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The ICJ Advisory Opinion

In this Section, the analysis in the Nuclear Weapon Advisory Opinion of the International Court of Justice (ICJ)¹ will be reviewed. Given that the Opinion was issued approximately a quarter of a century ago, the purpose of the Section is to consider whether, if the issue were to come back before the Court now, the same or a similar Opinion could be expected. Accordingly, we will consider the elements of the ICJ Nuclear Opinion that are of greatest relevance to the discussion in this book. The specific purposes are to assess whether the Court might be expected to analyse the issues in a similar way and whether it might be expected to reach similar overall conclusions.

It was the General Assembly of the United Nations that requested an opinion from the Court pursuant to Resolution 49/75 K, which was adopted on 15 December 1994. In the preambular paragraphs of the Resolution, the General Assembly drew attention to numerous resolutions dating from 1961 to 1991, in which it had declared that the use of nuclear weapons would violate the UN Charter and be a crime against humanity. The question posed by the General Assembly was: 'Is the threat or use of nuclear weapons in any circumstance permitted under international law?'²

Having concluded that it had the authority to deliver an opinion on the question posed,³ the Court considered the question by referring, in turn, to a number of bodies of law or legal propositions. It addressed the suggestion that the use of nuclear weapons would violate the right to life as guaranteed by Article 6(1) of the International Covenant on Civil and Political Rights (ICCPR). The Court noted that ICCPR protection does not cease in times

¹ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion of 8 July 1996) [1996] ICJ Rep. 226 (ICJ Nuclear Opinion).

² ICJ Nuclear Opinion, para. 1.

³ ICJ Nuclear Opinion, para. 19.

of war other than by derogation in accordance with Article 4; that the right to life cannot be derogated from and applies in hostilities; that the test of what is an arbitrary deprivation of life in breach of the ICCPR falls to be determined by applicable *lex specialis* (i.e. LOAC, the law of armed conflict); and that whether a particular loss of life through use of a certain weapon in warfare is an arbitrary deprivation of life can be decided only by reference to the law applicable in armed conflict, and not deduced from the terms of the ICCPR itself.⁴

The questions that arise are whether, twenty-five years on, the ICJ would apply the same reasoning, and if not, what reasoning it would apply and with what implications for the lawfulness of the possession and use of nuclear weapons and of nuclear deterrence policies. In subsequent cases the ICJ has adopted a more nuanced approach. In the *Palestinian Wall* case, for example, the Court reaffirmed that, subject to any permissible derogation that a State might make, human rights protections do not cease during armed conflict. The Court identified three possible circumstances. Some situations may be exclusively matters for LOAC, others may be exclusively matters for human rights law and yet others may have to be considered by reference to both bodies of law. The issues concerning the Palestinian Wall fell, in the opinion of the Court, into the last of these three categories.⁵ Thereafter, in the case of *Democratic Republic of the Congo v. Uganda*, the ICJ characterised LOAC and human rights law as complementary.⁶

The authors conclude that, were the legality of nuclear weapons to come back before the Court, it would likely apply the *Palestinian Wall* case approach and determine that both LOAC and human rights law must be considered in determining the issue. The LOAC aspects that would be of most significance would be those that were discussed in the 1996 Advisory Opinion, subject to a few additional points made below.

Where human rights law is concerned, the right to life, and specifically the ICCPR right not arbitrarily to be deprived of life, is likely, in the view of the authors, to weigh heavily on the minds of the judges. The possibility of the Court finding that the characteristics of a nuclear explosion – the blast, the fallout and the casualties and damage it is likely to occasion – would be difficult to reconcile with the ICCPR right to life cannot be entirely excluded. Such a finding would likely sit uncomfortably with the

⁴ ICJ Nuclear Opinion, para. 25.

⁵ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion of 9 July 2004) [2004] ICJ Rep. 136, para. 106.

⁶ *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (Judgment of 19 December 2005) [2005] ICJ Rep. 116, paras. 178–80, 216–17.

practice of the States that possess and maintain nuclear weapon capabilities. Whether that State practice aspect would influence the Court in its human rights law deliberations is unclear.

The Court went on to review the prohibition of genocide in the Genocide Convention⁷ and concluded, as reflected in Section H, that the requisite intent would need to be established.⁸ The treatment of genocide in the Rome Statute involves requirements as to intent similar to those noted by the Court, so there is no reason to believe that a different conclusion in that regard would be reached today.

