

Beyond International Humanitarian Law

April 22, 2013

NPT PrepCom side-event

Remarks of John Burroughs

International humanitarian law (IHL) consists in part of rules governing the conduct of warfare, the law of armed conflict. Recent years have seen major contributions from the International Committee of the Red Cross (ICRC), the guardian of IHL. A major ICRC scholarly study mapped out the rules of IHL, based on multilateral treaties, military manuals on the law of armed conflict, and other sources. A 2011 resolution of the Red Cross/Red Crescent movement declared that it is difficult to envisage how use of nuclear weapons could comply with basic rules of **distinction, proportionality, and precaution**.

Distinction requires discrimination between military targets and civilians and civilian infrastructure.

Proportionality in attack requires that any collateral effects not be excessive in relation to the military advantage.

I have explained these rules in a [chapter](#) in the Reaching Critical Will book [Unspeakable Suffering](#). I'll return to precaution later.

An unavoidable truth is in the process of being recognized, that typical uses of nuclear weapons would violate IHL. This proposition can almost seem absurd, in the sense that war involving an exchange of nuclear weapons goes far beyond the scope of what we normally think of as war, or war crimes.

In some ways, the reality is better captured by reference to crimes of large magnitude that can occur in both peace and wartime. The Rome Statute of the International Criminal Court defines **crimes against humanity** as *"any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination ..."* The use of nuclear weapons against cities would seem to qualify.

Another crime spanning peace and war now emerging within international law is **ecocide**. The 1976 ENMOD Convention prohibits military or any hostile use of environmental modification techniques, and is not restricted to wartime. The 1977 Protocol I to the Geneva Conventions prohibits the use of *"methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment."* Because it does not require intent, this is a wider constraint than the ENMOD Convention. The ICRC study found that the Protocol I rule has now become customary, and it was cited by the 35-nation Joint Statement in the 2012 General Assembly on the Humanitarian Dimension of Nuclear Disarmament.

Polly Higgins has proposed a broader definition of ecocide that would apply in both peace and war: *"Ecocide is the extensive damage to, destruction of or loss of ecosystem(s) of a given territory, whether by human agency or by other causes, to such an extent that peaceful enjoyment by the inhabitants of that territory has been or will be severely diminished."* Several national legal systems contain ecocide provisions.

Most if not all uses of nuclear weapons would cause widespread, long-term and severe damage to the environment, that is, ecocide. 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.

If typical uses of nuclear weapons violate IHL and some constitute crimes against humanity and ecocide, **what is the legal status of maintaining on an ongoing, apparently permanent basis, capabilities and doctrines contemplating use of nuclear weapons in certain circumstances?**

Let's first consider a provision of international law that has not received much attention with respect to this question, **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. Drawing on Protocol I, the ICRC study states that "[a]ll feasible precautions must be taken to avoid, and in any event to minimise, incidental loss of civilian life, injury to civilians and damage to civilian objects." 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 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.

Now let's go back to the beginning of the nuclear age. There is language from a legal instrument predating the UN Charter that is remarkably evocative and appropriate to the nuclear situation. That is the Charter of the International Military Tribunal. It prohibits as a crime against peace **planning, preparing**, initiating or waging a war of aggression. It also contains language arguably making criminal a common plan to commit war crimes and crimes against humanity as well as crimes against peace. As applied by the International Military Tribunal, also known as the Nuremberg Tribunal, however, the planning and preparation element was limited to the crime of aggression, and only where aggression had in fact occurred.

The crime of aggression has now been defined in an amendment to the Rome Statute of the International Criminal Court. It will be applied once 30 states have ratified the amendment and the amendment has been "activated", no earlier than January 2017. Under the definition, the crime of aggression is:

the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

Act of aggression means, in general:

the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.

The Elements of Crimes, also adopted by the Assembly of States Parties, provides that the act of aggression must have occurred for there to be a crime. Thus simply planning and preparing, without initiating and executing, an act of aggression, is not a crime.

For two reasons, then, the planning and preparing element does not easily apply to 'nuclear deterrence'. It concerns aggression, whereas states maintain that the policy of 'nuclear deterrence' is for purposes of individual or collective self-defense. And planning and preparing is not a crime absent the commission of the act of aggression.

