TRANSCRIPT

PANEL FOUR

NUCLEAR DETERRENCE AND THE LAW OF THREAT

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Speakers: John Burroughs;[2] *David S. Jonas;*[3] *Dr. Eirini Giorgou;*[4] *Navy Commander Leigha Groves;*[5] *Allen S. Weiner*[6]

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Introduction to Panel Four

JACQUELINE CABASSO:

My name is Jacqueline Cabasso. I am the Executive Director of Western States Legal Foundation, based in Oakland, California, an affiliate of the International Association of Lawyers against Nuclear Arms. It is my privilege to serve as moderator of Panel 4, which will address "Nuclear Deterrence and the Law of Threat." The Latin root of the word deterrence means "to frighten away, fill with fear." In many ways, "nuclear deterrence" is the Gordian knot blocking the path to nuclear disarmament. In my view, nuclear deterrence is an elastic doctrine that is used as a justification by nuclear arms states and their allies for the perpetual possession and threatened use of nuclear weapons. But today we will hear a variety of perspectives on the law and policy of nuclear deterrence, which are closely linked.

U.S. national security policy has been remarkably consistent in the post-World War II and post-Cold War eras − despite dramatically changed geo-political conditions and very different Presidential styles. "Nuclear deterrence" has been reaffirmed as the cornerstone of U.S. national security by every President, Republican or Democrat, since 1945, when President Harry Truman, a Democrat, oversaw the atomic bombings of Hiroshima and Nagasaki. Unfortunately, Russia and other would-be superpowers have increasingly modeled their own national security policies - as well as their economies, on the U.S. model.

You may recall President Obama's 2009 speech in Prague which launched a tidal wave of expectations around the world that the abolition of nuclear weapons was finally on the horizon.

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In Prague, President Obama famously declared: "To put an end to Cold War thinking, we will reduce the role of nuclear weapons in our national security strategy, and urge others to do the same." But this was immediately followed by, "Make no mistake: as long as these weapons exist, the U.S. will maintain a safe, secure, and effective arsenal to deter any adversary, and guarantee that defense to our allies."

So what is the U.S. policy of "nuclear deterrence"? As stated in a September 2008 Department of Defense Report on the Air Force's Nuclear Mission: "Nuclear deterrence is achieved by credibly threatening a potential adversary with the use of nuclear weapons so as to prevent that adversary from taking actions against the U.S., its allies, or its vital interests. This is accomplished primarily by maintaining sufficient and effective nuclear capabilities to pose unacceptable costs and risks upon the adversary should it so act." And it continues: "Though our consistent goal has been to avoid actual weapons use, the nuclear deterrent is 'used' every day by assuring friends and allies, dissuading opponents from seeking peer capabilities to the U.S., deterring attacks on the U.S. and its allies from potential adversaries, and providing the potential to defeat adversaries if deterrence fails."

Closely related to the question, "What is the U.S. policy of nuclear deterrence?" is the question "What purposes do U.S. nuclear weapons serve?" One answer was provided by the U.S. Navy Admiral Charles Richard, then Commander of the U.S. Strategic Command, who wrote, in an article titled "Forging 21st Century Strategic Deterrence*,"* published in *2021 proceedings of the U.S. Naval Institute*: "We must acknowledge the foundational nature of our nation's strategic nuclear forces, as they create the 'maneuver space' for us to project conventional military power strategically."

Today our panelists will address the legality of explicit direct threats of use and the legality of the long-standing policy of deterrence. After our panelists speak I will give them a chance to ask each other questions. If there's time, we'll take questions from the audience. If you have questions please write them in the Q&A box. Now I will briefly introduce our expert panel. As each presenter speaks, you will be able to see their full bios in the chat.

Our first speaker is Dr. John Burroughs, a Senior Analyst with the Lawyers Committee on Nuclear Policy. He will be followed by David S. Jonas, a partner at Fluet, former nuclear nonproliferation planner, Joint Chiefs of Staff, Lieutenant Colonel U.S. Marine Corps retired, and an Adjunct Professor at Georgetown and George Washington Law Schools. Following Dr. Jonas, we will hear again from Dr. Erini Giorgou, International Committee of the Red Cross Legal Advisor covering nuclear weapons, then, Navy Commander Leigha Groves, Deputy Staff Judge Advocate, U.S. Strategic Command. Finally, we will hear from Allen S. Weiner, Senior Lecturer in Law and Director of Stanford's Program in International Comparative Law, Stanford Law School, and former legal advisor with the U.S. State Department. John, I turn the floor over to you.

The Illegality of the Threat to Use Nuclear Weapons

JOHN BURROUGHS:

Thank you, Jackie. Contradicting the widespread and complacent belief that the risks of the nuclear age are on the decline, recent years have seen a number of invocations of possible use of nuclear weapons, including the following episodes.

It seems sometimes to be forgotten, but in the summer and autumn of 2017, the U.S. and North Korea exchanged incendiary threats of nuclear destruction. In September 2019, Pakistan referred to possible nuclear war in connection with the dispute with India over Kashmir. Finally, as has been talked about, the Russian Federation on more than one occasion has referred to Russian resort to nuclear weapons should the U.S. and NATO States intervene militarily in the conflict in Ukraine. Such threats are utterly unacceptable, above all because they greatly increase the risks of a humanitarian and environmental catastrophe resulting from the use of nuclear weapons.

