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In Praise of Kaleidoscopic Judge: A Different Reading of Judge C. G. Weeramantry's Jurisprudence Before the Power Politics in ICJ

Abstract: The power politics has always been a great obstacle in reaching the just consensus in international law. In particular, the political realist approaches stemming from the powerful states often undermine the equality and justice in international legal sphere. Yet the judicial wisdom of some of the outstanding judges in the International Court of Justice have shown a remarkable audacity against trickiest power politics. This article unveils the universalist approach used by outstanding jurist late judge C. G. Weeramantry during his tenure at ICJ. This article seeks how judge Weeramantry delivered his judgements and advisory opinions as a jurist emerged from the Global South. This paper will assess the contribution made by Judge Weeramantry in a complex judicial space filled with power politics from both legal and philosophical perspectives.

Key words: universalism, international law, power politics, nuclear weapons, global south

Introduction

Non legal factors of judges on carving their judgments have received an enormous attention in legal academia. The writings written by many jurists have shown a keen interest in describing the upbringing and personal reasoning of judges that paving the path for their judgments in the bench. American realism being a school opposed to Scandinavian realism places the role of judge as vitally important in the center of law making process and American realists further argue the importance of judge's personal upbringings cull the judgment. According to distinguished American Jurist Justice Holmes "Life of law has always not been the logic, It is the experience" (Holms, 1997, pp. 129). Indeed, the personal ideology behind a jurist sharpens the legal acumen and the great saga of eminent Sri Lankan jurist and former vice president of International Court of Justice Christopher Gregory Weeramantry provides some insightful evidence for above mentioned realist argument. There have been dozens of appreciations and tributes to late judge Weeramantry since his timely departure in 2017, yet in this article I intend to seek judge Weeramantry's jurisprudence in International Court of Justice from a perspective which stood as his *sui generis* value of being a jurist emerged from the Global South. As a different reading on the stalwart of our time, this paper would adopt three arguments. Firstly, we examine why and how judge Weeramantry opted for non-conventional attitude for his legal reasoning among rest of textualists in the ICJ and this article examines the rationale behind his jurisprudence at ICJ through two of his land mark advisory opinions. Secondly we evaluate his contribution to public international law as the echoing voice of Global South in an era of world hegemony for superiority. Thirdly we trace the universalist philosophy judge Weeramantry adored as the paragon of his judgments and

advisory opinions, the references to civilizational values and the concept of humanity depicted in world religions frequently came from judge Weeramantry's juristic writings and his vehement opposition to the usage of nuclear weapons throughout his illustrious career at International Court of Justice and beyond it had made judge Weeramantry an exceptional jurist.

Art of Dissenting

In examining the jurisprudence adopted by judge Weeramantry during his days at International Court of Justice as a judge and its Vice President, one needs to comprehend the time he grappled with his legal reasoning. The year judge Weeramantry entered World Court in Hague 1991 marked the end of USSR, which saw the symbolic end of cold war giving its reward to the USA to become the unchallenged omnipotent political giant in the global system. However, the world emerged after cold war began to see a new set of challenges relating to the humanity, moreover the internal political chaos in post-colonial states in Africa, Latin America and Asia crumbled off its citizens while it raised a question of the aftermath of colonialism. This was the general geo political atmosphere of the time Judge Weeramantry began his career at ICJ and this unstable situation and the power unbalance loomed after cold war paved an apt path for justice Weeramantry for activism in ICJ.

