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SPECIAL ISSUE

The Advisory Opinion of the International Court of Justice on the legality of nuclear weapons and international humanitarian law

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INTERNATIONAL REVIEW OF THE RED CROSS

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INTERNATIONAL COMMITTEE OF THE RED CROSS

A note from the Editor

On 8 July 1996, the International Court of Justice issued an advisory opinion entitled "Legality of the threat or use of nuclear weapons" in reply to a question submitted to it by the General Assembly of the United Nations. The Review *subsequently invited a number of international legal experts to discuss the implications of this opinion for international humanitarian law as a whole, and we are happy to be able to publish eight articles on the subject by as many authors. While they have expressed a variety of viewpoints about the Court's conclusions on the main issue, they all stress in one form or another the importance of the advisory opinion for international humanitarian law in general.*

The Review *is particularly pleased that Professor Géza Herczegh, a judge at the International Court of Justice and a renowned authority in the field of international humanitarian law, has agreed to write the foreword to this series of articles.*

In his introduction to the articles regarding the Court's conclusions, Yves Sandoz, the ICRC's Director for International Law and Policy, reminds those in positions of political power that they have a responsibility to ensure that nuclear weapons are never used again.

At our invitation, John H. McNeill had already set about drafting an article when his work was abruptly interrupted by his sudden death. His passing away constitutes a great loss to all those who knew this eminent jurist and expert in international humanitarian law. The Review *is grateful to his close colleague at the United States Department of Defense, Ronald D. Neubauer, for completing the unfinished text.*

The Review

Foreword by Judge Géza Herczegh

At the request of the United Nations General Assembly, the International Court of Justice delivered an Advisory Opinion on the legality of the threat or use of nuclear weapons. Some commentators have called this one of the most important decisions in the Court's history. It was taken after long debate, and section 2E of the decision was adopted only by the President's casting vote, seven members of the Court having voted in favour and seven against. Every member found it necessary to add to the Advisory Opinion either a declaration or a separate or dissenting opinion making clear his or her own position in relation to the question raised by the General Assembly.

The principles and rules of international humanitarian law are at the heart of the Advisory Opinion. Paragraphs 74-95 of the grounds explicitly refer to it, as do sections D and E of the decision; and many parts of the individual declarations and separate and dissenting opinions deal with the respective roles of those principles and rules in regard to the threat or use of nuclear weapons.

Given the importance of the Advisory Opinion and of the contrasting views expressed by the members of the Court, it would seem most important that eminent experts in international humanitarian law thoroughly investigate the theoretical questions that may be raised in this connection. I therefore welcome the very commendable initiative taken by the *International Review of the Red Cross* in devoting one of its issues to this debate. The conclusions of the Advisory Opinion may be criticized — and some of them certainly will be — but the comments published in the *Review* will nevertheless serve to clarify the various aspects of the problem. They will highlight the present role and place of international humanitarian law in contemporary international law and the content and nature of the relevant principles and rules. In short, they will help to

promote and develop general knowledge of humanitarian law, and hence increase its effectiveness around the world. I myself hope that the discussion launched by the *Review* will be taken up in other periodicals and fora and will arouse widespread interest.

Géza Herczegh, Judge
International Court of Justice

Advisory Opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons

Preliminary remarks by Yves Sandoz, Director for International Law and Policy at the International Committee of the Red Cross.

There are some questions which one would prefer not to raise. The legality of the use of nuclear weapons in war is surely a case in point.

With the emergence and development of nuclear weapons mankind crossed a major threshold: for the first time, it had weaponry which threatened its very survival. The dropping of atomic bombs on Hiroshima and Nagasaki brought about a moral cataclysm and changed the whole face of warfare. The ICRC immediately saw the implications of those events. It shared its concern with all the National Red Cross and Red Crescent Societies in a circular letter that its President, Max Huber, sent out on 5 September 1945, less than one month after Hiroshima and Nagasaki.[1]

From a "doomsday" weapon wielded by a single power, nuclear capability became a means of mutual deterrence as soon as it was acquired by the other major military powers. While preventing direct confrontation between the great powers, the nuclear threat did not forestall the outbreak of numerous other conflicts, with civilians paying the highest price.

Clearly, there was a need to rethink and develop international humanitarian law. This process could not in all honesty evade the question of means of combat whose indiscriminate effects ruled out any distinction between combatants and civilians — a distinction which is essential in humanitarian law. And how could this question possibly be raised without broaching the issue of the use of nuclear weapons?

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[1] Reproduced in *IRRC*, No. 313, July-August 1996, pp. 501-502.

The *Draft Rules for the limitation of the dangers incurred by the civilian population in time of war* presented by the ICRC in 1956 were rejected precisely because they directly addressed the question of nuclear weapons. As a result, and although the international situation made such rules increasingly necessary, the ICRC decided to avoid the problem of nuclear weapons altogether when it drafted the Additional Protocols, adopted by consensus in 1977. The Ad Hoc Committee of the Diplomatic Conference which examined the question of weapons acknowledged that "nuclear weapons and other weapons of mass destruction were, of course, the most destructive". But most of its members accepted that the Committee's work should be restricted to conventional weapons, because "nuclear weapons in particular had a special function in that they act as deterrents preventing the outbreak of a major armed conflict between certain nuclear powers".[2]

The relationship between the 1997 Additional Protocols and international humanitarian law was thus somewhat ambiguous: while it was impossible to exclude the weapon with the greatest potential for destruction from the field of application of international humanitarian law, the law could not be expected to resolve a problem of strategic balance which clearly went beyond its purview.

Hence the quandary in which the ICRC found itself when it drew up its Commentary on the 1977 Additional Protocols, and the dilemma faced by the International Court of Justice when it was requested to hand down an opinion. Hence also the difficulty of broaching the question of whether it is lawful to use nuclear weapons in war.

But then the question *was* raised, and the Court's Opinion, along with the explanations, dissenting opinions and arguments put forward during the proceedings, supplied a wealth of information which is extremely useful in understanding the problem in general and international humanitarian law in particular. The *Review* has accordingly decided to devote a large section of this issue to the matter.

Beyond the studies conducted on this topic, we consider it important to emphasize one point which may not have emerged from the debate and which should make it possible to leave all "sterile" legal arguments behind. Nobody really wants to see these weapons unleashed, and every-

[2] See Y. Sandoz, C. Swinarski, B. Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC/Martinus Nijhoff Publishers, Geneva, 1987, para. 1849, p. 592.

one knows that their use would spell disaster for humanity. The reason why the advocates of nuclear deterrence want at all costs to keep the door open for such use is because they believe that this will strengthen the credibility of deterrence. For them it is the best way of ensuring that nuclear weapons will never be used, an objective shared by those who think that it would be preferable to declare an unequivocal ban on the use of nuclear weapons by means of an international treaty. Opinions may differ on strategy and analysis, but not on the final aim.

That is why both the Court's Opinion and the ICRC's Commentary refer to the political responsibility of States. We have neither the capability nor the competence to judge the reliability of defence policies based on nuclear deterrence. Yet it is clear that some day — and far be it from us to say when that day will come — easy access to nuclear technology will call these policies into question. At that point the drafting of a treaty providing for a complete ban, linked in all probability with nuclear disarmament, will resume its place at the top of the agenda. We can only hope that the States, and in particular the nuclear powers, will seize that crucial opportunity — indeed, they will have no other choice. Nuclear weapons must never be used again: it is up to the States to ensure this, and they are well aware of their responsibility.

Nuclear weapons: a weighty matter for the International Court of Justice

JURA NON NOVIT CURIA?

by Luigi Condorelli

1. It is easy to heap scorn on the Advisory Opinion handed down by the International Court of Justice on 8 July 1996 on the legality of the threat or use of nuclear weapons. No great cerebral effort is required; one need only choose any of the numerous and often harsh criticisms to be found in the declarations and the separate or dissenting opinions that all fourteen judges present took care to formulate, whether they agreed with the whole of the decision or voted against any of its paragraphs.

Indeed, one may well feel bemused when reading the views expressed by the judges as to the merits of the question asked by the General Assembly, and when one tries to relate those views to the title — declaration, separate opinion or dissenting opinion — chosen by each judge for his or her document and to the way the voting went. The Advisory Opinion is full of surprises, particularly as regards the critical paragraph of the decision (para. 2E, clause 2), in which the Court states that it is unable to say 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". For the purposes of this article it should be said at once that although those words indisputably

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Original: French

lend themselves to various interpretations, at least one thing is certain, namely that by a tiny majority the Court did indeed refuse to reject the nuclear powers' argument that in such circumstances the use of nuclear weapons would not be prohibited by law.

The fact is that any attempt to understand for exactly what reasons the judges who voted for the paragraph in question did so leads to the astonishing discovery that those reasons are not only disparate, but actually contradict each other. Of the seven judges who formed the majority on this point thanks to the President's casting vote (Bedjaoui, Shi, Vereshchetin, Fleischhauer, Herczegh, Ferrari Bravo and Ranjeva), the three last-named more or less disapprove of that refusal, and put their opposition — whether clear or qualified — on record either in a Declaration (Herczegh,[1] Ferrari Bravo[2]) or in a Separate Opinion (Ranjeva[3]). Of the judges who voted against, however, three (Schwebel, Guillaume and Higgins), plus one (Oda[4]), are basically in favour of the implication arising from the position adopted by the Court, that is, that there may be extreme circumstances in which the use of nuclear weapons can certainly not be said to be outlawed. Nevertheless, three of the four (Schwebel, Higgins and Oda) express their substantial agreement in Dissenting Opinions which, incidentally, are strongly critical, and the fourth (Guillaume) does so in a Separate Opinion in which he blames the Court only for failing to say explicitly what it admitted implicitly. The Dissenting Opinions of the three remaining judges who voted against

[1] "The fundamental principles of international humanitarian law (...) categorically and unequivocally prohibit the use of weapons of mass destruction and, among these, nuclear weapons" (ICRC translation). See para. 2 of Judge Herczegh's Declaration.

[2] Judge Ferrari Bravo's position is in fact extremely difficult to classify. First of all he concludes: "I think that there is not as yet any precise and specific rule that prohibits atomic weapons and takes into account all the consequences of such a prohibition". That opinion seems essentially in agreement with the vote cast. But he goes on to say that the events of the Cold War "merely prevented the *implementation* of the ban (...) whereas the ban itself, the ban pure and simple, so to speak, still stands and is still in effect ...". (Declaration, pp. 3-4: ICRC translation.) But if the ban, pure and simple or otherwise, exists, it is hard to see why the use of the weapon covered by it should not also be called ("purely and simply" no doubt) illegal.

[3] In the first place Judge Ranjeva stresses that "... there can be no doubt as to the validity of the principle of unlawfulness in the law of armed conflict", and a little further on gives the reasons that "... in my view make the exception of 'extreme self-defence' baseless both in logic and in law". (Declaration, pp. 6-7: ICRC translation.)

[4] Judge Oda was alone in affirming that the Court should not have answered the question posed by the General Assembly. His Dissenting Opinion, however, clearly indicates his position on the issue.

(Shahabuddeen, Weeramantry and Koroma) show clearly that they so voted for diametrically opposite reasons, namely their firm conviction that the threat or use of nuclear weapons is always prohibited. As already seen, that conviction does not appear to be poles apart from the view expressed in the written statements (but not the votes) of three of the judges who voted with the President.

In short, it is often quite hard to understand why each judge voted as he or she did, or why — in answer to questions which were sometimes strangely split up or coupled together — they found themselves voting in the same way as colleagues holding views contrary to their own. This is ample evidence of the Court's difficulties in handling the problem — a legal one, certainly, but above all a highly political one, undeniably and by far the most daunting of modern times. Faced with two utterly irreconcilable positions, each upheld by such influential sectors of the international community, the Court must certainly have realized that it would cost it dear to endorse either one of them. It therefore decided to seek a compromise whereby it could escape from its dilemma without fully committing itself, and took refuge in a sort of *non liquet* — the confession (a baffling one, coming from a judge) that as regards nuclear weapons the Court did not feel able to say exactly where to draw the line between what was lawful and what was not. In other words, *jura non novit curia*![5] But closer examination shows that this is not a compromise at all, and that the *non liquet* is only apparent.

The apparent compromise was as follows: having been asked to endorse one of two conflicting arguments, the first being that the threat

[5] It should be pointed out that, as will be seen below, the Court gives as reasons for its uncertainty first the insufficiency of the elements of fact made known to it, and secondly what it calls (as opposed to the "elements of fact at its disposal"), "the present state of international law viewed as a whole" (para. 97 of the Opinion). In other words, the Court does not take cover solely behind the inadequacy of the factual data placed before it (paras. 94 and 95). The Court also indicates very clearly that it cannot come to a conclusion because the legal data pertinent to the issue appear to be fundamentally ambiguous and contradictory (paras. 95 and 96). It is in this latter connection that one can well ask what has become of the principle *jura novit curia*, translated by the Court itself as follows: "... the law lies within the judicial knowledge of the Court" (*Fisheries Jurisdiction Case*, Judgment of 24 July 1974, ICJ Reports, 1974, p. 9, para. 17). It is indeed undeniable that the Court "... states the existing law and does not legislate" (as the Advisory Opinion under discussion stresses in para. 18), given that "its task is to engage in its normal judicial function of ascertaining the existence or otherwise of legal principles and rules applicable" (*ibid.*). But if this is "its normal judicial function", and if it must be pursued according to the principle of *jura novit curia*, it is surely nothing less than an act of abdication for the Court to confess that it is not able to say what legal regime applies to a given activity, what is lawful and what is not, what is allowable and what is prohibited.

or use of nuclear weapons is unlawful in all circumstances, and the second that it could be permitted in certain exceptional circumstances, the Court did not accept either, alleging that the state of the law and of the facts did not allow it to decide which thesis was valid and which was invalid. Clever, no doubt, but very disappointing and surprising. A judge is after all expected to be able to "state the law"! But is it really a reply which fails to say whether either party is right or wrong? Did the Court really distance itself equally from both parties, leaving everyone equally dissatisfied? Surely and obviously not!

In my view, the mere fact that, for whatever reason, the Court did not decide that nuclear weapons are always forbidden implies that those who held them to be illegal have been totally defeated. They did not get what they wanted, that is, a ruling by the Court that the nuclear powers are not in any circumstances entitled to use the weapon they possess. And vice versa: the very fact that the Court did not rule that the threat or use of nuclear weapons is prohibited in all circumstances means that those who hold it to be legal — mainly the nuclear powers — in effect triumphed. Their dearest wish (that their policy of nuclear deterrence should not be labelled *hic* et *nunc* illegal) was granted to the full.

The same applies to the *non liquet.* Anyone who believes that the Court did not really answer the question put to it is deceived by appearances. True, the words "... the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful ..." leave the question unanswered, but only in so far as it is phrased strictly in terms of lawfulness (or, in the words of the General Assembly, in terms of what is "permitted").[6] On the other hand, those words certainly do answer — in the negative — a question phrased as follows: "Can the Court affirm that the threat or use of nuclear weapons is prohibited in all circumstances?"[7] Indeed, interna-

[6] General Assembly resolution 49/75 K of 15 December 1994 posed the question in the following terms: "Is the threat or use of nuclear weapons in any circumstance *permitted* under international law?" (emphasis added).

[7] In the light of these remarks and in view of the (exceptional) fact that all fourteen judges explained their personal views, I cannot resist making a guess — pure speculation based on an interpretation of each judge's opinion — as to what the result might have been if the following single question had been put to the vote: "Is the threat or use of nuclear weapons always prohibited, or might it not be prohibited in an extreme circumstance of self-defence in which the very survival of the State would be at stake?" According to my calculations, there would probably have been five votes in favour of the absolute prohibition of such weapons (Ranjeva, Herczegh, Shahabuddeen, Weeramantry and Koroma), or perhaps six (Ferrari Bravo), and eight votes for their "conditional" prohibition (Bedjaoui, Shi, Fleischhauer, Vereshchetin, Schwebel, Oda, Guillaume and Higgins), or perhaps nine (Ferrari Bravo).

tional public opinion has not been taken in; it is common knowledge that the Advisory Opinion delighted the nuclear powers and bitterly disappointed[8] those in favour of illegality. In such circumstances, looking beyond the appearances, is it honestly possible to talk of a *non liquet*?

