



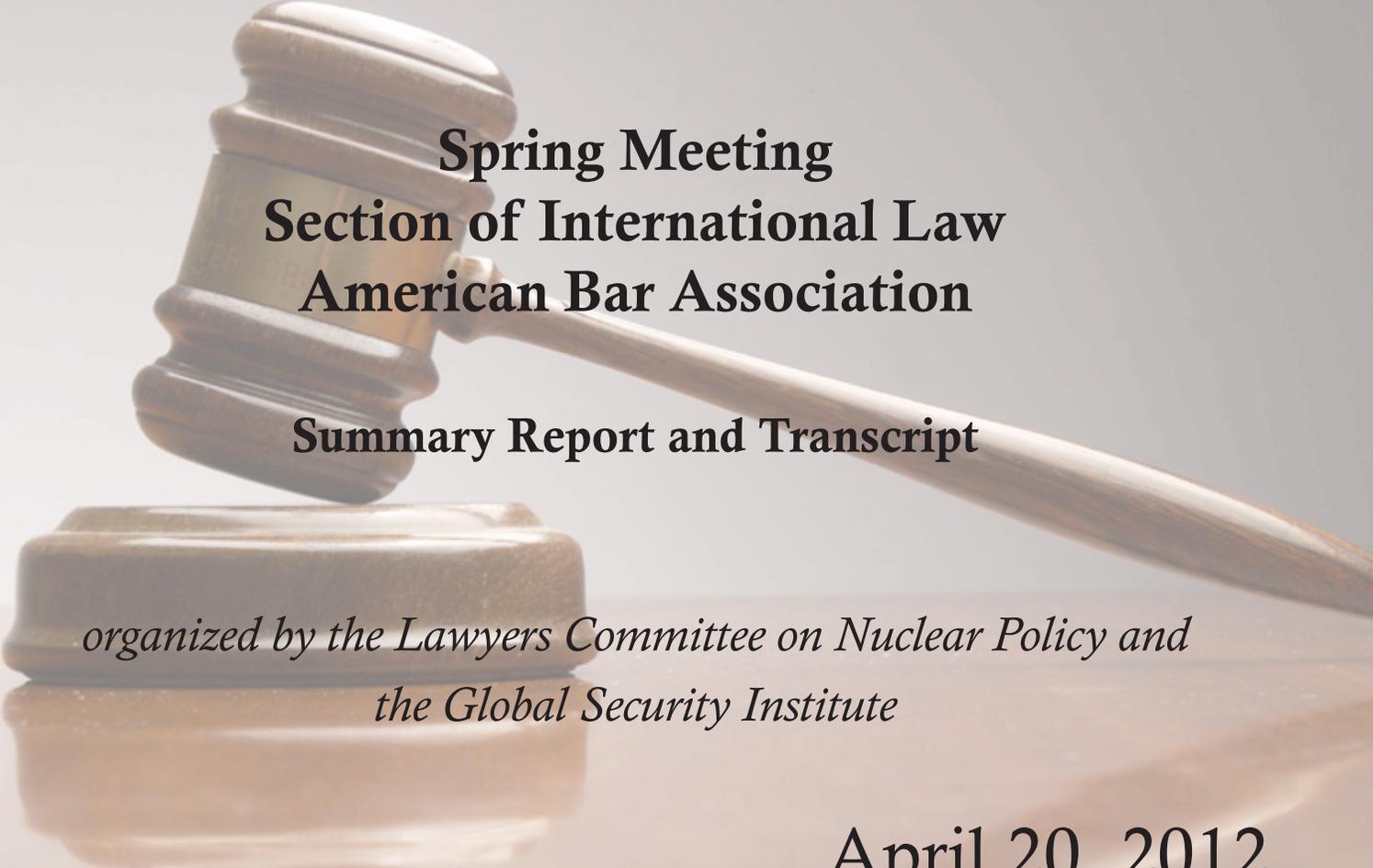
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Lawyers Committee



on Nuclear Policy

NUCLEAR WEAPONS AND INTERNATIONAL HUMANITARIAN LAW



**Spring Meeting
Section of International Law
American Bar Association**

Summary Report and Transcript

*organized by the Lawyers Committee on Nuclear Policy and
the Global Security Institute*

April 20, 2012

LAWYERS COMMITTEE ON NUCLEAR POLICY

www.lcnp.org

Founded in 1981, the Lawyers Committee on Nuclear Policy is a non-profit educational association of lawyers and legal scholars that engages in research and advocacy in support of the global elimination of nuclear weapons and a more just and peaceful world through respect for domestic and international law. LCNP serves as the UN office of the International Association of Lawyers Against Nuclear Arms.

We:

- Provide legal and policy analysis to national and international policymakers, civil society, and media;
- Publish books and papers;
- Advocate in UN and Nuclear Non-Proliferation Treaty settings, and in Washington, DC;
- Work in disarmament and peace networks and campaigns;
- Provide legal assistance to individuals and organizations working for disarmament and peace.

THE GLOBAL SECURITY INSTITUTE

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The Global Security Institute is dedicated to strengthening international cooperation and security based on the rule of law, with a particular focus on nuclear arms control, non-proliferation and disarmament. GSI was founded by Senator Alan Cranston whose insight that nuclear weapons are impractical, unacceptably risky, and unworthy of civilization continues to inspire GSI's efforts to contribute to a safer world. GSI has developed an exceptional team that includes former heads of state and government, distinguished diplomats, effective politicians, committed celebrities, religious leaders, Nobel Peace Laureates, disarmament and legal experts and concerned citizens.

Lawyers Committee on Nuclear Policy and the Global Security Institute are grateful to the Government of Switzerland for its support and its work in advancing international humanitarian law.

Lawyers Committee on Nuclear Policy additionally thanks The Simons Foundation and The Samuel Rubin Foundation for their support.

Nuclear Weapons and International Humanitarian Law

Grand Hyatt Hotel, New York City, April 20, 2012

Program Co-Chairs

John Harrington, Co-Chair, National Security Committee, ABA International Law Section
Jonathan Granoff, President, Global Security Institute

Moderator

Dr. John Burroughs, Executive Director, Lawyers Committee on Nuclear Policy

Speakers

Ambassador Libran Cabactulan, Permanent Representative of the Philippines to the United Nations; President,
2010 Nuclear Non-Proliferation Treaty Review Conference

Professor Charles J. Moxley, Jr., Fordham University School of Law

Professor Gary Solis, Georgetown Law, George Washington University Law School

Summary Report

How does, and how should, international humanitarian law (IHL) governing the conduct of warfare apply to nuclear weapons? On April 20, 2012, three highly qualified speakers addressed that question in a well-attended program of the annual meeting of the International Law Section of the American Bar Association. The program was organized by Lawyers Committee on Nuclear Policy (LCNP) and Global Security Institute and sponsored by the section's National Security Committee.

Introducing the topic, moderator **Dr. John Burroughs**, LCNP Executive Director, noted an important recent development, an innovative provision adopted by the 2010 Nuclear Non-Proliferation Treaty (NPT) Review Conference. In the Final Document, the Conference “expresses its deep concern at the catastrophic humanitarian consequences of any use of nuclear weapons, and reaffirms the need for all states at all times to comply with applicable international law, including international humanitarian law.”



H.E. Mr. Libran
Cabactulan

*Photo credit: Hiroshima Peace
Media Center*

The first speaker, **Ambassador Libran Cabactulan**, the Philippines' Permanent Representative to the United Nations, served as President of the 2010 NPT Review Conference. He said that there is a link between the NPT and the illegality of nuclear weapons; the NPT came into existence with the objective of eliminating nuclear weapons “precisely because the weapons' destructive force is inherently inhuman. The NPT preamble makes this abundantly clear.” For the first time in the history of the NPT, the 2010 Final Document specifically invoked international humanitarian law. The provision was placed in the disarmament portion of the conclusions and recommendations. In his view, “taken as a whole” it is a “major step” in reinforcing the legal prohibition of nuclear weapons and a “powerful political statement on the nexus between nuclear disarmament and IHL.”

