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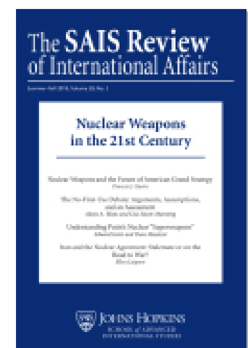

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SAIS Review of International Affairs, Volume 39, Number 2, Summer-Fall 2019, pp. 149-158 (Article)

Published by Johns Hopkins University Press
DOI: https://doi.org/10.1353/sais.2019.0023

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What Does International Law Have to Say About Nuclear Weapons? And What Does This Have to Say About International Law?

Steven M. Schneebaum

In 1996, the International Court of Justice—the judicial arm of the United Nations—was asked to advise on whether the "threat or use" of nuclear weapons "in any circumstances" was or was not consistent with international law. The Court responded that there is no legal prohibition against such weapons per se, but that numerous principles of widely-subscribed treaties and of customary law imposed severe restrictions on both the threat and the deployment of nuclear devices. These limitations, as a practical matter, declare that in nearly any foreseeable circumstances, nuclear weapons may not be used. This outcome was disappointing to many observers, who felt that the Court had missed an opportunity to make an affirmative case for disarmament. But the Court's task in this instance was not to state what it wished the law to be: the Court was required to state no more and no less than what the law actually is. In so doing, the International Court of Justice provided lessons regarding not only jus in bello—the law of war—but also the role of international law as applied to such significant and critical issues.

International law is a legal regime grounded in consent, not coercion. In that regard, it differs fundamentally from domestic legal systems. Under domestic law, violations of established norms draw the prospect of penalties at the behest of the offended party: the victim, in the civil law, and the polity itself, if criminal laws are breached. All who live within a society are answerable to the institutions of the law, which possess powerful weapons to enforce their will. In democratic cultures, of course, the goal is to ensure that the law's will is the will of the people, and when such systems strive toward that goal, they insist that the state or government itself, as well as its leaders, be held to the same standards. They too may be held susceptible to punishment, because they have no legitimate claim to be above, or beyond the reach of, the law.[1]

International law, however, does not work that way. No international constitution provides for the generation of statutory enactments, no international

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legislature is capable of adopting binding rules, and no international executive is tasked with enforcing such rules. Instead, there is a latticework of principles and institutions that create legal norms out of the confluence of states' interests, which converge in the desirability of order, predictability, and some (one hopes, an ever-increasing) sense of fairness and equity.

The elements of international law are treaties to which states have given their consent, custom that reflects their practice deriving from a sense of legal obligation, and principles common to the municipal legal regimes of civilized nations (in accordance with Article 38 of the Statute of the International Court of Justice).[2] This does not, of course, undermine the claim that the international legal regime is indeed a system of law, and not something else. The cynical canard that there is no such thing as international law, because states will invariably do what they please, is analytically vacuous and empirically false. To the contrary, the coordination of states' wills has led to what the late Anthony D'Amato called a system of "reciprocal entitlements," and, as he wrote, "[a] state cannot be described without reference to its entitlements, nor can its actions be fully understood without reference to the steps it takes to preserve those entitlements."[3] It is for this reason that states generally, broadly, and quite deliberately conform their conduct to the dictates of international law, even when the law requires that they act in a manner not directly reflective of short-term preferences.

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That there exists a system of legal norms agreed to by states, however, does not imply that every issue in international relations is, or should be, seen as having a definitive legal solution. States may well resist the subordination of their most vital interests—matters that can legitimately be described as existential threats—to an abstract understanding of what the law requires.

It is, therefore, not surprising that international law has not embraced hard-and-fast rules expressly banning the possession, or even the deployment, of nuclear weapons. So long as states regard such armaments as potentially their ultimate lines of defense against oblivion, international law is likely to provide at least some measure of latitude to keep them, and some degree of autonomy in considering whether and when their use is necessary. Yet, at the same time, the law has developed to rein in the use of all weapons, to govern the behavior of states engaged in armed conflict, and to impose liability on states for the injuries they may cause. These developments mark significant steps toward realizing the rule of law on the global plane.

Thus, in 1968, under the auspices of the United Nations, the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) was concluded, prohibiting the development of nuclear capability among states that did not already have it, establishing an elaborate regime for oversight of the development of nuclear technology, and calling on the five states that at that time possessed such weap-

ons (the five permanent members of the UN Security Council) not to use them against non-nuclear states, not to share their dubious bounty, and gradually to disarm. The oversight regime has been maintained, but the disarmament program has not only failed to bring about the decommissioning of those devices, but it has not prevented at least four states (India, Pakistan, Israel, and North Korea) from joining the nuclear "club."