In terms of analyzing his dissenting opinions, his dissenting in advisory opinion on the legality of nuclear weapons in ICJ has left a hallmark legacy on his legal erudition as it was regarded to be an opinion of a jurist who looked at international legal principles to ban nuclear weapons from a different approach whereas rest of the judges in the bench took up the matter from taking the law in a mere positivist angle. More importantly Court's notion on the legality of nuclear weapons was centered on the UN charter as court found it that words drawn by Charter has not been weapon-specific. In its opinion Court states "the Charter neither expressly prohibits nor permits, the use of any specific weapon, including nuclear weapons" (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, p. 226, International Court of Justice (ICJ), 8 July 1996). In fact the task which was expecting from ICJ by asking its advisory opinion on the legality of nuclear weapons was transformed into a riddle when court adopted too much cautious position in its approach to international law. The ambivalent position held by the Court on the scope of nuclear weapons made rather a complex situation as they over examined the scope of self-defense in UN charter, which finally led them to reach a conclusion that affirmed there is no legal prohibition in the use of nuclear weapons, but in examining the principles of international humanitarian law along with the issue of nuclear weapons court found that using nuclear weapons would contravene the principles affirmed by international humanitarian law. However, the dilemma Court could not solve was that it left no specific remarks on link between self-defense and use of nuclear weapons, especially court's position would not provide a light in an extreme circumstance of choosing the principles of international humanitarian law and self-defense. This situation seems to have created a loophole for justifying the legality of nuclear weapons under self-defense for the sake of preserving states, but we think the in

its implicit approach court too has pointed out that using nuclear weapons are contrary to the law of armed conflict and international humanitarian law. However, court deserves no admiration as it entangled the entire concept. Stefaan Smith and Kim Van der Borgh state.

“The Court should have distinguished the ends from the means.” The aim of the United Nations is “to save succeeding generations from the scourge of war, and to reaffirm the faith in fundamental human dignity and worth of the human person. The rules that are most adequate to achieve this goal are undoubtedly the rules of humanitarian law, rather than the concept of extreme self-defense. States are only means of governing communities of peoples and facilitating the interaction between those communities and are never an end in themselves. The Court should have given priority to the objective of the international community instead of favoring the survival of states” (Smith, Borgh, 1998, p. 78).

In the overall opinion of the ICJ, it seems to indicate that Court had not aptly unveiled the international legal principles to ban nuclear weapons completely, yet it sought alternative compatibilities like complying with self-defense in a situation like existence of a state is completely at stake. However, from the four dissenting opinions of judges at ICJ, Judge Weeramantry’s opinion took a unique approach as he displayed a complete opposition to using nuclear weapons and by all means he pointed out why nuclear weapons must be obliterated from human kind in his dissenting opinion written in 96 pages. At outset of his dissent, Judge Weeramantry has palpably shown in his regret on court’s reluctance to ban using nuclear weapons at any circumstance. He states:

“I regret that the Court has not held directly and categorically that the use or threat of use of the weapon is unlawful in all circumstances without exception. The Court should have so stated in a vigorous and forthright manner which would have settled this legal question now and forever” (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, p. 12, International Court of Justice (ICJ), 8 July 1996).

Re reading Judge Weeramantry’s dissenting opinion evokes us appreciate the humanism that he was struggling to uphold in ICJ throughout his career. His adamant position to ban nuclear weapons exclusively was not left a mere rhetoric filled with idealism, instead it was aptly bulwarked by his most descriptive arguments in favor of banning nuclear weapons. The complexity arising from the distinction between the possession of nuclear weapons and usage of nuclear weapons created a situation in international law where states have relied on their own defensive arguments, which was pointed out by Judge Weeramantry as an outrageous position in international law. His empathy on the clarifying a standard sets of rules relating to the position of nuclear weapons in international law was primarily based on the historical depiction of how nations haven’t been able to comply with complete abandonment of nuclear weapons since the end of Second World War. His long dissenting opinion has given a considerable concern over describing the destructive nature of nuclear weapons and it would be interesting to examine that his dissent was the only dissenting in Court who is consisted of much elaborative remarks on the nature and the destructive capabilities of nuclear weapons. It is by no means an attempt to elucidate nuclear proliferation from technical and scientific perspective yet, Weeramantry’s approach on nuclear effects and nature of nuclear weapons significantly help us to fathom the palpable reason for denial of nuclear weapons. Especially his con-

