

Trident and International Law: Scotland's Obligations

February 3, 2009

Conference Organized by the Acronym Institute for Disarmament Diplomacy,
Edinburgh Peace and Justice Centre and Trident Ploughshares
Dynamic Earth, Edinburgh

Recent Developments in the Illegality of Nuclear Weapons

Notes for Presentation by

John Burroughs, Executive Director

Lawyers' Committee on Nuclear Policy, New York

A few days ago, in Berlin, I told Judge Weeramantry that my topic for this conference is "Recent Developments in the Illegality of Nuclear Weapons." He commented that since nuclear weapons have always been illegal, I should think of my topic as "Recent Developments in *Communicating* the Illegality of Nuclear Weapons."

Indeed, in its 1996 advisory opinion, the International Court of Justice (ICJ) was at pains to explain that the rules of international humanitarian law applying to nuclear weapons largely predate the nuclear age.

Para. 78: "humanitarian law, **at a very early stage**, prohibited certain types of weapons either because of their indiscriminate effect on combatants and civilians or because of the unnecessary suffering caused to combatants, that is to say, a harm greater than that unavoidable to achieve legitimate military objectives." (Emphasis supplied.)

Para. 86: "nuclear weapons were invented after most of the principles and rules of humanitarian law applicable in armed conflict had already come into existence; the Conferences of 1949 and 1974-1977 left these weapons aside, and there is a qualitative as well as quantitative difference between nuclear weapons and all conventional arms. However, **it cannot be concluded from this that the established principles and rules of humanitarian law applicable in armed conflict did not apply to nuclear weapons. Such a conclusion would be incompatible with the intrinsically humanitarian character of the legal principles in question which permeates the entire law of armed conflict and applies to all forms of warfare and to all kinds of weapons, those of the past, those of the present and those of the future.** In this respect it seems significant that the thesis that the rules of humanitarian law do not apply to the new weaponry, because of the newness of the latter, has not been advocated in the present proceedings." (Emphasis supplied.)

I do not think it is entirely a digression to observe that a clear implication of the ICJ's reasoning is that the US atomic bombings of Hiroshima and Nagasaki were unlawful.

But let me nonetheless review some of the developments in international law relating to nuclear weapons since the 1996 opinion.

1) **NATIONAL ACADEMY OF SCIENCES:** I start with not with a legal authority, but a scientific one, a body extremely knowledgeable about the effects of nuclear weapons and doctrines regarding their use. In a 1997 book, *The Future of U.S. Nuclear Weapons Policy*, the Committee on International Security and Arms Control of the U.S. National Academy of Sciences well summarized the implications of the ICJ's opinion. The Committee stated:

[T]he ICJ unanimously agreed that the threat or use of nuclear weapons is strictly limited by generally accepted laws and humanitarian principles that restrict the use of force. Accordingly, any threat or use of nuclear weapons must be limited to, and necessary for, self defense; it must not be targeted at civilians, and be capable of distinguishing between civilian and military targets; and it must not cause unnecessary suffering to combatants, or harm greater than that unavoidable to achieve military objectives. *In the committee's view, the inherent destructiveness of nuclear weapons, combined with the unavoidable risk that even the most restricted use of such weapons would escalate to broader attacks, makes it extremely unlikely that any contemplated threat or use of nuclear weapons would meet these criteria.* (Committee on International Security and Arms Control, National Academy of Sciences, *The Future of U.S. Nuclear Weapons Policy*, National Academy Press, 1997, p. 87; emphasis supplied.)