The Court then examined the rules protecting the natural environment, specifically Article 35(3) of API, the Environmental Modification Convention and two principles taken from environmental law. Recognising ‘the general obligation of States to ensure activities within their jurisdiction and control respect the environment of other States or of areas beyond national control’, the Court did ‘not consider that the treaties in question could have intended to deprive a State of the exercise of its right of self-defence’.⁹ However, the Court did conclude that States ‘must take environmental considerations into account when assessing what is necessary and proportionate in pursuit of legitimate military objectives’. One assumes these include, but are not necessarily limited to, self-defence.¹⁰ So the Court found no explicit prohibition of the use of nuclear weapons on the basis of environmental law, but noted there are environmental factors to consider in the context of implementing LOAC.¹¹ Were the same issue to come before the Court again, Articles 35(3) and 55 of API would again be addressed, alongside more recently adopted provisions of environmental law. The inclusion in the Rome Statute of reference to environmental damage in the proportionality-based war crime mentioned in Article 8(2)(b)(iv) may be seen as simply reflecting the conclusion reached in paragraph 33 of the Opinion. However, one cannot help thinking that increasing global concerns linked to notions of global warming, climate change, rising sea levels and related issues will cause the Court to reflect perhaps a little more thoroughly on the legal acceptability, or otherwise, of the use of a kind of weapon that may be expected to render significant areas of land essentially useless for very long periods of time. It would seem appropriate for the hypothetical modern-day Court to consider the categorisation of the

⁷ Convention on the Prevention and Punishment of the Crime of Genocide, Paris, 9 December 1948.

⁸ ICJ Nuclear Opinion, para. 26.

⁹ ICJ Nuclear Opinion, paras. 29, 30.

¹⁰ ICJ Nuclear Opinion, para. 30.

¹¹ ICJ Nuclear Opinion, para. 33.

natural environment as, in principle, a civilian object and to assess whether, in the modern context, the use of a nuclear weapon could be equated with the infliction of wanton destruction. An act is wanton if it involves intent and malice. While the modern-day Court would be unlikely to conclude that all potential uses of nuclear weapons would satisfy those twin tests, it would be interesting to receive the Court's views as to the circumstances in which the tests are likely to be satisfied.

The Court's view, expressed in paragraph 34, was that the UN Charter law on the use of force, LOAC rules on the conduct of hostilities and any relevant treaty law dealing with nuclear weapons constitute the most directly relevant applicable law. Perhaps nowadays, as discussed above, certain provisions of human rights law would be added to that list.

The Court assessed the key characteristics of nuclear weapons as being the immense quantities of heat and energy they produce and the powerful and prolonged radiation they release, rendering such weapons 'potentially catastrophic'. The assertion that their destructive power 'cannot be contained in either space or time',¹² and in particular the long-term potential effects of ionising radiation, clearly weighed heavily with the judges and formed the baseline against which their lawfulness in *ad bellum* and *in bello* terms was analysed by the Court.¹³

J.1 APPLYING JUS AD BELLUM

Famously, the Court observed that the prohibition of the use of force in Article 2(4) of the UN Charter, the recognition of the inherent right of self-defence in Article 51 and forceful Security Council action under Article 42 'apply to any use of force, regardless of the weapons employed'.¹⁴ As the Court pointed out, the Charter 'neither expressly prohibits, nor permits, the use of any specific weapon, including nuclear weapons'. Here, maybe, the Court was starting to lay down the basis for its subsequent, and controversial, *non liquet* finding. That Article 2(4)'s prohibition applies to nuclear weapons is not controversial and would no doubt feature with suitable prominence in any revised Opinion. The existing Opinion states that the proportionality limitation on lawful self-defence¹⁵ cannot exclude the use of nuclear weapons in all circumstances, but that such a proportionate use must also comply with LOAC. This view would

¹² ICJ Nuclear Opinion, para. 35.

¹³ ICJ Nuclear Opinion, para. 36.

¹⁴ ICJ Nuclear Opinion, para. 39.

