

THE LEGALITY OF THE THREAT OR USE OF NUCLEAR WEAPONS: THE ICJ ADVISORY OPINION RECONSIDERED

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This article deals with what I think is the most serious, but also the most insidious and publicly neglected challenge in today's world and international law: the legal status of nuclear weapons.¹ It is a subject which will take us right to the limits of international law. But we will approach it with all due modesty, asking questions and trying to give answers and pointing to and leaving open many aspects, which you will certainly discuss in class or in your papers in the months ahead.

I shall try to introduce the subject with some remarks of a historical and rather general nature. I shall then concentrate on the 1996 Nuclear Weapons Opinion of the International Court of Justice, and I shall formulate seven critiques concerning the Opinion based on fundamental principles and concepts of international law. And I may, in conclusion, ask whether the Court would or should decide differently, if it had to deal with the General Assembly's request today.

Throughout my exposé, I am expressing my own personal opinions. Although I am a member of the governing board of the International Committee of the Red Cross which is intimately involved in the questions we are going to consider, I cannot and will not engage the Institution by anything I say in my lecture.

I.

On 6 August 1945, the first atomic bomb was dropped on Hiroshima. It was followed three days later by a second bomb on Nagasaki. The two bombs produced approximately 150,000 immediate victims. More than 100,000 human beings died in the following weeks and months as a result of injuries and nuclear radiation. The victims were mainly civilians. The consequences of dropping the bombs, for human health, were long-lasting: they are being felt even now.

It is moving to learn how, in the words of a Japanese author, a victim from Hiroshima experienced the situation:

"It was just like hell" – he wrote – "a procession of ghosts, a sea of flames. But I didn't see the devil, so I thought it was something happening on this earth ...

An atomic bomb doesn't just fall; someone has to drop it ...

It was eight o'clock. There was a great flash; it was like nothing ever seen before. The old woman neither felt a jolt nor heard a bang. The ceiling and the roof just fell down together, the floor jumped up, and she was caught between them."

Similar and equally moving words can be found in the testimony of witnesses before the International Court of Justice (ICJ) in 1996.

Soon after the atomic bombings, the Dutch international lawyer Bert Röling pointed out, that they were unlawful, because they were attacks on the civilian population. They were not directed against military targets. Neither in Hiroshima nor in Nagasaki was the civilian population given warning. The dropping of the atomic bombs contradicted – said Röling – the rule adopted at the St. Petersburg Conference in 1868 that "the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy".

In the same sense, the International Committee of the Red Cross, from the very outset, questioned the legality of this new weapon of mass destruction. In an appeal launched in 1950 it pointed out:

"Within the radius affected by the atomic bomb, protection is no longer feasible. The

use of this arm is less a development of the methods of warfare than the institution of an entirely new conception of war (...) With atomic bombs and non-directed missiles, discrimination (between combatants and non-combatants) becomes impossible."

Obviously, nuclear weapons cannot discriminate between combatants and non-combatants. But what is more important and was well expressed in and underlying the appeal of the ICRC is the fact that the reach of such weapons goes beyond and exceeds the formal categories of international humanitarian law, due to their potential of destroying humankind or large portions of it in a single stroke.

The bombings of Hiroshima and Nagasaki did not result in any military advantage whatsoever, because the civilians affected by them were not taking part in the war and its end was not dependent on their destruction. The use of the two bombs was also pointless from a military point of view. And they had, arguably, no decisive impact on Japan's attitude. They were not the means by which the war was brought to an end. They killed indiscriminately and arguably to no purpose. And they tainted the cause of the Allied Powers and undermined their fitness to judge the defeated Japanese.

It is important to *see* and to *listen*: To look at the devastation inflicted on Hiroshima and Nagasaki. To listen to the testimony of victims. Compared to these voices, abstract discussions about the threat or use of nuclear weapons have less power to move people and to engage them. The main problem is that decisions on nuclear weapons are prepared and taken by political leaders, strategists and scientists. Their arguments revolve around abstract concepts, military doctrines, ideologies, interests of (national) power, and things of that sort. This is the greatest danger: to neglect, behind an overriding general goal, the fact of suffering caused for thousands and millions of people.

