4 The Dissent of Judge Weeramantry*

This chapter primarily seeks to address itself to an exploration of the political and moral underpinnings of a particular strand of response offered by the Sri Lankan Judge, Christopher Gregory Weeramantry, during the course of his participation in the advisory procedure. The task of discerning the political and cultural repertoire that the judge unwields in advancing his case for the comprehensive illegality of nuclear threat or use assumes a special relevance. Weeramantry's philosophical conspectus is not restricted merely to questions of collective violence but rather derives from a much wider engagement with issues of planetary survival and a broad-based religious and social ethic constituting an invaluable personal philosophy of international law.[1] The judge provides us with an inclusive cultural frame to draw upon to contest narrow constructions of international law and claims advanced by states with regard to their perceived national interests. The critique advanced by the Judge must be viewed against the background appreciation that while this intervention by the Court "does not go to the full extent" that it may have in terms of categorically outlawing nuclear weapons, it does "judicially establish certain important principles governing the matter for the first time."[2]

1. This study derives insights from a similar exploration of the philosophical underpinnings of Judge Radhabinod Pal gleaned from his intervention in the Tokyo Trials by Ashis Nandy in "The Other Within: The Strange Case of Radhabinod Pal's Judgment of Culpability." See his *The Savage Freud* (Delhi: OUP, 1995), pp. 53–80.

2. 35 *ILM* 809 (1996), Dissenting Opinion of Judge Christopher Gregory Weeramantry, pp. 879–924. [Cited hereafter as Dissenting Opinion of Weeramantry in response to the Court's treatment of the UNGA request].

My choice of examining Weeramantry's dissenting note in this Advisory Opinion is prompted by an inclination to comprehend a particular mode of critique adopted by the Judge in his July 1996 interventions and to establish the bases of more inclusive conceptualizations of international law. The Judge, throughout his exposition of the relevant principles of international law, remains sensitive to the diverse multicultural bases and content of law. He observes that the issue of the legal status of nuclear weapon threat or use is not specific to any single political entity but is a wider human concern and the Court is a universal court, whose composition is required by the Statute to reflect the principal cultural traditions. The dissenting opinion of the Judge is informed by an inquiry into the insights of Hindu, Christian, Islamic, Judaic and Buddhist lineages of thought, all "demonstrating the universality and the extreme antiquity of the law we call *jus in bello*."[3]

THE COSMOLOGY OF WEERAMANTRY: A FRAMEWORK FOR INTERNATIONAL LAW

My purpose here is primarily restricted to discerning Weeramantry's personal philosophy of international law and how it came subsequently to impinge on his July 1996 advisory intervention.

Any effort to unravel Weeramantry's cognitive predispositions and his political and moral choices must inevitably lead to a consideration of the influences that informed his career in international law.[4] Why Weeramantry chose to append a voice of nuclear dissent in July 1996 much against the dominant writ of the major powers in the international system becomes easier to gauge if one explores the background make-up of a critical postcolonial sensibility.[5]

Judge Weeramantry was born in Colombo in the winter of 1926 when Sri Lanka was a colony under the British. The predominant early and

3. Dissenting Opinion of Weeramantry in response to the Court's treatment of the UNGA request, p. 898.

4. Nandy, "The Other Within," p. 77.

5. Casting postcolonialism as a political sensibility derives from Philip Darby and A.J. Paolini, "Bridging International Relations and Postcolonialism," *Alternatives*, Vol. 19, No. 3, pp. 371–397. Also of particular relevance is Sankaran Krishna's review essay, "The Importance of Being Ironic: A Postcolonial View on Critical International Relations Theory," *Alternatives*, Vol. 18, No. 3, 1993, pp. 385–417.

deep influence on Weeramantry's life was his parentage. It was from his father, Gregory, that Weeramantry was most unambiguously made aware of the hypocrisies of the colonizer.[6] In 1912, Gregory Weeramantry was one of the beneficiaries of an award instituted in the colony for higher studies in England based on academic distinction. Gregory Weeramantry post-graduated in mathematics at the University of London. It did not take long for Gregory to confirm a sense of discrimination in the minds of the colonizer, especially when it came to any evaluation of native calibre. The ship set sail from Colombo, and Gregory recognized that while attitudes on board appeared cordial initially, it eventually revealed overt shades of segregation by the time they touched Eden. During the course of his stay, he remained sensitive to "British life from inside."[7] Colonial manipulations illustrated in the depiction of the 1857 Indian War of Independence and the War of Abyssinia revealed to Gregory the glaring hiatus between colonial precept and practice.[8] The standards the colonizer was espousing vis-à-vis the colonies were being flouted without the slightest diffidence in the home of the empire.[9]

Christopher Gregory Weeramantry internalized these critiques which were received first impressions from an intimate family member who had successfully met the canons of academic scholarship set by the colonizer. This was important especially at a time when the colonizer was not losing any occasion to tell the colonized how inferior they were in terms of both their intellectual calibre and moral fibre.[10] How this mediated his political worldview is more clearly illustrated through the judge's subsequent interventions in his legal career. Weeramantry's mother was a teacher. She combined a religious mastery over scriptures with a sound historical sense.[11] These orientations left a deep imprint on the judge's early intellectual formation. Weeramantry attributes to his mother an abiding interest in religious texts and history.[12]

Weeramantry's choice of formal international law as a career comes only accidentally. His first love was religion. He spent much of his school years acquainting himself with various scriptures with the explicit and

6. Interview with Judge Christopher Gregory Weeramantry, Colombo, April 28, 2000.
7. Ibid.
8. Ibid.
9. Ibid.
10. Ibid.
11. Ibid.
12. Ibid.

constant support of his mother. His ability to partake of the dispositions of "multicultural" teachers in Colombo reinforced a natural proclivity to examine religious texts and the lessons they had to offer.[13] An early inclination to religious scholarship was also demonstrated at school with his bagging a prize conferred for mastery in comparative religion.[14] It was Weeramantry's interest in religion that led him on to a steady engagement with issues of human rights and eventually the passage was made to contemporary international law.[15]

Colonialism remained deeply etched in Weeramantry's memory and inevitably shaped his perception of the political universe. The description of the development dilemmas of the "Third World" (a concept he employs with great caution) has remained a subject area of his enduring engagement. He observes, "the very expression 'Third World' has connotations of ranking order, for while none is prepared to say which of the other two worlds is first or second, all seemed prepared to characterize the Third World the third."[16] Such a usage he writes "undermines equality from the very commencement of the dialogue."[17] His usage of the term therefore is premised on the understanding that "the group described as the Third World offers, within itself, a universe of diverse values and cultural backgrounds."[18] He notes in this context that it is true that there is scarcely any Third World condition today which is not directly linked and traceable to some aspect of its colonial past. With a deep sense of remorse, the judge records that

> [c]olonialism, lasting varyingly from 50 to nearly 500 years, served to sever the present from the past, and to put colonial territories adrift from their cultural moorings. Valiant efforts are now being made to cast around for the threads through which the present and the past can be joined, despite the severance, but alas, the surviving strands are all too few.[19]

These connections percolate into modern international law and an appreciation of their underpinnings remain an integral part of Weeramantry's conspectus.

13. Interview with Weeramantry, Colombo, April 28, 2000.
14. Ibid.
15. Ibid.
16. C.G. Weeramantry, *Equality and Freedom: Some Third World Perspectives* (Colombo: Sarvodaya Vishva Lekha, 1999, first edn, 1976), p. 6.
17. Ibid.
18. Ibid., p. 4.
19. Ibid., p. 53.

