

# Advisory Opinion of the International Court of Justice on the legality of the use of nuclear weapons under international law

## A few thoughts on its strengths and weaknesses

by **Manfred Mohr**

On 8 July 1996, the International Court of Justice finally rendered its Advisory Opinion on the legality of the threat or use of nuclear weapons. The procedure had been dragging on since the start of the public sittings on 30 October 1995. Several deadlines set by the Court for reaching a decision came and went, ultimately giving rise to the fear that there would be no decisive majority to affirm the basic unlawfulness of the use of nuclear weapons. This would have been a bitter setback for the initiators of the Advisory Opinion proceeding and for the development of international law.

### **An NGO success story<sup>1</sup>**

In May 1992 an international campaign was launched in Geneva by non-governmental organizations (NGOs) under the title "World Court Project". The original promoters of the campaign were the long-standing

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<sup>1</sup> See in this regard M. Mohr, "Das World Court Project — vom Erfolg einer NGO-Kampagne", *Humanitäres Völkerrecht. Informationsschriften*, 8 (1995) 3, pp. 146 ff.

International Peace Bureau (IPB) in Geneva, the well-known International Physicians for the Prevention of Nuclear War and the International Association of Lawyers Against Nuclear Arms, formed at the end of the 1980s. Some 10 more (international) NGOs, including Greenpeace International, later joined in. What at the outset looked like a rather unpromising initiative by a few determined “peace activists” soon developed into a worldwide movement made up of numerous non-governmental and governmental players.

This was yet another demonstration of the effective, mobilizing power of NGOs — so-called civil society — even beyond the realm of human rights. The Red Cross Movement is also part of this “non-governmental” world, in spite of its separate identity shaped by the fundamental principles of the Red Cross, the instances where it comes together with the community of States within the framework of the International Conference of the Red Cross, and the special status of the International Committee of the Red Cross (ICRC). The greater the extent to which the Red Cross Movement defines itself as a *specific* entity within that world of NGOs, the sooner it can cooperate with those organizations — with due respect for the principles of impartiality and neutrality. This is increasingly the case not only in the area of human rights (the German Red Cross is part of an NGO forum on this topic in Germany, for instance), but also in the disarmament sector, in particular as regards the nuclear issue. Since Hiroshima and Nagasaki, the International Red Cross has repeatedly stated its position on the matter.<sup>2</sup>

What is and always will be crucial is that NGO initiatives are taken up and implemented by the community of States. Thus the World Court Project did not remain — as Judge Oda somewhat critically observes — a mere “idea” brought up by a handful of NGOs;<sup>3</sup> on the contrary, it soon turned out that NGOs and States alike felt that the end of East-West confrontation had by no means resolved the nuclear issue. And it was not just a matter of the danger of proliferation. Humanity’s survival was still threatened by the nuclear arsenals in the hands of the five true nuclear powers. Hence the idea of applying to the highest legal authority — the

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<sup>2</sup> See for example, M. Mohr, in M. Cohen, M. Gouin (eds), *Lawyers and the nuclear debate*, Ottawa, 1988, pp. 85 ff.

<sup>3</sup> See International Court of Justice, *Legality of the threat or use of nuclear weapons*, Advisory Opinion of 8 July 1996 (hereinafter referred to as “Opinion”), Dissenting Opinion of Oda, para. 8.

International Court of Justice — to clarify the nature of those weapons once and for all.

The main point of reference is international humanitarian law, which seems at long last to have lost its reputation as an abstruse body of law and now enjoys considerable popularity outside the Red Cross Movement, as borne out by the numerous declarations made by the United Nations and by European institutions. The brutality of the war in Yugoslavia and the establishment of an International Tribunal for the former Yugoslavia no doubt largely contributed to this development.<sup>4</sup>

In the proceeding in question, the Court received a record number of 43 written statements from States — further evidence of the unabated interest in this question. Twenty-three States made oral statements; among them, 14 came out in favour of the illegality of nuclear weapons, in contrast to the nuclear-weapon States and their (closest) partners, which were against it.<sup>5</sup> Developing countries formed the majority within the anti-nuclear or pro-Advisory Opinion group. To these countries, the situation of “nuclear apartheid” was simply intolerable, as also emerged from the negotiations and outcome of the conferences on the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) and on the Comprehensive Nuclear-Test-Ban Treaty. Even massive pressure from the nuclear powers failed to persuade those States otherwise. This pressure, exerted even before the Court handed down its Advisory Opinion, may well have had the opposite effect.

