

## THREAT OR USE OF NUCLEAR WEAPON: ANALYSING THE DISSENTING OPINION OF JUDGE CHRISTOPHER WEERAMANTRY

Koomar Bihangam Choudhury\*

*“Now I have become Death, the destroyer of worlds”<sup>1</sup>*

### ABSTRACT

Nuclear weapons are no doubt weapons of mass destruction. A single nuclear bomb can obliterate an entire city and turn rubble into dust within seconds. Thus, legality surrounding the use of such weapons has always been a pressing concern globally. Such a case arose when the International Court of Justice was asked to give its advisory opinion on whether the use or mere threat to use nuclear weapons can have any legal backing. In some situations, e.g. self-defence where the survival of a country could be at stake, could it resort to using its nuclear Armitage as the last option? These were some of the leading issues on which ICJ was asked to render its advisory opinion. There were majority opinions and then there were some dissenting opinions. In this article, we shall discuss and analyse one of these dissenting opinions which were given by Justice Weeramantry of Sri Lanka. We shall also try to reason these opinions and see whether these should have been the majority opinion for the larger good of this planet.

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**Keywords:** Nuclear weapon, ICJ, Christopher Weeramantry, Advisory Opinion, Dissenting Opinion.

### BACKGROUND

“Legality of the Threat or Use of Nuclear Weapons” is a landmark decision of the International Court of Justice (hereinafter referred to as “ICJ”) which gave an advisory opinion on the aforementioned issue at the request of the United Nations General Assembly (hereinafter referred to as “UNGC”). It discussed the legality of such threat or actual use as well as the role of international judicial bodies in the area of conditions when the state may resort to war or armed conflict (*jus ad bellum*) and the effect thereof in light of international humanitarian laws.<sup>2</sup> The case was initially requested by the World Health Organisation (WHO) but the ICJ

\*LLM, O.P. JINDAL GLOBAL UNIVERSITY, HARYANA.

<sup>1</sup> J. Robert Oppenheimer (inventor of nuclear weapons).

<sup>2</sup> Legality of the threat or use of nuclear weapons, International Court of Justice <<https://www.icj-cij.org/case/95>> accessed 27th January 2024.

declined the same declaring that such a request is outside the purview of the WHO<sup>3</sup> upon which the UNGC requested again to have an advisory opinion on “Is the threat or use of nuclear weapons in any circumstances permitted under international law?”<sup>4</sup> which was accepted by the ICJ and hearing began in January 1995 and finally, the case was decided on the 8<sup>th</sup> of July 1996.<sup>5</sup>

## JUDGEMENT

Forty-two countries, which included *India* participated in the written statement phase of the pleadings while twenty-two states participated in the oral hearing. WHO and the Secretariat of the UN also participated in the proceedings.<sup>6</sup> The case was heard by ICJ *based on non-liquet*<sup>7</sup> and all fifteen sitting judges voted on seven headings. Judge Christopher Weeramantry of Sri Lanka voted in favour of five headings while he dissented on the third as well as the sixth heading.

He wrote a detailed dissenting opinion on these two headings and opined that such a threat to use a nuclear weapon or actual use of nuclear weapons is and will always be illegal “*in any circumstances whatsoever*” as it is not only a gross violation of international law but it represents “*the very negation of the humanitarian concerns which underlie the structure of humanitarian law*”.<sup>8</sup>

### *i. The 3<sup>rd</sup> Issue:*

On the third issue, the Court decided, with eleven votes in favour to three against, that

<sup>3</sup> Denial of the initial request for an opinion submitted by the WHO [1996] ICJ 2, ICJ Reports 1996, 66.

<sup>4</sup> ‘UNdemocracy - General Assembly Session 49 Meeting 90’, 15 December 1994  
<[https://web.archive.org/web/20070926234114/http://www.undemocracy.com/generalassembly\\_49/meeting\\_90/highlight\\_A-49-699#pg035-bk05](https://web.archive.org/web/20070926234114/http://www.undemocracy.com/generalassembly_49/meeting_90/highlight_A-49-699#pg035-bk05)> accessed 27th January 2024.

