



Nuremberg and Nuclear Weapons

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The principal message of the Nuremberg trials is that individuals are responsible for what they do, and will be held accountable for committing serious crimes under international law. At Nuremberg, these serious crimes included crimes against peace (that is, planning, preparing for, or participating in acts of aggressive warfare), war crimes, and crimes against humanity [1].

One of the great ironies of history -- or perhaps it is not such a great irony -- is that the Charter establishing the International Military Tribunal at Nuremberg was signed on August 8, 1945. That was just three months after the German surrender. More important, it was just two days after the first nuclear weapon was used in warfare on the city of Hiroshima, and one day prior to a nuclear weapon being used on the city of Nagasaki. The nuclear weapon used on Hiroshima, with an equivalent force of some 15 kilotons of TNT, killed some 90,000 people immediately and some 140,000 by the end of 1945. The bomb dropped on Nagasaki, with an equivalent force of some 20 kilotons of TNT, killed some 40,000 people immediately

and some 70,000 by the end of 1945.

The number of people who died immediately from the use of each of these nuclear weapons was less than the number of people who died in Tokyo on the night of March 9-10, 1945 as a result of U.S. bombing raids. This number is estimated at approximately 100,000. The major difference between the Tokyo bombings and those of Hiroshima and Nagasaki is that the former took nearly a thousand sorties to accomplish, while the destruction of the latter two cities took only one bomb each.

The Nuclear Arms Race: Failure of Accountability?

It is reasonable to speculate that if the Germans had had two or three atomic bombs, as we did at that time, and had used them on European cities prior to being defeated in the Second World War, we would have attempted to hold accountable those who created, authorized, and carried out these bombings. We would likely have considered the use of these weapons on cities by the Nazi leaders as among the most serious of their crimes.

The outcome of history, of course, is that the Germans did not develop or use atomic weapons and, thus, this issue never came before the International Military Tribunal at Nuremberg or before any other international tribunal. The record of the past 50 years

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reflects the consequences of this lack of accountability, namely, the nuclear arms race pursued by the United States and the former Soviet Union, which lasted until the end of the Cold War in the early 1990s.

The question under consideration here is not whether war crimes were committed at Hiroshima and Nagasaki. Under the rules of international humanitarian law, as they apply to the inhumane bombing of civilians, a strong argument can be made that such crimes were committed. They would then also have been committed by the bombings of London, Coventry, Hamburg, Dresden, Rotterdam, and Tokyo. Civilians were the primary targets of all these bombings and the indiscriminate killing of civilians has always, in modern times, been understood to be a clear violation of the laws of war.

Nuclear Weapons and International Law

The more relevant question has to do with where we stand today. On July 8, 1996, the International Court of Justice (ICJ) in the Hague issued an opinion on the legality of the threat or use of nuclear weapons. Actually, two questions were placed before the Court for advisory opinions. The first question, posed by the World Health Organization in May 1993, asked: "In view of the health and environmental effects, would the use of nuclear weapons by a state in war or other armed conflict be a breach of its obligations under international law" [2]?

The second question, put to the Court by the General Assembly of the United Nations in December 1994, asked: "Is the threat or the use of nuclear weapons in any circumstances permitted under international law?"

The International Court of Justice found that the question asked by the World Health Organization, as a legal question, fell outside the scope of activities of the WHO. The Court therefore declined to accept jurisdiction. On the question posed by the United Nations General Assembly, however, the Court did find jurisdiction and issued an advisory opinion.

In a multi-part answer to the question, the Court found the following: "...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 view of the current state of international law, and of the elements of fact at its disposal, the Court cannot 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" [3].

In reaching this opinion, the Court dramatically reduced the possible circumstances in which nuclear weapons could be used or in which their use could be threatened in conformity with international law. The Court left open only the slim possibility of legality under "an extreme circumstance of self-defense, in which the very survival of a State would be at stake." Even in this circumstance, the Court did not say that such use would be legal; it said only that it could not determine legality under these conditions. Judge Muhamad Bedjaoui, the president of the Court, said in his declaration upon releasing the Court's opinion, "I cannot sufficiently emphasize the fact that the Court's inability to go beyond this statement of the situation can in no manner be interpreted to mean that it is leaving the door ajar to recognition of the legality of the threat or use of nuclear weapons" [3].

Judge Bedjaoui went further to describe nuclear weapons as "the ultimate evil" and to state that these weapons "destabilize humanitarian law, which is the law of the lesser evil." He argued that "Until scientists are able to develop a 'clean' nuclear weapon which would distinguish between combatants and non-combatants, nuclear weapons will clearly have indiscriminate effects and constitute an absolute challenge to humanitarian law. Atomic warfare and humanitarian law therefore appear to be mutually exclusive: the existence of the one automatically implies the non-existence of the other." (Emphasis in original.)

Where does this leave us today? Although the opinion of the Court is an advisory opinion, it is the most authoritative statement of international law on this question, and must be taken seriously. Thus far, however, there have been no statements made by any of the declared or undeclared nuclear weapons states indicating that they plan any changes in their nuclear policies as a result of the Court's opinion.

