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INTRODUCTION

The primary issue that Professor Fried raises in his critical essay in the *Denver Journal of International Law and Policy* is:

> Whether international law - particularly the law of war (*jus in bello*) - makes the use of nuclear weapons against other states impermissible.[1]

Professor Fried asserts that international law establishes the illegality of nuclear weapons as illegal per se; that is, that nuclear weapons are impermissible regardless of use. It follows that the first use of nuclear weapons is unlawful and Professor Fried supports the no-first-use pledge. Fried opposes the Strategic Defense Initiative (SDI), because he believes that it will not provide a comprehensive defense system and is incompatible with the Anti-Ballistic Missile (ABM) Treaty. Fried recognizes that states may invoke nuclear weapons by way of reprisals, but he observes:

> [I]t is questionable whether nuclear reprisal could achieve the very purpose of reprisal, namely, to induce the opponent to discontinue its illegal behavior.[2]

Professor Fried believes that the no-first-use pledge can have "legally binding character," because this is what the International Court of Justice declared in 1974.[3] "Governments," according to Fried, "can make formal declarations" and these can be made "unilaterally at any time."[4] And, "if governments wish," they can become "binding at once."[5] While Fried recognizes that the Soviet and Chinese versions of the no-first-use pledge, "neither promises nor expects any renunciation of the right to nuclear reprisals (second use)," the pledge is not "useless."[6] Presumably,

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1. Fried, *The Nuclear Collision Course: Can International Law Be Of Help?*, 14 DEN. J. INT'L L. & POL. 97 (1985).

2. *Id.* at 113.

3. *Id.* at 114.

4. *Id.*

5. *Id.*

6. *Id.* at 115. For an article that illustrates the sharp difference between democratic states and the Soviet Union, *see* TUNKIN, THEORY OF INTERNATIONAL LAW, (W.E. Poufler

it would provide what amounts to a mind-set among decision makers: a psychological barrier to the future use of nuclear weapons. Moreover, the act of pledging would wind down the "systematic preparations for instantaneous nuclear response."[7]

A number of propositions subordinate to the primary issue of the legality of nuclear weapons appear in Professor Fried's commentary. They form the basis for this brief response. However, I must say at the outset that I share with Fried an abhorrence of nuclear weapons and of war conducted with weapons of any kind. The experience among states that we both invoke, however, discloses new conventional weapons that have the destructive force equivalent to nuclear weapons, and include chemical and biological weapons that would augment the destructiveness of warfare in general. Our differences lie in a perception of the measures that might realistically be taken by the United States and the Soviet Union, coupled with participation by other states, that would make nuclear war less likely.

I respond to Fried's essay by making the following argument. First, an analysis of international law and specifically, the law of war, shows that nuclear weapons are not, as Fried contends, illegal per se. The law of war addresses itself to the use of weapons during war, rarely prohibiting, under all conditions, the use of specific types of weapons. In some situations, the use of nuclear weapons may cause less destruction and suffering than some conventional weapons, and therefore better conforms to the spirit of the law of war. Second, deterrence has always been a fundamental aspect of nuclear arms control, but works only when the threat of aggression is backed by stocked and ready arsenals. Finally, the Strategic Defense Initiative (SDI) need not be the comprehensive defense system Fried portrays; it is, rather, a defensive system aimed at enhancing deterrence policy and as such, it is not only legal, but a necessary element in shaping our policy with the Soviet Union. I will discuss some of the relevant propositions raised by Fried.

I. LEGALITY OF NUCLEAR WEAPONS

First, contrary to Fried's opinion, nuclear weapons are not illegal per se under international law, nor in particular, under the law of war. This proposition raises three related points to be examined together: whether nuclear weapons are treated as illegal under all circumstances in wartime use; when such weapons are treated as illegal because they violate the law of war; and whether such weapons are unlawful if first used for the purposes of self-defense in response to aggression.

The law of war, emanating from the practice of states and from the agreements they adhere to with regard to the use of weapons during com-

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trans. 1974).

7. *Id.*

bat, has prohibited only a few weapons as illegal per se. Moreover, these prohibitions are not all based upon the application of law, because some, such as those applied to dum-dum bullets, were finally adopted as a result of political pressures. The wounds created by dum-dum bullets may be more extensive than those created by other devices such as shrapnel, or modern field rifles.

