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IT IS 6 MINUTES TO MIDNIGHT



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International humanitarian law and nuclear weapons: Irreconcilable differences

Dean Granoff and Jonathan Granoff

Abstract

In 1996, the International Court of Justice issued an opinion that the use of nuclear weapons is “scarcely reconcilable” with international humanitarian law and concluded that nations have an obligation to pursue good-faith negotiations leading to disarmament. The 2010 Nuclear Non-Proliferation Treaty Review Conference reaffirmed the need for all states to comply with international humanitarian law, which governs the use of nuclear as well as conventional weapons. When the rules of war are applied to nuclear weapons, it becomes clear that these weapons cannot comply with international law. The effects of nuclear weapons are inherently uncontrollable and do not meet international criteria for discrimination between military and civilian targets, for proportionality, and for necessity. Arguments made by the United States as to why some uses of nuclear weapons could be lawful do not stand up to scrutiny. Nuclear weapon states should make immediate changes to any missions, deployments, and targeting policies and practices that facilitate the use of nuclear weapons. Not only does international law preclude the use of nuclear weapons, but it also precludes *threats* to use nuclear weapons.

Keywords

disarmament, International Court of Justice, international humanitarian law, law of armed conflict, law of war, military, Nuclear Non-Proliferation Treaty, nuclear weapons

There are more than 22,000 nuclear weapons in existence today, and their destructive capacity is of a magnitude that dwarfs imagination. Most deployed nuclear weapons would detonate with a force more than 10 times that of the bomb dropped on Hiroshima, and some would be hundreds of times more destructive. Experts agree that even a limited exchange of, say, 100 nuclear weapons, a fraction of the world's stockpile, could devastate the

global climate and trigger widespread famine, resulting in a cascade of horrific consequences.

International law is central to efforts to effectively control, constrain, and eliminate nuclear weapons. The final statement of the 2010 Nuclear Non-Proliferation Treaty Review Conference highlighted the importance of the legal obligations of parties by stating that the conference “expresses its deep concern at the catastrophic

consequences of any use of nuclear weapons and reaffirms the need for all States at all times to comply with applicable international law, including international humanitarian law” (2010 Review Conference: 19). This explicit recognition heightened the significance of a body of law that actively guides the world’s militaries in all areas of conventional weapons use¹ and is referred to as the law of armed conflict, the law of war, *jus in bello*, or international humanitarian law—terms that are generally synonymous. This body of law defines the legal boundaries of the uses of weapons and is designed to protect innocent parties and curtail unnecessary suffering.

Just prior to the 2010 Review Conference, the International Committee of the Red Cross declared the essential incompatibility of nuclear weapons with humanitarian law and values, and drew the logical conclusion that “preventing the use of nuclear weapons requires fulfillment of existing obligations to pursue negotiations aimed at prohibiting and completely eliminating such weapons through a legally binding international treaty” (Kellenberger, 2010). This call to action is consistent with the 1996 advisory opinion of the International Court of Justice when it addressed the legality of the threat or use of nuclear weapons. The court highlighted that the use of nuclear weapons is “scarcely reconcilable” with the requirements of international humanitarian law and concluded that there “exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all aspects under strict and effective international control” (International Court of Justice, 1996: 226).

It is therefore important to understand the basic elements and implications of international humanitarian law. An analysis of actual nuclear weapons practices—including contemplated uses as expressed in national mission statements, war plans, scenarios, and options—shows that they fall short of international humanitarian law standards and Nuclear Non-Proliferation Treaty commitments to comply with this law.² The most fundamental policy implication of this analysis is that states possessing nuclear weapons should make immediate changes to missions, deployments, and targeting policies and practices to prevent a use that would violate international humanitarian law or would thwart the speedy fulfillment of a treaty obligation to achieve the global elimination of nuclear weapons through good-faith negotiations. Not only does international law preclude the use of nuclear weapons, but it also precludes *threats* to use nuclear weapons, which are often expressed in statements such as “all options are on the table.” Nuclear weapon states must promptly take illegal options off both the table and the menu.

The rules of war

At the core of international humanitarian law—as defined by the International Court of Justice and codified by “Hague Law” and “Geneva Law”—are a number of rules that define acceptable military conduct.³ Based on military manuals from various countries, the rules can be summarized as follows:

- *Rule of distinction* prohibits the use of a weapon that cannot discriminate in its effects between military

and civilian targets. This law recognizes that the use of a particular weapon against a military target may cause unintended collateral or incidental damage to civilians and objects and permits such damage, subject to compliance with the other applicable rules of law, including the rule of proportionality. However, the weapon must have been intended for—and capable of being controlled and directed against—a specific military target, and the civilian damage must have been unintended.

