

‘ADVISORY OPINION ON THE LEGALITY OF THE THREAT OR USE OF NUCLEAR WEAPONS’ OF 1996 – TIME TO RE-EXAMINE

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Annotation. The article examines the 1996 International Court of Justice (ICJ) Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons. The analysis argues that the Opinion, while a significant step, remains incomplete in achieving nuclear disarmament.

The Court acknowledged the absence of a clear legal prohibition on nuclear weapons but emphasized their incompatibility with international humanitarian law.

The concept of ‘state survival’ as a justification for using nuclear weapons remains ambiguous and raises legal concerns. The Opinion’s call for pursuing nuclear disarmament in good faith necessitates further action. The Court avoided definitively outlawing nuclear weapons, leaving room for interpretation.

The applicability of International Humanitarian Law to nuclear use and its limitations were not fully addressed. The Opinion diverged from the UN General Assembly’s desire for a more explicit ban.

Need for re-examination: recent geopolitical tensions highlight the urgency of stricter regulations on nuclear weapons. The Opinion’s limitations necessitate revisiting it to establish comprehensive international law regarding nuclear arms.

The article concludes by emphasizing the importance of reevaluating the 1996 Advisory Opinion and pursuing stronger international legislation to eliminate the threat of nuclear devastation.

Key words: nuclear weapons threat, war, Ukraine, Advisory Opinion on The Legality Of The Threat Or Use Of Nuclear Weapons.

1. Introduction.

‘90 seconds to midnight’ was the time the Doomsday Clock struck in 2023. Scientists at the Bulletin of the Atomic Scientists, who manage the Clock’s settings, note that this is the closest the world has come to a nuclear Armageddon in the entire history of the Clock.

But is the world truly on the brink of a global nuclear war? This question has repeatedly surfaced within the global community throughout the latter half of the 20th century. Today, considering Russia’s full-scale attack on Ukraine on February 24, 2022, and the escalating situation in the Middle East, it resurfaces once again before the global community. It will continue to loom over us unless we finally seek an answer – why does this ‘pendulum of global war’ persistently hover over humanity? After the harrowing Second World War, one might have assumed that the pendulum would have come to a permanent halt, yet inexplicably, for over seventy years, it continues its sway and even gains momentum.

The issue lies in the fact that nuclear weapons and their utilization strategies have created a relentless cycle, ensnaring the international community. William Arkin aptly encapsulates this situation as follows:

What are the targets of nuclear weapons?

– Nuclear weapons.

What provocation could bring about the use of nuclear weapons?

– Nuclear weapons.

What is the defence against nuclear weapons?

– Nuclear weapons.

How do we prevent the use of nuclear weapons?

– By threatening to use nuclear weapons. Why can't nuclear weapons be abolished?

– Nuclear weapons.

To this can be added one more question: what is the strongest incentive to nuclear proliferation?

– Nuclear weapons [2, p. 37].

But is it possible to turn back the hands of the Doomsday Clock?

The 1996 International Court of Justice (ICJ) Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons marked a significant moment in the debate surrounding these devastating weapons. However, in the face of evolving global threats, particularly exemplified by Russia's recent aggression against Ukraine and its nuclear posturing, the adequacy of this opinion demands re-examination.

2. Research status.

Since the issuance of the Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons in 1996, a significant number of publications with thorough analyses of the verdict have been published, in particular, Singh J., Arkin W., Falk R., Hilpold P., Bothe M., Koroma A., Koskeniemi M., Thüre D. However, certain pertinent issues, particularly regarding the urgent need for a review of the opinion and the adoption of an international legal act regulating the threat and use of nuclear weapons, remain underexplored considering the current world crisis.

3. The purpose of the article.

The research aims to re-examine the Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons issued by the International Court of Justice in 1996. Specifically, it seeks to analyse whether international law regarding the threat and use of nuclear weapons should be reconsidered considering evolving global threats, particularly in the context of Russia's persistent nuclear threats against Ukraine. The study intends to provide insights into the adequacy of existing legal frameworks and propose potential revisions or amendments to address contemporary challenges effectively.

