International Law as Law of the Land: Another Constitutional Constraint on Use of Nuclear Weapons.

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Abstract

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KEYWORDS: weapons, nuclear, international law
Introduction

Concern now focuses on the threat to humankind posed by nuclear weapons to an extent not seen since the days of the Ban-the-Bomb movement of the 1950s. During the past several years, millions of people have taken to the streets in North America and Europe to express this concern. Now, in the United States, physicians, scientists and lawyers are banding together in their own professional organizations to concentrate energies and expertise on this, the greatest problem of our age.

As part of the legal community's effort to address issues presented by nuclear weapons, Professor Arthur S. Miller has written a thought-
ful and thought-provoking essay exploring, in a preliminary way, constitutional considerations relevant to American nuclear weapons strategy. In the process of examining implications of the President's Article II responsibilities, Professor Miller asks, "is international law a part of the corpus of laws that the President must faithfully execute?" The answer is, most assuredly, yes.

International law is part of the law of the United States. It binds the United States through its constitutional incorporation into domestic law, and also in its own right, as a self-contained legal system functioning independently of municipal law mechanisms of implementation and enforcement. Substantively, international law binding upon the United States already prohibits the aggressive threat or use of nuclear weapons and by treaty makes illegal a significant number of other uses of nuclear weapons. Additionally there are other evolving international law limitations and prohibitions relevant to nuclear weapons, and, as they crystallize, they will similarly constrain United States nuclear options. International law thus affects the legality of United States nu-

6. Id. at 33.
7. Paust, The Seizure and Recovery of the Mayaguez, 85 YALE L.J. 774, 803 n.131 (1976) ("the President is required to execute treaty and customary obligations faithfully both at home and abroad"). See Paust, Is the President Bound by the Supreme Law of the Land?—Foreign Affairs and National Security Reexamined, 9 HASTINGS CONST. L.Q. (forthcoming 1982). Contra, L. Henkin, FOREIGN AFFAIRS AND THE CONSTITUTION 221-22 (1972) ("the Constitution does not forbid the President (or the Congress) to violate international law"). For a well-reasoned critique of Henkin's thesis, however, see Paust, 9 HASTINGS CONST. L.Q., supra, at . For an examination of domestic law implications for the United Kingdom of the international illegality of nuclear weapons see Background Paper, Nuclear Weapons and the Law, 5 ST. RESEARCH BULL. (No. 31) 170 (1982).
8. U.N. CHARTER art. 2, para. 4. See infra note 55 and accompanying text.
9. See infra notes 33-41 and accompanying text.
10. See infra notes 43-80 and accompanying text.
clear strategy directly and as another dimension of the constitutional restraints outlined by Professor Miller.

I. International Law as Law of the Land: An Historical Overview

International law was part of eighteenth century English common law received into American law. State courts applied it prior to adoption of the Constitution, and it was thoroughly familiar to participating legal scholars, Blackstone and Lord Mansfield among them, “[W]here the individuals of any state violate [the Law of Nations], it is then the interest as well as the duty of the government under which they live, to animadvert upon them with a becoming severity, that the peace of the world may be maintained.” 4 W. BLACKSTONE, COMMENTARIES 68 (1st ed. 1765-69) (emphasis added). For other examples of Blackstone’s writing on this subject, see 1 W. BLACKSTONE, COMMENTARIES 263-64 (1st ed. 1765-69); 3 W. BLACKSTONE, COMMENTARIES 69, 108 (1st ed. 1765-69); 4 W. BLACKSTONE, COMMENTARIES 67-73 (1st ed. 1765-69).


The Act of Anne of 1708 recognized that arrest of an ambassador pursuant to the suit of creditors was “contrary of the Law of Nations” and proceeded to avoid all such suits. Blackstone wrote that the Act was “not to be considered as introductive of any new rule, but merely as declaratory of the old fundamental constitutions of the kingdom; without which it must cease to be a part of the civilized world.” 4 W. BLACKSTONE, COMMENTARIES 67 (1st ed. 1765-69). Lord Chancellor Talbot, in Barbuits Case in Chancery, 25 Eng. Rep. 777, 777 (Ch. 1735), wrote that the Act was “only declaratory of the antient universal jus gentium,” and Lord Mansfield agreed, observing that the Act of Anne did not vary from international law because “[t]his privilege of foreign ministers . . . depends upon the law of nations,” Triquet v. Bath, 97 Eng. Rep. 936, 937, 3 Burr. 1478, 1480 (K.B. 1764).


pants in the Constitutional Convention. The Framers not only knew common law writings upon the subject, but were also well schooled, as was normal for educated men of their times, in the treatises of such great international law scholars as Grotius, Pufendorf, and Vattel.