<sup>5</sup> International Court of Justice (General List Number 95) [105]  
<[https://web.archive.org/web/20041013111214/http://www.icj-cij.org/icjwww/icasess/iunan/iunan\\_judgment\\_advisory%20opinion\\_19960708/iunan\\_ijudgment\\_19960708\\_Advisory%20Opinion.htm](https://web.archive.org/web/20041013111214/http://www.icj-cij.org/icjwww/icasess/iunan/iunan_judgment_advisory%20opinion_19960708/iunan_ijudgment_19960708_Advisory%20Opinion.htm)> accessed 27th January 2024.

<sup>6</sup> Rhineland, John B., et al. “Testing the Effectiveness of the International Court of Justice: The Nuclear Weapons Case.” *Proceedings of the Annual Meeting (American Society of International Law)*, vol. 91, 1997, pp. 1–19. JSTOR, <<http://www.jstor.org/stable/25659098>> Accessed 26<sup>th</sup> Sept. 2023.

<sup>7</sup> A situation where there is no law applicable.

<sup>8</sup> Christopher Weeramantry, Dissenting Opinion: Legality of the Threat or Use of Nuclear Weapons case I.C.J Reports (1996), 433 [1].

- “*There is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such*”.<sup>9</sup>

#### Dissenting Opinion of Judge Weeramantry

Judge Weeramantry dissented on this issue and held that there are already existing international laws e.g., Environmental Laws and Treaties, Geneva Gas Protocol and Hague Regulations etc. which put comprehensible and universal limitations on such threat or use of nuclear weapons by any state.<sup>10</sup>

#### ii. *The 6<sup>th</sup> Issue*

On the sixth issue, the Court held in, by seven votes “in favour” and equal votes “in against” where, in accordance with the standard protocol in such case, with the casting vote “in favour” by the President, that

- “*...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; ...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...*”.<sup>11</sup>

#### Dissenting Opinion of Judge Weeramantry

Judge Weeramantry dissented on both these sentences. In the first sentence, he opined that words like “general” or “generally” should not be used while giving an advisory opinion as it opens an option, however far-reaching, that in some exceptional cases threat or use of nuclear weapons is not contrary to international laws while this should not be the case at all. He held that had the word not been used it would otherwise be a good advisory opinion however such usage rendered the whole opinion purposeless as it opens a window of permissibility in which

<sup>9</sup> International Court of Justice (General List Number 95), [105] §2B <[https://web.archive.org/web/20041013111214/http://www.icj-cij.org/icjwww/icasas/iunan/iunan\\_judgment\\_advisory%20opinion\\_19960708/iunan\\_ijudgment\\_19960708\\_Advisory%20Opinion.htm](https://web.archive.org/web/20041013111214/http://www.icj-cij.org/icjwww/icasas/iunan/iunan_judgment_advisory%20opinion_19960708/iunan_ijudgment_19960708_Advisory%20Opinion.htm)> accessed 27th January 2024.

<sup>10</sup> Christopher Weeramantry, Dissenting Opinion: Legality of the Threat or Use of Nuclear Weapons case I.C.J Reports (1996), 435 [1].

<sup>11</sup> International Court of Justice (General List Number 95), [105] §2E <[https://web.archive.org/web/20041013111214/http://www.icj-cij.org/icjwww/icasas/iunan/iunan\\_judgment\\_advisory%20opinion\\_19960708/iunan\\_ijudgment\\_19960708\\_Advisory%20Opinion.htm](https://web.archive.org/web/20041013111214/http://www.icj-cij.org/icjwww/icasas/iunan/iunan_judgment_advisory%20opinion_19960708/iunan_ijudgment_19960708_Advisory%20Opinion.htm)> accessed 27th January 2024.

a nation can resort to such threat or use which cannot be permitted and that no nation should be put in a condition where it can be the sole deciding factor on such an important issue.<sup>12</sup>

He also dissented from the second part of this judgement as there should be no reason whatsoever as to why the Court “cannot definitively conclude” why such threat or use of the nuclear weapon would be unlawful as once these weapons are resorted to, the *jus in bello* comes into factor, in which there are several precedents of international law which render such threat or use completely illegal and completely forbids the same. He was of the view that this was the chance for the Court to eliminate all such uncertainties in this matter which it failed to take and created a niche in the legality of the threat or use of nuclear weapons which shouldn't be in any circumstance and definite and unambiguous judgement should have been pronounced.<sup>13</sup>

### ANALYSIS OF THE DISSENTING JUDGEMENT

Judge Weeramantry wrote a detailed dissenting opinion on the aforementioned issues to which I largely agree. He held that under no circumstances should any state be put into a situation where it is allowed an option to exercise its sole discretion on whether to use nuclear weapons or not. It is a very important observation as allowing nations to do so, will open a floodgate of such cases where this lack of definitive conclusion of court on the legality of such threat or use of nuclear weapons shall be used in every case where a nation decides to enforce such threat or use against its enemy state during war. No such room must be provided to any nation in any situation as even if we leave aside the legal issues, the mere devastation and post-detonation calamity that such weapons of mass destruction bring with them should be reason enough for the court to decide concludingly and definitively on the issue of such importance.