2. I must say that the most impressive and most crucial of the innumerable criticisms addressed by individual judges to the Court (in regard, of course, to what it *really* decided) would seem to be one of those put forward by Judge Shahabuddeen. He expresses surprise that the Court, although recognizing that the destructive power of nuclear weapons cannot be contained in either space or time, and that they have the potential to destroy all civilization and the entire ecosystem of the planet (para. 35 of the Opinion), gives the key role in its reasoning to "the fundamental right of every State to survival, and thus its right to resort to self-defence (...) when its survival is at stake" (para. 96). "It would, at any rate, seem curious", he says in a remarkable understatement, "that a World Court should consider itself compelled by the law to reach the conclusion that a State has the legal right, even in limited circumstances, to put the planet to death" (page 34 of the Dissenting Opinion).

That is true; it is more than "curious". The law — whose basic function, students are told, should be to make coexistence and cooperation possible among the members of the society it is supposed to govern, would be absurd if it legalized an act leading to the destruction of that society, by allowing any one of its members, for whatever reason, to eliminate *in radice* the very possibility of coexistence and cooperation. The question arises, however, whether law, especially international law, really has to be logical and coherent; whether, in fact, law that contradicts itself still deserves to be called law. In his general course on private international law given at The Hague Academy in 1961, Professor Wengler raised some disturbing issues by pointing out that until very recently the penal law of several legal systems forbade duelling, whereas their military law inflicted severe penalties on any officer who refused to fight a duel. The latter lost his honour and rank and could even be expelled from the military career,

[8] The role played by para. 2F of the decision (and paras. 98-103 of the Opinion) deserves mention in this context. Here the Court goes so far as to affirm that States are under a real obligation to bring to a conclusion negotiations leading to nuclear disarmament. What the scope and legal effects of such an obligation might be is not clear. Evidently, in making such a statement the Court is answering a question it was never asked; quite apart from the formal implications (is this a case of *ultra petita*? and does that concept apply to advisory proceedings?) one might wonder whether the Court was not trying to sugar the pill that those supporting the illegality of nuclear weapons have had to swallow.

but was not sent to prison. An officer who fought a duel, on the other hand, was packed off to prison but his honour as a soldier remained intact.

The point I wish to make in this connection is that, however weighty it may be, an argument based primarily on logic (that is, one that relies on the "coherence of the system" and therefore hinges on the "principle of non-contradiction") can hardly be called definitive and exhaustive if it is contradicted by specific rules that proceed in an opposite direction. Where such rules exist, the fact of having to consider them as incoherent, pernicious and immoral, as the case may be, does indeed justify opposing them (that is, making every effort to amend or revoke them), but does not justify denying their existence. In law as in other areas, to deny the existence of something because it is bad never has any merit; such a course merely misleads.

Leaving behind these general remarks and turning to the main argument of the Advisory Opinion, it naturally has to be made perfectly clear, as indeed the Court does in paragraph 2E, clause 1, of its decision, that the use of nuclear weapons would be entirely contrary to a whole series of major principles of international humanitarian law. But that would not be sufficient grounds for concluding that the use of such weapons is absolutely prohibited by law, in view of the fact that a highly significant group of States (the nuclear powers and States sheltering under their "deterrent" umbrella) have openly set up formidable systems of nuclear deterrence, and have not only refused to consider any specific treaty prohibition but also and coherently and persistently[9] resisted the introduction and consolidation of any general rule of international law having such specific content (para. 2B of the decision). This seems all the more significant since, for various reasons and in various contexts, many other States have ultimately had to heed the nuclear powers' attitude.[10]

In sum, if the situation is really as described by the Court, the only possible conclusion is that the international legal order is remarkably

[9] Vice-President Schwebel is right to stress (in pp. 1 and 2 of his Dissenting Opinion) that the situation here has nothing to do with that of the "persistent objector", the attitude and practice are those "... of five of the world's major Powers, of the permanent Members of the Security Council, significantly supported for almost 50 years by their allies and other States sheltering under their nuclear umbrellas".

[10] Incidentally, the *Lotus* principle seems no more relevant to this discussion than the "persistent objector" principle mentioned in note 9 above. The point is not what is to be thought of the time-honoured axiom "Anything that is not forbidden is allowed"; the real problem here is whether a rule of international law can come into being and bind substantial groups of States against their will.

self-contradictory, ill-conceived and open to criticism. A determined effort is therefore needed to overhaul the system, bringing it into line with the principles of humanitarian law and ensuring that these are unconditionally and universally observed. It does no good to assert that the law is better than it really is. That merely encourages comforting delusions and, as always when people are deluded, might even have very serious consequences: it would confer on international lawmakers a seal of approval that — let it be said loud and clear — they do not in the least deserve.

3. Putting aside for the moment the central matter so far discussed, the Advisory Opinion of 1996 is the second major contribution made by the International Court of Justice to identifying the principles of *jus ad bellum* and *jus in bello* in relation to the threat and use of force, after the judgment of ten years ago in the case concerning *Military and paramilitary activities in and against Nicaragua*, not to mention the good old *Corfu Channel* case of nearly half a century ago. Virally's contention that matters relating to the use of force are not in the "operational field" of international justice is beginning to be strongly disputed, especially in connection with other pending cases that are now before the Court, such as those of *Iran v. the United States*, and *Bosnia v. Serbia.*

From the point of view of *jus ad bellum* (or "New York law", as this author likes to call it) the Court's Opinion is remarkable for several reasons.

First because, observing that the principles and provisions of the United Nations Charter relating to the prohibition of the threat or use of force and the right of self-defence do not mention any particular weapon, the Court points out that they apply to any use of force, whatever the weapon used, and thus to nuclear weapons (para. 2C of the decision). This implies in particular that their use in self-defence is subject to the conditions of necessity and proportionality. In view of the Court's general conclusion (or non-conclusion), it is particularly important to establish this point, because of the severe restrictions that should therefore follow under *jus ad bellum* by reason of the gravity and exceptional extent of the "force" in question. In plain English, the conditions of necessity and proportionality require that the use of nuclear weapons in self-defence could be envisaged only to meet an attack of comparable gravity that could not be neutralized by any other means.

The Opinion is also remarkable because the Court correctly couples the threat of force with its use and points out that whenever the use of force is prohibited, a threat to use that same force it also prohibited

(paras. 46 and 48 of the Opinion). In other words, nuclear deterrence[11] could be legal only in scenarios in which the use of nuclear weapons for self-defence was not prohibited.

Finally and above all, the Opinion is remarkable because it gives the Court an opportunity to express its wish to see New York law coordinated with Geneva law to such an extent that, so to speak, the first incorporates the second. Thus in paragraphs 39 and 42 of the Opinion and paragraph 2D of the decision, the Court stresses that the conditions that render the use of force in self-defence compatible with international law are not only those explicitly or implicitly prescribed by the Charter. A weapon prohibited by the law of armed conflict, or a use of force inconsistent with the rules of international humanitarian law, would not become lawful because the Charter recognized the aim pursued as legitimate. For the first time, the key principle that international humanitarian law must be equally respected by all parties to a conflict, quite irrespective of the *causa belli* (that is, of whether the war was a *bellum justum* or *injustum* according to New York law), is given the unequivocal blessing of jurisprudence. But, most unfortunately, that blessing might seem to be contradicted to some extent in the concluding remarks of the Opinion, as is pointed out below.

4. Anyone interested in the law of armed conflict must nevertheless be glad to see that the Court and its individual judges devoted so much attention to this body of international law, which is so often eyed by jurists with arrogance or suspicion. Here too we shall digress from the main question discussed in the beginning to note some of the Court's most significant *dicta*. Pending a more detailed study which cannot be made in this article, there would appear to be four that deserve attention.

The first relates to the fact that the corpus of international humanitarian law contained in the major conventions essentially comprises general and customary international law. Thus, referring to "*a great many rules of humanitarian law*", the Court observes (in para. 79 of the Opinion) that these rules "are to be observed by all States whether or not they have ratified the conventions that contain them".[12] Later on (para. 82) the Court talks of "a corpus of treaty rules *the great majority of which* had already become customary"[13] by the time they were codified. This is a

[11] This should be understood as comprising both actual possession of nuclear weapons and the declared intention to use them in specified circumstances.

[12] Emphasis added.

[13] *Idem.*

viewpoint that has to be taken into account in the present highly topical debate on customary humanitarian law. The International Committee of the Red Cross in particular must find it very encouraging (the international community having requested it to review custom in this area) as showing the great similarities between codified law and general law, with reference also to Additional Protocol I of 1977 (see para. 84 of the Opinion).

Second, the Court describes the said fundamental rules of humanitarian law as "*intransgressible* principles of international customary law" (para. 79).[14] This novel term is not as clear as it might be, but it is unlikely that the Court merely meant (as a literal interpretation of the word in italics might suggest) that those principles must not be transgressed. That, indeed, is true of any rule of law that imposes any obligation at all! The solemn tone of the phrase, and its wording, show that the Court intended to declare something much more incisive and significant, doubtless in order to bring the fundamental rules so described closer to *jus cogens;* to bring them closer but not to make them part of it, for in paragraph 83 the Court says frankly that it does not feel it has to decide whether these are peremptory rules — a statement open to question for many reasons.[15] By "intransgressible", then, the Court does not mean "peremptory", but something not far from peremptory, as President Bedjaoui hints in paragraph 21 of his Declaration. Probably — at least as I understand it — the intention was to highlight the fundamental concept embodied in Article 1 common to the four Geneva Conventions of 1949 and repeated in Article 1, paragraph 1, of Protocol I of 1977, namely that no circumstance offered as justification can make behaviour contrary to the principles in question anything but unlawful.[16] In other words, the circumstances eliminating unlawfulness that apply in other sectors of the international legal order (such as the victim's consent, self-defence, counter-measures or a state of necessity) cannot be invoked in this particular case.

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[14] *Idem.*

[15] If these principles belong to *jus cogens,* no treaty can abrogate them. In that case the Court should not have given priority to discussion of the treaty rules on nuclear weapons (as it admits openly having done — see para. 74 of the Opinion). In any case it is surely obvious that one of the Court's main concerns should have been to decide whether or not the relevant rules of international humanitarian law were or were not peremptory rules.

[16] See L. Condorelli, L. Boisson de Chazournes, "Quelques remarques à propos de l'obligation des États de 'respecter et faire respecter' le droit international humanitaire 'en toutes circonstances'", in Swinarski (ed.), *Studies and essays on international humanitarian law and Red Cross principles, in honour of Jean Pictet,* ICRC/Martinus Nijhoff Publishers, Geneva/The Hague, 1984, p. 17 ff.

Thirdly, nuclear weapons are subject not only to *jus ad bellum*, but also to *jus in bello*, and to humanitarian law in particular (para. 2D of the decision). The Court sets great store by this principle (see paras. 85-89 of the Opinion), and duly stresses that no one, the nuclear powers included, made any contrary statement to the Court. But if humanitarian law applies to nuclear weapons, what does that imply, seeing that because of their unique characteristics "the use of such weapons in fact seems scarcely reconcilable with respect for such requirements"?[17] It was, of course, at just this point that the Court brought its ratiocination to a halt and confessed that it was unable to conclude definitively whether nuclear weapons were legal or illegal. The stalemate arises, according to the Court, not only because the facts are uncertain (can there really be a "clean" nuclear weapon with "limited" effects?) but also because the law is ambiguous and in a state of flux. Obviously, the Court is alluding here to those specific legal data which, as this author has pointed out, are quite incompatible with the fundamental rules of humanitarian law.

So according to the Court the principles of humanitarian law, in spite of their "intransgressible" content, which seems "scarcely reconcilable", are not sufficient to justify outlawing weapons, because of the existence of other specific legal data (which, for their part, are not sufficient to justify the opposite conclusion). All this, however, does not mean that

[17] While by no means going deeply into the subject, the Court admits this *de plano* in para. 95 of the Opinion and para. 2E, clause 1, of the decision. It was most certainly (and rightly!) convinced of the intrinsically catastrophic nature of nuclear weapons and of the impossibility of containing their devastating effects in either space or time (para. 35 of the Opinion). In the view of Judge Higgins, however, that intermediate conclusion deserves strong criticism, on the grounds that the Court should not have confined itself to generalities and approximations, but should have closely examined the specific provisions of humanitarian law. Judge Higgins draws special attention to those provisions which, provided that combatants and not the civilian population are attacked, describe the suffering inflicted on combatants as "superfluous" and collateral damage suffered by civilians as "excessive" — not in the absolute sense of their magnitude only, but in terms of the extent to which they are proportionate to the legitimate aims of the military operation (such as repelling an aggressor) and to the military advantage expected. Going by the opinion examined, a study of this kind would doubtless have led the Court to conclude that "in the present stage of weapon development, there may be very limited prospects of a State being able to comply with the requirements of humanitarian law" if nuclear weapons were used (Dissenting Opinion, para. 26). This possibility, however, cannot be ruled out categorically and *a priori*. Clearly, this was an attempt to "reconcile the irreconcilable" — to reconcile humanitarian law with nuclear weapons; a very clever attempt, but a completely hopeless one if nuclear weapons have the characteristics and effects described by the Court. In my opinion, and for the reasons I have given, it would be preferable to condemn the blatant contradiction on this subject that lies within the international legal order.

nuclear weapons confer an exemption, so to speak, from the obligation to take humanitarian imperatives into account. That is the fourth and last point that deserves to be emphasized. In fact the Court assigns to humanitarian imperatives the role of helping[18] to restrict situations in which the use of nuclear weapons *might* not be unlawful to those, and only those, that would place a State in an "extreme circumstance of self-defence, in which its very survival would be at stake" (para. 97 of the Opinion and para. 2E, clause 2, of the decision). The Court's reasoning hinges on what it calls "the fundamental right of every State to survival". That right has never been heard of before,[19] but much will undoubtedly be said of it in the future. Unfortunately the Court neither defines nor indicates the scope of that right in any way whatsoever.

5. An attempt really should be made to arrive at an exact definition of this "right to survival", to which the Court appears to attribute the unprecedented force of making the legalization of nuclear weapons *possible* (if not *probable*). This despite the fact that because of their apocalyptic effects the use of such weapons "would generally be contrary (...) to the principles and rules of humanitarian law" (point 2E, clause 1, of the decision). This approach gives rise to the greatest misgivings as to the devastating implications for humanitarian law that might result from a certain interpretation of the Court's opinion.

Of course the Court's intention was in itself praiseworthy. It wanted to be as restrictive as possible in identifying situations in which the use of nuclear weapons might not be prohibited. Not feeling able to declare that the prohibition was absolute, the Court intimated that perhaps it did not apply exclusively to an absolutely extreme situation. But precisely as regards such a situation, the Opinion irresistibly prompts some highly sensitive questions. If, for example, the "right to survival" can justify the use of the most terrible and inhumane weapon in existence, why should it not also, and on even stronger grounds, justify less serious breaches of humanitarian law, in particular by a State whose survival hangs in the balance but which does not possess nuclear weapons? All things considered, should it be conceded that in a case of "extreme self-defence" *jus ad bellum* grants at least a partial exemption from the obligation to respect *jus in bello,* and by so doing flagrantly contradicts the fundamental rule

[18] Together with the principles of *jus ad bellum* relating to self-defence, whose restrictive effect, arising mainly from the condition of proportionality, has already been pointed out.

[19] As Judge Ranjeva stresses on p. 6 of his Separate Opinion.

of humanitarian law that *jus in bello* must be respected in all circumstances, whatever the *causa belli*? Is any and every criminal State to be offered the possibility of whitewashing its violations of humanitarian law by brandishing the argument of its "right to survival"?

From this viewpoint the Advisory Opinion (especially para. 2E, clause 2, of the decision) seems extraordinarily incomplete, defective and disquieting. Instead of making the "right to survival" the key factor in its attempt to justify its inability to decide whether nuclear weapons were lawful or unlawful, the Court would have done better to indicate that its argument was based mainly if not wholly on specific rules relating expressly to nuclear weapons, and leading, should the case arise, to a regime of exception. There can be no shadow of doubt that it is less pernicious to entertain the possibility of a *lex specialis* pertaining only to nuclear weapons than to endow States with a right to survival regardless of the principles of humanitarian law.

Happily (small consolation though this is) the text of the Opinion, especially paragraph 96, is open to an interpretation quite different from the one the decision alone appears to demand. According to this alternative interpretation the "right to survival" would be a sort of *ratio*, or reason justifying the waiver imposed on humanitarian law in relation to nuclear weapons, and not its true legal source. That would be established on the basis of specific normative data such as the Court mentions in the second clause of the aforesaid paragraph, namely, on the one hand, the "practice referred to as 'the policy of deterrence', to which an appreciable section of the international community adhered for many years", and, on the other, treaty practice in regard to nuclear weapons. The warning given in paragraph 104 of the Opinion[20] significantly attenuates the adverse impact of the Court's unfortunate failure to mention these matters in paragraph 2E of the decision.

