BOOK REVIEW

BOOK REVIEW: NUCLEAR WEAPONS AND INTERNATIONAL LAW, EXISTENTIAL RISKS OF NUCLEAR WAR AND DETERRENCE THROUGH A LEGAL LENS, 2 VOLUMES, SECOND EDITION, BY CHARLES J. MOXLEY JR. (2024)

Reviewed by Roger S. Clark[*]

I. INTRODUCTION

These are scary times to be thinking and writing about nuclear weapons. Introducing a "Times Opinion's" series entitled "At the Brink," the *New York Times* writer Kathleen Kingsbury insists that: "We've condemned another generation to live on a planet that is one grave act of hubris or human error away from destruction without demanding any action from our leaders. That must change."[1] These words are written especially against the backdrop of President Putin's threats in respect of Ukraine, but there are also other areas of concern. The lead writer on the *Times* project, W. J. Hennigan, posits an

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1. Kathleen Kingsbury, *Confronting A New Nuclear Age*, N.Y. TIMES, (Mar. 10, 2024), https://www.nytimes.com/interactive/2024/05/22/opinion/nuclear-weapons-nytimes.html [https://perma.cc/HHL6-NHKV].

"unpredictable threat" that "hangs over battlefields in Ukraine as well as places where the next war might occur: the Persian Gulf, the Taiwan Strait, the Korean Peninsula."[2]

For sixty years, I have been engaged in anti-nuclear advocacy based on the application of international law to the phenomenon. In the 1960s, I was one of many urging the New Zealand Government to take France to the International Court of Justice (ICJ) in an effort to stop French nuclear tests in the South Pacific.[3] In 1994–1996, I represented the Government of Samoa in the Advisory Proceedings on Nuclear Weapons in the ICJ.[4] In 2014–2016, I was one of a team representing the Marshall Islands in its cases against the nuclear powers, seeking to

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2. W.J. Hennigan, *How We Returned to the Brink*, N.Y. TIMES (Mar. 10, 2024), https://www.nytimes.com/interactive/2024/03/07/opinion/nuclear-war-prevention.html [https://perma.cc/NAJ2-UQPQ]. Hennigan adds: "Nuclear war is often described as unimaginable. In fact, it's not imagined enough."

3. *See* Roger S. Clark, *French Tests and International Law*, 52 N. Z. MONTHLY REV. 5 (1964–65); Roger S. Clark, *Is the Butter Battle Book's Bitsy Big Boy Boomeroo Banned? What Has International Law to Say about Weapons of Mass Destruction?*, 58 N.Y.L. SCH. L. REV. 655 (2014) (contributing to the Symposium on Dr. Seuss and the Law). New Zealand, along with Australia, did go to the I.C.J. on the French tests nearly a decade later, after I had moved to the United States to pursue my career in law teaching. *See* CHARLES J. MOXLEY, JR., NUCLEAR WEAPONS AND INTERNATIONAL LAW, EXISTENTIAL RISKS OF NUCLEAR WAR AND DETERRENCE THROUGH A LEGAL LENS 822 (2024). The Court held the cases moot when the French promised not to test in the atmosphere. *See* Nuclear Tests (Austl. v. Fr.), Judgment, 1974 I.C.J. Rep. 253 (Dec. 20); Nuclear Tests (N.Z. v. Fr.), Judgment, 1974 I.C.J. Rep. 457 (Dec. 20). New Zealand later sought unsuccessfully to revive the case in respect of (continuing) underground tests. *See* Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the *Nuclear Test Case* (N.Z. v. Fr.), Order, 1995 I.C.J. Rep. 288 (Sept. 22). *See also* Roger S. Clark, *Pacific Island States and International Humanitarian Law*, *in* ASIA-PACIFIC PERSPECTIVES ON INTERNATIONAL HUMANITARIAN LAW 199, 201 n.10 (Suzannah Linton, Tim McCormack & Sandesh Sivakumaran eds., 2019) [hereinafter Clark, *Pacific Island States*].

4. *See* THE CASE AGAINST THE BOMB: MARSHALL ISLANDS, SAMOA AND SOLOMON ISLANDS BEFORE THE INTERNATIONAL COURT OF JUSTICE IN ADVISORY PROCEEDINGS ON THE LEGALITY OF THE THREAT OR USE OF NUCLEAR WEAPONS (Roger S. Clark & Madeleine Sann eds., 1996); Roger S. Clark, *The Laws of Armed Conflict and the Use or Threat of Use of Nuclear Weapons*, 7 CRIM. L.F. 265 (1996). As explained in these sources, the three Pacific States combined their resources to make a joint presentation. On the proceedings, see JOHN BURROUGHS, THE LEGALITY OF THE THREAT OR USE OF NUCLEAR WEAPONS: A GUIDE TO THE HISTORIC OPINION OF THE INTERNATIONAL COURT OF JUSTICE (1998); THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS (Laurence Boisson de Chazournes & Philippe Sands eds., 1999).

enforce the obligation to negotiate in good faith to rid the world of nuclear weapons.[5]

As a result of these endeavors, I thought I knew most of what there is to know about nuclear weapons and the law. It was humbling, therefore, to read Charles Moxley's blockbuster study of the topic.[6] Based on prodigious research, Moxley has located far more material than I ever recall seeing, not only on the international law sources, but also on domestic law, science on the effects of weapons, risk analysis, and material relating to US policy in the literature and in military manuals.[7] At over a thousand pages and twenty-eight chapters, spilling over two volumes, reading the study cover to cover is a daunting task. Nevertheless, it is very readable. The prose is clear and accessible. A useful Index makes it possible for anyone wishing to delve selectively into some of the more arcane aspects of the subject to do so. There is a little repetition which does not detract significantly from the flow of the argument. Moxley makes no secret about the fact that he is fervently devoted to the abolition of nuclear weapons, with law as his tool, but he is scrupulous in formulating the arguments on the other side, even as he skewers the irrationality and hypocrisy of many of them.

