

International Humanitarian Law Versus Nuclear Weapons

By JOHN BURROUGHS

Since the dawn of the nuclear age, the detonation of nuclear weapons has been condemned as contrary to humanitarian values and law. While this view was subordinated during the Cold War, it has now surged to the forefront of the disarmament enterprise.

This article explains the current state of international humanitarian law (IHL) rules particularly relevant to nuclear weapons, with a focus on those cited by the Council of Delegates of the International Red Cross and Red Crescent Movement in its November 2011 resolution, "Working towards the elimination of nuclear weapons." In that resolution, the Council stated that it is "difficult to envisage how any use of nuclear weapons could be compatible with the rules of international humanitarian law, in particular the rules of distinction, precaution and proportionality." (Read the resolution at <http://www.icrc.org/eng/resources/documents/resolution/council-delegates-resolution-1-2011.htm>)

International Humanitarian Law

International Humanitarian Law rules are rooted in treaty, custom, and general principles of law. They are set forth in multilateral treaties with the wide participation of states and in military manuals on the law of armed conflict. The basic rules apply universally as a matter of customary international law and thus bind all states regardless of a state's adherence to a particular treaty. IHL, which applies equally to aggressor and defender states, aims to prevent cruelty and unnecessary suffering and destruction, and to preserve the possibility of establishing a just and lasting peace.

Distinction

Cited by the Red Cross/Red Crescent resolution, this principle requires that attacks distinguish between civilian personnel and objects, on the one hand, and combatants and other legitimate military targets, on the other. Of great importance in the nuclear weapons context is the associated prohibition of indiscriminate attacks.

An essential guide regarding this and other matters is a major International Committee of the Red Cross (ICRC) study first published in 2005, *Customary International Humanitarian Law*, principally authored by Jean-Marie Henckaerts and Louise Doswald-Beck. The study states that indiscriminate attacks include those "which employ a method or means of combat the effects of which cannot be limited as required by international humanitarian law" and consequently "are of a nature to strike military objectives and civilians or civilian objects without distinction." The study explains that prac-



U.S. Air Force Photo

A B-2 Spirit bomber is followed by two F-117 Nighthawks during a mission. The B-2 is an American multi-role bomber capable of delivering nuclear munitions.

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Council of Delegates, International Red Cross and Red Crescent Movement, 2011

“points to weapons whose effects are uncontrollable in time and space,” and quotes a U.S. Air Force publication giving biological weapons as an example of such weapons.

That compliance with the prohibition of indiscriminate attacks requires the controllability of effects is recognized in U.S. military manuals. Thus a 2007 Joint Chiefs of Staff publication states: “Attackers are required to only use those means and methods of attack that are discriminate in effect and can be *controlled* ...”¹

The inability to comply with the requirement of discrimination due to the uncontrollability of effects is the single most powerful argument for the unlawfulness of the use of nuclear weapons.

Any nuclear explosion has immense blast, heat, and immediate and long-term radiation effects. In urban areas, nuclear detonations create powerful firestorms. Nuclear explosions in numerous urban areas would generate soot and smoke that would circulate in the atmosphere on a scale causing global cooling and a subsequent decline in agricultural production. (See “Hope for Nuclear Abolition” by Kanter and Helfand beginning on page 1 of this issue.)

Proportionality

A second principle cited by the Red Cross/

Red Crescent resolution requires that the collateral damage to civilians, civilian objects, and the environment caused by an attack not be disproportionate to the expected military advantage. Because it involves a balancing of costs and benefits, the requirement may not be understood to rule out all possible uses of nuclear weapons. However, even if a proportionality calculus is believed to justify use of nuclear weapons, it remains unlawful under the prohibition of indiscriminate attacks.

Precaution

The third principle cited by the Red Cross/Red Crescent resolution requires that measures be taken in advance to ensure compliance with the principles of distinction and proportionality. One of several rules implementing this principle requires taking “all feasible precautions in the choice of means and methods of warfare.”

