

## *Nuclear Weapons*

### Student Materials

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- Decided by the International Court of Justice in July 1996
- Key topics: armed conflict (principles, weapons); environment; use of force

### Learning Objectives

- Understand and apply:
  - elements of customary international law
  - principles of the law of armed conflict
  - treaties that regulate nuclear weapons and the environmental effects of armed conflict
- Analyze and evaluate:
  - how international law can be extended to regulate new technology
  - how judges manage competing political pressures on highly-contentious issues

### Background Information

As part of a broader wave of anti-nuclear activism, the UN General Assembly voted in 1994 to ask the ICJ to rule on the legality of using nuclear weapons. Namely, the General Assembly passed a resolution that said:

The General Assembly, ... *Convinced* that the complete elimination of nuclear weapons is the only guarantee against the threat of nuclear war ...

*Decides* ... 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?”

The ICJ agreed to do so, inviting General Assembly members to share their views via written submission and oral arguments. It then issued an advisory opinion in 1996.

This advisory opinion carefully considers how many different areas of international law—including the law of armed conflict, the environment, and the use of force—affect nuclear weapons. This case was highly-politicized and was decided based on a 7-7 tie vote of the judges.<sup>1</sup> As you read the opinion, ask yourself: what have the judges decided, and what have they not decided in the ruling?

### Relevant Legal Texts

#### Additional Protocol I (1977)

##### Article 35, para. 3

It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.

##### Article 55, para. 1

Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.

#### Environmental Modification Convention (1977)

##### Article I, para. 1

Each state party ... undertakes not to engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other state party.

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<sup>1</sup> Under ICJ rules, tie votes are decided based upon the vote of the President of the ICJ.

### Majority Opinion

The ICJ began by considering whether environmental law provisions affect the legality of nuclear weapons. In particular, the Court focused on Additional Protocol I (1977) and the Environmental Modification Convention (1977).

Some states ... 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 ... and the [Environmental Modification Convention (1977)].

These instruments and other provisions relating to the protection and safeguarding of the environment were said to apply at all times, in war as well as in peace, and it was contended that they would be violated by the use of nuclear weapons whose consequences would be widespread and would have transboundary effects.

Other states questioned the binding legal quality of these precepts of environmental law; or, in the context of the ... Environmental Modification [Convention], 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 ...

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.

The Court recognizes that the environment is under daily threat and that the use of nuclear weapons could constitute a catastrophe for the environment. The Court also recognizes that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. 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.

However, the Court is of the view that the issue is not whether the treaties relating to the protection of the environment are or are 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-defense 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 ...

The Court notes furthermore that ... Additional Protocol I provide[s] 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 ...

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

General Assembly Resolution 47/37 ... on the “Protection of the Environment in Times of Armed Conflict” is also of interest in this context.<sup>2</sup> 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 “*appeals* to all states that have not yet done so to consider becoming parties to the relevant international conventions” ...

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<sup>2</sup> UNGA Resolution 47/37 (1992).

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 ...

The Court then briefly described some of the “unique characteristics of nuclear weapons” that affected the Court’s application of international law on the use of force and armed conflict.

The Court [must] take into account certain unique characteristics of nuclear weapons ...

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 ... 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.

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.

The Court then turned to international law on the use of force. The Court noted that this area of international law does not address the legality of specific weapons. Nonetheless, the Court noted that a

state's right to use any kind of force (including nuclear weapons) in self-defense is constrained by international law, and the principle of proportionality applies to all uses of force.

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 ... The Charter neither expressly prohibits, nor permits, the use of any specific weapon, including nuclear weapons. 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.

The entitlement to resort to self-defense under Article 51 is subject to certain constraints ... The submission of the exercise of the right of self-defense to the conditions of necessity and proportionality is a rule of customary international law. As the Court stated in the [*Nicaragua* case]: there is a "specific rule whereby self-defense would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law" ... The proportionality principle may thus not in itself exclude the use of nuclear weapons in self-defense in all circumstances ...

Certain states have ... suggested that in the case of nuclear weapons, the condition of proportionality must be evaluated in the light of still further factors. They 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 ... 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-defense in accordance with the requirements of proportionality ...