Ambassador Cabactulan also presented the Philippines' longstanding views on the subject, stating: “The Philippines strongly believes that nuclear weapons are strictly prohibited by customary and conventional IHL. No amount of legal hairsplitting or operational obfuscation can change the fact that of all the weapons ever conceived by the mind of man, nuclear weapons are inherently indiscriminate, far beyond

The 2010 NPT provision on international humanitarian law is a major step in reinforcing the legal prohibition of nuclear weapons and a powerful political statement on the nexus between nuclear disarmament and IHL.

– Ambassador Libran Cabactulan

nuclear weapons would not violate IHL to us is simply allowing the exception to lead the rule by the nose. But more importantly assertion of exceptions should be seen as proving the rule and that rule must find life in law either by treaty or court opinion.”

The next speaker, **Charles J. Moxley, Jr.**, a mediator and arbitrator, is an adjunct professor at Fordham University School of Law and author of *International Law and Nuclear Weapons in the Post Cold War World* (Austin & Winfield, 2000). Professor Moxley concentrated on assessment of the lawfulness of use of nuclear weapons under rules of IHL as to discrimination, proportionality and necessity, and a corollary requirement of controllability, set forth in the US armed services manuals on the law of armed conflict. A 2010 US Army manual states that discrimination “requires parties to a conflict to engage only in military operations the effects of which distinguish between the civilian population (or individual civilians not taking part in hostilities) and combatant forces, directing the application of force solely against the latter.” Given that the effects of nuclear explosions include a huge blast, electromagnetic pulses, and radiation, Professor Moxley asked whether nuclear weapons can possibly meet this standard which calls for controllability of effects. “The answer,” he said, “seems evident.” It is also impossible to ensure that a nuclear attack is limited to the level of violence necessary and proportionate to achieve legitimate military ends in accordance with standards set out in the manuals.

In principle, the US accepts that international humanitarian law applies to nuclear weapons, but in practice the US does not apply but rather ignores the rules. That is so in the Nuclear Posture Review, in training, in weapons development and possession, and most importantly in relying on the policy of nuclear deterrence.

– Professor Charles J. Moxley, Jr.

In principle, Professor Moxley said, the United States accepts that IHL applies to nuclear weapons; this is acknowledged in the manuals and in the US argument to the International Court of Justice in the nuclear weapons case. In practice, however, the United States does not apply but rather ignores the rules. That is so in the Nuclear Posture Review, which does not mention IHL, in training, in weapons development and possession, and most importantly in relying on the policy of nuclear deterrence, under which nuclear weapons in large numbers remain continuously ready for launch as during the Cold War. Regarding that policy, Professor Moxley noted that in its 1996 advisory opinion, the International Court of Justice stated that it is unlawful to threaten use of a weapon which would be unlawful to use. He closed by asking: “Is it not evident that our policy of deterrence is unlawful if the actual use would be unlawful?”

The final speaker, **Gary Solis**, for six years headed the law of war program at the US Military Academy at West Point, is currently an adjunct professor at Georgetown Law and a lecturer at George Washington University Law School, and is the author *The Law of Armed Conflict: International Humanitarian Law in War* (Cambridge University



Professor Gary Solis
Photo credit: Medill National Security Zone

Press, 2010). Professor Solis explained that in directives and in training at all levels, the US military takes the law of armed conflict quite seriously. West Point and Annapolis, the two military academies he is familiar with, stress the law of armed conflict in instruction generally and now have dedicated courses on the subject. He said: “What about war crimes like Abu Ghraib, Haditha, Hamdaniya, the Thrill Kills of Third Stryker Brigade, Staff Sergeant Bales, and so on? No law will deter the lawless. Actually, it is a wonder there are not more war crimes than there are. When you send a million 18 and 19 year olds into a combat zone with high powered weapons, it is inevitable that bad things are going to happen. That’s not cynicism so much as a recognition of reality. But for every egregious war crime that you can name, there are 6, 8, 10, 12 court-martial convictions for violations of the law of armed conflict.”

However, Professor Solis continued, “there is a glaring anomaly in America’s admirable resolve to observe and enforce the law of war. There is one law of war topic that is not taught; that is not the subject of Department of Defense directives and orders; that is overlooked by military education directives and uniformed education and classroom discussions; and that is nuclear weapons, their lawful, and more significantly, their potentially unlawful use.” Nor is the question addressed in military law journals. Professor Solis concluded: “As lawyers we know what the law is. The absence of discussion in Department of Defense orders and instructions and regulations in regard to nuclear weapons allows for both tactical and strategic wiggle room.”

There is a glaring anomaly in America’s admirable resolve to observe and enforce the law of war. There is one law of war topic that is not taught; that is not the subject of Department of Defense directives; and that is overlooked in military education. That is nuclear weapons, their lawful, and more significantly, their potentially unlawful use.

– Professor Gary Solis

The Program Co-Chairs were **John Harrington**, Co-Chair of the National Security Committee of the ABA International Law Section, and **Jonathan Granoff**, President of the Global Security Institute and Co-Chair of the ABA International Law Section Blue Ribbon Task Force on Nuclear Non-Proliferation. In opening the program, Mr. Harrington observed that the discourse in the section has largely concerned nuclear arms control treaties. IHL, in contrast, applies to all weapons, in all countries; it is a powerful body of law.

You cannot bring nuclear weapons into compliance with the standards of international humanitarian law; the two are simply incompatible. However, there seems to be collective psychological denial that nuclear weapons are being brandished. But some people are awake, and there are road maps with practical and reasonable steps for coming into compliance with the law.

– Jonathan Granoff

Responding to the speakers, Mr. Granoff said that “the law seems to be quite clear here: You cannot bring nuclear weapons into compliance with the standards of IHL; the two are simply incompatible.” However, “there seems to be collective psychological denial” that nuclear weapons are being brandished. But “some people are awake,” and there are road maps with practical and reasonable steps for coming into compliance with the law, both IHL and the “unequivocal

undertaking” under the NPT “to accomplish the total elimination of nuclear arsenals.” What is needed is passion and advocacy, and lawyers have the necessary skills. “These are legal issues,” Mr. Granoff said, “and I believe that it is our responsibility to take this on.”

FURTHER READING ON LAW AND NUCLEAR WEAPONS

Charles J. Moxley, Jr., John Burroughs, and Jonathan Granoff, “Nuclear Weapons and Compliance with International Humanitarian Law and the Nuclear Non-Proliferation Treaty,” 34 *Fordham International Law Journal* (April 2011, No. 4).

Charles J. Moxley, Jr., “Obama’s Nuclear Posture Review,” 34 *Fordham International Law Journal* (April 2011, No. 4).

Dean Granoff and Jonathan Granoff, “International humanitarian law and nuclear weapons: irreconcilable differences,” *Bulletin of the Atomic Scientists* (November/December 2011).

Nuclear Abolition Forum (2011, No. 1), “International Humanitarian Law and Nuclear Weapons: Examining the Humanitarian Approach to Nuclear Disarmament,” edited by John Burroughs.

EDITED TRANSCRIPT

John Harrington

Today we return to the topic of nuclear weapons. The discourse in this section, both in conferences and law review articles, has largely reflected the primary discourse among nations which has addressed the effectiveness of treaties such as SALT, START, ABM, the Comprehensive Test Ban Treaty, Fissile Materials Cut-off Treaty, and so forth. The effectiveness of these treaties is stemming proliferation, reducing nuclear dangers and fulfilling treaty commitments to negotiate nuclear disarmament. But none of these treaties are of universal application and all of them are specific to the control of nuclear weapons. International Humanitarian Law (IHL) applies to all weapons, in all countries. It is often referred to as the laws of war and sets forth standards of conduct below which no people or country may transgress. Today we have experts and practitioners of this significant subject, and we believe a powerful body of law.

