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by Christopher A. Ford



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Law, Morality, and The Bomb

by Christopher A. Ford¹

In this paper presented to a panel hosted by the Global Security Institute and the American Bar Association, Assistant Secretary Ford explores some key legal and moral issues attendant to the possession and potential use of nuclear weapons, arguing for a more factually and morally nuanced approach than one normally hears from many disarmament advocates.

Given the stakes involved, it is hardly surprising that few questions of security policy have elicited as much moral passion as nuclear weapons, and with good reason. Even though the number of nuclear weapons held by Washington and Moscow has fallen to only a small fraction of what it was during the Cold War, and [state-of-the-art modeling of combustion, soot-propagation, and climate science](#) still has not settled the question of whether a minimal use of nuclear weapons could have a huge climate impact, there is no question that a war involving the use of nuclear weapons could still have catastrophic consequences. This grim fact necessarily entangles choices about nuclear weapons posture and doctrine with questions of morality in powerful and compelling ways. This moral salience also colors how it is that one should think about the *legal* aspects of nuclear policy.

Citing the potentially existential stakes, the disarmament community has long claimed to feel a moral imperative to eliminate all nuclear weapons as quickly as possible. Acting on this, some disarmament advocates have made legal claims asserting the inherent unlawfulness of nuclear weaponry that, if true, would bring the law into line with their moral passion.

One effort in this regard occurred at the International Court of Justice (ICJ), though there, in response to a request by the U.N. General Assembly for an advisory

opinion, the Court [in 1996 declined to find that nuclear weapons were *per se* unlawful](#), pointedly leaving open the possibility that the threat or use of nuclear weapons could be lawful as a way to forestall catastrophic defeat in a conflict:

“There is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such [and] the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.”

Ever since that opinion, some in the disarmament community have dreamed of revisiting the question, and of thereby obtaining a clear pronouncement on the unlawfulness of nuclear weapons. After having failed to make a convincing *per se* legal case against nuclear weapons on the basis of existing international law, moreover, campaigners have attempted to create new legal rules – specifically, with the Treaty on the Prohibition of Nuclear Weapons (TPNW). Nuclear weapons policy has many intertwined legal and moral issues, and I will focus

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upon assessing some of the policy and moral arguments that form the subtext of such debates.

In particular, I will argue herein *against* the unreflective moral certainties that characterize much of the contemporary disarmament discourse, and in favor of a more factually and morally nuanced approach to these challenges. This is not likely to endear me to those whose preferred mode of debate has traditionally consisted simply of fervent moralistic assertion.

To my eye, however, if one seeks wise policymaking, certainty – not in the more salutary sense merely of *confidence*, but rather a full-throated belief in the inerrant and unquestionable rectitude of one’s position – can be a poison. This is true not just in issues related to the morality of policy choices, but also in legal analysis. Whether one agrees with Oliver Wendell Holmes, Jr., that “[t]he life of the law has not been logic: it has been experience”² – or with Sir Edward Coke, that “[r]eason is the life of the law”³ – one must perforce admit that the law is animated by considerations that seek objectivity and rational analysis but may also be based on incorrect factual assumptions or principles. And, unless one has the intellectual humility to concede that it is at least possible one can get these objective considerations in some respect wrong, one is more likely actually to *be* wrong, and will in any event be unable to learn anything new.⁴

With this in mind, I will explore herein some of the legal and moral issues raised by contemporary debates over nuclear weapons possession and nuclear doctrine. Some of the moral certainties of the modern disarmament community – with respect specifically to the nuclear weapons “Ban” Treaty and to the supposedly undifferentiated immorality of great power nuclear

doctrines – are notably more problematic than their advocates admit. As I hope will become clear, however, I make this point less by way of repudiation than as an invitation to *real* dialogue, through which it may be possible to make more progress than would otherwise have been the case in nuclear risk reduction, and eventually to help facilitate disarmament.

I. The “Ban” Treaty

A. Legal and Policy Counterpoint

In struggling with legal and moral issues associated with nuclear weaponry in recent years, it is impossible not to address questions related to the Treaty on the Prohibition of Nuclear Weapons – a.k.a. the “Ban Treaty.” On one level, despite the rhetorical temperature sometimes associated with TPNW advocacy, it is easy to discuss the “Ban.”

The United States’ position on TPNW has been clear from the outset, for instance, and so also has the position not just of other nuclear weapons possessors but also of the many allies who rely *indirectly* upon these possessors’ nuclear weaponry for their own security. In the U.S. case, the beneficiaries of deterrence include more than 30 allies and partners. For Russia, one might perhaps count the Collective Security Treaty Organization (CSTO) states of Armenia, Belarus, Kazakhstan, Kyrgyzstan, and Tajikistan. Together with the other countries that are known and proclaim themselves to have nuclear weapons, these necessarily anti-TPNW countries amount to a sizable proportion of the countries of the world, and the lion’s share of its population and economic weight.