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As of this writing, the NPT counts as parties all members of the United Nations save five: the four recently nuclearized states, and South Sudan (the newest UN member, which almost certainly will ratify the NPT once its domestic institutions are able to do so). India, Pakistan, and Israel never became parties, presumably sensing from the outset that they would ultimately need to develop nuclear weaponry of their own. North Korea acceded to the Treaty in 1985, but withdrew from it (in accordance with its terms in Article X) in 2003, claiming that "extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country."[4] Those states, therefore, did not act in violation of any international treaty norms by developing nuclear arsenals.

North Korea has come under heavy diplomatic pressure for continuing with its aggressive nuclear program and has been the target of economic and other forms of sanctions on the part of numerous states acting unilaterally as well as under the auspices of the Security Council. But these are political responses, rather than legal ones. Other nations that are parties to the NPT (such as Iran) would be in breach of the treaty were they to develop nuclear weapons without first withdrawing, and the response of the international community would therefore undoubtedly be harsher and likely more unified in condemning the violation of a conventional norm, voluntarily accepted.

The Vienna Convention on the Law of Treaties provides in Article 34 that "[a] treaty does not create either obligations or rights for a third State without its consent."[5] So it is fair to conclude that unless there is a customary norm of international law forbidding the possession of nuclear weapons in all cases (or even in all cases excepting the five permanent members of the UN. Security Council), international law does not contain such a prohibition.

Certainly the argument can be made that such a norm is an implicit component or correlate of treaties that are universal in adherence, such as the Geneva Conventions of 1949.[6] Nuclear arms, by their very nature, are indiscriminate in the devastation they cause. Indeed, that is part of their presumably desired *in terrorem* and therefore deterrent effect: you do not need a nuclear weapon to blow up a building, but if you are willing to ignore international humanitarian law guardrails, you might want one to blow up a city. There is no evidence to suggest that "tactical nuclear weapons"—supposedly limited in range and in lethal power, but still capable of catastrophic destruction—do not

raise similar concerns, or that the collateral or environmental havoc they are capable of wreaking is substantially less.[7]

The international regime of *jus in bello* (the rules governing the conduct of armed conflict) generally bars the use of weapons that cause large-scale and wanton "collateral damage" (to use the bloodless term for the mass murder of civilians during warfare). Additional Protocol I to the Geneva Conventions, at Art. 57.2(a)(iii), enshrines the principle of proportionality, under which the use of force far greater than the provocation is never permissible. States must "refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated." International humanitarian law as well as the international law of human rights—both conventional and customary—treat as fundamental states' obligations to protect life and human dignity.[8]

It is difficult, therefore, to understand how the use of weapons that will inevitably constitute violations of proportionality, and that will produce humanitarian as well as environmental catastrophes enduring for generations, could be seen as permissible under international law. Surely, the treaties to which all or nearly all of the world's nations have subscribed, and the customary norms that have become binding upon them, can be said to form an international legal bar against at least the deployment, if not the development and possession, of nuclear weapons of mass destruction.

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In 1996, the International Court of Justice ("the ICJ" or "the Court") responded to a request, from the UN General Assembly, for an advisory opinion on whether "the threat or use of nuclear weapons in any circumstance [is] permitted under international law?"[9] To the great consternation of those who had hoped for a definitive, unqualified declaration that such weapons are *per se* illegal, the Court's answer, in the *Legality of Nuclear Weapons* case, was a nuanced, intricate, and, in the opinion of many, evasive "maybe."[10] The Court was so sharply divided, and its members so concerned that they not be misunderstood, that all fourteen sitting judges submitted declarations, separate opinions, or dissents.

Although the Court unanimously agreed that "there is in neither customary nor conventional international law any specific *authorization* of the threat or use of nuclear weapons," it also soundly rejected (by eleven votes to three) the claim that international law contains "any comprehensive and universal *prohibition* of the threat or use of nuclear weapons as such [emphasis added]."[11] Finally, with the President's vote breaking a tie among the judges (per Article 55 of the ICJ Charter), the Court held:

> in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence [*sic*], in which the very survival of a State would be at stake.[12,13]

The meaning of the words "the very survival of a State" is somewhat unclear. It could refer to the imminent obliteration of the physical state, including its human population, or to the overthrow of the state as a polity. The Court repeated that expression several times in its opinion, without clarifying its referent. That ambiguity is extremely unfortunate, and it is to be hoped that a future ICJ decision clarifies the meaning of this critical term. But if the analysis proposed here is correct, this issue may be of academic rather than practical significance.