The position expressed in the G20 Declaration made in Bali on November 16, 2022, is striking in this regard. The Declaration states in part: "It is essential to uphold international law and the multilateral system that safeguards peace and stability. This includes defending all the Purposes and Principles enshrined in the Charter of the U.N. and adhering to international humanitarian law, including the protection of civilians and infrastructure in armed conflicts." The next sentence is what I want to emphasize: "The use or threat of use of nuclear weapons is inadmissible." The G20 is an intergovernmental forum that includes the world's major powers. The statement about the threat of use of nuclear weapons was occasioned by Russian threats but it is not by its terms limited to that circumstance.

For a lawyer the word "inadmissible "is intriguing. It conveys unacceptability to be sure, but it also has a legal flavor. For example, in a trial, evidence is found to be admissible or inadmissible. What I want to convey today is that there is a strong case that threats of use of nuclear weapons are not only unacceptable and illegitimate, they are also contrary to international law. That is true under the law governing when resort to force is lawful, *jus ad bellum*, and the law governing the conduct of conflict, *jus in bello*, the law of armed conflict or international humanitarian law. As to *jus ad bellum*, the U.N. Charter, Article 2(4), provides: "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 U.N." If a use of force would violate Article 2(4), a threat to engage in such force violates that article.

As the International Court of Justice (ICJ) stated broadly in its 1996 Nuclear Weapons Advisory Opinion, "The notions of threat and use of force under Article 2, paragraph 4, of the Charter stand together in the sense that if the use of force itself, in a given case, is illegal for whatever reason, the threat to use such force will likewise be illegal." It follows that a threat to use nuclear weapons as part of an aggressive attack is illegal. That certainly applies to the nuclear threats made in support of Russia's invasion of Ukraine. As the ICJ also explains, importantly, it is also the case that a use or threat of force in self-defense must be necessary and proportional. This is a sometimes overlooked aspect of the U.N. Charter requirement. A defensive threat to use nuclear weapons that does not meet those criteria would also be illegal

under *jus ad bellum*. In this context, proportionality requires that the defensive use of force have a reasonable relationship to the aggressive act responded to and also a reasonable relationship to the lawful goals of the defensive use of force, for example, expelling troops from the attacked state's territory. In many circumstances, it could certainly be argued that a defensive first use of nuclear weapons is not necessary or proportionate as a matter of *jus ad bellum*.

What is the law when a state threatens to use nuclear arms in self-defense - not as part of an aggressive attack as in the Russian case? Let me underline this point: Any threat to use nuclear weapons whether aggressive or defensive must also be of use that would comply with the law of armed conflict or *jus in bello*. In general, as the ICJ found [in its 1996 Nuclear Weapons Advisory Opinion], "If an envisaged use of weapons would not meet the requirements of humanitarian law, a threat to engage in such use would also be contrary to that law." Similarly, in its in-depth study *Customary International Humanitarian Law*, the International Committee of the Red Cross observed that "the prohibition on threatening to carry out a prohibited act is generally recognized in international law." The general principle is reinforced and instantiated by certain provisions of Protocol 1 to the Geneva Conventions. One provides that "[a]cts or threats of violence, the primary purpose of which is to spread terror among the civilian population, are prohibited." Another provision prohibits threatening that there shall be no survivors.

Under the general principle, if the use of nuclear arms is illegal, the threat of the use is illegal. In my view, putting aside speculative marginal cases, use in typical scenarios or normal scenarios, again even if defensive, would be illegal under the law of armed conflict. The ICJ went a long way toward accepting this conclusion, finding that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict. However, the Court did not reach a conclusion one way or the other regarding an extreme circumstance of self-defense in which the very survival of a state is at stake. Nearly three decades after the Court issued its opinion, we should move beyond the Court's uncertainty in that circumstance.

Now, here is a tough question and I am only going to partially answer it, "What is a threat as a matter of international law?" A statement making demands that is both credible and specific qualifies. Take a concrete context where the stakes are high, such as one of armed conflict involving a nuclear-armed state, and the message is, "If you do not refrain from X or if you do Y, we will resort to nuclear arms." That, without a doubt, is a legally cognizable threat. It describes Putin's threat at the outset of the invasion of Ukraine in which he expressed a readiness to resort to nuclear force should addressee states interfere in the Russian military operation in Ukraine.

What about general policies declaring a readiness to resort to nuclear weapons when vital interests are at stake and stating or implying a definite intention to do so if subjected to a nuclear attack? One could object that these are not specific and credible threats. However, first of all, the signal that a nuclear attack will be met with a responsive or preemptive nuclear

attack is specific and credible, though it is not in an actual circumstance. But it is true that references to vital interests and like formulations are vague.

Second, and importantly, what is an issue here is not the mere possession of nuclear arms. Especially in the case of Russia and the U.S., it is the deployment of nuclear weapons ready for use on short notice − less than 30 minutes in the case of ICBMs. More broadly, if specific threats are illegal, that points towards the illegality and certainly the illegitimacy of the machinery and doctrines of nuclear deterrence. They should be dismantled as rapidly as possible through both multilateral and bilateral negotiations, and through unilateral steps, as indeed the Non-Proliferation Treaty and other international law require.