² Holmes, *The Common Law* (Boston, 1881), p. 1.

³ Coke, *Institutes of the Laws of England, or a Commentary on Littleton*, (London, 1628), part 62a.

⁴ Just as policymakers invite harm if they ascribe absolute certainty to legal or moral assertions which in reality depend to some degree upon context and factual presuppositions, so too is caution justified with regard to assertions of a scientific character. There, too, we deal not with absolutes but with probabilities, and these necessarily can ebb and flow as further facts come to light and experts test each other’s hypotheses. This is quite normal, and indeed it would be worrisome, in either science or policy, were any given accepted fact – however venerable – to be declared entirely immune to question or testing. Any certainty of and about this world, therefore, must have caveats. Honesty and intellectual integrity, in effect, oblige us generally to rely upon accepted understandings, but only up to the point that such understandings have been convincingly scrutinized, while also requiring us both always to be open to the *possibility* that such understandings will be proven false, and to preserve the availability of ongoing inquiry that makes such testing possible. To fear error so much that one forecloses skeptical inquiry is in fact to err. (In the law, of course, where a genuinely controlling *institutional authority* exists – such as a court of highest appeal that has jurisdiction over policymakers’ conduct – one *is* safe in ascribing “certainty” to the legal determinations that such authority adopts within its jurisdiction; indeed, we are required to. But that situation is not the one that concerns us here.)

For countries that directly or indirectly rely upon nuclear weapons for security, the TPNW is a simple issue: we will not join it, we already consider it to be a failed treaty, and when it does enter into force, it will not bind us. The nuclear weapons-reliant states oppose the “Ban” not because we oppose disarmament, for we do not. (Even the People’s Republic of China [PRC], which shuns nuclear arms control while now steadily building up its nuclear capabilities, at least *claims* to support disarmament.) Rather, we oppose the TPNW because it will not achieve its ends, approaches its objectives in a counterproductive way, could damage other institutions critical to international peace and security, and might even be strategically destabilizing.

This is not primarily a *legal* critique, though indeed the vagueness of the TPNW in some respects raises more questions than it answers. That vagueness, however, will be more a problem for parties to that treaty than non-parties: as a legal matter, the “Ban” simply cannot bind non-parties. Moreover, the world’s many states that rely on nuclear weapons have repeatedly and consistently signaled their rejection of a potential ban on nuclear weapons and their rejection of the idea that there is any hint of *opinio juris*⁵ in the mere fact of States not having used nuclear weapons since World War II – messages which should make clear to future jurists that no customary international legal norm against nuclear weapons is emerging.⁶ (This is a point that Stephen Schwebel, as Vice-President of the International Court of Justice in the *Nuclear Weapons* advisory proceedings, made forcefully: the practice of, acceptance of, and reliance upon nuclear weaponry “is not a practice of a lone and secondary persistent objector,” nor merely that of a single “pariah Government crying out in the wilderness of otherwise adverse international opinion.” Instead, this is “the practice of five of the world’s major Powers . . . [supported by] a large and weighty number of other States.”⁷) Indeed, the text of the treaty *itself* fails to require non-possession of nuclear weapons, inasmuch as

it does not actually prohibit States from joining while still having nuclear weapons, and only envisions them relinquishing such devices at an unspecified future date and under unspecified future circumstances. This is a point that the United States has made consistently in regard to international law generally, replete as it is with agreements that address, but do not prohibit *per se*, the possession or use of nuclear weapons.⁸ So there isn’t much “legal” debate here.

Rather than being fundamentally of a legal nature, therefore, criticism of the TPNW revolves around its structural defects as a *policy* matter – and, despite the presumably good intentions of most of its supporters, the instrument’s problematic character from the perspective of practical morality. As I have [explained elsewhere in a more detailed U.S. critique](#) of the “Ban,” the Treaty has fundamental flaws, some of them actually dangerous.

The first of these flaws derives from the fact that the TPNW is, at best, doomed to be ineffective in achieving its ostensible objectives: it will not lead to the elimination of even a single nuclear weapon. The Treaty also provides no mechanism to *verify* such elimination even if it ever occurred.

Nor are simple uselessness and incoherence the “Ban’s” only flaws. TPNW supporters, particularly those in civil society, have opted to pursue states’ signature and ratification of or accession to the treaty through a public campaign focused less upon genuine good-faith persuasion than upon demonization and confrontationalism — hardly an approach obviously consistent with the clear admonition in the Nuclear Non-Proliferation Treaty (NPT) for all states to work to [ease tension and strengthen trust between states in order to facilitate nuclear disarmament](#). Far from making disarmament more likely, the international *politics* of the “Ban” campaign will likely make it more difficult, by poisoning and undermining the cooperative state-to-state

⁵ *Opinio juris* – the belief that adherence to a practice is required by law (rather than simply being desirable, for instance) – is one of the elements necessary in order to establish a rule of customary international law.