What little controversy concerning international law existed during the Constitutional Convention came from the inevitable intertwining of its incorporation with the difficulties of dividing powers between national and state authorities, and between the various branches of the proposed national government. The Constitution finally assigned exclusive responsibility for international relations to the federal government, divided it among the three branches, and specified that, in addition to the Constitution itself and federal statutes, “all Treaties made, or which shall be made, . . . shall be the supreme law of the land.”

Id. at 116.

13. See, e.g., The Federalist No. 3, at 15 (J. Jay) (Bourne ed. 1947). The Federalist No. 80, at 112, 114 (A. Hamilton) (Bourne ed. 1947); No. 83, at 144 (A. Hamilton) (Bourne ed. 1947); No. 82 (A. Hamilton) (Bourne ed. 1947). See also Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 451 n.12 (1964) (White, J., dissenting); W. Solberg, The Federal Convention and the Formation of the Union of the American States (1979). The participants in the Convention had a knowledge of contemporary legal thought. . . . It was axiomatic among them that the Law of Nations, applicable to individuals and to states was an integral part of the law which they administered or practiced. . . . Whenever in terms or by implication they spoke or wrote with reference to Law of Nations, they were indulging no mere flight of hopeful rhetoric. . . .

Dickenson, supra note 11, at 35-36.


16. U.S. Const. art VI, cl. 2. Additionally, the Constitution provides that the President shall have the Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur; . . . shall nominate, and by and with the Advise and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls. . . . [art. II, § 2, cl. 2;] shall receive Ambassadors and other public Ministers. . . . [art. II, § 3; and] shall be Commander in Chief of the Army and Navy of
Chief Justice John Marshall little doubted that all international law, no matter what its source, had been incorporated into the law of the United States. American judicial decisions of the last 190 years generally confirm Marshall's understanding of the place of the law of nations in American law. The simplicity and clarity of early court decisions support Marshall's view that international law is part of American law.

Congress has the power to establish Armies, raise and support Armies, and make Rules for the Government and Regulation of the land and naval Forces.

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to all Cases arising between a State and the Citizens of another State; to all Cases between one State and Citizens of another State; to Controversies between a State and foreign States, Citizens or Subjects.

17. "Marshall accepted the binding force of international law upon courts of the United States with no apparent difficulty. . . ." B. Ziegler, The International Law of John Marshall 5 (1939). See, e.g., the following decisions by Marshall: The Antelope, 23 U.S. (10 Wheat.) 66, 120 (1825) ("[T]he law of nations . . . which has received the assent of all must be the law of all . . . "); The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815) ("Until such an act be passed, the court is bound by the law of nations, which is a part of the law of the land. . . . "); Rose v. Himely, 8 U.S. (4 Cranch) 241, 277 (1808) ("[T]he law of nations is the law of all tribunals . . . "); Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of congress ought never to be construed to violate the law of nations, if any other possible construction remains. . . . ").

decisions, however, has been lost as the question of the domestic role of
the law of nations became increasingly complicated by other legal is-
issues, including the allocation of competence between national and state
governments, the political question doctrine, the self-execution doc-
trine, and the division of foreign affairs powers among the President
and the houses of Congress.

The general principle that international law is part of United
States law, however, has survived even the chauvinism of manifest
destiny, the banality of American legal positivism, and the arrogance of
power that came with American twentieth century global hegemony.
Unfortunately, most of the present generation of American lawyers and
legal scholars fail to understand the role of international law within

504 (D.N.J. 1978); Sociedad Nacional de Marineros de Honduras v. McCulloch, 201
F. Supp. 82, 80 (D.D.C. 1962). See also Paust, Litigating Human Rights in U.S.

the absence of an effective federal extradition treaty the governor of Vermont allowed a
Canadian resident to be extradited to Canada from Vermont; the Court refused to hear
the case because the Justices were equally divided on the meaning of the "Agreement
generally, L. Henkin, supra note 7, at 227-49.

20. See generally, L. Henkin, supra note 7, at 208-16; Gordon, American
Courts, International Law and "Political Questions" Which Touch Foreign Relations,
14 Int'l L. 297 (1980); Henkin, Is There a "Political Question" Doctrine?, 85 Yale
L.J. 597 (1976); Wechsler, Toward Neutral Principles of Constitutional Law, 73
(1918) ("[C]onduct of the foreign relations of our Government is committed by the
Constitution to the Executive and Legislative—the political—Departments of the
Government, and the propriety of what may be done in the exercise of this political
power is not subject to judicial inquiry or decision.").

State, 38 Cal. 2d 718, 242 P.2d 617 (1952). See generally L. Henkin, supra note 7, at
156-66. For a discussion of self-execution in the context of human rights treaties, see
Feinrider, Extraterritorial Abductions: A Newly Developing International Standard,
14 Akron L. Rev. 27, 45 n.121 (1980).

