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30 years of the Advisory Opinion on the Legality of Nuclear Weapons: *eppur si muove*

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Abstract

The 1996 Advisory Opinion of the International Court of Justice (ICJ) on the Legality of the Threat or Use of Nuclear Weapons remains a pivotal reference in international law and disarmament debates. While the Opinion did not categorically prohibit nuclear weapons, its reasoning has been widely cited in legal and diplomatic arenas. This study examines the Opinion's long-term influence through three key elements: its incorporation into state practice, its role in international litigation, and its impact on the 2017 Treaty on the Prohibition of Nuclear Weapons. Employing a methodology centered on primary sources, this research evaluates the Opinion's relevance in shaping international legal norms and assesses whether it still accurately reflects the state of international law on nuclear disarmament.

Keywords: International Court of Justice (ICJ), Advisory Opinion (1996), Nuclear Weapons, International Law, Nuclear Disarmament.

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Introduction

Almost thirty years ago, on July 8, 1996, under the chairmanship of Algerian professor Mohammed Bedjaoui, the International Court of Justice (Palchetti and Lima 2016, 313-353; Kolb 2013; Zimmermann et al. 2019; Hernández, 2014; Counvreur 2016), in the *Grande Salle de Justice* of the Peace Palace in The Hague, pronounced itself on one of the most important issues of law and international relations of the post-war period, which also gave its name to its then most recent Advisory Opinion: *The Legality of the Threat or Use of Nuclear Weapons* (hereinafter the '1996 Opinion') (International Court of Justice 1996, 226).

The hearings took up more than ten days of the Court's agenda, and almost thirty countries participated in the proceedings by presenting their legal positions on the state of international law regarding the compatibility between nuclear weapons and the set of rules governing relations between states. Abundant literature has been derived from the 1996 Opinion (Condorelli 1997; Greenwood 1997; Burroughs 1997; Chazournes and Sands 1999; Casey-Maslen 2019; Weil 1997; Rosenne 1997; Thurer 2012), although the bibliography of Brazilian origin is still reasonably brief (Pereira 2019; Cançado Trindade 2017; Vieira and Batista 2017). Much has been written about the fact that the International Court of Justice has shied away from addressing sensitive issues, and harsh criticism has been leveled at the fact that the majority of the Court – albeit a narrow majority, broken by the casting vote of its president – refused to condemn the thesis of the absolute illegality of the use of nuclear weapons. In short, according to the Court, it would be impossible to say that their use, by states and within certain circumstances, would be impracticable in the limits of international law.

The 1996 Opinion unquestionably crystallized as a point of reference for the discipline and for the regulation of the sub-area itself in international law. However, the Advisory Opinions are not binding on any state, since there is no provision in this regard either in UN Charter or the ICJ Statute. However, this does not detract from the authoritative nature of the Court's pronouncement. The mandatory nature of the instrument cannot be confused with the binding force of the rights and obligations identified and recognized by the Court (Ago 1991). Consequently, the assessments made by the Court of the rules and principles of international law are doubly authoritative. Firstly, because in a legal system characterized by decentralized normative production processes, judicial manifestations tend to gain reasonably high weight. Secondly, because of the very quality of the Court's reasoning, whose decision-making process is particularly designed to garner influence. Therefore, the considerations of the Hague Court in 1996 can certainly be seen as a snapshot – more or less accurate, depending on the observer – of the state of the law regarding the legality of nuclear weapons.

Three arguments attest to this. Firstly, the language of the 1996 Opinion has entered the practice of States: at seasonal meetings of international organizations aimed at discussing disarmament obligations it is possible to notice States using the Court's terms; some states have adapted their nuclear policies in the light of the Opinion and, the international legal community itself has embraced the reasoning developed in it as authoritative.¹ A second example illustrating

¹ Every year the United Nations General Assembly and its First Committee deal with disarmament issues. The influence of the Advisory Opinion can be seen in at least two (there are others) sets of resolutions. The first is the resolution on Nuclear Disarmament (UNDOC, A/RES/75/63). Another, more specific one, is a *follow-up* resolution that the Assembly regularly discusses entitled “*Follow-up to the advisory opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons*” (UNDOC, A/RES/75/66). This resolution recurrently recalls the importance of what the ICJ stated in the Opinion, calls on States to initiate negotiations for nuclear disarmament, and asks that the Secretary-General be informed of any initiative in this direction. It is also interesting to note that the Opinion is divided on some of its conclusions. For example, by a vote of 136 states in favor, 33 against and 15 abstentions, the part of the resolution that underlines the ICJ's unanimous conclusion on the existence of an obligation to negotiate in good faith and to carry out negotiations leading to nuclear disarmament. It is unquestionable that, since 1996, one can speak of the existence of practice and *opinio juris* emerging within the framework of these General Assembly resolutions.