cern over damage to eco system caused by nuclear weapons has exposed a tip of the ice burg as it clearly shows the potentiality possessed by any nuclear weapon to obliterate the entire eco system on earth. On the other hand, the repercussion that can befall the future generations in using nuclear weapons is another notable feature in Weeramantry's dissent. Regarding that context, we believe the legal wisdom shown by Judge Weeramantry was not merely confined to his interpretation of international law conventions and his reasoning was afoot to show how detrimental it can be before a larger nuclear cataclysm which can wipe out the generic system, eco system and every livable thing in planet leading to the destruction of civilization and future generation who are yet to come. As a matter of fact, such a moral concern was not taken up by other judges in their opinions of International Court of Justice as they primarily focused on developing their arguments under conventional international law understating of nuclear weapons. The position of the majority of the judges in the Court was akin to the textual analysis of international law over nuclear weapons and nothing stood beyond it. However, in reassessing the futuristic arguments by Judge Weeramantry, it becomes salient his personal upbringing and the civilizational values bestowed on him has played a profound role.

The approach of Judge Weeramantry showing the intergenerational justice in his advisory opinion convinces us that the risk factor arising from nuclear weapons as so devastating and the concern of Weeramantry took a more specific root based on his visionary ideal to preserve the planet for future generation as a sustainable place. In his later writings too Judge Weeramantry showed a keen interest in developing intergenerational equity as a doctrine parallel to customary international law. His writings testify there is a rich array of principles of customary international law which can be used for this purpose. They need to be developed both individually and in combination with each other (Weeramantry, 2004, p. 67). For example concepts of the right to life, the right to found a family, rights of motherhood and childhood, human dignity, the integrity of the human person, the right to health, the right to food, the right to a pure environment, the duty not to cause irreparable damage to neighboring states, the precautionary principle, the concept of sustainable development, the concept of duties *erga omnes*, principles of individual responsibility, of trusteeship of earth resources, of intergenerational equity, of planetary responsibility and so forth. His argument to maintain the intergenerational equity was strengthening very much by taking Article 8 of Universal Declaration of Human Rights implicitly applicable to future generation as a guiding shield. In his dissent the words written by Judge Weeramantry have a prophetic value as it stands as a plea for salving the conscience of modern world. He states:

“The ideals of the United Nations Charter do not limit themselves to the present, for they look forward to the promotion of social progress and better standards of life, and they fix their vision, not only on the present, but on ‘succeeding generations’. This one factor of impairment of the environment over such a seemingly infinite time span would by itself be sufficient to call into operation the protective principles of international law which the Court, as the preeminent authority empowered to state them, must necessarily apply” (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, p. 67, International Court of Justice (ICJ), 8 July 1996).

However, the most interesting part of his dissent was his vehement opposition to legitimizing the right to use nuclear weapons when the very existence of a state is at stake.

In this scenario, rest of the judges in International Court of Justice opted for Article 51 of UN Charter that illustrates the “Self Defence” clause as evasive protection for nuclear weapons. As an example in reading the opinion of the Court on the legality of nuclear weapons, it's president Mohammed Bedjaoui clearly condemned the nuclear weapons and its fatalistic nature for humanity, yet the opinion of Court swiftly justified the right of any state to chooses “deterrence” in accordance with Article 51 of UN Charter.

“The Court cannot lose sight of the fundamental right of every State to survival, and thus its right to resort to self-defence, in accordance with Article 51 of the [UN] Charter, when its survival is at stake. Nor can it ignore the... ‘policy of deterrence’.”

The position held by Judge Weeramantry on legality of nuclear weapons under self-defense was merely confined to what the statutory obligation of Article 51 of UN Charter and while accepting the state's inherent right to self-defense he went on create a clear distinction between use of force and using nuclear weapons under the shield of self-defense, later was pointed out by Judge Weeramantry as he stated:

“The first point to be noted is that the use of force in self-defence (which is an undoubted right) is one thing and the use of nuclear weapons in self-defence is another. The permission granted by international law for the first does not embrace the second, which is subject to other governing principles as well.”