4. Presentation of the research material.

On August 6 and 9, 1945, the United States became the first in human history to deploy nuclear weaponry. The objective behind such action was to force Japan into surrendering and to conclude the Second World War. After the nuclear bomb was used in Hiroshima, the 'father of the atomic bomb,' J. Robert Oppenheimer, remarked, 'We knew the world would not be the same. A few people cried. Most people were silent. I remembered the line from the Hindu scripture, the Bhagavad-Gita; Vishnu is trying to persuade the Prince that he should do his duty, and to impress him, takes on his multi-armed form and says, "Now I am become Death, the destroyer of worlds." I suppose we all thought that one way or another.'

As anticipated, the global order was irrevocably altered – the U.S. demonstrated to the world that those possessing weapons of mass destruction held global power. Throughout the Cold War (1946-1991), nuclear armament was fostered, famously known as the ‘nuclear arms race’ between the USSR and the U.S. Possession of nuclear weaponry politically functioned as a symbol for each state to showcase its strength, wealth, and adherence to nuclear deterrence policies, notably recognized as Mutually Assured Destruction [8].

Through a formal letter dated December 19, 1994, and officially recorded on January 6, 1995, the Secretary-General of the United Nations communicated the General Assembly’s decision. This decision, encapsulated in resolution 49/75 K on December 15, 1994, involved the submission of a crucial query to the Court for an advisory opinion: ‘Is the threat or use of nuclear weapons permissible under international law in any circumstance?’ The urgency of the matter was underscored, requesting the Court to expedite its advisory opinion [6].

Prior to the advisory decision, significant tensions existed between nations advocating for the retention of nuclear arms for their security, such as the United States, United Kingdom, and France, and those vehemently pushing for their complete elimination due to the global threat, notably countries like Japan, Germany, and a few others affected by nuclear risks.

Before the International Court rendered its advisory decision, a fervent exchange of arguments ensued from both sides. Advocates for nuclear arm retention emphasized its role in deterring conflicts and ensuring their own security. However, proponents for nuclear disarmament highlighted the risks of usage and its potential consequences, citing a global threat.

Finally, on July 8, 1996, the ICJ issued its advisory opinion on the Legality of the Threat or Use of Nuclear Weapons.

The Court delved into international laws and treaties pertaining to the violation of the right to life and environmental protection (Opinion, para. 24-33), recognizing the unique and catastrophic effects of nuclear weapons due to their aftermath of radiation and material destruction (Opinion, para. 35) [7].

The Court explored whether nuclear weapons aligned with the principles of proportionality and necessity in self-defence during armed conflicts. It noted that these principles did not inherently rule out weapon use [3]. Seeking specific laws, treaties (*lex specialis*), and customary international law prohibiting nuclear weapon use, the Court found no explicit sources. The Court, however, does not find particular legal sources and it claims that the prohibition of the use of nuclear weapons is hampered both by the nascent *opinion juris* (an opinion of law) of the illegality of nuclear weapons and by years of practicing deterrence policy by some states (Opinion, para. 73) [4; 7].

The Court refrained from definitively determining the legality of nuclear weapons, “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 in an extreme circumstance of self-defence, in which the very survival of a state would be at stake” (Opinion, para. 96) [10; 7].

The adoption of this advisory decision marked a crucial milestone in global discourse on nuclear safety and the threat posed by nuclear arms, providing a legal foundation for further discussions and initiatives in this realm.

The Court, in its final determinations, chose to adhere to the request for an advisory opinion with a majority of thirteen votes in favour and one opposing.

The Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons was summarized by Jasjit Singh as follows [9, pp. 160-161].

