

## CHAPTER II

Urging No First Use of Nuclear  
Weapons on the World Court

*A legal theory is devised whereby the International Court of Justice (known as the World Court) could, if it wished, ban the first use of nuclear weapons. The court is lobbied in unusual ways. Its unexpected and Delphic decision tells us quite a bit about the calculus of its decision making and the interplay between law and politics in which the tautological can become politically potent.*

In the summer of 1995, while working on related newsletters, I pondered the fact that the United Nations General Assembly was given to passing resolutions, almost every year, condemning the use of nuclear weapons. But the votes were always about a hundred in favor and twenty against, with the nuclear powers opposing; because they were not sufficiently unanimous, these declarations had little effect on international law. Recalling that the other weapons of mass destruction, chemical and biological, were already deemed illegal by various conventions, I wondered whether a resolution would pass if it took the following form: “Resolved: The use of any weapons of mass destruction such as biological, chemical, and nuclear weapons is hereby prohibited.”

My thought was that the nuclear states might vote for this with the reservation that they understood it as a contract—something they would obey only so long as others did not violate it. This had been the approach to the ban on poison-gas warfare. The Geneva Protocol precluded chemical warfare under any circumstances. The

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United States and others endorsed it. But they continued to build such weapons in case the other side violated it.

Under these circumstances, my draft resolution would have, in effect, banned only “first use” of nuclear weapons and, indeed, literally, only first use of a weapon of mass destruction, since it would have permitted use of nuclear weapons following chemical or biological weapons use. But this seemed to me worth doing. And as part of the plan, a high-sounding resolution that seemed to do more, much more, would be adopted and this would help the anti-nuclear campaign.<sup>[150]</sup>

As I pondered this idea, I learned something that I should have known before. A group of antinuclear activists, grouped together since 1992 under the aegis of a World Court Project, had persuaded the United Nations General Assembly to ask the International Court of Justice this question: “Is the threat or use of nuclear weapons in any circumstance permitted under international law?”<sup>[151]</sup> In effect, the World Court Project had decided to try to circumvent the General Assembly’s failure to ban nuclear weapons by asking the court a yes-no question. The case was to be heard in November 1995. I decided to try to reshape the resolution idea into something the court, rather than the General Assembly, could say. The reformulated declaratory proposition was simple: “The use of any weapons of mass destruction such as chemical, biological, or nuclear weapons is, and ought to be declared, illegal under international law.”<sup>[152]</sup>

I decided to try an amicus brief. A splendid international lawyer, Burns Weston, polished my draft (twice) and helped put it into a proper form. The brief explained that the Federation of American Scientists was not a group of lawyers but nevertheless had a strong interest in the subject, knew what the political traffic would bear, and wanted to be helpful. I mailed it off to the court.

At the last minute, I also decided to try to place an article summarizing the amicus brief in *The International Herald Tribune*, where the judges would be likely to read it. And after sending it off

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and mailing separate copies to the fourteen sitting judges, I decided to go to The Hague (nothing ventured, nothing gained) and see the opening of the proceedings.

It seemed impossible to me that the World Court Project could be successful. Judges on the World Court vote as their nations want 80 percent to 90 percent of the time, either in the hope of having their nine-year terms renewed or because they are chosen to have views compatible with their nation-state's perspective. How could such a court—which included seven judges from countries that either were nuclear states or were allied with them—do other than split if it were given no other option than to abandon even nuclear deterrence (i.e., nuclear retaliation for nuclear attack)? Our no-first-use proposal, dressed up as an absolute ban, seemed the only politically feasible alternative.

It was very exciting watching the hearings open and seeing, for the first time, the World Court. But the judges rarely ask questions of the petitioners, and when they do, the answers are provided for the record. So life is easy for the lawyers. A day of this was enough for me.

