

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

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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, the United States.

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.

* Andrew Lichterman is a policy analyst and lawyer with the Oakland, California-based Western States Legal Foundation. of the Coordinating Committee of United for Peace and Justice. The opinions expressed here are his own.

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.

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 that in most of the nuclear-armed countries, campaigning for disarmament treaties, or for that matter any kind of single-issue campaigning for elimination of nuclear weapons will be of limited use.

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 war making. 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.”¹

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.

A Right to Democracy?²

The United Nations Human Rights Committee in 2018 adopted a General Comment on the right to life set out in the International Covenant on Civil and Political Rights. Paragraph 66 of the General Comment stated that “[t]he threat or use of weapons of mass destruction, in particular nuclear weapons, which are indiscriminate in effect and are of a nature to cause destruction of human life on a catastrophic scale, is incompatible with respect for the right to life and may amount to a crime under international law.”³

This development has sparked further reflection and discussion about the application of international human rights principles to nuclear weapons and disarmament. It strikes me, however, that like the TPNW, the characterization of the threat or use of nuclear weapons as a violation of the right to life is a kind of transitional effort, both in applying human rights law to the goal of nuclear disarmament and in developing legal thought that might play a role in accomplishing it.

Using either humanitarian law or a human rights-based right to life as a lens through which to view the problem of nuclear weapons tends to keep the focus mainly on the *effects* of nuclear weapons—the horrific things they do, and the way those effects violate every civilized value. I would like to suggest that the next step in moving the project of disarmament forward is to focus more on *causes*—why nuclear weapons still exist, and in sufficient quantities to end our civilization in short order, and who nuclear weapons serve, what elements in society benefit from continuing to wield them. I believe a focus on the causes of our current predicament to be essential not only for legal efforts but across the range of social action for nuclear disarmament, and for action to address other threats to humanity’s future that share common roots with the persistence of nuclear arsenals.

An approach that might allow a stronger focus on root causes, while also providing some common ground with movements confronting other manifestations of civilizational crisis such as climate change, would be to explore a more expansive right to democracy. This would entail much more than a right to vote, which in many countries today affords most people only limited

choices among narrowly defined elites. Rather, it would mean creating space for the emergence of movements embodying significant alternatives to the existing order of things, with the requisite tolerance of and protection for political expression and nonviolent action. Such a right already has some grounding in human rights law, and there are arguments that we would be well served by measures that set free the creativity of all humanity in seeking solutions to the existential challenges we now face, solutions that encourage and protect political participation.

A right to democracy is an essential corollary to the right to life where what is at stake is the decisions of governments that threaten our collective survival. It is a right that inheres in the people as a whole. A right that is framed in reference to the individual, as opposed to one of the people in relation to the state, is too easily made compatible with a jurisprudence that places existential issues, especially those concerning war and peace, firmly and unreachably within the purview of a presumptively legitimate state.⁴ It denies the people the power they need when rulers make existential decisions not easily reversed because existing political channels are blocked, and also without means short of insurrection to declare a social emergency that requires immediate redress.

Most modern views of the state acknowledge that sovereignty ultimately resides in the citizenry. For the most part, however, mere acquiescence of the populace is taken as sufficient evidence of consent to support a state's legitimacy. From the perspective of the international legal system, this view is reinforced by principles of non-intervention in the internal affairs of states. The foundational texts of human rights and of the post-World War II international legal order contain support for a right to democracy, but also manifest this tension with the principle of state sovereignty.⁵

Yet no government's sovereignty should be viewed as legitimate if it places the survival of its people permanently at risk. Nuclear deterrence assumes the legitimacy of risking annihilation of the people to preserve the state. This has become a corrosive contradiction at the heart of the legitimacy of every nuclear-armed state, particularly those claiming to be democracies, and also at the core of nuclear age international law. It is this latter contradiction that was signaled by the International Court of Justice in its 1996 Advisory Opinion on the Legality of the Threat and Use of Nuclear Weapons: "In the long run, international law, and with it the stability of the international order which it is intended to govern, are bound to suffer from the continuing difference of views with regard to the legal status of weapons as deadly as nuclear weapons."⁶

