

INTERNATIONAL LAW,  
THE INTERNATIONAL COURT  
OF JUSTICE AND  
NUCLEAR WEAPONS

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EDITED BY  
LAURENCE BOISSON DE CHAZOURNES  
PHILIPPE SANDS

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## THE NUCLEAR WEAPONS CASE

DAVID KENNEDY

ON 8 JULY 1996, the ICJ responded to a request by the United Nations General Assembly for an 'advisory opinion' on the 'legality of the threat or use of nuclear weapons'. The response was lengthy and equivocal, a cacophony of dicta and holding, ruling and dissent, itself read in numerous ways in the years since. We might read this episode – alongside the Gulf War and the emergence of a juridified international economic law, as embodied in the General Agreement on Tariffs and Trade and its successor the World Trade Organization – as a last chapter in this century's engagement with international law. Three great internationalist dreams crash on its beach.

The last century closed with the hope that the great issues of war and peace might be resolved by trial at The Hague. In the aftermath of the Great War, twentieth-century international law opened by rejecting the Hague dream as elitist and legalistic in the name of new progressive institutions which could embrace the vagaries of a changing politics: a new dream for a new century, that states could resolve their differences peacefully in plenary institutions. The General Assembly's request for an advisory opinion brings international institutions full circle to the Court they were invented to replace. And nuclear weapons themselves, at once dream and nightmare for the international community after 1945, ushered in a period of military stability among the great powers while evoking the possibility of a military technology finally gone too far. The 1996 ICJ ruling figures in at least three stories about international law in the twentieth century – a story about international institutions and the Court, a story about international law and adjudication, and a story about nuclear weapons and efforts to harness or abolish their nightmarish potential.

**Political institutions turn to the Court**

The easiest story to tell is the story of return – the return of politics to law and of the twentieth century to the nineteenth. The United Nations, promoted to a 'system' in the 1960s, languishing now in the chaos of institutional proliferation, non-stop budgetary crises and internal reforms, bypassed by bilateralism and the great institutions of the private sector before whom governments, themselves disaggregated into a welter of agencies, executives and departments, now bow, addresses the century's major technological innovation, the most significant transformation in the conditions of war and peace by asking the ICJ for an advisory opinion. Not the Security Council or the Disarmament Agency, but the World Health Organization, followed by the General Assembly, turn to the Court – surrender or savvy?

• Surrender, law the recourse of the weak, rights the refuge of the politically marginal – if only nuclear weapons were illegal we might avoid so many difficult negotiations, might avoid the unanswerable questions: do nuclear weapons promote peace or war, stability or Armageddon, should non-proliferation be maintained or proliferation managed? And this after so many disappointments, the UN in bolder days pursuing apartheid or decolonisation against the Court's unhelpful jurisprudence. Or shrewd: perhaps the Court will return us the problem for legislation, embolden us, confirm the centrality of the great international public institutions. The model here would be the Western Sahara case, in which the Court, after lengthy inquiry into facts and norms, concluded that no legal ties or titles precluded the UN from proceeding with plebiscitary intervention to determine the status of the Western Sahara, law clearing the slate for institutional action.<sup>1</sup>

But if shrewd, what is the law and Court to which the General Assembly turned? And here, in the story of international law and adjudication, we run into two quite different images. The first is simple, overt and clear. The ICJ simply is the world court – an adjudicator like any other, empowered to opine, on the basis of law, with some expectation of authority, even of compliance and enforcement. The second presents itself as a more sophisticated correction to the first – of course the ICJ is not like that, international law is not like that, even domestic law may not be like that.

