**MILITARY LAW REVIEW**

**Volume 229** **Issue 4**

# LAW AND ITS LIMITS "LEFT OF LAUNCH"

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## I. Introduction

Passion is not invariably a fuel conducive to insight and cogency in either legal or policy analysis. To be sure, passion can unlock the availability of nearly endless reservoirs of energy, hard work, and dedication in those it animates, and it is obviously of great value in any effort to make the world a better place. Without great care, however, passion can lead one over the line into abandoning the perspective and the rigor that is essential to good analysis and improved understanding.

With apologies to the vipassana teacher and author Jack Kornfield—who popularized the term in a very different context—one might say that the "near enemy" of *passion* is *fixation*: an error that looks and feels perilously close to its twinned virtue, and into which it can be terribly easy to slip when earnestly pursuing the good. (Such an error is probably especially tempting in an era, such as our own, that seems not merely to reject the possibility of achieving real objectivity, but indeed to be increasingly contemptuous even of those who merely valorize its *pursuit* as a means to encourage honesty and clarity, and to distinguish between weaker and stronger lines of argumentation.) Questions of socio-political direction that elicit great passion are therefore not only essential and

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inescapable subjects for public policy debate, but also topics about which responsible leaders need to be constantly careful and self-aware precisely *because of* and *in proportion to* the passion that such matters elicit.

In this author's professional experience in the public policy community, at least, few topics elicit as much passion as the role, morality, and future of nuclear weaponry. Far too often, debate on such critical questions tends to cluster into mutually unintelligible "silos" of solipsistic argumentation that do not merely discount and dismiss contrary perspectives, but in some sense even deny their existence by assuming *a priori* that opposing views are not really legitimate perspectives at all, but rather crass rationalizations driven by discreditable or even sinister ulterior motives (e.g., ugly and atavistic warmongering or mindlessly craven appeasement and civilizational self-hatred, as the case may be) and thus not really worth even the oxygen expended in expressing them. If we are truly to deal with these questions—not just finding sensible answers today, but in fact developing approaches to handle such grave challenges that will be effective and sustainable over time—we need to do better than simply talking past each other in reciprocal incomprehension and disgust.

To date, much scholarly work skeptical or dismissive of the legality of nuclear weaponry has had something of an aspirational air, as if seeking less to understand and describe international law than to find whatever legal arguments it can to buttress antecedent conclusions in pursuit of the longstanding policy objective of nuclear disarmament. (The *lex ferenda* of what it is felt the law should be in the future, in other words, is pervasively mistaken for the *lex lata* of what the law actually is.) For its part, work defending nuclear weapons possession sometimes slips into analogously axiomatic axe-grinding about the purportedly inevitable logics of geopolitical threat and nuclear response, and the corresponding impossibility that the law would, or could, decree anything at odds with such elemental realities.

For both sides—though it must be admitted that this is a particularly common failing in the disarmament community, in its efforts to use ostensibly legal discourse as a policy cudgel—the factor of "legality" sometimes seems to be viewed as having almost magical value, as if the Gordian knot of nuclear weapons and disarmament policy could be cut simply by the talismanic invocation of "the law" as a tool before which

opponents must perforce cower in submission. To truly find a way forward, however, we need to do better than this.

In this article, I will take a view that both sides may find somewhat contrarian. I do not aim precisely to sidestep questions of legality, for as will be seen, I have clear views thereupon. What I hope to do, however, is to draw out how it is that fetishizing a definitive, all-solving "legal" answer to the nuclear weapons problem can lead us to miss the true challenge. I hope, also, to point to how we may be able to make more progress—specifically, toward the secure and stable nuclear weapons-free world that most participants in these debates claim to desire—by putting aside the framing of "legality," at least for now. In its place, we should concentrate directly upon trying to ameliorate the *substantive* security challenges that drive real-world national leaders to feel that it is still, at the very least, *premature* to abandon direct or indirect reliance upon nuclear weaponry, irrespective of what various passionate legal writers and advocates may argue.

## II. Legality of the Threat of Nuclear Weapons Use

On one level, it is almost surprising to ask the question that is the central subject of this conference.[1] In essence, given that Article 2(4) of the United Nations (U.N.) Charter provides that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state,"[2] we are asked: "If it is illegal to issue a first nuclear strike, is it similarly illegal to *threaten* to issue a first strike?"[3] This might certainly be said to be a foundational question for

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[1] University of Pennsylvania Carey Law School, *Rethinking U.S. and International Nuclear Policies*, YOUTUBE (Apr. 23, 2021), https://youtu.be/Y_gaKQnwAgc.

[2] U.N. Charter art. 2, ¶ 4.

[3] *Left of Launch: Communication & Threat Escalation in a Nuclear Age*, UNIV. OF PENN. L. SCH., https://archive.law.upenn.edu/institutes/cerl/conferences/sovereigncommunications/keynote.php (last visited Nov. 8, 2021). Questions central to the conference included the following:

> Do the traditional methods of analyzing a State's compliance with Articles 2(4) and 51 of the U.N. Charter apply in the context of threat-making when those threats explicitly or implicitly implicate the use of nuclear weapons?
>
> Does the inherent right of self-defense include the right to use nuclear weapons?

the entire enterprise of nuclear deterrence—which, of course, has for many decades revolved in large part around being willing to threaten nuclear attack, not merely in response to a nuclear strike, but also potentially in order to forestall devastating conventional or other non-nuclear attack or invasion.

Yet for the most part, the basic legal questions in play here have already been asked and answered, as it were, fully a quarter century ago by the International Court of Justice (ICJ) in its advisory opinion of July 1996.[4] Moreover, the question as presented in this conference also encodes a conditional statement—assuming that "it is illegal to issue a first nuclear strike"—that is itself not supported by the ICJ's decision or any actual source of law. There being no reason to think the ICJ misunderstood the law in 1996 and no reason to think the law has changed, it is hard to imagine a *legal* reason to revisit the matter. The following pages will outline these points in more detail.

To begin, it is worth remembering what the ICJ actually said in its non-binding advisory opinion and what it did not. The question it had been asked was straightforward: "Is the threat or use of nuclear weapons in any circumstance permitted under international law?"[5] After an extensive evaluation of the arguments and briefs submitted by various parties, the Court reached a number of formal conclusions.

Most importantly, the ICJ declared that there was "in neither customary nor conventional international law" *either* "any specific authorization of the threat or use of nuclear weapons" *or* "any comprehensive and universal prohibition of the threat or use of nuclear weapons as such."[6] Having thus

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> Is nuclear war so different from other forms of warfare that traditional legal doctrines no longer apply, or must they be applied in substantially different ways?
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> What does the expanding set of complications portend for nuclear non-proliferation and nuclear disarmament?
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> Given the current state of rhetoric by leaders of nuclear sovereigns, are such goals even within the realm of possibility?
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> What roles will strategic communications and the rule of law play in de-escalating nuclear tensions?

*Id.*

[4] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8).

[5] *Id.* at 228.

[6] *Id.* at 266, ¶ 105(2)(A)–(B).

ruled out such a direct answer to the question presented, the Court declared that any threat or use of nuclear weapons *would* be unlawful if it did not comply with Article 2, paragraph 4, of the U.N. Charter, or if it failed to meet the requirements of Article 51.[7] It also made clear that any threat or use of nuclear weapons needed to be compatible with the requirements of the international law applicable in armed conflict, "particularly those of the principles and rules of international humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons."[8]

In what has turned out to be its most controversial holding, the ICJ then opined 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."[9] Nevertheless—and crucially—the ICJ's 1996 advisory opinion also declared that "the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake."[10]

In light of the passions aroused by the case, this careful phrasing was notably diplomatic, even to the point of disingenuousness. To see this, one must recall the longstanding understanding in international law that unfettered freedom of action for sovereign states is the default mode of the system, and that such freedom will only be limited where a clear legal rule can be identified to that effect. To international law experts, therefore, the ICJ's holding was thus crystal clear, even if its wording may have helped to lead laymen to conclude that something remained ambiguous or unsettled.

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[7] *Id.* ¶ 105(2)(C). Article 51 of the Charter provides that

> [n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

U.N. Charter art. 51.

