A non liquet on nuclear weapons

The ICJ avoids the application of general principles of international humanitarian law

by Timothy L.H. McCormack

"The fact that [the] principles [of international humanitarian law] are broadly stated and often raise further questions that require a response can be no ground for a non liquet. It is exactly the judicial function to take principles of general application, to elaborate their meaning and to apply them to specific situations. This is precisely the role of the International Court, whether in contentious proceedings or in its advisory function."¹

Judge Higgins

1. Introduction

The Advisory Opinion delivered by the International Court of Justice (ICJ) on the Legality of the Threat or Use of Nuclear Weapons was a somewhat disappointing if not entirely unexpected decision.² After the

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Dr Timothy L.H. McCormack is the inaugural Australian Red Cross Professor of International Humanitarian Law, Faculty of Law, The University of Melbourne, Australia. The author wishes to thank Professor Gillian Triggs of the Faculty of Law, The University of Melbourne, and Robert J. Mathews OAM, member of the Australian Red Cross Advisory Committee on International Humanitarian Law, for their helpful comments on an earlier draft of this article. Thanks are also due to Justine Braithwaite for her excellent research assistance and her own helpful suggestions in the preparation of the article.

1 International Court of Justice, Legality of the threat or use of nuclear weapons, Advisory Opinion of 8 July 1996, Dissenting Opinion of Judge Higgins, para. 32.

2 International Court of Justice, Legality of the threat or use of nuclear weapons, Advisory Opinion of 8 July 1996, Opinion of the Court (hereinafter referred to as “Opinion”).
final paragraph, which constitutes the *dispositif*, all fourteen judges appended either personal declarations, separate opinions or dissenting opinions to indicate the extent to which they agreed or disagreed with specific findings and particular aspects of the reasoning behind the Opinion.

Some findings were approved unanimously — in particular, the reaffirmation that any use of nuclear weapons is subject to the principles of customary international law governing the conduct of armed conflict, and the reminder to nuclear-weapon States of the obligation to negotiate and reach agreement on a comprehensive ban on nuclear weapons. These findings constitute two positive aspects of the Opinion. However, on the crucial issue of the legality of the threat or use of nuclear weapons, only seven judges could endorse the finding of the Court. The other seven judges dissented from the decision for different reasons. According to Article 55(2) of the Statute of the Court, the President has a casting vote in the event of a split decision. In this case, President Bedjaoui voted for the finding in the Joint Opinion, and as a consequence the position enunciated in the *dispositif* is the prevailing one.

The Court determined that, despite the lack of a specific prohibition on the threat or use of nuclear weapons in conventional or in customary international law, the general principles of customary international law, particularly the principles of international humanitarian law, would apply to any threat or use of nuclear weapons. Although the Court was able to conclude that the use of nuclear weapons “seems scarcely reconcilable with respect for” the principles of international humanitarian law, it felt compelled to reach a qualified conclusion because it considered 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 any circumstance”. International law has traditionally distinguished between the law regulating the legitimate resort to force (the *jus ad bellum*) and the law regulating the actual deployment of force (the *jus in bello*). Any legitimate exercise of force must be consistent with both sets of principles. The Opinion, however, confuses the *jus ad bellum* with the *jus in bello*, since the majority of the Court declared a non-finding (*non liquet*) — a determination that the possibility of a legitimate use of nuclear weapons in an “extreme circum-

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3 Opinion, para. 105(2)D.
4 *Ibid.*, para. 105(2)F.
stance of self-defence, in which the very survival of a State would be at stake”, could not be ruled out.⁶

In the light of the majority’s non-finding, the statement that “although the applicability of the principles and rules of humanitarian law and of the principle of neutrality to nuclear weapons is hardly disputed, the conclusions to be drawn from this applicability are, on the other hand, controversial”⁷ may well rank as one of the great understatements in the jurisprudence of the Court. A split decision was always a likely outcome. However, the fact that the majority qualified its ruling on the illegality of the threat or use of nuclear weapons by referring to an “extreme circumstance of self-defence” rather than arguing, for example, that such threat or use may not necessarily be inconsistent with the jus in bello was both a surprise and a disappointment.