Next, the Court examined the law of armed conflict. It began by asking whether international law had specific treaty rules that made the use or threat of nuclear weapons illegal. In this discussion, the Court focused on three treaties. First, it considered the Treaty of Tlateloco (1967), a Latin American regional agreement on nuclear weapons. Second, it considered the Treaty of Rarotonga (1985), a South Pacific regional agreement. Finally, it considered the Non-Proliferation Treaty (NPT) of 1968. In particular, it examined security assurances that were made by states with nuclear weapons in 1968 and 1995, when the NPT was indefinitely extended.

International customary and treaty law does not contain any specific prescription authorizing the threat or use of nuclear weapons or any other weapon in general or in certain circumstances, in particular those of the exercise of legitimate self-defense. Nor, however, is there any principle or rule of international law which would make the legality of the threat or use of nuclear weapons or of any other weapons dependent on a specific authorization. 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.

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 ...

The pattern until now has been for weapons of mass destruction to be declared illegal by specific instruments. The most recent such instruments are the [Biological Weapons Convention (1972)]—which prohibits the possession of bacteriological and toxic weapons and reinforces the prohibition of their use—and the [Chemical Weapons Convention (1993)]—which prohibits all use of chemical weapons and requires the destruction of existing stocks. 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.

In the last two decades, a great many negotiations have been conducted regarding nuclear weapons; they have not resulted in a treaty of general prohibition of the same kind as for bacteriological and chemical weapons. However, a number of specific treaties have been concluded in order to limit: (a) the acquisition, manufacture and possession of nuclear weapons ...; (b) the deployment of nuclear weapons ...; and (c) the testing of nuclear weapons ...

Recourse to nuclear weapons is directly addressed by two of these Conventions and also in connection with the indefinite extension of the [Non-Proliferation Treaty (NPT)] of 1968:

(a) the Treaty of Tlatelolco ... for the Prohibition of Nuclear Weapons in Latin America prohibits, in Article 1, the use of nuclear weapons by the Contracting Parties. It further includes an Additional Protocol II open to nuclear-weapon states outside the region, Article 3 of which provides:

“The Governments ... undertake not to use or threaten to use nuclear weapons against the Contracting Parties ...”

The Protocol was signed and ratified by the five nuclear-weapon states. Its ratification was accompanied by a variety of declarations. The United Kingdom Government ... stated that “in the event of any act of aggression by a Contracting Party ... in which that Party was supported by a nuclear-weapon state”, the United Kingdom Government would “be free to reconsider the extent to which they could be regarded as committed by the provisions of Additional Protocol II”. The United States made a similar statement. The French Government ... stated that it “interprets ... Article 3 of the Protocol as being without prejudice to the full exercise of the right of self-defense ...” China reaffirmed its commitment not to be the first to make use of nuclear weapons. The Soviet Union reserved “the right to review” ... Additional Protocol II, particularly in the event of an attack by a state party either “in support of a nuclear-weapon state or jointly with that state”. None of these statements drew comment or objection from the parties to the Treaty of Tlatelolco.

(b) the Treaty of Rarotonga ... establishes a South Pacific Nuclear Free Zone in which the Parties undertake not to manufacture, acquire or possess any nuclear explosive device (Art. 3) ... [It] does not expressly prohibit the use of such weapons. But such a prohibition is for the states parties the necessary consequence of the prohibitions stipulated by the Treaty. The Treaty has a number of protocols. Protocol 2, open to the five nuclear-weapon states, specifies in its Article 1 that:

“Each Party undertakes not to use or threaten to use any nuclear explosive device against: (a) Parties to the Treaty; or (b) any territory within the South Pacific Nuclear Free Zone for which a state that has become a Party to Protocol 1 is internationally responsible.”

China and Russia are parties to that Protocol. In signing it, China and the Soviet Union each made a declaration by which they reserved the “right to reconsider” their obligations ... The Soviet Union also referred to certain circumstances in which it would consider itself released from those obligations. France, the United Kingdom and the United States, ... signed Protocol 2 [in] 1996, but have not yet ratified it. On that occasion, France

declared, on the one hand, that no provision in that Protocol “shall impair the full exercise of the inherent right of self-defense” ... The United Kingdom made a declaration setting out the precise circumstances in which it “will not be bound by” ... the Protocol.

