

THE ADVISORY OPINION ON THE LEGALITY OF THE THREAT OR USE OF NUCLEAR WEAPONS

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CONTENTS

	<i>Page</i>
I. INTRODUCTION	347
II. COMPETENCE OF THE COURT	347
A. <i>General Remarks</i>	347
B. <i>Jurisdiction of the General Assembly to Request an Advisory Opinion</i>	348
C. <i>A Legal Question?</i>	350
1. <i>Legal or Political?</i>	350
2. <i>Motives and Implications</i>	351
3. <i>Judicial Propriety</i>	352
III. THE REQUEST SUBMITTED TO THE COURT	354
A. <i>The Absurdity of the Question</i>	354
B. <i>The Threat or Use</i>	355
C. <i>Permitted or Prohibited?</i>	356
D. <i>Nuclear Weapons</i>	358
IV. INTERNATIONAL LAW RULES APPLICABLE TO THE LEGALITY OF THE THREAT OR USE OF NUCLEAR WEAPONS	359
A. <i>Conventional Rules of General Scope</i>	360
B. <i>The Charter</i>	365
1. <i>Prohibition of the Use of Force</i>	365
2. <i>Self-Defense</i>	366
a. <i>Theories Relating to Self-Defense</i>	366
b. <i>Legal Boundaries of Self-Defense</i>	369

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c.	<i>Legality or Illegality of the Use of Nuclear Weapons in Self-Defense</i>	370
d.	<i>Unanswered Questions</i>	371
C.	<i>The Law Applicable in Armed Conflicts</i>	372
1.	<i>Specific Rules Regulating the Legality or Illegality of Recourse to Nuclear Weapons per se</i>	372
a.	<i>Poisoned Weapons</i>	372
b.	<i>Treaties Dealing with Nuclear Weapons expressis verbis</i>	373
c.	<i>Customary Prohibition</i>	374
2.	<i>International Humanitarian Law</i>	376
V.	CONCLUSION	

I. INTRODUCTION

On July 8, 1996, the International Court of Justice issued its advisory opinion on the legality of the threat or use of nuclear weapons.¹ By unanimity it decided that (1) neither in customary law nor in conventional international law, is there any specific authorization to threaten or to use nuclear weapons, (2) a threat or use of nuclear weapons contrary to Article 2(4) and 51 of the UN Charter is unlawful, (3) a threat or use of nuclear weapons must 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 and (4) states are obliged to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament.² By eleven votes to three, the Court found neither in customary nor in conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such.³ Finally, and this is the most controversial aspect of the opinion, by seven votes to seven and with a casting vote of the President, the Court held 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.⁴ 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-defense, in which the very survival of a state would be at stake.⁵

II. COMPETENCE OF THE COURT

A. General Remarks

The competence of the Court⁶ to give advisory opinions to, *in casu*, the General Assembly is regulated by Article 96(1) of the United Nations

¹ Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 265-67 (Advisory Opinion of July 8) reprinted in 35 I.L.M. 809.

² See *id.* at 266.

³ *Id.* at 266.

⁴ *Id.*

⁵ *Id.*

⁶ The word competence is used here according to Rosenne's definition meaning both jurisdiction and propriety. See SHABTAI ROSENNE, THE INTERNATIONAL COURT OF JUSTICE 253 (1957).

Charter and Article 65(1) of the Statute of the International Court of Justice. These articles provide that the Court may issue an advisory opinion on any legal question when it is requested to do so by the General Assembly.⁷ Before replying to the question, the Court will have to assure itself that it is competent.⁸ This involves investigating its jurisdiction and examining the propriety of entertaining the request. The jurisdiction of the Court depends on whether the requesting organ (i.e. the General Assembly) has followed the correct procedure and is not acting *ultra vires*. Also part of the jurisdictional aspect is an assessment on whether the question is a legal question. Finally, the Court will have to decide whether it would be proper to give a reply.⁹

B. Jurisdiction of the General Assembly to Request an Advisory Opinion

Article 96(1) of the United Nations Charter declares that the General Assembly can request advisory opinions on any legal question. Article 96(2) limits the possibility of requesting an advisory opinion for authorized organizations to matters which are within the scope of their activity. A strict *a contrario* interpretation leads to the conclusion that no such limitation exists for the organs deriving their jurisdiction from Article 96(1). It has, however, rightly been pointed out that this limitation is undoubtedly implied in Article 96(1).¹⁰ The reason simply being that international organizations only have the powers attributed to them by states.¹¹ It cannot be the aim of Article 96(1) to allow the General Assembly to request advice on matters for which it would otherwise not be competent.¹²

⁷ See generally, P. Daillier, *Article 96*, in LA CHARTE DES NATIONS UNIES 1283-98 (J.-P. Cot & A. Pellet eds., 1985).

⁸ See KENNETH JAMES KEITH, THE EXTENT OF THE ADVISORY JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE 35 (1971). The jurisdiction of a court to determine its own jurisdiction is called 'compétence de la compétence.' See also DHARMA PRATAP, THE ADVISORY JURISDICTION OF THE INTERNATIONAL COURT 117-19 (1972); IBRAHIM SHIHATA, THE POWER OF THE INTERNATIONAL COURT TO DETERMINE ITS OWN JURISDICTION: COMPÉTENCE DE LA COMPÉTENCE 400 (1995).

⁹ See KEITH, *supra* note 8, at 35.

¹⁰ Hermann Mosler, *Article 96*, in THE CHARTER OF THE UNITED NATIONS, A COMMENTARY 1008, 1010-11 (Bruno Simma ed., 1994).

¹¹ H.G. SCHERMERS & N.M. BLOKKER, INTERNATIONAL INSTITUTIONAL LAW § 209 (1995).

¹² Martin Lailach, *The General Assembly's Request for an Advisory Opinion from the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons*, 8 LEIDEN J. INT'L L. 401, 423 (1995).

Whereas the Court found that there is a presumption that an action by the United Nations is not *ultra vires* if it is an appropriate fulfillment of the stated principles of the United Nations.¹³ *Ultra vires* decisions of organs within the U.N. are more readily found.¹⁴ It was suggested that this matter was within the powers of the Security Council rather than of the General Assembly.¹⁵ The Court has shown that the General Assembly is competent based on Articles 10, 11 and 13 of the United Nations Charter.¹⁶ In essence, these articles give the General Assembly the power to conduct studies and make recommendations for the purpose of the progressive development of international law on any question within the scope of the Charter and especially concerning the maintenance of peace and security, including the principles governing disarmament and the regulation of armaments. Although Article 12 declares that the functions of the General Assembly are subordinate to those of the Security Council,¹⁷ this does not pose a problem for Article 11(1) because there is a clear functional division: the General Assembly considers general principles and the Security Council makes concrete plans.¹⁸

The requesting body does not only have to act within its jurisdiction but also according to the procedural requirements pertinent to that body. In his dissenting opinion Judge Oda was opposed to the request of the General Assembly because it was decided without "a meaningful consensus."¹⁹ Yet there is no procedural rule requiring a meaningful consensus. It is established practice that a decision on a request for an advisory opinion is taken with a simple majority.²⁰ Similarly, one commentator rejects the idea that a 2/3 majority might be required because it is not an important question within the meaning of Article 18(2) of the United Nations Charter.²¹ In fact, it is neither listed in Article 18(2), nor did the General Assembly itself

¹³ See *Certain Expenses of the United Nations*, 1962 I.C.J. 151, 168 (Advisory Opinion of July 20).

¹⁴ See SCHERMERS & BLOKKER, *supra* note 11, at § 208.

¹⁵ See Lailach, *supra* note 12, at 424.

¹⁶ See *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 1, at 233-34.

¹⁷ See Lailach, *supra* note 12, at 424.

¹⁸ *Id.* See also Kay Hailbronner & Eckart Klein, *Article 11, in THE CHARTER OF THE UNITED NATIONS*, *supra* note 10, at 242, 244-45.

¹⁹ *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 1, at 332 (dissenting opinion of Judge Oda).

²⁰ Mosler, *supra* note 10, at 1011.

²¹ Lailach, *supra* note 12, at 428.

consider it an important question.²²

Thus the Court correctly decided that the General Assembly acted within its jurisdiction irrespective of the interpretation of Article 96(1). Furthermore, the decision was made in accordance with the procedural requirements.

C. A Legal Question

The Court can only render advisory opinions on legal questions and cannot render advisory opinions on political questions.²³ Opponents of the advisory opinion vigorously argued that the legality of the threat or use of nuclear weapons is essentially a political question.

The issue was consistently debated in the First Committee, the General Assembly and before the Court.²⁴ The debate consisted of two interconnecting elements. First, the opponents considered the legality of the threat or use of nuclear weapons a practical question that was appropriately handled through negotiations.²⁵ An advisory opinion would arguably only harden each party in its position and would hamper the negotiating process.²⁶ Second, opponents argued that the motives for requesting the advisory opinions were purely political.²⁷ The Court's acceptance of the question arguably would leave it open to political pressure and would prejudice its judicial reputation.²⁸

1. Legal or Political?

The Court and scholars have clarified the meaning of "legal question" for purposes of Article 96.²⁹ Questions which have political aspects, a political

²² *Id.*

²³ Statute of the International Court of Justice, June 16, 1945, art. 38, 59 Stat. 1055.

²⁴ For an account of the proceedings in the First Committee and the General Assembly, see Lailach, *supra* note 12, at 401-19.

²⁵ *Id.* at 404.

²⁶ These arguments were forwarded by Morocco, Russian Federation, France, United Kingdom, Benin, Canada, Sweden, Australia and Malta during the debates in the First Committee. *Id.*

²⁷ *Id.*

²⁸ See generally, Lailach, *supra* note 12, at 406-15, 419-23 (giving an account of the debate in the General Assembly).

²⁹ See, e.g., PRATAP, *supra* note 8, at 90-91; ROSENNE, *supra* note 6, at 454-59; Mosler, *supra* note 10, at 1013-15.

background, or are part of a legal dispute pending before the representing organ could constitute legal questions.³⁰ If this were not the case, scarcely any question would be left. The Court has recognized that virtually all international law questions have political aspects.³¹ One commentator pointed out that most international disputes have legal foregrounds and political backgrounds.³²

For the Court, it suffices that a question is framed in terms of law and raises problems of international law.³³ Such question appears, according to the Court, to be a question of a legal character if it is susceptible to a reply based on law.³⁴

As to the problem of concurrent competency of both the General Assembly and the ICJ, the Court pointed out that "in situations in which political considerations are prominent it may be particularly necessary for an international organization to obtain an advisory opinion from the Court as to the legal principles applicable with respect to the matter under debate."³⁵ This attitude of the Court has been applauded by legal scholars. Their praise mainly focuses on the fact that this allows the Court to depoliticize debates or make political debates justiciable.³⁶

2. *Motives and implications*

To convince the Court that the legality of threat or use of nuclear weapons was a political question, the opponents next argued that the supporters of the request were purely driven by political motives and that issuance of an advisory opinion would have political implications. Opponents argued that supporters would use the reply of the Court in their political struggle for the

³⁰ See generally, KEITH, *supra* note 8, at 50-87 (presenting a detailed discussion of the "legal question" requirement).

³¹ See also Legality of the Threat or Use of Nuclear Weapons, *supra* note 1, at 234.