the importance of the 1996 Opinion is the use of the Opinion in litigation in international disputes. The most notable example of this was the *Nuclear Disarmament* case (International Court of Justice, 2016). In short, the Republic of the Marshall Islands filed an application to the International Court of Justice against the nine nuclear weapon states. However, only against three of them was the jurisdictional link identified. Although the Court rejected the case on grounds of admissibility (absence of a dispute), it was possible to note in the memorial of the Republic of the Marshall Islands an abundant use of the arguments contained in the 1996 Opinion, arguments which were reaffirmed by the Court in the preliminary ruling on jurisdiction (Lima 2018; Anghie 2017; Bianchi 2017; Bonafè 2016; Galindo 2017; Santa Aria 2018; Awmee 2018; Pigrau Solé 2018; Oellers-Frahm 2017; Miron 2017; Palchetti 2018). The third contribution of this movement that began in 1996 is the Treaty on the Prohibition of Nuclear Weapons itself, signed in 2017 and entered into force in 2021 (Ritchie and Kmentt 2021; Evans 2021; Casey-Maslen 2019; Ruff 2018). The Opinion of 1996 was a frequently referenced element in the negotiations and some of its provisions clearly mirror the language used by the Court. From a broader point of view, the emergence of the treaty can be read as a direct response to one of the conclusions of the ICJ: the absence of a prohibition on the use of nuclear weapons in international law. The Treaty, even if it does not have the support of the nuclear states, is an important legal instrument to fill the “gap” indicated by the Court in its Advisory Opinion.

These three elements demonstrate the importance of the contributions of the International Court of Justice in the Advisory Opinion on the *Legality of Nuclear Weapons*. However, the focus of this contribution goes beyond the literal meaning of the Advisory *Opinion* issued by the Court. The question that prompts reflection is: how has the 1996 Advisory Opinion aged? Does it still accurately reflect the *status of* international law, or should new developments be taken into account in order to understand the different pressures that international law can exert on the issue of nuclear disarmament? To address this research question, the author adopts a methodology centered on the analysis of primary sources, including decisions of international courts and tribunals, reports and interpretations of treaty bodies, as well as codification efforts within international law. This approach seeks to precisely assess the influence of the Advisory Opinion. To this end, all explicit references to the Advisory Opinion, as well as the invocation of its underlying legal arguments in subsequent judicial and quasi-judicial decisions, have been systematically identified and examined. This compilation allows for a thorough evaluation of how the Opinion has been interpreted, applied, or contested across various legal *fora* over time. Furthermore, the analysis considers the broader doctrinal and institutional contexts in which these references appear, shedding light on the Opinion’s enduring impact on the evolution of international legal norms governing nuclear weapons and other international law regimes.

What did the Court say in 1996?

The Advisory Opinion request submitted to the ICJ by the UN General Assembly followed a less successful attempt by the World Health Organization, which had previously sought an advisory opinion on the use of nuclear weapons in relation to health issues—a request the Court ultimately found inadmissible. Unlike the position advocated by some states (International Court of Justice 1996; Lima 2019), the Court understood that it had the power to rule on the issue of the legality of the use of nuclear weapons, once its legal opinion had been requested by a UN body. Considerable resistance was put up by various legal theses aimed at preventing the Court from expressing its opinion on such a sensitive issue. Significant participation and support from civil society and non-governmental organizations was involved in the request (Falk 1997). The fact that a representative number of states supported the initiative in the General Assembly is an indicator that could not be ignored on the eve of the Opinion.²

Once the jurisdictional hurdles had been overcome, the Court went into the merits of the question. Important considerations can be drawn from the reasoning developed from then on. The Court stated that there was no specific authorization in customary or treaty law for the threat or use of nuclear weapons. However, there was also no comprehensive and universal prohibition on the threat or use of such weapons. Therefore, and by 1996, states had not taken any steps towards an effective prohibition – the multilateral treaty of quasi-universal adherence governing the field was still the Treaty on the Non-Proliferation of Nuclear Weapons (Abe 2020; Joyner 2011; Firmage 1969). These two observations by the Court resounded in the ears of those who, familiar with its case law, remembered an old *dictum* from 1927, responsible for the fame of the *Lotus* case: “restrictions upon the independence of States cannot be presumed.” (PCIJ, 1927).

After commenting on the general regime of specific rules on nuclear weapons, the Court then turned to the special regimes of international law, giving priority to those that had a particular connection with the matter, such as the international regime on the use of force. In this regard, the Court’s conclusion was that “the threat or use of force by means of nuclear weapons which contravenes Article 2, paragraph 4, of the Charter of the United Nations and which does not comply with all the requirements of Article 51 is unlawful.” The conclusion was not groundbreaking but reaffirmed that the general rules on the use of force also applied to the use of nuclear weapons. In short, the golden rule of Article 2, paragraph 4 remained valid in this context, and the only exception would be self-defense guaranteed by Article 51 of the Charter.

Next, the Court ruled on international humanitarian law. The Court noted that “a threat or use of nuclear weapons should also be compatible with the requirements of international law applicable to armed conflict, particularly those of the principles and rules of humanitarian law, as well as with specific obligations under treaties and other commitments expressly dedicated to

² The General Assembly resolution was adopted by 78 votes to 43, with 38 abstentions.

nuclear issues.” Finally, the Court concluded that “the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflicts, and in particular the principles and rules of humanitarian law.”