At the beginning of the post-World War II era, the U.N. Charter envisaged a world in which the threat or use of force by states at most would play a minimal role in global order. Tragically, nuclear weapons were born at the same time, and within a few years global order was in significant part structured through the permanent threat of nuclear force by certain states, above all, the U.S. and the Soviet Union. We need to return to the original vision of the U.N. Thank you.

JACQUELINE CABASSO:

Thank you, John. Professor Jonas.

Actual Versus Implied Threats of Nuclear Weapons Use

DAVID S. JONAS:

Thank you. I wanted to thank Charlie for the invitation to speak, and I wanted to note that in my emails with Charlie initially, we had many debates about the viability and practicality of international law as it pertains to those states that simply don't follow it, compared to those who do. I think that that's something that everyone should keep in mind when we're talking about these things.

I have no doubt that many panelists and participants, viewers, and listeners would like to see nuclear weapons eliminated. I'm actually among them, but I simply see no way to get there. Of course, the worst possible world that we could live in would be a world in which the U.S. decided that "Well, you know, the threat and use - it's all illegal and so we're going to give up our nuclear weapons," but then you've got Iran, Russia, China, North Korea, perhaps, with nuclear weapons and we have none. That's not a world I want to live in. I would love to be able to get rid of nuclear weapons, I just don't see how we can get there. I hope that there are smarter people than me who can figure that out. I did appreciate the opening remarks of the ABA President Mary Smith. She quoted Jamie Dimon noting that nuclear proliferation is probably the greatest threat that we confront right now and it's certainly not climate change, and that's spot on. Because nuclear proliferation and the threat of nuclear weapons detonation; nothing can approximate that. As a matter of fact, I personally view nuclear weapons as the only WMD. I don't think that chemical or biological weapons even approach the damage that nuclear weapons can do. Of course, they do no damage to infrastructure whatsoever.

Now, we've talked a lot and we've heard a lot of discussion about the ICJ Opinion, of course, and that's relevant here. We talked about the NPT [Treaty on the Non-Proliferation of Nuclear Weapons] quite a bit - nuclear weapons are not illegal to possess under the NPT, certainly for the five recognized nuclear weapons states. I also don't happen to believe that the NPT creates some kind of customary international law against the possession of nuclear weapons if you're not a nuclear weapon state in the NPT. So, four other states, nine total with nuclear weapons −I don't believe that the possession of any of them except, arguably North Korea, you could come up with an argument against their possession of nuclear weapons, as illegal.

Now, the threat of nuclear weapons of course is something else. And the ICJ said that the threat or use is generally contrary to international law, but, of course, not always, so it's not really against international law either. You do have, though, in the NPT context, you've got the five nuclear-weapon states who have committed either through a policy declaration or a legally binding negative security assurance given in the context of a protocol to a nuclear weapon-free zone, essentially, a negative security assurance commitment not to use or threaten to use nuclear weapons against nearly all non-nuclear-weapon states. And, of course, when we look around at the threats occurring, they're only really coming from Russia and North Korea. Certainly, Russia has violated the guarantee that it gave in writing in The Budapest Memorandum, not to violate the territorial integrity or sovereignty of Ukraine. That's pretty obvious to everyone that they're doing that. Then of course the threats they routinely make to deploy tactical nuclear weapons against Ukraine. They've moved strategic and tactical nuclear weapons into Belarus. All of these things are threatening moves and they are real threats. And so what I really want to get at here is the difference between what I would call an implied and an actual threat of use of nuclear weapons.

Now, the ICJ − of course, I don't believe that they have outlawed the threat, nor do I believe that the Treaty on the Prohibition of Nuclear Weapons changed anything in that regard. So I don't think there's any treaty or customary international law that prohibits nuclear weapons or the threat of nuclear weapons. But when we get down to, you know, John just said what is a threat and that is indeed the key question. And I agree, you know, we really need to define that and figure out what it is. And we can all agree that Putin's statements and, of course, actually going into Ukraine with conventional military forces − that those things are wrong. Let's take it down a notch and let's look at a statement that we often hear from the U.S. presidents. When something happens in the world − it might be the use of chemical weapons, it might be an attack across a border of another country and they'll come to the President and they'll say "Well, what does that mean? What are you thinking about doing?" And what we'll often hear from the President is that "all options are on the table." Now, that is taken to mean that we can use conventional forces but means "all options that we have" or something that we would consider and that, by implication, includes the use of nuclear weapons. I personally don't believe the U.S. would use nuclear weapons against a conventional attack on an ally, particularly if it didn't threaten their existence or the use of a chemical weapon. But we want them to know that that's still an option. That kind of statement, I believe, I might classify as a veiled implied threat. It

doesn't mention the word nuclear weapon but yet it implies that it is something we might consider.

