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Nuclear Weapons and International Law

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By their very nature, their physical characteristics, nuclear weapons are not compatible with a rule of law society; they defy the spirit, the letter, and the concept of law. But they continue to exist in the arsenals and policies of a minority of powerful states because they have come to represent power, influence, and status. For the states that possess nuclear weapons, they are expressions of sovereignty. Ironically, nuclear weapons not only undermine the sovereignty of states because they defy any national borders, nuclear weapons also conflict directly with the principles of an international legal order. Nuclear weapons reveal the cracks in the existing international legal system, and suggest the changes necessary for a more just world order to emerge.

International law and nuclear weapons intersect in a number of ways, including specific treaties (NPT, START, CTBT), general treaty structures that form the basis of international law today (UN Charter), and the law of armed conflict, or humanitarian law and the law of neutrality.

It is not possible here to cover all of these, but to touch on a few:

1. Non-Proliferation Treaty (NPT) obligation (because that is the reason we are here)
2. United Nations Charter (jus ad bellum and jus in bello)
3. International Court of Justice (ICJ) opinion (interpretation of existing law, but limited by the political system of today)
4. Judge Weeramantry's dissenting opinion (as the authoritative interpretation of the law, following through on the logical and legal conclusions that - for political reasons - the Court could not)

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1. Non-Proliferation Treaty - opened for signature in 1968; entered into force 1970. Deal between 5 nuclear weapons states (NWS) and the rest of the world (182 NNWS): not to acquire nuclear weapons, in exchange for negotiating nuclear disarmament

NPT Article VI obligation:

"Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a Treaty on general and complete disarmament under strict and effective international control."

"Each of the Parties" suggests this goes beyond the bilateral START process and requires multilateral negotiations. This obligation is backed up by numerous resolutions of the UN General Assembly, dating back to the very first resolution.

2. The UN Charter provides the framework for modern international law, though much of it is the codification of pre-existing customary international law.

Article 2(4): "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations."

Article 51: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."

The combination of these two provisions means that a state may engage in the threat or use of force only in collective or individual self-defence, if an armed attack occurs, and only when the Security Council has not exerted control. Of course, the result has been, in part, that states claim their own threat or use of force as an act of self-defence, and see aggression on the part of others who act and speak in the same way. Nuclear weapons raise this irony to the level of absurdity.

But implicit in these principles of law is the aspiration for a just and effective international legal order. That it does not function smoothly is due largely to the psychological mindset of human mistrust, and the ways that fear, greed, and the drive for power have been infused into political structures. At the same time, these structures are being challenged today in ways that do not necessarily promise but do allow for the possibility of a transition to a more just world order based on the force of law rather than the law of force.

The 1996 Advisory Opinion of the ICJ on the threat or use of nuclear weapons reflects this moment of transition. The Court was caught between the political power structures that have shaped it, and the potential legal and political system that might emerge. Politically, the Court went as far as it could in affirming the illegal nature of nuclear weapons, but it could not directly state the logical and legal conclusions suggested by its own reasoning. The separate opinion of Judge Weeramantry (offered as a dissent) is in this sense the authoritative interpretation of the law, completing the legal reasoning suggested by the Court.

3. The International Court of Justice in its Advisory Opinion of July 8, 1996 held that:

"...the threat or use of 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" (para. 105(2)(E)).

The Court as a whole could not, however,

"reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake" (Ibid.).

This "exception" portion of the judgment was the subject of specific comment by the President of the Court, Judge Bedjaoui. He stressed this exception could not be interpreted as "leaving the door ajar to recognition of the legality of the threat or use of nuclear weapons" (Declaration of President Bedjaoui, para. 11).

Judge Bedjaoui stated that:

"...self-defence - if exercised in extreme circumstances in which the very survival of a State is in question - cannot engender a situation in which a State would exonerate itself from compliance with the *'intransgressible'* norms of international humanitarian law" (para. 22, Bedjaoui).

Indeed, he added that: "[I]t would thus be quite foolhardy unhesitatingly to set the survival of a State above all other considerations, in particular the survival of mankind itself" (Ibid. para. 22).

Thus, even a situation of extreme self-defence does not constitute an exception to the other rules of international law applicable. The Judges all agreed that the rules of international humanitarian law apply at all times (para 105(2)(d) of the Opinion).

Furthermore, the Court unanimously concluded that any threat or use of nuclear weapons whatsoever,

"...should also be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons..." (Judgement of the ICJ, para 105(2)(D)).

The "non-holding" regarding extreme circumstances of self-defence was likely a political bargain struck in order to gain enough votes for general illegality, given the political constraints on the judges. (Five of 15 judges are traditionally from the P5.)

