

Student Legal Advocacy & Nuclear Disarmament: Reflections of One Law Student's Journey

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“Nuclear weapons are the apex of man’s genius at finding ways to destroy his fellow human beings.” Filipino Ambassador Libran Cabactulan ominously and eloquently spoke these words at the *Program on International Humanitarian Law and Nuclear Weapons*, a panel discussion during the Annual Meeting of the American Bar Association Section of International Law in April of 2012.¹ This was the first event of its kind and scope that dealt with the topic of nuclear weapons in relation to international humanitarian law. The panel was a prestigious event that I felt privileged to help facilitate. I assisted in my capacity as a Global Law Extern for two organizations that helped to present the panel: The Lawyers Committee on Nuclear Policy, and the Global Security Institute. At the time of the conference, I was just entering my term as ILSA Student President, and had been focusing on arms control and international humanitarian law in school. At high points such as this, one must reflect back on the past to determine how we have come this far. This reflection also helps to guide other students to pursue the legal career path of their choice, which, as ILSA Student President, is one of my foundational goals.

Before that journey of reflection can begin, though, perhaps it would be helpful to explain what exactly is so important about nuclear disarmament, what precisely international humanitarian law (IHL) is and to define the relationship between the two.

The Importance of Nuclear Disarmament

The legal issues surrounding nuclear weapons

disarmament and arms control have existed since they were first used against Japan in World War II. In fact, the very first Resolution ever passed by the United Nations General Assembly was on the “Establishment of A Commission to Deal with the Problems Raised by the Discovery of Atomic Energy.”²

Notwithstanding the persistence and importance of the issue, however, most people go their entire lives without having to worry about nuclear weapons adversely affecting them. Many law students go their entire educational and professional careers without considering the legalities of these terrible weapons. A majority of people on the planet have no idea how close they have often come to a nuclear catastrophe – whether by accident or intention. The importance of nuclear disarmament can be summed up by paraphrasing a quote attributed to former U.S. President Ronald Reagan, “what’s so great about a world that can be blown up in 30 seconds?”

International Humanitarian Law

International Humanitarian Law is “a robust body of conventional and customary international law governing the use and threat of use of” force.³ Of particular interest in terms of nuclear weapons is the fact that IHL establishes limits not just on the use of force, but also the threat of use of force. This means, as the International Court of Justice espoused in 1996 in the *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion, that “[i]f an envisaged use of weapons would not meet the requirements of humanitarian law, a threat to engage in such use would also be contrary to that

law.”⁴This premise, of course, follows closely with that quintessential component of the UN Charter, Article 2 §4, which is a prohibition of “the threat or use of force against the territorial integrity or political independence of any state”⁵

The Relationship Between Nuclear Weapons and IHL

A necessary question arises: what makes a use of nuclear weapons a violation of IHL? As the customary laws of war, IHL requires that an envisaged use of force comply with “the rules of distinction/discrimination, proportionality, and necessity, and the corollary requirement of controllability.”⁶The rules of IHL, particularly in regards to nuclear weapons, were very succinctly summarized in a recent Fordham International Law Journal article, titled, “Nuclear Weapons and Compliance with International Humanitarian Law and the Nuclear Non-Proliferation Treaty.” Authors Charles J. Moxley, John Burroughs and Jonathan Granoff explained:

The *rule of distinction/discrimination* prohibits the use of a weapon that cannot discriminate in its effects between military targets and noncombatant persons and objects

The *rule of proportionality* prohibits the use of a weapon whose potential collateral effects upon noncombatant persons or objects would likely be disproportionate to the value of the military advantage anticipated by the attack

The *rule of necessity* provides that a state may only use such a level of force as is necessary to achieve the military objective of the particular strike

The *corollary rule of controllability* provides that a state may not use a weapon if its effects cannot be controlled because, in such circumstances, it would be unable to believe that the particular use of the weapon would comply with the rules of distinction, proportionality, or necessity.⁷

One of the article’s main focus points was to illustrate that the United States different military entities all provide, in their manuals on the law of armed conflict, that the use of force is subject to limitation by IHL; however, in practice, the U.S.’ position seems to be that nuclear weapons are not necessarily subject to the same standards as typical weapons. In essence, as the article explains, “[t]he United States’ overriding position is that the lawfulness of the use of nuclear weapons cannot be determined categorically or in the abstract, but must be made on an ad hoc basis[;]”⁸ thus, allowing for reservations relating to nuclear deterrence policies and possibly other limited uses of nuclear weapons.

