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Communication and Threat Escalation in a Nuclear Age

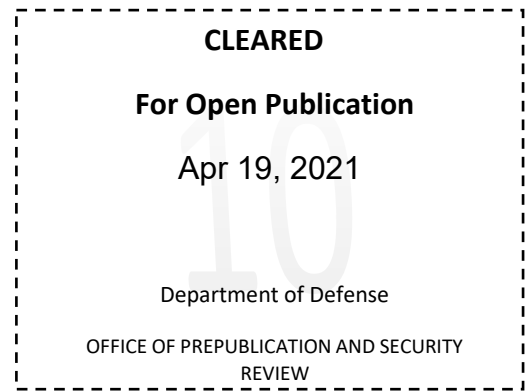
A Modest Proposal to Update the Department of Defense Law of War Manual

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The world is at a turning point: in one direction lies continuing success in limiting and managing the nuclear arms race; in the other direction lies an aggregation of unknowns, of technology innovations combined with political fears and dreads, that could usher in Hobbes' world—on steroids.” — Stephen J. Cimbala¹

Abstract

As the world deals with the combined threats of geopolitical realignment, global pandemic, revolutionary technological advances, authoritarian states, and climate change, it is important not to lose sight of what is quite possibly the greatest threat facing world peace—nuclear weapons. In this time of unprecedented challenges, there have been calls for the United States to ensure that its policy of nuclear deterrence remains credible.² Amid such calls, however, it is noteworthy that little mention is made of the role that “law” plays in limiting policy. Given the lacuna, this paper takes the position that it is necessary to begin a new appraisal of U.S. nuclear policy in a structured and disciplined fashion by starting with an analysis of the applicable law—specifically, with the law that underlies the use of and threat to use nuclear weapons from the perspective of the U.S. Department of Defense (“DoD”) as embodied in the *Department of Defense Law of War Manual* (“LoW Manual”). Policy, even nuclear policy, cannot exceed the bounds of law.³

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The International Court of Justice (ICJ) issued a ruling on nuclear weapons in 1996 in a decision known as the *Nuclear Weapons* advisory opinion.⁴ This opinion made clear that a legal regime currently operates in the field of nuclear weapons. The applicable law is International Humanitarian Law (IHL), also referred to as the law of armed conflict (LOAC) and the law of war (LoW). To its credit, the DoD assembled a document designed to detail the “laws” that both direct and circumscribe the U.S. military when it conducts military operations in other nations and places of the world. This document is known as the *Department of Defense Law of War Manual*. The LoW Manual contains a relatively small section that addresses the laws of war that apply to the possession and use of nuclear weapons. This section acknowledges that military strikes utilizing nuclear weapons must undergo the same legal analysis as any use of conventional weapons.⁵ Such legal analyses apply five core principles of the LOAC to any proposed military strike.

The abbreviated treatment of nuclear weapons in the LoW Manual does not incorporate an analysis of all five principles. Specifically, it fails to address the principles of military necessity, humanity, and honor with respect to the use of nuclear weapons. It also fails to include a discussion of the law surrounding the issuance of threats to use nuclear weapons. This paper contends that to bring the LoW Manual into compliance with the current state of international law as it applies to nuclear weapons, the United States should, at a minimum, add three paragraphs to § 6.18 of the LoW Manual. This paper also provides draft language for each of these paragraphs.

1. Introduction

Current U.S. nuclear strategy, policies, and posture reviews focus primarily on protecting America, its allies, and its partners from a volatile mix of nuclear, chemical, biological, conventional, and cyber threats.⁶ Myriad documents designed to achieve this end, however, pay little heed to the role that law plays (or should play) in the formulation of nuclear policy. As the use of or threats to use nuclear weapons necessarily implicate international humanitarian law (IHL), the absence of the applicability of such law to nuclear policy is in sharp contrast to the United States’ long tradition of respect for, participation in, and commitment to the laws of war.⁷ Within the U.S. military, the applicable law is outlined in the *Department of Defense Law of War Manual*. The manual’s current treatment of the law of armed conflict applicable to nuclear weapons largely ignores several key principles. This is problematic and demands review and, where necessary, augmentation.

Given the many issues simultaneously at play in the current nuclear landscape, it is not surprising that law has received little attention. The ways that different nations have responded to and positioned themselves to emerge from the shadow of the global pandemic highlight the fact that a global power shift is underway.⁸ The United States is no longer the global hegemon it once was, though just how far it has fallen remains to be seen. What is undeniable is that China is ascending along all traditional facets of state power: diplomatic, informational, military, and economic.⁹ The changing power dynamic, however, is particularly relevant to the possession and use of nuclear weapons. During and after the Cold War, arms control measures by the United

States and Russia resulted in significant reductions.¹⁰ Today, however, the number of countries that pose a nuclear threat to the United States has increased and the threat has magnified.¹¹ The Pentagon recently announced that China is on pace to double its current arsenal of 200 nuclear weapons over the next 10 years.¹² Adding insult to injury, other nations such as Saudi Arabia, South Korea, and Germany have demonstrated interest in joining the nuclear club.¹³

The world has grown complacent by the initial success of post-Cold War efforts to prevent the proliferation of nuclear weapons and reduce the size of nuclear arsenals. These efforts to limit the dangers of nuclear escalation remain counterbalanced by the need to maintain strategic deterrence. For U.S. allies, this means that the credibility of extended deterrence is a function of U.S. resolve. Unfortunately, that credibility is in jeopardy. It is the victim of increasing questions surrounding the United States' commitment to NATO and its allies in other geographic reaches of the world.¹⁴ Dysfunctional U.S. foreign policy has eroded trust. The situation is exacerbated by the current state of political polarization within the United States—a situation that leaves allies and adversaries with doubts as to whether the United States will honor its commitments from one administration to the next. These pressures make it more likely, not less, that nations will entertain the idea of procuring nuclear weapons.¹⁵

While technological advances may make it possible to scale down large nuclear arsenals, those same advances may also increase the potential for nuclear escalation and brinksmanship. Cyber weapons have introduced an entirely new form of threat to nuclear command and control systems.¹⁶ As the Russian hack of the information technology firm SolarWinds has shown, even the United States Department of Energy and the National Nuclear Security Administration are not immune from intrusive cyberattacks and cyber espionage.¹⁷ The ubiquitous nature of telecommunications and social media has also increased the likelihood of escalatory events, as has the emergence of machine learning, artificial intelligence, and hypersonic missiles. Technology has opened pathways for malign actors to level the playing field, and they are no longer dependent on the resources of a state to support their efforts. For example, individual actors already possess the tools to hack the Twitter account of a world leader to issue fake nuclear threats or falsely proclaim a nuclear launch. The reality of this danger has even renewed dormant debates over the propriety of “no first use” proclamations and efforts to remove a sovereign leader's sole launch authority.¹⁸ In short, while technology has improved the precision, speed, and lethality of nuclear weapons, it has also enabled malign actors to shorten the decision cycle of world leaders contemplating nuclear strikes or counterstrikes. The increased speed of multiple attack vectors makes sound decision-making more difficult—and the consequences of poor decision-making more deadly.