The application of the prohibitions of the law of war to weapons appears in three separate categories. The first consists of weapons or agents which are subject to absolute or positive prohibitions under the usages and practices of states. These include poisons and poisoned weapons, prohibited by Article 23(a) of the Hague Regulations.[8] According to the Department of Army's Field Manual, other examples are found in certain usages:

> Usage has, however, established the illegality of the use of lances with barbed heads, irregular-shaped bullets, and projectiles filled with glass, the use of any substance on the bullets that would tend unnecessarily to inflame a wound inflicted by them, and the scoring of the surface or the filing off of the ends of the hard cases of bullets.[9]

However, with respect to poisons and poisonous weapons, the Manual notes that Article 23(a):

> [D]oes not prohibit measures being taken to dry up springs, to divert rivers and aqueducts from their courses, or to destroy, through chemical or bacterial agents harmless to man, crops intended solely for consumption by the armed forces (if that fact can be determined).[10]

Clearly, the belligerents are free to impose upon themselves restraints or conditions which are more restrictive than those to be found in the law of war. This, in fact, the United States did under its rules of engagement as to the war in Vietnam. But decisions to impose those additional restrictions are made by the belligerents among themselves and do not arise from the restraints in the law of war that are shared with other belligerents.

The second category of prohibitions is set out in Article 23(e) of the Hague Regulations:

> In addition to the prohibitions provided by special Conventions, it is especially forbidden: (e) to employ arms, projectiles, or material calculated to cause unnecessary suffering.[11]

Under this article the belligerents are prohibited from the use of weapons unless they justify such use through the necessities of warfare:

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8. The Hague Convention Respecting the Law and Customs of War on Land, Oct. 18, 1907, art. 18 (annex), 36 Stat. 2277, T.S. No. 539.

9. DEPT. OF THE ARMY, FM27-10, THE LAW OF LAND WARFARE, at 18 (1956) [hereinafter cited as U.S. ARMY FIELD MANUAL].

10. *Id.*

11. *Supra* note 8.

that is, the necessary suffering, legally established, that must be endured during warfare or in combat conditions. In this connection, the Declaration of St. Petersburg of 1868 [12] is at times invoked. Its preamble declares that the legitimate object of war would "be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable" and "that the employment of such arms would therefore be contrary to the law of humanity."[13]

These prohibitions must be read against the context of modern warfare, where the "law of humanity" does not prohibit all weapons that kill, because all weapons, under at least some circumstances, foreseeably cause death. A United States Air Force Pamphlet observes:

> All weapons cause suffering. The critical factor in the prohibition against unnecessary suffering is whether the suffering is needless or disproportionate to the military advantages secured by the weapon, not the degree of suffering itself.[14]

This turns us back to the legal principle of military necessity as the justification upon which the suffering is based.[15] There is, of course, the additional element of humanity, noted by the Pamphlet:

> The rule against unnecessary suffering applies also to the manner of use of a weapon or method of warfare against combatants or enemy military objectives. In this context, the prohibition precludes the infliction of suffering upon individuals for its own sake or mere indulgence in cruelty.[16]

Professor Fried suggests that nuclear weapons are prohibited under this proposition because they violate the rule against unnecessary suffering, but his analysis seemingly draws upon the physiological element of suffering. He fails to recognize that the legal principle of military necessity and the general principles in the law of war apply to all weapons. War itself is justified by necessity, while the law of war simply regulates the conduct of hostilities to prohibit conduct which is excessive, inhumane, or deliberately, but unnecessarily, invoked.[17]

The third category is based upon the proposition that the legal principle of military necessity is subject to standards of reasonableness. Under such standards, the use of force must be both necessary and

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12. The Declaration of St. Petersburg, *cited in* FRIEDMAN, THE LAW OF WAR, 192-193 (1972). *See also* M. MCDOUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER, 660 (1961).

13. *Id.*

14. DEPT. OF THE AIR FORCE, AFP 110-31, INTERNATIONAL LAW: THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS 6-2 (1976) [hereinafter cited as U.S. AIR FORCE TREATISE].

15. *See* M. MCDOUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 72 (1961) offering a comprehensive approach to the matter of military necessity [hereinafter cited as LAW AND MINIMUM WORLD PUBLIC ORDER].

16. U.S. AIR FORCE TREATISE, *supra* note 14.

17. *See* II TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10, Oct. 1946 - Apr. 1949, at 1253, 1254.

designed to attain military objectives. These objectives must be limited to legitimate military targets and the amount of force used against these targets must be proportionate to the military objectives sought.

The legality of attacks during wartime is not restricted to those that might cause damage exclusively to legitimate military objectives, because this would be impossible under real world conditions. Some civilian casualties must be anticipated or indirect damage incurred. Article 51 of the Protocol I provides in paragraph 5(b) that attacks would be considered as "indiscriminate" if they constitute an "attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated." Thus a standard of "reasonableness"—reasonableness in the context of licensed violence during wartime—is imposed.