The implications of the principle of precaution for the policy of “nuclear deterrence” appear far-reaching. That policy involves in-depth planning and preparation for use of nuclear weapons in a broad range of scenarios. Decisions about the use of nuclear weapons probably would be made rapidly under conditions of very high stress, precluding in-depth

consideration of legal aspects. Further, for at least Russia and the United States, deterrence involves constant readiness to launch nuclear forces rapidly, responsively or preemptively, in circumstances of an actual or anticipated nuclear attack by the other side.

The requirement of precaution would therefore seem to require in-depth consideration in advance, for typical scenarios, of compliance with the requirements of distinction and proportionality. However, such consideration, if fairly carried out, would lead to the conclusion that use would be unlawful and should not be executed or threatened. That in turn implies the imperative of urgent efforts to end reliance on nuclear weapons.

Damage to the Environment

The principle of proportionality forbids damage to the environment that is excessive in relation to military advantage. Another customary IHL rule, not referred to by the Red Cross/Red Crescent resolution but cited in other recent statements,² prohibits the “use of methods or means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.” This prohibition is not subject to a test balancing collateral damage against military advantage. Moreover, violation of the prohibition does not depend on intent to cause damage or on the knowledge that it will do so, only on a hypothetical observer’s reasonable expectation of that outcome.

The criteria for prohibited damage — widespread, long-term and severe — set a high threshold. But if any means of warfare can meet the criteria, nuclear weapons can; it is clear that many if not all nuclear explosions would contravene the prohibition.

Reprisals

Not specifically referred to in the Red Cross/Red Crescent resolution is the question of reprisals. A reprisal during armed conflict is an otherwise unlawful action taken to induce the enemy to cease its unlawful actions. One element of nuclear deterrence is the threat of carrying out nuclear attacks in response to a prior nuclear attack. A widely ratified IHL treaty, the 1977 First Protocol to the Geneva Conventions, prohibits reprisals against civilian populations, civilian objects in general, installations containing dangerous forces, and the environment. However, it is not crystal clear that the Protocol I restrictions are universally binding law in part due to positions taken by the Western nuclear weapon states.

The ICRC study states that “there appears, at a minimum, to exist a trend in favor” of considering the prohibition on reprisals against civilian populations to be

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universally binding. The study notes decisions of the International Criminal Tribunal for the Former Yugoslavia recognizing such a prohibition, based largely on the imperatives of humanity and public conscience. In general, from IHL to human rights law, the principle of the immunity of civilians to attack has become more and more entrenched in the post-World War II period. The 2011 Vancouver Declaration, initiated by civil society groups and signed by numerous eminent international lawyers, states:

Use of nuclear weapons in response to a prior nuclear attack cannot be justified as a reprisal. The immunity of non-combatants to attack in all circumstances is codified in widely ratified Geneva treaty law and in the Rome Statute of the International Criminal Court, which provides inter alia that an attack directed against a civilian population is a crime against humanity.³

Conclusion

The case is overwhelming that the use of nuclear weapons contemplated in the plans and doctrines of states possessing nuclear arsenals would violate international humanitarian law. That is a powerful reason for continuing the practice of non-use of nuclear weapons that has existed since World War II. It further demonstrates the urgent need to ban any

use whatever of nuclear weapons, thus confirming the existing illegality of use; to ban their possession; and to provide for their verified and irreversible elimination. Banning and eliminating nuclear weapons would uphold the rule of law and advance the purposes of international humanitarian law of protecting life and making possible a civilized and enduring peace.

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Notes

This article originally appeared in longer form in Beatrice Fihn, ed., *Unspeakable Suffering – The Humanitarian Impact of Nuclear Weapons*, Reaching Critical Will, 2013. Full text including extensive endnotes online at www.reachingcriticalwill.org

1. Emphasis added.
2. See, for example, the October 2012 Joint Statement on the Humanitarian Dimension of Nuclear Disarmament made by 34 governments in the First Committee of the General Assembly.
3. Law's Imperative for the Urgent Achievement of a Nuclear-Weapon-Free World, February 11, 2011, online at www.lcnp.org. See John Burroughs, "The Vancouver Declaration and the Humanitarian Imperative for Nuclear Disarmament," Nuclear Abolition Forum, no. 1 (2011), online at www.abolitionforum.org