Despite decades of nuclear non-use, the danger of an intentional or unintentional nuclear strike is greater than ever. All the aforementioned threats demand serious attention. Yet, when all things are given priority, nothing is prioritized. Clearly, efforts to improve, protect, exploit, or counteract each of these threats must proceed simultaneously. One component of national security demands more attention than others, however, given its ability to impact all the other lines of effort—the law. At a time of tremendous uncertainty, the stabilizing force of the law is desperately needed.¹⁹ This, of course, begs the larger question—the role that “law” plays in the

development, possession, use of, or threat to use nuclear weapons. Has law been usurped by theories of strategy and self-defense? The Center for Ethics and the Rule of Law (CERL) is a nonpartisan interdisciplinary institute dedicated to preserving and promoting the rule of law in 21st century national security, warfare, and democratic governance. To promote the primacy of the rule of law, this paper identifies and analyzes (from a U.S. perspective) the body of law that presently governs nuclear weapons. The purpose of this effort is to determine whether the United States' elicitation of the applicable law is consistent with International Humanitarian Law. This academic exercise is but the first of many to renew debate over the propriety of current nuclear policy and the legality of nuclear weapons moving forward.

2. Background

U.S. commitment to IHL compliance is embodied in the *Department of Defense Law of War Manual* ("LoW Manual"), the preeminent law of war resource for commanders, legal practitioners, soldiers, and civilian employees within the Department of Defense.²⁰ Of the 1,193 pages in the LoW Manual, however, fewer than three are dedicated to nuclear weapons.²¹ Within this abbreviated treatment, the United States maintains that it is lawful to possess and use nuclear weapons and that specific U.S. nuclear policies can be found in more focused policy documents.²² In doing so, the United States has elected to ground its interactions with nuclear weapons (i.e., procurement, maintenance, and use) in policy rather than law.²³ The practical import of this decision is to subordinate "law" to "policy" when it comes to the possession and potential use of the most catastrophic weapon history has ever known.

The current practice is problematic because the subordination of law to policy creates a dangerous gap between U.S. actions and U.S. obligations under IHL, thereby leaving potential room for nuclear policy to unlawfully operate outside the bounds of the law. Amending the LoW Manual to more fully account for and respect the international law that regulates nuclear weapons will expose the inadequacies of current U.S. nuclear policy and result in a safer, more consistent approach over time and across presidential administrations. Updating the LoW Manual's treatment of nuclear weapons is but the first of many steps required to ensure that law fulfills its role in regulating the use of the most dangerous weapon created by man.

3. The International Law Applicable to Nuclear Weapons

3.1 Overview

In its watershed 1996 *Nuclear Weapons* advisory opinion, the International Court of Justice (ICJ) held that while there is currently no *per se* prohibition on the use of nuclear weapons, their use (and the threat of their use) is conditioned upon compliance with the requirements of the international law applicable in armed conflict.²⁴ Pursuant to LOAC/IHL, nuclear weapons must only be directed against military objectives.²⁵ Additionally, under the LOAC principle of proportionality, attacks using nuclear weapons must not be conducted when the expected incidental harm to civilians is excessive compared to the military advantage expected to be gained.²⁶ Even when directing attacks against legitimate military objectives, nuclear possessor states, like the United States, may not employ means or methods of warfare of a nature to cause "unnecessary suffering to combatants: it is accordingly prohibited to use such weapons causing

them such harm or uselessly aggravating their suffering.”²⁷ Given the potential for catastrophic levels of death and destruction occasioned by nuclear weapons, the ICJ unanimously held that the threat or use of such weapons would generally be contrary to the rules of international law applicable in armed conflict.²⁸

The LoW Manual makes no reference to the constrictive language employed by the ICJ in its 1996 advisory opinion on nuclear weapons nor does it justify its failure to do so. By eschewing any reference to the actual holdings of the ICJ, the United States undercuts its claim as champion of the rule of law. This paper proposes a solution to this problem by amending two paragraphs and adding a paragraph to § 6.18 of the LoW Manual. The proposed amendments would ensure that any targeting analysis involving nuclear weapons must incorporate all five of the principles of LOAC espoused by the DoD. The proposed additional paragraph would be drafted to reinforce the notion that IHL not only regulates the use of nuclear weapons but the threat of their use as well. Such legal acknowledgment would have tremendous ramifications on the U.S. policy of nuclear use and deterrence, especially for policy that is predicated upon the threat of assured retaliation.

In the United States, the decision to launch nuclear weapons is vested solely in the president.²⁹ Given this immense responsibility and authority, the president is uniquely capable of issuing threats to use nuclear weapons, whether intentional or unintentional. Such a concentration of decision-making power begs the question—is it legal to threaten a nuclear strike when the attack itself would otherwise violate LOAC/IHL? Given that the Founding Fathers attempted to divide the war power between the executive and legislative branches of the U.S. federal government, it is possible for Congress to play more of a role in both establishing nuclear policy and in limiting the president’s outsized authority. Whether Congress would seek to assert its war powers authority in the context of nuclear threats is a political matter beyond the scope of this paper. Even in the absence of Congressional action, however, the authority of the president to issue nuclear-tinged threats remains circumscribed by law. The same principles of LOAC/IHL that apply to the use of nuclear weapons also apply to threats to use such weapons.³⁰

3.2 History of U.S. Compliance with the Law of War (International Humanitarian Law)

Since its founding, the United States has been steadfastly committed to conducting military operations in compliance with the law of war. While this commitment is expressed in multiple voices, its very expression supports the sincerity with which it has been held by U.S. politicians, policymakers, and practitioners alike.

In his book *Lincoln’s Code: The Laws of War in American History*, John Fabian Witt confronts the issue of whether an accurate reading of U.S. history shows that the United States genuinely complies with the law of war or instead cynically uses the notion of compliance to mask the pursuit of other political objectives.³¹ As Witt poignantly notes,

At their best, the laws of war have served as tools of practical moral judgment in moments of extreme pressure. If the law of war is to do this work, however, and not merely be thrown overboard at the first sign of danger, it will have to rest on a

better conception of the relationship between our ideals and our practices than the current historical conventions entail.³²

In this light, what will history say about the evolution of U.S. nuclear policy? Has the United States been faithful to its international legal obligations with respect to the possession and non-proliferation of nuclear weapons? Has it sufficiently promoted the development of customary international law that “reaffirm[s] faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small ... ”?³³ In short, do official pronouncements by the United States accurately reflect the current standing of LOAC/IHL with respect to the possession, use of, or threat to use nuclear weapons? The history of U.S. action in the field of nuclear weapons suggests that a policy untethered to law falls short as a guide and that the country has failed to live up to its international legal obligations in this area.

When it comes to the moments of “extreme pressure” mentioned by Professor Witt, it is difficult to imagine a more dire situation than one posed by the threat or use of nuclear weapons. This fact did not go unnoticed by the ICJ in its *Nuclear Weapons* advisory opinion wherein the court noted that “[t]he destructive power of nuclear weapons cannot be contained in either space or time. They have the potential to destroy all civilization and the entire ecosystem of the planet.”³⁴ Given the sheer destructive power of nuclear weapons and the catastrophic procession of events that would ensue from the use of even a single low-yield warhead, it is imperative that U.S. policy on the use (or threatened use) of nuclear weapons complies with all applicable international laws, both positive and customary.