In addition, there were the differing and in part contradictory positions of other States, such as Australia and New Zealand. While the latter, under the impression of the French nuclear tests, was in favour of the Court banning nuclear weapons, Australia too promoted the idea of a comprehensive prohibition on nuclear weapons, but failing that (and for fear of a negative finding, as outlined at the beginning of this article), wanted the Court to decline to render an opinion.

We should now like to comment on a few important findings in the Advisory Opinion that echo key points from the nuclear weapons de-

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<sup>4</sup> As regards this development as a whole, see M. Mohr, “Das humanitäre Völkerrecht 1945-1995. 50 Jahre Entwicklung”, *Bochumer Schriften zur Friedenssicherung und zum Humanitären Völkerrecht*, Vol. 31, Bochum, 1996.

<sup>5</sup> See for example *IPB News*, December 1995, pp. 3 ff.

bate,<sup>6</sup> though some issues are left unresolved. The crucial thing is that the overall trend is towards a strengthening of the anti-nuclear weapons camp.

### The applicable law

The Court starts by examining the right to life as guaranteed in Article 6, paragraph 1, of the United Nations International Covenant on Civil and Political Rights (CCPR). But that treaty is then declared not relevant: although human rights law applies even in wartime, and the right to life cannot be suspended by operation of Article 4 of the Covenant under any circumstances, the question of what constitutes an arbitrary deprivation of life can be decided only by reference to the applicable *lex specialis*, namely international humanitarian law.<sup>7</sup>

The Court does not enter into a discussion of the famous General Commentary 14/23 of the Human Rights Committee responsible for monitoring compliance with this Covenant. In its commentary, the Committee described the production, testing and stockpiling of nuclear weapons as one of the greatest threats to the right to life and demanded that those activities, as well as the use of nuclear weapons, be banned and declared to be crimes against humanity.<sup>8</sup> This link between the nuclear weapons issue — i.e., the question of a general ban and an effective prohibition on the use of such weapons — and the right to life should have been more clearly perceived by the Court. It is not only a matter of parallel effects, but also of mutual reinforcement: the use of nuclear weapons violates both the right to life and international humanitarian law. Here as in many other contexts, there is an obvious overlap between international humanitarian law and human rights law.

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<sup>6</sup> From the abundant literature available, we can only cite a few particularly outstanding works, namely:

N. Singh, E. McWhinney, *Nuclear weapons and contemporary international law*, Leiden, 1988;

M. Cohen, M.E. Gouin (eds), *Lawyers and the nuclear debate*, Ottawa, 1988;

B. Graefrath, "Zum Anwendungsbereich der Ergänzungsprotokolle zu den Genfer Abkommen vom 12. August 1949", *Staat und Recht*, 29/1980, pp. 133 ff.;

H. Fischer, *Der Einsatz der Nuklearwaffen nach Art. 51 des I. Zusatzprotokolls zu den Genfer Konventionen von 1949*, Berlin, 1985;

M.C. Ney, *Der Einsatz von Atomwaffen im Lichte des Völkerrechts*, Frankfurt a. M., 1985;

R. Falk, E. Meyrowitz, J. Anderson, *Nuclear weapons and international law*, Princeton, 1981;

H.-M. Empell, *Nuklearwaffeneinsätze und humanitäres Völkerrecht*, Heidelberg, 1993.

<sup>7</sup> See Opinion, paras. 24 and 25.

<sup>8</sup> For further evidence, see M. Nowak, *CCPR Commentary*, Kehl et al., 1993, pp. 108 ff.

After declaring the prohibition on genocide to be pertinent under certain specific circumstances (intent to destroy a group), the Court undertakes a more detailed examination of the relationship between the use of nuclear weapons and environmental protection.<sup>9</sup> Its conclusion is that although existing international law pertaining to the protection of the environment does not specifically prohibit the use of nuclear weapons, "important environmental factors" must be taken into account in the implementation of international humanitarian law. Indeed, widespread and long-lasting damage to the environment resulting from the use of nuclear weapons is a key argument in favour of outlawing such weapons.<sup>10</sup>

The Court goes on to establish a link with what it describes as the "unique characteristics" of nuclear weapons.<sup>11</sup> These lie in the vastly destructive power of such arms (including the radiation phenomenon), thus rendering the nuclear weapon "potentially catastrophic". Furthermore: "They have the potential to destroy all civilization and the entire ecosystem of the planet". What is highly significant is that the Court extends these "unique characteristics", i.e., the capacity to cause untold human suffering and damage to generations to come, to *all* types of nuclear weapons and use thereof. In so doing, it clearly distances itself from academic theories, such as the purportedly admissible theory of isolated use of nuclear weapons in Antarctica.<sup>12</sup> At least such theories can be countered with the ever-present risk of escalation.

