

INTRODUCTION

Speakers:

Prof. Charles J. Moxley, Jr.; Prof. John D. Feerick**; Scott M. Karson***; Edward K. Lenci+; Ariana N. Smith++; Jonathan Granoff++*

CHARLES MOXLEY:

Good morning. I'm Charlie Moxley. On behalf of Ed Lenci, John Burroughs, Jonathan Granoff, and myself, as organizers of this event, with wonderful help from the New York State Bar Association, welcome.

I'm delighted to open this conference. We've been gratified by the turnout. A substantial number of people have shown an interest in this subject. Our purpose in focusing on this area is that we've had a sense, since the Cold War, that the risks of nuclear weapons, the threats presented, and the ways of controlling nuclear weapons, have largely fallen out of the public consciousness. This is evident to us in the State Bar and the ABA, and to our major sponsors who we're very pleased to have working with us.

We are joined by Fordham Law School, Georgetown University, the ABA, the New York City Bar Association, the New York County Lawyers Association, the Lawyers Committee for Nuclear Policy, the Global Security Institute, various of their institutes and programs, and most centrally, this program's sponsor, the New York State Bar Association through its International Section. In a few moments, we'll hear from Scott Karson, the president of New York State Bar Association and Ed Lenci, Chair of the International Section of the State Bar.

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In the many months that we've been working with all of these groups to organize this program, we've found an extraordinary amount of concern about the risks posed by nuclear weapons. I think there's widespread concern around this issue that hasn't been appreciated by the policy elites and the people who organize programs and make plans concerning these weapons. As a result, this issue has not been in the forefront of the public policy debates and planning. Nuclear weapons pose a serious problem, and a real threat to human survival, as we'll hear in today's program. Most interestingly for us, as a group made up of lawyers—and being sponsored by the State Bar, the ABA, and various institutions of legal education and other legal groups—is that rule of law, as a principle, seems to be an organizing sense for all of us. Crucially, law already exists that governs nuclear weapons.

As we will explore throughout the day, there is a robust body of law currently in existence. Let me take a few minutes and walk you through how we have structured the program so you can get a sense of how we hope these discussions will develop. The organizational premise we're aiming for is something very organic. We will start with the first panel of the day where we talk about the facts of nuclear weapons, and also about nuclear weapons policy, which is extremely important in terms of gauging how states may act in certain circumstances and what they will or will not do in the context of a conflict and the stress of war or potential war.

So, first we'll discuss the weapons themselves. Then we'll consider the possible strategies. Most importantly, we will explore the consequences of the various nuclear states maintaining these weapons. The burden of the first panel is to help us understand the unique nature of nuclear weapons and the risks concerning these weapons. The importance of this will become clear throughout the day, as we walk through the different rules of international law that govern the use of nuclear weapons. We will see that the legal standards largely turn upon the effects of the weapons.

The second topic of the day is the role of the United Nations in disarmament, arms control, and potentially (hopefully in the not-too-distant future), the complete abolition of nuclear weapons. We will learn about a wide variety of actions and ongoing efforts the UN has made over the years and is continuing to make now. We are privileged to have UN Under-Secretary-General and High Representative for Disarmament Affairs Hon. Izumi Nakamitsu

open this session with her Keynote on the Role of the United Nations.

We will then hear from the president of the American Bar Association about the ABA's focus on rule of law and international law in connection with controlling and addressing the issues surrounding nuclear weapons. We will also hear what I'm sure will be a wonderful conversation between Jonathan Granoff and former California Governor Jerry Brown, talking about the exigencies of the risks of nuclear weapons, which are existential risks. Governor Brown has become very interested in this area over the years, going back a long time. We look forward to hearing his thoughts on this.

Next is panel three, which Johnathan Granoff will lead. It will be a discussion of the international treaty regime. What treaties currently address nuclear weapons? What treaties have been proposed? Which treaties have worked, and which have failed? What's the attitude of the United States and other countries towards treaties, towards making conventions, and towards cooperation among nations, as these relate to risks of nuclear weapons?