³² M. O. HUDSON, THE ADVISORY OPINION AND THE PERMANENT COURT 374 (1972).

³³ See Legality of the Threat or Use of Nuclear Weapons, *supra* note 1, at 233-34 (quoting Western Sahara, Advisory Opinion, 1975 I.C.J. 18). Note that the opponents argued that it was a political question framed in legal terms. See Lailach, *supra* note 12, at 404.

³⁴ See Legality of the Threat or Use of Nuclear Weapons, *supra* note 1, at 234.

³⁵ Legality of the Threat or Use of Nuclear Weapons, *supra* note 1, at 234 (quoting Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, 1980 I.C.J. 87).

³⁶ See ROSENNE, *supra* note 6, at 60.

complete elimination of all nuclear weapons.³⁷ The Court made it clear in the first *Admissions* case that it would not consider the reasons for requesting an advisory opinion.³⁸ The UN Charter provides: "[The Court] is not concerned with the motives which may have inspired this request, nor with the considerations which . . . formed the subject of the exchange of views which took place in that body."³⁹

In the case regarding the legality of threat or use of nuclear weapons, the Court held to this view and rejected all arguments based on motives which may have inspired the request and potential political implications of the opinion.

3. *Judicial Propriety*

Once the Court established its jurisdiction, it turned to the second element of competence. The jurisdiction of the Court is discretionary according to Article 65(1) of the Statute⁴⁰ but the Court, as the principal judicial organ of the United Nations, will not refuse to render an opinion unless there are compelling reasons.⁴¹ The present Court has never refused to answer a question. However, precedent of refusal to answer a question can be found in the jurisprudence of the Permanent Court of International Justice, namely in the *Eastern Carelia* case.⁴²

In the nuclear weapons case, the Court rejected all of the suggested reasons for refusing to give an Advisory Opinion as unconvincing.⁴³ Reasons the Court rejected included: the vague and abstract nature of the question, the General Assembly's failure to explain its purpose in seeking an advisory opinion, the possibility that the advisory opinion might adversely affect the disarmament process, and the possibility that the Court would go beyond its judicial role into a legislative one.⁴⁴

³⁷ See Lailach, *supra* note 12, at 420.

³⁸ *Id.*

³⁹ Conditions of Admission of a State to Membership in the United Nations (Article 4 of the UN Charter), 1948 ICJ 61 (Advisory Opinion of May 28).

⁴⁰ Statute of the International Court of Justice, *supra* note 23, at 1055.

⁴¹ See Mosler, *supra* note 10, at 1013. For a list of cases in which the Court discussed its decisions regarding Advisory Opinions, see *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 1, at 234. For further discussion see Said Mahmoudi, *The International Court of Justice and Nuclear Weapons*, 66 *NORDIC J. INT'L. L.* 77, 81-82 (1997).

⁴² See *Status of Eastern Carelia*, 1923 P.C.I.J. (ser. B), No 5 (July 23). The reason for the refusal in this case was the absence of consent of one state in an inter-state conflict.

⁴³ *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 1, at 236-37.

⁴⁴ *Id.*

The Nature of the Question

It is for the Court irrelevant whether a question is hypothetical, abstract or concrete.⁴⁵ Although some diverging views have existed, it is now clear that the Court can entertain both abstract and concrete questions.⁴⁶

The General Assembly's Unexplained Purpose in Requesting an Advisory Opinion

Some states argued that the General Assembly did not explain the reasons it sought an advisory opinion.⁴⁷ The Court answered this argument by holding that it would not have regard for the origins or the political history of the request, or the distribution of votes with respect to the adopted resolution.⁴⁸

The Effect on the Disarmament Process

The Court did not account for the effect of the advisory opinion on the disarmament process because it lacked criteria to assess its effect on disarmament negotiations.⁴⁹

The Court's Judicial Role

If the *corpus juris* could not provide rules to deal with the question at hand then the Court would be required to go beyond its judicial role. The Court was confident that it could render a reply by applying existing rules, although the need might arise to specify the scope of the law or to note its general trend.⁵⁰ However, after a survey of relevant customary and conventional international law, the Court effectively left an important question unanswered. The Court held that although there was nothing within

⁴⁵ See PRATAP, *supra* note 8, at 130.

⁴⁶ See *id.* at 169-72; see also ROSENNE, *supra* note 6, at 466-68. But see KEITH, *supra* note 8, at 62-74 (arguing that the Court's role is to settle actual disputes and without actual facts it may be impossible to properly answer the question put to it without redrafting it). The accusation that the question is vague refers to the requirement in Article 65(2) of the Statute that questions submitted for advisory opinions be laid out in an exact statement of the question. Some may argue that the "exactness" requires a precise and exact question but it is generally accepted that the question submitted must faithfully reflect the question asked by the requesting organ. See KEITH, *supra* note 8, at 72.

⁴⁷ See Legality of the Threat or Use of Nuclear Weapons, *supra* note 1, at 237.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

customary or conventional international law that specifically authorized the use or threat of nuclear weapons, neither was there a comprehensive and universal prohibition of the use or threat of nuclear weapons.⁵¹ There is merit to the argument of Judge Higgins who finds this inconsistent with the Court's decision that it could render a reply using existing international law.⁵²

III. THE REQUEST SUBMITTED TO THE COURT

The General Assembly submitted the following question to the International Court of Justice:

Is the threat or use of nuclear weapons in any circumstances permitted under international law? (Est-il permis en droit international de recourir à la menace ou à l'emploi d'armes nucléaires en toute circonstance?)⁵³

A. *The Absurdity of the Question*⁵⁴

The question, following the English version, invites the Court to determine whether the threat or use of nuclear weapons is ever permitted.⁵⁵ The Court could answer the question in the affirmative and be done with it.⁵⁶ Obviously, this was not the result envisaged by the supporters of the request. As Judge Oda pointed out in his dissenting opinion, the supporters of the request phrased the question in this way because they wanted the Court to

⁵¹ *Id.* at 253.

⁵² *Id.* at 583 (dissenting opinion of Judge Higgins). For an opposing view, see *id.* at 280 (declaration of Judge Vereshchetin).

⁵³ See G.A. Res. 75, 49th Sess., 90th mtg., U.N. Doc. A/Res/49/75 (1995).

⁵⁴ Judge Ranjeva speaks of "*le caractère évident ou absurde de la question.*" Legality of the Threat or Use of Nuclear Weapons, *supra* note 1, at 298 (separate opinion of Judge Ranjeva).

⁵⁵ The English translation read, "Is the threat or use of nuclear weapons in any circumstance permitted under international law?" *Id.* at 238.

⁵⁶ *Id.* at 237. An interesting criticism to this approach came from a delegate from Australia, Mr. Gareth Evans: "it would be academic and unreal for any analysis to seek to demonstrate that the use of a single nuclear weapon in particular circumstances could be consistent with the principle of humanity. The reality is that if nuclear weapons ever were used, this would be overwhelmingly likely trigger a nuclear war." *Id.* at 547-59 (dissenting opinion of Judge Weeramantry). See also Lailach, *supra* note 12, at 422.

answer: "No, the threat or use of nuclear weapons is not permitted under international law in any circumstances."⁵⁷ According to Judge Oda they were seeking the endorsement of a legal axiom.⁵⁸

The French version of the question invites the Court to look for an example where recourse to nuclear weapons is illegal and proceed with a negative reply.⁵⁹

The Court did not reply to the question as submitted but distilled what it considered the real objective. Although the Court is bound to the question submitted, it is also the duty of the Court to "ascertain what are the legal questions really in questions formulated in a request."⁶⁰ This duty is based on its responsibility to contribute to the good functioning of the international organizations and to be able to give a reply that is both useful and conforming to the judicial role of the Court.⁶¹

The redrafted question entertained by the Court was: "is the threat or use of nuclear weapons legal or illegal in *any circumstances*?"⁶² In other words, the Court was going to apply the body of international law to the threat or use of nuclear weapons to determine whether such behavior is legal or illegal.

B. *The Threat or Use*

In the request submitted, the disjunctive word "or" creates two possibilities: the threat of nuclear weapons and the use of nuclear weapons. What is meant by "use" is clear, the meaning of "threat" in this context is less apparent. The phrase "threat of nuclear weapons" does not necessarily imply "use" of nuclear weapons. The possession can be perceived as threatening through the production, stockpiling or targeting of nuclear weapons.⁶³

⁵⁷ *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 1, at 333 (dissenting opinion of Judge Oda).

⁵⁸ *Id.*

⁵⁹ The divergence between the English and the French text will not be looked at further since neither the Court, nor Judge Oda (the only judge dissenting on this point), nor the French-speaking delegations in the First Committee and the General Assembly raised objections and the original draft was submitted in English in the First Committee (by Indonesia). See *id.* at 238, 333; Lailach, *supra* note 12, at 401-02.

⁶⁰ MOSLER, *supra* note 10, at 1014. See also KEITH, *supra* note 8, at 64-65.

⁶¹ See Daillier, *supra* note 7, at 1288-89.

⁶² *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 1, at 237.

⁶³ *Id.* at 540 (dissenting opinion of Judge Weeramantry). Judge Weeramantry distinguishes threat from possession or stockpiling. Threat, according to him, is possession of weapons in a state of readiness for actual use. See *id.*

This interpretation was not followed by the Court. On the contrary, the Court considered the phrase to mean: the threat or use of *force* (employing nuclear weapons). "Threat" in this view becomes an *actual* threat to use such force as opposed to actions which could be perceived as a threat to use force.⁶⁴ This interpretation is directly based on Article 2(4) of the UN Charter.⁶⁵ The "threat" and "use" are, in this interpretation, inextricably linked; if the use of force is illegal, the threat to use such force is equally illegal.⁶⁶ Mere possession of nuclear weapons might justify an inference of preparedness to use them; however, to constitute a threat, there must be a credible intention to use them in certain circumstances.⁶⁷ Although this is probably what was meant by Indonesia when the original draft resolution was proposed in the First Committee, it seems that some countries supported the draft resolution on the basis of the alternate interpretation.⁶⁸

C. Permitted or Prohibited?

The use of the word "permitted" begs the question whether a state needs permission to do anything. Under the classical theory of international law the principles of sovereignty and consent make a state free to do anything it wishes, unless it has consented to limit its sovereignty.⁶⁹ Limitations on

⁶⁴ See, e.g., *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 1, at 243, 246. See also M.J. Zarif et al., *Impermissibility of the Use or Threat of Use of Nuclear Weapons: A case for an Advisory Opinion from the International Court of Justice*, VIII IRANIAN J. INT'L AFF. 1 (1996). Note that a similar line is followed in the Tlatelolco and Rarotonga treaties which prohibit the use or threat to use nuclear weapons. See *Treaty for the Prohibition of Nuclear Weapons in Latin America*, Feb. 14, 1967, 22 U.S.T. 762, 634 U.N.T.S. 281 [hereinafter *Treaty of Tlatelolco*]; *The South Pacific Nuclear Free Zone Treaty*, Aug. 6, 1985, 24 I.L.M. 1440 [hereinafter *Treaty of Rarotonga*].

⁶⁵ *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 1, at 246.