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[20] Paragraph 104 states that the Court's reply to the question put to it by the General Assembly "rests on the totality of the legal grounds set forth (...) above (paragraphs 20 to 103)", and goes on to stress: "Some of these grounds are not such as to form the object of formal conclusions in the final paragraph of the Opinion; they nevertheless retain, in the view of the Court, all their importance".

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

by Eric David[1]

1. Of the 51 opinions handed down by the Court of the Hague (28 by the Permanent Court of International Justice and 23 by the International Court of Justice), there is little doubt that the two delivered on 8 July 1996 in response to requests submitted by the WHO World Health Assembly and the United Nations General Assembly will become landmarks in the history of the Court, if not in history itself.

Never before had the Court been asked to address a legal problem that had lain so close to the heart of international relations over the preceding 50 years, one which in the words of Vice-President Schwebel represented "a titanic tension between State practice and legal principle".[2] Its task was both sensitive and thankless because, in considering the particular problem of the legality of the threat or use of nuclear weapons, the Court had

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Original: French

[1] The author of this commentary served as an adviser to the government of the Solomon Islands in connection with the two requests for an opinion; the views expressed here are purely personal and do not necessarily reflect the views of the government of the Solomon Islands.

[2] International Court of Justice, *Legality of the threat or use of nuclear weapons*, Opinion of 8 July 1996 (hereinafter referred to as "Opinion"), Dissenting Opinion of Schwebel, p. 1. Since the Opinion has not been published in the Court's *Reports* at the time of writing, the references relate to either paragraph numbers in the Opinion or page numbers in the statements and separate or dissenting opinions of the judges in the mimeographed edition.

to pronounce on the validity of conduct which, although it had remained hypothetical ever since Hiroshima and Nagasaki, was nonetheless the cornerstone of the defence policy of the world's major powers.

The Court therefore handed down two opinions — or rather one opinion and a refusal to express an opinion — which were supposed to reconcile everybody but surely satisfied no-one, least of all the judges themselves![3]

2. It will be recalled that the World Health Assembly submitted the following question to the Court on 14 May 1993:

> "In view of the health and environmental effects, would the use of nuclear weapons by a State in war or other armed conflict be a breach of its obligations under international law, including the WHO Constitution?"[4]

One year later it was the turn of the United Nations General Assembly to ask the Court for an advisory opinion on the question:

> "Is the threat or use of nuclear weapons in any circumstance permitted under international law?"[5]

3. Arguments for and against the legality of using or threatening to use nuclear weapons were expounded at length during the written and oral phases of the proceedings.[6] The States supporting legality — notably the United States of America, the United Kingdom and France[7] — began by disputing the Court's competence to respond to either of the two requests for an opinion, citing on the one hand what they held to be WHO's incompetence to submit such a request and, on the other, the vague and abstract nature of the UN General Assembly's request and its potentially adverse effect on disarmament negotiations. As to the substance, the same States pointed *inter alia* to:

— the lack of any express prohibition on the use of such weapons;

— the impossibility of inferring an *opinio juris* from General Assembly resolutions condemning the use of such weapons since, far from being voted unanimously, they had always been adopted in the teeth of stiff

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[3] Separate Opinion of Guillaume, para. 1.

[4] Resolution WHA 46.40 of 14 May 1993.

[5] A/Res. 49/75K of 15 December 1994.

[6] In favour of legality: see *inter alia* the written and oral statements of the United States of America, France, the United Kingdom and the Russian Federation. Against legality: see *inter alia* those of Egypt, India, the Solomon Islands, Malaysia and Nauru.

[7] See the written and oral statements by those States and the Court's reply, Opinion, paras. 10-19.

opposition from a significant section of the international community, chiefly the Western group of States;

— the practice of deterrence accepted by the international community as a whole, which presupposed implicit recognition of the legality of resorting to nuclear weapons;

— the declaration made by certain nuclear powers when acceding to the Treaties of Tlatelolco and Rarotonga, whereby they reserved the right — without objection from the other States Parties — to resort to nuclear weapons in the event of aggression;

— the right of a State under attack to use nuclear weapons in self-defence.

Those contesting the legality of the use of nuclear weapons maintained that the Court should respond to both requests for an opinion: WHO had been examining the issue of nuclear weapons since 1983, so the question posed was well within the scope of its activities; moreover, since both requests were legal questions within the meaning of Article 96 of the United Nations Charter, it was appropriate that the Court should answer them; as to the substance, the use of nuclear weapons for hostile purposes was clearly unlawful in view of the effects they produced:

— it was virtually impossible to use such weapons against military targets without simultaneously causing tremendous damage both among the civilian populations of the parties to the conflict and to countries outside the theatre of war; since radiation, electromagnetic bursts and radioactive dust knew no frontiers, nuclear arms could be regarded as weapons causing indiscriminate effects and infringing on both the territorial integrity of third States and the rules of neutrality;

— all trace of human life would inevitably disappear within a radius which, depending on the magnitude and site of the explosion and the local topographical and climatic conditions, might range from a few hundred metres to several dozen kilometres (in the case of certain megabombs) from the point of impact; moreover, depending on the extent of their exposure, survivors exposed to the explosion or to radiation therefrom might either die within a timespan ranging from a few minutes to several years or suffer after-effects and, in particular, undergo irreversible genetic changes; weapons which caused such effects could therefore be classified as weapons which rendered death inevitable and caused unnecessary suffering; in addition, some of their characteristics were such that they could be likened to poisoned weapons and gas and could result in actual genocide;

— existing relief services, if they were not annihilated, would be unable to discharge their duty to help victims because of the extent and specific nature of the damage they had sustained; in that respect, therefore, such weapons also threatened the inviolability of health services.[8]

4. Without going into the details of those arguments, suffice it to say that the Court refused to respond to WHO's request for an opinion on the grounds that the matter did not relate to a question which arose within the scope of the activities of that organization, as required by Article 96, para. 2, of the United Nations Charter.[9]

On the other hand, the Court agreed to take up the question submitted by the UN General Assembly, thus rejecting the pleas of incompetence and inadmissibility lodged by several nuclear powers. As to the substance, it concluded by seven votes to seven, the President's casting vote being decisive, that the threat or use of nuclear weapons violated in principle the law of armed conflict. It added, however, that it could not conclude whether such threat or use would be unlawful in circumstances of self-defence or if necessary for the survival of the State.

5. Both the refusal to respond to WHO's request for an advisory opinion and the opinion handed down to the General Assembly offer a wealth of legal material which could give rise to reams of commentary. For reasons of space, however, our observations will be confined to certain aspects of the opinion given on the substance, namely:

— the Court's rejection of certain arguments concerning the illegality of the use of nuclear weapons (I);

— the Court's claim that it could not conclude whether certain uses of nuclear weapons would be unlawful (II).

I. The Court's rejection of certain arguments concerning the illegality of the use of nuclear weapons

6. Among the arguments hostile to the legality of using nuclear weapons, the Court set aside those based on the prohibition on the use of chemical or poisoned weapons:[10] it found that the Convention of

[8] For references to these various arguments, see E. David, *Principes de droit des conflits armés*, Bruylant, Brussels, 1994, p. 295 ff.

[9] International Court of Justice, *Legality of the use by a State of nuclear weapons in armed conflict*, Opinion of 8 July 1996 (WHO), para. 20 ff.

[10] Opinion, paras. 54-57.

13 January 1993 banning chemical weapons had been negotiated and adopted "in its own context and for its own reasons".[11] It pointed out that the issue of nuclear weapons had never been raised during the negotiations leading to the adoption of that instrument, so it would be improper to look there for the source of ban on the threat or use of nuclear weapons.

That reasoning is correct because it reflects the facts. Conversely, there is more room for scepticism when the Court asserts that Article 23 (a) of the 1907 Hague Regulations (which prohibits the use of poisoned weapons) and the 1925 Geneva Protocol (which bans the use of chemical, bacteriological and similar weapons) do not apply to nuclear weapons. Neither of these texts defines what is meant by "poisoned weapons" or "analogous (...) materials or devices" (1925 Protocol); moreover, in the words of the Court, the practice of States demonstrates that "the terms have been understood (...) in their ordinary sense as covering weapons *whose prime, or even exclusive, effect* is to poison or asphyxiate",[12] and not as covering nuclear weapons.[13]

7. Both parts of that objection are perplexing. The claim that the "practice" of States excludes nuclear weapons from the field of application of the 1925 Geneva Protocol and of Article 23 (a) of the 1907 Hague Regulations is contradicted by UN General Assembly resolution 1653 (XVI) of 1961, which states — admittedly in very general terms (preamble, third paragraph) — that the use of nuclear weapons falls within the purview *inter alia* of the Hague Conventions of 1899 and 1907 and of the Geneva Protocol of 1925. The General Assembly has recalled resolution 1653 (XVI) in every subsequent resolution (in 1972 and many times since 1978) condemning the use of nuclear weapons,[14] so a "practice" affirming the applicability of those instruments to the use of nuclear weapons certainly does exist.

8. The claim that those texts prohibit only weapons whose "*prime, or even exclusive*, effect is to poison or asphyxiate" (our emphasis) cannot be based on any precise element. Quite the contrary: the preparatory work for the Geneva Protocol in no way confirms such a restrictive interpretation since it is silent on the matter;[15] then again, although the Hague

[11] *Ibid.*, para. 57.

[12] *Ibid.*, para. 55 (our emphasis).

[13] *Ibid.*

[14] A/Res. 2936 (XXVIII) of 29 November 1972; 33/71 B of 14 December 1978; 35/152 D of 12 December 1980, etc.; more recently, 50/71 E of 12 December 1995.

[15] League of Nations, *Records of the Conference for the Supervision of the International Trade in Arms and Ammunition and in Implements of War*, Geneva, 4 May-17 June 1925.

Declaration of 29 July 1899 did prohibit "the use of projectiles *the object of which* is the diffusion of asphyxiating or deleterious gases" (our emphasis), that wording is significantly absent from the text of the Geneva Protocol. When we recall that the latter text prohibits not only "asphyxiating, poisonous or *other* gases" but also "*all* analogous liquids, materials or devices" (our emphasis), we realize the extent to which its letter and spirit contradict the Court's narrow interpretation, i.e., that it refers only to weapons whose "*prime, or even exclusive,* effect is to poison or asphyxiate"[16] (again, our emphasis).

9. The Court is also inconsistent in its own findings: after correctly noting that "the phenomenon of radiation is said to be *peculiar* to nuclear weapons"[17] (our emphasis), how can it then ignore the fact that such radiation, which is *specific* to nuclear weapons alone,[18] affects only living matter, the very property that defines chemical weapons?[19]

Maintaining that nuclear weapons are not like chemical weapons because they also produce a blast and heat is tantamount to stating that if one merely adds explosives to a chemical weapon it is no longer chemical, or even that if one combines legal effects with the illegal effects of a weapon it is no longer illegal!

The Solomon Islands responded as follows to those States which upheld that thesis:

> "The logic of this approach is, to say the least, disconcerting: he who does more cannot do less; the greater the destruction the more likely the legality of the weapon. The absurdity of the conclusion is matched only by the absurdity of the reasoning."[20]

In his Dissenting Opinion, Judge Weeramantry virtually echoed those words by stating that the Court's reasoning amounted to saying that "if an act involves both legal and illegal consequences, the former justify or excuse the latter".[21]

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[16] Opinion, para. 55.

[17] *Ibid.*, para. 35.

[18] *Comprehensive study on nuclear weapons, Report of the Secretary-General*, UN doc. A/45/373 of 18 September 1990, para. 327.

[19] See *Chemical and bacteriological (biological) weapons and the effects of their use, Report of the Secretary-General*, UN, New York, 1969, pp. 5-6.

[20] Written observations on the written statements concerning the WHO's request for an opinion on the legality of the use by a State of nuclear weapons in armed conflict, written observations of the Solomon Islands, 20 June 1995, para. 4.21 (mimeographed).

[21] Opinion, p. 58.

10. The Court's reasoning is also debatable if measured by the yardstick of the ban on the use of "poisoned weapons" (Article 23 [a] of the Hague Regulations).

First, we do not know on what basis the Court claimed that Article 23 (a) is confined to weapons whose "prime or exclusive" effect is to poison: was the statement based on practice (para. 7 above)? But what practice? The Court is silent on that point.

Nowhere is it actually written that poisoned weapons are solely those which deliver poison without having any other harmful effect on the victim; and indeed it is hard to imagine a poisoned projectile which would not injure the victim but would nevertheless manage by some telekinetic process to inoculate him with poison. It is hardly likely that the authors of the Hague Regulations had in mind scenarios or procedures which in their day would have belonged to the realm of science fiction.

The effects of nuclear weapons resulting from initial and induced radioactivity are similar to those of poison, a fact which has been recognized in scientific circles[22] and indeed by States themselves when they defined nuclear weapons as:

> "any weapon which contains or is designed to contain or utilize nuclear fuel or radioactive isotopes and which, by explosion or other uncontrolled nuclear transformation of the nuclear fuel, or by radioactivity of the nuclear fuel or radioactive isotopes, is capable of mass destruction, mass injury or mass *poisoning*"[23] (our emphasis).

In other words, even if the primary effects of a nuclear weapon are brought about by blast and heat, it nonetheless produces subsequent effects of poisoning; it is therefore prohibited under Article 23 (a) of the Hague Regulations on the same footing as a poisoned arrow or bullet which, although its prime effect is to injure the victim's body, nonetheless delivers poison and is thus subject to the ban.

11. The Court also dismisses the condemnation of the use of nuclear weapons in General Assembly resolutions on the grounds that the latter

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[22] M. Lechat, M. Errera and A. Meessen, in "Dangers pour les populations civiles, de la pollution inhérente à l'emploi des armes nucléaires", *Actes de la réunion de l'Académie royale de médecine de Belgique*, 25 September 1982, cited by A. Andries in "Pour une prise en considération de la compétence des juridictions pénales nationales à l'égard des emplois d'armes nucléaires", *RDPC*, 1984, p. 43. See also: *Effects of nuclear war on health and health services*, WHO doc. A/36/12, 24 March 1983.

[23] Protocol III to the Paris Agreements of 23 October 1954 on Arms Control, Annex II.

were adopted "with substantial numbers of negative votes and abstentions"; thus, although they "are a clear sign of deep concern regarding the problem of nuclear weapons, they still fall short of establishing the existence of an *opinio juris* on the illegality of the use of such weapons".[24]

That finding seems equally debatable. First, it disregards the special *agreement* that General Assembly resolutions represent for States which vote for them and which thus acknowledge an *opinio juris*, at least in so far as those States are concerned. Secondly, it appears to take for granted that the traditional rules of international humanitarian law set out in those resolutions do not prohibit the use of nuclear weapons because a number of States oppose such a ban: in other words, notwithstanding the majority of States which support a thesis, the Court deduces from the minority will that that thesis does not exist, owing *inter alia* to "the continuing tensions between the nascent *opinio juris* on the one hand, and the still strong adherence to the practice of deterrence on the other".[25]

Thus a minority opinion limiting the scope of earlier rules is given precedence over the majority opinion which endows those rules with the scope due to them by virtue of the texts themselves, and all in the name of the practice — questionable in itself — of deterrence.[26] This is particularly unconvincing when the Court goes on to contradict itself by asserting that international humanitarian law governs and ... prohibits the use of nuclear weapons (see section II below). Yet what is humanitarian law if not the very rules mentioned in the resolutions which the Court declares devoid of any effect?

12. To sum up, the Court's refusal to place nuclear weapons in the same category as chemical or poisoned weapons has no logical justification. The same applies to its refusal to take UN General Assembly resolutions into account, even as agreements limited to those States which accepted them.

II. The Court's claim that it could not conclude whether certain uses of nuclear weapons would be unlawful

13. The Court goes on to conclude, however, that the use of nuclear weapons is in principle illegal after finding *inter alia* that:

[24] Opinion, para. 71.

[25] *Ibid.*, para. 73.

[26] *Ibid.*, Dissenting Opinion of Shahabuddeen, pp. 25-28.

