

How Many Points of the Law is Possession?

Possession is nine points of the law, say the skeptics. And well they might, when it comes to objects the legality of which is in dispute. Like nuclear weapons. But let us suppose that, in some not too distant future, the total illegality of the threat or use of nuclear weapons becomes generally accepted. Will it still be legal to own them? Or can a case for the illegality of their possession be made even now? And should it be made?

The last question is not as farfetched as it may seem. In its opinion in the nuclear weapons case, the International Court of Justice said:

Some States put forward the argument that possession of nuclear weapons is itself an unlawful threat to use force. Possession of nuclear weapons may indeed justify an inference of preparedness to use them. In order to be effective, the policy of deterrence, by which those states possessing or under the umbrella of nuclear weapons seek to discourage military aggression by demonstrating that it will serve no purpose, necessitates that the intention to use nuclear weapons be credible. Whether this is a “threat” contrary to article 2, paragraph 4, depends upon whether the particular use of force envisaged would be directed against the territorial integrity or political independence of a State, or against the Purposes of the United Nations, or whether, in

the event that it were intended as a means of defence, it would necessarily violate the principles of necessity and proportionality. In any of these circumstances the use of force, and the threat to use it, would be unlawful under the law of the Charter.¹

The Court has provided no guidance on how to predict, in advance of the event, whether a use of one or more nuclear weapons would be envisaged as directed against the territorial integrity or political independence of another State, or be contrary to the purposes of the United Nations, or, if used in defense, would violate the principles of necessity or proportionality. Indeed, this injection of something akin to a *mens rea* requirement, or an ability to see into the future, seems somewhat odd.

But we know that, in its conclusions, the court held unanimously that

A threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict².

This cautious mandate seems to leave open the possibility that there may still be a minimal role for nuclear weapons. Yet in the

¹ *Legality of Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 2006, I.C.J. Reports 1996, pp. 246-247

² *Id.*, p. 266

body of the opinion leading up to the conclusions we find the Court saying

[T]he principles and rules of armed conflict – at the heart of which is the overriding consideration of humanity – make the conduct of armed hostilities subject to a number of strict requirements. Thus, 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, to which the Court has referred above, the use of such weapons seems scarcely reconcilable with respect for such requirements.³

This brings us tantalizingly near to closing the circle of absolute prohibition of threat or use. All it would take is substituting “is not reconcilable” for “seems scarcely reconcilable.” But if possession is threat, and if threat is prohibited regardless of the conditions which make threat illegal, referred to above, then possession must be illegal.

“Are we there yet?”, as children are wont to ask in the course of a long car ride. For the moment, all we can say is “Not yet. But soon.” We can also point, with some satisfaction, to the fact that possession of nuclear weapons is already outlawed by the Nonproliferation Treaty in the vast majority of the world’s states,

³ Id., p. 262

i.e. all those which are parties to NPT except the five which had them in 1968 and which have an obligation, under Article VI of the Treaty, to negotiate in good faith for their elimination.

And we can bear in mind that the outlawing of the possession of weapons and other devices which are inherently dangerous to health and safety is a common practice in many legislatures. A New Jersey law, for instance, outlaws the unlicensed possession of all kinds of firearms as well as “any other weapon under circumstances not manifestly appropriate for such lawful uses as it may have.”⁴ In the United States, federal law⁵ as well as the laws of many states⁶, prohibit the possession of weapons of mass destruction, usually defined as NBC, nuclear, biological and chemical.

A New York City law prohibits the carrying or possession in public of knives with a blade length of more than four inches. Like all such laws, it makes exceptions for lawful possession and lawful possessors. But for our present purposes, it is interesting to note that it begins with the following legislative findings:

It is hereby declared and found that the possession in public places, streets and parks of the city, of large knives is a

⁴ N.J.S.A..2C.39-4

⁵ 18 USC 2332a

⁶ e.g. Florida Statutes 90.166, North Carolina General Statutes 14-288.21

menace to the public health, peace, safety and welfare of the people⁷....

A similar finding, with no exceptions and of universal relevance, should be made about nuclear weapons, which the President of the Court, let us never forget it, called “the absolute evil”.⁸

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⁷ New York City Administrative Code 10-133

⁸ ICJ Reports 1996, p. 272

