

**The Relevance of ICJ Advisory Opinions: nuclear weapons, Climate Change and other
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Comments of Charles J. Moxley, Jr.¹

Good day. I'm delighted to participate in this conference. I join John Burroughs and others in saluting Peter Weiss and Judge Christopher Weeramantry and extend the salute also to John Burroughs, Jackie Cabasso, Alyn Ware, and so many others of you who were instrumental in presenting the advisory case to the ICJ, a monumental achievement.

I'll be addressing what I see as accomplishments of the ICJ Nuclear Weapons Advisory Decision and some concerns as to its shortfalls and issues still to be addressed.

Because of the exigencies of time, I'll to an extent speak in kind of an outline form, leaving more detailed discussion of individual points potentially to the discussion period and later parts of the conference.

Great accomplishments of the Advisory Decision

- **Devastating and uncontrollable effects of nuclear weapons:** The Court's recognition that "[T]he destructive power of nuclear weapons cannot be contained in either space or time ... [and that nuclear weapons] have the potential to destroy all civilization and the entire ecosystem of the planet." ¶¶35-36.
- **Applicability of international law to the threat and use of nuclear weapons:** The Court's finding that the principles of international humanitarian law, including as reflected in the various Hague and Geneva Conventions and the St. Petersburg Declaration, apply to nuclear weapons, including the principles of distinction, proportionality, and necessity, the prohibition of unnecessary suffering, and the Martens

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Clause, and its characterization of such legal requirements as “intransgressible principles of international customary law, which are to be observed by all States whether or not they have ratified the conventions that contain them.”. ¶¶41-44, 77, 78, 79, 82, 86, 90.

- **General unlawfulness of the threat and use of nuclear weapons:** The Court’s finding that the threat and 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...” ¶105.E; *see also*, ¶¶78, 146.
- **Scarce reconcilability of the effects of nuclear weapons with the principles of distinction and necessity/unnecessary suffering:** The Court’s finding that the use of nuclear weapons seems “scarcely reconcilable” with LOAC, including the rules of distinction and prohibition of causing unnecessary suffering. ¶95.
- **Unlawfulness of the use of weapons whose effects cannot be controlled:** The Court’s finding that, among the “cardinal principles ... of humanitarian law” is the prohibition of “us[ing] weapons that are incapable of distinguishing between civilian and military targets.” ¶78.
- **Unlawfulness under both *jus ad bellum* and *jus in bello* of threats to use nuclear weapons in circumstances where the use would be unlawful:** The Court’s finding that threats to use nuclear weapons are unlawful under both *jus ad bellum* (¶¶47-48) and *jus in bello* (¶78) to the extent the uses threatened would themselves be unlawful—and its broad definition of “threat” as potentially encompassing possession of nuclear weapons with intent to use them. ¶¶ 47–48.
- **Relevance of potential escalation in assessing the lawfulness of the threat and use of nuclear weapons:** The Court’s seeming recognition of the relevance of potential nuclear escalation to the assessment of the lawfulness of the threat and use of nuclear weapons. ¶95.
- **Requirement that belligerent reprisals be proportionate and, potentially, that they not be directed against the natural environment:** The Court’s finding that belligerent reprisals, like self-defense, are governed, *inter alia*, by the principle of proportionality (¶46) and that, under Additional Protocol I, for States that subscribed to it, belligerent reprisals may not be directed against the natural environment (¶31).
- **Prohibition of unnecessary, disproportionate, extreme, and longstanding damage to the natural environment:** The Court’s finding:
 - that, in applying the principles of necessity and proportionality, warring parties “must take environmental considerations into account” —that “[r]espect 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.” ¶30.
 - that States, “as to activities within their jurisdiction and control,” must “respect the environment of other States or of areas beyond national control,” that such requirements are “now part of the corpus of international law relating to the environment (¶29), and

