

**Humanitarian Law, Human Security:  
The Emerging Paradigm for Non-Use and Elimination of Nuclear Weapons**

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**Nuclear Weapons: the legal status of use, threat and possession**

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1. Introduction

In April 2010 the President of the ICRC declared: ‘the ICRC finds it difficult to envisage how any use of nuclear weapons could be compatible with the rules of international humanitarian law’.<sup>1</sup> Just over a month later, the 2010 NPT Review Conference ‘expresse[d] its deep concern at the catastrophic humanitarian consequences of any use of nuclear weapons and reaffirm[ed] the need for all States at all times to comply with applicable international law, including international humanitarian law.’ It also ‘reaffirm[ed] the unequivocal undertaking of the nuclear-weapon States to accomplish the total elimination of their nuclear arsenals leading to nuclear disarmament, to which all States parties are committed under article VI.’<sup>2</sup>

The links between possession, proliferation and use are self-evident. The probability of use increases as the number of nuclear-weapon States rises, and the probability of proliferation increases if the commitments of the Non-Proliferation Treaty are not honoured.

In these remarks on the legal status of the use, threatened use and possession of nuclear weapons, our focus will be upon United Kingdom practice. We begin with use because the legality of use determines the legality of threatened use and, in part, of possession.

2. Use

The use of nuclear weapons would violate international law, chiefly because their blast, heat and especially their radiation effects could not be limited as required by international humanitarian law (IHL).<sup>3</sup>

In its advisory opinion in the *Nuclear Weapons Case*,<sup>4</sup> the ICJ explained the ‘cardinal principles contained in the texts constituting the fabric of humanitarian law’ as follows:

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<sup>1</sup> ‘Bringing the era of nuclear weapons to an end’, statement by Jakob Kellenberger, 20 April 2010, <http://www.icrc.org/eng/resources/documents/statement/nuclear-weapons-statement-200410.htm>.

<sup>2</sup> 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Final Document, Volume 1, Part 1, p 19, Conclusions and recommendations for follow-on actions, I.A.v and ii.(Doc NPT/CONF.2010/50 (Vol. I)).

<sup>3</sup> Cf the UK Government’s submission to the ICJ: ‘In some cases, such as the use of a low-yield nuclear weapon against warships on the high seas or troops in sparsely populated areas, it is possible to envisage a nuclear attack which caused comparatively few civilian casualties.’

<sup>4</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p 226.

‘The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian [objects] and military targets. According to the second principle, it is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. In application of that second principle, States do not have unlimited freedom of choice of means in the weapons they use.’<sup>5</sup>

In light of those fundamental rules of IHL, which it described as ‘intransgressible principles of international customary law’,<sup>6</sup> the World Court clearly doubted whether nuclear weapons could ever be used lawfully. In view of ‘the unique characteristics of nuclear weapons, and in particular their destructive capacity, their capacity to cause untold human suffering and their ability to cause damage to generations to come’, it observed that the use of such weapons ‘seems scarcely reconcilable’ with respect for the law of armed conflict, ‘at the heart of which is the overriding consideration of humanity’.<sup>7</sup>

Nevertheless, the ICJ considered that it did not have ‘sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with [IHL] in any circumstance’.<sup>8</sup> Accordingly, whilst it 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’, 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’.<sup>9</sup>

As President Bedjaoui emphasised in his Declaration, however, the Court was not thereby recognising an *in extremis* exception to the general prohibition of threat or use:

‘I cannot sufficiently emphasize that the Court's inability to go beyond this statement of the situation can in no way be interpreted to mean that it is leaving the door ajar to recognition of the legality of the threat or use of nuclear weapons.’<sup>10</sup>

In contrast, the UK Government’s response has been that the advisory opinion does not:

‘require a change in the United Kingdom’s entirely defensive deterrence policy. We would only ever consider the use of nuclear weapons in the

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<sup>5</sup> Ibid, para 78.

<sup>6</sup> Ibid, para 79.