⁶ It would, of course, be ironic for “Ban” proponents to argue that the fact that nuclear weapons haven’t been used in armed conflict since 1945 somehow supports the existence of a customary international legal norm against nuclear weapons, since that very fact results from nuclear weapons being deployed as part of deterrence strategies and policies. (Historically speaking, nuclear weapons have so far only been detonated in conflicts when only *one* country had them.)

⁷ 1996 I.C.J. Rep. at p. 312 (July 8) (dissenting opinion of Judge Schwebel).

⁸ See, e.g., from the *Nuclear Weapons* advisory proceedings, *Letter dated 20 June 1995 from the Acting Legal Adviser to the Department of State, together with the Written Statement of the Government of the United States of America*, at 7.

dialogue the world needs in order to ameliorate the global and regional conditions that stand in the way of progress toward “zero.”

In the process, the TPNW does nothing to contribute to the goals of the NPT, even as “Ban” politics have come increasingly to roil and complicate diplomatic discussions in the NPT review process. It cannot be seen as an “effective measure” towards nuclear disarmament, it relies upon a 1970s-era International Atomic Energy Agency (IAEA) nuclear safeguards model that the world has long known to be insufficient to provide confidence in compliance, and it provides that in the event of a conflict between the TPNW and the NPT, the TPNW would prevail for states that are party to both.

These various factors alone are good reason for states to stand clear of the TPNW. They are also why it is, on the whole, a good thing that the Treaty’s entry into force will be a legal non-event vis-à-vis possessor states and those states that refuse to join because they rely indirectly upon nuclear weapons for their security. The TPNW’s deep structural flaws make it not merely counterproductive but potentially dangerous – and here, significant questions of morality intrude to undermine the strident moralism of “Ban” advocacy and raise the possibility that the TPNW might, in practice, have *immoral* effects.

B. Moral Counterpoint

One of the most disturbing aspects of the “Ban” movement is the potential geopolitical selectivity of its impact. The TPNW is the result of a campaign of civil-society activism and grass roots pressure upon national legislatures and elected representatives, pushing them toward Treaty ratification or accession. Civil society activism is a well-established and entirely legitimate way to seek social change, of course, but in this context, the problem is obvious: [nuclear weapons possessors that lack a free press and use draconian tools of political oppression to suppress disfavored political activism in civil society are highly resistant – and arguably even immune – to such pressures.](#)

Civil-society pressure tactics may have traction in the world’s rights-based democracies, in other words, but by definition they are all but toothless vis-à-vis the nuclear-weapons-wielding regimes of Vladimir Putin’s thuggish and kleptocratic Russia, Xi Jinping’s increasingly brutish

and autocratic China, and the belligerent and oppressive hermit dynasty of North Korea. If you are a Russian dictator who rules with a heavy hand, has turned domestic media into fawning vehicles for disinformation and pro-regime propaganda, brazenly rigs elections, and uses radioactive poisons and illegal chemical weapons in its attempts to murder political opponents at home and abroad, for example, what do you care if activists in Europe disapprove of your nuclear doctrine? Similarly, if you are a would-be Chinese “Red Emperor” in charge, for life, of a repressive state that surveils its subjects like no other tyranny in history, brutally suppresses dissent, and uses a vast network of prison camps and forced-labor facilities to “re-educate” religious minorities out of existence, disarmament-focused civil-society campaigns based in the West must appear little more than a joke.

Actually it’s worse than that. The leaders of Russia and the PRC in fact probably *do* care about and pay some attention to the TPNW campaign – but they certainly don’t fear it. Instead, they surely *approve of it*, not because they would ever consider acceding to the Treaty, but rather on account of that campaign’s asymmetric impact upon their regimes’ geopolitical adversaries in Europe, East Asia, and the Americas. To the degree that it succeeds in influencing the legislators and politicians that it targets, the “Ban” approach has the potential to bring about nuclear disarmament only for those free, democratic societies that actually *listen* to their citizens’ concerns. How could Putin and Xi *not* be delighted by a movement that creates divisive and paralyzing disarmament pressures in the major democratic states while placing no such pressure on decision-making in the Kremlin or in the Chinese Communist Party’s leadership compound in Zhongnanhai? Surely these dictators pray for the TPNW’s success in winning adherents among NATO members, or the United States’ allies in East Asia.

One hopes that no one associated with the “Ban” movement actually *intends* the TPNW crusade to be an enabler for authoritarian revisionism in Europe or Asia, but [it could have that result nonetheless.](#) And here is the fundamental moral problem at the core of the TPNW approach, for it can hardly be a moral imperative to create a world in which dictators such as Putin, Xi, and Kim Jong Un are the only leaders left with nuclear weapons. If the Ban is successful in eliciting nuclear disarmament by the democracies, the TPNW could spur political divisions that destabilize the “extended deterrence” alliances that help prevent aggression by such revisionist dictators, thereby

making Europe and East Asia *more* (not less) likely to collapse into war – possibly even nuclear war, and possibly causing states that currently benefit from extended deterrence to conclude that they need nuclear arsenals of their own.

