Looking Back: The 1996 Advisory Opinion of the International Court of Justice

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The 1996 advisory opinion of the International Court of Justice (ICJ) was the culmination of a decades-long debate on the legality of nuclear weapons. In recent years, it has shaped how international law is invoked by the initiative focused on the humanitarian impacts of nuclear weapons use and served as a foundation for the nuclear disarmament cases brought by the Marshall Islands in the court.

The legality of use of nuclear weapons had been considered by the UN General Assembly since 1961, when the body adopted Resolution 1653 by a divided vote.¹ The resolution declared that such use “is contrary to the rules of international law and to the laws of humanity.” But the General Assembly’s 1994 resolution² requesting the ICJ “urgently to render” an advisory opinion on the matter set in motion an entirely different, extraordinary process. The General Assembly asked the court to opine on the following question: “Is the threat or use of nuclear weapons in any circumstance permitted under international law?” This put the issue before the judicial branch of the United Nations, the highest court in the world on questions of international law.

Several nuclear-weapon states chose to defend the lawfulness of using nuclear weapons in extended arguments to the court. Russia, the United Kingdom, and the United States argued that although nuclear arms, like other weapons, are subject to the law of armed conflict, whether their use would be lawful or unlawful would depend on the circumstances. France contended that absent a specific prohibition, the weapons may be employed in the exercise of the right of self-defense. States not reliant on nuclear weapons, plus Australia, a country closely aligned with a nuclear-armed state, argued that the effects of nuclear explosions are inherently uncontrollable and indiscriminate and that the use of such weapons is therefore unlawful in all circumstances.³

Over two weeks of dramatic hearings in November 1995, 22 states made oral arguments, most after also submitting written arguments, and another 23 made written submissions only. Altogether, 45 states participated, the largest number to do so in ICJ proceedings to that date. Civil society also played a role. More than 700 groups worldwide had joined together in the World Court Project to support the General Assembly’s request for an opinion and to publicize the initiative.

Release of the Opinion

The court deliberated for an unusually long period of time before delivering its opinion on July 8, 1996.⁴ For advocates of the illegality of threat or use of nuclear arms sitting in the Peace Palace courtroom in The Hague and listening to the court’s president, Mohammed Bedjaoui, read the opinion, the experience was something of a roller coaster ride.

A positive early signal was the observation that the “destructive power of nuclear weapons cannot be contained in either space or time” and the acknowledgement of “the unique characteristics of nuclear weapons, and in particular their destructive capacity, their capacity to cause untold human suffering, and their ability to cause damage to generations to come.” Toward the end of the opinion, Bedjaoui read the following key finding:
[Under] the principles and rules of law applicable in armed conflict—at the heart of which is the overriding consideration of humanity...methods and means of warfare, which would preclude any distinction between civilian and military targets, or which would result in unnecessary suffering to combatants, are prohibited. In view of the unique characteristics of nuclear weapons...the use of such weapons in fact seems scarcely reconcilable with respect for such requirements.

Then he continued, reading a finding that was baffling at the time and has not become any less so in the two decades since then:

[T]he 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.”

Accordingly, in view of the present state of international law viewed as a whole...and of the elements of fact at its disposal, the Court is led to observe that it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake.

One of the several formal conclusions, each adopted by a vote of the judges, in reply to the General Assembly's question joined the “general” illegality of the threat or use of nuclear weapons under the law of armed conflict with the court’s uncertainty regarding the extreme circumstance of self-defense. Because a judge had died shortly before the hearings, the court had 14 members instead of the normal 15. The judges’ votes on the conclusion were evenly split, 7-7; it was considered adopted due to the positive vote of Bedjaoui. Yet, the tie vote is misleading. In powerful dissents, three of the seven judges who voted against the conclusion maintained that the threat or use of nuclear weapons is unlawful in all circumstances. Thus, 10 of the 14 judges took the position that such threat or use is at least generally unlawful.

At the close of the reading of the opinion, Bedjaoui unexpectedly turned to a matter not raised by the General Assembly’s question joined the “general” illegality of the threat or use of nuclear weapons under the law of armed conflict with the court’s uncertainty regarding the extreme circumstance of self-defense. Explained its meaning, and observed that fulfillment of the nuclear disarmament obligation “remains without any doubt an objective of vital importance to the whole of the international community today.” All judges voted for the resulting formal conclusion: “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.”