Professors McDougal and Feliciano have formulated the application of this principle under this concept in terms of widely shared expectations that even violence unleashed during wartime will not lead to the unnecessary destruction of values:

> [T]he fundamental policy of minimum unnecessary destruction may be seen to underlie questions of legitimacy . . . [W]here the suffering or deprivation of values incidental to the use of a particular weapon is not excessively disproportionate to the military advantage accruing to the belligerent user, the violence and the weapon by which it is effected may be regarded as permissible. All war instruments are "cruel" and "inhuman" in the sense that they cause destruction and human suffering. It is not, however, the simple fact of destruction, nor even the amount thereof, that is relevant in the appraisal of such instruments; it is rather the needlessness, the superfluity of harm, the gross imbalance between the military result, and the incidental injury that is commonly regarded as decisive of illegitimacy.[18]

The military commander, no less than the layman, is sensitive to the principles of economy in the use of scarce resources, and seeks, through the invocation of military measures, to achieve the objective prize without unnecessary destruction. These are the perspectives that have led to the policy base for the law of war and unquestionably, will be the perspectives that will apply to the use of nuclear weapons.[19] There are no military advantages to be gained through the retaliatory destruction of urbanized areas through use of nuclear weapons.[20]

The Department of Army Manual observes that "atomic weapons" are not "regarded as violative of international law," and notes that such law does not point to any "customary rule of international law or interna-

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18. LAW AND MINIMUM WORLD PUBLIC ORDER, *supra* note 15, at 72.
19. *See* MCDOUGAL, LASSWELL & CHEN, STUDIES IN WORLD PUBLIC ORDER (1960).
20. *See, e.g.*, DEPT OF THE ARMY PUBLICATION, FM 100-1 (1981).

tional convention that specifically restricts their employment."[21] The Air Force Pamphlet in its discussion of "indiscriminate weapons," in particular the weapons or methods of warfare which may cause "excessive injury or damage to civilians or civilian objectives," declares:

> The extent to which a weapon discriminates between military objectives and protected persons and objects depends usually on the manner in which the weapon is employed rather than on the design qualities of the weapon itself. Where a weapon is designed so that it can be used against military objectives, its employment in a different manner, such as against the civilian population, does not make the weapon itself unlawful. Indiscriminate weapons are those incapable of being controlled, through design or function, and thus they cannot, with any degree of certainty, be directed at military objectives.[22]

While there is a grave risk that the use of tactical nuclear weapons, or the impacts of massive force imposed by conventional weapons, or even military doctrine, might lead to a large scale use of nuclear weapons of greater destructive force, none of these facts alone enables us to condemn such weapons under the existing law. Misuse of nuclear weapons, such as uses contrary to the legal principle of military necessity, are violations of the law of war, as is the use of other weapons under these conditions. The use of nuclear weapons among naval forces in combat on the high seas is likely to be a use which falls well within the permissibility of international law and the law of war.

The juridical feature of the principle of military necessity operating pursuant to law, is to encompass the process of claims and counterclaims among states. If the principle is invoked, for example, in an international tribunal, past practice indicates that there will be claims of justification and opposing claims of illegality in numerous situations. This characterized the proceedings at Nuremburg. Because a legal principle of international law embraces the overall claims process, the application of the principle enables a tribunal to formulate more specific directives, drawing upon the claims introduced, and the context in which the weapons or attacks were launched or took place.[23]

Professor Fried is concerned with promoting the no-first-use pledge, and seemingly raises his analysis relating to no-first-use in this connection. If his assumptions of illegality of nuclear weapons are accepted, then it simply follows that the first use of such weapons, either by way of aggression or during hostilities under way, would be illegal.

II. AGREEMENTS, IMPLEMENTATION AND PRACTICALITY OF THE NO-FIRST-USE PLEDGE

The no-first-use pledge, applicable during hostilities, might be ex-

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21. U.S. ARMY FIELD MANUAL, *supra* note 9, at 18.
22. U.S. AIR FORCE TREATISE, *supra* note 14, at 6-3.
23. LAW AND MINIMUM WORLD PUBLIC ORDER, *supra* note 15, at 56.

amined against the experience of the United States with the allegations made by the Soviet Union and China that it had used bacteriological agents in the Korean War. The United States at that time had not ratified the Geneva Protocol of 1925,[24] but it had recognized that the use of chemical and biological agents were violations of customary international law and that customary international law could be construed as applying to any use of such agents. If it were construed this liberally, it would impose restraints more substantial than those imposed by the Geneva Protocol, because most of the states that ratified the Protocol, added a reservation that they had the right to respond to any first use made against them. Moreover, the Protocol itself limited its restraints to other contracting parties. And some states, such as the Soviet Union, reserved the right to respond to a first use against their allies as well as against themselves.

In a real sense, the Protocol established the applicable law, which tended to limit the content and reach of customary international law. While it is arguable that the customary international law, with its wider reach to all uses and subject to no reservations, was the law *jus cogens*, and therefore was expected to override more restrictive law adopted by way of treaties, such as the Protocol, the practice - the declarations and behavior of states - indicates that they intend to adhere to the Protocol and have thrown the customary international law restraints in doubt.