My concern here is that some of my friends who would like to see nuclear disarmament would like to argue that the very possession of nuclear weapons for use as a deterrent is illegal. And, of course, I'd say if the U.S. ever agreed that that was the truth, again, and we did get rid of our nuclear weapons, we'd be in a hell of a situation because there are a few states out there that have nuclear weapons that would be happy to threaten us with them. And, of course, if we had no way to deter them with nuclear weapons then what exactly do we do? So I think that it's important to also note that when you say "all options are on the table," it also includes conventional weapons and we have the strongest conventional military in the world at least right now.

And no one has ever said that the threat of sending in the Marines or sending in an aircraft carrier, nobody ever talks about that threat as being really illegal. It's only when nuclear weapons get mentioned that we talk about illegality. And so, I think that when we look at this distinction of implied versus actual threats, the actual threat is what we're hearing from Putin, where he and any number of his lieutenants are publicly saying at different times that "We're thinking about the use of a tactical nuclear weapon," "They better be careful or we're going to consider the use of nuclear weapons and that's why we're putting tactical weapons into Belarus, and now we're moving strategic weapons into Belarus."

Those are real threats and that kind of conduct I believe should be unlawful. But I don't ever want to see us get into a situation where the mere possession of nuclear weapons, where we do say admittedly that they are for deterrence, could be considered unlawful because it's merely an implied threat. It's not an actual threat against anyone. No one is actually saying it. I'm aware that it's written down in our Nuclear Posture Review, but it needs to be there because in order to have real deterrence the threat has to be credible, but it doesn't need to be made publicly and constantly as a warning. When a leader does that kind of thing as Putin does, what I often say to my students is that that is harmful to the nuclear nonproliferation regime also. I don't say it's illegal, but I say that it's harmful to the nuclear nonproliferation regime because it increases the perceived value of nuclear weapons and it might make a state that doesn't have nuclear weapons think, "Jeez, maybe we ought to get one of them so that we can make those kinds of statements so no one will attack us." And I think that's the key difference. That's what I'd like us to bear in mind as we move forward here 'actual versus implied' threats. Thanks very much.

JACQUELINE CABASSO:

Thank you. And now, Dr. Giorgou.

The Unacceptability of Nuclear Deterrence, the Inadmissibility of Threats of using Nuclear Weapons under the Martens Clause, and the Principles of Humanity and Dictates of Public Conscience

DR. EIRINI GIORGOU:

[Remarks omitted.]

JACQUELINE CABASSO:
Thank you for staying up. Thank you. Our next speaker will be Commander Groves.

The Role of Attorneys in Nuclear Planning and Targeting at the Department of Defense

NAVY COMMANDER LEIGHA GROVES:

Yes, thank you, and thank you, Dr. Giorgou, for your perspective and to Professor Moxley for inviting me to sit on this esteemed panel. I'm a naval officer and an attorney in the legal office at the U.S. Strategic Command, which I will talk more about shortly. But before I do, I have to give the obligatory disclaimer and say that I do not speak for Strategic Command, and any comments or opinions I provide today are my own and do not necessarily represent Strategic Command, the Department of the Navy, the Judge Advocate General's Corps, or the Department of Defense.

I was asked to speak about the role of attorneys in nuclear planning and targeting at the Department of Defense. The attorneys in the Strategic Command Legal Office provide the full spectrum of legal advice to our four-star Commander and his staff. We come from diverse geographic and educational backgrounds. We each have at least 10 years' experience as attorneys, and we have advised at all levels of command and all along the spectrum of conflict—from the battlefields of Iraq, the detention facilities in Afghanistan, the Embassy in Kuwait, the European theater, the Mexican border, and an aircraft carrier in the South China Sea.

Our client, Strategic Command, is one of eleven unified combatant commands within the Department of Defense. Its mission is to deter strategic attacks and employ forces as directed to guarantee the security of our nation and allies. Strategic Command is responsible for strategic deterrence, nuclear operations, nuclear command, control, and communications operations, joint electromagnetic spectrum operations, global strike analysis and targeting, and missile threat assessment. It is our responsibility as the command's lawyers to understand each of these mission sets and their corresponding legal regimes.

We work closely with the planners and others involved in the analysis and targeting process. We are their primary resource for questions concerning the law of armed conflict, and we provide the first legal review for plans and targets that get reviewed again by the joint staff, DOD Office of Government Council, and other attorneys before being approved by the Secretary of Defense and the President. And when those attorneys in that technical chain have questions, they call us because we are best poised to translate the plans for the lawyers and the law for the planners.

The role lawyers play in targeting is not unique to Strategic Command, but the stakes are obviously higher. The Department of Defense requires each DOD component, including Strategic Command, to make qualified legal advisers (at all levels of command available) to provide advice about law of war compliance during planning and execution of exercises and operations. Commanders at the highest levels must also ensure that all plans, policies, directives,

and rules of engagement issued by the command and its subordinate commands and components are reviewed by legal advisers to ensure consistency with DOD directives and the law of war.

Now, specific to nuclear weapons, the Nuclear Posture Review from 2022 makes clear that legal advice is integral to the preparation of employment guidance and plans and includes a review of their consistency with LOAC, which is authoritatively stated for DOD personnel in the DOD *Law of War Manual*. Long-standing DOD policy is to comply with LOAC in all armed conflicts, however characterized. And the DOD Law of War Manual recognizes that the law of war governs the use of nuclear weapons, just as it governs the use of conventional weapons.