II.

One of the biggest and still unfinished tasks for the international community thus concerns the law governing disarmament and arms control. In this area, the effective banning of nuclear weapons is a fundamental challenge, not just for international lawyers but for all of humanity.

The rules of international law that have been designed to place constraints on warfare are

far from perfect. The most alarming gap in this framework of rules is that the international community has not yet succeeded in imposing a total ban on nuclear weapons. For years the General Assembly of the United Nations was engaged in fighting the non-proliferation of nuclear weapons and calling for their prohibition; however, it did not mobilize indignation and public awareness to a necessary degree.

In December 1994 the General Assembly adopted a resolution by which it urgently requested the International Court of Justice to render an Advisory Opinion on the question: "Is the threat or use of nuclear weapons in any circumstances permitted by international law?" The request followed another which had been made by the Assembly of the World Health Organisation to the Court in May 1993; that previous request had focused on the health and environmental effects of possible use of nuclear weapons and its conformity with international law and especially with the WHO constitution. The Court dismissed the request by WHO on the grounds that it had not been made within the Organization's legal capacity. However, no such formal obstacle was present in regard to the General Assembly's request. The Court rendered its Opinion on both requests on 8 July 1996.

This Opinion is maybe the best-known pronouncement of the ICJ in the 90s as was the Nicaragua Case in the 80s. It did not definitively establish the legality or illegality of the use of nuclear weapons. It was very controversial in its content.

The extent of the legal difficulties that confronted the Court is evident from the fact that, in the absence of a majority, it had to resort, for the second time only in its history, to adopting the most crucial paragraph of the operative part by the casting vote of the President. Another indication of no lesser significance is that, probably for the first time in the history of the Court, every Judge who took part in the proceedings appended a Declaration or a Separate or Dissenting Opinion. Georges Abi Saab² was right when he concluded his thorough study of the Court's pertinent jurisprudence concerning questions of admissibility of requests for Advisory Opinion by stating that "(i) indeed, if there was a case in which the exercise of discretion would have been justified, had it been at all possible, this was it."

The Court took a broad approach to the General Assembly's request. It made interesting statements concerning human rights law, environmental law and other domains of international law. But it chose international humanitarian

law as the main field of the law on which to base its Opinion.

In its reply to the Assembly the Court ruled, in the crucial section 2 E of the operative part 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”. However, in the following sentence, the Court held that in view of the current state of international law and of the elements of fact at its disposal, it could not conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence in which the very survival of a State would be at stake. This section of the Opinion was adopted by a split of seven votes to seven, with the President casting the deciding vote.

The Court thus found, first, that the threat or use of nuclear weapons was generally not compatible with the principles and rules of humanitarian law; but, second, it opened the door for the possibility that nuclear weapons may legally be used under very exceptional circumstances. The Court could not – so it stated in the limiting or “non-liquet” clause – definitely define and decide on these circumstances.

The general rule on the illegality of nuclear weapons was given forceful expression in pronouncements by several judges, from which I quote a few passages.

Judge Mohammed Bedjaoui, President of the Court, wrote in a separate declaration that:

“By its very nature the nuclear weapon, a blind weapon, (...) has a destabilizing effect on humanitarian law, the law of discrimination which regulates discernment in the use of weapons. Nuclear weapons, the ultimate evil, destabilize humanitarian law which is the law of the lesser evil. The existence of nuclear weapons is therefore a major challenge to the very existence of humanitarian law.”

This view was supported by one of Judge Bedjaoui’s colleagues, Judge Geza Herczegh, who noted in a declaration that:

“The fundamental principles of international humanitarian law, rightly emphasized in the reasons of the Advisory Opinion, categorically and unequivocally prohibit the use of weapons of mass destruction, including nuclear weapons. International humanitarian law does not recognize any exceptions to these principles.”

Judge Mohammed Shahabudden referred to the abstract concept of sovereignty and pointed out in his dissenting opinion:

“however far-reaching may be the rights conferred by sovereignty, those rights cannot extend beyond the framework within which sovereignty itself exists; in particular, it cannot violate the framework. The framework shuts out the right of a State to embark on a course of action which would dismantle the basis of the framework by putting an end to civilization and annihilating mankind.”