It is my privilege to introduce our moderator, Dr. and Professor John Burroughs. He is a prolific author regarding international law as applied to security issues and nuclear weapons issues in particular. He teaches these subjects at Rutgers Law School, Newark, as an adjunct professor. He is very active in UN affairs as the Executive Director of the Lawyers Committee on Nuclear Policy, a UN NGO. He wrote a book on the International Court of Justice advisory opinion on the illegality of nuclear weapons, which will be raised during this discussion. So I would like to welcome Dr. Burroughs.

Dr. John Burroughs

Thank you John and thanks to both you and Jonathan Granoff for serving as Program Co-Chairs and for helping to make this event happen.

States parties to the Nuclear Non-Proliferation Treaty (NPT) held a five-year Review Conference at the UN in New York in 2010. Libran Cabactulan, one of the speakers today, was President of the conference. In its Final Document the Review Conference “expresses its deep concern at the catastrophic humanitarian consequences of any use of nuclear weapons, and reaffirms the need for all states at all times to comply with applicable international law including international humanitarian law.” IHL of course consists of rules and principles governing conduct of warfare. The United States was a key participant in the Review Conference and was active in negotiating the provision I just quoted.

We are concerned today with the policy implications of that commitment, especially for the United States. Unfortunately Ambassador Bonnie Jenkins of the US State Department is unable to be here, so let me say something briefly about US stated positions, and then I will introduce the panelists.

Yesterday there was a UN Security Council meeting chaired by the US, which is president for this month. The meeting was on nuclear non-proliferation, security, and disarmament, and was a follow up to the September 2009 Summit chaired by President Obama. US Ambassador to the UN Susan Rice said in conclusion, echoing President Obama’s remarks in Prague in 2009, which he reiterated in Seoul last month: “The United States believes that it has a moral responsibility to lead and act now, in cooperation with the members of this Council and the international community, to seek the peace and security of world without nuclear weapons.”

Regarding non-proliferation and disarmament efforts, Ambassador Rice said in part: “The 2010 U.S. Nuclear Posture Review (NPR) outlined our approach for reducing the role of nuclear weapons and pursuing the goal of

a world without such weapons. Through the posture review, we announced that the United States will not use or threaten to use nuclear weapons against non-nuclear-weapon states that are party to the NPT and in compliance with their nuclear non-proliferation obligations. And we emphasized our collective interest in ensuring that the record of more than six decades of nuclear non-use continues forever.”

Nonetheless the NPR does not rule out use of nuclear weapons in certain circumstances. It says: “In the case of countries not covered by this assurance - states that possess nuclear weapons and states not in compliance with their nuclear non-proliferation obligations - there remains a narrow range of contingencies in which U.S. nuclear weapons may still play a role in deterring a conventional or CBW attack against the United States or its allies and partners. ... Yet this does not mean that our willingness to use nuclear weapons against countries not covered by the new assurance has in any way increased. Indeed, the United States wishes to stress that it 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.”

Some of you may not know that both the United States and Russia are still ready today right at this moment to launch an all-out nuclear attack of the kind that was so much in the news during the Cold War. Regarding the application of IHL to nuclear weapons, the United States agreed to the provision in the 2010 NPT document. In 1995, the US argued to the International Court of Justice that such law indeed does apply to nuclear weapons. Furthermore, at that time the United States maintained that in some circumstances the use of nuclear weapons could comply with IHL.

Currently the Obama administration is developing new presidential guidance for missions, targeting, and deployments for US nuclear forces. My organization, Lawyers Committee on Nuclear Policy, wrote a letter to the Obama administration urging consideration of IHL in that process. We received a reply from Under Secretary of Defense James Miller stating that “any guidance regarding US nuclear force planning and deployment is highly classified, and I cannot, therefore, comment on it.” He also quoted the statement of the NPR regarding the interest of all states in extending forever the record of nuclear non-use since World War II.

Let me introduce the panelists. Ambassador Libran Cabactulan is the Philippines’ Permanent Representative to the United Nations. He served as President of the 2010 Review Conference of the NPT. Prior to his current employment, he was Assistant Secretary for Disarmament and Non-Proliferation in the Department of Foreign Affairs in Manila. He has held many other diplomatic and Foreign Service positions, but one I want to mention: He led the Group of 77 developing countries and China in negotiations on economic and related issues at the General Assembly, the Economic and Social Council, the Commission on Sustainable Development, the Population Commission, and the UN Development Program.

Professor Charles J. Moxley, Jr., is an adjunct professor at Fordham University Law School and distinguished ADR Professional in Residence at Cardozo Law School. He is a mediator and arbitrator in New York City, having previously for many years specialized in commercial, securities, and insurance litigation. Professor Moxley is the author of a major book, *Nuclear Weapons and International Law in the Post Cold War World*, Austin & Winfield, 2000, in addition to numerous law review articles on the subject.

Professor Gary Solis is currently an adjunct professor at Georgetown Law and a lecturer at George Washington Law. He taught on the London School of Economics law faculty for three years before joining the Department of Law at the United States Military Academy, and for six years he headed West Point’s law of war program. His most recent book is *The Law of Armed Conflict – International Humanitarian Law in War*, Cambridge University Press, 2010. Professor Solis is a retired US Marine with 26 years active service.

After the panelists' statements we will hear a response from Program Co-Chair Jonathan Granoff, who is President of Global Security Institute and Co-Chair of the ABA International Law Section Blue Ribbon Task Force on Nuclear Non-Proliferation.

Ambassador Libran Cabactulan

Thank you to the organizers of this panel. There is really much to say about the applicability of IHL to nuclear weapons, and the related question of illegality of the threat or use of such weapons. I would for a start mention the Filipino position on nuclear arms, then dwell on insights from the 2010 NPT conference.

The position of my country, the Philippines, is that nuclear weapons are illegal under international law, particularly international humanitarian law. This position we took before the ICJ in its 1996 advisory opinion on nuclear weapons. It was shaped by the role my country willingly or unwillingly played during the Cold War. During this period the Philippines found itself deep within the shadows of the nuclear arsenal of the United States. Some of the largest bases of the US were firmly entrenched in my country. This made us a natural target of the Soviet Union.

The Philippines strongly believes that nuclear weapons are strictly prohibited by customary and conventional IHL. No amount of legal hairsplitting or operational obfuscation can change the fact that of all the weapons ever conceived by the mind of man, nuclear weapons are inherently indiscriminate, far beyond proportionality, cause unimaginable unnecessary suffering, and are inescapably and grievously harmful to the environment. It is a weapon where the notion of control is meaningless and the idea of military necessity is absurd. Nuclear weapons are the apex of man's genius at finding ways to destroy his fellow human beings. Using that same genius to come up with hypothetical scenarios where nuclear weapons would not violate IHL to us is simply allowing the exception to lead the rule by the nose. But more importantly assertions of exceptions should be seen as proving the rule and that rule must find life in law either by treaty or court opinion.

While as John Burroughs said, the US position before the International Court of Justice was that nuclear arms can comply with IHL, it is much to our regret that the Court did not rule that nuclear weapons were illegal under international law. In our written and oral proceedings, we have asserted norms other than humanitarian law. We put forward the legal proposition that nuclear weapons violate the UN Charter; that the very existence of this terrible weapon renders the political independence and territorial integrity of sovereigns illusory.