2) **INTERNATIONAL CRIMINAL COURT:** Negotiations on the Rome Statute of the International Criminal Court were completed in 1998, and the Statute entered into force in 2002. The statute sets forth "serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law" (Art. 8(b)). The substantive provisions of the Statute were negotiated on the basis that they would reflect the present state of law binding on all states. It thus stands as a consensus-based statement of presently binding law defining war crimes. The United Kingdom is also a party.

a) Article 8(b)(i) forbids "Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities". In the view of the International Committee of the Red Cross, the prohibition on attacks on civilians covers the use of indiscriminate weapons. The International Court of Justice identified as customary the following rule: "States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets" (para. 78). The Red Cross pointed out: "The Court thus equated the use of indiscriminate weapons with a deliberate attack upon civilians". August 1999 Paper prepared by the International Committee of the Red Cross relating to the crimes listed in article 8, paragraph 2(b)(xvii), (xviii), (xix), (xx), (xxiii), (xxiv) and (xxv) of the Rome Statute of the International Criminal Court, submitted by the governments of Belgium, Costa Rica, Finland, Hungary, the Republic of Korea, and Switzerland to the Preparatory Commission for the ICC, PCNICC/1999/WGEC/INF2/Add.2 (4 August 1999), p. 25.

b) **Rule of proportionality:** Rome Statute Art. 8(b)(iv)) prohibits: "Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or

damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.”

This is sometimes known as the rule of proportionality, as applied to methods of warfare as opposed to the general response to another state’s armed attack. It was not addressed specifically by the ICJ, perhaps because it was thought too flexible for the context of nuclear weapons, as it involves balancing. Nonetheless, it is central to the way the UK and USA now practice warfare, and deserves examination.

What we have recently been emphasizing at LCNP is that compliance with this rule, and others, requires the ability to control the weapon or method of warfare used. See [The Legal and Policy Imperatives for the Abolition of Nuclear Weapons](#), July 2008; [Ending U.S. Reliance on Nuclear Weapons and Achieving Their Global Elimination: Wise Policy and Required by Law](#), March 2008.

An Air Force publication on the law of armed conflict states in part:

Weapons are not unlawful simply because their use may cause incidental casualties to civilians and destruction of civilian objects. Nevertheless, particular weapons or methods of warfare may be prohibited because of their indiscriminate effects.... [*S]ome weapons, though capable of being directed only at military objectives, may have otherwise **uncontrollable effects** so as to cause disproportionate civilian injuries or damage.* Biological warfare is a universally agreed illustration of such an indiscriminate weapon. (International Law – The Conduct of Armed Conflict and Air Operations, U.S. Air Force Pamphlet 110-31, 1976, § 6-3(c); emphasis supplied.)

Nuclear weapons are not capable of being controlled in this fashion. A related provision is found in the 1977 Protocol I to the Geneva Conventions. Article 51, “Protection of the Civilian Population,” provides:

4. Indiscriminate attacks are prohibited. Indiscriminate attacks are:
 - (a) those which are not directed at a specific military objective;
 - (b) those which employ a method or means of combat which cannot be directed at a specific military objective;
 - (c) *those which employ a method or means of combat the effects of which cannot be limited as required by the Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.* (Emphasis supplied.)

Limiting effects requires that the weapons be capable of being controlled. Again, that is not possible with nuclear weapons, above all due to the radiation effects.

c) **Protection of the environment:** It is also noteworthy that the Rome Statute Art. 8(b)(iv) prohibition of disproportionate attacks includes effects on the environment within the balancing test. This is also stated in the ICJ opinion. While noting that environmental law does not "deprive a State of the exercise of its right of self-defense under international law because of its obligations to protect the environment," the ICJ stated: "Nonetheless, **States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives.**" (Para. 30; emphasis supplied.) With the Rome Statute, that requirement became more entrenched. It is important to the illegality of threat and use of nuclear weapons, because it may come into play even in cases of attacks which arguably do not affect civilian populations and civilian infrastructure.

The ICJ also observed

that Articles 35, paragraph 3, and 55 of Additional Protocol I [to the Geneva Conventions] provide additional protection for the environment. Taken together, these provisions embody **a general obligation to protect the natural environment against widespread, long-term and severe environmental damage;** the prohibition of methods and means of warfare which are intended, or may be expected, to cause such damage; and the prohibition of attacks against the natural environment by way of reprisals. [§] These are powerful constraints for all the States having subscribed to these provisions. (Para. 31; emphasis supplied.)

