

Report on the 2010 ACDC Workshop

John H. Kim, Co-Chair of ABILA's Arms Control & Disarmament Committee (ACDC), led a 90-minute workshop on the topic of "U.S. Nuclear Weapon Policy and International Law on Nuclear Disarmament" at Fordham University School of Law on Oct. 22, 2010, as part of the International Law Weekend sponsored by ABILA. On the panel were:

James Kraska, Commander, U.S. Navy; Howard S. Levie Chair of Operational Law, U.S. Naval War College; Senior Fellow, Foreign Policy Research Institute; former Chief of the International Negotiations Division, Strategic Plans and Policy, for the Joint Chiefs of Staff in 2007-2008; and Chair of the ABILA Use of Force Committee.

Daniel Joyner, Associate Professor of Law, teaching International Law at the University of Alabama School of Law; Author of *International Law and the Proliferation of Weapons of Mass Destruction (2009)*; and ABILA representative to ILA's Committee on Nuclear Weapons.

John Burroughs, Executive Director, Lawyers Committee on Nuclear Policy; Director, UN Office of the International Association of Lawyers Against Nuclear Arms; and Adjunct Prof. of International Law at Rutgers Law School, NJ.

In his opening remarks, the moderator called on the panel to address how the Obama administration's nuclear weapon policy differs from the past U.S. policy, how it comports with international law, and how the goal of international nuclear disarmament may be promoted.

I) Kraska Lauds Steps Toward 'a World Without Nuclear Weapons'

Commander Kraska said the Obama administration's policy spelled out in the Nuclear Posture Review (NPR), as announced in April 2010, is quite revolutionary, and "gets it right." The NPR, he said, focuses on prevention of nuclear terrorism – the primary threat – and proliferation, rather than balancing strategic deterrence. Although a strategic balance is still important, the "the old way" – strategic parity and mutual assured destruction (MAD) – is passé, poorly suited to U.S. national security. Nuclear weapons that cannot be effectively controlled or that are mismanaged make us less secure, he said. To the extent that the U.S. arsenal generates efforts by other states to develop asymmetric nuclear capabilities aimed at the United States, such weapons have the ironic potential to yield less security. "There is a point of diminishing return," he noted.

Changes in the international security environment have resulted from 9/11, Kraska said, adding that the A. Q. Kahn network, in particular, raised deep concern for the danger of nuclear proliferation. In addition, the specter of proliferation rises because non-nuclear states think they need somehow to match or deter the United States. The NPR defuses such motivations by declaring that the U.S. will never use nuclear weapons against states compliant with the Non-Proliferation Treaty (NPT), the Commander noted. He alluded

to the bipartisan views of elder statesmen George Shultz, William Perry, Henry Kissinger, and Sam Nunn that are mirrored in the thinking behind the NPR.

Kraska said that the U.S. and Russia possess 95 percent of the world's nuclear arms, but that mistaken launches by either major nuclear power are "quite unlikely." Right now China is not a strategic nuclear threat to the United States, although its capabilities are growing in both quality and quantity. China, he added, needs to be brought into the international nuclear nonproliferation paradigm, which would arrest the growth in Beijing's arsenal, and thereby increase U.S. and allied security. Embracing more countries in the nonproliferation regime is what he termed "a *realpolitik* approach" to a safer world. The Obama administration has prudently increased the emphasis on nonproliferation diplomacy, said Kraska.

The New START treaty, reducing operational deployment of strategic nuclear weapons (ODSNW) by 25-30 percent to 1,500 warheads on each side, while curbing launchers and barring development of new nuclear weapons, is part of the new U.S. strategic vision for a world without nuclear weapons. While eliminating MIRVs, he noted, the U.S. will assure weapons reliability.

II) Joyner Sees NPT Duty to Negotiate for Nuclear Disarmament

Dr. Joyner said changes since President Obama took office "are absolutely right" and help the United States comply with longstanding treaty obligations. He characterized the 2010 Nuclear Posture Review as a "very significant" change that brings the United States more into line with the NPT's Article VI. He recalled that the Bush administration adopted a "minimalist" interpretation of the Article VI mandate to pursue negotiations on nuclear disarmament. But he also said an opinion by the International Court of Justice (ICJ) went too far in the other direction, construing Article VI effectively as a mandate to disarm.