The nexus between colonialism and international law have also come to be more clearly accounted for today than ever before. It has been recorded in this context that "the colonial confrontation is central to an understanding of the character and nature of international law."[20] One of the traits of legal positivism has been to denounce the interplay of politics and law. Weeramantry has "over the last few years steadily refuted that the involvement of issues in politics takes away from the legal character. Every case involves a political element …" and this he points out must not serve as the basis for the World Court's effacement of its right to jurisdiction on the more pressing issues of our times.[21]

Another facet of Weeramantry's framework is the critique of the sharp demarcation between civil law and common law visible in the jurisprudence of the Court.[22] He is particularly sensitive to the fact that "the principal philosophy standing in opposition to the natural law view that a higher law prevails over the law of the state, is the philosophy of positivism which holds the law of a sovereign state is supreme and yields no higher principle."[23] This dialectic between natural law and positivism has a historical basis in international law "and at various periods the one or the other has been in the ascendant."[24] While configuring the movement of ideas in the sphere of international law, Weeramantry points to a growing divorce of religion from international law. This is traced to Hugo Grotius. However, this distancing, we are reminded, appeared at that historical moment in a much more diluted form than in its current incarnations. While Grotius still took recourse to "quoting hundreds of scriptural passages," it is his followers and descendants who have further increased the distance between religion and international law.[25] Weeramantry admits that much of this transition was effected in a time and age that witnessed "the dazzling successes of science. However, today it has been established beyond doubt that even science has no certitudes."[26] It is in this changed milieu that Weeramantry believes that

20. Antony Anghie, "Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century," *Harvard International Law Journal*, Vol. 40, No. 1, Winter 1999, pp. 1–80, see esp. p. 5.
21. Interview with Weeramantry, Colombo, April 28, 2000.
22. Ibid.
23. C.G. Weeramantry, *An Invitation to the Law* (Melbourne: Butterworths, 1982), p. 196.
24. Ibid.
25. Interview with Weeramantry, Colombo, April 28, 2000.
26. Ibid.

"international law is still in that formative phase wherein it must continually draw upon equity, ethics and a moral sense of humankind to nourish its developing principles."[27] He argues,

> far from demanding a distancing from religion, our times demand that we urgently strengthen the moral base that underpins international law and order. That it is still evident that the rationale for distancing international order from religion no longer exists, we are still captives of a school of thought that arose in vastly different circumstances and was undoubtedly the appropriate approach for that day and age.[28]

An indispensable dimension of Weeramantry's philosophy of international law is the centrality of religion in its development. This is premised on the assumption that

> global unrest is due largely to lack of understanding of other cultures. A principal source of such misunderstanding is the lack of appreciation of shared religious values of these different civilizations. In the ultimate analysis in this cognitive framework the goal remains to fuse out of the world's different historical and cultural backgrounds a set of common principles. All must cooperate, or all will perish. This era of co-operation demands that the legal essence distilled from each culture be brought to the common service of the international order.

It is in this scheme that "law needs no longer distance itself from the value of religion (as opposed to dogma and ritual)."[29]

The centrality of the sovereign state and its compact with modern science is another related manifestation of legal positivism. The judge observes "for centuries men have had to live their lives hemmed in and circumscribed by the notion of the nation state. The barriers imposed upon human thinking and the free exchange of ideas by this compartmentalized concept have done untold damage to humanity."[30] Weeramantry's efforts to develop more inclusive notions of political community led him to observe that

> [a]lthough the subjects of international law are primarily states, it is being increasingly recognized that many international organizations ranging from

27. C.G. Weeramantry, *The Lord's Prayer: Bridge to a Better World* (Missouri: Ligouri/Triumph, 1998) p. 5.
28. Ibid.
29. Ibid.
30. C.G. Weeramantry, *The Law in Crisis: Bridges of Understanding* (London: Capemos, 1975), p. 47.

> the United Nations itself to such organizations as the Universal Postal Union or the World Health Organization are international personalities. Indeed individuals too may on occasion be regarded as subjects of international law as will increasingly be the case with the growing recognition of human rights in many international forums.[31]

Moreover, Weeramantry has candidly pointed out that

> [t]he theory of sovereignty in its original form is a theory that suited a formal legal system, receiving the full protection of a well established sovereign authority. Lawyers and judges functioning within this framework could pursue the strict analyses on the basis of a severe logic without overmuch concern for social realities, secure in the confidence that the sovereign authority they supported would in turn support their work. In the more sensitive times in which we live such austere theories need modification even by those who stand basically committed to them.[32]

A most glaring illustration of the quest for pristine versions of sovereignty yields to an acknowledgement of "the enormous importance positivist theories acquired in the context of the Prussian state, and later, of Nazi Germany."[33] Weeramantry rejects law's excessive reliance on technicality. Such a position is convergent with the traditional understanding that

> [n]either on the subcontinent nor in Sri Lanka were sharp distinctions ever drawn between laws and morals. Law as a 'command of the sovereign' and enforced by his might, irrespective of whether it was morally right or wrong, was never recognized either in ancient or medieval India or in Sri Lanka. Every law had its root and justification in right conduct according to the current ideas of right.[34]

Thus it is relevant that "[i]f we want to understand the legal system of Sri Lanka we should look at it through the window of India rather than through the peep-hole made by Hayley and other disciples of Austin."[35] Legal positivism in this narrative comes to be critiqued as a source of discrimination in the practice of modern international law. Of particular import in Weeramantry's critique of positivism is a repudiation of versions

31. C.G. Weeramantry, *An Invitation to the Law*, p. 179.
32. Ibid., pp. 177–178.
33. Ibid., pp. 177.
34. A.R.B. Amarasinghe, *The Legal Heritage of Sri Lanka* (Colombo: Sarvodaya Vishva Lekha, 1999), p. 18.
35. Ibid., p. 18.

of realism. He strongly subscribes to the view that "[i]nternational law currently is positivistic and accords great deference to the realities of power, making it less responsive to the broader international purposes which international law should subserve."[36] He reckons that "…[i]t is indeed a paradox that we can, in international law, shut our eyes to the central realities of the international scene by too much reliance on 'realism.'"[37] He adds

> for a realist, a true view of the goings on at the level of international politics must not be obscured by a naïve reliance on morality or idealism. Such views rest upon rigid concepts of sovereignty and the acceptance of force as the main effective means for the resolution of international disputes. This conceptual framework unfortunately excludes custom and general principles of international law. Moreover, the elevation of state practice to a level of pre-eminence stifles the development within international law of an increased inventory of sanctions for compliance and a more survival-oriented set of concepts and norms.[38]

On the contrary, we are reminded that "if humanity is to survive (this) is in fact more realistic than any of the 'realism' of current international law."[39]

Weeramantry further rejects for postcolonial societies any simplistic imitation of the development models of the West. He observes that

> it is unfortunate that Third World countries are themselves now unconsciously imbibing scales of values based upon modern technology and material goods. Once launched upon the quest of these as supreme values in life, a society subordinates itself to their pursuit, and the unequal race that results leads to industrialization of agricultural societies, hence the vast new proletariats, hence a drift to the cities, hence a denudation of the countryside, hence a loss of bargaining power in the councils of the world.[40]

He however concedes "with all its numerous faults and weaknesses [postcolonial societies are] still a sharing society, where the individuals strives not only for himself but for his group."[41]

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36. C.G. Weeramantry, *Nuclear Weapons and Scientific Responsibility* (Wolfeboro: Longwood Academic, 1987), p. 107.
37. Ibid., p. 107.
38. Ibid., p. 108.
39. Ibid., p. 108.
40. Weeramantry, *Equality and Freedom: Some Third World Perspectives*, p. 130.
41. Ibid., p. 187.

