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Nuclear Weapons Advisory Opinions

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A. Procedural Issues

1 A coalition of non-governmental organizations (NGOs) exercised political pressure for a number of years in order that the → *International Court of Justice (ICJ)* would pronounce a legal opinion on the legality or otherwise of the use of nuclear weapons, a political move called the ‘World Court Project’. This move first succeeded in the → *World Health Organization (WHO)*. On 23 May 1993, the Assembly of the WHO adopted resolution WHA 46.40 asking the ICJ to answer the following question:

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?

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A year later, this move was successful in the UN General Assembly, against the adamant resistance of number of military powers and their allies. On 15 December 1994, the UN General Assembly adopted Resolution 49/75K (GAOR 49th Session Supp 49 vol 1, 153) by which it requested the ICJ to give an answer to the following question: ‘Is the threat or use of nuclear weapons in any circumstances permitted under international law?’

2 The Court responded by two advisory opinions dated 8 July 1996. The first one refused to give the opinion requested by the WHO; the second one answered the question put by the UN General Assembly.

3 As to the WHO request, the crucial question was that of the competence of the World Health Assembly to submit this particular request to the Court pursuant to Art. 96 (2) UN Charter. That competence is based on an authorization by the UN General Assembly given in the Agreement between the United Nations and the World Health Organization (19 UNTS 193), which relates to ‘legal questions arising within the scope of [the] competences’ of the WHO. The Court denied that competence for two reasons. First, while there is no denying the fact that the health effect of the use of nuclear weapons is considerable, the competence of the WHO only relates to these effects, and the legality or illegality of their use is immaterial for their effects. It thus falls outside the competence of the WHO. Secondly, there is a division of powers between the various specialized agencies of the UN system. Their relations are governed by the ‘principle of speciality’. Applying this principle, the Court concluded that questions relating to the use of force and to arms control and disarmament are the exclusive domain of the United Nations, not that of any specialized agency. That approach was severely criticized in the dissenting opinions of Judges Weeramantry and Koroma. The first argument is excessively formalistic and over-simplistic. The second one—justified as it may be as a general proposition—raises more far-reaching issues, which the Court does not address, namely the undeniable overlap between various fields of activities of the United Nations and of specialized agencies.

4 The request of the UN General Assembly raised a number of general procedural issues related to advisory opinions. In this respect, the advisory opinion given on the request of the General Assembly is in line with constant jurisprudence (*Conditions of Admission of a State to Membership in the United Nations [Article 4 of the Charter] [Advisory Opinion] [1948] ICJ Rep 57; Competence of the General Assembly for the Admission of a State to the United Nations [Advisory Opinion] [1950] ICJ Rep 4; Certain Expenses of the United Nations [Article 17 Paragraph 2 of the Charter] [Advisory Opinion] [1962] ICJ Rep 198*), which continued after the Nuclear Weapons Advisory Opinion (→ *Israeli Wall Advisory Opinion (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory)*). The advisory jurisdiction of the Court is limited to legal questions, but the fact that a question has important political implications does not exclude the legal character of a question formulated in terms of law. Secondly, the Court has discretion to give or not to give an answer to a question, but only for a compelling reason will it refuse to render an opinion. Such compelling reasons did not exist. The question was not too vague and abstract; the Court would not be forced to engage in merely speculative discussions. It was not for the Court to question the motives behind a General Assembly request. It was up to the General Assembly to decide whether it wanted and needed the opinion of the Court. In sum, as to the ‘propriety’ of rendering an opinion, the Court would as a rule yield to the judgment of the organ making the request, a position also taken earlier by the Court and continued later (see *Legal Consequences of the*

deciding cases as they come before the Court, it also means a responsibility for shaping the international legal order. The Court does this by contributing to an international legal discourse, which determines, as a matter of practice, the concretization and development of international law. The Court could not fulfil this responsibility by yielding to suggestions that issues submitted to the Court are political and therefore not for the Court to decide. But on the other hand, the Court would jeopardize its acceptance in the international community if it overdid this role, a limitation it did recognize in its Opinion. This may explain the compromise character of the substantive holdings of the Court.