[8] *Legality of the Threat or Use of Nuclear Weapons*, at 266, ¶ 105(2)(D).

[9] *Id.* ¶ 105(2)(E).

[10] *Id.*

Since in international law anything not specifically prohibited is legal,[11] to say that one "cannot conclude definitively" that the threat or use of nuclear weapons would be unlawful in cases of existential threat is thus *precisely the same thing* as declaring that the threat or use of nuclear weapons *is legal* in such cases.

Notably, moreover, in light of the question presented for this conference—which seems to assume that "a first nuclear strike" would be unlawful—the Court said nothing to support this view. (One would search the 1996 opinion in vain, for instance, for the phrase "first strike" or references to concepts such as "preemption.") To the contrary, as we have seen, the ICJ went out of its way to specify that nuclear weapons were subject to the *same* legal rules that *all* uses of force are subject.

Accordingly, it follows that there is also nothing special, in legal terms, about a nuclear strike being "first." Its legality does not stand or fall depending on its "firstness," as it were, but rather upon all the "regular" legal criteria involved in assessing the lawfulness of a use of force. Significantly, the law is not generally understood to preclude striking "first" in any use-of-force context, provided that appropriate criteria are met (e.g., the presence of an imminent threat), and under the ICJ's 1996 holding this would be no different in the nuclear realm.

To be sure, some scholars have tried to argue that the enactment of Article 51 of the U.N. Charter erased prior understandings permitting anticipatory self-defense in case of imminent threat—such as the so-called *Caroline* formula, named after a nineteenth-century diplomatic dispute

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[11] *See, e.g.*, Case of the S.S. "Lotus," 1927 P.C.I.J. (ser. A) No. 10, at 18–19 (Sept. 7). The authority of a sovereign state to take actions under the law of war comes from its inherent rights *as* a sovereign state rather than from the existence of any sort of legal rule giving it "permission." In this sense, the law of war is merely "prohibitive law," in that where it exists and acts, it *prohibits* rather than *authorizes*. *See, e.g.*, OFF. OF GEN. COUNS., U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL § 1.3.2.1 (12 June 2015) (C3, 13 Dec. 2016) [hereinafter LAW OF WAR MANUAL]. The International Court of Justice (ICJ), therefore, was being disingenuous to the point of actually being misleading in using phrasing designed to make the legality of nuclear weapons use in extreme circumstances of self-defense seem unclear because it could not find "any specific authorization" for such use. Particularly given its *ultra vires* excursion into dicta about Article VI of the Nuclear Nonproliferation Treaty, this was not, to say the least, the Court's finest hour.

involving a vessel by that name.[12] Mary Ellen O'Connell, for instance, reads Article 51 as having entirely superseded earlier understandings.[13] She relies in making this argument, however, upon an ICJ case that she herself concedes did not actually consider the question of when self-defense actually begins,[14] and admits that her argument is not consistent with the actual text of Article 51 describing the right of self-defense as being "inherent"—an inconvenient fact that she dismisses with the offhand comment that the existence of a *genuinely* "inherent" right to self-defense would be "at odds with the Charter's design"[15] as she interprets it.[16]

The stronger position, by contrast, is that prior understandings of anticipatory self-defense did *not* evaporate with the adoption of the U.N. Charter, which merely supplemented the traditional law of self-defense with some additional rules applying to and between U.N. Member States (e.g., that one must report one's use of force in self-defense to the Security Council). As noted, the text of Article 51 clearly describes the right to self-defense as being "inherent," thus making clear that such a right already existed *before* and independent of the adoption of the U.N. Charter, and indeed arguably signaling that, *as* an "inherent" right, the Charter was powerless to abridge it in any event.

As we have seen, it is a foundational concept of international law that states enjoy a basic sovereign freedom that shall only be deemed to have been restricted where some clear rule of international law can be shown. Critics of anticipatory self-defense have not carried this burden, however, and the customary legal rule articulated in the *Caroline* principle clearly survives to the present day—a conclusion buttressed by references to the *Caroline* in both the Nuremburg and Tokyo war crimes trials held even "at the very time the [U.N.] Charter was drafted and entering into force."[17]

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[12] *See generally, e.g.*, *British-American Diplomacy: The Caroline Case*, AVALON PROJECT, https://avalon.law.yale.edu/19th_century/br-1842d.asp (last visited Nov. 17, 2021).
[13] MARY ELLEN O'CONNELL, THE MYTH OF PREEMPTIVE SELF-DEFENSE 5 (2002).
[14] *Id.* at 8.
[15] *Id.* at 13.
[16] Instead of legal arguments, O'Connell spends most of her article offering expressly *policy*-based reasons to favor of her view of Article 51. *See id.* at 15–20.
[17] Terry D. Gill & Paul A.L. Ducheine, *Anticipatory Self-Defense in the Cyber Context*, 89 INT'L L. STUD. 438, 455 (2013).

As Terry Gill and Paul Ducheine thus summarize it:

> In both the nineteenth century and at the time the Charter was adopted, armed attack [giving rise to a right of self-defense] was considered to include clear and manifest preparations, even the intention to attack in the proximate future, when their existence was supported by clear evidence.
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> . . . .
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> . . . [T]here is ample evidence that the right of self-defense contained an anticipatory element at the time the Charter was adopted and that it continues to do so now. In the absence of conclusive evidence that the law has been altered since the Charter entered into force, there is no reason to assume that anticipatory self-defense when exercised within the confines of the *Caroline* criteria has become unlawful.
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> In short, an armed attack was considered to have "occurred" at a time it was evident an attack was going to take place in the near future, even though this was well before any forces ever crossed the frontier, or even concrete measures—as opposed to preparations—had been taken to initiate an attack . . . .[18]

Accordingly, "a State need not wait idly as the enemy prepares to attack. Instead, a State may defend itself once an armed attack is 'imminent'" pursuant to international legal principles dating back at least to the *Caroline* precedent, which "has survived as the classic expression of the temporal threshold."[19] (This is also the view of U.S. and British law-of-war authorities.[20])

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[18] *Id.* at 456–59.

[19] TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS 350–51 (Michael N. Schmitt ed., 2d ed. 2017) [hereinafter TALLINN MANUAL].

[20] *See, e.g.*, LAW OF WAR MANUAL, *supra* note 11, § 1.11.5.1; NAT'L SEC. L. DEP'T, THE JUDGE ADVOC. GEN.'S LEGAL CTR. & SCH., U.S. ARMY, OPERATIONAL LAW HANDBOOK 6–7 (2021); Daniel Bethlehem, *Principles Relevant to the Scope of a State's Right of Self-Defense*

It is incorrect, therefore, to argue that a "first" nuclear strike would be *per se* unlawful, since there remains at least some potential scope for anticipatory self-defense here as in any other use-of-force context. Nor, in fact, would there be any requirement that an imminent threat justifying a first blow actually have to be a *nuclear* threat. (A nuclear weapons policy of "no first use" cannot intelligibly be shoehorned in here!) To the contrary, a sufficiently grave *non-nuclear* threat or combination of threats might also be perfectly adequate to justify nuclear use, provided that they actually rose to the specified level of creating an "extreme circumstance of self-defence, in which the very survival of a State would be at stake."[21]

There is thus nothing here that would preclude nuclear weapons policies such as those adopted by the United States over successive presidential administrations since the 1996 case. Significantly, U.S. official statements of nuclear weapons declaratory policy in recent decades have closely tracked the 1996 formulation describing the ICJ's understanding of when nuclear weapons use would be lawful, making clear that nuclear weapons use would only be considered in "extreme circumstances" to defend the vital interests of the United States or its allies. This, for instance, is the position expressed in both the Obama Administration's *Nuclear Posture Review* of 2010[22] and the Trump Administration's similar 2018 *Review*.[23] Nuclear weapons policy statements by both Britain and France use this basic formulation as well,[24] and even Russian, Pakistani, and Indian formulations tend to use analogous terms.[25] All thirty countries that make up the NATO

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*Against an Imminent or Actual Armed Attack by Nonstate Actors*, 106 AM. J. INT'L L. 1, 2–3 (2012) (quoting Lord Goldsmith on 21 April 2004).

