The Advisory Opinion on nuclear weapons and the contribution of the International Court to international humanitarian law

by Christopher Greenwood

The request by the United Nations General Assembly, in resolution 49/75 K (1994), that the International Court give an advisory opinion on the question "Is the threat or use of nuclear weapons in any circumstance permitted under international law?" gave the Court an unusual opportunity to consider the principles of international humanitarian law. It is an opportunity which the Court might well have preferred to do without. The question was not well framed and the reasons for asking it were wholly unsatisfactory. In particular, the necessarily abstract nature of the question placed the Court in an exceptionally difficult position, because it could not possibly consider all the combinations of circumstances in which nuclear weapons might be used or their use threatened. Yet unless one takes the position that the use of nuclear weapons is always lawful (which is obvious nonsense), falls wholly outside the law (which no State suggested) or is always unlawful (a view which has had some supporters but which the majority of the Court quite rightly rejected), then the answer to the General Assembly's question would have to depend upon a careful examination of those circumstances.

In this writer's opinion, therefore, the request for an advisory opinion was misconceived and the Court should not have been expected to answer

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such a question. Yet answer it the Court did[1] and it is important, therefore, to examine the impact of its answer on international humanitarian law.[2] That is not an easy task, since the Court's Opinion - and, in particular, the important paragraph of the *dispositif* (para. 105[2]E), which was adopted by seven votes to seven, thanks to the casting vote of President Bedjaoui — is more than a little enigmatic. Nevertheless, paragraph 105(2)E does not stand alone. As the Court itself said,[3] the Opinion has to be read as a whole. If it is approached in that way, then whatever reservations there might be about some of the conclusions which the Court reached, the Opinion has significant implications for humanitarian law.

The Court's starting point

Those implications begin with the starting point adopted by the Court. The fact that the question asked whether the threat or use of nuclear weapons was *permitted*, rather than asking whether it was *prohibited*, was taken by some States as implying that the use of nuclear weapons was unlawful in the absence of a permissive rule to the contrary. Others maintained that their use was lawful unless it was established that international law contained a rule which prohibited that use, an approach identified by many with the comment of the Permanent Court of International Justice in the *Lotus* case that "restrictions upon the independence of States cannot (...) be presumed".[4] The Court's Opinion initially brushes this debate aside as lacking "particular significance".[5] Insofar as the debate about the implications of the *Lotus* case was cast in terms of arguments regarding the burden of proof, this dismissive attitude is entirely understandable: considerations relating to the burden of proof are largely out of place in the context of advisory, rather than contentious,

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[1] International Court of Justice, *Legality of the threat or use of nuclear weapons*, Advisory Opinion of 8 July 1996 (hereinafter referred to as "Opinion"). The Court rejected, by 13 votes to one, submissions that it should not comply with the request. However, it held by 11 votes to three that it could not answer a similar question posed by the World Health Organization: Advisory Opinion on the legality of the use by a State of nuclear weapons in armed conflict, 8 July 1996.

[2] The present article will be confined to the issues of substantive law considered in the Opinion handed down to the General Assembly and will not discuss the arguments as to whether the Court should have given a response to the question posed by the Assembly or the issues raised by the WHO request. Those issues are briefly considered in A.V. Lowe, "Shock verdict: Nuclear war may or may not be unlawful", *Cambridge Law Journal*, 1996, p. 415.

[3] Opinion, para. 104.

[4] PCIJ *Reports*, Series A, No. 10, p. 18 (1927).

