

BOOK REVIEW

REVIEW OF CHARLES J. MOXLEY, JR., *NUCLEAR WEAPONS AND INTERNATIONAL LAW: EXISTENTIAL RISKS OF NUCLEAR WAR AND DETERRENCE THROUGH A LEGAL LENS, SECOND EDITION*

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Nuclear weapons inevitably engage the learning, the passion, and the energy of actors in multiple disciplines. These appalling arms raise profound problems that are, in turn, political, military, economic, diplomatic, humanitarian, and moral in character. But too often, the legal dimensions are overlooked; the world community has declined or failed to recognize and resolve foundational questions about the conformity with international law of nuclear weapons, nuclear deterrence, and nuclear strategy. So the puzzle lingers: what if the entire nuclear enterprise were *per se* illegal?

That is the challenge that Charles J. Moxley, Jr. addresses in his capacious new two-volume treatise, *Nuclear Weapons and International Law*. In this Herculean work, Moxley assembles a careful lawyer's brief for the illegality proposition, arguing that the threat and use of nuclear weapons would be, in all circumstances, violative of fundamental standards under international law. He positions his thesis not simply as advocacy for some future comprehensive universal treaty to abolish nuclear weapons, but even more audaciously in support of the proposition that even without new international agreements, the corpus of existing international law—appropriately understood and applied to this most extreme case—already suffices to render nuclear weapons beyond the pale.

This text is the second iteration of Moxley's challenge to nuclear weapons. His first edition, published in 2000, was inspired by the hopeful circumstances of the end of the Cold War and by the famous (and frustrating) 1996 advisory opinion of the International Court of Justice (ICJ) addressing the legality of nuclear weapons.¹ Today's volume (actually printed as two volumes) is a substantial rewrite and expansion,

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1. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 266 (July 8) [hereinafter I.C.J. Advisory Opinion].

incorporating the additional legal developments of the past two decades, including new treaties, revised national legislation and military operational manuals, additional court decisions, and developments in customary international law.

The book also reflects Moxley's enduring personal obsession with nuclear questions. Moxley is a veteran litigator, having labored for years in tony New York law firms. More to the point, he has thrived as a citizen-activist and gadfly for public interest organizations, bar associations, and other civil society groups, and as an adjunct professor at the Fordham University School of Law. For the past decade, his day job has been as a professional arbitrator, adjudicating commercial cases. In that role, his job description is to provide independent integrity, affording a fair and full hearing to all sides of every issue—and that is precisely what he undertakes to do, with admirable success, in this book.

Remarkably, Moxley's strategy is to rely principally on statements by the U.S. government about warfare, law, and nuclear arms in particular. He voluminously excerpts language from the Department of Defense Law of War Manual² (and the subordinate manuals from individual services, particularly the Air Force³), as well as from official public statements by leadership spokespersons and briefings and oral arguments⁴ offered by the principal U.S. lawyers in advisory proceedings before the ICJ. He then applies those general statements and opinions to the facts of the immediate case, substantiating his claims about illegality—a classic instance of hoisting official policy by its own petard.

The work is richly detailed and thorough; it runs over 1,096 pages, many burdened with expansive footnotes. Each strand of the argument is identified with crystalline clarity, and even if a skeptical reader might not be thoroughly persuaded, everyone must concede that Moxley briefs each element of the claim with overwhelming evidence and logic. The piling on of daunting detail succeeds admirably here; there is no room left for a critic to complain that the manuscript has overlooked important facts or omitted relevant shards of analysis.

2. U.S. DEP'T OF DEFENSE, LAW OF WAR MANUAL (2023) [hereinafter DoD LAW OF WAR MANUAL], <https://media.defense.gov/2023/Jul/31/2003271432/-1/-1/0/DOD-LAW-OF-WAR-MANUAL-JUNE-2015-UPDATED-JULY%202023.PDF>.

3. See e.g., AIR FORCE JUDGE ADVOC. GEN. CORPS, THE LAW OF AIR, SPACE AND CYBER OPERATIONS (2020), https://www.afjag.af.mil/Portals/77/documents/Publications/AFOPSLAW%202020%20Web3c.pdf?ver=E_fCdUrdLrN4Upnj-Anfw%3d%3d; U.S. AIR FORCE, NUCLEAR OPERATIONS: AIR FORCE DOCTRINE PUBLICATION 3-72 (2020), https://www.doctrine.af.mil/Portals/61/documents/AFDP_3-72/3-72-AFDP-NUCLEAR-OPS.pdf.

