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Nuclear Weapons and International Law 2020

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Overview & Introduction

Nuclear weapons endanger human civilization. Yet nine states—the United States, Russia, China, France, the United Kingdom, India, Israel, Pakistan, and North Korea—pursue security by threatening their use. The rule of law is one of the most important constraints on the threat, use, and proliferation of these devices and is crucial to their control and elimination.

On November 12, 2020, the International Section of the New York State Bar Association hosted an all-day virtual conference on nuclear weapons and international law. [Lawyers Committee on Nuclear Policy](#) (LCNP) and [Global Security Institute](#) (GSI) co-sponsored² and co-organized the conference. LCNP Board member Charles J. Moxley Jr. played a leading role in developing the conference; other organizers were John Burroughs, LCNP Senior Analyst; Jonathan Granoff, GSI President and Chair of the Task Force on Nuclear Non-Proliferation of the [International Law Section of the American Bar Association](#), a conference co-sponsor; and Ed Lenci, incoming Chair of the NYSBA International Section.

The conference has few if any precedents in its comprehensiveness and the caliber of its speakers. An exceptional group of experts in law, policy, diplomacy, and advocacy joined high-level officials from the United Nations and the United States to examine the application of international law to nuclear weapons and policy and advocacy strategies for the control and elimination of the weapons and preventing their use. Speaker bios can be found [here](#).

¹ Special thanks to LCNP advisor Randy Rydell for his drafting contributions to this report.

² Additional co-sponsors included: Fordham Law School, Center on National Security; Georgetown University, Berkley Center for Religion, Peace and World Affairs; American Bar Association, International Law Section; New York City Bar Association, Committees on International Law, Military and Veteran Affairs, the United Nations, and Cyrus R. Vance Center for International Justice; and New York County Lawyers Association, Committee on Foreign & International Law.

Charles Moxley opened the conference, followed by welcoming remarks by [John Feerick](#), Professor and Dean Emeritus, Fordham Law School; Scott Karson, President of the New York State Bar Association; Ed Lenci; [Ariana Smith](#), LCNP Executive Director; and [Jonathan Granoff](#).

Over the course of five panels, a keynote, and a dialogue, speakers examined international humanitarian law, human rights law, arms control treaties, and national nuclear weapons postures. Interwoven in the discussion were explorations of the United Nations system, *pacta sunt servanda* (Latin for “agreements must be kept”) as a key foundational principle of the nuclear nonproliferation regime, civil society advocacy, and religious and moral considerations.

Panel 1: Overview of Nuclear Weapons Risks, Consequences, and Responses

The [first panel](#) (starting at 34:10), moderated by Moxley, offered a clear reminder of the concrete and lasting consequences of nuclear weapons. Professor Osamu Arakaki (International Christian University, Japan) described the effects of nuclear weapons, speaking about the humanitarian and environmental consequences of the US’s bombing of Hiroshima and Nagasaki. He also outlined Japan’s approach to nuclear weapons, which seeks to reconcile its support for disarmament with its reliance on the nuclear umbrella.

[Hans Kristensen](#) (Federation of American Scientists) then painted a detailed picture of the nuclear arsenals held by nine countries as well as many of their known doctrines and strategies. Kristensen noted that while global arsenals have declined considerably (from approximately 70,000 weapons to about 13,000 worldwide) since the Cold War, the more interesting consideration pertains to the role of nuclear weapons in today’s military strategies, including the extensive modernization plans for existing arsenals. Kristensen underscored that US military doctrines and manuals require compliance with the international law of armed conflict (international humanitarian law). He cited US military policy that declares it will not “intentionally” target civilian populations, noting, however, that civilians often live nearby would-be nuclear targets. Kristensen also referred to the significant climate effects of nuclear weapons use, including nuclear winter. Kristensen acknowledged the dynamics of great power competition and the “strategic rivalry” among the US, Russia, and China; he reported that we are not in a new nuclear arms race in terms of number of weapons but rather are in a “technological arms race or competition,” evidenced in modernization plans and long-term nuclear planning.

Stanford Professor [Scott Sagan](#) (starting at 1:39:34) discussed the many risks associated with nuclear weapons, especially risks of accidents and technical malfunctions. He noted the difficulties of assessing risks of escalation in scenarios involving limited use of nuclear arms. Sagan said US military lawyers agree that nuclear weapons must not be used in violation of

international law, and he warned how—ironically—these legal constraints are actually encouraging the development of new nuclear weapons with greater accuracy, lower yield, and less collateral damage. Referring to the legal principles of distinction, proportionality, and precaution in the law of armed conflict, Sagan remarked that the US’s 1945 bombing of Hiroshima and Nagasaki would be illegal today. He believes disarmament is feasible “with verification.”