The fourth panel will cover current applicable law: the law of armed conflict, also known as the law of war or international humanitarian law and international criminal law. This is the law that governs the threat and use of nuclear weapons. So, there is a relevant body of law. There are obviously issues about its application and its enforcement, but there is law in this area, and we'll have a panel devoted to exploring that.

Then, the final panel of the day will be what we call, the "so what" panel. By then we will have seen that there are severe risks associated with nuclear weapons. We'll have seen that there are genuine legal issues, that there are existing treaties that are applicable in this area, and that there's potential for action. But how do we make it happen? Is nuclear weapons law going to be enforced in the courts? What's the role of legislative action? What's the potential for public action, civic advocacy, leadership by civic, religious, or other groups? In this final panel, we are going to look at various ways to in effect operationalize this body of law. We call it the "so what" panel because its central question is: "So, what do we do with all of this? Does the law in this area matter?"

That's the general plan for the day. In the interest of saving time, we will keep speaker/panelist introductions brief, but we have included bios of everybody in the program materials available to you and invite you to look at these for more information on the participants. It's my privilege now, to introduce representatives of some of our sponsoring organizations who have been instrumental in making this program possible.

I will first introduce each group, and then representatives of various of the groups. We couldn't get everyone here today, but the representatives we do have here will each make a few comments on behalf of their organization and how they feel about this issue and its importance. First, is a person well known to anybody active in the New York legal community throughout the state and much beyond. It's Dean John Feerick, a professor and Dean for many years, and now Dean Emeritus of Fordham Law School. John is by anybody's account a towering figure. He is the go-to person when there's a problem involving the legal community and the rule of law in New York. His background, what he's done over the years, and what he's doing now is beyond compare.

Next, we're going to hear from Scott Karson, the president of the New York State Bar Association and longtime leader of the Bar who is very committed to the State Bar's work on the rule of law. We're going to hear a lot about the rule of law today, because, as far as the organizers for this event are concerned, this is a conference on the rule of law. This is about work that we do as lawyers. What are the facts and what is the law?

Next, we're going to hear from Edward Lenci. Ed is one of the organizers of this conference. He is chair-elect of the International Section of the New York State Bar Association, which is very active across public as well as private international law. Ed is the strongest advocate you will find in the State Bar, along with Scott Karson, for the rule of law.

Next, we'll hear from Ariana Smith, Executive Director of the Lawyers Committee on Nuclear Policy. You'll hear a lot about LCNP throughout the day. Each of the organizers of this program, Jonathan Granoff, John Burroughs, and myself, is very active in LCNP. Ariana worked with us as an intern before she graduated from law school. She caught the attention of LCNP with a very interesting paper, which I reread recently, on the legal status of threats of force under international law. This is a very important

analysis in the nuclear weapons area because nuclear weapons have many risks, but the most routine risk that they pose is from the policy of the deterrence and the high alerts as to such weapons maintained by the United States, Russia and many other nuclear weapons states, whereby their nuclear weapons are kept ready to use within minutes.

Finally, last but definitely not least, we will hear opening comments from Jonathan Granoff, who is a towering figure in the area of nuclear weapons law and international security. He's known to everyone active in the area. He's president of the Global Security Institute. He's a senior advisor and the United States representative of the Permanent Secretariat of the World Summit of Nobel Peace Laureates, Chair of the ABA Task Force on Nuclear Non-proliferation, and advisor to the Committee of National Security of the international section of the ABA.

We will further meet John Burroughs, an equally towering figure. He was executive director of the LCNP until Ariana came into that position and John took over as a senior policy advisor to LCNP. John can be seen in the halls of the United Nations on any given day when there's something going on that has to do with international security and arms control. So, that's the basic lay of the land. We're now going to hear from each of these speakers, talking about their organizations. Dean Feerick.

JOHN FEERICK:

Thank you very much, Charlie. I am pleased to add my welcome today on behalf of Fordham Law School and its national security clinic, directed by Karen Greenberg. As a school, we have long had in our curriculum, of course, nuclear weapons and international law. And, that is because of you, Charlie. You received your BA from Fordham College, and an MA from Fordham and Russian area studies, and then attended Columbia Law School, where you concentrated on international law. You joined our faculty to teach a course on nuclear weapons, which started for us shortly after the turn of the century, when I had the honor to serve as the school's Dean. You have taught that course ever since and have also contributed more broadly to an understanding of nuclear weapons and international law through writings, speeches, lectures, reports, and as a participant in public forums and programs.