Our experience with the no-first-use pledge of the Geneva Protocol of 1925 leads to further consideration. The allegations of first-use by the United States in the Korean War by the communist states were unquestionably fraudulent. This experience suggests that in future wars the no-first-use pledge, combined with fraudulent allegations can lead to a justification to what will amount to a first-use by those making the allegations. Because the Protocol as a treaty is expected to establish the rules of restraint, this action would be tantamount to breaching the Protocol and making it no longer applicable during the remainder of the conflict. Clearly, if customary international law applies or continued to apply in the example given, the right would be incorporated into a right of reprisal and then limited to correcting the incident, but not extending to elimination of the application of the law to the remainder of the hostilities.

But states must look to their security. It is apparent that whether they are prepared to retaliate by way of reprisal or through the freedom to retaliate during hostilities by terminating the Protocol, they must have the weapons stockpiled, tested, reliable and ready. They may need to have their military forces and civilian population prepared to be immunized against the use of such weapons. The entire no-first-use posture during hostilities is fraught with uncertainty and for this reason the United States, by way of general policy, has sought more than no-first-use

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24. Geneva Protocol, June 17, 1925 - Apr. 29, 1975; *see* ARMS CONTROL AND DISARMAMENT AGREEMENTS (1982).

pledges and has looked to a more effective disarmament agreement.

The experience with the Geneva Protocol of 1925 points to another lesson in current practice among states. The Protocol does not serve arms control objectives as such, it provides instead for controls over use of weapons, such as those covered in the Protocol, during wartime. It does not even apply to peacetime, or to the use of the agents it covers if invoked for other activities than "warfare". It operates under the law of war, and its effectiveness is the effectiveness afforded by that law. The reservations taken by states seem to recognize this. While those are reservations to respond to a first use, in the wartime setting of violations of customary international law, rather than under treaty law as found in the Protocol, the response would be identified as a reprisal. However, the reprisal is conditional or limited under international law. It must be terminated once the corrective action sought in its use has been accomplished. States reserving their right of response under treaties, are in a position to claim that the breach of the treaty terminates the application of that treaty with regard to the hostilities with the belligerent involved. Hence, the Protocol provides at best, a limited barrier and once broken, provides none at all, unless of course we shift to the application of customary international law, emerging upon the breach of the Protocol to cover the same activities.

Clearly, the Protocol, with its reservations and customary international law, and with its rights of reprisal, afford a deterrent to using chemical or bacteriological agents. However, it is noteworthy that even the deterrent element during World War II that made President Roosevelt's warning to Germany effective, regarding any use that Germany might make of chemical weapons against the United States or its allies, lay in German perceptions that that element was enforceable. The Germans believed that the United States would retaliate in attacks with chemical weapons and more importantly, that the United States had the lethality and destructive force in those weapons and the delivery capability which would make the retaliation even more formidable than the initial attack.

We are justified, then, in distinguishing between the controls in arms control measures and capabilities and the control measures to be found in the law of war. This distinction turns on how the use of weapons is to be controlled. The law of war imposes its controls upon the use of weapons during wartime and those controls reflect expectations shared among belligerents with regard to both weapons and methods of attack occurring during wartime. These controls are largely identified with responses in kind or other responses to enforce a legal claim. Arms control agreements do not usually provide for controls over the use of the weapons covered in the agreements. Even when such controls are added to the agreements, it is essential that they be incorporated in the understandings and decisions of the parties to the applicable agreements to be applied with the law of war, should they go to war. The control features of arms control govern the weapons per se: how they are produced; tested and deployed; stock-

piled; the number of them in inventories; and the number produced.

Furthermore, the no-first-use pledge of Professor Fried and others would have strategic consequences which affect the freedom and capacity of decision-makers to invoke defensive measures in a variety of situations.[25] An aggressor could for example, launch a massive conventional attack, under conditions where a response by conventional means would be ineffectual. But the commander may find, in that aggression, that he could respond effectively with nuclear weapons. Should that option be foreclosed? Moreover, should its deterrent value also be foreclosed, as would occur with the pledge? The pledge would foreclose him from all uses of nuclear weapons for all purposes. He could not use them for tactical response, or tactical use. He would be unable to invoke the highly discriminating nuclear weapons already in the arsenals of both the United States and the Soviet Union. His planning, doctrine and strategy would be materially changed and he would be unable to justify the weapons, provide for their readied and tested use and their reliability.

Democratic states such as the United States must be exceedingly careful to "keep their powder dry" when faced with the mounting threats from the totalitarian communist states, because the ripple effect of security decisions extends deeply into the democratic processes and to the opposition engendered in terms of the allocation of resources and power. Confusion and ambiguity in these processes can be readily exploited with regard to security issues when they can only be superficially assessed by the citizen.