[5] Opinion, para. 22.

proceedings, where what is at issue is the existence of a principle of law, rather than a matter of fact. However, the underlying question of principle — whether the Court should be looking for a permissive rule or a prohibition — cannot be so easily set aside and was discussed at length in several of the Separate and Dissenting Opinions.[6]

At first sight, the Opinion itself is uncertain on this point. The Court stated (unanimously) that international law contained no "specific authorization of the threat or use of nuclear weapons"[7] and (by 11 votes to three) that it contained no "comprehensive and universal prohibition of the threat or use of nuclear weapons as such".[8] The first statement, though uncontroversial, is surprising, since no State had argued that there was any "specific authorization". It could therefore be seen as a rejection at least of the more extreme variations of the *Lotus* argument. The Court did not, however, endorse the argument that nuclear weapons carried a general stigma of illegality which rendered their use unlawful in the absence of a permissive exception to the general rule. Had the Court adopted such an attitude, then its finding that there was no rule authorizing the use of nuclear weapons would have disposed of the case. By holding that international law contained neither a comprehensive prohibition of the use of nuclear weapons, nor a specific authorization of their use,[9] all the Court did was to hold that the answer to the Assembly's question had to be sought in the application of principles of international law which were not specific to nuclear weapons.

When the Court came to consider those principles, it tried to determine whether they prohibited the use of nuclear weapons, not whether they authorized such use. In commencing its examination of the law of armed conflict, the Court stated that:

> "State practice shows that the illegality of the use of certain weapons as such does not result from an absence of authorization but, on the contrary, is formulated in terms of prohibition.
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> The Court must therefore now examine whether there is any prohibition of recourse to nuclear weapons as such ...".[10]

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[6] See, e.g., the Declarations of President Bedjaoui and Judge Ferrari Bravo and the Separate Opinions of Judges Ranjeva and Guillaume.

[7] *Dispositif*, para. 2A.

[8] *Ibid.*, para. 2B.

[9] The Court's decision that there was no comprehensive prohibition is considered further below.

[10] Opinion, paras. 52-53.

Similarly, the Court's consideration of *jus ad bellum* examined that law to see whether it prohibited the use of nuclear weapons.[11] Whatever views some members of the Court may have held about the *Lotus* case, therefore, it is clear from the Opinion that the Court took as its starting point the premise that it was necessary to ascertain whether international law contained a prohibition of some or all uses of nuclear weapons.

The applicable law

The Court's Opinion is also important in identifying the areas of international law in which such a prohibition might be found. Those who maintained that the use of nuclear weapons was unlawful relied not only upon the United Nations Charter and international humanitarian law but also, and quite independently, on human rights and environmental law. The Court, however, considered that the legality of using nuclear weapons had to be determined by reference to the Charter and the laws applicable in armed conflict.

With respect to human rights law, some States submitted that any use of nuclear weapons would violate the right to life guaranteed by Article 6 of the International Covenant on Civil and Political Rights.[12] The Court, however, noted that Article 6 of the Covenant prohibited only the "arbitrary" deprivation of life. Since killing is an inherent feature of any armed conflict, to determine whether a deprivation of life occurring in an armed conflict was arbitrary, reference had to be made to some criteria outside the Covenant. Those criteria, the Court held, had to come from the law of armed conflict. Only if a killing in armed conflict were contrary to that law could it be regarded as arbitrary for the purposes of Article 6 of the Covenant.[13] In other words, Article 6 added nothing of substance to the law of armed conflict in this context.

With respect, this conclusion is plainly correct. The very general language of Article 6 cannot have been intended — and has not been treated in practice — as overriding the detailed provisions of the law of armed conflict. Nevertheless, the Court's acceptance that the Covenant continued to apply in time of war (except insofar as derogation was expressly permitted)[14] may be of considerable importance in other cases.

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[11] Opinion, paras. 37-50 and *dispositif*, para. 2C.

[12] See also the European Convention on Human Rights, Article 2, the American Convention on Human Rights, Article 4, and the African Charter on Human and Peoples' Rights, Article 4.

[13] Opinion, para. 25.

[14] *Ibid.*

At the substantive level, although the right to life may add nothing to international humanitarian law, other provisions of human rights treaties go beyond anything contained in either customary or conventional humanitarian law. Moreover, at the procedural level, human rights treaties contain unique mechanisms for enforcement which may be of great assistance. The continued applicability of human rights treaties in armed conflict is likely to be of particular significance in the context of belligerent occupation.