22. "[T]he constitution is especially inarticulate in allocating foreign affairs pow-
ers; . . . a particular power can with equal logic and fair constitutional reading be
claimed for the president or for Congress. . . ." L. Henkin, supra note 7, at 90. See
generally T. Franck & E. Weisband, Foreign Policy by Congress 135-62 (1979);
Feinrider, America's Oil Pledges to Israel: Illegal But Binding Executive Agreements,
American law; unlike their predecessors and members of the legal profession of other nations, they rarely study it.23 The significance of international law is lost upon this generation for whom American international political, economic and military power is a ready substitute. Nevertheless, as the world grows smaller and American dominance grows weaker, the relevance of international law may be learned anew.

II. The International Dimension

International law is a law of consent and consensus. The existence of consent given by sovereign nations is demonstrated by treaty, custom and general principle—the primary sources of international law.24 In the era of the United Nations Charter, when multilateral treaties are common,25 international debate regular, and global communication rapid, the process of achieving agreement creating international law is

23. "[I]t is really only in the past two decades that doubt has been cast on the propriety of judicial invocation of international legal norms." Gordon, supra note 20, at 309.

24. The Statute of the International Court of Justice, generally recognized as the most authoritative contemporary statement of the sources of international law, directs that the world court shall apply:
   a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
   b. international custom, as evidence of a general practice accepted as law;
   c. the general principles of law recognized by civilized nations;
   d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

The Statute of the International Court of Justice, at art. 38(1). Article 59 of the Statute of the International Court of Justice provides that "The decision of the Court has no binding force except between the parties and in respect of that particular case."

A recent International Court of Justice case (Nuclear Tests Case—Australia v. France, 1974) and recent state practice (see infra note 41), suggest that even unilateral statements by national representatives may be sources of international obligations.

potentially quicker than in times past. Further, the substance of international law is far greater than in times gone by, reaching nearly all areas of concern to the law. At a time when the globe continues to shrink daily, respect for and adherence to international law is the indisputable prerequisite for international peace and security.

International law is explored and relied upon not only in international tribunals and fora, but also in the courts and legislative chambers of the many nations of the world. This is a function of the fact that at its present state of development international law still, for the most part, relies upon municipal authorities for its enforcement. This, however, does not mean that municipal determinations of the content of international law define international obligations. To the contrary, international law is ultimately determined according to its own sources. If it were otherwise, a law of nations would be an impossibility, drowned in the parochial and often self-serving views of the world's nations.

If a rule of international law exists, it is binding upon the United States. International law, of course, protects against easy imposition of obligations upon a nation without its assent. Once that assent is given, however, or once a peremptory norm is created, binding international obligations exist.

27. International agreements now deal with subjects as diverse as human rights, exploration of the moon, uses of outer space, patents, trade and tariffs, settlement of boundary disputes, arms limitation, protection of non-combatants and civilians during time of international and non-international armed conflict, preservation of the environment, exploration of Antarctica, assignment of radio broadcast frequencies, etc.
28. This is not to prejudge whether any particular norm has risen to the level of a rule of international law, nor to minimize the role of the United States as an important actor upon the global scene whose conduct is watched carefully for evidence of relevant state practice by students of international law.
29. Treaties to which the United States is a party, according to the principle pacta sunt servanda, are binding. Though subsequent inconsistent United States legislation may negate the incorporation of treaties or customary rules of international law into national law under the last in time doctrine, domestic law may likewise be negated by subsequent inconsistent treaties or customs. RESTATMENT SECOND OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 135(1) (Tent. Draft No. 1, 1980) (and Reporter’s notes 1 & 6); see Murphy, Customary International Law in U.S. Jurisdiction—A Comment on Draft Restatement II, INT’L PRACTITIONER’S NOTEBOOK (No.
The Judgment at Nuremberg demonstrated the extent to which the international community ascribes individual liability to government officials for breaches of serious international obligations. As a party to the charter which created the Nuremberg Tribunal, the United States committed itself to the international rule of law, a commitment reaffirmed by its ratification of the United Nations charter. Certainly the rule of international law is as binding upon the United States and its government officials as it was binding upon Nazi Germany and the German leaders brought to trial by the Allied Powers.

III. The Limits on and Potential of Law

Before proceeding to an analysis of international legal norms concerning nuclear weaponry, we should first consider of what utility international law can be in the face of nuclear weapons; that is, how might international law affect future use or plans for future use of nuclear weapons? Though demonstration of the illegality of nuclear weapons will not in itself determine the nuclear weapons question or prevent policy planners from detailing conditions of future nuclear weapons use, doctrinal inquiry is far from mere self-delusion.