Weeramantry's understanding of human rights also reveals a great deal of self-reflexivity. While conceding that "the concept of rights as opposed to duties unfolded … against a specific social and historical background which is peculiar to the West," he elsewhere affirms that "it would be unwise indeed to jettison this stream of tradition merely because it had its greatest development in the West."[42] However, in a critical genealogy of the concept of human rights, Weeramantry records that "the Western political tradition tended to obscure the importance of social, economic and cultural rights, for the historical process by which they evolved tended to concentrate on the civil and political rights that each individual could win from those exercising authority over him."[43] It was believed that "other rights could subsequently follow, once these rights were established."[44] However the fact of the mater was that even after the era of human rights began, with the enactment of the Universal Declaration of Human Rights in 1948, it took eighteen years before economic, social and cultural rights were placed on a footing of equality with civil and political rights by the simultaneous adoption in 1966 of the twin Covenants: the International Covenant on Civil and Political Rights and the International Covenant of Economic, Social and Cultural Rights a facet that rarely escapes the eye of an informed observer in our subcontinent.[45]

Given this set of philosophical and political commitments, Weeramantry began his professional legal career specializing in domestic contracts in Sri Lanka. This period witnessed his involvement in all domestic courts fulfilling various professional roles from original to appellate, admiralty and court martial. It was also during this period that Weeramantry came to acquire a better understanding of the domestic problems of the people of Sri Lanka. His social orientation and firm conviction that the primary objective of law was to serve people also crystallized during this period. He writes in this context, "legal systems, particularly those transplanted into a country from an alien soil, must grow and develop with the people they serve."[46] A deeply disturbing trend Weeramantry identifies in subsequent years is that

42. Weeramantry, *An Invitation to the Law*, p. 194.
43. C.G. Weeramantry, *A Prayer for the Third Millennium*, p. 32.
44. Ibid.
45. Ibid., pp. 32–33.
46. C.G. Weeramantry, *The Law of Contracts: Being a Treatise on the Law of Contracts as Provided in Ceylon and Involving a Comparative Study of the Roman-Dutch, English and Customary Laws Relating to Contracts*, vols 1 and 2 (New Delhi: Lawman, First Indian Reprint, 1999), p. 10.

> at least for some generations now the gulf between the law and the people had been widening till it has reached the stage of a near total breakdown of communication. This is another facet of the communication crisis. Indeed as law advanced in complexity the legal provision reversed it role of bridge between law and [the] public and began withdrawing within itself, keeping its body of legal knowledge shrouded in mystery and obscure language. Rarely indeed did any lawyer break through this screen and attempt to reach the public. The problem is amplified in postcolonial societies.[47]

"There is little doubt," Weeramantry adds, that "in multilingual societies as well in societies that are effecting a switch in legal language (from a colonial legal language to the language of the country) language planning is of major importance. Unless this is done now, when the new legal language is in its formative stage, the quality and content of the rule of law and democracy can be seriously affected."[48]

Here Weeramantry's study of the law of contracts of Sri Lanka assumes a special significance.[49] The seed of his subsequent erudition in comparative legal inheritances of diverse societies consolidates itself from this period onwards. As he himself succinctly notes, "the prevalence of this multi-legal system in the Island is best explained historically." Ceylon came under the rule of three European powers in modern times. The periods of their rule were approximately the same, each holding sway for a century and a half—the Portuguese ruled from 1505 to 1656, the Dutch from 1656 to 1796 and the British from 1796 to 1948. The Kandyan provinces became subject to foreign rule for the first time in 1815.[50]

Weeramantry is also deeply appreciative of notions of human agency visible in the legal culture of Sri Lanka. He asserts,

> the legal system of Ceylon, is no simple amalgam. It represents rather the co-existence of diverse elements than their fusion into one. It marshals within a common framework, laws as diverse in their origin as those of England, Holland and South Africa, Arabia, South India and old Ceylon. The pattern so formed intricate at first sight but readily available on close

47. Weeramantry, *The Law in Crisis: Bridges of Understanding*, p. 169.
48. Ibid., pp. 175–176.
49. Also see Barry Connnell's characterization of Weeramantry as "a contract lawyer at heart" in an appraisal of the Contribution of his Excellency Judge Weeramantry to the International Court of Justice, *Monash University Law Review*, Vol. 20, No. 2, 1994, pp. 191–194.
50. Weeramantry, *The Law of Contracts,* p. 24.

> acquaintance affords an excellent field of study for the student of comparative law.[51]

A more recent study of another leading scholar of Sri Lankan jurisprudence only confirms the validity of these informed reflections. A.R.B. Amarsinghe historically establishes that "expectations of equitable decisions and justice in the sense of an accurate decision after a fair trail and impartial and independent adjudication have indigenous roots that are ancient".[52] He further observes

> it seems that traditionally, a judge of Sri Lanka was required to adjudicate in accordance with the law, he had to act without fear or favour, affection or ill will, impartially and independently, without bias or prejudice or the appearance of bias or prejudice, he had to hold a fair trial, showing patience and attentiveness and endeavoring to ascertain the truth, and in exercising his discretion with regard to the punishment of offenders, he had to impose a sentence that was within the limits permitted by law and in accordance with the prescribed or customary sentencing policy applicable to the circumstances of the case.[53]

Subsequent to his practice of municipal law in Sri Lanka, Weeramantry also carried on a consultancy practice for eighteen years as barrister at Law in Victoria, Australia. His teaching stints at Australia confirmed the conspicuous and complete "lack of knowledge of other systems" that was prevalent in the academic curriculum and socialization of studies in his new environment.[54] Initially, during the lunch hours, Weeramantry took upon himself the task of introducing students to the different legal cultures prevalent in parts of Asia. This was until then regarded as beyond the ken of mainstream scholarship. This plea for sensitivity to plurality of legal influences soon acquired a space in the regular curriculum. From 1972 to 1991 Weeramantry remained Sir Hayden Starke Professor of Law at Monash University, Melbourne.

Any attempt to chart Weeramantry's subsequent interventions (not merely in the July 1996 Advisory Opinion but in other cases as well) must partake of an assessment of the Judge's broader conceptualization of international law and his perception regarding the objectives of the World

51. Weeramantry, *The Law of Contracts*, p. 65.
52. Amarasinghe, *The Legal Heritage of Sri Lanka*, p. X1.
53. Ibid., p. 195.
54. Interview with Weeramantry, Colombo, April 28, 2000.

Court. Weeramantry introduces in his work a useful temporal dimension to our understanding of the field. He brings to the fore the "infancy" of what is conventionally referred to as modern international law. In a comparative time frame he cites evidence through illustration:

> [t]ake the common law. It has about 1000 years of existence; the civil law has over 2000 years; Islamic law around 1500 years; Buddhist law 2500 years; Hindu law about 4000 years; Jewish law a similar period. They all measure their history in millennia. But come to international law as a system, and take classical international law, and you just have about 300 years of development. But modern international law, as distinguished if you make that distinction from classical international law is just about 50 years old. And I say this for a very good reason—that modern international law began after the era of empires which ended with World War II. Until 50 years ago, international law by and large served the age of empires and the needs of empires, with strong individualist overtones.[55]

More importantly from our perspective, Weeramantry is sensitive to the demands placed by the field on the individual judge. "Questions of logic, philosophy, history, tradition, sociology, the felt mores of the community are interpreted by the judge (as capable of) exercising an influence upon the judge's thinking and offer a whole series of alternative possibilities from which a choice must be made."[56] In contrast to the positivist pretence of strict demarcations between politics and international law, Weeramantry is critical of "the widely shared belief that it is not the function of judges to make law, and that therefore judges should not make law."[57] He concedes in this context "that judges do in fact make the law in all systems. This holds for international courts as well."[58]

The most critical aspect of Weeramantry's legal and political project that keeps resurfacing periodically is the introduction of perspectives from other systems. He does "feel quite strongly that international law has not helped itself sufficiently from the repositories of wisdom available to it in various cultures of the world. It is so far a monocultural construct. It might even be described as a 'Eurocentric' product."[59] In this context it must be

55. C.G. Weeramantry, "The Function of the International Court of Justice in the Development of International Law," *Leiden Journal of International Law*, Vol. 10, 1997, pp. 309–340.
56. Ibid., p. 315.
57. Ibid., pp. 309–340.
58. Ibid.,
59. Ibid., p. 317.

stressed that expanding the potential of the World Court is a task that needs to draw upon one of the richest influences that has fertilized nearly all legal systems of the world. Related to this plea for a wider conception of the content of international law, Weeramantry also highlights the need for greater representative equity governing international institutions like the World Court.