In discussing international environmental law, the Court considered that States engaged in armed conflict had a duty "to take environmental considerations into account in assessing what is necessary and proportionate in the pursuit of legitimate military objectives",[15] a duty which appeared to stem from customary law and general treaties on the environment rather than from the specific environmental provisions of Additional Protocol I of 1977.[16] The Court, however, rejected the argument that the use of nuclear weapons was prohibited by the general environmental treaties or by customary environmental law.[17] Indeed, it would have been extraordinary for the Court to have found that nuclear-weapon States, which had so carefully ensured that treaties on weaponry and the law of armed conflict did not outlaw the use of nuclear weapons, had relinquished any possibility of their use by becoming parties to more general environmental agreements.

The Court therefore concluded that the answer to the question posed by the General Assembly had to be found principally in *jus ad bellum* and *jus in bello*, both of which were designed to deal with the use of weapons — including nuclear weapons — in armed conflict. This part of the Court's Opinion is important in several respects. First, it unequivocally reaffirms that the use of nuclear weapons is subject to international humanitarian law. Although no State had contested that proposition in these proceedings, it had frequently been challenged by commentators and by at least one State in the past.[18] Secondly, the Court's examination of the impact of the United Nations Charter makes clear that modern *jus ad bellum* is not concerned solely with whether the initial resort to force is

[15] *Ibid.*, para. 30.

[16] This part of the Opinion is, in fact, quite close to the view expressed in the 1995 edition of the United States *Naval Commander's Handbook*, para. 8.1.3.

[17] Opinion, paras. 30 and 33.

[18] *Ibid.*, para. 22. See also the discussion in the Separate Opinion of Judge Guillaume, para. 5.

lawful; it also has implications for the subsequent conduct of hostilities (a matter which is further considered below). Finally, while other areas of international law may have a bearing on armed conflict, the Opinion emphatically rejects arguments that the detailed *lex specialis* which has been developed over the years to deal with the conduct of hostilities can be circumvented by reference to general provisions of environmental or human rights law.

Nuclear weapons and the Charter

In applying *jus ad bellum* to the use of nuclear weapons, the Court reached the unanimous and unsurprising conclusion that:

> "A threat or use of force by means of nuclear weapons that is contrary to Article 2, paragraph 4, of the United Nations Charter and that fails to meet all the requirements of Article 51, is unlawful".[19]

Neither Article 2(4) nor Article 51 refers to specific weapons. Nevertheless, the Court, in reaffirming that the right of self-defence was subject to the requirement of proportionality, apparently accepted that the need to ensure that a use of force in self-defence was proportionate had implications for the degree of force and, consequently, for the weaponry which a State might lawfully use. In determining whether the use of a particular weapon in a given case was lawful, it was therefore necessary to look at both international humanitarian law and the requirements of the right of self-defence. The Court did not, however, accept that the use of nuclear weapons could never be a proportionate measure of self-defence.[20] Moreover, it noted that the Security Council, in resolution 984 (1995), had welcomed security assurances given by the nuclear-weapon States, the implication of which was that not all uses of nuclear weapons would violate the Charter's provisions on the use of force.

Nuclear weapons and international humanitarian law

The Court therefore went on to consider the question whether the use of nuclear weapons could ever be compatible with international humanitarian law, and it is here that its answer becomes particularly enigmatic. The Court held unanimously that, as well as complying with the Charter provisions on the use of force,

[19] *Dispositif*, para. 2C.

[20] Opinion, paras. 42-43.

"[a] 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, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons".[21]

This proposition is one which would command almost universal acceptance today. The Court, however, went on to hold, by the casting vote of the President:

"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-defence, in which the very survival of a State would be at stake".[22]

Space permits only three comments on this aspect of the case.

