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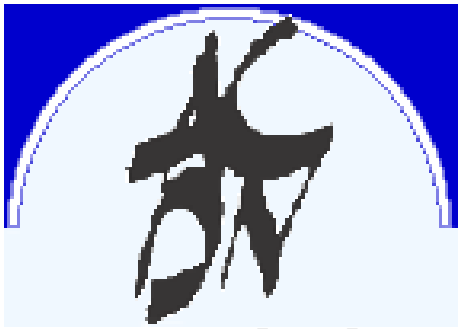

Are Nuclear Weapons authorized by International Law?

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The use and threat of use of nuclear weapons were the subject of a famous Advisory Opinion, dated 8 July 1996, given by the International Court of Justice (ICJ) which sits in The Hague (Netherlands) and is the principal judicial organ of the United Nations. This legal question of the LEGALITY OF THE THREAT OR USE OF NUCLEAR WEAPONS is obviously a crucial one because of its political consequences: if the use of these weapons is illegal - contrary to international law - then they must disappear, and even before they disappear the threat to use them must disappear also. This logic condemns all policies of "nuclear deterrence".

Since the Advisory Opinion seems at first sight to authorize several different readings, it should be examined more closely. We propose to do just that.

A summary of the text of the Advisory Opinion is on the ICJ website or on:

[-] English:

http://www.icj-cij.org/icjwww/idecisions/isummaries/iunanaummary960708.htm

[-] French:

http://library.lawschool.cornell.edu/cijwww/cijwww/ccases/cunan/cunanframe.htm

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The Court was composed of 14 judges. On 19 December 1994, the UN Secretary-General (Boutros Boutros-Ghali) had placed before it a « request for an Advisory Opinion on the legality of the threat or use of nuclear weapons", as a result of resolution 49/75 K adopted by the UN General Assembly on 15 December 1994. This resolution, which in its preamble spoke clearly for the total banning and abolition of nuclear weapons, had been presented by the movement of non-aligned nations to the General Assembly, which adopted it by 78 votes to 43 (including those of four nuclear states - but not China, which had not taken part in the vote). There were 38 abstentions.

The French government, in its written exposé sent to the Court on 20 June 1995, deduced that « one cannot fail to notice that, since the UN comprised [at the time] 185 member states, only about 40 % supported the resolution. » It considers that « the resolution does not respond to a need of the General Assembly but is merely part of an orchestrated political campaign ». The French government was forgetting that it had engaged (like the US and the UK) in intense lobbying of other governments, notably of France's African « clients ». It asked the Court not to respond to the request.

The resolution and the subsequent request resulted from an international campaign called the *World Court Project* which had been launched in Geneva in May 1992 by the International Peace Bureau, the IPPNW (International Physicians for the Prevention of Nuclear War) and the International Association of Lawyers Against Nuclear Arms (IALANA), soon joined by other NGOs like Greenpeace (and supported by the Red Cross). In 1993, representatives from Vanuatu, Ecuador, Panama and Mexico laid the matter before the 46th General Assembly of the World Health

Organization (WHO), which adopted the following question, which was referred in June to the ICJ: *"In view of the health and environmental effects, would the use of nuclear weapons by a State in war or other armed conflict be a breach of its obligations under international law including the WHO Constitution?".* Later (November 1993), the non-aligned nations intended to present to the UNGA a related question: *"Are there circumstances in which international law authorizes the threat or use of nuclear weapons?*". But they renounced this request, notably because of questions of procedure, and postponed it to the next UNGA, 1994.