He contests simplistic caricatures regarding the efficacy of international law, often the source of skepticism. He observes

> despite some outstanding instances in which it (international law) has been violated, nations of the world honour international law in myriad daily transactions. The[se] are respect for territory or airspace, the honouring of treaties, universal postal regulations, world health rules, freedom of high seas, and diplomatic relations between states. Even though we are still in the era of nation states claiming sovereignty, the current world order could not exist without international law.[60]

WEERAMANTRY'S ENGAGEMENT WITH THE NUCLEAR ISSUE

The World Court Advisory Opinion was not the first time that Weeramantry critically appraised the nuclear issue. He had, prior to this, devoted a full-length book to study the question of scientific responsibility in the context of nuclearism. The primary objective of these sustained interventions has been to challenge the folklore surrounding the bomb and to demonstrate the speciousness of arguments adduced in support of nuclear use. Weeramantry rejects the notion of an apolitical and objective science unaware of the political implications of scientific research. He observes that "the idea that scientific activity, by reason of its detachment from external interests is or ought to be immune from concepts of moral, social or legal responsibility is … no longer valid. Science can be and often is as politically and socially involved as any other activity."[61] Thus in a nuclear age,

> the manufacture of nuclear weapons must always be with the knowledge of their intended use and with such real or reasonably imputable knowledge of those various considerations, only too well known today, which render manufacture a source of increased risk and which make manufacture inher-

60. Weeramantry, *Nuclear Weapons and Scientific Responsibility*, p. 64.
61. Ibid., p. 164.

> ently illegal and destructive of human rights. Intention and knowledge of consequences are key factors in determining legal accountability for the consequences of one's action. Concerning nuclear weapons, it is submitted that there can be no justification for placing responsibility for the manufacture in a different category from responsibility for use. The only difference is the difference between the commission of a crime and preparation to commit a crime.[62]

The nuclear issue in Weeramantry's framework is cast as a theme of collective violence. The parallels with genocide do not escape the judge's worldview. He observes,

> …the killing of nations has occurred before. Though many individual aboriginals have survived, the aboriginal 'nation' of Australia was killed. Though many individual American Indians have survived, the aboriginal 'nation' of American Indians was killed. And what such systematic genocide has achieved in the past, nuclear weapons are designed to do in the future. Individuals might survive, but the nation-state in the sense of a territorial group with its own lifestyle will have vanished.[63]

In another scathing indictment of nuclear status quoism, Weeramantry argues that the crime of genocide appears a lesser anthropocentric evil in terms of outcomes when compared to a nuclear holocaust. He notes

> If it is a valid law that civilians are entitled to protection then obviously the use of nuclear weapons is illegal, since there is no way for civilians to be protected. Indeed the damage, which a nuclear war would inflict, goes beyond even the scope of genocide, which has been declared a crime against humanity. Genocide is the extermination of only one group of human beings. Nuclear war would exterminate not only defined groups by also all human beings both combatant and non-combatant without regard to any principle of selection. It destroys all living things and the environment as well. Therefore it has sometimes been described as "omnicide" as opposed to the "mere" crime of genocide. Should nuclear war occur, the culpability for this kind of killing would go far beyond the already enormous culpability attaching to genocide.[64]

When the World Court, therefore, took up the issue of the legality of nuclear weapons, his strong defense of comprehensive illegality must have

62. Weeramantry, *Nuclear Weapons and Scientific Responsibility*, p. 136.
63. Ibid., p. 59.
64. Ibid.

come as no real surprise. Judge Weeramantry dissented at two points during the course of the World Court Advisory procedure. The judge appended a Dissenting Opinion on account of the Court's refusal to respond to the request of the WHO and subsequently in response to the Majority Opinion.

It was through a resolution in 1993 that the WHO had requested the World Court to render an Advisory Opinion on the nuclear question. The Court, after having studied the request arrived at the view that the request for an Advisory Opinion submitted by the WHO does not relate to a "question capable being considered as arising 'within the scope of (the) activities' of the WHO."[65] Weeramantry argues that such a rejection by the World Court was "fraught with far ranging implications," and the WHO request far from being unconstitutional was well "within the WHO's legitimate and mandated area of concern."[66]

The Dissenting Opinion of Weeramantry in this case is primarily a critique of the World Court's "narrow and literal" construal of the WHO question. This was also supplemented by its failure to recognize that such a denial would have an undesirable precedential effect on the future use of the advisory capacity of the Court in response of requests by the specialized agencies of the United Nations. However, this denial brings Judge Weeramantry to coherently show by way of his Dissenting Opinion that far from being "framed in terms of lawfulness or illegality in general," the WHO legal counsel had in fact requested clarification "in terms of State obligations in relation to the environment and the WHO constitution."[67]

The primary objections to the WHO request being awarded came form the entrenched nuclear weapon states. Weeramantry reveals that the United Kingdom characterized the WHO request as a "pointless and

65. See Annex II, Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Request of the World Health Organization), ICJ Advisory Opinion, July 8, 1996 in Laurence Boisson de Chazournes and Philippe Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons* (Cambridge: Cambridge University Press, 1999), pp. 561–580, esp. p. 572.

66. General List No. 93, July 8, 1996, On the Legality of the Use By State of Nuclear Weapons in Armed Conflict by the International Court of Justice. Dissenting Opinion of Judge Weeramantry <http://www.cornet.nl/akmalten/wweerama.html> Accessed on March 10, 2003. [Cited hereafter as Dissenting Opinion of Judge Weeramantry in response to the Court's treatment of the WHO request].

67. Ibid.

expensive disruptive exercise."[68] The United States argued that this resolution would inject the WHO into debates about arms control and disarmament that are the responsibility of other organizations of the United Nations system. France, too, was quick to point out that the WHO was "not the appropriate forum to deal with a subject with purely political connotations."[69] Russia vindicated its disapproval by suggesting that such a demand "would lead to politicization and involvement of the organizations in the problem of disarmament, without its having a proper perspective on the matter."[70] China, interestingly, as Weeramantry notes, maintained a studied silence on the issue. Countering allegations of legal camouflage, the Judge clearly outlined his position in this regard. He observed

> [t]he fact that the legal question is inextricably interlinked with political considerations, that political motives are alleged to lie behind the application, that political consequences would ensue from a ruling of the Court—these are matters extraneous to the consideration whether a given matter is a legal one. In fact, in the international world there are few issues indeed which do not have political overtones in varying degrees. The weightier the issue, the heavier is its likely political overtones.[71]

Moreover, the judge argued that since this denial of the Advisory Opinion marked the first such episode in the recent history of the Court, it would indeed have to cite compelling reasons for its rejection of such a request. However, the judge found no such compelling reasons existing in the current case and endorsed the view that the Court was to discharge a fundamentally judicial assignment.

Weeramantry's defense of the WHO request revolves round the complete fulfillment of three conditions: first, that the concerned agency must be authorized to make the request for an Advisory Opinion; secondly, that the request must have a legal basis; and finally, that such a request remained well within the concerned body's scope of activities. The distinction further directs Weeramantry's inquiry into specific state obligations with respect to the subjects of health, environment and the WHO Constitution.

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68. Dissenting Opinion of Judge Weeramantry in response to the Court's treatment of the WHO request.

69. Ibid.

70. Ibid.

71. Ibid.

While the limited purpose of inquiry in this context does not permit a detailed statement of all the legal obligations imposed by the WHO Constitution on states with regard to the issue of health and environment, what is important here is to present the crux of the argument which Weeramantry builds up to bolster the case of the WHO application. The entire edifice of Weeramantry's argument hinges on an important constitutional obligation set within the WHO Constitution that supports two levels of involvement in health related activity. As the judge reminds us, the WHO's activity in the domain of health is informed by the logic that "prevention is better than cure … be it a microbe which can kill tens of thousands or a nuclear weapon which can kill tens of millions."[72] Planning for any health disaster also falls on the shoulders of the WHO as the world has no higher medical service to turn to when the domestic system fails. Therefore, according to the Judge, what becomes critical from the point of view of the WHO is the "right to know what the law is."[73] Weeramantry, during the course of his argument, sets out a series of legal provisions enshrined in the WHO constitution which collectively endorse the Preamble's spirit in recognizing that "the inter-relatedness of health of all peoples is fundamental to the attainment of peace and security and is dependent upon the fullest co-operation of individuals and States."[74]

Similarly, the judge draws attention to the juristic state obligations (imposed by the WHO Constitution) in the realm of the environment. It is argued that the issue of environment is not unrelated to health. The primary findings which result from such an inquiry shows that "there are State obligations in regard to the WHO Constitution in regard to health, environment and in regard to the WHO regulations which would be violated by the use of nuclear weapons."[75] Weeramantry draws attention to the fact that concept of state responsibility in regard to the environment is an established part of international law. Moreover, Weeramantry traces "the growth of the notion of state obligations" in the environment domain from the 1972 UN Conference on the Human Environment to the more recent Rio Declaration that endorses "the obligations of States not to damage or endanger significantly the environment beyond their jurisdiction."[76]

72. Dissenting Opinion of Judge Weeramantry in response to the Court's treatment of the WHO request.
73. Ibid.
74. Ibid.
75. Ibid.
76. Ibid.