- *Rule of proportionality* prohibits the use of a weapon if its probable effects upon noncombatant persons or objects would likely be disproportionate to the achievement of a specific, legitimate military objective.
- *Rule of necessity* provides that in conducting a military operation, a state may use only such a level of force against its adversary as is “necessary” or “imperatively necessary” to achieve its military objective, and that any additional level of force is unlawful.
- *Corollary requirement of controllability* means that the rules of distinction, proportionality, and necessity prohibit the use of weapons whose effects cannot be controlled by the user.
- *Belligerent reprisal* provides that a state may not engage in even limited violations of the law of armed conflict, even in response to an adversary’s violation of such law, unless such acts of reprisal obey the rules of necessity and proportionality and are solely intended and executed to get the adversary

to adhere to the law of armed conflict. The reprisal must be necessary to achieve that purpose and proportionate to the violation against which it is directed.

- *Self-defense* means that the inherent right of states is subject to constraints imposed by the Charter of the United Nations. In addition, the use of force in the exercise of self-defense is subject to the requirements of international humanitarian law—including the rules of distinction, proportionality, and necessity as well as the corollary requirement of controllability.
- *Individual responsibility* provides that militaries, governments, and even private industrial personnel are subject to criminal conviction for violation of the law of armed conflict if they knowingly, recklessly, or in a manner that is grossly negligent, participate in or have supervisory responsibility over violations of the law of armed conflict. Potential criminal liability extends not only to what the individual or commander knew but also to what he or she “should have known” concerning the violation of law.

These rules of law regulate threats as well as overt actions, making it unlawful for states—and individuals acting on behalf of states—to threaten to take actions that are contrary to international humanitarian law.

Applying the law

The applicability of international humanitarian law to the use of nuclear

weapons is accepted doctrine, even among nuclear weapon states. The rules of distinction, proportionality, and necessity as well as the corollary requirement of controllability are squarely articulated in manuals on the law of armed conflict published by the US Navy, Air Force, and Army, for example.⁴

The US Army defines war crimes as any violations of the law of war by any person or persons, military or civilian: “Every violation of the law of war is a war crime” (US Department of the Army, 1976: 178). When it comes to conventional weapons, the United States takes its duties under international law very seriously.⁵ For example, in a March 2010 address to the annual meeting of the American Society of International Law, State Department legal adviser Harold Hongju Koh stressed how targeting practices—including lethal operations conducted with unmanned aerial vehicles—comply strictly with international humanitarian law and its standards of distinction and proportionality (Koh, 2010). But, while there is strict oversight of drone targeting and its international legal ramifications, there remains a need for US nuclear weapons programs to be subject to more rigorous scrutiny.

The International Court of Justice’s 1996 advisory opinion provides a framework for the application of international humanitarian law to nuclear weapons. The court assessed the effects of nuclear weapons and determined that the heat, blast, electromagnetic impulse, and radiation of a nuclear weapon are inherently uncontrollable.⁶ The court stated that the use of nuclear weapons is subject to international humanitarian law, and that nuclear weapons would generally be unlawful to use under such law.

However, while the court called the use of nuclear weapons “scarcely reconcilable” with international humanitarian law, it was unable to decide whether the use of “low-yield” nuclear weapons in hypothetical proposed circumstances or the use of nuclear weapons in extreme circumstances of self-defense involving the very survival of a state would or would not comply with the law. The court did not decide such matters either way, but rather concluded that it did not have sufficient facts or law to decide them. Its unanimous advice to states to commence negotiations on the elimination of nuclear weapons is consistent with international humanitarian law requirements.

Can nuclear weapons comply with international humanitarian law?

The court ruling left open the possibility that the use of a nuclear weapon could be legal under extraordinary circumstances. When the rules of war are applied to the known facts about nuclear weapons, however, it becomes clear that nuclear weapons cannot comply with international humanitarian law. The real-world scenarios of contemplated uses do not practically limit the effects of nuclear weapons to those permitted under the rules of distinction, proportionality, and necessity.

Low-yield “mini-nukes” are no exception. The spread of radiation from a low-yield weapon is unpredictable and can span great distances in space and time. Thus, mini-nukes also violate the rules of distinction, proportionality, and necessity.