<sup>1</sup> *The Western Sahara case, Advisory Opinion, ICJ Reports, 1975, p. 12.*

Here the Court is one cultural and political institution among others, crafting its decision to enhance its legitimacy and pull towards compliance, the decision one drop in the ocean of world public opinion, part of *travaux préparatoires* for future interstate behaviour as broad as international civil society.<sup>2</sup>

These two quite different images are distributed unevenly, associated with different traditions of international legal scholarship and journalistic commentary. Pleadings and decisions adopt the first, as if the ICJ were like a national supreme court, international law like national law, and so on. This was the Court's self-image in the 1920s, the heyday of jurisprudence about 'sources' of law and the high-water mark for a sharp distinction between a formal law and an unstable politics. Today, this image is more common in Europe than in the United States, and in the polemics of advocacy than in academic commentary. Even the Court's self-image drew closer to the world of international institutions and the relativist discourse which followed American legal realism or French sociological jurisprudence after 1945, the Court now an 'organ' of the UN system, the sovereign now an 'institution', an 'international social function of a psychological character' in the words of the 1949 *Corfu Channel* case.<sup>3</sup>

Where American legal commentary generally makes clear on its face that it thinks the first image naive, seeking instead to place the Court and law in a cultural or political or sociological narrative, European international legal commentary is far more likely to read as if the author thought he or she lived in a world governed by law articulated by a court – as if this were the world fantasised in pleadings and opinions. In the American tradition, where everything legal is process and all the world's a regime, writing *as if* the Court were a court is simply one posture in a complex theatre of persuasion and calculation. We are interested in the effects generated by the opinion, the values advanced, the institutional process followed, the political strategies of the participants etc. And also in the strategic effect of commentary which does or does not accept the Court's own fantasy world. In the European tradition, such calculations remain largely off-stage, in the private discourse of insiders about what the Court was 'actually' doing. Outside the American/European axis, one finds both

2 For a related analysis of the *travaux préparatoires* for the Law of the Sea negotiations, see Philip Allott, 'Power Sharing in the Law of the Sea', *AJIL*, 77 (1983), p. 1.

3 *The Corfu Channel* case, Individual Opinion of Judge Alvarez, ICJ Reports, 1949, p. 43.

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images, often blended together – a positivist or formal denunciation of this or that doctrine coupled with a sociology of its generation. For all the participants in this case from the Third World, the absence of a workable methodological alternative to some blend of the American and European style of international legal work was pronounced.

#### International law and adjudication: a strategic intervention?

It is easier to interpret the UN as shrewd if we take the second view of Court and law – turning to international law for resolution and decision seems surrender – especially when read against an implicit background understanding that in realpolitical terms a legal decision prohibiting the use of nuclear weapons seems, if anything, less likely to achieve their elimination than a General Assembly resolution. But if we detach ourselves from the overt claims of law and the Court, we can imagine the General Assembly enlisting the *rhetoric* of law, engaging the legal *process*, acting as if it were a naive believer in a world of law and courts as a *manoeuvre*, one marginal institution calling upon another. Going to the Court is somewhere on a list of strategies for the General Assembly, like passing a resolution which will never be law in any strong sense, but might shame or mobilise or deter. Or like funding a movie about refugees or hiring a missile to send a message. Addressing the Court as if it would rule is a game for the middle powers – engaging the Court in a public relations campaign is a game even hegemons can play.

It is not surprising that enthusiasm for the campaign to request an advisory opinion was more pronounced in the United States than in Europe. And here there is perhaps a European backlash – for if the European scholarly posture seems naive to aficionados of an American legal process, nothing could seem more quixotic to the European international law sensibility than efforts by diverse, usually American-based, advocacy groups to storm the ICJ for a declaration that nuclear war or weaponry is 'illegal'. At century's end we find an American academy of overly sophisticated analysis and harebrained advocacy, a European academy with a fetish for the Court in a fantasy world of law, whispering the wisdom of a chastened realpolitik.

And all the while the Court stands alone, at once crafty and craven. Is it fudging to find that international law both is and is not complete, covers and does not cover nuclear weapons, which are (generally) illegal,

except when they are not? Is it equivocating to exhort the nuclear powers to consider their obligations, while remembering their rights, without clarifying what those might be beyond reciting conventional bromides about self-defence and proportionality and environmental protection and humanitarianism, norms whose interpretation one might have thought was precisely the point of the request for an advisory opinion? And all this seven to seven (or was it ten to four) – deferral, denial, disappointment.