Additionally, the Nuclear Posture Review reaffirms that U.S. policy is not purposefully to threaten civilian populations or objects, and the U.S. will not intentionally target civilian populations or objects in violation of LOAC. And while the U.S. does not espouse a no first use policy, it has declared that as long as nuclear weapons exist, the fundamental role of nuclear weapons is to deter nuclear attacks on the U.S., our allies, and partners. The U.S. would only consider the use of nuclear weapons in extreme circumstances to defend vital interests of the U.S., its allies, and partners. The U.S. will not use or threaten to use nuclear weapons against non-nuclear weapon states that are party to the Non-Proliferation Treaty in compliance with their nuclear non-proliferation obligations.

I echo a former DOD general counsel [Jennifer M. O'Connor in a speech given on Nov. 28, 2016 at New York University School of Law] when I say that we take our obligation to comply with the law of armed conflict very seriously. And like her, I believe our compliance is fundamentally a source of our strength. Compliance with LOAC and other DoD initiatives like the civilian harm mitigation and response program that was directed by Secretary Austin last year helps us defeat our adversaries and their ideology by conferring legitimacy on our actions in the eyes of the people around the world.

I'm happy to discuss these points or others made by the panelists to the extent that I'm able to do so. Obviously, I'm limited to how much I can say, with respect to my experience at Strategic Command, but I look forward to the discussion, and again, thank you for having me on this panel.

JACQUELINE CABASSO:
Okay, thank you very much. And finally, we have Professor Weiner.

The Lack of a Legal Prohibition Against Making Threats to Use Force in a Manner that Violates international humanitarian law

ALLEN S. WEINER:

Great. Thank you. So, first of all, I'd like to thank Charlie Moxley for organizing this panel and inviting me and also Carra Forgea from the New York State Bar Association for all of the excellent work that she's done in supporting the organization of this program. So, thank you both. You've heard a very thorough presentation from my expert colleagues on the panel about the law governing what has been styled for purposes of our panel as "the law of threat." I should

note that most of the work on the legality of threats of force relates to whether it would be lawful to *initiate* or *have recourse to force*. In other words, the legality of threats discourse is focused largely on whether a threat is lawful under the law governing the *jus ad bellum*.

Now, actually, in our discussion today, that has not been true. We've had some quite thoughtful discussions about a topic that ordinarily gets less attention, which is the lawfulness of a threat that would violate the *manner* in which a state wages war, whether it would violate the *jus in bello*, which I'll refer to alternatively as international humanitarian law (with deference to my European colleague Eirini), or the law of armed conflict (with deference to my U.S. military colleague Commander Groves).

With respect to the law of threats to use force, a couple of different views have evolved. But under the dominant view, which I think is often referred to as the "coupled" view, the basic notion is that the legality of a threat depends on whether the actual use of force that is threatened would be lawful. In other words, if a state says, "If you invade me aggressively, I will use force in self-defense," that is, of course, a threat to use force. But it is not considered to be an illegal threat. So, we evaluate the legality of the threat on the basis of whether or not the actual threatened force would be permissible.

But with respect to *jus in bello*, we see much less work on whether it would be unlawful to threaten to use force in a manner that would be illegal, i.e., that would violate the means and methods of warfare, even if the underlying recourse to force itself was permissible. So, consider a terrible hypothetical to capture that notion: if a state says, "If you launch an aggressive war against us, we will use force in self-defense, and we will intentionally target civilians in your country." This would be a circumstance in which the threatened use of force would be permissible as a matter of *jus ad bellum*, but, of course, the threatened use of force would be impermissible as a matter of IHL or *jus in bello*.

It's interesting to me that in the realm of nuclear deterrence, we don't see as much attention on the question of threats to use force that would violate IHL. That seems to me, in some ways, to be more urgent or more salient than the legality of threats under the *jus ad bellum*. That's primarily because most states, to the extent they have declared nuclear policies, typically indicate that they're going to use force only in circumstances of self-defense. We might have rare examples to the contrary – such as the statements that President Putin has made in the context of the invasion of Ukraine – but generally, and we see the permanent members have adopted statements indicating that nuclear weapons should be used defensively. Accordingly, we don't see too many examples of states essentially threatening to use nuclear weapons in a manner that would constitute an act of aggression in violation of [U.N. Charter] Article 2(4)'s prohibition on the use of force.

Given the characteristics of nuclear weapons, which some suggest cannot be used in a manner that comports with international humanitarian law—and I should note that's not a position I necessarily embrace—it seems to me that the question of threatening to use force in a manner that violates international humanitarian law is particularly germane to our discussions about nuclear deterrence

Now, some commentators, I know, would be surprised by the question that I'm asking about the threat to use force in a manner that would violate IHL. I think my colleague Professor Burroughs, for example, would be surprised by that. They would argue that the question has already been decided by no less an authority than the International Court of Justice in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons.