The Court, of course, cannot "make" law, and its decisions are not precedential even for the tribunal itself, as the Statute declares in Article 59 that "[t]he decision of the Court has no binding force except between the parties and in respect of that particular case."[14] Yet the high quality and obvious scholarship of the ICJ's judges and of its decisions means that its pronouncements on what is and what is not part of the international legal canon deserve respect and command attention, even if they do not always merit endorsement. How did the ICJ manage to conclude that the use of weapons of mass destruction could ever be legal?

The answer is to be found in the Court's perception of its own role as the "principal judicial organ of the United Nations" (per Article 92 of the UN Charter), and if a reader of the decision keeps this forefront in her mind, the otherwise mystifying contradictions become understandable.[15] ICJ President Mohammed Bedjaoui, for example, described nuclear weapons as "blind," and observed that their very existence is "therefore a major challenge to the very existence of international humanitarian law."[16,17] Yet he nevertheless concluded that they are not *per se* illegal.[18] Indeed, it was his vote, holding that international law does not prohibit nuclear weapons, that determined the outcome.

The Advisory Opinion of the Court consisted of more than the headline-grabbing sentence in which the judges decided that international law neither authorizes nor prohibits the use of nuclear weapons. Although the General Assembly had not requested more than an affirmative or negative answer to a straightforward fifteen-word question, the Court found it necessary (after determining that it had jurisdiction to hear the case, as well as the obligation to respond to the request) to pronounce, uninvited, on several other points. In addition to concluding that international law contains no express rules on the legality of such weapons, the ICJ also made, unanimously, four declarations. First, any threat or use of nuclear weapons "against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations" is unlawful (a direct reference to the UN Charter).[19] Second, any threat or use of nuclear weapons in a manner inconsistent with the Charter's rules on self-defense—including the requirements, per Article 51 of the UN Charter, that it be in response to an actual armed attack, and that it "be immediately reported to the Security Council" for consideration

of collective action in response—is unlawful.[20] Third, any threat or use of nuclear weapons must comply with the principles of international humanitarian law, and with any treaties "which expressly deal with nuclear weapons."[21] Finally, states are under an affirmative obligation "to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control."[22]

Nearly all of the fourteen Judges went out of their way to express the hope that complete nuclear disarmament could be achieved in the near future. They also strove, in their individual ways, to ensure that their opinions not be construed as minimizing the danger or the potentially catastrophic consequences of nuclear warfare. Instead, the judges sought to make clear, they were merely acknowledgments of the actual state of the law as it existed just before the dawn of the 21st century.

In light of the decision of the Court, as well as the separate writings of its fourteen judges, both concurring in and dissenting from that decision, the status of nuclear weapons in international law may be summed up as follows. Starting from the proposition—the actual holding of the tribunal—that there is no absolute and *per se* ban on such weapons, it appears that their use may be threatened, or even carried out, only when four core conditions are satisfied. First, a state's "very survival" must be in jeopardy, presumably because of the actual or imminent aggression of a state capable of bringing about such a result. Second, the proposed use of such weapons must be achieved in a manner that does not interfere with "the territorial integrity or political independence" of the aggressor or any other state (in line with Article 2 of the UN Charter).[23] Third, the threat or deployment of nuclear weapons must be in response to an actual—not a potential or imminent—armed attack, and the state in question promptly reports the facts and circumstances to the Security Council, permitting it to take "measures necessary to maintain international peace and security" (in accordance with Article 51 of the UN Charter).[24] Finally, the attack must be carried out in a way that conforms to the requirements of (a) specific treaties to which the state is a party; (b) binding customary and conventional norms concerning human rights; and (c) the relevant provisions of international humanitarian law, including the Geneva Conventions and Additional Protocols, if applicable.

It is nearly impossible to conceive of a situation in which all of these criteria would be satisfied. Then ICJ Vice-President Stephen Schwebel dissented from the advisory opinion on the grounds that there could be factual circumstances in which nuclear weapons might be used without causing widespread destruction and without risking environmental damage. He gave the following example: "[T]he use of a nuclear depth-charge to destroy a nuclear submarine that is about to fire nuclear missiles, or has fired one or more of a number of its nuclear missiles, might well be lawful."[25] And he is surely right: in instances in which nuclear weapons are used to

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achieve a result, and with contained consequences essentially indistinguishable from those of their conventional counterparts, the fact that they derive their propulsion from nuclear rather than other sources is unlikely to be the ultimate determinant of their legality.

