

**Course Description, Syllabus, Topics for
Papers, and Reference Sources**

NUCLEAR WEAPONS & INTERNATIONAL LAW

Professor Charles J. Moxley, Jr.

Fordham University School of Law

Fall 2004

This seminar will address issues as to the lawfulness under international law of the use or threat of use of nuclear weapons. The course will focus upon such matters as the following: applicable rules of international law, as articulated by the United States; the United States' position as to the application of such rules to nuclear weapons; the 1996 advisory decision of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons; relevant judicial decisions subsequent to the ICJ decision; and generally accepted principles of international law applicable to the analysis. The course will also focus upon the facts that are central to the legal analysis, including the characteristics and effects of nuclear weapons, U.S. policy as to the circumstances in which it might use nuclear weapons, the theory and implications of nuclear deterrence, and identifiable risk factors as to the potential effects of the use of nuclear weapons. This will be a paper course and students will be required to present their papers in class. The primary text will be Charles J. Moxley, Jr., *Nuclear Weapons and International Law in the Post Cold War World* (Austin & Winfield, University Press of America, 2000).

Credits: 2

Prof.	Day/Time	Room	Call No.
MOXLEY	M - 7:50PM to 9:40PM	205	10911

Included herein are [Syllabus](#) , [Topics for Papers](#) , [Selected Reference Sources](#)

Following are the class assignments. I have tried to balance the legal and factual materials relating to the issue of the lawfulness of the use or threat of use of nuclear weapons, so that, when we get to the point of applying the law to the facts, we will have covered both elements.

This will very much be a discussion course. Students are expected to participate actively.

Set forth below are various topics for papers, designated by numbers keyed to the classes in which the various topics will be presented.¹ Students will be expected to present their papers orally to the class in presentations of approximately twenty minutes and to answer questions from the professor and other students and participate in discussion of their topic for another approximately twenty minutes. We start the presentations in the seventh class, although the papers need not be turned in until the thirteenth class. Students are expected to circulate outlines or drafts of their papers a week in advance of their oral presentation, to facilitate discussion of the matters presented. Such outlines/drafts will not be graded and may be in rough form, particularly in the case of students presenting early in the course.

Papers should be approximately twenty-five pages.

Grading will be as follows: class participation (25%); presentation and "defense" of the paper (20%); and the paper (55%).

Starting with the seventh class we will primarily be doing student presentations of papers and discussion of the presentations. However, the substantive readings will continue. Students will be expected to draw upon the continued readings both in their papers and in their discussion of other students' papers and will be graded accordingly .

The following syllabus includes various materials available on the internet.

Syllabus

Class 1 (8/30/04):

Focus: General introduction to law and facts relevant to the question of whether the use or threat of use of nuclear weapons are lawful under the law of armed conflict

- Readings
 - 1-11 (assignments, unless otherwise noted, are to Moxley, *Nuclear Weapons and International Law in the Post Cold War World*)
 - 395-446
 - Transcript of U.S. oral argument before the International Court of Justice in the "Nuclear Weapons Advisory Case" ² available on the ICJ website at www.icj-cij.org . (Choose "Decisions" (written in English), then choose "Legality of the Threat or Use of Nuclear Weapons (1994-1996)" under "Advisory Cases" in "1994." Select "Oral Pleadings" and open document "CR/95/34 - 15 November 1995," the first of two documents available for 15 November 1995. (Direct hotlink: [http:// www.icj-cij.org/icjwww/icasess/iunan/iunan_cr/iUNAN_iCR9534_19951115.PDF](http://www.icj-cij.org/icjwww/icasess/iunan/iunan_cr/iUNAN_iCR9534_19951115.PDF) .)) The U.S. oral argument begins on page 55. [Extra link to US oral argument.](#)

Class 2 (9/13/04):

Focus: Detailed discussion of the topics for student papers (set forth below) to refine them, put them in context, and evaluate their significance, and match up students and topics (Students should come prepared with their top four or five preferences as to a topic to pursue or with a proposed alternate topic).³

- Readings
 - U.S. briefs before the ICJ in the Nuclear Weapons Advisory Case: The U.S. submitted two briefs, one in connection with a request for an advisory opinion as to nuclear weapons by the World Health Organization of the United Nations and the other in connection with a similar request by the U.N. General Assembly, available as follows:
 - Brief re General Assembly request:
 - at ICJ website: http://www.icj-cij.org/icjwww/icasess/iunan/iunan_ipleadings/iunan_ipleadings_199506_WriStats_18_USA.pdf , or
 - at www.icj-cij.org , choose "Decisions" (written in English), then choose "Legality of the Threat or Use of Nuclear Weapons (1994-1996)" under "Advisory Cases" in "1994," and then choose "Written Pleadings." The U.S. brief is Written Statement No. 18.
 - Brief re World Health Organization request:
 - at ICJ website: http://www.icj-cij.org/icjwww/icasess/ianw/ianwpleadings/ianw_ipleadings_199409_WriStats_23_USA.pdf , or
 - at www.icj-cij.org , choose "Decisions" (written in English), then choose "Legality of the Use by a State of Nuclear Weapons in Armed Conflict (1993-1996)" under "Advisory Cases" in "1993" and then choose "Written Pleadings." The US brief is Written Statement No. 23.
 - British and Russian briefs before the ICJ (Skim):
 - British: http://www.icj-cij.org/icjwww/icasess/iunan/iunan_ipleadings/iunan_ipleadings_199506_WriStats_17_UK.pdf
 - Russian: http://www.icj-cij.org/icjwww/icasess/iunan/iunan_ipleadings/iunan_ipleadings_199506_WriStats_08_Russia.pdf
 - British and Russian oral arguments before the ICJ (Skim):
 - British: http://www.icj-cij.org/icjwww/icasess/iunan/iunan_cr/iUNAN_iCR9534_19951115.PDF (British oral argument begins at p. 20). [Extra link to British oral argument.](#)
 - Russian: http://www.icj-cij.org/icjwww/icasess/iunan/iunan_cr/iUNAN_iCR9529_19951110.PDF (Russian oral argument begins at p. 39). [Extra link to Russian oral argument.](#)
- Discussion of paper topics

Class 3 (9/20/04):

Focus: Rules of the law of armed conflict applicable to the lawfulness of the use and threat of use of nuclear weapons, as articulated by the United States

- Readings
 - 15-74
 - Joint Chiefs of Staff, Joint Pub 3-12, Doctrine for Joint Nuclear Operations, http://www.dtic.mil/doctrine/jel/new_pubs/jp3_12.pdf (Skim)
 - Joint Chiefs of Staff, Joint Pub 3-12.1, Doctrine for Joint Theater Nuclear Operations, available at http://www.dtic.mil/doctrine/jel/new_pubs/jp3_12_1.pdf (Skim)

Class 4 (9/27/04):

Focus: Rules of the law of armed conflict applicable to the lawfulness of the use and threat of use of nuclear weapons, as articulated and applied by the United States

- Readings
 - 74-120
 - 501-14; 555-74
 - The ICJ's decision in the Nuclear Weapons Advisory Case, available in Lexis at 35 I.L.M. 809, 809-832 (The opinion is also available on the ICJ website at <http://www.icj-cij.org/icjwww/idecisions.htm> . Choose "Legality of the Threat or Use of Nuclear Weapons (1994-1996)" under "Advisory Cases" and "1994," and then choose "Advisory Opinion.") (At this point, it is not necessary to read the separate opinions of the individual judges.)