This is true not only for nuclear weapons, but also for the refusal of the most powerful governments to take action of a magnitude commensurate with the threat of global warming, and with the broader human-caused deterioration of the ecosystems essential to our survival. Here too we must ask what are the root causes, and who is benefiting so much that they are willing to place humanity's future at risk. It is clear that a global economic and political order whose main goal is accumulation of material wealth, and whose driving dynamic is endless competition among immense, internally authoritarian organizations is on a course bound for ecological and social collapse. It is this order that generated and has been sustained by the state model, centered on rapid resource extraction and accumulation of the means to make war,⁷ that has come to dominate the entire planet. The dangers of this moment are compounded by the presence of

weapons that could end civilization in short order, with the likelihood of their use likely to increase as ecological decline precipitates social disorder within states, and intensifies competition among them.

Humanity now faces the challenge of developing new ways of organizing our life here together on earth. This will require a transformation of the economy, our technology, and much of our built world, and also of how we conceive “the state” and its purposes. As Elizabeth Wilson observes in her monograph *People Power Movements and International Human Rights*,

“The nation-state system is a historical phase, perhaps one that has attained a certain stability and power to endure, but at this point it is arguably failing the most important test confronting the international community at the present time—the threat of climate change.... If the state-centric system fails to respond adequately to this catastrophic threat to human existence, we may see the end of the state-based system we have now and a transition to a new, probably more primitive pattern of organized human relations characterized by chaos, violence, and suffering.”⁸

Wilson argues for a strong concept of democracy, one in which social movements that prefigure a more democratic and nonviolent future play a central role. It is grounded in a view of the sovereignty of the people that is more than an abstract notion of original social contract. “Since in every practical sense people power creates and maintains states,” Wilson writes, “it is a fiction to assign sovereign power only to states as international law traditionally does.”⁹ Wilson posits that “when nonviolent civil resistance movements respecting human rights general principles reach a certain scale and intensity, they are activating a ‘dormant social contract’ and reclaiming sovereignty and thus taking law-making power back from the state.”¹⁰

Large scale social movements demanding fundamental change represent a claim by large numbers of people to exercise directly the sovereignty the state claims to exercise on their behalf. But they also are one of the main ways that societies can learn, by experimenting with alternative forms of social organization and visions of the future. They are where concepts like “human rights” have been incarnated and further developed, often through risky confrontations with state power.

In 1985, writing about the great wave of disarmament movements of that time, Jürgen Habermas observed that they opposed not just nuclear weapons but the entire way of life that produced them.¹¹ 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:

“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. If the representative system collapses in the face of challenges that touch the interests of all, the nation as a collectivity of citizens as well as individual citizens, must be permitted to assume the

original rights of the sovereign. In the last instance, the democratic constitutional state must rely on this guardian of legitimacy.”¹²

And even in “normal” times, vigorous social movements keep societies that aspire to be democratic on track, providing an essential check on governments anchored outside mainstream institutions.¹³

How a right to democracy might be put into practice can only be sketched in a preliminary way. The first steps can be taken within movements for a more fair, democratic, and peaceful society, by incarnating those values in their actions and organizational forms. In this moment, there also is particular value for movements in elaborating an explicit normative vision of the more fair and democratic future we hope to bring about. An essential part of this is a commitment to non-violence. Political violence only reinforces the existing violent order of things, feeding the immense organizations both public and private that are all too ready to offer more elaborate mechanisms and technologies of surveillance and repression. A commitment to non-violence also is consistent with broader human rights principles, and helps to build the legitimacy of social movements as providing an alternative both lawful and democratic.¹⁴