In its 1996 Opinion, the Court first embraced what I would describe as the coupled view that the legality of threats and the legality of the use of force are linked. So we see the notion of threat: "If the envisaged use of force is itself unlawful, the stated readiness to use it would be a threat prohibited under Article 2, paragraph 4." But the Court added that the threat would be unlawful if the use of force would be unlawful for any means – "for whatever reason," the Court said. This seems to encompass the idea that a threat to use of force that was illegal because it violated IHL would be illegal. And later in its opinion, the Court, in discussing the possible consistency of the use of nuclear weapons with international humanitarian law, said explicitly, "If the envisaged use of weapons would not meet the requirements of international humanitarian law, a threat to engage in such use would be contrary to the law." So again, one might conclude that the question is resolved. And, in his impressive 1997 monograph analyzing the ICJ's nuclear weapons opinion [*The Legality of Threat or Use of Nuclear Weapons: A Guide to the Historic Opinion of the International Court Of Justice*], my co-panelist John Burroughs highlighted what he characterized as the Court's important holding that a threat of the use of force that would violate international humanitarian law is prohibited. And he discussed, as he did in his remarks today, the important implications of such a holding or such language for the policy of deterrence.

With due respect to the Court and to Professor Burroughs, however, I don't agree that the language in the ICJ's Advisory Opinion ends our inquiry into this matter. I believe that the ICJ's comments about threats to use force in a manner that violates international humanitarian law are simply incorrect.

In advancing this claim, as a preliminary matter, I think it is worth saying something about the legal meaning of an ICJ Advisory Opinion. Advisory Opinions are just that; they are advisory. They are meant to provide guidance on legal questions to the U.N. organ or body that has requested them, and the Court itself, according to its website, acknowledges that Advisory Opinions have "no binding force," although the website adds that such Opinions carry great legal weight and moral authority. In my view, as a U.S.-trained lawyer, such Opinions have what we might call persuasive authority. But the persuasiveness of the Advisory Opinion, or any particular element of it, depends on how well-reasoned and how well-supported the conclusions are, not merely the fact that the Opinion was issued by the Court.

In assessing how well-reasoned the Court's statements on the question of whether threats to use force in a manner that would violate international humanitarian law are themselves unlawful, I think it's worth noting that the entirety of the Court's analysis is captured in just the two sentences that you have seen in the slides that I just showed you. As Dr. Giorgou indicated, there is no real elaboration in the Court's Opinion about the reasons for its conclusions. The Court also stated elsewhere in its opinion that for a threat to be lawful, the declared readiness of

the state to use force would have to be "in conformity with the Charter" of the U.N. To me, that contradicts the notion that threats to use force in violation of IHL would themselves be illegal because, of course, the *jus in bello* rules do not derive themselves from the U.N. Charter, with which the Court said the threatened use of force would have to conform. *Jus in bello rules* derive from separate sources of law—they derive, of course, from customary international law, from the 1949 Geneva Conventions, the 1977 Additional Protocols, and other sources of law.

So, despite this *en passant* suggestion in the ICJ's Nuclear Weapons Advisory Opinion, I believe the better view is that the prohibition on threats in Article 2(4) of the Charter does not itself make it illegal to threaten to engage in uses of force that would violate IHL. I think the legality of threats, when we properly understand the scope of Article 2(4) of the Charter, should be assessed in terms of the *jus ad bellum*. That, to me, is consistent with the language of Article 2(4) itself, which prohibits "threat or the use of force." The reference to the "use of force" in my mind suggests a concern with the initiation of force. Had the Charter been focused on whether issues related to the *manner* in which force is used, we would have perhaps seen language prohibiting threats "*related to* the use of force," rather than "the use of force." And again, as I suggested, the source of law governing the conduct of the means and methods of warfare—international humanitarian law—does not derive itself from the U.N. Charter.

So, if Article 2(4) of the Charter does not provide a prohibition on making threats to use force in an illegal manner, i.e., in violation of IHL, one might ask whether there are other sources of international law that would make it illegal to threaten to violate IHL.

I think the answer in general is no. There is no general prohibition in international law threatening to violate international law, i.e., there is no general prohibition on making a threat to do something that is illegal. The International Law Commission (ILC) addressed the question of whether threats, incitement, or attempts to violate international law were *per se* illegal in one of its reports on the law of state responsibility [Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries]. The ILC took the view that the legality of a threat has to be determined on the basis of the underlying primary rule. If, in other words, a rule itself makes it unlawful to make a threat to carry out the act prohibited by the rule, then of course the threat is illegal. But merely preparatory conduct by itself is not unlawful if there is no such prohibition in the primary rule. The ILC relied on the ICJ's decision in the *Gabčíkovo-Nagymaros* case, and concluded that the preparatory conduct – which for our purposes would include making a threat – does not itself amount to a breach if it does not predetermine the final decision to be taken.

So let's consider the primary rules in question here. Do the primary rules, i.e., the rules of IHL themselves, prohibit threats? I would argue that the international humanitarian law rules do not as a categorical matter prohibit threats in a way that the International Law Commission said would be required to deem a threat to be unlawful. To be sure, as Dr. Giorgiou described, there are a limited number of particular international humanitarian law rules that *do* prohibit threats. The Third 1949 Geneva Convention on Prisoners of War, for instance, provides that prisoners who refuse to answer questions "may not be threatened with unpleasant or disadvantageous

treatment of any kind." There we see a prohibition on making threats in the primary rule. Article 51(2) of Protocol I makes it clear that "acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited." Protocol I also makes it unlawful to threaten that no quarter shall be given. But these are specific provisions linked to specific IHL violations. They don't reflect a general norm that is unlawful to threaten to engage in any violation of IHL.