As the years go by, those provisions also become part of customary international law, applicable even to those states not party to Protocol I or which, as in the case of the United Kingdom, ratified subject to the reservation that rules "introduced" by the Protocol – new rules - do not apply to nuclear weapons.

d) **Crimes against humanity:** The Rome Statute also defines the following as a crime against humanity (Article 7): murder, extermination, and other inhumane acts of a similar character, when committed as part of a widespread or systematic attack directed against any civilian population. This is the modern version of the crime against humanity prosecuted at Nuremberg. While not really a "recent development," it certainly demonstrates the entrenchment of the prohibition of crimes against humanity. Any use of nuclear weapons would involve war crimes. However, because nuclear weapons really are beyond the scope of warfare, and because of its rhetorical power, it is important to also state that use of nuclear weapons is a crime against humanity. This may serve as useful language for a future agreement or perhaps a UN Security Council resolution, as Rebecca Johnson suggests. It is also significant that crimes against humanity can be committed in time of peace as well as time of war, opening the door for arguments that peacetime preparations to commit such crimes are unlawful.

3) **Reprisal and the International Criminal Tribunal for the Former Yugoslavia:** The ICJ framed the prohibition of inflicting indiscriminate harm in categorical form, stating that it is a "*fundamental*" and "*intransgressible*" rule that states must "*never* use weapons that are incapable of distinguishing between civilian and military targets". Paras. 78, 79 (emphasis added). While the Court elsewhere declined to pass on the legality of nuclear reprisals, its statement of the

prohibition effectively rules them out. The categorical nature of the principle protecting civilians was affirmed by the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia in a decision reconfirming Milan Martić's indictment for ordering rocket attacks on Zagreb which killed and wounded civilians. *Prosecutor v. Milan Martić (Rule 61 Proceeding)*, Case No. IT-95-11-1 (8 March 1996), paras. 8-17. Applying humanitarian law including Article I Common to all Geneva Conventions, which sets forth minimum standards of customary international law, the Trial Chamber stated that **"no circumstances would legitimize an attack against civilians even if it were a response proportionate to a similar violation perpetrated by the other party"**. *Id.* at para. 15, emphasis supplied; see also paras. 16 and 17.

4) **NPT Commitments:** In paragraph 105(2)F of the "dispositif" setting forth its answers to the General Assembly, the Court unanimously concluded: "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's statement of the disarmament obligation is now the authoritative interpretation of Article VI of the Nuclear Non-Proliferation Treaty (NPT). Article VI provides: "Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control."

Article VI must be understood in the context of the entire treaty. The NPT is the only security treaty that permits two classes of members: states acknowledged to possess nuclear weapons and states barred from acquiring them. One hundred and eighty-eight states are members. Only three countries are outside the regime, all nuclear-armed, India, Pakistan, and Israel. In addition, North Korea's status is in limbo; it has announced its withdrawal, and may have a few nuclear weapons. The NPT strikes a bargain between non-nuclear weapon states, which are prohibited from acquiring nuclear arms and are guaranteed access to peaceful nuclear technology, and nuclear weapons states, which are required to negotiate nuclear disarmament in good faith. In the post-Cold War era, the 1995 and 2000 NPT Review Conferences, and the 1996 International Court of Justice opinion, established that the NPT requires the achievement of symmetry by obligating the nuclear weapons states to implement a program culminating in the elimination of their arsenals.

In 1995, the year that the NPT was due to expire, the indefinite extension of the treaty was agreed as part of a larger package that included a set of commitments known as the "Principles and Objectives for Nuclear Non-Proliferation and Disarmament". The Principles and Objectives set forth measures for implementation of the Article VI disarmament obligation. They include negotiation of a Comprehensive Test Ban Treaty by 1996, commencement of negotiations on a treaty banning production of fissile materials for use in weapons, and the "determined pursuit by the nuclear-weapon States of systematic and progressive efforts to reduce nuclear weapons globally, with the ultimate goal of eliminating those weapons."