[21] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 266, ¶ 105(2)(E) (July 8).

[22] U.S. DEP'T OF DEF., NUCLEAR POSTURE REVIEW REPORT, at viii–ix, 16–17 (2010).

[23] U.S. DEP'T OF DEF., NUCLEAR POSTURE REVIEW REPORT, at ii, viii, xvi, 21, 68 (2018).

[24] *See, e.g.*, U.K. PRIME MINISTER, GLOBAL BRITAIN IN A COMPETITIVE AGE: THE INTEGRATED REVIEW OF SECURITY, DEFENCE, DEVELOPMENT AND FOREIGN POLICY 76 (2021) ("We would consider using our nuclear weapons only in extreme circumstances of self-defence, including the defence of our NATO Allies."); REPUBLIC OF FR., FRENCH WHITE PAPER: DEFENCE AND NATIONAL SECURITY 73 (2013) ("The use of nuclear weapons would only be conceivable in extreme circumstances of legitimate self-defence. In this respect, nuclear deterrence is the ultimate guarantee of the security, protection and independence of the Nation.").

[25] *See, e.g.*, *The Military Doctrine of the Russian Federation*, EMBASSY OF THE RUSSIAN FED'N TO THE U.K. OF GREAT BRITAIN & N. IR. (June 29, 2015), https://rusemb.org.uk/press/2029 ("The Russian Federation shall reserve the right to use nuclear weapons in response to the use of nuclear and other types of weapons of mass destruction against it and/or its allies, as well as in the event of aggression against the Russian Federation with the use of conventional

alliance, moreover, use such language in describing their reliance upon nuclear deterrence,[26] while even China's supposed "no first use" nuclear weapons policy[27] inherently implies the possibility of *responsive* use—which is certainly not inconsistent with the ICJ's "extreme circumstances" formulation but would be unlawful if nuclear weapons use were *per se* illegal. From the perspective of customary international law formation, therefore, it is surely significant that essentially *all* of the "States who are specially affected"[28] by the question of nuclear deterrence clearly endorse the "extreme circumstances" concept of lawful use; there is thus not even a whisper of new customary law formation here.

It follows, furthermore, that if the actual *use* of nuclear weapons in such extreme cases is not prohibited, it is necessarily not unlawful to *threaten* such use—provided, presumably, that one only threatens to use them in

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weapons when the very existence of the state is in jeopardy."); *Arms Control and Proliferation Profile: Pakistan*, ARMS CONTROL ASS'N, https://www.armscontrol.org/factsheets/pakistanprofile (last visited Nov. 17, 2021) (noting that Pakistani officials "have claimed that nuclear weapons would be used only as a matter of last resort in . . . a conflict with India"); *Arms Control and Proliferation Profile: India*, ARMS CONTROL ASS'N, https://www.armscontrol.org/factsheets/indiaprofile#bio (last visited Nov. 17, 2021) (noting that Indian officials have claimed that India "would not use nuclear weapons against states that do not possess such arms and declared that nuclear weapons would only be used to retaliate against a nuclear attack" and that the government also "reserved the right to use nuclear weapons in response to biological or chemical weapons attacks").

[26] *See, e.g.*, *NATO Nuclear Deterrence*, NATO, https://www.nato.int/nato_static_fl2014/assets/pdf/2020/2/pdf/200224-factsheet-nuclear-en.pdf (last visited Nov. 17, 2021) (declaring that "the circumstances in which NATO might contemplate the use of [nuclear weapons] are extremely remote" but could include circumstances in which "the fundamental security of any Ally were to be threatened").

[27] *See, e.g.*, *Chinese Government Statement on the Complete Prohibition and Total Destruction of Nuclear Weapons*, MINISTRY OF FOREIGN AFFS. OF CHINA, https://www.fmprc.gov.cn/mfa_eng/ziliao_665539/3602_665543/3604_665547/t18055.shtml (last visited Nov. 17, 2021).

[28] "Specially affected" states have been said to be those "with a distinctive history of participation in the relevant matter":

> States that have had a wealth of experience, or that have otherwise had significant opportunities to develop a carefully considered military doctrine, may be expected to have contributed a greater quantity and quality of State practice relevant to the law of war than States that have not.
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> For example, "specially affected States" could include, depending upon the relevant matter, the nuclear powers[ or] other major military powers . . . .

LAW OF WAR MANUAL, *supra* note 11, § 1.8.2.3.

circumstances, or in a fashion, that would not contravene the U.N. Charter, law of armed conflict principles, or any other applicable rules, as noted by the ICJ. And indeed, as we have seen, the Court's own phrasing also did not distinguish threat and use in any such way, speaking in its holdings of "the threat or use of nuclear weapons" together.[29]

There is, therefore, no real question about whether the use of nuclear threats is a lawful way to deter either nuclear or non-nuclear aggression of a sort that could create the aforementioned "extreme circumstances." Nor is there any reason to think the ICJ misunderstood the law in 1996. If anything, the Court actually *overreached* by going as far as it did, for it exceeded its authority in its final holding,[30] addressing the meaning of Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT).[31]

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[29] See NIKOLAS STÜRCHLER, THE THREAT OF FORCE IN INTERNATIONAL LAW (2007), for more on whatever legal distinction there may be between the *use* of force and its mere *threat*.
[30] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 267, ¶ 105(2)(F) (July 8).
[31] This author has described the problem elsewhere, noting that:

> the question of the meaning of Article VI was not actually before the court, making that portion of its opinion, as Judge Stephen Schwebel observed, a mere "*dictum*." The ICJ had originally been asked by the World Health Assembly to render an advisory opinion on the question: "Would the use of nuclear weapons by a State in war or other armed conflict be a breach of its obligations under international law including the WHO [World Health Organization] Constitution?" But the court determined that because the issue lay outside the WHO's scope, the question had been improperly asked. The U.N. General Assembly, however, had also requested that the ICJ render an advisory opinion on essentially the same question: "Is the threat or use of nuclear weapons in any circumstance permitted under international law?" The court accepted this second attempt to pose the question. In neither case, however, was the meaning of Article VI something that the ICJ was formally asked to consider.
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> In the Anglo-American tradition, *obiter dictum* refers to a comment made in a legal opinion on matters not actually raised in the case at hand. As comments on extraneous matters, *dicta* generally are regarded as having minimal authority or value as precedent. The ICJ's comments on Article VI are clearly such. Worse still, because the court was not asked to give any advice on Article VI, its pronouncement on the subject may in fact have been *ultra vires*—beyond its powers. After all, the ICJ is only authorized to give an advisory opinion upon request from a properly authorized body. The ICJ's statute also requires that "questions upon which the advisory opinion of the Court is asked shall be laid before the

Furthermore, there is no reason today to think that the law has changed in the intervening years. To be sure, a sizeable community of civil society activists and disarmament-minded governments has certainly been trying to *create* new rules under which nuclear weaponry would be flatly outlawed. This is the purpose, for instance, of the Treaty on the Prohibition of Nuclear Weapons (TPNW).[32] To date, however, no nuclear weapons possessor has joined the TPNW, nor has any country that relies even indirectly upon nuclear weaponry for its security (e.g., a member of an alliance such as NATO that has a policy of nuclear deterrence).

So far, in fact, TPNW signatories include *no* state with any experience with or background in nuclear weapons questions whatsoever, with the arguable minor exceptions of South Africa (the government of which was carefully denied the opportunity to possess nuclear weapons by the apartheid regime's dismantlement of such weapons before the transfer of power in 1994), Kazakhstan (which relinquished Soviet-era nuclear weapons that had been stranded in its territory by the collapse of the USSR, but which it could not maintain or likely actually employ in combat anyway), and Brazil and Libya (both of which in the past undertook nuclear weapons development efforts, in the latter case in violation of Article II of the NPT, but never actually manufactured a nuclear device). As noted, essentially *all* "specially affected States" in effect agree with the ICJ that nuclear weapons use can be lawful in extreme circumstances of self-defense.