I can't think of anyone more invested than you, Charlie, in the subjects of this virtual conference today. You're a lawyer's lawyer, and you've been recognized as such in so many leadership positions you presently hold, and you have held, in the bar of this state. Your career over the past 40 years has been marked as well by a deep commitment, defining ways to resolve controversies and disputes as a litigator, arbitrator and mediator, both internationally and domestically. I'm honored each year to participate as a speaker in a program you organize with others for the New York State Bar Association that is held at Fordham Law School, on alternatives to litigation. The timeliness of today's program is reflective in the incredible registration, as I understand it, of close to 700 individuals, which is certainly a testament, Charlie, to your vision and reputation for excellence and the work of the co-chairs of this program.

Nineteen years ago, in the aftermath of 9/11, I was asked to speak about the tensions and balances between security and liberty, in a program organized by Dr. Kevin Cahill called, *Traditions, Values, and Humanitarian Action*, in which Dr. Cahill said, and I quote, "Life is never secure, and the strongest foundation so carefully constructed can crack under the pressure of fear or folly or evil. Acts that are in opposition to the foundations of society can cause devastation and destruction." Your discussions today of nuclear weapons and international law deal with fault lines that bear on our traditions and values, and that bind us together. I hope to listen to the discussions throughout the day as best I can. And I thank you, Charlie, for the opportunity to address them in this conference. Permit me in closing, to welcome former Governor Jerry Brown to this Fordham Law School sponsored program, whose sister was a student of mine at the law school and whose father proudly attended her graduation in 1985. Thank you.

CHARLES MOXLEY:

Thank you very much, Dean Feerick. Scott Karson.

SCOTT KARSON:

Good morning, everybody. My name is Scott Karson, and I am the President of the New York State Bar Association, the largest voluntary state bar association in our nation. It is my pleasure to be speaking with you this morning. I only wish that we could be

meeting each other in person, as it is well known within the New York State Bar Association that our International Section hosts the very best meetings and events. The International Section has been very welcoming to me throughout my time as President Elect and President of the Association. This morning, the section is affording me a great honor and opportunity by inviting me to deliver welcoming remarks at this very important program before such a distinguished panel that features international and national experts in the field of nuclear weapons and the law.

The importance of today's program cannot be overstated. It is a topic which squarely implicates the rule of law that is so important to so many of us, and which belongs at the forefront of the public discourse. The current state of our political climate demonstrates how important it is to have conversations surrounding the development, proliferation, and use of these powerful and deadly weapons. I am personally pleased that the International Section has chosen this topic for discussion.

Having grown up during the height of the cold war, when atmospheric testing of nuclear weapons was commonplace, and the world seemed forever to be at the brink of nuclear conflict, I vividly remember the duck and cover air raid drills at school, which I have now come to believe were foolish and misguided. And I also remember my parents declining to serve milk to my sister and I out of concern that it contained chemical fallout from atmospheric testing. Now, some 60 years later, nuclear weapons remain a matter of great concern. As the global pandemic has shown, we are all interconnected within the global community, and therefore, the threat of nuclear weapons belongs as a prominent component of the national and international conversation. And so, I wish to thank Ed Lenci, the Chair Elect of the International Section, as well as the leadership and membership of the section, our many co-sponsors, our distinguished panel, and those of you who will be listening throughout the day, for your participation in this most important endeavor. Thank you, and good morning to all.

CHARLES MOXLEY:

Thank you, Scott. Ed Lenci.

EDWARD LENCI:

Thank you, Charlie. Good morning, good afternoon, or good evening, as the case may be. Here in the United States, we've been through, and unfortunately remain, in one of most partisan political periods in the history of our Republic. But nuclear weapons are neither a Republican issue nor a Democratic issue, nor even a bipartisan issue. Nuclear weapons transcend party politics. Given the present geopolitics of issues such as climate change and resource inequality, as well as the dangers of terrorists and rogue nations like North Korea, nuclear weapons pose a greater threat to our world now than they did at the peak of the Cold War in the last century. Today, you'll hear from the A-list of those involved in the control, reduction, and elimination of nuclear weapons. The International Section of the New York State Bar Association is committed to the rule of law, particularly international law, and so, it is proud to sponsor this necessary conference. Thank you for joining us today.