Weeramantry also draws our attention to the Vienna Convention of 1969 relating to treaty interpretation, which also finds mention in the Court's main response to the WHO request. Article 31 is particularly relevant for our inquiry as it lays down a basic rule of interpretation where the "terms of a treaty must be interpreted in the light of their context and in the light of its object and purpose."[77] Moreover the Judge draws attention to the teleological method of interpretation, which gains salience in interpreting multilateral conventions "of the normative and particularly of the sociological or humanitarian type."[78] The judge in legal pursuit of the properties of interpretation provided by the Vienna Convention asserts that the "WHO Constitution cannot be permitted to diverge from its objects, purposes and principles."[79] Interpreting the WHO preamble, Weeramantry observes,

> the central purpose of the Statute is health. The Statute is interpreted as to promote the purpose, rather than endanger it. A statutory construction of the WHO Constitution which sets State use of nuclear weapons as not being in conflict with the state obligations there under is a construction that endangers rather than promotes the central purpose of the Statute.[80]

Another principle, which came in for special scrutiny in the light of the WHO request, was the principle of speciality. The principle demarcates spheres of legitimate competence for various specialized agencies of the United Nations. Opponents of the WHO request had during the course of the Court's proceedings, argued that the WHO request was in violation of the "principle of speciality" which did not authorize it to raise questions related to the legal states of nuclear weapons threat or use. Judge Weeramantry however clarified his stance on the principle of speciality. The Judge argued "there has been no suggestion that the WHO should confine itself purely to the medical/epidemiological level of protection, and not enter the legal and political areas of prevention of activities damaging to health."[81]

A series of other contentious arguments came about during the course of the WHO request, which finds special mention in Weeramantry's Dissenting Opinion. The most common of these arguments was that the

77. Dissenting Opinion of Judge Weeramantry in response to the Court's treatment of the WHO request.
78. Ibid.
79. Ibid.
80. Ibid.
81. Ibid.

Opinion would be a product of politics. However, since the argument and Weeramantry's response finds mention in an earlier segment of this chapter, I shall concentrate on the Court's reasoning and the response offered by the Judge to these positions.

It was held during the course of the Court's proceedings that nuclear weapons as a subject of concern were being addressed in other contexts in the UN. Therefore, it was not proper for the WHO to intervene at this stage. Judge Weeramantry refuted such a proposition by holding that "the mere circumstance that a matter is pending in forums cannot deprive a legal question of the quality of being legal, nor can it deprive the Court of a jurisdiction expressly voted by the Charter."[82] Moreover Weeramantry recognized that the functioning of esteem of the court would be undermined if it decided not to deliberate on a matter because it touches upon the areas of peace and security. Moreover, the judge argued that the linkages on the request for the legality of nuclear weapon threat or use does not in any way diminish the Court's competence in medical matters.

It was also suggested by the States who were against the rendering of an Advisory Opinion by the World Court that such "an opinion would be devoid of object or purpose."[83] However, Weeramantry was of the view that the "advisory procedure is intended to allow the body invoking it to seek a legal option that will be of a assistance to it in the performance of its duties."[84] In any event; "the Court must respect the technical judgments of WHO when it decides that it needs that Opinion."[85]

Another argument that was advanced by the nuclear weapon states (NWSs) was that the Opinion would have no effect on the conduct of States. Weeramantry recorded in this context his observation that "clarity in law was desirable in the interests of the community served by law."[86] Moreover, "it is for the Court to pronounce upon what the law is. Other matters, extraneous to the question of legality, are not factors, which should deter the Court from doing its duty."[87] Besides the above objection, it was held that the "Advisory Opinion could adversely affect disarmament negotiations."[88] Weeramantry, in his defense of the WHO request, held that it was not for the Court to indulge in speculation or be

82. Dissenting Opinion of Judge Weeramantry in response to the Court's treatment of the WHO request.
83. Ibid.
84. Ibid.
85. Ibid.
86. Ibid.
87. Ibid.
88. Ibid.

acquainted with diplomatic nuances. Instead, "what the Court needs to consider is whether it is possessed of the requisite jurisdiction to address the particular matter on which an opinion is sought. If it has this jurisdiction it must proceed." Moreover, Judge Weeramantry is of the view that a clear position on legality may offer a firmer basis on which negotiations will proceed.[89]

The WHO request also invited the charge that it was "purely abstract and theoretical."[90] Weeramantry brings to attention the French written statement, which argued that the World Court's function is to state the law, not to write scenarios. Weeramantry offers four arguments against such an allegation. First, he suggests that since the effects of nuclear weapons have been well documented and corroborated by scientific study, "there is no element of abstraction about these concrete facts."[91] Second, the judge holds that the Court's role was to clarify legal problem and these problems were "live issues in the real world."[92] Third, Weeramantry appreciates the potential value of an Advisory Opinion serving as it does in explicating the "purpose and clarification of law" which shall "assist individuals and entities subject to the law in guiding and controlling their social behaviour.[93] Fourth, the Judge concedes, "the advisory function was specifically tailored to deal with questions of law that have a practical connotation." Such an Opinion "may look back to a past event or it may look forward to the future, seeking guidance for the resolution of an expected practical problem."[94] It was also alleged that the question posed by the WHO was too general. However, the Judge viewed the WHO request as a "limited question confined to State responsibility in regard to the use of or threat or use of a specific type of a weapon."[95]

Critics of the WHO request were also of the view that an opinion would undermine the Court's credibility. They argued that this particular situation required the Court "to engage in speculation" and not without implications for state sovereignty. Such a role would in their opinion seriously "compromise" the Court's judicial role. However, turning the reasoning on its head, Judge Weeramantry states, "what could be

89. Dissenting Opinion of Judge Weeramantry in response to the Court's treatment of the WHO request.
90. Ibid.
91. Ibid.
92. Ibid.
93. Ibid.
94. Ibid.
95. Ibid.

damaging is the Court's refusal to consider a legal question on the grounds of political implications and like considerations."[96]

Concern was also expressed over what was perceived as a political transgression of the Court's role as a judicial organ and its taking on a legislative or law making capacity. However, Weeramantry in his Dissenting Opinion to the WHO request rather convincingly assuages such doubts when he observes that the Court is being asked to exercise its classical judicial function. He further notes,

> it is being asked to pronounce on whether general principles existing in the body of international law are comprehensive enough to cover the specific instance. To suggest this is to invite the Court to legislate is to lose sight of the essence of the judicial function. Moreover, if the law were all embracing, self-evident and specifically tailored to cover every situation, the judicial function would be reduced to a merely technical application of rules.[97]

Those opposing an Advisory Opinion from the World Court in response to a WHO request also suggested that "the case falls outside the categories of cases in which an Opinion ought to be given."[98] This main line of argument was that the facts and issues of the case raise matters different from any previous request for an Advisory Opinion. However, Judge Weeramantry is careful to point out that

> the Court's jurisdiction to grant Advisory Opinions cannot be considered in terms of categories or precedents. The express language of the Statute enables the Court to give an Advisory Opinion on any legal question that is referred to it and the categories on which an Advisory Opinion may with propriety be sought are never closed. The qualification or limitation of such a crude enabling power cannot rest on considerations based on some fundamental matter or principle.[99]