In effect, therefore, the TPNW so far amounts to no more than a collection of states that have come together to promise in a new instrument to do what they were all already obliged to do by Article II of the NPT: namely, not to have nuclear weapons.[33] (Most TPNW signatories, moreover,

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> Court by means of a written request containing an exact statement of the question upon which an opinion is required." Since no one had actually asked the ICJ to interpret Article VI, its eagerness to pronounce upon the subject may have led it to exceed its authority.

Christopher A. Ford, *Debating Disarmament: Interpreting Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons*, 14 NONPROLIFERATION REV. 401, 402 (2007) (citations omitted).

[32] Treaty on the Prohibition of Nuclear Weapons, *opened for signature* July 7, 2017 (entered into force Jan. 22, 2021).

[33] Treaty on the Non-Proliferation of Nuclear Weapons art. II, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 (entered into force Mar. 5, 1970) ("Each non-nuclear-weapon State Party to the Treaty undertakes not to receive the transfer from any transferor whatsoever of nuclear weapons or other nuclear explosive devices or of control

are also already signatories to one of the various Nuclear Weapons Free Zone Treaties,[34] making the "ban" instrument *doubly* superfluous in legal terms.) Furthermore, all the nuclear weapons states and their allies have stated repeatedly and clearly not only that they will not join the new instrument, but also that they do not agree with the idea of a nuclear weapons ban in the first place (at least at this time) and that they feel there to be no legal obligation upon them in such respects[35]—thus undermining any basis for concluding that a norm of customary international law might be emerging. As a result, the TPNW changes precisely nothing with respect to the continuing validity of the ICJ's 1996 opinion.

## III. Teleology and Subjectivity in International Law

Despite the clarity of the abovementioned conclusions, however—or perhaps precisely *because* of that clarity—disarmament activists in the legal community have spent a great deal of time working to revisit and to close

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over such weapons or explosive devices directly, or indirectly; not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices; and not to seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices.").

[34] The author is indebted to Tobias Vestner of the Geneva Centre for Security Policy for pointing this out. E-mail from Tobias Vestner, Head of Sec. & L., Geneva Ctr. for Sec. Pol'y, to author (Apr. 26, 2021).

[35] *See, e.g.*, Christopher Ford, Assistant Sec'y of State, The Treaty on the Prohibition of Nuclear Weapons: A Well-Intentioned Mistake (Oct. 30, 2018), https://2017-2021.state.gov/remarks-and-releases-bureau-of-international-security-and-nonproliferation/the-treaty-on-the-prohibition-of-nuclear-weapons-a-well-intentioned-mistake/index.html. The United States has declared that

> the proposed Treaty would neither make nuclear weapons illegal nor lead to the elimination of even a single nuclear weapon. Contrary to what its supporters might wish, it makes no impact that would support any new norm of customary international law that would in any way be binding on any state having nuclear weapons today. In particular, all NPT nuclear-weapon States consistently and openly oppose the "Ban," along with their military allies around the world. The text of the treaty *itself* is inconsistent with creation of any norm of non-possession of nuclear weapons, inasmuch as it does not actually prohibit States from joining while still having nuclear weapons, and only envisions them relinquishing such devices at an unspecified future date and under unspecified future circumstances. Far from contributing to some kind of non-possession norm, the Treaty seems itself to prove there's no such thing.

*Id.*

the supposed "loophole" in the Court's "extreme circumstances" holding in order to be able to declare nuclear weapons *per se* "illegal" after all. That they might imagine this "look again and try harder" approach to be a potentially promising one is perhaps not surprising.

International law has long had a flavor to it of both aspiration and improvisation. Many of its proponents, in fact, often seem to feel themselves part of a great teleological movement of law-creation and law-improvement—a world-historical progression that will in time end international law's inferiority complex vis-à-vis domestic jurisprudence by closing the gap between the "thickness" and detail of domestic legal rule-sets and the (so far) still much sparser landscape of international jurisprudence.

The Finnish legal scholar Martti Koskenniemi memorably described this phenomenon in the E.H. Carr Memorial Lecture at Aberystwyth University in 2011, noting the "persistence of teleology" in international legal thinking ever since the field of international law was first established as a distinct professional practice in European law schools in the early nineteenth century. In his characterization, international law was from the outset infused with "the idea of progressive history" and retains this flavor even in today's more cynical postmodern era, with international lawyers these days being "about the only group of human beings who still use the vocabulary of progress."[36]

The spirit of the international bar, as it were, is thus suffused with deep assumptions of progress in an "intrinsic teleology expressed by and accomplished through international law," and in which legal practice "possesses an inbuilt moral direction to make human rights, justice and

[36] Martti Koskenniemi, *Law, Teleology and International Relations: An Essay in Counterdisciplinarity*, 26 INT'L RELS. 3, 3–4, 5 (2011). So pervasive does the "teleological impulse" seem to be in international legal circles that the panel of legal experts who drew up the *Tallinn Manual* on cyberspace operations law apparently felt it necessary to distinguish their project from the field's general instinct to press the law forward in desired policy directions. The introduction to the *Tallinn Manual* takes pains to emphasize that it "does not represent 'progressive development of the law', and is policy and politics neutral. In other words, *Tallinn Manual 2.0* is intended as an objective restatement of the *lex lata* [current law as it is]. Therefore, the Experts involved . . . assiduously avoided including statements reflecting *lex ferenda* [future law, or law as it aspires to be]." Michael Schmitt, *Introduction* to TALLINN MANUAL, *supra* note 19, at 3.

peace universal."[37] To "do" international law, Koskenniemi contends, is often assumed to mean that one "operate[s] with a teleology that points from humankind's separation to unity."[38]

> [I]nternational lawyers . . . tend to be united in our understanding that legal modernity is moving towards what an influential Latin American jurist labelled in 2005 a new *jus gentium* uniting individuals (and not states) across the globe, giving expression to "the needs and aspirations of humankind" . . . [and in which] territorial systems are being replaced by intrinsically global, functional ones.[39]

In this telling, the geopolitical tensions and existential rivalries of the Cold War represented something of an uncomfortable and unwelcome *realpolitikal* pause—a hiatus in which "international lawyers were compelled to modesty in their ambitions about international government."[40] Nevertheless, given the enthusiasms in the field for relentless forward movement toward goals that it was everyone's responsibility to help advance, "it was unsurprising when after 1989 they began to dust off the teleologies of the interwar period."[41] Those intervening years of great power competition, it was felt, "had signified only a temporary halt in the liberal progress of humankind"—and the push to build a brave new legal order revived.[42]

Nor was this desire for forward movement, it would seem, just about a perceived need to drive toward some kind of ideologically axiomatic global human end-state. The field of international law has also sometimes seemed to display an almost *arriviste* status desperation, with the relative "thinness" of international jurisprudence being perhaps something of an embarrassment in comparison to the depth and intricacy of the systems of domestic law with which we are all familiar within our own individual countries.

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[37] Koskenniemi, *supra* note 36, at 4.
[38] *Id.* at 3–4.
[39] *Id.* at 4–5 (citations omitted).
[40] *Id.* at 8.
[41] *Id.*
[42] *Id.* at 8.

Moreover, unlike domestic legislation—in democracies, at least—the positivist enactments of sovereign states in broad multilateral conventions have also long quietly suffered from an intrinsic legitimacy deficit. After all, despite its teleological aspiration to unite all of humanity and perhaps supersede the state-territorial construct entirely, the international system has no particularly compelling ethical basis upon which to defend agreements arrived at "democratically" by state sovereign consent when so many of the diplomats who draft and sign international conventions are themselves representatives of regimes that have no actual democratic legitimacy themselves. There are, one imagines, relatively few multilateral agreements and institutions formed exclusively by national governments that can be said genuinely to represent the sovereign peoples over whom they rule and in whose name they purport to speak in international rulemaking.[43]

Perhaps for these reasons, the claims made by legal scholars as to the existence of certain international legal rules in service of the teleology have sometimes advanced as much by willpower and passion as by meticulous demonstration. This can produce a kind of derivational slipperiness, under which international legal thinkers have sometimes been willing to countenance law-creation through mechanisms unlikely to be accepted in a domestic jurisdiction.