4. Oral Statement of the United States of America, Legality of the Use by a State of Nuclear Weapons in Armed Conflict and Legality of the Threat Or Use of Nuclear Weapons, 1995 I.C.J. Oral Statement 55–81 (Nov. 15, 1995), <https://icj-cij.org/sites/default/files/case-related/95/095-19951115-ORA-01-00-BL.pdf>.

Moxley opens the inquiry with a direct lesson, leading readers by the hand through the classic syllogism: stating the law, then offering the facts, then applying the law to the facts, to reach emphatic conclusions. The investigation begins at the beginning, with a tutorial about the sources and methods of public international law, including both *jus ad bellum* (stating the circumstances under which resort to military force is lawful) and *jus in bello* (establishing which means and methods are permissible when engaged in armed conflict). This primer includes insightful commentary about some of the most provocative topics within the nuclear realm, including neutrality and reprisals. Moxley also draws useful analogies from other challenging cognate areas of disarmament law, such as the rules applicable to chemical and biological weapons and anti-personnel land mines.

Obviously, it would be impossible to summarize a work of this magnitude in a short review; the sequence of twenty-eight chapters includes presentations about the history of nuclear weapons, the “risk factors” inherent in the nuclear regime, the “probabilities” of targeting, the security concerns about the command-and-control structures, and the conventional weapons alternatives to nuclear force, to cite just a few of the many topics.

To a lawyer’s eye, the two culminating chapters (Chapter 27 on “Unlawfulness of Threat and Use of Nuclear Weapons under Rules of the Law of Armed Conflict as Articulated by the United States” and Chapter 28 on “Unlawfulness of Nuclear Weapons Threat and Use under Additional Rules of the Law of Armed Conflict”), which together constitute nearly one-third of the book, serve the function of pulling all the strands together and assembling the prosecutor’s case for illegality. Three contestable propositions lie at the heart of the analysis.

First, Moxley claims that the pernicious effects of nuclear weapons are inherently “uncontrollable.” This is a crucial point because the first rule of the law of armed conflict—the requirement of “discrimination” (or “distinction”)—bars “indiscriminate” weapons, which cannot be effectively directed at lawful military objectives.⁵ Additionally, the companion principle of “proportionality” prohibits the use of a weapon

5. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 48, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP1] (stating the “basic rule” that “In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”); JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 3 (2005) (identifying “the Principle of Distinction between Civilians and Combatants” as Rule 1 in their authoritative study for the International Committee of the Red Cross of the customary international law of armed conflict).

that generates excessive harm to civilians and civilian objects, compared to the military value of the strike.⁶ Moxley assesses that the extraordinarily destructive effects of a nuclear explosion—which the ICJ characterized as powers that “cannot be contained in either space or time”—inevitably exceed those legal standards.⁷

The easy part of this claim is to demonstrate that the U.S. government (along with virtually all others) accepts as legally binding the criteria of discrimination and proportionality. Even though the United States has never ratified the two 1977 Protocols Additional to the 1949 Geneva Conventions,⁸ the relevant restraints have passed into customary international law, binding on all states, and the United States has consistently affirmed the validity of these foundational principles.⁹

The harder part of the claim is the proof that the use of nuclear weapons would inherently, in all circumstances, prove to be indiscriminate and disproportionate. The consistent posture of the U.S. government has been that some possible uses of nuclear weapons (like some possible applications of any other weapon) would be legally defective, but some other realistic scenarios could generate lawful uses.¹⁰ In particular, as Moxley reports, U.S. government litigators and leaders contend that “small” nuclear weapons (small only by the standards of this absurdly powerful technology) could be effectively cabined.¹¹ If a small number of such nuclear devices was precisely delivered against a known enemy military target in an isolated, unpopulated site (such as a convoy of ships on the high seas or a concentration of tanks in a remote desert), then the obligations of discrimination and proportionality *might* be met. Indeed, the barest majority of the ICJ bought this hypothetical analysis, concluding that the Court did not have before it sufficient evidence to support a contrary finding.¹²

6. AP1, *supra* note 5, arts. 51.5(b), 57.2 (a)–(b) (prohibiting “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”); HENCKAERTS & DOSWALD-BECK, *supra* note 5, at 46–55.

