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

---

Louise Doswald-Beck, LL.M. (London), is deputy head of the ICRC Legal Division.

[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

---

[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]

---

[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]

---

[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

---

[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.

INTERNATIONAL REVIEW OF THE RED CROSS

INTERNATIONAL HUMANITARIAN LAW

HUMANITARIAN POLICY AND ACTION

INTERNATIONAL RED CROSS AND RED CRESCENT MOVEMENT

INTERNATIONAL COMMITTEE OF THE RED CROSS

INTERNATIONAL REVIEW OF THE RED CROSS

SUBSCRIPTION FORM

I should like to subscribe to the INTERNATIONAL REVIEW OF THE RED CROSS

Edition:

❑ *English* ❑ *Spanish* ❑ *French* ❑ *Arabic* ❑ *Russian*

Name _____ *First name* _____

Organization _____

Profession or function _____

Address _____

Country _____

Please send to:

INTERNATIONAL REVIEW
OF THE RED CROSS
INTERNATIONAL COMMITTEE OF THE RED CROSS
19, avenue de la Paix CH-1202 Geneva, Switzerland
Fax (++4122) 733 20 57

Annual subscription price (6 issues): 30 Swiss francs or US$ 18, to be paid after receiving our invoice.
For more information or a simple copy, please contact the Editor of the Review:
tel.(++4122) 730 20 78 or 734 60 01
e-mail: irrcreview. gva @gwn.icrc.org

Date _____ *Signature* _____

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

---

[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.

---

[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.

---

[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.