Moreover, he further mentioned the state subjected to the first nuclear attack could be expected to launch a counter attack and these circumstances under enormous pressure both sides would fall to a stage of waging nuclear war and which was described by Judge as a “global catastrophe.” His emphasis on self-defense was not a misleading principle that would legitimize nuclear weapons as Hobson's choice; yet, Judge Weeramantry was keen to trace the right of a state to defend itself by using the all available weapons for the purpose of repulsing the aggressor without violating the fundamental rules of warfare.

The dissenting opinion given by Judge Weeramantry in Hungary Vs Slovakia has shown another unique approach, which left a ponderable impact on international legal understanding of sustainable development and intergenerational equity. In fact, the separate opinion given by justice Weeramantry in Hungary Vs Slovakia seemed to be a reflection on what Court might have had in mind regarding applying sustainable development in international law. The case commonly known as *Gabykavo-Naggymaros* evoked the attention towards describing the scope of right to development in international law. The phase development itself is being a double edged sword created rather complicated situation, especially when the means and methods of development were not in compliance with certain standards preserving the environmental and humanistic principles. In the said case the concept of sustainable development was emphasized by Judge Weeramantry as a crucial factor to concern, in doing so, he vividly pointed out how conceptual path of sustainable development entered the world discourse since 1970's and his analysis on sustainable development as a principle within international law and state responsibility denote that no state can entirely liberate from their responsibilities to community. In his opinion Judge Weeramantry aptly showed the longest legacy of the concept of sustainable development traces its roots to ancient societies as cardinal value of human existence. In his opinion he stated:

“It is thus, the correct formulation of the right to development that the right does not exist in the absolute sense, but it relative always to its tolerance by the environment. The right to development is thus refined is clearly part of modern international law. It is compendiously referred to as sustainable development” (Hungary/Slovakia, Judgment, I.C.J. Reports 1997, p. 53, para. 75).

We need to understand, in the entire judgement of Hungary Vs Slovakia, the concern on sustainable development as a static principle in international law was not discussed beyond the 140th paragraph and it was Weeramantry’s separate dissenting opinion that unveiled the significance of the concept. In a judicial space surrounded by Westphalian attitude to state filled with positivism, Judge Weeramantry’s own interpretations emerged from his broad vision towards international law based on universal humanity stood for the dissenting voice of Non-Eurocentric perspective of public international law.

Echoing Voice of Global South

Third World Approach to International Law (TWAIL) has been a counter narrative emerged from the post-colonial states in Asia, Latin America and Africa as an intellectual movement, it’s task stands primarily in coping with the hegemonic rules created by the West in international law, both in practice and in academia. TWAIL scholars have looked at international law from the perspective of the oppressed colonial nations which shows the modern saga of colonial construction of international law for the justification of colonial expansion since 16th century onwards. Subduing the knowledge or practices existing outside Christian Europe as uncivilized, backward roots happened to be the *crème de la crème* achievement of modern colonial international law. In fact, TWAIL pioneers from post-colonial states were much enthusiastic in critiquing this power hegemony in modern international law, yet their voices merely remained to be an academic discourse. Perhaps it would be justifiable to assess that Judge Weeramantry’s stances before the issues he envisaged at ICJ echoed what TWAIL scholars persuaded to discuss in their academic discourse albeit Weeramantry never appeared to be a stalwart of TWAIL. In an Article written by A. Anghie and B. S. Chimni, the authors have named Judge Weeramantry as one of pioneering jurists of TWAIL 1 and this recognition given to him by the international law scholars seem to be an acknowledgement on his audacity he showed in ICJ for providing viewpoints pertinent to the issues what exactly TWAIL scholars were addressing as the issues laid in the peripheral level of international law (Anghie, Chimni, 2003, p. 34). Especially in examining the concern given by Judge Weeramantry over budding concepts like “Intergenerational Equity”, that it is a known factor, international law or West were not particularly interested in pressing such issues as indispensable ones, rather that kind of concepts were treated as whimsical ideals which can harm and sabotage achieving realist goals. For an example when notion of intergenerational equity was emerging as a new discourse, its legitimacy was always subjected to challenge as some scholars raised the question of what validity we possess to assess and seek remedies for a generation that has not yet begun to appear on earth. (Hendlin, 2014, p. 78) Such a pretext implicitly legitimized the right to exploit earth resources endlessly for material benefits of today’s world. Also, neither ICJ nor international law academia genuinely

attempted to trace the utter importance of duty based approach to future till Judge Weeramantry brought it to the stage through various his separate opinions.