It is for this reason that the Philippines continues to strongly support efforts in the UN to keep the issue on the global agenda. In particular, we have consistently backed Malaysia's annual resolution in the First Committee of the General Assembly on follow-up to the advisory opinion of the ICJ on the legality of the threat or the use of nuclear weapons. It was also for this reason the Philippines helped to lead efforts to criminalize nuclear weapons in the preparatory committee for negotiations of the International Criminal Court. At the diplomatic conference in Rome that adopted the ICC Statute, the Philippines vigorously pushed for the inclusion of nuclear weapons in the list of prohibited weapons. But you all know what happened: Some participants spread the word that the United States and others would not become party to the Rome Statute if nuclear weapons were included. The Philippines recently became a state party and had a judge elected to the Court. It is our hope that the United States and others consider joining the Statute.

The NPT was a child of the Cold War and in that deeply divided era it was born of different reasons. For the Non-Aligned Movement (NAM) it was a compromise on nuclear disarmament but a nuclear disarmament document nonetheless. For the nuclear powers it was really a validation of their nuclear status. But there is a legal link between the NPT and illegality of nuclear weapons under IHL. The NPT came into existence with

the objective of eliminating these weapons precisely because their destructive force is inherently inhuman. The NPT's preamble makes this abundantly clear.

At the 2010 Review Conference, I believed it was high time to start really emphasizing and developing to a logical conclusion this link. I also believed this could be done without compromising any of the three pillars of the NPT. It is for this reason I felt I had to encourage discussions in the Review Conference on this issue. I was glad that the Non-Aligned Movement tackled this head on; I was pleasantly surprised at the support that also came from some NAM countries, in fact some NAM countries were really at the forefront of the discussions. I'd also like to acknowledge the crucial role of the International Committee of the Red Cross, as well as civil society and academics, in the formulation and eventual adoption of the language in the provision on humanitarian consequences and IHL.

I had hoped that this discussion would be taken up in the working group on nuclear disarmament. I wanted any language on humanitarian law to be directly linked to nuclear disarmament. At the very end I was satisfied that at least there is this reference in the agreed conclusion relating to IHL. Had it been the case that there was no positive outcome or had it been the case that the reference to IHL was thrown out altogether, it would take us a longer period for this principle or this reference to be included in an agreed document in the NPT. This is the first time in the history of NPT in the efforts of countries to deal with the issue of nuclear disarmament that there is a direct reference in an agreed document by the state parties on matters relating to IHL.

So it was to my satisfaction and after much unavoidable and animated discussion that we were able to place in the disarmament portion of the conclusions and recommendations for follow-on action the language which is very familiar to you. This reaffirms the need for all states at all time to comply with applicable international law including international humanitarian law. We had some little discussions here even in my delegation. I will admit there were some initial difficulties. There were those that felt that the linkage was too remote. Others felt that the fine legal dimensions of the issue were still unsettled. A few intimated that the very existence of the NPT and the non-existence of a nuclear weapons convention militated against the views of the NAM.

In the end, language was found that allowed for some perceived wiggle room for those with certain concerns. The changes to the original formulation may seem to weaken its core, adding the phrase "applicable international law." It may seem like an escape clause. It may seem from the text that humanitarian law is taking a back seat to other applicable international law, giving the impression that these are the laws of war on self-defense or military necessity. Well I disagree with that assessment; the discussions were clearly focused on humanitarian law and not on any other law; the language talks about catastrophic humanitarian consequences; this is the clear context of the IHL provision. If it will be necessary to give some textual context to the application of applicable international law other than humanitarian law, it should be those laws that lend themselves to resolving and ending the armed conflict. This could be the norms of state responsibility on peaceful settlement of dispute, and treaty law, among others.

I believe that taken as a whole the agreed language in the final document is a major step in reinforcing the legal prohibition on nuclear weapons. There is this question of whether the language is legally binding. In a strict legal sense it is not; in terms of form there is no compliance with the requirements for a state to express its desire to be legally bound. But I believe that more than just a powerful political statement on the nexus between nuclear disarmament and IHL, the 2010 Review Conference adopted a language that interprets existing treaty obligations. The challenge is, and always has been, to convince certain states to observe these obligations. I believe is for the international community, for all of us, to really work for this nexus to be carried to its logical conclusion as expansively as possible and for it to be accepted by all countries.

Next month in Vienna we will start again the new round preparing for the 2015 Review. It is my objective that we build on what we have achieved in 2010. It is a long road, it is a long process, but it is better to take this road rather than be obliterated by inaction.

I want to emphasize to you one final point. Right from the very start when I engaged myself in this journey of presiding over the Review Conference, I really honestly believed it is a recipe for non-action – a recipe for coming out with no substantial result. It is a very complicated procedure; the Review Conference is organized in such a way that I believe that there are no creative ways of doing things – it is not going to produce a very substantial result. It has a mandate to look forward and it has a mandate of course to look backward, to assess what has been done before and then to take what can be done thereafter. In the past it has usually been the case you are stopped in looking forward, and maybe that is why in 2005 it was a major disaster. Previously of course in 2000 there were 13 practical steps agreed upon, but that agreement negotiated by just a few countries and as a result was nothing much really. That is why it is very important to put things in proper perspective, and to have patience in the real negotiations.

That is why in the final, the very critical junction, I decided that the review part will be my responsibility, and we would really focus on what can be achieved and that was the recommendation and action plan. I told the negotiators: Let us all put ourselves in a car and we have to look at the rear view mirror to look back but we have to focus our eyes on the road so we can go and reach our destination; if we have our eyes stuck on the rear view mirror we are going to have an accident. So finally they agreed with me that the review part will be my responsibility and that we would focus our efforts on the outcome and recommendations. Happily for us and for you and for our focus on international law there is this little portion on IHL as part of the agreed conclusion.

Professor Charles J. Moxley, Jr.

I would join John in thanking the Ambassador. We have a foundation from the NPT 2010 Final Document that international humanitarian law has to be complied with. What I can offer in addition, in particular in the absence of a representative from the US government, is a look at statements by the US military and by the US government, including before the ICJ in the nuclear weapons case. We can look at statements from the United States to validate the point that the rules of armed conflict that we are talking about are rules that have been accepted of record by the US as applicable to nuclear weapons.

I have five or six general propositions and I am going to state them and then go through them in as much detail as time permits. One: Nuclear weapons threaten human existence. Two: It is not over with the end of the Cold War; there are over 20,000 nuclear warheads in existence today, some 95% of which are held by the United States and Russia. We have thousands of them, the Russians have thousands, and numerous other countries have many. Three: There is a body of law, the law of armed conflict, which applies to the use and, it's important to add, to the threat of use of nuclear weapons. Four: The US acknowledges these principles; the substance of these rules of law is not in contention; there may be some dispute at the edges, but in the vast majority of instances the law is not in contention. The US further acknowledges that these rules of armed conflict apply to nuclear weapons; that is not in contention.

Where we get into contention, and really there is not contention, is here: The reality would seem to be that if one takes the acknowledged rules of law announced by the US and takes the facts of nuclear weapons, which for the lawyers among you are sufficient for summary judgment, the conclusion seems ineluctable, that in virtually all circumstances these weapons might be used the use would be unlawful.

So where is the US on this? In terms of application we seem to ignore this body of law. In this wonderful

Nuclear Posture Review, this big process, law is not mentioned except as to some aspects of the NPT, and even that is distorted. The law is ignored; its implications are ignored in our training; it is ignored in our weapons possession and development process. But most important in a way is the policy of deterrence; this is what brings it down to earth. We are prone to thinking the Cold War is over, that there's no big nuclear weapons adversary, that it's not that imminent. But as John mentioned, this policy of deterrence is being applied right now today; it's being applied 24/7 and there is still a high level of alert of both sides, the United States and Russia, and of other countries as well. There is a high level of alert, so the existential risk of something going astray by intention or lack of attention is there. So I think the question we should ask ourselves at the end of today really is not what the facts are, not what the law is, not what the implication for the law of known facts is – but why are we ignoring the law?