(c) as to the [Non-Proliferation] Treaty ..., at the time of its signing in 1968 the United States, the United Kingdom and the USSR gave various security assurances to the nonnuclear-weapon states that were parties to the Treaty. In Resolution 255 (1968) the Security Council took note with satisfaction of the intention expressed by those three states to

“provide or support immediate assistance, in accordance with the Charter, to any non-nuclear-weapon state party to the Treaty on the Non-Proliferation . . . that is a victim of an act of, or an object of a threat of, aggression in which nuclear weapons are used”.

On the occasion of the extension of the Treaty in 1995, the five nuclear-weapon states gave ... security assurances against the use of such weapons. All the five nuclear-weapon states first undertook not to use nuclear weapons against non-nuclear-weapon states that were parties to the [NPT]. However, these states, apart from China, made an exception in the case of an invasion or any other attack against them, their territories, armed forces or allies, or on a state towards which they had a security commitment, carried out or sustained by a nonnuclear-weapon state party to the [NPT] in association or alliance with a nuclear-weapon state. Each of the nuclear-weapon states further undertook, as a permanent member of the Security Council, in the event of an attack with the use of nuclear weapons, or threat of such attack, against a non-nuclear-weapon state, to refer the matter to the Security Council without delay and to act within it in order that it might take immediate measures with a view to supplying, pursuant to the Charter, the necessary assistance to the victim state (the commitments assumed comprising minor variations in wording). The Security Council, in unanimously adopting Resolution 984 (1995) of 11 April 1995, cited above, took note of those statements with appreciation. It also recognized

“that the nuclear-weapon state permanent members of the Security Council will bring the matter immediately to the attention of the Council and seek Council

action to provide, in accordance with the Charter, the necessary assistance to the state victim”;

and welcomed the fact that

“the intention expressed by certain states that they will provide or support immediate assistance, in accordance with the Charter, to any non-nuclear-weapon state party to the [NPT] that is a victim of an act of, or an object of a threat of, aggression in which nuclear weapons are used”.

Those states that believe that recourse to nuclear weapons is illegal stress that the conventions that include various rules providing for the limitation or elimination of nuclear weapons in certain areas ... or the conventions that apply certain measures of control and limitation to the existence of nuclear weapons ... all set limits to the use of nuclear weapons. In their view, these treaties bear witness ... to the emergence of a rule of complete legal prohibition of all uses of nuclear weapons.

Those states who defend the position that recourse to nuclear weapons is legal in certain circumstances see a logical contradiction in reaching such a conclusion. According to them, those Treaties, such as the [NPT], as well as Security Council Resolutions 255 (1968) and 984 (1995) ... cannot be understood as prohibiting the use of nuclear weapons, and such a claim is contrary to the very text of those instruments. For those who support the legality in certain circumstances of recourse to nuclear weapons, there is no absolute prohibition against the use of such weapons. The very logic and construction of the [NPT], they assert, confirm this. This Treaty, whereby, they contend, the possession of nuclear weapons by the five nuclear-weapon states has been accepted, cannot be seen as a treaty banning their use by those states; to accept the fact that those states possess nuclear weapons is tantamount to recognizing that such weapons may be used in certain circumstances. Nor, they contend, could the security assurances given by the nuclear-weapon states in 1968 [and] 1995, have been conceived without its being supposed that there were circumstances in which nuclear weapons could be used in a lawful manner. For those who defend the legality of the use, in certain circumstances, of nuclear weapons, the acceptance of those instruments by the different non-nuclear-weapon states confirms and reinforces the evident logic upon which those instruments are based.

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 [NPT], 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 ...;
- (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.

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 ... 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.

The Court then asked whether customary international law prohibited the use or threat of nuclear weapons.

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 ...

States which hold the view that the use of nuclear weapons is illegal have endeavored 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.

Some other states ... assert the legality of the threat and use of nuclear weapons in certain circumstances ... 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-defense 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 ...