B. Substantive Issues

1. Relevant Norms

6 A number of different rules were pleaded before the Court as forming a basis for the prohibition of use or threat of use of nuclear weapons. They are:

- the prohibition of the use of force contained in the UN Charter (*ius ad bellum*, or rather *ius contra bellum*);
- the international protection of human rights, in particular the right to life;
- the Convention on the Prevention and Punishment of the Crime of Genocide ('Genocide Convention'; 78 UNTS 277);
- international environmental law;
- treaty provisions relating to specific weapons (Hague Declaration II concerning Asphyxiating Gases of 1899; Art. 23 (a) Hague Regulations; 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare);
- treaty provisions on arms control and disarmament, ie those relating to the possession, acquisition, or transfer of nuclear weapons in certain areas or under certain conditions, non-use of nuclear weapons in relation to certain States, prohibition of nuclear tests;
- a customary law rule specifically prohibiting the use of nuclear weapons;
- international humanitarian law, both treaty and custom;
- the customary law of neutrality.

7 The Court addressed all these areas of international law. Most of its holdings are unanimous or by a great majority (11 to 3), with the exception of one crucial issue where the vote was 7 to 7, the question being decided by the casting vote of the President.

2. The Court's Answer to the Question Submitted by the General Assembly

8 The point of departure of the Court is that there is no explicit authorization of the use of nuclear weapons, the real issue being that of a prohibition. As to a possible prohibition following from the *ius contra bellum*, any use of weapons that is not justified as → *self-defence* is unlawful. The right of self-defence is limited by the principles of necessity and → *proportionality*. But even if a use of force passes this test, it must still be in conformity with other applicable rules of international law, in particular international humanitarian law. A threat to use nuclear weapons would be unlawful if the threatened use would be unlawful. Possession as such would not constitute such an unlawful threat, depending on the circumstances.

9 The right to life is also applicable in times of armed conflict. Art. 6 International Covenant on Civil and Political Rights (999 UNTS 171) prohibits the 'arbitrary' deprivation of that right. What is arbitrary in

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application of the human rights norm and the law of armed conflicts, the limitation of the human right being derived from the law of armed conflict.

10 A use of nuclear weapons was not necessarily prohibited by the Genocide Convention, but only if it was done with genocidal intent, which was the condition for applying Art. II Genocide Convention. That was a question of the specific facts of a case.

11 As to the international legal norms protecting the environment, the holdings of the Court are somewhat vague. The Court concludes that there is an important body of law protecting the environment also in armed conflict, which, however, does not specifically prohibit the use of nuclear weapons (→ *Environment, Protection in Armed Conflict*). As to the concrete requirements of the law protecting environment, a few questions are touched upon but not really solved. The Court raises, but does not answer, the question of whether treaties protecting the environment in times of peace continue to apply in times of armed conflict. It doubts whether these treaties are in any way meant as restraints on warfare. The Court also mentions Arts 35 (3) and 55 → *Geneva Conventions Additional Protocol I (1977)* prohibiting certain attacks against the environment, without clearly solving the controversial issue of whether these provisions constitute an expression of customary law. On the other hand, the Court expressly states that environmental considerations have to be taken into account when assessing the conformity of an action with the principle of necessity and proportionality both under the *ius contra bellum* and under the *ius in bello*.

12 Having thus assessed the relevance of certain specific fields of international law for the use of nuclear weapons, the Court turns to the question of a specific prohibition of nuclear weapons (nuclear weapons as unlawful weapons). As to certain older treaty provisions on weapons, the Court concludes that the use of nuclear weapons is not covered by the 1899 Hague Declaration II concerning Asphyxiating Gases, that it does not constitute the use of 'poison' within the meaning of Art. 23 (a) Hague Regulations, nor a forbidden 'analogous liquid, material or device' pursuant to the 1925 Geneva Protocol.

13 Different arms control and → *disarmament* treaties prohibit certain nuclear activities, in particular the possession or acquisition of such weapons, the testing of nuclear weapons (Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and under Water; 480 UNTS 43) and stationing such weapons in certain localities (eg on the seabed, the moon, or in Antarctica). They also restrain the use of these weapons, but even taken together they do not amount to a comprehensive prohibition of their use.