⁶⁶ See *id.* But see R. Sadurska, *Threats of Force*, 82 AM. J. INT'L L. 237, 250 (1988) (stating that "there is no reason to assume that the threat will always be unlawful if in the same circumstances the resort to force would be illicit"). See also William R. Hearn, *The International Legal Regime Regulating Nuclear Deterrence and Warfare*, 61 BRIT. Y.B. INT'L L. 199, 209 (1990).

⁶⁷ See *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 1, at 540 (dissenting opinion of Judge Weeramantry).

⁶⁸ See Lailach, *supra* note 12, at 401-19. This was rightly underlined by Oda in his dissenting opinion. See *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 1, at 333 (dissenting opinion of Judge Oda).

⁶⁹ This stance on international law is reflected in military handbooks. These handbooks state that in the absence of a specific prohibition the use of nuclear weapons is permissible under international law. Several military handbooks are quoted by Hearn, *supra* note 66, at

sovereignty are not presumed. The theory of residual rights resting with states was confirmed in the *Lotus* case.⁷⁰ This principle applied to the question of legality of nuclear weapons would presumably give states a right to use nuclear weapons, unless prohibited under international law. But surely the *Lotus* principle cannot give states the right to extinguish civilizations, annihilate mankind and destroy the framework of the international community.⁷¹

In our view, the *Lotus* principle should not have been applied to this case. The *Lotus* case involved a different set of circumstances and its applicability should be limited to cases involving similar circumstances. First, *Lotus* involved a peace-time accident. There is a peace-time rule of customary international law imposing a duty on states to conduct their affairs so as not to injure others.⁷² Second, the theory of state sovereignty is presently viewed in a different perspective. We no longer live in an international society consisting of "co-existing independent communities"⁷³ but in an increasingly interconnected global world. The different circumstances and the changed attitude toward sovereignty undoubtedly make this case distinguishable.⁷⁴ Some commentators erroneously argued that in the nuclear weapons advisory opinion, the Court followed the *Lotus* dictum. This argument was based on § 52 of the advisory opinion, where 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."⁷⁵ However, this is merely an observation of reality, rather than a confirmation of the *Lotus* principle.

Even if the *Lotus* case were applied, *quod non*, the states possessing nuclear weapons have accepted that they are bound by humanitarian principles and by the Hague Convention.⁷⁶

222-23; see also Richard Falk et al., *Nuclear Weapons and International Law*, 20 INDIAN J. INT'L L. 558 (1980).

⁷⁰ S.S. *Lotus*, (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 9 (Sep. 7).

⁷¹ Legality of the Threat or Use of Nuclear Weapons, *supra* note 1, at 395 (dissenting opinion of Judge Shahabuddeen).

⁷² *Id.* at 496 (dissenting opinion of Judge Weeramantry).

⁷³ *Id.* at 394 (dissenting opinion of Judge Shahabuddeen).

⁷⁴ *Id.* at 396 (dissenting opinion of Judge Shahabuddeen); see also *id.* at 494-95 (dissenting opinion of Judge Weeramantry).

⁷⁵ *Id.* at 246.

⁷⁶ *Id.* at 239; see also *id.* at 495 (dissenting opinion of Judge Weeramantry); A.-S. Millet, *Les Avis Consultatifs de la Cour Internationale de Justice du 8 Juillet 1996; Licéité de l'utilisation des armes nucléaires par un Etat dans un conflit armé. Licéité de la menace ou*

Only if the *Lotus* case were applied, would the use of the word "prohibited" be more in line with the theory of international law. The position of the Court is unclear, however. The attitude taken has made the debate rather academic since the redrafted question incorporates both the positive and the negative approach to the problem.⁷⁷ The Court investigates both prohibitions and authorizations in international law.⁷⁸

D. Nuclear Weapons

Although the request for the advisory opinion was primarily aimed at nuclear weapons as weapons of mass destruction, the Court held it could not differentiate between various kinds of nuclear weapons.⁷⁹ As a result, the advisory opinion would encompass all nuclear weapons. Some states had suggested that the so-called clean use of smaller, low-yield, tactical or battlefield nuclear weapons could be permissible.⁸⁰ Suggested targets were a lone nuclear submarine or an isolated military target in the desert.⁸¹ This

de l'emploi d'armes nucléaires, 1 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 162-163 (1997). Millet points at the ambiguity existing in the advisory opinion. The Court takes no clear position but investigates both prohibitions and authorizations which is contrary to the *Lotus* principle. The same ambiguity is found in the declarations and opinions of the judges. See *Legality of the Threat or Use of Nuclear Weapon*, *supra* note 1, at 268, 274 (declaration of President Bedjaoui), 287-93 (separate opinion of Judge Guillaume).

⁷⁷ The following rule from the *Nicaragua* case was also relied upon: "In International law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited." *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 4, at 135 (June 27). This deals with mere possession and is thus irrelevant, considering the construction of the question by the Court. See, e.g., *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 1, at 239, 245-46. But see J.H. McNeill, *The International Court of Justice Advisory Opinion in the Nuclear Weapons Cases: A First Appraisal*, INT'L REV. RED CROSS 107-08 (1997) (arguing that the Court only evaluates whether the threat or use is prohibited).

⁷⁸ See *supra* pp. 355-356.

⁷⁹ See *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 1, at 262.

⁸⁰ See *id.*

⁸¹ Other words used to describe these weapons are theater, clean, and tactical. See *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 1, at 381 (dissenting opinion of Judge Shahabuddeen). More examples can be found in Falk et al., *supra* note 69, at 561. It would be "possible to imagine 'surgical' minimal uses of nuclear weapons that achieve their military objectives with no greater level of destruction and suffering than their pre-nuclear antecedents, but such potential uses (e.g. in a mountain pass or to destroy an approaching fleet) are not characteristic of the broader, less discriminate, role accorded to

seems to be an illogical suggestion, because nuclear weapons would still have the effect of creating consequences far greater than the actual blast even if smaller weapons are used. As Judge Weeramantry writes, it would not render biological or chemical weapons lawful if they were applied in small quantities.⁸² Moreover, there still remains a real risk of escalation when tactical nuclear weapons are used.⁸³ As pointed out by UN experts, it might prove very difficult for the side under attack to know whether they are being attacked with tactical weapons or with strategic weapons.⁸⁴ The side under attack would have to make decisions having no knowledge concerning the exact weapons used in the attack and the effects of such weapons. The communication lines would likely be cut in such an attack limiting the ability of the side under attack to acquire such knowledge. Thus, the side under attack would likely respond in a manner inconsistent with the principles of necessity and proportionality.

IV. INTERNATIONAL LAW RULES APPLICABLE TO THE LEGALITY OF THE THREAT OR USE OF NUCLEAR WEAPONS

The Court, in its search for the identification of the existing principles and rules that may be applicable to the request for an advisory opinion on the legality of the threat or use of nuclear weapons, conducted a three-part analysis. First, it considered general rules and principles; then it examined the UN Charter; and, finally, it focused on the law applicable in armed conflict situations.

nuclear weapons in various strategic outlooks." *Id.* at 561. An alternative classification can be found in Peter Weiss et al., *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, Including the W.H.O. Constitution*, 4 *TRANSNAT'L L. & CONTEMP. PROBS.* 721, 783 (1994). They speak in terms of micro nukes, mini nukes and tiny nukes.

⁸² Legality of the Threat or Use of Nuclear Weapons, *supra* note 1, at 548-49 (dissenting opinion of Judge Weeramantry).

⁸³ See Falk et al., *supra* note 69, at 544.

⁸⁴ See SIDNEY D. BAILEY, *PROHIBITIONS AND RESTRAINTS IN WAR* 148 (1972). For a discussion on various restrictions on weapons, see generally INGRID DETTER DE LUPIS, *THE LAW OF WAR* (1987).

A. *Conventional Rules of General Scope*

Although the following areas of international law do not specifically regulate the threat or use of nuclear weapons, the Court found them relevant to its inquiry: human rights law, the rules on the prohibition of genocide, and environmental law.⁸⁵ However, the Court focused on the law applicable in armed conflicts.

First the Court delved into human rights law, particularly Article 6 of the International Covenant on Civil and Political Rights referring to the right of life.⁸⁶ The Court correctly stated that the protection of human rights does not cease in times of war.⁸⁷ Although Article 4 of the Covenant limits certain human rights in times of national emergency, the right to life is non-derogable.⁸⁸ Under no circumstances should a person be arbitrarily deprived of his life. To determine whether someone has been arbitrarily deprived of life, the Court found that the law applicable in armed conflicts should be consulted.⁸⁹ The Court's finding, however, is not free from criticism. Not all references to the right of life in international law are qualified by the term "arbitrarily."⁹⁰ Moreover, it has been suggested that the term "arbitrarily" is synonymous with the phrase "without due process of law,"⁹¹ and does not refer to the applicable law of armed conflict, as the

⁸⁵ See *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 1, at 239-41.

⁸⁶ International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 6, 999 U.N.T.S. 171, 174. Article 6 is worded as follows: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." *Id.*

⁸⁷ See *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 1, at 240.

⁸⁸ See *id.*

⁸⁹ See *id.* The Court stated that "whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the term of the Covenant itself." *Id.*

⁹⁰ For example, Article 3 of the Universal Declaration of Human Rights, widely recognized as declaratory of customary international law, holds that "everyone has the right to life, liberty and security of person." *Universal Declaration of Human Rights*, G.A. Res. 217, 2 GAOR, U.N. Doc. 1/777, art. 3 (1948).

⁹¹ See B.G. Ramcharan, *The Concept and Dimension of the Right to Life*, in *THE RIGHT TO LIFE IN INTERNATIONAL LAW* 1, 19 (B.G. Ramcharan ed., 1985). Ramcharan writes that the word 'arbitrary' was one of the most extensively debated terms in the Universal Declaration and in the International Covenant on Civil and Political Rights. From this debate he concludes that the intention of the drafters was to provide the highest possible level of protection of the right to life and to confine permissible deprivations therefrom to the

Court believed. Even the Human Rights Committee (HRC) seems to adopt an interpretation different from that of the Court. It is quite significant that the HRC stated that the right of life "is the supreme right from which no derogation is permitted even in time of public emergency *which threatens the life of the nation.*"⁹² The HRC thus provides an answer to resolve the Court's dilemma. The HRC has even demonstrated its concern about the right to life in the context of weapons of mass destruction:

3. While remaining deeply concerned by the toll of human life taken by conventional weapons in armed conflicts, the Committee has noted that, during successive sessions of the General Assembly, representatives from all geographical regions have expressed their growing concern at the development and proliferation of increasingly awesome weapons of mass destruction, which not only threaten human life but also absorb resources that could otherwise be used for vital economic and social purposes, particularly for the benefit of developing countries, and thereby for promoting and securing the enjoyment of human rights for all.

4. The Committee associates itself with this concern. It is evident that the designing, testing, manufacture, possession and deployment of nuclear weapons are among the greatest threats to the right to life which confront mankind today. This threat is compounded by the danger that the actual use of such weapons may be brought about, not only in the event of war, but even through human or mechanical error or failure.

5. Furthermore, the very existence and gravity of this threat generates a climate of suspicion and fear between States, which is itself antagonistic to the promotion of universal respect for and observance of human rights and fundamental freedoms in accordance

narrowest of limits. Therefore, he opines, certain considerations should be taken into account in order to grasp the proper understanding of the concept of arbitrariness. For further discussion see *id.* at 19-20.