Nonetheless, this element must not be forgotten; it describes rather well what 'nuclear deterrence' is about: planning and preparing for total war. And aggression, in the nuclear context, perhaps should be interpreted more broadly. I'll come back to this point.

Threat: The subject of threat is not raised in the Red Cross/Red Crescent resolution or the Joint Statement, but there are rules of IHL concerning threat. The ICRC study identifies as customary this rule set forth in Protocol I: *"Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited."*

Beyond such specific prohibitions, the ICRC study notes that the "prohibition on threatening to carry out a prohibited act is generally recognised in international law." The ICJ applied this principle in stating: "If 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."

The ICJ also embarked on an analysis of threat under the UN Charter. Article 2(4) of the Charter provides: "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."

In the course of its analysis, the Court stated: "The notions of 'threat' and 'use' of force under Article 2, paragraph 4, of the Charter stand together in the sense that if the use of force itself in a given case is illegal -- for whatever reason -- the threat to use such force will likewise be illegal."

Thus, as the Court said, compelling a state to take a certain political or economic path, or to give up territory, under threat of attack, including nuclear attack, would be unlawful.

The Court also said that a threat of force in self-defense, including nuclear force, is unlawful when execution of the threat would be unlawful because violative of the basic conditions of necessity and proportionality. This is a sense of proportionality relating, not to IHL per se, but to the lawfulness of force generally, under *jus ad bello*.

Any time nuclear weapons were used first would likely be disproportionate. This is especially so when the risk of nuclear escalation is taken into account. Indeed, even if nuclear weapons were used first in a

situation of self-defense, the disproportionality would seem almost to be an act of aggression – though the ICJ did not say this.

The ICJ thus clarified the law regarding threats of unlawful attack. As was the case with use, however, it did not delve into various scenarios, declaring only that threat or use of nuclear weapons are “generally” illegal. The Court also declined to pass judgment on “nuclear deterrence.”

As opposed to the question of use of nuclear weapons, before and after the ICJ opinion the subject of the threatened use has received only limited attention. However, inspired by the 2010 NPT Review Conference provision regarding catastrophic humanitarian consequences and compliance with IHL, and seeking to build upon the ICJ opinion and advance understanding of the law, the Vancouver Declaration tackles these subjects head-on, stating:

Threat as well as use of nuclear weapons is barred by law. As the ICJ made clear, it is unlawful to threaten an attack if the attack itself would be unlawful. This rule renders unlawful two types of threat: specific signals of intent to use nuclear weapons if demands, whether lawful or not, are not met; and general policies (‘deterrence’) declaring a readiness to resort to nuclear weapons when vital interests are at stake. The two types come together in standing doctrines and capabilities of nuclear attack, preemptive or responsive, in rapid reaction to an imminent or actual nuclear attack.

This understanding enables us to see a larger truth, that ‘nuclear deterrence’ is incompatible with the basic scheme of the UN Charter. Compare the security supposedly provided by reliance on nuclear weapons with the security system envisaged by the United Nations 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.

The only exceptions to the prohibition on the threat or use of force are when the UN Security Council directs or authorizes force to maintain international peace and security, under Chapter VII, and the exercise of self-defense against an armed attack under Article 51.

Deployment of nuclear forces 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.

To envision the peace and security of a world without nuclear weapons, we need only return to the vision – and the obligations – enshrined in the UN Charter.

The unlawfulness of threat and use of nuclear weapons, and their incompatibility with the UN Charter vision and scheme, reinforces the norm of non-possession. The NPT prohibits acquisition of nuclear weapons by the vast majority of states, and there is a universal obligation, declared by the ICJ and based

in the NPT and other law, of achieving their elimination through good-faith negotiation. It cannot be lawful to continue indefinitely to possess weapons which are unlawful to use or threaten to use, are already banned for most states, and are subject to an obligation of elimination.

In the end the problems of deployment and possession of nuclear weapons can only be overcome with their elimination, probably pursuant to a global agreement. But I think it is worthwhile to go beyond the examination of the incompatibility of use of nuclear weapons with IHL, crimes against humanity, and ecocide, to think hard about the legal, moral, and political status of their threat, deployment, and possession. A deeper understanding of the illegitimacy of deployment and possession, if perhaps not yet their unlawfulness, can contribute to maintaining the record of non-use since World War II and to the process of abolition.