14 In determining whether there is a customary law prohibition of the use of nuclear weapons, the Court notes that there is a practice of non-use after 1945. In this situation, the crucial question is whether there is an → *opinio iuris* that corresponds to this practice. To answer this question, the Court analyses a number of relevant General Assembly resolutions, in particular Resolution 1653 (XVI) ([24 November 1961] GAOR 16th Session Supp 17 vol 1, 4) and concludes that they fall short of providing sufficient proof for such an *opinio iuris*.

15 The Court thus concludes, by 11 votes to 3, that there is no rule of international law specifically prohibiting the use of nuclear weapons. As to the question of whether and to what extent general rules of the law of armed conflict (international humanitarian law) apply to the use of nuclear weapons, the relevant principles of international humanitarian law are the following:

- the principle of distinction, involving the protection of civilians and of civilian objects and the prohibition of indiscriminate attacks;
- the prohibition of causing unnecessary suffering;
- the so-called Martens Clause.

16 These rules constitute customary international law. Consequently, the Court declares irrelevant the controversy as to whether the corresponding treaty provisions of Additional Protocol I apply to nuclear weapons or not. It is these customary rules that do apply to nuclear weapons as they apply to all other

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17 The Court then turns to the question of what precisely these rules mean for the use of nuclear weapons. The essential problem analysed by the Court (leaving aside the problem of neutrality) is whether the use of these weapons can respect the distinction between the civilian population and → *combatants*, between → *civilian objects* and → *military objectives* as required by international humanitarian law. Two diametrically opposed views had been submitted to the Court and were held by different members of the Court. A clear majority of the Court (10 out of 14) were of the view that, at least as a matter of principle, a scenario where a lawful use of nuclear weapons could not be imagined under these rules ('scarcely reconcilable with respect for such requirements', at para. 95), in particular as no nuclear weapons State had submitted such a scenario. Only two judges saw such a possibility (Schwebel, Guillaume); two judges (Higgins, Oda) based their negative vote on other considerations. Three judges, however, would completely exclude such possibility. Seven judges, who constituted the decisive majority because of the casting vote of the President, left the possibility of a strictly limited exception open:

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. Furthermore, the Court 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, when its survival is at stake ... Accordingly, in view of the present state of international law viewed as a whole, ... and of the elements of fact at its disposal, the Court is led to observe 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 (paras 95–97).

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18 This possible exception is a difficult compromise formula and must thus be very carefully considered. It is sometimes misquoted as the recognition of an exception to the prohibition which is the rule. It must, however, be emphasized that the Court has not positively stated such an exception. It just would not exclude such exception and so reserves the right to look differently at different facts that may be brought before the Court. Although this approach has sometimes been called a *non liquet*, it differs from that notion as applied to judgments. It is a limitation that is due to the special character of an advisory opinion where the question asked may require a different answer relating to different sets of facts and where such facts are not known at the time when the opinion is rendered.

19 The exception that may be envisaged is limited to extreme circumstances. Nevertheless, the formula 'survival at stake' opens the door to abuse. That fear would be alleviated if there was a judicial review of the application of that concept. This is the case only to a limited extent. Violating the principle of distinction, be it through the use of a nuclear weapon or in any other way, is a crime that is subject to the jurisdiction of the → *International Criminal Court (ICC)*, which could then decide on the circumstances that might trigger the exception. Thus, the broader the acceptance of this Court, the more acceptable is the exception.

20 Another critique to be raised against the holding of the Court is that it blurs the distinction between *ius contra bellum* and *ius in bello* by applying a notion of the *ius contra bellum*, ie self-defence, to a question of the law on the conduct of hostilities, ie the *ius in bello*. By doing so, it disregards a fundamental principle of the law of armed conflict, namely the equality of the parties, a point made, for instance, by Judge Higgins in her Dissenting Opinion.