⁹² General Comment No. 14, *Article 6* (Twenty-third session, 1984), U.N. Doc. HR/GEN/1 (1992), at 17 [hereinafter General Comment]. Compare the core of the opinion where the Court stated that "in the view of the present 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] in an extreme circumstance of self-defense, in which [a State's] very survival would be at stake." (Emphasis added.) *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 1, at 263.

with the Charter of the United Nations and the International Covenants on Human Rights.

6. The production, testing, possession, deployment and use of nuclear weapons should be prohibited and recognized as crimes against humanity.

7. The Committee accordingly, in the interest of mankind, calls upon all States, whether Parties to the Covenant or not, to take urgent steps, unilaterally and by agreement, to rid the world of this menace.⁹³

Several other human rights, not referred to by the Court, are susceptible to violation by the use of nuclear weapons. Such rights include: the right to be free from torture, the right to be free from cruel, inhuman or degrading treatment or punishment,⁹⁴ and the right to health.⁹⁵

By referring solely to the law applicable in armed conflict as the Court did, the Court did not address other relevant aspects of the issue. For example, a state could use a nuclear weapon against its own population. In such a situation the rules applicable in armed conflict would not apply. On that point, the Court stated that it was "not called upon to deal with an internal use of nuclear weapons" because no state addressed that issue during the proceedings.⁹⁶ The question of the General Assembly, however, clearly included such a possibility: "is the threat or use of nuclear weapons in *any* circumstances permitted under international law?" As a result, the Court should have answered that question too. The Court also failed to answer the question of whether the testing of nuclear weapons can be considered "use" of such weapons.⁹⁷

⁹³ General Comment, *supra* note 92, at 17.

⁹⁴ See, e.g., *Universal Declaration of Human Rights*, *supra* note 90, at art. 5; International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 7, 999 U.N.T.S. 171, 175.

⁹⁵ See, e.g., *Universal Declaration of Human Rights*, *supra* note 90, at art. 25; International Covenant on Economic, Social and Cultural Rights, Dec. 19, 1966, art. 12, para. 1, 993 U.N.T.S. 3, 8.

⁹⁶ Legality of the Threat or Use of Nuclear Weapons, *supra* note 1, at 247.

⁹⁷ There has been a development in international law prohibiting certain forms of nuclear testing. See, e.g., Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and Under Water, Aug. 5, 1963, 480 U.N.T.S. 43; Antarctic Treaty, Dec. 1, 1959, 402 U.N.T.S. 72; Treaty of Rarotonga, *supra* note 64; Treaty on the Southeast Asia Nuclear Weapons-free Zone, Dec. 15, 1995, 35 I.L.M. 635; African Nuclear-Weapon-Free Zone Treaty, *opened for signature* June 21, 1995, 35 I.L.M. 698; Treaty of Tlatelolco, *supra* note

The Court agreed with the suggestion made by some states that the use of nuclear weapons could be contrary to both the rules of customary law prohibiting genocide and the conventional rules of the Convention on the Prevention and Punishment of the Crime of Genocide.⁹⁸ However, the intent element of the Genocide Convention necessitates an examination of the specific circumstances of each case and precludes its use as a generally applicable rule regarding the use of nuclear weapons.⁹⁹

The Court also examined international environmental law and concluded that the existing corpus of international environmental law cannot be used to deprive a state of its inherent right to self-defense. Environmental considerations must, however, be taken into consideration "when assessing what is necessary and proportionate in the pursuit of legitimate military objectives."¹⁰⁰ Just as it had done when examining the issue under human rights law, the Court focused primarily on the law applicable in armed conflict and thereby failed to consider several relevant instruments of environmental law. Examples include the 1982 United Nations Convention on the Law of the Sea,¹⁰¹ the 1985 Vienna Convention for the Protection

64; Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 610 U.N.T.S. 206, Comprehensive Test Ban Treaty, *opened for signature* September 24, 1996, 35 I.L.M. 1439.

⁹⁸ Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

⁹⁹ Article II defines genocide as:

[A]ny of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group. *Id.* at 281.

¹⁰⁰ Legality of the Threat or Use of Nuclear Weapons, *supra* note 1, at 242.

¹⁰¹ United Nations Convention on the Law of the Sea, Dec. 10, 1982, 21 I.L.M. 1245.

Article 192 requires that:

States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention. *Id.* at 1308.

of the Ozone Layer,¹⁰² the Framework Convention on Climate Change,¹⁰³ the Convention on Biological Diversity,¹⁰⁴ and the Rio Declaration on Environment and Development.¹⁰⁵ The Court based its argument on Articles 35 and 55 of Additional Protocol I to the Geneva Conventions.¹⁰⁶ "Taken together," the Court argued, "these provisions embody a general obligation to protect the natural environment against widespread, long-term and severe environmental damage; the prohibition of methods and means of warfare which are intended, or may be expected, to cause such damage; and the prohibition of attacks against the natural environment by way of reprisal."¹⁰⁷ By focusing only on the rights applicable in armed conflict, the Court overlooked aspects of the question posed by the General Assembly, namely whether the use of nuclear weapons in times of peace would violate environmental law.

¹⁰² Vienna Convention for the Protection of the Ozone Layer, Mar. 22, 1985, 26 I.L.M. 1516. Article 2(1) states: "The Parties shall take appropriate measures . . . to protect human health and the environment against adverse effects resulting or likely to result from human activities which modify or are likely to modify the ozone layer." *Id.* at 1529.

¹⁰³ United Nations Framework Convention on Climate Change, May 29, 1992, 31 I.L.M. 849. Article 3 states:

In their actions to achieve the objective of the Convention and to implement its provisions, the Parties shall be guided, *inter alia*, by the following:

1. The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof. *Id.* at 854.

¹⁰⁴ Convention on Biological Diversity, Jun. 5, 1992, 31 I.L.M. 818. Article 3 states: States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

Id.

¹⁰⁵ Rio Declaration on Environment and Development, Jan. 14, 1992, 31 I.L.M. 874. The declaration requires that, "States shall co-operate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem." *Id.* at 877. At Principle 25 it states, "Peace, development and environmental protection are interdependent and indivisible." *Id.* at 880.

¹⁰⁶ Protocol Additional (No. I) to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1391 [hereinafter Protocol I].

¹⁰⁷ Legality of the Threat or Use of Nuclear Weapons, *supra* note 1, at 242.

In sum, the Court's reasoning demonstrates its intention to discuss whether the threat or use of nuclear weapons would violate the rules applicable in armed conflict. It only superficially considered the general conventional rules of environmental and humanitarian law without drawing the proper conclusions of these bodies of law. Although the Court did not state explicitly that the threat or use of nuclear weapons outside the domain of armed conflict is contrary to international law, one might reach such a conclusion in construing the opinion. In fact, the Court limited its advisory opinion to the facts of the case before it rather than issuing a general statement regarding the legality or use of nuclear weapons in every circumstance.¹⁰⁸

B. *The Charter*

1. *Prohibition of the Use of Force*

A state's recourse to use of force has been long considered an acceptable option, but only in limited circumstances. Civilized societies took an amoral approach only in rare cases.¹⁰⁹ Even ancient civilizations such as those in India and China had rules justifying war.¹¹⁰ International relations in the western world were, from the Roman era until modern times, dominated by the theory of the *bellum justum*.¹¹¹ The theory was adopted by the Christians and, by the beginning of modern international law in the 17th century, had evolved into a theory of *bellum legale*.¹¹²

This evolution can be seen in treaty law, which has gradually curtailed a state's right to go to war.¹¹³ The real turning point was the Kellogg-Briand Pact of 1928.¹¹⁴ Until 1928, war was considered a valid option unless

¹⁰⁸ *Id.* at 234-38.

¹⁰⁹ The secular authority of Russia and Byzantium in the eleventh and twelfth centuries took an especially amoral stance. See IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE* 5-6 (1991).

¹¹⁰ See BROWNLIE, *supra* note 109, at 3; BAILEY, *supra* note 84, at 1-53.

¹¹¹ The concept originated with *jus fetiale*. See YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 61-62 (1988).

¹¹² Josef L. Kunz, *Bellum Justum and Bellum Legale*, 45 AM. J. INT'L L. 528-32 (1951).

¹¹³ See Convention (II) with Respect to the Law and Customs of War on Land, July 29, 1899; Convention (IV) with Respect to the Law and Customs of War on Land, Oct. 18, 1907 League of Nations Covenant (1919) [hereinafter Convention (IV)].

¹¹⁴ General Treaty for the Renunciation of War, Aug. 27, 1928, 94 L.N.T.S. 57. See also BROWNLIE, *supra* note 109, at 74-92.

proved unjust or waged for illegitimate purposes. The stance after 1928 was that war is illegal and may only be resorted to in exceptional circumstances.¹¹⁵ This principle inspired the United Nations Charter.¹¹⁶

The principle of the United Nations Charter is clear. The threat or use of force is prohibited if it is directed against the territorial integrity or political independence of any state, or if it is in any other manner inconsistent with the purposes of the United Nations.¹¹⁷

The Court indicates the two exceptions to this principle of Article 2(4), namely Article 51 and 42.¹¹⁸ Article 51 concerns the inherent right to individual or collective self-defense.¹¹⁹ Article 42 gives the Security Council the right to take military enforcement measures in conformity with Chapter VII of the United Nations Charter.¹²⁰

The Court does not investigate the question that might arise from an application of Chapter VII.¹²¹ The main thrust of the argument of the Court revolves around the concept of self-defense. The Advisory Opinion on the legality of the threat or use of nuclear weapons hinges on this concept.

2. Self-Defense

a. Theories Relating to Self-Defense

There are two competing views of the concept of self-defense: the first, untying it from the realms of international law and the second, placing it firmly within the ambit of international law, even making it part of *jus*

¹¹⁵ This evolution was typified as a shift from *jus ad bellum* to a *jus contra bellum*. DINSTEIN, *supra* note 111, at 81. The United States and France declared that a state claiming self-defense, nevertheless, is alone competent to decide whether circumstances require recourse to war. See Oscar Schachter, *Self-Defense and the Rule of Law*, 83 AM. J. INT'L L. 259, 260-61 (1989). For a reaction, see HERSCH LAUTERPACHT, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* 172-80 (Archon Books 1966) (1933).

¹¹⁶ DINSTEIN, *supra* note 111, at 81-86.

¹¹⁷ UN Charter art. 2, para. 4. See also Albrecht Randelzhofer, *Article 2(4)*, in *THE CHARTER OF THE UNITED NATIONS*, *supra* note 10, at 106-28.

¹¹⁸ See *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 1, at 245.

¹¹⁹ See Randelzhofer, *supra* note 117, at 661-78; DE LUPIS, *supra* note 84, at 73-75.

¹²⁰ See Randelzhofer, *supra* note 117, at 661-78; Georges Fischer, *Article 42*, in *LA CHARTE DES NATIONS UNIES*, *supra* note 7, at 705-16; DINSTEIN, *supra* note 111, at 86.

