

NUCLEAR WEAPONS

Under International Law

EDITED BY

Gro Nystuen, Stuart Casey-Maslen
and Annie Golden Bersagel



CAMBRIDGE

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CAMBRIDGE
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University Printing House, Cambridge CB2 8BS, United Kingdom

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning and research at the highest international levels of excellence.

www.cambridge.org

Information on this title: www.cambridge.org/9781107042742

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First published 2014

A catalogue record for this publication is available from the British Library

Library of Congress Cataloguing in Publication data

Nuclear weapons under international law / edited by Gro Nystuen, Stuart Casey-Maslen, Annie Golden Bersagel.

pages cm

Includes bibliographical references and index.

ISBN 978-1-107-04274-2 (hardback)

1. Nuclear weapons (International law) I. Nystuen, Gro, editor of compilation.
II. Casey-Maslen, Stuart, editor of compilation. III. Bersagel, Annie Golden, 1983—editor of compilation.

KZ5665.N83 2014

341.7'34—dc23

2014011305

ISBN 978-1-107-04274-2 Hardback

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FOREWORD

We have recently commemorated the fiftieth anniversary of the assassination of President John F. Kennedy on 22 November 1963. The regular question asked of my generation was: 'where were you when you heard the news?' Everybody could remember, just as, for a later generation, the news of '9/11' and the attacks on Washington and New York would provide similar memories. And yet Kennedy's death overshadowed an equally momentous date, the night of 27/28 October 1962, when the world was on the brink of nuclear war in the Cuban Missile Crisis. As a schoolboy, I can remember going to bed that night wondering whether there would be a morning for me to wake up to. We lived that night in fear of nuclear annihilation.

Later, as a serving officer, I would be part of the forward UK division on the Inner German Border. Our task was to resist an invasion for as long as we could, though we knew in such an event our position was suicidal. Later at Supreme Headquarters Allied Powers Europe, I took part in exercises to resist such an invasion and such exercises almost inevitably ended in a nuclear exchange. On one such exercise, the first nuclear explosion in the UK missed its intended target, Greenham Common, and landed on a nearby village – where my family lived. It was a sobering moment.

Today the nuclear shadow cast during the Cold War has evaporated – but the danger has not gone away. The fear of nuclear proliferation remains and the new danger of nuclear technology falling into the hands of non-state actors is grounds enough for taking the issue seriously. As Gro Nystuen says in her conclusion, '[a] strongly polarised debate over nuclear weapons and their legality has taken place over the past decades' and almost twenty years have passed since the International Court of Justice gave its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons. That Advisory Opinion did little to stem the debate, except that there emerged a new factor: 'both sides taking the Advisory Opinion as evidence that they were right.'

This book has sought to take a dispassionate view of the debate, taking into account the legal developments since 1996 in the various fields of international law relevant to the use or threat of use of nuclear weapons. As should be expected, most if not all of the authors have strong views on the legality of nuclear weapons – which may or may not come across in their writings.

However, all have tried to view the issues dispassionately with the result that there are no firm conclusions on the legality or otherwise of nuclear weapons, contrary to what some would undoubtedly wish. Arguments are put forward and it is left to the reader to reach his or her own conclusions on the facts presented.

It is a relief to me – and to many – that the argument has now shifted from the political suspense of the Cold War into the more rarefied atmosphere of academia. However, we should not forget that this remains a real issue and a real threat. Regardless of the legal niceties, a nuclear conflict would be a catastrophe. There could be no winners. Any steps that can be taken to reduce such a risk are therefore to be welcomed. It is my hope that no child ever again has to go to sleep in the deep despair and fear of the unknown that I experienced on the night of 27/28 October 1962.

Charles Garraway

EDITORS' PREFACE

This book seeks to describe and assess the status of nuclear weapons under international law as it stands today, not as one might like to see it. Indeed, although many of the authors believe in the desirability of eliminating completely this category of non-conventional means of warfare, great care has been taken to focus on the identification of *lex lata* rules and to apply them dispassionately to nuclear weapons. Where authors believe the law is evolving in a particular field, such asserted *lex ferenda* is made explicit with contrary views duly reflected.