Class 5 (10/4/04):

Focus: Rules of the law of armed conflict applicable to the lawfulness of the use and threat of use of nuclear weapons, as applied by the United States

- Readings
 - 120-153
 - dissenting opinion of Judge Weeramantry, 35 I.L.M. 880, in the Nuclear Weapons Advisory Case (This cite works in Lexis. The opinion is also available at the ICJ website at <http://www.icj-cij.org/icjwww/idecisions.htm> . Choose "Legality of the Threat or Use of Nuclear Weapons (1994-1996)" under "Advisory Cases" and "1994," and then choose "Advisory Opinion" and then "Weeramantry.")

Class 6 (10/18/04):

Focus: The ICJ decision in the Nuclear Weapons Advisory Case

- Readings
 - 155-192
 - the separate opinions of various judges in the Nuclear Weapons Advisory Case:
 - dissenting opinion of Vice-President Schwebel, 35 I.L.M. 836,
 - dissenting opinion of Judge Higgins, 35 I.L.M. 934, and
 - dissenting opinion of Judge Koroma, 35 I.L.M. 925 (These cites work in Lexis. The opinions are also available at <http://www.icj-cij.org/icjwww/idecisions.htm> , although some of them are available there

only in French.)

Class 7 (10/25/04):

Focus: the ICJ decision in the Nuclear Weapons Advisory Case; student presentations

- Readings
 - 193-250
 - ICJ decision: the separate opinions of various Judges:
 - individual opinion of Judge Guillaume, 35 I.L.M. at 1351,
 - declaration of President Bedjaoui, 35 I.L.M. at 1345,
 - declaration Judge Herczegh, 35 I.L.M. at 1348,
 - dissenting opinion of Judge Shahabudeen, 35 I.L.M. at 861,
 - declaration of Judge Shi, 35 I.L.M. at 832,
 - separate opinion of Judge Fleischhauer, 35 I.L.M. at 834,
 - declaration of Judge Vereshchetin, 35 I.L.M. at 833,
 - declaration of Judge Bravo, 35 I.L.M. at 1349, and
 - individual opinion of Judge Ranjeva, 35 I.L.M. at 1354. (These cites work in Lexis. The opinions are also available at <http://www.icj-cij.org/icjwww/idecisions.htm> , although some are available there in French only.)
- Papers No. 1, 2, and 3:
 - Paper No. 1: Rule of Necessity
 - Paper No. 2: Rule of Proportionality
 - Paper No. 3: Rule of Discrimination

Class 8 (11/1/04):

Focus: U.S. contemporary nuclear doctrine; student presentations

- Readings
 - 483-500
 - 2002 Nuclear Posture Review Materials, including Professor Moxley's paper and background materials describing the Bush Administration's 2002 Nuclear Posture Review, available at http://www.nuclearweaponslaw.org/2002NPR/2002NPR_Article.html
 - 2002 National Security Strategy of the United States, <http://www.whitehouse.gov/nsc/nss.pdf> (Skim)
- Papers No. 4, 5, and 6:
 - Paper No. 4: Role of Law of Armed Conflict In Target Selection
 - Paper No. 5: Law of Neutrality
 - Paper No. 6: The Case for the Lawfulness of the Use and Threat of Use of Nuclear Weapons

Class 9 (10/15/04):

Focus: Generally accepted principles of law applicable to the issue of the lawfulness of the use or threat of use of nuclear weapons; student presentations

- Readings

- 251-311
- 447-63
- Papers No. 7, 8, and 9
 - Paper No. 7: Enforcement
 - Paper No. 8: Issues as to the Legal Sufficiency of a Possible Shareholders Derivative Action against a Corporation Participating in the Manufacture of Nuclear Weapons Components, Assuming that the Use and Threat of Use of Nuclear Weapons Is Unlawful and that the U.S. Policy of Nuclear Deterrence Constitutes the Threat of Use of Such Weapons
 - Paper No. 9: Bases For A *Per Se* Rule--Level of Certainty as to the Likelihood of Impermissible Effects that Must Be Present to Render the Use or Threat of Use of Nuclear Weapons Unlawful

Class 10 (10/22/04):

Focus: Generally accepted principles of law applicable to the issue of the lawfulness of the use or threat of use of nuclear weapons; risk factors inherent in U.S. operational policy as to nuclear weapons in the post World War II era; student presentations

- Readings
 - 313-373
 - 465-81
- Papers No. 10, 11, and 12:
 - Paper No. 10: Risk Analysis
 - Paper No. 11: *Mens Rea/Scienter*
 - Paper No. 12: The Sixteenth Opinion

Class 11 (10/29/04):

Focus: Technical capabilities of the United States' modern high tech conventional weapons; unlawfulness of the use of nuclear weapons under rules of international law recognized by the United States; additional ICJ individual opinion; student presentations

- Readings
 - 633-708
 - dissenting opinion of ICJ Judge Oda in the Nuclear Weapons Advisory Case, 35 I.L.M. at 843 (Skim)
- Papers No. 13, 14, and 15:
 - Paper No. 13: Respective Effects of Nuclear Versus Conventional Weapons and the Legal Significance Thereof
 - Paper No. 14: Mininukes
 - Paper No. 15: Comparison of the Legal Regimes Applicable Respectively to Nuclear, Chemical and Biological Weapons and Analysis of the Reasons for the Differences

Class 12 (11/29/04):

Focus: Technical capabilities of modern high tech conventional weapons; unlawfulness of the use of nuclear weapons under rules of international law recognized by the United States and under additional generally recognized principles of law; student presentations

- Readings
 - 708-780
- Papers No. 16, 17, and 18:
 - Paper No. 16: Reprisals
 - Paper No. 17: Issues as to the Lawfulness of the Possession of Nuclear Weapons
 - Paper No. 18: Issues as to the Legal Sufficiency of a Possible Shareholders Derivative Action against a Corporation Participating in the Manufacture of Nuclear Weapons Components, Assuming that the Use and Threat of Use of Nuclear Weapons Is Unlawful and that the U.S. Policy of Nuclear Deterrence Constitutes the Threat of Use of Such Weapons

Class 13 (12/6/04):

Focus: Scottish decision in Lord Advocate's Reference No. 1 of 2000, 2001 SCCR 296, (March 30, 2001) Misc 11/00 H.C.J. (Scotland, High Court of Justiciary) ("Zelter"), as to the lawfulness of the British policy of deterrence; additional ICJ brief; student presentations

- Readings
 - *Zelter decision*, <http://www.gn.apc.org/tp2000/lar/index.php>
 - Charles J. Moxley Jr., "*The Unlawfulness of the United Kingdom's Policy of Nuclear Deterrence: The Invalidity of the Scottish High Court's Decision in Zelter*," *Disarmament Diplomacy* No. 58, June 2001, available at www.nuclearweaponslaw.org/United_Kingdom_Scots.pdf
 - Brief of Nauru before the ICJ, http://www.icj-cij.org/icjwww/icasess/iunan/iunan_ipleadings/iunan_ipleadings_199506_WriStats_07_Nauru.pdf
- Papers No. 19, 20 and 21:
 - Paper No. 19: Issues as to the Lawfulness of the U.S. Policy of Deterrence
 - Paper No. 20: Impact of the ICJ Decision in the Nuclear Weapons Advisory Case:
 - Paper No. 21: Developing a New Paradigm--A Lawful Nuclear Policy for the United States for the Post Post Cold War Era