The conclusion seems to be a victory for scholars of international humanitarian law. Several other arguments were raised: some states admonished and invoked the regime of international human rights law, and international environmental law was also particularly subject to analysis by the Court. The Court was very succinct on these points. It affirmed important arguments, but these manifestations did not appear in the operative part of the Opinion. The Court’s position concluded that nuclear weapons and international humanitarian law cannot coexist in the same legal environment. If the story ended there, it would be a partially happy ending. However, the Court added the famous paragraph 2.E to the Advisory Opinion, which states that:

“However, in view of **the current state of international law**, and of the factual elements available to it, the Court has not been able to conclude definitively whether the threat or use of nuclear weapons would be legal or illegal in an extreme circumstance of self-defense, in which the very survival of a State would be at stake.” (International Court of Justice, 1996, p. 266)

This passage makes it possible to affirm that, among the various interests competing for space in the text of the opinion, the thesis of non-illegality in extreme situations won out. The Court corroborated the existence of circumstances which international law would not regulate, which allows us to infer the existence of a right to use nuclear weapons in extreme situations. For this reason, the Opinion was seen as a victory for the nuclear countries. If there are situations in which their use would not be completely expunged in international law, then what about their possession and, *in ultimis*, the very existence of nuclear weapons. This victory was not without important limitations. Even the aforementioned duty to respect humanitarian law, which is clearly incompatible with the use of nuclear weapons, is a notable barrier. Before 1996 there were doubts or the possibility of arguing against it, with the Court’s opinion this possibility would be taken out of the hands of the nuclear weapon states.

Even so, if self-defense is a circumstance that excludes illegality, as provided for in the Articles on State Responsibility of the International Law Commission (2001), then perhaps the 1996 Advisory Opinion can be considered a victory for the non-illegality thesis, although the discuss here would be broader with regard to peremptory rules. Obviously, the right to use nuclear weapons has only been recognized in extreme, very rare situations. There has been much discussion about which hypotheses would constitute a situation “in which the very existence of the state would be at risk.” For this reason, perhaps this is the typical case of an opinion in which neither *stakeholder* was particularly happy: the nuclear weapons possessors considered it excessively limiting with regard to their inherent right to self-defense, while the vast majority regretted the non-recognition of a comprehensive prohibition. This second line of thinking can

be well represented in an ethical dilemma, present in Judge Weeramantry's dissenting opinion (International Court of Justice, 1996): how can humanity conceive and legally guarantee an instrument that would be responsible for its own annihilation? Nonetheless, the fact that it was handed down by the main judicial body of the United Nations and that it has gained the attention of the international community for years makes its importance reaffirmed. After all, as we have seen, all normative production on the subject of nuclear disarmament after 1996 necessarily took the Opinion into account.

Finally, the Court, invoking the language of Article VI of the Non-Proliferation Treaty, unanimously reminded states in paragraph 2.F that "there is an obligation to pursue in good faith and to carry out negotiations leading to nuclear disarmament in all its aspects under strict and effective international control." The *dictum* allowed the Republic of the Marshall Islands to initiate litigation against the nine nuclear powers before the Court years later. The event demonstrates that, if the doors are open, interested states will seek new pronouncements from the Court on the issue of denuclearization. For some states, this is a central issue in their legal foreign policies. There are also those who believe there is a connection between the failure of the *Marshall Islands* case in 2016 and the swift adoption of the Ban Treaty in 2017. This does not, of course, redeem the Court's embarrassing procedural exit in order to detect that there was no controversy between the states in dispute.

International Law after 1996: what's new under the sun?

An expression often ignored in the Court's speech is the fact that it subordinated its conclusions to the "current state of international law" and the "factual elements available to the Court." Therefore, an answer on the timeliness of the Court's conclusions must necessarily take into account the gradual development of international law since 1996, especially on the categories and regimes that the Court has challenged – but not only.

As is well known, the international legal order is a dynamic system, made up of different sets of rules which are in a permanent process of updating, interpretation and customary formation. Litigated in international courts and tribunals, refined at conferences of the parties, discussed by experts and the academy, the rules and principles governing international law are far from being watertight structures. To invoke the precise analysis of the former president of the ICJ, Dame Rosalyn Higgins, international law should be understood as a *process* (Higgins 1995, 7). A quarter of a century later, it is now possible to observe the different impacts of the 1996 Advisory Opinion on different legal regimes, as well as on the general regime. In the end, what's new under the sun?

It would be impossible to examine in detail all the legal regimes listed by the Court in 1996, and even those not highlighted by it despite their relevance. However, some points are worthy of more detailed analysis, precisely because they represent substantial contributions to the

current state of international law. Furthermore, in some cases it is possible to glimpse, with some clarity, the normative horizons which have contributed to the norms and legal regimes examined. Therefore, this work should investigate the legal regime of the use of force in international law, the nuclear weapons regime, the human rights regime and, finally, briefly dwell on the inescapable environmental dimension of public international law.

The use of force regime and nuclear weapons

Since 1996, there have been no significant changes to the fundamental rules regarding the use of force in international law (Gray 2018; Hakimi 2021). Even after the supposed end of the era of the war on terror, the use of force has remained within the limits of Article 2.4, Article 51 of the Charter and the exceptions provided for in customary law. The *theses* of preventive and pre-emptive self-defence found no place in the practice of states, nor were they accepted by the organized international community. Similarly (Murphy 2005; O'Meara 2021), responsibility to protect is not compatible with nuclear weapons.³ For its part, the International Court of Justice has reaffirmed the criteria of necessity and proportionality in the use of self-defense, as well as the need for the existence of an armed attack (International Court of Justice 2004; 2005; 2003; Scobbie 2020).