— such weapons are "potentially catastrophic" because their "destructive power (...) cannot be contained in either space or time. They have the potential to destroy all civilization and the entire ecosystem of the planet";[27]

— because of their radiation, such weapons produce effects that are harmful to the environment and future generations: "ionizing radiation has the potential to damage the future environment, food and marine ecosystem, and to cause genetic effects and illness in future generations";[28]

— even supposing the existence of tactical nuclear weapons which are sufficiently precise to limit the risk of escalation,[29] no State has been able to demonstrate "whether such limited use would not tend to escalate into the all-out use of high yield nuclear weapons";[30]

— the newness of nuclear weapons is not an argument against the applicability of international humanitarian law to them, as has been recognized by the United Kingdom, the United States and the Russian Federation;[31]

— the Martens clause affirms that international humanitarian law applies to nuclear weapons;[32]

— neutrality is applicable "to all international armed conflict, whatever type of weapons might be used";[33]

— "methods and means of warfare, which would preclude any distinction between civilian and military targets, or which would result in unnecessary suffering to combatants, are prohibited". Yet, "in view of the unique characteristics of nuclear weapons (...), the use of such weapons in fact seems scarcely reconcilable with respect for such requirements".[34]

14. Thus, while in paragraph 105 E of its opinion the Court reaches a conclusion consonant with the thesis that the use of nuclear weapons is illegal, it tempers that finding by observing that:

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[27] Opinion, para. 35.

[28] *Ibid.*

[29] *Ibid.*, para. 43.

[30] *Ibid.*, para. 94; cf. para. 43.

[31] *Ibid.*, para. 86.

[32] *Ibid.*, para. 87.

[33] *Ibid.*, para. 89.

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

— it "cannot lose sight of the fundamental right of every State to survival, and thus its right to resort to self-defence, in accordance with Article 51 of the Charter (...)";[35]

— "an appreciable section of the international community" has adhered to the "policy of deterrence";[36]

— when the Treaties of Tlatelolco and Rarotonga were adopted, the States in possession of nuclear weapons reserved the right to use them in the event of aggression committed by a State with the assistance of a nuclear Power;[37]

— those States entered similar reservations in connection with the extension of the Treaty on the Non-Proliferation of Nuclear Weapons.[38]

In view of that practice, the Court concluded:

> "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."[39]

In other words, the threat or use of nuclear weapons is in principle incompatible with the law of armed conflict, but the Court does not know whether that would still be so in a case of self-defence when the survival of the State is at stake.

15. Having been passed by seven votes to seven by virtue of the casting vote of the President, that surprising conclusion in paragraph 105 E of the opinion has caused and will continue to cause much ink to flow.[40] However, we shall confine ourselves to the following remarks.

(1) The considerations on which the Court chiefly relied (para. 13 above) relate to the practice of the nuclear powers in regard to deterrence.

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[35] *Ibid.*, para. 96.

[36] *Ibid.*

[37] *Ibid.*

[38] *Ibid.*

[39] *Ibid.*, para. 105 E.

[40] With the exception of Judges Shi and Ferrari Bravo, all the judges commented on this provision in one way or another: Statements by Bedjaoui, p. 2, Herczegh, p. 1, Vereshchetin, p. 1; Separate Opinions of Guillaume, p. 3, Ranjeva, p. 3, Fleischhauer, p. 3; Dissenting Opinions of Schwebel, p. 8, Oda, p. 37, Shahabuddeen, p. 1, Weeramantry, p. 3, Koroma, p. 1 and Higgins, p. 1.

However, those considerations confuse two problems, that of the possession of nuclear weapons and that of their use or threatened use; while the international community appears to some extent resigned to accepting the practice of deterrence, that does not mean it has also accepted the use of such weapons. Similarly, although the nuclear Powers have publicly reserved the right to use nuclear weapons in certain circumstances, we cannot deduce therefrom that the said right has been accepted by most other States, since the latter are constantly affirming in UN General Assembly resolutions that any such use would be unlawful.[41] While the Court admittedly stopped short of deducing from those facts that the threat or use of nuclear weapons might be lawful, it is nonetheless regrettable that it invoked them to conclude that it did not know whether, in a case of self-defence where the survival of a State under attack was at stake, the use or threatened use of nuclear weapons would still be unlawful.

(2) That affirmation of ignorance is all the more regrettable in that it is based on recognition of the right of self-defence. In giving the impression that a case of self-defence, however extreme, might justify the use of nuclear weapons, the Court creates dangerous confusion between *jus ad bellum* and *jus in bello*; indeed, it suggests that respect for the latter might be subordinate to a rule of the former. In so doing the Court calls into question one of the basic principles of the law of armed conflict, namely that of the equality of belligerents before the law of war.[42] A finding so contrary to the essence of international humanitarian law carries within itself the seeds of its own invalidity.

(3) In the light of certain considerations, the second sub-section of paragraph 105 E is contradictory: indeed how, after finding that the use of nuclear weapons might bring about the annihilation of mankind,[43] can the Court go on to wonder whether the survival of a State under attack might not justify the use of a weapon which could lead to the destruction of its user? If resorting to nuclear weapons is likely to lead to the disappearance of all life from the planet, and if it is accepted that international

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[41] For more substantial developments, see the written observations of the Solomon Islands on the written statements submitted in connection with WHO's request for an advisory opinion, 20 June 1995, paras. 4.67-4.71 (mimeographed).

[42] *Yearbook of the Institute of International Law*, Vol. 50, Part II, 1963, p. 368; Protocol Additional to the Geneva Conventions of 12 August 1949 (Protocol I), Preamble, para. 5, and Article 96, para. 3. See also: Opinion, Separate Opinion of Ranjeva, pp. 6-7, and Dissenting Opinion of Shahabuddeen, p. 30.

[43] Opinion, para. 35.

humanitarian law reflects the will of States, then it is hard to see how States could have accepted a rule which would lead to their own suicide, as well as that of the State trying to protect itself.[44] The absurdity of such a hypothesis implies a negative answer to the question put to the Court: not even an extreme case of self-defence can justify the use of nuclear weapons.

(4) Supposing that this is not exactly what the Court means, and that it is prepared to envisage, for purposes of self-defence, only a minimum use of nuclear weapons (in which case it should have said so), or a use which would not affect the survival of mankind as such, the fact remains that such a use of nuclear weapons, however limited, would not prevent nuclear radiation and fallout affecting the territory of many other States, as the Court itself acknowledges.[45] Here again, is it reasonable to suppose that most of the States in the international community would have agreed that, in order to ensure the survival of one of their number, their own territorial integrity, the health of their inhabitants and respect for their environment and neutrality could be jeopardized? An affirmative answer would mean that States have accepted a serious infringement of their sovereignty, and such a position would be known. No State has ever said that it was prepared to accept harmful affects resulting from the use of nuclear weapons by another State and, since limitations on sovereignty cannot be presumed,[46] it is fruitless to try to trace any acceptance of the use of nuclear weapons in the fact that States are more or less resigned to deterrence.[47]

(5) For the first time in its history, the Court claims not to know the content of the rule in a particular *de facto* hypothesis. As several judges observed, the result is a *non liquet*[48] or, to put it another way, a "non-opinion". As such, the decision should have no implications whatever: first, because it is based on considerations which have just been shown to be dubious (see [1] and [2] above) and, second, because the Court is in its own words a judicial organ and, in that capacity, "pro-

[44] *Ibid.*, Dissenting Opinion of Shahabuddeen, p. 34.

[45] Opinion, paras. 35 and 89.

[46] Permanent Court of International Justice, *Lotus*, ruling of 7 September 1972, *PCIJ*, Series A, No. 9, p. 19.

[47] Opinion, paras. 73 and 96.

[48] *Ibid.*, Statement by Vereshchetin, p. 1; Dissenting Opinions of Schwebel, p. 8, Shahabuddeen, p. 10 and Higgins, p. 1.

nounces only on the basis of the law"[49] or, as it asserts here, "states the existing law (...) even if, in stating and applying the law, the Court necessarily has to specify its scope and sometimes note its general trend".[50]

In other words, the Court is fulfilling its judicial function when it finds that a certain type of conduct is lawful or unlawful, but it is not fulfilling that function when it says that it does not know the state of the law in a given hypothesis. *In casu*, the Court starts by clearly affirming that the threat or use of nuclear weapons is unlawful (first sub-section of para. 105 E), then it adds that it does not know how matters stand in the particular hypothesis of self-defence on the part of a State whose survival is at stake (second sub-section of para. 105 E). Since the Court fails to specify the scope of the prohibitory rule in the hypothesis in question, despite its self-avowed power to state the law (see quotation above), we may logically conclude that the only safe rule is that the use and threatened use of nuclear weapons are generally unlawful. The Court "states the law" in the first sub-section but, in the second, claims ignorance of the law: the second sub-section is therefore devoid of implications.

16. The affirmation of illegality in principle is, moreover, not confined to the seven judges who voted for paragraph 105 E; it is also shared by three dissenting judges who hold that the use and threatened use of nuclear weapons are *always* unlawful.[51] Setting aside the Dissenting Opinion of Judge Oda, who pronounces neither for nor against (he simply feels that the Court should have refused to respond to the request for an opinion given, *inter alia*, the excessively political and general nature of the question asked),[52] we find that ten of the thirteen judges recognize the illegality in principle of using or threatening to use nuclear weapons. Such is the law! The claim made by seven judges that they did not know whether it was legal or illegal to use or threaten to use nuclear weapons in response to aggression which threatens the very survival of a State does not constitute a legal argument. Any student who admits to his examiners that he does not know the content of this or that rule acknowledges his own ignorance but, in so doing, he is not stating the law. The only law is that

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[49] International Court of Justice, *Namibia*, Advisory Opinion of 21 June 1971, *ICJ Reports 1971*, p. 23, para. 29.

[50] Opinion, para. 18.

[51] Opinion, Dissenting Opinions of Shahabuddeen, p. 1 ff., Weeramantry, p. 1 ff. and Koroma, p. 1 ff.

[52] *Ibid.*, Dissenting Opinion of Oda, especially paras. 25, 44 and 51.

which is affirmed to be such. Anything else is merely a state of mind, devoid of substance.

17. For all the foregoing reasons, we take the view that the second sub-section of paragraph 105 E of the Court's opinion neither adds to nor detracts from the general illegality affirmed in the first sub-section. It simply betrays the Court's misgivings — the *"drame de conscience"* in the words of President Bedjaoui[53] — as to the considerable political implications of a more decisive opinion. Its qualms recall Hamlet's existential doubts but, as in the case of Shakespeare's hero, those qualms have to do with philosophy, not with the law.

18. After a moment's initial disappointment, therefore, the specialist in international humanitarian law might easily come to accept the opinion, which contains a wealth of favourable elements relating to humanitarian law. For instance, while the Court did not pronounce on the *jus cogens* nature of humanitarian law because it was not asked to do so,[54] it did implicitly recognize that the fundamental rules of the Hague Regulations and the 1949 Geneva Conventions are endowed with that quality, in that it described them as "intransgressible principles of international customary law".[55]

That is just one of the positive points of the opinion, and those are the ones which will stand.

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[53] *Ibid.*, Declaration by Bedjaoui, para. 9.

[54] Opinion, para. 83.

[55] *Ibid.*, para. 79.

International humanitarian law and the Advisory Opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons

by Louise Doswald-Beck

Introduction

The Advisory Opinion of the International Court of Justice represents the first time that the Court's judges have been called upon to analyse in some detail rules of international humanitarian law. Other instances, for example, the *Nicaragua* case, involved nowhere near such an extensive analysis. The Advisory Opinion is therefore of particular interest in that it contains important findings on the customary nature of a number of humanitarian law rules and interesting pronouncements on the interpretation of these rules and their relationship with other rules. Most judges based their final decision on the legality of the threat or use of nuclear weapons on teleological interpretations of the law, choosing either the right of self-defence as being the most fundamental value, or the survival of civilization and the planet as a whole as paramount. Unfortunately, space does not permit a comment on these highly important analyses of the underpinnings of humanitarian law and its purpose in the international order.[1] Therefore, rather than focusing primarily on the Court's conclusion

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[1] The most extensive analysis of this nature was made in: International Court of Justice, *Legality of the threat or use of nuclear weapons*, Advisory Opinion of 8 July 1996, Dissenting Opinion of Judge Weeramantry.

as to the legality of the threat or use of nuclear weapons, this short comment will concentrate on the various pronouncements made on humanitarian law rules. Reference to the Court's finding on the legality of the use of nuclear weapons will only be made from the point of view of how it has contributed to the interpretation of those rules. For this purpose, reference will be made not only to the Advisory Opinion as such (hereafter referred to as the "Opinion"), but also to the various Separate and Dissenting Opinions.

Definition of international humanitarian law

It is to be hoped that controversies as to the exact meaning of this term have at last been put to rest, as the Opinion makes it clear that this body of law contains both the rules relating to the conduct of hostilities as well as those protecting persons in the power of the adverse party.[2] In so doing, the Court based itself on a commonly-held belief regarding the historical development of humanitarian law, namely, that the law relating to the conduct of hostilities (so-called "Hague Law") began to be developed in one set of treaties, whereas the law protecting victims (so-called "Geneva Law") developed separately in the various Geneva Conventions, and that these two branches later became interrelated in the Additional Protocols of 1977 to become one body of law. In fact the distinction between "Hague Law" and "Geneva Law" never really existed. A careful reading of the 1862 Lieber Code, the 1874 Brussels Conference and early textbooks reveals that the "laws and customs of war" of that period did contain rules protecting persons in the power of the enemy, in particular prisoners of war and persons in occupied territory. Conversely, the Geneva Conventions contained aspects of the law on the conduct of hostilities, namely, the prohibition to attack medical units and personnel or persons *hors de combat* by reason of sickness or wounds (the latter being one element of the customary rule of quarter). The effect of the Additional Protocols of 1977 was therefore not to create for the first time a unified body of humanitarian law containing both these elements, but rather to eliminate what was always an artificial and erroneous distinction. "International humanitarian law" is merely a modern term for "the law of war".

Customary nature of humanitarian law treaties

The Court reaffirmed the customary nature of the 1907 Hague Convention IV with its Regulations, the 1949 Geneva Conventions and the

[2] Opinion, para. 75.

1948 Genocide Convention. It did so by referring with approval to a statement to that effect made in the Report of the United Nations Secretary-General pursuant to Security Council resolution 808 (1993),[3] to the extent of accession to these treaties and to the fact that their denunciation clauses have never been used. The Court concluded that "these rules indicate the normal conduct and behaviour expected of States".[4]

With regard to Additional Protocol I of 1977, the Court stated that "all States are bound by those rules...which, when adopted, were merely the expression of the pre-existing customary law".[5] This statement gives little guidance as to the customary nature of the rules in this Protocol beyond those specifically commented on in other parts of the Opinion. However, it should be pointed out that treaty rules can become customary *after* the adoption of a treaty, and it is assumed that the Court was not intending to exclude that this could have happened with some of the Protocol's provisions.

Customary rules of international humanitarian law

The Opinion listed a number of "cardinal principles...constituting the fabric of humanitarian law", namely, the principle of distinction, the prohibition of the use of indiscriminate weapons, the prohibition against causing unnecessary suffering to combatants, and the fact that States do not have unlimited choice of means in the weapons they use.[6]

The principle of distinction

The Court pointed out that this principle "is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants".[7]

As the Opinion was concerned with the legality of the use of nuclear weapons, this statement was considered only in terms of how it would affect the use of specific weapons. However, it is important that the Court reaffirmed this as a "cardinal principle" of humanitarian law as this provision is only to be found in treaty form in Article 48 of Additional

[3] *Ibid.*, para. 81.
[4] *Ibid.*, para. 82.
[5] *Ibid.*, para. 84.
[6] *Ibid.*, para. 78.
[7] *Ibid.*

Protocol I. Many rules stem from this principle, ranging from those establishing combatant and non-combatant status to the prohibition against starving the civilian population.

