

## **Humanitarian Law, Human Rights, and Nuclear Weapons: Social Movements and the Path of Legal Development**

*Text of a presentation by Andrew Lichterman, Western States Legal Foundation, delivered at an NGO side event on Human Rights, Democracy, and Nuclear Weapons Sponsored by Lawyers Committee on Nuclear Policy during the 2019 PrepCom for the 2020 Nuclear Nonproliferation Treaty Review Conference, New York, May 1, 2019.*

I am a generalist peace activist and lawyer, not an international law expert. So I am the token member of the user community for international law expertise on this panel. I will be offering some speculative thoughts about what kinds of international law I think will be useful to peace movements going forward, and about where that law might come from.

My views rest on some assumptions about the current moment. If there was a window for nuclear disarmament created by the end of the Cold War, it now is definitively over. That period, with its relative absence of confrontation among the leading nuclear-armed countries, perhaps offered some hope that advocacy focused solely on nuclear disarmament might succeed. Now, with global conditions increasingly resembling those that have brought great power wars in the past, I believe that meaningful progress towards disarmament will require social movements broad and deep enough to address the causes of high-tech militarism and war.

I also believe that movements of this kind will be necessary to stave off wars that could be catastrophic in a nuclear-armed world. These movements will need to bring together work for peace and disarmament with the disparate strands of work against environmental breakdown, polarization of wealth and economic injustice, erosion of democracy, and the targeting of migrants, national minorities, and other vulnerable people. The connections between these issues will have to be made at the level of their common causes in a global economy whose central dynamic for centuries has been endless material growth, driven by ruthless competition among authoritarian organizations of ever-increasing size and power.

I am old enough now to have lived through the latter part of one long cycle of high political mobilization and large, sustained social movements, followed by three decades of low political mobilization in which significant movements were few, at least in the country I live in.

Doing social change work is quite different in those two kinds of moments. Periods of low political mobilization are characterized by single-issue, professionalized, interest-group advocacy-style politics. Conventional professionals focus on effects rather than causes and offer technical, legal, and short-term political fixes for the problems that the dominant order of things systematically generates. In contrast, sustained, broad-based social movements can change not only the boundaries of the politically possible but the terrain of legal argument and interpretation.

Social movements are one way complex societies learn. They are the settings where new forms of social relations and new visions of justice are experimented with and developed. They are where concepts like “human rights” have been first imagined, and then incarnated through often risky confrontations with state power.<sup>1</sup>

I believe that we are at the beginning of another wave of movements now. And given the gravity of the overlapping crises we face, it likely is best that we act as if we are.

In regard to international law, we must try to think of the kind of role it might play in a time of unresponsive, authoritarian governments that spark widespread resistance. It is worth noting that perhaps the most acute proliferation danger we face today is the proliferation of authoritarian nationalist governments in nuclear-armed states.

In trying to describe our current moment, a number of commentators have turned to Antonio Gramsci's concept of an interregnum. He used the term to characterize a period in which the old order is dying, but a new one cannot yet be born. In such moments, Gramsci observed, "a great variety of morbid symptoms will appear." We are, I think, in another such moment today.

One of the reasons that such transitions are so difficult is that so much power has concentrated at the top of societies that ruling elites have been able to eliminate many of the mechanisms that might rein in their power—and that might also provide the means for an orderly and non-violent transition to something else.

A characteristic of such moments is a general sense of rapidly eroding norms, and of lawlessness emanating from the highest levels of society. I believe that today both can be felt within many countries—and certainly is here in the United States. But it is also apparent in the strains on the fabric of the post-World War II international legal order, its institutions increasingly deadlocked and its central norms, particularly regarding the use of force, ignored by the most powerful states.

So where does this leave us, in terms of where our focus might be in peace and disarmament work in regard to international law?

The states, the actually existing governments, are not going to save us. We must save ourselves. We can only do so by building movements strong enough to take power back from the small fractions of global society that now wields it, and that threatens to annihilate us with their endless quest for material wealth and their factional disputes.

In 1985, Juergen Habermas writing about the great wave of disarmament movements of that time, observed that they opposed not just nuclear weapons but the entire way of life that produced them. And he argued that there are circumstances in which resistance to the state's law may be the only way that the law can continue to develop. According to Habermas,

"That which is *prima facie* disobedience may soon prove to be the pace-setter for long overdue corrections and innovations because law and policy depending on principles are in a constant process of adaptation and revision. In these cases, civil violations or rules are morally justified experiments without which a vital republic can retain neither its capacity for innovation nor its citizens' belief in its legitimacy."<sup>ii</sup>

Generally, I think that until large movements emerge strong enough to challenge the dynamics driving high-tech militarism and conflicts among the most powerful states, we can expect few positive developments in state forums.