Yet, if all of the conditions listed by the Court are really required for the threat or use of nuclear weapons to be deemed legal under international law, then, for all practical purposes, that conclusion can never be reached. Why, then, did the Court give the answer it gave? Why did it equivocate as it did?

To see what really happened here, it is necessary to consider both the specific wording of the General Assembly's request and the specific role played by the International Court of Justice in the UN system. The question whether "the threat or use of nuclear weapons in any circumstance [is] permitted under international law" invited a response that would focus on the words "*any* circumstance." The Court read the question as asking very precisely what the law *is*, not what it *should be*, or what existing legal principles might be taken to imply.

The decision of the Court immediately drew a barrage of withering criticism from the international law academy. But legal purity, that not-so-distant cousin of political correctness, was not on the Court's agenda, nor should it have been. It is problematic for an international judicial tribunal to tell states that they are absolutely helpless to defend themselves against the worst possible scenarios, however inconceivable they might seem.

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It is not unusual for international obligations to be stated in such a way as to provide exceptions in response to (what are perceived as) existential threats, on the understanding that such exceptional circumstances do not actually dilute the generality of legal norms. Even in establishing the decision-making mechanisms for the European Communities, the Member States had to accept that when a Member considered that "very important [national] interests are at stake," it reserved the right to block the adoption of European legislation (the so-called "Luxembourg Compromise").[26] States that accept the jurisdiction of the ICJ *a priori* by submitting an "optional clause" declaration may, and frequently do, reserve the right to object to dispute resolution by the Court when their "vital interests" are involved.[27]

Those judges who supported the opinion of the Court evidently saw its role not as issuing a *diktat*, the observance of which would have been uncertain in any event, but as simply reporting on the state of the law at the time of their writing. They handled a very difficult assignment with aplomb and sensitivity, even if they disappointed a constituency hoping for greater clarity, and perhaps boldness. To be audacious, they concluded, would be to dishonor the judicial function and would impede, rather than promote, the development of international law as a system driven by "reciprocal entitlements," to which the consent of all states is a prerequisite. The price of boldness, in other words, would be too high a price to pay for a declaration of principle.

As one commentator wrote in the immediate aftermath of the decision, "[A]n opinion from the Court that all uses of nuclear weapons are unlawful… could only have cast serious doubt on the credibility of the Court as a nonpolitical arbiter of legal issues and interpreter of legal commitments, and thus have impaired its effectiveness across the board."[28] The Court did not say that "all uses of nuclear weapons are unlawful"; it said that their use could theoretically be consistent with international law, but only in situations that cannot sensibly be conceived.[29]

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"The solution arrived at in this Advisory Opinion frankly states the legal reality, while faithfully expressing and reflecting the hope, shared by all, peoples and States alike, that nuclear disarmament will always remain the ultimate goal."[30] In this conclusion to his declaration, President Bedjaoui set out his vision, not only of the future of disarmament negotiations, but also for the international legal regime itself. It was the role of the Court to "state the legal reality"; the torch is now passed to the world community itself to achieve the "hope shared by all."

With all of the foregoing as prologue, and with the role of the Court in addressing this issue properly understood, the basic question can now be answered.

> Question: Is the use or threat of nuclear weapons permissible in international law?
>
> Answer: No, not in any reasonably foreseeable circumstance. The only exception is for the use of a nuclear device in self-defense, without threatening the integrity of another state, creating no collateral damage, ensuring no harm to the environment, and in a manner consistent with all of the treaty obligations to which the state in question has voluntarily acceded. In other words, for all practical purposes, never.

And the authority for that response may be confidently asserted: it is the 1996 Advisory Opinion of the International Court of Justice in the *Legality of Nuclear Weapons* case.

Notes

[1] See, generally, *United States v. Nixon*, 418 U.S. 683 (1974), https://supreme.justia.com/cases/federal/us/418/683/.
[2] International Court of Justice, "Statute of the International Court of Justice," https://legal.un.org/avl/pdf/ha/sicj/icj_statute_e.pdf.
[3] Anthony D'Amato, "Is International Law Really 'Law'?," *Northwestern University Law Review* 79 (1984–5): 1293–314.