The unique characteristics of nuclear weapons are then examined in the light of the applicable law, the main components of which the Court considers to be the provisions of the Charter of the United Nations relating to the use of force, and international humanitarian law.<sup>13</sup>

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<sup>9</sup> See Opinion, paras. 26 ff.

<sup>10</sup> In lieu of several sources, see P. Weiss, B. Weston, R. Falk, S. Mendlowitz, "Draft Memorial in support of the application by the World Health Organization for an advisory opinion by the International Court of Justice on the legality of the use of nuclear weapons under international law", *Transnational Law and Contemporary Problems*, 4 (1994) 2, pp. 24 ff.

<sup>11</sup> See Opinion, paras. 35 ff.

<sup>12</sup> In this connection, see for example Mohr, *op. cit.* (note 1 above), p. 150. Schwebel, in his Dissenting Opinion (p. 7), makes similar comments regarding "tactical nuclear weapons" and the use of nuclear weapons "in a desert".

<sup>13</sup> See Opinion, para. 34 and paras. 37 ff.

## Nuclear weapons and self-defence

The Court begins by aptly observing that Article 51 of the Charter of the United Nations concerning the right to individual or collective self-defence makes no reference to specific weapons. On the other hand, the concept of self-defence is subject to the conditions of necessity and proportionality. Here the Court expresses reservations as to whether nuclear weapons may be used, and because of the “nature” of such arms and the risk they entail, its misgivings also extend to “small” and “tactical” nuclear weapons, and the conduct of reprisals under certain circumstances.

Alongside these very clear and convincing findings, one thing is to be regretted, however, and that is the *distinction* drawn by the Court between the principle of proportionality (which *per se* would not unconditionally exclude any recourse to nuclear weapons in self-defence) and international humanitarian law (to which reference must ultimately be made in determining lawfulness). The fact is, however, that humanitarian law is *itself* influenced by the principle of proportionality, which basically links it with international law as deriving from the Charter or peacetime international law. In other words, the use of nuclear weapons, more specifically for a “first strike”, is always disproportionate *and/because it is* contrary to international humanitarian law.

The Court then turns to the policy of deterrence, which, in its view, requires that there be a credible intent to use nuclear weapons. As in the case of actual use of nuclear weapons, such a “threat” may be contrary to international law if it violates the principles of necessity and proportionality.<sup>14</sup> Here again, the Court’s position is clearly in line with those of the experts in international law or political science forming part of the anti-nuclear weapons camp.

## A general ban on nuclear weapons?

It is interesting to note that by way of introduction the Court turns this question around; equally interesting is how it does so: conventional and customary international law contain no specific prescription *authorizing* the use of nuclear weapons, or of any other type of weapon for that matter — yet another important observation.<sup>15</sup>

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<sup>14</sup> *Ibid.*, para. 48. See also M. Mohr, “Völkerrecht kontra nukleare Abschreckungsdoktrin: einige wesentliche und bleibende Einwände”, *Demokratie und Rechte*, 19 (1991) 1, pp. 47 ff. In his Declaration, Judge Shi unequivocally describes “nuclear deterrence” as a practice that should be an *object* of regulation by law.

<sup>15</sup> *Ibid.*, para. 52 and paras. 53 ff.

The Court further states that to date there is no treaty-based general ban on nuclear weapons similar to the prohibitions on biological and chemical weapons. It does, however, distinguish a trend. Treaties such as the Comprehensive Nuclear-Test-Ban Treaty, the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) and the treaties on nuclear-free zones seem to point to increasing concern within the international community over nuclear arms, "foreshadowing a future general prohibition of the use of such weapons".