The prohibition of the use of indiscriminate weapons

This was undoubtedly the most relevant rule to the issue at hand and also one which has not been analysed in detail in a Court case thus far.[8] Its relationship with the principle of proportionality can easily create confusion, and therefore care must be taken in trying to assess how the majority of the judges appeared to interpret this rule. Not only did the Court as a whole judge this rule to be customary, but Judge Bedjaoui considered it to be *jus cogens*[9] and Judge Guillaume stated that it was absolute.[10] The rule was introduced by the Court in the Opinion as follows:

> "States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets."[11]

The Court thus equated the use of indiscriminate weapons with a deliberate attack on civilians. The significance of this statement cannot be overestimated. First, it is important that the prohibition of indiscriminate weapons has been confirmed as customary, for the only treaty formulation of the prohibition of indiscriminate attacks is to be found in Additional Protocol I, which has not yet been ratified by all States, and only in that treaty is there a general statement as to which types of weapons would fall foul of this rule. Secondly, following the Court's logic, the prohibition against deliberately attacking civilians found in Additional Protocol II automatically means that indiscriminate weapons must not be used in non-international armed conflicts to which that Protocol applies. Thirdly, it means that any weapon can be tested against these criteria and

[8] The only case in which attacks by nuclear weapons were analysed by a court in the light of international law was the *Shimoda Case* (Tokyo District Court 1964, reprinted in International Law Reports, vol. 32, 1966, p. 626). The judgement is summarized and analysed by R. Falk, *"The Shimoda Case: a legal appraisal of the atomic attacks upon Hiroshima and Nagasaki", AJIL, vol. 59, 1965,* p. 759. The District Court did not analyse the meaning of an indiscriminate weapon as such, but did look at the lawfulness of indiscriminate bombing as a method of warfare. However, it referred to the law applicable at the time and this involved the outdated distinction between bombing defended and undefended cities — a concept only really relevant in the context of open cities.

[9] Declaration of Judge Bedjaoui, President, para. 21.

[10] Separate Opinion of Judge Guillaume, para. 5.

[11] Opinion, para. 78.

if it falls foul of them, its use would be prohibited without there being a need for any special treaty or even State practice prohibiting the use of that particular weapon. The Court did not say that legality in any particular case depended on the States' assessment of whether the weapon in question conformed to the rule, but rather made it clear that the Court had the right to make such a judgement itself.

It remains to be seen what precisely the Court meant by "incapable of distinguishing between civilian and military targets". It is obvious that a weapon, being an inanimate object, cannot itself make such a distinction, for this process requires thought. The language of Additional Protocol I is more accurate in this regard. The relevant provision is Article 51, paragraph 4, sub-paragraphs (b) and (c) of which describe the characteristics of indiscriminate "methods or means of combat" as those:

> "(b) ...which cannot be directed at a specific military objective; *or*
>
> (c) ...the effects of which cannot be limited as required by this Protocol;
>
> and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction" (emphasis added).

To this author's knowledge, this is the only existing treaty definition of an "indiscriminate" weapon.

The Protocol presents two possibilities, either of which would render the weapon illegal. The phrase used in the Opinion — "incapable of distinguishing between civilian and military targets" — could apply to either or both. It may be argued that nuclear weapons do not violate the first criterion, i.e., that they can be aimed at a specific military objective, if in fact what one is referring to is the accuracy of the delivery system. Three judges seem to have decided that nuclear weapons are not necessarily indiscriminate in nature, by using only the first criterion. Of these, only Judge Higgins in her Dissenting Opinion attempted to define indiscriminate weapons, as follows:

> "it may be concluded that a weapon will be unlawful *per se* if it is incapable of being targeted at a military objective only, even if collateral harm occurs."[12]

[12] Dissenting Opinion of Judge Higgins, para. 24.

On applying this to nuclear weapons she said:

> "Notwithstanding the unique and profoundly destructive characteristics of all nuclear weapons, that very term covers a variety of weapons which are not monolithic in their effects. To the extent that a specific nuclear weapon would be incapable of this distinction, its use would be unlawful."[13]

Judge Guillaume did not add much to the definition given by the Court and gave no reasons whatsoever for his conclusion as regards nuclear weapons in his Separate Opinion:

> "...customary law contains only one absolute prohibition: that concerning the use of so-called "blind" weapons which cannot distinguish between civilian and military targets. But obviously, nuclear weapons do not necessarily fall into this category."[14]

The third, Vice-President Schwebel, did concede some difficulty:

> "While it is not difficult to conclude that the principles of international humanitarian law — ...discrimination between military and civilian targets — govern the use of nuclear weapons, it does not follow that the application of those principles...is easy."[15]

However, as Judge Schwebel then went on to speculate on different types of uses and which of these might be lawful or not, it is clear that he too decided that nuclear weapons are not by nature indiscriminate.

The second test in paragraph 4 of Article 51 would render a weapon unlawful if its effects "cannot be limited as required by this Protocol", which presumably means, especially in the light of the paragraph's final phrase, that the effects do not otherwise violate the principle of distinction.

What is meant by this? One hypothesis could be the other criteria of "indiscriminate attacks" found in paragraph 5 of Article 51, which in effect can be translated as the principle of proportionality (sub-para. b) and the prohibition of area bombardment (sub-para. a). Both of these are incontestably customary law rules. Although not impossible, it is very

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[13] *Ibid.*

[14] Separate Opinion of Judge Guillaume, para. 5 (ICRC translation. French original: *"... le droit coutumier comporte une seule interdiction absolue: celle des armes dites "aveugles" qui sont dans l'incapacité de distinguer entre cibles civiles et cibles militaires. Mais à l'évidence les armes nucléaires n'entrent pas nécessairement dans cette catégorie".*)

[15] Dissenting Opinion of Vice-President Schwebel.

difficult to use proportionality to test whether a weapon is indiscriminate in nature. To do so, one would have to decide in advance if any use of the weapon in question would inevitably lead to civilian casualties or civilian damage which would be excessive in relation to any military objective that could be attacked using that weapon. As far as the prohibition of area bombardment is concerned, this rule, as formulated in the Protocol, would also be difficult to use as a test, for the words of Article 51, paragraph 5 (a) presuppose the intention to attack several distinct military objectives in a populated area, treating them as if they were one objective. One cannot assume this when deciding on the nature of any particular weapon, for one of the planned uses of the weapon may well be to attack one military objective far from a civilian centre.

The second hypothesis, which this author prefers, is not to try to find the answer in other parts of Article 51 of the Protocol, but rather to decide on the basis of the essential meaning of the principle of distinction. This principle presupposes the choice of targets and weapons in order to achieve a particular objective that is lawful under humanitarian law and which respects the difference between civilian persons and objects on the one hand, and combatants and military targets on the other. This requires both planning and a sufficient degree of forseeability of the effects of attacks. Indeed, the principle of proportionality itself requires expected outcomes to be evaluated before the attack. None of this is possible if the weapon in question has effects which are totally unforseeable, because, for example, they depend on the effect of the weather. It is submitted that the second test of "indiscriminate weapons" is meant to cover cases such as these, where the weapon, even when targeted accurately and functioning correctly, is likely to take on "a life of its own" and randomly hit combatants or civilians to a significant degree.[16]

Turning now to the assessment made in the Opinion and by the other judges, it is clear that for a decision on the indiscriminate character of nuclear weapons, the Court's findings on their nature became pivotal. On the basis of the extensive scientific evidence presented to the Court, it concluded in the Opinion that:

> "In applying this law to the present case, the Court cannot...fail to take into account certain unique characteristics of nuclear weapons...

[16] This is quite different from a bullet or missile which misses its intended target or the side effects of conventional bombs. This definition of an "indiscriminate weapon" would clearly cover bacteriological weapons and, in general, poison gas.

> ...nuclear weapons are explosive devices whose energy results from the fusion or fission of the atom. *By its very nature* that process...releases not only immense quantities of heat and energy, but also powerful and prolonged radiation...These characteristics render the nuclear weapon potentially catastrophic. The destructive power of nuclear weapons *cannot be contained in either space or time.* They have the potential to destroy all civilisation and the entire ecosystem of the planet (emphasis added)...
>
> The radiation released by a nuclear explosion would affect health, agriculture, natural resources and demography over a very wide area. Further, the use of nuclear weapons would be a serious danger to future generations. Ionizing radiation has the potential to damage the future environment, food and marine ecosystem, and to cause genetic defects and illness in future generations."[17]

In its Opinion, the Court assessed nuclear weapons' legality as follows:

> "In view of the unique characteristics of nuclear weapons, to which the Court has referred above, the use of such weapons in fact seems scarcely reconcilable with respect for such requirements. Nevertheless, the Court considers that it does 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."[18]

Given the fact that the Court had found that "the destructive power of nuclear weapons cannot be contained in either space or time", the second sentence of this finding is somewhat surprising. However, in the opinion of this author, it may be more appropriate to see the two sentences as representing the two different points of view rather than one thought. Reference has already been made to the three judges who stated or implied that nuclear weapons are not necessarily indiscriminate in nature (however, two of these dissented from the Opinion). Eight judges (three of whom dissented from the Opinion) stated that the use of any type of nuclear weapon would infringe the rules of humanitarian law, basing themselves primarily on the extensive destructive nature of these weap-

[17] Opinion, para. 35.

[18] *Ibid.*, para. 95. The "requirements" referred to in this sentence were the prohibition of "methods and means of warfare which would preclude any distinction between civilian and military targets or which result in unnecessary suffering to combatants".

ons, and in particular the radiation that uncontrollably affects civilians and combatants alike. It is particularly worth citing three of the judges who voted in favour of the Opinion:

Judge Fleischhauer stated that: "the nuclear weapon is, in many ways, the negation of the humanitarian considerations underlying the law applicable in armed conflict... the nuclear weapon cannot distinguish between civilian and military targets".[19]

President Bedjaoui found that "nuclear weapons seem to be — at least at present — of a nature to hit victims indiscriminately, confusing combatants and non-combatants... The nuclear weapon is a blind weapon, and therefore by its very nature undermines humanitarian law, the law of discernment in the use of weapons".[20]

Judge Herczegh wrote that "the fundamental principles of international humanitarian law, properly highlighted in the findings of the Advisory Opinion, categorically and unequivocally prohibit the use of weapons of mass destruction, which include nuclear weapons".[21]

Setting aside the reasons for the way the Opinion has been formulated and basing ourselves on the statements of the judges themselves, the majority found nuclear weapons to be indiscriminate in nature; they did so not in terms of the initial targetability of any nuclear weapon system, but rather by virtue of their pernicious uncontrollable effects which meant that no proper distinction could be made between civilians and civilian objects, on the one hand, and combatants and military objectives on the other. As such this interpretation will be useful for the evaluation of other weapons.[22]

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[19] Separate Opinion of Judge Fleischhauer, para. 2.

[20] Declaration of Mr Bedjaoui, President, para. 20 (ICRC translation. French original: *"Les armes nucléaires paraissent bien — du moins dans l'état actuel de la science — de nature à faire des victimes indiscriminées, confondant combattants et non-combattants... L'arme nucléaire, arme aveugle, déstabilise donc par nature le droit humanitaire, droit du discernement dans l'utilisation des armes"*).

[21] Declaration by Judge Herczegh, page 1, second paragraph (ICRC translation. French original: *"Les principes fondamentaux du droit international humanitaire, correctement mis en valeur dans les motifs de l'avis consultatif, interdisent d'une manière catégorique et sans équivoque l'emploi des armes de destruction massive et, parmi celles-ci, des armes nucléaires"*).

[22] It is arguable that anti-personnel landmines are indiscriminate in nature on the basis of both tests: first, because they cannot actually be targeted at military objectives for they are placed in advance on the assumption that combatants may pass in that direction; secondly, because they frequently have unforeseen effects, especially when they move from their original emplacement by the effects of the weather.

The principle of proportionality

This rule is only of relevance if the weapon used is lawful to begin with and if the target chosen for attack is a military objective within the meaning of humanitarian law. It prohibits the carrying out of an attack if the expected collateral casualties would be excessive compared with the value of the military objective.

Strangely enough, the Opinion did not make direct reference to this rule, but several judges affirmed its customary nature. Judges Higgins, Schwebel and Guillaume relied on this principle to establish that in certain cases, the collateral effects of nuclear weapons would not be excessive. Both Judge Higgins and Judge Guillaume were restrictive in this regard and stated that the damage that nuclear weapons caused was so great that only in extreme circumstances could the military objective be important enough for the collateral damage not to be excessive. However, they gave no concrete examples of the types of objectives, although Judge Higgins did speak of the necessary circumstances as follows:

> "that the 'military advantage' must indeed be one related to the very survival of a State or the avoidance of infliction (whether by nuclear or other weapons of mass destruction) of vast and severe suffering on its own population; and that no other method of eliminating this military target be available".[23]

Vice-President Schwebel, on the other hand, gave the frequently-cited examples of the army in the desert and the submarine in the ocean, the attack of which may well not be disproportionate because the radiation would not affect many people.[24] On the other hand, he acknowledged that although there may be specific cases that would not violate the rule of proportionality, in most cases the use of nuclear weapons would not be in conformity with the law.[25]

Other judges, however, either did not make reference to the principle of proportionality or considered it irrelevant to the case in point as they had deemed nuclear weapons to be indiscriminate in nature.[26]

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[23] Dissenting Opinion of Judge Higgins, para. 21.

[24] Dissenting Opinion of Vice-President Schwebel, paras. 23 and 24.

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

[26] See, for example, the Dissenting Opinion of Judge Weeramantry, page 84, para. (xi).

The prohibition of the use of weapons that cause unnecessary suffering or superfluous injury

It is gratifying that the Court described the customary rule that protects combatants against certain weapons as a "cardinal principle", for in recent decades the international community has for the most part paid it little more than lip-service, focusing instead on the protection of civilians. This author is all too familiar with the efforts that were required for the recent adoption of the ban on blinding laser weapons[27] and it is to be hoped that both this new treaty and the pronouncement of the Court will firmly reinstate the meaningful existence of this rule.

With regard to the actual interpretation of the rule, the Opinion states that it is "accordingly prohibited to use weapons causing [combatants] such harm or uselessly aggravating their suffering...that is to say a harm greater than that unavoidable to achieve legitimate military objectives".[28]

As was the case for the principle of proportionality, this requires an assessment in the light of various circumstances. In order to justify such suffering to soldiers, Judges Higgins and Guillaume referred to the same extreme circumstances as they had done for proportionality in collateral civilian casualties and damage.

However, there is a problem with that approach in that, contrary to what is the case for the principle of proportionality, the unnecessary suffering rule presupposes a general assessment as to the lawfulness of the weapon concerned. If it fails the test, the weapon cannot be used at all. In theory, an assessment could be made for each and every use, but this is totally unrealistic and not what has been done in practice. It is still not doctrinally settled whether the assessment should be based on the "normal" intended purpose of the weapon, or on any conceivable use. In practice, specific weapons have been prohibited in the past based on the usual intended use, for if the other test were insisted on, it is unlikely that any weapon would be banned.[29] Another element that would have the

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[27] See for example, Louise Doswald-Beck, "New Protocol on Blinding Laser Weapons", *IRRC*, No. 313, May-June 1996, p. 272.

[28] Opinion, para. 78.

[29] The difficulty is that the unnecessary suffering rule means that the weapon is prohibited without the need for a treaty. This deters States, especially those which had developed the weapon, from declaring such unlawfulness, but they may be willing to ban a weapon arguing that such a ban is purely treaty-based. There can be no doubt, however, that the motivation for agreeing to a ban stems from an assessment that the normal military utility does not justify the weapon's adverse effects.

nature of an absolute test is the statement in the St Petersburg Declaration of 1868 that weapons that render death inevitable are excessive to the needs of war. Only Judge Higgins made reference to this,[30] but she did not go on to assess nuclear weapons against this test.

The Opinion gave exactly the same assessment as that for the principle of distinction, i.e., that the use of nuclear weapons was "scarcely reconcilable" with the principle, but that the Court could not decide definitively for all circumstances.[31]

Most judges were not so cautious and made a general assessment. Judge Fleischhauer stated that such "immeasurable suffering" amounted to "the negation of the humanitarian considerations underlying the law applicable to armed conflict".[32] President Bedjaoui stated that such weapons "cause, moreover, unnecessary suffering",[33] and Judge Herczegh stated that the basic principles of international humanitarian law prohibited the use of nuclear weapons.[34] Judge Shahabuddeen, in his Dissenting Opinion, recognized that this rule required a balance to be struck between military necessity and suffering to combatants and that the greater the military advantage, the greater the willingness to tolerate higher levels of suffering. However, in some cases the public conscience could consider that no conceivable military advantage could justify the suffering, as was the case, for example, with poison gas, which could arguably have some military utility. Judge Shahabuddeen thought that the principle ought to be extended to the suffering of civilians during collateral damage that is not otherwise unlawful, but that even if it were limited strictly to soldiers, the Court could have held that the use of nuclear weapons would violate this rule.[35] Judge Koroma, after describing the effects of atomic weapons in Hiroshima, Nagasaki and the Marshall Islands, stated that as the radioactive effects were worse than those caused by poison gas, "the above findings by the Court should have led it inexorably to conclude that any use of nuclear weapons is unlawful under international law".[36] Judge

[30] Dissenting Opinion of Judge Higgins, para. 12.

