THE ENVIRONMENTAL EFFECTS OF NUCLEAR WEAPONS AND THE 1996 WORLD COURT OPINION

Michael J. Matheson*

INTRODUCTION

In 1996, the International Court of Justice (I.C.J.) issued an opinion on the legality of the threat or use of nuclear weapons that includes significant points on the protection of the environment during armed conflict.[1] The I.C.J.'s opinion is "advisory" in that it is not legally binding, but such opinions can still be of considerable importance in the development of international law and its acceptance by states.

In this particular case, the General Assembly's request arose out of the efforts of a group of anti-nuclear, non-governmental organizations that created a "World Court Project" for the purpose of securing an opinion declaring that any threat or use of nuclear weapons would be unlawful.[2] In 1994, the General Assembly was persuaded to ask the I.C.J. for an opinion on the following question: "Is the threat or use of nuclear weapons in any circumstance permitted under international law?"[3] More than forty states (including all the nuclear-weapon states but China) submitted oral or written statements of their views to the I.C.J.[4]

I. THE COURT'S GENERAL CONCLUSIONS

In July 1996, the I.C.J. handed down its response. It found that international law neither specifically authorizes nor prohibits the threat or use of nuclear weapons.[5] In particular, it found that the various arms control treaties that restrict the acquisition, transfer, and use of nuclear weapons do not constitute a general prohibition on their use.[6] It also found that there is no

---

* Director of International Law and Organizations, Johns Hopkins School of Advanced International Studies. This Article is based on a presentation given at a *Vermont Law Review* Symposium regarding the Environmental Law of War on October 27, 2000.

1. Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226 (July 8). For commentary on the decision, see Richard A. Falk, *Nuclear Weapons, International Law and the World Court: A Historic Encounter*, 91 AM. J. INT'L L. 64 (1997); Judith Hippler Bello & Peter H. Bekker, *Legality of the Threat or Use of Nuclear Weapons Advisory Opinion*, 91 AM. J. INT'L L. 126 (1997); Michael J. Matheson, *The Opinions of the International Court of Justice on the Threat or Use of Nuclear Weapons*, 91 AM. J. INT'L L. 417 (1997). The Court declined to respond to a parallel request from the World Health Organization (WHO) because the question raised did not fall within the scope of WHO's activities. Matheson, *supra*, at 417-18.

2. *See* 1996 I.C.J. 226 ¶ 8 (dissenting opinion of Judge Oda).

3. *Id.* ¶ 2 (dissenting opinion of Judge Oda).

4. 1996 I.C.J. 226 ¶¶ 4-9.

5. *Id.* ¶ 105(2)(A)-(B).

6. *Id.* ¶ 62.

such prohibition under customary international law, and that, in fact, a large number of important states deliberately rely on nuclear deterrence for safeguarding their national security.[7]

Nevertheless, the I.C.J. held that any threat or use of nuclear weapons must comply with the provisions of the U.N. Charter concerning the use of force, as well as the general requirements of international law applicable during armed conflict.[8] Specifically, the I.C.J. held that the use of nuclear weapons must comply with the rules of international humanitarian law concerning the protection of the civilian population and of objects that do not constitute legitimate military targets. This was consistent with what every state—including the nuclear-weapon states—argued to the I.C.J., but it was, in any event, important for the Court to confirm it explicitly.

The I.C.J. confirmed that there is an obligation under the Nuclear Non-Proliferation Treaty[9] "to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament . . . under strict and effective international control."[10] This was an important confirmation, although it does not resolve any of the substantial difficulties that lie in the path of progress toward this goal.

However, on the key question of whether the threat or use of nuclear weapons would in fact be consistent with international law applicable during armed conflict, the Court was sharply divided and ambivalent. By a vote of seven-to-seven (with the President's vote resolving the tie) the I.C.J. made the qualified finding "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. . . ."[11] The separate opinions of the concurring and dissenting judges underlined the deep divisions within the Court. At least six judges indicated that there were some circumstances in which the threat or use of nuclear weapons would be lawful,[12] and only three clearly stated that all threat or use would be unlawful.[13]

Further, the I.C.J. expressly stated that it was not in a position to rule on the legality of the use of nuclear weapons "in an extreme circumstance of self-

---

7. *Id.* ¶ 67.

8. *Id.* ¶ 105(2)(C)-(D).

9. Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161.

10. 1996 I.C.J. 226 ¶ 105(2)(F).

11. *Id.* ¶ 105(2)(E) (emphasis added).