Governmental Responses

The participating nuclear-armed states responded to the issuance of the opinion essentially by stating that nothing in it requires them to change their policies. The United States correctly noted that the court “declined to pass on the policy of nuclear deterrence” and incorrectly claimed, as did France in stronger terms, that the “opinion indicates that the use of nuclear weapons in some circumstances would be legal.” In fact, the court only stated its inability to decide the matter in certain possible circumstances and stressed that states must always comply with rules protecting civilians from the effects of warfare. The UK commented, “Like the Court, we believe that the use of nuclear weapons would be considered only in self-defence in extreme circumstances.” Russia observed that the opinion “reflected a complex, mostly political role of nuclear weapons in the modern world.”

States of the Non-Aligned Movement, in particular Indonesia and Malaysia, had led the campaign to obtain a General Assembly majority in favor of asking the court for its opinion. Their emphasis was on the court’s unanimous conclusion regarding the disarmament obligation. In a resolution put forward by Malaysia in the fall of 1996 and adopted annually since then, the General Assembly underlines the conclusion and calls on all states to fulfill the obligation by immediately commencing multilateral negotiations leading to the early conclusion of a convention prohibiting and eliminating nuclear weapons. The resolution receives a substantial number of opposing votes and abstentions, due in part to the position of states such as Japan that negotiation of a convention is premature. However, in years when the paragraph welcoming the court’s statement of the disarmament
obligation has been voted on separately, it has been approved by an overwhelming majority, not including France, Israel, Russia, the UK, and the United States.  

**Nuclear Weapons Threat or Use**

In reaching its conclusions, the court considered a range of legal issues relating to threat or use of nuclear weapons, not all of which can be reviewed here. One significant finding was that a customary norm of nonuse of nuclear weapons has not arisen out of the practice of nonuse since World War II due to states’ continued assertion of doctrines of deterrence that contemplate resorting to nuclear arms. Another was that impacts on the environment must be taken into account in assessing whether an attack complies with the law of armed conflict. Also important was the court’s examination of the legal status of threats. It found that “if the use of force itself in a given case is illegal—for whatever reason—the threat to use such force will likewise be illegal.” But the heart of the court’s analysis and of the arguments made by states concerns the application of the law of armed conflict to the use of nuclear weapons.

The court laid particular emphasis on two elements of what is commonly referred to as international humanitarian law: the prohibition of causing unnecessary suffering to combatants and the principle of distinction between combatants and noncombatants. Under the principle of distinction, the court stated categorically, “States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets.” The court did not refer to another aspect of the principle of distinction, the prohibition of attacks on military targets expected to cause excessive incidental harm to civilians and civilian objects when weighed against the expected military advantage. Perhaps the court considered it to be inapplicable in the nuclear realm, where collateral casualties can number in the tens or hundreds of thousands.

The court said that the rules of international humanitarian law it highlighted reflect “elementary considerations of humanity” and are “fundamental.” Moreover, they are “intransgressible,” an innovative term that must mean that the rules are not to be violated whatever the circumstance. The court further said that for a use of force in response to an armed attack to be proportionate, a requirement for the lawful exercise of the right of self-defense, it must also comply with international humanitarian law. Although the court declined to address whether the legal doctrine permitting reprisals aimed at dissuading further unlawful acts by an enemy could justify a use of nuclear weapons in response to a prior use, it stated that any reprisal must meet the requirement of proportionality. The court found that it was unable to assess the legality of use in marginal scenarios such as use of low-yield nuclear weapons in remote areas, but stated that the nuclear-weapon states had failed to make the case for legality in such circumstances.

The thrust of the analysis is captured by the court’s finding that, in view of their “unique characteristics,” the use of nuclear weapons is “scarcely reconcilable with the requirements of international humanitarian law. That finding has been taken up as a subsidiary theme by the initiative on the humanitarian impact of nuclear weapons (see box).