Let me start by summarizing what nuclear weapons do. Language in the 1996 decision of the ICJ is helpful. The Court “notes that nuclear weapons are explosive devices whose energy results from the fusion or fission of the atom. By its very nature, that process, in nuclear weapons as they exist today, releases not only immense quantities of heat and energy, but also powerful and prolonged radiation. According to the material before the Court, the first two causes of damage are vastly more powerful than the damage caused by other weapons, while the phenomenon of radiation is said to be peculiar to nuclear weapons. These characteristics render the nuclear weapon potentially catastrophic. The destructive power of nuclear weapons cannot be contained in either space or time.” Remember that when we talk about the legal standards. The Court continues: “They have the potential to destroy all civilization and the entire ecosystem of the planet.” That is the effect of nuclear weapons. In terms of the numbers, the US now has some 5,000 nuclear warheads plus 3,500 to 4,500 retired warheads awaiting dismantlement. There are more than 22,000 warheads in the world today.

So where is this body of law and how do we know that it is applicable? There is a robust body of conventional and customary law governing the use and threat of use of nuclear weapons that is recognized by states throughout the world including by the US and other nuclear weapons states, and the principles have been explicitly articulated in the decision by the ICJ in 1996. This used to be called law of war; it is now called law of armed conflict; it also referred to as international humanitarian law or *jus in bello*. This is a huge body of law; the ICJ in its decision referred to it as one single complex system known as IHL, a body of customary rules many of which have been codified in the Hague law and the Geneva law of numerous conventions. So what does the US say?

Some examples: The 2009 US manual, Nuclear Operations, recognizes that the use of nuclear weapons is subject to the principles of the law of war generally. The manual states that “under international law the use of nuclear weapons is based on the same targeting rules applicable to the use of any other lawful weapon, i.e. the counterbalancing principles of military necessity, proportionality, distinction, and unnecessary suffering.” So we will talk about three requirements, necessity, proportionality, and distinction. In its memorandum to the ICJ in the nuclear weapons case, the US stated that the legality of the use of nuclear weapons depends on the conformity of the particular use with the rules applicable to such weapons. The memorandum goes on to say that this would depend on the characteristics of the particular weapon and so forth. So we acknowledge the applicability of this body of law to these weapons. We can see from the US manuals and the US statements to the ICJ that the US acknowledges the applicability of these rules to nuclear weapons.

The rule of distinction or discrimination: This rule prohibits the use of a weapon that cannot discriminate in its effects between military targets and non-combatant persons and objects; the weapons have to be able to distinguish. It is unlawful to use weapons whose effects are incapable of being controlled and therefore cannot be directed against a military target. If the state cannot maintain such control – in one of those targeting rooms – the state cannot use that weapon in compliance with the rule of discrimination.

The US Army in its 2010 Law of War Deskbook describes this principle of distinction as the “grandfather of all principles,” stating that the rule requires that “parties of the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.” Another manual, also from 2010, the Army’s Operational Law Handbook, states: “Distinction requires parties to a conflict to engage only in military operations the effects” – and I think that’s important – “of which distinguish between the civilian population (or individual civilians not taking part in hostilities) and combatant forces, directing the application of force solely against the latter.” Why is the point about “effects” significant? We know the effects of nuclear weapons. We know there is a huge blast effect and an electromagnetic effect which itself can cause huge consequences, but the effects also include the release of radiation. Can nuclear weapons possibly meet these standards which call for control for controllability of effects and call for distinction between legitimate military targets and other targets which are not legitimate? The answer seems evident, does it not?

The rule of proportionality prohibits the use of a weapon whose potential collateral effects upon non-combatant persons or objects would likely be disproportionate to the value of the military advantage anticipated by the attack. The rule of proportionality requires the state using a weapon to be able to control its effects; if the state cannot control such effects, it cannot ensure that the collateral effects of the attack will be proportional to the anticipated military advantage. A 2006 Air Force manual called Targeting states that proportionality requires that “the anticipated loss of civilian life and damage to civilian property incidental to attack is not excessive in relation to the concrete and direct military advantage expected from striking the target.” We have to ask ourselves the same question: If we cannot control the effects, how can we in the targeting room make the legal judgment whether the use of this weapon can be lawful? How can we say it will be lawful when we cannot know what the effects of the weapon will be? We cannot determine the predictability but we know broadly about the effects of nuclear weapons that they are so extensive with the potential to destroy human life and destroy the environment and to spread so widely that they would seem to be inherently disproportionate.

The rule of necessity provides that a state may only use a level of force that is necessary to achieve the military objective of the particular strike; any additional force is unlawful. The Army’s 2010 Operational Law Handbook states that the principle of necessity is explicitly codified in article 23(g) of the Annex to Hague IV which prohibits a belligerent to destroy or seize the enemy’s property “unless such destruction or seizure be imperatively demanded by the necessities of war.” The 2007 Naval Commander’s Handbook states that the law of war’s purpose “is to ensure that the violence of hostilities is directed toward the enemy’s war efforts and is not used to cause unnecessary human misery and physical destruction.” Again, how can any potential use by the US of nuclear weapons satisfy the requirement that the extent of the violence that will result from the weapon is limited to the level that is necessary when we are dealing with weapons whose effects are unlimited and unlimitable?

[A verbatim transcript is unavailable for the last two minutes of Professor Moxley’s remarks. He concluded by noting that in its advisory opinion, the ICJ stated that it is unlawful to threaten use of a weapon which would be unlawful to use. He asked: “Is it not evident that our policy of deterrence is unlawful if the actual use would be unlawful?”]

Professor Gary Solis

It’s really a privilege to be here to talk to you. I come to you as a military individual. Although I am retired from the military, I have been in the military all my life. There is an anomaly in America’s military position on the law of armed conflict and nuclear weapons. I would like to review that anomaly and tell you why it is unlikely to be altered or resolved in the near future.

The United States military establishment takes IHL quite seriously. There are for example a number of orders requiring training in the law of armed conflict, for example Department of Defense Directive 2311, the DOD Law of War Program, and the Chairman of the Joint Chiefs of Staff Instruction 5810 implementing the DOD Law of War Program. It says in part: The armed forces of the US will comply with the law of war during all armed conflicts, however such conflicts are characterized, and will comply with the principles and spirit of the law of war during all operations. And it assigns responsibility for teaching our warfighters what the law of war is.

And then the subordinate commands, the United States Navy, for example, has SECNAV Instruction 3300, the Law of Armed Conflict Program to Ensure Compliance by the Naval Establishment. All of these are available on the internet. The Air Force has a similar order, Air Force Directive 51-4. The Marine Corps has the most extensive law of war program, in Marine Corps Order 3300.4. It sets forth among other things the training that all Marines must receive upon entry, and it lists a number of principles. Marines will fight only combatants; Marines don't harm enemy soldiers who surrender; Marines disarm them and turn them over to their superiors; they do not torture or kill prisoners, etc. It goes on to list follow-on training objectives. All of the service units are required to repeat that training on an annual basis, for enlisted Marines, sailors, soldiers and Coast Guardsmen.

In addition, there is Army regulation 27-53, Review of Legality of Weapons Under International Law. One paragraph reads: "The Judge Advocate General reviews weapons and weapon systems to determine whether the weapons or weapons systems for their intended use in combat are consistent with the obligations assumed by the United States under all applicable treaties and with customary international law."

The education of America's war fighter, officers at West Point and Annapolis (the two with which I am very familiar) stress the law of armed conflict in instruction. At West Point we installed law of war issues in every class, from plebes on. In their very first summer, they receive training in the law of war in terms of scenarios, which the cadets, who are armed with blank firing weapons, must deal with.

The American Red Cross and the International Committee of the Red Cross (ICRC) have train the teachers programs. The American Red Cross concentrates on high school teachers. They take a program around the country to teach high school teachers how to teach the law of armed conflict. The ICRC concentrates on training of college level professors and law school professors, training them how to teach the law of armed conflict. In the last couple of years, I participated in both programs, teaching teachers in Berkeley, St. Louis, Atlanta, Santa Clara, Washington, DC, etc. This is in compliance with the 1949 Geneva Convention common article 47/48, 127 and 144. And this instruction by the American Red Cross and ICRC always involves active duty or retired military officers.