Judge Abdul G. Koroma observed in another dissenting opinion that

“the Court flinched and failed to reach the only and inescapable finding, namely, that in view of the established facts of the use of such weapons, it is inconceivable that there is any circumstance in which their use would not violate the principles and rules of international law applicable in armed conflict and, in particular, the principles and rules of humanitarian law”.

III.

This is what I wanted to say in commenting on the reasoning put forward by the Court 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 international humanitarian law. But what about the so-called “non liquet”-clause added to and limiting the general principle just stated? The Court found – I repeat – that in view of the current state of international law, and of the elements of fact at its disposal, it could not conclude definitively whether the threat or use of nuclear weapons be lawful or unlawful in an extreme circumstance of self-defence, in which “the very survival of a State would be at stake”.

I very much deplore this sentence in the operative part of the Opinion, and I am now going to formulate seven critiques of this clause and of the legal and theoretical conceptions on which it is based. My concerns are:

- 1) a deviation from the principle of strict separation of “ius in bello” from “ius ad bellum”;
- 2) inconsistency with basic principles in the law of disarmament;
- 3) reaffirmation of the so-called “Lotus-Doc-trine”;

are among the greatest achievements of modern international law. But one particular, serious gap in the law is the absence of a prohibition of nuclear weapons. The Court, in its Advisory Opinion, did nothing to remedy this disastrous lacuna in the law of arms control. The lack of a formal Convention prohibiting nuclear weapons stands in strange and sad contradiction to the modern logic of the law of arms control.

Critique No 3: Reaffirmation of the so-called “Lotus-Doctrine”?

The Opinion is based on the premise that States are free to do what is not prohibited by international treaties (or customary law). It continued a line of reasoning which was given explicit expression in the so-called “Lotus”-case decided, in the thirties, by the Permanent Court of International Justice. It is marked by the age of positivism and its celebration of State sovereignty, but seems somewhat outdated today.

The “Lotus-Doctrine” does not adequately take into account the common needs of the modern international community. The Australian government put it aptly in its oral statement on the Advisory Opinion when it said that:

“(T)he fact that particular conduct is not proscribed by any international treaty does not of itself enable the conclusion to be drawn that such conduct is consistent with general principles of law. The general principles may in some respect be broader than any existing treaty provision at all.”

It is noteworthy that already in *Shimoda et al. v. The State*, a Tokyo District Court in 1963, dealing with some effects of the bombing of Hiroshima and Nagasaki had observed that:

“Any weapon the use of which is contrary to the customs of civilized countries and to the principles of international law should *ipso facto* be deemed to be prohibited even if there is no express provision in the law; the new weapon may be used as a legal means of hostilities only if it is not contrary to the principles of international law...”

Critique No 4: Inadequacies concerning the doctrine of sources of International Law

Closely connected with Critique No 3 concerning the reaffirmation of the so-called “Lotus-

-Doctrine” is Critique No 4 concerning the conception of sources on which the Opinion rests. It is based on the will of States as the ultimate source of international law.

Such positivism is old-fashioned. A modern theory of international law should better reflect the common values of the international community. It must therefore be possible, in the final analysis, to bring into the mix concepts such as “values and interests of mankind”, the “universal human conscience”, and the demands of “comprehensive global justice”, not only as meta-legal concepts but as an integral part of the law. By analogy with domestic law, we could speak here of an “international public order”.

I always thought that “General Principles of Law” (in the sense of Article 38 of the Statute of the International Court of Justice) might, together with the Martens Clause, help to overcome the rigid dichotomy of treaties and customary law as the essential foundation of the international legal order.

The issue of nuclear weapons is proving to be a catalyst in challenging orthodox opinions on the sources of international law. Hitherto, the conventional view has been that international law is derived from treaty law and customary law, hence from the will of States. However, a system of international law for which – owing to its roots in the will of the States, according to the positivist view – the illegality of weapons of mass destruction is not an unambiguous and basic premise, is one that rests uneasily on shaky foundations.