Although there are novelties in the field of *jus ad bellum*, it seems that none of them justifies a use of nuclear weapons. The principle of proportionality – which also governs the field of international humanitarian law – has value in the field of the right to use force. This means that, in order for the principle to be observed, the armed attack must be of such a magnitude that it amounts to a nuclear attack. A stricter view – and in line with the rules of the field – would suggest that a nuclear weapon could only be used when a state has been the target of a previous nuclear armed attack. In this case, the first attacker would be in full violation of the rules of international law and could face the appropriate international pressure and sanctions. In this context, considering the humanitarian catastrophe that a nuclear attack would entail, it becomes even more crucial for internationalists to firmly reject the doctrines of pre-emptive and preventive self-defense as incompatible with the current state of development of international law.

The nuclear weapons regime

With regard to the use of nuclear weapons, as seen above, the International Court of Justice stated in 1996 that there was no general, customary or conventional rule prohibiting the use of this type of weaponry. The current scenario is not necessarily the same. Since January 22, 2021, the Treaty on the Prohibition of Nuclear Weapons (TPNW) has been in force, with 73 States parties. It would hardly be possible to classify it as a treaty of universal adherence, especially if we consider the

³ Weise, R. "How Nuclear Weapons Change the Doctrine of Self Defense." *International Law and Politics* 44, (2012): 1331-1346.

resistance and opposition faced by the convention on the part of some countries. We also know that the select club of nuclear weapon states will never be part of this instrument – unless there is a substantial change in circumstances. On the other hand, this hypothesis is not completely impossible, considering the role that civil society can play within national political processes. Nevertheless, it doesn't seem to be the case that this pressure will gain support in the near future. However, the treaty's claim is certainly 'universalizing' (Art. 12 TPNW) and the meeting of the parties scheduled for 2022 has opened the channels for increasing its effectiveness, its membership and its impact on the international legal order.

In addition to the universalizing dimension, there are undeniable impacts that the treaty generates in relation to the formation of custom (International Court of Justice 1985, 27; Baxter 1970, 64; Crawford 2013, 218). Would it be possible to say, in the current state of affairs and international legal relations, that the treaty would serve as evidence of a general practice recognized as law which, because it is part of general international law, is binding on all members of the international community? Hardly. Perhaps it can be deduced that parts of the treaty reflect customary international law (especially some obligations contained in Article 1 of the TPNW), notably those that in some way persevere the obligations of the NPT. It is extremely difficult to argue, however, that Article 1.c ("1. Each State Party undertakes never under any circumstances to (c) use or threaten to use nuclear weapons or other nuclear explosive devices") already corresponds to customary law. This provision is in stark contrast to the 1996 Opinion. The ultimate goal of the nuclear activists is that Article 1.c reflects customary law and, consequently, is capable of binding even states that have not accepted the treaty or even non-nuclear states. It will be a relevant test for the persistent objector doctrine, recognized by the 2018 International Law Commission (ILC 2018).

If the current number of states that have signed the treaty eventually ratify it, we will have meaningful adherence (but far from universality). This adherence will be able to create a customary regime, albeit imperfect, or binding on a single number of states. A few more steps would be needed for the regime to become part of general international law – starting with meeting the criteria that there be a general practice, "sufficiently widespread and representative, as well as consistent" (ILC 2018, 53-66). For now, the Treaty provides us with an excellent presumption of *opinio juris*, but little more.

The best-case scenario is that the treaty is a catalyst for customary rules which should be enforceable against all states that do not oppose them at the time of their formation. The path will not be simple, of course, but the expectation is that the treaty will supplant, in whole or in part, the loophole indicated by the International Court of Justice in 1996, in particular by eliminating "any circumstance" (Art. 1.c TPNW) under which the use or threat of nuclear weapons is accepted. Be that as it may, a treaty affirming the prohibition of nuclear weapons that gathered, in 2025, 94 signatures and 73 ratifications was something that certainly did not exist in 1996 and was perhaps even unthinkable. Evolution? Up to discussion. Novelty? Certainly.

The international humanitarian law regime

In the vast field of international humanitarian law, which the Court recognized as applicable to nuclear weapons in 1996, some developments are worth noting. Perhaps the one that deserves close examination in this article is the discussion of peremptory norms of general international law (*jus cogens*).

There has been some progress in the discussions regarding the elevation of some rules relating to the international humanitarian law regime to the category of peremptory norms of international law. In his fourth report, the Special Rapporteur of the International Law Commission on the topic of peremptory rules of general international law, Dire Tladi, analyzed the issue (International Law Commission 2016, 50-63). Not by chance, the “basic principles of international humanitarian law” were included in the non-exhaustive list of peremptory rules prepared by the ILC. Therefore, some legal problems emerge if we consider that part of the rules that the ICJ declared incompatible in 1996 with the use of nuclear weapons are now recognized – or at least excellent candidates – for peremptory rules.

The International Court chose not to rule on the peremptoriness of the norms of international humanitarian law in 1996, exhausting the discussion simply by stating that the question posed by the General Assembly did not concern the character of the norms, but their applicability.⁴ As Professor Luigi Condorelli rightly points out, it merely stated that these principles were ‘non-transgressible’ (Condorelli 1997, 16). In short, the Court did not rule on the potential effects that a peremptory rule would have on the regime. At the time, the Court’s recognition that the rules constituted customary law and applied to the use of nuclear weapons was seen as a step forward. With the current understanding that certain basic rules of international humanitarian law could be considered to have a peremptory character, other questions can be raised.