Three of the dissents, however, dissented because they disagreed with the possible exception in extreme circumstances of self-defence, arguing that nuclear weapons were illegal under all circumstances. Weeramantry's dissent falls into this category. More on this below.

With respect to the principles of humanitarian law, the Court observed that:

"...the principles and rules of law applicable in armed conflict - at the heart of which is the overriding consideration of humanity - make the conduct of armed hostilities subject to a number of strict requirements. Thus, methods and means of warfare, which would preclude any distinction between civilian and military targets, or which would result in unnecessary suffering to combatants, are prohibited. In view of the unique characteristics of nuclear weapons...the use of such weapons in fact seems scarcely reconcilable with respect to such requirements" (para. 95).

Thus the Court confirmed that the Hague and Geneva Conventions, which codify the law of armed conflict, apply to nuclear weapons and make their use generally illegal. The principles of this law establish that the use of any weapon:

a. must be proportional to the initial attack,

b. must be necessary for effective self-defence,

c. must not be directed at civilians or civilian objects,

d. must be used in a manner that makes it possible to discriminate between military targets and civilian non-targets,

e. must not cause unnecessary or aggravated suffering to combatants,

f. must not affect States that are not parties to the conflict, and

g. must not cause severe, widespread, or long-term damage to the environment.

The Court also confirmed that if a particular use of weapons is illegal, so is the threat of such use. With respect to possession, the Court said specifically: "[i]f the envisaged use of force is itself unlawful, the stated readiness to use it would be a threat prohibited under Article 2, para 4." This being the case, the Court observed that "[p]ossession of nuclear weapons may indeed justify an inference of preparedness to use them" (para 48). It added that:

"Whether there is a "threat" contrary to Article 2, para 4, depends upon whether the particular use of force envisaged would be directed against the territorial integrity or political independence of a state, or against the Purposes of the United Nations or whether, in the event that it were intended as a means of defence, it would necessarily violate the principles of necessity and proportionality" (para 48).

Since first use of nuclear weapons would necessarily violate the principles of necessity and proportionality, it is arguable that mere possession of such weapons by a state that maintains a foreign policy of first use would constitute a threat to use those weapons under the Charter.

With regard to the obligation under the NPT for good faith negotiations on nuclear disarmament, the Court found that:

"The legal import of that obligation goes beyond that of a mere obligation of conduct; the obligation involved here is an obligation to achieve a precise result - nuclear disarmament in all its aspects - by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith" (para. 99).

The Court saw this obligation as the *remedy* to the current state of instability in international law created by the "non-holding" that it identified. This was not an incidental reminder to negotiate nuclear disarmament, but the solution to lack of clarity in the law.

In this context, the Court held unanimously that: "There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control."

The Advisory Opinion reflects the changing role of global society and international law. The Court was caught between the framework of the past and indeterminate power structures yet to emerge. What kind of system will emerge and what the power structures will be is not yet clear, but Weeramantry's opinion offers some guidance.

4. Weeramantry's dissenting opinion as the accurate, authoritative statement of the law, statement of transition, and a guide to discerning positive signs of the emergent system

Weeramantry's dissent is based in large part on his fundamental disagreement with the concept of "general" illegality and the possible self-defence exception. He believes that the existing law is sufficiently clear on this matter. His interpretation should and will most likely be the prevailing opinion in years to come, as he was not bound, like the Court, by current politics and the jurisprudence of the past.

Under the nation-state system of the past 350 years, the international actors are sovereign, territorial states, and the international security system depends on the role of a few dominant states. Warfare and economic disparity are seen as inevitable.

It is something of a cliché to point out that the world is going through a period of transition, or globalization, which includes centralization and integration of non-state actors, non-territorial social and economic forces, and globally organized media and communication, among others. This transition can be labeled a move from *geopolitics* to *geogovernance*.

Whether the emergent system will be human rights based or statist and market centered depends greatly on the nature of participation of transnational civil society and on our ability to discern emergent structures and to reinforce those we view as humane. The guiding principles of *humane geogovernance*, both analytical and normative, include economic well-being, social justice, non-violence, ecological stability, and positive identity. Weeramantry foreshadows positive signs by affirming the role of law in society as a guide to interpreting the law. His opinion on nuclear

weapons offers a reading of the current state of the law that brings us into the "shadowland" of a nuclear weapons free world.

"Shadowland" is a term used by Richard Falk in an essay entitled, *The Grotian Quest*. He argues that our endeavors to create a better world necessitate "a special sort of creativity that blends thought and imagination without neglecting obstacles to change." He continues:

> "We require, in effect, an understanding of those elements of structure that resist change, as well as a feel for the possibilities of innovation that lie within the shadowland case backward by emergent potential structures of power. Only within the shadowland, if at all, is it possible to discern 'openings' that contain significant potential for reform, including the possibility of exerting an impact on the character of the emergent political realities."

