ICJ’s ADVISORY OPINION ON NUCLEAR WEAPONS
A brief overview of the conclusions of International Court of Justice in 1996
By ILPI

In 1994, the United Nations General Assembly, pursuant to its powers under Article 96 of the United Nations Charter, requested an advisory opinion concerning the legality of the use of nuclear weapons from the International Court of Justice. In this request, the UNGA asked that the Court answer the following question: “Is the threat or use of nuclear weapons in any circumstance permitted under international law?” Ultimately, the Court replied that, although “the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict,” it could not “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.”

The Court reached this conclusion after a thorough examination both of the relevant frameworks of international law and of the interplay between them. Its threshold decision that the laws of war would determine nuclear weapons use left it with essentially two questions to answer:

1) Could the decision to use nuclear weapons be legal under jus ad bellum and (2) could the use of nuclear weapons ever comply with jus in bello? The Court’s determination that nuclear weapons might, under exceptional circumstances, meet the demands of both doctrines compelled its refusal to find the use of nuclear weapons categorically unlawful.

JUS AD BELLUM

Turning to the first question, jus ad bellum determines the legality of decisions to use force, and its precepts serve as a foundation of the United Nations Charter. The Charter creates a presumption against the legality of decisions to use force by demanding that States “refrain in their international relations from the threat or use of force.” The Charter also, however, creates exceptions to this rule, explicitly permitting any decision to use force authorized by the United Nations Security Council, and noting that the Charter does not “impair the inherent right of individual or collective self-defense if an armed attack occurs” against a State. Thus, any decision to use force

1 U.N. Charter, art. 96, par. (a).
2 Opinion, par. 1.
3 Opinion, par. 105(2)(E).
4 par. 34.
5 U.N. Charter, art. 2, par. 4.
6 U.N. Charter, art. 42.
7 U.N. Charter, art. 51.
pursuant to Security Council authorization or to defend against an armed attack is presumptively legal, whereas any other use of force is presumptively illegal.

Applying this doctrine to determine the legality of nuclear weapons use, the Court sets aside the question of the Security Council authorization (the Security Council, in theory, may authorize the use of any sort of force it deems necessary to maintain or restore peace and security) and instead focuses on the legality of a nuclear strike launched in self-defense. Although uses of force in self-defense are presumptively legal, the Court notes that attacks carried out in self-defense must conform to the requirements of necessity and proportionality to qualify as legal.

Though the Court recognizes fully the impossibility of containing the destructive power of nuclear weapons “in either space or time,” and notes that such weapons “have the potential to destroy all civilization and the entire ecosystem of the planet,” it refuses to find that any possible authorization of a defensive nuclear strike would violate the principle of proportionality. A nuclear strike launched to defend against a nuclear strike, or against a sufficiently potent bombardment with conventional weapons, would qualify as proportional and thus satisfy the demands of jus ad bellum. (This corresponds to the “extreme circumstance of self-defence” language in the Court’s ultimate holding quoted above.)

JUS IN BELLO

The Court then looks to whether jus in bello—or international humanitarian law, which governs the conduct of warfare—would ever permit the use of a nuclear weapon. The Court focuses its inquiry on three principles of IHL: the prohibition against unnecessary suffering, the command that weapons distinguish between combatants and civilians, and the requirement that attacks be proportional.

The Court states that, given their tremendous destructive power, “the use of nuclear weapons in fact seems scarcely reconcilable for with respect” for the requirements against unnecessary suffering and the requirement of distinction. However, noting the lack of a discrete factual scenario before it, the Court went on to find that it could not “conclude with certainty that the use of nuclear weapons would necessary be at variance with the principles and rules of law applicable in armed conflict in any circumstance.”