After the ILC work on peremptory rules of general international law, which compiled significant practice by states, it is possible to say that there is greater clarity about the effects of declaring a rule to be part of *jus cogens*. Now, if the basic principle of peremptory rules is that no derogation is permitted, this means that, at least in theory, the exception envisioned by the Court in 1996 in paragraph 2.E could not contradict a peremptory rule. In order to comply with this rule, the use of nuclear weapons must conform to the basic principles of international humanitarian law – which we know is practically impossible. As Judge Cançado Trindade said in his dissenting opinion in the 2016 *Marshall Islands* Case, nuclear weapons simply ignore the principles of distinction and proportionality (International Court of Justice 2016).

⁴ In the words of the Court “The question whether a norm is part of the *jus cogens* relates to the legal character of the norm. The request addressed to the Court by the General Assembly raises the question of the applicability of the principles and rules of humanitarian law in cases of recourse to nuclear weapons and the consequences of that applicability for the legality of recourse to these weapons. But it does not raise the question of the character of the humanitarian law which would apply to the use of nuclear weapons. There is, therefore, no need for the Court to pronounce on this matter” (International Court of Justice 1996, 83).

An investigation certainly worthy of interest would be to see how the fact that certain peremptory norms stand in contrast to the use of nuclear weapons could also have an impact on the field of international responsibility, in particular on considerations of the exclusion of the wrongfulness of an act (which, in a tenuous way, could justify the exception in paragraph 2.E). Another question, which only the (distant?) future will be able to answer, is whether any of the rules contained in the nuclear weapons regime (the NPT and the TPNW, for a start) could eventually *rise to the status of* a peremptory norm of general international law.⁵

The human rights regime

Another legal regime in which significant developments can be seen and from which consequences can be drawn in relation to the use of nuclear weapons is the legal regime of international human rights law. Since 1996, the case law of regional international courts, as well as enforcement committees and national courts and tribunals, have made effective progress in protecting individual and collective rights in the face of serious human rights violations and armed conflicts. Progress can be seen not only in the field of treaties and the application of norms, but also in the customary field (Schabas 2021; Thirlway 2015, 495-506; Chiusi 2018, 163-174).

Many human rights would eventually be affected by the use of nuclear weapons: the right to life, including the right to health and even the human right to a healthy environment. But it is in relation to the right to life that we have a particularly relevant pronouncement for the international legal regime on nuclear weapons. The UN Human Rights Committee, in its General Comment 36 (United Nations 2018) of 2018 on Article 6 of the International Covenant on Civil and Political Rights, deduces from the Right to Life obligations for states in relation to nuclear weapons. The long paragraph 66 of the Commentary concerns nuclear weapons *in toto*. *In summary*, the UN Human Rights Committee makes it crystal clear that “the threat or use of weapons of mass destruction, in particular nuclear weapons, which are indiscriminate in effect and naturally cause the destruction of human life on a catastrophic scale is incompatible with respect for the right to life and may amount to a crime under international law.”⁶ Therefore, faced with a threat to the right to life, according to the Committee, states have a series of obligations under the International Covenant, also reinforcing the obligation to negotiate. One more element among many that would reinforce a customary claim to this right.

⁵ On this issue, Judge Cançado Trindade ruled in his Dissenting Opinion in the Nuclear Disarmament case, at paras 180-183. However, in the opinion of the Brazilian judge, nuclear weapons would be contrary to other norms that already have the character of *jus cogens*, and not the rules relating to nuclear weapons directly.

⁶ From the original, in free translation, to 66 : “The threat or use of weapons of mass destruction, in particular nuclear weapons, which are indiscriminate in effect and are of a nature to cause destruction of human life on a catastrophic scale is incompatible with respect for the right to life and may amount to a crime under international law. States parties must take all necessary measures to stop the proliferation of weapons of mass destruction, including measures to prevent their acquisition by non-state actors, to refrain from developing, producing, testing, acquiring, stockpiling, selling, transferring and using them, to destroy existing stockpiles, and to take adequate measures of protection against accidental use, all in accordance with their international obligations”.

What would be the legal value of a pronouncement by the Committee? It could be argued that it is a rather broad interpretative step to consider the security regimes of States on the basis of the right to life. However, the International Court of Justice has mentioned in the past that it should “give great weight to the Committee’s interpretation of the Covenant by an independent body and specifically established to supervise the application of the treaty” (International Court of Justice 2010b).⁷ Thus, the General Comments can naturally be understood as an authoritative interpretation of that body of norms made up of the Human Rights Covenants.

As one can see, the Committee’s interpretation also refers to another regime: the fact that the use of nuclear weapons could be considered a crime invokes the international criminal law (Clark 2013). It will not be possible to analyze it properly here, although some considerations are necessary. Despite the fact that there is no specific type of criminal law relating to the use of nuclear weapons, it is common ground in the doctrinal debate that many of the types under the jurisdiction of the International Criminal Court could certainly be configured in that context. A second issue concerns the reflection led by Professor Roger Clark: despite the significant evidence that international law can offer to characterize the use of nuclear weapons as a crime, the problem is always the fact that it acts *after the tragedy*. This does not mean, however, that the rules are superfluous. On the one hand, it will serve *ex post facto* to punish the individuals who made the decision to use such weapons. It cannot be argued that there is no typology. On the other hand, it should at least serve as an additional element to be taken into account when the decision to use nuclear weapons is being made.

