

**Remarks of John Burroughs
Executive Director, Lawyers Committee on Nuclear Policy
Facing the Dangers of 21st Century Great Power War:
A Conference on the Centenary of World War I
New York City, May 3, 2014
Panel: The limits of the moral imagination**

Lawyers Committee on Nuclear Policy here in New York is the UN office of the International Association of Lawyers Against Nuclear Arms. I was very happy to work with Joseph Gerson, Andy Lichterman, Reiner Braun, and Jenny Wegel on organizing this meeting. I think that it was important for us to really think about the question of great power war in the 21st century. Maybe it's over with. Maybe it's never going to happen again. But I think we have to come to grips with it and not deny it. If you deny that it's a question, why would you even bother with nuclear disarmament if you didn't think that great power war was a possibility? You know, go work in your garden.

Zia asked a very good question this morning, as is his wont. He said essentially, "What went wrong?" Prior to World War I, it's well worth reading about, there was a lot of belief in peace, prosperity, democracy, and there was also belief that the international rule of law was coming. The international rule of law was going to come through international arbitration and adjudication.

In 1907, you had the Hague Convention for Pacific Resolution of Disputes, precursor of Kellogg-Briand. Article 1: "With a view to obviating as far as possible recourse to force in the relations between States, the Contracting Powers agree to use their best efforts" - not very strong obviously - "to ensure the pacific settlement of international differences."

Then, following on to the Lieber Code, which was written during the Civil War, you had some codification of law of armed conflict. So the Hague convention on the law of land warfare of 1907 prohibited infliction of unnecessary suffering. You're not supposed to bomb undefended cities. You're not supposed to launch projectiles with asphyxiating gases. That was the extent of regulation of chemical warfare. You're not supposed to use poison, but they weren't talking about chemical weapons when they said that.

All of this can be viewed in two ways. You can see that there were important principles of humanity and decency being asserted in the face of what turned out to be the utter catastrophe that ensued with World War I and World War II. You can also see it - and even though I am a lawyer this is the way I tend to see it - as utterly inadequate and even absurd in the face of what was to come.

Between the wars, the Geneva Gas Protocol of 1925 has already been mentioned. People also knew that aerial bombardment was coming. There was a rather optimistic view of it, even after World War I. As former British Prime Minister Harold Macmillan is quoted in the Call to the Conference: "We thought of air warfare in 1938 rather as people think of nuclear war today." In other words, they thought there wasn't going to be strategic bombing of cities just as people have thought for the past few decades that there would never be use of nuclear weapons again in war between countries.

Somewhat in the same vein, there was an effort to codify law relating to aerial bombardment. The Draft Hague Rules of Air Warfare were formulated in 1923 by prominent lawyers and military experts representing the respective countries. The U.S. representative was the well-known international lawyer, John Bassett Moore. These rules were not adopted in treaty form, but until the outbreak of World War II they were accorded considerable status by military officers and others. Among other things, Article 24(3) of the Draft Hague Rules of Air Warfare forbids aerial bombardment of military objectives such as military depots or factories where they cannot be bombarded without the indiscriminate bombardment of the civilian population. It clearly ruled out strategic bombing as practiced during World War II. Article 24(4) forbids bombardment where there is no reasonable presumption that the military concentration is sufficiently important to justify such bombardment.

So with some work, just as the Nuremberg tribunals did some work to develop their understanding of the law given the rather sparse form in which international law had been articulated, a tribunal after World II could have found much of the strategic bombing and the atomic bombings to be crimes against humanity and contrary to the law of war. Of course, the political circumstance was that the post-World War II tribunals were established by the prevailing nations which did not care to have the legality of bombing adjudicated.

There was a court that did address the issue, the Tokyo District Court in the *Shimoda* case. The setting was a suit for damages brought by survivors of the atomic bombings against Japan. Japan had given up war damages claims, but the survivors of the atomic bomb were still seeking compensation. The Court did not agree with the survivors that the agreement between Japan and the U.S. could be overcome. However, the Court did pass on the legality of the bombings. The Tokyo District Court, among other things citing the Hague Rules of Air Warfare, said that the bombings were illegally indiscriminate.

Post World War II, we really saw the notion of pacific resolution of disputes carried forward. That is a central element of the UN Charter. Another central element of the UN Charter is to prohibit the threat or use of force except in self-defense or where authorized by the Security Council in order to maintain peace and security. This was carrying forward Kellogg-Briand and League of Nations, but there was an enforcement mechanism established through the Security Council.

Perhaps this system was going to be workable, but it was rapidly replaced, superseded by nuclear deterrence, the permanent willingness and capability to wage devastating war, the permanent threat of devastating war. But 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. It turns the UN Charter on its head.

What can be done? Lawyers and academics and pundits and all of us can all come up with very good ideas for reforming international relations and reforming international institutions. Even relatively modest reform of international institutions could produce very good results.

I believe that Paul Lansu was referring to reform of the UN Security Council. If we had a more representative Security Council, we would probably be quite a bit more down the path to having a peaceful world where disputes can be resolved. Just look at the Iran situation. Why is it that the P5 plus Germany are in charge of the negotiating with Iran? Why isn't South Africa, Brazil, or Indonesia, or any number of other countries also involved in those negotiations? I believe South Africa offered it at one point. The veto can be limited.

Countries can accept the jurisdiction of the International Court of Justice. France withdrew from the jurisdiction of the ICJ after it was challenged by Australia and New Zealand for carrying out nuclear testing in the Pacific. The United States withdrew from the jurisdiction of the International Court of Justice after Nicaragua brought a case against the U.S. for support of the Contras.

One can have very nice debates, worthwhile ones, about what effect these and similar reforms would have. We should all pay attention to these issues. But I want to go to another point. Whatever your view on particular reforms are, I am completely convinced that really to make international law work, we need to anchor its fundamental principles in political culture and popular culture.

We got some understanding of the potential power of this in the amazing, remarkable opposition to the U.S./U.K. invasion of Iraq. We had hundreds of thousands of people out on the streets in New York and around the world. Millions. It began to get through to people that invading another country is contrary to the UN Charter. It wasn't very complicated. That to me was an instance of how – it may be a slow tortuous process – but how these fundamental principles can become part of political culture and popular culture.

I would like to see that happen more in the case of nuclear disarmament, because there is an obligation of nuclear disarmament. "Nuclear disarmament" does not mean the process of reductions; when "nuclear disarmament" is used internationally, it means zero nuclear weapons globally. In Article VI, that is the result promised by the Non-Proliferation Treaty. The International Court of Justice said in its 1996 advisory opinion, there is an obligation to pursue in good faith and bring to a conclusion negotiations on nuclear disarmament in all its aspects under strict and effective international control. Article VI should be part of political culture and popular culture in this country and other countries around the world. I think it is to a limited extent, at least among those that work on nuclear disarmament. It needs to get beyond that, because the American public actually supports a world without nuclear weapons. It is not a high priority but they support it. It needs to be understood that there is a fundamental legal principle involved.

Rick Wayman is here in the room with Nuclear Age Peace Foundation. Rick and I have been working on the lawsuits filed by the Marshall Islands a week ago against all nine governments that possess nuclear arms. The basic argument is that they are not meeting their obligation of nuclear disarmament. All of those applications are on the website www.nuclearzero.org. You can read one or two of the applications to get the basic idea of what the case is about. I assume we will eventually boil this down so that it is more accessible, but the applications are pretty accessible. Information on campaigning is at www.WagingPeace.org/nuclearZero. I hope the Nuclear Zero cases project is going to be part of making this fundamental principle of nuclear disarmament more popularly understood. Thanks very much.