The project of social transformation without violence in complex, culturally and structurally diverse and stratified modern societies suffused with bureaucratic institutions and pervasive webs of legal regulation presents tasks of normative self-understanding, elaboration, and transformation that are vast, and particular to this age. Part of this process is assessing the relationship of that vision to existing legal orders, evaluating what must be transformed and what can be retained. Efforts to craft and practice an alternative vision of democracy and law also may help prepare movements to act effectively—and consistently with their principles—should they attain significant political power.¹⁵ Human rights law, with core principles that have emerged in large part out of past emancipatory movements, provides one logical starting point and frame of reference. At the same time, it also provides movements with some resources in public discourse to defend and expand space for political expression and self-organization.¹⁶

For peace and disarmament efforts 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 more fertile ground than does humanitarian law for integrating disarmament work into the kind of multi-issue movements that likely will be needed to create the conditions for significant disarmament progress. A right to democracy may be more likely than the right to life to play a useful role in defining a legal discourse that bears on key issues blocking everything else, such as prevalent extremes in wealth concentration and concomitant inequities in meaningful access both to political power and to meaningful legal redress for rights violations of all kinds.

It is within broader, system-critical movements, perhaps, that the 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 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.¹⁷ The “western” character of “democracy” and the civil and political rights commonly associated with it becomes less clear when one considers democracy initiatives having no necessary link to

capitalism, especially neoliberal capitalism, which in the words of Boaventura de Sousa Santos, “recognizes no other freedom than economic freedom, and so finds it easy to sacrifice all other freedoms.”¹⁸ And democracy movements have sprung up many places outside “the West,” with a variety of visions of self-determination and democratic rule emerging—or re-emerging. This includes campaigns for indigenous self-governance, now being recognized even by intergovernmental expert panels as critical to preserving alternative ways of sustaining ourselves together with our ecosystems.¹⁹

In the movement to address climate change, there already has been an effort to think systematically about how human rights principles might advance their work. Scholars participating in the Global Network for the Study of Human Rights and the Environment published a Draft Declaration on Human Rights and Climate Change, with the hope that human rights could “offer a powerful meta-ethical language of critique and the seeds of alternative future histories....”²⁰ Noting the emergence in several countries of climate change initiatives grounded in human rights principles, the authors noted that “...it is vital that respect for human rights should now be understood as an indispensable element of any adequate approach to climate change.”²¹

The Draft declaration recognizes the importance not only of substantive rights, such as the right to life, but of procedural rights to participate in decisions that affect all of our futures, particularly for those who long have been excluded from meaningful participation. One section reads in part:

“All human beings have the right to active, free, and meaningful participation in planning and decision-making activities and processes that may have an impact on the climate. This particularly includes the rights of indigenous peoples, women and other under-represented groups to equality of meaningful participation. This includes the right to a prior assessment of the climate and human rights consequences of proposed actions. This includes the right to equality of hearing and the right for processes to be free of domination by powerful economic actors....”²²

It is easy to see how such principles are relevant to disarmament work. Decisions about nuclear weapons affect everyone on the planet. Yet most people, including most who live in nuclear-armed states, have little or no voice in those decisions. And it is easy to see these principles as a starting point for finding common ground on which movements might come together that are broad and deep enough to make a different kind of world possible, a world where nuclear disarmament might become a reality rather than an ever-distant dream.

Regarding the role of states, it is hard to imagine governments recognizing a right to democracy under international law in a moment when authoritarian elements are ascendant globally and hold power in most of the nuclear-armed countries. Yet we must imagine it, for it is unlikely that humanity will have much of a future unless it is more democratic, a future that can unleash the willing participation of all to overcome the current economic, political, and ecological impasse of our civilization.

The tension between a right to democracy and the principle of non-intervention poses conundrums for movements for a more fair, democratic, peaceful, and sustainable global society that are different than those perceived by governments, but that are significant nonetheless. In a time in which state power is deployed internationally by the most powerful countries with little accountability to their own publics, democratic movements must consider with care any principle that might provide a rationale for intervention by the most powerful governments in the internal affairs of other states. Until the distribution of wealth and power both among and within states has become far more equitable, claims by governments that such interventions are intended to further human rights or “democracy” must be viewed with suspicion. For the moment, international efforts to further either democracy or human rights may best be advanced by solidifying connections and mutual support globally among organizations and movements embodying those values.²³