The International Court of Justice sat for months and received numerous opinions, oral and written, including those of several dozen states (mostly wishing to condemn nuclear arms), and finally declared itself competent to consider the matter - this in itself was a victory of the NGOs and abolitionist states over the nuclear states (notably France). Intense debates took place inside the Court. Its final Opinion (several times postponed) bears the trace of this, both in the ambiguity of point 2E and in the « declarations », « separate opinions » and « dissenting opinions » which each of the 14 judges saw fit to attach to it. Since some of these opinions are very long, we will quote below from the résumés given on this website:

http://library.lawschool.cornell.edu/cijwww/cijwww/cijhome.htm

The question was formulated thus in English : *« Is the threat or use of nuclear weapons in any circumstance permitted under international law ? »*. The French wording : « Est-il permis en droit international de recourir à la menace ou à l'emploi d'armes nucléaires en toute circonstance ? » seems to imply that the question was whether there were particular circumstances in which the freedom (supposedly general) to use these weapons would not apply. But, on the contrary, the question was whether international law ever permits their use or threat of use. Those who opposed the referral of this question to the ICJ, notably France, used this apparent "confusion" in the question as an extra argument for rejecting it . . . but unsuccessfully, since the ICJ decided to accept it: « The Court does not deem it necessary to pronounce on the possible divergences between the French and English versions of the question. It has a clear objective: to determine the state of legality or illegality of the threat or use of nuclear arms. »

After a very long exposé of the reasons (more than 100 articles), the ICJ concludes thus in article 105:

« For these reasons,

THE COURT

(1) By thirteen votes to one,

Decides to comply with the request for an advisory opinion **(1)** ;

(2) Replies in the following manner to the question put by the General Assembly:

A. Unanimously,

There is in neither customary nor conventional international law any specific authorization of the threat or use of nuclear weapons;

B. By eleven votes to three **(2)**,

There is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such;

C. Unanimously,

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 the requirements of Article 51, is unlawful;

D. Unanimously,

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;

E. By seven votes to seven, by the President's casting vote **(3)**,

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;

F. Unanimously,

There 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. »

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This Advisory Opinion gave rise to numerous judicial commentaries. We will quote from that of Manfred Mohr, Doctor of Laws, who is a professor of international law and an expert on international humanitarian law. It appeared in the "International Review of the Red Cross" no 316, pp.92-102 (28 Feb. 1997).

Abstracts of the full text may be found of the Red Cross website www.icrc.web

Here are the most significant passages:

"The centrepiece of the Advisory Opinion is the Court's examination of the use or threat of nuclear weapons in the light of the principles and rules of international humanitarian law. The following were singled out as the cardinal principles of that law:

1. the protection of the civilian population and civilian objects and the distinction between combatants and non-combatants;

2. the need to avoid causing unnecessary suffering and the fact that States do not have unlimited freedom of choice of means in the weapons they use.

[...] Having established the applicability of those principles, the Court reaches the following "split" and to my mind contradictory conclusions:

(1) in view of the "unique characteristics" of nuclear weapons, the use of such weapons is scarcely reconcilable with the requirements of international humanitarian law;

(2) nevertheless, the Court does not consider itself in a position to conclude with certainty that the use of nuclear weapons is at variance with international humanitarian law in any circumstance; after all, States have a right to survival, a right of self-defence, and there is the policy of deterrence to which an appreciable section of the international community adhered for many years.

[...] The Court thus concludes that the threat or use of nuclear weapons is in general contrary to international law, but it does also leave a sort of "escape hatch" in the event of a threat to survival. The decision was a very close one, with seven votes to seven, plus the President's casting vote. It should, however, be borne in mind that three (formal) opposing votes came from judges who were against any possible justification of the use of nuclear weapons. The "real" opposing votes came only from the judges from the three nuclear-weapon States, i.e., the USA, the United Kingdom and France."

However, as Manfred Mohr points out:

"Certainly no-one would think of approving the use of poison gas if "vital security interests" or the "survival" of a State were at stake. For exceptional circumstances of that nature are always present to some extent in the event of armed attack (which entails the right of self-defence), especially when the question of the (lawful) use of nuclear weapons arises. It is precisely when a State wishes to survive that ***it should sooner refrain*** from using nuclear weapons!"