Moxley's essential premise, then, is that international law is capable of being applied to the ultimate banishment of nuclear weapons, just as it has been applied to the abolition of other weapons of mass destruction. He is, of course, not the first to espouse such a position. A big focus of his study lies in the numerous opinions of the ICJ (Court) and individual judges in the two advisory proceedings instituted in the 1990s at the World Health Organization (WHO)[8] and

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5. *See* Clark, *Pacific Island States*, *supra* note 3, at 213–18; *infra* note 18 and accompanying text.

6. *See* MOXLEY, *supra* note 3.

7. Moxley's is by far the most careful examination of what the manuals from the various US military services have to say on the subject.

8. Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 I.C.J. Rep. 66, ¶ 16 (July 8) [hereinafter WHO Advisory Opinion]. The WHO asked:

> In view of the health and environmental effects, would the use of nuclear weapons by a State in war or other armed conflict be a breach of its obligations under international law including the WHO Constitution?

In using the term "war or other armed conflict," the WHO question addressed more precisely than the GA question the use of nuclear weapons in non-international armed conflict (civil wars). *Compare id., with* source cited *infra* note 9. The Court did not elaborate, but the

the U.N. General Assembly[9] on the legality of nuclear weapons. Those proceedings came about through a concerted effort by civil society to have the matter before the Court.[10] The Court held, by a majority of eleven to three,[11] that the request by the WHO was ultra vires the scope of the powers granted by the U.N. Charter to organizations like the WHO to request an advisory opinion of the Court,[12] but it offered its take on the General Assembly's question.[13]

There was no treaty specifically forbidding the use or threat of use of nuclear weapons. Opponents of the bomb thus argued on the basis of essential principles of the laws of armed conflict, such as the prohibition against the use of weapons that cause unnecessary suffering, the prohibition against weapons that have indiscriminate effects, and the prohibition against violating the territorial integrity and neutrality of third states. Existing bans on poison, asphyxiating gases,

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logic of its conclusion must apply there also. *See* source cited *infra* note 15 and accompanying text.

9. *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶ 20 (July 8) [hereinafter General Assembly Advisory Opinion]. The GA asked, "Is the threat or use of nuclear weapons in any circumstance permitted under international law?" *See id.*

10. For the best account of this effort, see Catherine Dewes, The World Court Project: The Evolution and Impact of an Effective Citizens' Movement (1998) (Ph.D. dissertation, University of New England, Australia) (Research UNE).

11. The Court was short of its normal fifteen-person complement as a judge who died shortly before the argument had not yet been replaced. *See* Press Release, Int'l Ct. of Just., Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion (July 8, 1996), https://www.icj-cij.org/sites/default/files/press-releases/5/10395.pdf [https://perma.cc/9A34-QFS4].

12. The three dissenters in the WHO proceedings wrote scholarly opinions on the merits as well as on the vires question, and Moxley mines those opinions in his analysis. *See* WHO Advisory Opinion, *supra* note 8, at 97, 101, 172 (Koroma, Shahabuddeen & Weeramantry, JJ., dissenting).

13. *See* General Assembly Advisory Opinion, *supra* note 9, ¶¶ 11–12 (noting that Article 96, paragraph 1 of the Charter of the United Nations empowers the General Assembly or the Security Council to "request the International Court of Justice to give an advisory opinion on any legal question"). On the other hand, paragraph 2 of the Article states that "[o]ther organs of the United Nations and specialized agencies [like the WHO], which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions *arising within the scope of their activities*" (emphasis added). U.N. Charter art. 96, ¶ 2. The majority of the Court held that, while the WHO had ample authority to deal with the health aspects of nuclear weapons, it was not within WHO's scope to deal with the legalities. WHO had sponsored a number of studies showing that no health system could possibly cope with aftereffects of a significant nuclear explosion; it had therefore turned to a (public health) prevention strategy of arguing for the illegality of the use of nuclear weapons on humans and on the planet in general. *See* WHO Advisory Opinion, *supra* note 8, ¶ 1. *See also id.*, ¶ 67, n. 2.

and exploding bullets could be extrapolated into general principles; human rights law and the laws protecting public health and the environment gave added weight to the laws of armed conflict. The Court—in fact seven of the judges, with the tie broken by the President's casting vote per the Court's rules—offered some cryptic remarks on the inferences to be drawn from the general rules and principles of armed conflict to nuclear weapons.[14] The Court concluded with the much-parsed statement:

> It follows from the above-mentioned requirements that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law;
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> However, in view of the current state of international law and the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.[15]

In a somewhat unexpected unanimous dictum, the Court added to its opinion a paragraph based on Article VI of the 1968 Nuclear Non-Proliferation Treaty (NPT).[16] Article VI obligates parties to the NPT to "[P]ursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control."[17]

Emphasizing that under customary law, all states are obligated to reach a specific result (as opposed to only parties to the NPT), the Court stated: "There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control." [18]

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14. *See* General Assembly Advisory Opinion, *supra* note 9, ¶¶ 90–97.

15. *Id.* ¶ 105(2) (E).

16. Treaty on the Non-Proliferation of Nuclear Weapons, art. VI, *opened for signature* July 1, 1968, 729 U.N.T.S. 161 [hereinafter NPT].

17. *Id.*

18. *See* General Assembly Advisory Opinion, *supra* note 9, ¶ 105(2)(F). For over half a century, the nuclear powers have been intractable in resisting these negotiations. *See* MOXLEY, *supra* note 3, at 1025. It was this obligation that the Marshall Islands sought to enforce in its cases against the nuclear powers. Marshall Islands was able to find an arguable jurisdictional theory against only three of the nuclear powers, India, Pakistan, and the United Kingdom. The others declined an invitation to appear voluntarily. *See* Obligations concerning Negotiations

Moxley has no problem with the Court's statement on the obligation to negotiate, but he takes issue with current validity of the Court's equivocal conclusion ("generally") quoted above.[19] In his view, regardless of the state of knowledge (or what was "proven") in 1996, it is now clear that nuclear weapons may never be used consistently with the laws of armed conflict. That illegality, moreover, can be found especially in arguments made by the United States in oral and written arguments in the Advisory Proceedings and subsequently. He sets out to demonstrate how these rationales for legality do not pass muster under the laws of armed conflict. Moxley summarizes the US argument in his Introduction:

