Paras 1 to 63

N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

[**Source**: Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, July 8, 1996, ICJ Rep. 1996, p. 226; available on http://www.icj-cij.org]

"THE COURT [...] gives the following Advisory Opinion:

1. The question upon which the advisory opinion of the Court has been requested is set forth in resolution 49/75 K adopted by the General Assembly of the United Nations [...] on December 15, 1994. [...], the English text of which [...] reads as follows: "*The General Assembly,* [...] *Decides*, pursuant to Article 96, paragraph 1, of the Charter of the United Nations, to request the International Court of Justice urgently to render its advisory opinion on the following question: 'Is the threat or use of nuclear weapons in any circumstance permitted under international law?'" [...]

1. The Court must furthermore satisfy itself that the advisory opinion requested does indeed relate to a "legal question" within the meaning of its Statute and the United Nations Charter. The Court has already had occasion to indicate that questions "framed in terms of law and rais[ing] problems of international law . . . are by their very nature susceptible of a reply based on law . . . [and] appear . . . to be questions of a legal character" (*Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 18, para. 15). The question put to the Court by the General Assembly is indeed a legal one, since the Court is asked to rule on the compatibility of the threat or use of nuclear weapons with the relevant principles and rules of international law. To do this, the Court must identify the existing principles and rules, interpret them and apply them to the threat or use of nuclear weapons, thus offering a reply to the question posed based on law. The fact that this question also has political aspects, as, in the nature of things, is the case with so many questions which arise in international life, does not suffice to deprive it of its character as a "legal question" and to "deprive the Court of a competence expressly conferred on it by its Statute" (*Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory*

Opinion, I.C.J. Reports 1973, p. 172, para. 14). Whatever its political aspects, the Court cannot refuse to admit the legal character of a question which invites it to discharge an essentially judicial task, namely, an assessment of the legality of the possible conduct of States with regard to the obligations imposed upon them by international law. [...]

1. [...] Certain States have however expressed the fear that the abstract nature of the question might lead the Court to make hypothetical or speculative declarations outside the scope of its judicial function. The Court does not consider that, in giving an advisory opinion in the present case, it would necessarily have to write “scenarios”, to study various types of nuclear weapons and to evaluate highly complex and controversial technological, strategic and scientific information. The Court will simply address the issues arising in all their aspects by applying the legal rules relevant to the situation. [...]

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1. Some of the proponents of the illegality of the use of nuclear weapons have argued that such use would violate the right to life as guaranteed in Article 6 of the International Covenant on Civil and Political Rights. [...] “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.” [...]

1. The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one’s life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable lex specialis, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus 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 terms of the Covenant itself. [...]
2. [...] [S]ome States furthermore argued that any use of nuclear weapons would be unlawful by reference to existing norms relating to the safeguarding and protection of the environment, in view of their essential importance. Specific references were made to various existing international treaties and instruments. These included Additional Protocol I of 1977 to the Geneva Conventions of 1949, Article 35, paragraph 3, of which prohibits the employment of “methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment”; and the Convention of May 18, 1977 on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, which prohibits the use of weapons which have “widespread, long-lasting or severe effects” on the environment (Art. 1). [...]

1. Other States questioned the binding legal quality of these precepts of environmental law; or, in the context of the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, denied that it was concerned at all with the use of nuclear weapons in hostilities; or, in the case of Additional Protocol I, denied that they were generally bound by its terms, or recalled that they had reserved their position in respect of Article 35, paragraph 3, thereof. It was also argued by some States that the principal purpose of environmental treaties and norms was the

protection of the environment in time of peace. It was said that those treaties made no mention of nuclear weapons. It was also pointed out that warfare in general, and nuclear warfare in particular, were not mentioned in their texts and that it would be destabilizing to the rule of law and to confidence in international negotiations if those treaties were now interpreted in such a way as to prohibit the use of nuclear weapons.

1. [...] The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.
2. However, the Court is of the view that the issue is not whether the treaties relating to the protection of the environment are or not applicable during an armed conflict, but rather whether the obligations stemming from these treaties were intended to be obligations of total restraint during military conflict. The Court does not consider that the treaties in question could have intended to deprive a State of the exercise of its right of self-defence under international law because of its obligations to protect the environment. Nonetheless, States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality. This approach is supported, indeed, by the terms of Principle 24 of the Rio Declaration, which provides that: “Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary.”

