely in concert, international norms stand little chance of being substituted for the decisions of that powerful alliance. William H. Taft IV,<sup>21</sup> responding on behalf of the Department of Defense, dismisses Professor Miller's arguments simply by referring to the article IV provision which calls for the government to protect the states against invasion. Iredell Jenkins<sup>22</sup> bases his argument against constitutional strictures on the observation that Congress cannot remove all the threat presented by nuclear weapons throughout the world. He criticizes Professor Miller for failing to provide any specified action the Supreme Court might pursue in telling Congress how to eliminate this threat. He questions the wisdom of involving the Court in foreign policy, a realm traditionally occupied by the President and Congress. Further, he doubts whether even a favorable ruling by the Supreme Court would have public approval and moral impact in view of the decline of the moral authority of the Court in the public's eyes. Although Fletcher Baldwin, Jr.,<sup>23</sup> would like to see the issue of nuclear weapons use argued in the Supreme Court, he describes that body as "ill-equipped intellectually, procedurally, and emotionally to hear

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<sup>18</sup> Harmon W. Caldwell Professor of Law at the University of Georgia School of Law.

<sup>19</sup> Assistant Professor of Political Science at Colgate University.

<sup>20</sup> Attorney-Advisor with the Office of Legal Counsel of the United States Department of Justice.

<sup>21</sup> General Counsel of the Department of Defense.

<sup>22</sup> Professor Emeritus of Philosophy at the University of Alabama.

<sup>23</sup> Professor of Law at the Spessard T. Holland Law Center at the University of Florida.

this type of case which would require creative thinking to an extreme degree.”

Two essayists focus on the war powers of Congress. Dean Alfange, Jr.,<sup>24</sup> suggests that there is no guarantee that the Supreme Court would be any better or more responsive than the Congress or the President in starting the turn away from nuclear weapons. Indeed, he believes that if the Court should find that any particular use of nuclear weapons is legal, the debate would essentially end. He reasons that because Congress has the power to declare war under the Constitution, that body has the power to select the weapons. Rather than go to the Court before there has been a failure in the legislative process, he favors an examination not of the constitutionality but of the wisdom of our nuclear weapons policy. Thomas Frank<sup>25</sup> provides a useful analysis of the constitutional division of war powers between the President and Congress. The gray area he finds regarding the concurrent powers may allow Congress to control the deployment and use of nuclear weapons in the same way as it has controlled troop deployment in the past.

Although most of the essayists reject Professor Miller's constitutional analysis in whole or in part, most of them realize the importance of stimulating public interest and involvement in the policymaking process. Ovid Lewis<sup>26</sup> ultimately puts the burden on the public to make the policy decision. Arval Morris<sup>27</sup> sees Professor Miller's contribution as being the stimulation of public interest and discussion rather than a test case in the Supreme Court. Many of the essayists express the hope that lawyers will join the debate and use their skills to effect a change in policy. Professor Miller's reply to the essays is that the Constitution should be seen as a living document capable of reinterpretation by each generation. Additionally, he warns that his arguments should not be dismissed as merely “political” since every decisionmaking body is bound up in politics, including the Supreme Court.

The final two essays in the book concern the environmental and medical effects of nuclear war. Both are good summaries but are much too brief to offer very much detail.<sup>28</sup> An annotated bibliogra-

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<sup>24</sup> Professor of Political Science and Acting Chancellor at the University of Massachusetts.

<sup>25</sup> Professor of Law at the New York University School of Law.

<sup>26</sup> Dean and Professor of Law at the Nova University Center for the Study of Law.

<sup>27</sup> Professor of Law at the University of Washington School of Law.

<sup>28</sup> For greater details about the environmental and medical effects of nuclear war, see P. EHRLICH, C. SAGAN, D. KENNEDY, & W. ROBERTS, *THE COLD AND THE DARK* (1984) (discussing

phy similar to the one in the international law section would have benefited the readers.

Professor Miller urges the reader to view these essays not as definitive works but as an attempt to encourage the public in general and lawyers in particular to examine the ways in which they think about nuclear weapons. Selections from the book would be very useful for classroom discussions in international law and constitutional law courses both in law schools and in history and political science programs. Whatever the flaws may be in its reasoning, the book edited by Professors Miller and Feinrider provides the opening for a new dialogue on nuclear weapons and the law.

*Dorinda G. Dallmeyer\**

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the concept of "nuclear winter"); S. GLASSTONE & P. DOLAN, *THE EFFECTS OF NUCLEAR WAR* (3d ed. 1977).

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