12. *See generally* 1996 I.C.J. 226 (declaration of Judge Vereshchetin, dissenting opinion of Vice-President Schwebel, separate opinion of Judge Fleischhauer, separate opinion of Judge Guillaume, dissenting opinion of Judge Oda, and dissenting opinion of Judge Higgins).

13. *See generally* 1996 I.C.J. 226 (dissenting opinion of Judge Shahabuddeen, dissenting opinion of Judge Weeramantry, and dissenting opinion of Judge Koroma).

defence, in which the very survival of a State would be at stake,"[14] or in "belligerent reprisals,"[15] for example, in response to the use of weapons of mass destruction by an adversary. Nor was the I.C.J. prepared to pronounce on the legality of what it called "the policy of deterrence,"[16] by which it presumably meant the maintenance of stocks of nuclear weapons by states for use to defend themselves and their allies from armed attack. These caveats are very important because they cover the main reasons for the acquisition and possible use of nuclear weapons: to deter an attack, to deter or respond to enemy use of weapons of mass destruction, and to prevent military defeat that would threaten the survival of the state.

II. DAMAGE TO THE NATURAL ENVIRONMENT

In the course of its opinion, the I.C.J. confirmed that certain fundamental principles of the Stockholm and Rio Declarations are now a part of customary international law. Specifically, the I.C.J. stated that "[t]he 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."[17] This was an important and authoritative confirmation by the I.C.J. of what environmental advocates have long asserted.

Opponents of nuclear weapons argued that such environmental principles, that developed in the context of peacetime activities, had the effect of prohibiting any use of nuclear weapons in armed conflict because of the serious risk that any use of nuclear weapons would cause damage to the environment of other states or of areas beyond national jurisdiction. In response, the I.C.J. found that such principles could not be applied literally in armed conflict as a total prohibition on weapons causing environmental damage, but rather that the possibility of environmental damage had to be integrated into the normal rules of the law of armed conflict. The Court provided the following rationale:

> [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

14. 1996 I.C.J. 226 ¶ 105(2)(E).
15. *Id.* ¶ 46.
16. *Id.* ¶ 67.
17. *Id.* ¶ 29.

> 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.[18]

This recognition by the I.C.J. that the natural environment enjoys the protection given by international humanitarian law to civilian objects is important. It means that elements of the natural environment cannot be made the object of attack, unless their destruction would give direct military advantage in the particular circumstances in question, which seems a rare situation. It means that an attack cannot be made if the risk of collateral damage to the environment is disproportionate to the direct military advantage of the attack. These principles apply to both nuclear and conventional attacks that may cause environmental damage.

The fact that the rule of proportionality applies to attacks that may damage the natural environment does not mean that all uses of nuclear weapons would be prohibited for this reason. Opponents of nuclear weapons argued that they are inherently indiscriminate because of their severe heat, blast, and radiation effects, and that any use of nuclear weapons would inevitably cause disproportionate damage to objects that were not legitimate military objectives. The United States and others responded that the rule of proportionality certainly applied to the use of nuclear weapons, but that the likelihood of disproportionate damage must be judged on a case-by-case basis, depending on the specific circumstances of any actual use. Judge Schwebel gave the hypothetical example of the use of a nuclear weapon to destroy a submarine in mid-ocean that was about to fire nuclear-armed missiles at friendly population centers and concluded that such a use would clearly comply with the requirement of proportionality.[19] The I.C.J. was not able to resolve this difficult question.

CONCLUSION

In its opinion, the I.C.J. was not able to resolve the fundamental question of the legality of the threat or use of nuclear weapons. This is not surprising, since the legality of such use will depend on the circumstances of each case, which will vary and cannot be predicted in advance. Nonetheless, on the question of the effect of nuclear weapons on the environment, the I.C.J. made some important points, including: (1) that international law now requires states to ensure that activities within their jurisdiction and control respect the

---

18. *Id.* ¶ 30.
19. 1996 I.C.J. 226 (dissenting opinion of Vice-President Schwebel).

environment of other states or of areas beyond their national control; (2) that this general principle is to be applied in wartime in accordance with the rules of armed conflict, rather than as an absolute prohibition; and (3) that the rules protecting civilians and civilian objects—including the rule of proportionality—apply to the natural environment. These rules, by their general nature, cannot answer all questions about the use of nuclear weapons (or any other method of warfare), but they provide a useful framework for understanding the applicable law as it relates to possible damage to the environment.