The purpose of this article is to consider the implications of the Advisory Opinion for international humanitarian law. In its reasoning, the majority of the Court overlooked the normative significance of the Nuclear Non-Proliferation Treaty (NPT)⁸ as regards the use of nuclear weapons and also failed to perform the anticipated judicial function of applying the general principles of international humanitarian law to the use of nuclear weapons. In effect, it declared that the rules of international law on the use of nuclear weapons would remain uncertain in the absence of a comprehensive agreement on complete nuclear disarmament. The conclusion of this article is that, while the Opinion has some positive results for international humanitarian law, the Court failed to take full advantage of the opportunity presented by the case to clarify the applicability of long accepted principles of customary international law to a specific category of weapons.

2. Lack of a conventional prohibition on the use of nuclear weapons

The Court concluded that there was no comprehensive and universal prohibition on the threat or use of nuclear weapons in conventional international law. According to the Opinion, “the pattern until now has been for weapons of mass destruction to be declared illegal by specific instruments”.⁹ The Court contrasted the existence of the Biological Weapons

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⁶ Ibid., para. 105(2)E.
⁷ Ibid., para. 90.
⁸ Treaty on the Non-Proliferation of Nuclear Weapons, of 1 July 1968.
⁹ Opinion, para. 57.
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Convention (BWC)\(^{10}\) and the Chemical Weapons Convention (CWC),\(^ {11}\) which constitute comprehensive prohibitions on biological weapons and chemical weapons respectively, with the failure of the international community to impose a comprehensive ban on nuclear weapons through a nuclear weapons convention.\(^ {12}\) Here, the ICJ conveniently failed to make a fundamental distinction between possession and use of weapons of mass destruction and omitted from the Opinion an analysis of key aspects of the NPT.

**Global Significance of the NPT**

The NPT is the key global multilateral treaty dealing specifically with nuclear weapons. The NPT is not a disarmament treaty and is correctly distinguished from the BWC and CWC in this respect. As the title of the NPT suggests, the primary objective of the treaty is to prevent the proliferation of nuclear weapons, particularly horizontal proliferation. The NPT allows for the continued possession of nuclear weapons by the five States declared to be nuclear-weapon possessors at the time the treaty was concluded, but it is arguable that this is only an interim measure pending agreement between those States on complete nuclear disarmament.\(^ {13}\) It ought not to be inferred that the NPT's discriminatory concession to ongoing possession either authorizes or does not prohibit the use of nuclear weapons.

Well before either the BWC or the CWC were agreed, there was already a norm in international law against the use of biological and chemical weapons. These particular treaty regimes were negotiated to ensure that such weapons would not be used in warfare and in recognition of the fact that the existing prohibition on their use would not necessarily, in and of itself, guarantee that they were not used. Thus, while there was a need to negotiate comprehensive treaty regimes in order to eliminate these weapons, it cannot be argued that there was no existing prohibition

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\(^ {10}\) Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, of 10 April 1972.


\(^ {12}\) Opinion, para. 57.

\(^ {13}\) Article VI of the NPT (see note 8) states: "Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control".
on their use in international law. The Court observed that both the BWC and the CWC had been negotiated and adopted "in [their] own contexts and for [their] own reasons". Surely this is because specific treaty regimes are required to achieve the comprehensive elimination of various categories of weapons since there are inevitably specific implications for verification of compliance with those regimes. The lack of a nuclear weapons convention incorporating a comprehensive prohibition on possession and use of nuclear weapons makes it difficult to contend that all possession of nuclear weapons is prohibited. Any attempt to eliminate nuclear weapons entirely will necessarily involve the negotiation of a treaty regime with specific provisions relating to the destruction of stocks, verification of compliance and continued peaceful uses of nuclear energy. However, the lack of such an instrument does not justify the ICJ's willingness to overlook the significance of the existing NPT regime as it relates to the use of nuclear weapons.

The Opinion fails to mention that 183 States are now party to the NPT, of which have undertaken to respect a comprehensive prohibition on the production, acquisition, stockpiling, testing and use of nuclear weapons. The non liquet on the question of whether it is legal to use or to threaten to use nuclear weapons is, therefore, a discriminatory one in that it only applies to the five nuclear-weapon States party to the NPT (coincidentally the permanent members of the Security Council) and to those States which have refused to join the NPT regime. For all other States, the international law on nuclear weapons is abundantly clear: the threat or use of nuclear weapons is illegal, since treaty law specifically and explicitly prohibits it. The normative significance of the NPT is overlooked in the Advisory Opinion, which groups the discussion of the NPT with that of the regional nuclear weapon free zone treaties.

