The Advisory Opinion of the International Court of Justice on the legality of nuclear weapons

by Hisakazu Fujita

The Advisory Opinion handed down by the International Court of Justice (ICJ) on 8 July 1996 concerning the legality of the threat or use of nuclear weapons contains many elements that are of fundamental interest from the standpoint of international humanitarian law. Indeed, humanitarian law, which has developed to a remarkable extent since the Second World War, has always lacked an express ruling on nuclear weapons.

Although the nuclear issue had long been a topic of discussion within United Nations bodies and the Disarmament Commission in Geneva (later called the Disarmament Conference), it was avoided in preparatory work for the reaffirmation and development of international humanitarian law, in particular the 1949 Conference that adopted the four Geneva Conventions and the 1974-1977 Conference that drafted the Protocols additional thereto. As a result, the modern world has always had to live with the threat of nuclear weapons, that is, nuclear war. That threat loomed larger during the long years of the Cold War owing to the strategy adopted by the nuclear powers and their allies; and even now that the Cold War is over it has still not completely disappeared. In the present circumstances it was public opinion and the non-nuclear and non-aligned countries which took the initiative of asking the Court for an opinion, through such international bodies as the World Health Organization (WHO) and the United Nations General Assembly.

This initiative appears to bring a sort of public action before the court. For better or for worse, the Court accepted the request of the UN General

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Assembly (but refused that submitted by WHO). The Advisory Opinion itself, as a legal instrument, and the separate or dissenting opinions of the individual judges, are valuable documents for research into the legality of the threat or use of nuclear weapons, especially in situations covered by the treaty provisions and customary rules of humanitarian law.

Taking the text of the Advisory Opinion as a whole, one gains a strong impression that the judges made a tremendous effort to place restrictions on the threat or use of nuclear weapons by means of any pertinent rules of international law. Although the Court's findings result in a sense from a compromise on the part of the fourteen judges, the judges themselves gave their sincere individual opinions on a problem which is both difficult and sensitive not only from the legal viewpoint but also in political and military terms. Let us now examine a few significant or problematic points of the Advisory Opinion as they relate to humanitarian law.

Applicability of humanitarian law to the threat or use of nuclear weapons

One of the main points to be highlighted as far as humanitarian law is concerned is the fact that the Court gave an affirmative reply to the question of the applicability of humanitarian law in the event of the threat or use of nuclear weapons. Whereas it states in paragraphs 105 (2)A and B of its opinion that "there is in neither customary nor conventional international law any specific authorization of the threat or use of nuclear weapons" or "any comprehensive and universal prohibition" of the threat or use of nuclear weapons as such, it confirms in paragraph 105 (2)D that the threat or use of nuclear weapons "should also be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law (...)". This leads to the conclusion (see para. 105 [2]E) that the threat or use of nuclear weapons is generally prohibited under humanitarian law.

Humanitarian law must be applicable to all means of warfare, and particularly to weapons having uncontrollable effects, which include nuclear weapons. In 1963 the Tokyo District Court applied the principles and rules of the law of war in force at the time of the Second World War to the dropping of atomic bombs, then regarded as new means of warfare,[1] on Hiroshima and Nagasaki.

[1] Decisions of the Tokyo District Court, 7 December 1963, in *Japanese Yearbook of International Law*, No. 8 (1964), pp. 212-251 (English translation). H. Fujita, "Reconsidération de l'affaire Shimoda. Analyse juridique du bombardement atomique de Hiroshima et Nagasaki", *Revue de droit pénal militaire et de droit de la guerre*, Vol. XIXX-I-2, pp. 49-120.

The ICJ endorsed that view: "Indeed, nuclear weapons were invented after most of the principles and rules of humanitarian law applicable in armed conflicts had already come into existence" (para. 86).