1. The Court notes furthermore that Articles 35, paragraph 3, and 55 of Additional Protocol I provide additional protection for the environment. Taken together, 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 reprisals.

These are powerful constraints for all the States having subscribed to these provisions.

1. General Assembly resolution 47/37 of 25 November 1992 on the Protection of the Environment in Times of Armed Conflict, is also of interest in this context. It affirms the general view according to which environmental considerations constitute one of the elements to be taken into account in the implementation of the principles of the law applicable in armed conflict: it states that “destruction of the environment, not justified by military necessity and carried out wantonly, is clearly contrary to existing international law”. Addressing the reality that certain instruments are not yet binding on all States, the General Assembly in this resolution “[a]ppeals to all States that have not yet done so to consider becoming parties to the relevant international conventions.” [...]
2. The Court thus finds that while the existing international law relating to the protection and safeguarding of the environment does not specifically prohibit the use of nuclear weapons, it indicates important environmental factors that are properly to be taken into account in the context of the implementation of the principles and rules of the law applicable in armed conflict.

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1. In the light of the foregoing the Court concludes that the most directly relevant applicable law governing the question of which it was seized, is that relating to the use of force enshrined in the United Nations Charter and the law applicable in armed conflict which regulates the conduct of hostilities, together with any specific treaties on nuclear weapons that the Court might determine to be relevant.

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1. In applying this law to the present case, the Court cannot however fail to take into account certain unique characteristics of nuclear weapons. The Court has noted the definitions of nuclear weapons contained in various treaties and accords. It also notes that nuclear weapons are explosive devices whose energy results from the fusion or fission of the atom. By its very nature, that process, in nuclear weapons as they exist today, releases not only immense quantities of heat and energy, but also powerful and prolonged radiation. According to the material before the Court, the first two causes of damage are vastly more powerful than the damage caused by other weapons, while the phenomenon of radiation is said to be peculiar to nuclear weapons. These characteristics render the nuclear weapon potentially catastrophic. The destructive power of nuclear weapons cannot be contained in either space or time. They have the potential to destroy all civilization and the entire ecosystem of the planet. The radiation released by a nuclear explosion would affect health, agriculture, natural resources and demography over a very wide area. Further, the use of nuclear weapons would be a serious danger to future generations. Ionizing radiation has the potential to damage the future environment, food and marine ecosystem, and to cause genetic defects and illness in future generations.

1. In consequence, in order correctly to apply to the present case the Charter law on the use of force and the law applicable in armed conflict, in particular humanitarian law, it is imperative for the Court to take account of the unique characteristics of nuclear weapons, and in particular their destructive capacity, their capacity to cause untold human suffering, and their ability to cause damage to generations to come.

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1. The Court will now address the question of the legality or illegality of recourse to nuclear weapons in the light of the provisions of the Charter relating to the threat or use of force.
2. The Charter contains several provisions relating to the threat and use of force. [...]
3. [...] A weapon that is already unlawful *per se*, whether by treaty or custom, does not become lawful by reason of its being used for a legitimate purpose under the Charter.
4. The entitlement to resort to self-defence under Article 51 is subject to certain constraints. Some of these constraints are inherent in the very concept of self defence. Other requirements are specified in Article 51.
5. The submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law. As the Court stated in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (I.C.J. Reports 1986*, p. 94, para. 176): “there is a specific rule whereby self-defence 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”. [...]

6. The proportionality principle may thus not in itself exclude the use of nuclear weapons in self-defence in all circumstances. But at the same time, a use of force that is proportionate under the law of self-defence, 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.
7. Certain States [...] contend that the very nature of nuclear weapons, and the high probability of an escalation of nuclear exchanges, mean that there is an extremely strong risk of devastation. The risk factor is said to negate the possibility of the condition of proportionality being complied with. The Court does not find it necessary to embark upon the quantification of such risks; nor does it need to enquire into the question whether tactical nuclear weapons exist which are sufficiently precise to limit those risks: it suffices for the Court to note that the very nature of all nuclear weapons and the profound risks associated therewith are further considerations to be borne in mind by States believing they can exercise a nuclear response in self-defence in accordance with the requirements of proportionality. [...]
8. Having dealt with the Charter provisions relating to the threat or use of force, the Court will now turn to the law applicable in situations of armed conflict. It will first address the question whether there are specific rules in international law regulating the legality or illegality of recourse to nuclear weapons per se; it will then examine the question put to it in the light of the law applicable in armed conflict proper, i.e. the principles and rules of humanitarian law applicable in armed conflict, and the law of neutrality.