The 2000 NPT Review Conference further specified what the Article VI disarmament obligation requires. Its Final Document sets forth "practical steps for the systematic and progressive efforts to achieve nuclear disarmament" ("Practical Steps"). Implementation of this comprehensive agenda would result in the achievement of a nuclear-weapon-free world. Among its crucial

elements were: 1) an “unequivocal undertaking by the nuclear-weapon States to accomplish the total elimination of their nuclear arsenals,” confirming the ICJ’s interpretation of Article VI; 2) affirmation of principles of transparency, verification, and irreversibility for the reduction and elimination of nuclear arsenals; 3) bringing the Comprehensive Test Ban Treaty into force and observing the moratorium on nuclear test explosions pending its entry into force; and 4) “a diminishing role for nuclear weapons in security policies to minimize the risk that these weapons ever be used and to facilitate the process of their total elimination.”

Under well-established rules of treaty interpretation set forth in the Vienna Convention on the Law of Treaties, the 2000 Practical Steps together with the 1995 Principles and Objectives constitute agreement and practice subsequent to the adoption of the NPT authoritatively applying and interpreting Article VI. The Vienna Convention is widely acknowledged as stating customary rules of international law. Article 31(3) of the Vienna Convention, entitled “General Rule of Interpretation,” provides that in addition to the text and preamble of a treaty, “there shall be taken into account ... (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.” The 2000 NPT Review Conference Final Document states that the “Conference agrees” on the Practical Steps. Further, the agreement was reached in the context of a proceeding authorized by Article VIII of the NPT “to review the operation of this Treaty with a view to assuring that the purposes of the Preamble and the provisions of the Treaty are being realized.” This is the most natural setting for states to make authoritative applications and interpretations of the NPT.

In addition to constituting *agreements*, the Principles and Objectives and Practical Steps are part of a *practice* of the parties to the NPT that has been consistent over the course of the treaty’s life, dating back to its inception. After the treaty was opened for signature on July 1, 1968, the Soviet Union and the United States placed specific measures before the predecessor to today’s Conference on Disarmament, the Eighteen Nation Disarmament Committee, where the NPT had been negotiated. Under a heading taken from Article VI, they proposed an agenda including “the cessation of testing, the non-use of nuclear weapons, the cessation of production of fissionable materials for weapons use, the cessation of manufacture of weapons and reduction and subsequent elimination of nuclear stockpiles” (ENDC/PV. 390, 15 August 1968, para. 93.) Disarmament measures have been the subject of discussion at every Review Conference since then. In short, the Practical Steps, as an application of Article VI, are an essential guide to its interpretation. They identify criteria and principles that are so tightly connected to the core meaning of Article VI as to constitute requirements for compliance with the NPT and more generally the disarmament obligation stated by the ICJ.

Article VI and the commitments made in 1995 and 2000 enjoin reduction and elimination of nuclear arsenals. They are wholly incompatible with planning and implementation of maintenance and modernization of nuclear forces for decades to come. What are their implications for threat and use of nuclear weapons? If a state has accepted an undertaking to eliminate its arsenal, and a diminishing role for nuclear weapons in security policies to minimize

the risk of their use, the strong implication is that threat and use is illegitimate; the NPT thus reinforces international humanitarian law in this respect.

5) **Good faith.** The International Association of Lawyers Against Nuclear Arms recently has sought to better define what the “good faith” referred to in Article VI requires. It is also a fundamental principle of international law that treaties are to be implemented in good faith. With others we organized an excellent [conference](#) on May 1, 2008 in Geneva on this subject. Judge Bedjaoui gave the keynote address, and some of what he has to say on good faith is available in the paper prepared for today’s meeting.

At the most basic level, good faith means keeping promises and working sincerely and cooperatively to achieve agreed objectives. Good faith requires meeting the NPT commitments made in 1995 and 2000 or, when appropriate, developing alternative means of fulfilling Article VI. Judge Bedjaoui stated that good faith requires refraining from acts incompatible with the object and purpose of the NPT and proscribes every initiative the effect of which would be to render impossible the conclusion of the contemplated disarmament treaty. Replacement and modernization of nuclear arsenals looking ahead for decades falls in the category in an act incompatible with the NPT’s object and purpose. As to the negotiations required by Article VI, they must first of all be commenced! Once commenced, Judge Bedjaoui explained, good faith requires their sustained upkeep, awareness of the interests of the other party, and a persevering quest for an acceptable compromise.

