

REMARKS OF ANTHONY D'AMATO*

The Purposive Dimension of International Law

For a group of lawyers trained to see both sides of any issue, I'm surprised that so far no one has come out in favor of total annihilation. What's left? What about the term "international law?" Although Professor Berman has reminded us that processes as well as rules are an important part of international law,¹ and Professor Nanda has emphasized the flow of communication as a measure of international law,² I wonder if our audience nevertheless feels that the concept remains elusive. Domestic law is clearly "law" without the need to resort to processes or communication flows.

For me, the term "international law" defines what a nation is, what its entitlements are, and what it can expect other nations to regard as their own legal entitlements. Since a nation is an abstract term, what it consists of is what it is legally entitled to, i.e., its territory, its airspace, the protection of its diplomats, the human rights of its citizens travelling abroad, and so forth. These and a host of other international rules formulate and define the legal concept of "nation."

While I think that the term "law" is not misplaced in discussing the entitlements of nations, I also agree with Professor Kennedy that one can talk too much about international law and wind up reifying conservative concepts that justify the status quo.³ But if that is what happens, then I think international lawyers can try harder and do better. If we are truly apprehensive about the possibility of a global nuclear war, as I am, then we have to be very clear about the legal concepts we use, why we are using them, and what the political effects of their usage can be.

One of those effects has already been postulated by Profes-

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1. *Remarks of Harold J. Berman*, 9 BROOKLYN J. INT'L L. 259, 259 (1983).

2. Nanda, *Nuclear Weapons and the Right to Peace under International Law*, 9 BROOKLYN J. INT'L L. 283, 285 (1983) [hereinafter cited as Nanda].

3. *Remarks of David Kennedy*, 9 BROOKLYN J. INT'L L. 307, 309 (1983) [hereinafter cited as *Kennedy*].

sor Moore.⁴ If American jurists say blanketly that the use of nuclear weapons is illegal, maybe the effect of so saying is simply to reduce the credibility of our nuclear deterrence posture. In effect, we would be promoting unilateral disarmament, either because our political leaders might have second thoughts about doing something that we say is illegal, or more likely, because foreign nations might think that our political leaders might have such hesitations.

If we move away from blanket pronouncements of what the law is, and instead look more deeply into the various prohibitions of certain kinds of weapons of warfare, we will arrive at more specific as well as more useful principles of international law relating to nuclear weapons. A way of looking deeply into law is to focus on the relation of the law that *is* to the law that *ought to be*. Many of the previous speakers have talked about this relation as if it were a distinction, but in fact law is a purposive instrument of human interaction, as Professor Lon Fuller has taught us.

When the signatories to the Hague Conventions outlawed the use of dum dum bullets,⁵ for example, they had a purpose in mind as well as a specific prohibition. Their purpose was to outlaw a particular kind of weapon that seemed to have no use in warfare except to cause unnecessary suffering. If a new form of shell is developed, we cannot tell whether it "really is" or "really is not" a dum dum bullet by looking at its name, or its size, or its manufacturer. Rather, we have to see what its purpose is. The law that *is* intersects with the law that *ought to be* in our examination of the physical characteristics of the new shell coupled with a study of its intended use. Or to put it differently, we have to look at what the framers of the Hague Convention were trying to do as well as what they did. Law extends beyond the two dimensions of the paper upon which it is written; there is a third dimension of purpose that gives the law depth.

International law as a whole has this purposive dimension. Its rules are not simply arbitrary provisions found in treaties and custom, but rather are the product of numerous interactions, the interactions of the drafters of treaties or the interac-

4. *Remarks of John Norton Moore*, 9 BROOKLYN J. INT'L L. 263, 266 (1983) [hereinafter cited as *Moore*].

5. Declarations concerning the use of expanding bullets were adopted by the Hague Conventions of 1899 and 1907. See generally J. SCOTT, *THE HAGUE CONVENTIONS AND DECLARATIONS OF 1899 AND 1907* (1915).

tions of States that comprise customary international law. The verbal record of these interactions only makes sense if we view it through our own understanding of the human purposes that animated them.