In a 2011 law review article titled *Nuclear Weapons and Compliance with International Humanitarian Law and the Nuclear Non-Proliferation Treaty*, the nuclear law and policy experts Charles J. Moxley, Jr., John Burroughs, and Jonathan Granoff declared that “[t]here is a pressing need to promptly set forth exactly what the requirements are to bring the current policies of nuclear weapons states into compliance with IHL ... and the NPT [Nuclear Nonproliferation Treaty].”³⁵ Nearly a decade removed from that article, the situation has not improved. Worse, U.S. policy on nuclear weapons continues to push against international legal norms and, as seen in the LoW Manual, attempts to re-characterize the applicable law. In doing so, the United States risks becoming a polity that, as Witt would put it, cynically and callously uses the law to mask its true political intentions.

In their article, Moxley, Burroughs, and Granoff also squarely address the dissonance between U.S. nuclear weapons policy and international law. They accomplish this by establishing that the U.S. government “recognizes that the use of nuclear weapons is subject to IHL, including the rules of distinction/discrimination, proportionality, and necessity, and the corollary requirement of controllability.”³⁶ Citing numerous manuals, handbooks, and publications from the DoD and its various subordinate military services, the authors compare U.S. nuclear policy with underlying legal doctrines, thereby exposing the growing disparity between law and policy. They conclude that “[a]nalysis of nuclear weapons issues by governmental and private experts across the political spectrum routinely fail to take into consideration the requirements of international law.”³⁷

Moxley, Burroughs, and Granoff drive the point home by detailing how IHL applies not just to the use of nuclear weapons but to threats to use such weapons as well. Their position on this issue is unequivocal: “[IHL] regulates threats as well as overt actions, making it unlawful for states—and individuals acting on behalf of states—to threaten actions that are contrary to IHL. This becomes of central significance to the policy of nuclear deterrence, which is founded on the threat to use nuclear weapons.”³⁸ Because U.S. nuclear policy is inherently bounded by law, one can infer from the position of the authors that any U.S. pronouncements on the law applicable to either the threat or actual use of nuclear weapons must fall within the bounds of LOAC/IHL.

To fully appreciate the significance of their finding, one can look to the U.S. position on the global war on terror and the respect that previous administrations have had for adhering to and even establishing international law in this arena. President Obama drew upon not only the history of U.S. compliance with the law of war but also the leadership role played by the United States in its development to document his administration’s compliance with IHL in its prosecution of the global war on terror. The following excerpt from Obama’s foreword to the December 2016 *Report on the Legal and Policy Frameworks Guiding the United States’ Use of Military Force and Related National Security Operations*³⁹ addresses this in detail:

From President Lincoln’s issuance of the Lieber Code during the Civil War to our nation’s leadership at the Nuremberg Trials following World War II, the United States has a long history of emphasizing the development and enforcement of a framework under which war can be waged lawfully and effectively, with due regard for humanitarian considerations, and consistent with our national interests and values. Consistent with this long tradition, since my first days in office I have underscored the importance of adhering to standards—including international legal standards—that govern the use of force. Far from eroding our nation’s influence, I have argued, adherence to these standards strengthens us, just as it isolates those nations who do not follow such standards. Indeed, as I have consistently emphasized, what makes America truly remarkable is not the strength of our arms or our economy, but rather our founding values, which include respect for the rule of law and universal rights.⁴⁰

Conspicuously absent from President Obama’s framework was the U.S. position on the possession, use of, and threat to use nuclear weapons. The Obama administration acknowledged this shortcoming, noting that “[w]hile the report ... does not address all conceivable legal aspects or justifications for the use of military force in every context, it does describe in detail key frameworks that guide the United States’ use of military force and related national security operations.”⁴¹ The report makes it clear that any use of force undertaken by U.S. military forces overseas will comply with “the body of international law known as the *jus ad bellum*” and that all such operations will be “conducted consistent with the law of armed conflict, also known as the *jus in bello*.”⁴²

The Trump administration continued to utilize the policy outlined in the report. This was due in part to the passage of § 1264 of the National Defense Authorization Act (NDAA) for Fiscal Year 2018.⁴³ The Trump administration update to the report was dated March 12, 2018 (2018

Guidance).⁴⁴ This “Guidance” reiterated the legal, factual, and policy bases for the report. One section of the 2018 Guidance was titled “United States Policies Regarding Targeting and Incidental Civilian Casualties.” According to this section,

The United States remains committed to complying with its obligations under the law of armed conflict, including those that address the protection of civilians, such as the fundamental principles of necessity, humanity, distinction, and proportionality. In addition to American values and legal imperatives that guide U.S. forces in the protection of civilians, protecting civilians is fundamentally consistent with mission accomplishment and the legitimacy of operations.⁴⁵

Thus, in situations where military operations may lead to civilian casualties, the United States has recognized its obligation to conduct a thorough targeting analysis incorporating all LOAC principles. As Moxley, Burroughs, and Granoff show us, these principles must also apply in the context of nuclear weapons.

4. The DoD Law of War Manual

For the U.S. military, the law applicable during military engagements is carefully detailed in the LoW Manual. The current LoW Manual was promulgated in June 2015 and amended on May 31, 2016.⁴⁶ According to its preface, “This manual is a Department of Defense (DoD)-wide resource for DoD personnel—including commanders, legal practitioners, and other military and civilian personnel—on the law of war.”⁴⁷ In essence, the LoW Manual delineates the U.S. position on the duties and responsibilities imposed by IHL on the United States, its leaders, and its military forces. To this end, the first sentence of the LoW Manual states the purpose of the document, which is “to provide information on the law of war to DoD personnel responsible for implementing the law of war and executing military operations.”⁴⁸ In the context of nuclear weapons, the individuals who bear this responsibility are the men and women of the U.S. military.

As a single-source document for practitioners, the LoW Manual professes to accurately restate IHL to guide future U.S. military conduct and ensure adherence to international legal norms. The authors describe it as “an institutional publication [that] reflects the views of the Department of Defense, rather than the views of any particular person or DoD component. An effort has been made to reflect ... sound legal positions based on relevant authoritative sources of the law.”⁴⁹ Documenting the current state of the law regarding nuclear weapons is critical to transform the LoW Manual from a legal treatise to a guide for practitioners and policymakers.

For the men and women of the U.S. military, having a manual that contains the fundamental rules of war and complying with its contents is more than just an obligation—it is a matter of honor. Stephen W. Preston, who served as the DoD General Counsel at the time the LoW Manual went into effect, penned the LoW Manual’s foreword, noting that:

The law of war is of fundamental importance to the Armed Forces of the United States...The law of war is part of who we are ... the laws of war have shaped the U.S. Armed Forces as much as they have shaped any other armed force in the

world ... [This manual] reflects the experience of this Department in applying the law of war in actual military operations, and it will help us remember the hard-learned lessons from the past. Understanding our duties imposed by the law of war and our rights under it is essential to our service in the nation's defense.⁵⁰

4.1 The LoW Manual's Treatment of Nuclear Weapons

Of the LoW Manual's 1,193 pages, the section on nuclear weapons (§ 6.18) takes up less than three. This brief discussion of nuclear weapons is broken down into five parts: § 6.18 - introduction; § 6.18.1 - U.S. policy on the use of nuclear weapons; § 6.18.2 - nuclear weapons and arms control obligations; § 6.18.3 - additional Protocol I provisions and nuclear weapons; and § 6.18.4 - authority to launch nuclear weapons. Taking each of these subsections in turn, it is apparent that the text falls short of explaining the current status of LOAC/IHL with respect to nuclear weapons.