So I conclude by arguing that the statement by the ICJ in its Nuclear Weapons Advisory Opinion, that "if an envisaged use of weapons would not meet the requirements of humanitarian law, a threat to engage in such use would be contrary to that law" is not an accurate statement of international law, except with respect to those humanitarian law rules that themselves already embody a prohibition on threat.

Let me just say that this means *only* that threats to use force in manners that would violate international humanitarian law in my view are not unlawful. But that is not the end of the inquiry. I do believe that there are threats in declared nuclear doctrine, including historic U.S. nuclear postures, that have involved threats to use force in manners that would violate IHL. Scott Sagan and I have written ["The Rule of Law and the Role of Strategy in U.S. Nuclear Doctrine" in Volume 45 of *International Security*] that even in the most recent declared Nuclear Posture Review, the U.S. continues to include declared policies for the use of nuclear weapons that we believe are incompatible with IHL. Although these declared policies are not necessarily illegal under international law, that's not to say they are a good idea. The concluding thought I would like to leave you with is that these threats, as Sagan and I have argued, represent bad policy and should not be made by the states that are making these threats. We believe that threats to use force in a manner that violates IHL may not be credible for the reasons that we heard from Professor Hathaway and Commander Groves regarding the institutions that exist within the U.S. government to ensure compliance with international law. Given those checks, making threats to use force in a way that would violate IHL may lack credibility, and thus be of limited deterrent value. Alternatively, if such threats are seen by the adversary as credible, they might create an escalatory threat cycle that could heighten instability by increasing the security dilemma challenges for an adversary that perceives it may have to act first to try to prevent a use of force that would violate IHL. There are also issues associated with a possible "commitment trap" of inducing a state's leader to feel compelled to carry out a threat to use force in a manner that has been made by his or her government – even though the state does not in fact wish to carry out such a threat – in order to maintain credibility. Accordingly, there are very powerful reasons *not* to make threats to use force in a manner that violates IHL. I simply don't believe that there is a legal prohibition on doing so. Thank you for your attention.

Introduction to Q&A Session

JACQUELINE CABASSO:

Thank you. It's been a very interesting panel with a lot of different and divergent views expressed and as I said in the beginning I was going to invite the panelists to ask questions of

each other at the end before we looked at the Q&A and I just wonder, Dr. Burroughs, since so much of Professor Weiner's presentation was directed at your work I wondered if you wanted to respond?

Burroughs' Response to Weiner's Presentation

JOHN BURROUGHS:

Right. Well, I believe Allen has been investigating this question independently. And I am very glad that he is because it is sort of an understudied but really important issue and I believe that Dr. Giorgou has said that the ICRC is also pursuing further work on the legal status of threat. It was somewhat accidental to be honest that we had two people that were working on this question and turned out to be the people in this panel and I am happy about that.

Concerning the ICJ statement, first of all, the ICJ has to be given some respect and I am not saying that Professor Weiner was not giving them respect. They have eminent international lawyers on the ICJ, not necessarily all of them, but some of them are eminent international lawyers. I have made some effort over the years, but not like a comprehensive effort, to figure out what the sources and background are of that statement by the ICJ. I sort of dimly recall and I don't guarantee this, that there could be some prominent international lawyers who have made such statements, say in treatises, perhaps Brownlie.

I am also speaking in this conference where there are lawyers who are among the participants and I would put the question to lawyers, not only as a matter of international law, but as a matter of law within the U.S., is there a general principle or is there something approaching a general principle that it is prohibited to threaten something which it is a really bad thing to do? Like for example a murder. And I should have kept track of that, I just saw a couple of months ago, that there were recent convictions or charges regarding threats to commit murder, and there are statutes of states within the U.S. that go to this question. For instance, Colorado has a prohibition [Colo. Rev. Stat. § 18-3-206] concerning a crime of menacing: "A person commits a crime of menacing if, by any threat or physical action, he or she knowingly places or attempts to place another person in fear of imminent serious bodily injury."

So I think this whole issue of the legal status of threats that would violate IHL is something that needs further work and as I said I am glad that some of the very participants in this panel are working on it. But I would also note that, and I suppose that I am echoing Professor Weiner in this circumstance, often whether something is considered to be a legal violation in the international sphere can almost be the wrong question. First of all, is it a normative violation? Is it a violation of a norm even if the norm doesn't have the status of law? Secondly, of course, is it wise, prudent or rational to issue a threat? I would cite in support of this, and I am going to be slightly optimistic here, which I hope is permissible here given the nature of the subject matter we are dealing with, if you look at the history of the nuclear age, really overt nuclear threats are somewhat rare. When the use of nuclear weapons is referred to it tends to be somewhat elliptical or opaque. In the case when Putin made his threat at the outset of the invasion of Ukraine, he didn't actually say don't interfere because we will use nuclear

weapons. He said don't interfere because there will be consequences like you have never seen before, or something along those lines. I think other Russian officials have been quite clear; they are really specific in saying they are talking about nuclear weapons. So this is my slightly optimistic suggestion; if you look at the discourse I think there is a reluctance to engage in overt threats. That's all I will say at the moment.