I have repeatedly confronted “Ban” activists over this problem, wondering how they intend to address the presumably unintended, dictator-empowering consequences of their work. While some of them have acknowledged the problem, however, no one has yet offered a solution, and any worries they might feel privately haven’t slowed them down. Indeed, TPNW activists all but wear this asymmetry on their sleeve, often showing distressingly little apparent concern with nuclear threats arising *outside* the Western democracies. (When was the last time, for instance, that “Ban” activists demonstrated against China’s nuclear build-up, insisted that Beijing agree to a moratorium upon the production of fissile material for nuclear weapons, or demanded that China join arms control talks with the United States? Or condemned Russia’s large and growing arsenal of non-strategic nuclear weapons and its development of bizarre and dangerous new nuclear-powered strategic nuclear weapons delivery systems? Or voiced concern about Russia, and possibly China, secretly conducting yield-producing nuclear experiments in a manner inconsistent with the “zero yield” standards of the testing moratoriums of the U.S., the UK, and France? Or endorsed the United States’ diplomatic efforts to achieve the final and fully verified denuclearization of North Korea and to impose permanent restrictions on the size and scope of Iran’s nuclear program?)

But things get even worse. For the sake of argument, even if the TPNW were actually to persuade all current possessors to eliminate their nuclear weapons, the world it would thus create would still not obviously be a more desirable one. A world in which all nuclear weapons had been dismantled, but in which states still knew how to build them and still confronted conflicts, tensions, and rivalries in the international security environment, might well be a world *more* unstable and likely to see nuclear weapon use even than today’s world. As I outlined in our [ACIS Paper discussion of nuclear weapons infrastructure issues](#), such a world might be characterized by

“terribly destabilizing dynamics[,] not merely by giving countries powerful incentives in time of crisis to race each other to reconstitute nuclear

arsenals, but also actually giving the *first* reconstituted possessor strong reasons to *use* nuclear weapons preemptively, before the other side got them too. Ironically, therefore, such crisis instability and nuclear use incentives might well make [such] a world ... more likely to result in nuclear war than today’s world. (Not for nothing, for instance, did the great nuclear deterrence theorist Thomas Schelling describe a world free of nuclear weapons but *capable of easily rebuilding nuclear weapons* as hopelessly unstable: ‘Every crisis would be a nuclear crisis, any war could become a nuclear war. The urge to preempt would dominate; whoever gets the first few weapons will coerce or preempt.’)”

And all this, moreover, is even *without* getting into the additional problem that a premature “Ban” might, as a foreign diplomat put it to me many years ago, “[make the world safe again for large-scale conventional war](#)” between the major powers. World War II is today an increasingly distant memory, and it is easy to forget that the nuclear explosions that ended it were but a small fraction of the overall destruction and suffering that took place in six years of global warfare. It is also all too easy to overlook the counterfactual alternative to the world’s great post-war peace – namely, the large-scale, great power wars that might have happened since 1945 but for the fact that nuclear deterrence has made them all but unthinkable. At least until more work has been done to ameliorate the tensions and conflicts that wrack today’s world – [work that we are starting through our “Creating an Environment for Nuclear Disarmament” \(CEND\) initiative](#), by the way – the TPNW might actually make the world *more* prone to catastrophic conflict, whether nuclear or “conventional.”

Assuming that the objective is not to achieve “disarmament” at any cost but rather to strengthen international peace and security and prevent human suffering as thoroughly and effectively as possible, the situation is thus more complicated and problematic than TPNW advocacy would have one believe. The world the TPNW might actually create is *not* inescapably an attractive and morally compelling one even compared to today’s world, let alone in comparison to some easy-to-imagine future world of precisely the sort that current U.S. policy seeks to create, in which:

- a) [an effective new arms control framework has prevented a spiraling three-way nuclear arms race between Beijing, Moscow, and Washington](#);
- b) [new risk-reduction and confidence-building measures are in place between all nuclear weapons possessors](#), and frameworks of responsible behavior are understood to apply in fast-changing high-technology arenas such as [cyberspace](#) and [outer space](#);
- c) countries are engaged in deep and creative [dialogue about how to ease tensions and strengthen trust in ways that facilitate further disarmament progress](#); and
- d) the global nonproliferation regime has been [shored up against rogue state proliferation threats](#) and [U.S. security arrangements continue to help prevent proliferation by states threatened by revisionist aggressive behavior](#).

At the very least, the “Ban” seems nowhere near as morally compelling as its supporters claim; at worse, its proponents have dangerous blind spots.