Section 6.18 opens with two paragraphs that set forth the U.S. position on the legality of nuclear weapons. The first paragraph mirrors the position taken by the United States in the *Nuclear Weapons* advisory opinion: because there is no explicit prohibition in either treaty or customary IHL regarding the use of nuclear weapons, such weapons are prima facie lawful. The second paragraph concedes that the LoW governs the use of nuclear weapons and lists two applicable principles that any such use must satisfy: discrimination and proportionality.

According to § 6.18.1, the United States articulates its justification for the use of nuclear weapons in national policy documents rather than in its LoW Manual. The manual quotes from the 2010 Nuclear Posture Review (NPR) for the proposition that the United States "would only consider the use of nuclear weapons in extreme circumstances to defend the vital interests of the United States or its allies and partners."⁵¹ This same statement is included in the 2018 NPR. However, the sentence following this quotation has changed considerably. In the 2010 NPR, it reads: "It is in the United States' interest and that of all other nations that the nearly 65-year record of nuclear non-use be extended forever."⁵² This stands in marked contrast to the 2018 NPR wherein the subsequent sentence now reads: "Nevertheless, if deterrence fails, the United States will strive to end any conflict at the lowest level of damage possible and on the best achievable terms for the United States, allies, and partners."⁵³ While the United States remains committed to using nuclear weapons in extreme circumstances, the surrounding context driving such decision-making and the justification for use have changed dramatically. In the transition between two presidential administrations, the best interests of the United States have shifted from ensuring that nuclear weapons are never used again to ensuring a favorable outcome for the United States when nuclear weapons are used.

In § 6.18.2, the United States concedes that numerous arms control agreements regulate nuclear weapons but maintains that those agreements are "beyond the scope of this manual."⁵⁴ The implication here is that while specific agreements may limit the "development, testing, production, proliferation, deployment, [and] use" of nuclear weapons, they do not prohibit U.S. possession. Furthermore, the LoW Manual reinforces the U.S. position that some of the nuclear agreements to which the United States is a party would not apply during armed conflict.

In § 6.18.3, the LoW Manual reiterates the position of the United States and several of its allies: the provisions of Additional Protocol I to the Geneva Conventions only apply to conventional weapons, not nuclear weapons. In § 6.18.4, the manual asserts that the United States restricts the authority to launch nuclear weapons to the highest levels of government. However, the specific domestic laws and procedures surrounding their employment is, once again, “beyond the scope of this manual.” Aside from scattered footnotes that reiterate arguments made by the United States while litigating the legality of the threat or use of nuclear weapons before the ICJ, that concludes the LoW Manual’s treatment of nuclear weapons.

4.2 Noteworthy Omissions in the LoW Manual

Section 6.18 contains several noteworthy omissions. First, it fails to cite the ICJ’s *Nuclear Weapons* advisory opinion. Instead, it refers only to written statements that the United States submitted to the court during the proceedings. In doing so, the LoW Manual takes the position that pronouncements by the United States on the current standing of IHL on nuclear weapons take precedent over ICJ holdings on the same subject. The LoW Manual paraphrases the ICJ’s finding that “[t]here is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such”⁵⁵ – notably, without any reference to “threats.” But it conspicuously excludes the court’s finding that “[t]here is in neither customary nor conventional international law any specific *authorization* of the threat or use of nuclear weapons.”⁵⁶ As noted in chapter 2 of the LoW Manual, “The lack of an express prohibition in treaty law ... does not necessarily mean that an action is lawful under *jus in bello*. When no specific rule applies, the principles of the law of war form the general guide for conduct during war.”⁵⁷ In addition to the principles of discrimination and proportionality whose application was conceded by the United States, additional LOAC principles play central roles in the context of using or threatening to use nuclear weapons.

5. The Principles of the Law of Armed Conflict

In total, the DoD LoW Manual identifies five principles of LOAC/IHL: military necessity; humanity; proportionality; distinction; and honor. All five are key to analyzing the use or threatened use of nuclear weapons. In accordance with § 2.1.2.3 of the manual, the “[l]aw of war principles work as interdependent and reinforcing parts of a coherent system.”⁵⁸ Therefore, any discussion of the relevant international law surrounding the use of and threats to use nuclear weapons must include a discussion of all LOAC principles.

Section 6.18, however, makes only an oblique reference to the existence of LOAC principles beyond distinction and proportionality—a footnote that indicates that “all plans must also be consistent with the *fundamental principles* of the Law of Armed Conflict.”⁵⁹ It does not specifically address the principles of military necessity, humanity, or honor with respect to the use of nuclear weapons.

Regarding the principle of proportionality, the treatment in § 6.18 consists of a brief restatement of the rule—“attacks using nuclear weapons must not be conducted when the expected incidental harm to civilians is excessive compared to the military advantage expected to be gained.”⁶⁰ Noticeably absent, however, is any discussion within § 6.18 of the superfluous injury rule or its

corollary, weapons that necessarily cause excessive incidental harm. This discussion is included in the LoW Manual but is left to § 6.7.4, which notes in pertinent part that:

As with the superfluous injury rule, in assessing whether weapons necessarily cause excessive incidental harm, it will be important to consider whether the practice of States demonstrates that they are prohibited as such. For example, the United States regards nuclear weapons not to be inherently disproportionate weapons.⁶¹

This passage includes the following footnote:

Written Statement of the Government of the United States of America, 23, Jun. 20, 1995, I.C.J., Request by the United Nations General Assembly for an Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons (“Whether an attack with nuclear weapons would be disproportionate depends entirely on the circumstances, including the nature of the enemy threat, the importance of destroying the objective, the character, size and likely effects of the device, and the magnitude of the risk to civilians. Nuclear weapons are not inherently disproportionate.”).⁶²

In short, the LoW Manual reiterates the position of the United States that whether a weapon is “inherently disproportionate” is entirely situationally dependent. In other words, because the United States could conceive of a way to use a nuclear weapon to attack a target (a ship in the open sea, for example) that would not cause excessive incidental harm to civilians, nuclear weapons are not inherently disproportionate weapons. This claim is belied by a later admission within § 6.7.4 that “Weapons that necessarily cause excessive incidental harm also include weapons whose uncontrollable nature is such that, even when directed against military objectives, they otherwise are expected invariably to cause excessive incidental harm.”⁶³ From a commonsense perspective this would naturally encompass nuclear weapons, especially when the anticipated civilian casualties would be in the magnitude of tens, if not hundreds, of thousands. Given the size of the U.S. nuclear arsenal, the United States cannot claim that all target sets are situated in locations such that a nuclear strike would not impact the civilian population. This issue is so pivotal to any discussion of the use or threatened use of nuclear weapons that it should be included in the LoW Manual’s section devoted to nuclear weapons.