> The United States' defense of the lawfulness of nuclear weapons before the ICJ was thus specifically based on its contention that it is able to deliver such weapons (ostensibly, a small number of precision, low-yield devices) accurately against discrete military targets in remote areas, and of doing so in such a way as to control and limit resultant nuclear radiation and other effects and not kill or injure substantial numbers of noncombatants. The United States further told the Court that the potential effects of using nuclear weapons are not materially different from those that would be caused by modern conventional weapons and disputed that the limited use of low-yield nuclear weapons would necessarily escalate into a strategic nuclear exchange.[20]

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relating to Cessation of the Nuclear Arms Race and to Disarmament (Marsh. Is. v. India), Judgment, 2016 I.C.J. Rep. 215 (October 5); Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Disarmament (Marsh. Is. v. Pak.), Judgment, 2016 I.C.J. Rep. 552 (October 5); Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Disarmament (Marsh. Is. v. U.K.), Judgment, 2016 I.C.J. Rep. 833 (October 5). The three cases failed to reach the merits when the Court accepted, by a narrow majority, the preliminary argument that the Marshall Islands had failed to prove that there was a valid "dispute" between the parties when the proceedings were filed. Art. VI was also at the back of the negotiations, undertaken without the nuclear powers, that led in 2017 to the adoption of the Treaty on the Prohibition of Nuclear Weapons. *See* Treaty on the Prohibition of Nuclear Weapons, July 7, 2017, U.N. Doc. A/CONF.229/2017/8 (entered into force Jan. 22, 2021) [hereinafter TPNW]. *See also* MOXLEY, *supra* note 3, at 1028.

19. *See* General Assembly Advisory Opinion, s*upra* note 9, ¶ 105(2)(E).

20. *See* MOXLEY, *supra* note 3, at 2. Responding to an advisory request which poses a yes/no question presents some interesting issues in advocacy. Recall that the General Assembly question to which the United States was responding was: "Is the threat or use of nuclear weapons in any circumstance permitted under international law?" The US advocates apparently decided that, by emphasizing mini-nukes, they could take the low ground and argue that there were, indeed, circumstances in which nuclear weapons were lawful, and hence that the answer to the question was "Yes." For Samoa, we believed that we should make the strongest arguments in

Moxley attacks the underpinnings of each of these arguments.

II. THE STRUCTURE OF MOXLEY'S ARGUMENT

Because of the book's size, a summary of the structure of Moxley's argument as it addresses these questions must inevitably gloss over some of the detail. The general thrust is worth recording, nonetheless.

Part I of the study (Chapters 1–3) addresses "The Law" especially as articulated by the United States. It emphasizes the "sources" of the law of armed conflict as found in treaties and custom, introduces the distinction between the *jus ad bellum*[21] and the *jus in bello*,[22] and outlines the general principles of the laws of armed conflict, including the principle of proportionality, the requirement of precaution, the principle of necessity, the principle of moderation, the principle of distinction, and the rule of civilian immunity. Most of this discussion is in the context of the rules of state responsibility. Moxley, however,[23] also introduces the notion of international crimes under the rules of armed conflict which might be tried either domestically or in an

opposition that we could fairly make with the material available and thus contended that there were no circumstances in which they might be used; the answer was "No." That amounted to a total, *per se* rule against their use, or threat of use. There were, of course, some intermediate positions that could be taken, a modest no first use rule, for example. The Court's ultimate conclusion that nuclear weapons are "generally" unlawful is itself, an intermediate position, declining to conclude "Yes" or "No." *See* General Assembly Advisory Opinion, *supra* note 9.

21. The law pertaining to when it is permissible to engage in armed conflict. *See* Jus ad bellum *and* jus in bello, INT'L COMM. OF THE RED CROSS (Jan. 22, 2015), https://www.icrc.org/en/law-and-policy/jus-ad-bellum-and-jus-bello [https://perma.cc/UNX3-THPK].

22. The law pertaining to conduct in the course of armed conflict. *See id.*

23. *See* MOXLEY, *supra* note 3, at 109–17 (introducing notion of command responsibility).

international forum.[24] The argument continues[25] with more on the law as applied by the United States, particularly to questions of operational planning, as well as controllability of the effects of nuclear weapons and the significance of probabilities as to potential nuclear counterstrikes. Part I concludes[26] with a thorough account of the ICJ's nuclear weapons advisory decisions, including the many separate opinions of the judges which spread across a spectrum of views.

Part II (Chapters 4–11) is headed "Additional Applicable Principles of Law." It deals with several issues not directly addressed in the Nuclear Weapons Advisory Proceedings, notably the legal significance of probabilities as to the potential effects of the use of nuclear weapons (Chapter 6). Part II also undertakes several efforts at extrapolating general principles of law[27] which are arguably germane to the legality of nuclear weapons and are derived from tort and criminal law, including probability analysis under generally accepted principles of criminal law. This argument by Moxley related especially

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24. The I.C.J. Advisory Opinion deals almost solely with issues of state responsibility. A widely-supported effort to include nuclear weapons as criminal *per se* in the Rome Statute of the International Criminal Court (relying on the three dissenting opinions in the advisory proceedings) failed. *See generally* Roger S. Clark, *The Rome Statute of the International Criminal Court and Weapons of a Nature to Cause Superfluous Injury or Unnecessary Suffering, or Which Are Inherently Indiscriminate*, *in* INTERNATIONAL HUMANITARIAN LAW: CHALLENGES 259 (John Carey et al. eds., 2004) [hereinafter Clark, Rome Statute]; Roger S. Clark, *The Phantom Annex in Article 8(2)(b)(xx) of the Rome Statute*, J. INT'L CRIM J. (forthcoming 2024) [hereinafter Clark, *Phantom Annex*]. Much of the opposition to nuclear weapons relies on the argument that the weapons themselves are, or should be, illegal in themselves (*per se* illegality) like poisoned weapons, for example. But criminal infractions like genocide, crimes against humanity and many war crimes, are weapons-neutral. If the appropriate mental elements and circumstances can be proved, a nuclear weapon could be the modality for such a particular crime. In General Assembly Advisory Opinion, *supra* note 9, ¶ 26, the majority commented on an argument that the massive deaths from a nuclear explosion could amount to a breach of the Genocide Convention as follows:

> The Court would point out . . . that the prohibition of genocide would be pertinent in this case if the recourse to nuclear weapons did indeed entail the element of intent, towards a group as such, required by [Article II of the Convention]. In the view of the Court, it would only be possible to arrive at such a conclusion after having taken due account of the circumstances specific to each case.