Critique No 5: Outdated conception of security

In a speech made in Hiroshima, Judge Antonio Augusto Cançado Trindade⁴ has rightly pointed out that the Opinion reflects a notion of security which wrongly concentrates on State interests and not on interests relating to the security of mankind (human security). Just as the logic of development – so he points out – has moved on from the framework of inter-State relations to the new concept of human development, so has the logic of security: conceived in the past to apply to inter-State relations (including in the scheme to renew collective security under the U.N. Charter), it nowadays transcends that dimension, causing attention to shift to human security.

The new approach to the whole subject of security was developed by the United Nations within the framework of its Millennium summit (2000)

and set out in its Report on Human Security in 2008. It called for the necessary control of weapons in order to guarantee the “security of persons”.

In one and the other contexts the central concern today is therefore no longer with States properly, but rather with human beings within and across State borders thus replacing the old state-centric approach of the matter by an anthropocentric one. Cançado Trindade rightly concludes that the concern is ultimately with humankind as a whole; he pointed to the new “*ius gentium*” of our days, the international law for humankind. This newly emerging idea, philosophy or concept of security is not (yet) reflected in the Court’s Advisory Opinion.

Critique No 6: Philosophical conceptions concerning a lack of justiciability underlying the “non-liquet”-clause – “Black Hole” and need for a constitutional approach

What do I mean with black hole? What is meant by a “constitutional approach”?

With the first term, I am referring to a point made by Professor Martti Koskenniemi^{5/6} in defence of the “non liquet”-clause of the Court’s Nuclear Weapons Advisory Opinion. Koskenniemi argues that a legal-technical approach to the massive killing of the innocent (...) cannot deal with the political and moral dilemma involved. “For the voices of justice to be heard”, he writes, “law must sometimes be silent”. This idea is well formulated. However, I do not share Koskenniemi’s view. What is the value of a legal system – I ask myself – if it is not capable of giving answers to the most basic concerns of the community? I try to find a response to Koskenniemi’s apology by referring to a theory which has been close to my thinking for a long time and which might be called “constitutional method” of constructing and interpreting international law.

This term needs, I think, some explanation. For most of you, the term “constitution” is closely connected to the idea of the basic law of a State. You may ask: Does it make sense to transfer a notion or a concept which is so deeply rooted in the history of statehood to the international domain? Not even all States have – you might object – their national constitution. Can there be such a thing as a “constitution” of the international community: A constitution like the “*Constitution de la République française*” or the German “*Grundgesetz*”?

Imagine a State Constitution or basic order which does not contain, *expressis verbis*, a guarantee of a right to life or personal freedom, the principle of good faith, a prohibition of arbitrary conduct, or a set of powers of State authorities to safeguard the existence of the State or to uphold its constitutional system in the event of revolution, attack from abroad or other emergency situations.

Would it not be necessary, or even imperative, to infer such fundamental principles – which are the essence and shape the identity of a legal community, which even safeguard the survival its very survival – from the very system, from the very concept, from the purpose of the constitution, from an all-embracing set of fundamental values underlying the constitution and are immanent therein?

In fact, all or most constitutions of States or international or supranational constitutional treaties refer, in one way or another, to concepts of implied powers.

I remember Albert Schweitzer having written that, in the final analysis, nuclear crisis can only be averted by means of international law. And we ask: what system of law would it be, would it still deserve the name of “law”, if it permitted or did not speak out against the collective suicide of mankind? If the international lawyer shrugged his shoulders and said: This is a challenge I am not able to face with my methodological repertoire and its limited technical means?

I think that international humanitarian law is an extremely fertile ground for new ideas on the this subject. International humanitarian law has, from its very beginning, been ruled by considerations other than the interests of States. It is based on the principle of humanity, i.e. a value system centred around the human being, the suffering victim of war.

We need a fresh thinking about fundamental ideas and concepts of international law. Humanitarian law might serve as an excellent starting point. It would be rewarding, I believe, to return, from time to time, to the enlightened teaching of the founding fathers of international law who, standing at the threshold of modern international law, had – so it seems – a broader, truly universal vision. Are not, in our period of transition, Victoria, Suarez, Grotius, Gentili or de Vattel, more relevant for the conception of modern international law than more recent thinkers like Anzilotti or Triepel?