Keynote with UN High Representative Izumi Nakamitsu

United Nations (UN) High Representative for Disarmament Affairs [Izumi Nakamitsu](#)’s [keynote](#) (2:10:05) addressed the current status of the global nuclear regime. She discussed the failure to bring the Comprehensive Nuclear-Test-Ban Treaty into force and the lack of multilateral negotiations for a fissile material treaty. She noted the success in verifiably reducing US and Soviet/Russian deployed nuclear arsenals through a series of bilateral agreements as well as successes in establishing regional nuclear-weapon-free zones. She offered several recommendations for progress, including the reaffirmation and expedited implementation of commitments relating to nuclear disarmament made in past Nuclear Non-Proliferation Treaty (NPT) Review Conferences.

In comparing progress made on nuclear disarmament to that on other weapons of mass destruction (biological and chemical weapons), Nakamitsu observed that there is still “a considerable way to go.” She also referred to disarmament motivated by an understanding of the catastrophic humanitarian consequences of use of nuclear weapons. The International Court of Justice (ICJ) grappled with the issue in 1996; states parties at the 2010 NPT Review Conference invoked such consequences; and the Treaty on the Prohibition of Nuclear Weapons (TPNW) was explicitly negotiated as a contribution to humanitarian disarmament. Nakamitsu additionally referred to UN Secretary-General Guterres’s disarmament agenda, “[Securing Our Common Future](#),” and invoked the existing norm against the use of nuclear weapons, quoting the Reagan-Gorbachev dictum, “a nuclear war cannot be won and must never be fought.”

Panel 2: The Role of the United Nations

Moderated by LCNP Executive Director Ariana Smith, [this panel](#) (beginning 2:29:55) featured remarks by Allison Pytlak (Reaching Critical Will, WILPF) and John Burroughs (LCNP) as well as High Representative Nakamitsu. The panel described the activities, products, obstacles, and current status of the various institutions in the UN disarmament machinery (e.g. General Assembly, its First Committee, Conference on Disarmament, and Security Council); the Secretary-General’s 2018 Disarmament Agenda; the significance of the 1996 ICJ Advisory Opinion; and the UN Human Rights Committee’s 2018 finding in General Comment 36 that threat or use of nuclear weapons is incompatible with respect for the right to life. Panelists also discussed contributions of civil society in these arenas.

Pytlak provided an overview of the functioning of the UN system with respect to nuclear weapons. Through its First Committee, the General Assembly adopts numerous resolutions relating to nuclear weapons and at times generates initiatives such as the request for an advisory opinion on nuclear weapons from the ICJ and the negotiation of the TPNW. The Security Council mostly has dealt with issues related to the proliferation of nuclear weapons. The human rights machinery centered in Geneva, Pytlak said, is an underappreciated venue for advocacy on nuclear disarmament challenging the prevailing security and power paradigm.

Pytlak also outlined the role of civil society, noting that it is not monolithic and that its diversity allows bringing a wide range of perspectives to bear on nuclear weapons issues. She underscored the successful efforts of civil society to highlight the humanitarian consequences of nuclear weapons and to promote the TPNW, work for which the International Campaign to Abolish Nuclear Weapons received the Nobel Peace Prize.

[Burroughs](#) then discussed the 1996 ICJ Advisory Opinion, highlighting its finding that use of nuclear weapons is “generally” contrary to international humanitarian law and its analysis and articulation of the obligation to pursue and conclude negotiations on nuclear disarmament. He also noted increasing references since then in NPT and UN arenas, and in the TPNW, to the incompatibility of use of nuclear weapons with international humanitarian law and international human rights law. Despite these developments, in the two-plus decades since the International Court of Justice rendered its opinion, nuclear-armed states have done little to reduce the role of nuclear weapons in their security postures. Earlier in the conference, Burroughs observed that nuclear deterrence is a “permanent threat of force” and “an ongoing affront to the UN Charter.”

During panel Q&A, Burroughs affirmed the merit of including China and other nuclear weapons possessor states beyond the US and Russia in future nuclear disarmament and arms control deliberations. Nakamitsu additionally called for “dialogue” in addressing the Democratic People’s Republic of Korea (DPRK) nuclear challenge and said the UN Secretariat was “ready to support” the convening of the first meeting next year (which will be held in Austria) of the states parties to the TPNW. She hoped the Security Council would play a more active role in disarmament in the future, given its responsibility for international peace and security. Nakamitsu also called for reinforcing existing disarmament norms while also developing new norms related to emerging weapons technologies.