Nonetheless, there remains a great deal that states can do to devolve a greater measure of sovereignty back to the people for whom they only hold it in trust. A starting point is to recognize the positive roles that recurring non-violent movements can play in providing flexibility, learning capacity, and legitimacy for the state. An essential first step would be to reverse the nearly-universal dynamic of exploiting every possible technological development to expand the reach and power of state surveillance and repression. Next would come expanding space for self-organized political expression and action outside existing channels and institutions. This begins with informal tolerance of more vigorous dissent, including nonviolent civil disobedience, manifesting a recognition that democracy is worth some suspension of order that interferes with business as usual.

This expanded political space could allow development of a positive cycle of normative innovation. It could create the conditions for a de-centering of the state-centered legal order by according legal significance to the norms and practices of social movements that organize themselves and act in ways consistent with existing human rights principles and that embody principles of democracy and nonviolence. Norms generated within these movement contexts could be recognized, as Elizabeth Wilson suggests, as “a second, even alternative, source of legal meaning is created that is independent of, though to some extent parallel to, the state practice that traditionally shaped the emergence and applicability of human rights norms,” cognizable as “general principles” that can be a source of law.²⁴

Without democratization of our society and economy that allows more meaningful participation in decisions that affect us all and a fair sharing of the risks of the necessary transitions we must undertake, the likely outcome will be widespread resistance, social chaos, and rising danger of great power war in a nuclear-armed world. The path to a humane, peaceful, and sustainable future will require openness and forbearance from above, and disciplined nonviolence and democracy from below.

¹ International Committee of the Red Cross, Advisory Service On International Humanitarian Law, “What is International Humanitarian Law?” 2004.

² This section draws on Elizabeth A. Wilson, *People Power Movements and International Human Rights: Creating a Legal Framework* (Philadelphia: International Center on Nonviolent Conflict, 2017). My thanks to Professor Wilson for the thoughts her work engendered, and my apologies if I took them in a direction never intended.

³ “The threat or use of weapons of mass destruction, in particular nuclear weapons, which are indiscriminate in effect and are of a nature to cause destruction of human life on a catastrophic scale is incompatible with respect for the right to life and may amount to a crime under international law. States parties must take all necessary measures to stop the proliferation of weapons of mass destruction, including measures to prevent their acquisition by non-state actors, to refrain from developing, producing, testing, acquiring, stockpiling, selling, transferring and using them, to destroy existing stockpiles, and to take adequate measures of protection against accidental use, all in accordance with their international obligations. They must also respect their international obligations to pursue in good faith negotiations in order to achieve the aim of nuclear disarmament under strict and effective international control[,] and to afford adequate reparation to victims whose right to life has been or is being adversely affected by the testing or use of weapons of mass destruction, in accordance with principles of international responsibility.” United Nations Human Rights Committee, General comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life, CCPR/C/GC/36, 3 September 2019, Para. 66. Adopted by the Committee at its 124th session (8 October–2 November 2018). Access at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f36&Lang=en.

⁴ The General Comment on the right to life frames it as an individual right:

The right to life is a right that should not be interpreted narrowly. It concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity. Article 6 of the Covenant guarantees this right for all human beings, without distinction of any kind, including for persons suspected or convicted of even the most serious crimes.” United Nations Human Rights Committee, General comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life, 3 September 2019, CCPR/C/GC/36, Para. 3.

⁵ “International human rights law is somewhat schizophrenic with respect to a right to democracy. The UN Charter does not mention democracy but links human rights and self-determination in Articles 1 and 55, without, however, clearly explicating either term. At the same time, Article 1 of both the ICCPR and ICESCR declares the right of self-determination, defined broadly as a right enabling ‘peoples’ to ‘freely determine their political status and freely pursue their economic, social and cultural development.’ By their terms, Article 1 in both Covenants seems to guarantee the right of a people to democratically choose their form of self-government. Article 25 of the ICCPR protects, among other things, the rights “to take part in the conduct of public affairs, directly or through freely chosen representatives” and “to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.” But, as [Thomas] Franck recognized, the ‘notion that the [international] community can impose such standards, on which the democratic entitlement is based’ is in tension with the principle of state sovereignty, embodied in Article 2(7) of the UN Charter, which provides that the UN shall not interfere in matters ‘essentially within the domestic jurisdiction of states.’” Wilson, *People Power Movements and International Human Rights*, pp.122-123.