Yet no one seemed to mind. The parties and advocates, like most journalists, were willing to take what they could get, reading the opinion to support a wide variety of positions, simply continuing their debate in the key of legal dicta. And the sophisticated commentators were quick to see the wisdom of the Court's manoeuvre – for the Court also manoeuvres, worries about its legitimacy, its allies and enemies in the game of mutual political regard. If you like doctrine, the decision showed a little doctrine. For those preferring values, there were values. For those who thrill to process, the Court inaugurated an infinite regress of interpretation and commentary, playing its role in the menagerie of international civil society with the elegance of equipoise. It will be a joy to teach – one can imagine students coming with the naive idea that the point is to clarify the holding and decide if the case was rightly decided, only to be led on to higher ground, appreciation of the Court's exquisite sense of strategy.

But how should we feel about this smorgasbord of savvy, the Court the king of swing? Is it possible to leave the century convinced *both* in the plausibility of the legal project – a world governed by rules interpreted by courts calming the politics of nations – *and* of an interminably malleable process, in which words are acts, deeds transliterated into messages, normativity is relative and law bleeds off into politics at every turn? Is this savvy or schizophrenic, this stipulated ambivalence about what happens when a Court is asked to decide? Can we honour the Court's integrity while praising its strategy, invoke the law while extolling its interdisciplinary engagement with politics, sociology or cultural studies? At the very least there is a problem here of good faith. The good faith of judges who flaunt their fealty to positive law and an apolitical judiciary while remaining proud of their engagement with the humanist issues of the day, of their national or cultural patriotism, even their participation in internationalist advocacy institutions of one or another stripe. Or the good faith of academic commentators split between the voices of earnest advocacy and detached analysis.

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As a cultural moment in the story about international law and the Court, then, we might read the *Nuclear Weapons* Opinion as an expression of modernism at the end of the century – the modernism of ambivalence and contradiction, of the desire for action and the turn to language. But modernism about nuclear weapons? Appreciating the Court's sophistication, in either the American or European style, places one inside the discipline, concerned more for the erection of international law and institutions than for substantive outcomes – after all, you may have to break some eggs, go with half a loaf, be proud to have lit but one candle, that sort of thing. But is this sort of strategy for the international community indeed a higher ground? Here we meet the dark side of modernism, the modernity of Hiroshima and holocaust. It is here that we can place the case in a story about efforts to understand, harness and defuse the world's arsenal of nuclear weaponry.

#### **Oil of nuclear weapons on the waters of law?**

In thinking about nuclear war, it has been tempting to say that law, with its hedges and equivocations, should simply step aside. There is the conventional argument that nuclear weaponry lies beyond the boundaries of law in the domain of the political, an argument made as a matter of either right or fact. An argument of the early twentieth century against the nineteenth, moreover, when efforts to outlaw the dumdum bullet must have seemed quixotic against the background of the trenches. In 1919 it seemed clear that whether making war or making peace, the future belonged to the political. But once we see law as a modernist doubling of legal propriety and communicative engagement, a Court pronouncement or treaty provision simply a role-generated pretence in a broad and unfinished process of global governance, this argument becomes simply one in the broader fabric of claims about what different institutions should do. When we hear someone say the matter is political, reasserting formal claims about law's disentanglement from the political, we can only ask who makes the claim, with what objective, as part of what project, to persuade whom.

Then there is the argument that nuclear weaponry is best considered in a technical or logical vocabulary of military specialists, a vocabulary of prisoners' dilemmas and of strategic games foreign to the rules and values of even the most open-ended legal process. The last thing you want is a

lawyer in the clean room. In this argument, international law drifts toward the cultural, the valuative, even the political, when what we need, for deterrence or disarmament, is expertise. This is a claim of the middle years of our century against the bureaucratisation of international institutions and law. Once the legal process becomes subject to capture by one political or social interest after another, becomes enmeshed in a myriad diffused institutions, one hesitates to hand over the button. And yet the expertise of military planners and of lawyers are no longer so different in the new age of technocratic convergence. That was the whole point of the critique of formalism, the insistence that law merge with the political and social. The great military machines have become immense bureaucracies whose technical expertise is expressed in rules of engagement or computer simulations quite similar to the rules of war and compliance games of the new international law, with its focus on proportionality and the efficient use of force.