On Tuesday morning, at the Amsterdam airport, I saw that *The International Herald Tribune* (God bless it) had printed my op-ed piece summarizing the amicus brief. Thus the judges would all see it! I later learned, quite indirectly, that the court had debated, that morning, whether to accept the amicus brief as part of its records; the court had declined to do so. In its fifty-year history the court had only once solicited an amicus brief (which it never received) and had *never* accepted one. It was a tribute to our brief, and the fact that it had been published, that the court considered accepting it. Normally, whoever had the temerity to send such an unsolicited communication received a polite note of rebuff stating that the document had been put in a special reading room where the judges could read it if they wished. Such briefs were not, however, made part of the record.<sup>[153]</sup>

But I knew nothing of this as I entered the aircraft. Instead, I was

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walking on air. It was, in fact, to become a red-letter day. In the first place, I was sexually harassed by an attractive stewardess. And in the second place, I had another idea.

This idea was rooted in an unusual experience involving the Gulf War. In August 1990, I had dimly recalled that back in 1978 President Carter had instructed Secretary of State Cyrus Vance to say something related to no first use of nuclear weapons at the UN. Carter had wanted, no doubt, to adopt a doctrine that was as close as possible to a flat out “no-first-use” doctrine on nuclear weapons. But “no first use” unqualified was clearly impossible in the face of fears of the overwhelming Soviet conventional attacks on Western Europe. First use of nuclear weapons, as a response, had been the touchstone of Western strategic policy since the early fifties.

No doubt Carter had asked whether he could say, at least, that the United States would not use nuclear weapons against non-nuclear states. The sticking point here was North Korea, which might lurch forward and seize South Korea’s capital of Seoul unless deterred by some overwhelming threat. Accordingly, the Carter administration drafted a policy statement designed to “grandfather” the Korean conflict. It said, in effect, that the United States would not attack nonnuclear states, even if they were carrying out an aggression, so long as they were not “allied to a nuclear-weapons state or associated with a nuclear-weapons state” in carrying out their attack.

This would take care of North Korea, which, based on memories of the Korean War, would never attack, it was felt, without support from Russia or China. In a wholly pointless addition, the administration further decided not to offer this assurance to states that were not cooperating with the Nuclear Non-Proliferation Treaty, thus leaving out India, Pakistan, and Israel (none of which needed this assurance). As a result, the “negative security assurance” got fairly complicated and arcane, and, as a further result, it was little discussed and few people ever heard anything about it.<sup>[154]</sup>

When Iraq invaded Kuwait on August 2, 1990, fears began to cir-

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culate that the United States might use nuclear weapons in the war. I then dug this negative security assurance doctrine out of a reference book. But, unsure whether the Bush administration supported this Carter administration doctrine of a dozen years before, I wrote to the director of the Arms Control and Disarmament Agency (ACDA), Ronald F. Lehman II, on August 15 and asked him. His response of August 28 said that, indeed, the Carter assurance had been "reaffirmed by successive Administrations" as recently as August 21, three weeks after the war with Iraq broke out. And it had been called, on March 13, 1990, a "firm and reliable statement of U.S. policy" by the U.S. ambassador to the Geneva Conference on Disarmament.

Six months after the war began, on February 5, a front-page article in *The Los Angeles Times*—"American Support Grows for Use of Nuclear Arms"—quoted an unnamed official who said, "We have never forsworn nuclear use in the past, and if we did so now, we'd lock ourselves into making the same statement in every future crisis." Accordingly, on February 7 FAS released the exchange of letters between Lehman and me in a statement entitled "Nuclear Weapon Use Already Precluded by U.S. Policy." This exchange of letters has become a kind of footnote in history. It confirmed that the U.S. policy opposing the use of nuclear weapons in wars with nonnuclear states was deemed by at least some government officials to apply to the worst possible case: Iraq was a false adherent to the Nuclear Non-Proliferation Treaty, was engaged in a war with the United States, and was threatening to use prohibited weapons of mass destruction, such as biological and chemical weapons.

