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Nuclear Weapons, Elephants, Israel and the World Court

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Israel's nuclear policy troubles law, but does not violate it. The World Court (International Court of Justice/ICJ) delivered its 1996 Advisory Opinion on the use of nuclear weapons without mentioning Israel. But the Jewish state sat beyond the bar as the elephant in the courtroom. Numerous United Nations General Assembly (UNGA) resolutions on nuclear weapons had preceded the one that requested this Court's advisory opinion — some of those resolutions had singled out Israel for criticism of its nuclear program. The linkage to this case was clear. By finding the use of nuclear weapons *generally* illegal, the Court pleased the anti-Israel General Assembly majority. By failing to find an *absolute* prohibition on use and failing to find any prohibition on possession, the Court undoubtedly disappointed that majority.

The world community creates international law by two principal means. First, if two or more states agree to a course of action or a set of rules — for example, to charge no more than specified tariffs on each other's imports — that *treaty* binds them legally. The agreement does not bind other states that are not parties to it. Second, if the overwhelming majority of states follow a particular practice among themselves — for example, not arresting one another's diplomats — and if they believe that practice to be required, such a *custom* is an international law.

No world parliament exists. No global body can legislate. Thus, the UNGA does *not* make laws. It passes "resolutions" that do not have binding effect (understandable for a body where a mini-state like Lichtenstein or the Bahamas has the same one vote as mammoth countries like India and China). Neither does the UN Security Council (UNSC) create generally applicable law. It *does* issue binding legal orders applicable to specific state parties who, it finds, threaten international peace and security in particular

situations. Such resolutions are not general international laws — they are only orders to the parties involved.

The UN Charter (UNC) provides the most powerful collection of rules of international law from any single source. Virtually all states have ratified this treaty and, therefore, the entire world is legally bound by its provisions. No other international agreement comes close to its substantive scope of coverage and its universality of acceptance. The Charter establishes the ICJ as the judicial arm of the UN. That court may settle legal questions brought before it by contending state parties, thus promoting one of the UN's principal aims — the peaceful settlement of disputes and the avoidance of armed conflict. The ICJ possesses a secondary judicial power — to render advisory opinions to the UNGA or UNSC when either of those bodies so requests (UNC Article 96). While not legally binding, such an opinion is the most authoritative view of what international custom or treaties require. The General Assembly requested such an Advisory Opinion in 1996 regarding the legality of nuclear weapons.

The World Court Advisory Opinion

In its Advisory Opinion of July 8, 1996 (“Legality of the Threat or Use of Nuclear Weapons”), the ICJ responded to the UNGA’s question: “Is the threat or use of nuclear weapons in any circumstance permitted under international law?” The opinion did respond *generally* to the UNGA’s inquiry, but left uncertain legal issues pertaining to particular circumstances. The international legality of Israel’s nuclear posture appears to lie within the ICJ opinion’s zone of uncertainty.

The opinion reached the following conclusions:

First, no *treaty* of universal application either authorizes or *absolutely* outlaws the use of nuclear weapons. The Court here is cognizant of the legally obvious — that only parties to a treaty are bound by it. However, since virtually all states have ratified the UNC, any use of nuclear weapons must overcome the very high hurdle of Article 2 Paragraph 4, which prohibits “the threat or use of force against the territorial integrity or political independence of any state...” The Court implies that no justification could clear that hurdle except, perhaps, “self-defense” under UNC Article 51.

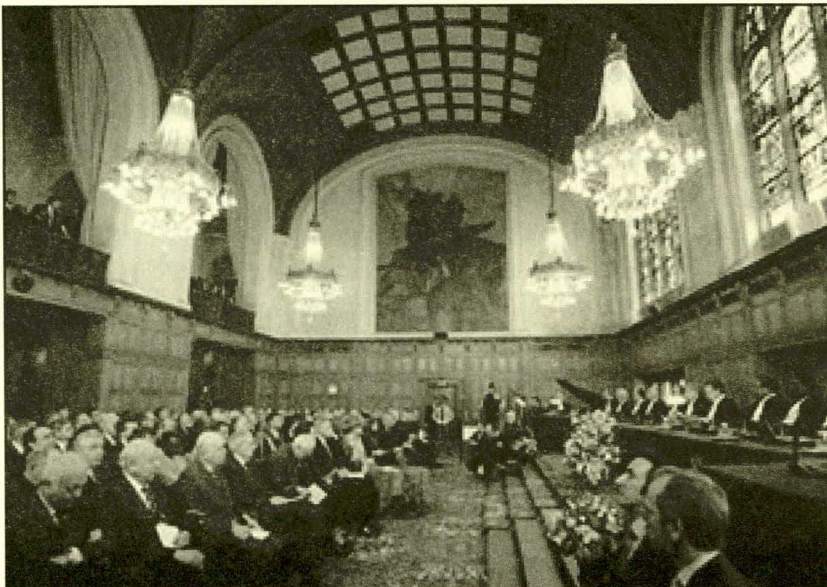
Second, no international law *custom absolutely* outlaws the use, much less the possession of nuclear weapons. The “possession” part of that conclusion is a no-brainer: Since custom can only be inferred from uniform state practice, and since state practice reveals most of the world’s major powers and its most populous nations possessing nuclear weapons, no custom can exist that prohibits that possession. The Court recognized

