

Andrew Lichterman, Western States Legal Foundation, Oakland, California, talk for workshop on using the law to advance the prohibition and elimination of nuclear weapons, Nuclear-Weapon-Free World global civil society online program, September 26, 2020, the UN International Day for the Total Elimination of Nuclear Weapons.

When talking about law and social change, context is everything. The character of the historical moment must ground discussion of how significant change in law or policy might come about.

This is an interesting but difficult time to talk about law. Law embodies order and predictability. We are in the most unpredictable moment in living memory. Talking about the usual run of topics regarding law and disarmament—treaties, humanitarian law, human rights—feels a bit like keeping our eyes turned down to our desks while the building is burning down around us. So I am going to talk first about near term prospects, which are quite dismal. Then I am going to talk about human rights and disarmament in a longer view.

John Burroughs has already talked about the right to life. I will be talking briefly about an additional approach that might provide some basis for making connections that help to build the broader and deeper movements needed to make real progress towards disarmament possible.

We are now far into intertwined crises that have been intensifying for many years. The 2008 financial collapse, a product of decades of deep polarization of wealth, was papered over in ways that mainly rescued the rich. The discontent engendered by the unfairness and inadequacy of that response engendered the resurgence of authoritarian nationalisms now reaching its climax in the United States. Climate change is no longer some future threat. It is here, already causing ecological and economic shocks and migration flows that will only intensify. Immense polarization of wealth and political power assures that the effects of these calamities fall mainly on the least fortunate. The pandemic only has accelerated processes of economic and social disruption already well along.

Several of the countries that possess nuclear weapons currently are ruled by authoritarian nationalist governments. This includes the current governments of the three most powerful nuclear-armed states. And the United States is entering the most unstable period in living memory—one in which the status of legal and constitutional order itself is very much in question.

These conditions are driving renewed arms racing and a rising risk of war among nuclear-armed countries. They also are making prospects for nuclear disarmament even more remote. It is in moments like this that political elites are most likely to make rash decisions, dangerous gambits to distract from their refusal to do what is fair, and just, and just plain necessary, for their people.

This is the context in which we must think about peace and disarmament work. If there was a post-Cold War window where the elimination of nuclear weapons in the near term seemed possible, it now is gone. Our main goals now must be reducing the risks of war among nuclear-

armed countries in the near term, while building the kinds of movements that can eliminate the main drivers of high-tech militarism and war.

So what role does law, and particularly international law, play in all this? It's hard to do much more in such uncertain times than to sketch some general themes.

Disarmament is a global issue, and the movements against nuclear arms have long been international. But the legal and political discourses that most directly affect government decisions about nuclear weapons are domestic debates. This is even true for international law. Its main role will not be in international venues but in domestic discourses and forums, and within the movements that will be needed to make progress towards disarmament possible.

There is no one-size-fits-all approach, either politically or legally. Advocacy for the Treaty for the Prohibition of Nuclear Weapons, for example, may be of significant value in countries where eliminating nuclear weapons or refusing to participate in nuclear-armed alliances is a topic of mainstream debate. But here in the United States, not only nuclear disarmament but more generally issues of war and peace are little discussed, even at the height of a Presidential campaign. Foreign policy, military spending, and war and peace didn't even make it onto the list of issues pollsters asked voters to rank in a recent Washington Post poll.¹ There is a great deal that must be done before any particular disarmament proposal can have much impact in the U.S. context.

Further, in the United States, the first order of business is restoring a stable legal and constitutional order at home. This is a necessary but far from sufficient step for the U.S. to play any positive role in pursuing a global path towards disarmament.

A second Trump term could mark the end of what democracy there is here, and the beginning of a period of unrest that could lead to extreme outcomes. Under these conditions, a nuclear-armed authoritarian nationalist government would pose great dangers to the rest of the world, and hopes for disarmament would be a dead letter. In foreign policy a Biden administration likely would try to take up where the Obama administration left off—including its long-term commitment to an ambitious program to modernize the nuclear arsenal. The forces that brought Trump to power or profited enough to tolerate his excesses will not go away. A Biden administration likely will steer a path between those who put them into office and the still-potent powers of the Right. If so, we probably would see continued high levels of military spending, which a Biden administration likely would see as Keynesian stimulus, a means to assist high-tech industries, and an inoculation against criticism from the nationalist Right.

In the near term in the United States, we will need to focus on restoring some kind of framework for arms control, or at least for arms control negotiations. This could include particular measures like an extension or replacement for new START and restoration of the Iran nuclear agreement. It could also include initiatives that would raise the profile and capacity for arms control, perhaps via a new agency similar to the old Arms Control and Disarmament agency. Even when the prospects agreement seem dim, negotiations between nuclear-armed adversaries have other positive results. They allow the military and political leadership of the adversaries to better understand each other's intentions, and their fears. They build broader

channels of communication between military and government bureaucracies that can be of tremendous value when tensions rise.

But we must recognize that in the absence of movements capable of bringing far deeper social change in the United States and elsewhere, the dynamics driving renewed arms racing and the risk of war among nuclear armed states will not change much. The movements we need must 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.

It is on this terrain that the more visionary role for law, and particularly human rights law, may be most useful. It might provide new ways to understand common themes around which the movements might coalesce. And it may also be terrain where we can learn from other movements.

In this regard, I would suggest that a useful 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.

Approaches grounded in humanitarian law and in the human rights-based right to life focus mainly on the effects of nuclear weapons—the horrific things they do, and the way those effects violate every civilized value. 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 like climate change, would be to explore a more expansive conception of a right to democracy. This means much more than a right to vote, which in many countries affords people only limited choices among narrowly defined elites. It would entail a right for everyone to have an equal voice in decisions that by their nature affect us all.

We can find an example of this approach in the Draft Declaration on Human Rights and Climate Change, the work of scholars participating in the Global Network for the Study of Human Rights and the Environment. 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....”²

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.

Notes

¹ Sept. 21-24, 2020, Washington Post-ABC News poll https://www.washingtonpost.com/context/sept-21-24-2020-washington-post-abc-news-poll/13c7913a-ebbb-482b-a661-c5562bd2d551/?itid=lk_inline_manual_2

² Draft Declaration on Human Rights and Climate Change, II.13.

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>