25. *See* MOXLEY, *supra* note 3, at 119–68.

26. *See id.* at 169–248.

27. *See id.* at 249–358. Recall that Article 38 of the Statute of the International Court of Justice includes among the "sources" of law, "the general principles of law recognized by civilized nations." *See id.* at 17.

to principles as to recklessness and foreseeability[28] developed in US law (Chapter 7) and in war crimes tribunals (Chapter 8).[29]

Also touched on in Part II are limitations on the extent to which innocent third parties may be endangered in the exercise of otherwise lawful uses of force (Chapter 9), the lesser evil/necessity principle (Chapter 10), and the legal effect of having caused one's own need to resort to extreme force (Chapter 11). These can provide some suggestive analogies to the use of nuclear weapons.

Part III is a brief interlude (Chapters 12–13) which turns to what are described as "Additional Legal History and Principles." It addresses only two interesting issues that could probably have been tucked in somewhere else in the volume: the evolution of international law as to landmines (as an analogy to how a regime banning nuclear weapons might be developed) (Chapter 12), and the inapplicability of the principle of double effect developed by St. Thomas Aquinas[30] (Chapter 13).

Moxley notes[31] that anti-personnel landmines:

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28. *See id.* at 285–300. For critical comments on some of these arguments, *see infra* notes 42–53 and accompanying text.

29. *See* MOXLEY, *supra* note 3, at 301–36. Chapter 8 also offers some thoughts on an expanding area of international criminal law, the potential criminal liability of corporations. *See id.* at 907. Some countries still have conceptual reservations about corporate criminal responsibility. The Rome Statute of the International Criminal Court, art. 25, reflecting this, limits jurisdiction to "natural persons." Rome Statute of the International Criminal Court art. 25, July 17, 1998, 2187 U.N.T.S. 3. An amendment to this seems unlikely in the near future. On the other hand, some more recent criminal law treaties encourage States to consider further modes of responsibility, including criminal, for legal persons. *See, e.g.*, United Nations Convention on Transnational Organized Crime art. 10, Nov. 15, 2000, 2225 U.N.T.S. 209. Corporate criminal responsibility is likely presently to have bite at the national rather than the international level.

30. *See* MOXLEY, *supra* note 3, at 359–74. St. Thomas asserted:

> One act may have two effects only one of which is intended and the other outside of our intention. Moral acts are classified on the basis of what is intended, not on what happens outside of our intention since that is incidental to it, as explained above. The action of defending oneself may produce two effects—one, saving one's life, and the other, killing the attacker. Now an action of this kind intended to save one's own life cannot be characterized as illicit since it is natural to maintain himself in existence if he can.

AQUINAS, SUMMA THEOLOGIAE, I–II, Quest. 64, Art. 7 *quoted in* CHARLES J. MOXLEY, JR., NUCLEAR WEAPONS AND INTERNATIONAL LAW, EXISTENTIAL RISKS OF NUCLEAR WAR AND DETERRENCE THROUGH A LEGAL LENS 369–70 (2024). Aquinas adds that the response must be proportionate.

31. *See* MOXLEY, *supra* note 3, at 361.

> are in some respects analogous to nuclear weapons effects such as radioactive fallout and potential electromagnetic pulses and nuclear winter. Landmines, like such effects, injure and kill innocent persons without regard to belligerent status and do so for an extended period of time into the future, long after the armed conflict that led to their initial use.

The 1997 Ottawa treaty banning anti-personnel mines (which has 164 parties including all of Europe, but not the United States) has a title which is suggestive of what must be contained in the ultimate treaty ridding the world of nuclear weapons: the Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and of Their Destruction.[32]

As to the double effect, Moxley notes[33] that:

> The United States ostensibly applies the principle of double effect, *inter alia,* to justify the radiation effects of nuclear weapons, arguing that, since nuclear weapons destroy through effects that are assertedly controllable in space and time, such as blast and heat, they are lawful, even though they also cause radiation, which is not subject to control. The radiation, in the view of the United States, allegedly does not count because it is "a by-product which is characterized as not the main or most characteristic feature of the weapon."[34]

"Casuistry" (used pejoratively) is a word that comes to mind; Moxley must surely be correct that "[a]t a minimum, the potential destructiveness of nuclear weapons would seem to be so extreme as to preclude the element of proportionality required by the principle [of double effect]."[35]

Part IV (Chapters 14–25), a lengthy section that runs to the end of the first Volume then continues in the second, looks comprehensively at "Risk Factors of the Nuclear Weapons Regime." Chapter 14 covers, inter alia, risk factors as to the weapons themselves, risks from delivery vehicles and warheads, radiation effects, climate effects, medical care

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32. *See* Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Sep. 18, 1997, 2065 U.N.T.S. 211. *See* MOXLEY, *supra* note 3, at 361–62 for references to NGO drafted model treaties on nuclear abolition, picking up on similar principles to the abolition of anti-personnel landmines.

33. *See* MOXLEY, *supra* note 3, at 373.

34. *Id*. *See also id.* at 161, 55 nn.127–28.