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1. [...] 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.

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1. The Court must therefore now examine whether there is any prohibition of recourse to nuclear weapons as such; it will first ascertain whether there is a conventional prescription to this effect.
2. In this regard, the argument has been advanced that nuclear weapons should be treated in the same way as poisoned weapons. In that case, they would be prohibited under:
    a. the Second Hague Declaration of July 29, 1899, which prohibits “the use of projectiles the object of which is the diffusion of asphyxiating or deleterious gases”;
    b. 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, whereby “it is especially forbidden: ...to employ poison or poisoned weapons”; and
    c. The Geneva Protocol of June 17, 1925 which prohibits “the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices”.
3. The Court will observe that the Regulations annexed to the Hague Convention IV do not define what is to be understood by “poison or poisoned weapons” and that different interpretations exist on the issue. Nor does the 1925 Protocol specify the meaning to be given to the term “analogous materials or devices”. The terms have been understood, in the practice of States, in their ordinary sense as covering weapons whose prime, or even exclusive, effect is to poison or asphyxiate. This practice is clear, and the parties to those instruments have not treated them as referring to nuclear weapons.
4. In view of this, it does not seem to the Court that the use of nuclear weapons can be regarded as specifically prohibited on the basis of the above-mentioned provisions of the Second Hague Declaration

of 1899, the Regulations annexed to the Hague Convention IV of 1907 or the 1925 Protocol (see paragraph 54 above).

5. The pattern until now has been for weapons of mass destruction to be declared illegal by specific instruments. [...] Each of these instruments has been negotiated and adopted in its own context and for its own reasons. The Court does not find any specific prohibition of recourse to nuclear weapons in treaties expressly prohibiting the use of certain weapons of mass destruction. [...]
6. The Court notes that the treaties dealing exclusively with acquisition, manufacture, possession, deployment and testing of nuclear weapons, without specifically addressing their threat or use, certainly point to an increasing concern in the international community with these weapons; the Court concludes from this that these treaties could therefore be seen as foreshadowing a future general prohibition of the use of such weapons, but they do not constitute such a prohibition by themselves. As to the treaties of Tlatelolco and Rarotonga and their Protocols, and also the declarations made in connection with the indefinite extension of the Treaty on the Non-Proliferation of Nuclear Weapons, it emerges from these instruments that:
    a. a number of States have undertaken not to use nuclear weapons in specific zones (Latin America; the South Pacific) or against certain other States (non-nuclear-weapon States which are parties to the Treaty on the Non-Proliferation of Nuclear Weapons);
    b. nevertheless, even within this framework, the nuclear-weapon States have reserved the right to use nuclear weapons in certain circumstances; and
    c. these reservations met with no objection from the parties to the Tlatelolco or Rarotonga Treaties or from the Security Council.
7. These two treaties, the security assurances given in 1995 by the nuclear-weapon States and the fact that the Security Council took note of them with satisfaction, testify to a growing awareness of the need to liberate the community of States and the international public from the dangers resulting from the existence of nuclear weapons. The Court moreover notes the signing, even more recently, on December 15, 1995, at Bangkok, of a Treaty on the Southeast Asia Nuclear-Weapon-Free Zone, and on April 11, 1996, at Cairo, of a treaty on the creation of a nuclear-weapons-free zone in Africa. It does not, however, view these elements as amounting to a comprehensive and universal conventional prohibition on the use, or the threat of use, of those weapons as such.