There is a third argument against the use of law in the struggle over nuclear weapons which can best be described as moral – there is something obscene in the use of legal language to talk about something like Hiroshima or Armageddon. The law muddles what is clear. The enemy here is the complex, enmeshed understanding of law as legal process, assimilating claims, accepting nuance. This argument resonates with calls for the return of formalism, outlawry, principle. But ultimately, the formal effort to outlaw nuclear weapons – to separate law and politics that they might be joined as prohibition – is no different from the effort to sneak up on the nuclear powers by insinuation into their bureaucratic vocabulary. Even saying that blowing up the world is illegal somehow speaks the unthinkable.

I have written in this vein myself.<sup>4</sup> The chapter in this volume by my friend Martti Koskenniemi, bringing the Court's decision repeatedly in juxtaposition to the phrase 'slaughter of the innocents', operates largely on this terrain.<sup>5</sup> I share completely Martti's analysis of the difficulties in the Court's efforts to speak normatively about nuclear weapons, and his frustration at the outcome. The difficulty with this position is its unstated

4 See David Kennedy, 'A Critical Approach to the Nuclear Weapons Problem', *Brooklyn Journal of International Law*, IX 2 (Summer 1983), p. 307.

5 See Martti Koskenniemi, 'Faith, Identity and the Killing of the Innocent: International Lawyers and Nuclear Weapons', *Leiden Journal of International Law*, 10 (1997), pp. 137–62.



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fantasy that there exists an alternative mode of discussion, a discipline in which to speak which is free from the troubles he's seen with the discipline of law. The wish here is clear – that we could repeat the move from formalism to process, lodging against the proceduralism of the post-1945 period the very sentiments it lodged against its predecessor. Or that we might repeat the move from The Hague to the League, this time in a turn away from a fallen Court and Council to something bright and shiny and new – an NGO, a domestic court, the private sector, the authenticity of personal or professional struggle and commitment, even a religious experience.

But were we to speak about nuclear weapons in the language of the 'slaughter of innocents', I'm afraid we would soon find ourselves in the same soup. Nuclear weapons are not simply the 'slaughter of the innocents' – they are also a technology, a machinery, a threat, a strategy undeployed, on a continuum with a host of other gadgets and modes of making a point. We would need to account not merely for the horrors of Hiroshima and Nagasaki, but also for their singularity. In this, the nuclear weapons case takes us to the heart of modernist darkness, at once horror and friend, act and symbol, norm and violation. This is the modernism of no exit and existential crisis: a problem set at mid-century for which we cannot yet glimpse an answer. The equivocation of the opinion is not simply strategy, but also a symptom of the impossibility of thinking nuclear weapons as both norm and exception, both routinised into the everyday doctrines about war and an exception about which nothing specific can be said.

### **Modernism as eternal return**

So it turns out at the end of the century to be modernism all the way down. Invoking a privileged domain outside the dilemmas of form and process is itself a manoeuvre, which can be read both literally and strategically. If we see Martti, or me, as a person with a project, we can ask whom he seeks to persuade for what in the essay. This sort of internal criticism of the law, which led international lawyers in this century from formalism to process, places us now against the constraints of process as well, wishing for a broader, alternative world of choice and strategy. In this we find *ourselves* caught between the utopia of moralism and the apology of process.

But say we returned, both to process and to form. Can we reshape without projecting a fantasy of exit? Partly, of course, this is the project of much mainstream international legal commentary, a commentary of chastened expectations, modestly cross-dressed as realism, asking whether the judgment was fair, reflected good process, contributed to non-proliferation or environmental protection in wartime. Or whether the doctrine was turned to best advantage, the details well grounded and rigorously reasoned. If we drift with these questions away from nuclear weapons towards the vague project of furthering internationalism, I suppose it was good to expand the roster of participants in international litigation, to reinforce obligations to negotiate in good faith toward new norms. If we focus only on nuclear weapons, perhaps it was good to clarify that they too are subject to law, to reward and reinforce a generation of citizen initiatives, but also bad to reinforce the possibility of nuclear weapons by normalising them into the existing body of law – the public interest lawyer’s classic test case gone wrong. And troubling to see this as the goal of so much good faith activist energy. Perhaps more could have been done to strengthen the hand of the existing regime of non-proliferation beyond rewriting Article VI of the Non-Proliferation Treaty.