The International Court of Justice maintained that, despite the absence of an explicit global agreement banning nuclear weapons, their threat or use contradicts International Humanitarian Law. The Court unanimously stressed that employing these weapons must adhere to humanitarian law, considering their effects and the context of their use, especially in situations where they fail to differentiate between civilian and military targets (Opinion, para 86, 105D) [7].



The Court affirmed that the possession and deployment of weapons with an expressed intent to use them in circumstances violating the principles of necessity and proportionality would constitute an illegal threat. Additionally, it emphasized the requirement that even a proportionate nuclear response must comply with humanitarian law (Opinion, para 47, 48, 42) [7].

Recognizing the considerable challenge in reconciling the use of nuclear weapons with humanitarian obligations, the Court highlighted 'the use of such (nuclear) weapons is in fact scarcely reconcilable with respect for such requirement' (Opinion, para 95) [7]. Court noted that no state making submissions to the Court provided a plausible scenario in which the use of nuclear weapons would be lawful (Opinion, para 94) [7].

The Court could not decide whether threat or use of nuclear weapons by a state would be lawful if its 'very survival would be at stake' (Opinion, para 97) because it did not have sufficient detailed information before it abutted the precise circumstances of such an event (Opinion, para 95), but the President of the Court, Judge Bedjaoui, said that this 'cannot in any way be interpreted as a half-open door to the recognition of the legality of the threat or use of nuclear weapons' [7].

The Court unanimously decided that 'there exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspect under strict and effective international control' (Opinion, para 105F) [7].

During the formulation of the conclusion, there were numerous remarks regarding its content and wording, which further escalated after its final adoption. It's worth noting that despite its significance, the conclusion of the international court faced criticism from scholars. Below are the main cornerstones of the conclusion and their analysis.

Firstly, the Court frames the question at issue, as 'Is the threat or use of nuclear weapons in any circumstance permitted under international law?'

The crux of the paradox in the Advisory Opinion on The Legality of The Threat or Use of Nuclear Weapons revolves around the nuanced choice of words – specifically, the contention between using 'permitted' versus 'prohibited' in the formulation of the General Assembly's question. Legal experts and lawyers dissect this paradox, drawing insights from international legal precedents and principles.

The objection raised by certain states during both written and oral submissions centered on the critical distinction between 'permitted' and 'prohibited' in the context of international law. Their argument stemmed from the belief that only an explicit prohibition, either in a treaty or customary law, would unequivocally bind states, mandating them not to engage actions. This stance finds support in the Lotus case of the Permanent Court of International Justice, which emphasized that international law does not presume restrictions on states; rather, limitations must be explicitly expressed, ideally in the language of a treaty [1].

This paradoxical debate underscores the inherent tension within international law regarding the presumption of rights versus limitations. Those advocating for 'prohibited' argue that without a clear, express prohibition regarding the use of nuclear weapons, states retain an absolute right to utilize them. However, the General Assembly's choice of 'permitted' in the formulation of the question raised doubts about the extent to which this terminology could restrict or imply allowance within the legal context.

Lawyers and legal experts continue to analyse this paradox, contemplating the intricacies of language within international legal frameworks and the profound impact a single term can have on the interpretation and application of laws governing such contentious issues as the use of nuclear weapons.

Tomonori Teraoka in her article uses an in-depth analysis of the conflict between the use of 'permitted' and 'prohibited'. She is using The Greimasian Square (Fig. 1) clarifies this relationship (See QUESTION B and ASSUMPTION B) [10, p.120].