International law, it is true, has generally not had enforcement mechanisms other than the domestic machinery provided by nation-states, its traditional subjects. Future international criminal law punishment of nuclear weapons users, however, could occur, based on the Nuremberg precedent, but even this would not ensure the efficacy of international legal norms. No law, no matter what its mechanism for enforcement, can prevent illegal behavior other than by threat of negative after-the-fact consequences. The need for post facto punishment reflects the inherent inadequacy of all law as an absolute deterrent to proscribed behavior. This would be as true of the international law basis of a Nuremberg-type trial of those responsible for nuclear aggression as it is of the state penal code under which a murderer is brought before some local trial court. Moreover, the nuclear apocalypse, should it ever come to pass, might well preempt forever all possibility of after-

20) 17 (Oct. 1982). No matter what the domestic effect of subsequent legislation, however, the international obligations of the United States emanating from treaty or custom remain in force.
the-fact legal consequences, making resort to law futile.

All law, however, receives whatever power it has, not primarily from its threatened enforcement, but from the normative consensus underlying it. In a democracy, according to theory, policy-makers and members of the polity alike share in this consensus;\textsuperscript{30} in an authoritarian or totalitarian society the leadership can only retain power by not straying \textit{too far} from the views of those below. Consensus and law, through an interactive process, help create and strengthen each other, thus effectively shaping behavior. Despite the elitist assumptions normally associated with governance and the present nation-state system, consensus and law—even on the international level—can be built from the bottom up. In fact, given the failure of the world’s leaders to respond effectively to the challenge of nuclear weapons, we may have no choice but to rely on the efforts and consciousness of the people of the United States, the Soviet Union, and all other nations.\textsuperscript{31} International law, and its attempted implementation through domestic legal systems which incorporate it, can effectively assist the popular movement against nuclear weapons.

International law can help limit or even prevent future use of nuclear weapons by defining considerations of policy-makers, swaying public dialogue, providing ammunition for anti-nuclear populist movements, and demonstrating to all willing to listen the complete incompatibility of nuclear weaponry with virtually the entire thrust of the post-World War II effort to create structures and norms supportive of international peace and security. Should these ends be accomplished, they could well become means to the creation of law, and no small feat will have been done. Enforcement of international proscriptions of nuclear weaponry may then prove unnecessary in view of a popular anti-nuclear consensus globally reached.

\textsuperscript{30} See generally Paust, The Concept of Norm: Toward a Better Understanding of Content, Authority, and Constitutional Choice, 53 \textsc{Temple L. Q.} 226 (1980). For an interesting view of the implications of nuclear weapons for democracy, see Falk, Nuclear Weapons and the End of Democracy, 2 \textsc{Praxis Int’l} 1 (1982).

IV. International Law and Nuclear Weapons

Analysis of the international legality of nuclear weapons must take into account the complexities of reality. Nothing in fact or law justifies the a priori lumping together, into one neat conceptual category, of all types of nuclear weapons and all their possible uses. Defensive surgical use of a low-yield clean tactical weapon against a clearly military target in an isolated geographical region with low population density, for example, must be viewed, initially at least, as different from strategic first-use of a multi-megaton dirty bomb against a major urban population center. A complex analytic task must be undertaken before we can conclude that all uses and types of nuclear weapons are subject to the same proscriptive norm of international law. Here, the goal is simply to make a small contribution toward accomplishment of that task.

At present no treaty explicitly prohibits all use of nuclear weapons. It is also probably correct to say that, as yet, no rule of customary international law prohibits all use of nuclear weapons. Nevertheless, a variety of treaties, evidencing global disapproval, explicitly outlaw or limit a significant number of nuclear weapon uses.

By treaty, international law prohibits nuclear weapons deployment or use in Antarctica, Latin America, earth orbit, outer space and on
celestial bodies, and deployment on the seabed beyond the twelve-mile limit of national territorial seas. Further, more than one hundred nations have subjected themselves to a rule of international law prohibiting possessors of nuclear weapons and nuclear weapons technology from transferring such weapons or technology to non-nuclear weapons nations. Further yet, states may not even test nuclear weapons in outer space, under water or within the earth’s atmosphere. In addition, the United States and the Soviet Union have concluded a series of bilateral agreements designed specifically to reduce the risk of accidental or avoidable military use of nuclear weapons during any confrontation between the two superpowers, and also to limit the number of states).