The Court more carefully scrutinizes the principle of proportionality, articulated in IHL as a prohibition against attacks “expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.” The italicized clause directs a State to weigh the expected damage to civilians and civilian objects not against a fixed counterweight but against the military advantage of the attack. More concretely, a State whose very survival hinged on a nuclear attack against the civilian-filled city of an opponent would weigh the expected loss of civilian life not against any objective standard, but against the military advantage it anticipates—in this case, survival. Given this feature of IHL, the Court found that it could not construe IHL to categorically prohibit the use of nuclear weapons. (This corresponds to the “in which the very survival of a State would be at stake” language in the Court’s ultimate holding quoted above.)

REJECTED ARGUMENTS

Having outlined the reasoning supporting the Court’s principal conclusion, let us turn now to those arguments it rejected. State parties before the Court contended that principles of international human rights law, international environmental law, various treaties, and customary international law render illegal any use of nuclear weapons. In its examination and dismissal of these arguments, the Court reveals more fully the way in which international law interacts with nuclear weapons.

Some States argued that the right to life guaranteed by the International Covenant on Civil
and Political Rights,18 which provides that “no one shall be arbitrarily deprived of his life.” The Court noted, however, that during wartime, this provision of the ICCPR extends only as far as international humanitarian law—that is, whether or not a given killing counts as “arbitrary” depends upon whether the killing was legal under international humanitarian law.19 The ICCPR, though an omnipresent part of the international legal framework, thus offers no guidance at all as to the legality of nuclear weapons use.

The Court makes an analogous finding regarding international environmental law, which it identifies as prohibiting States from using “means of warfare which are intended, or may be expected” to cause “widespread, long-term and severe environmental damage.”20 The Court again recognizes that these obligations do not create a “total restraint” on State action during conflict, but instead create demands coterminous with those of the laws of war. Instead, “respect for the environment is one of the elements that to go assessing whether an action is in conformity with necessity and proportionality.”21 On the Court’s reading, a use of a nuclear weapon conforming to the demands of jus ad bellum will not, as a point of departure, fail the demands of international environmental law.

Certain States argued that the bundle of nuclear weapons treaties—such as the Non-Proliferation Treaty, the Partial Test Ban Treaty, treaties establishing nuclear weapons-free zones, and others—together effectively point to, but do not themselves constitute, a prohibition on the use of nuclear weapons.22 The Court quickly dismisses this argument, noting that none of these instruments aspire to regulate nuclear weapons use.

18 art. 6, par. 1.
19 Opinion, par. 25.
20 par. 31.
21 par. 30.
22 par. 60.
globally, and that States unfailingly regulate through specific prohibition treaties. In the absence of a treaty explicitly banning the use of nuclear weapons, the Court refuses to find a ban on their use rooted in treaties regulating their dissemination.

States also contended that five decades of nuclear weapons non-use, coupled with UNGA resolutions affirming the illegality of nuclear weapons, created sufficient basis for the Court to find within customary international law a complete proscription against nuclear weapons. Customary international law requires State practice predicated on shared opinio juris—belief about a legal compulsion to so behave—to form. The court here finds that consistent refusal of States to use nuclear weapons rests not on a belief in their illegality, but on security concerns—in other words, the opinio juris needed to form a precept of customary international law is absent. The Court likewise rejects attempt to locate the requisite opinio juris in UNGA resolutions, noting that “substantial numbers of negative votes and abstentions” occurred at the adoption of each resolution.

THE OBLIGATION TO DISARM

Though the Court plainly refuses to declare nuclear weapons illegal, it notes that “international law, and with it the stability of the international order which it is intended to govern, are bound to suffer from the continuing difference of views with regard to the legal status of weapons as deadly as nuclear weapons” to preface its emphasis of the obligation on to disarm. Particularly, the Court highlights the obligation articulated in Article VI of the Non-Proliferation Treaty (to which most, but not all, nuclear weapons States belong) “to pursue negotiations in good faith” with an aim to conclude “a treaty on general and complete disarmament under international control.”

23 par. 62.
24 par. 57.
25 par. 64, 68.
26 par. 66.
27 par. 71.
28 par. 98.
29 par. 99 (quoting NPT, art. VI).