¹⁵ See Rule 12 in Section C; ICJ Nuclear Opinion, para. 42.

probably be repeated in any updated Opinion, while noting that the nature of nuclear weapons and the profound risks, including escalation, associated with their use must be borne in mind by States when addressing proportionality.¹⁶

The Opinion goes on to consider threats contrary to Article 2(4) of the UN Charter, observing that 'States sometimes signal that they possess certain weapons to use in self-defence against any State violating their territorial integrity or political independence', and suggesting that '[i]f the envisaged use of force is itself unlawful, the stated readiness to use it would be a threat prohibited under Article 2, paragraph 4'.¹⁷ Perhaps the fact that China, France, India, Pakistan, the Russian Federation, the United Kingdom and the United States all appear, according to their practice, to adopt, to a greater or lesser extent, a policy of deterrence that contemplates *in extremis* the use of nuclear weapons should cause the Court, in any revised Opinion, to ask itself whether the cited sentence from paragraph 47 really reflects a general practice of States accepted as law and, if it does not, whether it has a proper place in such an Opinion. The present authors would suggest that a threat in breach of Article 2(4) must involve a somewhat more directed and specific expression that must be communicated explicitly, or impliedly through conduct. The interpretation of 'threat' now being put forward would, arguably, also be more readily coherent with the final sentence of paragraph 47.

Continuing with the deterrence theme, the Court recognised that, to be effective, a deterrence policy 'necessitates that the intention to use nuclear weapons be credible'.¹⁸ It is certainly right that a threat to use force directed against the territorial integrity or political independence of a State or against the purposes of the United Nations breaches Article 2(4). It is also right that a threat to use force in purported self-defence that breaches the requirements as to proportionality and/or necessity would also be unlawful. However, the real point that paragraph 48 arguably fails properly to tease out is that the mere maintenance of a capability, without more, appears generally not to be considered by States, in their general practice, as constituting an unlawful threat.

J.2 NUCLEAR WEAPONS UNDER THE LAW OF ARMED CONFLICT

Having pointed out that international law does not specifically authorise the use of any weapon in general or in specified circumstances, the Court explains

¹⁶ ICJ Nuclear Opinion, para. 43.

¹⁷ ICJ Nuclear Opinion, para. 47.

¹⁸ ICJ Nuclear Opinion, para. 48.

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'.¹⁹ That reference to the essentially prohibitive terms in which most of LOAC is expressed remains true today and would need to be reflected carefully in any revised Opinion.

The Court then looked at whether nuclear weapons should be treated in the same way as poisoned weapons, drawing attention to the prohibition of the latter in the Hague Regulations of 1899,²⁰ in Article 23(a) of the 1907 Hague Regulations and in the Geneva Gas Protocol.²¹ As the Court correctly pointed out, the term 'poison or poisoned weapons' is not defined in the Hague Regulations, but has not been treated by the parties to the listed instruments as referring to nuclear weapons. This consideration of the conduct of States by reference to nuclear weapons would also seem to be applicable to notions of nuclear deterrence in the manner suggested above. It seems most unlikely that, in an updated Opinion, the Court would depart from that position, as the general practice of States has not significantly changed.²²

The Court noted that, at the date of delivery of its Advisory Opinion, no treaty of general prohibition of the same kind as the chemical and biological conventions had been adopted. More recently, the Treaty on the Prohibition of Nuclear Weapons, discussed in Section K, has been adopted and has now come into force. It is not at present clear what influence, if any, the existence of that treaty would have on the deliberations of the judges, were the issue to come back before the Court. The authors rather suspect that, until nuclear weapon States, and States nearing the development or acquisition of nuclear weapons, start to become parties to the Convention, its influence will be somewhat limited. In the ICJ Nuclear Opinion, the Court grouped relevant treaties into those dealing with acquisition, manufacture and possession of nuclear weapons; those concerned with their employment; and, finally, treaties addressing nuclear weapon testing. The Opinion then addresses the numerous treaties that establish nuclear weapon-free zones, non-proliferation obligations or similar restrictive arrangements and shows how

¹⁹ ICJ Nuclear Opinion, para. 52.

²⁰ Regulations Respecting the Laws and Customs of War on Land, Annex to Hague Convention II, 29 July 1899.

²¹ Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, Geneva, 17 June 1925.