Lunchtime Event: Dialogue between Jerry Brown and Jonathan Granoff

A special [lunchtime dialogue](#) featured Jerry Brown, former California governor and current Executive Chairman, Bulletin of the Atomic Scientists, and Jonathan Granoff, GSI President. Brown called for “planetary realism” aligning the priorities of states with global goals including reducing nuclear weapons dangers, which are acute. Brown expressed frustration that the mainstream media and political elites have marginalized issues relating to nuclear arms. He

called for consciousness raising and educational work to inform the American public and politicians about the imperative for progress on diminishing the grave risks arising from nuclear weapons, in particular the US and Russian nuclear weapons postures. He underlined the need for less nationalism, more humility, and expanded international dialogue and cooperation to meet common challenges.

Granoff appreciated Brown's call for planetary realism and said that the rule of law is an important tool in that approach. He emphasized the importance of *pacta sunt servanda*, in particular with respect to the NPT disarmament obligation. He explained that if international agreements are not kept, then the tools of law—words and agreements—become empty and social edifices collapse. International stability, good governance, and development at every level—including addressing poverty as well as protecting financial systems, the natural environment, and security environment—depend on this principle. If the big players like the US renege on multilateral treaties, he said, then how can we expect other states to uphold their commitments?

Panel 3: The International Treaty Regime Applicable to Nuclear Weapons and Further Treaties That Have Been Proposed

This [panel](#) (starting at 42:30), moderated by Jonathan Granoff, featured comments and reflections from Ambassador [Dr. Christopher Ashley Ford](#) (Assistant Secretary for International Security and Nonproliferation), Hon. Thomas Graham, Jr., (Former Special Representative for Arms Control, Nonproliferation and Disarmament; Former General Counsel, Arms Control and Disarmament Agency; and GSI Board Member), and Dr. Gloria C. Duffy (President and CEO, The Commonwealth Club of California; and former Deputy Assistant Secretary of Defense).

Ford criticized the Treaty on the Prohibition of Nuclear Weapons (TPNW) and contended that no customary international legal norm against nuclear weapons is emerging. Ford maintained that no nuclear weapon state or state in a nuclear alliance with the US would join the TPNW. Regarding the application of international law to use of nuclear weapons, he stated that use is not ruled out by the 1996 ICJ Advisory Opinion. He observed that the United States recognizes the applicability of international humanitarian law to any potential use of nuclear weapons, and deep involvement by military and Department of Defense civilian lawyers in nuclear planning and operational matters is also a matter of well-established routine in order to ensure consistency with that law and implementing guidance.

Ford stated that we should not be doubling down on commitments from previous NPT outcome documents such as the [1995 Decision on the Principles and Objectives for Nuclear Non-Proliferation and Disarmament](#) and the [Action Plan on Nuclear Disarmament from the 2010](#)

[NPT Review Conference](#). He said that “dust covered commitments” do not provide us with today’s answers; we have to come to grips with current security challenges and realities.

In response to Ford’s comments, Granoff held that “when the US makes commitments, we must show good faith attempts to live up to them.” In other words, the US must adhere to the principle of *pacta sunt servanda*.

Graham traced the history of weapons control and underlined that law is a condition for civilization. In the nuclear age, a key instrument is the NPT, which reflects a “strategic bargain”—states agree not to acquire nuclear weapons and possessor states agree to disarm. He stressed the need to fulfill key commitments made in connection with the 1995 decision to extend the NPT indefinitely and in subsequent conferences, notably the commitments to bring into force the Comprehensive Nuclear-Test-Ban Treaty and to create a Middle East zone free of weapons of mass destruction. It is crucial that the NPT survives, despite incentives for new states to acquire nuclear arms that may arise due to climate-change related conflicts. Without the NPT, disarmament is not possible, Graham said.

Duffy reminded the audience about successes arising from the time in which the US actively engaged in arms control measures with the Soviet Union. Specifically, she discussed how Cooperative Threat Reduction via the Sam-Luggar Initiative assisted three former Soviet states—Ukraine, Belrus, and Kazakhstan—with dismantling Soviet nuclear weapons. As a result, 13,000 nuclear weapons were “deactivated.” Duffy stressed the importance of treaty compliance and expressed concern over the US withdrawal from arms control treaties like the Intermediate-Range Nuclear Forces (INF), Open Skies, and Joint Comprehensive Plan of Action (JCPOA).

Message from the President of the ABA

Following this panel presentation, [Patricia Refo](#), President of the American Bar Association, delivered a [pre-recorded video message](#) to the participants. Refo stressed the “central role of the rule of law” in dealing with nuclear weapon issues. She underscored the common global goal of “international stability and order based on the rule of law.” In this regard, she noted that “following the Cuban Missile crisis of 1962, the intelligence agencies of both the United States and the Soviet Union concluded that without a legal constraint, a cascade of nuclear proliferation was likely—and thus they committed to advancing a path to curb proliferation and advance disarmament.”