<sup>7</sup> Ibid, paras 36, 79 and 95.

<sup>8</sup> Ibid, para 95.

<sup>9</sup> Ibid, para 105, point 2E of the dispositif.

<sup>10</sup> ICJ Reports 1996, p 270, para 11.

extreme circumstance of self-defence which includes the defence of our NATO allies.’<sup>11</sup>

But this wrongly assumes that the ICJ acknowledged an *in extremis* exception to the prohibition of threat or use, whereas the Court clearly did not say that nuclear weapons may be used *in extremis*.

The UK Government would probably contend that restrictions on the actions of States cannot be presumed.<sup>12</sup> In the advisory opinion proceedings they argued that ‘it is ... axiomatic that, in the absence of a prohibitive rule applicable to a particular State, the conduct of the State in question must be permissible’.<sup>13</sup> However, there is no room for such an argument here. It is not ‘good faith’ interpretation of the advisory opinion, the text and tenor of which clearly indicate the Court’s strong inclination towards illegality in all circumstances.<sup>14</sup> Furthermore, any insistence on a specific legal prohibition, which ‘can only be attributable to an extreme form of positivism’,<sup>15</sup> ignores the fact that States co-exist within a circumscribing boundary of norms or principles.<sup>16</sup> These include elementary considerations of humanity<sup>17</sup> and the fundamental rules of IHL which bind all States whether or not they are parties to the conventions that contain them and which are themselves infused with the overriding consideration of humanity.<sup>18</sup>

Similar objections apply to this comment on the advisory opinion by a former Deputy Legal Adviser of the Foreign and Commonwealth Office:

‘The Court does not appear to have considered the, admittedly paradoxical, possibility that in certain exceptional situations the threat or even use of nuclear weapons might be done altruistically to support demands by it or the United Nations for the observance of fundamental human rights, such as the prohibitions on genocide or, indeed, the use of other weapons of mass destruction against a third State.’<sup>19</sup>

It would not be lawful for a State to use nuclear weapons to support such demands by the UN Security Council or the ICJ, which is the UN’s principal judicial organ.<sup>20</sup> A weapon that cannot be used consistently with the fundamental rules of IHL does not

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<sup>11</sup> Hansard, HL Debates, 26 January 1998, Col 7. See also UK Ministry of Defence, The Manual of the Law of Armed Conflict, OUP, 2004, para 6.17.1.

<sup>12</sup> *The Lotus Case*, PCIJ, Series A, No 10, p 18.

<sup>13</sup> United Kingdom, Written Submission on the Opinion requested by the General Assembly, p 21.

<sup>14</sup> At para 104 of its opinion in the *Nuclear Weapons Case*, the ICJ emphasised that its reply to the General Assembly’s question ‘rests on the totality of the legal grounds set forth by the Court, each of which has to be read in the light of the others.’

<sup>15</sup> *Nuclear Weapons Case*, dissenting opinion of Judge Koroma, p 14.

<sup>16</sup> Cf Judge Weeramantry’s dissenting opinion in the *Lockerbie Case (Provisional Measures)*, ICJ Reports, 1992, pp 3, 51.

<sup>17</sup> *Corfu Channel Case*, ICJ Reports 1949, pp 4, 22. The ICJ listed ‘elementary considerations of humanity, even more exacting in peace than in war’ among ‘certain general and well-recognized principles’ on which Albania’s obligations to notify the existence of a minefield in its territorial waters and warn approaching British warships of the imminent dangers were based.

<sup>18</sup> *Nuclear Weapons Case*, paras 79 and 95.

<sup>19</sup> A Aust, Handbook of International Law, CUP, 2<sup>nd</sup> edition, 2010, pp 239-240.

<sup>20</sup> Article 92 of the UN Charter and Article 1 of the Statute of the ICJ, which forms an integral part of the Charter.

become lawful because it is being used for a legitimate purpose under the Charter.<sup>21</sup> Any use of nuclear weapons would be inconsistent with the purposes and principles of the UN<sup>22</sup> and subvert the rule of law.