But returning to the domain of norm and process might also take us beyond the mainstream savvy. We might also look for more systematic blindnesses alongside the law’s insights – moments of bias and elision. The Court’s elaborate equipoise took place against a backdrop of clarity about the distinction between legal passivity and action, the terrain of adjudication and legal interventionism, as between fact and law. We are encouraged to think of nuclear weapons, indeed weaponry and war of all sorts, as prior to the law, arising from the factual and the political, free until they touch the hand of the law. The Court scrolled through the cloud cover of rules to see if the peak of nuclear weapons had broken through. But nuclear weapons are not simply expressions of right until constrained – they are also, at least in part, a production of the law, which harness the resources of territories into states and measure competition among sovereign ‘equals’, or which offer a lexicon for permissible state force and provide guideposts for rendering weaponry rational, proportional, efficient. In these ways international law has already had a hand in the establishment of great power nuclear hegemony, and plays a role in the temptation to proliferation. But all this remained off-screen in the decision and commentary.

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We can, of course, place this decision in a tradition of efforts to control weaponry. We can assess whether nuclear weapons after 1945 are more like chemical weapons or machine guns and tanks after 1914. Is nuclear deterrence more like blitzkrieg and Dresden or collective security? Or we might place the case in the history of laws of war, rendering state-to-state violence at once humanitarian, efficient as to its objectives and respectful of sovereign boundaries. What contribution might the case make to the project of rationalising interstate combat? Has the law of force come away from its encounter with nuclear weapons stronger for the engagement? But all these mainstream assessments, however helpful, quarantine nuclear weapons in the laws of war, assessing the status of forces between words and weapons. International law is also the law of states and territory which generate and separate nuclear and non-nuclear powers, the structure of claims and counterclaims of which nuclear deterrence is but one manifestation.

The construction of nuclear weapons as exceptional and specific to the law of war was shared by the Court, searching for a norm it could not find to cover them, as well as by advocates on both sides. By and large Court and commentary followed the *Lotus* line, steering clear of the implication that the law might have been there before the prohibition. International law has a history of figuring the regulable as exceptional in, for example, the willingness to take a systemic stand on issues of *jus cogens* – norms governing behaviour so lurid as to shock the conscience of mankind – about which the elaborate machinery of deference to sovereign opinion is unnecessary. We wonder whether the Court did or did not find international law silent here, as we might wonder whether the use of nuclear weapons would or would not shock the conscience – in both cases eliding the question whether elsewhere the law speaks, whether elsewhere the conscience is calm. In this, nuclear weapons, alongside war crimes or genocide or terrorism, operate as one of international law's great barbiturates. Even in equipoise, the extreme can be distanced from the everyday. Poverty is not a gap in the law, any more than war, because nuclear weapons might be.

The *Nuclear Weapons Opinion* offers a mirror for international law at century's end, for the international law of the *Nuclear Weapons Opinion* is a modernist enterprise, recursive and uncertain. There is the broad story of international law and institutions – a turn from law to politics, and then a nervous glance back over the shoulder, perhaps a return to law, to

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law at once as politics and antidote to politics. And there is the movement within international law from form to process – followed by an uncertain recoil against the procedural. But most of all we find a polemic for the law itself, claiming now both to embrace the perils of nuclear war and hold them at bay. In that, this is a story less about nuclear weapons than about law – a story which invites our rebellion, our insistence on an honest confrontation with the perils and possibilities of the nuclear age. But in the end, if we wish to speak more about nuclear weapons, we must speak more about the law, speak in a way this case is silent, about the law which emboldens states as warriors and structures deterrence as rational, which worries about whether the threat or use of nuclear weaponry falls into a lacuna, while serenely treating the everyday divisions of wealth and poverty, the background norms for trade in arms and military conflict as part of the global *donnée*.