By the summer of 1994, the world had reached the point where it had become inconceivable that any of the aggressor states would be "allied to a nuclear state or associated with a nuclear weapon state" in carrying out an attack on U.S. forces or our allies. Put another way, Iran, Iraq, Libya, and North Korea were not going to get any help from nuclear powers in attacking our interests, nor were they allied with Britain, France, China, or Russia. And these potential

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aggressors were all, of course, nominally part of the Nuclear Non-Proliferation Treaty.

As a result, the qualifying phrases of the negative security assurance had become quite irrelevant. I drafted an editorial for the September–October 1994 FAS *Public Interest Report (PIR)* entitled “Nuclear Weapons: A No-First-Use Doctrine Exists for All Non-Nuclear States.” (Of course, some states were not signatories to the treaty—India, Pakistan, and Israel are the only ones of significance—but these, though not covered, were not countries the United States would ever threaten with nuclear weapons.)

All this was in my mind when I boarded the plane to return home. Furthermore, I knew that by this time the other nuclear powers (e.g., Britain, France, and Russia) had adopted parallel versions of this negative security assurance as part of the effort to win support in 1995 for extension of the Nuclear Non-Proliferation Treaty. And China had adopted a no-first-use policy in 1963.

With a blinding flash, it occurred to me that one could, with mathematical precision, prove that *nobody*, for all practical purposes, was threatening first use against *anybody*. The nuclear powers were not threatening the nonnuclear states. And the nuclear states were not threatening one another. First use against a powerful Soviet Union became moot after the collapse of the Soviet regime rendered Russia too weak to present a conventional threat to NATO. Russia had offered China a no-first-use pledge. Was Britain threatening France, etc.? I knew vaguely that there was something called customary international law in which a policy followed by *nearly* all states could become binding on *all* states. Suddenly, this seemed a perfect solution to the problem faced by the court. Obviously, the court would not denounce the policy of nuclear deterrence—the threat of nuclear retaliation for nuclear attacks. Nor should it opt out of the case on some procedural grounds. Instead, it could pronounce nuclear first use as a policy that had been abandoned by the community of states.

On returning to Washington from The Hague, I wrote up my

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ideas as an op-ed piece and sent it to *The International Herald Tribune* on the very slight chance that lightning might strike twice.

One of the judges had acknowledged my amicus brief by letter and perhaps recognized that FAS had a right to be heard as the conscience of the original atomic scientists. Accordingly, I sent the judge an advance copy of my latest article, as well as my exchange of letters with Lehman. I received a brief acknowledgment stating that the material had been of "intense interest."

It was obvious that the judges knew little about strategic analysis, doctrine, or facts. Emboldened by the acknowledgment, I wrote a third op-ed-length piece observing that the pleadings they were receiving from interested parties were no substitute for testimony or evidence from disinterested parties. I had earlier lunched with a real expert on the World Court, Keith Highet, and learned there was an untried way to get such evidence. As a result, my article observed, I hoped learnedly, that the court ought to try, under its unused Article 50 of its statute, to seek expert opinions. I sent this off, and it was politely acknowledged. But I doubted very much it would have any effect.

I then learned, through a call to Paris, the stunning news that the *Tribune* was actually thinking of running my second piece. My old friend Dick Falk, a legal expert for the World Court Project, had commended the amicus brief and liked this idea also; he said that he would, if I wanted, work with me to develop the legal basis for the concept of using customary law. Burns Weston also offered his help. Thus encouraged, I decided to return for the last three days of hearings, which included the day at which the alphabetically rear-guard United States and United Kingdom would testify.

On the first of these days, November 13, the *Tribune* printed my article; given the sparse coverage of this World Court proceeding, my ideas on this subject were getting more attention than all the other commentary put together.

The British pleaders were magnificent in style and made our own officials, who pleaded immediately thereafter, seem like provincials. Officials from both countries told the court that the "specific cir-

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cumstances” and “sizes” of nuclear weapons made any court determination about first use a technical issue beyond its competence. But the British, in what a psychiatrist would call “leakage” from a reticent patient, said that the international community had “sensibly elected to draw a veil of constructive silence” over the issue of legality of nuclear weapons.