In this regard, see the ACDN piece about the absurdity of nuclear deterrence: "Let's make an end to the nuclear terror!".

Mohr's conclusion, dating from 1997, thus seemed very pertinent:

"Despite some flaws and contradictions, the Court's Advisory Opinion of 8 July 1996 represents a triumph for the rule of law in international relations. The Court has taken a stand on one of the most burning legal and political questions of our time, and its response is in essence a negative one. Even though such Advisory Opinions are not binding, they nonetheless carry very high authority. The impressive structure of this Opinion places it among the ranks of earlier, 'famous' opinions handed down by the Court which have substantially influenced the development of international law."

Since 1996, in fact, those who seek the abolition of nuclear weapons (whether states or NGOs) have constantly referred to this Advisory Opinion. They celebrated its 10th anniversary in July 2006, regretting of course that it has not been followed up by concrete results, i.e. judicial progress in the explicit and total condemnation of nuclear weapons, and above all in an effective implementation (or even the start of one) by the nuclear states concerned, of this ***"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"*** That was the final conclusion, which the ICJ delivered unanimously and which therefore is not debatable. But the policies of the nuclear powers

have reasons of their own, which know neither legal reason nor human reason.

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It is true that point 2E (second paragraph) has been invoked and continues to be invoked by France (and other nuclear states) to say that the Court did not condemn nuclear deterrence. The French judge Guillaume had made this point already in his "Separate Opinion":

"Judge Guillaume stresses that neither the Charter of the United Nations, nor any conventional or customary rule can detract from the natural right of self-defence recognized by Article 51 of the Charter. He deduces from this that international law cannot deprive a State of the right to resort to nuclear weaponry if that resort constitutes the ultimate means by which it can ensure its survival.

He regrets that the Court has not explicitly recognized this, but stresses that it has done so implicitly. It has certainly concluded that it could not, in those extreme circumstances, make a definitive finding either of legality of illegality in relation to nuclear weapons. In other words, it has taken the view that, in such circumstances, the law provides no guidance to States. However if the law is silent on that matter, the States, in the exercise of their sovereignty, remain free to act as they think fit.

Consequently, it follows implicitly but necessarily from paragraph 2 E of the Court's Advisory Opinion that the States may resort to "the threat or use of nuclear weapons in an extreme circumstance of self-defence, in which the very survival of a State would be at stake". When recognizing such a right the Court, by so doing, has recognized the legality of policies of deterrence."

This is a tendentious interpretation. In fact, in this advisory opinion (which is not a legal decision), for which the Court declared itself competent by 13 votes to 1, it considered by majority agreement that it was consulted not to settle the question, but only to say whether in view of existing international law, the use or threat of use of nuclear weapons was legal or not.

Thus, in the view of Judge Vereshchetin, "the Court cannot be blamed for indecisiveness or evasiveness where the law, upon which it is called to pronounce, is itself inconclusive [...] the Opinion adequately reflects the current legal situation and shows the most appropriate means to putting an end to the existence of any "grey areas" in the legal status of nuclear weapons."

To interpret this Opinion properly, one must therefore refer to the Declaration made by Judge Bedjaoui, the Court's President:

"After pointing out that paragraph E was adopted by seven votes to seven, plus the President's casting vote, Judge Bedjaoui emphasized immediately that the Court applied great meticulousness and a strong sense of its responsibilities when examining all aspects of the complex question asked by the General Assembly. He indicates that nevertheless the Court had to state that unfortunately, given the current state of international law, the Court was unable to give a clear answer. He thinks that the Opinion it gave has at least the merit of showing the imperfections of international law and of inviting states to correct them.

"Judge Bedjaoui declares that the Court's inability "to go beyond this statement of the situation can in no manner be interpreted to mean that it is leaving the door ajar to recognition of the legality of the threat or use of nuclear weapons." He says that the Court merely acknowledged the existence of judicial uncertainty. After observing that the

votes on paragraph E do not reflect any geographical split among the judges, he explains the reasons why he endorsed the Court's pronouncement.