that the possession of nuclear weapons did not necessarily imply the intent to use them offensively. Indeed, it took note of the decades of deterrence that characterized the Cold War and implicitly accepted that deterrence might be a justification for the possession of such weapons. The *use* of nuclear weapons is another matter. While the ICJ does not find an absolute customary prohibition on their use, it comes pretty close. The Court recognizes that international custom has long held (at least since the St. Petersburg Declaration of 1868) that a state's discretion in resorting to weaponry to harm the enemy is *not* unlimited. Its opinion reflects at least four long-standing principles of the laws of war — unnecessary suffering, discrimination, necessity and proportionality.

The ICJ reaffirms in its *Nuclear Weapons* opinion that a weapon may not inflict *unnecessary suffering* on human targets. Only that force *necessary* to stop an enemy, not to make him suffer beyond incapacitation, is permitted.

The ICJ reaffirms that a weapon must reasonably *discriminate* between combatants and non-combatants. Civilians, incapacitated wounded, surrendered soldiers and non-arms-bearing medics are in the latter category.

The ICJ reaffirms that force used may not be *disproportionate* to the justification for that force. Thus, customary law would prohibit destruction of an enemy's entire military capacity in an otherwise justifiable armed response against a small border incursion.



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On each of these customary grounds — unnecessary suffering, discrimination, necessity, and proportionality — the ICJ finds the use of nuclear weapons generally illegal, but not necessarily in every conceivable case. The vagueness of the Court's language probably reflects division and ambivalence within the tribunal. It suggests that there might be a situation where a state's *existence* was threatened that justified the defensive use of nuclear weapons. The Court fails to elaborate on this exceptional hypothetical situation.

Finally, the ICJ does find an obligation to negotiate "in good faith" toward nuclear disarmament. Israel could arguably be breaching this duty, but its requirements are vague. Would Israel's asserted willingness to agree to such disarmament in a phased application *after* a comprehensive Mideast Peace Settlement meet its obligation? That seems debatable.

The application of the Court's analysis to Israel's *legal* posture regarding nuclear weapons does not seem too difficult. Israel does not appear *presently* to be violating any rule articulated by the Court. The mere possession of nuclear weapons is not found to be illegal. No use of nuclear weapons has occurred, so no violation exists there. The Court's "existential" exception to the general prohibition on use tends to support Israel's *implied position* that it would not engage in the first use of such weapons unless its existence was threatened. Responding to the rather abstract question posed by the UNGA, the Court had no occasion to address the circumstances surrounding particular states' possession of nuclear weapons, not Israel's or India's or North Korea's or anyone else's. The Advisory Opinion contained no "advice" regarding the legality of Israel's policy of intentional ambiguity — its practice of not officially affirming or denying its nuclear capability.

Generally speaking, international law permits that which it does not prohibit. If there's no law against it, it's okay (legally, if not morally). The Court recognized this principle in the *Lotus Case*. Such a principle flows from the notion of *sovereignty*: Except as explicitly limited by international law or by its own agreement, every state is free and independent to carry on its business as it sees fit. Since there is no treaty or custom that would require Israel or any other state to reveal whether it possesses nuclear weapons, there is no law that it is violating in that regard.

Perhaps an argument could be formulated that purposeful ambiguity regarding a state's own possession of nuclear weapons so intimidates its potential enemies that such ambiguity amounts to a threat of force in violation of Article 2 of the UNC. However, no authoritative source establishes this proposition. Furthermore, the logic of such an argument weakens when considering that overt possession of nuclear weapons is legal.