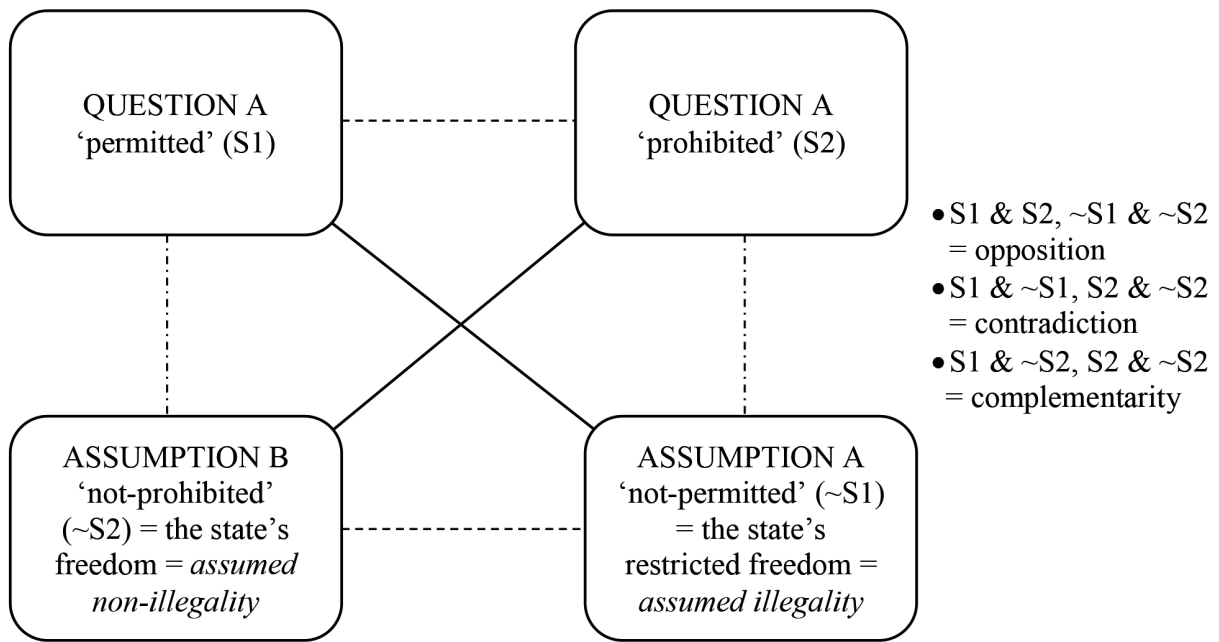


Fig. 1 The Greimasian Square

In the Nicaragua case, the Court acknowledged a state's autonomy to act freely within international law, emphasizing that 'in international law, there are no rules restricting a sovereign State's armament level, except those it accepts through treaties or otherwise'. However, the usage of the term 'permitted' by the Court indicated that, under certain circumstances, the use of such weapons is 'not allowed', aligning this view with principles found in international humanitarian law (refer to QUESTION A and ASSUMPTION A). Nevertheless, the Court later stressed that the illegality of weapon usage doesn't stem from a lack of permission but rather is established as a prohibition, contradicting the initial framing of the issue. This shift in emphasis implies a significant alteration in understanding, transforming the notion from 'permitted' to 'prohibited', thereby reshaping the perception of the weapons' legality. Consequently, the burden of proof shifts from assuming the weapons are 'not allowed' to establishing their 'not prohibited' status, altering the Court's initial stance regarding state autonomy. Secondly, is the 'possession' of nuclear weapons a threat to their use?

Article 2, paragraph 4 of the United Nations Charter is a cornerstone in international law, explicitly prohibiting the use or threat of force against a state's territorial integrity or political independence. However, despite its significance, the interpretation of what constitutes the "threat of force" remains vague and contentious, especially concerning the possession and potential use of nuclear weapons.

The International Court of Justice (ICJ) has grappled with the question of defining the threat of force, particularly in the context of nuclear weapons. It attempted to link the concept of threat to the actual use of force, considering the former as subordinate to the latter. However, this poses challenges, particularly when applied to nuclear deterrence strategies. The prevailing logic behind nuclear deterrence relies heavily on the symbolic nature of possessing nuclear weapons rather than actual intent to use them.