CHARLES MOXLEY:

Thank you, Ed. Ariana Smith.

ARIANA SMITH:

Good morning. As Charlie mentioned, my name is Ariana Smith, and I am the Executive Director of Lawyers Committee on Nuclear Policy, very newly. We are a proud cosponsor of today's event. We have spent some months now invested in pulling together this conference and are very glad to bring to you this full and dynamic slate of panel discussions on nuclear weapons and the law. A conference like this is relatively unique, but I hope that today represents a departure from that tradition and marks the beginning of a broader ongoing conversation about the legal regime, managing nuclear weapons, and related policies.

The essential relevance of rule of law, as you've heard, and in particular, international law to nuclear weapons and to guiding the way toward their disarmament and abolition cannot be overstated. Given the very destructive and permanent consequences of both use and testing of these weapons of mass destruction, understanding the effective application of law to the nuclear weapons regime is fundamental for lawyers, activists, and policy makers alike. While we're all gathered today virtually, as a result of an altogether different threat to our world, the COVID 19

pandemic, the existential threat of nuclear weapons still looms large. I hope that you take away from today both a deeper understanding of how international law constrains this threat and the renewed energy to shape the law and developing norms toward a more just and safe world for all. Thank you so much for being here, and I look forward to engaging throughout the day together.

CHARLES MOXLEY:

Thank you, Ariana. Jonathan Granoff.

JOHNATHAN GRANOFF:

I'd like to personally thank the international law section of the State Bar of New York and some of its staff that worked so hard to put this together. Simone Smith and Carra Forgea and especially my colleagues, Charlie Moxley and John Burroughs.

Good faith adherence to solemnly made and formally adopted international agreements, treaties, is necessary for global security. Confidence in such legal instruments is the foundation of the rule of law internationally. Without the rule of law, the quest for power results in systemic injustice, imbalance and insecurity. And by rule of law, we mean the orderly transparent accountable application of equity and justice in both domestic and international affairs. Advancing these principles is part of the DNA of the American Bar Association and part of the international advocacy agenda of one of today's sponsoring organizations, its international law section, as well as the Global Security Institute, which focuses specifically on the rule of law as applied to nuclear weapons.

I can also say that the World Summits of Nobel Peace Laureates consistently addresses this issue, declaring nuclear weapons both unacceptable morally and unacceptable legally. In that regard, let me remind the many lawyers here today of the most ancient of legal maxims, *pacta sunt servanda*; Latin for agreements must be kept. Without its good faith application, the social edifices upon which we depend collapse. International stability, good governance, development at every level, including addressing poverty and protecting financial systems, as well as the natural environment and security environment, depend on this principle. Words amongst nations are weighty and meaningful. When promises become empty, when words amongst nations and their

promises become empty, bullets become verbs, and the bullets of nuclear weapons must never be permitted to fly.

That is why this conference is so important. Understanding the relationship between law and nuclear weapons may not be appreciated in our popular political culture as essential for a sustainable future, but it is essential for our sustainable future. How the most powerful behave is copied by others. And thus, American lawyers have a special responsibility to ensure that our nation exemplifies the conduct we want others to follow. We must make sure our nation leads in fulfilling promises made, particularly those with existential impact on the survival of humanity, particularly agreements regarding nuclear weapons. The alternative to ignoring the law is unacceptable. Today, we will gain tools necessary to be effective lawyers, effective advocates, for our most important clients, future generations. Thank you.

CHARLES MOXLEY:

Thank you very much, Jonathan. We have a question from Peter Davidse, which we'll be talking about later in the program in some detail, but I don't want to just ignore the question now. So, I'm going to pose it, and then, just give a two-minute response to it and also, invite John Burroughs if he wants to make a quick comment. But one of the things we are going to try to do, although we have a large number of people participating today, is to make this as interactive as possible. We also want to be as organized as possible, we'll deal with things as they come up, where it makes sense.