Grotius, often referred to as the father of international law, lived in the shadowland of a transition from feudalism to the modern nation-state system. His contributions to the laws of war and peace (1625) provided the basis for a new normative order for the nation-state system, which was then emerging. Today's "Grotian Quest" faces a set of obstacles that includes widespread abuse of human rights, scarcity of basic material needs, environmental degradation, and global militarization, including the threat of nuclear weapons. Judge Weeramantry foreshadows a globalization that moves the state system from geopolitics to humane geogovernance. Finding that "international law has clearly a commitment to the Grotian vision," he brings the shadowland into focus by coding the instruments of international law that are both normatively grounded and oriented toward a nuclear weapon free world.

Weeramantry uses an updated Grotian methodology to build his case, relying on positive legal instruments as well as the historical and jurisprudential bases of these instruments, and fundamental humanitarian principles shared by cultures and authorities throughout the world. He also ranges far afield both in a macro-historical and multi-cultural fashion, opening up a range of topics that the other judges do not get into and inviting us to think about the world in which we live, how law presently affects that world, and how it should.

In his analysis of past reliance on nuclear weapons, Weeramantry keeps in sight the role of the Court in guiding global society:

> "A global regime which makes safety the result of terror and can speak of survival and annihilation as twin alternatives makes peace and the human future dependent on terror. This is not a basis for world order which this Court can endorse. This Court is committed to uphold the rule of law, not the rule of force or terror, and the humanitarian principles of the laws of war are a vital part of the international rule of law which this Court is charged to administer."

He also reminds us why, in today's increasingly interdependent world, the admittedly difficult task of analyzing and explaining international law is essential, as illustrated by the example of South Africa:

> "The Court's decision on the illegality of the apartheid regime had little prospect of compliance by the offending government, but helped to create the climate of opinion which dismantled the structure of apartheid. Had the Court thought in terms of the futility of its decree, the end of apartheid may well have been long delayed, if it could have been achieved at all. The clarification of the law is an end in itself, and not merely a means to an end. When the law is clear, there is a greater chance of compliance than when it is shrouded in obscurity."

Weeramantry reminds us that a viable social organization contains rules of conduct that allow for its continued existence. Thus, international law - flexible as it might often appear - cannot be manipulated to permit any conclusion that tolerates the possibility of self-destruction. Seeking security through arms races and the capacity for mass destruction is incompatible with a legal system that has prohibited the threat or use of force, as the UN Charter does.

The Court was also bound by a tradition of jurisprudence inherited from its predecessor, the Permanent Court of International Justice (PCIJ). In a 1927 criminal jurisdiction case, *Lotus*, the PCIJ held that "restrictions upon the independence of States cannot...be presumed." This "permissive theory" of international law provides that what is not specifically prohibited is permitted. *Lotus* was the brooding omnipresence in the ICJ's advisory opinion, causing it to look for explicit prohibitions of nuclear weapons, for example. Weeramantry moves beyond this extreme deference to state sovereignty, noting also that in times of war, when humanitarian law applies, there can be no presumption of permissibility.

The Advisory Opinion also serves to highlight the gaps in the law of self-defence, itself a manifestation of the concept of sovereignty. Given the range of opinions on the meaning and application of self-defence, it should come as little surprise that the ICJ could not reconcile extreme circumstances of self-defence with the most extreme means of warfare to date - nuclear weapons. If the law is unclear and inconsistent on the use of force in self-defence, it would be all the more indeterminate when juxtaposing weapons of mass destruction with the "very survival of a state."

The Court could not resolve the question of self-defence in relations to state survival because the emerging system of geogovernance threatens the very *survival of statehood* as an institution. The concept of "extreme circumstances of self-defence" underscores the futility of attempting to draw a line between legitimate and illegitimate uses of nuclear weapons. The Court did not recognize that self-defence as a *right* should carry a *duty*: an obligation of restraint.

Weeramantry's analysis of *Lotus* foreshadows a fundamentally different interpretation of sovereignty and permissible state behavior than that espoused by the nuclear weapon states. He recognizes that the postulate of law contributes to and functions within the premise of continued existence of the community served by that law. Legal systems are postulated upon the continued existence of society.

Conclusion

Nuclear law cannot be only an exercise in jurisprudence. Law must take into account the unique nature of nuclear weapons *and* the political/social context that enables their continued development and improvement.

The policies and practices of defence establishments and weapons labs help to shape society and law. Considerations of the role of law in society must therefore take into account the functioning of the machinery that produces nuclear weapons, other weapons of mass destruction, and newer and more sophisticated weapons that cannot even be easily classified.

Our law is failing us as a society if it allows us to continue putting enormous quantities of resources and talent into the science of destruction. Weeramantry offers a framework for reversing this trend.