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Paras 64 to 97

1. The Court will now turn to an examination of customary international law to determine whether a prohibition of the threat or use of nuclear weapons as such flows from that source of law. As the Court has stated, the substance of that law must be “looked for primarily in the actual practice and *opinio juris* of States” *(Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgement, I.C.J. Reports 1985*, p. 29, para. 27).
2. States which hold the view that the use of nuclear weapons is illegal have endeavoured to demonstrate the existence of a customary rule prohibiting this use. They refer to a consistent practice of non-utilization of nuclear weapons by States since 1945 and they would see in that practice the expression of an *opinio juris* on the part of those who possess such weapons.
3. Some other States, which assert the legality of the threat and use of nuclear weapons in certain

circumstances, invoked the doctrine and practice of deterrence in support of their argument. They recall that they have always, in concert with certain other States, reserved the right to use those weapons in the exercise of the right to self-defence against an armed attack threatening their vital security interests. In their view, if nuclear weapons have not been used since 1945, it is not on account of an existing or nascent custom but merely because circumstances that might justify their use have fortunately not arisen.

4. [...] [T]he Members of the international community are profoundly divided on the matter of whether non-recourse to nuclear weapons over the past fifty years constitutes the expression of an *opinio juris*. Under these circumstances the Court does not consider itself able to find that there is such an *opinio juris*.
5. According to certain States, the important series of General Assembly resolutions, beginning with resolution 1653 (XVI) of November 24, 1961, that deal with nuclear weapons and that affirm, with consistent regularity, the illegality of nuclear weapons, signify the existence of a rule of international customary law which prohibits recourse to those weapons. [...]
6. The Court notes that General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule.
7. Examined in their totality, [...] several of the resolutions under consideration in the present case have been adopted with substantial numbers of negative votes and abstentions; [...] they [...] fall short of establishing the existence of an *opinio juris* on the illegality of the use of such weapons. [...]
8. Having said this, the Court points out that the adoption each year by the General Assembly, by a large majority, of resolutions recalling the content of resolution 1653 (XVI), and requesting the member States to conclude a convention prohibiting the use of nuclear weapons in any circumstance, reveals the desire of a very large section of the international community to take, by a specific and express prohibition of the use of nuclear weapons, a significant step forward along the road to complete nuclear disarmament. The emergence, as *lex lata*, of a customary rule specifically prohibiting the use of nuclear weapons as such is hampered by the continuing tensions between the nascent *opinio juris* on the one hand, and the still strong adherence to the practice of deterrence on the other.

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1. The Court not having found a conventional rule of general scope, nor a customary rule specifically proscribing the threat or use of nuclear weapons *per se*, it will now deal with the question whether recourse to nuclear weapons must be considered as illegal in the light of the principles and rules of international humanitarian law applicable in armed conflict and of the law of neutrality.
2. A large number of customary rules have been developed by the practice of States and are an integral part of the international law relevant to the question posed. The “laws and customs of war” – as they were traditionally called – were the subject of efforts at codification undertaken in The Hague (including the Conventions of 1899 and 1907), and were based partly upon the St. Petersburg Declaration of 1868 as well as the results of the Brussels Conference of 1874. This “Hague Law” and, more particularly, the

Regulations Respecting the Laws and Customs of War on Land, fixed the rights and duties of belligerents in their conduct of operations and limited the choice of methods and means of injuring the enemy in an international armed conflict. One should add to this the “Geneva Law” (the Conventions of 1864, 1906, 1929 and 1949), which protects the victims of war and aims to provide safeguards for disabled armed forces personnel and persons not taking part in the hostilities. These two branches of the law applicable in armed conflict have become so closely interrelated that they are considered to have gradually formed one single complex system, known today as international humanitarian law. The provisions of the Additional Protocols of 1977 give expression and attest to the unity and complexity of that law.