In the realm of the laws by which states choose to limit their ways and means of war-making—arms control treaties and humanitarian law—the role of law will mainly be defensive, aimed at containing an accelerating arms race. There will be little opportunity for significant norm development. In the realm of human rights, however, there is perhaps more hope. Such development could take place first within movements, as part of broader processes of elaborating a vision for a more humane future.

Unless and until there are movements powerful enough to address the forces driving high-tech militarism in general, I think campaigning for disarmament treaties, or for that matter with any kind of single-issue campaigning for elimination of nuclear weapons in most of the nuclear-armed countries will be of limited use.

The Ban Treaty [the Treaty on the Prohibition of Nuclear Weapons] might play a useful role in providing a focus for debate about nuclear weapons issues in some of the nuclear umbrella states where there already is controversy about nuclear weapons in the mainstream. It also provides a way for other nuclear weapons free states to put some pressure on the nuclear-armed countries.

But it is far more difficult to make significant disarmament progress in countries where nuclear weapons play a systemic role in military policies, national security ideologies, and the increasingly insular top tier of national economies. We have not assembled nearly enough social power to get nuclear disarmament on the agenda of governments in those countries in any serious way.

To the extent that it is worth spending time in single-issue work on nuclear weapons here in the United States, I think the near-term focus should be on supporting what is left of the existing arms control framework and pushing for arms control negotiations. These are areas where there is some support within the national security elites and some hope for success in the absence of significant movements pushing for more. Arms control can slow some of the most dangerous forms of arms racing. And even where prospects for tangible outcomes are dim, sustained negotiations provide channels of communication and a measure of mutual understanding that may prove invaluable in a crisis.

The most fruitful context for further normative development pointing towards the outlawing of nuclear weapons is not, I think, in inter-state forums. Rather, it will be *within* movements broad and deep enough to address the causes of international conflict and war. Until further on, when ordinary people in many places have gathered enough social power to build some measure of democracy, enough to hold the powerful and unaccountable few to account, there is little value on core issues of state power in trying to convince governments that one or another international law rule is authoritative.

Within the movements, the discussion should not center on what the law is. Rather, it should be about what the law should be, what is consistent with the world we must bring into being if we are to have a fair, humane, democratic, and sustainable future, and with a democratic and nonviolent path for getting there.

A legal discourse intended to play a positive role in movements should aim to play a role in their self-formative process, to be part of their story, their vision, their sense of justice. All of this requires lawyers and legal workers who are willing to find ways to situate themselves within the emerging movements, and to make themselves accountable to them.

In regard to the body of law most useful for this kind of normative development within our movements, it seems to me that human rights law has more promise going forward than humanitarian law.

The Treaty on the Prohibition on Nuclear Weapons represents something of a transitional and forward-looking effort in this regard, still rooted in humanitarian law but containing elements of a broader human rights perspective. Humanitarian law still ultimately is state-centered law. It concerns what states can expect and demand from each other. Humanitarian law provides the rules by which states regulate their warring. It is compatible with war, and to some degree legitimizes it. As the International Committee of the Red Cross has observed, “These rules strike a careful balance between humanitarian concerns and the military requirements of States.”<sup>iii</sup>

We are faced today with potentially civilization-ending ecological crises. We can no longer afford diversion of resources for war, and war itself could end civilization in a day. The laws of war have little capacity to inform the broad normative vision we need in this moment. Human rights law is, or can be, a people-centered law. It concerns what all human beings can expect and demand from states.