5.1 Military Necessity

Military necessity is defined in § 2.2 as “the principle that justifies the use of all measures needed to defeat the enemy as quickly and efficiently as possible that are not prohibited by the law of war.”⁶⁴ Whether military necessity exists depends in part on the nature of the associated “military objective.” According to § 5.6.3, “Military objectives, insofar as objects are concerned, include ‘any object which by its nature, location, purpose or use makes an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.’”⁶⁵

Contrary to certain treaties that limit the term “military objective” to non-human objects, the LoW Manual “uses the term ‘military objective’ to include persons who may be made the object of attack.”⁶⁶ Noticeably absent from this category are civilians or those not taking an active part in hostilities (*see* § 5.6.2). Out of respect for the legal authority of military necessity, any discussion of the use of nuclear weapons must include a review of the potential impact such use might have on civilians and the legal ramifications thereof. Given the intense heat, immense blast radius, and extended period of nuclear fallout, however, there are conceivably only rare circumstances in which nuclear weapon use would not necessarily result in the infliction of an unacceptable level of damage to civilians and civilian objects. The near impossibility of carrying out a nuclear attack that will solely target legitimate military objectives suggests that nuclear weapons transcend any standard *jus in bello* “distinction” or “proportionality” analysis. Any serious discussion of the international law surrounding nuclear weapons must address the overlap among the principles of military necessity, distinction, and proportionality.

5.2 Humanity

The second LOAC principle not specifically mentioned in § 6.18 is that of humanity. The LoW Manual defines humanity in § 2.3 as “the principle that forbids the infliction of suffering, injury, or destruction unnecessary to accomplish a legitimate military purpose.”⁶⁷ This principle underlies various protections for combatants and civilians. For combatants, the principle of humanity prohibits “the use of means and methods of warfare of a nature to cause superfluous injury or unnecessary suffering [also referred to in the LoW Manual as the superfluous injury rule].”⁶⁸ While many of the postulates that underlie the principle of humanity are designed to protect civilians and those rendered *hors de combat*,⁶⁹ the prohibition on weapons calculated to cause unnecessary suffering is specifically designed to protect those lawfully engaged in combat. In accordance with § 6.6.2, the rule “prohibits weapons that are designed to increase the injury or suffering of the persons attacked beyond that justified by military necessity.”⁷⁰ Further explanation is provided in footnote 126, which cites a statement the United States submitted to the ICJ during the *Nuclear Weapons* case:

This prohibition was intended to preclude weapons designed to increase the injury or suffering of the persons attacked beyond that necessary to accomplish the military objective. It does not prohibit weapons that may cause great injury or suffering if the use of the weapon is necessary to accomplish the military mission. For example, it does not prohibit the use of anti-tank munitions which must penetrate armor by kinetic-energy or incendiary effects, even though such weapons can produce severe and painful injuries.⁷¹

The use of an anti-tank munition, though capable of devastating injuries, pales in comparison to the detonation of even one nuclear warhead. This disparity might explain why the principle of humanity is not mentioned in § 6.18 or any of its attendant footnotes. Alternatively, the humanitarian impact of a nuclear detonation is cataclysmic:

The explosion of a nuclear weapon creates phenomenal quantities of heat upon detonation: between 60 and 100 million degrees centigrade. Anyone within a radius of 2.5 km from ground zero and who is unprotected will receive third-degree (full thickness) burns, which will almost certainly be fatal. What is unique about nuclear weapons is the radiation, which occurs at different times. ‘Prompt’ radiation comes first, soon after the explosion, consisting of neutrons, gamma rays, and electrons. Neutron radiation is an especially hazardous form of radiation to humans ... Fallout begins one to two hours afterwards and lasts for a day or so. The horrific blast and burn injuries nuclear weapons would likely inflict on hundreds of thousands of people across a huge area in the instant following detonation are dramatically enhanced by the lethal doses of radiation that would kill in the ensuing days and weeks. But the long-term impact of nuclear weapons also means a significantly increased risk of cancer mortality throughout the life of the survivors.⁷²

Any serious discussion of the use of nuclear weapons must incorporate an analysis of the nature of the short- and long-term injuries that combatants and innocent civilians are likely to suffer. Accordingly, § 6.18 of the LoW Manual must discuss this overlap among the principles of humanity, proportionality, and military necessity.

5.3 Honor

A comprehensive legal analysis of the use or threat of use of nuclear weapons must also account for honor, the last fundamental LOAC principle. According to § 2.6.2.1,

In requiring a certain amount of fairness in offense and defense, honor reflects the principle that parties to a conflict must accept that certain limits exist on their ability to conduct hostilities. For example, parties to the conflict must accept that the right of belligerents to adopt means of injuring the enemy is not unlimited. Here, honor does not address what those limits are so much as requires that parties accept that there are legal limits that govern their conduct of hostilities.⁷³

In support of this provision, the LoW Manual cites a dissenting opinion in the *Nuclear Weapons* advisory opinion.⁷⁴ Of note, the citation is not included in § 6.18, the section devoted to nuclear weapons. The section referred to asserts that the parties to any conflict accept that there are limits to the means and methods of warfare that can be used against an adversary, that these limitations are grounded in law, and that this law can be the product of treaties or of custom. The LoW Manual does not, however, incorporate this principle into its analysis of the use of nuclear weapons. The omission of the principle of honor in the discussion of nuclear weapons denigrates the principle itself. How can a polity believe that there are inherent limits on the ability of foes to injure one another yet maintain that it is honorable for a single person to order the use of a weapon that will cause the deaths of untold thousands of men, women, and children for unknowingly living within the blast radius of a pre-identified target set? In recognition of the important constraining role played by law (the rule of law), even in the field of nuclear weapons, this discussion should be incorporated directly into § 6.18.

6. *The Nuclear Weapons Advisory Opinion*

Section 6.18 of the DoD LoW Manual, the section dedicated to nuclear weapons, does not contain a single citation to the holding of the ICJ in its *Nuclear Weapons* advisory opinion. As already mentioned, the first two paragraphs of § 6.18 draw largely from written statements submitted by U.S. officials to the court in the *Nuclear Weapons* case. The nuclear weapons section eschews, however, any reference to the actual holdings of the court, even the holdings that were rendered unanimously. By ignoring the specific findings of the court on the very issue addressed by § 6.18, the United States undercuts its claim as champion of the rule of law.

The authority of the ICJ to issue its opinion in the *Nuclear Weapons* case is settled. That did not stop several nations (including the United States) from formally raising the issue, however. Specifically, the states questioned the competence of the ICJ to rule on the legality of the threat or use of nuclear weapons by nuclear possessor states. In its opinion, the ICJ noted it had previously held that questions “framed in terms of law and rais[ing] problems of international law ... are by their very nature susceptible of a reply based on law.”⁷⁵ Accordingly, the court found that the question at issue was “legal” in nature and that it had the authority to issue a legal opinion on the matter. To do this, the court found that it “must identify the existing principles and rules, interpret them and apply them to the threat or use of nuclear weapons, thus offering a reply to the question posed based on law.”⁷⁶ Furthermore, the court stated that it “cannot refuse to admit the legal character of a question which invites it to discharge an essentially judicial task, namely, an assessment of the legality of the possible conduct of States with regard to the obligations imposed upon them by international law.”⁷⁷ This is, after all, the function of courts and judges in an international order ruled by law—identifying, interpreting, and applying the relevant rules of law to determine the legality of the use or threatened use of nuclear weapons. Accordingly, the court’s conclusions require great deference by states, such as the United States, seeking to abide by the rule of law.