[31] Opinion, para. 95. See footnote 18 above.

[32] Separate Opinion of Judge Fleischhauer, para. 2.

[33] Declaration of Mr Bedjaoui, President, para. 20 (ICRC translation. French original: *"causent des souffrances inutiles"*).

[34] See footnote 21 above.

[35] Dissenting Opinion of Judge Shahabuddeen, paras. 19-21.

[36] Dissenting Opinion of Judge Koroma, p. 11. The Tokyo District Court in the *Shimoda Case* found atomic bombs to be a violation of this rule on the same reasoning, see Falk, *op. cit.* footnote 8 above, p. 775.

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Weeramantry was firmer: "the facts ... are more than sufficient to establish that the nuclear weapon causes unnecessary suffering going far beyond the purposes of war".[37]

The prohibition of poison

The Opinion of the Court referred to the Hague Declaration of 1899, Article 23 (a) of the 1899 and 1907 Hague Regulations and the Geneva Gas Protocol, but then went on to state that these did not cover nuclear weapons because State practice showed that these treaties covered weapons whose prime or even exclusive effect was to poison or asphyxiate.

Actually, this is not quite accurate, because it has long been accepted that poison-tipped arrows or bullets are covered by this prohibition although the poison is not the main wounding mechanism. It is unfortunate that the Court dealt with the prohibition of poison only in the context of treaty law. Had it considered the prohibition in the light of customary law as well, it could have acknowledged the purpose of this customary prohibition, namely, the fact that poison prevents the possible recovery of wounded soldiers. This consideration would surely be of relevance to an assessment of nuclear weapons. Only Judges Weeramantry[38] and Koroma[39] decided in their Dissenting Opinions that nuclear weapons are prohibited also because one of their major effects is to poison.

The Martens Clause

This is a provision in humanitarian law treaties that is potentially of great significance, but the exact interpretation of which is subject to enormous variation. Originally put into the preamble to the Fourth Hague Conventions of 1899 and 1907, it has since been introduced into the main body of the text of Additional Protocol I of 1977 and into the preamble to Additional Protocol II. The Martens Clause states that if a particular rule is not to be found in treaty law, belligerents "remain under the protection and authority" of customary law, the principles of humanity and the dictates of the public conscience.

It is a debated point whether the "principles of humanity" and the "dictates of the public conscience" are separate, legally-binding yardsticks

[37] Dissenting Opinion of Judge Weeramantry, p. 48.

[38] Dissenting Opinion of Judge Weeramantry, pp. 56-58.

[39] Dissenting Opinion of Judge Koroma, p. 11.

against which a weapon or a certain type of behaviour can be measured in law, or whether they are rather moral guidelines.[40] It is therefore significant that the Court affirmed the importance of the Martens Clause, "whose continuing existence and applicability is not to be doubted",[41] and stated that it "has proved to be an effective means of addressing the rapid evolution of military technology".[42] On the basis of this, the Court affirmed that the basic principles of humanitarian law continued to apply to all new weapons, including nuclear ones, and pointed out that no State disputed this.[43]

Judge Shahabuddeen went into more detail. He stated that the Martens Clause was not limited to affirming customary law, for this would be unnecessary, but rather provided the authority for treating the principles of humanity and the dictates of the public conscience as principles of international law to be ascertained in the light of changing circumstances. He quoted the United States Military Tribunal at Nuremberg in the case of *Krupp* in 1948, which stated that the Martens Clause:

> "is much more than a pious declaration. It is a general clause, making the usages established among civilized nations, the laws of humanity and the dictates of the public conscience into the legal yardstick to be applied if and when the specific provisions of the Convention...do not cover specific cases...".

Judge Shahabuddeen pointed out that the Court had used "elementary considerations of humanity" as the basis for its judgement in the *Corfu Channel Case*. He concluded that as far as nuclear weapons were concerned, the risks associated with them meant that their use was unacceptable in all circumstances.[44]

Judge Weeramantry stated that "the Martens Clause clearly indicates that, behind such specific rules as had already been formulated, there lay a body of general principles sufficient to be applied to such situations as

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[40] See, for example, a debate on the influence of the Martens Clause by a group of experts during discussions on whether blinding laser weapons should be considered illegal or in any event should be banned: *Blinding Weapons: Reports of the Meetings of Experts convened by the International Committee of the Red Cross on Battlefield Laser Weapons, 1989-1991*, ICRC, 1993 pp. 340-341 and 344-346.

[41] Opinion, para. 87

[42] *Ibid.*, para. 78.

[43] *Ibid.*, para. 86.

[44] Dissenting Opinion of Judge Shahabuddeen, pp. 22-23.

had not already been dealt with...". He went on to point out that the violation of humanitarian standards is more developed now than at the time when the Martens Clause was formulated, especially with the development of human rights law and sensitivity with regard to the need to preserve the environment. These "are now so deeply rooted in the existence of mankind that they have become particularly essential rules of general international law".[45]

It is the personal opinion of this author that Judges Shahabuddeen and Weeramantry are absolutely correct in their evaluation and that one could in fact go one step further and assert that the effect of the Martens Clause is to reverse the classical assumption of international law. In humanitarian law one cannot state that what is not expressly prohibited in treaty or custom is allowed, for the principle of humanity and the dictates of the public conscience are lawful restraining factors. It is undoubtedly these factors which have in practice restrained States from actually using nuclear weapons since 1945, for there is no doubt that there is a powerful stigma attached to their use.[46]

The threat to violate humanitarian law rules

In the context of the threat to use illegal weapons, the Opinion of the Court was straightforward:

> "If an envisaged use of weapons would not meet the requirements of humanitarian law, a threat to engage in such use would also be contrary to the law."[47]

No judge contested this despite the fact that State practice since 1945 seems to have done just this, i.e., no actual use of nuclear weapons, whereas the policy of deterrence is based on such a threat. There was also

[45] Dissenting Opinion of Judge Weeramantry, pp. 41-43.

[46] Although not actually brought up in the Opinion, a number of judges did discuss the relevance of the *Lotus Case* (PCIJ, 1927; a case concerning criminal jurisdiction as a result of a collision at sea). Judge Guillaume cited this case favourably in order to make his point that in humanitarian law, States choose to prohibit weapons by treaty, and if not so prohibited, they are lawful (para. 10 of his Separate Opinion). However, President Bedjaoui, in his Declaration, stressed that he voted with the Opinion only on the understanding that what was not prohibited was not necessarily allowed; international society had changed dramatically since 1927, being now far more closely knit (paras. 10-15). This view was supported by Judge Shahabuddeen (pp. 13-14), and Judge Weeramantry added that the PCIJ would never have imagined such a use for its statement, especially in the light of the Martens Clause (pp. 45-46).

[47] Opinion, para. 78

no indication of the basis of this statement. Is it a general principle of law applicable in most national legal systems? Or was the statement based on logic, or what would encourage respect for the law?

Does this mean that a threat to violate any rule of humanitarian law is also unlawful in itself? Would such a threat also amount to a grave breach if the commission of the act would be such a breach? Humanitarian law does explicitly prohibit certain threats, for example, the threat to attack the civilian population with the primary purpose to spread terror,[48] or the threat to deny quarter.[49] The Opinion does not really give a clear answer, but if affirmative, the effect is far-reaching and it would also be superfluous to add threats to any treaty text (unless the commission itself would not be unlawful — not a likely eventuality).

The relationship between international humanitarian law and other rules of international law

A number of international law rules were looked at by the Court, but for the purposes of this comment, we will limit ourselves to three: human rights law, environmental law and the law of self-defence.

Human rights law

The Court referred to the fact that the proponents of illegality argued that nuclear weapons violated the right to life, as guaranteed in Article 6 of the Covenant on Civil and Political Rights, whereas others argued that the use of nuclear weapons was never envisaged in that document, which is meant to be applied in peacetime. The Court affirmed that human rights law continues to apply in time of war but went on to state the relevance of humanitarian law:

> "In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict, which is designed to regulate the conduct of hostilities."[50]

[48] Additional Protocol I of 1977, Art. 51, para. 2.

[49] *Ibid.*, Art. 40.

[50] Opinion, para. 25.

This is a very significant statement, for it means that humanitarian law is to be used to actually interpret a human rights rule. Conversely, it also means that, at least in the context of the conduct of hostilities, human rights law cannot be interpreted differently from humanitarian law. Although this makes complete sense in the context of the arbitrary deprivation of life (a vague formulation in human rights law, whereas humanitarian law is full of purpose-built rules to protect life as far as possible in armed conflict),[51] it is less clear whether this is also appropriate for human rights rules that protect persons in the power of an authority. This is particularly so when it is a human rights treaty body that is applying the text of the treaty. Practice thus far, in particular of the European Commission and Court of Human Rights, seems to show that such bodies apply the human rights text within its own terms.[52]

Environmental law

It is of great importance that the Court found the existence of customary environmental law:

> "The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment."[53]

With regard to the relevance of this to international humanitarian law, the Court went on to say that environmental law treaties could not have intended to deprive States of the exercise of their right of self-defence, but "States must take environmental considerations into account when

[51] In a case before the Inter-American Commission of Human Rights, relating to the bombardment of a hospital in an armed conflict, the plaintiffs asked the Commission to interpret the "right to life" in the light of humanitarian law rules. See D. Weissbrodt and B. Andrus "The Right to Life during Armed Conflict: *Disabled People's International v. United States*, 29 Harvard Int.L.J.,1988, p. 59. A similar request was made before the same Commission in case number 10.573.

[52] See, for example, the case of *Cyprus v. Turkey* (Council of Europe, European Commission of Human Rights, Decisions and Reports, vol. 72, p. 5), in which the Commission found a violation of Article 5 of the European Convention on Human Rights (right to liberty and security of person) in the case of persons missing during and after an armed conflict, and did not interpret this Article in the light of relevant provisions of the Geneva Conventions. Similarly, *Loizidou v. Turkey* (judgement of the Court, 18 December 1996) relating to northern Cyprus, in which the Court found a violation of the right to property and did not consider equivalent provisions in the Fourth Geneva Convention although it based the responsibility of Turkey under the European Convention on its military occupation of northern Cyprus (paras. 52 and 54 of the judgement).

[53] Opinion, para. 29.

assessing what is necessary and proportionate in the pursuit of legitimate military objectives."[54]

It is not absolutely clear if this reference to "necessity and proportionality" refers to the more general restraints inherent in the context of the law of self-defence, or to the principle of proportionality of collateral damage within humanitarian law. If the latter, then it means in effect that "environment" is a "civilian object" and that an attack on a military objective must be desisted from if the effect on the environment outweighs the value of the military objective. There is much to support this view, not only in the wording of the Court's Opinion, but also in the context of recent texts on humanitarian law and the environment.[55] It means that one cannot so easily argue that the rule of proportionality is not violated based on the sole fact that the attacks took place in an area that has little or no human population. The Court also cited with approval General Assembly resolution 47/37 of 25 November 1992 on the Protection of the Environment in Times of Armed Conflict, stating that "it affirms the general view [that] ...destruction of the environment, not justified by military necessity and carried out wantonly, is clearly contrary to existing international law".[56]

On the other hand, as far as Articles 35, para. 3, and 55 of Additional Protocol I are concerned, the Court stated that these rules provide additional protection and "are powerful constraints for all States having subscribed to these provisions".[57] This appears to indicate that these provisions are still only treaty law and not customary. However, in this author's opinion, and contrary to the view of the Court, these specific provisions, given the high threshold, do not add much by way of protection to the environment to the customary rules confirmed by the Court.

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[54] *Ibid.*, para. 30. In this context, the Court cited approvingly Principle 24 of the Rio Declaration, which provides that "[w]ar is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development".

[55] See, for example, *ICRC Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflicts*, 1994, submitted pursuant to UN General Assembly Resolution A/RES/48/30 of 9 December 1993, see *IRRC*, No. 311, March-April 1996, pp. 230-237; also paragraph 13 (c) of the San Remo Manual on International Law Applicable to Armed Conflicts at Sea, published by Cambridge University Press together with a commentary entitled "Explanation", IIHL, 1995 (ed. L. Doswald-Beck), p. 87. See also other provisions relating to the environment: paras. 11, 34 and 44 and commentary on them on pp. 82-83, 108-109 and 119-121 respectively of the Explanation.

[56] Opinion, para. 32

[57] *Ibid.*, para. 31

The law of self-defence

For at least two centuries it has been absolute dogma that international humanitarian law applies equally to all parties to a conflict, irrespective of which is acting in self defence; this has been confirmed by very long-standing State practice and universally acknowledged in legal literature. The only point of contention has been whether, in an armed conflict, the restraints inherent in self-defence law, i.e., necessity and proportionality in a general sense, apply in addition to the specific restraints of humanitarian law. The point arose during the drafting of the San Remo Manual on International Law Applicable to Armed Conflicts at Sea, which contains a section on the effect on the law of naval warfare of the law of self-defence.[58] The majority of experts argued that the restraints in the law of self-defence applied in addition to those of humanitarian law, and this is therefore what is written in the Manual, whereas others argued that once the necessity for self-defence had arisen, the only restraints were those contained in humanitarian law.[59]

In its general analysis of the law, the Court, in paragraphs 41 and 42 of its Opinion, was also of the view that the restraints of both areas of law apply:

> "The submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law.... *But at the same time, a use of force that is proportionate under the law of self-defence must, in order to be lawful, also meet the requirements of the law applicable in armed conflict which comprise in particular the principles and rules of humanitarian law*" (emphasis added).[60]

If the Opinion had continued to apply this statement, the judgement would not be as controversial and as criticized in academic circles as it is. Unfortunately, it is all too easy to look only at the now famous paragraph 2E of the conclusion, which, after stating in its first paragraph that the use of nuclear weapons would be generally contrary to humanitarian law, goes on to state in its second paragraph that "the Court cannot conclude definitively whether the threat or use of nuclear weapons would

[58] San Remo Manual, 1994, Section II paras. 3-6. Some of this argument is reflected in the *travaux préparatoires* in *Bochumer Schriften*, No. 24, pp. 133 - 206.

[59] *Op cit.*, footnote 52, pp.75-78.

[60] Opinion, paras. 41 and 42; text in italic in para. 42

be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake."[61] As indicated before, the actual opinions of the judges themselves do not really tally with this part of the Opinion,[62] but this author will abstain from speculating why this paragraph was drafted this way.

The only way for the statement in paragraph 2E to be in conformity with the previous statement of the Court in paragraphs 41 and 42 is that indicated by the purely positivist analysis of Judge Higgins, namely, that in her opinion nuclear weapons are not necessarily inherently indiscriminate and that in certain extreme circumstances their use would infringe neither the rule of proportionality nor the rule prohibiting unnecessary suffering to combatants. However, the majority of judges actually found nuclear weapons to be inherently unlawful in humanitarian law and Judge Higgins delivered a Dissenting Opinion. The only other explanation, i.e., that in certain cases of self-defence humanitarian law no longer applies, is not only in flat contradiction to the statement in paragraphs 41 and 42, but is also dangerously like an application of the discredited doctrine of *Kriegsraison geht vor Kriegsmanier*. This doctrine, which suggested that in extreme circumstances of danger one could abandon the application of humanitarian law rules in order to meet the danger, was rejected by the Nuremberg Tribunal in the cases of *Peleus, Milch* and *Krupp*.[63]

It is submitted that for the purposes of evaluating the relationship between the law of self-defence and humanitarian law, it would be more meaningful to rely on the statement in paragraphs 41 and 42 of the Opinion, rather than the confusing and rather artificial creation of paragraph 2E of the conclusion.

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[61] Opinion, para. 105, sub-para. 2E.

[62] Of the seven judges who voted in favour of this finding, four stated in their Separate Opinions that the use of nuclear weapons was clearly illegal, applying the rules of humanitarian law (Judges Bedjaoui, Ranjeva, Herczegh and Fleischhauer), and a fifth found them to be illegal in customary law (Judge Ferrari Bravo). Of the seven who voted against, three thought that their use might be legal within humanitarian law in certain extreme circumstances (Judges Schwebel, Guillaume and Higgins), three considered their use to be always illegal under humanitarian law (Judges Shahabuddeen, Weeramantry and Koroma) and the seventh (Judge Oda) thought that the Court should not have given an Advisory Opinion.