"For this purpose he first emphasizes the particularly exacting character of humanitarian law and its vocation to apply in all circumstances. More specifically, he concludes that "The very nature of this blind weapon therefore has a destabilizing effect on humanitarian law which regulates discernment in the type of weapon used. Nuclear weapons, the ultimate evil, destabilize humanitarian law which is the law of the lesser evil. The existence of nuclear weapons is therefore a challenge to the very existence of humanitarian law, not to mention their long-term effects of damage to the human environment, in respect to which the right to life can be exercised."

"Judge Bedjaoui considers that "self-defence - if exercised in extreme circumstances in which the very survival of a State is in question - cannot engender a situation in which a State would exonerate itself from compliance with the "intransgressible" norms of international humanitarian law". In his view, it would be imprudent to unhesitatingly place the survival of a state above the survival of all humanity.

"Since "nuclear disarmament will always remain the ultimate goal of all action in the field of nuclear weapons", Judge Bedjaoui insists on the importance of the obligation to negotiate nuclear disarmament in good faith, which the Court recognised. He considers that it is possible to go beyond the Court's conclusions in this matter and to assert that "there is in fact a twofold general obligation, opposable *erga omnes,* to negotiate in good faith and to achieve the desired result." In other words, given the at least formal unanimity on this matter, this has now, in his view "acquired a customary character."

The Court could likely have gone further.

That is the opinion of Judge Shi. In his view, "nuclear deterrence" is "an instrument of policy to which certain nuclear-weapon States, supported by those States accepting nuclear umbrella protection, adhere in their relations with other States. This practice is within the realm of international politics and has no legal value from the standpoint of the formation of a customary rule prohibiting the use of the weapons as such."

Judge Koroma thought so too. He "regretted that the Court did not follow through with those normative conclusions and make the only and inescapable finding that because of their established characteristics, it is impossible to conceive of any circumstance when the use of nuclear weapons in an armed conflict would not be unlawful. Such a conclusion by the Court would have been a most invaluable contribution by the Court as the guardian of legality of the United Nations system to what has been described as the most important aspect of international law facing humanity today."

Since the Court did not follow through, the arguments whereby one might "go beyond the Court's conclusions", as its President himself said, were developed with exception vigour by several judges, notably Judge Weeramantry.

Judge Weeramantry today is continuing the struggle, with admirable energy and constancy, as he showed during the World Peace Forum (Vancouver, 23-29 June 2006). Let us let him speak: his arguments show very well how the nuclear states constitute a sort of "suicide club" and their leaders a sect preparing for a collective suicide, which will put an end to any sort of law.

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The Dissenting opinion of Judge Weeramantry

"Judge Weeramantry's Opinion is based on the proposition that the use or threat of use of nuclear weapons is illegal in any circumstances whatsoever. It violates the fundamental principles of international law, and represents the very negation of the humanitarian concerns which underlie the structure of humanitarian law. It offends conventional law and, in particular, the Geneva Gas Protocol of 1925, and Article 23(a) of the Hague Regulations of 1907. It contradicts the fundamental principle of the dignity and worth of the human person on which all law depends. It endangers the human environment in a manner which threatens the entirety of life on the planet.

"He regretted that the Court had not so held, directly and categorically.

"However, there were some portions of the Court's Opinion which were of value, in that it expressly held that nuclear weapons were subject to limitations flowing from the United Nations Charter, the general principles of international law, the principles of international humanitarian law, and by a variety of treaty obligations. It was the first international judicial determination to this effect and further clarifications were possible in the future.