Finally, there were critics who argued that the Opinion would trespass on State sovereignty and threat "matters of strategy and defense policy" are undeniably within the purview of each State. Moreover, there was feeling that this would upset the strategic apple cart of deterrence, international strategic balances and particular defense policies of indi-

96. Dissenting Opinion of Judge Weeramantry in response to the Court's treatment of the WHO request.
97. Ibid.
98. Ibid.
99. Ibid.

vidual state. To find legal sanction for such a position, the NWSs referred to the "Military and Paramilitary activities in and against Nicaragua" case. According to the findings of the case, "in international law there are no rules, other than such rules as may be accepted by the State concerned by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited."[100]

Judge Weeramantry it appears did not encounter any difficulty in countering this argument. He offers us five reasons for the rejection of such a rationale. First, he holds that the Nicaraguan case cited above related to the possession of weapons and not with the use of weapons "a matter on which the Court's Opinion is sought in this case."[101] Second, he argued that the laws of war were never regarded as "an intrusion upon State sovereignty, or an interference in a State's military decisions."[102] Third, Weeramantry held that "if international law decrees particular weapon illegal, that can constitute no interference with qualities of state sovereignty. Fourth, the Court, he observed, wanted to consider "whether all nuclear weapons irrespective of their size or quality offend basic principles of international law."[103] Finally, Weeramantry puts to rest all arguments suggesting recognition of "special" State obligations in the domain of environment and health. He acknowledged firmly that "international law has long passed the stage when it was possible to contend that the manner in which a sovereign treated his subjects or the territory under his control as a matter within his absolute authority, unlimited by international norms and standards."[104]

WEERAMANTRY'S CRITIQUE OF THE MAJORITY OPINION

The main findings of the Court were recorded in the formal conclusion or the *dispositif* of the July Opinion. The Court endorsed the norm of "general illegality" and reinforced the interntional obligation of nuclear weapon states to negotiate disarmament. Judge Weeramantry, while agreeing with the general drift of the advisory opinion in the direction of delegitimzation

100. Dissenting Opinion of Judge Weeramantry in response to the Court's treatment of the WHO request.
101. Ibid.
102. Ibid.
103. Ibid.
104. Ibid.

of the threat or use of nuclear weapons, voted against certain findings of the Court, more specifically on the issue of self-defense and the finding that conventional international law does not provide for a "comprehensive and universal prohibition of the threat or use of nuclear weapons."[105]

On the issue of self-defense, Weeramantry argues that while self-defense is a legal right granted to all states, "the use of nuclear weapons in self-defense is another" issue altogether.[106] The threat or use of nuclear weapons is a serious contravention of the humanitarian principles regulating armed conflict between nations. The universal applicability of these principles has been an accepted tenet of international law. On this issue, Weeramantry finds the Opinion of the Court quite disappointing. He observes "there should be no niche in legal principle, within which a nation may seek refuge, constituting itself the sole judge on so important a matter."[107] Thus "not generally, but always, the threat or use of nuclear weapons would be contrary to the rules of international law and, in particular, the principles and rules of humanitarian law."[108] Judge Weeramantry, also does not deny "the undoubted right to the state that is attacked to use all weaponry available to it for the purpose of repulsing the aggressor." But he insists that "this principle holds only so *long as such weapons do not violate the fundamental rules of warfare embodied in those rules*."[109]

Crucially what is of relevance here is that, the "principles relating to unnecessary suffering, proportionality, discrimination, non-belligerent states, genocide, environmental damage and human rights would all be violated, no less in self-defense than in an open act of aggression. The *jus in bello* covers all uses of force, whatever the reasons for resort to force. There can be no exceptions, without violating the essence of its principles."[110]

Weeramantry also maintains that conventional international law has sufficient resources at its disposal to make a case for comprehensive illegality of all situations relating to the threat or use of nuclear weapons.

105. Dissenting Opinion of Weeramantry in response to the Court's treatment of the UNGA request, p. 881. The extract also appeared as "Postcolonialism, Interntional Law and the Nuclear Question," in the journal *International Studies,* Vol. 37, No. 2 (2000), pp. 129–142.
106. Ibid., p. 909.
107. Ibid., p. 881.
108. Ibid.
109. Ibid., p. 909.
110. Ibid.

In particular, he cites Articles 22 and 23 (e) of the Hague Regulations. Article 22 reads, "Belligerents have not an unlimited choice of means of injuring the enemy." Article 23 states that "it is expressly forbidden to employ arms, projectiles or materials calculated to cause unnecessary suffering."[111] Similarly, the Geneva Gas Protocol clearly "prohibits the use in war of asphyxiating, poisonous, or other gases and of all analogous liquids, materials or devices."[112] A whole corpus of United Nations principles and humanitarian laws clearly provide for a categorical ban on the threat or use of nuclear weapons.

AFFIRMING THE MULTICULTURAL BASIS OF INTERNATIONAL LAW

Weeramantry's recourse to a cultural axis in order to affirm the role of "morality" in all situations of armed conflict is deliberate. The purpose here is to reinforce the historical and civil basis of the concern for propriety and a code of conduct in all instances of war. This concern is not new. The whole argument is that we must discuss the question regarding the legality of the threat or use of nuclear weapons in the context of a "varied cultural background."[113] The dissent not only partakes of the cultural plurality of these past efforts but also the geographical spread of such thinking. For instance, in the context of South Asia, Weeramantry cites the two celebrated Indian epics, *Mahabharata* and *Ramayana,* "which are known and regularly re-enacted through the length and breadth of South and South East Asia as part of the living cultural tradition of the region."[114] The sections of Weeramantry's text which have been reproduced below need to be examined in the light of his overall objective to show that "these cultures have all given expression to a variety of limitations on the extent to which any means can be used for the purpose of fighting one's enemy."[115]

He observes,

> The Ramayana tells the epic story of a war between Rama, prince of Ayodhya in India, and Ravana, ruler of Sri Lanka. In the course of this epic struggle,

111. Dissenting Opinion of Weeramantry in response to the Court's treatment of the UNGA request, pp. 899–904.
112. Ibid., p. 907.
113. Ibid., p. 898.
114. Ibid., pp. 896–897.
115. Ibid., p. 896.

> described in this classic in minute detail, a weapon of war becomes available to Rama's half-brother, Lakshmana, which could destroy the entire race of the enemy, including those who could not bear arms.
>
> Rama advised Lakshmana that the weapon could not be used in the war, 'because such destruction en masse was forbidden by the ancient laws of war even though Ravana was fighting an unjust war with an unrighteous objective.'
>
> These laws of war, which Rama followed, were themselves ancient in his time. The law of Manu forbade stratagems of deceit, all attack on unarmed adversaries and non-combatants, irrespective of whether the war being fought was a just war or not. The Greek historian Megasthenes makes reference to the practice in India that warring armies left farmers tilling the land unmolested, even though the battle raged close to them. He likewise records that the land of the enemy was not destroyed with fire nor his trees cut down.
>
> The *Mahabharata* relates the story of an epic struggle between the *Kauravas* and the *Pandavas*. It refers likewise to the principle forbidding hyperdestructive weapons when it records that:
>
> Arjuna observing the laws of war, refrained from using the *pasupathastra*, a hyperdestructive weapon, because when the fight was restricted to ordinary conventional weapons, the use of extraordinary or unconventional types was not even moral let alone in conformity with religion or the recognized law of warfare.[116]

This is not to suggest that South Asia's cultural tradition can be reduced to the "great epics" of the *Ramayana* and *Mahabharata,* but to emphasize the cultural and normative bases of international law.[117] Weeramantry's account of the legacy of international law becomes particularly relevant in the context of the threat or use of nuclear weapons. He observes

> [t]he general principles provide both nourishment for the development of the law and anchorage to the mores of the community. If they are to be discarded in the manner contended for, international law would be cast adrift from its conceptual moorings. The general principles of law recognized by

116. Dissenting Opinion of Weeramantry in response to the Court's treatment of the UNGA request, p. 897.
117. For a political strategy of conscious essentialism, however, see Krishna, "The Importance of Being Ironic," p. 410.