3. Since the turn of the century, the appearance of new means of combat has – without calling into question the longstanding principles and rules of international law – rendered necessary some specific prohibitions of the use of certain weapons, such as explosive projectiles under 400 grammes, dum-dum bullets and asphyxiating gases. Chemical and bacteriological weapons were then prohibited by the 1925 Geneva Protocol. More recently, the use of weapons producing “non-detectable fragments”, of other types of “mines, booby traps and other devices”, and of “incendiary weapons”, was either prohibited or limited, depending on the case, by the Convention of 10 October 1980 on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects. The provisions of the Convention on “mines, booby traps and other devices” have just been amended, on 3 May 1996, and now regulate in greater detail, for example, the use of anti-personnel land mines.
4. All this shows that the conduct of military operations is governed by a body of legal prescriptions. This is so because “the right of belligerents to adopt means of injuring the enemy is not unlimited” as stated in Article 22 of the 1907 Hague Regulations relating to the laws and customs of war on land. The St. Petersburg Declaration had already condemned the use of weapons “which uselessly aggravate the suffering of disabled men or make their death inevitable”. The aforementioned Regulations relating to the laws and customs of war on land, annexed to the Hague Convention IV of 1907, prohibit the use of “arms, projectiles, or material calculated to cause unnecessary suffering” (Art. 23).
5. The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; 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. According to the second principle, it is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. In application of that second principle, States do not have unlimited freedom of choice of means in the weapons they use. The Court would likewise refer, in relation to these principles, to the Martens Clause, which was first included in the Hague Convention II with Respect to the Laws and Customs of War on Land of 1899 and which has proved to be an effective means of addressing the rapid evolution of military technology. A modern version of that clause is to be found in Article 1, paragraph 2, of Additional Protocol I of 1977, which reads as follows: *“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.”* In conformity with the aforementioned principles, humanitarian law, at a very early stage, prohibited certain types of weapons

either because of their indiscriminate effect on combatants and civilians or because of the unnecessary suffering caused to combatants, that is to say, a harm greater than that unavoidable to achieve legitimate military objectives. If an envisaged use of weapons would not meet the requirements of humanitarian law, a threat to engage in such use would also be contrary to that law.

1. It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and “elementary considerations of humanity” as the Court put it in its Judgement of April 9, 1949 in the *Corfu Channel case (I.C.J. Reports 1949*, p. 22), that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.
2. The Nuremberg International Military Tribunal had already found in 1945 that the humanitarian rules included in the Regulations annexed to the Hague Convention IV of 1907 “were recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war” (International Military Tribunal, *Trial of the Major War Criminals*, November 14, 1945–October 1, 1946, Nuremberg, 1947, Vol. 1, p. 254).
3. The Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), with which he introduced the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, and which was unanimously approved by the Security Council (resolution 827 (1993)), stated: [...] The part of conventional international humanitarian law which has beyond doubt become part of international customary law is the law applicable in armed conflict as embodied in: the Geneva Conventions of August 12, 1949 for the Protection of War Victims; the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of October 18, 1907; the Convention on the Prevention and Punishment of the Crime of Genocide of December 9, 1948; and the Charter of the International Military Tribunal of August 8, 1945.

1. The 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 provided the international community with a corpus of treaty rules the great majority of which had already become customary and which reflected the most universally recognized humanitarian principles. These rules indicate the normal conduct and behaviour expected of States. [...]
2. Nor is there any need for the Court to elaborate on the question of the applicability of Additional Protocol I of 1977 to nuclear weapons. It need only observe that while, at the Diplomatic Conference of 1974-1977, there was no substantive debate on the nuclear issue and no specific solution concerning this question was put forward, Additional Protocol I in no way replaced the general customary rules applicable to all means and methods of combat including nuclear weapons. In particular, the Court recalls that all States are bound by those rules in Additional Protocol I which, when adopted, were merely the expression of the pre-existing customary law, such as the Martens Clause, reaffirmed in the first article of Additional Protocol I. The fact that certain types of weapons were not specifically dealt with by the 1974 -1977 Conference does not permit the drawing of any legal conclusions relating to the substantive issues which the use of such weapons would raise. [...]
3. [...] [N]uclear weapons were invented after most of the principles and rules of humanitarian law applicable in armed conflict had already come into existence; the Conferences of 1949 and 1974-1977

left these weapons aside, and there is a qualitative as well as quantitative difference between nuclear weapons and all conventional arms. However, it cannot be concluded from this that the established principles and rules of humanitarian law applicable in armed conflict did not apply to nuclear weapons. Such a conclusion would be incompatible with the intrinsically humanitarian character of the legal principles in question which 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. [...] None of the statements made before the Court in any way advocated a freedom to use nuclear weapons without regard to humanitarian constraints. Quite the reverse; it has been explicitly stated, “Restrictions set by the rules applicable to armed conflicts in respect of means and methods of warfare definitely also extend to nuclear weapons” (Russian Federation, CR 95/29, p. 52); “So far as the customary law of war is concerned, the United Kingdom has always accepted that the use of nuclear weapons is subject to the general principles of the jus in bello” (United Kingdom, CR 95/34, p. 45); and “The United States has long shared the view that the law of armed conflict governs the use of nuclear weapons – just as it governs the use of conventional weapons” (United States of America, CR 95/34, p. 85.)