35. *Id.* at 373. I liked the quip with which he closed the chapter: "The application of the principle of double effect to nuclear weapons would seem to be the apotheosis of sterile rationalization run amok." *Id.* at 374.

in the aftermath of a nuclear strike, potential effects of electromagnetic pulses, effects of nuclear testing, and the aftermath of the Chernobyl disaster. Chapter 15 then turns to risk factors in the US policy and the ways in which the logic of deterrence – Mutually Assured Deterrence (or "MAD") – hinges upon the irrational. Chapter 16 continues with risk factors inherent in US operational capabilities and planning. Then follows a very significant chapter (Chapter 17) on the US nuclear force structure and related risk factors. It examines the overall nuclear arsenal and how it breaks down between the strategic arsenal and the tactical arsenal. In the real world, there is, in fact, a big emphasis on strategic weapons—a break from the United States' rationale presented to the Court which was based on small weapons. Part IV continues in Volume II by noting the occasions on which the United States threatened or considered the use of nuclear weapons (Chapter 18) and the probabilities as to the targeting accuracy of US nuclear weapons. Chapter 20 turns to risk factors inherent in nuclear deterrence and operational readiness; these include the risks of precipitating nuclear war, fostering an arms race, fostering of nuclear proliferation, risks of terrorism, risks of human and equipment failure, risks to command and control, risks of production storage and disposal, financial costs, jeopardy to rule of law, catastrophe theory, and risks of unstable, impulsive, incompetent or ill-intentioned leaders of nuclear-weapon states. Chapter 22 summarizes statements by the United States' political and military leadership, foreign leaders, and defense experts that the use of nuclear weapons would serve no military purpose. Chapter 23 then hones in on the likelihood that even a limited use of nuclear weapons would escalate into a widescale nuclear war, and posits that this reality is inconsistent with the United States' nuclear war plan. This is followed by a discussion in Chapter 24 of the risks of nuclear weapons in the contemporary world. I note in particular the danger of terrorism, action by the United States which continues the legitimization of nuclear weapons and, perhaps most egregiously, the modernization programs currently being undertaken by nuclear powers, including the United States. Such modernizations occur in the teeth of the obligations of Article VI of the NPT[36] and the Court's unanimous underlining of those[37] obligations. Chapter 25 then argues that even a limited use of nuclear weapons would precipitate the use of

36. *See* sources cited *supra* note 16.
37. *See* sources cited *supra* note 18.

chemical or biological weapons in retaliation (or vice versa) and the interrelatedness of chemical, biological, and nuclear weapons risks. Chapter 26, concluding Part IV, puts forth the technical argument that nuclear weapons are no longer necessary since there are now available or developing "high tech" conventional weapons alternatives to nuclear weapons, including highly accurate long-range ones and weapons just as capable of dealing with hardened and deeply buried targets.

Part V of the argument, Chapters 27 and 28, is aptly entitled, given the structure of the study, "Application of the Law to the Facts." Chapter 27 primarily asserts the unlawfulness of the threat or use of nuclear weapons under rules of armed conflict as articulated by the United States. It underscores the uncontrollability of the effects of nuclear weapons and unlawfulness under the rule of distinction, rule of proportionality, rule of necessity, law of reprisal, the policy of nuclear deterrence, as an argument based on self-defense, and as war crimes.[38] The final lengthy chapter (Chapter 28) has a heading which is slightly misleading: "Unlawfulness of Nuclear Weapons Threat Under Additional Rules of the Law of Armed Conflict." It does indeed discuss aspects of "additional rules" of armed conflict perhaps not fully addressed in the previous chapter. This includes, for example, the rule of neutrality, the rule of precaution, and delayed and inter-generational injury. But it also includes the role of other areas of law, namely crimes against peace, crimes against humanity, and genocide, as well as the failure to comply with the NPT, the obligations under the Treaty on the

38. The ICJ avoided the deterrence issue in its Advisory Opinion:

> The Court does not intend to pronounce here upon the practice known as the "policy of "deterrence." It notes that it is a fact that a number of States adhered to that practice during the greater part of the Cold War and continue to adhere to it. Furthermore, the Members of the international community are profoundly divided on the matter of whether non-recourse to nuclear weapons over the past fifty years constitutes the expression of an *opinio juris.* Under these circumstances the Court does not consider itself able to find that there is such an *opinio juris.*

General Assembly Advisory Opinion, *supra* note 9, ¶ 67. Deterrence, à la MAD, it will be noted, relies on the threat of high-yield weapons and massive destruction, not on mini-nukes. *See* MOXLEY, *supra* note 3, at 944.

Prohibition of Nuclear Weapons,[39] and human rights law,[40] all of which have a role in the penumbras of the argument. Chapter 28 ends with a conclusion[41] which reiterates the major points.

III. SOME POINTS OF DISAGREEMENT

I find Moxley's case overwhelmingly persuasive. There is, however, one aspect of his analysis with which I would cavil, although it does not seriously undercut the basic thrust of his argument.[42]

Chapters 7 and 8 deal with criminal liability in situations short of proof of intent or knowledge for harm caused. Chapter 7 is a comparative law discussion which addresses what Moxley describes as "probability analysis under generally accepted principles of criminal law"[43] and Chapter 8 addresses recklessness under the law of armed conflict. The arguments appear to be addressed ultimately to the *mens rea* standard of criminal liability for employment of nuclear weapons, which would be applied in a world where Moxley's arguments for individual responsibility are finally accepted. He is particularly taken with the idea that recklessness could be a useful mental element on which to base convictions for offenses involving nuclear weapons. The Rome Statute of the International Criminal Court is especially germane to the argument since the future of adding nuclear crimes (as Moxley is espousing) to the architecture of International Criminal Law lies

39. *See* TPNW, *supra* note 18. The TPNW has no nuclear powers among its parties, although the treaty has provisions making it possible for them to join. No doubt many of the parties hoped that the effort to negotiate this treaty would convince some of the shameless of the error of their ways in failing to comply with Article VI of the NPT. Alas, this does not seem to have happened so far.

40. One important and fairly recent argument to be added to the mix is the Human Rights Committee's General Comment No. 36 on the right to life. Comm. on Human Rights, General Comment No. 36, ¶ 66, U.N. Doc. CCPR/C/GC/36 (2018). The relevant language reads: "The threat or use of weapons of mass destruction, in particular nuclear weapons . . . is incompatible with respect for the right to life and may amount to a crime under international law." The pertinent part of the General Comment is quoted in full in MOXLEY, *supra* note 3, at 1034. *See generally*, Roger S. Clark, *The Human Rights Committee, the Right to Life and Nuclear Weapons*: *The Committee's General Comment No. 36 on the Covenant on Civil and Political Rights*, 16 N.Z.Y.B. INT'L L. 263 (2018).

41. *See* MOXLEY, *supra* note 3, at 1035–39.

42. It is, however, a point that Moxley sees as important, reverting to it again in his conclusion. *See* MOXLEY, *supra* note 3, at 1036. So, I think a response is in order.