II. The Law of War

The TPNW, however, is not the only question that should concern us about the legality and morality of nuclear weapons – nor the only area in which much of the disarmament community’s conventional wisdom gets things wrong, overplaying the moral strength of its position and ignoring the case that can be made for nuclear weapons in the context of a thoughtfully risk-attendant and deterrence-focused posture and policy. I certainly do not mean to suggest that all current nuclear weapons possessors necessarily *have* a morally defensible position. (As we shall see, this is not obviously the case.) But it is a crucial point that the disarmament community has *not* found consensus on the *per se* impropriety of nuclear weapons — and for good reason, since the facts are more complicated, and the case for such blanket impropriety rather weaker, than many TPNW supporters seem to realize. And the very complexity of the lived reality of nuclear weaponry points to the need to assess the legality and morality of possessors’ nuclear weapons policies and postures individually: at the retail, as it were, rather than the wholesale level.

A. A Legal and Moral Yardstick

The principles of military necessity, proportionality, distinction, and humanity form part of the core of International Humanitarian Law (IHL) – a.k.a. the law of armed conflict (LOAC) – and provide part of the corpus of *jus in bello* (lawful conduct in war), complementing doctrines regarding when it is lawful to resort to force in the first place (*jus ad bellum*) to provide a comprehensive legal framework. As the ICJ confidently observed in its 1996 advisory opinion, “there can be no doubt as to the applicability of humanitarian law to nuclear weapons”:

“A threat or use of nuclear weapons should ... be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons”

Accordingly, any use of nuclear weapons is subject to the “cardinal principles ... of humanitarian law,” just as are all other means and methods of warfare. Of these principles, the ICJ observed,

“... [t]he first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets. According to the second principle, it is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering.”

Moreover, with respect to the *jus ad bellum*, the use of force in any lawful case of self-defense against armed attack “would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law.”

The Court observed that the rules governing the use of force set forth in the United Nations Charter – under which States must “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 United Nations” but retain the inherent right of individual or collective self-defense if they face armed attack – also apply in the case of nuclear weapons. Moreover, the ICJ reminds us, “[t]hese provisions do not refer to specific weapons. They apply to any use of force, regardless of the weapons employed.” Similarly, the Court rejected any argument that nuclear weapons are not subject to the established principles and rules of IHL as “incompatible with the intrinsically humanitarian character of the legal principles in question which permeates the entire law of armed conflict and applies to all forms of warfare and to all kinds of weapons, those of the past, those of the present and those of the future.” As the United States in its submissions to the ICJ at that time observed, “[a]s in the case of other weapons, the legality of use depends on the conformity of the particular use with the rules applicable to such weapons.”⁹

Given the extraordinary destructiveness of nuclear weapons, their threat or use to conduct attacks must be carefully considered for its consistency with IHL, but as we have seen, the Court, even in the face of intense pressure to do so, did not conclude that their threat or use would be unlawful in all circumstances. As the Court’s discussion makes plain, it is the *jus ad bellum* and *jus in bello* – and not the mere desires or assertions of those who have advanced the TPNW – that provide us with compelling and widely-recognized standards for evaluating not merely the legality but also the morality of a country’s nuclear weapons policies.

And it is here that the disarmament community – in its disdain for complexity and nuance, and in its thirst for the crystalline clarity of one-size-fits-all moral pronouncements – has often gotten things wrong. Such monodimensional moralism has tended to impede actual efforts to *compare* nuclear weapons postures and doctrines, thus not merely obscuring important points but also making it harder to identify opportunities for legal and moral progress therein. To help fill this gap, however, and to identify risk reduction opportunities consonant with the noble aspirations and clear-eyed pragmatism of the law of war, it is useful to offer some comparisons.

B. The United States

By far the most forthcoming among the nuclear weapons possessors when it comes to issues of doctrines, postures, policies, budgets, and future plans, the United States offers a model of transparency and clarity in the nuclear weapons arena. There is, of course, no reconciling U.S. nuclear weapons policy with those who still insist that there is *no* legal or moral case for nuclear weapons possession at all. For those more inclined to evaluate matters under established principles of international law and morality, however, U.S. approaches hold up well.

As for the ICJ’s proposition leaving open the possibility of lawful nuclear weapons use, this, to recall, refers to “an extreme circumstance of self-defence, in which the very survival of a State would be at stake.” It is noteworthy – and no coincidence – that U.S. nuclear doctrine has long stressed that the use nuclear weapons could only make sense in extreme circumstances. In the [2010 Nuclear Posture Review](#) (NPR), for instance, it was declared that “[t]he United States would only consider the use of nuclear weapons in extreme circumstances to defend the vital interests of the United States or its allies and partners.” The [2018 Nuclear Posture Review](#) repeats this declaration, and emphasizes, in fact, that “[a]ll U.S. Presidents since 1945 have considered U.S. employment of nuclear weapons only in extreme circumstances and for defensive purposes.”