I think that the concept of good faith deserves emphasis and further development. Not only is it required to make progress in the nuclear sphere and others, notably that of climate protection. It also is one that is well suited to public advocacy and public understanding. Citizens can demand that their governments act in good faith to stop nuclear arms racing and accomplish the elimination of nuclear forces.

6) UN Security Council (UNSC) Resolution 1540 (2004). This resolution is aimed at requiring states to prevent non-state actor trafficking in and acquisition of nuclear, chemical, biological weapons and associated materials and parts. It also, however:

6. *Calls upon* all States: (a) To promote the universal adoption and full implementation, and, where necessary, strengthening of multilateral treaties to which they are parties, whose aim is to prevent the proliferation of nuclear, biological or chemical weapons.

Also, a preambular provision recalls “the Statement of its President adopted at the Council’s meeting at the level of Heads of State and Government on 31 January 1992 (S/23500), including the need for all Member States to fulfil their obligations in relation to arms control and disarmament and to prevent proliferation in all its aspects of all weapons of mass destruction”.

As a whole, the UNSC resolution is binding upon all states. It was adopted under Chapter VII of the UN Charter pursuant to which the UNSC maintains international peace and security. While

the provisions relating to disarmament are phrased in precatory terms – “calls upon” – arguably they too are binding, given the context.

So “non-state actors” - the subject of the resolution – can have a positive role as well; citizens in demanding that their government meet the NPT obligations reinforced by the resolution.

7) Regarding threat, I am not aware of developments in the law since the ICJ opinion. Already, the fact that the use of nuclear weapons would be unlawful under the law of armed conflict necessarily means that any specific threat to use nuclear weapons would be unlawful. This arises from the established rule of the law of armed conflict that it is unlawful for a state to threaten to use force that it would be unlawful in fact to use. As stated by the International Court of Justice, “If an envisaged use of weapons would not meet the requirements of humanitarian law [including discrimination], a threat to engage in such use would also be contrary to that law.” Clearly, a “threat” contrary to the UN Charter and humanitarian law will be considered to have occurred in a concrete situation, like an ongoing war, where one state signals to another, “If you do not do X or refrain from Y, we will resort to the use of nuclear weapons.” That is true even where the demand itself is lawful, for example “do not invade our territory.” However, clearly identifiable threats of this kind, while they have occurred, are somewhat rare and hard to establish. (Interestingly, governments do not like to openly threaten use of nuclear weapons in specific circumstances.)

What about long-running declared policies giving governments the option of use of nuclear weapons in certain circumstances? What about the longstanding nuclear threat vs. nuclear threat claimed to be at the core of “strategic stability” by the United States and Russia? It can certainly be plausibly argued that these are “unlawful” threats. The ICJ opinion gives some support to this argument. While declining to make a formal pronouncement on the policy of “deterrence”, the Court concluded that the policy would be unlawful under the United Nations Charter if use of nuclear weapons in self-defense pursuant to the policy would violate the principles of necessity and proportionality. This is an area where further analysis is needed – or, much better, clear international agreements or decisions. It is certainly the case that ongoing, declared policies of deterrence are contrary to the commitment to a “diminishing role for nuclear weapons in security policies to minimize the risk” of their use by the 2000 NPT Review Conference, and are generally inconsistent with obligation of good faith negotiation of disarmament.

What we sometimes lose sight of, and what I will end with, is that doctrines of so-called “deterrence” – even if they will indefinitely not result in use of the weapons – are wholly incompatible with achievement of the world governed by principles of peace, law and disarmament promised by the UN Charter. One of the aims of the Charter, as stated in its preamble, is “to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained.”