In contrast, the UK Government argue that nuclear weapons fall to be dealt with by the same general principles as apply to conventional weapons and that the legality of their use in a particular case would depend on all the circumstances.<sup>23</sup> On ratifying Additional Protocol I,<sup>24</sup> moreover, the Government stated:

‘It continues to be the understanding of the United Kingdom that the rules introduced by the Protocol apply exclusively to conventional weapons without prejudice to any other rules of international law applicable to other types of weapons. In particular, the rules so introduced do not have any effect on and do not regulate or prohibit the use of nuclear weapons.’<sup>25</sup>

That statement, which is arguably a reservation,<sup>26</sup> applies only to ‘the rules introduced by the Protocol’, such as the rule requiring protection of the environment.<sup>27</sup> It does not affect those provisions which were declaratory of customary international law, such as the prohibition against causing unnecessary suffering to combatants and the requirement to distinguish between civilian objects and military objectives. The ICJ emphasised that ‘all States are bound by those rules in Additional Protocol I which, when adopted, were merely the expression of the pre-existing customary law’.<sup>28</sup>

### 3. Threat

In the *Nuclear Weapons Case*, the ICJ observed that there is a symbiotic relationship between ‘use’ and ‘threat’:

‘Whether a signalled intention to use force if certain events occur is or is not a “threat” within Article 2, paragraph 4, of the Charter depends upon various factors. If the envisaged use of force is itself unlawful, the stated readiness to use it would be a threat prohibited under Article 2, paragraph 4... The notions of “threat” and “use” of force under Article 2, paragraph 4, of the Charter stand together in the sense that if the use of force itself in a given case is

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<sup>21</sup> Cf para 39 of the *Nuclear Weapons Case*.

<sup>22</sup> Article 24(2) of the Charter provides that the Security Council shall act in accordance with the Purposes and Principles of the United Nations’ and Article 1(1) refers to the peaceful settlement of disputes ‘in conformity with the principles of justice and international law’.

<sup>23</sup> UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, OUP, 2004, 6.17.

<sup>24</sup> Protocol I of 1977 Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts.

<sup>25</sup> See The Geneva Conventions Act (First Protocol) Order 1998 (SI 1998 No 1754) and The International Criminal Court Act 2001 (Reservations and Declarations) Order 2001 (SI 2001 No 2559).

<sup>26</sup> Article 2(1)(d) of the Vienna Convention on the Law of Treaties 1969 defines a reservation as ‘a unilateral statement, however phrased or named, made by a State, when signing, ratifying... or acceding to a treaty whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State’. Under Article 19(c) of the Convention, a reservation which is incompatible with the object and purpose of the treaty is impermissible.

<sup>27</sup> Articles 35(3) and 55 of Additional Protocol I, in respect of which the UK statement may be an impermissible reservation.

<sup>28</sup> *Nuclear Weapons Case*, para 84.

illegal - for whatever reason - the threat to use such force will likewise be illegal...'<sup>29</sup>

In March 2001 a Scottish appeal court rejected the contention that the general deployment of Trident pursuant to a policy of deterrence constituted a 'threat' to use it.<sup>30</sup> Its assessment echoed that of a former Lord Advocate, Lord Murray, an opponent of Trident, who in a 1998 lecture said:

'to possess nuclear submarines supplied with weapons which it is illegal to use is not of itself unlawful; nor would it be unlawful for them to be put to sea in a general state of operational readiness. But to deploy them with definite targets in face of hostile confrontation could constitute a threat in law.'<sup>31</sup>

It is true that in 2005 the then Secretary of State for Defence, John Reid, told Parliament:

'All the UK's Trident missiles have been de-targeted since 1994, and the submarine on deterrent patrol is normally at several days' notice to fire. The missiles can be targeted in sufficient time to meet any foreseeable requirement.'<sup>32</sup>