The book takes as its starting premise that the International Court of Justice (ICJ) did not, in its 1996 Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, find that nuclear weapons were unlawful per se under any branch of international law. However, such is not the understanding of every international lawyer, for a number have argued fervently that the Court did rule nuclear weapons illegal (or at least that application of the rules deduced by the Court inevitably renders not only their use but also their stockpiling illegal). Certainly, where the ICJ did not address or apply a particular rule to nuclear weapons or, in the relevant author's view, did not assess its application correctly, the lacuna or error is acknowledged and discussed in this book. Further, where the state of the law in a particular field has evolved since the 1996 Advisory Opinion, this too is openly debated.

In identifying customary international law, authors have sought to discern a general practice of states (*usus*) accepted as law (*opinio juris*).¹ Where an issue under review calls for interpretation of a treaty provision, the approach taken is to employ the customary rules codified in the 1969 Vienna Convention on the Law of Treaties, especially its Articles 31 and 32. Thus, a treaty is interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of the treaty's object and purpose. A special meaning is only given to a term if it is established that the negotiating parties

¹ Statute of the International Court of Justice, San Francisco, 26 June 1945, in force 24 October 1945, 3 Bevens 1179, Art. 38. For a more detailed description of customary international law, see I. Brownlie, *Principles of Public International Law*, 5th edn (Oxford University Press, 1998), pp. 4–11.

so intended.² Supplementary means of interpretation, particularly the *travaux préparatoires*, are used in order to confirm the meaning that is discerned, or to determine the meaning when the general rules of interpretation either leave it ambiguous or obscure, or lead to a manifestly absurd or unreasonable result.

As set out in more detail in the introduction to this book, we have sought to embrace all branches of international law deemed relevant to an assessment of the legality of nuclear weapons: the law on inter-state use of force (*jus ad bellum*); international humanitarian law;³ international human rights law; international criminal law; disarmament law; and international environmental law. Although not the primary purpose of the book, we argue that this approach can be used to assess the legality of any weapon, whether conventional or non-conventional in nature.

We hope that readers will find this book engaging and thought-provoking, and that it will contribute to the various debates on nuclear weapons. Arguably, given the hugely destructive effects of all nuclear weapons, whatever their explosive yields, too few lawyers are currently involved in reflections and discussions in this area. If the book stimulates more to turn their minds to this critical humanitarian and security issue, then it can already be considered a success.

We would like to thank all the authors for their contributions. Two experts meetings were held during the course of the project to review the draft chapters, in December 2012 and June 2013. Special thanks are also owed to several hardworking interns at the International Law and Policy Institute for contributions to the editorial work: Marisol Nina Guttman, Lars Jørgen Røed and Kjølvi Egeland. We are also very grateful to Charles Garraway for his careful review of the draft manuscript, which has further improved the text. Of course, any remaining errors of fact or law remain our responsibility.

² Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, in force 27 January 1980, 1155 UNTS 331, Art. 31(1) and (4).

³ By international humanitarian law is meant the entire international law of armed conflict, including Hague law governing the conduct of hostilities.

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NUCLEAR WEAPONS UNDER INTERNATIONAL LAW

Nuclear Weapons Under International Law is a comprehensive treatment of nuclear weapons under key international law regimes. It critically reviews international law governing nuclear weapons with regard to the inter-state use of force, international humanitarian law, human rights law, disarmament law and environmental law, and discusses where relevant the International Court of Justice's 1996 Advisory Opinion. Unique in its approach, it draws upon contributions from expert legal scholars and international law practitioners who have worked with conventional and non-conventional arms control and disarmament issues. As a result, this book embraces academic consideration of legal questions within the context of broader political debates about the status of nuclear weapons under international law.

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