The question that Peter Davidse asked is about mutual assured destruction. He is asking "Is mutual assured destruction part of the policy of deterrence? And, is it a violation of the UN charter law that regulates the use of force?" I'll briefly address it now as an introductory comment and not in an effort to deal with it in depth, because we'll deal with this in the first panel where we talk about the facts as to nuclear weapons, and again in the fourth panel where we talk about the law as to nuclear weapons. So, just by way of an introduction, there are various bodies of law, and one of them is the *jus ad bellum*, which is the rule as to the legal basis for the use of force in the first instance under the UN Charter, which Peter refers to. Specifically, article 2.4 of the charter provides that

states shall refrain from the use of force, except as in an individual or collective self-defense. So, that's *jus ad bellum*.

Also, there's another the body of law that we'll talk about more today. It's the *jus in bello*. It's the law of armed conflict, the law of war, or international humanitarian law. Subject to obvious footnotes, these are basically synonymous names for a body of law that has to do with the regulation of the use of force within armed conflict. We will discuss this further, but suffice it to say, for present purposes, that mutual assured destruction is the concept that a state will use the threat of broadscale retaliation with nuclear weapons to deter any adverse action by an adversary, threatening that it will destroy the other state and its people if it takes the adverse action. It means what it sounds like. It was at the top of the public consciousness during the Cold War, where the U.S. and the Soviet Union were targeting cities, and the idea was that each side would be deterred because if it acted wrongly, the other side would wreak Armageddon on them.

We have come away from this stance a little, in that now we target military targets. But as we'll hear, the military targets are often co-located within the cities or near the cities. So, to some extent, it's a distinction without a difference. But, as we'll hear, one of the primary rules of the law of armed conflict is the protection of civilians, a rule against attacking civilians. Mutual assured destruction threatens civilians. So, that's a broad answer. It seems clear as a general matter that the policy of mutual assured destructions is part of the policy of deterrence and that it violates both *jus ad bellum* and *jus in bello*. Let me ask Dr. John Burroughs. John, if you want to add to that or subtract from it, please do so. After that, we'll move on to panel one.

JOHN BURROUGHS:

Well, thank you, Charlie. As Ariana said, Lawyers Committee on Nuclear Policy is delighted to be co-sponsoring this conference and also very happy to have worked, especially with Charlie, and Jonathan Granoff, and Ed Lenci on organizing it. In the summer of 1945, the United Nations Charter was adopted. Within weeks, the United States bombed, with nuclear weapons, two cities in Japan. And a few years later, the doctrine of mutually assured destruction came into effect.

Essentially, deterrence is about a permanent threat of force and that does really run contrary to the UN Charter, which prohibits the threat of use of force except in self-defense or when the Security Council takes action. It is quite true that deterrence stands as an ongoing affront to the UN Charter.

One thing you could say about ending reliance on nuclear weapons is it would give new life to the United Nations and the UN Charter.

CHARLES MOXLEY:

Thank you, John. Also, thank you, Carra Forgea and Simone Smith from the State Bar, who are keeping us moving. We're finished with the introductions. Thank you, everybody. Let's assemble panel one.

We have another a question. "Will this conference address the treaty on the Prohibition of Nuclear Weapons and its upcoming entry into force?" Yes, that will be addressed in the second and third panels of today. More the second panel, I believe.

JONATHAN GRANOFF:

I don't think any of us appropriately thanked Ed Lenci because he stepped out in front and brought us to the opportunity to do this. I just think he needs a special recognition for that initiative. We wouldn't have this conference without him. He was the essential guy that brought the New York State Bar and the rest of us together. Thank you, Ed.

EDWARD LENCI:

Thank you. Thank you very much.

CHARLES MOXLEY:

Thank you, Jonathan. I join in that. Ed, as you know, is the incoming chair of the international section of the State Bar, our primary sponsor. We are very fortunate that they, along with our other wonderful sponsors, have taken a deep interest in the area of nuclear weapons. Ed has been with us since the beginning. Ed, John, Jonathan, and I have been working together in this area for many years now.