35. Treaty of Tlatelolco (Latin American Nuclear Free Zone Treaty), Feb. 14, 1967, 634 U.N.T.S. 281 (ratified, as of Nov. 15, 1982, by 24 states; Argentina and Cuba are the only Latin American states not party to this treaty, and Argentina has signed but not yet ratified it).


nuclear weapons allowed to each.\textsuperscript{41}

In view of these substantial restrictions on nuclear weaponry explicitly imposed by conventional international law, what remains to be explored are ways in which uses of nuclear weapons still unaddressed by treaty may be subject to implicit legal constraints emanating from the structures and norms of international law generally. In the present context, the result of such examination leads to the conclusion that a rule of customary international law outlawing nuclear weapons \textit{per se} is currently in the process of being created.\textsuperscript{42}

A. The Lawyer’s Committee Analysis

In the most well-developed analysis currently available,\textsuperscript{43} members of the Consultative Council of the Lawyers’ Committee on Nuclear Policy rely heavily on the laws of war,\textsuperscript{44} Nuremberg principles,\textsuperscript{45} Gen-


\textsuperscript{42} Law, as Professor Thomas Franck has pointed out, is “congealed politics.” T. FRANCK AND M. MUNANSANGO, \textit{THE NEW INTERNATIONAL ECONOMIC ORDER: INTERNATIONAL LAW IN THE MAKING?} 1 (UNITAR Policy and Efficacy Study No. 6, 1982). Unfortunately, the world social order has only begun the “congealing” necessary to overcome the cultural lag between norm and technology that has thus far re-


\textsuperscript{44} E.g., the St. Petersburg Declaration, (1868); the 1889 Hague Declaration Respecting Asphyxiating Gases; the Hague Conventions of 1907, arts. 22, 23(a) and
eral Assembly recommendations (resolutions), and a policy analysis of international law. They convincingly argue international law now limiting war-making by nations equally applies to nuclear war-making, and "any threat or contemplated use of nuclear weapons is contrary to the dictates of international law, and constitutes a crime of state... [the continuation of which] should be enjoined by judicial bodies and opposed by citizens and nongovernmental organizations." Elliot L. Meyrowitz, Vice-Chairperson of the Lawyers' Committee sets forth this analysis in greater detail elsewhere in this issue of Nova Law Journal, thus obviating the need for lengthy discussion here.

On the basis of the Lawyers' Committee analysis we can conclude that international law prohibits, at a minimum, those uses and kinds of nuclear weapons violative of the binding principle of proportionality applicable to all warfare and weapons. This general principle of humanitarian law requires that "[b]elligerents shall not inflict harm on their adversaries out of proportion with the object of warfare, which is to destroy or weaken the military strength of the enemy." Proportional-

23(e) of the regulations annexed thereto and the famous "de Martens" preambular clause; the Treaty of Versailles (1919), art. 171; the Geneva Gas Protocol of 1925; the four Geneva Conventions of 1949; and, the 1977 Protocol on Humanitarian law Applicable to Armed Conflict, Additional to the Geneva Conventions of 1949. See R. Falk, L. Meyrowitz & J. Sanderson, supra note 43, at 21-33.

47. R. Falk, L. Meyrowitz & J. Sanderson, supra note 43, at 78.
48. See Meyrowitz, supra note 43.
50. J. Pictet, The Principles of International Humanitarian Law 30 (undated; available from the International Committee of the Red Cross). See International Committee of the Red Cross, Some International Red Cross Conference Resolutions and ICRC Statements on the Protection of Civilian Population and on Weapons of
ity, and its correlate providing that "[b]elligerents do not have unlim-
ited choice in the means of inflicting damage on the enemy," have
spawned three binding principles of humanitarian law proper to the
rules of war:

[(1)] [b]elligerents will leave non-combatants outside the area of
operations and will refrain from attacking them deliberately.;
[(2)] [a]ttacks are only legitimate when directed against military
objectives, that is to say whose total or partial destruction would
constitute a definite military advantage.; and
[(3)] [w]eapons and methods of warfare likely to cause excessive
suffering are prohibited.

Nuclear weapons, many of which have massive destructive capabilities,
long-lasting environmental and genetic effects, and a unique capacity
for indiscriminate devastation, are more likely than other weapons to
violate proportionality and the three principles derived therefrom. To
the extent that certain uses of nuclear weapons would violate these
principles, international law, as it exists today, prohibits them.