[63] A fact pointed out by Judge Weeramantry, Dissenting Opinion, pp. 81-82. It is also worth mentioning that Judge Weeramantry was the only judge to analyse whether a use of nuclear weapons in such extreme circumstances would realistically protect the State acting in self-defence and concluded on the basis of impressive authority that it probably would not (pp. 59-61).

Conclusion

The Opinion of the Court, especially when taken together with the various Separate and Dissenting Opinions, is rich with statements and interpretations of international humanitarian law and the relationship between this body of law and other areas of international law. It is a pity that they threaten to be lost because of the controversy surrounding the Opinion's finding on nuclear weapons. Although, as it must be clear from this comment, this author is dissatisfied with the wording of the conclusion in paragraph 105, subparagraph 2E of the Opinion, the Advisory Opinion will remain significant for its other contributions to international humanitarian law.

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;
>
> "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.

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,

[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.
>
> 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.

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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[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,[3] and the reminder to nuclear-weapon States of the obligation to negotiate and reach agreement on a comprehensive ban on nuclear weapons.[4] 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".[5] 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-

[3] Opinion, para. 105(2)D.

[4] *Ibid.*, para. 105(2)F.

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

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

[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.

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

[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.

[11] Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, of 13 January 1993.

[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".[14] 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,[15] 178 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[16] and Rarotonga[17] and to their Protocols, the Court highlighted the positive[18] and

[14] Opinion, para. 57.

[15] As at 30 September 1996.

[16] Treaty for the Prohibition of Nuclear Weapons in Latin America, of 14 February 1967.

[17] Treaty on the South Pacific Nuclear-Weapon-Free Zone, of 6 August 1985.

[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[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.[20] These security assurances include reservations by the nuclear-weapon States regarding the use of nuclear weapons in certain circumstances.[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.[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.[23] Judge Schwebel conceded that it would be too much to argue that such acquiescence supported *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).[24] However, he did argue that it acted to "abort the birth or survival of *opinio juris* to the contrary".[25]

Judge Schwebel's analysis of the effect of the acquiescence of those non-nuclear-weapon States "sheltering under the umbrella" of their

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[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, *Arms Control*, 1994, pp. 150-155.

[20] See UN Doc. S/Res/984 (1995), noting the assurances of the nuclear-weapon States.

[21] Opinion, para. 62(*b*).

[22] *Ibid.*, para. 62(*c*).

[23] Dissenting Opinion of Judge Schwebel.

[24] The succession of resolutions commenced with UN GA Res. 1653 (1961).

[25] Dissenting Opinion of Judge Schwebel.

nuclear-weapon allies would undoubtedly be contested by many of the "beneficiary" States. As a party to ANZUS,[26] 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.[27] 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.[28] 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.[29] 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".[30] 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

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

[27] See, e.g., oral statement on behalf of Australia by Senator Gareth Evans QC, Minister of Foreign Affairs, "International Court of Justice: Requests for Advisory Opinions on nuclear weapons submitted by the World Health Organization and the United Nations General Assembly — The case for illegality", reprinted in *Australian International Law Journal*, 1994-95, p. 178.

[28] See, e.g., statement by Richard Starr, Ambassador for Disarmament, Main Committee 1 of the Review and Extension Conference of the States Parties to the NPT, New York, 19 April 1995; and concluding statement by Richard Butler, Permanent Representative of Australia to the Review and Extension Conference of the States Parties to the NPT, New York, 12 May 1995 (copies on file with author). See also Gareth Evans and Bruce Grant, *Australia's foreign relations: In the world of the 1990's*, 2nd ed., 1995, p. 86.

[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-weapon 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[31] and for the obligation of the nuclear-weapon States to negotiate in good faith for the elimination of their nuclear-weapon stockpiles.[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-weapon States is in clear disregard for the objects and purposes of the treaty, as well as for some of its specific obligations.[33]

Without explicitly saying so, the majority of the Court found, in effect, that the five nuclear-weapon 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 weapon States party to the NPT[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".[35] Unfortunately, the implication of its *non liquet* as to the legality of the threat or use of nuclear weapons is that only a specific treaty

[31] Articles II, IV and V.

[32] Article VI.

[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, *Report of the Canberra Commission on the Elimination of Nuclear Weapons*, Department of Foreign Affairs and Trade, Canberra, 1996, pp. 24-28.

[34] As evidenced by statements made to this effect at the 1995 Review and Extension Conference of the States Parties to the NPT.

[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

[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.[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.[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.[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.[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.

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[41] See the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949.

[42] Opinion, para. 78.

[43] *Ibid.*

[44] See, e.g. William O'Brien, "Legitimate military necessity in nuclear war", 2 *World Polity*, 1960, p. 35. For analyses *generally* discussing the (in)compatibility of tactical nuclear weapons with international humanitarian law, see, e.g., Burns H. Weston, "Nuclear weapons versus international law: A contextual reassessment", 28 *McGill Law Journal*, 1983, pp. 543, 581, 587; William R. Hearn, "The international legal regime regulating nuclear deterrence and warfare", 61 *British Yearbook of International Law*, 1990, pp. 199, 232-44; Daniel J. Arbess, "The international law of armed conflict in light of contemporary deterrence strategies: Empty promise or meaningful restraint?", 30 *McGill Law Journal*, 1984, pp. 89, 111-121; Elliot Meyrowitz, *Prohibition of nuclear weapons: The relevance of international law*, 1990, pp. 41-86.

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".[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."[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

[45] Opinion, para. 95.

[46] Dissenting Opinion of Judge Higgins, para. 25.

own reasoning ought to have led it "inexorably" to this conclusion.[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.[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.[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.[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

[47] See Dissenting Opinions of Judge Weeramantry and Judge Koroma.

[48] Dissenting Opinion of Judge Shahabuddeen.

[49] Dissenting Opinion of Judge Higgins, para. 24.

[50] *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*".[51] 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.[52]

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.*"[53] 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.[54] 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

[51] Opinion, para. 97 (emphasis added).

[52] Dissenting Opinion of Judge Higgins, para. 29.

[53] *Ibid.*

[54] See Opinion, para. 22.

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.[55] 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[56] 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[57] 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.[58] 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).

[58] See the text of Protocol IV to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, of 13 October 1995 (not yet in force). See also B.M. Carnahan and M. Robertson, "The Protocol on 'Blinding Laser Weapons': A new direction for international humanitarian law", *American Journal of International Law*, 1996, p. 484; "The Vienna Review Conference: Success on blinding laser weapons but deadlock on landmines", *International Review of the Red Cross*, No. 309, November-December 1995, p. 672.

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.

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[1]

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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Original: German

[1] 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.[2]

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;[3] 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

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

[3] 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.[4]

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.[5] 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-

[4] 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.

[5] See for example *IPB News*, December 1995, pp. 3 ff.

bate,[6] 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.[7]

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.[8] 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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[6] 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.

[7] See Opinion, paras. 24 and 25.

[8] 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.[9] 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.[10]

The Court goes on to establish a link with what it describes as the "unique characteristics" of nuclear weapons.[11] 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.[12] 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.[13]

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[9] See Opinion, paras. 26 ff.

[10] 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.

[11] See Opinion, paras. 35 ff.

[12] 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".

[13] 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.[14] 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.[15]

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[14] *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.

[15] *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.[16] 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.[17]

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.[18] The present Advisory Opinion will surely give strong impetus to that process, particularly within the framework of the United Nations.[19]

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[16] 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".

[17] Opinion, paras. 98 ff.

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

[19] 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".[20] 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.[21]

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.[22] 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.[23] For

[20] See Opinion, paras. 64 ff.

[21] 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.

[22] *Ibid.*, paras. 74 ff.

[23] 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[24]— 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).[25]

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.[26] 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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[24] See, respectively, Dissenting Opinion of Koroma, *inter alia* pp. 4 and 18; Dissenting Opinion of Higgins, para. 41; Separate Opinion of Fleischhauer, para. 5.

[25] See Dissenting Opinion of Schwebel, pp. 8 ff.

[26] 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.[27]

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

The International Court of Justice Advisory Opinion in the *Nuclear Weapons Cases*

A first appraisal

by John H. McNeill †

Introduction

There were two requests for advisory opinions from the International Court of Justice — the first from the World Health Organization (WHO), and the second from the United Nations General Assembly.

WHO asked: "In view of the health and environmental effects, would the use of nuclear weapons by a state in war or other armed conflict be a breach of its obligations under international law, including the WHO Constitution?" The Court held by eleven votes to three (Judges Shahabuddeen, Weeramantry and Koroma dissenting), that it was not able to give the advisory opinion requested by WHO. The Court's opinion was consistent with the position argued by the United States and other countries and, in our view, is correct. As the WHO opinion primarily concerned jurisdictional issues, we will focus on the advice given in response to the request of the General Assembly.

John H. McNeill was Senior Deputy General Counsel at the United States Department of Defense. He sadly died on 26 October 1996, and Commander Ronald D. Neubauer, Judge Advocate General's Corps, US Navy, one of his associate deputy general counsels, completed this article. Mr McNeill was an advocate and Commander Neubauer was a counsel on behalf of the United States in the *Nuclear Weapons Cases*. The views expressed in this article are the authors', and do not reflect the official policy or position of the Department of Defense, the Department of the Navy, or the US government.

The UN General Assembly asked: "Is the threat or use of nuclear weapons in any circumstance permitted under international law?"[1] Over the sole objection of Judge Oda, the Court decided to hear the case. There were six specific findings in the Court's Advisory Opinion. The ultimate advice of the Court, approved by seven of fourteen judges, with President Bedjaoui (Algeria) casting the deciding vote, was

> "... that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict (...). 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".[2]

President Bedjaoui and Judges Herczegh, Shi, Vereshchetin and Ferrari Bravo appended Declarations to the Court's Advisory Opinion. Judges Guillaume, Ranjeva and Fleischhauer issued Separate Opinions. Vice-President Schwebel and Judges Oda, Shahabuddeen, Weeramantry, Koroma and Higgins appended Dissenting Opinions. This diversity of views makes distilling the Court's advice to the General Assembly a daunting task. In this first appraisal, we will confine our analysis principally to the Court's Advisory Opinion. We shall begin with some initial observations. We shall then consider the Court's contributions regarding its general jurisprudence. Finally, we will discuss the contributions of the Advisory Opinion to the Court's jurisprudence regarding the use of force in general, and the threat or use of nuclear weapons in particular.

Initial observations

Three underlying themes of the Court's Advisory Opinion

As an aid to understanding the Court's Advisory Opinion, we suggest that three general considerations might have informed the deliberations of the judges who constituted the majority. The first is a recognition that no State is eager to detonate nuclear weapons in armed conflict, and that, hopefully, nuclear weapons would be employed — as they have for the past fifty years — only as a deterrent against unlawful aggression. The other considerations derive from what the eighteenth-century philosopher David Hume called the "is-ought fallacy": one cannot derive an *is* from

[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"), para. 1.

[2] Opinion, para. 105(2)E.

an *ought*. The is-ought fallacy seems to be relevant in two respects. First, the existence of broad agreement that there ought to be nuclear disarmament does not guarantee the immediate achievement of that goal. Second, the fact that the destructive force of nuclear weapons is in order of magnitude greater than that of conventional weapons does not render the threat or use of nuclear weapons unlawful *per se*.

What is the anticipated impact of this case?

Decisions of the Court are made by a majority of the sitting judges — normally fifteen.[3] However, owing to an unfilled vacancy, there were only fourteen judges in this case. Article 55(2) of the Court's Statute provides that, in the event of an equality of votes, the President shall cast the deciding vote. In essence, in case of a tie, the President votes twice, which is what occurred in this case.

Whereas decisions in contentious cases bind only the parties, advisory opinions have no "binding force".[4] However, as Judge Mohamed Shahabuddeen stated in his recently published book, *Precedent in the World Court*, ". . . although an advisory opinion has no binding force under article 59 of the Statute, it is as authoritative a statement of the law as a judgment rendered in contentious proceedings".[5] That said, it is generally accepted that the larger the majority the more influential the decision. This case had the smallest possible majority, with a significant number of substantially different opinions on the state of the law. Our view is that the Court's Advisory Opinion in the *Nuclear Weapons Cases* is generally reflective of the state of the law, and that the Declarations, and the Separate and Dissenting Opinions accurately reflect the range of opinion in the international legal community.

The contributions of the Nuclear Weapons Cases toward the Court's general jurisprudence

The role of non-governmental organizations

The Statute of the Court provides that, in contentious cases, only States may be parties in cases before the Court.[6] The Court may give advisory

[3] Statute of the International Court of Justice (hereinafter referred to as "Statute"), Article 3.

[4] *Ibid.*, Article 59.

[5] M. Shahabuddeen, *Precedent In The World Court*, Grotius Publications, Cambridge University Press, Cambridge, 1996, p. 171.

[6] Statute, Article 34.

opinions on legal questions at the request of a body authorized by the UN Charter to make such a request.[7] In the *Nuclear Weapons Cases*, the principal force behind the raising of these issues was a group of non-governmental organizations (NGOs) that successfully persuaded member States of WHO, and subsequently the UN General Assembly, to ask the Court for its advisory opinion. This initiative, named the "World Court project," was launched by the International Association of Lawyers Against Nuclear Arms, the International Physicians for the Prevention of Nuclear War, and the International Peace Bureau, none of which were authorized to put the question to the Court. We will not debate the merits of this manner of obtaining the jurisdiction of the Court. Suffice it to say that this method was successful and might portend further such initiatives in the future.[8]

The Court decided to render the advisory opinion requested by the General Assembly

As a priliminary matter, the Court, by thirteen votes to one, decided to comply with the General Assembly's request for an advisory opinion. The United States, along with other States, argued that the Court, while possessing the authority to issue the advisory opinion, should exercise its discretion to decline to respond. The main argument advanced was that the question posed by the General Assembly was so hypothetical — so dependent on facts that were not ascertainable — that the Court could not, consistent with its judicial function, afford meaningful guidance to the General Assembly. Those who criticize the Court's opinion as non-dispositive or evasive have quoted Vice-President Schwebel's statement that: "[i]f this was to be its ultimate holding, the Court would have done better to have drawn on its undoubted discretion not to render an Opinion at all".[9] We agree with those who argued that the Court should have declined to issue the advisory opinion requested by the UN General Assembly. However, given that the Court did provide the requested advisory opinion, we tend to agree with the thoughts expressed by Judge Vereshchetin in his Declaration. The Court's Advisory Opinion clarified and confirmed some aspects of use-of-force law and general international

[7] *Ibid.*, Article 65.

[8] Judge Oda, the lone dissenter on the Court's finding to render the advisory opinion, offers some insightful thoughts on this and related issues.

[9] Dissenting Opinion Schwebel, p. 8.

law that we find instructive and helpful. Although the Court's ultimate advice lacks clarity and does not articulate the law as we see it, we think its Advisory Opinion is not inconsistent with US and NATO nuclear doctrine or deployments.

Non liquet

The final clause of Paragraph 2E of the Court's findings states: "... 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". Vice-President Schwebel criticized the Court in harsh terms for this finding of *non liquet* ("it is not clear"). If this were a contentious case, we would share Vice-President Schwebel's sense of astonishment that the Court left the issue unresolved, especially as the Statute of the Court clearly implies that in contentious cases the Court must decide disputes brought before it.[10] However, as Judge Vereshchetin highlighted in his Declaration, there is no dispute to decide in advisory cases. When issuing an advisory opinion, the Court is essentially in the position of a general counsel advising its client as to what the law is. In this role the Court can, we think, legitimately advise its client that there is a lacuna in the law or that the law on a certain point is unclear. A detailed discussion of whether or not the Court has a role as law-creator, in addition to law-identifier and law-applier, exceeds the scope of this paper. In brief, at least with respect to advisory opinions, our view is that the Court should limit itself to advising on what the law is, and eschew the role of law-maker.

Law of permission or prohibition?

The UN General Assembly asked the Court to advise on whether "... the threat or use of nuclear weapons in any circumstance [is] permitted under international law". Phrased in this way, the question incorrectly assumed that international law addressing the use of weapons is permissive rather than prohibitory. The Court affirmed 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".[11] The Court thus correctly recast the General

[10] See, for example, Statute, Articles 38(1) and 55(1).

[11] Opinion, para. 52.

Assembly's question and proceeded to evaluate whether the threat or use of nuclear weapons is prohibited.