If in 1996 the Court could not delve into the international criminal issue because it understood that the special regime of the law of armed conflict would apply, today the situation seems quite different in the light of both General Comment 36 and international criminal law. Furthermore, it is well known that strategic human rights litigation, both internationally and nationally, is very important for taking forward new cases and obtaining important rulings from international courts. It would be very desirable, for example, for the Inter-American Court of Human Rights to rule on nuclear weapons and the right to life against the backdrop of the American Convention.

The international environmental law regime

The growing body of rules and standards that today make up international environmental law (Boyle and Redgwell 2021; Dupuy and Viñuales 2018; Nascimento da Silva 2002; Soares 2003) was not the focus of the Court’s investigation in its Advisory Opinion. In 1996, the international community was still receiving and discussing the impacts of the important Rio de Janeiro Conference, mentioned

⁷ From the original, in free translation, para 66: Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty. The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled. (ICJ 2010, 639, 66).

in the Advisory Opinion itself. The Court even made important pronouncements on the need for environmental protection and the importance of environmental protection rules. The ICJ was clear in observing, for example, that “the environment is under threat on a daily basis 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 yet to be born.”⁸

However, the Court did not take the view that the various environmental obligations that then made up the *corpus of* international environmental law (International Court of Justice 1996, 29) would be sufficient to restrict armed action. On the contrary, the Court’s understanding was that international environmental law was an important element within the law of armed conflict. According to the Court, “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 make it possible to assess whether an action complies with the principles of necessity and proportionality.” (International Court of Justice 1996, 30).

There is certainly a limiting dimension to environmental standards, restricting them to one of the elements to be weighed up in armed conflicts. However, other important customary principles of that set of norms, such as the principles of prevention and precaution, would have a notable impact on the issue debated here. There is certainly some timidity on the part of the Court in 1996 in relation to the application of international environmental standards – which can perhaps be understood in the light of the time and international consensus on the matter.

Nevertheless, since 1996, comprehensive environmental legal regimes have emerged in international law. In 2019, the ILC itself adopted the Guiding Principles for the Protection of the Environment in Armed Conflict, detailing a series of rules that belligerents and non-belligerents must comply with in order to reduce the impacts on the environment as a result of the use of force (ILC, 2019, 58-71). The ILC understood, in line with what the Court had already said in 1996, that environmental considerations should also be taken into account as a factor in weighing up the proportionality of an armed attack. However, the ILC itself has further elaborated on this issue in the last two decades, further restricting the possibilities for the legal use of nuclear weapons.

Another particularly eloquent argument that could eventually affect nuclear weapons is the growing intersection between human rights and environmental protection (Lima 2021). As the obligations regarding the protection and preservation of environmental goods grow in the light of human rights, one could think of using the same normative framework to advance the regulation of nuclear weapons.

⁸ From the original: “29. 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.”

At the present time, especially in the light of important scientific advances in climate science, Judge Shahabuddeen's statement that it would seem strange that, under limited circumstances, states would have the right to conjure up the death of the planet resonates even more strongly. Thus, a more in-depth analysis of environmental legal regimes in the context of nuclear weapons is something that international law will be able to offer in the future.

Conclusion

Two concluding remarks need to be made. It is a banally simplistic statement to say that international law does not offer adequate solutions to the problem of nuclear weapons. As Galileo said in the face of the authorities' insistent refusal to agree with the thesis of heliocentrism, *Eppur si muove*. "And yet, it moves." The different legal regimes capable of influencing the behavior of states and non-state actors in relation to nuclear weapons in 1996 seem to have been strengthened and important values safeguarded in the process.

Does this mean that if the Court were asked the same question today, twenty-five years later, it would make a different decision? The answer to this question does not accept the extremes, yes or no, but nuances. On the one hand, the Court would have to take into account the advances and developments in international law during the period. On the other hand, other factor might be influential to determine the Court's decision-making process.

Has the Advisory Opinion aged well? If we consider the current state of international law, we can safely say that international legal obligations have developed in the direction of limiting the presumptions limiting the sovereignty of states with regard the use of nuclear weapons. In this process, the Advisory Opinion was an important starting point. Its passages and analysis are reflected in all the ILC work on the subject, in the language of some treaties and in the practice of states. In a field of international law as unsteadily dominated by politics as the field of nuclear weapons, the Court's legal decision is an indispensable element of concreteness in the legal order. Given the risks the use of nuclear weapons imply, one cannot be completely satisfied with the current status of the international legal regime on the matter: However, *eppur si muove*.

References

- Abe, N. "The NPT at fifty: successes and failures." *Journal for Peace and Nuclear Disarmament* 3, no. 1 (2020): 224-233.
doi: <https://doi.org/10.1080/25751654.2020.1824500>
- Ago, R. "Binding" Advisory Opinions of the International Court of Justice. *The American Journal of International Law* 85 (1991): 439-451.