Topics for Papers

1. Rule of Necessity: Review the background, history, and contemporary meaning of this rule of the law of armed conflict. What is the nature of this rule? Is it a rule of conventional or customary law or both?⁴ Is it a generally accepted principle of law? (*See* discussion at 654-57.)⁵ Does the characterization of the nature of the rule matter? Is its application to nuclear weapons limited by the practice of many States of the policy of nuclear deterrence? Identify as many actual cases and proceedings in which the rule has been interpreted and analyze such interpretations, insofar as relevant to the lawfulness of the use or threat of use of nuclear weapons. Was this rule applied in the Nuremberg or other war crime proceedings,

and, if so, how? Could a use or threat of use of nuclear weapons be unlawful under this rule if it was not otherwise in violation of customary international law? To what extent, if at all, is a State's obligation to comply with this rule excused in extreme circumstances of self-defense (*see, e.g.*, 174-85; U.S. oral argument before the ICJ at 67)? Is this rule subject to *per se* application as to the lawfulness or unlawfulness of the use or threat of use of nuclear weapons? Most importantly and controversially, what is the range of potential effects that must be considered in evaluating whether the potential use of a nuclear weapon would violate this rule? Would only the "direct" effects be relevant? Or would foreseeable or other indirect effects also be relevant? For example, if one is evaluating the prospective lawfulness of a nuclear strike under this rule, must one include in the analysis an evaluation of the potential effects of possible retaliatory responses by one's adversary or its allies or other States and of the effects of one's own escalatory strikes that might result in light of such possible or actual retaliatory strikes? Most centrally, given that this rule applies to the use of all weapons, are there any unique problems involved in applying it to the use of nuclear weapons? If so, what are those problems and how may they be dealt with? Develop a series of hypotheticals illustrating the application of this rule to the use and threat of use of nuclear weapons. Discuss any other aspects of this rule that you find interesting or particularly applicable to the issues of the lawfulness of the use or threat of use of nuclear weapons. (52-63, 124-25, 219-21, 705-07.)

2. Rule of Proportionality: Review the background, history, and contemporary meaning of this rule of the law of armed conflict. What is the nature of this rule? Is it a rule of conventional or customary law or both?⁶ Is it a generally accepted principle of law? (*See* discussion at 654-57.) Does the characterization as to the nature of the rule matter? Is its application to nuclear weapons limited by the practice of many States of the policy of nuclear deterrence? Identify as many actual cases and proceedings in which the rule has been interpreted and analyze such interpretations, insofar as relevant to the lawfulness of the use or threat of use of nuclear weapons. Was this rule applied in the Nuremberg or other war crime proceedings, and, if so, how? Could a use or threat of use of nuclear weapons be unlawful under this rule if it was not otherwise in violation of customary international law? To what extent, if at all, is a State's obligation to comply with this rule excused in extreme circumstances of self-defense (*see, e.g.*, 174-85; U.S. oral argument before the ICJ at 67)? Is this rule subject to *per se* application as to the lawfulness or unlawfulness of the use or threat of use of nuclear weapons? Most importantly and controversially, what is the range of potential effects that must be considered in evaluating whether the potential use of a nuclear weapon would violate this rule? Would only the "direct" effects be relevant? Or would foreseeable or other indirect effects also be relevant? For example, if one is evaluating the prospective lawfulness of a nuclear strike under this rule, must one include in the analysis an evaluation of the potential effects of possible retaliatory responses by one's adversary or its allies or other States and of the effects of one's own escalatory strikes that might result in light of such possible or actual retaliatory strikes? Most centrally, given that this rule applies to the use of all weapons, are there any unique problems involved in applying it to the use of nuclear weapons? If so, what are those problems and how may they be dealt with? Develop a series of hypotheticals illustrating the application of this rule to the use and threat of use of nuclear weapons. Discuss any other aspects of this rule that you find interesting or

particularly applicable to the issues of the lawfulness of the use or threat of use of nuclear weapons. (39-52, 136-38, 220, 282, 686-87.)

3. Rule of Discrimination: Review the background, history, and contemporary meaning of this rule of the law of armed conflict. What is the nature of this rule? Is it a rule of conventional or customary law or both?⁷ Is it a generally accepted principle of law? (*See* discussion at 654-57.) Does the characterization matter as to the nature of the rule? Is its application to nuclear weapons limited by the practice of many States of the policy of nuclear deterrence? Identify as many actual cases and proceedings in which the rule has been interpreted and analyze such interpretations, insofar as relevant to the lawfulness of the use or threat of use of nuclear weapons. Was this rule applied in the Nuremberg or other war crime proceedings, and, if so, how? Could a use or threat of use of nuclear weapons be unlawful under this rule if it was not otherwise in violation of customary international law? To what extent, if at all, is a State's obligation to comply with this rule excused in extreme circumstances of self-defense (*see, e.g.*, 174-85; U.S. oral argument before the ICJ at 67)? Is this rule subject to *per se* application as to the lawfulness or unlawfulness of the use or threat of use of nuclear weapons? Most importantly and controversially, what is the range of potential effects that must be considered in evaluating whether the potential use of a nuclear weapon would violate this rule? Would only the "direct" effects be relevant? Or would foreseeable or other indirect effects also be relevant? For example, if one is evaluating the prospective lawfulness of a nuclear strike under this rule, must one include in the analysis an evaluation of the potential effects of possible retaliatory responses by one's adversary or its allies or other States and of the effects of one's own escalatory strikes that might result in light of such possible or actual retaliatory strikes? Most centrally, given that this rule applies to the use of all weapons, are there any unique problems involved in applying it to the use of nuclear weapons? If so, what are those problems and how may they be dealt with? Develop a series of hypotheticals illustrating the application of this rule to the use and threat of use of nuclear weapons. Discuss any other aspects of this rule that you find interesting or particularly applicable to the issues of the lawfulness of the use or threat of use of nuclear weapons. (64-9, 142, 216-19, 699-705.)

4. Role of Law of Armed Conflict In Target Selection: What is the role of the law of armed conflict in target selection by the United States?⁸ By other States? What criteria are used? What guidelines are in place? What oversight is conducted? What records are maintained? What accountability is enforced? What, if any, sanctions are imposed for deviations from the determinations of legal advisors as to the lawfulness of particular strikes? Are there military manuals or other documents establishing protocols for such matters, and, if so, what do they say? What, in particular, is the role of the law of armed conflict in planning by the United States and other States as to the circumstances in which nuclear weapons might be used or their use threatened? There has been a lot of reporting in the media about the role of lawyers in target selection in recent military operations. There has also been some interesting professional discussion of the matter (*e.g.* , various articles in Andru E. Wall, Ed., *Legal and Ethical Lessons of NATO's Kosovo Campaign*, vol. 78, International Law Studies (Naval War College, Newport, Rhode Island 2002). Have there been Congressional hearings on the topic? What else is out there? What are other States doing in this regard? What ethical

obligations does a lawyer have who is participating in this process with the military if his or her legal judgment is overridden on military grounds? (45-49, 133-34, 188-89, 226-27, 536, 586, 673, 735-36, 654.)

5. Law of Neutrality: What is the contemporary law of neutrality? To what extent would the use or threat of use of nuclear weapons violate the neutrality rights of a neutral State if the radiation or other effects of the contemplated or threatened strike (a) would likely or (b) might possibly extend into the territory of the neutral State? Would the law of neutrality only be violated if, after the fact, it turned out that the radiation or other effects had in fact extended into the neutral State? Or would such law be violated if, in advance of the strike, the extension of such effects into the State appeared (a) possible or (b) likely or (c) had been foreseeable? What actual judicial or other decisions are available on this point and what do they show? Were these issues raised in the Nuremberg or other war crime proceedings or in reparations or other damages actions? (74-76, 146-48, 221-26, 699-705.)