_Acquiescence of non-nuclear-weapon States in the possible use of nuclear weapons?_

In linking the discussion of the NPT to the Treaties of Tlatelolco and Rarotonga and to their Protocols, the Court highlighted the positive and

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14 Opinion, para. 57.
15 As at 30 September 1996.
18 The positive declarations are to the effect that the nuclear-weapon States will come to the assistance of any non-nuclear-weapon State Party the subject of an attack by nuclear weapons.
negative\textsuperscript{19} security assurances given by nuclear-weapon States pursuant to these instruments as well as to the statements made by representatives of these States at the NPT Review and Extension Conference in New York in 1995.\textsuperscript{20} These security assurances include reservations by the nuclear-weapon States regarding the use of nuclear weapons in certain circumstances.\textsuperscript{21} Since the nuclear-weapon States do not feel bound by a prohibition on the threat or use of nuclear weapons, the Opinion seems to maintain that no such prohibition exists. The majority of the Court observed that the States party to the Treaties of Tlatelolco and Rarotonga had not objected to the reservations on the possible use of nuclear weapons that the nuclear-weapon States had made to the protocols to those treaties.\textsuperscript{22} The implication is that such acquiescence is further proof that States, in practice, do not consider that there is a prohibition on the threat or use of nuclear weapons.

Vice-President Schwebel was more explicit about the acquiescence of the non-nuclear-weapon States in the position of the nuclear-weapon States, which reserve the right to use nuclear weapons in certain circumstances. In his Dissenting Opinion, he explicitly argued that this position had been supported by the practice of many of the world’s non-nuclear-weapon States which had sheltered under the nuclear umbrellas of their nuclear-weapon allies.\textsuperscript{23} Judge Schwebel conceded that it would be too much to argue that such acquiescence supported \textit{opinio juris} in favour of the legality of the threat or use of nuclear weapons (particularly given the vehement protest registered in successive UN General Assembly resolutions).\textsuperscript{24} However, he did argue that it acted to “abort the birth or survival of \textit{opinio juris} to the contrary”.\textsuperscript{25}

Judge Schwebel’s analysis of the effect of the acquiescence of those non-nuclear-weapon States “sheltering under the umbrella” of their

\textsuperscript{19} The negative security guarantees are to the effect that the nuclear-weapon States will not use nuclear weapons against the non-nuclear-weapon States party to the various instruments. These guarantees are usually accompanied by reservations whereby the guarantee will not apply where the non-nuclear-weapon State Party is an ally of a nuclear-weapon State involved in armed conflict against another State. On the security guarantees pursuant to the Treaties of Tlatelolco and Rarotonga, see Jozef Goldblat, \textit{Arms Control}, 1994, pp. 150-155.


\textsuperscript{21} Opinion, para. 62(b).

\textsuperscript{22} \textit{Ibid.}, para. 62(c).

\textsuperscript{23} Dissenting Opinion of Judge Schwebel.

\textsuperscript{24} The succession of resolutions commenced with UN GA Res. 1653 (1961).

\textsuperscript{25} Dissenting Opinion of Judge Schwebel.
nuclear-weapon allies would undoubtedly be contested by many of the "beneficiary" States. As a party to ANZUS, the tripartite security alliance between Australia, New Zealand and the United States, my own State, Australia, has been under the American nuclear umbrella since 1951. Despite any apparent contradiction, the Australian government has argued that the threat or use of nuclear weapons is illegal in all circumstances. Moreover, it has consistently maintained that Article VI of the NPT imposes a binding obligation on the nuclear-weapon States Parties to work towards, and to achieve, complete nuclear disarmament. The right of the NPT nuclear-weapon States to possess nuclear weapons, at least on an interim basis, does not give them the automatic right to use nuclear weapons. The right to possess nuclear weapons is arguably justified by the fact that unilateral nuclear disarmament by the five nuclear-weapon States party to the NPT may be neither feasible nor desirable. Possession is allowed pending a phased reduction that should eventually lead to the complete elimination of nuclear weapons.