Given its analysis of the application of international humanitarian law to the use of nuclear weapons, what sense can be made of the court’s inability to determine the lawfulness or unlawfulness of a threat or use of nuclear weapons in an extreme circumstance of self-defense in which the very survival of a state is at issue? This provision has been the subject of harsh criticism, and most members of the court signaled their discomfort or disagreement with it in their separate statements accompanying the opinion. It seems incongruous that a court would declare itself unable to apply the law to an important issue in the matter before it. The provision left an opening for states relying on nuclear arms to claim that their policies of deterrence are lawful and that use could be lawful—an opening that they in fact seized. No similar clause exists in international law governing the use of force, the conduct of warfare, and the use of particular weapons. Further, the court’s finding arguably implies that international humanitarian law possibly could bend in extreme circumstances of self-defense, whereas the essence of that law is that it applies to all states, whether aggressor or defender, in all circumstances. Indeed, as already noted, the opinion elsewhere is abundantly clear that whatever the circumstance, use of nuclear weapons must comply with international humanitarian law. States must “never use weapons that are incapable of distinguishing between civilian and military targets.”
The court’s reference to the policy of deterrence in justifying the finding suggests that the finding is as much or more about threat than it is about use. It appears to reflect the stark realities of threat and counterthreat at least implicitly faced by states when other potentially adverse states possess nuclear weapons. All of this points toward the comprehensive prohibition and elimination of nuclear arms as the only real solution to the dilemmas posed by their existence, a subject addressed by the court in the final section of the opinion.

### Humanitarian Initiative on Nuclear Weapons

The initiative first made its mark with the provision in the final document of the 2010 NPT Review Conference referring to the “catastrophic humanitarian consequences of any use of nuclear weapons.” It has continued through conferences in Oslo; Nayarit, Mexico; and Vienna in 2013 and 2014 and is a moving force in the 2016 UN open-ended working group on nuclear disarmament.

While emphasizing the unacceptable consequences of nuclear weapons explosions and the inability to provide adequate relief to survivors, influential actors in the initiative have also referred to the basic incompatibility between nuclear weapons and international humanitarian law. Thus, a 2011 resolution of the International Red Cross and Red Crescent Movement “finds it difficult to envisage how any use of nuclear weapons could be compatible with the rules of international humanitarian law.”

In her presentation to the 2014 Vienna Conference on the Humanitarian Impact of Nuclear Weapons, Helen Durham, director of international law and policy at the International Committee of the Red Cross, outlined concerns motivating the resolution. She stated that “the sheer scale of civilian casualties and destruction that would result from the use of a nuclear weapon in or near a populated area and its long-term effects on human health and the environment raise serious questions about the compatibility of this weapon with the rules” of international humanitarian law. She also noted that the use of a low-yield nuclear weapon “far from civilian settlements” would raise such questions due to the impact of radiation on combatants, the eventual spread of radiation, and radiological contamination of the environment.

A 2015 General Assembly resolution, “Ethical imperatives for a nuclear-weapon-free world,” puts the matter more strongly: “given the humanitarian impact of nuclear weapons, it is inconceivable that any use of nuclear weapons, irrespective of the cause, would be compatible with the requirements of international humanitarian law or international law, or the dictates of public conscience.”

### The Disarmament Obligation

In declaring the obligation to pursue in good faith and conclude negotiations leading to nuclear disarmament in all its aspects under strict and effective international control, the court made a significant contribution to the elucidation of international law. Its construction of NPT Article VI, read together with other parts of the opinion, clarifies that negotiation of an instrument or instruments eliminating nuclear arms would advance the objective of general and complete disarmament in the same way that the conventions on biological and chemical weapons advance that objective. The court also explained that the obligation is one of result—nuclear disarmament in all its aspects—as well as conduct—the pursuit of good faith negotiations. In both respects, essentially the same approach to interpretation of Article VI was taken by the 2000 NPT Review Conference when it adopted the “unequivocal undertaking by the nuclear-weapon States to the total elimination of their nuclear arsenals” separately from the reaffirmation of the ultimate objective of “general and complete disarmament under effective international control.”

The court’s formulation of the obligation and its underlying analysis compel the reading that the obligation applies universally, including to states not party to the NPT, as a matter of customary international law. In its analysis, the court notes that “the vast majority of the international community” is bound by the NPT, implicitly invoking the doctrine that customary international law can arise out of multilateral treaties with widespread participation. Moreover, the court cites General Assembly resolutions on nuclear disarmament, beginning with the very first, unanimously adopted resolution, which set up a commission to make proposals for “the elimination from national
armaments of atomic weapons and of all other major weapons adaptable to mass destruction.”

When very widely supported, General Assembly resolutions can provide evidence of customary international law.