¹²¹ See *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 1, at 247.

cogens.¹²²

The first approach places the emphasis on the inherent right (*droit naturel*)¹²³ language of Article 51 of the Charter. The theory is based on a traditional naturalist doctrine.¹²⁴ The inherent right could not be limited by positive law as it had its origin "directly and chiefly, in the fact that nature commits to each his own protection."¹²⁵ As such, the right was not governed by law. It was judged by states and not susceptible to objective legal scrutiny.¹²⁶ Dinstein describes this theory as an anachronistic residue from an era in which international law was dominated by ecclesiastical doctrines.¹²⁷ Nevertheless, this naturalist fallacy still influences popular and official attitudes in international law.¹²⁸

Within the first view, a second school of thought, equally regarding self-defense as extra-legal, insists that self-defense cannot be governed by law because ultimately law is subordinate to power when grave threats to the existence of a state or its way of life are made.¹²⁹ In such cases, no legal limits can be imposed on the sovereignty of states.¹³⁰ A clear expression of this position can be found in the remarks of U.S. Secretary of State Dean Acheson before the 1963 Conference of the American Society of International Law who pointed out that: "law does simply not deal with such questions of ultimate power-power that comes close to the sources of sovereignty The survival of states is not a matter of law."¹³¹ This theory of self-defense is based on an older theory (19th century and beginning of the 20th century) that claimed that war as such was extra-legal. The idea was based on a loose analogy with phenomena of nature such as earthquakes, floods or

¹²² DINSTEIN, *supra* note 111, at 98-104; Walter T. Gangl, Note, *The Jus Cogens Dimensions of Nuclear Technology*, 13 CORNELL INT'L L.J. 63, 72 (1980).

¹²³ "Droit naturel" is the term used by the French version.

¹²⁴ See DINSTEIN, *supra* note 111, at 169-72; Schachter, *supra* note 115, at 259-60.

¹²⁵ Schachter, *supra* note 115, at 259.

¹²⁶ See Schachter, *supra* note 115, at 261; Randelzhofer, *supra* note 117, at 666.

¹²⁷ DINSTEIN, *supra* note 111, at 170.

¹²⁸ See Schachter, *supra* note 115, at 260. See also Hearn, *supra* note 66, at 203-04. But see D.K. Linnan, *Self-Defence, Necessity and U.N. Collective Security: United States and Other Views*, 1 DUKE J. COMP. & INT'L L. 57-124 (1991).

¹²⁹ See Schachter, *supra* note 115, at 260. Hearn describes this group as political realists. Hearn, *supra* note 66, at 200-02.

¹³⁰ See DINSTEIN, *supra* note 111, at 69-72, 165-72; R. TUCKER, *THE JUST WAR* 118 (1960).

¹³¹ Dean Acheson, Remarks, in 1963 PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW, 13, 14 (Washington DC).

droughts. Like these phenomena, war was seen as an inevitable fact of life. A fact that existed and that could be regulated by law but that could not be "uninvented."¹³² As such, a disassociation was made between the *jus ad bellum* and the *jus in bello*. No limits could be imposed on the right of states to wage war; their conduct during hostilities on the other hand, were subject to regulation.¹³³

The theories based on the extra-legality of war and especially of self-defense imply that recourse to the use of force can never be regulated or, *a fortiori*, prohibited. At best, the regulation of the use of force itself is accepted. In the most radical approach no limits are permitted to the use of force in self-defense.

At first glance, the Court follows the second approach to the concept of self-defense. In this view, self-defense is essentially a legal concept. It is based on international customary law and is now restricted within the confines of both the UN Charter and customary international law.¹³⁴ The word "inherent" in this theory refers to the fact that the right is vested in all states, not only the members of the United Nations.¹³⁵ The right is absolute insofar as a state cannot be deprived of it but is relative because

¹³² See TUCKER, *supra* note 130, at 120.

¹³³ See DINSTEIN, *supra* note 111, at 69-72. According to Judge Guillaume this reasoning is applied by states before the Court and reflected in the present Advisory Opinion:

Tous (i.e. the states appearing) ont raisonné comme si ces deux types de prescription étaient indépendants, en d'autres termes, comme si le *jus ad bellum* et le *jus in bello* constituaient deux entités n'entretenant aucun rapport l'un avec l'autre. La Cour, dans certaines parties de son avis, a même pu paraître tentée par une telle construction. Or, on peut se demander s'il en est bien ainsi ou si, au contraire, les règles du *jus ad bellum* ne permettent pas d'éclairer celles du *jus in bello*.

Legality of the Threat or Use of Nuclear Weapons, *supra* note 1, at 290 (separate opinion of Judge Guillaume).

¹³⁴ See Randelzhofer, *supra* note 109, at 666. *But see* Linnan, *supra* note 128, at 57-84 (discussing the controversy over whether the Charter limited the customary right to self-defense at the time of drafting and if so, whether this is still the case. The argument is made that state practice might have effectively rejected the most restrictive doctrinal views of the Charter and that it might be preferable to admit that the restricted functional customary law rules never lost their force. This could reconcile the international law's systematic problems with self-help and self-preservation interests).

¹³⁵ See *id.* Some say "inherent" refers to the fact that the right was pre-existing. It is not created by the Charter but explicitly recognized by it. See L. GOODRICH ET AL., THE CHARTER OF THE UNITED NATIONS 344 (1969).

legal rules determine its boundaries.¹³⁶ Moreover, it is not states that are the sole judges of the applicability of the concept.¹³⁷ As stated by Hersch Lauterpacht:

There is not the slightest relation between the content of the right to self-defense and the claim that it is above the law and not amenable to evaluation by law, such a claim is self-contradictory, in as much as it purports to be based on legal right, and as, at the same time, it dissociates itself from regulation and evaluation by the law. Like any other dispute involving important issues, so also the question of the right of recourse to war in self-defense is in itself capable of judicial decision.¹³⁸

Reading only the part of the Advisory Opinion dealing with the Charter provision leads to the conclusion that the Court gives its unfettered support to the positivist theory of self-defense as a legal concept, limited by rules of international law and susceptible to judicial scrutiny. However, as discussed, *infra*, the Court fails to draw the only logical conclusion flowing from the application of this theory by building a reasoning that conforms to the theory of the contextualists.¹³⁹

b. Legal Boundaries of Self-Defense

Some boundaries are set out in Article 51 of the Charter, for example, the time-element and notification requirement, but the most important conditions

¹³⁶ See Linnan, *supra* note 128, at 81 (noting that self-defense was considered by the United States as an inalienable right, inherent in every treaty); Gangl, *supra* note 122, at 72.

¹³⁷ See Linnan, *supra* note 128, at 85-124.

¹³⁸ See *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 1, at 322-23 (dissenting opinion of Judge Schwebel) (quoting Hersch Lauterpacht); LAUTERPACHT, *supra* note 115, at 180.

¹³⁹ In the contextualist approach, the threat or use of nuclear weapons is not illegal as such. The legality or illegality depends on the specific context of their threatened or actual use. See Hearn, *supra* note 66, at 200-02. Even if the naturalist view is followed, this does not mean there are no limits to the right of self-defense. Law in this context is based on moral convictions. The destruction of mankind goes against the most fundamental moral principles. The nuclear strategy of deterrence is described by the proponents of this philosophy as radically inconsistent with the natural law framework. See Falk, *supra* note 69, at 541-42.

are found in international customary law. The concept of self-defense inherently includes restrictions.¹⁴⁰ In the *Nicaragua* case, the Court found that "there is a specific rule whereby self-defense would warrant, only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law."¹⁴¹ As a result, the use of force in situations of self-deterrence must be proportionate and necessary to respond to an armed attack.

The right of self-defense only gives a legal basis to justify the raising of arms (*jus ad bellum*). Once force is resorted to, the actions taken must be consistent with the rules of *jus in bello*.¹⁴² The Court's attitude is unequivocal: "the use of force . . . 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."¹⁴³

c. Legality or Illegality of the Use of Nuclear Weapons in Self-Defense

The Court concludes that nuclear weapons could be legitimately employed under the Charter because the provisions of the Charter are not weapon-specific. In the words of the Court "[t]he Charter neither expressly prohibits nor permits, the use of any specific weapon, including nuclear weapons."¹⁴⁴

Although we agree with the conclusion reached by the Court, it is phrased rather inappropriately because it suggests one could somehow draw inferences from the fact that nuclear weapons are not mentioned *expressis verbis* in the Charter. Today, with scientific knowledge we can assess the nature of nuclear weapons and with the benefit of hindsight we can appreciate the horrific consequences of the actual use of such weapons.

¹⁴⁰ Inherent is defined as existing in someone or something as a permanent characteristic or quality (from the Latin *inhaerens/inhaerentis*). See THE NEW LEXICON WEBSTER'S DICTIONARY OF THE ENGLISH LANGUAGE 498 (1987). "[T]o inhere: To exist in and inseparable from something else; . . . To be inherent." BLACK'S LAW DICTIONARY 782 (6th ed. 1991). This presumably means that these characteristics can under no circumstances be taken from it. See also Falk, *supra* note 69, at 568.

¹⁴¹ See Legality of the Threat or Use of Nuclear Weapons, *supra* note 1, at 245; Military and Paramilitary Activities, (Nicar. v. U.S.), 1986 I.C.J. 4, at 176 (June 27). See also Randelzhofer, *supra* note 117, at 677; DINSTEIN, *supra* note 111, at 200-21 (identifies immediacy as a third element).

¹⁴² See DINSTEIN, *supra* note 111, at 200-21.

¹⁴³ See Legality of the Threat or Use of Nuclear Weapons, *supra* note 1, at 245.

¹⁴⁴ *Id.* at 244.

However, clairvoyance is not expected from negotiators or legal draftsmen. It is impossible to determine how the Charter would have looked had the same knowledge and experience been available. With this reservation, we concur with the Court that the legality or illegality of recourse to nuclear weapons is not regulated directly by the Charter but will depend on treaties and custom.¹⁴⁵

Since self-defense is the only legitimate basis for unilateral recourse to force, the legality or illegality of the use of nuclear weapons will, in the first instance, be established on the basis of conformity with the elements of proportionality, necessity, and the rules of *jus in bello*, especially the principles and rules of humanitarian law with which the use of force in self-defense must comply.¹⁴⁶

d. Unanswered Questions

The question submitted was worded in the most general terms possible, encompassing all situations in which nuclear weapons may be used. In its reply, the Court limited itself, disregarding aspects not argued before the Court by states and aspects that were severable from the core argument. Some aspects received a brief comment, such as the use of force under Chapter VII of the Charter (collective self-defense)¹⁴⁷ and belligerent reprisals.¹⁴⁸ Some were simply mentioned, such as internal wars.¹⁴⁹ Others were completely ignored in the Advisory Opinion rendered (e.g. anticipatory self-defense¹⁵⁰ and responses to terrorism¹⁵¹).

¹⁴⁵ *Id.* at 245.

¹⁴⁶ *Id.*

¹⁴⁷ See *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 1, at 244; *id.* at 276 (declaration of Judge Herczech); *id.* at 490-91 (dissenting opinion of Judge Weeramantry); *id.* at 578 (dissenting opinion of Judge Koroma).

¹⁴⁸ Randelzhofer, *supra* note 117, at 675; DINSTEIN, *supra* note 111, at 230-54; Hearn, *supra* note 66, at 215-20; Linnan, *supra* note 128, at 110-14.