Certainly, if covert possession constituted an illegal “threat” under UNC Article 2, so would overt possession, which the ICJ does not find illegal. The Court recognizes the possession-equals-threat argument in its opinion, but does not accept it as law.

A number of the briefs submitted to the Court claimed that nuclear weapons were illegal by virtue of international human rights and environmental treaties and customs. The Court responded to these arguments by noting that in dealing with the legality of the use of nuclear weapons, the controlling specific international rules were to be found under the laws of war. While environmental and human rights law might inform some of that analysis, ultimately the law of war, as discussed above, had to control.

General Assembly Resolutions and Israel

The General Assembly has passed numerous resolutions regarding nuclear weapons, including declarations of the weapons’ illegality and of Israel’s need to join the Nuclear Non-Proliferation Treaty. As noted above, UNGA resolutions are not law. However, they may be evidence of international customary law, if they demonstrate the presence of uniform international practice and of *opinio juris*, the universal recognition by states of an obligatory norm. Regarding the illegality of nuclear weapons, the practice of important states in possessing such weapons renders any UNGA resolutions insufficient evidence of custom. Regarding Israel’s non-adherence to the Non-Proliferation Treaty, the pertinent resolutions stand as moral and political exhortations — but no principle of international law requires any state to become party to any treaty. In fact, the principle of sovereignty supports the right of a state *not* to so adhere. Furthermore, unlike the UNSC regarding threats to peace, the UNGA lacks any power to make binding orders against Israel, any other state or any person whatsoever.

Can the Security Council Have Impact?

The last point raises an interesting possibility. Could the UNSC legally order Israel to reveal the nature of its nuclear capability, or even order it to disarm? While politically unlikely, the theoretical answer is: “Possibly, yes.” The UNC empowers the Security Council to take actions it deems appropriate to address threats to international peace and security (UNC Article 39). If the UNSC found that Israel’s policy of nuclear ambiguity or its possession of nuclear weapons posed such a threat to peace, that body has the legal competence to order remedial action. It further has the power to impose sanctions if its orders are not followed (UNC Articles 41 and 42).

Mutual Existential Fright

The Court's *Nuclear Weapons* opinion implicitly raises the specter of mutual existential fright, since it cites as its only example of a *possibly* permissible use of atomic weapons a response to a threat to a state's existence. While the ICJ does not mention Israel in its opinion, the applicability is obvious. Israeli officials, while not confirming possession of nuclear weapons, seem to have implied that, if they exist, they would be used in response to an immediate existential threat. One example might be where the Israeli Air Force has been destroyed and enemy armies are threatening to overrun Israeli population centers. Another would be if weapons of mass destruction (e.g., chemical or biological) were being used against such population centers. Perhaps, such officials would now add to the list Iran actively arming nuclear warheads on long-range missiles. One or more of these threats might meet the ICJ's "existential exception."

Israel has cause for its existential fear. History — both ancient and recent — need not be repeated here to establish that proposition.

However, when contemplating nuclear weapons, existential fear is not a one-way street. Palestinians (and to some lesser degree other Arabs and even Iranians) have quite rational grounds for trepidation. If Israel were to exercise nuclear self-defense, who would be the victims, and how wide would be the devastation? If Israel followed those international law limitations of proportionality and discrimination described above, targeting only military objectives with tactical weapons, perhaps the damage might be merely awful, but not catastrophic. But it is not irrational for Arab populations to fear that such nice lines might not be observed by the Israeli military in time of perceived existential crisis.

Palestinians also have cause for existential fear, perhaps not historically or geopolitically equivalent to that of Jews, but real nonetheless. Does international law help at all with this dilemma of mutual existential fear? The legal limits on the use of force (immediacy, necessity, proportionality, discrimination, etc.) provide some brakes on the escalation to nuclear devastation. This is true even where self-defense is invoked, since that customary doctrine has long required that the threat responded to must be immediate, and the response proportional and only that which is absolutely necessary. Nuclear warfare would rarely meet these requirements.

While law is helpful, it is not sufficient. It cannot substitute for moral and political reconciliation. Only when neither side can *contemplate* eliminating the other will mutual existential fear disappear. A comprehensive treaty that recognizes Israel and Palestine's permanent existences and provides for nuclear disarmament is the only legal document that will work.

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