²² ICJ Nuclear Opinion, paras. 54–6. Clearly, the adoption of the Treaty on the Prohibition of Nuclear Weapons, discussed in Section K, clarifies the position of certain States, but the point being made here is that the generality of State practice, including that of States that retain nuclear weapons, has not altered materially.

these texts are variously interpreted by supporters and critics of the lawfulness of a resort to nuclear weapons in appropriately grave circumstances.

The Court, rather presciently, suggested that those treaties could 'be seen as foreshadowing a future general prohibition of the use of such weapons', adding that 'they do not constitute such a prohibition by themselves'.²³ The present authors agree and would merely add that the Treaty on the Prohibition of Nuclear Weapons (TPNW), which at the time of writing has been ratified by fifty-two States and is now in force,²⁴ also does not reflect binding customary law.²⁵ Specifically, the Court did not view the treaty arrangements that it addressed 'as amounting to a comprehensive and universal conventional prohibition on the use, or the threat of use, of [nuclear] weapons as such'.²⁶ The present authors do not believe this view would necessarily be affected by the TPNW, unless and until nuclear weapon States start to become parties to the convention. In this context it is worth mentioning that the fifty-two States that are parties to the TPNW at the time of writing do not include China, France, India, Israel, Pakistan, the Russian Federation, the United Kingdom, the United States or any NATO member States.

It was at this point in the judgment that the Court assessed whether customary international law included a prohibition on the threat or use of nuclear weapons, referring to the *Continental Shelf* case for this purpose.²⁷ Evidently, the argument had been made that a customary rule prohibiting the use of nuclear weapons already existed, based on 'a consistent practice of non-utilization of nuclear weapons by States since 1945'²⁸ and an implied *opinio juris*. The Opinion juxtaposes that thought with the notion of deterrence, where the right to use such weapons in self-defence is reserved in the case of 'an armed attack threatening . . . vital security interests'.²⁹ The argument goes that it is merely fortuitous that such circumstances have not arisen. The Court felt unable to find an *opinio juris* linked to the non-recourse to nuclear weapons over what was then a period of fifty years. If the Court were to reconsider this aspect today, it would probably be unlikely to reach a different conclusion, despite the continuation of the practice for a further quarter of a century.³⁰

²³ ICJ Nuclear Opinion, para. 62.

²⁴ www.icrc.org (viewed 30 January 2021).

²⁵ See ICJ Nuclear Opinion, para. 62.

²⁶ ICJ Nuclear Opinion, para. 63.

²⁷ *Continental Shelf (Libyan Arab Jamahiriya/Malta)* (Judgment of 3 June 1985) [1985] ICJ Rep. 13, para. 27.

²⁸ ICJ Nuclear Opinion, para. 65.

²⁹ ICJ Nuclear Opinion, para. 66.

³⁰ See ICJ Nuclear Opinion, para. 67.

The Court considered a sequence of relevant UN General Assembly resolutions, including Resolution 1653 (XVI) of 24 November 1961 essentially condemning nuclear weapons, but could not find an associated customary prohibition. It did, however, recognise a widespread desire for a decisive step to be taken towards nuclear disarmament.³¹ As has already been noted, the TPNW discussed in Section K certainly represents a significant step in the desired direction. How decisive it may be expected to prove will be assessed in that Section.

So, having failed to find a rule, conventional or customary, the Court turned its attention to the principles and rules of international humanitarian law and to neutrality law. After briefly charting the evolution of international humanitarian law (IHL), the Court famously recognised certain IHL principles – namely, distinction and superfluous injury/unnecessary suffering – while also taking into account the Martens Clause as set forth in Article 1(2) of API.³² Importantly, the Court asserted that if a weapon's use would not meet IHL requirements, a threat to use it would also breach IHL.

More generally, the Court considered that IHL principles and rules indicate the normal conduct and behaviour expected of States and shared the majority view among States and writers that IHL applies to nuclear weapons. The Opinion pointedly asserts that the intrinsically humanitarian character of the principles of IHL 'permeates the entire law of armed conflict and applies to all forms of warfare and to all kinds of weapons, those of the past, those of the present and those of the future'.³³ The language that is used in this part of the judgment is somewhat convoluted and risks being misinterpreted. Read literally, the sentence is stating that the humanitarian character permeates IHL as a whole and that this humanitarian character applies to all forms of warfare. That would appear to be a nonsense and is not, it is assumed, what the learned judges were trying to say. Rather, this oft-cited passage has been widely interpreted as signifying that the principles and rules themselves apply to past, present and future weapons. It is likely that any revised ICJ Opinion would make that point somewhat less ambiguously, no doubt citing in support, *inter alia*, Article 1 common to the Geneva Conventions and Article 36 of

³¹ ICJ Nuclear Opinion, para. 73.