The members of the international community are profoundly divided on the matter of whether non-recourse to nuclear weapons over the past 50 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*.

According to certain states, the important series of General Assembly resolutions ... 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. According to other states, however, the resolutions in question have no binding character on their own account and are not declaratory of any customary rule of prohibition of nuclear weapons; some of these states have also pointed out that this series of resolutions not only did not meet with the approval of all of the nuclear-weapon states but of many other states as well ...

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.

Examined in their totality, the General Assembly resolutions put before the Court declare that the use of nuclear weapons would be “a direct violation of the Charter of the United Nations”; and in

certain formulations that such use “should be prohibited” ... Several of the resolutions under consideration in the present case have been adopted with substantial numbers of negative votes and abstentions; thus, although those resolutions are a clear sign of deep concern regarding the problem of nuclear weapons, they still fall short of establishing the existence of an *opinio juris* on the illegality of the use of such weapons ...

Having concluded that neither treaty law nor customary international law specifically prohibited the use or threat of nuclear weapons, the Court then asked whether “principles and rules of international humanitarian law” made the use or threat of nuclear weapons illegal.

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 ... This “Hague Law” ... 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” ... 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 ... The provisions of the Additional Protocols of 1977 give expression and attest to the unity and complexity of that law.

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 ...

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 ...

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 ... to the Martens Clause, ... 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.

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 ... 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.

The Nuremberg International Military Tribunal had already found in 1945 that the humanitarian rules included in the [Hague] Regulations ... “were recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war” ...

The [1993] Report of the Secretary-General [introducing the Statute of the International Criminal Tribunal for Yugoslavia] stated:

“The part of conventional international humanitarian law which has beyond doubt become part of international customary law is ... embodied in: the Geneva Conventions [(1949); the Hague Regulations (1907); the Genocide Convention (1948)]; and the Charter of the International Military Tribunal [(1945)].”

The extensive codification of humanitarian law and the extent of the accession to the resultant treaties ... 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 behavior expected of states ...

Turning now to the applicability of the principles and rules of humanitarian law to a possible threat or use of nuclear weapons, the Court notes that doubts in this respect have sometimes been voiced on the ground that these principles and rules had evolved prior to the invention of nuclear weapons and that ... the four Geneva Conventions of 1949 and the two Additional Protocols [of 1977] did not deal with nuclear weapons specifically. Such views, however, are only held by a small minority. In the view of the vast majority of states as well as writers there can be no doubt as to the applicability of humanitarian law to nuclear weapons.

The Court shares that view. Indeed, nuclear weapons were invented after most of the principles and rules of humanitarian law applicable in armed conflict had already come into existence ... 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 ...

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 ...

The Court then attempted to draw conclusions about how international humanitarian law applied to nuclear weapons.

Although the applicability of the principles and rules of humanitarian law ... to nuclear weapons is hardly disputed, the conclusions to be drawn from this applicability are, on the other hand, controversial.

According to one point of view, the fact that recourse to nuclear weapons is subject to and regulated by the law of armed conflict does not necessarily mean that such recourse is as such prohibited ...

Another view holds that recourse to nuclear weapons could never be compatible with the principles and rules of humanitarian law and is therefore prohibited. In the event of their use, nuclear weapons would in all circumstances be unable to draw any distinction between the civilian population and combatants, or between civilian objects and military objectives, and their effects, largely uncontrollable, could not be restricted, either in time or in space, to lawful military targets. Such weapons would kill and destroy in a necessarily indiscriminate manner, on account of the blast, heat and radiation occasioned by the nuclear explosion and the effects induced; and the number of casualties which would ensue would be enormous. The use of nuclear weapons would therefore be prohibited in any circumstance, notwithstanding the absence of any explicit conventional prohibition. That view lay at the basis of the assertions by certain states before the Court that nuclear weapons are by their nature illegal under customary international law, by virtue of the fundamental principle of humanity ...

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.

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 ... 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 ... 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.

Furthermore, the Court cannot lose sight of the fundamental right of every state to survival, and thus its right to resort to self-defense ... when its survival is at stake ....

Accordingly, ... the Court ... 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-defense, in which its very survival would be at stake ...