⁶ International Court of Justice, *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, 8 July 1996, para.98.

⁷ “Power holders’ pursuit of war involved them willy-nilly in the extraction of resources for war making from the populations over which they had control and in the promotion of capital accumulation by those who could help them borrow and buy. War making, extraction, and capital accumulation interacted to shape European state making.” Charles Tilly, “War Making and State Making as Organized Crime,” in *Bringing the State Back In*, edited by Peter Evans, Dietrich Rueschemeyer, and Theda Skocpol (Cambridge: Cambridge University Press, 1985), p.172.

⁸ Wilson, *People Power Movements and International Human Rights*, p.132.

⁹ Wilson, *People Power Movements and International Human Rights*, p.109.

¹⁰ Wilson, *People Power Movements and International Human Rights*, p.111; see also Elizabeth A. Wilson, *People Power and the Problem of Sovereignty in International Law*, 26 *Duke J. Comp. & Int'l L.* 551 (2016).

¹¹ “The heterogeneous groups which have coalesced in this movement say not only a plebiscitary “no” to nuclear missiles. instead, many “no’s” are aggregated in this movement: the “no” to nuclear weapons with the “no” to nuclear power, to large-scale technology general, to chemical pollution of the environment, to bureaucratic health care, “slum clearance,” the death of the forests, discrimination against women, hatred of foreigners, restrictive immigration policies, etc. The dissensus which gains expression in this complex “no” aims not at this or that measure or policy; it is rooted in the rejection of a life-form- namely, that life-form which has been stylized as the normal prototype- which is tailored to the needs of a capitalist modernization process, programmed for possessive individualism, for values of material security, and for the strivings of competition and production, and which rests on the repression of both fear and the experience of death.” Jürgen Habermas, “Civil Disobedience: Litmus Test for the Democratic Constitutional State,” *Berkeley Journal of Sociology* Vol. 30 (1985), pp. 95-116, 110.

¹² Jürgen Habermas, “Civil Disobedience: Litmus Test for the Democratic Constitutional State,” *Berkeley Journal of Sociology* Vol. 30 (1985), pp.95-116, 104-105.

¹³ “In the historical evolution of democratic regimes, a circuit of surveillance, anchored outside mainstream institutions, has developed side by side with the institutions of democratic accountability. Necessary to democratic legitimacy, confidence requires defiance, in the sense of instruments of external control and actors ready to perform this control; in fact, democracy requires permanent contestation of power. Actors such as independent authorities and judges, but also mass media, experts, and social movements, have traditionally exercised this function of surveillance. The latter, in particular, are most relevant for the development of an ‘expressive democracy’ that corresponds to the *prise de parole* of the society, the manifestation of a collective sentiment, the formulation of a judgement about the governors and their action, or again the production of claims.” Donnatella della Porta, *Can Democracy be Saved? Participation, Deliberation, and Social Movements* (Cambridge, UK: Polity Press, 2013), p.5; citing and quoting Rosanvallon, P., *La Contre-democratie: la politique a l’age del la defiance*. Paris, Seuil.

¹⁴ “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.... 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. Wilson, *People Power Movements and International Human Rights: Creating a Legal Framework* (Philadelphia: International Center on Nonviolent Conflict, 2017), p.57.

¹⁵ See Wilson, *People Power Movements and International Human Rights*, pp.132-133.

¹⁶ “.....[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.” C. J. Polychroniou, “Human Rights, State Sovereignty, and International Law: An Interview With Richard Falk,” *Global Policy* blog, September 11, 2018.