It must also be said that during the work undertaken since the Second World War to codify and develop humanitarian law this crucial problem has always been avoided, and the Diplomatic Conferences of 1949 and 1974-1977 ignored it completely. The few nuclear powers attending the 1974-1977 Diplomatic Conference asserted that the rules set out in Additional Protocol I had no effect on the use of nuclear weapons and neither regulated nor prohibited their use.[2] However, to say the least, it would be odd and discriminatory to propose that, in the event of conflicts between States, some of which possessed nuclear weapons while others did not, the latter would have to apply the rules of Protocol I while the former would not if nuclear force were used.[3]

The Court is quite clear on that point: "However, it cannot be concluded from this that the established principles and rules of humanitarian law applicable in armed conflict did not apply to nuclear weapons. Such a conclusion would be incompatible with the intrinsically humanitarian character of the legal principles in question which permeates the entire law of armed conflict and applies to all forms of warfare and to all kinds of weapons, those of the past, those of the present and those of the future" (para. 86).

That finding leaves no doubt that humanitarian law applies to the possible use of nuclear weapons.

The threat of nuclear weapons or the policy of deterrence

The question submitted by the UN General Assembly covered not only the use but also the threat of nuclear weapons. Indeed, the issue of the nuclear threat is profoundly bound up with the policy of deterrence, although the Court did not consider it in depth.

In response to the argument upheld by certain States to the effect that the possession of nuclear weapons is in itself an unlawful threat to resort

[2] The United States declared: "It is the understanding of the United States of America that the rules established by this protocol were not intended to have any effect on and do not regulate or prohibit the use of nuclear weapons". *American Journal of International Law*, Vol. 72, No. 2, 1978, p. 407. Great Britain and France issued similar statements. *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts*, Geneva, 1974-1977, Vol. VII, CDDH/SR. 56, para. 3.

[3] See H. Fujita, *International regulation of the use of nuclear weapons*, Kansai University Press, Tokyo, 1988, pp. 161-185.

to force, the Court examined the policy of deterrence. This is the policy whereby States holding nuclear weapons or under the protection of such States seek to discourage military aggression by demonstrating that it would be pointless, thus lending credibility to the intention to use nuclear weapons. The Court declared: "Whether this is a "threat" contrary to Article 2, paragraph 4 [of the UN Charter] depends on 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" (para. 48). This means that the actual threat of nuclear weapons, or the possession of them to discourage military aggression in accordance with the policy of deterrence, is unlawful only if it constitutes a threat within the meaning of Article 2, paragraph 4, of the Charter.

The Court said that it had no intention of ruling on the practice known as the "policy of deterrence", noting that "a number of States adhered to that practice during the greater part of the Cold War and continue to adhere to it" (para. 67). What does that mean in legal terms? In examining customary international law in relation to the prohibition of the threat or use of nuclear weapons as such, the Court establishes two categories of States: those which maintain that the use of nuclear weapons is unlawful and those which hold that the threat or use of such weapons is lawful in certain circumstances. The latter invoke the doctrine and practice of deterrence in support of their argument. The Court also recognizes the continuing tensions between, on the one hand, the nascent *opinio juris* on the illegality of the use of nuclear weapons, as manifested in UN General Assembly resolutions, including the often-cited resolution 1653 (XVI), and, on the other, the still strong adherence to the practice of deterrence (para. 73). In paragraph 66 of its opinion, the Court notes that those States which uphold the doctrine and practice of deterrence "have always, in concert with certain other States, reserved the right to use [nuclear] weapons in the exercise of the right to self-defence against an armed attack threatening their vital security interests".

So in the Court's opinion, the doctrine of deterrence leads to the thesis that the threat or use of nuclear weapons is lawful, and thus profoundly affects the issue of the legality or illegality of nuclear weapons. Indeed, several of the judges said as much in their separate opinions.[4]

[4] See for example the Declarations of Judges Shi and Ferrari Bravo, and the Dissenting Opinions of Judges Schwebel and Weeramantry.

"General" illegality of the threat or use of nuclear weapons

In its Advisory Opinion the Court addresses the issue of the legality or illegality of the threat or use of nuclear weapons in an ambiguous and highly controversial manner:

> "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 particularly the principles and rules of humanitarian law;
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> "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-defence, in which the very survival of a State would be at stake" (para. 105 [2]E).

How are these lines to be interpreted in law? First we must try to discern the meaning of the first passage, in particular the term "generally", then that of the second passage, in particular the expression "extreme circumstance of self-defence".