Universalism

We cannot confine his judicial vision or activism as a merit emerged from his own erudition, because it was certain that such altruistic actions taken by him mainly sprang from the civilizational values he represented. Indeed, his role as a judge in ICJ was very much shaped and culled by the oriental wisdom he dearly practiced throughout his life. In examining how his deep associations with world religions and oriental culture aspired his judicial activism, his writings compiled by him after left ICJ have left us a greater clue to ascertain his deep devotion to all world religions as a path for universal pacifism. He was not taken aback by the textualists around him at ICJ to shape his opinions, which were inspired by many communitarian and religious values beyond black letter law. As an example his vehement opposition to the legality of nuclear weapons was strengthened by some deep insights taken from world major religions. In his separate opinion Weeramantry has taken various instances from religious scriptures to prove his position beyond international law, which shows how ancients followed the rules of war without annihilating the whole enemy. Weeramantry took ancient Indian epic *Ramayana* to prove how its hero Prince *Rama* impeded his army from launching a destructive weapon that could uproot not only his enemy King *Ravana*, but his whole country too, in *Rama's* justification to oppose launching such an attack, *Rama* states:

“Because such destruction of masse was forbidden by the ancient laws of war, even though *Ravana* was fighting an unjust war with an unrighteous objective.”

His idea on global trusteeship and peace was mainly attributed to his deep reading of world major religions and cultures. In his separate opinion in Hungary Vs Slovakia, Judge Weeramantry unveiled a bit of history of the vast hydraulic civilization existed in ancient Sri Lanka as a pragmatic example of how sustainable development and principle of trusteeship were bloomed in past. The sermon preached by *Arahant Mihindu* to Sri Lankan king *Tissa* (around 237 B.C.) on Buddhist understating of governance was quoted by Judge Weeramantry at his separate opinion of Hungary Vs Slovakia as an illustration of sustainable development and trusteeship. He states:

“This sermon, which indeed contained the first principle of modern environmental law – the principle of trusteeship of earth resources caused the king to start sanctuaries for wild animals – a concept which continued to be respected for over twenty centuries. The traditional legal system’s protection of Sauna and flora, based on this Buddhist teaching, extended well into the eighteenth century” (Hungary/Slovakia, Judgment, I.C.J. Reports 1997, p. 90).

The notion of applying universalism in International Court of Justice for complicated legal disputes among state parties was not a wise decision for any judge to reach his conclusions, yet Judge Weeramantry was keen in opting for his own approaches based on his profound understanding of humanity. But this idealistic approach to legal issues from various non-perspectives did not mar his legal acumen from the pivotal issues he

envisaged as a judge and indeed, his approaches elaborating the factual reasons, history, and civilizational values were all assimilated into the legal reasoning in a sharp way. As we discussed above his flair for intergenerational justice was not entirely emerged out of the blue with philosophical whims, but it was fortified by solid legal arguments as well. As an example in *Maritime Delimitation in the Area Between Green/and Jan Mayen Case*, Judge Weeramantry noted in his separate opinion that “respect for these elemental constituents of the inheritance if succeeding generations dictated rules and attitude based upon a concept of an equitable sharing which was both horizontal in regard to the present generation and vertical for the benefit of generations yet to come” (*Green Jan Mayen*, Judgment, I.C.J. Reports 1993, p. 38). Having stated that, Judge Weeramantry admitted that notion of intergenerational equity has reached the stage to include in customary international law as he found several international treaties and juristic opinions affirmed the application of intergenerational justice.