In the 2018 NPR, moreover, we offered unprecedented clarity about what might conceivably count as such “extreme circumstances.” As we explained:

“Extreme circumstances could include significant non-nuclear strategic attacks. Significant non-nuclear strategic attacks include, but are not limited to, attacks on the U.S., allied, or partner civilian population or infrastructure, and attacks on U.S. or allied nuclear forces, their command and control, or warning and attack assessment capabilities.”

U.S. declaratory policy on nuclear deterrence in this context finds compelling justification as a component of collective defense, exclusively against the most dire of threats, and in connection with protecting the vital

⁹ Letter dated 20 June 1995 from the Acting Legal Adviser to the Department of State, together with the Written Statement of the Government of the United States of America, at 2.

interests of not just the United States itself but also those aforementioned “allies and partners” – that is, the numerous democracies of the North Atlantic area and Pacific Rim who rely upon U.S. “extended” nuclear deterrence for their own safety, and perhaps even for their continued existence as independent sovereign states, in the face of potential aggression by Russia, the PRC, or North Korea.

The United States also recognizes the applicability of IHL to any potential use of nuclear weapons, and U.S. doctrine and nuclear weapons policy guidance make this quite clear. The [U.S. Department of Defense Law of War Manual](#) provides an extraordinary depth of guidance on a range of law of war issues, and standing nuclear policy guidance specifies that such rules also apply to nuclear weapons. The 2013 [Report on Nuclear Employment Strategy of the United States](#), for instance, specified that

“all plans must also be consistent with the fundamental principles of the Law of Armed Conflict. Accordingly, plans will, for example, apply the principles of distinction and proportionality and seek to minimize collateral damage to civilian populations and civilian objects. The United States will not intentionally target civilian populations or civilian objects.”

As one former Commander of the U.S. Strategic Command summarizes,

“...[i]t is clear that U.S. policy-makers were mindful of ethical concerns as they sought to strike a careful balance among the high (perhaps unavoidable) potential for collateral damage from nuclear weapons, the principle of military necessity, and the critical importance of nuclear deterrence to our national security and that of our allies. The desire to strike that balance certainly influenced the evolution of U.S. nuclear policy.”¹⁰

In U.S. practice, moreover, deep involvement by military and Defense Department civilian lawyers in nuclear planning and operational matters is also today a matter of well-established routine, such lawyers being an official part of formal and informal planning, targeting, and operational processes and reviews precisely in order to ensure consistency with the law of war and relevant

implementing guidance. All uniformed members of the U.S. armed forces are also bound by the Uniform Code of Military Justice (UCMJ), under which they are obliged to refuse to follow orders that are clearly unlawful or that they know to be unlawful, such as orders that direct violations of the law of war.

Furthermore, though this is not strictly a legal factor, the United States has for decades invested enormous amounts of money and manpower in ensuring that the President has as many options available to him or her – and as much time in which to make decisions – as possible, even in a nuclear crisis. U.S. nuclear command-and-control has long been structured to [maximize time for decision-making](#), to include trying to preserve the option of “riding out” a nuclear attack rather than being forced into “use or lose” launch decisions. At present, a [modernization of the U.S. National Command, Control, and Communications \(NC3\) system is also underway](#), to ensure that even under the most challenging conditions, leaders can still detect threats, formulate plans, identify targets, issue orders, and assess the results of combat operations. Keeping the NC3 system functional and resilient even in the face of growing potential threats – which arise not only from increasingly numerous Chinese intercontinental-range nuclear delivery systems and more sophisticated Russian ones, but also from long-range precision-guided conventional munitions, direct-ascent and on-orbit counter-space weapons, and cyber tools – has not merely an operational but also a compelling *legal and moral* aspect, for this system is intended to preserve command and control in a crisis that is instrumental for effectively making and implementing nuclear decisions in conformity with a coherent and rational U.S. policy, and with the law.

All in all, the United States has established formidable doctrinal and procedural safeguards, including review and advice by lawyers, into its military operations, and nuclear weapons policy is no exception. Particularly in the broader moral context of its nuclear forces’ fundamental objective of deterring aggression, the United States stands in both a strong legal and a strong *moral* position in defending its careful and nuanced approach to nuclear weapons policy.

¹⁰ C. Robert Kehler, “Nuclear Weapons and Nuclear Use,” *Daedalus* (Fall 2016), at 50, at 58.

C. The Russian Federation

By contrast, there are reasons to be concerned about the conformity of Russian nuclear policy with well-established international legal rules and principles. President Vladimir Putin's June 2020 declaration of nuclear weapons policy speaks in general terms, for the most part unproblematically, about the importance of nuclear deterrence, and declares that Russia

“reserves the right to use nuclear weapons in response to the use of nuclear and other types of weapons of mass destruction against it and/or its allies, as well as in the event of aggression against the Russian Federation with the use of conventional weapons when the very existence of the state is in jeopardy.”

Russia argues that its doctrine conforms with international law, that it has nuclear weapons only for defensive and deterrent purposes, and that they would only be *in extremis*, and one hopes that this is indeed the case.