On returning, I prepared a rebuttal to the U.S. and U.K. testimony—the title was “No Such Thing as a Limited Nuclear War: U.K. and U.S. Try to Mislead the Court”—and sent it to the same judge. After all, I wrote, since the 1950s all strategists had agreed that there was no reliable “fire-break” between nonuse of nuclear weapons and, on the other hand, bilateral spasms in which virtually all deployed nuclear weapons are fired. No matter how small the bomb first used or how limited the circumstances, the head of state—not technicians—would make the decision. And in the minds of those chief executives would be the inevitability of escalation to full-scale nuclear war. It was, in fact, embarrassing to watch the U.S. representative from the Defense Department tell the court that limited nuclear war was possible—something no serious book on strategy had countenanced for decades.

When this rebuttal was acknowledged by one judge, I was already hard at work on another: “Divide the Question Rather Than the Court: Truths No State Dared to Plead.”<sup>[155]</sup>

When that was acknowledged, I prepared and sent to the court a final tutorial entitled “What Is Extended Deterrence?” In this piece I tried to educate the court about the way in which the NATO doctrine had developed, and I gave reasons why the abandonment of first use could be accepted.

In the end, I had published two op-ed pieces for a newspaper the judges would likely read, and I had sent the court four more brief analyses.<sup>156</sup> I rested because I had nothing more to say. I had tried to provide the court with the accumulated wisdom not of the legal profession but of the arms controllers. Although the court had refused to acknowledge my amicus brief—and had led me to wear a

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button on later trips bearing the words "failed amicus"—I felt that I had been a true "friend of the court." I later confirmed that the op-ed pieces had been distributed internally through the court. There was nothing more I could have done.

Seven months later, on July 8, 1996, when the court announced its advisory opinion, I was there. The long background opinion of the president of the court, as read, and the first four agreed court conclusions that he recited seemed unremarkable.

But after the fifth conclusion was read—a two-sentence observation that had been passed only by a seven-seven tie and a tie-breaking vote of the chief justice—there was a crush in the press room so great that when I tried to get a copy of the opinion, my glasses were almost broken and a bag I was carrying was ripped from my shoulder.

On these two sentences, instead of a seven-seven polarization between third-world doves and NATO or nuclear-state hawks, the court evinced a center of seven judges who left, in dissent, two hawks, two doves, two cop-outs, and a Frenchman. Since the center half included the president, who has a deciding vote in ties, the center was a majority. This two-sentence decision, designated as point E, read, in its entirety:

It follows from the above-mentioned requirements that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law.

However, 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-defense, in which the very survival of *a* State would be at stake. (emphasis added)

This decision called the use of nuclear weapons "generally" unlawful but it said it did not know whether the "threat or use" was

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“lawful or unlawful” in the extreme cases in which the “very survival” of a state would be at stake.

The president of the court, in his summary conclusion, stated that with the requirements that the court had demanded, “the use of such weapons in fact seems scarcely reconcilable.”<sup>157</sup> On the other hand, with regard to just about any “imaginable circumstance” of nuclear use considered by the nuclear powers in the post-Cold War era, the court said it was uncertain. And under international law, the court’s uncertainty permits states to do as they wish. Thus basic nuclear deterrence itself was certainly not ruled unlawful. Under this “extreme-circumstance” doctrine, the United States could threaten the wide-scale use of nuclear weapons against Russia in an effort to deter the Russians from destroying the United States.

More surprisingly, the United States could also continue to threaten first use of nuclear weapons to prevent conventional attacks designed to overthrow foreign governments. For example, the United States could threaten Russia with the use of nuclear weapons to deter the overthrow of the Federal Republic of Germany by Russian conventional forces, or it could threaten North Korea with nuclear weapons if that Communist regime threatened to overthrow the government of South Korea. And “a” state (in our example Germany or South Korea) has the right to protect itself—qua government—even if its population were not threatened by nuclear death and would, perhaps, in the face of a conventional attack, rather be red than dead.