The Court reached its conclusion in the first passage of paragraph 105 (2)E by the following reasoning: having found no treaty rule of general scope nor any customary rule specifically prohibiting the threat or use of nuclear weapons as such, it sought to determine whether resorting to nuclear weapons should be regarded as unlawful having regard to the principles and rules of international humanitarian law applicable in armed conflict (and to the law of neutrality). It thus came across the two cardinal principles of humanitarian law, the first of which is designed to protect the civilian population and civilian property and establishes the distinction between combatants and non-combatants, and the second of which prohibits the infliction of unnecessary suffering on combatants. In regard to the application of this second principle, States do not have an unlimited choice as to the weapons they use, and in that connection the Court cited the Martens clause. In accordance with the above-mentioned principles, humanitarian law long ago banned certain weapons, either because they had indiscriminate effects on both combatants and the civilian population or because they inflicted unnecessary suffering on combatants, that is, suffering greater than that which is inevitable in the pursuit of legitimate military goals. If the proposed use of a weapon fails to meet the requirements of humanitarian law, would the threat of its use also be a breach of that law?

The ICRC had already stated in 1956, in the Rules for the Limitation of the Dangers incurred by the Civilian Population in Time of War, that "the use is prohibited of weapons whose harmful effects — resulting in particular from the dissemination of incendiary, chemical, bacteriological, radioactive or other agents — could spread to an unforeseen degree or escape, either in space or in time, from the control of those who employ them, thus endangering the civilian population" (Article 14).

Indeed, the Court confirmed that assertion by the ICRC of the illegality of the use of nuclear weapons and acknowledged that most of the principles and rules of humanitarian law had now become customary (paras. 80 and 85). Moreover, during the proceedings it maintained that those principles and rules of humanitarian law formed part of *jus cogens*, though unfortunately it did not go into the legal character of humanitarian law in more detail on the grounds that the General Assembly had not raised the issue (para. 83). (In order to clarify the link with "general" illegality in the first passage, the Court would have had to examine the problem of priority as between the legal character of humanitarian law, prohibiting the use of nuclear weapons and regarded as *jus cogens*, and extreme circumstances of self-defence.)

Exception in the case of an extreme circumstance of self-defence

The second passage referred to earlier raises a most crucial question relating to the Court's Advisory Opinion.

First, what is meant by "an extreme circumstance of self-defence, in which the very survival of a State would be at stake"? This must be a new concept, but one which was not defined by the Court. The concept of State self-preservation was admittedly mentioned in Emer de Vattel's *Law of Nations* of 1758 and in works of the nineteenth century, when war had not yet been prohibited under traditional international law. Might that establish the circumstances in which a State would be in danger or peril, or its territory occupied? Or can a distinction be drawn between such circumstances, particularly in the light of current views on self-defence?

Then again, is not the first passage — "general" illegality of the threat or use of nuclear weapons — applicable to the second? Why should an extreme circumstance of self-defence preclude the "general" application of humanitarian law within the meaning of the first sub-section? It has sometimes been stressed in the past that necessity annihilates law. Yet contemporary humanitarian law cannot be brushed aside for reasons of necessity or even in a circumstance of self-defence.

Humanitarian law provides for such an exception only in the case of military necessity.[5]

The problem of self-defence and the applicability of humanitarian law, including the legality or illegality of the threat or use of nuclear weapons, warrants closer attention. It appears *prima facie* that humanitarian law should apply to all categories of international armed conflict, and therefore also to those in which self-defence is invoked by one party to the conflict vis-à-vis the aggressor. To make a more accurate analysis, however, ever since war itself has been recognized as unlawful under a series of international instruments (the League of Nations Pact, the 1928 Paris Pact and the UN Charter), the international community has entertained a thesis based on the discriminatory application of the law of war and the law of neutrality to the party which is the victim of the aggression on the one hand and the party which is the aggressor on the other. For instance, there are the International Law Association's "Budapest interpretative articles" of 1934 and the 1963 resolutions of the Institute of International Law.[6]

Yet even those resolutions accept the equal applicability of humanitarian law to victim and aggressor alike, precisely because of its humanitarian nature. Within the context of the UN Charter, Article 51 of which in particular provides for self-defence, the 1949 Geneva Conventions — and the Preamble to Protocol I of 1977 even more strongly — reaffirm the application of the provisions of those instruments in all circumstances, without any adverse distinction based on the nature or origin of the armed conflict.