Worryingly, however, Putin's guidance specifies that one “possibility of nuclear weapons use by the Russian Federation” is upon “arrival of reliable data on a launch of ballistic missiles attacking the territory of the Russian Federation and/or its allies” – apparently irrespective of the circumstances of such attack (*e.g.*, whether or not the missiles are armed with conventional or nuclear warheads, or whether the “territory” in question is inhabited by anyone). This explicit heedlessness to circumstance is apparently not an accident of phrasing, but is the very point: as two senior officers from the Russian General Staff recently reemphasized in the official military newspaper *Krasnaya Zvezda*, “[a]ny attacking missile will be perceived as carrying a nuclear warhead.”

Especially coming from a country that itself possesses a very large arsenal of ballistic missiles that are capable of carrying either conventional or nuclear warheads, it is not obvious – to say the least – how such a threat of nuclear use in response to any missile attack would always be consistent with the *jus ad bellum* requirements of necessity and proportionality. One should certainly be careful not to draw firm conclusions about doctrine from press commentary, but more clarity and transparency on such issues is essential, for these points raise potentially troubling questions.

Another disturbing sign comes with Russia's development of the *Poseidon* nuclear-powered underwater drones that it apparently intends to fit with multi-megaton nuclear warheads and launch across the ocean in wartime in order to inundate U.S. coastal cities with radioactive tsunamis. The very operational concept of the *Poseidon* – involving an enormously destructive warhead dispatched without possibility of recall on a trans-oceanic passage that could take days – raises serious questions about the extent to which it could be used in compliance applicable international legal rules and principles.

Questions might also arise in connection with the so-called Perimeter – or Mertvaya Ruka (“Dead Hand”) – system that some media accounts claim was built by the Soviets in the 1980s and would seem to have been kept in service, and the existence of which the commander of Russia's Strategic Rocket Forces apparently confirmed in 2011. If one assumes that this system actually exists and functions as reported, if switched on by the high command in time of crisis, Perimeter would apparently automatically launch the country's nuclear arsenal if it detected nuclear explosions in Russia and its computer brain could not thereafter establish communications links to the General Staff. For anyone concerned with the morality of nuclear weapons, Perimeter surely raises disturbing questions. Can Russia defend Perimeter as anything more than just a vindictive and barbaric fun-house mirror vision of apocalyptic retribution? Russia would seem to have a lot of explaining to do.

It is thus particularly disturbing, that Russian officials in *another* arena – specifically, cyberspace – have recently begun openly to question the applicability of LOAC principles to the complexities of modern armed conflict. [As I have noted elsewhere:](#)

“... Russian government officials ... have recently tried to walk back aspects of their prior commitment to and acceptance of important declarations ... about the applicability of international humanitarian law to cyber operations in armed conflict. Where once Moscow agreed with the common sense and morally inescapable position that IHL principles such as military necessity, proportionality, distinction, and humanity would apply to cyber attacks in wartime just as they apply to kinetic or any other form of attack, now the Kremlin's

representatives have begun to equivocate, suggesting that it might be ‘impossible’ to apply IHL in cyberspace because it is hard to distinguish between ‘civilian’ and ‘military’ objects in that domain.

“Such claims are false – for it is not impossible to apply IHL in cyberspace, and it is not impossibly hard to distinguish between legitimate and illegitimate targets in cyberspace during armed conflict – and are quite alarming, inasmuch as such Russian logic would seem also to justify indiscriminate massacres of civilians during armed conflict if it is ‘too hard’ to distinguish between civilians and combatants. With ongoing Russian efforts to lay the groundwork for attacks using cyber assets against critical infrastructure that supports basic necessities of civilian life, Moscow’s effort to retreat from acknowledging the applicability in cyberspace conflict of the IHL principles of necessity, proportionality, distinction, and humanity suggests that the Kremlin is comfortable with *needlessness, disproportion, indiscriminateness, and inhumanity* in contemplating future cyber attacks against civilians.”

With Russian officials suggesting it would be futile even to *try* to apply the law where it is difficult to distinguish between civilian and military actors, and employing nuclear tools such as *Poseidon* (and perhaps *Perimeter*), this raises real questions about whether Russia would follow legal principles in the conduct of nuclear operations. This should concern the rest of the world and should be a matter of conspicuous attention – not least by the disarmament community, but also in the ongoing Strategic Security Dialogue (SSD) and the continuing arms control talks between U.S. and Russian officials over nuclear doctrine and transparency.

D. The People’s Republic of China

Nor can one be much more sanguine about the PRC’s nuclear policy, notwithstanding the sanctimonious moralism of Beijing’s virtue-signaling about supposedly following a policy of “minimum deterrence” and nuclear “no first use” (NFU). Part of the reason for concern is simply that the PRC is extraordinarily opaque about its nuclear posture and doctrine, even while [expanding both the size and diversity of its nuclear arsenal at a rapid pace](#) and rejecting all calls to participate in arms control dialogue with the United States and Russia.