The opinion put forward by Judge Weeramantry was very far-sighted as observed during the recent ongoing Ruso-Ukraine War where the possibility of the use of nuclear weapons was threatened by Vladimir Putin which put the whole world on its feet and created massive global unrest.<sup>14</sup> These are not good examples and certainly a situation which should not happen ever again. Even if arguments of self-defence are put against the opinion of Judge Weeramantry,

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<sup>12</sup> Christopher Weeramantry, Dissenting Opinion: Legality of the Threat or Use of Nuclear Weapons case I.C.J Reports (1996), 435 [2]-[5]

<sup>13</sup> Christopher Weeramantry, Dissenting Opinion: Legality of the Threat or Use of Nuclear Weapons case I.C.J Reports (1996), 435 [6].

<sup>14</sup> ‘Nuclear Threats during the Russian Invasion of Ukraine’ (Wikipedia, 18 September 2023) <[https://en.wikipedia.org/wiki/Nuclear\\_threats\\_during\\_the\\_Russian\\_invasion\\_of\\_Ukraine](https://en.wikipedia.org/wiki/Nuclear_threats_during_the_Russian_invasion_of_Ukraine)>; accessed 28 September 2023.

they shall not hold much value as if no nation is permitted to use such weapons, then no nations must be permitted to use them as self-defence as well.

Judge Weeramantry further held that in court was wrong in its opinion that there are no existing international laws that prohibit the threat or use of nuclear weapons. He was correct in his opinion as many such international treaties including but not limited to the “Geneva Gas Protocol of 1925”<sup>15</sup> and “Article 23(a) of the Hague Regulations of 1907”<sup>16</sup> put universal limitations on such use of weapons. Thus, there was no question of the lack of such international laws. Also, even going by according to the majority decision of the Court that no such laws exist, it should have taken this chance to cure such uncertainties and must have held in favour of prohibiting the threat or use of nuclear weapons with no exceptions. The Court not only missed the chance to correct such unambiguity but also created further issues by using certain words in their judgement that permitted nations to resort to a threat to use nuclear weapons or use of nuclear weapons in certain cases. Thus, in an attempt to have a positive impact on world peace, it did completely the opposite as its judgement could be used by nations to seek such exemptions as they deem fit and no clarity in the judgment now makes it easier for them to seek refuge in case their action is criticized or called into question by the international diaspora.

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## CONCLUSION

This case was a landmark one and the outcome of the advisory opinion of ICJ was very critical in determining the role of nations in using nuclear weapons. The Court had a chance to create and set a legal precedent and remove all doubts about case of legality of threat or use of nuclear weapons. However, it merely concluded that there are no such express laws that limit such usage. Also, it held, in unclear and ambiguous terms that nations are not allowed to resort to such threat or usage in ordinary circumstances without explicitly clarifying what those “not general” or exceptional circumstances can be where such threat or use is permitted. This caused more harm than good and this lack of conclusion is something which Judge Weeramantry

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<sup>15</sup> 'Geneva Protocol' (The Nuclear Threat Initiative) <[<sup>16</sup> ICRC Database, Treaties, States Parties and Commentaries, Convention \(IV\) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907., Regulations: Art. 23 <<https://ihl-databases.icrc.org/en/ihl-treaties/hague-conv-iv-1907/regulations-art-23>> accessed 27<sup>th</sup> January 2024.](http://www.nti.org/education-center/treaties-and-regimes/protocol-prohibition-use-war-asphyxiating-poisonous-or-other-gasses-and-bacteriological-methods-warfare-geneva-protocol/#:~:text=The%20Geneva%20Protocol,%20implicitly,%20does,cover%20internal%20or%20civil%20conflicts.></a> accessed 27th January 2024.</p></div><div data-bbox=)

rightly cruised his dissenting opinion on this case is very well articulated and his reasons for such dissent is, in my opinion, should have been the majority judgement in this case.