The no-first-use pledge has separate implications for the arms control process. According to Professor Fried, it stems from the purported illegality of nuclear weapons. However, if adopted, it would make the threats and counter-threats involved in the arms control equilibrium uncertain. It would not lead to reducing accidental or negligent launches, because those by their nature are unintentional. The pledge itself is unverifiable as are all undertakings not to use or be the first to use weapons or engage in attacks and for this reason would be unacceptable as an arms control measure. Breach of such understandings occurs when the aggressor or belligerent acts, and by then, the controls have lost their effectiveness.

Hence, Professor Fried concludes:

> [I]f the pledge were broken or rescinded, the legal and factual situation would be the same as if no pledge has been made . . . [but] a mutual no first-use pledge can, as much as humanly possible, guaran-

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25. The relationship of strategy, defense and security in terms of the perspectives of the "statesman," is examined in EARLE, MAKERS OF MODERN STRATEGY 117-118 (1982). "More than three hundred years ago, Francis Bacon pointed out that the ability of a nation to defend itself depended upon its material possessions than upon the spirit of the people, less upon its stocks of gold than upon the iron of determination of the body politic." *Id.* at 124

> tee the prevention of the ultimate blasphemy - an unintended end of civilization.[26]

Professor Fried's proposals simply do not reach to the decision process shared by the United States and the Soviet Union. They fail to weigh the interdependence of decisions and fail to lead to the strategy they share about arms control and the arms control deterrence equilibrium. Such proposals, however, upset that strategy and leave both sides open to conventional warfare or, more likely, lead to one side securing strategic nuclear advantage through clandestine activities.

Arms control processes unquestionably fall short of producing a stable strategic situation, largely because they are dependant upon the relations between two sides. Those relations may even be adversely affected by pledges or declarations of unverifiable professions of no-first-use or even of moratoria on a unilateral basis.[27] Both sides have shown in their practice that they are willing to communicate, even if tenuously, about maintaining the strategic weapons stand-off. We cannot proceed to better ordering processes among them if we deny this minimal level of communications, or the practice that it establishes.

III. THE STRATEGIC DEFENSE INITIATIVE (SDI)

The reasons for proposing the Strategic Defense Initiative and the actions to be taken under the initiative at times become confusing.[28] President Reagan has stressed that SDI is a research and technology program and Congress has provided funding and authorization exclusively for those purposes.[29] Both the executive and legislative branches are, to that extent, committed to determining whether the strategies for attaining or maintaining deterrence are sufficient, and whether they can be improved upon by new strategies, including the deployment of defensive weaponry. One of the important reasons for pursuing SDI is to seek the means to strengthen a deterrence equilibrium that is in danger of breaking down. The strategic perspective is that of the security of the United States and its allies in a global order and the security sought, is that which will assure that nuclear war will not break out.

SDI and the retention of the right of first use share in common a strategy of deterrence that has been adopted by the United States. That

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26. Fried, *supra* note 1, at 115.

27. For example, verification of activities in outer space - particularly of anti-satellite activities - has not been resolved to the satisfaction of the United States according to Arms Control and Disarmament Agency Director Kenneth Adelman in his statement before the Senate Committee on Foreign Relations: Outer Space, May 18, 1983 *quoted in* DOCUMENTS ON DISARMAMENT, WASHINGTON ACDA PUB. 125, *released* Feb. 1986, USGPO, 420-430 (1986) [hereinafter DOCUMENTS].

28. *See* President Reagan's speech of March 23, 1983 announcing SDI, *quoted in* DOCUMENTS at 199-201.

29. President Reagan's National Security Decision Directive on Defense Against Strategic Weapons (Mar. 25, 1983), *quoted in* DOCUMENTS at 206, 207.

strategy depends upon several assumptions, the foremost of which is that the use of the strategic nuclear weapons would cause intolerable destruction. It is assumed that our rivals are influenced by a credible threat that any such attack upon us would be the subject of a comparable response—a response in kind or otherwise—causing the same destructive force or greater. But a credible threat presupposes the capabilites—reliable, tested, and mobilized for response. The strike that causes severe destruction to us need not be limited to the nuclear threat, but may be caused by a massive attack with the modern conventional weapons. The no first use pledge would destroy this strategy—both its deterrence and the credibility of its deterrence, and leave us bare to the possibility of facing situations that are not subject to deterrence. Moreover, the illegality of nuclear weapons or the no first use form of illegality would lead to serious consequences in terms of our governmental processes relating to defense preparedness.