43. *See id.* at 285.

mostly in "fitting" those crimes within the current structure of the ICC.[44] (Domestic law proscriptions may perhaps be more robust.)

Moxley concludes from his comparative study, that "[t]he seeming broad consensus across the world's legal systems as to the sufficiency of recklessness . . . for a wide range of crimes would seem to support the notion that recklessness may be a sufficient mens rea for international crimes."[45] Moxley may be correct that there is a consensus across legal systems to accept criminal responsibility (exceptionally) based on negligence or recklessness. That "consensus" was not ultimately acted upon by the drafters of the Rome Statute, or by the drafters of the so-called Elements of Crime which were required by Article 9 of the Statute, or by the Court's case-law.

The language ultimately adopted in the Statute, Article 30, defining "mental element" reads:

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44. There is a problem that Moxley does not address in how to go about adding new crimes (such as the use or threat of use of nuclear weapons) to the Rome Statute: the abstruse amendment procedures in the Statute make it likely that such crimes can be made applicable only to those existing parties to the Statute who expressly accept them, and this may not be an overwhelming number. *See generally*, Roger S. Clark & Alexander Heinze, *Article 121, Amendments, in* ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT ARTICLE-BY-ARTICLE COMMENTARY 2871 (Kai Ambos ed., 4th ed. 2022); Clark, *Phantom Annex*, *supra* note 24. There may be an even more general problem lurking in Moxley's criminal analysis. He makes the jump rather readily from state responsibility under the laws of armed conflict, as contained particularly in the 1949 Geneva Conventions and their 1977 Protocols, to individual criminal responsibility. Making that leap is, however, complex. Not all that is forbidden to states in Geneva is required by those treaties to be suppressed criminally in a domestic context. The four 1949 Conventions and 1977 Protocol I have lists of "grave beaches" which are to be criminalized on a universal jurisdiction basis. Moxley asserts baldly that: "Under established international law, commanders, political leaders, and military personnel could potentially be found guilty of violation of such rules as those of distinction, necessity and proportionality and the corollary requirement of control liability." MOXLEY, *supra* note 3, at 896.

Not quite. The three *principles* (rather than rules) that he mentions, and similar ones he mentions throughout the book, are not "grave breaches" as such and are not specifically found in those terms among the prohibitions of the Rome Statute, or of other international tribunals. Rather more precise crimes derived from them are. My point is simply that Moxley has not completely thought through the difficult move from state to individual responsibility. The non-international armed conflict prohibitions (Common Article 3 of 1949 and Protocol II of 1977), incidentally, do not have such grave breach requirements. Yet, since the 1990s, there has been a tendency to criminalize breaches nationally (sometimes on a universal jurisdiction basis) and to include *some* of them in instruments contemplating trial before international tribunals such as the ICC. Employment of nuclear weapons in non-international conflict ought to be as criminal as employment in international armed conflict.

45. *See* MOXLEY, *supra* note 3, at 300.

> 1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.[46]

I have rehearsed elsewhere the negotiations surrounding this provision—in particular, the significance of removing the references to recklessness and negligence in earlier drafts.[47] Moxley underestimates this.[48] Intent and knowledge are required for most offenses.

Article 30, like most "general part" provisions in penal codes, is a default rule, meaning it can be set aside in specific instances by appropriate drafting. This is underscored by its opening words: "Unless otherwise provided . . . " But on what basis is something "otherwise provided"? The most logical source for that is somewhere else in the Statute, which I think is the main source for Moxley's argument, especially as the word "wilful" appears several times in the substantive provisions of war crimes in Article 8 of the Statute. That argument was not accepted by the drafters of the Elements, as they found little in the Statute to permit deviations from intent and knowledge. Piragoff and Robinson,[49] referring to how the Elements deal with anomalous

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46. Rome Statute of the International Criminal Court art. 30, ¶ 1, July 17, 1998, 2187 U.N.T.S. 3. Paragraphs 2 and 3 define the terms "intent" and "knowledge." *Id.* ¶¶ 2–3. "Material elements" is not defined in the Statute but a reasonable inference drawn by those who worked on the drafting of The Elements was that it included (at least) conduct, consequences, and circumstances. A tacit decision was made in the Preparatory Committee for the Court in 1996 to have a General Part of the Statute and, indeed, the general part of the Statute is the most extensive in any international treaty instrument. It would be too much to say that it represents a complete code, since some issues were dropped as too difficult, but it comes close. The author represented the Government of Samoa in the negotiations to create the Court. He realized by mid-1996 that States we negotiating a general part, but could find no specific decision to that effect.

47. Roger S. Clark, *The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences*, 12 CRIM. L.F. 291 (2001) [hereinafter Clark, *Mental Element*]; Roger S. Clark, *Drafting a General Part to a Penal Code: Some Thoughts Inspired by the Negotiations on the Rome Statute of the International Criminal Court and by the Court's First Substantive Law Discussion in the Lubanga Dyilo Confirmation Proceedings*, 19 CRIM. L.F. 519 (2008) [hereinafter Clark, *Drafting*]. *See also* DONALD PIRAGOFF & DARRYL ROBINSON, Article 30, Mental element, in ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT ARTICLE-BY-ARTICLE COMMENTARY 1328 (Kai Ambos ed., 4th ed. 2022).

48. Later in the book, Moxley quotes language in the *Lubanga* Trial Chamber to the effect that *dolus eventualis* and reckless were "deliberately excluded" during the drafting but downplays the significance of this. *See* MOXLEY, *supra* note 3, at 903.