6. Bases For A *Per Se* Rule--Level of Certainty as to the Likelihood of Impermissible Effects that Must Be Present to Render the Use or Threat of Use of Nuclear Weapons Unlawful : What level of likelihood must be present that the use of a nuclear weapon would cause impermissible effects for such use to be *per se* unlawful? What is the validity of the legal position taken by the United States in the Nuclear Weapons Advisory Case that, for the use or threat of use of nuclear weapons to be *per se* unlawful, it would have to be the case that every use of every type of nuclear weapon would "necessarily" violate the law of armed conflict, or that every use of nuclear weapons would "inevitably" escalate into a massive strategic nuclear exchange, resulting "automatically" in the "deliberate" destruction of the population centers of opposing sides? What is the validity of the United States' choice of language--"necessarily," "inevitably," "automatically," and "deliberate"? Is the United States correct that such high levels of certainty and intentionality as to unlawful consequences must be present before a *per se* rule could arise? As the seriousness of the impermissible effects increases, does the level of probability of such effects that must be present for unlawfulness decrease? (132-33; *see also*, 102-03, 113, 226-28, 255-75, 654-57, 762-66.)

7. Risk Analysis: Under the rules of necessity, proportionality, and discrimination, what level of likelihood of impermissible effects must be present for a prospective use of nuclear weapons to be unlawful? What is the relevance of risk analysis to the evaluation of the lawfulness or unlawfulness of the use or threat of use of nuclear weapons? What legal basis is there for the application of risk analysis in this context? Are there any decisions of courts of the United States or of other States or of war crimes tribunals applying risk analysis? If not why not, and what does this mean for the applicability of risk analysis to the use or threat of use of nuclear weapons? (131-36, 162-71, 186-192, 279-92, 293-311, 313-37, 339-45, 729-59.)

8. Mens Rea/Scienter: What, if any, mental state is required for the violation by a State of the law of armed conflict applicable to the use or threat of use of nuclear weapons? What, if any, mental state is required for the violation of such law by an individual government official or military person? How is responsibility allocated along the chain of command of

the civilian and military leadership in the United States for violations of the law of armed conflict in connection with the use or threat of the use of nuclear weapons? What mental state is required by current U.S. legislation (*see, e.g.*, 18U.S.C. §2441) criminalizing certain violations of the law of armed conflict? Does the *mens rea* element for the violation of the rules of the law of armed conflict differ from rule to rule? Does it differ, depending upon the terms of any convention setting forth the particular rule? Most centrally: What role has the issue of *mens rea/scienter* played in the traditional analysis of the issue of the lawfulness of the use and threat of use of nuclear weapons? What role did it play in the Nuremberg and other war crimes proceedings? Why has it not played a greater role in the traditional analysis of the lawfulness of the use and threat of use of nuclear weapons? Should it? If it is assumed that the threat of use of nuclear weapons is unlawful under the law of armed conflict and that the U.S. policy of deterrence constitutes the threat of use of nuclear weapons, what factors as to *mens rea /scienter* would affect the potential culpability/liability of the civilian and military personnel of the United States implementing the policy of nuclear deterrence and of persons working for defense contractors making the weapons backing up the policy of deterrence? (94-98, 245-47, 313-37, 722-26, 753-59.)

9. The Case for the Lawfulness of the Use and Threat of Use of Nuclear Weapons: Write a brief in support of the lawfulness of the use of nuclear weapons in the arsenal of the United States. The brief should contain a "Facts" sections setting forth the dispositive facts as to nuclear weapons and their effects and a "Law" section, analyzing those facts in light of the applicable law. Consider such questions as the following:

- o Can the United States control the radiation effects of nuclear weapons? Are such effects relevant to the consideration of the lawfulness of the use and threat of use of nuclear weapons? Is the United States' characterization before the ICJ that "[m]odern nuclear weapon delivery systems are, indeed, capable of precisely engaging discrete military objectives" (oral argument at 70) accurate as to the radiation effects of such weapons?
- o Was it the U.S. position before the ICJ that the radiation effects of nuclear weapons are not relevant to lawfulness of the use of such weapons? Is this the U.S. position generally? Is such a position valid under the law of armed conflict?
- o Is it a fair characterization of the U.S. position before the ICJ that the U.S. argued that the potential effects of the use of conventional weapons and nuclear weapons would be generally comparable (140)? Is this factually accurate? What is the significance of this point to the issue of the lawfulness of the threat or use of nuclear weapons?
- o Is it a fair characterization that the United States, in its arguments before the ICJ, only defended the lawfulness of the limited use of low yield nuclear weapons in remote areas? Did the United States implicitly acknowledge, in its arguments to the ICJ, that the use of high yield nuclear weapons and the widescale use of limited nuclear weapons would be unlawful?
- o What basis, if any, is there for asserting the lawfulness of the use of high yield nuclear weapons against "co-located" military targets in urban areas and of the widescale use of low yield nuclear weapons in such areas?

- Would the United States' use and threat of use of nuclear weapons be *per se* unlawful under the rules of necessity, proportionality, and discrimination if the following facts are assumed:
 - That the United States recognizes the substance and binding nature of such rules and their applicability to the use and threat of use of nuclear weapons,
 - That the objective facts as to the effects of nuclear weapons are such that it is clear that no use of nuclear weapons could comply with such rules,
 - That the United States and other nuclear weapons States and States relying upon such States for their security, while refraining from the use of nuclear weapons, have not done so out of a sense of obligation, but, instead, have always asserted and presently assert the right to use such weapons?
 - In other words, can the United States be bound by the application of a general rule it recognizes when it does not accept the validity of the application of that rule in a specific instance? Or is this a bogus issue in the present context? Is the dispute really one of fact as to the potential effects of the use of nuclear weapons? And of law, as to the prerequisites for the existence of a *per se* rule? Does the United States, in fact, recognize that the use of nuclear weapons would be *per se* unlawful if such a use could never comply with the law of armed conflict, and simply dispute the factual matter and stand hard on the legal point that, for a *per se* rule to arise, it would have to be clear that all uses of nuclear weapons in all circumstances would be unlawful?
- If it is assumed that some uses of nuclear weapons by the United States (say, the use of low yield tactical nuclear weapons in remote areas) would be lawful and that other uses (say, the use of high yield nuclear weapons) would be unlawful, what does that mean as to the lawfulness of the U.S. policy of deterrence, insofar as it without qualification threatens the use of all of the nuclear weapons in the U.S. arsenal and such weapons include the high yield nuclear weapons whose use would be presumptively unlawful?
- If it is assumed that any use of a nuclear weapon would carry with it some risk that the weapon would have impermissible effects (*e.g.*, hitting the wrong target, causing impermissibly widescale injury, and precipitating major escalation), what is the legal significance of such probabilities?
- What is the range of potential effects that must be considered in evaluating whether a particular use of a nuclear weapon would violate the law of armed conflict? Is it sufficient to evaluate the lawfulness of a potential use of nuclear weapons based only upon the direct effects, or must the broader effects (such as the effects of resultant escalation and the long term effects of the resultant radiation upon human, animal and plant life) be taken into consideration?
- Under the rule that civilians may not be targeted "as such," would the use of nuclear weapons against major military targets in areas where there are many civilians be unlawful if it were foreseeable that many civilians would be killed and injured? What is the contemporary validity, content and defensibility of the "as such" rule?
- Is it a fair characterization to say that a State's use of a nuclear weapon would not

comply with the rule of necessity if the use would likely cause such extensive effects as to boomerang on the State and result in its sustaining more damage than the original target was worth?