First, as we have seen, the Court looked to see whether there was a prohibition of nuclear weapons in international humanitarian law and found that no specific and comprehensive prohibition existed, either in customary or in conventional law. Having reviewed a number of treaties which limited the possession, testing and deployment of nuclear weapons, particularly those establishing nuclear-weapon-free zones, it held that those treaties did not amount, in themselves, to a comprehensive prohibition of the use of nuclear weapons as a matter of existing international law.[23] The Court also rejected an argument to the effect that the resolutions adopted by the United Nations General Assembly on the subject of nuclear weapons reflected a customary law prohibition. While resolutions of the General Assembly could constitute authoritative declarations of custom, these did not. The essence of customary international law is, of course, the actual practice and *opinio juris* of States,[24] and the General Assembly resolutions fell short of establishing that *opinio juris*, as well as being at

[21] *Dispositif*, para. 2D.

[22] *Dispositif*, para. 2E.

[23] Opinion, paras. 58-63.

[24] *Ibid.*, para. 64.

odds with the practice of a significant number of States. The Court also found that nuclear weapons were not covered by the provisions of treaties prohibiting the use of poisoned weapons and chemical or bacteriological weapons, noting that the terms of those treaties

> "... have been understood, in the practice of States, in their ordinary sense as covering weapons whose prime, or even exclusive, effect is to poison or asphyxiate. This practice is clear, and the parties to those instruments have not treated them as referring to nuclear weapons".[25]

It thus rejected an old but unconvincing argument that nuclear weapons could somehow be equated with these distinct categories of weaponry.

Secondly, in the absence of a specific prohibition of nuclear weapons, any prohibition or limitation of their use had to be derived from the application of more general principles. In this context, the Court referred, in particular, to the prohibition of weapons calculated to cause unnecessary suffering, of attacks upon civilians and of the use of indiscriminate methods and means of warfare, and to the principles protecting neutral States from incursions onto their territory. Although the Court noted that the use of nuclear weapons was "scarcely reconcilable" with respect for these principles, it concluded that it did not have

> "... sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstance".[26]

The Opinion is not easy to follow at this point. In the absence of a specific prohibition of the use of nuclear weapons, the only basis upon which the Court could have concluded, consistently with its own earlier reasoning, that such use was illegal in all circumstances would have been an analysis of the circumstances in which nuclear weapons might be used and then application of the principles of humanitarian law which were relevant. At the heart of any such analysis would have been three questions:

(1) Would the use of a nuclear weapon in the particular circumstances inflict *unnecessary* suffering upon combatants?

[25] *Ibid.*, para. 55.

[26] *Ibid.*, para. 95.

(2) Would the use of a nuclear weapon in the particular circumstances be directed against civilians or indiscriminate, or, even if directed against a military target, be likely to cause *disproportionate* civilian casualties?

(3) Would the use of a nuclear weapon in the particular circumstances be likely to cause *disproportionate* harm to a neutral State?

To answer those questions would have required both a factual appreciation of the capabilities of the weapon being used and the circumstances of its use and a value judgement about whether the adverse consequences of that use were "unnecessary" or "disproportionate" when balanced against the military goals which the State using the nuclear weapon was seeking to achieve.

The Court did not attempt that task; it merely enumerated the relevant principles, with little discussion, before reaching the conclusions quoted above.[27] It is not clear, therefore, how it arrived at its conclusion that the use of nuclear weapons would "*generally* be contrary to the rules of international law applicable in armed conflict" (our emphasis), nor, indeed, what it meant by the term "generally" in this context. It is clear, both from the voting on paragraph 105(2)E and from some of the separate and dissenting opinions, that there was a considerable divergence of views within the Court.

Nevertheless, if one looks at the Opinion as a whole, the only interpretation of the first part of paragraph 105(2)E which can be reconciled with the reasoning of the Court is that, even without the qualification in the second part of the paragraph, the Court was not saying that the use of nuclear weapons would be contrary to the law of armed conflict in all cases. It could only have reached such a conclusion if it had found that there were no circumstances in which nuclear weapons could be used without causing unnecessary suffering, striking civilians and military targets indiscriminately (or with excessive civilian casualties), or causing disproportionate damage to neutral States. The Court did not make such an analysis and the reasoning gives no hint that it reached such a conclusion. Indeed, it is difficult to see how it could have done. In considering the application of principles of such generality to the use of weapons in an indefinite variety of circumstances, the Court could not have determined as a matter of *law* that a nuclear weapon could not be used without

[27] See the criticism of this approach in the Dissenting Opinion of Judge Higgins, paras. 9-10.

violating one or more of those principles,[28] even if some of its members suspected as a matter of *fact* that that was so.