"Judge Weeramantry's Opinion explained that from the time of Henri Dunant, humanitarian law took its origin and inspiration from a realistic perception of the brutalities of war, and the need to restrain them in accordance with the dictates of the conscience of humanity. The brutalities of the nuclear weapon multiplied a thousand-fold all the brutalities of war as known in the pre-nuclear era. It was doubly clear therefore that the principles of humanitarian law governed this situation.

"His Opinion examined in some detail the brutalities of nuclear war, showing numerous ways in which the nuclear weapon was unique, even among weapons of mass destruction, in injuring human health, damaging the environment, and destroying all the values of civilization.

"The nuclear weapon caused death and destruction; induced cancers, leukaemia, keloids and related afflictions; caused gastro intestinal, cardiovascular and related afflictions; continued, for decades after its use, to induce the health-related problems mentioned above; damaged the environmental rights of future generations; caused congenital deformities, mental retardation and genetic damage; carried the potential to cause a nuclear winter; contaminated and destroyed the food chain; imperilled the eco-system; produced lethal levels of heat and blast; produced radiation and radioactive fall-out; produced a disruptive electromagnetic pulse; produced social disintegration; imperilled all civilization; threatened human survival; wreaked cultural devastation; spanned a time range of thousands of years; threatened all life on the planet; irreversibly damaged the rights of future generations; exterminated civilian populations; damaged neighbouring States; produced psychological stress and fear syndromes - as no other weapons do.

"While it was true that there was no treaty or rule of law which expressly outlawed nuclear weapons by name, there was an abundance of principles of international law, and particularly international humanitarian law, which left no doubt regarding the illegality of nuclear weapons, when one had regard to their known effects.

"Among these principles were the prohibition against causing unnecessary suffering, the principle of proportionality, the principle of discrimination between combatants and civilians, the principle against causing damage to neutral states, the prohibition against causing serious and lasting damage to the environment, the prohibition against genocide, and the basic principles of human rights law.

"In addition, there were specific treaty provisions contained in the Geneva Gas Protocol (1925), and the Hague Regulations (1907) which were clearly applicable to nuclear weapons as they prohibited the use of poisons. Radiation directly fell within this description, and the prohibition against the use of poisons was indeed one of the oldest rules of the laws of war.

"Judge Weeramantry's Opinion also draws attention to the multicultural and ancient origins of the laws of war, referring to the recognition of its basic rules in Hindu, Buddhist, Chinese, Judaic, Islamic, African, and modern European cultural traditions. As such, the humanitarian rules of warfare were not to be regarded as a new sentiment, invented in the nineteenth century, and so slenderly rooted in universal tradition that they may be lightly overridden.

"The Opinion also points out that there cannot be two sets of the laws of war applicable simultaneously to the same conflict - one to conventional weapons, and the other to nuclear weapons.

"Judge Weeramantry's analysis includes philosophical perspectives showing that no credible legal system could contain a rule within itself which rendered legitimate an act which could destroy the entire civilization of which that legal system formed a part. Modern juristic discussions showed that a rule of this nature, which may find a place in the rules of a suicide club, could not be part of any reasonable legal system - and international law was pre-eminently such a system.

"The Opinion concludes with a reference to the appeal in the Russell-Einstein Manifesto to "remember your humanity and forget the rest", without which the risk arises of universal death. In this context, the Opinion points out that international law is equipped with the necessary array of principles with which to respond, and that international law could contribute significantly towards rolling back the shadow of the mushroom cloud, and heralding the sunshine of the nuclear- free age.

"The question should therefore have been answered by the Court - convincingly, clearly, and categorically."

Source:
www.un.org/law/icjsum/9623.htm

See also

http://www.dfat.gov.au/intorgs/icj_nuc/icj_nuclear_weapons.html

(which gives the whole of the statements of the individual judges)

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As for what specifically concerns France, we can say - simply on the basis of this over-timid Advisory Opinion dating from 1996 - that France undoubtedly violates it on at least two points:

(1) France does not respect the obligation (stated in article VI of the NPT and in the final point of the ICJ Opinion) to negotiate nuclear disarmament, since she is indefinitely postponing the day for sitting around a negotiating table, and while thus "waiting for Godot" she is developing new nuclear weapons.