Field Manual 27-10, The Law of Land Warfare, is the fourth in a series going back to 1914. It contains the law of land warfare taught to all sailors, soldiers, Marines, etc. There is going to be a new edition, fifth in the series, published hopefully by the end of this year, that will be more than 1000 pages in length. Its content is taught by service order to every officer and enlisted service member. There is law of war training based on the content of 27-10 even in Afghanistan.

Forty-five years ago in Vietnam, as a captain I was assigned to teach the law of armed conflict to each platoon of the company of which I was the executive officer and later the commanding officer. I found it very odd that in a place where we sometimes had to take breaks due to enemy fire I would be telling them about the law of war. But I have come to realize the significance of teaching warfighters who are engaged in combat what the law of combat is.

You may ask, what about war crimes like Abu Ghraib, Haditha, Hamdaniya, the Thrill Kills of Third Stryker Brigade, Staff Sergeant Bales, and so on? No law will deter the lawless. Actually, it is a wonder there are not more war crimes than there are. When you send a million 18 and 19 year olds into a combat zone with high powered weapons, it is inevitable that bad things are going to happen. That's not cynicism so much as it's a recognition of reality. But for every egregious war crime that you can name, there are 6, 8, 10, 12 court martial convictions for violations of the law of armed conflict. Even in Vietnam, 95 soldiers and 27 marines were convicted of the murder of Vietnamese noncombatants, and there were many, more convictions as well. In Iraq we read about courts-martial and convictions; they are the fare of every daily newspaper.

But there is a glaring anomaly in America's admirable resolve to observe and enforce the law of war. There is one law of war topic that is not taught; that is not the subject of Department of Defense directives and orders; that is overlooked by military education directives, by uniformed education and classroom discussions; and that is nuclear weapons, their lawful, and more significantly, their potentially unlawful use. It is not only American military manuals that disregard the use of nuclear weapons. I was commissioned in 1963 and I became a judge advocate in 1971; I have never read a military journal article discussing the law of nuclear weapons, not in the *Military Law Review*, not in the *Army Lawyer*, not in the *Naval War College Review* – all of the many military legal journals I have never read anything on the use or the law of nuclear weapons. Undoubtedly they are out there, I have not read every article in every journal, but I have read a hell of a lot and I have never seen one. In Washington, DC, for three years I headed the Marine Corps worldwide military law section; before that I was the legal advisor to the commanding general of all Marine forces in the East Coast and in Europe. In that time I never saw a DOD directive relating to the lawful or unlawful use of nuclear weapons.

Of course there are numerous directives in the Air Force, the Army and the Navy relating to nuclear ordnance, but never an official writing detailing the lawfulness or unlawfulness of their use. The manuals relate to targeting, to the protection of nuclear munitions, to their storage, their transportation, their deployment – but not to their legality in international law, certainly not to their morality. The numerous military orders that require education and training of all members of the Armed Forces make no mention of nuclear weapons and offer no judgment on their lawfulness.

As to Field Manual 27-10, *The Law of Land Warfare*, taught by DOD order to all Armed Service members, the current edition has not a single mention of nuclear weapons; they goes unmentioned in its otherwise inclusive index. Now the current British manual on the law of armed conflict, which is the gold standard, has 19 entries and 5 sub-entries concerning the law of war as it applies to nuclear weapons. The new edition of FM 27-10, the 1000 page manual, has been prepared by a special task force over the past six years. Although it is not yet released, I asked the general editor about its content in regard to nuclear weapons this week. Col. Hays Parks told me the draft manual is limited in its discussion of nuclear weapons; it simply quotes approvingly from the ICJ 1996 opinion, he told me.

The Army regulation requiring legal review of all weapons and weapon systems specifically excludes nuclear weapons. Chemical weapons and all conventional arms shall be reviewed; no nukes.

The educational programs at West Point and Annapolis have no course offerings and no individual lessons on the law of nuclear weapons. Adding a course at any service academy is quite a project because you only have so many hours, unlike a civilian college where you can simply add a course when you have a professor to teach it. At West Point, Annapolis or the Air Force Academy if you want to add a course you have to kill a course; and every professor is very jealous of his or her prerogatives and that is not easily done. It was hard enough to get law of war added to the West Point curriculum. When I first came there in 1996 the United States Military Academy did not teach a course on the law of war. I was astounded, having just received my Ph.D. in the law of war. I looked

around for a year and a half before I could find a course to kill. The Naval Academy added the law of war this semester for the first time in many years. Now of course they have courses on the law of the sea, but the law of war not until this semester.

For several years I have taught in both the ICRC and the American Red Cross teach the teacher programs around the country, as I said. There is not a word regarding nuclear weapons in those courses.

And what is that law? Well as we have already heard it's the flawed 1996 ICJ advisory opinion. After the Court said that nuclear weapons have the potential to destroy all civilization and the entire ecosystem of the planet, it then backs off by adding that the Court 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-defense in which the very survival would be at stake.

In concluding, as lawyers we know what the law is. The absence of discussion in DOD orders and instructions and regulations in regard to nuclear weapons, in my opinion, allows both tactical and strategic wiggle room. There are no orders or directives to be violated or contravened; there is no basis for assessing legal culpabilities of commanders. And that, in my opinion, is why the anomaly in US law of war doctrine is likely to go unchanged.

Jonathan Granoff

The United States is the first country in history ever created based on the rule of law. It was through a legal instrument that we were created. The greatest offering we bring to the world is the concept that government must be limited by law and that the state, the sovereign, is subject to the law. There is no sufficient international judicial body that can compel jurisdiction and itself cause states to come before it in order to adhere to international law. For greater global stability and justice that is the bridge that we have to build.

We have commitments pursuant to the Nuclear Non-Proliferation Treaty regarding nuclear non-proliferation and disarmament that have been reaffirmed largely through the efforts of this gentleman, Ambassador Cabactulan. I had the privilege of observing him herd 189 cats to come to consensus over this highly contentious issue; the whole world owes this man a great deal. He did it quietly. On the last day of the conference, at twelve noon, there was no consensus and the United States appeared willing to leave the conference with a super majority. Ambassador Cabactulan deftly recessed the Conference for three hours, and in that period consensus was reached. I believe the Nuclear Non-Proliferation Treaty was substantially saved through those efforts. Although the NPT does not get us to disarmament, without it we would have massive proliferation.

I was very struck by the eloquence of his expression calling nuclear weapons “the apex of genius for destruction.” I was thinking, if this is the apex for genius, what are the countervailing reins to control the horse of destruction that has run out of the barn? It's not controlled by the military manuals, shockingly. The two controls I was thinking of are law and morality.

As lawyers we are not supposed to be moralists, so let us just stick to the law. The law seems to be quite clear here. You cannot bring nuclear weapons into compliance with the standards of IHL; the two are simply incompatible. So what to do? Let us suppose our position was absolutely get rid of them immediately. Well that is politically unrealistic and it would probably be very dangerous. So let me use some analogies.

Nuclear weapons states use hypothetical situations to argue that nuclear weapons can be used in compliance with IHL, such as a depth charge on the high seas, which would be in compliance, or attacking a troop deployment in the Gobi Desert. These are the sorts of silly things they brought before the International Court of Justice.

These are the exceptions. Are they not really saying that if you can go 100 mph down 42nd Street while you have a person bleeding to death and you have to get them to the hospital, an exigent circumstance which could excuse the violation of running traffic lights and speeding, we could do away with traffic lights and speeding? Because we have a situation in which speeding could be justified, we will just do away with the traffic laws. That is how it appears to me.