The International Court of Justice (ICJ) issued a partially-ambiguous advisory opinion that addressed 99 percent of the issues relating to nuclear weapons, but chose to abstain from one important exception. The ICJ opined that the threat or use of nuclear weapons was within the purview of, and “would generally be contrary to the rules of” IHL.⁹ However, the ICJ chose not to issue a ruling on whether the threat or use of nuclear weapons would be legal “in an extreme circumstance of self-defense, in which the very survival of a State would be at stake[;]” inadvertently allowing legal ‘wiggle room’ with respect to nuclear deterrence policies and possibly certain limited uses of nuclear weapons.¹⁰

When a student of international law considers the prohibition on the threat or use of force (e.g., UN Charter Art. 2(4) and the ICJ’s pronouncement that if a use of force were illegal, the threat of that force would also be illegal), an inherent inconsistency becomes clear.

The Danger of Continued Reliance on Nuclear Weapons in Relation to IHL

Article VI of the Nuclear Non-Proliferation Treaty (NPT) obligates the world’s nuclear weapons States to “pursue negotiations in good faith on effective measures relating to cessation of the

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Nuclear Disarmament

nuclear arms race at an early date and to nuclear disarmament and on a treaty on general and complete disarmament under strict and effective control.”¹¹ Over 40 years ago, the world’s nuclear weapons powers legally obligated themselves to nuclear disarmament – they have not completed this task. In their defense, they assuredly are acting in what they perceive as the best interest of [national security and international] peace and stability. However, not every nation, or groups of people feel the same way. Nations without nuclear weapons, having agreed under the NPT not to pursue nuclear weapons, have seen them used by states as diplomatic power pieces. These non-nuclear weapons nations have realized that “with tremendously destructive weapons comes power – power and influence in an Orwellian dystopia where those who flex their muscles enough for the cause of freedom can control the actions of the rest of the world.”¹² This inconsistency has led non-nuclear weapons states to desire, and obtain, nuclear weapons over the past 40 years (e.g. Pakistan, India, Israel, North Korea, and efforts currently being made by Iran). “[E]ventually, as long as some have nuclear weapons, others will want them. As long as they want them, at some point they will get them.”¹³

As a patriot, humanitarian, and a self-described ‘realistic idealist’, I recognize the current situation as (even though stable for the time being) unsustainable in time. In my personal opinion, since it is only a matter of time before less stable nations (or less rational groups of non-state actors) obtain nuclear weapons or technologies, the only way to prevent this ominous disaster is to restrict access. The most simple and effective method is one that is part of the most adhered to disarmament treaty in the world – the NPT – and the method is disarmament. If the world’s nuclear weapons states work together in verifiable ways to disarm, then those without weapons 1) would not be able to obtain them or the materials required to make them, and 2) would not see nations using these

weapons as diplomatic power pieces anymore, resulting in a presumed lessened desire for them. Further, a controlled and verifiable disarmament would allow security to be maintained until there is no longer a need for these types of weapons.

“Regulating the conduct of warfare is ironically essential to the preservation of a civilized world.”¹⁴ It is with this preservation in mind that I author this article.

Taking Action As A Law Student Advocate:

My Journey

As previously stated, most people (and lawyers) go their entire lives without ever having to worry about the havoc that could be unleashed by nuclear weapons. When I entered my first year of law school, I was no different. My career was planned out – first, I would work for the prosecutor’s office and then I would go into politics.

Once the world of international law was introduced to me, however, things began to change. As International Law Society President at Widener University School of Law in Delaware, I took an international law course with two adjunct Professors – James T. Ranney and Jonathan Granoff (both professors are experts in nuclear disarmament and arms control). Revealing that “[e]xperts suggest that a regional nuclear exchange – for example, between India and Pakistan – would have a devastating impact on the planet’s climate, causing a global famine that could kill one billion people[;]” my professors inspired me to not just learn, but to advocate for the cause of humanity, as well. The inspiration provided by my professors was also accompanied by opportunities in the field of international humanitarian law and nuclear disarmament. When opportunities arose in a field I was quickly becoming interested in, I accepted the challenges the opportunities brought.