In the ICJ's interpretation, the possession of nuclear weapons becomes significant in the realm of international politics due to the principle of deterrence. However, the critical question arises: does the mere possession of nuclear weapons inherently imply a threat? The Court acknowledges the credibility of intent to use nuclear weapons as a factor related to their possession. But it remains ambiguous whether credible intention, coupled with possession, constitutes an implicit threat of use.

Various scholars and legal experts have attempted to define and categorize the concept of the threat of force in international law. Some distinguish between oral or verbal threats, such as explicit coercion,



and non-verbal threats, which can include military demonstrations or troop build-ups. Yet, the challenge remains in determining when the possession of nuclear arms inherently signifies a threat, especially considering the ambiguous and subjective nature of such interpretations.

While possessing nuclear weapons might not explicitly translate to an immediate threat according to some legal perspectives, the real-world implications often diverge. Non-Western states, like North Korea and Iran, have pursued nuclear capabilities due to perceived threats from nuclear-armed nations. Conflicts, such as the arms race between India and Pakistan, have arisen from such perceptions of threat and the need for strategic parity.

The legal and semiotic interpretation of nuclear possession often diverges. International law tends to view possession as non-threatening unless explicitly declared. However, some states, influenced by historical and political contexts, perceive nuclear possession as an inherent threat due to the power dynamics and historical conflicts involving nuclear-armed nations.

Ultimately, the challenge in defining the 'threat of force' concerning nuclear weapons lies in navigating the complex interplay between legal interpretation, historical contexts, political perceptions, and the inherent ambiguity surrounding possession and intent in the realm of nuclear deterrence.

For the third time, what is Concept of state survival?

The concept of state survival, while central in the discussed opinion, presents a vexing ambiguity due to its lack of explicit definition and its historical nonexistence as a distinct legal notion. This section of the analysis endeavours to delve into the nuanced layers of this concept and how the Court's adoption of it could potentially exert considerable influence, granting an almost unchecked authority to the state over legal principles.

In paragraph 96, the Court elevates state survival to the status of a fundamental right and grounds it in self-defence. However, this alignment raises significant legal and conceptual concerns. Traditionally, the legal grounds for self-defence are associated with specific conditions or contexts under the law of war, primarily involving the existence of an armed threat, rather than the precariousness of a state's survival itself. If the vague and expansive notion of state survival is admitted as grounds for self-defence, it could conceivably allow a state unrestrained access to utilize any means, including weapons and violence, under the pretext of preserving itself.

The essence of state survival is intertwined with several facets of state sovereignty, such as international legal recognition, territorial integrity, and political independence. In the global legal framework, a state's sovereignty hinges on acknowledgment by other member states. Even if a state is recognized, irrespective of its material or functional existence, it survives based on the fundamental principles of territorial integrity and political autonomy endorsed by the international community.

Yet, the intricate components of state survival encompass more than just acknowledgment. The preservation of the state encompasses a nuanced interplay of territorial, functional, and even cultural elements. However, neither international law nor prior legal precedents explicitly define or address the precise conditions under which state survival is genuinely at risk.

This ambiguity raises crucial legal and philosophical questions. Does state survival represent an inherent right of the state or serve as a principle aimed at preventing wrongful acts? The former is unlikely within the current legal framework due to its arbitrary nature and historical associations with outdated notions of state sovereignty. Conversely, the latter interpretation, rooted in the concept of state necessity, emerges as a potential avenue. However, notably, the Court does not explicitly invoke the state of necessity within the Opinion.

Moreover, international law doesn't inherently guarantee a state's perpetual existence. Instead, it operates within the parameters that respect the existence of other states. In this context, perceiving state survival as an absolute and inviolable right or as an exemption from potential threats contradicts the essence of international cooperation and mutual recognition among sovereign entities. It's crucial to consider state of necessity as an excuse rather than a fundamental right, as it subjects a state's resort to violence for self-preservation under stringent legal scrutiny.

