

# INTRODUCTION - MOXLEY

## INTRODUCTION

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With Russia's threats that it may use nuclear weapons in its war against Ukraine, concern about nuclear weapons is front and center again with an immediacy not felt since the Cold War. Hopefully, these proceedings of our November 8, 2023 conference, *Nuclear Weapons and International Law: The Renewed Imperative in Light of the Russian Invasion of Ukraine*, will enable us to better understand the potential role of law in regulating risks presented by such weapons.

Whether the matter at hand is a federal securities or antitrust case, complex commercial matter, or an international law dispute concerning the lawfulness of the use of nuclear weapons and the policy of deterrence that threatens such use, the lawyer's approach is the same: Investigate and determine the relevant facts; research and determine the applicable law; and then apply that law to the facts to conduct the legal evaluation of the matter. It's an iterative process. The more one looks at the facts, the more one gets a sense of aspects of the law one needs to research to address the facts at hand. And the more one looks at the law, the more one gets a sense of facts that need to be investigated to be able to make the legal assessment.

Engaging in this process is the task of this conference. Building on the earlier 2020 conference in this series, in this 2023 conference we dig more deeply into facts and law that can inform us whether our country's nuclear weapons policies and plans and those of other nuclear weapons states comply with international law.

Obviously, one can look at policies and plans concerning nuclear weapons from a variety of perspectives—morality, policy, strategy, philosophy, psychology, anthropology, even Big History. Our focus is on the legal perspective, the body of international law that applies to such matters, a perspective that has been subjected to much less attention than policy and other approaches and is much less a part of the public consciousness or even of the consciousness of our military and civilian policy elites charged with responsibility for formulating and maintaining our nuclear weapons policies and plans. This conference, with its focus on the law, is an effort—one might say, a much-needed effort—to redress the balance and give due consideration to the role law should play in our nuclear weapons policies and plans.

Which makes it worth stating: *There is law in this regard*. Defenders and critics of U.S. nuclear weapons policies and plans agree—indeed, the United States formally asserts—that there is an existing body of law that governs the lawfulness of nuclear weapons threat and use: the overall body of *jus ad bellum* and *jus in bello*, established international regimes that prescribe circumstances in which a state may lawfully resort to the use of force and that establish limits on the use of force in circumstances where it is lawful for a state to use force. This body of law, essentially U.N. Charter law as to when force may be used and the law of armed conflict

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(LOAC), also known as international humanitarian law (IHL), as to limits on how force may lawfully be used—this body of law governs the use of force by states generally, whether through the use of conventional or nuclear weapons.

That is the opening reality here—and an important one: Defenders and critics of U.S. nuclear policies and plans recognize and acknowledge, as does the United States, as a matter of national policy, that the Charter law and LOAC apply to the use and threat of use of nuclear weapons every bit as much as they apply to the use and threat of use of conventional weapons.

Yet many believe, of course, that, as a practical matter, questions concerning nuclear weapons threat and use are beyond law—that, when it gets beyond the theoretical to a situation of actual potential use of such weapons, all restraint would be long gone and law would have gone out the window.

But this Realpolitik view that law does not matter and, in exigent circumstances, would be disregarded does not change the reality that, by all accounts, there is a well-established body of law that governs the lawfulness of the use of nuclear weapons and law that addresses threats. To say that war crimes may be committed does not mean that acts that constitute war crimes are not criminal.

The premise of this conference is that we dare have greater confidence in the potential of law—that, in the area of nuclear weapons, as in so many areas in human history, law, combined with serious efforts by serious people, can make an effective contribution to human welfare and the advancement, not to mention survival, of human culture, life, and civilization. Indeed, is not our ability to subject potential nuclear weapons use to law likely the ultimate test of law's ability to regulate human conduct?

The faculty for this conference includes present and former military and civilian officials of the United States with an extraordinary range of experience and responsibility working with U.S. nuclear weapons policies and plans, along with a wide range of leading academic and other commentators on such policies and plans, including such prominent representatives of the rule of law as the attorney within the International Committee of the Red Cross (ICRC) responsible for analyzing issues concerning nuclear weapons' threat and use.

The conference proceeds in the way lawyers approach such matters. We start in panel 1 with an analysis of the facts as to nuclear weapons that will serve as the basis for assessing the lawfulness of the threat and use of such weapons. Because the lawfulness of use of nuclear weapons largely turns on the effects of such uses, we look in that panel at known and likely effects of nuclear weapons uses, including blast, fire, prompt radiation, radioactive fallout, and potential nuclear winter and electromagnetic pulses (EMPs), including in the context of low-yield nuclear weapons

Then, in panel two, we look at the requirements of LOAC that limit states' uses of nuclear weapons, including such rules as distinction, proportionality, and necessity. Because of the need to apply such law to the potential use of nuclear weapons in advance, *before* they are actually used, at a time when only probabilities can be known, we then in panel 3 look at the application of LOAC to *risks* as to potential effects of potential nuclear weapons uses. We

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particularly look at how risk analysis is or should be used in applying LOAC to low probability high impact potential effects of nuclear weapons uses. In panel four, we then turn to nuclear deterrence and look at the facts and law concerning this policy. We end the discussion in panel five with a discussion as to how lawyers and others interested in nuclear weapons and international law can get involved.