Professor Fried has attacked SDI for a number of reasons, familiar to the public debate, but mounted by the groups antagonistic to SDI. These attacks tend to miss the fundamental points. If SDI identifies an effective defense system, that system must be one that is cost-effective. It must be invulnerable to the kind of destruction during, or at the initiation of, warfare or aggression which would make it inoperable. It must contribute to arms control objectives of deterrence. Fried has already resolved the question of its feasibility, though, because he sides with those who find it technologically infeasible. Fried has posited his own strategy of an effective or strategic defense and his conception of SDI is exclusively a comprehensive defense against any attack, by any weapon, at any time. Strategic defense is not limited to illusions or utopian claims, but extends to measures that will enhance deterrence.[30]

Professor Fried is troubled by the impact SDI will have on the Anti-Ballistic Missile Treaty (ABM Treaty),[31] but that treaty was designed for the strategic nuclear weapons equilibrium, for example, making all targets except either the capital city or land based strategic weapons hostage to a nuclear attack. This perspective would thus embrace Fried's "illegal" weapons for the balancing process, but necessarily embroils him in the inconsistencies of his argument.

More importantly, the ABM Treaty is a strategy in itself, and not sacrosanct. It is a desirable strategy only if it promises to achieve the objectives wanted from arms control. If those objectives cannot be achieved, then the challenge is to establish either more realistic objectives, or to change the overall strategy.[32] SDI provides us with an oppor-

30. *See* WHITE HOUSE PAMPHLET, THE PRESIDENT'S STRATEGIC DEFENSE INITIATIVE, PR 40-2: St 8/985 (1985).

31. ABM Treaty, May 26, 1972, United States-U.S.S.R., 23 U.S.T. 3435, T.I.A.S. No. 7503.

32. The Report of the President's Commission on Strategic Forces (Apr. 6, 1983), *published in* DOCUMENTS at 272 [hereinafter Snowcroft Report].

tunity to conduct this appraisal with empirical rather than speculative data.

Moreover, the realities of practice with the Soviet Union relating to arms control under the current system, must be closely and continuously assessed.[33] The assessments of the United States government indicate that the Soviet Union has been vigorously pursuing its own SDI program and has been doing so for a number of years. The Soviet Union has also been strengthening its defense programs and defense deployments in general, weakening the thrusts of the ABM system. The Soviet funding for these defense efforts has been substantial and an effective defense strategy coupled with Soviet offensive arms provides the possibility of a major strategic breakthrough. As the Arms Control and Disarmament Agency (ACDA) has indicated:

> The Soviets have devoted about as much financially to defenses of all kinds, including ABM, as they have to their strategic offensive forces. The prospect of the Soviet Union deploying an effective, nationwide defensive system along with extensive air defenses would raise a serious challenge to deterrence and stability in the absence of an effective defense response by the West.[34]

In short, the United States, under the checks and balances process of arms control, must respond to the actions of the Soviet Union if deterrence equilibria is to be maintained. The United States has not protested the Soviet research efforts simply because they are permitted under SALT and ABM Treaties, and are not readily reached through arms control agreements because, at the research or early development stage, there is no way of monitoring or verifying what is taking place.[35] For the United States, verification goes to the heart of the arms control process,[36] so that arms control cannot extend to that which cannot be verified.

ACDA publications observe that SDI falls within our arms control perspectives, citing the President's speech to the United Nations in 1984:

> In the near term, the SDI research program responds to the Soviet ABM effort, which includes actual deployments. In the long term, SDI research will be a crucial means by which the United States and the Soviet Union can safely agree to very deep reductions, and eventually, even the elimination of ballistic missiles and nuclear warheads. . . .

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33. *Id.* at 275. The Snowcroft Report does not claim that arms control can prevent war, only that it can reduce the risk of war. Moreover, arms control must be achieved through agreements that control, and the primary objective is "stability" in the weapons equilibrium, and presumably in relations with the Soviet Union.

34. ACDA, FISCAL YEAR 1986 ARMS CONTROL IMPACT STATEMENT, at viii (Apr. 1985).

35. *See* PRESIDENTIAL REPORT, U.S. DEPT. OF STATE SPECIAL REP. No. 136, SOVIET NONCOMPLIANCE WITH ARMS CONTROL AGREEMENTS (1985).

36. In pursuing verification, we must apply rigor to ensure the appropriate use of terms that are stipulated or defined, or the policy implications may be garbled. For a discussion on this subject, *see* Marshall, *Dour Thoughts on Inspection*, THE NEW REPUBLIC (Nov. 24, 1962), *cited in* A. KATZ, VERIFICATION AND SALT 2 (1979).