B. Charter Restraints on Nuclear Weapons

Article 1 of the Charter of the United Nations, the preeminent
international legal document of our time, makes clear that the raison
d'être of the United Nations is, first and foremost, "to maintain interna-
tional peace and security." The preamble of the Charter reminds us

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51. J. PICTET, supra note 50, at 32.
52. Id. at 52-55.
53. U.N. CHARTER art. 1. Article 1, in relevant part, provides;
The Purposes of the United Nations are:

(1) To maintain international peace and security, and to that end: to
take effective collective measures for the prevention and removal of threats
to the peace, and for the suppression of acts of aggression or other
breaches of the peace, and to bring about by peaceful means, and in con-
formity with the principles of justice and international law, adjustment or
settlement of international disputes or situations which might lead to a
breach of the peace;

(2) To develop friendly relations among nations based on respect for
the principle of equal rights and self-determination of peoples, and to take
that the Organization was brought into being "to save succeeding generations from the scourge of war," and no scourge could be greater than the one threatened by military use of nuclear weapons.

The article 2(4) prohibition of aggressive war forbids use of nuclear weapons as part of an aggressive war just as it forbids aggressive use of other weapons. Article 51, however, goes further and prohibits even certain defensive uses of nuclear weapons because of their unique capacity for mass destruction. The Charter recognizes the inherent sovereign right of self-defense against armed attack, yet it further provides that the right of self-defense will remain unimpaired by Charter obligations only "until the Security Council has taken measures necessary to maintain international peace and security." Article 51 also requires

other appropriate measures to strengthen universal peace.

54. U.N. CHARTER preamble. The preamble reads as follows:

WE THE PEOPLES OF THE UNITED NATIONS DETERMINED
to save succeeding generations from the scourge of war, which twice in our life-time has brought untold sorrow to mankind, and
to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and
to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and
to promote social progress and better standards of life in larger freedom,
AND FOR THESE ENDS
to practice tolerance and live together in peace with one another as good neighbours, and
to unite our strength to maintain international peace and security, and to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and to employ international machinery for the promotion of the economic and social advancement of all peoples,
HAVE RESOLVED TO COMBINE OUR EFFORTS TO ACCOMPLISH THESE AIMS.

55. U.N. CHARTER article 2, paragraph 4 reads as follows:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

56. U.N. CHARTER art. 51.
that self-defense measures taken before the Security Council becomes seized of a conflict "shall not in any way affect the authority and responsibility of the Security Council . . . to take at any time such action as it deems necessary in order to maintain or restore international peace and security." This apparently further limits the number of situations in which nuclear weapons could lawfully be used. For example, a nuclear attack on New York City resulting in destruction of United Nations headquarters would, to say the least, affect negatively the authority and responsibility of the Security Council in violation of article 51. Similarly, nuclear incineration of Moscow or Washington, D.C., or the capital of any permanent or non-permanent member of the Security Council also would violate the letter and spirit of article 51.

The article 51 limited right to self-defense, and the rest of the United Nations Charter, thus tell us that though the authors of the Charter knew the article 2(4) prohibition of aggressive war would likely be violated, they also envisioned a bottom-line limitation on war-making in the name of self-defense: the peace-making and peace-restoring machinery of the United Nations must always remain available to serve the needs of humankind. The Charter, in article 2(3), explicitly imposes upon states the duty to respect this bottom line. Any irreparable interference with the functioning or existence of international structures of peace would violate criminally the very object and pur-

Article 51, in full, provides that:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

See also U.N. Charter article 2, paragraph 3 which requires that "all Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."

57. U.N. Charter art. 51.

58. Is there anyone who would argue, should the analysis presented in the text be correct, that nations "merely" members of the General Assembly would remain legally unprotected against nuclear attack?

pose of the United Nations Charter; cynicism concerning the likelihood of effective U.N. action would be no defense. No head of state could violate this international law bottom-line without having need to fear a Nuremberg-type trial.\textsuperscript{60} It is inconceivable that the United States Constitution would allow the President to engage in nuclear crimes against the international structures of peace. Consequently, both international and United States domestic law prohibit at least strategic weapons aspects of United States "flexible response" strategy, which provides for escalating first-use of nuclear weapons in the event of Soviet conventional forces attacks in Europe.

C. The Human Rights/Natural Law Right to Survival

War is the ultimate, albeit irrational, act of sovereignty. It is therefore appropriate to look to international law restraints on sovereignty for possible limits on the ultimate act of war—nuclear attack. International human rights law may well serve as a fertile source for such limits on state nuclear war-making powers; human rights law has otherwise been responsible for the most significant limitations upon the sovereignty of states within the world order of the United Nations era. Since the unanimous adoption by the General Assembly of the Universal Declaration of Human Rights in 1948,\textsuperscript{61} numerous treaties of a universal, regional or specialized character have established limitations on the ways in which a national government can (mis)treat its

\textsuperscript{60} Of course, if nuclear war occurs there may well be no survivors to conduct the trial.

own citizenry. Over the last thirty years these treaties have been the subject of more than three hundred fifty separate acts of ratification, changing dramatically the very conceptualization of international law as a law only of nations. Now, individuals too can be subjects of, and direct recipients of rights under international law. Inherent in this development has been recognition that at the heart of all government and law, whether on the international or municipal level, exists a core set of values and rights protecting humankind which emanates from natural law.