No reason may therefore be invoked to claim that humanitarian law is not equally applicable in a case of self-defence, or even in an extreme circumstance of self-defence.[7]

Upholding the thesis in the second passage requires proof that the threat or use of nuclear weapons in an extreme circumstance of

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[5] See for example Article 53 of the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War: "(...) except where such destruction is rendered absolutely necessary by military operations". See also W.V. O'Brien, "Legitimate military necessity in nuclear war", *World Polity*, II (1960), p. 48.

[6] International Law Association, *Report of the Thirty-eighth Conference* (1934), p. 1 ff.; Institute of International Law, *Yearbook*, 1963-II, p. 340 ff. and I, p. 13. See Provisional Report by M. François, *ibid.*, 1957-I, p. 322 ff., p. 393 ff. and Final Report, *ibid.*, p. 491 ff.

[7] See G . Schwarzenberger, "Report on self-defense under the Charter of the United Nations and the use of prohibited weapons", in International Law Association, *Report of the Fiftieth Conference*, 1963, p. 192 ff.

self-defence is a case which constitutes an exception with regard to the equal applicability of humanitarian law. Why is the threat or use of nuclear weapons in such a circumstance not a case in which the threat or use of such weapons would be generally contrary to the rules of humanitarian law? The Court's Advisory Opinion does not touch upon that problem. However, in explaining the position of States invoking the doctrine of deterrence as outlined earlier, the Court accepts that States "have always (...) reserved the right to use [nuclear] weapons in the exercise of the right to self-defence against an armed attack threatening their vital security interests" (para. 66). Thus the second passage amounts to adoption of the doctrine of deterrence, a policy that favours the admission of an exception for the threat or use of nuclear weapons in an extreme circumstance. It may even be felt that political doctrine influenced legal appreciation in the Court's Advisory Opinion, a point which was criticized by some judges in their personal capacity.

If the second passage is regarded as having been influenced by the doctrine of deterrence, then it follows that for their own security all States should be allowed to have nuclear weapons or be protected under a nuclear umbrella in order to ensure their survival in an extreme circumstance of self-defence. But that would be contrary to the spirit and letter of the Treaty on the Non-Proliferation of Nuclear Weapons, as well as to the 1995 instruments providing for that treaty's unlimited extension. Furthermore, it would be incompatible with paragraph 105 (2)F of the Advisory Opinion itself. If complete nuclear disarmament were achieved, would not the security of a State in such an extreme circumstance be guaranteed without possession of nuclear weapons or without a nuclear umbrella?

Obligation to conclude nuclear disarmament negotiations

Paragraph 105 (2)F (the final conclusion in the Advisory Opinion) is, however, very important from the standpoint of disarmament law. The nuclear disarmament treaties so far concluded have all contained stereotyped clauses like Article VI of the Non-Proliferation Treaty, whereby every party to the treaty "undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race (...)". That clause is tantamount to a *pacta de contrahendo* and its effect has been to ensure that nuclear disarmament negotiations have never succeeded. Paragraph F is innovative in that it acknowledges an obligation not only to pursue such negotiations in good faith, but also to bring to a conclusion negotiations leading to nuclear disarmament in all its aspects. Complete nuclear disarmament under strict and efficient international

control has always been seen as the ultimate goal of disarmament treaties and of many UN General Assembly resolutions. But paragraph F obliges all States, particularly those in possession of nuclear weapons, to negotiate until a treaty providing for complete nuclear disarmament is concluded.

In conclusion, we would like to draw attention to two questions which remain open. The content of paragraph F was not included in the UN General Assembly's request for an opinion; and the existence of an obligation to conclude nuclear disarmament negotiations is not a very definite one under customary law. This rather suggests that the Court, although not a legislative body, has confirmed the relevance of these matters. In any event, this problem does not come directly within the purview of international humanitarian law as such.