The Marshall Islands' Cases

The proposition that the disarmament obligation applies universally is now being tested in three nuclear disarmament cases brought in April 2014 by the Marshall Islands in the ICJ. These are contentious cases that will lead to binding judgments between the litigating states, not advisory opinion proceedings. Two of the cases, against India and Pakistan, are based on a customary international obligation to pursue and conclude negotiations on nuclear disarmament as declared by the court. The third, against the UK, rests on NPT Article VI and the customary obligation.

In the case against the UK, a central issue is whether the UK is breaching the obligation to pursue negotiations leading to nuclear disarmament by opposing and refusing to participate in multilateral deliberations and negotiations on that subject. The issue is posed acutely by the UK’s absence from the 2016 UN open-ended working group on nuclear disarmament. The working group is charged with addressing legal measures to attain and maintain a world without nuclear weapons. Its deliberations are premised on the view of most states that the time to negotiate legal instruments relating to nuclear disarmament is now, not some distant future. That is also the implication, the Marshall Islands contends, of the disarmament obligation articulated by the court.

Unlike the UK, India and Pakistan support General Assembly resolutions calling for commencement of multilateral negotiations on nuclear disarmament, although they are not participating in the working group. In their cases, a principal issue is whether they are breaching the obligation and the requirement of good faith in implementing it by engaging in improvement, diversification, and quantitative buildup of their arsenals and failing to seek negotiated limits on such activities.

Hearings on preliminary issues in the cases against India, Pakistan, and the UK were held in The Hague in March. The issues concern whether the cases come under the terms of the three states’ declarations accepting the court’s jurisdiction and whether the cases are otherwise suitable for determination on the merits. The court’s judgments on preliminary issues are expected soon. In April 2014, the Marshall Islands also filed applications against the six other nuclear-armed states (China, France, Israel, North Korea, Russia, and the United States), but none of them have current declarations on file accepting the court’s jurisdiction. They have ignored or, in the case of China, declined the Marshall Islands’ requests that they come before the court in the matter.

Conclusion

The advisory opinion came at a high point of multilateral disarmament diplomacy. The Chemical Weapons Convention had been negotiated, the NPT had been indefinitely extended, and negotiation of the Comprehensive Test Ban Treaty was nearly complete. The initiative to obtain the opinion and the opinion itself reflect that moment.

In the subsequent two decades, efforts toward consolidating a multilateral nuclear disarmament regime have been stymied. Nuclear-armed states have done little to reduce the role of nuclear weapons in their security postures, let alone acknowledge that their use is incompatible with the law of armed conflict. Their planning for maintenance and modernization of their arsenals for decades to come and the associated projected vast spending—$1 trillion by the United States over the next three decades—manifests a lack of good faith in meeting the obligation of negotiating the elimination of nuclear arms. On the positive side, nuclear weapons have not been detonated in war, the demand for disarmament is still being vigorously pressed by non-nuclear-weapon states and civil society actors, and the contradiction between reliance on nuclear arms and what the court called “elementary considerations of humanity” is being exposed with renewed energy. In this complex environment, the advisory opinion remains an indispensable guide to the norms compelling nonuse of nuclear weapons and their universal elimination.
ENDNOTES


2. UN General Assembly, “Request for an advisory opinion from the International Court of Justice on the legality of the threat or use of nuclear weapons,” A/RES/49/75K, December 15, 1994. The General Assembly adopted this resolution in a 78-43 vote, with 38 abstentions.


5. Ibid., para. 105(2)E.


7. NPT Article VI states that “[e]ach of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.”

8. For the statements of France, Russia, the United Kingdom, and the United States in response to the issuance of the advisory opinion, see John Burroughs, The Legality of Threat or Use of Nuclear Weapons (Münster: LIT Verlag, 1997), pp. 153-155.

9. UN General Assembly, “Follow-up to the advisory opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons,” A/RES/70/56, December 7, 2015. The General Assembly adopted this most recent resolution on the ICJ opinion in a 137 to 24 vote, with 25 abstentions.

10. In votes on General Assembly Resolution 61/83 on December 6, 2006, the paragraph was approved by a 168-3 vote (Israel, Russia, and the United States voting no) with five abstentions (Belarus, France, Kyrgyzstan, Latvia, and the UK). The resolution was adopted as a whole by a 118-27 vote, with 26 abstentions.


14. The court construed NPT Article VI as follows: “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.” Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports, July 8, 1996, para. 99. The court elsewhere discusses the conventions on biological and chemical weapons, observing that “[t]he pattern until now has been for weapons of mass destruction to be declared illegal by specific instruments.” Ibid., paras. 57-58.


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