UN Photo/Paulo Filgueiras

U.N. Special Rapporteur Releases Interim Report on Drones

Ben Emmerson, U.N. Special Rapporteur on human rights and countering terrorism, released an interim report in October on drones strikes and targeted killings, with a focus on civilian casualties. "Put simply," he wrote, "there is an onus on any State using lethal force to account for civilian casualties." Emmerson's investigation, which includes drone strikes in Afghanistan, Pakistan, Yemen, Libya, Iraq, Somalia and Gaza, is ongoing, with a final report due in 2014. Among his conclusions were the following:

"If used in strict compliance with the principles of international humanitarian law, remotely piloted aircraft are capable of reducing the risk of civilian casualties in armed conflict

"[T]he Special Rapporteur considers that, in any case in which civilians have been, or appear to have been, killed, the State responsible is under an obligation to conduct a prompt, independent and impartial fact-finding inquiry and to provide a detailed public explanation. This obligation is triggered whenever there is a plausible indication from any source that civilian casualties may have been sustained, including where the facts are unclear or the information is partial or circumstantial. . . .

"In particular, the Special Rapporteur urges the United States to further clarify its position on the legal and factual issues raised herein; to declassify, to the maximum extent possible, information relevant to its lethal extraterritorial counter-terrorism operations; and to release its own data on the level of civilian casualties inflicted through the use of remotely piloted aircraft, together with information on the valuation methodology used."

READ THE INTERIM REPORT at http://www.un.org/en/ga/search/view_doc.asp?symbol=A%20/68/389. Christof Heyns, U.N. Special Rapporteur on extrajudicial, summary or arbitrary executions has also released a report on drones available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N13/473/63/PDF/N1347363.pdf?OpenElement>

Estimated Global Nuclear Inventories

Country	Deployed (Strategic/Non-Strategic)	Non-Deployed	Total
United States	1,950 / 200	2,650 ^b	7,700
Russia	1,800 / 0	≈2,700 ^c	8,500
United Kingdom	<160 / --	65	225
France	<300 / 50	--	298-300
China	--	240-300	300
India	--	80-100	80-100
Pakistan	--	90-110	90-110
Israel	--	80	80 (200) ^d
North Korea ^a	--	<10	<10

Total Nuclear Weapons in the World: 17,325

^aNorth Korea is not believed capable of fixing its warheads to delivery systems, though they are believed to be making progress toward that goal.

^bPlus 3,000 awaiting dismantlement

^cPlus 4,000 awaiting dismantlement

^dIsrael has never released any details of its nuclear program. U.S. intelligence believes Israel has an estimated 80 nuclear warheads. However, they are believed to possess sufficient fissile material to increase that to 200 should they desire.

Source: Center for Arms Control and Non-Proliferation. All figures should be considered estimates. More information at http://armscontrolcenter.org/issues/nuclearweapons/articles/fact_sheet_global_nuclear_weapons_inventories_in_2012/

FROM THE EDITOR

After seven years as editor of Disarmament Times, I am stepping down. It has been an incredible experience. I am continually impressed by the knowledge and dedication of those I have worked with, and even more, by their willingness to say yes. The scope of issues we have covered has been wide — from female peacekeepers to child soldiers, from landmines to weapons in space. The work can seem endless and progress slow, but there have been important, if imperfect, victories, including a cluster munitions ban and an arms trade treaty. There is increased recognition of the important role women play in international security, and renewed focus on the humanitarian effects of nuclear war. I would like to thank many for their contributions, but space is limited, so this will necessarily be a short list:

Thanks to Ray Acheson, John Burroughs, Randy Rydell, Daryl Kimball and Zia Mian for their expertise and many words contributed; to Bob Smylie, for invaluable years as a mentor and for his critical eye; to members of the NGOCDPS past and present, including Vernon Nichols, Marcella & Eldon Shields, Bernard Bellush, Ann Lakhdir, Guy Quinlan, Hiro Sakurai, and especially Beth Begley.

Disarmament Times will celebrate its 37th year in 2014. I wish all the best to DT's new leadership and to our readers as we move forward.
Melissa J. Gillis