- Anghie, A. "Politic, cautious, and the meticulous: an introduction to the symposium on the Marshall Islands case." *American Journal of International Law Unbound* 111, (2017): 62-67. doi: <https://doi.org/10.1017/aju.2017.27>
- Awmee, D. "Nuclear weapons before the international court of justice: a critique of the 'Marshall Islands v United Kingdom' decision." *Victoria University of Wellington Law Review* no. 25, April 04, 2018.
- Barrêto, R.Z. "Quando um não sabe, dois não litigam? O caso das Ilhas Marshall contra Estados detentores de armas nucleares". *Revista da Faculdade de Direito da Universidade Federal de Minas Gerais* 73 (2018): 605-638.
- Baxter, R. R. Treaties and Custom (Volume 129). *The Hague Academy Collected Courses Online / Recueil des cours de l'Académie de La Haye en ligne*. First published online January 2, 1970.
- Bianchi, A. "Choice and (the awareness of) its consequences: the ICJ's 'structural bias' strikes again in the Marshall Islands case." *American Journal of International Law Unbound* 111, (2017): 81-87.
- Bonafè, B. I. "La cour internationale de justice et la notion de différent." *Ordine Internazionale e Diritti Umani* 5, (2016): 924-933.
- Boyle, Alan, and Catherine Redgwell. *International Law and the Environment*. 4th ed. Oxford: Oxford University Press, 2021.
- Burroughs, J. *The (il)legality of the threat or use of nuclear weapons: a guide to the historic opinion of the international court of justice*. Munster: Lit, 1997.
- Cançado Trindade, A. A. *The universal obligation of nuclear disarmament*. Brasília: Fundação Alexandre de Gusmão, 2017.
- Casey-Maslen, S. *Treaty on the non-proliferation of nuclear weapons: a commentary*. Oxford: Oxford University, 2019.
- Chazournes, L. B., and P. Sands. *International law, the international court of justice and nuclear weapons*. Cambridge: Cambridge University, 1999.
- Chiussi, L. "Remarks on the ILC work on the identification of customary law and human rights: curbing 'droit de L'hommisme'?" *The Italian Yearbook of International Law* 27, no. 1 (2018): 163-174.
- Condorelli, L. "La cour internationale de justice sous le poids des armes nucléaires: jura non novit curia?" *International Review of the Red Cross* 79, no. spe. 823 (1997): 9-21. doi: <https://doi.org/10.1017/S0035336100050036>
- Couvreur, P. *The International Court of Justice and the Effectiveness of International Law*. Haia: Brill/Nijhoff, 2016.
- Crawford, J. *State Responsibility: The General Part*. Cambridge: Cambridge University Press, 2013.
- Dupuy, P.-M., and J. E. Viñuales. *International environmental law*. 2nd ed. Cambridge: Cambridge University, 2018.

- Eulálio, G. *Direito ambiental internacional*. São Paulo: Revista dos Tribunais, 2002.
- Evans, C. “Questioning the status of the treaty on the prohibition of nuclear weapons as a ‘humanitarian disarmament’ agreement.” *Utrecht Journal of International and European Law* 36, no. 1 (2021): 52-74. doi: <https://doi.org/10.5334/ujiel.532>
- Falk, R. “The nuclear weapons advisory opinion and the new jurisprudence of global civil society.” *Transnational Law & Contemporary Problems* 7, (1997): 333-352.
- Firmage, E. B. “The treaty on the non-proliferation of nuclear weapons.” *American Journal of International Law* 63, no. 4 (1969): 711-746. doi: <https://doi.org/10.2307/2199482>
- Galindo, G. R. B. “On form, substance and equality between States.” *American Journal of International Law Unbound* 111, (2017): 75-80. doi: <https://doi.org/10.1017/aju.2017.28>
- Gray, C. *International law and the use of force*. 4th ed. Oxford: Oxford University, 2018.
- Greenwood, C. “The advisory opinion on nuclear weapons and the contribution of the international court to international humanitarian law.” *International Review of the Red Cross* 37, no. 316 (1997): 65-75.
- Hakimi, Monica. “Arguing about the Jus ad Bellum.” In *Talking international law: legal argumentation outside the courtroom*, edited by I. Johnstone and S. Ratner. Oxford: Oxford University, 2021.
- Hernández, G. *The international court of justice and the judicial function*. Oxford: Oxford University, 2014.
- Higgins, R. *Problems and process: international law and how we use it*. Oxford: Oxford University, 1995.
- International Court of Justice - ICJ. *Continental shelf (Libyan Arab Jamahiriya/Malta)*. The Hague, 1985.
- International Court of Justice – ICJ. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*. The Hague, 1986. Accessed on March 14, 2025. <https://www.icj-cij.org/case/70/judgments>
- International Court of Justice – ICJ. “Legality of the threat or use of nuclear weapons.” *Advisory Opinion*, July 8, 1996. Accessed on March 14, 2025. <https://www.icj-cij.org/en/case/95>
- International Court of Justice – ICJ. “Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory”. *Advisory Opinion*, The Hague, 2004. Accessed on March 14, 2025. <https://www.icj-cij.org/case/131>
- International Court of Justice – ICJ. *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*. The Hague, 2005. Accessed on March 14, 2025. <https://www.icj-cij.org/case/116/judgments>
- International Court of Justice – ICJ. “Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo.” *Advisory Opinion*, The Hague, 2010. Accessed on March 14, 2025. <https://www.icj-cij.org/case/141>