6.1 *Key Holdings*

After identifying and interpreting applicable LOAC/IHL to the problem of nuclear weapons, the ICJ made several key holdings.

States are entitled to resort to force in self-defense pursuant to Article 51 of the UN Charter. However, the entitlement to resort to such force “is subject to certain constraints,” particularly if such force incorporates the uniquely destructive capacity of nuclear weapons. First, “under customary international law, exercises of the right of self-defense must comply with the conditions of necessity and proportionality.”⁷⁸ Second, “the very nature of all nuclear weapons and the profound risks associated therewith are further considerations to be borne in mind by States believing they can exercise a nuclear response in self-defense in accordance with the requirements of proportionality.”⁷⁹ Because the type and level of force applied in self-defense is also bound by the principles of LOAC, the use of nuclear weapons, even in self-defense, is not likely to comply with LOAC. A state cannot escape its obligation to comply with IHL simply by characterizing its use of nuclear weapons as an action taken in self-defense.

In addition to self-defense, the ICJ addressed in its advisory opinion the authority of a state to issue threats to use nuclear force. To make the point in the broadest possible terms, threats were described as “signals.” “Whether a signalled intention to use force if certain events occur is or is not a ‘threat’ within Article 2, paragraph 4, of the Charter depends upon various factors.”⁸⁰ More importantly, if the use of force at issue would violate international law, any signaled intention (threat) to apply such force, whether realized or not, would also violate the UN Charter. “The notions of ‘threat’ and ‘use’ of force under Article 2, paragraph 4, of the Charter stand

together in the sense that if the force itself in a given case is illegal—for whatever reason—the threat to use such force will likewise be illegal.”⁸¹

Therefore, to comply with the *jus ad bellum*, any State threatening to use nuclear weapons must ensure that it has proper legal authority to follow through on the threat. Such authority could arise from a resolution of the security council, from a use of force that does not violate the territorial integrity or political independence of another State (consent), or even be made necessary as a lawful exercise of self-defense under Article 51 of the UN Charter. Limitations on the ability of a State to issue threats also reside in the *jus in bello*. In this regard, the ICJ relied upon the fundamental principles of humanity that pervade international law:

It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and ‘elementary considerations of humanity’ as the Court put it in its Judgment of 9 April 1949 in the *Corfu Channel* case (I.C.J. Reports 1949, p. 22) that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.⁸²

If humanitarian law truly presents a line that cannot be crossed, the prohibitions must apply with equal force to the threat or use of nuclear weapons. The court definitively resolves the matter, noting that “in the view of the vast majority of States as well as writers there can be no doubt as to the applicability of humanitarian law to nuclear weapons.”⁸³

Having found that the key principles of LOAC/IHL apply, the ICJ turned its attention to the question of the legality of the use of nuclear weapons. On this score, the court held that

the principles and rules of law applicable in armed conflict—at the heart of which is the overriding consideration of humanity—make the conduct of armed hostilities subject to a number of strict requirements. Thus, methods and means of warfare, which would preclude any distinction between civilian and military targets, or which would result in unnecessary suffering to combatants, are prohibited. In view of the unique characteristics of nuclear weapons ... the use of such weapons in fact seems scarcely reconcilable with respect for such requirements. Nevertheless, the Court considers that it does not have sufficient elements to enable it to conclude with certainty that the use of nuclear weapons

would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstance.⁸⁴

Only select portions of the quoted paragraph from the *Nuclear Weapons* opinion found their way into the LoW Manual. The DoD used the court's inability to "conclude with certainty" that the use of nuclear weapons would be unlawful in every conceivable situation. The LoW Manual did not include, however, any of the language that detracted from the absoluteness of this position. For example, the manual does not contain any language indicating that the use of nuclear weapons "seems scarcely reconcilable with" respect for the law of armed conflict. It also fails to include any reference to the court's finding that "it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence (sic), in which its very survival would be at stake."⁸⁵

In essence, because it is theoretically possible for a state to use a nuclear weapon against another state in a fashion that could comply with all the principles of the law of armed conflict (the warship in the middle of the ocean example), the court could not conclude that nuclear weapons are *per se* unlawful. In deference to its desire for "certainty," the court paid little heed to the scientifically proven catastrophic consequences of a nuclear detonation—a level of devastation that renders meaningless any realistic application of the principles of LOAC. The court acknowledged this predicament in finding that "[i]n view of the unique characteristics of nuclear weapons ... the use of such weapons in fact seems scarcely reconcilable with respect for [the principles and rules of law applicable in armed conflict]." The court acknowledges the applicability of the LOAC principles to nuclear weapons while conceding that the unique characteristics of such weapons means that their use is not likely to ever comply with those principles. The full impact of this incongruity, however, was not included in the LoW Manual. Instead, it leaves most of the details surrounding the possession, use, and control of nuclear weapons to various policy documents. In so doing, it misses the opportunity to apply the best possible safeguard to the world's most dangerous weapon—the law.

7. Proposal to Amend the LoW Manual

The United States could take some simple, straightforward steps to remedy the deficiencies of the LoW Manual and align nuclear policy with relevant international law. Doing so would demonstrate respect for and adherence to the rule of law without jeopardizing U.S. national security. Moreover, it would lead to the formation of a stable set of parameters within which U.S. policy could be conducted safely and consistently across presidential administrations. To this end, any amendment of the LoW Manual must incorporate an analysis of all five of the fundamental principles of LOAC/IHL as well as several of the ICJ's holdings in its *Nuclear Weapons* advisory opinion into § 6.18. Specifically, the first two paragraphs of § 6.18 should be replaced with the following:

Neither customary nor conventional international law specifically authorizes the threat or use of nuclear weapons. However, neither source of international law contains a comprehensive or universal prohibition of the threat or use of nuclear weapons as such. While there is currently no *per se* prohibition on the use of

nuclear weapons, their use (and the threat of their use) is conditioned upon compliance with the requirements of the international law applicable in armed conflict. The applicable law “is that relating to the use of force enshrined in the United Nations Charter and the law applicable in armed conflict which regulates the conduct of hostilities, together with any specific treaties on nuclear weapons.”⁸⁶

Given the potential for catastrophic levels of death and destruction occasioned by the use of nuclear weapons, the threat or use of such weapons would generally be contrary to the rules of international law applicable in armed conflict. This presumption, however, can be overcome by a showing of extreme circumstances of self-defense in which the very survival of the United States or its allies or partners is at stake. Even in such circumstances, any use of nuclear weapons by the United States must still comply with international humanitarian law. For example, nuclear weapons must be directed against military objectives only in furtherance of a legitimate military purpose. In addition, attacks using nuclear weapons must not be conducted when the expected incidental harm to civilians is excessive compared to the military advantage expected or when the use of such weapons is likely to cause superfluous injuries to lawful combatants. The incorporation of these principles of LOAC into the targeting analysis is a reflection of American honor and an acceptance of the legal principle that the choice of means and methods of warfare is not unlimited.