Judge Schwebel approvingly cited the argument put forth by the United Kingdom before the Court that "the entire structure of the Non-Proliferation Treaty (...) presupposes that the parties did not regard the use of nuclear weapons as being proscribed in all circumstances". Many non-nuclear-weapon States party to the NPT would argue, however, that an admitted right to possession, pending agreement on a ban on possession and use, ought not to imply a right to use such weapons in the interim. Indeed, it would be more accurate to say that the structure of the NPT presupposes that the parties accepted the possession of nuclear weapons by the five nuclear-weapon States as a fact. The compromise

26 Security Treaty between Australia, New Zealand and the United States of America, of 1 September 1951.


29 It should be noted that at least one other State has completed unilateral nuclear disarmament and has become a non-nuclear-weapon State party to the NPT.

30 Dissenting Opinion of Judge Schwebel.
reached in the treaty was for the non-nuclear-weapons States Parties to forego the right to develop, acquire, stockpile, test and use nuclear weapons in exchange for access to nuclear technology for peaceful purposes\textsuperscript{31} and for the obligation of the nuclear-weapons States to negotiate in good faith for the elimination of their nuclear-stockpiles.\textsuperscript{32} The fact that the latter have not taken this obligation seriously has been a constant source of frustration for the former and of tension between the two. The preamble and entire text of the NPT show that its purpose is to prevent the horizontal spread of nuclear weapons and to achieve their eventual elimination. Thus, the vast vertical proliferation among the nuclear-weapons States is in clear disregard for the objects and purposes of the treaty, as well as for some of its specific obligations.\textsuperscript{33}

Without explicitly saying so, the majority of the Court found, in effect, that the five nuclear-weapons States, plus those States which have steadfastly refused to become party to the NPT, were in the privileged position of possibly being permitted to use nuclear weapons in self-defence while all other States — because of their obligations pursuant to the NPT — were not. The discriminatory effect of this finding is anathema to the non-nuclear-weapons States party to the NPT\textsuperscript{34} and was contemptuously dismissed in the Dissenting Opinions of Judge Shahabuddeen and Judge Weeramantry. According to Judge Shahabuddeen, the Court's finding was tantamount to saying that the principal object and purpose of the NPT was not to prevent the spread of a dangerous weapon but to ensure that the "enjoyment [sic] of its use was limited to a minority of States".

The Court found unanimously that there was an international legal obligation to pursue and to conclude negotiations leading to comprehensive nuclear disarmament under "strict and effective international control".\textsuperscript{35} Unfortunately, the implication of its \textit{non liquet} as to the legality of the threat or use of nuclear weapons is that only a specific treaty

\textsuperscript{31} Articles II, IV and V.
\textsuperscript{32} Article VI.
\textsuperscript{33} While the significant reduction of the nuclear arsenals of the US and the Russian Federation pursuant to the bilateral START Agreements between the two States has been encouraging, the remaining levels of nuclear warheads are still unwarranted. See, in particular, \textit{Report of the Canberra Commission on the Elimination of Nuclear Weapons}, Department of Foreign Affairs and Trade, Canberra, 1996, pp. 24-28.
\textsuperscript{34} As evidenced by statements made to this effect at the 1995 Review and Extension Conference of the States Parties to the NPT.
\textsuperscript{35} Opinion, para. 105(2)F.
requiring complete nuclear disarmament will remove the uncertainty. In the absence of such an instrument, the fact that possession is accepted is somehow seen as evidence that there is no clear and complete prohibition on use. According to the majority view, even the general principles of international humanitarian law which are reaffirmed as customary norms and which apply to the threat or use of nuclear weapons do not remove the non liquet.