Perhaps most prominent of these mechanisms can be seen in international legal doctrines of customary international law, which is said to be "independent of treaty law" and based upon the jurist's conclusions about what appears to be "accepted as law." Specifically, it is said, customary law can arise—considering, importantly but rather imprecisely, "the overall context, the nature of the rule, and the particular circumstances in which the evidence in question is to be found"—where there is "a general practice that is accepted as law."[44]

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[43] The author has elsewhere described this as the "*origins problem* of conventional internationalism—that is, its positivist roots in the decisions of functionaries many of whom lack any right to speak for such purposes on behalf of the sovereign populations whose will and consent necessarily represent the fundamental source of legitimacy for *anything* done in the international arena." Christopher A. Ford, *Democratic Legitimacy and International Society: Debating a "League of Democracies"*, *in* 3 HUMAN RIGHTS, HUMAN SECURITY, AND STATE SECURITY 1, 27 (Saul Takahashi ed., 2014) (emphasis added).

[44] G.A. Res. 73/203, annex, Identification of Customary International Law, at 2 (Dec. 20, 2018); *see, e.g.*, *Customary International Law*, INT'L COMM. OF THE RED CROSS (Oct. 29, 2010), https://www.icrc.org/en/document/customary-international-humanitarian-law-0

The combination of state practice and *opinio juris*, in other words, creates new law even where no state representatives have ever debated or enacted such a thing. If states *act* in a certain way and seem to think that doing so is legally required—as opposed to it just being a good idea, or simply necessary under the circumstances—then international lawyers deem that practice in fact to *be* mandatory.

This has a certain logic, one supposes, but it certainly is not the kind of thing that one imagines would be easily accepted in a domestic context. In some sense, moreover, customary law doctrine exacerbates the democratic deficit of international rule-making inasmuch as it not only allows the creation of new legal rules simply by aggregating the decisions of states irrespective of the democratic credentials of the decision-makers, but in fact permits such rule-creation to occur *sub silentio*, without express consideration and debate *at all*.

Another example can perhaps be seen in the doctrine of *jus cogens*: the idea that certain "peremptory norms" exist in international law such that countries will be bound by them even in the face of an express agreement to the contrary made through the very mechanisms of state-sovereign law-making that form the traditional default standard for international legal legitimacy.[45] The Vienna Convention on the Law of Treaties describes "a peremptory norm of international law" as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[46] A treaty that conflicts with a *jus cogens* norm will be deemed void.[47]

As for where these supernorms originate, however—and how one is actually to tell what their substantive content is—international legal theory provides little insight. To begin, such norms are not *quite* unchangeable foundational rules akin to natural law, inasmuch as they are said to be amenable to change as broad international conceptions of right and wrong

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(declaring that customary law "fills gaps left by treaty law" with rules that "derive[] from 'a general practice accepted as law.' To prove that a certain rule is customary, one has to show that it is reflected in state practice and that the international community believes that such practice is required as a matter of law").

[45] *Jus Cogens*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[46] Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331.

[47] *Id.*

evolve over time. Yet they *do* expressly prohibit states from "contracting out" of their strictures by the mechanisms of agreement that give rise to *other* international legal rules.

Precisely how *jus cogens* norms arise, what their content is at any given point in time, and how (and when) they can be said to have changed has never fully been explained. As one jurist described things at the time, for the drafters of the Vienna Convention, "the concept of *jus cogens* expressed some higher social need. . . . Ultimately, it was more society and less the law itself which defined the content of *jus cogens*."[48]

This conception of a "higher social need" that conjures up new, unbreakable legal rules (apparently simply because they are needed) suggests how close to the mark is Koskenniemi's description of the international legal project as being motivated by teleological "progress of history" thinking—rather than, say, by rigorous principles of doctrinal stability, derivational rectitude, and procedural legitimacy. Ultimately, despite their benevolent intentions, peremptory norms thus necessarily remain somewhat mysterious, for they are

> creatures without definable legal pedigree or doctrinal grounding; we may not be able to explain them yet we think—to borrow a phrase—that we know them when we see them.
>
> Ultimately, rules of *jus cogens* may derive from no conventional doctrinal "source" other than the "conscience" of the international community.[49]

Yet, for all that, international lawyers defend their existence as the strongest and most urgent rules in the global system.

While it is certainly the case that domestic legal systems have themselves occasionally had recourse to analogously slippery and subjective standards even in interpreting foundational law—such as the U.S. Supreme Court's occasional employment of a "shocks the conscience" standard in

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[48] *Summary Records of the 685th Meeting*, [1963] 1 Y.B. Int'l L. Comm'n 73, U.N. Doc. A/CN.4/SER.A/1963.

[49] *See generally, e.g.*, Christopher A. Ford, *Adjudicating* Jus Cogens, 13 WIS. INT'L L.J. 145, 152 (1994).

"substantive due process" cases under the United States Constitution[50]—such excursions into doctrinally unmoored subjectivity are invariably controversial, and are a surprising path for an international legal system that aspires to close its legitimacy deficit vis-à-vis the rigors of domestic jurisprudence. It would certainly seem strange to adopt as a general principle the view that things become illegal simply when one badly enough *wants* them to be, and it is not necessary to go as far as Anthony D'Amato—who suggests caustically that *jus cogens* may be essentially nothing more than a scam and a confidence game[51]—to suspect that something in the peremptory norms construct is at least *slightly* off.

Moreover, in contrast to domestic legal systems such as that of the United States—where activist movement of legal rules toward broad overall goals by unelected jurists is at least controversial—mechanisms for adding to the corpus of international law *outside* strict principles of state-sovereign consent are explicitly built into the international canon. The Statute of the International Court of Justice, for instance, explicitly provides its jurists with the opportunity to turn to sources of law beyond simply international conventions and even beyond customary law. Specifically, Article 38 of the Statute also allows judges to draw upon—and, impliedly, empowers them to make decisions about what qualifies as—"the general principles of law recognized by civilized nations"[52] and "the teachings of the most highly

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[50] *See, e.g.*, Rochin v. California, 342 U.S. 165, 172 (1952) (declaring that the police actions against a defendant constituted "conduct that shocks the conscience" and were "methods too close to the rack and the screw to permit of constitutional differentiation").

[51] Anthony D'Amato, *It's a Bird, It's a Plane, It's* Jus Cogens*!*, 6 CONN. J. INT'L L. 1, 1 (1990) (arguing that "the sheer ephemerality of *jus cogens* is an asset, enabling any writer to christen any ordinary norm of his or her choice as a new *jus cogens* norm, thereby in one stroke investing it with magical power," and that if anyone were actually able to articulate an intelligible theory of *jus cogens*, that person would deserve an "International Oscar").

[52] Statute of the International Court of Justice, art. 38(1)(c). The subtext here that some subset of "civilized" nations is empowered to establish legal standards binding upon the rest of humanity is unmistakable. Nevertheless, despite international law's origin in Western, European, and Christian ethico-religious traditions, modern progressives—though otherwise notably quick to try to exorcise the baleful influence of "dead White males" from educational curricula and historical memory—have been intriguingly slow to condemn international law as a presumptively illegitimate relic of a racist and imperialist age. Even though the seminal instruments and concepts of international humanitarian law were indeed primarily the handiwork of such dead White males, and seem to have grown quite directly out of Christian "just war" thinking and chivalric notions of martial honor and the protection of innocents, there would appear to be an implicit recognition that to "decolonize" the law of war might open the legal door to notably *uncivilized* behavior. Perhaps for this reason, the modern

qualified publicists of the various nations," albeit only as "subsidiary means for the determination of rules of law."[53] Such ambitiously broad identification of potential "sources" for international law certainly sits strangely in a system doctrinally grounded in state-sovereign consent, and in which even decisions by international *courts* are not generally binding on states, or even binding as precedent upon such tribunals themselves.[54]

Indeed, jurists even in *ad hoc* tribunals such as the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) have sometimes flexed these muscles in filling gaps left by more conventional sources of law, as Alexandra Adams has detailed in her analysis of ICTY and ICTR jurisprudence concerning

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academy has tended to focus more upon augmenting or improving the law of war rather than upon delegitimizing and erasing it. There is perhaps a salutary lesson here.