JACQUELINE CABASSO:

All right, thank you. Do any of the panelists have questions for each other?

Technical Expertise and the ICRC

ALLEN S. WEINER:

Actually, I have one, which I suppose would be for Dr. Giorgou, with respect to the ICRC's view. In 2021, together with Scott Sagan, I published a piece ["The Rule of Law and the Role of Strategy in U.S. Nuclear Doctrine"] in *International Security* on nuclear weapons targeting under international law. Part of what we stressed in that piece was that there has been a substantial evolution in the technology of nuclear weapons, both with respect to their accuracy and (at least for the U.S.) the ability to deploy them with precision, and also with respect to the ability to deliver lower yield weapons. We have seen discussion in the literature, for instance, of the hypothetical of a nuclear attack against a hardened nuclear infrastructure facility in North Korea housed in remote areas: when you actually look at the pattern of the dissemination of radiation following such a low-yield attack, the result is quite contrary to what we all have in mind when we think about nuclear weapons, which is the image of a mushroom cloud following the bombing of an urban target. To what extent does ICRC take those kinds of technological developments into account when it evaluates and tries to develop its position on nuclear weapons? How much of the ICRC's work is actually informed by technical expertise on this? I should stress I am an international lawyer, and I personally don't possess this kind of technical expertise, but I am just wondering whether that informs the ICRC's thinking.

DR. EIRINI GIORGOU:

[Remarks omitted.]

JACQUELINE CABASSO:

Since you did mention one of the prohibitions of the Treaty of the Prohibitions on Nuclear Weapons, another one expressly is "threat," and I just wanted to mention that because the International Association of Lawyers against Nuclear Arms lobbied quite specifically on that point, so it is there. We have a follow-up question on the chat from Joel Zacker. "Do you think in line with what Dr. Weiner has said about improvements in nuclear weapons, whether artificial intelligence can make nuclear weapons more in line with the law of armed conflict?" That is a creative question.

Artificial Intelligence and Compliance with the Law of Armed Conflict

NAVY COMMANDER LEIGHA GROVES:

I would say that I have the opposite concern that the introduction of artificial intelligence, by taking people out of the equation, I can see how it could go the other way. Without there being critical thought, without there being a weighing of all these critical factors that we have discussed in this conference, I can see how it would make it less likely to comply with the law of armed conflict, but I recognize that there are countervailing views on that.

Whether the Disarmament Obligation under NPT Applies to Non-NPT States

JOHN BURROUGHS:

Jackie, if I could raise something that is not directly the subject of this conference but that is dear to my heart, Professor Jonas said that the disarmament obligation which exists under NPT does not apply to non-NPT nuclear powers. This is something that I have some experience with, and the reason is that I was on the legal team for the Marshall Islands in its disarmament cases in the ICJ. Due to jurisdictional questions, the three states that were respondents were the United Kingdom, India, and Pakistan. In the India and Pakistan cases, we first had to allege that the disarmament obligation, based on various factors including unanimous General Assembly resolutions and the power of the widely subscribed to NPT, applies to states outside the NPT. The way the case against the UK unfolded, we filed a brief on the merits. In part of that brief, even though the UK is bound by NPT, we still made the case about the disarmament obligation being customary and global and applying to India and Pakistan. So, for anybody who's interested in this seemingly obscure but actually important question, I recommend you look at the Marshall Island's memorial on the merits in the UK case on nuclear disarmament before the ICJ.

States' Violations of International Law

DAVID S. JONAS:

John, I did look at that and it's an impressive piece, and I actually agree with a lot of the arguments in there, but again we get to the problem and again the limitations in international law where we have states like China that ignore the Tribunal on the Law of the Sea and other rulings, they ignore it, and India and Pakistan will ignore any law that says they should not have nuclear weapons. So these limitations of international law are truly something that concerns me, when, I think it was Professor Koplow who said in another panel that, when we, as the U.S. observe international humanitarian law, international law, we observe regardless whether are dealing with someone who observes it or not, and this is something kind of where the rubber meets the road and this is one of these very troubling issues of what do you do when you are dealing with someone who won't observe international law.

JOHN BURROUGHS:

One more point Jackie, is that this is sort of an occasion where I should raise something that troubles me about the conference so far. There has been a lot of focus on Russia's invasion

of Ukraine, and nobody has mentioned that the U.S. invaded Iraq just 20 years ago. Most people, certainly I, regarded that as just a flat-out violation of the U.N. Charter. There are other instances of course in the post-Cold War, post-World War II era where various states have violated international law. So Russia is not alone. And we do not need to discuss this, but I sort of felt an obligation to say it since nobody has said anything like that throughout the conference so far.

JACQUELINE CABASSO:

Thank you very much, John, because that is something also bothering me. That's going to be the last word for this panel, we will have a ten-minute break, but I do want to close with one cartoon I want to share with you, a little food for thought to put all this in perspective. I'd like everybody to just think about this as we go into the next panel. Thank you all to the panelists. It was a very stimulating discussion.