¹⁴⁹ See *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 1, at 249.

¹⁵⁰ See Randelzhofer, *supra* note 117, at 675; *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 1, at 513 (dissenting opinion of Judge Weeramantry). For an excellent summary of the arguments on anticipatory self-defense, see Falk, *supra* note 69, at 210-14.

¹⁵¹ See Falk, *supra* note 69, at 571.

C. *The Law Applicable in Armed Conflicts*

1. *Specific Rules Regulating the Legality or Illegality of Recourse to Nuclear Weapons per se*

After concluding that the Charter provisions do not provide grounds for determining the legality or illegality of recourse to nuclear weapons, the Court turns to other rules dealing with the legality or illegality of recourse to nuclear weapons. First, the Court investigates whether the treaties on poisoned weapons could apply. Second, the Court considers whether the treaties regulating the acquisition, manufacture, possession, deployment and testing of nuclear weapons have created a general prohibitive legal regime. Third, international customary law is scrutinized in search of applicable rules.

a. *Poisoned Weapons*

Conventional prohibitions on the use of poisoned weapons are found in the Second Hague Declaration of July 29, 1899.¹⁵² Article 23(a) of the Regulations respecting the laws and customs of war on land annexed to the Hague Convention IV of October 18, 1907,¹⁵³ (hereinafter Regulations) and the Geneva Protocol of June 17, 1925 (hereinafter Geneva Gas Protocol).¹⁵⁴

Judge Weeramantry, in his dissenting opinion, argues for the applicability of the Geneva Gas Protocol and Article 23(a) of the Regulations. His reasoning is based on showing that radiation is poisonous and that it involves contact of materials (*in casu* material particles) with the human body as required by the Geneva Gas Protocol.¹⁵⁵ Analogous reasoning would prove

¹⁵² Declaration Respecting Asphyxiating Gases, July 29, 1899, 1907 Gr. Brit. T.S. No 32 (Cmnd. 3751), 187 Consol. T.S. 453.

¹⁵³ Convention Respecting the Laws and Customs of War on Land, October 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277 Annex at 289-297.

¹⁵⁴ Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65.

¹⁵⁵ However, material particles are a solid substance rather than a gas. Singh argues that fissionable products could constitute a gas considering that mustard gas begins as a liquid and is converted into a gas. See Falk, *supra* note 69, at 561-63. Moreover, radiation upon blast is sometimes said to be more analogous to thermal radiation (heat), which does not involve introducing or absorbing a damaging substance into the body. See Hearn, *supra* note 66, at

the applicability of Article 23(a) of the Regulations.¹⁵⁶ This argument draws directly on notable authorities in international law.¹⁵⁷ The Court, however, does not agree with this reasoning for two reasons: one, that these conventional instruments do not provide a definition of poisoned weapons and so could potentially also encompass nuclear weapons, and the other, that practice shows that states do not consider these treaties to cover nuclear weapons.¹⁵⁸ As a result it was held that these treaties could not be relied upon to banish the use of nuclear weapons.¹⁵⁹

b. Treaties dealing with Nuclear Weapons expressis verbis

The trend among opponents of weapons of mass destruction is to obtain a general prohibition against the very existence of such weapons. This goal has been achieved with respect to chemical and biological weapons. However, the existing treaties governing nuclear weapons do not provide a general prohibition. Instead, existing treaties govern only certain activities with respect to nuclear weapons, such as testing, acquisition, manufacture and possession. The use and threat of nuclear weapons, the question under consideration, is only prohibited in specific regions and against non-nuclear weapon states and states who are parties to the Treaty of Non-Proliferation. The states with nuclear weapons still reserve the right to use nuclear

231.

¹⁵⁶ See Legality of the Threat or Use of Nuclear Weapons, *supra* note 1, at 508-12 (dissenting opinion of Judge Weeramantry). See also DETTER DE LUPIS, *supra* note 84, at 203-04. The argument of Judge Weeramantry works better for Article 23 of the Regulations because uranium, the central element in a nuclear weapon, is itself a highly toxic chemical. A nuclear explosion releases a variety of toxic chemicals, including some which toxicity endures for thousands of years. See Falk, *supra* note 69, at 561.

¹⁵⁷ See generally Ian Brownlie, *Some Legal Aspects of the Use of Nuclear Weapons in International Law*, 14 INT'L & COMP. L.Q. 437 (1965); Eric David, *The Opinion of the International Court of Justice on the Legality of the Use of Nuclear Weapons*, INT'L REV. RED CROSS 24-28 (1997); Falk, *supra* note 69; G. SCHWARZENBERGER, *THE LEGALITY OF NUCLEAR WEAPONS* (1958); NAGENDRA SINGH, *NUCLEAR WEAPONS AND INTERNATIONAL LAW* (1989); NAGENDRA SINGH & E. MCWHINNEY, *NUCLEAR WEAPONS AND CONTEMPORARY INTERNATIONAL LAW* (1989).

¹⁵⁸ In fact, the practice of the United States, for example, shows that nuclear weapons are not considered to be covered by these treaties. The United States would undoubtedly have made a reservation to the Geneva Gas Protocol had nuclear weapons been covered. See Hearn, *supra* note 66, at 230.

¹⁵⁹ See Legality of the Threat or Use of Nuclear Weapons, *supra* note 1, at 248.

weapons in certain circumstances and these reservations met with no objection from the parties to the Tlatelolco and Rarotonga treaties or from the Security Council.

In sum, existing treaties do not provide a general conventional prohibition on the threat or use of nuclear weapons. As a result of the acceptance of the Treaty of Non-Proliferation and Security Council Resolutions 255 (1968) and 984 (1995) by several non-nuclear weapon states, states who defend the legality of recourse to nuclear weapons have inferred confirmation of the right to possess nuclear weapons. The inferred confirmation of the right to possess nuclear weapons is claimed to be "tantamount to recognizing that such weapons may be used in certain circumstances."¹⁶⁰ This inference must be rejected. This logic advanced by nuclear weapon states is clearly based on a misconceived position of non-nuclear weapon states and of the aims of the Treaty of Non-Proliferation. Nuclear weapons have never been "accepted." The Treaty of Non Proliferation was based on a pragmatic observation of fact: the existence and proliferation of nuclear weapons. The Treaty's purpose was only to limit proliferation of nuclear weapons. However, the Treaty's eventual aim was "[t]he cessation of the manufacture of nuclear weapons, the liquidation of all existing . . . stockpiles and the elimination from national arsenals of nuclear weapons and the means of their delivery."¹⁶¹ The Treaty should not be interpreted as an acceptance of the possession, threat or use of nuclear weapons. The Treaty should be interpreted as the first step toward the eventual abolition of nuclear weapons.¹⁶²

c. Customary Prohibition

Development of custom as a source of law requires the fulfillment of a double requirement, a constant state practice and an *opinio juris*. Some states argued that those requirements were met with respect to the legality or threat of nuclear weapons because nuclear weapons have not been utilized since 1945. However, other states argued that non-utilization since 1945 failed to ratify the constant practice and *opinio juris* requirements because circumstances justifying the use of nuclear weapons had not arisen since

¹⁶⁰ *Id.* at 246.

¹⁶¹ See Treaty of Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, pmb., 21 U.S.T. 483, 729 U.N.T.S. 161.

¹⁶² See Zarif, *supra* note 64, at 14.

1945.¹⁶³ The Court held that the profound division in the international community showed that no *opinio juris* existed and thus that no customary rule explicitly prohibiting the use of nuclear weapons had emerged.¹⁶⁴

The conclusion of the Court that the divided views of the members of the international community stood in the way of an evolution in customary law on the subject of legality or illegality of recourse to nuclear weapons is correct. It is therefore of the utmost importance to assess the situation before the creation of this *status quo*. In other words, was there at the beginning of the nuclear age a rule of international law prohibiting states "from creating effects of the kind which would later be produced by the use of nuclear weapons?"¹⁶⁵ In our view, *jus in bello*, especially humanitarian law, contains such rules. These pre-existing rules are reflected in the various resolutions of the General Assembly denouncing recourse to nuclear weapons. The same rules also find an expression in the above mentioned treaties dealing with nuclear weapons *expressis verbis*. The fact that the resolutions are not binding or occasioned negative votes is immaterial to the existence of these rules.

The Court did not concur with this view. It does not refute the existence of pre-existing rules. It merely states that a resolution can provide evidence for establishing the existence of a rule (or the emergence of an *opinio juris*). Such a resolution has a normative character, which is deduced from its content, the conditions of its adoption and the existence of an *opinio juris* as to its normative character.¹⁶⁶ As to the content of the resolutions, the Court makes a gross generalization. It states that the resolutions put before the Court "declare that the use of nuclear weapons *would* be a direct violation of the Charter of the United Nations and in certain formulations that such use '*should* be prohibited'."¹⁶⁷ It should be noted that the formulation in the resolutions varies, but these resolutions are based on a

¹⁶³ See Legality of the Threat or Use of Nuclear Weapons, *supra* note 1, at 254.

¹⁶⁴ See also Millet, *supra* note 76, at 165-66.

¹⁶⁵ See Legality of the Threat or Use of Nuclear Weapons, *supra* note 1, at 380 (dissenting opinion of Judge Shahabuddeen).

¹⁶⁶ For background on the normative character of General Assembly resolutions see Richard A. Falk, *On the Quasi-Legislative Competence of the General Assembly* 60 AM. J. INT'L L. 782-91 (1960); JORGE CASTAÑEDA, LEGAL EFFECTS OF UNITED NATIONS RESOLUTIONS (1969); ROSALYN HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS (1963); Barbara Sloan, *General Assembly Resolutions Revisited (Forty Years Later)*, BRIT. Y.B. INT'L L. 41-150 (1987).

¹⁶⁷ Legality of the Threat or Use of Nuclear Weapons, *supra* note 1, at 255.

clear position taken by the General Assembly in the primary resolution on the subject, namely Resolution 1653 (XVI) of November 24, 1961.¹⁶⁸ As observed by the Court, this resolution expressly proclaims the illegality of recourse to nuclear weapons.¹⁶⁹ As the Court points out, this resolution does not give a specific customary rule prohibiting nuclear weapons, but it qualifies the legal nature of nuclear weapons.¹⁷⁰ The Court continues by saying that the resolution only performs this exercise in legal reasoning in the absence of a specific customary rule prohibiting the threat or use of nuclear weapons.¹⁷¹ This is hardly surprising since the Court established that no rule of customary international law could have developed because no *opinio juris* could be formed due to the division of the international community on this point.¹⁷² The only rule of customary international law that could exist is a pre-atomic age rule dealing with the consequences created by the use of nuclear weapons. Such a rule could not have been rescinded. There was neither an *opinio juris* present to create new rules nor an *opinio juris* present to rescind existing rules.

A limited number of negative votes and abstentions on resolutions cannot diminish the value of these pre-existing rules contained in these resolutions. Consequently, the Court could have held that customary rules exist that prohibit the use of any weapons with effects similar to those of nuclear weapons.