- that Additional Protocol I, for States that subscribed to it, “embod[ies] a general obligation to protect the natural environment against widespread, long-term and severe environmental damages,” prohibiting “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.” ¶31.
- **States’ obligation to negotiate nuclear disarmament—to “achieve a precise result – nuclear disarmament in all its aspects”:** The Court’s finding that Article VI of the Nuclear Non-Proliferation Treaty (NPT) obligates each State party to effectively and successfully negotiate nuclear disarmament in “good faith” and “at an early date”. (¶¶98-100).
- **The foreshadowing of a future general prohibition of the use of nuclear weapons:** The Court’s suggestion that numerous treaties addressing the acquisition, manufacture, possession, deployment and testing of nuclear weapons could “certainly point to an increasing concern in the international community with these weapons” and that such treaties could be seen as “foreshadowing a future general prohibition of the use of such weapons...” ¶76.
- **The ostensible advantage of advisory opinions in avoiding otherwise challenging barriers to jurisdiction and to justiciability of legal issues involving policies and practices of States:** The scope of the Advisory Opinion highlights the reality that the parties’ bringing of the case and the Court’s hearing of it were not subjected to limitations as to what States had consented to the Court’s jurisdiction and as to such largely otherwise applicable barriers to justiciability as standing, existence of a dispute, political question doctrine, sovereign immunity, self-executing versus non-self-executing status of treaties (or cases in the U.S.), and the like.
- **The resultant substantial enlargement of the body of law addressing the lawfulness of nuclear weapons threat and use:** The extraordinary development of the law through the numerous individual opinions in the case as well as the Court’s decision itself.
- **The substantial number of States seriously addressing issues as to legal limits on the threat and use of nuclear weapons and putting themselves on the record as to same:** The extraordinary development of the law resultant of the widescale fulsome participation of nuclear, as well as non-nuclear weapons States, including through the treasure trove of thoughtful briefs and oral arguments presented to the Court by States, creating an extraordinary record for all time of the extent to which States, including the United States, recognized the applicability of established principles of law to the threat and use of nuclear weapons.

Shortcomings of the Advisory Decision/Further Work to be Done²

- **The Court's professed uncertainty as to extreme circumstances of self-defense:** The Court's big lapse as to "extreme circumstances of self-defense":
 - The Court's determination that, "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 "could not 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" (§97)—this determination seemed inexplicably to undermine its finding of the general unlawfulness of the threat and use of nuclear weapons.
 - This failure of the Court to come to grips with the issues presented to it was only heightened by the Court's finding that it "[did] 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" (§95) and its further findings that it "cannot lose sight of the fundamental right of every State to survival, and thus its right to resort to self-defense, in accordance with Article 51 of the Charter, when its survival is at stake" and that it could not ignore the "practice" and "policy of deterrence" (§96).
 - The inconsistency of the Court's findings in this regard with its broader findings as the legal requirements for lawful self-defense, including that self-defense is subject to the customary requirements that it satisfy the "conditions "of necessity and proportionality, the requirements of Article 51 of the U.N. Charter, and the principles and rules of humanitarian law. §§41, 41.
- **Failure to address legal issues as to the lawfulness of the threat and use of low-yield nuclear weapons:** The Court's failure to come to grips with the facts and law as concerned low-yield nuclear weapons: the Court, after re-stating arguments supporting and opposing the lawfulness of the use of low-yield nuclear weapons, declined to assess the lawfulness of such use on the ground it did not have "sufficient basis" to determine the matter. §§94, 95.
- **Failure to come to grips with legal issues as to the lawfulness of nuclear deterrence:** The Court's deference to nuclear deterrence as a policy and failure to assess the lawfulness of deterrence—and particularly its failure to connect its discussion of the unlawfulness of threats of unlawfulness uses of nuclear weapons to its discussion of nuclear deterrence. §§47-48, 66-67, 73, 95, 96-97.

² These various matters are addressed in my recent book referenced above.

- **Failure to address mutual assured destruction (MAD) as a concomitant of nuclear deterrence:** Ostensibly because of the way the case was presented to it, the Court did not address the lawfulness of MAD and related issues as to the broad scope of “military” targets and the fact of the co-location of major military and civilian targets.
- **Failure/declination to engage in risk analysis:** The Court’s failure to engage in risk analysis on the ground that, in its view, it should just look at the issues presented from a high level, without getting into the nitty-gritty of potential factual scenarios, represents one of the most fundamental failures of the decision. (See ¶¶15, 43). In so doing, the Court overlooked the fundamental point that the putative lawfulness of potential uses of nuclear weapons needs to be assessed in advance of the actual use of the weapons—at a time when, of necessity, only probabilities can be known, with the result that assessment of the lawfulness of such probabilities must be assessed.
- **Failure to address the full scope of legal requirements concerning belligerent reprisals:** Other than noting the requirement of proportionality and the prohibition under Additional Protocol I of reprisals against the natural environment, the Court failed to address more broadly the assertion of some States that nuclear weapons could be used in reprisal, a major shortcoming of the decision, given the view of certain nuclear weapons States that nuclear weapons could lawfully be used in reprisal (see ¶46).
- **Failure to apply the law of neutrality:** The Court’s failure to come to grips with the protection the law of neutrality gives to neutral states and persons in such states. ¶¶88, 89, 93.
- **Lack of authority or rationale for the Court’s finding that IHL, particularly *jus in bello*, generally prohibits threats to use nuclear weapons in circumstances where the uses would be unlawful:** The Court’s failure to provide authority or rationale for this proposition undermines the force of the finding.
- **Legal significance of uncontrollability of effects of nuclear weapons:**
 - While the Court, in its broad discussion of the effects of nuclear weapons, generally described such effects as not containable “in either space or time” (¶35) and hence uncontrollable, and while the Court recognized the unlawfulness of using weapons that are incapable of distinguishing between civilian and military targets (¶78), it did not proceed to apply the legal prohibition against using uncontrollable weapons to the uncontrollability of the effects of nuclear weapons, with this failure perhaps being explained by its parallel declination to address questions disputed by parties as to the controllability of effects of low-yield

weapons, notwithstanding its recognition of the relevance of potential escalation of the use of low-yield nuclear weapons.