(2) Her new doctrine of the use of nuclear arms, as defined by President Chirac in his speech in Brittany on 19 January 2006

falls a long way outside cases of "self-defense" and "the survival of a state" - cases which the International Court of Justice viewed with the greatest circumspection.

France's policies are therefore clearly illegal under international law.

Jean-Marie Matagne, ACDN

28 September 2006

Footnotes

(1) IN FAVOUR: President Bedjaoui; Vice-President Schwebel; Judges Guillaume, Shahabuddeen, Weeramantry, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Ferrari Bravo, Higgins;

AGAINST: Judge Oda.

(2) IN FAVOUR: President Bedjaoui; Vice-President Schwebel; Judges Oda, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Ferrari Bravo, Higgins;

AGAINST: Judges Shahabuddeen, Weeramantry, Koroma.

(3) IN FAVOUR: President Bedjaoui; Judges Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Ferrari Bravo;

AGAINST: Vice-President Schwebel; Judges Oda, Guillaume, Shahabuddeen, Weeramantry, Koroma, Higgins.

PS:

One of the most recent comments was given by Meindert J.F. Stelling,
President of the Dutch Association of Lawyers for Peace and former air force pilot, at a Mayors for Peace meeting in the City Hall of the Hague on July 5th, 2006. He said notably:

"In my view it is clear that the Opinion unequivocally condemns any use of nuclear weapons against the civilian population and against military targets situated in or in the vicinity of cities or villages. This kind of nuclear attacks would be against international humanitarian law.

"What is left is the use of nuclear weapons against military targets which lie far away from cities and villages, at such a distance that the effects would not directly harm the civilian population. The Opinion gives some examples: warships on the high seas or troops in sparsely populated areas. Only with regard to this kind of targets the Court could not come to a definite conclusion. So according to the Court, even nuclear attacks which would not directly harm the civilian population, were not to be seen as lawful. In his declaration attached to the Opinion, the presi¬dent of the Court, Mohammed BEDJAOUI, explicitly emphasized this point. He stated that the Opinion could "in no way be interpreted to mean that it is leaving the door ajar to recognition of the legality" of nuclear attacks. So nobody could declare in good faith that the Court did indicate any possibility of legal use of nuclear weap¬ons.

"In this connection I would point to the MARTENS clause from the preamble of the 1899 Hague Convention on land warfare. A clause named after the Russian dele¬gate who drafted it. It provides for the minimum protection of people in wartime. It says that people:
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.

"Later on the MARTENS clause became a treaty provision. It is generally understood that this clause mentions three independent sources of international law. This makes clear that it is not only the governments who decide about the substance of international law. It is the people who define the principles of humanity. It is the people who decide what the dictates of public conscience say. Governments cannot but acknowledge the principles of humanity and the dictates of public conscience. In my view international humanitarian law has to be interpreted in accordance with

the minimum protection of the MARTENS clause, in accordance with the meaning we the people give to this clause.

"It was for this reason that in the World Court Project the peace movement asked for "declarations of public conscience". People have unequivocally condemned nuclear mass destruction as being utterly immoral and inhumane. In the light of this ex¬pression of the meaning of the principles of humanity and of the dictates of public conscience one could reach beyond the conclusions of the Court in its Opinion. One could help to change the finding of the minority of judges that the use of nuclear weapons is unlawful under any circumstance, into the final legal conclusion.

"Therefore I applaud the initiatives of Mayors for Peace and the start of the Cities Are Not Target Campaign. These initiatives strongly support and promote the idea that the conscience of mankind rejects nuclear annihilation. They strengthen the idea that the laws of humanity and the dictates of public conscience condemn the use of nuclear weapons as a crime against mankind and civilization.