7. I.C.J. Advisory Opinion, *supra* note 1, at 243 ¶ 35.

8. AP1, *supra* note 5; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609.

9. See DOD LAW OF WAR MANUAL, *supra* note 2, §§ 2.4–2.5.

10. CHARLES J. MOXLEY, JR., NUCLEAR WEAPONS AND INTERNATIONAL LAW: EXISTENTIAL RISKS OF NUCLEAR WAR AND DETERRENCE THROUGH A LEGAL LENS (forthcoming 2024) (manuscript at 756–59) (on file with author).

11. *Id.* at 758–59.

12. I.C.J. Advisory Opinion, *supra* note 1, ¶¶ 97, 105 (2) E (noting that “in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude

Moxley's counterclaim insists that even in those obscure scenarios, the full range of weapons effects must be evaluated, and he challenges the validity of the assumptions proffered by government and military advocates. What if these "small" nuclear weapons were not actually delivered on the target with such excruciating accuracy but flew some distance astray (as weapons frequently do)? What if unforeseen weather (such as wind or rain) drives the devastating effects further afield? What if the weapon does not perform precisely as anticipated? What if the enemy retaliates in kind, or even intensifies or enlarges the nuclear war? Even more, Moxley points to the full, obscene range of unique effects of any nuclear weapon, especially the prompt and delayed radiation, the danger of triggering a "nuclear winter," and the electromagnetic pulse, which can spread expansively and unpredictably, in both distance and time.

The author proposes that nuclear weapons are fundamentally weapons, so the complete constellation of legal obligations must apply; advocates cannot validly cherry-pick optimal circumstances and extend a favorable assessment to other, more problematic scenarios. Just as emphatically, nuclear weapons are not "normal" weapons, so their special characteristics and nearly infinite effects, and the distinct possibility that their use could lead to the extinction of human civilization, must be soberly and comprehensively taken into account.

Neither line of logic is unassailable. The United States correctly asserts that no positive law, including prior ICJ decisions, categorically rules out the use of nuclear weapons in all circumstances, so they cannot be deemed *per se* illegal.¹³ If some window remains open for legal use, then everything becomes just a matter of "it all depends on the circumstances." In contrast, Moxley directs attention to the most likely or expected uses and the reasonably anticipated consequences, not solely to the vanishingly improbable cases of restrained operations and discrete effects.

A second, succeeding aspect of the book's analysis builds upon that critique. Although Moxley does not use this term, there is an element of "bait and switch" in the U.S. government's advocacy for the legality of nuclear weapons. That is, as noted above, the strongest case for legality would be a very limited nuclear engagement: the use of just one or a small number of small weapons in very isolated locales, against an adversary that was not capable of retaliating in kind. But that is not how the U.S. nuclear arsenal has been constructed, and that is not how U.S.

definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstances of self-defence," in adopting judgment following a seven-to-seven vote among the judges, with the president of court then casting the tie-breaking vote).

13. *Id.* ¶¶ 39, 52, 61, 95.

nuclear doctrine is phrased. Instead, the U.S. nuclear arsenal consists overwhelmingly of large devices, from which the inevitable effects would surely spread to vast distances and extended periods of time.¹⁴ The essence of the concept of “strategic deterrence” contemplates the simultaneous use of many such devices against the heartland of adversary peer nations, not an isolated detonation on a remote outpost on the fringe of conflict.¹⁵ The nuclear force has been sized and structured for superpower conflict, so retaliation and escalation are the only realistic expectations.

Moxley correctly emphasizes that legality must be assessed based on the underlying realities of how these portentous weapons would actually be wielded in the most likely scenarios. It is not sufficient to focus exclusively on specious hypotheticals of limited nuclear warfare when the existing plans and capabilities address multiple, large-scale applications with the most devastating and enduring global consequences.