The personal will and interests of States are no longer solely decisive for the development of international law; more and more ideals like the public weal, the common interests of the international

community and the quest of humanity are shaping the direction to be taken by evolution of the law.

In this context, constitutionalism has its place. It means more than purely technical analysis of international law. It seeks the elementary principles above the ordinary law and within the legal system. It leads to a better, richer understanding and structuring of the legal order as a whole.

In the current debate in international law theory, the constitutional method serves as a vehicle for "second-order thinking" beyond "law in the books". It extends the geographical and temporal limit of debate, and admits ethical and moral considerations to the resolution of issues of international law. It appears to be a method of interpretation and construction that changes the inner dynamic of law without necessarily changing its wording.

It enables us to widen the range of reference and to exploit unwritten basic principles such as the principle of humanity and proportionality (understood in a large sense) and to see law in a different light while still recognizing and reinforcing it as law.

It also enables us to see international law as a complex field of norms within a broad context of rules and principles, legal, social, economic and ethical, written and unwritten. It refers to basic values within the legal system without being referred in meta-legal order.

I think that many principles of humanitarian law might be considered as being part of a constitutional core of the international legal order.

Constitutions thinking may overcome unsatisfactory results stemming from a theory of the "black hole" ("rechtsfreier", "gerichtsfreier Raum").

Critique No 7: Serious consequences of the Opinion on State practice

Let me end to the list of critiques of the "non liquet"-clause in the Court's Opinion on nuclear weapons by referring to its consequences on world order. This critique was aptly formulated by Professor Michael Reisman.⁷ What did the Opinion contribute – so Reisman asks – to the goals of the international law, in particular to the maintenance of minimum world order?

In contemporary world politics, one of the most urgent programmes for the maintenance of minimum world order is that of non-proliferation. Professor Nicolas Michel has already analyzed this subject profoundly many years ago.⁸ It is obvious

that the most urgent and fundamental common interest of humanitarian law is to prevent nuclear proliferation and to secure a general, orderly and effective nuclear disarmament. But what is the optimal realistic strategy for a continued reduction and finally total elimination of those weapons?

The essential question seems, in the present context, to be whether the Court's holdings contribute to minimum world order by reinforcing the legal regime governing nuclear weapons and pressing on towards the desired goal of nuclear disarmament.

A legitimate critique concerning the consequences of the Opinion is that the Court's formulations raise doubts about the cogency of the non-proliferation regime elaborated within the United Nations, and revive the legitimacy of claims to use nuclear weapons for exclusive national purposes.

What was the Court saying to security specialists in States that feel that they are under significant threat? It said, in particular in conclusion (2) E of the operative part, that the use of nuclear weapons might be legitimate for discrete national purposes which the Court described as an extreme circumstance of self-defence in which the States very survival was at stake. And it is of course, as pointed out by Reisman, the self-perceived threatened State that makes the initial and irrevocable operational decision that it is in an extreme situation of self-defence.

Those who oppose proliferation will not be helped by the Court's Opinion of 8 July 1996.

Ways to go

Since the bombing of Hiroshima and Nagasaki in 1945, the existence of nuclear weapons has weighed heavily on the conscience of mankind. The dropping of those bombs revealed man's infinite capacity to cause death, suffering and destruction using methods that preclude any distinction between civilians and members of the armed forces.

And yet, in discussions about the legality of such weapons, such ideas as "policy of deterrence", "strategic wars" and "military superiority" are still being advanced, as if they were anything other than morally disreputable, and the fact of human suffering is treated as if it were a purely abstract issue.