But there is more to it even than that. Beijing makes much of its supposed NFU policy, but few foreign observers take that policy terribly seriously, that policy does not preclude initiating destabilizing nuclear threats against another nuclear power in a crisis, and there are signs that the PRC may be revising its policy in any event. Even if PRC officials actually mean what they say in peacetime, moreover, there is little reason to think they could be depended upon to refrain from nuclear use if faced with defeat in a purely conventional conflict. In general, after all, [“NFU statements seem pretty useless: they can truly be credited only when they are unneeded, and where they would be the most consequential, they are at their most unreliable.”](#)¹¹

As for Beijing’s ostensible policy of “minimum deterrence,” this is in Chinese usage a phrase of spectacularly indeterminate meaning, and thus in no way actually reassuring. After all, the PRC’s current crash nuclear buildup is taking place in a strategic context in which the nuclear threats facing Beijing from Moscow and from Washington have *fallen* precipitously, by a stunning total of more than 60,000 warheads, since their high points in the 1960s and 1980s respectively. Despite the extraordinary shrinkage of the nuclear forces arrayed against it, however, Beijing is rapidly *expanding* its nuclear force. What could “minimum deterrence” possibly mean in this context, except as a meaninglessly feel-good propaganda cloak to wrap around a destabilizing policy of arms racing?

¹¹ “No first use” is [synonymous with the “sole purpose” theory](#) – *i.e.*, the idea that the “sole purpose” of nuclear weapons is to deter the use of *other* such weapons – [embraced by U.S. Vice President Joe Biden as recently as January 2017](#), and in U.S. usage would amount to a repudiation of the use of nuclear deterrence to protect U.S. allies in Europe or East Asia from conventional invasion by Russia or China. In light of the demonstrated willingness of at least one of the latter two powers to use conventional force against its neighbors to advance illegal territorial ambitions, the United States embracing “no first use” or “sole purpose” would be profoundly destabilizing.

The very concept of “minimum deterrence” is also at best questionable here, for it raises questions about the degree to which Beijing relies upon countervalue targeting (*i.e.*, the deliberate targeting of civilian population centers, as such) instead of counterforce targeting (*i.e.*, targeting adversary military capabilities). China’s apparent embrace of countervalue targeting should certainly trouble the disarmament community, who should join the United States in asking tough questions about the lawfulness of Chinese nuclear doctrine under LOAC and in demanding far more transparency and clarity from Beijing about its approach to nuclear weapons.

III. Conclusion

It is hard not to conclude that the moralistic fervor of both poles of the modern disarmament debate has helped impede serious analysis of the legality and morality of nuclear weapons postures and doctrines, and therefore also the development of sensible approaches to nuclear risk reduction. Throughout the nuclear age, and seemingly accelerating after the end of the Cold War – illustrating the insight that demands for more rapid progress can be most strident, most likely to *deny* the fact of progress, and most prone to counterproductive overreaching, when progress is already underway – disarmament debates for too long slipped into a cycle of polarization and stalemate.

In this dynamic, it was too often the case that what should be constructive dialogue has degenerated into reciprocal demonization. For the citizens of modern societies that have depended for decades on nuclear deterrence to keep the peace, appreciation for the potential horrors of nuclear war has all too often provoked either a guilt-ridden reflex of performative anti-nuclear virtue signaling, or a similarly reactive and angrily uncritical *per se* rejection of any possibility of arms control

or disarmament. In both cases, rather than seeking sound policymaking appropriate to the circumstances, moral positioning vis-à-vis The Other has tended to become the imperative, and even a question of personal identity. This has frequently produced what is, in effect, a conspiracy against serious policy, as both sides have worked to turn what ought to have been a challenge of wise statesmanship into a game of antagonistically self-exculpatory identity politics.

I have argued that the legal and moral issues of nuclear policy are not so clear and so simple as many suppose – but to suggest also that if one can get past the reflexive moral imperatives and identities of traditional disarmament discourse, there is much we can constructively discuss and perhaps improve. In particular, I have tried to show that there is a moral case to be made both for deterrence and for a nuanced approach that admits that *doctrines matter* and that all such doctrines are not “created equal” from a legal or a moral perspective. If we understand this, we can perhaps make progress in reducing risks and encouraging more genuinely moral (and lawful) choices by states possessing nuclear weapons until such time as such weapons can be safely and sustainably eliminated.

This analysis also points to the importance of transparency and honesty about doctrine and posture, since without this, real dialogue will be virtually impossible. It also suggests how vital it will be to develop opportunities for dialogue, particularly where – as with the recent U.S. “[Creating an Environment for Nuclear Disarmament](#)” Initiative – such [security-focused engagement](#) finally begins to [reframe disarmament discourse in ways cognizant of the issues that will need to be managed and overcome](#) by the international community in order to [ease tension and strengthen trust between states in order to facilitate disarmament](#).



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