49. *See* PIRAGOFF & ROBINSON, *supra* note 46, at 1342.

references to such terms as "wilful," "wanton," and "deliberately," found randomly in the Statute and in some treaties that provided their source:

> Some provisions in the Statute may appear to modify the Article 30 standard but are apparently not intended to do so. For example, some of the war crimes provisions use terms such as 'wilful' or 'wilfully' (Article 8(2)(a)(i) and (iii)), and the term 'deliberately" appears in one of the forms of genocide (Article 6(c)). These terms appear because many of the Rome Statute provisions faithfully reproduced definitions in instruments such as the Geneva Conventions or the Genocide Convention which were considered customary international law.[50] It appears that the intent of the drafters was not to deviate from the default rule of Article 30, and this interpretation is now confirmed by the approach in the Elements. [*See, e.g.,* Elements, Article 6 (d), element 1; Article 8(2)(a)(i), element 1; and Article 8(2)(a)(iii), element 1, none of which provide an alternative mental element and therefore rely on Article 30.][51]

As to the case law, the decision of the ICC Appeals Chamber in *Prosecutor v. Lubanga Dyilo*[52] puts the recklessness argument securely to rest.

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50. Interpreting the General Part of the Rome Statute along with the Special Part created some awkwardness, which was faced by the drafters of the Elements. By and large, the two parts were negotiated in different committees during the lengthy negotiations. The General Part provisions tended to be drafted by officials from Justice Ministries or Offices of the Attorney-General who were particularly concerned with using precision in defining criminal offenses. The Special Part provisions, on the other hand, tended to be negotiated by military lawyers and diplomats, for whom it was important to hew close to the language of the Hague Conventions of 1907 and the Geneva Conventions of 1949 and the 1977 Protocols to the latter. Hague and Geneva were, however, primarily drafted with state responsibility in mind and the language did not always square with what was appropriate for analyzing language meant to express individual criminal responsibility. The drafters of The Elements tried to iron out these anomalies. *See* Assembly of States Parties to the Rome Statute of the International Criminal Court Official Records, First Sess., at 108–56, U.N. Doc ICC-ASP1/3 (Sept. 3–10, 2002) [hereinafter Assembly of States Parties]; Clark, *Mental Element*, *supra* note 47.

51. Paragraph 2 of the General introduction to the Elements, *see* Assembly of States Parties, *supra* note 50*,* sets out the drafting convention on which this comment is based: "Where no reference is made in the Elements of Crimes to a mental element for any particular conduct, consequence or circumstance listed, it is understood that the relevant mental element, i.e., intent, knowledge or both, set out in article 30 applies."

52. *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06 A5, Appeals Judgment, ¶¶ 443–51 (Dec. 1, 2014) (criticizing the reference to "risk" by the Trial Chamber but finding that it did not affect the result as the Trial Chamber had correctly found that the accused was aware of "virtual certainty" as required by art. 30).

Moxley is correct in noting[53] that Article 28 of the Statute on command responsibility is an "unless otherwise provided" rule in the Statute. The drafters understood that command responsibility had grown to espouse different rules from the ordinary rules applied to principals and accessories.[54] This is a limited exception; it is too much to extrapolate any more general principle than that.

IV. MY CONCLUSION

Moxley's Conclusion ends with a strong plea to lawyers and policy-makers, and indeed to all his readers:

> The case seems compelling that the United States, with its long-stated commitment to conforming its nuclear weapons policies and plans to the requirements of international law, should take a fresh look at those requirements, recognize the unlawfulness of nuclear weapons threat and use, and exert best efforts to lead the international community to a nuclear free world. It is hoped that this book can contribute to such an effort.[55]

This is obviously a plea particularly to government lawyers and policy-makers, including members of Congress, to apply their professional skills to this end. But the rest of the legal profession can contribute to the education of their brothers and sisters, and I hope that Moxley's views will be widely read and acted upon.

Apart from the general exhortations about illegality, Moxley does not, in his conclusion, offer a great number of specific prescriptions about what we lawyers should be advocating for. There are some throughout the book, and I thought it might be useful in my own final paragraphs to draw together some of the ideas that he has touched on that we might try to execute.

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53. *See* MOXLEY, *supra* note 3, at 322. *See also id.* at 904–05. In his enthusiasm for negligence liability in both these instances, he misses the point that, while paragraph (a) of the article, on military commanders, adopts a negligence standard, in paragraph (b) on "superior and subordinate relationships not described in paragraph (a)" (that is civilian superiors like Cabinet members), the standard is a version of recklessness. Rome Statute of the International Criminal Court art. 28, July 17, 1998, 2187 U.N.T.S. 3.

54. *See, e.g.*, *Yamashita v. Styler*, 327 U.S. 1 (1946); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 86(2), June 8, 1977, 1125 U.N.T.S. 3.

55. *See* MOXLEY, *supra* note 3, at 1039.

1. He does not find all the problems,[56] with how to recognize the illegality of the use or threat of use of nuclear weapons, but I am sure he would be happy with an expansion of the ICC's jurisdiction to include use[57] and threat[58] of use of nuclear weapons.

2. I think he would also encourage us to advocate for the US ratification of the Comprehensive Nuclear-Test-Ban-Treaty.[59] He would also encourage more support (including by the United States) for the TPNW[60] and for a Comprehensive Nuclear Ban Treaty.[61]

3. Another suggestion he makes deals with the use of independent legal advice. His suggestion is summarized thus in his Conclusion:

> The inference is also compelling that the United States and other nuclear weapons states, before proceeding further with their nuclear weapons policies, practices, and plans, should obtain independent legal advice as to the lawfulness of those matters, just as governmental entities, including the Department of Justice, and major corporations do in important matters of a sensitive nature where the real or apparent independence of the entity's regular counsel could be questioned.[62]

The practice of having legal counsel to assist in battlefield targeting decisions is well-established in some militaries,[63] but I do not think that Moxley is advocating a lawyer standing by the person with a finger on the button. Rather, he is suggesting that the whole policy area,

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56. *Supra* notes 42–54 and accompanying text.

57. The handful of existing weapons proscriptions in the Rome Statute speak to "employing" the weapons in question. Rome Statute of the International Criminal Court art. 8(2)(b)(xvii), July 17, 1998, 2187 U.N.T.S. 3 (employing poison or poisoned weapons); *id* art. 8(2)(b)(xviii) (employing asphyxiating, poisonous or other gases and all analogous liquids or devices); *id.* art. 8(2)(b)(xix) (employing bullets which expand or flatten easily in the human body—"dum-dum bullets"). An amendment on nuclear weapons would need to be drafted in similar terms. Mexico has a long-standing proposal criminalizing nuclear weapons before the ICC's Working Group on Amendments. *See* Mexico: Proposed Amendment to Rome Statute of The International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3. It is stalled there.