[53] *Id.* art. 38(1)(d). In explaining this provision, the U.S. Defense Department's authoritative *Law of War Manual* offers the caution that "[t]he writings ['of the most highly qualified publicists'] should only be relied upon to the degree they accurately reflect existing law . . . ." LAW OF WAR MANUAL, *supra* note 11, § 1.9.2. This formulation merely begs the question, however, by presupposing that one knows existing law. One should certainly not rely upon the writing of publicists who do *not* accurately reflect existing law, of course, since doing so would undermine the law's rootedness in state sovereign decisions and would make a mockery of the very *idea* of international legality by reducing its demonstration to a mere matter of arbitrarily picking and choosing from among counterpoised assertions and policy preferences. Yet if one already knows the legal answer—which is the only sure way to avoid reliance upon an incorrect publicist—there would be no need to resort to "subsidiary means" in the first place. Ultimately, one struggles to find much useful meaning *at all* in Article 38's comment about reliance upon publicists. Interestingly, the *Law of War Manual* seems to distrust some of the legal writings of the International Committee of the Red Cross on just such grounds, hinting that they may have substituted the policy advocacy of *lex ferenda* for the legal description of *lex lata*. *Cf. id.* § 1.9 ("[T]he United States has said that it is not in a position to accept without further analysis the conclusions in a study on customary international humanitarian law published by the ICRC.").

[54] *See generally, e.g.*, LAW OF WAR MANUAL, *supra* note 11, § 1.9.1 ("Judicial decisions are generally consulted as only persuasive authority because a judgment rendered by an international court generally binds only the parties to the case in respect of that particular case. The legal reasoning underlying the decisions of the International Court of Justice is not binding on States. Similarly, the decisions of . . . the International Criminal Tribunal for Rwanda cannot, as a strictly legal matter, 'bind' other courts. The legal principle of *stare decisis* [settled, binding precedent] does not generally apply between international tribunals, *i.e.*, customary international law does not require that one international tribunal follow the judicial precedent of another tribunal in dealing with questions of international law. Moreover, depending on the international tribunal, a tribunal may not be bound by its [own] prior decisions." (citations omitted)).

how to handle issues of sexual assault.[55] The problem for these courts in that respect was that "in international criminal law, no sexual abuse offenses exist" apart from the more specific crime of rape. Rather than merely draw attention to this gap and urge states to amend relevant conventions in order to permit prosecution for sexual assault that *did not* meet the definition of actual rape—thus "let[ting] it go unpunished" in the cases specifically before the tribunals—the ICTY and ICTR judges improvised, "letting go of dogmatically 'clean' solutions in favour of 'feasible' justice."[56] In one case, Adams recounts, the chamber actually ended up adopting a legal definition that derived from no antecedent source of law at all: instead, the tribunal "had basically invented it itself."[57]

It may be difficult to fault the judges too much for such improvision under the circumstances, of course, and Adams indeed seems to approve. While criticizing the specific definitions adopted, for instance, she nonetheless applauds the ICTY, in particular, for developing "an important law-finding method, which allows the under-developed international criminal law to prove certain crimes" by letting judges "fill gaps in the *actus reus* of rape" by devising rules at least inspired by definitions used in various countries' domestic law.[58] All the same, it is also difficult not to be struck by the degree to which a remarkable amount of international legal thinking appears to be little more than bootstrapping of a sort that its proponents defend as creativity in service of the noblest of ends but that critics would also not be too far wrong to characterize as "making up the rules you want."

Returning to the topic of nuclear weaponry, therefore, it might seem entirely natural that dissatisfaction with the ICJ's "incomplete" ruling against nuclear weapons in 1996 would lead to sustained calls to revisit the question. After all, in *dicta* in that case, even the ICJ *itself* had already engaged in at least a small excursion in support of disarmament objectives, by reading words into Article VI of the NPT beyond what its text actually said.[59] As described earlier, the meaning of Article VI had been neither

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[55] Alexandra Adams, *The Legacy of the International Criminal Tribunals for the Former Yugoslavia and Rwanda and Their Contribution to the Crime of Rape*, 29 EUR. J. INT'L L. 749 (2018).
[56] *Id.* at 767.
[57] *Id.* at 761.
[58] *Id.* at 763.
[59] The ICJ declared that Article VI created a "twofold obligation to pursue *and to conclude* negotiations" on disarmament. Legality of the Threat or Use of Nuclear Weapons, Advisory

briefed nor argued, and the ICJ had not been asked to examine the question; as a result, the Court was actually acting *ultra vires*—beyond its statutory authority—to address this at all.[60] In effect, therefore, the Court was improperly freelancing in deliberately misreading Article VI's "obligation of conduct" as an "obligation of result."[61] The ICJ's judges, however, appear not much to have minded a bit of free-form inventiveness in a good cause: that holding was unanimously agreed.

So—one imagines the argument running today—why *not* today just opt to re-examine the 1996 question, improvise a bit further, and simply declare any threat or use of nuclear weaponry unlawful? Why scruple about cutting doctrinal corners when one can use the "law" as a solvent with which to wipe clean the stains of humanity's *mésalliance* with nuclear weapons?

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Opinion, 1996 I.C.J. 226, 264, ¶ 100 (July 8) (emphasis added). The actual treaty, however, rather carefully says merely that the Parties are obliged "to pursue [such] negotiations in good faith." Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 33, art. VI. This is, to be charitable, an odd excursion, since classically, obligations to negotiate are obligations to exert best efforts—and not, for instance, obligations to reach an agreement irrespective of its substantive merits, the good faith of one's counterparty, or even whether there is any party who has proven willing to negotiate at all.

[60] *See* Ford, *supra* note 31.

[61] *Cf.* TALLINN MANUAL, *supra* note 19, at 289 ("Obligations of conduct generally require States to undertake their 'best efforts' to comply by a means of their choice. Such obligations do not impose a duty on States to succeed in their efforts . . . ."). Indeed, it would surely be perverse to find State *A* in violation of Article VI because State *B* refused its good faith efforts to negotiate. It is also worth remembering that Article VI applies not just to nuclear weapons states but to *all* states and that it requires them to pursue negotiations not just on nuclear disarmament but also "on a treaty on general and complete disarmament under strict and effective international control." Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 33, art. VI. If the ICJ were correct that Article VI contains an obligation of result rather than simply one of conduct, *every* State party to the NPT must have been in violation ever since that treaty entered into force in 1970. (There has not been an actual effort to negotiate general disarmament since the Preparatory Commission for the World Disarmament Conference pursued under League of Nations auspices in the 1920s, much less agreement upon any such treaty. *See generally, e.g.*, DICK RICHARDSON, THE EVOLUTION OF BRITISH DISARMAMENT POLICY IN THE 1920S, at 52–95 (1989) (recounting debates at the Preparatory Commission).) It is easy to see, therefore, why although the disarmament community frequently *invokes* the ICJ's Article VI excursion, no one has yet offered an intelligible defense of its logic.

## IV. Reframing the Issue

To that question—and even if one does not find it in some sense offensive for lawyers to invent the legal rules they want when these cannot be found in accepted legal sources, conjuring them out of nothing on the fly precisely *because* they would not otherwise exist—this article would suggest at least two answers. The first relates to the integrity of the international legal system and the other to the *actual* prospects for nuclear disarmament.

### A. Law and its Legitimacy

First, reliance upon such bald invention risks damaging the legitimacy of an international legal system that already sometimes struggles to defend itself against charges that it is animated not by real respect for the rule of law but rather by a teleological political agenda that disregards its own doctrines whenever they get in the way of progress.

Nor is this just about potential risks to the legitimacy of international law at the margin, for on *this* issue—nuclear weaponry—such a judicial excursion would amount to meddling in strategic policy questions felt by some of the most powerful and consequential states of the international system, and their many allies, to have implications of existential importance. Indeed, precisely to the extent that the ICJ was *correct* in 1996 that the only really conceivable use for nuclear weaponry would be in "extreme circumstance[s] of self-defence, in which the very survival of a State would be at stake," this is an arena in which international law would *most* delegitimize itself with a further teleological excursion against nuclear deterrence.