Immediately after ILW 2011, I was in a taxicab on the way to New York’s Penn Station when I received a phone call from Professor Granoff. Professor Granoff gave me an opportunity that has

altered my legal educational path ever since; he said, “Are you in New York still? I was able to get you into a high-level meeting at the UN on Monday. Do you have a suit and can you find a place to stay until Monday?” Still wearing my suit, I was unsure where I would be spending the next two nights, but I knew this was an opportunity that I should not miss. Therefore, I made it work. UN Secretary General Ban Ki-moon gave the keynote address, followed by a discussion with ambassadors from around the world. It was at this meeting that I met Dr. John Burroughs, several Ambassadors, and a few others who have helped to mentor me in the beginnings of my career. After this meeting, I found that opportunities continued to make themselves available; and I continued to be allow my experiences to guide me in my journey.

When I returned from New York City, I led a small group of students in organizing an intimate discussion on nuclear non-proliferation with former U.S. Plenipotentiary Ambassador, Thomas Graham, Jr.¹⁵ Partly in recognition of the event, I was then given the honor of being the Inaugural Recipient of the Annual Craig C. Eisendrath Award for Youth Advocacy in Nuclear Disarmament, presented by the Project for Nuclear Awareness (PNA). Craig Eisendrath is a former U.S. Foreign Service Officer who has dedicated his life’s work to the elimination of nuclear weapons. I was later asked to serve on PNA’s Future Decisions Committee, an executive Board-level strategic steering committee, where a small group of us developed a strategic plan to assist the PNA Board of Directors in their work.

During this time, I began working with both the Lawyers Committee on Nuclear Policy (LCNP) and the Global Security Institute (GSI) as a Global Law Extern. They are both civil society non-governmental organizations with the purpose of eliminating the world of nuclear weapons through legal advocacy and rule-of-law initiatives. Working with LCNP and GSI, I was able to gain invaluable researching and writing experience. In addition to briefings on certain legal issues, I also wrote a re-

search paper assessing the Non-Treaty Methods Available for the U.S. President to Lead a Continuing Effort for Further Genuine and Verifiable Nuclear Disarmament. This paper will now be used in, among other things, the legal advocacy work of the LCNP and GSI.

The purpose of this reflection was not to bask in contrived glory, but to illustrate to law students all over the world that there are opportunities available to them while still in school to pursue different areas of law. They are available and they are possible to achieve. The key is to recognize opportunities and pursue them earnestly. Not only is the end-result fulfilling, but also in many cases, the hard work can actually make a difference.

A Call to Arms

Nuclear weapons are still very much a threat today. With the end of the Cold War, the risk of a global nuclear armageddon between the U.S. and Russia is very small; and yet, the two nations continue to target each other with nuclear weapons, all while smaller nations and terroristic non-state actors are attempting to obtain the technology and the weapons themselves.

The renewed threat of horizontal nuclear proliferation (to other nations and groups) has revitalized the need for legal advocacy organizations to incite a peaceful race to disarmament. One of the ways this is currently being done is through the application of International Humanitarian Law to nuclear weapons. The *Program on IHL and Nuclear Weapons*, presented by GSI and LCNP in April of 2012 was a step along this path. "Law exists to either prevent conduct or control conduct. These characteristics permeate the law of war, as exemplified by its two prongs: *Jus ad Bellum* serves to regulate the conduct of going to war, while *Jus in Bello* serves to regulate or control conduct within war."¹⁶ An interesting revelation in the application of IHL to nuclear weapons was made at the meeting by Professor Gary Solis, a Professor of Law at Georgetown Law and the George Washington

University School of Law. Professor Solis previously had led the law of war program at the U.S. Military Academy at West Point. He explained that the U.S. military "takes the law of armed conflict quite seriously ... [and] have dedicated courses on the subject."¹⁷ However, Professor Solis pointed out that