Thirdly, the connection between the two parts of paragraph 105(2)E calls for some comment about the Court's attitude to the relationship between *jus ad bellum* and *jus in bello*. In the main body of the Opinion, the Court sets out a view of that relationship which is entirely compatible with principle, namely that for a particular instance of the use of force to be lawful, it must not be contrary to either body of law. Thus, a State which is entitled to use force by way of self-defence nevertheless acts unlawfully if it employs methods or means of warfare prohibited by international humanitarian law. Conversely, the fact that a State complies with all the rules of humanitarian law will not render its actions lawful if its recourse to force is aggressive or exceeds what can be regarded as proportionate self-defence. This approach is taken in several places in the Opinion[29] and in paragraphs 2C and 2D of the *dispositif*.

It has, however, been suggested that the majority's view as expressed in the two parts of paragraph 105(2)E is that the use of nuclear weapons would inevitably violate *jus in bello* but that the Court was leaving open the possibility that, in some undefined circumstances, *jus ad bellum*, in the form of an extreme case of self-defence, would nevertheless justify their use.[30] Such an approach would be highly regrettable. The fact that a State had the right and the necessity to use force has not, in this century at least, been accepted as an excuse for failure to comply with the obligations of international humanitarian law, and no State appearing before the Court argued that it should be. To allow the necessities of self-defence to override the principles of humanitarian law would put at risk all the progress in that law which has been made over the last hundred years or so and raise the spectre of a return to theories of "just war". Happily, it seems that the Court did not intend to do anything of the kind. As we have seen, the main body of the Opinion takes an orthodox view of the relationship between the law governing the use of force and the principles of international humanitarian law. Moreover, for the reasons given above, the first part of paragraph 105(2)E should not be read as assuming that all uses of nuclear weapons would be contrary to humanitarian law. There

[28] See Opinion, paras. 94 and 95.

[29] See *ibid.*, paras. 39, 51 and 91.

[30] For a discussion of this theory, see the Separate Opinion of Judge Fleischhauer.

is, therefore, no need to read the second part of that paragraph as setting up *jus ad bellum* in opposition to *jus in bello.*

Conclusion

Critics of the Court, who include, ironically, some of the most enthusiastic supporters of the request for an advisory opinion, feel that it missed an historic opportunity to declare that the use of nuclear weapons was unlawful in all circumstances. For the Court to have done so, however, would have been wholly unwarranted and a departure from the judicial function. Whatever views there may be about the direction in which the law should go, the job of the Court is to apply the law as it is.

In this writer's view, the Court was right to find that international law does not at present contain a specific prohibition of the use of nuclear weapons. Any use of a nuclear weapon would be subject to the ordinary principles of the law on the use of force and of international humanitarian law. Those principles do not permit an abstract determination that, irrespective of what circumstances might exist at any time in the future, no use of any sort of nuclear weapon could ever be compatible with them. With obvious hesitation, the Court essentially took that view, for it was not prepared to hold that the use of nuclear weapons was unlawful in all circumstances. In view of the reasoning in the main body of its Opinion, the Court should have gone further than it did and have stated expressly in the *dispositif* that a use of nuclear weapons which satisfied the requirements of the law on the use of force and international humanitarian law would be lawful. Such a conclusion would have been preferable to the unsatisfactory and ambiguous clauses of paragraph 105(2)E. Properly read, however, the Opinion as a whole is compatible with international humanitarian law and reaffirms a number of important humanitarian principles, even if the Court should not have been placed in the invidious position of having to give an opinion on this question in the first place.