The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights both speak of the "inherent dignity" of the human person and the "inalienable rights of all members of the human family." The Preamble to


64. See infra notes 65-74 and accompanying text.


66. See supra note 65.
The International Convention on the Elimination of All Forms of Racial Discrimination states that the United Nations Charter “is based on the principles of the dignity and equality inherent in all human beings,” and, repeating the language of the Universal Declaration, concludes “that all human beings are born free and equal in dignity and rights.” The American Convention on Human Rights recognizes that “the essential rights of man are not derived from one’s being the national of a certain state, but are based upon the attributes of the human personality.” Language such as this indicates comprehension of a natural law basis for human rights, and, when incorporated into treaties, evidences both the state practice and opinio juris necessary for creating

The common preambular language of the two covenants, in relevant part, reads as follows:

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights. . . .

68. Id. (emphasis added).

The language quoted in the text at notes 65-70 is, admittedly, preambular language. Article 31 of the Vienna Convention on The Law of Treaties, supra note 63, however, provides that a preamble is to be considered part of a treaty’s text and is among the primary sources for treaty interpretation. Cf. Miller, supra note 5, at 27-29 (analysis regarding the substantive import of the preamble to the United States Constitution).
customary international law.71

Surely, if individuals have inherent and inalienable natural rights superior to the positive international law rights of sovereign states, then so does humankind, if only as holder of the aggregate of rights belonging to its individual members.72 The superiority of individual and collective natural rights over positive state rights only makes sense if individual and collective survival is assured. Individually and collectively, then, we all have the right not to have our survival threatened by states

71. To establish that a norm has become customary international law it is necessary to demonstrate the existence of a substantial number of states acting in conformity with the norm and that those states were in conformity because of a belief on their part that their behavior was required by law (opinio juris). Here, the norm is one providing that individuals have natural rights limiting the sovereign rights of states. The voluntary subordination of sovereign rights to human rights through the ratification of treaties, (see supra note 62) is state practice, and the preambular language of these treaties is clear evidence of opinio juris, that is, that the states ratifying them were motivated by the belief they were required to do so by certain preexisting “inherent,” “inalienable” “essential” rights, “attributes of the human personality” belonging to beings “born free and equal in dignity and rights.” See supra notes 65-69 and accompanying text.

The argument for illegality of nuclear weapons presented here should be distinguished from the one Eugene Rostow, Director of the United States Arms Control and Disarmament Agency, was presumably attempting to rebut at the Panel on Strategic Deterrence and Nuclear War of the 1982 Annual Meeting of the American Society of International Law. Rostow, in support of his argument that international law does not prohibit nuclear weapons per se, cited The Antelope, 23 U.S. (10 Wheat.) 66 (1825). See Panel on Strategic Deterrence and Nuclear War (response of Eugene Rostow to question of Professor Burns Weston) in the Proceedings of the 76th Annual Meeting of the American Society of International Law (Apr. 22, 1982). In The Antelope, Chief Justice John Marshall wrote that though slavery was repugnant to natural law, its prohibition had not yet been incorporated into international law and therefore was not enforceable in United States courts. Here, the argument is that natural law, by way of custom, has recently been incorporated into international law and the natural law right to collective survival is therefore part of United States law. Nothing in The Antelope contradicts this assertion.

72. A similar argument to that presented in text, but more palatable to positivists, could be based on the universally recognized “right to life” and the Convention on the Prevention and Punishment of the Crime of Genocide, opened for signature Dec. 9, 1948, entered into force Jan. 12, 1951, 78 U.N.T.S. 277 (1951) (ratified, as of Nov. 15, 1982, by 84 states). Nuclear holocaust would be seen as murder and genocide multiplied, just as some have suggested that Nuremberg convictions for genocide were not based on ex-post-facto law because murder had long been a crime in all “civilized” nations.
acting out their sovereignty through use of nuclear weapons of mass
destruction. Thus, the Universal Declaration of Human Rights provides
that “everyone is entitled to a social and international order in which
the rights and freedoms set forth in [the] Declaration can be fully real-
ized.” Nuclear weapons threaten that order, and even as ardent a
positivist as H.L.A. Hart has recognized that at the core of law is the
assumption that “the proper end of human activity is survival.”