Utility-thinking (as used in a very narrow, self-centered sense beyactors) seems to dominate moral thinking. Nuclear weapons still play a considerable part in national security strategies or as instruments of geopolitical power: a miscon-

NOTES

1. The present text is an elaborate version of the Inaugural Lecture which I presented at the Geneva Academy of the International Humanitarian Law on October 20, 2011. The style of the oral presentation has been maintained. For further reading see *L. Boisson de Chazournes and P Sands* (eds.), *International Law, The International Court of Justice and Nuclear Weapons* (1999), with contributions by Geneva Professors G. Abi-Saab, L. Condorelli, Ch. Dominicé, P-M. Dupuy, V. Gowlland-Debbas and M.G. Kohen. See also *L. Doswald-Beck*, *International Humanitarian Law and the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons*, in: *International Review of the Red Cross* No. 316 (1997). For more details see *D. Thüerer*, *International Humanitarian Law: Theory, Practice, Context – Paperback of The Hague Academy of International Law* (2011); *id.*, *Milestones in the Development of International Humanitarian Law*, in: A. Eide, J.Th. Möller and I. Ziemele (eds.), *Making Peoples Heard, Essays on Human Rights in Honour of Gudmundur Alfredsson* (2011). 1 ff.; *D. Thüerer and M. Zobl*, *Are Nuclear Weapons Really Legal? Thoughts on the Sources of International Law and a Conception of the Law Imperio Rationis instead of Ratione Imperii*, in: U. Fastenrath, R. Geiger, D.-E. Khan, A. Paulus, S. von Schorlemer and Ch. Vedder (eds.), *From Bilateralism to Community Interest, Essays in Honour of Judge Bruno Simma* (2011) 184 ff.
2. *G. Abi Saab*, *On discretion: reflections on the nature of the consultative function of the International Court of Justice*, in: *L. Boisson de Chazournes and P. Sands* (eds.), *International Law, the International Court of Justice and Nuclear Weapons* (1999) 36 ff.; *id.*, *The Court and the Bomb: A Case of Mutual Deterrence? In: Transnational Law and Contemporary Problems* (1997) 429 ff.
3. See *J. Kellenberger*, *Humanitäres Völkerrecht* (2010) 269 ff.
4. *A.A. Cançado Trindade*, *A Humanização do Direito internacional* (2006) 194 ff.
5. *M. Koskenniemi*, *The Silence of the Law/The voice of Justice*, in: *L. de Boisson de Chazournes and P. Sands* (eds.), *International Law, the International Court of Justice and Nuclear Weapons* (1999) 48 ff.; *id.*, *Faith, Identity, and the Killing of the Innocent: International Lawyers and Nuclear Weapons*, in: *M. Koskenniemi, The Politics of International Law* (2011) 198 ff.
6. *D. Thüerer*, *Recht der internationalen Gemeinschaft und Wandel der Staatlichkeit*, in: *D. Thüerer, Völkerrecht als Fortschritt und Chance (International Law as Progress and Prospect) – Grundidee Gerechtigkeit*, Band 2 (2009) 97 ff.
7. *W. Michael Reisman*, *The Political Consequences of the Assembly Advisory Opinion*, in: *L. Boisson de Chazourne and P. Sands* (eds.), *International Law, the International Court of Justice and Nuclear Weapons* (1999) 473 ff.
8. *Nicolas Michel*, *La Prolifération Nucléaire: Le Régime International de Non-Prolifération des Armes Nucléaires et la Suisse. Habilitation* (1990).
9. *Joseph S. Nye Jr.*, *The Powers to Lead* (2008).
10. *Negotiations should base themselves in international humanitarian law; they should proceed from the assumption that a general prohibition of nuclear weapons is already part of the corpus of international law as it exists today, that new treaty norms would be based on and reflect principles already in force. By doing so the vision of a “nuclear-free world” would be incorporated in a comprehensive treaty that would also contain provisions on related legal subjects (such as non-proliferation) and rest on the conviction that, for the purpose of negotiations, a ban on the use of nuclear weapons was a settled matter, an imperative, and not something to be haggled over by those seated at conference tables. See Council of Delegates of the International Red Cross and Red Crescent Movement 2011: Resolution 1 of 26-11-2011, “Working towards the elimination of nuclear weapons” in which the Council*
 1. emphasizes the incalculable human suffering that can be expected to result from any use of nuclear weapons, the lack of any adequate humanitarian response capacity and the absolute imperative to prevent such use,
 2. finds it difficult to envisage how any use of nuclear weapons could be compatible with the rules of international humanitarian law, in particular the rules of distinction, precaution and proportionality,
 3. appeals to *all* States:
 - to ensure that nuclear weapons are never again used, regardless of their views on the legality of such weapons,