1. Finally, the Court points to the Martens Clause, whose continuing existence and applicability is not to be doubted, as an affirmation that the principles and rules of humanitarian law apply to nuclear weapons. [...]
2. Although the applicability of the principles and rules of humanitarian law and of the principle of neutrality to nuclear weapons is hardly disputed, the conclusions to be drawn from this applicability are, on the other hand, controversial. [...]
3. The Court would observe that none of the States advocating the legality of the use of nuclear weapons under certain circumstances, including the “clean” use of smaller, low yield, tactical nuclear weapons, has indicated what, supposing such limited use were feasible, would be the precise circumstances justifying such use; nor whether such limited use would not tend to escalate into the all-out use of high yield nuclear weapons. This being so, the Court does not consider that it has a sufficient basis for a determination on the validity of this view.
4. Nor can the Court make a determination on the validity of the view that the recourse to nuclear weapons would be illegal in any circumstance owing to their inherent and total incompatibility with the law applicable in armed conflict. Certainly, as the Court has already indicated, the principles and rules of law applicable in armed conflict – at the heart of which is the overriding consideration of humanity – make the conduct of armed hostilities subject to a number of strict requirements. Thus, methods and means of warfare, which would preclude any distinction between civilian and military targets, or which would result in unnecessary suffering to combatants, are prohibited. In view of the unique characteristics of nuclear weapons, to which the Court has referred above, the use of such weapons in fact seems scarcely reconcilable with respect for such requirements. Nevertheless, the Court considers that it does not have sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstance.
5. Furthermore, the Court cannot lose sight of the fundamental right of every State to survival, and thus its right to resort to self-defence, in accordance with Article 51 of the Charter, when its survival is at stake. Nor can it ignore the practice referred to as “policy of deterrence”, to which an appreciable section of the international community adhered for many years. The Court also notes the reservations which certain

nuclear-weapon States have appended to the undertakings they have given, notably under the Protocols to the Treaties of Tlatelolco and Rarotonga, and also under the declarations made by them in connection with the extension of the Treaty on the Non-Proliferation of Nuclear Weapons, not to resort to such weapons.

1. Accordingly, in view of the present state of international law viewed as a whole, as examined above by the Court, and of the elements of fact at its disposal, the Court is led to observe that it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake.

[...]

Para. 105 - Decision

105. For these reasons,

THE COURT,

(1) By thirteen votes to one,

Decides to comply with the request for an advisory opinion; [...]

(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,

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

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

AGAINST: *Judges* Shahabuddeen, Weeramantry, Koroma.

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,

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;

IN FAVOUR: *President* Bedjaoui; *Judges* Ranjeva, Herczegh, Shi, Fleischhauer, Vereschetin, Ferrari Bravo;

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

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.

Discussion

1. (Paras 74-87) Is IHL applicable to the use of nuclear weapons? Are there any exceptions?
    a. Do the rules of customary IHL simply "indicate the normal conduct and behaviour expected from States" (para. 82) or are they binding on States? Even for the use of nuclear weapons?
    b. Are the Geneva and Hague Conventions applicable to the use of nuclear weapons only insofar as they are customary law?
    c. Can you imagine a specific use of nuclear weapons not prohibited by the principles referred to in para. 78 or by the treaties qualified as customary in para. 79, but which becomes unlawful because of the Martens Clause? Is it because of the Martens Clause that IHL covers the use of nuclear weapons, although no specific provision on those weapons exists?
    d. Is Protocol I applicable to the use of nuclear weapons? Why should it not be? Are only the customary law rules of Protocol I applicable to the use of nuclear weapons? Only the rules which were already customary in 1977, when Protocol I was adopted? Or also those which have become customary in the meantime? Has customary IHL developed since 1977? Are those new rules of customary IHL applicable to the use of nuclear weapons? Even the rules which became customary

under the influence of Protocol I?