2. *International Humanitarian Law*

After concluding that no conventional rule of general scope, nor a customary rule, could be found specifically prohibiting the threat or use of nuclear weapons *per se*, the Court turned to the question of whether the rules and principles of international humanitarian law applicable in armed conflict and the law of neutrality would allow the use of nuclear weapons. Since ancient times, rules have been adopted on the manner in which one was allowed to conduct hostilities. In India, China, Ancient Rome and the

¹⁶⁸ For a list of these resolutions, see Jill Sheldon, Note, *Nuclear Weapons and the Laws of War*, 20 *FORDHAM INT'L L. J.* 181, 230 (1996).

¹⁶⁹ *Id.*

¹⁷⁰ See *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 1, at 255.

¹⁷¹ *Id.*

¹⁷² *Id.* at 254.

European Middle Ages, rules governing the conduct of war existed.¹⁷³ These rules have since inspired the creation of a large number of customary rules.¹⁷⁴ To deduce whether the use of nuclear weapons would violate that body of customary law, the Court reviewed the historical sources of “the laws and customs of war.”¹⁷⁵ During their review of these sources, the Court sanctioned the marriage of the Hague law and Geneva law, two bodies of law that together comprise international humanitarian law.¹⁷⁶ This corpus of law must be “observed by all States whether or not they have ratified the conventions that contain them” because “the great majority of [humanitarian law] had already become customary” when the conventions were ratified.¹⁷⁷ The Court notes that “[t]he extensive codification of humanitarian law and the extent of the accession to the resultant treaties, as well as the fact that the denunciation clauses that existed in the codification instruments have never been used,” have created “a corpus of treaty rules, the great majority of which” pertains to the domain of customary law.¹⁷⁸ States are thus bound by these rules irrespective of the fact that they have ratified the conventions in which the rules are enunciated. In addition, these rules of humanitarian law have been widely supported by the international community.

Admittedly, the rules on humanitarian law were accepted prior to the development of nuclear weapons, and the conferences of 1949 and 1971-1977 did not expressly refer to nuclear weapons.¹⁷⁹ Moreover no one will doubt that the character of nuclear weapons compared to “conventional” weapons makes them different from any existing type of weapon. Despite the lack of reference to nuclear weapons in existing humanitarian law, the Court finds that the principles and rules of humanitarian law applicable in armed conflicts apply also to nuclear weapons, and concludes that the opposite view “would be incompatible with the intrinsically humanitarian

¹⁷³ For example, in a passage in the Seventh Book of Manu, the legendary Hindu lawgiver states that “when the king fights with his foes in battle, let him not strike with weapons concealed in wood, nor with such as are barbed, poisoned, of the points of which are blazing with fire,” which is a demonstration of an ancient civilizations rules which had to be respected during armed conflicts. Weiss, *supra* note 81, at 739.

¹⁷⁴ There was a similar development in the *jus ad bellum*.

¹⁷⁵ Legality of the Threat or Use of Nuclear Weapons, *supra* note 1, at 256.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 258.

¹⁷⁸ *Id.*

¹⁷⁹ See *supra* p. 370.

character of the legal principles in question which permeates the entire law of armed conflict and applies to all forms of warfare and all kinds of weapons."¹⁸⁰ The continued reaffirmation of the Martens clause confirms the correctness of the Court's reasoning. Using this same reasoning, the Court could easily counter the argument that Additional Protocol I of 1977 would not be applicable to nuclear weapons because the nuclear issue was not the object of the Diplomatic Conference leading to the adoption of Additional Protocol I.¹⁸¹ Since Additional Protocol I codifies pre-existing rules of customary law, these rules are applicable irrespective of whether the substantive issue of this Protocol dealt with nuclear weapons. It is significant that the vast majority of states have contended that the rules of humanitarian law apply to nuclear weapons.¹⁸²

The Court even associated these rules of humanitarian law with something close to the concept of *jus cogens*. In fact, the solemn language used in paragraph 79 of the opinion to describe these rules alludes to *jus cogens*.¹⁸³

¹⁸⁰ Legality of the Threat or Use of Nuclear Weapons, *supra* note 1, at 259.

¹⁸¹ *Id.* at 259. On signing the Additional Protocol, all the great powers, save China, made a declaration whereby the new rules introduced by the Additional Protocol were not meant to affect, regulate or prohibit the use of nuclear weapons. France did not sign the Protocol, but commented at the end of the Conference that "the rules of the Protocol do not apply to the use of nuclear weapons." See Hearn, *supra* note 158, at 241; Henri Meyrowitz, *Les armes nucléaires et le droit de la guerre in HUMANITARIAN LAW OF ARMED CONFLICT: CHALLENGES AHEAD* 297, 312-14 (Astrid J.M. Delissen & Gerard J. Tanja eds., 1991). In addition, the Conference itself could only be brought to an end if the question of nuclear weapons was left outside the discussion. Frits Kalshoven wrote that "the choice has been clear throughout the proceedings of the Diplomatic Conference: it was either a Protocol not bearing on the use of nuclear weapons, or no Protocol at all." Frits Kalshoven, *Arms, Armaments and International Law*, 191 RECEUIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL 187, 283 (1985).

¹⁸² Legality of the Threat or Use of Nuclear Weapons, *supra* note 1, at 259. Similarly, Meyrowitz pointed out that no nuclear power has ever pretended, can or would pretend that the customary rules are not applicable to nuclear weapons. Meyrowitz, *supra* note 181, at 314.

¹⁸³ See Legality of the Threat or Use of Nuclear Weapons, *supra* note 1, at 257. See also L. Condorelli, *Nuclear weapons: A Weighty Matter for the International Court of Justice*, INT'L REV RED CROSS 17 (1997) (stating that "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 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.").

The court describes the rules as “fundamental to the respect of the human person and ‘elementary considerations of humanity’ ” and “*intransgressible* principles of international customary law.”¹⁸⁴

The court singled out five fundamental principles of humanitarian law applicable in armed conflict for further discussion.¹⁸⁵ These are: the principle of discrimination between combatants and non-combatants, the prohibition regarding use of indiscriminate weapons, the prohibition regarding use of weapons that cause unnecessary suffering or that aggravate suffering (principle of humanity), the principle limiting the means to wage war, and the prohibition regarding use of weapons that violate the neutrality of non-participating states.¹⁸⁶

The principle of discrimination between combatants and non-combatants

In the view of the Court, the first principle is “aimed at the protection of the civilian population and civilian objects.”¹⁸⁷ It therefore makes a distinction between combatants and non-combatants. The Court confirms the value of this customary rule that has been the object of various instruments including Article 25 and 27 of the Hague Regulations of 1907,¹⁸⁸ General Assembly resolution 2444 (XXIII) of December 18, 1968,¹⁸⁹ and Article 48 of Additional Protocol I of 1977.¹⁹⁰ The importance of the Court’s reaffirmation of this principle lies in the difficulty of distinguishing between combatants and non-combatants. Some scholars claim that it is impossible to keep straight the traditional distinction between combatants and non-combatants.¹⁹¹ For example, Schwarzenberger has pointed out that the distinction between combatants and non-combatants is not limited to “soldiers in the field” but is connected to anyone contributing to the war

¹⁸⁴ The Legality of the Threat or Use of Nuclear Weapons, *supra* note 1, at 257.

¹⁸⁵ *See id.*

¹⁸⁶ *See id.*

¹⁸⁷ *Id.*

¹⁸⁸ Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, reprinted in THE HAGUE CONVENTIONS AND DECLARATIONS OF 1899 AND 1907 (J.B. Scott ed., 3d ed. 1918).

¹⁸⁹ Resolution 2444 (XXIII) proclaims that “a distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible.” Hearn *supra* note 157, at 235.

¹⁹⁰ Protocol I, *supra* note 106.

¹⁹¹ *See* Falk, *supra* note 69, at 565.

effort.¹⁹² Likewise, Hearn has concluded that the rule is vague and somewhat subjective, requiring a balance of the considerations of military necessity and humanity.¹⁹³

The prohibition regarding the use of indiscriminate weapons

According to the Court, "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."¹⁹⁴ This rule is similar to that enunciated in Article 51 paragraphs 4 and 5 of Additional Protocol I. It was important that the Court confirmed the customary value of the rule because only one instrument expresses this rule and Additional Protocol I has not been ratified by all states.¹⁹⁵ Yet it is not clear what the Court meant by "incapable of distinguishing between civilian and military targets" since most of the Court's judges had opposing views on the issue of whether the use of nuclear weapons would have indiscriminate effect.¹⁹⁶

¹⁹² See Hearn, *supra* note 157, at 236.

¹⁹³ *Id.* at 235-36.

¹⁹⁴ Legality of the Threat or Use of Nuclear Weapons, *supra* note 1, at 257.

¹⁹⁵ See L. Doswald-Beck, *International Humanitarian Law and the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons*, INT'L REV. RED CROSS 38-39 (1997).

¹⁹⁶ The majority found that nuclear weapons have an indiscriminate effect. President Bedjaoui pointed out that "[l]es 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 et causent de surcroît des souffrances inutiles aux uns comme aux autres. *L'arme nucléaire, arme aveugle, déstabilise donc par nature le droit humanitaire, droit du discernement dans l'utilisation des armes.*" The Legality of the Threat or Use of Nuclear Weapons, *supra* note 1, at 272 (declaration of President Bedjaoui). Judge Herczegh declared that "[l]es 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." *Id.* at 275 (declaration of Judge Herczegh). In the view of Judge Fleischhauer "[t]he nuclear weapon is, in many ways, the negation of the humanitarian considerations underlying the law applicable in armed conflict and of the principle of neutrality. The nuclear weapon cannot distinguish between civilian and military targets." *Id.* at 306 (separate opinion of Judge Fleischhauer).

Other judges shared the view that the use of nuclear weapons would not necessarily be indiscriminate. Judge Guillaume believed that "le droit coutumier humanitaire 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." Legality of the Threat or Use of Nuclear

The prohibition regarding use of weapons that cause unnecessary suffering or aggravate suffering

In the words of the Court, "weapons causing [unnecessary] harm or uselessly aggravating . . . suffering" are prohibited.¹⁹⁷ The Court's attention to this principle is meritorious of the advisory opinion.¹⁹⁸ Yet some doctrinal controversies were not solved. For example, the Court failed to provide a standard for assessing whether the use of a weapon is causing unnecessary suffering or superfluous injury.¹⁹⁹

The principle limiting the means to wage war

The Court referred to the Martens Clause²⁰⁰ as an "effective means of addressing the rapid evolution of military technology."²⁰¹ This clause first appeared (or, was first approved) in the 1899 Convention Respecting the Laws and Customs of War on Land (1899 Hague II) and was reaffirmed by the similarly titled, and virtually identical, Convention of 1907 (Hague IV).²⁰² Modern-day references to this clause are numerous.²⁰³ The Court

Weapons, *supra* note 1, at 289 (Separate Opinion of Judge Guillaume). Vice President Schwebel pointed out that "[w]hile it is not difficult to conclude that the principle of international humanitarian law—above all [. . .] discrimination between military and civilian targets—govern the use of nuclear weapons, it does not follow that the application of those principles to the threat or use of nuclear weapons' in any circumstance is easy." *Id.* at 320 (dissenting opinion of Judge Schwebel). Finally Judge Higgins mentioned that "[n]otwithstanding the unique and profoundly destructive characteristics of all nuclear weapons, that very term covers a variety of weapons which are not monolithic in all their effect. To the extent that a specific nuclear weapon would be incapable of this distinction, its use would be unlawful." *Id.* at 589 (dissenting opinion of Judge Higgins).