These changes would address the current standing of IHL with respect to nuclear weapons. This language is insufficient by itself, however, to address the full scope of concern surrounding nuclear weapons, namely, the threat of their use. Accordingly, the following subsection should also be added to § 6.18:

§ 6.18.5 – Threats to use nuclear weapons. On those occasions when the United States elects to signal its intention to use nuclear weapons as a matter of its inherent right to self-defense, the United States will ensure that such signals fully comply with the law of armed conflict. Whether or not such signals are labelled or intended as “threats,” all such uses will comply with both the *jus ad bellum* and the *jus in bello*. In so doing, the United States will ensure that it complies with the international legal norm that if an envisaged use of force is itself unlawful, the stated intention to use it would be a threat prohibited under international law.

8. Conclusion

The United States celebrates its military history—a history marked by strict adherence to the law of armed conflict. Through its conduct in armed conflict, the United States has taken a leading role in identifying, refining, renewing, and enforcing the rules that guide commanders and that attempt to cabin to the extent possible the horrors of war. In the field of conventional armed conflict, the United States continues to develop and apply the law of armed conflict in the war against terror. Before leaving office, President Obama felt the need to memorialize the legal

principles by which his administration authorized the use of military force in hotspots throughout the world. The Trump administration carried on this project and continues to justify its use of military force through the principles of the law of armed conflict.

The principles of LOAC currently addressed in Obama’s “Report” and Trump’s “Guidance” find their genesis in the more complete treatment of IHL contained in the LoW Manual—the preeminent law of war resource within the DoD. The LoW Manual was created to ensure that the U.S. military conducts all its operations in compliance with LOAC. In this regard, the same principles that apply to conventional weapons also apply to nuclear weapons. Unfortunately, the LoW Manual’s discussion of nuclear weapons does not fully address those principles. In so doing, it risks misleading commanders, legal practitioners, service members, and civilian employees within the national security community.

To its credit, the LoW Manual contains a section dedicated to the use of nuclear weapons (§ 6.18). That section, however, fails to apply the manual’s five principles of the law of armed conflict to its subject. As a result, the LoW Manual ignores many of the findings of an advisory opinion by the ICJ that directly addressed the lawfulness of nuclear weapons. Most notably, the manual fails to mention the ICJ’s finding that given “the unique characteristics of nuclear weapons . . . the use of such weapons in fact seems scarcely reconcilable with respect for [the principles and rules of law applicable in armed conflict].”⁸⁷ In glossing over the scientifically verifiable effects caused by the detonation of such weapons, the cribbed legal analysis outlined in the LoW Manual creates a misleading picture of the manner in which nuclear weapons may be lawfully employed. These omissions detract from the LoW Manual’s claim to document the current state of IHL applicable to U.S. forces. The practical effect of these deficiencies calls into question the value of the LoW Manual as a guide for military commanders and DoD civilians in developing nuclear strategy and in devising nuclear operational plans. For that strategy and those plans to be well grounded, they must be fully rooted in accurate representations of existing law.

This paper proposes a simple corrective for the identified deficiencies in the LoW Manual—revising two of the paragraphs in § 6.18 and adding another. Though modest in their extent and reach, these measures reflect the first steps in a larger effort to ensure that U.S. nuclear policy is appropriately bounded by IHL. Any effort to free policy from the requirements of the law or to even give the appearance of doing so will have disastrous implications for the rule of law. Because of the tremendous dangers inherent in the use or threatened use of nuclear weapons, this issue demands further attention.

Endnotes

¹ Cimbala, Stephen J. *Nuclear Deterrence in a Multipolar World: The U.S., Russia and Security Challenges*, Routledge, 2016, p. 5.

² “The Decline of Deterrence,” Center for a New American Security, September 14, 2020, at: <https://www.cnas.org/publications/commentary/the-decline-of-deterrence>

³ The DoD Law of War Manual [hereinafter LoW Manual] reflects a recognition by the United States that there are inherent limitations on a State’s ability to conduct of hostilities. According to § 2.6.2.1, “In requiring a certain amount of fairness in offense and defense, *honor* reflects the principle that parties to a conflict must accept that certain limits exist on their ability to conduct hostilities. For example, parties to the conflict must accept that the right of belligerents to adopt means of injuring the enemy is not unlimited.” See DoD LoW Manual, footnote 111, which cites to: “1899 HAGUE II REG. art. 22 (“The right of belligerents to adopt means of injuring the enemy is not unlimited.”); HAGUE IV REG. art. 22 (same); CCW preamble (noting “the principle of international law that the right of the parties to an armed conflict to choose methods or means of warfare is not unlimited”) [and] *Consider AP I* art. 35(1) (“In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.”). The United States, through the DoD Law of War Manual, also recognizes that international law places limitations on the right of States to use nuclear weapons by citing language to this effect from the Nuclear Weapons Advisory Opinion. See LoW Manual footnote 112, “Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 583, 585 (¶11) (Dissenting Opinion of Judge Higgins) (“The legal principle by which parties to an armed conflict do not have an unlimited choice of weapons or of methods of warfare... [is intended] to ensure that weapons, both in the context of their use, and in the methods of warfare, must comply with the other substantive rules.”).

⁴ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 257, at <https://www.icj-cij.org/public/files/case-related/95/095-19960708-ADV-01-00-EN.pdf>

⁵ “The law of war governs the use of nuclear weapons, just as it governs the use of conventional weapons.” DoD LoW Manual, § 6.18. In support of this proposition, at footnote 411 the LoW Manual cites to:

Secretary of Defense, *Report on Nuclear Employment Strategy of the United States Specified in Section 491 of 10 U.S.C.*, 4-5 (Jun. 2013) (“The new guidance makes clear that all plans must also be consistent with the fundamental principles of the Law of Armed Conflict. Accordingly, plans will, for example, apply the principles of distinction and proportionality and seek to minimize collateral damage to civilian populations and civilian objects. The United States will not intentionally target civilian populations or civilian objects.”); *Written Statement of the Government of the United States of America*, 21, Jun. 20, 1995, I.C.J., Request by the United Nations General Assembly for an Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons (“The United States has long taken the position that various principles of the international law of armed conflict would apply to the use of nuclear weapons as well as to other means and methods of warfare. This in no way means, however, that the use of nuclear weapons is precluded by the law of war.”); Edward R. Cummings, *The Role of Humanitarian Law*, Sept. 25, 1982, III CUMULATIVE DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1981-1988 3421, 3422 (As far back as 1965 the U.S. supported a UN Resolution that essentially stated “that all governments and other authorities responsible for action in armed conflicts should conform at least to the following principle[] ... that the general principles of the Law of War apply to nuclear and similar weapons.”).

⁶ Department of Defense, *Nuclear Posture Review*, Washington, D.C., February 2, 2018, p. 1, at <https://media.defense.gov/2018/Feb/02/2001872877/-1/-1/1/EXECUTIVE-SUMMARY.PDF>

⁷ The laws of war are known variously as the law of armed conflict (LOAC) and international humanitarian law (IHL).