10. Lawfulness of the Arsenal of Nuclear Weapons Maintained by the United States: What nuclear weapons does the United States currently maintain in its active stockpile?⁹ As to the various types of such weapons, what are the arguments as to the lawfulness or unlawfulness of their use or threat of use? What nuclear weapons does the United States currently maintain in its inactive stockpile? What is the lawfulness of the prospective use or threat of use of such weapons? Review the various types of nuclear weapons the United States has in its active and inactive stockpiles and analyze which of those types of weapons fit within the categories of nuclear weapons whose lawfulness the United States urged before the ICJ and as to which the ICJ concluded it did not have sufficient facts to determine lawfulness, i.e., highly accurate low yield nuclear weapons. Correspondingly, analyze what portion of the stockpiles is made up of the types of weapons that the United States did not contend could lawfully be used and whose use the ICJ ostensibly found would generally be unlawful. Analyze the facts as to the inactive weapons: How close to ready are they for use? (129-31, 161, 171-74, 483-500, 501-14, 585-98, 605-32; *see also*, 2002 Nuclear Posture Review Materials, including Professor Moxley's paper and background materials describing the Bush Administration's 2002 Nuclear Posture Review, http://www.nuclearweaponslaw.org/2002NPR/2002NPR_Article.html .)

11. Mininukes: What are mininukes? Low yield nuclear weapons? Tactical nuclear weapons? Are these all the same thing? What are the distinctions, if any, between such types of weapons? What role do these types of weapon play in U.S. nuclear policy and planning today? What role are they currently projected to play in the future? What role have they played in the past? What role should they play in the future? Is the use and threat of use of such weapons more or less defensible than that of higher yield nuclear weapons? To what extent do such weapons release less radiation than higher yield nuclear weapons? What is the status and significance of recently proposed revisions to current U.S. legislation banning research and development of nuclear weapons with yields of less than five kilotons (*see, e.g.*, materials collected at http://www.nuclearweaponslaw.org/Mini_Nukes_Bunker_Busters.html). What does the legislative history of such legislation and efforts to amend it reveal as to the arguments for and against such legislation? Is the use and threat of use of mininukes and low yield and tactical nuclear weapons lawful under the law of armed conflict? Is the use of such weapons *per se* unlawful? In what circumstances, if any, would the use and threat of use of such weapons be lawful? In what circumstances, if any, would they be unlawful? With respect to the U.S. argument that "[m]odern nuclear weapon delivery systems are, indeed, capable of precisely engaging discrete military objectives" (U.S. oral argument at 70)--is this factual assertion accurate insofar as concerns the radiation effects of nuclear weapons? If not, what is the legal significance of such U.S. inability to control radiation effects? Is the use of mininukes more likely to be lawful than the use of high yield nuclear weapons, since, by definition, the effects of the mininukes are presumably less extensive? Is the use of mininukes more likely to be unlawful because conventional weapons could more certainly achieve any military objective for which the

mininukes might be used? Are there any particular types of military objectives which only nuclear weapons could achieve? If so, what are they? Why can't conventional weapons achieve such objectives? How close are we to being able to develop a conventional weapons capability to address such objectives? With respect to the lawfulness of the first use of mininukes, what is the legal significance of the fact that such use would cross the "nuclear threshold"? (129-31, 171-74, 190, 483-500, 506-14, 585-98; *see also*, John Burroughs, *The Lawfulness of "Low-Yield," Earth-Penetrating Nuclear Weapons*, January 20, 2003 (available at <http://www.lcnp.org/wcourt/nwlawfulness.htm> .)

12. Comparison of the Legal Regimes Applicable Respectively to Nuclear, Chemical and Biological Weapons and Analysis of the Reasons for the Differences: What are the differences between the applicable law of armed conflict as to nuclear, chemical and biological weapons? What are the reasons for such differences? Do the radiation effects of nuclear weapons constitute poisons, poisonous gas or analogous materials? Is the U.S. position (*see, e.g.*, 143-44) correct that the radiation effects of nuclear weapons do not render such weapons unlawful since the blast and heat effects are potentially lawful? Is that the rule, that, as long as a weapon has a potentially lawful effect, its use is lawful, regardless of the fact that it also causes presumptively unlawful effects? Is the United States correct that the prohibition of the use of poison weapons "does not prohibit nuclear weapons, which are designed to injure or cause destruction by means other than poisoning the victim, even though nuclear explosions may also create toxic radioactive byproducts?" (*See* 143-44.) If so, what is the basis of such a rule? Where does it appear? What support is there for it? Is it valid? What is the relevance of the principle of "double effect" to such rule (*see* discussion at 387-90). Did the United States, in its oral argument to the ICJ in support of the lawfulness of the threat and use of nuclear weapons (*see, e.g.*, oral argument at 70), ignore the radiation effects of such weapons? If so, was the United States correct that such effects are irrelevant? Most centrally: Apropos of the U.S. argument (*see, e.g.*, oral argument before the ICJ at 61), that, if the use of nuclear weapons, like that of chemical and biological weapons, were unlawful under international law, there would be a convention setting forth such unlawfulness, as there is with chemical and biological weapons, analyze whether the use of chemical and biological weapons was unlawful, and recognized as such, *before* the conventions formally outlawing such weapons were enacted. Analogously, is the United States correct in its ostensible position (*see, e.g.*, oral argument before the ICJ at 72) that the unnecessary suffering principle prohibits the use of weapons designed specifically to increase the suffering of persons attacked beyond that necessary to accomplish a particular military objective, but does not prohibit the use of weapons that simply have that effect, among other permissible effects? Is the impermissible effect acceptable under the law of armed conflict if it was not the result of a "specific design" to cause such effect, but rather a natural but not specifically intended effect of the specifically desired effects? Are we back to the principle of double effect here? If so, is it valid? (76-84, 143-45, 197-99, 387-92, 605-32, 708-12.)

13. Respective Effects of Nuclear Versus Conventional Weapons and the Legal Significance Thereof: Does the United States today have any actual or potential military objective that it could not achieve with either conventional weapons it now has or ones it could develop if it

expended the necessary resources? What are the relative likely collateral effects of the use and threat of use of contemporary nuclear weapons versus such effects of contemporary conventional weapons? What is the legal significance of the differences in potential effects of such nuclear and conventional weapons, respectively? Was the United States correct in arguing to the ICJ that the effects of conventional and nuclear weapons are comparable? To what extent is the lawfulness of the use or threat of use of nuclear weapons dependent upon the conventional weapons that a State has available or could potentially have had available to meet the military need in question? Does a State have a legal obligation under the law of armed conflict or otherwise to develop, purchase, and maintain a sufficient supply of conventional weapons such that it will always have such weapons available in case of military need and not be in the position of having to use or threaten to use nuclear weapons because of not having conventional weapons that could have been available to address the particular military needs in question? If so, does this mean that two adversaries may be subjected to differing legal and ethical regimes, dependent upon their relative level of technological sophistication and financial means? (By way of analogy, in conducting a conventional strike, is the United States generally required to use precision-guided rather than dumb weapons, since it has the ability to take steps to put it in a position of being able to do so?) (See articles in Andru E. Wall, Ed., *Legal and Ethical Lessons of NATO's Kosovo Campaign*, vol. 78, International Law Studies (Naval War College, Newport, Rhode Island 2002) addressing such questions.) (140-42, 397-401, 405-46, 367-73, 633-50.)