There is a nascent literature developing of a jurisprudence that can recognize more “bottom up” sources of law, with legal concepts that eventually become law having their origins in social movements, particularly in the development, historically and prospectively, of human rights.<sup>iv</sup> And human rights law, with its capacity to elaborate the protection of human life, dignity, freedom, and equality in a wide range of social settings, provides, I think, more fertile ground for the development of the normative vision that inclusive, multi-issue movements will need going forward. It is within such movements, perhaps, that that concept of human rights can be reclaimed and redeemed from being too often the stalking horse for geopolitical interventions of the Western countries. And it is also perhaps within emerging movements that a new synthesis might be reached of civil and political rights and economic, cultural, and social rights, a split in thought and practice with roots deep in the Cold War that persists to this day.<sup>v</sup>

To credibly advance such a vision, movements would have to be democratic, nonviolent, and to the maximum extent possible international. As Richard Falk put it in a recent interview,

“.....[I]t is important not to overlook the central relevance of international law and human rights to civil society movements for peace, justice, and ecological sustainability. These

normative sources of authority give peoples a legitimated discourse by which to oppose oppressive tendencies of the state or international institutions, and to project images of alternative futures that are more benevolent from the perspective of promoting a more satisfying shared destiny for the peoples of the world, with a special emphasis on protecting those who are most vulnerable.”<sup>vi</sup>

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## Notes

<sup>i</sup> see Jürgen Habermas, “Civil Disobedience: Litmus Test for the Democratic Constitutional State,” *Berkeley Journal of Sociology* Vol. 30 (1985), pp. 95-116, 104-105, discussed *infra*.

<sup>ii</sup> Jürgen Habermas, “Civil Disobedience: Litmus Test for the Democratic Constitutional State,” *Berkeley Journal of Sociology* Vol. 30 (1985), pp. 95-116, 104-105.

<sup>iii</sup> International Committee of the Red Cross, Advisory Service On International Humanitarian Law, “What is International Humanitarian Law?” 2004.

<sup>iv</sup> See, e.g., Elizabeth A. Wilson, *People Power Movements and International Human Rights: Creating a Legal Framework* (Philadelphia: International Center on Nonviolent Conflict, 2017); Balakrishnan Rajagopal, “International Law and Social Movements: Challenges of Theorizing Resistance,” 41 *Colum. J. Transnat’l L.* 397.

<sup>v</sup> Regarding these two points:

The Marxist political program has been left behind but the values advanced by the tradition—social and economic welfare, the communal good—have been integrated into the human rights movement with the adoption of the ICESCR, especially after an Optional Protocol came into force in 2013. Without the principle of nonexploitation, the human rights project maps too neatly onto political liberalism and corporate capitalism, exposing the project to the criticism of neoimperialism or neocolonialism. However, the most radical vision of the human rights project, the UDHR, conceived of human rights as an indivisible and interdependent unity of civil and political rights and social and economic rights. The general principle of nonexploitation encompasses most of the social and economic rights outlined in the ICESCR, including the right to work (Art. 6); the right to “just and favorable conditions of work” (Art. 7), including fair wages, safe and healthy working conditions, rest and leisure; the right to form and join trade unions (Art. 8); the right to social security and social insurance (Art. 9); special protections for childbirth article 10; “the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions” (Art. 11); the right to the “enjoyment of the highest attainable standard of physical and mental health” (Art. 12); the right to education (Art. 13); the right to share in cultural life and scientific progress, including to benefit from any intellectual property (Art. 15). Nonexploitation includes structural exploitation (e.g., an unfair tax code) and exploitation by businesses or other private actors. Social and economic rights are here expressed through the idea of not exploiting in order to highlight human responsibility for human suffering. Elizabeth A. Wilson, *People Power Movements and International Human Rights: Creating a Legal Framework* (Philadelphia: International Center on Nonviolent Conflict, 2017), 55-56

Nonviolence is also a core principle because the use of force in the name of human rights does not respect the right to life. Not all nonviolent resistance practice is a human rights practice but there is compelling argument that all human rights practice must be nonviolent. It is important that the means used to realize rights be consistent with the overall spirit and end goals of the human rights project. Although not all violence is categorically rejected in international law—the UN Charter justifies armed defense in case of armed aggression while the “just war” doctrine sees attaining peace as a proper end goal of war — from a human rights perspective. However, from a human rights perspective, resistance characterized by a high degree of nonviolent discipline is the appropriate modality for realizing human rights because it is less likely to set off a costly cycle of violence in the short and long term and less likely than its violent counterpart to increase the level of repression, discrimination and exploitation. Elizabeth A.

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Wilson, *People Power Movements and International Human Rights: Creating a Legal Framework* (Philadelphia: International Center on Nonviolent Conflict, 2017), 57

<sup>vi</sup>C. J. Polychroniou, “Human Rights, State Sovereignty, and International Law: An Interview With Richard Falk,” Global Policy blog, September 11, 2018.