> civilian nations remains law, even though indiscriminate mass slaughter … irreversible damage to future generations … environmental devastation and irreversible damage to neutral states through the nuclear weapons are not expressly prohibited in international treaties … It seems specious to argue that the principle of prohibition is defeated by the absence of the particularization of the weapon.[118]

In this context, it may be pointed out that the World Court, too, noted "the newness of nuclear weapons has been expressly rejected as an argument against the application to them of international humanitarian law."[119]

AN EPISTEMIC CRITIQUE

Scholars have often claimed that there are deep historical links between colonialism and epistemology.[120] This is reflected in the manner in which colonialism "refracted the production of knowledge and structured the conditions for its dissemination and reception."[121] Postcolonial studies show how the stains of these links carry over into our modern knowledge systems.[122] This "alien scaffolding" of reality depends heavily on "a misrepresentation of reality and its reordering."[123] Moreover, it has been widely acknowledged that

> the theory of imperialism not only imputed superior objectivity and rationality to modern scientists and technologists and to societies which produced and sustained such scientists, and insisted that objectivity and rationality should always have primacy over values such as compassion, freedom and participatory democracy. It was this part of the theory which Western education successfully sold to the colonies.[124]

118. Krishna, "The Importance of Being Ironic," p. 902.
119. 35 *ILM* 809 (1996), p. 828.
120. See for instance Edward Said, *Orientalism* (New York: Vintage, 1979) and Amia Loomba, *Colonialism/Post Colonialism* (London: Routledge, 1998).
121. Loomba, *Colonialism*, p. 69.
122. Ibid., p. 64.
123. Ibid., p. 127.
124. Ashis Nandy, *Traditions, Tyranny and Utopias: Essays in the Politics of Awareness* (Delhi: OUP, 1987), p. 87.

Weeramantry's dissent partakes of a postcolonial epistemic critique directed at "disciplines" aimed at generating a privileged, though fallacious, sense of "expertise." Thus, he eschews any attempt at abstraction and links apparently innocent characterizations with the actual realities of modern day violence. His central premise in this context is that the analyses of the legal status of the threat or use of nuclear weapons cannot be treated as "abstract, intellectual inquiries, which can be pursued in ivory-tower detachment from the sad realities which are their stuff and substance."[125]

Weeramantry's critique is particularly perceptive from the point of view of problematizing "vital interests" in the context of a state's perceived strategic requirements. He pertinently asks, "what are vital interests and who defines them?"[126]

A part of the problem, in his opinion, is the "bland and disembodied language" that conceals "the basic contradiction between the nuclear weapons and the fundamentals of international law."[127] In a section entitled "Euphemisms Concealing the Realities of War," Weeramantry records his disagreement with much of the terminology in vogue while discussing issues like the legality of nuclear weapons. He observes that

> [h]orrendous damage to civilians and neutrals is described as collateral damage, because it was not directly intended; incineration of cities becomes considerable thermal damage. One speaks of acceptable levels of casualities, even if mega-deaths are involved. Maintaining the balance of terror is described as nuclear preparedness, assured destruction as deterrence, total devastation of the environment as environmental damage. Clinically detached from their human context, such expressions bypass the world of human suffering, out of which humanitarian law has sprung.[128]

The solution to this is "to strip away these verbal dressings and come to grip with its actual subject matter."[129] Weeramantry's epistemic critique is not limited to strategic expertise; it holds a mirror to contemporary international law too. In a moment of critical reflection, the judge poses the question relating to the fundamental epistemological purposes of international law. He argues that

125. Dissenting Opinion of Weeramantry in response to the Court's treatment of the UNGA request, p. 902.
126. Ibid., p. 918.
127. Ibid., p. 887.
128. Ibid.
129. Ibid., p. 887.

> if international law had principles within it strong enough in 1899 to recognize the extraordinary cruelty of the 'dumdum' or exploding bullets as going beyond the purposes of war and projectiles diffusing asphyxiating or deleterious gases as also being extraordinarily cruel, it would cause some bewilderment to the objective observer to learn that in 1996 it is so weak in principles, that with over a century of humanitarian law behind it, it is still unable to fashion a response to the cruelties of nuclear weapons as going beyond the purposes of war.[130]

The judge further records:

> every branch of knowledge benefits from a process of occasionally stepping back from itself objectively for anomalies and absurdities. If a glaring anomaly or absurdity becomes apparent and remains unquestioned, the discipline is in danger of being seen as floundering in the midst of its own technicalities. International law is happily not in this position, but if the conclusion that nuclear weapon are illegal is wrong, it would indeed be.[131]

The point which Weeramantry's dissenting note constantly makes is that international law has been sufficiently equipped to categorically ban the threat or use of nuclear weapons and "it would be a paradox if international law, a system intended to promote world peace and order should have place within it for an entity that can cause total destruction of the world system, the millennia of civilization which have produced it, and humanity itself."[132]

THE PROBLEM OF CULPABILITY

An important dimension of Weeramantry's dissent relates to the whole issue of culpability.[133] Implicit in such an understanding is recognition that the choice of "moral framework" is "a matter of political choice."[134] Weeramantry's invocation of "reason" in the context of nuclear weapon

130. Dissenting Opinion of Weeramantry in response to the Court's treatment of the UNGA request, p. 899.
131. Ibid., p. 899.
132. Ibid., p. 887.
133. The use of the term "culpability" with a postcolonial tenor finds expression in Ashis Nandy's "Treatment of Radhabinod Pal's legal intervention at the Tokyo War Crimes Tribunal"; "The Other Within," p. 79.
134. Nandy, "The Other Within," p. 75.

threat or use bears further scrutiny.[135] What was said of Radhabinod Pal's concept of reason in the Tokyo War Crimes Trials could be reiterated in the light of Weeramantry's dissent. It was observed then that "[n]either such reasons nor the law grounded in it … is culturally empty. Indeed the growing institutionalization of cultural diversity defines the context of all law."[136] Judge Weeramantry's concept of reason is similarly culturally grounded. Culpability extends to both "person and nations states."[137] Radhabinod Pal's engagement with Japanese war trials and the "duality of guilt" extending to both the users of nuclear weapons (the United States) and the Japanese perpetrators of war crimes shows that "[c]ulpability could never be divisible and responsibility, even when the individual could paradoxically be fully individual only when seen as collective and in fact global."[138] For Judge Pal, the Japanese "imperial guilt" in this century had to be situated in a larger global context.[139] In other words:

> the larger political and economic forces released by the nation state system, by modern warfare, by the dominant philosophy of international diplomacy, and the West's racist attitude to Japan, all of which helped produce the political response of the Japanese. The West had to acknowledge that wartime Japan wanted to beat the West at its own game, that a significant part of Japanese imperialism was only a reflection of Japan's disowned self.[140]

In the context of recent nuclear developments, it may be added that culpability rests not merely within the original "sinners" but also with all states seeking to emulate them.[141] Further, a common argument advanced by nuclear weapon is that "collateral damage is unintended."[142]

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135. Also see Richard Falk, "The Coming Global Civilization: Neo-Liberal or Humanist?" in Antony Anghie and Gary Sturgess (eds), *Legal Visions in the 21st Century: Essays in Honour of Judge Christopher Weeramantry* (The Hague: Kluwer, 1998), pp. 15–32, esp. p. 16.
136. Nandy, "The Other Within," p. 77.
137. Ibid., p. 79.
138. Ibid., p. 80.
139. Ibid., p. 79, note 45.
140. Ibid., p. 79.
141. For an account of personal culpability of the original atomic physicists involved in the Manhattan Project and their attempted resolutions of guilt from "sin" see Shiv Visvanathan, "Atomic Physics: The Career of an Imagination" in Ashis Nandy (ed.), *Science, Hegemony and Violence: A Requiem for Modernity* (Delhi: OUP, 1988), pp. 113–166.
142. Dissenting Opinion of Weeramantry in response to the Court's treatment of the UNGA request, p. 901, note 1.