14. Enforcement: By what means may the law of armed conflict as to the use or threat of use of nuclear weapons be enforced? By what means may legal issues as to the lawfulness of such use or threat of use be raised? In what forums and in what States might criminal and civil enforcement actions be brought? What criminal charges are available to enforce the law of armed conflict? What civil claims are available to enforce such law? Who has standing to raise issues as to the lawfulness of the use or threat of use of nuclear weapons? What governmental bodies or courts may apply such law or make determinations as to how it should be applied? Most centrally, what precedent, if any, is there for the bringing of criminal charges or civil claims based upon the threatened or attempted violations of the law of armed conflict? What does this mean as to the prospects of enforcement of the law of armed conflict insofar as concerns nuclear weapons? What is the basis and validity of the Belgium legislation that has in recent years permitted the bringing of claims under international law against present and former officials of the United States in courts of that State? (See Comment, "*Belgian Waffle*," Nat'l Rev., July 31, 2003, available in Lexis.) Are there other States in which such actions might be brought? What are the restrictions of sovereign immunity, both here and in the law of other States, upon the bringing of criminal charges and civil claims against States and civilian and military officials thereof asserting the unlawfulness of the use and threat of use of nuclear weapons? Most centrally, what restraints are imposed by the political question doctrine upon the bringing of cases in U.S. courts relating to the enforcement of the law of armed conflict? Is the law of armed conflict "law" to the extent there is no one and no way to enforce it? To what extent may protestors who deface or damage military property to protest the lawfulness the policy of deterrence raise legally justiciable issues as to the lawfulness of the use or threat of use of nuclear weapons? Include in your analysis available information available from the Lawyers'

Committee for Nuclear Policy (LCNP) and other available sources as to cases which have arisen around the world involving issues as the lawfulness of the use or threat of use of nuclear weapons (*see, e.g.*, the LCNP web site at <http://www.lcnp.org/wcourt/Court%20cases.htm> ; *see also*, <http://www.j-n-v.org/prisoners.htm>). If one assumes that the use of nuclear weapons is unlawful, is the United States subject to criminal or civil liability for its use of nuclear weapons against Hiroshima and Nagasaki? What would be the legal obstacles to such a charge or action? What are the statute of limitations constraints as to such a charge or action? Would such a claim possibly be tolled on any basis? (*See generally*, 47-48, 99-101, 327-28, 721-22; *see also*, 313-37; *Ryuichi Shimoda et al. v. The State*, 355 Hanrei Jiho 17, translated into English at 8 Japanese Ann. Int'l L. 212 (1964) ("*Shimoda*" case); Richard A. Falk, *The Shimoda Case: A Legal Appraisal of the Atomic Attacks upon Hiroshima and Nagasaki*, 59 AJIL 759 (1965).)

15. Issues as to the Legal Sufficiency of a Possible Shareholders Derivative Action against a Corporation Participating in the Manufacture of Nuclear Weapons Components, Assuming that the Use and Threat of Use of Nuclear Weapons Is Unlawful and that the U.S. Policy of Nuclear Deterrence Constitutes the Threat of Use of Such Weapons [*This is an elaborate topic that perhaps several students might want to work on together as a joint project*]: Is the manufacture or assembly of nuclear weapons (including delivery systems) and their components lawful under international and other law? To what criminal and civil liability, if any, could persons participating in such work potentially be subject? (*See generally*, 47-8, 99-101, 327-28, 721-22; *see also*, 313-37.) What is the potential criminal and civil liability, if any, of corporations performing such work? What kinds of actions could be brought against a corporation for engaging in such activities? What are the prospects of a derivative action against a corporation's officers and directors for causing the corporation to engage in manufacturing, assembling or other activities with respect to nuclear weapons or their components? (332-33; *see generally*, materials on *mens rea/scienter*: 94-98, 245-47, 313-37, 722-26, 753-59.) Specifically, if one establishes

- that the use or threat of use of nuclear weapons would be unlawful under international law, and
- that the policy of nuclear deterrence of the United States is a policy tantamount to the threat of use of nuclear weapons,
- would it then be unlawful (a violation of international law) for a corporation to manufacture such weapons, including delivery vehicles and components thereof (particularly delivery vehicles used solely ¹⁰ for large scale nuclear weapons, not the low yield tactical nuclear weapons that the ICJ in the Nuclear Weapons Advisory Case ostensibly recognized to be possibly lawful)? Would it be a war crime (101) or a crime against the peace (99)?
- If so, is it a breach of fiduciary or other duty for an officer or director of the corporation to permit the corporation to manufacture such weapons?
 - If so, can a shareholder of the corporation state a legally sufficient shareholders derivative action on behalf of the corporation against such officers and directors?
 - Does it matter to the legal sufficiency of such an action that the corporation has not yet sustained damages, and indeed is reaping substantial profits from the

- nuclear manufacturing activities? Or is it enough that the activities are unlawful (like price-fixing or predatory pricing or the like) and potentially subject the corporation to criminal and/or civil liability? ¹¹ (Are there analogous areas where corporations have been subjected to criminal or civil liability for conducting activities that assist foreign governments in activities that are unlawful?)
- To what extent does the potential viability of a derivative action along the foregoing lines differ based upon the forum in which one might bring the action or the State's law that one might invoke?
 - With respect to the question of in what federal or State court one might bring such an action:
 - What are the requirements as to the posting of a bond?
 - What other considerations affect choice of forum?
 - Other issues:
 - Most centrally, could the political question doctrine successfully be invoked by the officer and director defendants or the corporation in such an action to bar the judicial determination of the underlying substantive issues as to the lawfulness or not of the use or threat of use of nuclear weapons? To what extent does the political question doctrine differ from jurisdiction to jurisdiction? In what federal circuits (or State court systems?) would one have the best prospects of avoiding the application of the political question doctrine?
 - To what extent could the federal statute substantially protecting government contractors from civil liability ¹² be invoked by the corporation or the officer and director defendants to defeat liability?

16. Reprisals: Was the United States correct in arguing before the ICJ that the use of a weapon "may be lawful or not depending upon whether and to what extent such use was prompted by another belligerent's conduct and the nature of such conduct?" (U.S. oral argument at 69.) What is a reprisal? Are reprisals lawful under contemporary international law? What limitations are there on actions that may permissibly be taken in reprisal? Is the apparent U.S. position valid that it is permitted in the course of a reprisal to attack civilians with nuclear weapons (*see, e.g.*, 712 n. 227)? To what extent would it be lawful to use nuclear weapons in reprisal, following another State's use of nuclear, chemical or biological weapons? If any such use would be lawful, what would be the limits upon such use? Would the "second use" of nuclear weapons be lawful as a reprisal, given the enemy's first use? What is the difference in the law applicable to first versus second nuclear strikes? Does the right of reprisal potentially arise if a State, in an unlawful act of aggression, attacks a second State? If so, in what circumstances? What are the differences, if any, between the right of reprisal and that of self-defense? (88-94, 150-51, 228-29, 712-16, 776-80; *see also* Paula B. McCarron & Cynthia A. Holt, *A Faustian Bargain? Nuclear Weapons, Negative Security Assurances, and Belligerent Reprisal*, 25 Fletcher F. World Aff. 203 (2001).)