³² As given in Article 1(2), the clause states: '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.' The text is cited in the ICJ Nuclear Opinion, para. 78.

³³ ICJ Nuclear Opinion, para. 86.

API, as well as the Martens Clause and the national positions noted later in paragraph 86 of the judgment.

The principle of neutrality is then considered, and the Court readily finds the principle to be fundamental and to apply, subject to the relevant UN Charter provisions, to all international armed conflicts irrespective of the weapons used. Weighing the competing views and arguments against the foregoing principles and rules, the Court pointed out that those advocating legality have not indicated the circumstances that might justify the use of a low-yield nuclear weapon, even supposing such low-yield use were to be feasible. The Court therefore could not determine whether such a use would be potentially lawful. Of course, were the issue to come back before the Court, more specific evidence would need to be forthcoming on the existence, foreseen circumstances of use, likely characteristics and impact of such a limited-yield weapon. Notwithstanding such factors, the likelihood of nuclear escalation following such a limited-yield nuclear attack would, in all probability, influence the Court to conclude that such use would, in most if not all circumstances, be unlawful.³⁴

The Court expressed the opinion that the use of nuclear weapons seems scarcely reconcilable with LOAC rules, but could not 'conclude with certainty that the use of nuclear weapons would necessarily be at variance with' IHL principles and rules 'in any circumstances', and in this context cited the right of every State to resort to self-defence 'when its survival is at stake'.³⁵ This *non liquet* part of the judgment has been roundly criticised from a number of perspectives, and judges reconsidering these issues would be less than human were they not to take those criticisms into account. However, the basis for that part of the finding lies in the preceding analysis in the earlier paragraphs of the Opinion and, as the foregoing discussion tends to suggest, while there are certainly additional points that would likely be made in a revised Opinion, it is by no means certain that the ultimate conclusion would necessarily be radically different.

In the closing paragraphs of the Opinion, the Court drew attention to diverse authorities that, taken together, place an obligation on States to pursue negotiations to achieve effective measures towards nuclear disarmament.³⁶ In Section K, the TPNW will be examined and evaluated to see whether it may be the vehicle whereby this objective can be achieved.

³⁴ Consider ICJ Nuclear Opinion, para. 94.

³⁵ ICJ Nuclear Opinion, para. 96, largely re-stated in para. 97.

³⁶ ICJ Nuclear Opinion, para. 103.

In its concluding findings, the Court decided by thirteen votes to one to comply with the request for an advisory opinion. It then found, unanimously, that '[t]here is in neither customary nor conventional international law any specific authorization of the threat or use of nuclear weapons' and, by eleven votes to three, that '[t]here is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such'. Unanimously, the Court opined that '[a] threat or use of force by means of nuclear weapons that is contrary to Article 2, paragraph 4, of the United Nations Charter and that fails to meet all of the requirements of Article 51, is unlawful'. Also unanimously, it found that '[a] threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons'.

Then came the *non liquet* part of the judgment. By seven votes to seven and by the casting vote of the president, the Court found:

It follows from the above-mentioned requirements that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law;

However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.

Finally, the Court stated, unanimously, that '[t]here exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control'.³⁷

The foregoing analysis of the judgment leads the authors to consider that, while the details of the language used and the voting numbers might well differ, there can be no certainty that, were the matter to come back before the Court, there would necessarily be a different overall outcome. While the right to life might attract a greater focus, while environmental impact may be seen as even more important and while the TPNW may have some influence on the judicial analysis, it seems likely that the absence of a general practice of States

³⁷ ICJ Nuclear Opinion, para. 105(2).

recognised as law indicating a customary prohibition would cause the judges to hesitate before finding definitive illegality. An argument that treaties and other State documents might support a finding of illegality would, in the end, have to be weighed against the actual practice of the numerous most powerful States in the world in their maintenance of their nuclear capabilities and of their associated deterrence policies. In such a legal contest, it is the clear opinion of the authors that it is the nuclear conduct of States that will, in the end, be decisive.