Accountability of Individuals and Nations in the 21st Century

We know what the Principles of Nuremberg tell us about individual accountability. The primary principle is that "Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment" [4]. The fact that there is no penalty for the act under a nation's internal laws does not relieve the person who committed the act from responsibility under international law. That the person acted as a head of state or as

an official of the government does not relieve that individual of responsibility. Nor does the fact that the individual acted pursuant to a superior's orders, so long as a choice was, in fact, possible to him.

It was the four principal Allied powers - the U.S., the UK, France, and Russia -- that established the Nuremberg Tribunal in order to hold Nazi and other Axis leaders accountable for their crimes under international law. The Nuremberg Principles were derived from the Charter of the Nuremberg Tribunal and its proceedings. If we want to create a world community in the 21st century that acts with respect for international law, we must seek to apply the Nuremberg Principles to one and all, equally and without favor. We must apply these Principles to ourselves as well as to others. If the threat or use of nuclear weapons is, in fact, illegal under international law in any conceivable circumstance, then the nuclear weapons states must act accordingly and neither use nor threaten to use these weapons. Instead, since the possession of nuclear weapons in combination with the theory of deterrence creates the threat of their use, nuclear arsenals must be eliminated subject to the terms of a Nuclear Weapons Convention as called for by the United Nations General Assembly [5]. In the meantime, all military personnel with responsibilities for nuclear weapons should be informed about the ICJ advisory opinion and its implications for their individual criminal responsibility with regard to the use or threatened use of nuclear weapons.

The International Court of Justice added to their opinion a clarification of Article VI of the Non-Proliferation Treaty. The Court unanimously found 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 Court has clearly indicated that the nuclear weapons states have an obligation to negotiate in good faith not only for nuclear disarmament, but for nuclear disarmament "in all its aspects" and to bring these negotiations to a conclusion. In the aftermath of the Cold War, we have been moving far too slowly to attain this goal -- a goal that is necessary so that no other city will ever again have to face the consequences of what happened at Hiroshima and Nagasaki, and so that the future of humanity will not be jeopardized by nuclear genocide.

The Need for a Permanent International Criminal Court

Even if the threat or use of nuclear weapons is unlawful under international

law, there currently exists no tribunal where persons committing such acts can be brought to account. One of the great shortcomings of the current international institutional structure is the lack of a permanent International Criminal Court. Two Ad Hoc Tribunals have been created by the United Nations Security Council -- one for the former Yugoslavia and one for Rwanda. The jurisdiction of both of these tribunals, however, is limited by time and mandate.

Were nuclear weapons to be used by accident or design, the consequences would be horrible beyond our deepest fears. Nazis and other war criminals were convicted and punished in part for bringing human beings to the incinerators of the Holocaust. Nuclear weapons may be conceived of as portable incinerators -- portable crematoria, if you will -- that bring death on a massive scale to people where they live. Viewed in this light, the American, British, Russian, French, and Chinese people -- the citizens of any country known or believed to possess nuclear weapons -- can be seen as guilty of their own crimes of silence.

For many, perhaps most, citizens of nuclear weapons states today, nuclear weapons are not perceived as a critical issue. They are largely ignored. Were these weapons ever to be used again, however, future historians -- if there were any -- would be hard pressed to explain the lack of commitment to ridding the world of these terrible weapons.

We have the opportunity, in fact the responsibility under the Nuremberg Principles, to speak out against these genocidal weapons. Yet for the most part we do not do so. We must break the silence that surrounds our reliance upon these weapons of mass destruction. A hopeful sign occurred at the State of the World Forum in San Francisco in 1996 when General Lee Butler, a former commander of the U.S. Strategic Command, broke his personal silence and made a ringing plea to abolish nuclear weapons. "We can do better," General Butler said, "than condone a world in which nuclear weapons are enshrined as the ultimate arbiter of conflict. The price already paid is too dear, the risks run too great. The nuclear beast must be chained, its soul expunged, its lair laid waste. The task is daunting but we cannot shrink from it. The opportunity may not come again" [6].

In a reaffirmation of the Nuremberg Principles, we must redouble our efforts to rid the world of nuclear weapons. As we enter the 21st century, this goal is within our grasp.

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References

1. Paech N. Nuremberg and the nuclear question. M&GS 1995;2:158-161.
2. Wilson N, Baker M. Nuclear weapons illegality -- the public health case. M&GS 1995;2:115-121.
3. International Court of Justice. Return to text]
4. United Nations. Report of the International Law Commission covering its second session, 5 June - 29 July 1950. New York: General Assembly Official Records: fifth Session, Supplement No. 12 (A/1316), 11-14.
5. United Nations General Assembly. Resolution 51/45M. New York: United Nations. 10 December 1996.
6. Butler L. Chaining the nuclear beast. Waging Peace Worldwide 1996;6,3:12-13.