Those of us who are saying that we must walk down the nuclear ladder are characterized as if we are saying you have a car that's going at 90 mph in an area you can't go over 65 and you have to smash on the brakes. Well if you smash on the brakes going 95 mph you'll probably flip over. That is simply not what advocates of bringing policy into compliance with international humanitarian law are saying. What are we saying? We are actually saying that the existing legal commitments that have already been made to bring the car into compliance with the speed limits need to be fulfilled. And let me just give some of them that the nuclear weapon states have said that they accept as affirmed commitments under the NPT.

Nuclear weapons states agreed in 2000 that their cuts in the arsenals would be irreversible. They agreed that they would make further efforts to reduce nuclear arsenals unilaterally, increase transparency, reduce non-strategic nuclear weapons, take concrete agreed measures to further reduce operational status – in other words taking weapons off of high alert, the launch on warning. They agreed to a diminished role for nuclear weapons in security policies to minimize the risk that they will be used. And they agreed to an “unequivocal undertaking by the nuclear weapons states to accomplish the total elimination of their nuclear arsenals leading to nuclear disarmament, to which all states parties are committed under Article VI of the NPT.” The nuclear weapon states thus affirmed that the duty of elimination is a legal commitment. They also agreed to some of the steps: Entry into force of a Comprehensive Test Ban Treaty, negotiation of a Fissile Materials Cut-off Treaty, and creation of subsidiary body in the Conference on Disarmament in Geneva to negotiate a process of elimination.

Then you have other road maps. The UN Secretary General has called for a convention banning nuclear weapons akin to the conventions that ban chemical and biological weapons. Why should nuclear weapons be exceptional? Or a framework of agreements like the way in which we are approaching the environmental challenge of climate. Then you have people like Max Kampelman, who was one of Ronald Reagan's negotiators, suggesting that there be a Security Council resolution which would declare that nuclear weapons are a violation of IHL. It would prohibit the use and threat of use of nuclear weapons, but not immediately make possession illegal; there would be an existential reality to the weapons, but the process of elimination would be accelerated, quick-started.

For the United States, we have suggestions that presidential guidance on nuclear weapons should emphasize the requirement to come into compliance with IHL. This would immediately mean that it would have to be taught; there would be dialogue within the military; and military officers would have to be told, for example: “This is the law; you cannot target cities.” The guidance should also highlight nuclear weapons non-use as a policy objective, not just an existential reality.

But I don't agree with the characterization of the record of non-use since World War II in the Nuclear Posture Review because I think that when you put a gun to someone's head and you suggest they tie their shoes, you don't have to pull the trigger if they tie their shoes. Thus while nuclear weapons states are brandishing these weapons they are influencing the behavior of other countries without pulling the trigger.

Society seems to be in collective psychological denial that there is somebody brandishing these weapons. But some people are awake. My point is that there are numerous road maps, some of which are existing legal commitments, that will bring the car from 95 mph into legal compliance. There are numerous forward-looking proposals such as the Secretary General's. There is the legal foundation in the ICJ's unanimous decision calling

for negotiations leading to completion of the elimination of nuclear weapons. And we have the affirmed commitment of the United States and other countries to IHL.

What we don't have is the political will. What we do not have is a lobbying arm going to the Senate, going to the American people, and going to the world and lobbying for this. We have the four horsemen, Kissinger, Nunn, Shultz, Perry. They are not willing to go and lobby. They did an event and three congressmen showed up and Shultz was really surprised because normally these guys command large audiences. But they are not going door to door in a systematic lobbying effort galvanizing public opinion, getting organizations like ours to lobby on this. We even have an ABA House of Delegates resolution on the CTBT. It came out of our section and the precursor to the committee that sponsored this event. We do not have the lobbying arm of our organization focusing on this.

What is needed is will, passion and advocacy, and lawyers have the necessary skills. This will not be driven by the American Medical Association; it will not be driven by the plumbers association. These are legal issues and I believe it is our responsibility to take this on. Thank you.

DISCUSSION

Question/comment from Larry White: I'm a graduate of the Air Force Academy and a retired nuclear qualified officer. I'd like to provide some expansion on Colonel Solis' comment. You are very familiar with West Point and Annapolis. I'm very familiar with the Air Force Academy. They have a major in law, where there is an elective system, and there are five courses that address the law of armed conflict to some extent. I recall that during my time there, there was substantial discussion with regards to nuclear weapons mainly from a philosophical point of view and we have a course in philosophy as well.

I acknowledge the discrepancy you show with regard to the lack of regulations regarding nuclear employment. However, in the concept of military employment in the law of war, regulations are used to delegate authority and expansion of guidance down. Whereas the deployment of nuclear weapons is a national level decision where our only job is to employ that. Now I think that you will agree with me that Army and Marine Corps officers have a very small role in regards to this. The Naval and Air Force officers who are trained to do this have substantial training, not at the academies but in particular at flight training. There is not a lack of discussion; it is just done in some other forums. I certainly acknowledge that there is a discrepancy, but when the nuclear order would come down it is only to be executed. The trust, both up and down, is that targeting has been done at a national level.

With regards to the concept of distinction, while nuclear weapons are several orders of magnitude above normal weapons, if you look at something like the Mark 82 bomb, the standard 500 pound bomb, it does not distinguish either. Anything within its blast radius of 2000 feet laterally, it does not stop to say, "Oh, you're a civilian." There's a context to the distinction argument that already exists, so nuclear weapons are not that great an expansion. Keep in mind that there are groups lobbying for nuclear weapons. I personally hope we come to a point when the world does not need these, and I wish you luck in that endeavor.

Gary Solis: Were Hiroshima and Nagasaki war crimes?

Larry White: Yes. Dresden also.

Charles Moxley: I suppose that it is possible that there are some secret decisions made that we will not use high-yield nuclear weapons and we have integrated this into the planning, the new SIOP, etc. That is possible, but it

is contrary to the public posture and even to the Nuclear Posture Review. The public posture is that we will use these things, and we are using the policy of deterrence every day with high-yield weapons, so the threat is out there and we are using it. It is hard to imagine how one can justify the threat to use our nuclear arsenal which is made up of high-yield nuclear weapons.

Larry White: True, but there are some issues with regard to the levels of controls of some countries. I am very familiar with the controls in the United States. The personal reliability program is very, very stringent. If an Air Force unit makes one mistake on nuclear control in an exam, that unit fails. But if you look at other countries, the ones that we are worried about right now, you do not see those controls. That is a very important consideration in analyzing international security, which by the way I teach for the Turkish military academy.

Charles Moxley: That may be that our controls are much better, but as we know from the media they are not absolute and there have been some breaches in them. The ultimate problem is that if we see missiles coming over the horizon the time factor for making the decision is very tiny. So this policy of making an ad hoc determination is really the abrogation of law. Unless, it is hard to imagine, it has all been thought out in advance and it will not be done because it would not be lawful.

Question/comment: Ultimately you're looking forward to a situation where law-abiding nations will not have nuclear weapons, not immediately but over time. Does that not leave us in a situation where only the lawless will have them?

Question/comment: Regarding getting the enthusiasm and lobbying going to accomplish the goals that we have, what is the impact of the North Korean nuclear weapons program?

Charles Moxley: These questions go together, will we end up where only the lawless will have the weapons and how to deal with the Korean situation. It is about beginning a process, and the US beginning a process, to accomplish build down. If we can't do it, we can't do it, and it will not happen. But the premise is that we can do it and the technical issue that you get to is the level of transparency. That is a matter of debate and people get concerned when you get down to 500 weapons and below. There's a lot of information relating to this issue. I think most of us believe that you can have transparency. Regarding the Korean situation, we lose our credibility to make the build down happen as long as we are not complying with the law. If we comply with the law, it will take a long time but we can make it happen.

Question/comment from Jennifer Trahan: The International Criminal Court has a working group on future amendments to the Rome Statute and one of the proposals is to deem nuclear weapons use as a war crime. Mexico is working on this alone. Should this be worked on? Why are no other states getting behind this endeavor?