The illustrations he applied in his separate opinions at ICJ did not exclusively make him a legal populist stood for the interests and aspirations of the Global South as his views on development of modern international law mainly opted for bringing universalistic values. It would not be an exaggeration to state that vision from international law was very much akin to make global citizens. Despite knowing the fragile nature of international law before state actors and power politics, his static position of international law as ideal path for peace and order of the chaotic world was based on his indomitable faith of that international law should embrace cultural religious pluralism from world civilizations to face the greater interests in 21st century rather than dwelling in its inglorious colonial past comes from Westphalian nation state system in Europe. In his writing “*Universalizing International Law*”, Weeramantry pointed out the significance of Article 9 of ICJ statute which states the body of judges in ICJ should represent the all major legal systems in the civilization as a paramount factor to implement the universalizing process of international law in a pragmatic manner (Weeramantry, 2004, p. 67). In his idea of universal aspect towards international law, he was able to unveil the spirit of inculcating natural law in international law despite its importance in the application has been waned in contemporary positivistic position of international law jurists and lawyers. Judge Weeramantry always referred to the ancient and medieval philosophical teachings emphasizing natural law as the cardinal virtue of international law (Weeramantry, 1975, p. 122). Especially his admiration of Hugo Grotius was solely based on how Grotius attempted to create a bridge between natural legal values prevalent in the medieval era and secular modern needs of 16th century, in fact the vision Judge Weeramantry yearned from his universalizing process of international law was similar to the ideals upheld by Hugo Grotius in his writings.

Conclusion

In assessing the intrinsic jurisprudence of C. G. Weeramantry during his distinguished career as a judge of International Court of Justice and beyond, we need to admit his judicial activism was an outcome of blending international law with many other factors, which was aptly used by him to construct his beautiful dissenting opinions. Neverthe-

less, the arguments he presented were not merely filled with philosophical insights as most of his separate opinions at ICJ left a great deal of legal facts that compelled him for his position. If someone appreciates former US Supreme Court Judge Antony Scalia for being a great textualist which saved the US Constitution from getting distorted from so called “Judicial Activism,” the same admiration should be written before Judge Weeramantry for being a judicial activist in International Court of Justice who tried to perceive international law from a different perspective in a place surrounded by textualists. Moreover, the ideas developed by him in his opinions at ICJ indicate the versatility of widening the gaze, especially the topics we discussed in this paper such as intergenerational justice, and sustainable development arose from Judge Weeramantry as most insightful issues which were not much concerned by the majority in the Court. Especially in an era where the world was grappling to resolve its anomalies of Cold War memories, the role played by Judge Weeramantry could be regarded as a herculean task and as far as the gravity of his contribution to modern international law is concerned, it is a fact beyond dispute that the notions he brought in ICJ and his writings have paved the path to create more dynamic stances of 21st century international law.

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Pochwała sędziego kalejdoskopowego: inne odczytanie orzecznictwa sędziego C. G Weeramantry’ego przed polityką władzy w MTS

Streszczenie

Polityka władzy zawsze była wielką przeszkodą w osiągnięciu sprawiedliwego konsensusu w prawie międzynarodowym. W szczególności podejście realizmu politycznego wywodzące się z potężnych państw często podważa równość i sprawiedliwość w międzynarodowej sferze prawnej. Jednak sądowicza mądrość niektórych wybitnych sędziów w Międzynarodowym Trybunale Sprawiedliwości wyka-

zała niezwykłą śmiałość wobec najtrudniejszej polityki władzy. Ten artykuł ujawnia uniwersalistyczne podejście stosowane przez nieżyjącego już sędziego prawniczego C. G Weeramantry'ego podczas jego kadencji w MTS. W tym artykule szukamy sposobu, w jaki sędzia Weeramantry przedstawił swoje wyroki i opinie doradcze jako prawnik wyłoniony z Globalnego Południa. Artykuł ten oceni wkład wniesiony przez sędziego Weeramantry w złożoną przestrzeń sądową wypełnioną polityką władzy, zarówno z prawnego, jak i filozoficznego punktu widzenia.

Słowa kluczowe: uniwersalizm, prawo międzynarodowe, polityka energetyczna, broń jądrowa, globalne południe