The avoidance of unnecessary suffering has been one of the underlying purposes of international prohibitions on the use of certain kinds of military weaponry. Another fundamental purpose has been to secure the peace that is the common aim of the warring parties.⁶ Although "military necessity" is a realistic justification for certain actions during war, even that is tempered by the vision of a secure peace when the war is over. In short, "to win at all costs" has never been legally justifiable.

To take the verbal prohibitions of the laws of warfare, interpret them through the lens of the purposes I have just summarized, and apply them to particular aspects of nuclear weaponry is a long and arduous task. Let me indicate just two of the kinds of situations that can be assessed this way, and what a detailed study might show if it were pursued at length.

My first example comes from Professor Moore's advocacy of the deployment of tactical nuclear weapons in Europe.⁷ These weapons ostensibly protect European allies from the overwhelming conventional land forces that the Soviet army might use in an invasion. If a conventional war starts somehow, reliance on the nuclear deterrent might require its use, inviting nuclear retaliation. Worse, the danger of irrational, unplanned, unanticipated "mistakes" leading to a chaotic condition of nuclear explosions in Europe might escalate an ensuing conflict uncontrollably.

Such a scenario does not mean that nuclear weapon deployment is per se illegal. But if nuclear weapons are deployed to deter conventional, rather than nuclear, war, there is a danger that the "bluff" will be "called"—with intolerable consequences. In short, there is an instability in this deployment posture. An argument could be made that the plan itself violates the fundamental purposes of the laws of warfare.

On the other hand, the use of nuclear weapons to deter the use of nuclear weapons by the enemy may itself be consistent with all the purposes of the international regulation of the con-

6. See Wright, *The New Law of War and Neutrality*, in *VARIA JURIS GENTIUM* 412, 414-15 (1959).

7. Moore, *supra* note 4, at 266.

duct of war. A stable deterrent of this limited type may indeed prevent nuclear war.

Along this line, a counter-intuitive point was realized by nuclear weapons strategists in the 1950's: both the United States and the Soviet Union have an interest in the invulnerability of the other side's nuclear deterrent. If the Soviet Union has "hardened" missile silos and "secret" installations, then in the event of an initial nuclear exchange (perhaps precipitated by accident), we would be confident that the Soviet leaders would not feel pressured to launch immediately their deterrent force. Rather, confident that we cannot "take out" their deterrent, they might hold back until negotiations can put a halt to a war that neither side can win. Similarly, it is in our own interest, and in the interest of the Soviet Union as well, that our own missiles be invulnerable to a Soviet preemptive strike.

In the present state of technology, our nuclear-equipped submarines constitute an invulnerable deterrent force. They are hidden, dispersed and mobile. The same is not true of the proposed MX missile system, which I now use as my second example.

The MX program in any of its guises — whether on the "fast track" or in a "cluster" — is only partly invulnerable. In fact, it would constitute an attractive target for "dirty" megaton Soviet nuclear weapons, for there is a chance that a salvo of such weapons might take out the MX missiles. As a by-product of such a salvo, prevailing easterly winds will carry the radiation across the country, killing nearly every American. Presumably, before the last officers on American missile bases die from this radiation, they will order all the remaining missiles in our arsenal to be launched in easterly and northeasterly directions.

The MX missile plan, if we study it and compare it to the laws of warfare in more detail than I have been able to do here, might prove to be in violation of international law. I do not say that *any* plan to deploy nuclear weapons is illegal, but I do think that the MX missile plan is illegal. I do not agree with Professor Nanda that it is illegal to stockpile nuclear weapons.⁸ I don't believe that we should try to push international law too far, to make it do what we want it to do even if there is next to no basis for support. I agree with Professor Kennedy that we should not lose credibility for international law because we try to push it

8. Nanda, *supra* note 2, at 295.

too far.⁹ We do not want to end up with the policy-makers saying that we have had our say and that now it's business as usual.

The next symposium on nuclear weapons and international law would, in my opinion, be well advised to carry forward the general outlines that we have explored today and focus on precise deployments and scenarios. Credibility comes with specificity. So does integrity.

9. *Kennedy, supra* note 3, at 309.