Recognizing the importance of nuclear disarmament, Refo referred to President Kennedy’s famous speech before the UN General Assembly in 1961. Kennedy said that “every inhabitant of this planet must contemplate the day when this planet may no longer be habitable. Every man,

woman and child lives under a nuclear sword of Damocles, hanging by the slenderest of threads, capable of being cut at any moment by accident or miscalculation or by madness. The weapons of war must be abolished before they abolish us.”

She further stated that the “legal profession is strengthened by the ABA’s dynamic relationship with the New York State Bar Association and other organizations that lead on the important issues of our day, issues in which thoughtful and committed lawyers can and do make a difference.” Finally, she praised Graham’s role in negotiating arms control agreements and noted his participation in ABA’s International Law Section.

Panel 4: International Law and Threat and Use of Nuclear Weapons

[This panel](#) (starting at 3:59), moderated by LCNP Senior Analyst John Burroughs, featured remarks by Professor David Koplow (Georgetown University), Kathleen Lawand (International Committee of the Red Cross or ICRC), and LCNP Board member and Professor Charles Moxley (Fordham Law School), author of *Nuclear Weapons and International Law in the Post Cold War World*.

Moxley discussed how the law of armed conflict (LOAC—also known as international humanitarian law and *jus in bello*) operates. He said the LOAC includes a set of principles to limit the use of force, including the rules of distinction, proportionality, necessity, and precaution as well as the corollary to those rules that it is unlawful to use weapons whose effects cannot be controlled. Moxley noted that the United States agrees that these rules of the LOAC apply to the use of all weapons, including nuclear weapons, as is evident from the United States’ military manuals and other statements of the law. What is often overlooked, Moxley stated, is that the LOAC requires that a state and its personnel, in deciding whether to use nuclear weapons, consider *all* of the reasonably foreseeable effects of such weapons use—including radioactive fallout, electromagnetic pulse, and nuclear winter as well as the potential responses of the target to the strike, including the risks of nuclear retaliation and escalation.

Moxley observed that an area that needs further analysis in the LOAC is the applicability of risk analysis to the decision whether to use nuclear weapons, given the reality that the evaluation of the lawfulness of a nuclear strike needs to be made in advance, when only risks not realities are known. Moxley expressed appreciation for the United States’ vocal support for the applicability of the LOAC to the use of nuclear weapons but suggested that the view of the LOAC that the United States uses in its nuclear weapons planning is inappropriately narrow, *inter alia*, in not considering all of the reasonably foreseeable effects of nuclear weapons.

Moxley also noted the anomaly that there appears to be little clarity in international law as to the potential legal exposure of states, and potentially the representatives through whom they act, for failing to maintain adequate controls over their nuclear weapons—subjecting the world to

accidental, mistaken, or otherwise unintended use of such weapons by the state or unintended users, such as terrorist individuals or groups. Moxley's presentation invited skepticism that nuclear weapons could be used in a manner consistent with the LOAC.

Lawand reviewed the history of the ICRC in dealing with nuclear weapon issues since the US's bombing of Hiroshima in 1945, noting that the ICRC's representatives there promptly reported the attack. Lawand referred to the ICRC president's global appeal for nuclear disarmament on humanitarian grounds in March 2010. She then discussed the three "bases" of the ICRC's interest in nuclear weapons: (1) the catastrophic humanitarian consequences of their use; (2) the virtual impossibility of any humanitarian response to aid the victims of such use; and (3) the incompatibility of any such use with international humanitarian law. Any use of nuclear weapons "in or near a populated area" would not be consistent with that law. The LOAC norms apply to acts of self-defense.

Koplow discussed the 1996 ICJ Advisory Opinion, which he both praised and criticized as "incomplete and contradictory" as to the question of the legality of the threat or use of nuclear weapons. The opinion did not categorically outlaw nuclear weapons, reasoning that it might be possible to use them in unique circumstances (e.g. ships at sea or desert locations) without indiscriminate harm to civilians. This, however, ignores the risks of possible retaliatory uses and escalation to larger-scale uses. Moreover, countries are now designing nuclear weapons that are more accurate and with lower yields, which they may try to justify as consistent with the LOAC; hence the Advisory Opinion might well have had a negative impact in inadvertently encouraging the development of such weapons.