The United States, with a massive nuclear arsenal and a proclaimed deep

respect for the rule of law, has put forth eight primary arguments as to why some uses of nuclear weapons could be viable under international law:

Controllability

The United States argues that the effects of some nuclear weapons, such as a “small number of accurate attacks by low-yield weapons against an equally small number of military targets in non-urban areas” (International Court of Justice, 1995: 90), are controllable. However, this argument is limited to a small portion of the arsenal and to specific circumstances. Furthermore, it is an assertion without scientific justification; meanwhile, in other instances, the United States has acknowledged the uncontrollable effects of nuclear weapons. For example, the United States has ratified the Treaty of Tlatelolco (OPANAL, 1967) making all of Latin America free of nuclear weapons. The treaty’s preamble states: “That nuclear weapons, whose terrible effects are suffered, indiscriminately and inexorably, by military forces and civilian population alike, constitute, through the persistence of the radioactivity they release, an attack on the integrity of the human species and ultimately may even render the whole earth uninhabitable.”

Radiation is inherent

The United States argues that the radiation effects of nuclear weapons do not violate the rule that prohibits unnecessary force, because radiation is an “inherent” effect of nuclear weapons, rather than an effect added to cause extra injury to its victims. This argument has little merit because it is the weapon’s

actual effect—not the intent of its designer—that is relevant.

Radiation is a byproduct

The United States argues that the explosive, heat, and blast effects of a nuclear weapon are the primary effects, while radiation is only a “byproduct” and not the “main or most characteristic feature” of the weapon. The argument is that because radiation is a secondary effect of a nuclear weapon, its effects do not violate humanitarian constraints. The 1925 Geneva Protocol codifies relevant principles of humanitarian law in this area by setting forth prohibitions against asphyxiating, poisonous, or other gases and against analogous liquids, materials, and devices. The United States argues that these rules were only intended to cover weapons that kill by inhalation or other means of absorption of poison into the body and do not apply to nuclear weapons, which kill primarily through explosion: The prohibitions are “not intended to apply . . . to weapons that are designed to injure or cause destruction by other means, even though they also may create toxic byproducts” (US Government, 1995: 23). The United States also rejects the argument that the 1907 Hague Convention prohibiting the uses of poison weapons applies, arguing that the law only intended to prohibit projectiles that carry poison into the body of the victim (US Government, 1995: 24). However, there is little legal basis for the putative rule that secondary effects of weapons, such as radiation, do not count in the legal analysis, nor should it matter whether the weapon injures by going into the body or poisons it by other means. Such arguments are designed to defeat

the very purpose of international humanitarian law, which is to put limits on the extent and manner of injuries in armed conflicts.

Low-yield weapons in remote areas

The United States argues that nuclear weapons could be used selectively in remote areas where the collateral effects would be minor. This argument lacks substantial merit because, while the United States maintains some low-yield nuclear weapons, the arsenal predominantly comprises high-yield nuclear weapons. In any case, even low-yield weapons are unlawful under international humanitarian law because their effects are uncontrollable. Furthermore, conventional weapons can achieve the military objectives for which low-yield weapons would most likely be used, so the latter do not meet the requirements of necessity and proportionality.

Reprisal for another state's unlawful use of nuclear weapons

The United States argues that, even if it would be unlawful to use nuclear weapons first, a state could properly use them to respond to another state's use of such weapons in order to terminate unlawful actions. It is implausible that a nuclear weapon could be used in such a manner that is proportionate to the provocation *and* that meets internationally accepted conditions for lawfulness, which prohibit reprisals against specific types of persons and objects, including civilian populations, civilian property and infrastructure, cultural objects and places of worship, objects indispensable to the survival of the civilian population, the natural environment, and works and

installations containing dangerous force.⁷ Imagine the consequences of a reprisal upon nuclear energy facilities, for example. The arcane doctrine of reprisal only applies to uses of force that are designed to bring a violating party into compliance with international law. Such uses of force would otherwise be considered illegal and thus should not form the basis of any normative regime.

Evaluation on a case-by-case basis

The United States argues that no categorical judgments can be made as to the lawfulness of using nuclear weapons, but rather that each potential use has to be evaluated on its own merits. This position is not tenable because, under current US procedures in crisis conditions, the United States would not have enough time to weigh the legality—let alone the morality—of launching nuclear weapons.

