Notes on a Misunderstood Decision: The World Court's Near Perfect Advisory Opinion in the Nuclear Weapons Case

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The landmark decision rendered by the International Court of Justice (ICJ) on July 8, 1996 [1] has been hailed by the antinuclear movement as a major victory for the cause of nuclear weapons abolition. The decision has also been disparaged by skeptics and pronuclear forces as "incompetent," decided "by a narrow margin," and contributing nothing new to the debate on the legality of nuclear weapons [2]. The first of these two views is far closer to the truth than the second.

What the Court Did and What the Court Could Have Done

In response to the insistent urgings of the nuclear weapon states (NWS), the Court could have used its discretionary power to refuse to consider the case altogether. It did not do so. Instead the ICJ rejected, by 13 votes to 1 (including in the majority all of the judges from nuclear weapon states), the argument that the questions put to it by the World Health Organization (WHO) and the UN General Assembly were essentially political in nature and that an opinion from the Court would interfere with disarmament negotiations.

The Court could have held that the threat and use of nuclear weapons is illegal in some, but not necessarily all, circumstances without specifying the exceptional circumstances. This was essentially the position of the four nuclear weapon states that participated in the proceeding -- France, Russia, the UK, and the U.S. -- and some of their NATO allies. Instead, the Court held that "the threat and use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and particularly the principles and rules of humanitarian law." The only possible exception to the general rule mentioned by the Court was "an extreme circumstance of self-defense, in which the very survival of a state would be at stake." As to this "extreme circumstance," the Court could not decide whether the threat and use of nuclear weapons would be lawful or unlawful. In other words, the Court said definitively that threat and use are unlawful and refused to say that, even in the extreme circumstance involving the very survival of a state, threat and use would be lawful.

The Court could have said nothing about the obligation to rid the world of nuclear weapons, since that question was not before it. In fact, the Court held unanimously that "[t]here exists an obligation to pursue in

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good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control."

Vote Counting: A Numbers Game

The Court took seven votes on various aspects of the General Assembly question [on the legality of the use or threatened use of nuclear weapons under international law] and an eighth vote on the admissibility of the WHO question. The Court decided that the question of the legality or illegality of nuclear weapons was not within the jurisdiction of the WHO. Yet the Court took only a single vote on paragraph 2E, the two-part holding of general illegality and the possible "extreme circumstance" exception, thus obscuring the true nature of the vote. The vote on 2E was seven to seven, with the President of the Court, Muhamad Bedjaoui of Algeria, casting the deciding vote under the rules of the Court. But of the seven dissenting judges, three -- Mohamed Shahabuddeen of Guyana, Christopher Weeramantry of Sri Lanka and Abdul G. Koroma of Sierra Leone -- made it clear in their separate opinions that the reason for their dissent was their belief that there could be no exception whatsoever to the principle of general illegality. A fourth, Shigeru Oda of Japan, based his dissent principally on his view that the Court should not have taken the case at all. Thus the position on general illegality was, in effect, ten to four. Only three judges dissented from that principle: those elected to the Court from the three Western nuclear weapon states -- Stephen M. Schwebel (U.S.), Gilbert Guillaume (France) and Rosalyn Higgins (UK).

Separate Opinions Leading to a Single Conclusion

In addition to the majority opinion, which is 37 closely printed pages in length, the 14 judges filed a total of 230 additional pages of separate opinions. A close reading of these opinions reveals many interesting points that go counter to the "narrow margin" view of the case [see 1 for all citations to individual judge's opinions]:

Judge Schwebel recognized the relevance of the Martens clause (1) to nuclear weapons and condemned the use of nuclear weapons as weapons of mass destruction:

> "It cannot be accepted that the use of nuclear weapons on a scale which would -- or could -- result in the deaths of many millions in indiscriminate inferno and by far-reaching fallout, have pernicious effects in space and time, and render uninhabitable much or all of the earth, could be lawful."

Judge Higgins expressed problems with the Court's analysis and formulation, particularly the word "generally," but seemed to leave open the possibility that a more profound analysis might have led the Court to conclude in favor of illegality in any circumstance, stating, inter alia:

> "I share the Court's view that it has not been persuasively explained in what circumstances it might be essential to use any such weaponry" and "I do not... exclude the possibility that such a weapon could be unlawful by reference to the humanitarian law, if its use could never comply with its requirements."