58. There are no existing prohibitions of threats in the statute, so this would be an offense tailored to nuclear weapons specifically.

59. Comprehensive Nuclear Test Ban Treaty, *opened for signature* Sept. 24, 1996, U.N. Doc. A/50/1027. While the treaty has 178 parties, it is not yet in force as it still awaits the ratification of several States, like the United States, with nuclear capacity.

60. *See supra* note 18 and accompanying text.

61. *See supra* note 32 and accompanying text.

62. *See* MOXLEY, *supra* note 3, at 1038.

63. *See* Laura T. Dickenson, *Military Lawyers on the Battlefield: An Empirical Account of International Law Compliance*, 104 AM. J. INT'L L. 1 (2010).

including production and deployment, should be subject to independent scrutiny. Put the Moxleys and Clarks of the world on the job and the result could be promising, but the chance of that happening is a little visionary.

4. Moxley devotes a few pages in Chapter 20 to what he describes as "Injunctive Relief."[64] After noting the Security Council's power in Article 40 of the UN Charter[65] to provide a kind of preliminary injunction function and the political problems with using that avenue, including the veto,[66] he turns to cases in the ICJ affording provisional measures in cases involving atrocities or the use of force.[67] Moxley is candid that the ICJ's ability to issue provisional measures depends on at least a plausible showing of jurisdiction in respect of the underlying

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64. *See* MOXLEY, *supra* note 3, at 823–30. An optimist might also contemplate efforts at the domestic level to obtain declaratory or injunctive relief to prevent the Government from carrying out illegal activities. The US courts, unfortunately, have a collection of devices to avoid deciding such cases: standing, justiciability, the political question doctrine, separation of powers, and governmental immunity, for example. In one case, an international group of individuals, including sixteen citizens of the Marshall Islands, endeavored to obtain injunctive relief preventing further nuclear tests in the Marshall Islands. *See Pauling v. McElroy*, 278 F.2d 252 (D.C. Cir. 1960). Emphasizing the environmental and health effects of the tests, the plaintiffs insisted, first, that either the tests were not authorized by the Atomic Energy Act of 1954 or that the Act was unconstitutional; second, that the tests violated the freedom of the seas (in closing off international areas of the seas for the tests); and third, that the tests breached the terms of the United Nations Trusteeship Agreement for the Pacific Islands between the U.N. and the United States. *See id.* In a per curiam opinion, Judges Bazelon, Bastian, and Burger, in conclusory language, held that the appellants had no standing, that there was no justiciable controversy, that the legislative basis was adequate, and that this was within the traditional foreign affairs power of the Executive. *Id.* The trial judge had, for good measure, held that the principle of the freedom of the seas, the Trusteeship Agreement with the United Nations, and the U.N. Charter on which it was based, were non-self-executing. *See Pauling v. McElroy*, 164 F. Supp. 390 (D.D.C. 1958). The appellate body apparently saw this as overkill and ignored it. *See Pauling*, 278 F.2d; *see also Republic of the Marshall Islands v. United States*, 865 F.3d 1187 (9th Cir. 2017) (holding art. VI of NPT to be non-self-executing and a political question).

65. U.N. Charter art. 40.

66. *See* MOXLEY, *supra* note 3, at 824.

67. *See* Application of the Convention on the Prevention and Punishment of Genocide (Bosn. & Herz. v. Yugo.), Provisional Measures, 1993 I.C.J. 3 (March 20); Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of all Forms of Racial Discrimination (Ukr. v. Russ.), Provisional Measures, 2017 I.C.J. 104 (January 13); Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr v. Russ.), Provisional Measures, 2022, I.C.J. (February 27); *see also* MOXLEY, *supra* note 3, at 826–27 n.104 (referring to press release of Court's judgment). An even more recent example is Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (S. Afr. v. Isr.), Order, 2024 I.C.J. (January 26).

action. This often turns on the fortuitous presence of a compromissory clause in a bilateral or multilateral treaty. In this respect, he notes the difficulty the Marshall Islands faced in asserting jurisdiction over the nuclear powers in its effort to enforce Article VI of the NPT.[68] As a member of the Marshalls team, I can attest to this. With respect to the nine known nuclear powers, we found no multilateral or bilateral treaty on which jurisdiction could be based; only three of the nine states (the United Kingdom, India, and Pakistan) had made declarations under Article 36 of the Statute accepting the "compulsory" jurisdiction of the Court. Each of those declarations was hedged about with reservations making significant limitations on what could be brought to the Court.[69] If a state proceeds beyond the jurisdictional hurdle, there is always difficulty in obtaining compliance with provisional measures. Like Moxley, I think that sometimes litigation is worth trying for the point it makes. But we need to be aware of its limitations; the ICJ, for example, does not have a magic wand to wipe away nuclear weapons.[70]

Food for thought, Dear Readers.

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68. *See* MOXLEY, *supra* note 3, at 829.

69. Moxley points out that the United Kingdom, the only one of the five Permanent Members of the Security Council to have a current jurisdictional declaration under art. 36 of the Statute of the Court, later changed it to make it more difficult to pursue a case. *See id.* at 829 n.109. In fact, it changed its declaration once during the Marshall Islands proceedings and again afterwards, just in case it had not shut all the future doors the first time. *See* Clark, *Pacific Island States*, *supra* note 3, at 216 n.109.

70. Moxley is thinking primarily of contentious proceedings in the ICJ, but there might be some scope for further efforts at advisory proceedings, for example on Article VI of the NPT. For such a proposal, see PHON VAN DEN BIESEN ET AL., GOOD FAITH NEGOTIATIONS LEADING TO THE TOTAL ELIMINATION OF NUCLEAR WEAPONS: REQUEST FOR AN ADVISORY OPINION FROM THE INTERNATIONAL COURT OF JUSTICE (Int'l Human Rights Clinic, Harvard Law Sch. 2009), https://humanrightsclinic.law.harvard.edu/wp-content/uploads/2009/05/2009-Docherty-GoodFaithNegotiations2009.07.ICJbooklet.pdf [https://perma.cc/3P2D-WY3Z].