Professor Joyner addressed the "minimalist" approach, attributed to Christopher Ford, a Hoover Institute senior fellow who, as U.S. special representative for nuclear non-proliferation, led the U.S. delegation to the 2007 and 2008 NPT Preparatory Committee meetings. Joyner said that, according to Ford, the treaty mandate to "pursue" negotiations did not mean states actually had to "engage in" negotiations. That distinction, though "incorrect," represented the U.S. government stance through 2008, Joyner lamented.

The ICJ in 1996 issued an opinion which was at the other end of the spectrum of thought on the meaning of Article VI. The world court "went a little too far," Joyner commented, when its *dictum* said Article VI "required the result, disarmament."

Article VI is properly understood to require proactive, consistent, good faith pursuit of negotiation and an obligation to move toward nuclear disarmament, Joyner said. That approach, he noted, was not U.S. policy until the new administration took office in January 2009.

III) Burroughs Says Nuclear Arms Violate International Humanitarian Law

Dr. Burroughs suggested that the latest changes in U.S. nuclear weapon policy have been too timid. The Nuclear Posture Review leaves in place longstanding policy that the United States may use nuclear arms to preempt nuclear or non-nuclear attacks by states possessing nuclear arms. The NPR is “fundamentally deficient,” he argued, because it “ignores” international humanitarian law. Although the NPR states that it “is in the U.S. interest and that of all other nations that the nearly 65-year record of nuclear non-use be extended forever,” it does not address application of the principles the United States accepts in conventional military operations to the nuclear sphere, let alone acknowledge the unlawfulness of threat or use of nuclear weapons.

Uncontrollable collateral effects are impossible to reconcile with the principles of proportionality and discrimination, Dr. Burroughs said. He cited the Red Cross’ opinion for the proposition that customary international humanitarian law prohibits indiscriminate attacks and incidental loss of human life disproportionate to military advantage. Also, customary law does not tolerate methods and means of warfare that cause widespread, long-term environmental destruction, according to the Red Cross.

Burroughs said that Secretary-General Ban Ki-Moon believes that Article VI of the NPT does require a global treaty on nuclear disarmament. The United States should end its policy that reserves possible use of nuclear arms in response to chemical or biological attack, Burroughs said. He asked rhetorically, “Does the law have to give way or do nuclear weapons have to give way?”

IV) Q & A Session

Following the presentations, the moderator asked the panel whether there are clear criteria for determining which states are in compliance with the NPT. Professor Joyner alluded to the International Atomic Energy Agency as he replied, “No. The IAEA safeguards agreements are quite technical. Only an international tribunal can decide.” Joyner remarked further that the Security Council has “overstepped its bounds” regarding Iran. Dr. Burroughs pointed out that, as far as the U.S. government is concerned, it will be up to its own determination whether a particular state is in compliance, which can be a problem.

The moderator posed another question: “Are there circumstances in which we can use nuclear weapons?” Professor Joyner responded, “You cannot say nuclear weapons are never lawful,” as the ICJ left open the question of whether a state may resort to nuclear weapons in self-defense under an extreme circumstance in which the state’s very existence is threatened. Commander Kraska responded: “We have war-gamed this question a number of times over 60 years or more. Every weapon has to be reviewed for method and means. A rifle is a lawful weapon only for certain purposes. I don’t think nuclear weapons are unlawful under customary international law of state practice.

Lawyers say what is legal. Reality is an accepted part of international law.” Dr. Burroughs asked whether lawyers took part in the Pentagon’s war-games. “Yes,” said Commander Kraska. In any case, Dr. Burroughs was firm in his view that any use of nuclear weapon would constitute a violation of the international humanitarian law.

*Prepared by the Panel Reporter,
Anthony P. X. Bothwell, Esq.*