17. Issues as to the Lawfulness of the Possession of Nuclear Weapons: What is the lawfulness of a State's possession of nuclear weapons? What, if anything, do the various analyses as to the lawfulness of the use or threat of use of nuclear weapons mean or imply as

to the lawfulness of the possession of such weapons? What analogies can be drawn from the legal regimes as to chemical and biological weapons? What analogies can be drawn from general principles of law followed by civilized nations generally? Does the possession by a State of a substance or mechanism that could cause serious injury beyond the border of the state impose a legal obligation of care or other duty upon the State? Whatever that duty is, is it capable of being fulfilled, when the mechanism is a nuclear weapon? (Was the Soviet Union subject to claims by States and persons outside that State for damages sustained as a result of Chernobyl? Were such claims asserted? If so, how were they resolved?) To the extent that international law or law generally permits the possession of substances or mechanisms whose use would be unlawful, what is the rationale for permitting such possession or for not prohibiting it? Does such rationale withstand contemporary analysis? Review the various rules of the law of armed conflict that prohibit the use of specific weapons. Does the law of armed conflict also prohibit possession of such weapons? What is the legal significance, if any, of the possession by a State of a weapon which it would be unlawful to use? Of a weapon whose effects cannot be controlled? Would such possession imply a threat which would bring the possession of the weapon within the prohibition of threatening to take unlawful actions? (xvii, 10, 46-7, 114, 116-19, 199-201, 206, 772-73; *see also* , 608-609; pp. 56, 59, 61, 62 of U.S. oral argument before the ICJ.)

18. The Sixteenth Opinion: In all, the judges of the ICJ issued fifteen opinions in the *Nuclear Weapons Advisory Case*. In the Court's decision, it determined that it did not have sufficient facts to determine whether low yield tactical nuclear weapons could be used in remote areas in such a way as to not cause impermissible effects. Write the Court's further decision, analyzing that issue, based upon the available facts which the Court either regarded itself as not having or chose not to address. Include in your analysis the materials received by Professor Moxley from the U.S. armed services pursuant to his request under the Freedom of Information Act (available from Professor Moxley). (168-171.)

19. Issues as to the Lawfulness of the U.S. Policy of Deterrence: Under what circumstances, if any, is the threat to use nuclear weapons unlawful? Does the lawfulness of the threat to use nuclear weapons depend upon the lawfulness of the threatened use? What is a "threat?" What is the policy of "deterrence?" Evaluate the validity of the position taken by Nauru in its brief to the ICJ on this subject. Does the U.S. policy of deterrence constitute a "threat" to use nuclear weapons? Is the U.S. policy of deterrence lawful? What is the difference between the threat implicit in the policy of deterrence and an overt threat in a particular situation, in terms of their respective lawfulness or unlawfulness? Is there any difference, in legal effect, between an articulated policy of deterrence, such as that of the United States, and the deterrence implicit in a State's known possession of nuclear weapons?¹³ If the policy of deterrence can prevent attacks by other States or the use by other States of weapons of mass destruction, should such policy be lawful even if the actual use of the weapons would be unlawful? Is such a policy lawful? What is the significance of the U.S. acknowledgement in its oral argument before the ICJ that the U.S. policy of nuclear deterrence involves the "use" of such weapons (U.S. oral argument at 69)? (10, 46, 151-53, 156 n2, 202-08, 447-63, 515-20, 772-73; *see also*, U.S. oral argument before the ICJ at 79; Charles J. Moxley Jr., *The Unlawfulness of the United Kingdom's Policy of Nuclear*

Deterrence: The Invalidity of the Scottish High Court's Decision in Zelter," Disarmament Diplomacy No. 58, June 2001 (available at http://www.nuclearweaponslaw.org/United_Kingdom_Scots.pdf .)

20. Impact of the ICJ decision in the Nuclear Weapons Advisory Case: What has been the impact of the ICJ decision in the Nuclear Weapons Advisory Case? What judicial decisions have been made around the world that have been affected by the decision? What do such decisions tell us? How, if at all, did the Nuclear Weapons Advisory Decision affect the nuclear policy of the United States or of other nuclear States? Why? To what extent, if at all, were the Court's decision and the opinions of the various judges affected by political considerations? Has the ICJ heard comparable cases and, if so, does it appear to have addressed them on a legal or a political basis? *See, e.g.*, <http://www.lcnp.org/wcourt/Court%20cases.htm> ; <http://www.j-n-v.org/prisoners.htm> (under "U.S. nuclear resisters").

21. Developing a New Paradigm--A Lawful Nuclear Policy for the United States for the Post Post Cold War Era : Given that much of the traditional analysis as to the lawfulness or unlawfulness of the use or threat of use of nuclear weapons has grown out of the evaluation of the strategic milieu during the Cold War, what new considerations should be brought to bear on this question in our contemporary strategic milieu? What are the differences between the current *milieu* and that of the Cold War and what are the implications of such differences? What is the balance between the benefits of our current policy of deterrence in terms of deterring the types of adversaries we presently face and the costs of that policy in terms of legitimizing the use and threat of use of weapons of mass destruction ("WMD") and fostering proliferation and the overall WMD regime? What is the role, if any, of nuclear weapons today? Is it fair to say that nuclear weapons have themselves become our greatest security threat--or do such weapons even today have a significant role to play in our defense? Under what circumstances, if any, would it make sense for the United States to use or threaten to use nuclear weapons in our contemporary environment? What is the lawfulness of such uses or threats of use of nuclear weapons? Is it the case today that even a limited use of nuclear weapons by the United States, in the circumstances in which it would likely use such weapons, would likely escalate into a widescale nuclear exchange (*see* 585-98), and, if so, what is the legal significance of such fact? Would a limited use of nuclear weapons by the United States likely precipitate the use of chemical and/or biological weapons (*see* 605-32)? If so, what is the significance, if any, of such likelihood to the lawfulness of such use of nuclear weapons? Most centrally, analyze the legal considerations applicable to the policy paradigm you identify or propose. (741-42.)

22. Use of Nuclear Weapons for Self-Defense : Under what circumstances, if any, may nuclear weapons be used for self-defense? Does the right of self-defense trump the law of armed conflict? Do the restraints of the law of armed conflict apply to the actions of a State when it is defending its very existence? If so, is there any basis to expect compliance in such circumstances? If we cannot expect compliance in such circumstances, what does this mean as to the seriousness of this body of law? Does it even qualify as "law?" Most centrally, did any State, in its written or oral arguments to the ICJ, contend that the right of self-defense trumped such rules of the law of armed conflict as the rules of necessity, proportionality, and

discrimination? If so, what authority, if any, was given for such position, and what is the validity of such authority? Have any other decisions of the ICJ or of any other tribunal addressed the scope of a State's right of self-defense? If so, what did the decisions decide and on what basis--and what is the significance of such prior decision(s) in interpreting what the ICJ said on the subject in the Nuclear Weapons Advisory Case? (174-184, 347-51, 717-21.)

23. Potential Liability of Foreign Government Officials and Military Personnel and Defense Contractors and/or Officers, Directors and Employees thereof under the Alien Tort Claim Act: If it is assumed that the threat or use of nuclear weapons violates international law and that the policy of deterrence followed by nuclear States constitutes the threat of use of nuclear weapons, to what extent might legal action be brought against present or former government officials and military personnel of a foreign nuclear State and government contractors thereof and their officers, directors, and employees in U.S. courts under the Alien Tort Claim Act, 28 USC § 1350, based upon their participating in their State's implementation of its policy of deterrence? Anticipate the possible claims and objections and develop and analyze the best arguments on both sides, finally setting forth your own conclusion as to the viability of such an action. Are there similar statutes in other States that might offer potential forums for such litigation? If other States had comparable statutes, would the United States recognize such statutes?