3. The general principles of international humanitarian law

Steps in the Court's reasoning

Several steps in the Court’s reasoning are crucial to an understanding of its approach to the general principles of international humanitarian law as they relate to the threat or use of nuclear weapons. First, the Court acknowledged the uniquely devastating characteristics of nuclear weapons. The process which results from the fission of the atom releases two distinct forces — both “immense quantities of heat and energy” and “powerful and prolonged radiation”.36 The Court conceded that the effects of a nuclear blast are vastly more powerful than those of other weapons and that the phenomenon of radiation is unique to nuclear weapons.37

Secondly, the Court observed that any threat or use of nuclear weapons was regulated by the relevant principles of international law, in particular international humanitarian law. This obvious statement of principle was explicitly accepted by all the States that had appeared before the Court, including all five declared nuclear-weapon States.38

Thirdly, the Court identified the customary rules developed through State practice which were relevant to the issue before the Court. In particular, the Court reiterated the long-standing principle that the “right of belligerents to adopt means of injuring the enemy is not unlimited”39 and stated that the key limitations relevant to the present case were the well-known principle of distinction and the prohibition on the infliction of unnecessary suffering.40 The principle of distinction provides protection

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36 Ibid., para. 35.
37 Ibid.
38 Ibid., para. 22.
39 Article 22, Hague Regulations respecting the Laws and Customs of War on Land, of 18 October 1907; Opinion, para. 77.
40 Opinion, para. 78.
to civilians caught up in armed conflict.\textsuperscript{41} Parties to a conflict are not permitted to make civilians the object of an attack or to use weapons that do not distinguish between military and civilian targets.\textsuperscript{42} As for the prohibition on the infliction of unnecessary suffering, it provides protection to combatants in an armed conflict. Parties to a conflict are not entitled to rely on the deployment of weapons which cause injuries that are superfluous in relation to the achievement of legitimate military objectives.\textsuperscript{43}

Prima facie, the application of these principles to the threat or use of nuclear weapons, particularly in view of the earlier steps in the Court’s reasoning outlined above, would lead to a conclusion of illegality in almost all conceivable circumstances. Certainly the use of nuclear weapons against a civilian population centre would fall within the scope of the prohibition. However, arguments have often been raised that small, low-yield tactical nuclear weapons could be deployed against military targets remote from civilian population centres and that any such deployment may not necessarily be inconsistent with the general principles of international humanitarian law.\textsuperscript{44} Many observers had expected the Court to place much greater emphasis on this question; at the very least, it seemed reasonable to think that it would attempt to explain the “cardinal principles” of international humanitarian law and to endeavour to apply them in different scenarios involving the threat or use of nuclear weapons. Surely, the application of general principles to specific situations is fundamental to the judicial process. As Judge Higgins stressed in the extract from her Dissenting Opinion quoted at the commencement of this article, this is precisely what the Court is supposed to do.

\textsuperscript{41} See the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949.

\textsuperscript{42} Opinion, para. 78.

\textsuperscript{43} Ibid.

**Failure to apply the general principles**

As it is, the Court wholly failed to enter into this process. Instead, it merely stated that while the use of nuclear weapons seemed “scarcely reconcilable” with the general principles of international humanitarian law, it was unable to “conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law (...) in any circumstance”.\(^\text{45}\) The Court did not provide any insight into what particular circumstances would render the use of nuclear weapons consistent with these principles. In the first limb of sub-paragraph (2)E of the *dispositif*, the Court stated that the threat or use of nuclear weapons “would *generally* be contrary to the rules of international law applicable in armed conflict”. While the use of the qualification “generally” implies the possibility of an exception to this proposition, again the Court did not indicate the exceptional circumstances in which the threat or use of nuclear weapons would be consistent with these rules. In her persuasive Dissenting Opinion, Judge Higgins criticized the concept of general illegality because of its lack of precision and its consequent ambiguity in relation to the question posed to the Court — a question which the Court chose to answer but then, according to Judge Higgins, failed to do so adequately:

“What does the term ‘generally’ mean? Is it a numerical allusion, or is it a reference to different types of nuclear weapons, or is it a suggestion that the rules of humanitarian law cannot be met save for exceptions? If so, where is the Court’s analysis of these rules, properly understood, and their application to nuclear weapons? And what are any exceptions to be read into the term ‘generally’? Are they to be linked to an exceptional ability to comply with humanitarian law? (...) The phraseology of paragraph 2E of the *dispositif* raises all these questions and answers none of them.”\(^\text{46}\)

The failure of the Court to apply the principles of international humanitarian law to the threat or use of nuclear weapons led several judges to dissent from the Joint Opinion. Judges Weeramantry and Koroma both argued that the uniquely devastating characteristics of nuclear weapons would inevitably render any use of such weapons inconsistent with the general principles of international humanitarian law and that the Court’s

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\(^{45}\) Opinion, para. 95.