The Court's preference for framing state survival as a right rather than an excuse generates significant implications. This choice aligns with the semiotic object of rights over excuses, creating potentially dangerous constraints. It potentially rekindles archaic notions of state-preservation, disrupting the balance between individual rights and the sovereignty of a state.

While the opinion does shed light on the contentious concept of state survival, it leaves critical questions unanswered. What truly defines state survival, and how should legality be gauged in desperate attempts for survival? When individual rights conflict with state survival, which should be prioritized? These intricate and multifaceted issues remain unresolved, leaving substantial room for further exploration and legal deliberation.

5. Conclusion.

Regarding the need to review the World Court's advisory opinion on *The Threat or Use of Nuclear Weapons* issued in 1996, after analysis, it becomes clear that Opinion marks a pivotal but incomplete step towards eliminating these weapons. Despite not entirely eradicating nuclear arms, the judgment holds significant implications. Notably, the Court unanimously ruled that there exists no explicit legal sanction, whether through custom or convention, for the threat or use of nuclear weapons. This pivotal stance calls for the establishment of appropriate legal frameworks. Jasjit Singh mentions that it's ironic, if not tragic, that while there's a convention against landmines, there's a reluctance to progress toward a similar treaty to regulate nuclear weapons. Such a treaty, at the very least, would establish norms discouraging the use of nuclear arms [9, p. 161].

The Court's analysis, under Article 38 of the International Court of Justice's Statute, considered various legal frameworks. However, the conclusions drawn seemed inadequate, appearing more as concessions to advocates seeking a clear prohibition against nuclear arms' threat and use. The Court's acknowledgment of International Humanitarian Law's applicability to nuclear weapon use overlooked critical aspects of proportionality and environmental consequences. Furthermore, the absence of commentary on scenarios aligning with IHL raised concerns. Additionally, the Court's interpretation of paragraph 105(2) (E) seemingly suggests that a state could breach IHL principles when its own survival is at risk, a position that clashes with the spirit of international law.

Although the Court's opinion ostensibly aimed to support international legal principles, it diverged from the expectations of the United Nations General Assembly (UNGA) seeking a more explicit stance against nuclear weaponry threats and usage.

The necessity for adopting international norms that regulate the use and threat of nuclear weapons is more pressing than ever due to Russia's military aggression against Ukraine and Putin's penchant for nuclear bravado. While adherence to international law may not be inherent for Russia, such norms would provide a clear framework for Ukraine and the world. The 1996 conclusion is far removed from today's realities and appears more as a formality than comprehensive rules of engagement. However, quoting Sings 'As long as the dominant elites in society and the nation-state believe in the utility of nuclear weapons for national security or as the currency of power, abolition of nuclear weapons would remain a mirage', the decision to establish legislation regarding the use and threat of nuclear weapons is not as easily reached [9, p. 163].

Falk's assessment highlights the complexities ingrained in altering the global nuclear weapons landscape. He points to the inherent problems of the current world order rooted in territorial sovereignty and geopolitical power dynamics, incapable of adequately addressing critical global issues like climate change and nuclear armament. His proposed remedy involves a shift towards a more humane global governance, transcending national boundaries and prioritizing people over markets and states. However, relying solely on civil society's influence seems insufficient in challenging the entrenched power of governments and agencies striving to maintain the status quo. Change, Falk suggests, necessitates both internal transformation and external pressure, acknowledging the limitations of solely external advocacy efforts [5].

While the judgment aimed to uphold international legal principles, it fell short of meeting the United Nations General Assembly's expectations for a more explicit stance against nuclear weaponry threats and



usage. The importance of revisiting and revising this decision in the near future is paramount, especially amidst contemporary challenges that increasingly edge the world towards a nuclear catastrophe. Establishing comprehensive international legislation regarding nuclear arms becomes imperative to mitigate the looming risks and ensure a safer global future.

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