

## **Report on the 2011 ACDC Workshop**

### **The Challenge of Nuclear Abolition: Closing the Gap Between International Law and National Politics**

International Law Weekend, Fordham Law School  
November 22, 2011

Moderator: John H. Kim, Co-Chair, ABILA Arms Control and Disarmament Committee  
Panelists:

- Charles J. Moxley Jr., Adjunct Professor, Fordham Law School
- Alicia Godsberg, Executive Director, Peace Action-NYS
- Tad Daley, J.D., Ph.D., Author of *Apocalypse Never: Forging the Path to a Nuclear Weapon-Free World*
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Reporter: Ryan Scoville

#### **Moderator's Introductory Remarks:**

The panel will discuss the international law on nuclear weapons, the nuclear weapons policy of nuclear states, and international developments since the ICJ opinion. The panel will also discuss proposals about how to achieve a nuclear weapons-free world.

The General Assembly resolution #1 (1946) illustrates the difficulties involved in nuclear abolition: Section 5(c) provides that the commission shall make specific proposals “for the elimination from national armaments of atomic weapons and of all other major weapons adaptable to mass destruction.” Fortunately, we have conventions for the elimination of biological and chemical weapons; However, there has been no similar convention on nuclear weapons so far.

#### **I) Professor Moxley**

\*Aim of his presentation is to walk through laws of war applicable to the use and threat of use of nuclear weapons, then to discuss US nuclear policy today, including by reference to the 2010 Nuclear Posture Review, and finally to discuss the significance of international law to nuclear weapons policy and the abolition of these weapons.

\*Uncontroverted laws of armed conflict squarely regulate nuclear weapons. The US view is that because we don't have a convention on nuclear weapons, there cannot be a categorical rule prohibiting use, but also that nuclear weapons are subject to the law of armed conflict, like every other kind of weapon. The US also asserts that the legality of the use of such weapons should be determined on an ad hoc basis.

\*So what, then, is the relevant law of armed conflict?

\*Discrimination or distinction—improper to use any weapon whose effects cannot distinguish between military and civilian targets.

\*Proportionality—cannot use a weapon if the anticipated collateral injury to non-military targets is disproportionate to the military value.

\*Necessity—one can only use in a given incidence such a level of force as is necessary to complete the military mission.

\*Controllability—if a state cannot control the effects of the weapons, how can it know whether the weapon can distinguish between permissible targets, whether the level of injury will be disproportionate, and whether the level of force is necessary?

\*Rule of reprisal—it's permissible to use a weapon that might otherwise be unlawful if you're simply responding to your adversary's use of that weapon. But even here, there are strict limits, including that the reprisal cannot be more than necessary to get the adversary to stop violating the law.

\*ICJ position: generally, nuclear weapons don't comply with the above laws of armed conflict, in particular because the effects of the weapons cannot be controlled in time and space. Therefore, the use of the weapons is unlawful, but with two hedges: (1) the court doesn't have enough facts at its disposal, and (2) it's unclear whether use would be lawful "in an extreme circumstance of self-defense in which the very survival of a State would be at stake."

\*The Obama Nuclear Posture Review(NPR) of 2010: Says nothing about international law, and that nuclear weapons are essential for our defense, deterrence, and to reassure our allies. It's a marked departure from Obama's earlier, aspiring statements that the U.S. would seek a world "without nuclear weapons."

\*What is the relevance of law to nuclear policy? Most groups that focus on nuclear weapons say nothing about the law, but law could be an engine of change.

## **II) Ms. Godsberg**

\*Focus on her presentation is on the role of the UN in disarmament, and on the nuclear policy of nuclear-weapons states.

\*UN is uniquely empowered to negotiate disarmament treaties. UN machinery includes the GA First Committee, Conference on Disarmament, and Disarmament Commission.

\*The UN's approach is incremental and slow; this has prompted non-nuclear-weapons states to call for a new treaty on nuclear disarmament.

--Conference on Disarmament is one aspect of the UN's ineffectiveness. Votes are based on consensus, which makes it difficult to reach agreements.

--Other discussion of the recent activities of the relevant UN bodies.

\*The 2010 NPR of the US changed little from prior administrations, but focuses more on the risk of terrorism, and also clarifies the policy of strategic ambiguity.

\*Russia adopted a new policy in 2010 that added some constraints on nuclear weapons—one change is to consider use only when the very existence of the state is threatened. US and Russia have agreed to modest reduction of nuclear weapons via the New START.

\*UK's arsenal is entirely sea-based, and weapons aren't ready for firing. Submarines will reach the end of their lifespan in 2024; new vessels will likely carry fewer warheads.

\*France relies on principle of strict sufficiency—a minimum deterrence policy.

\*China's forces: most of the buildup is in land-based ICBMs, but has been working on diversifying its capabilities. China has a declared no-first-use policy.

\*Update on the activities of North Korea, India, Pakistan, and Israel.

\*With more than 20,000 nuclear weapons worldwide, investment in the modernization of warheads, delivery systems, and infrastructure, backward security policies, and regional instabilities, it is difficult how nuclear weapons can be easily abolished. However, nuclear weapons are not necessary for today's security and the expense of maintaining them cannot be defended in today's financial climate.

#### Mr. Kim

\*The 2010 NPT review conference included a final statement saying that the use of nuclear weapons is subject to international humanitarian law.

#### **III) Dr. Daley**

\*Focus of his presentation is on the process of how to make abolition happen. Basic idea is that, before anything else, the end goal needs to be clearly defined. Each of us can play a role in furthering the effort.

\*After identifying the end-state, advocates must articulate the steps necessary to reach abolition.

\*Important areas of future legal development:

--Verification: Technical means are already quite good, but it will be important to also create societal verification mechanisms (e.g., offer large monetary inducements to encourage citizen reporting).

--Inspections: Intrusive international inspection obligations should apply broadly to all states.

--Enforcement: Need to get a waiver of veto power from the UN Security Council members, at least with respect to nuclear weapons.

\*It is important for us to continue to pressure states to pursue a comprehensive nuclear weapons elimination convention. Such a draft convention is already available.

#### **IV) Q&A Session**

\*Q (audience): Any prospect for an international convention permitting cyber warfare on nuclear weapons everywhere?

A (Prof. Moxley): Seems like it might be a good idea in some regards, but it would also be destabilizing.

\*Q (audience): At what point is another reminder of the horror of nuclear warfare necessary?

A (Dr. Daley): Detonation would galvanize the abolition movement. We have on several occasions been very close to nuclear war. But I hope not.

\*Q: Is the 1996 advisory opinion still valid in light of the development of low-yield and tactical nuclear weapons since 1996?

A (Prof. Moxley): Our arsenal is primarily high-yield. But even as to low-yield, there are still problems regarding the controllability of their radiation, so yes.

#### Moderator's Closing Remarks

For those who have more questions, please visit the website of the "Nuclear Abolition Forum," which was launched as a new initiative of a dozen of NGOs recently. Its web address is [www.abolitionforum.org](http://www.abolitionforum.org).

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