Bearing in mind that the system could be brought rapidly to readiness at a time of crisis,<sup>33</sup> however, the Scottish appeal court's assessment is at odds with the ICJ's analysis. The deployment of Trident pursuant to an effective policy of deterrence signals an intention to use force if certain events occur, and that is a 'threat' within Article 2(4) if for any reason the envisaged use of force would be unlawful. According to the ICJ,

'Possession of nuclear weapons may indeed justify an inference of preparedness to use them. In order to be effective, the policy of deterrence... necessitates that the intention to use nuclear weapons be credible. Whether this is a "threat" contrary to Article 2, paragraph 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. In any of these circumstances the use of force, and the threat to use it, would be unlawful under the law of the Charter.'<sup>34</sup>

The ICJ seems to have accepted that the deployment of nuclear weapons pursuant to an effective policy of deterrence is a 'threat' to use them. Instead, it was concerned with legality. In that regard the Court made it clear that the UN Charter is not the only reference point:

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<sup>29</sup> Ibid, para 47.

<sup>30</sup> Lord Advocate's Reference (No 1 of 2000), 2001 SCCR 296, para 98.

<sup>31</sup> Lord Murray, 'Can Trident missiles be lawfully used in light of the decision of the International Court of Justice in the Nuclear Weapons Case?', May 1998.

<sup>32</sup> Hansard, HC, 27 October 2005, Col 522W.

<sup>33</sup> House of Commons Library, Research Paper 06/53, 'The Future of the British Nuclear Deterrent', 3 November 2006, p 22.

<sup>34</sup> Ibid, para 48.

‘The proportionality principle may thus not in itself exclude the use of nuclear weapons in self-defence in all circumstances.’<sup>35</sup> But at the same time, a use of force that is proportionate under the law of self-defence, must, in order to be lawful, also meet the requirements of the law applicable in armed conflict which comprise in particular the principles and rules of humanitarian law.’<sup>36</sup>

Since the use of nuclear weapons would violate IHL, especially because their destructive power cannot be contained in either space or time,<sup>37</sup> the threatened use of such weapons is likewise illegal.

#### 4. Possession

In view of the ICJ’s description of the fundamental rules of IHL as ‘intransgressible principles of international customary law’, and even though it decided that there was no need to pronounce on the rules’ legal character,<sup>38</sup> it is appropriate to regard them as *jus cogens*: peremptory norms of general international law from which no derogation is permitted.<sup>39</sup> They are compelling law, norms that enjoy ‘a higher rank in the international hierarchy than treaty law and even “ordinary” customary rules.’<sup>40</sup> States must bring their practice into conformity with such rules.

The superior status of the fundamental rules of IHL in the hierarchy of international legal norms was confirmed in the *Wall Case* where the ICJ held that they ‘incorporate obligations which are essentially of an *erga omnes* character’.<sup>41</sup> This means that those obligations are the concern of all States and that all States have a legal interest in the protection of the rights involved.<sup>42</sup>

Such norms generate strong interpretative principles<sup>43</sup> which prevent the Non-Proliferation Treaty (NPT) from being construed as legalising the possession of nuclear weapons. Yet the UK Government claim that the NPT allows the United Kingdom to have nuclear weapons since the treaty recognises it as ‘a nuclear-weapon State’.<sup>44</sup> It is true that Article IX.3 of the NPT defines such a State as ‘one which has manufactured and exploded a nuclear weapon or other nuclear explosive device prior to 1 January 1967’. But that is purely a factual definition and strictly for the purposes

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<sup>35</sup> In terms of the proportionality principle, the ICJ observed that the very nature of all nuclear weapons and the profound risks associated with them, including environmental considerations, would have to be borne in mind.

<sup>36</sup> *Nuclear Weapons Case*, para 42.

<sup>37</sup> *Ibid*, para 35.

<sup>38</sup> *Ibid*, para 83. The Court said that the General Assembly’s request did not raise this question.

