

Nuclear Weapons: Humanitarian Aspects and Legal Framework

Hiroshima Prefectural Government

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Remarks of John Burroughs

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I want to thank the Hiroshima Prefectural Government and Nobuyasu Abe for inviting me to speak at this important event. The efforts of the Hiroshima Prefectural Government referred to in the event flyer, including the Hiroshima for Global Peace Plan, are impressive. I remember well my visit to Hiroshima in August 2001. It strengthened my resolve to work for nuclear abolition and helped widen my perspective to take in the entire nuclear age, from the beginning, not only the US/Soviet-Russian balance of terror. Everyone who can should visit Hiroshima and Nagasaki.

The humanitarian initiative over the last few years has been of great importance, including the contributions of the Hibakusha, who have been working over decades. I know this from personal experience. As a young man – really as a child – I was appalled by nuclear weapons and felt something must be done. In the 1980s, this feeling was greatly strengthened by seeing Physicians for Social Responsibility slides on how a nuclear explosion would impact a city.

But I'm with a lawyers' organization, and I'll address legal aspects. Let's assume there was another use of nuclear weapons, one as contemplated in current plans of nuclear powers. Does anyone here doubt that if a court subsequently ruled on the event, it would find the use to be unlawful and criminal? Such a use would violate the general provisions of the Rome Statute of the International Criminal Court defining war crimes, and depending on the circumstances the provisions defining crimes against humanity and even genocide as well. I remind you that a court has already ruled on the bombings of Hiroshima and Nagasaki. In 1963, the Tokyo District Court held that those bombings violated existing rules of international law.

Generally, in the last five years, in particular due to the praiseworthy efforts of the International Committee of the Red Cross and the Red Cross/Red Crescent movement, it has become increasingly understood that use of nuclear weapons would violate fundamental international law principles of discrimination, proportionality, and precaution. I commend to you also the

Vancouver Declaration released in 2011 by IALANA and The Simons Foundation and signed by many prominent international lawyers.

In some ways, though, this is an unreal discussion. Why? Because nuclear weapons are off the scale of human experience, as the late physicist and weapons designer Ted Taylor used to say. They are simply well outside the scope of war, and therefore not only violate the rules limiting violence in war but absolutely negate those rules.

This helps to explain why nuclear weapons discourse has mostly revolved around deterrence, understood as the prevention of war among major powers that could involve resort to nuclear weapons; non-proliferation, understood to lower the risks of nuclear war, as the NPT preamble conveys; arms control, understood as promoting stability among nuclear powers; and disarmament, understood as preventing the use of nuclear weapons by eliminating them.

The last mechanism, disarmament, is highlighted by the Marshall Islands cases in the International Court of Justice. Those cases build on the 1996 opinion of the court, which effectively found that the best means to prevent the use of nuclear weapons is their global prohibition and elimination through a negotiated instrument or instruments, as is required by NPT Article VI and customary international law. The recent IALANA paper, “Nuclear Disarmament: The Road Ahead,” explains that the Model Nuclear Weapons Convention can serve – as the UN Secretary-General has said – as a starting point for such negotiations.

Meanwhile, though, reliance on nuclear weapons as supposed instruments of security continues. At the Vienna Conference on the Humanitarian Impacts of Nuclear Weapons in December 2014, the moral problems raised by such reliance were effectively highlighted. From a lawyer’s perspective as well, such reliance is highly problematic, even if they are never used. How can it be lawful to rely on weapons whose use would be unlawful and indeed criminal? One thinks in this connection of the Nuremberg provision providing for culpability for planning and preparation for war crimes, crimes against humanity, and crimes against peace. As applied, that provision was limited to planning and preparing for aggression that actually took place – and the Rome Statute has followed this approach with respect to the crime of aggression. Still how can we regard so-called deterrence as anything

other than planning and preparing for the commission of international crimes?

There is another World War II instrument that bears on the question of the lawfulness of reliance on nuclear weapons. I refer to the United Nations Charter. Sometimes, the most basic and simple truths are the ones that escape notice. Compare the security supposedly provided by reliance on nuclear weapons with the security system envisaged by the UN Charter. Consider again these Charter provisions:

Article 2(3): All Members shall settle their international disputes by peaceful means **in such a manner that international peace and security, and justice, are not endangered.**

Article 2(4): All Members shall refrain in their international relations from the **threat** or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

Deployment of nuclear forces, with the declared readiness to use them, as an international security mechanism for prevention of major war is far removed from the world envisaged by the UN Charter in which threat or use of force is the exception, not the rule. International security allegedly provided by the permanent, ongoing threat of nuclear force, is the inverse of that world; it turns the UN Charter on its head. In its 1996 nuclear weapons advisory opinion, the International Court of Justice analyzed the UN Charter in relation to the legal status of “threat.” However, the Court did not consider the incompatibility of nuclear deterrence with the overall scheme and purposes of the Charter. It is past time to take up this fundamental question. To envision the peace and security of a world without nuclear weapons, we need to return to the vision – and the obligations – enshrined in the UN Charter.