No prohibition unless the United States says so

The United States argues that there can be no prohibition on the use of nuclear weapons unless the United States (and, presumably, every other nuclear state) *explicitly* agrees to a conventional law (one derived from international agreement or treaty) articulating such a constraint or to customary law established by the conduct of nations (International Court of Justice, 1995: 60). International humanitarian law, however, is already deeply rooted in custom and general principles of law, as well as widely ratified multilateral treaties. Moreover, this argument ignores the fact that the United States already explicitly recognizes that the law of armed

conflict—including the rules of distinction, proportionality, and necessity and the corollary requirement of controllability—apply to any use of force, including nuclear weapons.

The International Court of Justice and the use of nuclear weapons as lawful

The United States, at times, characterizes the court's decision in the Nuclear Weapons Advisory Case as upholding the lawfulness of the use of, and threat to use, nuclear weapons (US Department of the Army, 2010a, 2010b). This is simply inaccurate. The court ruling asserted that nuclear weapons "would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law" (International Court of Justice, 1996: 266). The only ambiguity was that the court did not determine, based on evidence presented, whether the general illegality of nuclear weapons rules out marginal cases (for example, use in remote areas) and whether the threat or use of nuclear weapons would be lawful or unlawful in all possible cases involving the very survival of a state. The lawyers for nuclear weapon states presented hypothetical uses, such as a low-yield weapon used against a warship at sea, or against enemy troops in a sparsely populated area. While the court's decision was unclear on some points, it was decisive in stating that a state's right of self-defense, even in "extreme" circumstances, is always subject to international humanitarian law.

Moreover, the International Court of Justice concluded that it is unlawful for a state to *threaten* to do that which would be unlawful. The court stated (1996: 257),

"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." This conclusion has significant consequences for nuclear deterrence policy, which is founded entirely on a threat—and is therefore inconsistent with international humanitarian law. The rationale that such a threat is necessary, to ensure that nuclear weapons will never be used, does not rectify the illegality of the threat.

Policy implications for nonproliferation

In current real-world deployments, neither the use of nuclear weapons nor the threat of using them can be reconciled with international law. This has bold implications for Nuclear Non-Proliferation Treaty parties that have affirmed their obligation to comply with international law with respect to nuclear weapons. Good-faith fulfillment of this commitment by nuclear weapon states would be demonstrated by visible and conscientious efforts to address the incompatibility of existing doctrines and deployments with international humanitarian law, and to change their policies accordingly.

Fulfillment of the international law commitment also demands more expeditious and energetic efforts toward the global elimination of nuclear weapons through good-faith negotiations. Such "humanitarian disarmament" has already been used to eliminate cluster munitions and anti-personnel mines—inhumane weapons incapable of compliance with international humanitarian law. It has also provided the basis for global treaty bans on the possession

and use of chemical and biological weapons.

Applying humanitarian disarmament to nuclear weapons would include bringing the test ban treaty into force, negotiating a treaty banning the production of fissile materials for nuclear weapons, and accomplishing verified, irreversible reductions leading to the elimination of nuclear weapons. Good faith also requires that treaty states refrain from actions undermining the achievement of the disarmament objective. Beyond these steps, compliance with the disarmament obligation requires preparation for, and commencement of, negotiations on the global elimination of nuclear forces through a convention or framework of instruments. This is a process consistently advocated by a large majority of states in UN General Assembly resolutions and Non-Proliferation Treaty review conferences.

This process will not be quick. It will require serious analysis of verification systems, enforcement mechanisms, and institutional changes. The argument that the political atmosphere is not ripe to commence a preparatory process simply allows each season of negotiations to be diverted by the political crisis *du jour*. By identifying the legal requirement clearly, by committing to a process of fulfilling it explicitly, and by commencing a modest preparatory process to get there, a clear compass heading will be set. Failure to do so, in the face of existing legal duties, degrades the commitment to the rule of law. International humanitarian law demonstrates in a very thorough manner that our civilized norms and nuclear weapons cannot coexist. As former California Senator Alan Cranston put

it, “Nuclear weapons are unworthy of civilization.”