[4] United Nations, "Treaty on the Non-Proliferation of Nuclear Weapons (NPT)," *United Nations Office for Disarmament Affairs*, https://www.un.org/disarmament/wmd/nuclear/npt/text/. The Vienna Convention on the Law of Treaties (VCLT), Article 54, contemplates that states may revoke the instruments by which they have voluntarily undertaken treaty obligations, so long as withdrawal is permitted by the treaty in question.
[5] "Vienna Convention on the Law of Treaties," *United Nations*, May 23, 1969, https://legal.un.org/ilc/texts/ instruments/english/conventions/1_1_1969.pdf. Of course, a treaty rule may become binding on third-party states if it metamorphoses into a principle of customary law. Ibid., Article 38.
[6] The four Conventions of 1949 have been ratified by all 193 members of the United Nations, as well as UN observer states Palestine and the Holy See. Additional Protocol I, discussed in the following paragraph, was opened for signature in 1977, and has been ratified by 174 states (and signed but not ratified by three others, including the United States).
[7] As retired Gen. Jim Mattis, then the United States Secretary of Defense, told the House Armed Services Committee, "I don't think there is any such thing as a 'tactical nuclear weapon.' Any nuclear weapon used any time is a strategic game-changer." Aaron Mehta, "Mattis: No such thing as a 'tactical' nuclear weapon, but new cruise missile needed," *Defense News*, February 6, 2018, https://www.defensenews.com/space/2018/02/06/mattis-no-such-thing-as-a-tactical-nuclear-weapon-but-new-cruise-missile-needed/.
[8] See, for example, the International Covenant on Civil and Political Rights, Art. 6.1. As of this writing, the ICCPR has 172 states parties, with six additional states as signatories.
[9] UNGA Resolution A/RES/49/75[K], December 15, 1996, https://undocs.org/en/A/RES/49/75. The General Assembly is authorized to request advisory opinions from the Court by Art. 96 of the UN Charter, and the Court is permitted to offer such opinions by Arts. 65–68 of its Statute.
[10] International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, July 8, 1996, 226, https://www.icj-cij.org/files/case-related/95/095-19960708-ADV-01-00-EN.pdf.
[11] Ibid., 226 and 266.
[12] International Court of Justice, "Statute of the International Court of Justice," https://legal.un.org/avl/pdf/ha/sicj/icj_statute_e.pdf.
[13] International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, 263 and 266.
[14] International Court of Justice, "Statute of the International Court of Justice," https://legal.un.org/avl/pdf/ha/sicj/icj_statute_e.pdf.
[15] United Nations, "UN Charter," https://www.un.org/en/sections/un-charter/un-charter-full-text/.
[16] J. Mohammed Bedjaoui, in International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, July 8, 1996, 272, https://www.icj-cij.org/files/case-related/95/095-19960708-ADV-01-01-EN.pdf.
[17] Ibid.
[18] Ibid.
[19] International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, 244 and 266.
[20] United Nations, "UN Charter," https://www.un.org/en/sections/un-charter/un-charter-full-text/.
[21] International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, 248–49 and 266.
[22] Ibid., 263–64 and 266.
[23] United Nations, "UN Charter," https://www.un.org/en/sections/un-charter/un-charter-full-text/.
[24] Ibid.
[25] J. Stephen Schwebel, in International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, July 8, 1996, 320, https://www.icj-cij.org/files/case-related/95/095-19960708-ADV-01-09-EN.pdf. Judge Stephen Schwebel, who later served as President of the Court, occupied the Burling Chair in International Law and Diplomacy at SAIS from 1967 to 1981.

[26] EU, "Final Communiqué of the Extraordinary Session of the Council," *Bulletin of the European Communities*, January 17–18 and 28–29, http://www.internationaldemocracywatch.org/attachments/297_Luxembourg% 20Compromise.pdf.
[27] See International Court of Justice, "Statute of the International Court of Justice," Article 36.3, https://legal.un.org/avl/pdf/ha/sicj/icj_statute_e.pdf. To cite illustrative examples, Australia has excepted maritime delineation disputes; Canada does not accept the jurisdiction of the Court in certain matters related to fisheries; and India has reserved its position regarding "hostilities, armed conflicts,…actions taken in self-defence [*sic*], [and] resistance to aggression." For a complete list of such declarations, see https://www.icj-cij.org/en/declarations/.
[28] Michael J. Matheson, "The Opinions of the International Court of Justice on the Threat or Use of Nuclear Weapons," *The American Journal of International Law* 91, no. 3 (1997): 435. Mr. Matheson, a former Deputy Legal Adviser at the Department of State, was for many years an adjunct professor at SAIS, and served as Interim Director of the International Law and Organizations Program from 2000 to 2001.
[29] Ibid.
[30] J. Bedjaoui, in International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, 274.