That is precisely the process that is now under way. It is marked by a series of intermediate steps, the Comprehensive Nuclear-Test-Ban Treaty being one of them. The crucial thing is that those activities should not become mere substitutes for action.<sup>16</sup> The objective remains complete nuclear disarmament, i.e., the total elimination of nuclear weapons, as enshrined in Article VI of the NPT. The Court itself firmly re-emphasizes that goal at the end of the Advisory Opinion, pointing out that Article VI does not contain a mere obligation of conduct, but an obligation to achieve a precise result.<sup>17</sup>

In this light, the project for a treaty establishing a (total) ban on the use of nuclear weapons, pursued for years by the United National General Assembly, can only be viewed as (yet) another intermediate step. In any case, such a treaty could do little more than strengthen existing instruments, which raises the question as to whether one should not proceed directly towards a comprehensive (treaty-based) ban on nuclear weapons themselves. Endeavours along those lines have been under way at inter-governmental and non-governmental levels for some time now.<sup>18</sup> The present Advisory Opinion will surely give strong impetus to that process, particularly within the framework of the United Nations.<sup>19</sup>

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<sup>16</sup> Hence one might well question the effectiveness and sense of the so-called "security assurances" extended by the nuclear powers; for example, those assurances entail the duty to provide humanitarian assistance for victims of nuclear weapons (!). Schwebel (Dissenting Opinion, pp. 1 ff.) goes too far, however, when he interprets the existence of such assurances — together with the NPT — as overall recognition of the legality of nuclear weapons, against the background of "fifty years of the practice of States".

<sup>17</sup> Opinion, paras. 98 ff.

<sup>18</sup> For instance, an NGO Abolition Caucus has now been formed; see Mohr, *op. cit.* (note 1 above), p. 152.

<sup>19</sup> Malaysia has in the meantime launched an initiative for a UN General Assembly resolution which welcomes the Opinion of the Court and calls upon States to start negotiations in 1997 on a convention comprehensively banning nuclear weapons.

As regards the other source of international law, namely customary law, the Court is unable to establish the existence of a convincing *opinio juris*. It holds that the aforementioned endeavours by the United Nations General Assembly to arrive at a convention prohibiting nuclear weapons indeed reflect the wish of a very large section of the international community, and as such constitute a “nascent *opinio juris*”. This is matched, however, by the still strong adherence to the policy of deterrence, construed as the right of a State to use nuclear weapons in self-defence against an armed attack threatening its “vital security interests”.<sup>20</sup> Unfortunately, the Court *at this point* fails to refer back to the principle of proportionality, which of course applies also in customary law. Further, the question arises as to how far adherence by a mere handful of States to a doctrine that is contrary — at least in tendency — to international law can nullify the view of law held by the vast majority of States.<sup>21</sup>

### **International humanitarian law**

The centrepiece of the Advisory Opinion is the Court’s examination of the use or threat of nuclear weapons in the light of the principles and rules of international humanitarian law.<sup>22</sup> The following were singled out as the cardinal principles of that law:

1. the protection of the civilian population and civilian objects and the distinction between combatants and non-combatants;
2. the need to avoid causing unnecessary suffering and the fact that States do not have unlimited freedom of choice of means in the weapons they use.

The Court explains that though the Diplomatic Conferences of 1949 and 1974-1977 did not address the nuclear issue, it cannot be concluded that the established principles of international humanitarian law are not applicable to the use of nuclear weapons. It thus falls back on the minimal position of the so-called (purported) “nuclear consensus”, which also emerges from a statement in this connection by the Federal Republic of Germany.<sup>23</sup> For

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<sup>20</sup> See Opinion, paras. 64 ff.

<sup>21</sup> Thus Judge Shi, in his Declaration, points out that the international community after all comprises 185 States and its structure is built on the principle of sovereign equality.

<sup>22</sup> *Ibid.*, paras. 74 ff.

<sup>23</sup> According to which the (new) rules established in Protocol I additional to the Geneva Conventions apply only to conventional weapons, without prejudice to other rules applicable to other types of weapons; in this regard, see mainly Fischer (note 6 above).



the purposes of the Advisory Opinion, this position may, however, be regarded as sufficient. In addition to the principles and rules of international humanitarian law the Court addresses the principle of neutrality, which, as it rightly maintains, unquestionably applies to all international armed conflict, whatever the type of weapon used.

Having established the applicability of those principles, the Court reaches the following "split" and to my mind contradictory conclusions:

- (1) in view of the "unique characteristics" of nuclear weapons, the use of such weapons is scarcely reconcilable with the requirements of international humanitarian law;
- (2) nevertheless, the Court does not consider itself in a position to conclude with certainty that the use of nuclear weapons is at variance with international humanitarian law *in any circumstance*; after all, States have a right to survival, a right of self-defence, and there is the policy of deterrence to which an appreciable section of the international community adhered for many years.