John Burroughs: Mexico indeed is seeking to have the Statute amended to explicitly make the use of nuclear weapons a war crime. That was proposed by the Philippines and others at the 1998 Rome negotiations, as Ambassador Cabactulan said. It was supported by the vast majority of participating countries but was dropped at the end of the negotiations as part of the deal to adopt the Statute. Obviously countries that have nuclear weapons and have policies of using them were not prepared to see that part of the Statute. Now Mexico is still pushing this and it is a very interesting question of politics and law. If such an amendment was adopted, it would probably be under a circumstance where it would apply only to countries that have accepted the amendment. While this would be good for international norm building, it would contribute to the fragmentation of international law. This is something that is taking place with respect to aggression, given the way the Statute amendment was handled in Kampala. These are issues well worth addressing. But really, to deal with the problem of nuclear weapons, the top authorities in countries that have them have to come to grips with it. Eventually that

is what is going to have to happen. And fortunately, in my opinion, in the last few years we have had people at the top in the United States who are trying to change the direction.

Jonathan Granoff: The gentleman from the Air Force raised a really important question. We are looking at this through the prism of the United States, but India and Pakistan have enough nuclear weapons to sufficiently modify the climate of the planet so that civilization as we know it could not continue. That's a scientific fact, and it's really quite harrowing. Today we are subject to a potential computer hacker, creating the appearance of an attack in that region that could cause a nuclear exchange. An appearance of an attack triggering a situation of use them or lose them. India and Pakistan only have 300 seconds in which to evaluate a perceived attack. Also, with respect to nuclear weapons there are many instances of computer errors taking place, and let us not forget human errors.

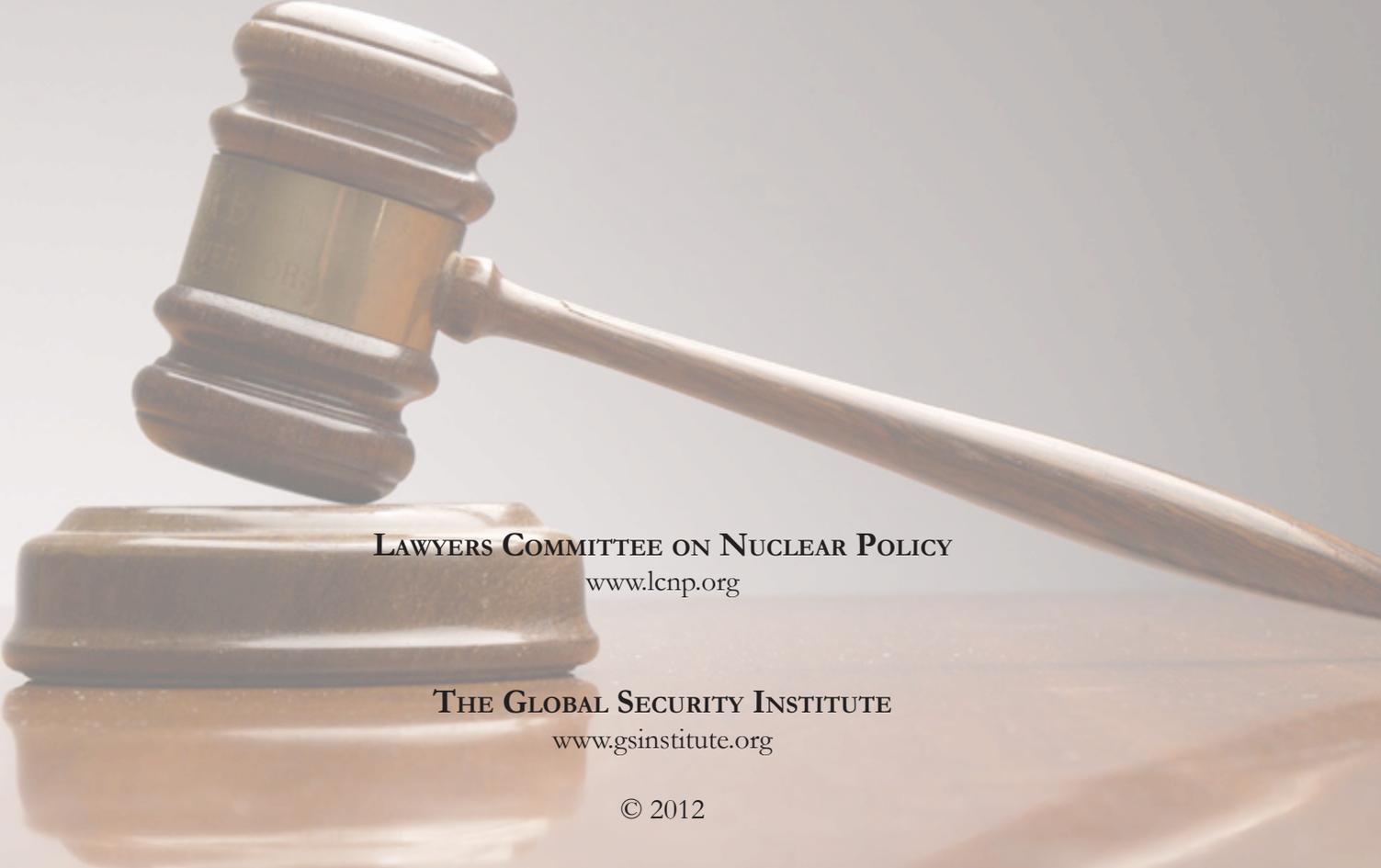
In 1995, there was a weather satellite shot off the coast of Norway, and the Russians were told about it but it did not go up the command and control. Boris Yeltsin was told that a missile was heading for Russia that could be a Trident launch. He had less than 10 minutes to decide if the information was accurate. He believed that Bill Clinton did not want to end the world but it looked like it could be the first volley with an electromagnetic pulse that would fry Russia's electrical systems. So we came very close.

Can India get rid of its weapons bilaterally with Pakistan? Absolutely not, because India did not get its weapons because of Pakistan, but rather because of China; and China because of Russia; and Russia because of the United States. And we were the first proliferator; we got them because of Adolf Hitler. The question is how to walk down the ladder, how to get off the dragon's back? I think – and I am addressing this to one of our great international legal scholars who is in the room, Hans Corell – that we need a legal norm that is of universal characteristic founded upon universally recognized moral principles. It comes down to what is the minimum standard of civilized behavior? I think that nuclear weapons are simply, as my political mentor Senator Cranston said, unworthy of civilization. They are below that standard.

Regarding the National Rifle Association analogy, if guns are outlawed, only outlaws will have guns, how do we make sure that sub-state actors and rogue states do not get these weapons? That is a practical operational issue and all the practical people who deal with this will say: We are a long way from getting down to the minimal numbers where that's a real consideration. And nuclear weapons leave a footprint and can be monitored. The nuclear technology is out there for people to build a weapon, but they need the fissile materials. So the question is how do we create an international cooperative system that sufficiently safeguards inventories and protects all the nuclear materials? Even without talking about getting rid of nuclear weapons, the President of the United States has made that an existing high priority.

I had the privilege of listening to a conversation between Professor Solis and former Secretary of Defense Robert McNamara in which McNamara asked questions about IHL as applied to nuclear weapons. McNamara began by stating that as Secretary of Defense, he was never briefed on the legal aspects of nuclear weapons.

Hans Corell: I was the UN Secretary-General's representative in Rome, and it was an extraordinary experience. You have to view the Rome Statute through the prism that they had five weeks to negotiate this extraordinarily complex treaty, and they managed. So this is very important in looking at the details, including the fact that aggression was not included in the Statute. But why I take the floor is that I must say, I have listened with great interest to this panel. It was an excellent presentation. [*Applause.*]



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