D. The Right to Peace

The “right to peace” is another legal expression of humankind’s
collective natural right to survive. In 1979, Karel Vasak, the chief legal
officer of UNESCO, argued that civil and political rights, and social,
economic and cultural rights, are being joined and enhanced by a
“third generation of human rights” which includes the “right to
peace.” Though such “group rights” or “solidarity rights,” or “global
rights” as Saul Mendlovitz has called them, remain controversial
within the international human rights community, they have, in fact,

73. Universal Declaration of Human Rights, supra note 61, at art. 28.
75. See Vasak, Inagural Address: Pour Les Droits de l'Homme de la Troisieme
Generation: Les Droits de Solidarité, in International Institute of Human Rights,
Summary of Lectures—Tenth Study Session (July 1979).
76. In Mendlovitz’ view, the struggle for individual civil and political rights now
typical of western liberal (capitalist) democracies marked the 19th century; the struggle
for group social and economic rights typical of eastern communist societies marked
the 20th century; and the struggle for global, or planetary rights such as those we are
now beginning to see develop (e.g., the right to a clean environment and the right to
peace) will mark the 21st century. See Mendlovitz, Remarks, 9 BROOKLYN J. INT'L L.
_ (forthcoming 1983).
77. E.g., A. H. Robertson, one-time Acting Secretary General of the Interna-
tional Institute of Human Rights and noted specialist in international human rights
law, consistently criticized “third generation rights” during sessions of the Institute’s
Human Rights Teaching Center because, in his view, they are not susceptible to en-
forcement by law. Additionally, he wondered against whom such rights might be
enforceable.

For a thoughtful critique of the right to peace as a group or solidarity right, see
Bilder, The Right to Peace as a Human Right, Remarks made at the International
Symposium on the Morality and Legality of Nuclear Weapons, in New York City
(June 4-5, 1982). (Available in author’s file at Nova University Center for the Study of

https://nsuworks.nova.edu/nlr/vol7/iss1/8
generated substantial debate and academic inquiry in Europe. Only very recently have they been taken up as the subject of study within the United States. If such rights exist, or are in the process of being created, whether reached inductively as the aggregate of all individual civil, political, social, economic and cultural rights recognized by international law or deductively from the evolving world order of humanity entering the twenty-first century, then the right to peace must be added to the norms limiting nuclear options. Though “peace” may mean more than mere absence of war, it certainly means at least absence of war and assurance of survival. The “right to peace” may thus confirm the integration of H.L.A. Hart’s observation regarding the axiomatic relationship of law and survival into the global legal system, meeting effectively, on a conceptual level at least, the threat of planetary eradication by nuclear holocaust.

Conclusion

As has been aptly put by Professor Saul Mendlovitz, “nuclear weapons are disgusting.” They are an abomination that must be outlawed by any civilized legal system worthy of the name.

International law already explicitly prohibits many, perhaps most uses of nuclear weapons. The structures and norms of international law and evolving conceptualizations of limits on state sovereignty strongly suggest the illegality of the remaining uses. At the very least these remaining uses should be seen as no more than exceptions which ought not be permitted to devour the emerging proscriptive rule. The international illegality of so many uses of nuclear weapons shifts the burden of persuasion to the proponents of nuclear weaponry. It is they who are on

80. See supra note 73 and accompanying text.
81. Mendlovitz, supra note 76.
the defensive now, legally as well as morally, they carry the onus of seeking legal sanction for the remaining nuclear weapons uses.

A comprehensive custom outlawing nuclear weapons per se is in the process of being created. It is, hopefully, only a matter of time before municipal as well as international legal systems specifically prohibit all use of nuclear weapons. In the alternative, our present civilization will vaporize in the blinding flash of nuclear explosions forever destroying humankind, its legacy of achievements and its dreams for a future of well-being and peace.

Professor Arthur S. Miller, in his seminal work, has given to American lawyers the hope of promise and the burden of challenge. He calls upon us to help our domestic legal system rise to the task of meeting head-on the nuclear nightmare of our time, a bad dream come true beyond the imagination of even the most pessimistic of eighteenth century apocalypts. By probing our nearly two hundred year old constitution for checks and balances and values that could "secure the Blessings of Liberty to ourselves and our Posterity," he sets a standard of achievement we must all strive to meet.

In response to Professor Miller's challenge, international lawyers must first turn a conservative, slow-moving discipline to face the nuclear challenge just as Miller has so artfully turned the U.S. Constitution. Second, they must help educate American domestic lawyers to the fact that international law is part of the law of the land. Success in the first will make the second all the more important: the United States remains the most powerful nuclear arsenal on earth. Fortunately, law is on the side of those who wish to hold the President to an international rule of law. The Constitution, in this matter, is clear. If, as suggested above, a norm of international law prohibits all, or at least most uses of nuclear weaponry, to answer Professor Miller's question, that norm is "part of the corpus of 'laws' that the President must faithfully execute."

82. U.S. CONST. preamble.
83. Miller, supra note 5 and accompanying text.