<sup>39</sup> See Article 53 of the Vienna Convention on the Law of Treaties 1969 and J Crawford, The International Law Commission’s Articles on State Responsibility, CUP, 2002, p 246.

<sup>40</sup> *Prosecutor v Furundzija*, ICTY, Case No IT-95-17/1-T, para 153. The ICTY continued: ‘The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by States through international treaties or local or special or even general customary rules not endowed with the same normative force’ (1999) 38 ILM 317.

<sup>41</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 1994, para 157. In para 19 of her separate opinion, Judge Higgins emphasised that ‘the protection of civilians remains an intransgressible obligation of humanitarian law’.

<sup>42</sup> *Ibid*, para 155 with a reference to the *Barcelona Traction Case*, ICJ Reports 1970, p 32, para 33.

<sup>43</sup> Crawford, *op cit*, p 187.

<sup>44</sup> See e.g. Hansard, HC, 1 March 2005, Col 805.

of the NPT only.<sup>45</sup> It does not legalise the possession of nuclear weapons. To construe the NPT as if it did is not ‘good faith’ interpretation or performance as required by the law of treaties,<sup>46</sup> especially in view of the *jus cogens / erga omnes* character of the fundamental rules of IHL and the ICJ’s interpretation of Article VI of the NPT. The Court concluded its advisory opinion in the *Nuclear Weapons Case* by unanimously holding:

‘There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all aspects under strict and effective international control.’<sup>47</sup>

The Court also said that fulfilling the obligation expressed in Article VI ‘remains without any doubt an objective of vital importance to the whole of the international community today’.<sup>48</sup> In other words, the obligation to negotiate in good faith and to conclude a nuclear disarmament treaty is an obligation *erga omnes*, complementing and reinforcing the *jus cogens / erga omnes* nature of the fundamental rules of IHL.<sup>49</sup> The logical legal consequence of this combination, I suggest, is that the use, the threatened use and the possession of nuclear weapons are all illegal. Such weapons cannot lawfully be employed and are required to be eliminated.

## 5. Conclusion

Some people say that in trying to deal with such matters we are beyond the limits of law, but we are not. Law must play a decisive role as the embodiment of normative values. The rule of law is a fundamental principle of civilised society and respect for the rule of law is an essential prerequisite of international order. This is how the late Lord Bingham, one of our greatest jurists, put it: ‘The rule of law requires compliance by the State with its obligations in international law as in national law.’<sup>50</sup> In a lecture on the same theme he added: ‘I do not think this proposition is contentious.’<sup>51</sup>

Either we have the rule of law or we do not. In the *Nuclear Weapons Case*, the ICJ said that it could not ignore the ‘policy of deterrence’ to which an appreciable section of the international community had adhered for many years.<sup>52</sup> As Judge Shi declared, however, the policy of nuclear deterrence should be an object of regulation by law, not vice versa.<sup>53</sup> International law is not simply whatever those with ‘the say’ (in practice, the nuclear-weapon States) say it is.

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<sup>45</sup> The relevant sentence of Article IX.3 begins: ‘For the purposes of this Treaty,...’

<sup>46</sup> See Articles 26 and 31(1) of the Vienna Convention on the Law of Treaties 1969.

<sup>47</sup> *Nuclear Weapons Case*, para 105, point 2F of the dispositif.

<sup>48</sup> *Ibid*, para 103.

<sup>49</sup> It might even have *jus cogens* status itself. See Crawford, *op cit*, p 244: ‘Whether or not peremptory norms of general international law and obligations to the international community as a whole are aspects of a single basic idea, there is at the very least substantial overlap between them...’

<sup>50</sup> T Bingham, *The Rule of Law*, Allen Lane, 2010, p 110.

<sup>51</sup> The Sixth Sir David Williams Lecture, ‘The Rule of Law’, University of Cambridge, 16 November 2006.

<sup>52</sup> *Nuclear Weapons Case*, paras 95-96.

<sup>53</sup> ICJ Reports 1996, p 277.