In sum, the court did not dare to deny NATO its residual first-use threats. From a legal point of view, the court felt obliged to do so because, in its eyes, collective self-defense by states is fully protected under the UN charter (so the Federal Republic of Germany can ask the United States for a protective umbrella). And, from a practical political point of view, Court President Bedjaoui, an Algerian, could not have gotten the seven votes he needed to make up his majority had he not done so. In particular, the German judge, Carl-August Fleischhauer, wrote that the “inherent right of

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self-defense . . . would be severely curtailed" if nuclear weapons were ruled out in "collective" self-defense. It is significant that in President Bedjaoui's summary for the court, he uses, instead of "a", the word "the." Had the word "the" been approved by the six other judges, the court would have ruled against the first use of nuclear weapons unless they were themselves threatened with overthrow from a conventional attack. It was that close.<sup>158</sup>

So both second use and NATO first use, and indeed, also first use against invading nonnuclear states, are permitted if they threaten the survival of some government. What about circumstances that are "not extreme"? The ruling says that nuclear weapons are "generally" prohibited, and that any use or threat of use must conform to the principles of "necessity and proportionality."<sup>159</sup> But there are circumstances that fit between "generally" and "extreme" circumstances in which the "very survival of a State" would be at stake.

So perhaps, under this opinion, the United States could threaten the use of nuclear arms against Iraq if Saddam Hussein were threatening to use chemical or biological weapons in war.<sup>160</sup>

It may seem strange that the court's advisory opinion consistently treated "use or threat of use" of nuclear weapons as a single indivisible phrase. (In short, the court ignored my op-ed piece entitled "Divide the Question Rather Than the Court.") Why did it? The court failed to make the commonsense distinctions between use and threat because international law considers it illegal to *threaten to do* what is illegal to *do*.<sup>161</sup> And the court failed to distinguish between first use and retaliatory use because it saw the real issue as the gravity of the threat confronting the state being attacked.

Above all, the court was unwilling to highlight the nearly universal significance of the negative security assurances on which I had put such store. Perhaps this is where the court felt it was hampered by a lack of "elements of fact at its disposal"—none of these facts had been put in evidence, and they did have to be applied. But it did incorporate them, with vague references to undertakings of states.

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## Experts Confused

Eight days later, in Washington, a panel of six experts convened to discuss the decision before an audience of about one hundred listeners; the group was sponsored by the Arms Control Association, the American Society of International Law, and the Lawyers Alliance for World Security. The panelists included the representatives of the departments of state and defense who had appeared before the court.

None pointed out that the decisions permitted first use in NATO (and would have done so in general except for a quiet court incorporation of the negative security assurances—which the U.S. government may be quietly abandoning). Three of the panelists actually misstated what the court had concluded. For example, one panelist said we should now take our nuclear weapons off our ships since first use was now prohibited in the defense of other states like South Korea.

The incredible fact was this: The World Court had devised an opinion so Delphic and subtly drafted that even a week later, the world's experts failed to notice that the ruling had, really, built its case around the existing policies of the nuclear powers. When I pointed this out from the floor there was general incredulity until the representative of the World Court Project, in what lawyer's would call advice against interest, said: "Jeremy is right." (Our two public interest groups had a greater insight into what the World Court had done than the government bureaucracies—something that is increasingly common in a world full of highly motivated activists.)

In a certain political logic, by providing much useful rhetoric, the court made an advance that would help rally antinuclear activists everywhere against nuclear weapons use. But the legal calculus used by the court departed from common sense (threat might be an appropriate deterrent when use is not), from strategic analysis (first use versus second use), and from real-life problems (such as use of other prohibited weapons of mass destruction).

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In any case, fifty years after our atomic-scientists movement had been created to prevent the further use of nuclear weapons, we had managed to get our two bits in before the World Court—despite the absence of a state sponsor and despite the fact that we argued something that no state pleading had had the sense to try. We had shown that, at least in our case, one could lobby the World Court.

In the end, as one shrewd and experienced observer advised me, the court had done something that courts do in difficult cases: It had given the decision to one side (the nuclear powers) and the language to the other (the antinuclear forces).