Judge Higgins also said:

> "It may well be asked of a judge whether, in engaging in legal analysis of such concepts as 'unnecessary suffering,' 'collateral damage,' and 'entitlement to self-defence,' one has not lost sight of the real human circumstances involved."

Those who, unlike Judges Schwebel and Higgins, voted with the majority, also had interesting things to say.

President Bedjaoui had this comment on the "exceptional circumstance" clause:

> "I cannot insist too strongly on the fact that the Court's inability to go beyond the conclusion it reached cannot in any manner be interpreted as having opened the door to the recognition of the legality of the threat and use of nuclear weapons."

He called nuclear weapons "the ultimate evil" and said:

> "By its nature, the nuclear weapon, this blind weapon, destabilizes humanitarian law, the law of discrimination in the use of weapons."

And, citing Einstein's adage that "humanity will get the fate it deserves," he

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1. The Martens Clause, which originated in the first Hague Peace Conference in 1899 and was incorporated into Additional Protocol I of the 1949 Geneva Conventions (Appendix 2), states that civilians and combatants alike remain under the protection of "the principles of humanity. . .from the dictates of public conscience." [Ed.]

threw out this challenge:

> "The ultimate aim of every action in the field of nuclear arms will always be nuclear disarmament, an aim which is no longer utopian and which all have a duty to pursue more actively than ever."

Judge Géza Herczegh (Hungary) let it be known that he voted for the two-part paragraph 2E only so as not to take a negative position toward certain essential conclusions contained therein, but indicated that, in his opinion,

> "the fundamental principles of international humanitarian law...categorically and without equivocation forbid the use of weapons of mass destruction, including nuclear weapons" and that "international humanitarian law knows no exceptions to these principles."

Judge Shi Jiuyong (China) objected to the fact that the majority of the justices, while declining to find a legal sanction for the practice of deterrence, referred to that practice as one to which "an appreciable section of the international community adhered for many years." Deterrence, he said,

> "has no legal significance from the standpoint of the formation of a customary rule prohibiting the use of nuclear weapons as such."

To paraphrase Judge Shi's perspective, customary international law represents the universal or almost universal consensus of humanity. But the only countries that make a claim for nuclear deterrence as a matter of justified policy are the four official nuclear weapon states, other than China, and the NATO allies of three of these states. That represents, at most, 20% of the world's population. So we should not recognize the policy of deterrence as rising to the level of customary international law. In other words, might does not make right.

Judge Vladlen S. Vereshchetin (Russian Federation), while agreeing with the proposition that "the most appropriate means for putting an end to the existence of any grey areas in the legal status of nuclear weapons would be nuclear disarmament in all its aspects under strict and effective international control," also opined that it was "plausible" that the Court could have deduced from its discussion of the principles of humanitarian law:

> "a general rule comprehensively proscribing the threat or use of nuclear weapons, without leaving any room for any 'grey area,' even an exceptional one."

Judge Luigi Ferrari Bravo (Italy) called the Court's opinion "not very courageous and sometimes difficult to read." He pointed out that, as a result of the many resolutions passed by the General Assembly of the United Nations before the outbreak of the cold war, the principle of the illegality of nuclear weapons had become a norm of international law and only its implementation was sidetracked by the cold war and its concomitant practice of deterrence. But he emphasized that the concept of nuclear deterrence has "no legal validity whatsoever" and stated that:

> "the totality of the normative production of the last fifty years, particularly as concerns the humanitarian law of war, is irreconcilable with the technological development of the construction of nuclear weapons."

Judge Raymond Ranjeva (Madagascar) expressed, more forcefully than any other member of the majority, his unhappiness at having had to vote for the two sections of paragraph 2E as a package. Had he been able to vote on them separately, he would have voted for the general proposition of illegality and abstained on the possible extreme circumstance exception. In fact, he said, there is no exception to the general rule of illegality:

> "One cannot find either in the jurisprudence of the Court or in any other jurisdiction, or in the doctrine, any authority confirming the existence of a distinction between the general case of the application of the rules of the law of armed conflict and an exceptional case freeing a belligerent party from respect for the obligations resulting from the law of armed conflict."

Judge Carl-August Fleischhauer (Germany), while approving of paragraph 2E in its entirety because of the dichotomy between "the rules and principles of humanitarian law...and the inherent law of self defense," also agreed with the majority that the use of nuclear weapons "seems scarcely reconcilable" with humanitarian law, because:

> "[t]he nuclear weapon is, in many ways, the negation of the

humanitarian considerations underlying the law applicable in armed conflict and the principle of neutrality. The nuclear weapon cannot distinguish between civilian and military targets. It causes immeasurable suffering. The radiation released by it is unable to respect the territorial integrity of a neutral State."