> SDI programs are consistent with present U.S. positions in arms control talks. The President stated in his September 24, 1984 speech to the United Nations General Assembly that the United States is committed to getting real results in the search for "ways to reduce the vast stockpile of armaments in the world" and restated United States willingness to discuss, among other topics, the relationship between offensive and defensive forces.[37]

United States' policy is not that proclaimed by those who attack the SDI for whatever reasons they adduce. United States' policy is proclaimed by the President, and, through Congress, SDI has secured the support of the people of the United States. In its 1984 Annual Report, the ACDA makes this policy clear, stressing again the research objectives of the SDI program. The full thrust of this policy comes from a statement that cannot be misunderstood:

> The fundamental objective of arms control, from the United States perspective, is to reduce the risk of war, especially nuclear war, by strengthening deterrence and by lowering levels of arms on an equitable and verifiable basis thereby fostering a more stable East-West relationship. Other goals include facilitating crisis management, reducing the destructiveness of war should it occur and lessening the cost of military forces. But the key test is can arms control lessen the chances of conflict, particularly any nuclear conflict, and thereby improve U.S. security?[38]

Arms control under these perspectives is not part of the far reaching policy and strategy of the democratic nations to establish global order itself and make that order serve the security of the global community.[39] Through arms control, we must attend to those matters that raise questions of the minimal security upon which we can proceed.[40] As the ACDA Report continues:

> Past negotiations, as the President's Commission on Strategic Forces pointed out in April 1983, have "produced neither agreement among ourselves, restraint by the Soviets, nor lasting mutual limitations on strategic offensive weapons." Moreover, new technologies may challenge longheld assumptions about deterrence, stability and the relationship between offensive and defensive forces. On both counts, a reassessment is needed of our arms control approaches to see how progress might best be made.
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> President Reagan's Strategic Defense Initiative (SDI), proposed in

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37. *See supra* note 34, at viii.

38. 1984 ARMS CONTROL AND DISARMAMENT AGENCY ANN. REP. 1.

39. *Cf.* address delivered by Secretary Shultz in San Francisco, October 14, 1985, *reprinted in* ARMS CONTROL, STRATEGIC STABILITY, AND GLOBAL SECURITY, U.S. DEPT. OF STATE CURRENT POLICY No. 750.

40. It appears that even though the ABM Treaty is of definite duration and the strategic offensive arms agreements are limited in duration, it is intended that the link between retaliatory capabilities of offensive weapons and the ABM regime cannot be broken, or the ABM Treaty would lose its rationale.

> March 1983, reflected that need. It called for a major research program to determine the feasibility for shifting strategic nuclear strategy toward more reliance on defensive forces, that is, integrating strategic defense into strategic deterrence. This shift's ultimate goal would be to move away from the doctrine of mutually assured destruction and eventually eliminate the threat posed by nuclear-armed missiles.[41]

This framework of policy and policy goals stands sharply at variance with Professor Fried's perspectives. In this framework, we have embodied a search into controlling the emerging technologies, while recognizing that the military and peacetime technologies are independent. The possibilities of Soviet adventurism continuing as it has in the past must be included; these may lead to a strategic imbalance outweighing the arms control process. Deterrence limited to nuclear war is identified, but there is implied the need to thrust our deterrence perspectives more deeply into the full array of Soviet interactions with the democratic states of the West.

CONCLUSION

Under current practice, states invoke a variety of strategic instruments of policy to have their own way. They seek to influence each other, acquire power, or deny power to their rivals. Military measures provide the instrument that appears to afford effective results, even if limited to backing up other policy instruments that are ideological, economic or diplomatic in nature. Arms control processes do not restrain these activities or reshape the competitive policies of states. They can, at best, serve us in seeking a more effective global public order, and, if they do not work, they warn us that we must depend more heavily upon capabilities that assure deterrence through military capabilities and military readiness.

Arms control processes depend upon the establishment of an effective practice among states in which we can develop and rely upon their shared expectations about the decisions they are making or intending to make. Such a practice depends upon reliable, timely, continuing and comprehensive intercommunications. The processes to check aggression are currently linked to improvement of these communications in order to provide the assurance of a reliable practice of control, in a reliable, shared enterprise.

Professor Fried falls back on rules and moral precepts that characterized the outlook on law of the 19th and early 20th centuries, but in today's world in which decisions and policy are the sources upon which control must rest, the earlier perspectives can no longer serve us. Our present policies relate to how the military capabilities can serve our maintaining minimal security in a world where hostility can break out and escalate to uncontrollable levels of violence and break out readily from the framework of rules, as Fried himself has noted.

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41. *See supra* note 38, at 1, 2.