Over the course of the discussion, the following themes emerged: Nuclear weapons—even if used in retaliation—must still comply with the LOAC; US military manuals recognize that it is not lawful to use nuclear weapons without controlling their effects; the military's problem, however, is that it has a very narrow interpretation of such "effects"—a much narrower definition that excludes distant, indirect, or long-term impacts. The military lacks a common understanding of "how much is too much" when it comes to weapon effects. Finally, nuclear weapons must be used exclusively on military targets, must not affect civilians disproportionately or in large numbers, and must be intended for a concrete and immediate military purpose; the use of these weapons simply with the goal of "winning the war" is not consistent with the constraints of the LOAC.

Panel 5: Approaches for Advancing the Rule of Law and Morality as Concerns Nuclear Weapons

[This panel](#) (1:27:30) was moderated by Charles Moxley with the following panelists: Laurie Ashton (counsel for Marshall Islands before the ICJ and Ninth Circuit); Jackie Cabasso (Western

States Legal Foundation and Mayors for Peace); Tom Collina (Ploughshares Fund); Rev. Drew Christiansen (Georgetown University); and Audrey Kitagawa (Global Parliament of Religions).

Ashton explained the significance of using the rule of law and legal institutions in enforcing international agreements. In this regard, she outlined the Marshall Islands' lawsuits against the nuclear armed states at the International Court of Justice and its case against the US in the Ninth Circuit. In both settings, the Marshall Islands argued that the nuclear armed states have failed to fulfil their disarmament obligation under the NPT and general international law. She noted that while those cases were dismissed without reaching the merits, they helped raise public consciousness on the issue. Ashton stated that an advantage of the litigative approach to nuclear weapons issues is that governments can be required to show up and defend. Whether appropriate persons or entities are prepared to serve as plaintiffs in future cases is yet to be seen, particularly in light of the political clout of the United States and other nuclear weapons states.

Describing her long history of working at the intersection of law and anti-nuclear activism, Cabasso stressed that legal approaches are most effective when reinforced by social movements. As an example she recounted her experience as a defendant in a trial arising from a massive nonviolent protest outside the Lawrence Livermore National Lab, a key US nuclear-weapons research facility, at the height of the anti-nuclear movement in the early 1980s. Though the defendants were not allowed to present their reasons for protesting in court, the trial received significant media coverage locally, nationally, and internationally. Cabasso explained that the legal defenses developed by the defendants and their attorneys working in partnership gave her powerful new language to express her moral outrage and a deeper understanding of the role of law in social movements.

Cabasso also described disarmament efforts by [Mayors for Peace](#), an international association of nearly 8,000 cities in 165 countries. She cautioned against the limitations of single issue organizing and urged support for “broad coalitions” addressing the interrelated issues of systemic racism, poverty, militarism, and environmental devastation. One such initiative is the [Poor People's Campaign: A National Call for Moral Revival](#), which explicitly challenges militarism and the war economy—including nuclear weapons—by building a “moral fusion” campaign.

Collina assessed the prospects for nuclear arms control under the new Biden administration. He noted that if the Democrats do not take control of the Senate, it will be difficult for the US to ratify treaties (which requires approval of 67 senators). However, exercising executive authority, Biden could quickly address risk reduction measures, including seeking the immediate extension of the New START Treaty, rejoining the Iran nuclear deal, and adopting a “sole purpose” nuclear doctrine. Additionally, he urged the Biden administration to retire first-use weapons, such as land-based ICBMs, and to cancel the new ICBM program.

Collina also concurred with Cabasso that multi-issue campaigns are the way to go, noting that Obama's Prague speech (addressing nuclear disarmament) failed to get the large-scale public support it deserved.

Both Christensen and Kitagawa discussed the religious and moral perspectives associated with nuclear disarmament. Christensen explained how Catholic views on nuclear weapons have evolved to the present view that is strongly pro-disarmament, as repeatedly affirmed by Pope Francis. He also outlined the role of the church in disarmament-related adult education, research, conferences, information exchanges, and internships. Finally, Christensen noted a recent Georgetown conference, the "[Pope and the Bomb](#)," in which Granoff and several experts associated with GSI participated in panel discussions that critiqued US nuclear deterrence policy.

Kitagawa discussed the important role of religious groups, such as the Parliament of the World's Religions, in advancing nuclear disarmament. For instance, interfaith religious groups adopted the Hiroshima/Nagasaki Accord to commemorate the 75th anniversary of the atomic bombings.

Conclusion

This conference highlighted the rich body of international law addressing nuclear weapons as well as policy and advocacy issues relating to their control and elimination. An extensive [bibliography](#) relating to topics discussed in the conference is worth the attention of anyone who comprehends the gravity of the issues and the need for disarmament progress now.