By purporting to tell those states that nonetheless rely upon such weapons that they must refuse to protect themselves from existential threats as they feel they must, such a doctrine would tend to pit "the law" against efforts to ensure national survival through deterring aggression. Can asking the latter to give ground to the former really foster the advance of international law?

From the perspective of those of a teleological bent who might hope that the Court would take the additional step of trying to "close" the remaining legal "loophole" and declare nuclear weapons entirely impermissible, the

ICJ's 1996 legal standard is thus, in effect, almost self-confounding. To the degree that states that still rely directly or indirectly upon nuclear weapons a quarter century after the 1996 opinion in fact agree with the Court's assessment of the law, the very fact of their continued reliance necessarily signals that they feel these questions to have existential security implications. In this context, a "legal" pronouncement purporting to declare nuclear weapons illegal risks delegitimizing itself—and the broader corpus of international law—more than it stigmatizes those weapons themselves. The nuclear weapons problem, one might say, is insoluble by mere legal decree in direct proportion to the extent to which the ICJ was right in 1996 about the exigencies of those "extreme circumstances."

This problem, moreover, has only gotten worse in the years since the ICJ case. The timing of that opinion, in fact, may not have been entirely coincidental. After all, that case was argued, and the decision rendered, in that happy post-Cold War period when so many of the world's leaders seem to have imagined that great power strategic rivalry had become forever a thing of the past. The mid-1990s were a period in which the nuclear arsenals of the two former Cold War adversaries were being dramatically reduced as Washington and Moscow shed huge numbers of weapons that had become surplusage as a result of the relaxation of Cold War tensions and then the collapse of the USSR. At least in the U.S. case, in fact, these reductions continued through the first decade of the 2000s, even being accelerated to bring the U.S. nuclear arsenal down to less than one-quarter of its size at the end of the Cold War, and indeed to its lowest point since the Eisenhower administration.[62]

As any who lived through them will remember, the post-Cold War years were a heady time for proponents of an optimistic, globalizing, progressive internationalism—a sort of "emancipatory cosmopolitanism"[63] that saw itself as both saving the world and building a new one. It was an especially buoyant time for disarmament activists, who had waited out the U.S.-Soviet arms race and the long decades of nuclear confrontation in sometimes all

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[62] *See, e.g.*, Christopher A. Ford, *A New Paradigm: Shattering Obsolete Thinking on Arms Control and Nonproliferation*, ARMS CONTROL ASS'N, https://www.armscontrol.org/act/2008-11/features/new-paradigm-shattering-obsolete-thinking-arms-control-nonproliferation (Nov. 5, 2008).

[63] The phrase is that of Samuel Moyn and Andrew Sartori. *See, e.g.*, Samuel Moyn & Andrew Sartori, *Approaches to Global Intellectual History*, *in* GLOBAL INTELLECTUAL HISTORY 3, 24 (Samuel Moyn & Andrew Sartori eds., 2013).

but indescribable fear and anxiety, but who now saw the superpowers' Cold War arsenals plummeting, and a raft of new arms control and arms-prohibitory agreements being negotiated.

To be sure, even at that point, no nuclear weapons possessor that actually relied upon nuclear weapons for its security was willing to give them up. (Four ultimately did, but these exceptions tend to demonstrate the challenge. As noted above, South Africa relinquished a small extant nuclear arsenal not out of strategic benevolence but because its collapsing apartheid regime did not wish the African National Congress to inherit atomic weaponry, while three former Soviet republics relinquished weapons stranded on their soil by the Soviet collapse that they could neither maintain nor really use operationally.) Nevertheless, in the mid-1990s, optimism about the strategic availability of nuclear disarmament was very much in the air, and strategic competition felt like it could be ever thereafter viewed in the rear-view mirror. Under the circumstances, one might be forgiven for a willingness to have a conversation about the viability of full prohibition—or for leavening one's judicial reasoning with a pinch of teleology.

A comparison to the present day, however, is therefore instructive. Unfortunately, contemporary circumstances—in this era of revived great power competition and emergent strategic instabilities and arms race pressures—seem almost tailor-made to support a case that the sort of "extreme circumstances" referred to by the ICJ in 1996 are all too imaginable. This seems true, furthermore, not merely for the direct competitors in today's great power struggles, but also for smaller states who rely upon nuclear deterrence indirectly, through the military alliances they need for their security against the threats they face from the increasingly well-armed, assertive, and geopolitically revisionist authoritarian powers of Xi Jinping's China and Vladimir Putin's Russia.

The expansion of Russian and Chinese nuclear arsenals highlights this point simply. Moscow, for instance, is expanding its arsenal of non-strategic weapons—including weapons it retained despite dismantlement promises made to the United States in the 1990s, as well as the missiles it originally built in violation of the Intermediate-Range Nuclear Forces Treaty[64]—and

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[64] *See generally, e.g.*, U.S. DEP'T OF STATE, ADHERENCE TO AND COMPLIANCE WITH ARMS CONTROL, NONPROLIFERATION, AND DISARMAMENT AGREEMENTS AND COMMITMENTS 12–21, 23–26 (2020).

it is now also openly bragging about the new types of strategic delivery system it is developing.[65] (The Kremlin has also done much to undermine confidence in the ability of arms control negotiations to address strategic challenges, by violating most of the arms control agreements of the of the post-Cold War era.[66]) For its part, Beijing is engaged in a dramatic full-scope expansion both in the diversity of the strategic and non-strategic systems and in China's overall stockpile numbers.[67] It also recently announced a major new program for producing massive new quantities of plutonium that could easily be diverted to expand its rapid nuclear build up even further,[68] even while continuing contemptuously to reject U.S. calls to engage in arms control discussions.[69]

Perhaps even more dramatically, at least from the perspective of smaller countries located much closer to the scene than American leaders find themselves, the growing military might and geopolitical self-assertiveness of the Russian and Chinese regimes have revived threats and fears of direct attack and territorial invasion in ways not seen for decades. As of today, China has illegally occupied and militarized large areas of the South China Sea[70] claimed by its neighbors, issued ever more bellicose threats against Taiwan,[71] and seized hundreds of square miles of Bhutanese territory

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[65] *See, e.g.*, Laurel Wamsley, *Putin Says Russia Has New Nuclear Weapons That Can't Be Intercepted*, NPR, https://www.npr.org/sections/thetwo-way/2018/03/01/589830396/putin-says-russia-has-nuclear-powered-missiles-that-cant-be-intercepted (Mar. 1, 2018, 9:55 AM).

[66] CHRISTOPHER A. FORD, RUSSIAN ARMS CONTROL COMPLIANCE: A REPORT CARD, 1984–2020, at 3–10 (2020).

[67] *See, e.g.*, OFF. OF THE SEC'Y OF DEF., U.S. DEP'T OF DEF., MILITARY AND SECURITY DEVELOPMENTS INVOLVING THE PEOPLE'S REPUBLIC OF CHINA 92 (2021) ("Beijing has accelerated its nuclear expansion, which may enable the PRC to have up to 700 deliverable nuclear weapons by 2027 and likely intends to have at least 1,000 warheads by 2030."); *see also, e.g.*, Christopher Ford, China's Nuclear Weapons Buildup, Geopolitical Ambition, and Strategic Threat (Oct. 17, 2021), https://www.newparadigmsforum.com/china-s-nuclear-weapons-buildup-geopolitical-ambition-and-strategic-threat.

[68] *See, e.g.*, NONPROLIFERATION POL'Y EDUC. CTR., CHINA'S CIVIL NUCLEAR SECTOR: PLOWSHARES TO SWORDS? (Henry D. Sokolski ed., 2021).

[69] *See, e.g.*, Jon Xie, *China Rejects US Nuclear Talks Invitation as Beijing Adds to Its Arsenal*, VOICE OF AM. (July 13, 2020, 3:38 PM), https://www.voanews.com/east-asia-pacific/voa-news-china/china-rejects-us-nuclear-talks-invitation-beijing-adds-its-arsenal.

