New Dilemmas in Ethics, Technology and War
November 4-6, 2015
American Academy of Arts & Sciences
The Thayer Hotel, West Point

Roundtable: Human Rights and Warfare Today
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Legal Aspects of Reliance on Nuclear Weapons

In *Just and Unjust Wars*, Michael Walzer argued that reliance on the threat of use of nuclear weapons – nuclear deterrence - is immoral. Therefore, he concluded, "we are under an obligation to seize upon opportunities of escape, even to take risks for the sake of such opportunities."

Today I want to talk about legal aspects of reliance on nuclear weapons for national and international security. I won't dwell on how use of nuclear weapons is contrary to the law of armed conflict; in some ways that's not really the center of debate because nuclear deterrence is justified as a way of ensuring the weapons are not used and more broadly that major war does not occur. Rather I will focus on issues of possession and threat in light of applicable international law.

1) I will begin with a treaty whose negotiation accompanied the start of the nuclear age, the supreme treaty in the world, the **UN Charter**. Compare the security supposedly provided by reliance on nuclear weapons with the security system envisaged by the United Nations Charter. Consider these key Charter provisions:

> Article 2(3): All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.
>
> Article 2(4): All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

The only exceptions to the prohibition on the threat or use of force are when the UN Security Council directs or authorizes force to maintain international peace and security, under Chapter VII, and the exercise of self-defense against an armed attack under Article 51.

Deployment of nuclear forces as an international security mechanism for prevention of major war is far removed from the world envisaged by the UN Charter in which threat or use of force is the exception, not the rule. International security allegedly provided by the permanent, ongoing threat of nuclear force, is the inverse of that world; it turns the UN Charter on its head.

In its 1996 nuclear weapons advisory opinion, the International Court of Justice (ICJ) analyzed the UN Charter in relation to the legal status of "threat." Its discussion implied that the Court was concerned more with specific threats, and the Court expressly said it would not consider the lawfulness of the policy of "nuclear deterrence." Thus the Court failed to consider the incompatibility of nuclear deterrence with the overall scheme and purposes of the Charter. I am glad to say that the question has been taken up by no less than Pope Francis. In his remarks at the UN on September 25, 2015, he said:

> The Preamble and the first Article of the Charter of the United Nations set forth the foundations of the international juridical framework: peace, the pacific solution of disputes and the development of friendly relations between the nations. Strongly opposed to such statements, and in practice denying them, is the constant tendency to the proliferation of arms, especially weapons of mass distraction, such as nuclear weapons. *An ethics and a law based on the threat of mutual destruction – and possibly the destruction of all mankind – are self-contradictory and an affront to the entire framework of the United Nations, which would end up as "nations united by fear and distrust".* There is urgent need to work for a world free of nuclear weapons, in full application of the non-proliferation Treaty, in letter and spirit, with the goal of a complete prohibition of these weapons. (Emphasis supplied.)

Pope Francis did not specifically raise the point I have emphasized, that the permanent threat of force as an international security mechanism is contrary to the Charter prohibition of threatening force except in narrow circumstances. But he has opened the door to the discussion.

2) Another legal instrument which accompanied the beginning of the nuclear age is the **Nuremberg Charter, the Charter of the International Military Tribunal**. It prohibits as a crime against peace **planning, preparing**, initiating or waging a war of aggression. It also contains language arguably making criminal a common plan to commit war crimes and crimes against humanity as well as crimes against peace. As applied by the International Military Tribunal, also known as the Nuremberg

Tribunal, however, the planning and preparation element was limited to the crime of aggression, and only where aggression had in fact occurred.

The crime of aggression has now been defined in an amendment to the Rome Statute of the International Criminal Court. It will be applied once 30 states have ratified the amendment and the amendment has been "activated", no earlier than January 2017. Under the definition, the crime of aggression is:

> *the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.*

Act of aggression means, in general:

> *the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.*

The Elements of Crimes, also adopted by the Assembly of States Parties, provides that the act of aggression must have occurred for there to be a crime. Thus simply planning and preparing, without initiating and executing, an act of aggression, is not a crime.