Opinio juris

In considering whether there exists in customary international law a prohibition on the threat or use of nuclear weapons, the Court affirmed its traditional approach to customary international law by emphasizing that "the substance of that law must be 'looked for primarily in the actual practice and *opinio juris* of States'".[12] The Court sought to determine the existence or emergence of an *opinio juris* from the way in which nuclear weapons have been used in the past fifty years — namely, for purposes of deterrence — and from a series of General Assembly resolutions affirming the illegality of nuclear weapons.

The Court first considered *opinio juris* in connection with the policy of deterrence. Proponents of the illegality of nuclear weapons argued that the fact that nuclear weapons have not been detonated in armed conflict since 1945 is evidence of *opinio juris* that their use would be unlawful. The States that adhere to the policy of deterrence argued that nuclear weapons have not been detonated in armed conflict since 1945 because the circumstances that might have justified such use have fortunately not arisen, and that the employment of nuclear weapons in the service of deterrence is evidence of *opinio juris* that the threat or use of nuclear weapons is not unlawful. The Court's conclusion was reasonable: with the international community profoundly divided on the issue, there is no *opinio juris* supporting either proposition.[13]

The Court also examined General Assembly resolutions "affirming" the illegality of nuclear weapons for evidence of the *opinio juris* requisite for the establishment of a new customary rule of international law. The Court noted that the proponents of the illegality of the use of nuclear weapons argued that the non-utilization of nuclear weapons since 1945, plus a series of General Assembly resolutions (beginning with resolution 1653 (XVI) of 24 November 1961) to the effect that nuclear weapons are illegal, express the requisite *opinio juris* in support of their proposition. The States that assert the legality of the threat and use of nuclear weapons in certain circumstances argued that the General Assembly resolutions

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

[13] *Ibid.*, para. 67 and 74.

declaring nuclear weapons to be illegal neither reflect existing customary international law nor generated sufficient support to create customary international law. These States reiterated that nuclear weapons have been employed every day since 1945 in the service of deterrence.

The Court determined that the relevant General Assembly resolutions evidence a "deep concern" regarding the problem of nuclear weapons, yet "they still fall short of establishing the existence of an *opinio juris* on the illegality of the use of such weapons".[14] The Court concluded that the "emergence, as *lex lata*, of a customary rule specifically prohibiting the use of nuclear weapons as such is hampered by the continuing tensions between the nascent *opinio juris* on the one hand, and the still strong adherence to the practice of deterrence on the other".[15] The Court's conclusion thus affirms that State practice, not rhetoric, is the decisive factor for determining *opinio juris*.

The Court's contributions regarding the use of force in general, and the threat or use of nuclear weapons in particular

The applicable law

The Court conducted a methodical and comprehensive survey of the law that might inform its advice to the UN General Assembly. At the outset, it eliminated those sources of law that were not applicable to the matter at hand.

Some of the proponents of the illegality of the use of nuclear weapons asserted that Article 6 of the International Covenant on Civil and Political Rights, which guarantees the right of persons not to be arbitrarily deprived of life, precludes the use of nuclear weapons. The Court stated that although Article 6 is applicable in hostilities, the law of armed conflict — not the Covenant itself — is relevant to determining whether loss of life resulting from use of a particular weapon during armed conflict would be an arbitrary deprivation of life.[16] We fully agree with the Court's view.

Some proponents of the illegality of the use of nuclear weapons contended that their use could violate the Convention of 9 December 1948

[14] *Ibid.*, para. 71.

[15] *Ibid.*, para. 73.

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

on the Prevention and Punishment of the Crime of Genocide. The Court correctly pointed out that the use of nuclear weapons, like any conventional weapon, would only violate the Genocide Convention if such use was accompanied by the "*intent* to destroy, in whole or in part, a national, ethnical, racial or religious group, as such" (emphasis added).[17]

Some proponents of the illegality of the use of nuclear weapons contended that any use of nuclear weapons would violate existing norms relating to the safeguarding and protection of the environment. The Court determined that "existing international law relating to the protection and safeguarding of the environment does not specifically prohibit the use of nuclear weapons", but in light of the general obligation of States to respect the environment, environmental factors are to be considered "in the context of the implementation of the principles and rules of the law applicable in armed conflict" — namely, necessity and proportionality.[18] We could not agree more with these conclusions of the Court.

The Court completed its analysis of possibly relevant sources of international law by concluding that the law germane to the question before it was the law relating to the use of force "enshrined" in the UN Charter and the law applicable in armed conflict, along with any pertinent treaties on nuclear weapons.[19] Again, we could not agree more.

Law of the UN Charter

The Court's examination of the relevant law of the UN Charter began, logically, with Article 2(4), which prohibits "the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations". This article has come to be known as the prohibition on unlawful aggression. The complementary provision to Article 2(4) is Article 51, which codifies the inherent right of individual or collective self-defence. The right to use armed force in self-defence is still subject to the customary international law norms of necessity and proportionality.[20] The Court's analysis here closely tracks the position of the United States' and other States' written and oral statements before the Court.

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

[18] *Ibid.*, para. 33.

[19] *Ibid.*, para. 34.

[20] *Ibid.*, para. 41.

The third of the Court's six findings was:

"(2)C. Unanimously,

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".[21]

We agree that the limitations on the use of force found in the Charter "apply whatever the means of force used in self-defence".[22]

Conventional international law

The Court first surveyed conventional international law. Some proponents of the illegality of the use of nuclear weapons contended that the use of nuclear weapons should be treated in a similar manner to that of poisoned weapons which are prohibited under the Second Hague Declaration of 29 July 1899 (which prohibits the use of projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases); Article 23(a) of the Regulations respecting the laws and customs of war on land annexed to the Hague Convention IV of 18 October 1907 (especially prohibiting the employment of poison or poisoned weapons); and the Geneva Protocol of 17 June 1925 (prohibiting "the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices").[23] The Court concluded, we think correctly, that none of these conventional provisions specifically prohibits the use of nuclear weapons.

The Court noted that, up to the present, weapons of mass destruction had been declared illegal by specific instruments, including the Convention of 10 April 1972 on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction; and the Convention of 13 January 1993 on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction. The Court found no "specific prohibition of recourse to nuclear weapons in treaties expressly prohibiting the use of certain weapons of mass destruction".[24]

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[21] *Ibid.*, para. 105(2)C.

[22] *Ibid.*, para. 44.

[23] *Ibid.*, para. 54.

[24] *Ibid.*, para. 57.

The Court next reviewed a number of specific treaties concluded in order to limit the acquisition, manufacture and possession of nuclear weapons; the deployment of nuclear weapons; and the testing of nuclear weapons.[25] States believing that recourse to nuclear weapons is illegal argued that these treaties reflect "the emergence of a rule of complete legal prohibition of all uses of nuclear weapons".[26] States defending the position that recourse to nuclear weapons is legal in certain circumstances argued that this body of treaty law does not contain any general prohibition on the use of nuclear weapons and, of equal or greater importance, some of these treaties presuppose that nuclear weapons might be used under certain circumstances. The Court concluded that "these treaties could therefore be seen as foreshadowing a future general prohibition of the use of such weapons, *but they do not constitute such a prohibition by themselves*" (emphasis added).[27]

Customary international law

Having exhausted conventional international law, the Court then examined customary international law to determine if there is a prohibition on the threat or use of nuclear weapons. As indicated above in the discussion of *opinio juris* in customary international law, the Court found none.

[25] Peace Treaties of 10 February 1947; State Treaty for the Re-establishment of an Independent and Democratic Austria of 15 May 1955; Antarctic Treaty of 1 December 1959; Treaty of 5 August 1963 Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and under Water; Treaty of 27 January 1967 on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies; Treaty of Tlatelolco of 14 February 1967 for the Prohibition of Nuclear Weapons in Latin America, and its Additional Protocols; Treaty of 1 July 1968 on the Non-Proliferation of Nuclear Weapons; Treaty of 11 February 1971 on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil thereof; Treaty of Rarotonga of 6 August 1985 on the Nuclear-Weapon-Free Zone of the South Pacific, and its Protocols; Treaty of 12 September 1990 on the Final Settlement with respect to Germany; the Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons in 1995; the Treaty on the Southeast Asia Nuclear-Weapon-Free Zone of 15 December 1995; and the Treaty on the Creation of the Nuclear-Weapons-Free Zone in Africa of 11 April 1996. The Court also considered UN Security Council Resolutions 255 (1968) and 984 (1995) addressing security assurances given by nuclear-weapon States to the non-nuclear-weapon States.

[26] Opinion, para. 60.

[27] *Ibid.*, para 62.

The first two of the Court's six findings were:

"(2)A. Unanimously,

There is in neither customary nor conventional international law any specific authorization of the threat or use of nuclear weapons;[28]

(2)B. By eleven votes to three [against, Judges Shahabuddeen, Weeramantry and Koroma],

There is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such."[29]

International humanitarian law

The Court, having found no conventional or customary international law proscribing the threat or use of nuclear weapons *per se*, moved to a consideration of whether "recourse to nuclear weapons *must* be considered as illegal in the light of the principles and rules of international humanitarian law applicable in armed conflict and of the law of neutrality" (emphasis added).[30]

It is beyond reasonable dispute that international humanitarian law applies to nuclear weapons in the same way as it applies to conventional weapons. Analysis of international humanitarian law begins with the fundamental principle that the "right of belligerents to adopt means of injuring the enemy is not unlimited".[31] There are two "cardinal" rules. First, the principle of distinction holds that States must not make civilians the object of attack and must not use weapons that are incapable of distinguishing between civilian and military targets. Second, it is prohibited to use weapons that cause unnecessary suffering, that is, weapons that cause "harm greater than that unavoidable to achieve legitimate military objectives".[32]

The Court found that the Martens clause is part of customary international law. The Martens clause first found expression in Hague Con-

[28] *Ibid.*, para. 105(2)A.

[29] *Ibid.*, para. 105(2)B.

[30] *Ibid.*, para. 74.

[31] *Ibid.*, para. 77, quoting Article 22 of the 1907 Hague Regulations relating to the laws and customs of war on land.

[32] *Ibid.*, para. 78.

vention II with Respect to the Laws and Customs of War on Land of 1899. The Court quoted from Article 1, paragraph 2, of Additional Protocol I of 1977 as a modern formulation of the Martens clause:

> "In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience".[33]

Parenthetically, the Court perceived no need to rule on the applicability of Additional Protocol I of 1977 to nuclear weapons, because that Protocol in no way replaced the general customary rules applicable to all means and methods of combat, including nuclear weapons. In particular, the Court recalled that all States are bound by those rules in Additional Protocol I which, when adopted, were merely the expression of the pre-existing customary law.[34]

The Court briefly considered the principle of neutrality, which had been raised by several States. It declined to elaborate on the specific content of the principle of neutrality, which has been debated since the adoption of the UN Charter, stating merely that the rules of neutrality apply to "all international armed conflict, whatever type of weapons might be used".[35] We think this is correct.

The Court proceeded to determine whether the threat or use of nuclear weapons is inherently incompatible with international humanitarian law or the law of neutrality. The proponents of the illegality of nuclear weapons argued, in essence, that the destructive force of nuclear weapons is so great that any use of them whatsoever would necessarily violate the principles of distinction and prevention of unnecessary suffering. The States that assert the legality of the threat or use of nuclear weapons in certain circumstances argued that the Court had insufficient evidence to conclude that any and every use of nuclear weapons would violate the principles of distinction and preventing unnecessary suffering. The Court concluded, we think correctly, that "it does 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."[36]

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[33] *Ibid.*

[34] *Ibid.*, para. 84.

[35] *Ibid.*, para. 89.

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

The fourth of the Court's six findings was:

> "(2)D. Unanimously,
>
> 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".[37]

We could not agree more.

The Court's ultimate advice

The fifth of the Court's six findings — its ultimate advice — was:

> "(2)E. By seven votes to seven (...) [Against, Vice-President Schwebel; Judges Oda, Guillaume, Shahabuddeen, Weeramantry, Koroma and Higgins],
>
> 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".[38]

If, in the first part of this advice, what the Court means by "generally" is that in most circumstances the use of nuclear weapons would be unlawful, that is consistent with the views of the United States and other States. Given the tremendous destructive force of nuclear weapons, their use — consistent with the principles of proportionality, distinction, and prevention of unnecessary suffering — would be limited.

The second part of the Court's ultimate advice is somewhat troublesome. On the one hand, the standard is ambiguous. The meaning of "an extreme circumstance of self-defence, in which the very survival of a State

[37] *Ibid.*, para. 105(2)D.

[38] *Ibid.*, para. 105(2)E.

would be at stake" is subject to wide interpretation. On the other hand, this formulation is also more limited than what the United States and other States had argued. The position of the United States and other States is that no general conclusion can be drawn about the legality of the use of nuclear weapons; a judgment can only be made in each specific case, taking into account all the particular circumstances. Certainly, the use of nuclear weapons would be a political decision of the highest order. From a more pragmatic perspective, legality of the employment of nuclear weapons would have to be considered in view of the specific target, and whether their use against that specific target would be consistent with the rules of international humanitarian law, particularly the principles of proportionality, distinction, and prevention of unnecessary suffering.

Obligation to negotiate nuclear disarmament

Finally, the Court addressed Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons, which provides:

> "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".[39]

The Court's sixth and final finding was:

> "(2)F. Unanimously,
>
> There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control".[40]

The obligation of which the Court reminds the international community is unquestionable, although the enormity and complexity of the task of concluding negotiations is daunting. This fact must be fully appreciated.

What the Court declined to decide

The Court declined to pronounce on two important issues: (1) the use of nuclear weapons in belligerent reprisal; and (2) the policy of deterrence.

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[39] *Ibid.*, para. 99.

[40] *Ibid.*, para. 105(2)F.

Regarding the use of nuclear weapons in belligerent reprisal, the Court declined to comment on the issue except to observe that such use would be governed by the principle of proportionality, a qualification that is consistent with international law.[41] Regarding the policy of deterrence, the Court found that, in the face of an international community profoundly divided on the issue, there is no controlling *opinio juris*.[42] Nevertheless, as mentioned in the section on *opinio juris*, the Court recognized that the policy of deterrence has a played a fundamental role in international security affairs.

Conclusion

Common-law lawyers have an expression: "Hard cases make bad law". Surely, this had to be among the hardest cases ever addressed by any court. Although this Advisory Opinion does not "make law" — it provides a response to a question asked by the General Assembly — we submit that the legal advice provided is "not bad". Our sense is that of the 28 States that made written statements to the Court (22 States made oral statements to the Court during its public sittings from 30 October to 15 November 1995), few are totally satisfied with the Court's Advisory Opinion. However, our sense is that most of these States can live with the Court's Advisory opinion, which is not seriously inconsistent with their national interests or their view of international law.

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[41] *Ibid.*, para. 46.

[42] *Ibid.*, para. 67.

ICRC statement to the United Nations General Assembly on the Advisory Opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons

The debate in the First Committee of the United Nations General Assembly (51st Session, 1996) on agenda items 71 and 75 (disarmament and the 1980 Conventional Weapons Convention) gave the ICRC the opportunity to make the following brief comment on the Advisory Opinion of the International Court of Justice relating to the legality of the threat or use of nuclear weapons:

This was the first time that the International Court of Justice analysed at some length international humanitarian law governing the use of weapons. We were pleased to see the reaffirmation of certain rules which the Court defined as "intransgressible", in particular the absolute prohibition of the use of weapons that are by their nature indiscriminate as well as the prohibition of the use of weapons that cause unnecessary suffering. We also welcome the Court's emphasis that humanitarian law applies to all weapons without exception, including new ones. In this context we would like to underline that there is no exception to the application of these rules, whatever the circumstances. International humanitarian law is itself the last barrier against the kind of barbarity and horror that can all too easily occur in wartime, and it applies equally to all parties to a conflict at all times.

Turning now to the nature of nuclear weapons, we note that, on the basis of the scientific evidence submitted, the Court found that "...The destructive power of nuclear weapons cannot be contained in either space or time...the radiation released by a nuclear explosion would affect health, agriculture, natural resources and demography over a very wide area. Further, the use of nuclear weapons would be a serious danger to future generations..." In the light of this, the ICRC

finds it difficult to envisage how a use of nuclear weapons could be compatible with the rules of international humanitarian law.

We are convinced that because of their devastating effects no one ever wants to see these weapons used. It is the ICRC's earnest hope that the opinion of the Court will give fresh impetus to the international community's efforts to rid humanity of this terrible threat.

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