[70] *See, e.g.*, *In re* South China Sea Arbitration (Phil. v. China), Case No. 2013-19 (Perm. Ct. Arb. 2016), https://pcacases.com/web/sendAttach/2086.

[71] *See, e.g.*, Paul D. Shinkman, *China Issues New Threats to Taiwan: 'The Island's Military Won't Stand a Chance'*, U.S. NEWS (Apr. 9, 2021, 11:14 AM), https://www.usnews.com/news/world-report/articles/2021-04-09/china-issues-new-threats-to-taiwan-the-islands-

through the secret establishment of a network of villages and military outposts.[72]

Most of all, Vladimir Putin's operations to invade and seize territory from his neighbors in 2008 and 2014—in the latter case breaking the very promises Russia made to safeguard Ukraine's territorial integrity in the Budapest Memorandum of 1994 *as part of the agreement under which Ukraine agreed to relinquish its Soviet-era nuclear weapons*[73]—highlight just how existential the threats arising out of modern geopolitics are again becoming, as well as their entanglement with nuclear deterrence. Such deterrence, alas, is nowadays steadily more, rather than less, salient to the security interests of many nations.

However instrumentally malleable and subjective international lawyers might wish the law to be in support of the integrationist teleology referred to by Martti Koskenniemi, this arena of existential concern by an array of states up to and including the most powerful countries on the planet would seem to be notably unwise terrain for a new judicial excursion. In contrast to the seemingly benign strategic environment of the 1990s when the ICJ last addressed the question, the threats and challenges of today's world make it all the less likely that any such bootstrapping would in fact have the desired effect of *actually* solving any nuclear problems—and all the *more likely* that such overreaching in support of a policy agenda would damage the legitimacy of the Court itself, and perhaps the entire international legal project. Especially with there being no actual doctrinal basis for thinking the core 1996 holding incorrect, discretion should surely be the better part of valor here.

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military-wont-stand-a-chance; *Taiwan: 'Record Number' of China Jets Enter Air Zone*, BBC (Apr. 13, 2021), https://www.bbc.com/news/world-asia-56728072.

[72] *See, e.g.*, Robert Barnett, *China Is Building Entire Villages in Another Country's Territory*, FOREIGN POL'Y (May 7, 2021, 4:02 PM), https://foreignpolicy.com/2021/05/07/china-bhutan-border-villages-security-forces.

[73] Memorandum on Security Assurances in Connection with Ukraine's Accession to the Treaty on the Non-Proliferation of Nuclear Weapons para. 2 (Dec. 5, 1994) (reaffirming that signatories, including the Russian Federation, promise "to refrain from the threat or use of force against the territorial integrity or political independence of Ukraine"), http://www.pircenter.org/media/content/files/12/13943175580.pdf.

B. A Better Way

The second reason to resist the urge for juridical improvision in this area, however good the cause might be felt to be, has already been suggested: namely, that approaching disarmament through such a "legal" prism is unlikely to produce the desired results. More importantly, there may be a much better—and less juridically destructive—way to help address the disarmament concerns that have animated the abolitionist project. The principal message of this article is that it would be far more productive to shift our focus away from "legality" entirely, at least for the moment, and to direct attention to where the real nuclear problems lie.

Ultimately, whatever legal arguments one might or might not make about nuclear deterrence, the problem of nuclear weapons cannot, and will not, be solved by declaratory legal means. Instead, what is needed is attention to the messier and more difficult work of effecting substantive change in the security environment in order to lessen (and hopefully ultimately eliminate) the security incentives that real-world leaders feel to retain nuclear weapons to deter grave threats from nuclear or other forms of aggression.

If anything, fetishizing the "legal" here—as if a more congenial ICJ holding or a brace of additional signatures on a piece of paper in an international meeting hall could magically resolve the security challenges created by the interaction of real-world military postures, doctrines, foreign policies, and strategic ambitions—will at the very least distract from the hard work needed to truly meet these challenges. Worse still, such a focus might actually make resolution of these problems more difficult, adding a moralistic entrenchment around mutually antagonistic legalisms to the many global divides and tensions that will need to be overcome in order for real and sustained progress to be had.

In truth, the principal obstacles to a secure and stable world free of nuclear weapons have little or nothing to do with any lack of "law" on the subject, nor would even a superabundance of relevant legal declarations solve those problems. Instead, something further is needed—an approach

that can speak intelligibly about issues of disarmament in the language of security.[74]

To their credit, some in the disarmament community have in the last few years at least started to recognize the need to address disarmament thinking more clearly and systematically to the security challenges that actually stand in the way of disarmament progress—especially in this era of revived great power competition and military rivalry. Beginning in 2017, U.S. officials have led the development of a new initiative to help draw attention to the need to address the substantive security concerns that impede disarmament progress and to reframe global disarmament discourse in order to focus more upon trying to solve these problems.[75]

Inspired, among other things, by the emphasis placed in the preamble to the NPT upon the fact that it is "the easing of international tension and the strengthening of trust between States" that is needed "in order to facilitate" disarmament,[76] this effort matured into the "Creating an Environment for Nuclear Disarmament" initiative. By late 2020, it had come to involve delegations from forty-two countries, meeting in three working groups, each exploring a critical series of substantive questions[77] about how to help bring about substantive change in the security environment in order to explore ways to overcome security-related obstacles to disarmament progress.[78]

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[74] This has been an interest of the author for some years. *See, e.g.*, Christopher Ford, Learning to Speak Disarmament in the Language of Security (Sept. 29, 2009), https://www.newparadigmsforum.com/p117. Unfortunately, the particular disarmament approach discussed in those 2009 remarks did not prove viable. *See* CHRISTOPHER A. FORD, NUCLEAR WEAPONS RECONSTITUTION AND ITS DISCONTENTS: CHALLENGES OF "WEAPONLESS DETERRENCE" (2010).

[75] *See, e.g.*, Christopher Ford, Assistant Sec'y of State, From "Planning" to "Doing": CEND Gets to Work (Nov. 24, 2020), https://www.newparadigmsforum.com/p2884.

[76] Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 33, pmbl. (declaring that States party desire "to further the easing of international tension and the strengthening of trust between States in order to facilitate the cessation of the manufacture of nuclear weapons, the liquidation of all their existing stockpiles, and the elimination from national arsenals of nuclear weapons and the means of their delivery pursuant to a Treaty on general and complete disarmament under strict and effective international control").

[77] *See, e.g.*, Christopher Ford, Assistant Sec'y of State, Reframing Disarmament Discourse, (Sept. 3, 2020), https://www.newparadigmsforum.com/p2755.

[78] *See generally, e.g.*, CHRISTOPHER A. FORD, FOUR YEARS OF INNOVATION AND CONTINUITY IN U.S. POLICY: ARMS CONTROL AND INTERNATIONAL SECURITY SINCE JANUARY 2017, at 19.

It should imply no disrespect for the world's jurists, nor for the broader international legal system, to suggest that the solutions for such problems of strategic stability, geopolitical rivalry, and military competition are beyond their professional ken and beyond their effective reach. If there are such solutions, they will require at least as much—and perhaps more—from statesmen, legislators, scholars, military professionals, educators, and ordinary citizens who comprise the extant democratic polities of the world than from lawyers and judges. Effective work on such solutions, moreover, will require engagement through a discourse that is not principally, and perhaps not even secondarily, "legal" in nature.

From a legal perspective, doctrinal questions about the legality of the threat or use of nuclear weapons have already been asked, and they have already been answered. They will be answered no better, moreover—and will most likely be answered far worse, and more dangerously both from the perspective of substantive security and from that of "the law" itself—if the policy community indulges in the fundamental category mistake of seeing existential security questions as ones amenable to resolution merely by legal-technocratic pronouncement, however well-intentioned.

Instead, it is now time for a more productive engagement on how to solve real-world problems. Now that, with Creating an Environment for Nuclear Disarmament and other such efforts, the disarmament community has finally begun to focus upon how to resolve or at least lessen the global security challenges that impede disarmament progress, we should not imperil such progress by returning to the sort of distracting and counterproductive magical thinking pursuant to which the problems of the world can be solved by a judge's pen.