

THE LEGALITY OF USING NUCLEAR WEAPONS

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International law - through treaties or customary practices - does not mention the legality of using nuclear weapons. As of now, the 1996 Advisory Opinion from the International Court of Justice offers the only detailed and interesting answer to this question. According to the Court, the threat or use of nuclear weapons would be illegal in almost all cases. The question of extreme circumstances of self-defense remains a complicated one, where use of nuclear weapons may not be expressly prohibited.

In late 1994, the Secretary-General of the United Nations asked the International Court of Justice to give its opinion on the legality of using nuclear weapons. The Court was asked the following question: “Is the threat or use of nuclear weapons in any circumstance permitted under international law?” The Court was only asked for an opinion, it did not create any binding commitment for any country. The opinion of the Court on these matters was sometimes unanimous, sometimes decided by a majority and sometimes a tie. As a consequence, the opinion of the Court on the question of whether threatening or using nuclear weapons is permitted under international law is not a simple one.

To explore the 1996 Advisory Opinion, one has to look at three different parts:

1. The idea of “a threat or the use of force;”
 2. The idea of self-defense;
 3. The idea of “good faith;”
1. “A threat or the use of force.”

According to the Court, a threat or the use of the force would be contrary to the article 2(4) of the Charter of the United Nations, because this article is the one mentioning that countries part of the United Nations should refrain from the threat or the use of force in their international relations¹. According to the Court, nuclear weapons would fall into this category². As such, the “threat or the use of force” with nuclear weapons would be contrary to this article and consequently prohibited. While this article prohibits the use of force in most cases, the Charter of the United Nations offers some exceptions: if asked by the country attacked, by order of the Security Council of the United Nations or through the Article 51 on self-defense. This last option is the most contentious part of the 1996 Advisory Opinion.

2. Self-defense.

International law allows a country to use proportionate force in its self-defense in the pursuit of the survival of the state, meaning it can only be done *after* an attack on itself and such force cannot be *worse* than the initial attack suffered.

In the case of self-defense, “the ICJ ruled that the use or threatened use of nuclear weapons was generally *illegal*, but could not determine whether there would be an exception to this general

¹ United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, art 2(4).

² Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1. C.J. Reports 1996, paras. 37-50.

finding in the extreme circumstance of self-defense, when the very survival of a state was at stake.”³ By a seven to seven deadlocked vote, the Court “cannot conclude definitely whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstances of self-defense, in which the very survival of a State would be at stake.” According to Judge Guillaume’s separate opinion, neither the Charter of the UN nor customary law can “detract from the natural right of self-defense recognized by the Article 51 of the Charter.”⁴ Similarly, Judge Fleischhauer argued that the right of self-defense would be “severely curtailed” if in the case of a nuclear weapon attack, “nuclear weapons were totally ruled out as an ultimate legal option.”⁵

According to the then-President of the International Court of Justice Mohammed Bedjaoui, “what is not expressly prohibited by international law is not therefore authorized.”⁶ The question of self-defense was not resolved, but it begs the question of where it would not be illegal. The question of the legality or illegality of nuclear weapons in the case of proportionate self-defense when the survival of the country is at stake remains up in the air.

3. “Good faith.”

The Court also referred to the idea of “good faith.” It concluded its opinion by a unanimous vote on the idea that “there exists an 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”⁷. This is based on Article VI of the Nuclear Nonproliferation Treaty: “the Court appreciates the full importance of the recognition by Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons of an obligation to negotiate in good faith a nuclear disarmament. The legal import of that obligation goes beyond that of a mere obligation of conduct; the obligation involved here is an obligation to achieve a precise result - nuclear disarmament in all its aspects - by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith.”⁸

To sum up, the Court is unanimous in the opinion that a threat or use of nuclear weapons would have to be compatible with international law applicable to armed conflicts and international humanitarian law. The Court is, however, divided on whether “the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a [country] would be at stake.” Finally, the Court was careful to assert that it would be incorrect to extrapolate that this exception would amount to “the same as a declaration of legality in such circumstance.”⁹

³ Alyn Ware, and Wolfgang, K.H. Panofsky. “The 1996 ICJ Opinion and the Legality of Nuclear Weapons,” *Arms Control Association*.

⁴ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1. C.J. Reports 1996, opinion.

⁵ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1. C.J. Reports 1996, opinion.

⁶ Alyn Ware, and Wolfgang, K.H. Panofsky. “The 1996 ICJ Opinion and the Legality of Nuclear Weapons,” *Arms Control Association*.

⁷ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1. C.J. Reports 1996, opinion.

⁸ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1. C.J. Reports 1996, opinion.

⁹ Alyn Ware, and Wolfgang, K.H. Panofsky. “The 1996 ICJ Opinion and the Legality of Nuclear Weapons,” *Arms Control Association*.

The Treaty on the Prohibition of Nuclear Weapons--adopted in 2017 by 122 nations and currently open for signature and ratification-- would offer a clear legal framework on the use of nuclear weapons. Its article 1(d) mentions clearly that countries pledge to never “use or threaten to use nuclear weapons or other nuclear explosive devices.” The treaty would come into effect for the countries party to the treaty after the 50th ratification.

Sources & treaties:

Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1. C.J. Reports 1996, available from <https://www.icj-cij.org/files/case-related/95/095-19960708-ADV-01-00-EN.pdf>.

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