It is evident there are material respects in which defenders and critics of the lawfulness of the United States' nuclear weapons policies and plans differ in their views of the facts and law. The challenge for this conference is how to harness our discussion of such areas of disagreement as to the facts and law—how to identify the areas of difference and most effectively formulate and address the resultant factual and legal issues.

When attorneys submit briefs to courts, particularly appellate courts, they are required to tee up the issues for the court, formulating them with specificity and clarity. This enables the courts to know what issues are presented and to probe such issues with counsel and ultimately address them. But the analysis can only meaningfully take place when the issues are identified with candor and precision.

This same process seems essential to our consideration of the lawfulness of nuclear weapons threat and use. Based upon my years-long work writing my 2024 book, *Nuclear Weapons and International Law: Existential Risks of Nuclear War and Deterrence Through a Legal Lens*, I prepared for this conference a list of what appear to be factual and legal issues that defenders and critics of U.S. nuclear weapons policy and plans see differently, in the hope of teeing such issues up for discussion.<sup>2</sup> That list of issues was then refined in prep sessions of the various panels, with all faculty members having the opportunity to weigh in on the formulation of the issues.

Some of the most salient issues on the list include the following:

### **Controllability**

1. Under LOAC, is it lawful under the requirements of distinction, proportionality, and necessity for a state to use weapons, including nuclear weapons, whose effects cannot be controlled?
2. Are such potential nuclear weapons effects as radioactive fallout, nuclear winter, and EMPs controllable?

### **Scope of Relevant Effects**

3. In applying the LOAC requirements of distinction, proportionality, and necessity to potential uses of nuclear weapons, must all foreseeable effects of such uses,

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<sup>2</sup> This list appears in full in the “Course Materials” document under the “Supplemental Materials” section. Accessible [here](#).

including radioactive fallout, nuclear winter, and EMPs be considered in assessing the lawfulness of such potential uses?

**Prerequisites for Legal Opinion of Lawfulness**

4. The U.S. has processes in place for its lawyers to advise on the lawfulness of military operations, including potential nuclear weapons uses, under consideration. What is necessary, as a matter of law, for such lawyers to conclude and advise that a particular nuclear weapons use would be lawful? Would it be sufficient for the legal advisors to conclude in good faith that they are unaware of any basis to conclude that such a use would be unlawful? Or must the legal advisors be able to form a good faith basis to believe that the effects of the strike *would* comply with LOAC, including the requirements of distinction, proportionality, and necessity? If the potential effects of a nuclear weapons strike under consideration are unknown or unquantifiable, may the legal advisors advise that the strike would be lawful? May the military lawfully use nuclear weapons in circumstances where the foreseeable likely effects of the uses are essentially unknown and even unknowable?

**Proportionality**

5. Is the requirement of proportionality, as applied to potential weapons uses, including potential nuclear weapons uses, solely a matter of balancing the concrete and direct value of the military target and the potential collateral effects on civilians and other protected persons and objects—or are there objective limits on the extent of collateral effects, and, if so, what are they?

**Necessity**

6. Under the LOAC requirement of necessity, would it be lawful for the United States or other nuclear weapons states to use nuclear weapons in circumstances where conventional weapons could do the job?

**Risk Analysis**

7. In applying risk analysis to the application of the LOAC requirements of distinction, proportionality, and necessity to potential nuclear weapons uses, what, if any, weight, should be ascribed to identifiable foreseeable non-speculative risks, including low-probability risks, of unlawful effects, including risks of tens or hundreds of millions and even billions of civilian deaths and the substantial destruction of human life and

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civilization? What, if any, objective limits are there, as a matter of law, as to the extent of risks a state may impose on non-combatants, including civilians and neutrals?

### **Nuclear Deterrence/Threat Law**

8. Does the policy of nuclear deterrence constitute a threat to use nuclear weapons?
9. Under LOAC, is it lawful for a state to threaten to use a weapon that it would be unlawful to use?

### **Nuclear Counter-Strike and Escalation**

10. In the context of a state that conducts a nuclear weapons strike against a target state, what, if any, legal responsibility does the attacking state have for identifiable foreseeable non-speculative nuclear counterstrikes and escalation by the target state?

In the course of our discussions at the conference, it can hardly be said that we “closed the gap” in resolving issues concerning the lawfulness of nuclear weapons threat and use. The conference, however, as you will see, provides a range of views on such questions as those posed above. Hopefully, you will find it to be a helpful discussion in assessing the applicable facts and law and formulating your own views as to these matters, perhaps tempting you to study these matters further and get involved in addressing them.

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