It is thus reasonable to conclude, or at least to speculate, that a total of six judges -- Weeramantry, Shahabuddeen, Koroma, Herczegh, Ferrari Bravo and Ranjema -- would have voted for complete illegality without any possible exception, had the vote been structured differently.

Prophetic Voices of Dissent

The history of law is the history of the progression from dissent to norm [3], making this decision an eloquent harbinger of things to come.

The 88-page dissent of Judge Weeramantry [1] bids fair to become a classic of international law and deserves to be reprinted and widely circulated as the ultimate legal statement on "the ultimate weapon." Replete with citations from the literature and jurisprudence of many cultures, it contains the detailed analysis of the unique and uniquely destructive nature of nuclear weapons that Judge Higgins would have wished to see from the majority. It also deals, patiently and convincingly, with every last argument advanced by the NWS in support of their position, including deterrence, reprisals, internal wars, the doctrine of necessity, "mini-nukes" and the relevance of the Non Proliferation Treaty (NPT), and other nuclear weapon treaties to the question before the Court. It is, furthermore, a ringing affirmation of the role of international law in international affairs and an answer to the skeptics who dismiss the pronouncements of the Court as "merely advisory" and "unenforceable."

As Judge Weeramantry put it:

> "[a] decision soundly based on law will carry respect by virtue of its own authority. It will assist in building up a climate of opinion in which law is respected. It will enhance the authority of the Court in that it will be seen to be discharging its duty of clarifying and developing the law, regardless of political considerations."

And, while regretting that the Court, in its Opinion, did not go the last mile toward a recognition of total, unqualified illegality, Judge Weeramantry begins his discussion by stating that the Opinion "contains positive pronouncements of significant value" that "take the law far on the road toward total prohibition."

Judge Koroma also allows that "the positive findings" contained in the Opinion "should be regarded as a step forward in the historic process of imposing legal restraints in armed conflicts" [1]. But he develops, at considerable length, his reasons for disagreeing with any possible exception to the general principle of illegality, basing his view in large part on the moving testimony of the effects of nuclear weapons presented to the Court by the mayors of Hiroshima and Nagasaki. His conclusion, stated at the outset of his opinion, is that "based on the existing law and the available evidence...the use of nuclear weapons in any circumstance would be unlawful under international law."

It remained for Judge Shahabuddeen to give the most persuasive rebuttal to the Court's professed inability to rule on the lawfulness of threat and use in an extreme circumstance involving the very survival of a state. Citing an Islamic commentator, Ibn Khaldun, to the effect that laws "are based upon the effort to preserve civilization," he discusses the well known phenomenon of nuclear escalation and asks "is there anything in the sovereignty of a State which would entitle it to embark on a course of action which could effectively wipe out the existence of all States by ending civilization and annihilating mankind" [1]? In other words, in a community of equally sovereign nations under law, can recourse to nuclear weapons in defense of the survival of one state possibly be lawful if it leads, or could lead, to the destruction of all states, or a number of other states? As an illustration of the richness of thought and comment scattered throughout the principal opinion and the various separate opinions, consider the following footnote by Judge Shahabuddeen:

> "The dilemma recalls that which confronted the learned judges of Persia when, asked by king Cambyses whether he could marry his sister, they made prudent answer 'that though they could discover no law which allowed brother to marry sister, there was undoubtedly a law which permitted the king of Persia to do whatever he pleased.'...So here, an affirmative answer to the General Assembly's question would mean that, while the Court could discover no law allowing a State to put the planet to death, there is undoubtedly a law which permits a

State to accomplish the same result through an exercise of its sovereign powers."

Conclusion

For the reasons stated by members of the majority as well as the minority, the decision of the International Court of Justice is not perfect. But it will go down as one of the most important decisions in the history of the Court and of the law of warfare. And it is close to perfect in that it affirms that the threat and use of nuclear weapons are subject to humanitarian law, environmental law, and human rights law; that the threat and use of nuclear weapons are generally prohibited under international law, subject to an extremely narrow and highly speculative possible exception; that nuclear deterrence cannot be said to be sanctioned by law; and that there is a solemn obligation to conduct and conclude negotiations leading to the complete abolition of nuclear weapons -- not at some distant date in the next century, but now, before the advent of holocaust by inertia. ❧

References

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