Judge Weeramantry invokes an analogy in this context that is of specific relevance to the nuclear question. He argues:

> the author of the act causing these consequences in any coherent system cannot in any way avoid legal responsibility for causing them, any less than a man careening in a motor vehicle at a hundred and fifty kilometers per hour through a crowded market street can avoid responsibility for the resulting deaths on the ground that he did not intend to kill the particular person who died.[143]

The problem of evading culpability also came up when the Court considered the question of genocide. In this case, the question of "intention" served as a problematic category. The argument offered by those who opposed illegality of the threat or use of nuclear weapons was "that there must be an intention to target a particular national, ethnic, racial or religious group qua such group and not incidentally to some other act." Article 2 of the Genocide Convention clearly conceptualizes genocide as

> any act committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious groups as such. Acts included in the definition of killing members of the group causing serious bodily harm to members of the group, and deliberately inflicting on the group conditions of life calculated to bring about physical destruction in whole or in part.[144]

Weeramantry argues that it is fallacious to invoke "intention" in the context of nuclear weapons. He observes that "having regard to the ability of nuclear weapons to wipe out blocks of population ranging from hundreds of thousands to millions, there can be no doubt that the weapons target, in whole or in part, the national group of the State at which it is directed."[145] The Majority Opinion felt the need to take "due account of the circumstances specific to each case."[146] In the context of deterrence, it may be pointed out that pro-nuclear theorists have constantly emphasized credibility of intention as an attribute of the successful practice of deterrence. Deterrence is thus premised on the factor of intention and constitutes, from the perspective of Judge Weeramantry's critique, a directly visible culpable practice adopted by certain states in the

143. Dissenting Opinion of Weeramantry in response to the Court's treatment of the UNGA request, p. 901, note 1. p. 905.
144. Ibid., p. 905.
145. Ibid.
146. Ibid.

international system. Deterrence he argues is "nothing short of threat to use."[147] Moreover, "if an act is wrongful, the threat to commit it, and more particularly, a publicly announced threat must also be wrongful."[148] Thus, any state relying on and practicing nuclear deterrence today must be considered culpable.

CONTESTING RECEIVED HISTORIES

Weeramantry's critique may have also helped revise ethnocentric versions of the Cold War history. The task is to "resist … the oppression which comes as history."[149] The issue is not merely the parochialisms, which have crept into this history but more pertinently, "the use of a linear progressive, cumulative, deterministic concept of history often carved out of humanistic ideologies—to suppress alternative utopias and even alternative self-concepts."[150] This results in a situation where the "peripheries of the world feel they are victimized not merely by partial, biased or ethnocentric history, but by the idea of history itself."[151] Thus, an effective silencing of "the blood drenched history of suffering of the third world" via received histories also comes to be addressed in the judge's critique.[152] Weeramantry attempts to restore some historical perspective by pointing out that a series of wars were waged despite the presence of nuclear weapons in the bipolar context. That these were not factored into notions of "stability" or provided for an illusory " long peace" remains seriously problematic.[153] Thus, providing a historical corrective, he holds that "it is incorrect to speak of nuclear weapons as having saved the world from wars, when well over 100 wars, resulting in 20 million deaths have occurred since 1945" most of them in the third world.[154]

147. Dissenting Opinion of Weeramantry in response to the Court's treatment of the UNGA request, p. 919.
148. Ibid.
149. Nandy, *Traditions, Tyranny and Utopias*, p. 4.
150. Ibid., p. 6.
151. Ibid.
152. Ibid.
153. For a consideration of the concept of "long peace" see John Lewis Gaddis, "The Long Peace: Elements of Stability in the Post War International System," *International Security*, Vol. 10, No. 4, 1986, p. 104.
154. Dissenting Opinion of Weeramantry in response to the Court's treatment of the UNGA request, p. 923.

RE-AFFIRMING EQUALITY AS THE BASIS OF INTERNATIONAL LAW

A constant concern of postcolonial engagement has been to bring to the fore enduring inequalities emerging from asymmetric economic, political and social interactions in "the modern theatre of neo-colonialist international relations."[155] While decolonization entailed political independence of the new states, the legacies of colonialism continue to persist. As Roger Garaudy observes in this context.

> the principle obstacle to the necessary change is that the West after four centuries of unshared domination during which it exercised a disastrous impact on the planet, imposes not only its economic, political and military order, but also the form of culture and history which justifies it as if the historical trajectory followed by the West was the only possible one, exemplary and universal.[156]

Weeramantry's conception of equality takes issue with any attempt involved in translating *de facto* inequality into *de jure*.[157] The opponents of categorical illegality argue that the use of nuclear weapons could be envisaged in the case of self-defense. More specifically, they invoke "the doctrine and practice of deterrence in support of their argument."[158] The Court's tacit and partial deference to this view of an "appreciable section of the international community" comes in for criticism in Weeramantry's dissent.[159] He observes:

> that if, under customary international law, the use of the weapon is legal, this is inconsistent with the denial to 180 of the United Nations' 185 members, of even the right of possession of the weapon. Customary international law cannot operate so unequally, especially if as is contended by the nuclear weapon powers, the use of the weapons is essential to their self-defense.

155. Peter Childs and Patricks Williams, *Introduction to Post-Colonial Theory* (London: Harvester Wheatsheaf, 1997), p. 5. They attribute this phrase to Stephen Slemon, "Modernism's Last Post," in Ian Adam and Helan Tiffin (eds), *Past the Last Post: Theorizing Post-Colonialism and Post-Modernism* (London: Harvester, 1991), p. 3.
156. See Roger Garaudy's foreword to Nandy's *Traditions, Tyranny and Utopias*, p. X.
157. Dissenting Opinion of Weeramantry in response to the Court's treatment of the UNGA request, p. 91.
158. Ibid., p. 826.
159. Ibid., p. 914.

> Self-defense is one of the most treasured rights of States and is recognized by Article 51 of the United Nations Charter as the inherent right of every member states of the United Nations. It is a wholly unacceptable proposition that this right is granted to different degrees to different members of the United Nations' family of Nations.[160]

It is important to reiterate that Judge Weeramantry's insertion of a more real rather than a purely notional sense of equality serve as a reminder to international law that if it "is to retain the authority it needs to discharge its manifold and beneficent functions in the international community, every element in its composition should be capable of being tested at the anvil of equality."[161] From a postcolonial perspective, it is prudent not to lose sight of the normative demand that there cannot "be one law for the powerful and another law for the rest."[162] Such a sensibility endorses the "total illegality of the use of nuclear weapons by any power whatsoever, in any circumstances whatsoever."[163]

CONCLUSION

Apart from providing a detailed account of the relevant resources at the disposal of international law to ensure the categorical illegality of the threat or use of nuclear weapons, Weeramantry's dissent also provides a postcolonial moment of cultural and epistemic renewal for international law. In the ultimate analysis, it needs to be re-emphasized that Weeramantry's critique of certain aspects of the majority findings. He qualifies "[e]ven though I do not agree with the entirety of the Court's opinion, strong indicators of illegality necessarily flow from the unanimous parts of the opinion."[164]

Whatever else may be remembered about July 1996, we cannot ignore this positive drift of the Opinion, if we are indeed concerned about consolidating a more humane political future. Squarely cast "had we been the generation adversely affected, had we been the victims would we

160. Dissenting Opinion of Weeramantry in response to the Court's treatment of the UNGA request, p. 919.
161. Ibid., p. 914.
162. Ibid.
163. Ibid., p. 914.
164. Ibid., p. 881.

have forgiven a previous generation that had, for its selfish advantage, irreversibly poisoned our land, water, and atmosphere for many generations to come?"[165] The responsibility to engage this question lies not merely with States but with individuals as well. A useful point of departure would be begun by candidly acknowledging, as Weeramantry exposed throughout his legal career, that "the citizen who permits his government to play ducks and drakes with human rights and thereby encourage torture is in a sense the torturer himself, however unpleasant this may sound."[166]

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165. Weeramantry, *The Lord's Prayer*, p. 73.
166. Weeramantry, *Equality and Freedom,* pp. 124–125.