¹⁷ “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

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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.” Wilson, *People Power Movements and International Human Rights*, pp.55-56

¹⁸ “As everyone knows these days, neoliberalism’s deep interconnectedness with the interests of finance capital makes it the most antisocial version of global capitalism. It recognizes no other freedom than economic freedom, and so finds it easy to sacrifice all other freedoms. The specificity of economic freedom lies in the fact that it is exercised strictly on the basis of one’s economic power to exercise it. This, in turn, always entails a measure of asymmetrical imposition upon those social groups that are lacking in power and a measure of brutal violence upon those who have no power at all, which happens to be the vast majority of the world’s impoverished population. The imposition and the violence lead invariably to the transfer of wealth from the poor to the rich (via the state’s meager policies of social protection) and the plundering of natural resources as well as economic assets whenever available.” Boaventura de Sousa Santos, “Ecuador: del centro al fin del mundo,” *LaJornada* October 15, 2019, <https://www.jornada.com.mx/ultimas/mundo/2019/10/15/ecuador-del-centro-al-fin-del-mundo-boaventura-de-sousa-santos-1939.html>, English translation by the author.

¹⁹ “Recognizing the knowledge, innovations, practices, institutions and values of indigenous peoples and local communities, and ensuring their inclusion and participation in environmental governance, often enhances their quality of life and the conservation, restoration and sustainable use of nature, which is relevant to broader society. Governance, including customary institutions and management systems and co-management regimes that involve indigenous peoples and local communities, can be an effective way to safeguard nature and its contributions to people by incorporating locally attuned management systems and indigenous and local knowledge.” Sandra Díaz et al., *Report of the Plenary of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services on the work of its seventh session, Addendum: Summary for policymakers of the global assessment report on biodiversity and ecosystem services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services*, (2019), p.9.

See also Kenneth P. Jameson, “The Indigenous Movement in Ecuador: The Struggle for a Plurinational State,” *Latin American Perspectives*, Vol. 38, No. 1, A Second Look at Latin American Social Movements (January 2011), pp.63-73

²⁰ For the full text of the Declaration and a commentary on its origins, intentions, and legal basis, see Kirsten Davies, Sam Adelman, Anna Grear, Catherine Iorns Magallanes, Tom Kerns and S Ravi Rajan, “The Declaration on Human Rights and Climate Change: a new legal tool for global policy change,” *Journal of Human Rights and the Environment*, Vol. 8 No. 2, September 2017, pp. 217–253. <https://doi.org/10.4337/jhre.2017.02.03>; passage cited here at p.248.

²¹ *Ibid.*

²² Draft Declaration on Human Rights and Climate Change, II.13; *Ibid* at p.252 .

²³ “This right to democracy may not create a duty as a matter of positive law on the part of other states to assist nonviolent activists in their struggles for democratic self-determination because of the norm of nonintervention and the fact that interventions can do more harm than good. But it would accord with the general (natural law) principles of human rights to say that non-state actors committed to the human rights project have both a right and a duty to do everything in their power to help those engaged in such struggles achieve their objectives.” Wilson, *People Power Movements and International Human Rights*, pp.125-127.

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²⁴ “This monograph goes, however, further and argues that general principles can be created and embodied by the activities of organized nonviolent individuals, not only by states. The key originality of the monograph lies in how it rehabilitates natural law by ‘operationalizing’ it as collective practice, treating the organized activities of mobilized individuals as practice that becomes legally relevant to the determination of human rights law as a kind of analogy to state practice to the extent that such activities are designed and executed consistent with the overall general principles that characterize the human rights *ethos*. In that way, this monograph argues, a second, even alternative, source of legal meaning is created that is independent of, though to some extent parallel to, the state practice that traditionally shaped the emergence and applicability of human rights norms. This monograph thus opens a theoretical and conceptual door for a *demos*-centric perspective to play a significant and concrete role in shaping and even determining new human rights norms.” Wilson, *People Power Movements and International Human Rights*, p.130.

See also on this point at p.16 *et seq.* Wilson’s discussion regarding the application in this context of Article 38 of the Statute of the International Court of Justice, which recognizes as a source of law “the general principles of law recognized by civilized nations...”.