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Notes

1. The International Red Cross has compiled the relevant military doctrines of all major states, including all those with nuclear weapons, and there is ample evidence of authentic operations designed to ensure that the use of conventional weaponry is compliant with international law (available at: http://www.icrc.org/customary-ihl/eng/docs/v2_cou).
2. An in-depth analysis, which served as the foundation for this article, can be found in Moxley et al. (2011).
3. International humanitarian law has been continuously refined in response to the terrible consequences of armed conflicts. Its modern expression starts with the Geneva Convention of 1864 for the Amelioration of the Conditions of the Wounded in Armies in the Field, and with the US Lieber Code of 1863. The Franco-Prussia and Russo-Japanese War gave rise to the Hague Conventions of 1907. The slaughters of World War I led to the Geneva Gas Protocol of 1925 and the two Geneva Conventions of 1929. After World War II, the four Geneva Conventions of 1949 set forth protections for victims of armed conflict, both civilian and military. A trio of Additional Protocols reinforcing the Geneva Conventions are generally recognized—even by countries, such as the United States, that have not formally adopted the Protocols.
4. The 2007 Naval Commander Handbook states that the use of nuclear weapons “against enemy combatants and other military objectives” is subject to the following

principles: (1) the right of the parties to the conflict to adopt means of injuring the enemy is not unlimited, (2) it is prohibited to launch attacks against the civilian population as such, and (3) distinction must be made at all times between combatants and civilians to the effect that the latter be spared as much as possible.

The Air Force in its 2009 manual, *Nuclear Operations*, recognizes that the use of nuclear weapons is subject to the principles of the law of war generally. The manual states, "Under international law, the use of a nuclear weapon is based on the same targeting rules applicable to the use of any other lawful weapon, i.e., the counterbalancing principles of military necessity, proportion, distinction, and unnecessary suffering." The Air Force in its 2006 manual, *Targeting*, states that the following questions are helpful in determining whether the use of a weapon complies with the applicable rules: "Is this target a valid 'military objective'? Will the use of a particular weapon used to strike a target cause unnecessary suffering? Does the military advantage to be gained from striking a target outweigh the anticipated incidental civilian loss of life and protected property if this target is struck? Have we distinguished between military objectives and protected property or places?"

The Army, in the *International Law Manual*, states that the provisions of international conventional and customary law that "may control the use of nuclear weapons" include: (1) Article 23(a) of the Hague Regulations prohibiting poisons and poisoned weapons, (2) The Geneva Protocol of 1925, which prohibits the use not only of poisonous and other gases but also of "analogous liquids, materials, or devices", (3) Article 23(c) of the Hague Regulations, which prohibits weapons calculated to cause unnecessary suffering, and (4) The 1868 Declaration of St. Petersburg, which lists as contrary to humanity those weapons which "needlessly aggravate the suffering of disabled men or render their death inevitable."

5. The US military's attention to legal compliance is documented in a series of international law studies published by the US

Naval War College (available at: <http://www.usnwc.edu/Publications/Studies-Series.aspx>).

6. The advisory opinion states:

In applying this law to the present case, the Court cannot however fail to take into account certain unique characteristics of nuclear weapons.

The Court has noted the definitions of nuclear weapons contained in various treaties and accords. It also notes that nuclear weapons are explosive devices whose energy results from the fusion or fission of the atom. By its very nature, that process, in nuclear weapons as they exist today, releases not only immense quantities of heat and energy, but also powerful and prolonged radiation. According to the material before the Court, the first two causes of damage are vastly more powerful than the damage caused by other weapons, while the phenomenon of radiation is said to be peculiar to nuclear weapons. These characteristics render the nuclear weapons potentially catastrophic. The destructive power of nuclear weapons cannot be contained in either space or time. They have the potential to destroy all civilization and the entire ecosystem of the planet.

The radiation released by a nuclear explosion would affect health, agriculture, natural resources and demography over a very wide area. Further, the use of nuclear weapons would be a serious danger to future generations. Ionizing radiation has the potential to damage the future environment, food and marine ecosystem, and to cause genetic defects and illness in future generations. (International Court of Justice, 1996: 21-22)

7. Regarding reprisals, see the *Vancouver Declaration: Law's Imperative for the Urgent Achievement of a Nuclear-Weapon-Free World*, which 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” (February 11, 2011. Available at: http://www.lcnp.org/wcourt/feb2011Vancouver_Conference/vancouverdeclaration.pdf).

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Author biographies

Dean Granoff is an associate of the Global Security Institute (www.gsinstitute.org). He is a recent graduate of Haverford College, USA, where he received the Kurzman Prize in Political Science.

Jonathan Granoff is an attorney, author, and international advocate who focuses on advancing the rule of law to address the threats posed by nuclear weapons. He is president of the Global Security Institute, an adjunct professor of international law at Widener Law School, USA, and co-chair of the Task Force on Nuclear Nonproliferation of the International Law Section of the American Bar Association.