3. The Court's Further Holding: a Duty of Nuclear Disarmament

21 The Court finds that the controversy concerning the legal status of nuclear weapons is unsatisfactory. Therefore, the Court concludes its opinion with a statement that was not, at least not expressly, included in the UN General Assembly's request, namely that there is a general duty 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' (para. 105). This obligation is based on Art. VI Treaty on the Non-Proliferation of Nuclear Weapons (729 UNTS 161), but it is formulated in somewhat stronger terms. The reasoning of the Court can, furthermore, be understood as meaning that the obligation forms part of

C. The Impact of the Judgment

22 As a first explicit reaction to the Nuclear Weapons Advisory Opinion, the UN General Assembly appreciated that the Court responded to the request and ‘takes note’ of the Opinion (Resolution 51/45 M [10 January 1997] GAOR 51st Session Supp 49 vol 1, 112). In the following years, the Nuclear Weapons Advisory Opinion became a regular element of the General Assembly verbal resolution practice. The follow-up to the Opinion has become a regular agenda item. The Opinion has become part of a continuing legal discourse and also of an arms control discourse, which keeps legal and political development going. This discourse has two different but related elements: the prohibition of the use of nuclear weapons and the obligation to conclude an agreement on nuclear disarmament.

23 The General Assembly has emphasized in particular the holding of the Court concerning obligato arms control negotiations and keeps referring to it. In 1997, the General Assembly adopted a draft tre on the ban of the use of nuclear weapons (UNGA Res 52/39 C [31 December 1997] GAOR 52nd Sessio Supp 49 vol 1, 89.). It constantly requested the Conference on Disarmament to commence negotiations on it, and later noted with regret that this has not happened (eg UNGA Res 62/51 [15 January 2008] GAOR 62nd Session Supp 49 vol 1, 102). However, the obligation to engage in, and to conclude, disarmament negotiations banning all nuclear weapons has so far not been fulfilled. As a result, there have been moves in the NGO community dealing with arms control to lobby for a new request to be submitted to the ICJ. With considerable NGO support, the Marshall Islands in 2014 brought a case before the ICJ against the nine States possessing nuclear weapons, alleging a breach of Art. 6 Treaty on the Non-Proliferation of Nuclear Weapons and of a corresponding rule of customary law. In three of the cases, the Marshall Islands could rely on the optional clause of Art. 36 (2) ICJ Statute. In March 2016, the ICJ held public sittings in the cases against the United Kingdom, India, and Pakistan. The Marshall Islands has also filed a complaint against the United States and various US authorities before a US District Court. These cases are pending in various stages at the time of writing. The initiative for a nuclear-free world proclaimed by the President of the United States on 5 April 2009 went in the direction of fulfilling the obligation formulated by the ICJ, but has so far failed to yield concrete results.

24 The legal and political discourse about the legality of nuclear weapons started in the 1950s and continues. The Nuclear Weapons Advisory Opinion has strengthened the position of those who argue that the use is illegal. Yet the *non liquet* regarding the applicability *vel non* of the prohibition of use leads to legal uncertainties. A first question is raised by the very wording of the Court’s opinion: If the Court’s formulation is taken literally, the exception would only cover a use by the State whose survival is at stake, not a use to ensure the survival of other States. Therefore, the Opinion adds a question mark to ‘nuclear umbrella’ strategies, which have become less important for European States but still play a role concerning a possible attack by North Korea against South Korea or Japan.

25 In spite of the Court’s opinion, the use of nuclear weapons continues to play a role in the strategic planning of the States possessing nuclear weapons. Some of these States (the United States, the United Kingdom, France, and the Russian Federation) use formulations in explaining their policies that can be related to the text of the Opinion and can thus be understood as trying to place their concept of use within the legal niche left open by the Opinion. In other cases (India, Pakistan) no such relationship can be established. In light of the continued military relevance of nuclear options and of the devastating humanitarian consequences of any use of nuclear weapons, a ‘Humanitarian Initiative’ was launched by a group of States, promoted by three conferences in 2013 (Oslo) and 2014 (Nayarit and Vienna), and formulated in a Joint Statement of 28 April 2015 adhered to by 150 States. It has resuscitated efforts to conclude a treaty banning the use of nuclear weapons.

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