With the affirmation in paragraph 2, the Court in my opinion contradicts its previous positions, as this statement is a clear concession to nuclear-weapon States and the advocates of the doctrine of nuclear deterrence. The yardsticks of proportionality and international humanitarian law are applicable to any use of nuclear weapons or of any other weapon, as the Court earlier demonstrated. The *raison d'être* of international humanitarian law is precisely to limit the effects of armed conflict, regardless of who is waging the conflict and in what circumstances.

Certainly no-one would think of approving the use of poison gas if "vital security interests" or the "survival" of a State were at stake. For exceptional circumstances of that nature are always present to some extent in the event of armed attack (which entails the right of self-defence), especially when the question of the (lawful) use of nuclear weapons arises. It is precisely when a State wishes to survive that it should sooner *refrain* from using nuclear weapons!

The Court thus concludes that the threat or use of nuclear weapons is in general contrary to international law, but it does also leave a sort of "escape hatch" in the event of a threat to survival. The decision was a very close one, with seven votes to seven, plus the President's casting vote. It should, however, be borne in mind that three (formal) opposing votes came from judges who were against any possible justification of the use of nuclear weapons. The "real" opposing votes came only from the judges from the three nuclear-weapon States, i.e., the USA, the United

Kingdom and France. The German Judge Fleischhauer voted with the President's majority.

Most of the declarations and opinions of the judges revolve around paragraph 2E of the Advisory Opinion. There is distinct opposition against the "escape hatch" left open by the Court (Weeramantry, Shahabuddeen, Koroma). Even Bedjaoui emphasizes that the survival of a State cannot take precedence over humanity's right of survival. In my opinion, Koroma aptly criticizes a tendency to return to an outmoded doctrine of survival which is untenable in law, and rightly concludes that the Court has not answered the question actually put to it, that is, whether it is permitted to use nuclear weapons "*in any circumstance*". Judge Higgins is rather perplexed by the answer set out in paragraph 2E, while Fleischhauer sees it as the smallest common denominator between the conflicting principles of international humanitarian law and the right of self-defence<sup>24</sup> — a conflict which to my mind is both unnecessary and incomprehensible. Just how far a practical instance of such an "extreme circumstance" can be taken emerges from Schwebel's discussion of Operation Desert Storm (threat of the use of nuclear weapons to deter the enemy from using biological and chemical weapons against the coalition forces).<sup>25</sup>

In their initial comments on the Opinion, nuclear-weapon States such as the USA and the United Kingdom made use of that "escape hatch" by explaining that, accordingly, the use of nuclear weapons could be admissible under international law and that the Advisory Opinion would not in any way affect defence policy.<sup>26</sup> It is obvious just how needless and in fact dangerous is that "escape hatch" in paragraph 2E. Hence the importance of underscoring the Court's (positive) *core* affirmation of the fundamental *illegality* of the use of nuclear weapons *under international law* (first subparagraph of paragraph 2E). In addition, there are the other important statements referred to earlier, e.g., the absence of any special prescription in international law authorizing the use of nuclear weapons and the requisite compatibility of the law governing the use of nuclear weapons with the law applicable in armed conflicts.

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<sup>24</sup> See, respectively, Dissenting Opinion of Koroma, *inter alia* pp. 4 and 18; Dissenting Opinion of Higgins, para. 41; Separate Opinion of Fleischhauer, para. 5.

<sup>25</sup> See Dissenting Opinion of Schwebel, pp. 8 ff.

<sup>26</sup> See *War & Peace Digest*, 4 (1996) 3, p. 2.

### **Concluding remarks**

Despite some flaws and contradictions, the Court's Advisory Opinion of 8 July 1996 represents a triumph for the rule of law in international relations. The Court has taken a stand on one of the most burning legal and political questions of our time, and its response is in essence a negative one. Even though such Advisory Opinions are not binding, they nonetheless carry very high authority. The impressive structure of this Opinion places it among the ranks of earlier, "famous" opinions handed down by the Court which have substantially influenced the development of international law.<sup>27</sup>

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<sup>27</sup> For instance the Advisory Opinions on the reservations to the Genocide Convention (1951), "Certain Expenses of the United Nations" (1962), and on Namibia (1971).