\(^{46}\) Dissenting Opinion of Judge Higgins, para. 25.
own reasoning ought to have led it "inexorably" to this conclusion.\textsuperscript{47} Judge Shahabuddeen suggested that a conclusion of illegality in all circumstances was open to the Court on the evidence before it and that, consequently, the Court's non-finding was inappropriate.\textsuperscript{48}

Judge Higgins, also in dissent, indicated the sort of approach she thought the Court ought to have taken in reviewing the applicability of general principles of international humanitarian law. In relation to the general principle of distinction and its attendant prohibition on weapons which are incapable of discriminating between combatants and non-combatants, for example, Judge Higgins recognized as self-evident that any use of nuclear weapons against a civilian target was clearly illegal. However, the use of nuclear weapons against a military target which might result in "collateral" damage to civilians was a more complicated issue. Here the law required a balancing act between military necessity and humanity. Any "collateral" damage must be proportionate to the achievement of the legitimate military objective and this would inevitably involve questions of degree. Even if a target was legitimate and the use of nuclear weapons was the only way of destroying it, the user might still have to justify a "necessity" which would result in massive collateral damage to civilians. Judge Higgins asserted that nuclear weapons were "not monolithic in all their effects" and that they included a variety of weapons.\textsuperscript{49} However, to the extent that any particular nuclear weapon was incapable of being targeted solely at a military objective, and so could not distinguish between military and civilian targets, it was unlawful.\textsuperscript{50}

Judge Higgins also considered the general prohibition against the deployment of weapons which cause unnecessary suffering or superfluous injury. She explained that unnecessary suffering was not synonymous with horrendous suffering. Again, the application of the general principle required a balancing act between military necessity and humanity, but that did not automatically mean that there was a prohibition against an objective level of suffering. This begged the question: what military necessity could ever be so grave as to justify the infliction of the sort of suffering which could be caused by nuclear weapons? These were the types of

\textsuperscript{47} See Dissenting Opinions of Judge Weeramantry and Judge Koroma.

\textsuperscript{48} Dissenting Opinion of Judge Shahabuddeen.

\textsuperscript{49} Dissenting Opinion of Judge Higgins, para. 24.

\textsuperscript{50} \textit{Ibid.}
questions which the Court ought to have asked itself and, if it was to give a qualified answer as to the legality of nuclear weapons, ought also to have answered.

4. Possible legitimate use of nuclear weapons in self-defence

These criticisms of the Court's findings are telling enough. However, it is the next stage of the Opinion that defies logic. The Court returned to the question of the right to resort to force in self-defence and articulated the non liquet in its observation that "it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake". This same formula is reiterated in the second limb of sub-paragraph (2)E of the dispositif. By linking the non liquet as to the possible lawful use of nuclear weapons in self-defence to the qualification that use would "generally" be inconsistent with international humanitarian law, the Court did not rule out the possibility that a particular use of nuclear weapons may be lawful even though it is contrary to international humanitarian law.

This finding not only represents a staggering confusion between the jus ad bellum and the jus in bello: as Judge Higgins noted, it also extends beyond the most optimistic claims for the legality of the use of nuclear weapons by the nuclear-weapon States which appeared before the Court — all of which "fully accepted that any lawful threat or use of nuclear weapons would have to comply with both the jus ad bellum and the jus in bello." When the Court determined in its Joint Opinion that the principles of international humanitarian law applied to the threat or use of nuclear weapons, it had already explicitly acknowledged that the nuclear-weapon States accepted the applicability of these principles. Indeed, the nuclear-weapon States themselves were inviting the Court to apply the general principles of international humanitarian law to the threat or use of nuclear weapons and to find that not all uses would necessarily be in conflict with these principles. Even if some, or all, of the nuclear-weapon States believed in a right to use nuclear weapons in an

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51 Opinion, para. 97 (emphasis added).
52 Dissenting Opinion of Judge Higgins, para. 29.
53 Ibid.
54 See Opinion, para. 22.
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extreme case of self-defence, these States still accepted the applicability of humanitarian principles.