⁸ Joseph De Weck & Elettra Ardissino, “The Pandemic Is Showing What the EU Is Good For,” Foreign Policy, September 8, 2020, at https://foreignpolicy.com/2020/09/08/eu-economy-rebound-pandemic-united-states-covid-19/?utm_source=PostUp&utm_medium=email&utm_campaign=25124&utm_term=Flashpoints%20OC&tpcc=25124

⁹ Joseph J. Collins, “Assessing Trump’s National Security Record,” Defense One, September 9, 2020, at <https://www.defenseone.com/ideas/2020/09/assessing-trumps-national-security-record/168327/>

¹⁰ Department of Defense, *Nuclear Posture Review*, Washington, D.C., February 2, 2018, p. 1, at <https://media.defense.gov/2018/Feb/02/2001872877/-1/-1/1/EXECUTIVE-SUMMARY.PDF>

¹¹ Eric Brewer, *et. al.*, “Toward a More Proliferated World? The Geopolitical Forces that Will Shape the Spread of Nuclear Weapons,” CNAS and CSIS Report, September 2020, p. 3, at <https://s3.us-east-1.amazonaws.com/files.cnas.org/documents/CNAS-Report-Proliferation-Trends-Final-C-web.pdf?mtime=20200902104509&focal=none> “Countries that pose a threat to the United States and its allies—including Russia, China, and North Korea—are modernizing and expanding their nuclear arsenals and behaving more aggressively.”

¹² Michael R. Gordon & Nancy A. Youssef, “Pentagon Says China Could Double Nuclear Weapons in Decade,” The Wall Street Journal, September 1, 2020, at <https://www.wsj.com/articles/pentagon-says-china-could-double-nuclear-weapons-in-decade-11599000957>

¹³ Eric Brewer, “Why Trump’s Retreat from U.S. Allies Could Have Nuclear Consequences,” Defense One, October 1, 2020, at <https://www.defenseone.com/ideas/2020/10/why-trumps-retreat-us-allies-could-have-nuclear-consequences/168896/>

¹⁴ Eric Brewer, *et. al.*, “Toward a More Proliferated World? The Geopolitical Forces that Will Shape the Spread of Nuclear Weapons,” CNAS and CSIS Report, September 2020, p. 3, at <https://s3.us-east-1.amazonaws.com/files.cnas.org/documents/CNAS-Report-Proliferation-Trends-Final-C-web.pdf?mtime=20200902104509&focal=none>

¹⁵ Eric Brewer, “Why Trump’s Retreat from U.S. Allies Could Have Nuclear Consequences,” Defense One, October 1, 2020, at <https://www.defenseone.com/ideas/2020/10/why-trumps-retreat-us-allies-could-have-nuclear-consequences/168896/>

¹⁶ Nuclear Matters Handbook 2020, Chapter 2: Nuclear Weapons Employment Policy, Planning, and NC3, The Office of the Deputy Assistant Secretary of Defense for Nuclear Matters, p. 27, at nmhb2020.pdf (fas.org)

¹⁷ Isabella Jibilian & Katie Canales, “Here’s a Simple Explanation of How the Massive SolarWinds Hack Happened and Why It’s Such a Big Deal,” Business Insider, at <https://www.businessinsider.com/solarwinds-hack-explained-government-agencies-cyber-security-2020-12>

¹⁸ Jules Zacher & Theo Wilson, “July Twitter hack underscores the need to nix ‘sole authority,’” Center for Ethics and the Rule of Law Post, August 19, 2020, at <https://www.law.upenn.edu/live/news/10361-july-twitter-hack-underscores-the-need-to-nix-sole/news/cerl-news>

¹⁹ Moxley, Jr., Charles J., *et. al.*, “Nuclear Weapons and Compliance with International Humanitarian Law and the Nuclear Non-Proliferation Treaty.” *Fordham International Law Journal*, vol 34, no. 2, 2011, pp. 600-601, at <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2290&context=ilj>

²⁰ U.S. Dep’t of Defense, Dir. 5100.77, DOD Law of War Manual ¶ 1.1.1 (May 31, 2016) [hereinafter LoW Manual], at <https://dod.defense.gov/Portals/1/Documents/pubs/DoD%20Law%20of%20War%20Manual%20-%20June%202015%20Updated%20Dec%202016.pdf?ver=2016-12-13-172036-190>

²¹ *Id.* at ¶ 6.18.

²² *Id.* at ¶ 6.18 (417).

²³ See Nuclear Matters Handbook 2020, Chapter 2: Nuclear Weapons Employment Policy, Planning, and NC3, The Office of the Deputy Assistant Secretary of Defense for Nuclear Matters, p. 16, at nmhb2020.pdf (fas.org). As noted by the following excerpt, neither “international law” or the law of armed conflict is mentioned.

Planning for the potential employment of U.S. nuclear forces goes through a deliberate and methodical process...The first step in the planning process is the issuance of nuclear employment

policy and planning guidance to meet national security objectives. Planning for the employment of nuclear systems is consistent with national policy and strategic guidance, which is articulated in a number of documents. These include:

- *Presidential guidance*, issued through directives and memoranda, addresses planning, posture, and strategic objectives regarding nuclear employment.
- *Departmental guidance*, issued by the Secretary of Defense, implements the President's guidance and contains amplifying planning and policy guidance consistent with Presidential direction.
- *Military guidance*, from the Chairman of the Joint Chiefs of Staff (CJCS) to Combatant Commanders (CCDRs), provides guidance on the development and coordination of nuclear operations plans.
- *Other strategy and posture documents*, such as the *National Security Strategy*, the *National Defense Strategy*, and the *Nuclear Posture Review*, which together describe U.S. nuclear policy, strategy, capabilities, and force posture.

²⁴ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 266, at <https://www.icj-cij.org/public/files/case-related/95/095-19960708-ADV-01-00-EN.pdf>

²⁵ See *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 257, at <https://www.icj-cij.org/public/files/case-related/95/095-19960708-ADV-01-00-EN.pdf> wherein the court notes that, "The first [cardinal principle] is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets."

²⁶ International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, art. 57 (2)(a)(iii), which holds that, "those who plan or decide upon an attack shall...refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated." While the United States has not ratified AP I, it does recognize the aforementioned principle of "proportionality" as an expression of customary international law. See comments of Mr. Michael Matheson, then U.S. Department of State Deputy Legal Advisor, to the Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law, reported in 2 AM. U. J. Int'l L. & Policy 419, 426-427 (1987), at <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1660&context=auilr>

²⁷ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 257, at <https://www.icj-cij.org/public/files/case-related/95/095-19960708-ADV-01-00-EN.pdf>

²⁸ *Id.* at 266

²⁹ "Defense Primer: Command and Control of Nuclear Forces, IF10521 · VERSION 5," Congressional Research Service, at <https://crsreports.congress.gov>. "The U.S. President has sole authority to authorize the use of U.S. nuclear weapons. This authority is inherent in his constitutional role as Commander in Chief."

³⁰ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 257, at <https://www.icj-cij.org/public/files/case-related/95/095-19960708-ADV-01-00-EN.pdf>. The court unanimously held that, "A *threat* or use of force by means of nuclear weapons that is contrary to Article 2, paragraph 4, of the United Nations Charter and that fails to meet all the requirements of Article 51, is unlawful...A *threat* or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law..." (emphasis added).

³¹ Witt, John Fabian. "Lincoln's Code: The Laws of War in American History." New York: Free Press, 2012.

³² *Id.* at 6

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