Finally, Moxley focuses sharply on comprehensive risk assessment in light of the above, insisting on taking into account the full range of nuclear dangers and possibilities—not solely the written plans, expectations, and best intentions. He stresses that rational decision-making must consider all the consequences of such a fraught action; the unlikelihood of the worst outcomes does not make them legally irrelevant. What if the enemy fails to understand that our use of “only” a low-yield nuclear weapon was an overture toward de-escalation? What if an enemy instead robustly climbs the ladder of nuclear options to its higher, more destructive rungs—a foreseeable, even if unsought, alternative?

Any type of weapon could go astray, and any type of weapon may provoke a disproportionate response—but when operating in the nuclear realm, the adverse consequences of out-of-control warfare would be so severe as to tilt the equation toward illegality. Moxley would not let the first nuclear mover off the hook when an escalatory response is foreseeable. In this view, if an action *may* result in such catastrophic consequences

14. See Hans M. Kristensen & Matt Korda, *Nuclear Notebook: United States Nuclear Weapons, 2023*, BULL. ATOMIC SCIENTISTS (Jan. 16, 2023), <https://thebulletin.org/premium/2023-01/nuclear-notebook-united-states-nuclear-weapons-2023/>.

15. David Vergun, *DOD Official Outlines U.S. Nuclear Deterrence Strategy*, U.S. DEP’T DEF. (Sept. 2, 2020), <https://www.defense.gov/News/News-Stories/Article/Article/2334600/dod-official-outlines-us-nuclear-deterrence-strategy/>; JOINT CHIEFS OF STAFF, DETERRENCE OPERATIONS JOINT OPERATING CONCEPT (2006), https://www.jcs.mil/Portals/36/Documents/Doctrine/concepts/joc_deterrence.pdf?ver=2017-12-28-162015-337; KIER KIER LIEBER & DARYL G. PRESS, *US STRATEGY AND FORCE POSTURE FOR AN ERA OF NUCLEAR TRIPOLARITY* (2023), <https://www.atlanticcouncil.org/wp-content/uploads/2023/04/US-Strategy-and-Force-Posture-for-an-Era-of-Nuclear-Tripolarity.pdf>.

as the extermination of the human species, it simply cannot be deemed lawful.

Among Moxley's most provocative concepts here is his analysis of the pregnant concepts of risk and causality. That is, under what circumstances should State *A* (a hypothetical first user of nuclear weapons, whose attack is confined to a "small," tightly constrained, and arguably legal use) be held accountable if its adversary State *B* responds by escalating the nuclear conflagration to manifestly indiscriminate and disproportional uses? Some analysts would allow State *A* to wiggle off the hook of legal responsibility, on the premise that State *B*'s subsequent attack constitutes an independent superseding act, relieving State *A* of culpability—similar to the application of doctrines of intervening causation by a subsequent tortfeasor, as posed in first-year torts classes.

Moxley, however, adamantly zooms in on the concept of foreseeability, insisting that a fulsome risk analysis by State *A* must take into account the complete array of anticipated outcomes, including the possibility of State *B*'s over-reaction. He argues that it would be disingenuous to permit State *A* to ignore foreseeable consequences—especially those that could devolve into catastrophic global nuclear devastation.

The final segment of Moxley's lawyer's brief does not include an explicit "prayer for relief"—a specification of the remedies he would seek if the decision-makers rule in his favor on liability. So, the question lingers: if Oppenheimer's proverbial "scorpions in a bottle" had mature second thoughts about their shared predicament, what could they do?

We therefore need to ask what difference it would make if the ICJ or some other authoritative impartial observers would now agree that nuclear weapons are *per se* illegal. It is hard to imagine the United States or other countries who proclaim simultaneous devotion to both the rule of law and the concept of strategic deterrence blithely accepting such a judgment and proceeding toward prompt unilateral nuclear disarmament.

But an enhanced appreciation of the legal defectiveness of existing nuclear armaments would alter the dialogue, internationally and domestically. A determination of illegality could lead law-abiding states to reconsider their defense postures and to de-emphasize nuclear weapons as the centerpiece of security, diminishing their role as the "coin of the realm" in great power discourse. Over time, stigmatizing nuclear weapons as contraband would support the disarmament proposition, stimulating a more vigorous diplomatic pursuit of "getting to zero" nuclear weapons.

That could be the enduring contribution of Moxley's excellent and comprehensive second edition.