2. (Paras 94-97, 105(2)E) Does IHL prohibit the use of nuclear weapons in every circumstance? Does the Court answer this question?
    a. Is the Court unable to conclude definitively due to doubts about the law or doubts about the facts (i.e. because it cannot exclude the possibility of a situation arising in which nuclear weapons are so clearly targeted at a military objective and their effects limited to that objective – or in which the civilian collateral damage is not disproportionate – that their use conforms to all rules of IHL)?
    b. Does the Court consider that nuclear weapons may be used "in an extreme circumstance of self-defence, in which the very survival of a State is at stake"?
        a. Has the Court doubts as to whether they may be used in that circumstance? If the Court holds that the use of nuclear weapons "would generally be contrary to" IHL, but that it cannot exclude its legality in that extreme circumstance, is not the court, in fact, admitting that violations of IHL may be lawful in that extreme circumstance? Do such acts in that extreme circumstance become lawful under IHL or does jus ad bellum then override jus in bello?
        b. May a belligerent torture prisoners of war, execute wounded on the battlefield or transport weapons in ambulances marked with the red cross emblem "in an extreme circumstance of self-defence, in which the very survival of a State is at stake"? Does IHL have to be respected when engaging in self-defence? Does IHL have to be respected even "in an extreme circumstance of self-defence, in which the very survival of a State is at stake"? Has the International Court of Justice doubts whether the answer is affirmative? What would the consequences of a negative answer be for IHL?
        c. Who decides whether there is "an extreme circumstance of self-defence, in which the very survival of a State is at stake"? If a State is violating IHL in that extreme circumstance, what is the likely reaction of its adversary?
    c. How do you explain the Court's division in answering the core question in para. 105(2)E, and that in its answer it seems to confuse jus ad bellum and jus in bello? What would the consequences for the Court and for IHL have been if the Court had given a positive or a negative answer? Would it have been better for IHL if the Court had concluded that the use of nuclear weapons may be lawful under IHL, rather than concluding that it is generally unlawful but may be justified "in an extreme circumstance of self-defence, in which the very survival of a State is at stake"?
3. (Para. 25) Is the right to life protected in armed conflicts only by IHL or also by international human rights law? Is not the right to life non-derogable under international human rights law, while IHL admits "the right to kill" combatants on the battlefield? Can the right to life be invoked against a specific belligerent act in an armed conflict before the UN Human Rights Committee (whose task is to monitor implementation of the UN Covenant on Civil and Political Rights) (See the Commission on Human Rights website: http://www.ohchr.org)?
4. (Paras 27-33) Is international environmental law applicable in armed conflicts?
    a. Are the general treaties and customary rules on the protection of the environment applicable in armed conflicts?
    b. Is the prohibition contained in Art. 35(3) of Protocol I simply "properly to be taken into account" when "assessing whether an action is in conformity with the principles of necessity and proportionality", or must it be respected in all circumstances? Even when exercising the right of self-defence?
    c. Are the principles of necessity and proportionality mentioned in para. 30 those of IHL? Or does this

paragraph only concern jus ad bellum? Or does it mix up jus ad bellum and jus in bello?

5. (Para. 43) Is the principle of proportionality referred to in para. 43 (and the values to be taken into account) the same as in Art. 51(5)(b) of Protocol I?
6. (Para. 55) Why are nuclear weapons not poisonous within the meaning of the prohibition of poisonous weapons in IHL? Because poison operates through a chemical process and radioactivity is a physical process?
7. (Paras 64-73) Is the fact that nuclear weapons have never been used since 1945 proof of a customary law prohibition of the use of nuclear weapons, particularly considering that many armed conflicts have been fought since then – including those in the exercise of the right to self-defence – and that some of them were lost by States possessing nuclear weapons?
8. Which aspects of this Advisory Opinion are helpful or harmful to IHL or to the victims of armed conflicts? Would it have been preferable if this opinion had never been requested? Does this opinion show a general direction in which contemporary international law is developing, and if so, what does this direction mean for IHL?