- The Court further failed to assess whether the uncontrollability of effects of nuclear weapons means that a State, in considering the use of a nuclear weapon, could not form a good faith belief that such use would (or could) be lawful under the principles of distinction, proportionality, necessity, or reprisal, since it could not know what the effects of the use would be, and also failed to assess legal requirements as to what level of assurance of lawfulness a State would have to have before being able to use a nuclear weapons lawfully.
- **Potential for addressing nuclear weapons risks through human rights law:** In an approach that the international legal system appears to be moving beyond, the Court, addressing whether the use of nuclear weapons would violate the right to life guaranteed in Article 6 of the International Covenant on Civil and Political Life, found that the question “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” (¶25), a view of the interrelationship of human rights law and LOAC that the UN Human Rights Committee in its 2018 General Comment No. 36 on Article 6 appears to have put in question, in a development that may be significant in terms of the justiciability of claims involving the threat and use of nuclear weapons, given the potential for courts to more readily find justiciability of human rights as opposed to LOAC claims and issues.
- **Failure to assess the legal requirements for *per se* rules under international law:** The Court’s failure to identify requirements under international law for *per se* rules, with the Court seeming to assume, without explanation or authority, that, as long as there was “any circumstance” in which use of nuclear weapons might be lawful, *per se* unlawfulness could not be found (¶95), although the Court recognized the existence of *per se* rules (¶39).
- **Potential for the Court to issue injunctive, declaratory, or other such relief against potential unlawful actions:** Again, no doubt because of the way the issues were presented to the Court, the Court did not get into a consideration of its ability to issue interim provisional relief or permanent such relief or the like against anticipated or ongoing violations of law.
- **Myopically looking at the lawfulness of the threat and use of nuclear weapons solely from the perspective of States:** Again ostensibly because of the way the case was presented to it, the Court focused on the lawfulness of nuclear weapons threat and use solely from the perspective of States, without looking at the potential criminal culpability of political, military and civilian persons

involved in nuclear weapons-related work, including applicable *mens rea* requirements, including as to whether reckless or negligent violation of law in threatening or using nuclear weapons potentially exposes the actor to criminal liability.

- **Not getting into the law of causation:**
 - Also ostensibly because of the way the case was presented to it, the Court did not get into the law of causation, including as concerns questions as to what effects of nuclear weapons must be considered, as a matter of law, in assessing the lawfulness of a putative use of such weapons. Specifically, is it a question of whether the weapon will hit the target—of whether the kinetic effects of the weapon will generally be confined to the target area, or must the following known/foreseeable effects of nuclear weapons also be considered in the legal analysis:
 - radiation;
 - nuclear winter;
 - electromagnetic pulses (EMPs); and
 - likely escalation by the target?
- **Level of likelihood of unlawful effects of a nuclear weapons use for the use to be unlawful under the principles of distinction, proportionality, necessity, and precaution and the law as to reprisals:** Given that, by hypothesis, the lawfulness of a putative nuclear weapons use is to be made in advance of the use, what level of likelihood of excessive effects is required for the use to be unlawful? Must the potential excessive (unlawful) effects be
 - intended (¶ 31),
 - necessary or such that they would necessarily result (¶¶48, 95),
 - inevitable,
 - anticipated,
 - clearly or manifestly likely,
 - likely,
 - expected,
 - effects that may be expected (¶31),
 - foreseeable,
 - or the like (In other words, what is the element of the crime in this regard)?
- **Failure to include the principle of precaution in its analysis:** Likely also as a result of how the case was presented to it, the Court failed to take into consideration the requirements of the principle of precaution as concerns the lawfulness of the threat and use of nuclear weapons.
- **Question of whether a nuclear weapons State with the capability to do so is legally required to maintain an adequate supply of conventional weapons so**

as to obviate potential use of nuclear weapons: This issue, which has been looked at somewhat in the context of the obligation, if any, of a State to maintain and, if necessary, use smart, as opposed to dumb bombs, deserves attention in the context of States' maintaining adequate supplies of conventional weapons.

- **Underlying issues as to the role of the Court in hearing a case like the Advisory Case:** While perhaps it is understandable that the Court did not get into the jurisprudential question of its role when hearing a case—whether it should just hear and decide the case the parties present to it or, instead, should consider the broader range of relevant considerations and assess their impact on the questions presented—these are questions that deserve further consideration when the bringing of further legal cases in this area are considered.

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