These larger perspectives are appropriately summarized by Professors McDougal, Reisman, and Willard:

> The use of a strategic instrument [in the power process] must be understood broadly. We speak of the use of the military instrument, for example, not only when bullets have been fired and forces are moved in large numbers from their garrisons. Instruments of strategy, like the whole of the process of effective power, operate on participants all the time. The military instrument is used even when weapons remain in the armory and troops in the garrison. As long as the availability of troops and weapons are perceived by other participants and taken into account in the formation of their own goals and their ongoing behavior, the military instrument is being used. The same observation applies to all other instruments of strategy; they are everpresent and especially influential when other participants perceive their availability and the predispositions of those having control over such instruments to exploit them. Hence, much of the strategic use of bases in the world effective power process involves prepositioning and communication rather than actual use. The rapid deployment of a long distance fleet to a critical area may be enough to deter participants within or outside of that area from adventures they may have contemplated. The mere availability of a rapid deployment force which can be expeditiously sent to any part of the planet may perform the same function.[42]

In sum, the strategies among the major rivals in a global and competitive power process are of contending public orders, of contentions that involve strategies emanating from the social process itself, but manifested most often in military strategies. Significantly, the element of threat, the perceptions of power and of credible use, the assurance of the will to act, and of firm commitment executed through action, are features of this changing rivalry.

Clausewitz caught the political element that occurs when states resort to war, but in today's strategic setting, the interdeterminancy of combat and the perception of combat through credible power is apparent. As to this, Clausewitz observed:

> Combat is the only effective force in war; its aim is to destroy the enemy's forces as a means to a further end. That holds good even if no actual fighting occurs, because the outcome rests on the assumption that if it came to fighting, the enemy would be destroyed. It follows that the destruction of the enemy's force underlies all military actions; all plans are ultimately based on it, resting like an arch on its abutment. Consequently, all action is undertaken in the belief that if the ultimate test of arms should actually occur, the outcome would be *favorable*. The decision by arms is for all major and minor operations in war what cash payment is in commerce. Regardless how complex the relationship between the two parties, regardless how rarely settle-

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42. M. MCDOUGAL, W. REISMAN & A. WILLARD, *The World Process of Effective Power: The Global War System*, in POWER AND POLICY IN QUEST OF LAW 376 (1985).

ments actually occur, they can never be entirely absent. (emphasis added).[43]

In its foreign policy, the United States seeks from the Soviet Union common objectives of global order; but to achieve the global order that is acceptable to us, we shall be compelled over a long period of time to shape Soviet policy toward the values that we prize. When these efforts prove unavailing, we must take up the strategies of nations that are under threat and attack, even if those threats are immersed in the peacetime processes we identify with influence and power. Law, always policy-oriented in this context of global competition, is shaped primarily to preserve the limited security arrayed against the nature of the threat. To expect more from our law or policy, or worse, to expect law or policy to deny us the choices we must make to ensure our security, is fatuous.

An effective policy-oriented analysis of nuclear weapons, their use in war-fighting, and their use as a component of a strategic instrument in "peacetime" must clarify the goals of the policy-maker and provide him with operable alternatives in facing threats to his policy or strategy - or to his nation.[44]

Crises or future opportunities, whether they are "found" to occur or induced, are the future "missions" for similar strategies that can couple nuclear weapons threats, subversion, or various forms of coercion. In these, too, we can anticipate that the nuclear weapons would be invoked without any expectation, that they will be used, or perhaps as in the Cuban Missile Crisis, under conditions in which an accommodation can be reached in return for diminishing or dropping the threat. Our perspectives about what constitutes a "threat" under such conditions as these must be extended to the realities of nuclear and other weaponry; those realities are affected by strategies using organized groups posing as "freedom fighters" involved in "wars of liberation," or using deployment and other strategies and threats aimed at us or our allies.

We cannot sever the strategic aspects of law from the larger perspectives of global order and the continuing imminence of threat. When law is perceived as part of the global ordering among adversaries, it is then readily identified with strategic goals. As in other relations, as the claims and demands processes of states over their competitive policies, the strategic goals are competing goals. What the Soviet Union wants from the

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43. K. v. CLAUSEWITZ, ON WAR 97 (M. Howard & P. Paret eds. and trans. 1976).

44. The Cuban Missile Crisis provides us with an ample illustration of a deployment use of nuclear weapons during peacetime, and might be compared with the deployment of the Soviet nuclear weapons targeted on NATO allies in Europe. The Soviet Union, a nation then "inferior" to the United States in such weapons, and a great distance away, was able to introduce these weapons, to preserve its grip on Cuba, and strengthen its relations with its government, and to ensure through President Kennedy's message to Premier Khrushchev of October 27, 1962 that we would "give assurances against an invasion of Cuba." *excerpted in* THE ART AND PRACTICE OF MILITARY STRATEGY 224 (G.E. Thibault ed. 1984).

global order is not what the democratic states are seeking and herein lie the seeds of conflict.[45]

45. *See* Almond, *The Struggle for a World Legal Order: An Overview of an Adversary Process*, 61 MARQ. L. REV. 1 (1977).