¹⁹⁷ Legality of the Use or Threat of Nuclear Weapons, *supra* note 1, at 257.

¹⁹⁸ See Doswald-Beck, *supra* note 195, at 45 (noting that the international community has in recent times paid little attention to this principle).

¹⁹⁹ *Id.* at 45-46.

²⁰⁰ The text of the Martens Clause in the Hague Convention IV reads as follows:

Until a more complete code of the law of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.

Convention (IV) *supra* note 113.

²⁰¹ Legality of the Threat or Use of Nuclear Weapons, *supra* note 1, at 257.

²⁰² Weiss, *supra* note 86, at 741.

²⁰³ See *id.* at 742 (for a list of these references).

considers Article 1, paragraph 2 of Additional Protocol I to the Geneva Conventions of 1949, a modern version of the clause.²⁰⁴ This provision proclaims that: "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."²⁰⁵

The prohibition regarding use of weapons that violate the neutrality of non-participating states

Turning to the question of neutrality, the Court referred to the proceedings of the WHO request,²⁰⁶ in which a state described the principle of neutrality.²⁰⁷ The Court decided that the principle of neutrality was relevant to its inquiry and then stated: "as in the case of the principles of humanitarian law applicable in armed conflict, international law leaves no doubt that the principle of neutrality, whatever its content, which is of fundamental character similar to that of the humanitarian principles and rules, is applicable (subject to the relevant provisions of the United Nations Charter), to all international armed conflict, whatever type of weapons might be used."²⁰⁸

In concluding that the principles and rules of humanitarian law applicable in armed conflicts as well as the rules on neutrality are relevant to the question of the legality of the threat or use of nuclear weapons, the Court established the standards to which a state's use of nuclear weapons must

²⁰⁴ See *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 1, at 257.

²⁰⁵ Protocol I, *supra* note 106.

²⁰⁶ See *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 1, at 260-61.

²⁰⁷ The principle of neutrality, in its classic sense, was aimed at preventing the incursion of belligerent forces into neutral territory, or attacks on the persons or ships of neutrals. Thus: 1) "the territory of neutral powers is inviolable." Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Oct. 18, 1907, art. 1; 2) "belligerents are bound to respect the sovereign rights of neutral powers . . ." Hague Convention (XIII) Respecting the Rights and Duties of Neutral Powers in Naval War, Oct. 18, 1907, art. 1; 3) "neutral states have equal interest in having their rights respected by belligerents . . .", Convention on Marine Neutrality, Feb. 20, 1928. Clearly, the "principle of neutrality applies with equal force to transborder incursions of armed forces and to the transborder damage caused to a neutral state by the use of a weapon in a belligerent State." *Id.*

²⁰⁸ *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 1, at 261.

conform.²⁰⁹ As one state expressed it in the proceedings: “[a]ssuming that a State’s use of nuclear weapons meets the requirements of self-defense, it must be considered whether it conforms to the fundamental principles of the law of armed conflict regulating the conduct of hostilities.”²¹⁰

Although agreement on the applicable law was easily reached, the conclusions to be drawn from this body of law are, according to the Court, controversial.²¹¹ Some states argue that “nuclear weapons might be used in a wide variety of cases, with very different results in terms of likely civilian casualties”²¹² and thereby suggest that the use of low yield nuclear weapons against military targets situated in sparsely populated areas would conform to the requirements of the rules and principles of humanitarian law.²¹³ Conversely, other states argue that “recourse to nuclear weapons could never be compatible with the principles and rules of humanitarian law.”²¹⁴ They argue that the use of nuclear weapons would “in all circumstances be unable to draw any distinction between the civilian population and combatants, or between civilian objects and military objectives.”²¹⁵ They argue further that the effects are largely uncontrollable and could not be contained to military targets alone.²¹⁶ Therefore, these weapons would “kill and destroy in a necessarily indiscriminate manner, on account of the blast, heat and radiation occasioned by the nuclear explosion and the effects induced.”²¹⁷ The same arguments were defended on the question of neutrality.

The Court is very reluctant to take a position. As stated earlier, the Court decided that it has insufficient basis for determining the validity of the view that the careful use of smaller, low yield tactical nuclear weapons would be justified under humanitarian law.²¹⁸ Nor can it determine whether such limited use “would not tend to escalate into the all-use of high yield nuclear

²⁰⁹ *See id.*

²¹⁰ *Id.* (quoting Written Statement of the United Kingdom).

²¹¹ *See id.*

²¹² *Id.*

²¹³ *See id.* at 261-62 (quoting Written Statement of the United Kingdom; Oral Statement of the United States of America).

²¹⁴ *Id.* at 262.

²¹⁵ *Id.*

²¹⁶ *See id.*

²¹⁷ *Id.*

²¹⁸ *See id.*

weapons."²¹⁹

The Court turned to the core of the advisory opinion. Here again, the Court demonstrated its hesitation. Referring to the standards of humanitarian law it had established before, the Court reaffirmed that "methods and means of warfare, which would preclude any distinction between civilian and military targets, or which would preclude any distinction between civilian and military targets, or which would result in unnecessary suffering to combatants *are prohibited*."²²⁰ Thus, "in view of the unique characteristics of nuclear weapons," the Court deems "the use of such weapons . . . scarcely reconcilable with respect for such requirements."²²¹ And yet, the Court states it does not possess sufficient evidence "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."²²² The reasons for this *non liquet* have to be deduced from the "fundamental right of every state to survival"²²³ and the policy of deterrence, "to which an appreciable section of the international community adhered for many years."²²⁴

Instead of leaving the issue open, the Court should have given a conclusive answer. We are confronted here with rules and principles deemed fundamental for the community of states. However, when the Court, the principal judicial organ of the world organization, is confronted with one of the most dangerous threats to the world community, it cannot find an answer to the question whether these threats would violate international law. The Court recognizes a great corpus of international law which might be appropriate.²²⁵ The Court has even isolated relevant rules and principles, but the Court refused to apply them to this particular situation.²²⁶ When the survival of a state is at stake, would a user of nuclear weapons be capable of distinguishing between civilian and military objects? Are the rules of neutrality and the environmental rules weakened in their application when the survival of the state is a risk?

Moreover, the Court has created a new category of acceptable behavior by

²¹⁹ *Id.*

²²⁰ *Id.* (emphasis added).

²²¹ *Id.*

²²² *Id.*

²²³ *Id.* at 263.

²²⁴ *Id.*

²²⁵ *See id.*

²²⁶ *See id.*

allowing self-defense if the survival of the state is in peril. The Court seemed to accept the doctrine of "military necessity" common in certain military circles but repudiated under the law.²²⁷ This is not only judicial legislation, but also contrary to the *raison d'être* of the rules outlawing aggression. Indeed, the Charter of the United Nations has, in Article 2(4), prohibited any threat or use of force contrary to the purposes of the United Nations.²²⁸ Article 51 protects states which are the object of aggression by allowing them a right to defend themselves. Consequently, the Court did not need to create a new category, or an exception to the rule, because the concept of self-defense includes the possibility of using force against aggression, including situations in which the state's survival would be at risk. Since this right of self-defense is conditional, all self-defense initiatives must comply with these rules.

V. CONCLUSION

In the Advisory Opinion rendered on the request of the General Assembly regarding the legality of the threat or use of nuclear weapons, the International Court of Justice has taken a cautious approach. Too cautious, some might say. The present Court is quite conservative in its judgments and opinions. A more progressive Court, like the Court of the 1980s, might have answered the question differently.

One thing is certain, the Court's conclusion is curious. First, it reduced the scope of conventional law to that applicable in armed conflict, followed by an examination of the *jus at bellum* and *jus in bello*. The Court began by examining the UN Charter provisions on self-defense. It concluded that there were no specific rules prohibiting the use of nuclear weapons. Then it established the foundations of humanitarian law. First, the civilian population and objects are protected. Second, unnecessary suffering to

²²⁷ On the illegality of the doctrine of "necessity," Meyrowitz writes that "[m]algré l'énorme différence qui existe au point de vue quantitatif et qualitatif entre les armes nucléaires et les armes classiques, et entre la nature, les effets, et les conséquences des effets, d'une guerre nucléaire et ceux d'une guerre classique, on ne voit pas en quoi l'introduction des armes atomiques aurait modifié les éléments du problème juridique de l'état de nécessité. Les situations de nécessité extrême, c'est-à-dire de péril non seulement de la défaite, mais de subjugation (*debellatio*) ont toujours fait partie intégrale du phénomène et de la notion de guerre. Et tout comme elle est un élément logique de la notion de guerre, la défaite est aussi un élément logique, présupposé, du droit de la guerre." Meyrowitz, *supra* note 180, at 322.

²²⁸ U.N. CHARTER art. 2, para. 4.

combatants is proscribed. Third, states not participating in the conflict are protected by the principle of neutrality. After setting the standards, the Court properly examined whether the threat or use of nuclear weapons would violate these standards. With a deciding vote of the President, the Court concluded 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, the Court did not conclude definitively whether use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense, in which the very survival of a State would be at stake. Of course, a dilemma emerges when one is forced to choose between extreme self-defense and the rules and principles of humanitarian law. But should the Court necessarily choose self-defense over humanitarian law, environmental law and human rights law?

Despite its problems, the advisory opinion has the merit of clarifying some points. First, nuclear weapons, everyone agrees, are reprehensible. The opinion confirms that states possessing nuclear weapons are under a duty to disarm. Second, although paragraph 2 E remains controversial, the Court did not give license to states to use nuclear weapons in the extreme circumstances of self-defense, it merely refused to decide the question. The Court's opinion makes clear that, generally, nuclear weapons cannot be employed in conformity with the rules of international humanitarian law. It is, moreover, hard to conceive situations where nuclear weapons could be used without violating environmental law. In any case, even in extreme situations, the use or threat of nuclear weapons is subject to law established in the UN Charter and in humanitarian law applicable in armed conflicts. The importance of the present opinion is that it established customary rules of humanitarian law applicable to any present and future weapon.

However, the Court should not be given much praise for the opinion. The Court did not give a straight answer to the question submitted but instead dodged the question by rendering unclear and contradictory advice. The root of the problem seems to lie in disagreements on the philosophical basis of the concept of self-defense. Under a modern view of international law, self-defense is a legal concept subject to regulation. The difficulty seems to lie in the conflict between two sets of legal rules. On the one hand, the concept of self-defense (or to be more precise, the extreme situation of self-defense where the existence of the state is threatened) and, on the other hand, the rules of international humanitarian law safeguarding life and the well-being of the human race.

The Court should have distinguished the objectives of the United Nations from the methods to reach these objectives. In other words, the Court should have distinguished the ends from the means. The aim of the United Nations is “to save succeeding generations from the scourge of war, . . . and to reaffirm the faith in fundamental human dignity and worth of the human person.”²²⁹ The rules that are most adequate to achieve this goal are undoubtedly the rules of humanitarian law, rather than the concept of extreme self-defense. States are only *means* of governing communities of peoples and facilitating the interaction between those communities and are never an end in themselves. The Court should have given priority to the objective of the international community instead of favoring the survival of states.

²²⁹ UN Charter