For two reasons, then, the planning and preparing element does not easily apply to 'nuclear deterrence'. It concerns aggression, whereas states maintain that the policy of 'nuclear deterrence' is for purposes of individual or collective self-defense. And planning and preparing is not a crime absent the commission of the act of aggression.

Nonetheless, this element must not be forgotten; it describes rather well what 'nuclear deterrence' is about: planning and preparing for total war. And the niceties about just when planning and preparing comes into play might very well be ignored by a court in the aftermath of a nuclear war. This is a direct legal counterpart to Professor Walzer's recognition that nuclear deterrence is immoral.

3) The **1968 Nuclear Nonproliferation Treaty** of course is the legal instrument most often considered with respect to the possession of nuclear weapons. And much has been said about its Article VI, which requires the pursuit of good-faith negotiations on effective measures relating to nuclear disarmament, and on a treaty

on general and complete disarmament. As a member of the legal team for the Marshall Islands in its nuclear disarmament cases in the International Court of Justice, I have thinking a lot about Article VI. Let me just make a few points.

a) Article VI itself is notoriously vague. Nonetheless, an examination of the entirety of the NPT, including the preamble, its negotiating history and its review process makes it crystal clear that the NPT was never intended to be a license for the indefinite possession of nuclear arsenals by the NPT-acknowledged nuclear-weapon states.

Here's one key piece of evidence. The NPT was opened for signature on 1 July 1968. Soon after, on 15 August 1968, the Geneva-based Eighteen Nation Disarmament Committee, the precursor of today's Conference on Disarmament, under United States and Soviet leadership adopted an agenda whose first item was listed under a heading taken from Article VI:

> 1. Further effective measures relating to the cessation of nuclear arms race at an early date and to nuclear disarmament. Under this heading members may wish to discuss measures dealing with 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, nuclear-free zones, etc. …

b) A global treaty prohibiting and eliminating nuclear weapons would be an effective measure of disarmament, and like the conventions on biological and conventional weapons, it would be a contribution to fulfilment of the objective of general and complete disarmament. State practice since the NPT entered into force, notably through adoption of the conventions on biological and chemical weapons, has established that the elimination of nuclear weapons need not be accomplished through a GCD treaty encompassing all WMD as well as limits on conventional forces.

c) The linkage of nuclear disarmament and GCD nonetheless does imply that states are legally obligated to negotiate controls on non-nuclear strategic systems like missiles defences and global strike devices whose control is necessary to successful elimination of nuclear weapons.

d) Article VI inarguably requires states to "pursue" negotiations. This means to seek to bring them about, as well as to conduct them. There are no negotiations of any kind underway now, and the last multilateral negotiations were of the CTBT.

A key question with respect to the US, UK, France, and Russia, is whether seeking further US-Russian reductions and a fissile materials treaty suffices at this point in the history of the NPT to meet the obligation of pursuit. Most of the world takes the position that it is time to commence multilateral negotiations on elimination of nuclear weapons. But opportunities to do so are systematically refused by the Western powers plus Russia. A key question for the International Court of Justice in the case brought by the Marshall Islands against the UK is whether that systematic refusal is a breach of Article VI.

e) There is a strong case that the obligation to pursue negotiations on nuclear disarmament is not limited to NPT states; it applies to states outside the NPT, India, Pakistan, Israel, North Korea. The case is based on widespread participation in the NPT; the history of UN efforts on nuclear disarmament, including the first UNGA resolution and the 1978 Special Session on Disarmament; and, implicitly, the underlying incompatibility of use of nuclear weapons with international law. Though the ICJ did not say so expressly, the Court's framing of the obligation in its 1996 opinion, "There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects," supports this view, as does its reasoning. This proposition is being tested in the Marshall Islands cases against India and Pakistan now before the ICJ.