24. International Criminal Court and Other War Crimes Tribunals: What is the competence of the International Criminal Court on issues as to the lawfulness of the use or threat of use of nuclear weapons? Under what circumstances, if any, could such claims be brought in the International Criminal Court as to the nuclear policies or actions of the United States or any other nuclear State? To what extent would the charters of other war crime tribunals reach violations of the law of armed conflict through the use or threat of use of nuclear weapons? What precedent, if any, is there for the prosecution of threatened or attempted violations of the law of armed conflict? What does this mean as to the prospects of enforcement of the law of armed conflict insofar as concerns nuclear weapons? (47-8, 317-22, 336-37; *see also*, Elaina I. Kalivretakis, Comment, *Are Nuclear Weapons Above the Law? A Look at the International Criminal Court and the Prohibited Weapons Category*, 15 Emory Int'l L. Rev. 683 (2001).)

25. View of Other States as to the Lawfulness of the Use or Threat of Use of Nuclear Weapons: For anyone having a facility in a language other than English: Based on available materials in the language of your familiarity, to what extent is the use or threat of use of nuclear weapons viewed as lawful or unlawful? How such legal considerations impacted upon the nuclear policies of the relevant State(s)?

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<http://www.nwc.navy.mil/ILD/Commander's%20Handbook.htm> ;

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- Joint Chiefs of Staff, Doctrine for Joint Nuclear Operations (Joint Pub 3-12, Dec. 15, 1995), http://www.dtic.mil/doctrine/jel/new_pubs/jp3_12.pdf ;
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- U.S. Department of the Air Force, Strategic Attack (Air Force Doctrine Document 2-1.2, May 20, 1998), http://www.dtic.mil/doctrine/jel/service_pubs/afd2_1_2.pdf
- U.S. Department of the Air Force, Nuclear Operations (Air Force Doctrine Document 2-1.5, July 15, 1998), http://www.dtic.mil/doctrine/jel/service_pubs/afd2_1_5.pdf .

Books Addressing Nuclear Weapons Issues¹⁴

- Ian Brownlie, International Law and the Use of Force by States, Oxford University Press (New York, 1991) pp. 262÷64, 436; *see also*, p 373;
- John Burroughs, The (Il)legality [Legality] of Threat or Use of Nuclear Weapons, Lit Verlag (Münster, Germany 1997);
- Makhijani Deller & John Burroughs, eds., Rule of Power or Rule of Law? Apex Press (2003);
- Myres S. McDougal and Florentino P. Feliciano, Law and Minimum World Public Order, Yale University Press (New Haven, Connecticut, 1967) pp. 23÷24, 32, 77, 244, 356, 388÷90, 472÷74;
- Elliot L. Meyrowitz, Prohibition of Nuclear Weapons, Transnational Publishers, Inc. (Dobbs Ferry, New York 1989);
- Adam Roberts and Richard Guelff, Documents on the Laws of War, 3rd Ed., Oxford University Press (Oxford, 2002);
- Stephen I. Schwartz, ed., Atomic Audit, Brookings Institution Press (Washington,

- D.C., 1998);
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ENDNOTES

¹ There are a total of twenty-five topics. Assuming fewer than twenty-five students enroll in the course, there will be some ability to select among the designated topics.

²*Legality of the Threat or Use of Nuclear Weapons*, International Court of Justice, Advisory Opinion, General List at pt. VI, 35-36, No. 95 (July 8, 1996) (The decision of the Court and all but five of the fifteen individual opinions are available at 35 I.L.M. 809. The remaining five, the declarations of Judges Bedjaoui, Herczegh and Bravo and the individual opinions of Judges Guillaume and Ranjeva, appear at 35 I.L.M. 1343. Such I.L.M. materials are available on Lexis.). References herein to briefs and transcripts of oral arguments are to such materials in the Nuclear Weapons Advisory Case unless otherwise noted.

³ The topics are designed to address pivotal issues as to the lawfulness of the use or threat of use of nuclear weapons. Applicable facts and law that frame the core issues are set forth in the description of the topics.

⁴ The United States argued before the ICJ in the Nuclear Weapons Advisory case, "It is a fundamental principle of international law that restrictions on States--particularly those affecting the conduct of armed conflict--cannot be presumed; they must, rather, be found in

conventional law specifically accepted by States, or in customary law generally accepted as such by the community of nations." For this rule, the United States cited and quoted *Nicaragua v. United States* . Does that case support the U.S. position? What did the ICJ in that case mean in saying that a State is only bound by rules accepted by the State "by treaty or otherwise ?" (See U.S. oral argument before the ICJ at 60) (emphasis supplied).

⁵ References are to some pages in *Nuclear Weapons and International Law in the Post Cold War World* where the topic or related topics are discussed.

⁶ The United States argued before the ICJ in the Nuclear Weapons Advisory case, "It is a fundamental principle of international law that restrictions on States--particularly those affecting the conduct of armed conflict--cannot be presumed; they must, rather, be found in conventional law specifically accepted by States, or in customary law generally accepted as such by the community of nations." For this characterization of the law, the United States cited and quoted *Nicaragua v. United States* . Does that case support the U.S. position? What did the ICJ in that case mean in saying that a State is only bound by rules accepted by the State "by treaty or otherwise?" (see U.S. oral argument before the ICJ at 60) (emphasis supplied).

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⁸ There has been much written in the media on this subject in connection with recent military operations of the United States. Why is the United States involving lawyers so heavily in target selection? Is it obligated to do so? Has a norm developed or is it developing requiring such care? Are other States exercising similar concern with the lawfulness of potential targets?

⁹ As to the distinctions between "attributed" or "accountable" nuclear weapons and weapons not characterized as "accountable" and hence not counted, see 502 n. 7.

¹⁰ Some delivery systems and component parts are used for both nuclear and conventional weapons.

¹¹ See, e.g., *Diamond v. Oreamuno*, 24 N.Y.2d 494, 248 N.E.2d 910, 301 N.Y.S.2d 78 (1969); *Biondi v. Beekman Hill House Apt., Corp.*, 257 A.D.2d 76, 692 N.Y.S.2d 304 (1st Dep't 1999); *Amfesco Industries, Inc. v. Greenblatt*, 172 A.D.2d 261, 568 N.Y.S.2d 593 (1st Dep't 1991).

¹²See Defense Production Act, 50 U.S.C. Appx. § 2157 (1994) (partly repealed; see Susan Rousier, Note and Comment, *Hercules v. United States: Government Contractors Beware*, 19 Whittier L. Rev. 215 (1997)); *Boyle v. United Techs. Corp.*, 487 U.S. 500, 101 L. Ed. 2d 442, 108 S. Ct. 2510 (1988); *In re "Agent Orange" Product Liability Litigation*, 597 F. Supp. 740 (E.D.N.Y. 1984); *Hercules Inc. v. United States*, 25 Cl. Ct. 616 (1992)).

¹³ What does the fact that Israel is a known nuclear power but does not generally acknowledge its possession of such weapons tell us on this score? See.g., <http://www.fas.org/nuke/guide/israel/nuke/index.html> .

¹⁴ The library will have these books on reserve.

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