[t]here 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.¹⁸

In order to, as the Preamble to the United Nations Charter states, "save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind," we the peoples of the world must work ardently and be tireless champions of the rule-of-law. We must insist that the law is upheld, even in light of violations and uncertainty. "History shows that in the vast majority of instances, the law of war works. Despite the fact that the rules are often violated or ignored, it is clear that mankind is better off with than without them."¹⁹ ■

Endnotes for Nuclear Disarmament

¹ *Program on International Humanitarian Law and Nuclear Weapons*, Annual Meeting of A.B.A. Int'l Law Section, April 20, 2012, (Summary report, transcript, audio available at <http://lcn.org/events/ABA-2012.htm> and <http://lcn.org/pubs/ABA-2012.pdf>).

² U.N. General Assembly, Res. 1(1) [Establishment of A Commission to Deal with the Problem Raised by the Discovery of Atomic Energy], 24 January 1946, available at <http://www.un.org/documents/ga/res/1/ares1.htm>.

³ Charles J. Moxley, Jr., John Burroughs, Jonathan Granoff, *Nuclear Weapons and Compliance with International Humanitarian Law and the Nuclear Non-Proliferation Treaty*, 34 *FDMLJ* 595, 606 (2011) [Hereinafter, "Moxley, Burroughs, Granoff"].

⁴ Moxley, Burroughs, Granoff, *supra* note 3, at 638 (citing, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, ¶178 (July 8).)

⁵ U.N. Charter, art. 4§2, opened for signature June 26, 1945, 1 U.N.T.S. XVI, available at <http://treaties.un.org/doc/Publication/CTC/uncharter.pdf>

⁶ Moxley, Burroughs, Granoff, *supra* note 3, at 610 (*citing*, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, Written Statement of the United States, 2, 7-47, rest of citation omitted.).

⁷ Moxley, Burroughs, Granoff, *supra* note 3, at 612-13. Charles J. Moxley is also an Adjunct Professor at Fordham University School of Law. Dr. John Burroughs is also an Adjunct Professor at Rutgers Law School, Newark; as well as, the Executive Director of the Lawyers Committee on Nuclear Policy. Jonathan Granoff is also an Adjunct Professor at Widener University School of Law, Delaware.

⁸ Moxley, Burroughs, Granoff, *supra* note 3, at 667.

⁹ Moxley, Burroughs, Granoff, *supra* note 3, at 639 (*citing*, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶105(2)(D) (July 8).).

¹⁰ Moxley, Burroughs, Granoff, *supra* note 3, at 639 (*citing*, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶105(2)(E) (July 8).).

¹¹ Treaty on the Non-Proliferation of Nuclear Weapons, art. VI, opened for signature July 1, 1968, 21 U.S.T. 483.

¹² Kevin Krauss, *Razing the Nuclear Mending Wall: An Analysis of Possible Non-Treaty Methods Available for The President Of The United States to Effectively Lead A Continuing International Effort For Further Genuine And Verifiable Nuclear Disarmament*, (Unpublished), at 19 (2012).

¹³ Jonathan Granoff, *Problema: The Table of Free Voices*, Sept. 10, 2006, (video documentary), available at <http://www.droppingknowledge.org/bin/home/home.page>.

¹⁴ Moxley, Burroughs, Granoff, *supra* note 3, at 635 (*citing*, INT'L & OPERATIONAL LAW DEP'T, U.S. ARMY JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., LAW OF WAR DESKBOOK, at 6 (2010).).

¹⁵ A short write-up and video of the event is available here: <http://law.widener.edu/NewsandEvents/Articles/2011/de120211ambassadorgraham.aspx>.

¹⁶ Moxley, Burroughs, Granoff, *supra* note 3, at 635 (*citing*, INT'L & OPERATIONAL LAW DEP'T, U.S. ARMY JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., LAW OF WAR DESKBOOK, at 6 (2010).).

¹⁷ *Supra* note 1.

¹⁸ *Supra* note 1.

¹⁹ Moxley, Burroughs, Granoff, *supra* note 3, at 635 (*citing*, INT'L & OPERATIONAL LAW DEP'T, U.S. ARMY JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., LAW OF WAR DESKBOOK, at 6 (2010).) ■

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