What is perhaps the most disconcerting potential consequence of the Court’s non liquet has already been mentioned. In practice, the uncertainty in international law as to whether nuclear weapons may be used in self-defence only benefits the five declared nuclear-weapon States and the three so-called nuclear “threshold” States which have chosen not to become party to the NPT as non-nuclear-weapon States. While all 178 non-nuclear-weapon States Parties have agreed to forego possession and hence use of nuclear weapons, these other States have not, and foreign ministry lawyers in Jerusalem, New Delhi and Islamabad surely must have cited the Court’s Joint Opinion in vindication of their respective governments’ decision to stay out of the NPT. As for non-nuclear-weapon States Parties enjoying less than warm relations with any one of the three nuclear threshold States, they had every reason for dismay: by not ruling out the possibility that States may use nuclear weapons in self-defence, the Court legitimized the nuclear-weapon programmes of the three States not bound by specific treaty obligations. Why should these States be entitled to develop nuclear-weapon programmes with the possibility of resorting to such weapons in self-defence, while 178 other States have accepted a treaty prohibition on that option?

One other unfortunate consequence of the Opinion has also already been alluded to. The Court has helped legitimize a compartmentalization of international law by reaffirming that the general principles of customary international humanitarian law do not automatically apply to specific weapons. In the absence of a comprehensive and specific treaty ban on the production, acquisition, testing, stockpiling and use of nuclear weapons, the Court was unwilling to declare the threat or use of nuclear weapons illegal in all circumstances. It did not seem to matter how well developed or how widely accepted the general principles were. As we have already seen, the Court explicitly acknowledged that the nuclear-weapon States themselves accepted the applicability of these principles. Even so, it still seemed to insist that the lack of agreement within the international community on complete nuclear disarmament was fundamental to its non liquet.

55 These three States are Israel, India and Pakistan. The other non-parties to the NPT, with the exception of Brazil, which has committed itself to full-scale nuclear safeguards in a bilateral agreement with Argentina, include Angola, Cook Islands, Cuba, Djibouti, Hong Kong, Oman and Taiwan. These entities hardly represent a major threat in terms of the proliferation of nuclear weapons.
5. Conclusion

It is true that the Court’s opinion has some positive implications for the development of international law regarding the legality of the threat or use of nuclear weapons. The Court’s unanimous reaffirmation of the obligation under Article VI of the NPT to pursue and to conclude negotiations on nuclear disarmament is a helpful statement even if, strictly speaking, this finding is beyond the scope of the UN General Assembly’s request. Obviously, North-South tensions in relation to the NPT, the Comprehensive Nuclear Test Ban Treaty and ongoing multilateral discussions on nuclear weapons will not dissipate until an agreement is reached.

It is also true that the Court’s determination that the principles of international humanitarian law applicable to the deployment of weapons constitute customary international law, and are therefore binding regardless of consent, is welcome. However, the Court’s inability to translate the general principles into a substantive prohibition on the use of nuclear weapons ought to raise concern. The international law of disarmament regarding specific weapons is in a perpetual state of reaction — seeking to catch up with what are euphemistically called “advances in weapons technology”. The recent agreement on the prohibition of laser and blinding weapons, negotiated in response to the development of a new technology but before deployment of that technology as a weapon of war, was an unprecedented success. Yet even in this cause célèbre, the negotiations of the international community were only a response to the technological developments and did not pre-empt them.

The international community has agreed to, and continues to express its commitment to, general humanitarian principles. However, the ICJ itself has acknowledged the unfortunate fact that there is a gap between

56 See Opinion, paras. 98-103.
57 The text of the CTBT was tabled at the UN General Assembly as UN Doc A/50/1027 (26 August 1996). The text was approved in a resolution at a special meeting reconvening the 50th Session of the UN GA. See A/RES/50/245 (20 September 1996).
those principles and their application to specific categories of weapons. Until that gap is closed, one has the sense that the international community will always be reacting to technology and to new expressions of inhumanity. We may yet make substantial progress on nuclear weapons but there will surely be future technological developments unforeseen or unannounced at this stage of history. The ICJ had a rare opportunity in this case to pronounce on the application of principles to practice. Although it was unable to conclude that the threat or use of nuclear weapons would be inconsistent with those principles in all circumstances, it could at least have engaged in the process of applying them. It is to be regretted that the Court failed to grasp this opportunity more readily.