- International Court of Justice – ICJ. *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*. The Hague, 2010b.
- International Court of Justice – ICJ. *Nuclear disarmament (Marshall Islands v. Nuclear-Weapon States)*. The Hague, 2016. Accessed on March 14, 2025.
<https://www.icj-cij.org/en/case/160>
- International Court of Justice - ICJ. *Oil platforms (Islamic Republic of Iran v. United States of America)*. The Hague, 2003.
- International Court of Justice – ICJ. “Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965”. *Advisory Opinion*, The Hague, 2019. Accessed on March 14, 2025. <https://www.icj-cij.org/case/169>
- International Law Commission – ILC. *Draft articles on responsibility of states for internationally wrongful acts*. Geneva, 2001. Accessed on March 14, 2025.
https://legal.un.org/ilc/texts/instruments/english/draftarticles/9_6_2001.pdf
- International Law Commission – ILC. *Draft Conclusions on the Identification of Customary International Law, with commentaries*. Geneva, 2018. Accessed on March 14, 2025.
https://legal.un.org/ilc/texts/instruments/english/commentaries/1_13_2018.pdf
- International Law Commission – ILC. *Draft Conclusions on Protection of the Environment in Relation to Armed Conflicts*, 2022. Geneva, 2022. Accessed on March 14 2025.
https://legal.un.org/ilc/texts/instruments/english/draft_articles/8_7_2022.pdf
- Joyner, D. *Interpreting the nuclear non-proliferation treaty*. Oxford: Oxford University, 2011.
- Kolb, R. *The international court of justice*. Oxford: Hart, 2013.
- Lima, L. C. “A opinião sobre o arquipélago de Chagos: a jurisdição consultiva da corte internacional de justiça e a noção de controvérsia.” *Revista da Faculdade de Direito da Universidade Federal de Minas Gerais* 75, (2019): 281-302.
doi: <https://doi.org/10.12818/P.0304-2340.2019v75p281>
- Lima, L. C. “Da relevância dos casos de desarmamento nuclear perante a corte internacional de justiça.” *Revista de Direito Internacional* 14, no. 3 (2018): 203-216.
doi: <https://doi.org/10.5102/rdi.v14i3.5000>
- Lima, L. C. “O reconhecimento do direito humano ao meio ambiente saudável pelo Conselho de Direitos Humanos da ONU.” *International Law Agendas*, November 10, 2021. Accessed on February 5, 2025.
http://ila-brasil.org.br/blog/resolucaocdhmeioambiente/#_ftn1
- Miron, A. “Establishing the existence of a dispute before the international court of justice: between formalism and verbalism.” *Questions of International Law*, December 13, 2017.
- Murphy, S. D. “The doctrine of preemptive self-defense.” *Villanova Law Review*, forthcoming, 2005.
- Nascimento e Silva, G. E. *Direito ambiental internacional*. São Paulo: Thex, 2002.
- Oellers-Frahm, K. “The awareness requirement and its problematic consequences for the court’s jurisdiction.” *Questions of International Law*, December 31, 2017.

- O'Meara, C. *Necessity and proportionality and the right of self-defence in international law*. Oxford: Oxford University, 2021.
- Palchetti, P., and L. C. Lima. "70 anos da Corte Internacional de Justiça: retrospecto e perspectivas futuras do principal órgão judicial da Organização das Nações Unidas." In *A ONU aos 70: contribuições, desafios e perspectivas*, edited by L. L. Jubilut, J. C. J. Silva, and L. Ramina, 313-353. Paraná: Universidade Federal do Paraná, 2016.
- Palchetti, P. "Desafios e Perspectivas da Corte Internacional de Justiça". *Revista do Programa de Pós-Graduação em Direito da Unochapecó*, 1 (2018), 52-60.
- Pereira, A. C. A. "Direito internacional e armas nucleares." *Revista da Faculdade de Direito da UERJ* 36, (2019): 302-326.
- Permanent Court of International Justice – PCIJ. *The Case of the S.S. Lotus (France v. Turkey)*. The Hague, 1927. Accessed on March 14 2025. <https://www.icj-cij.org/pcij-series-a>
- Pigrau Solé, A. "El caso de las Islas Marshall: colonialismo, armas nucleares y justicia ambiental." *Anuario Español de Derecho Internacional* 34, (2018): 443-462.
- Ritchie, N., and A. Kmentt. "Universalizing the TPNW: Challenges and Opportunities." *Journal for Peace and Nuclear Disarmament* 4, no. 1 (2021): 70-93. doi: <https://doi.org/10.1080/25751654.2021.1935673>
- Rosenne, S. "The nuclear weapons advisory opinion of 8 July 1996." *Israel Yearbook on Human Rights* 27, (1997): 263-308.
- Rosenne, Shabtai. The Nuclear Weapons Advisory Opinion of 8 July 1996. *Israel Yearbook on Human Rights* 27,(1997), 263-308.
- Ruff, T. "Negotiating the UN treaty on the prohibition of nuclear weapons and the role of ICAN." *Global Change, Peace & Security* 30, no. 2 (2018): 233-241. doi: <https://doi.org/10.1080/14781158.2018.1465908>
- Santa Aria, A. S. "La obligación de negociar el desarme nuclear: ¿un objetivo judicialmente incontrolable?" *Anuario Español de Derecho Internacional* 34, (2018): 397-420. doi: <https://doi.org/10.15581/010.34.397-420>
- Schabas, William A. *The Customary International Law of Human Rights*. Oxford: Oxford University Press, 2021.
- Scovazzi, T., and L. C. Lima, "Do protocolo de Kyoto ao acordo de Paris." *Revista da Faculdade de Direito da UFMG* 78 (2021): 469-476.
- Scovazzi, T. "Remarks on the ILC Work on the Identification of Customary Law and Human Rights: Curbing 'Droit de L'hommisme'?" *The Italian Yearbook of International Law Online* 27, no. 1 (2018): 163-174.
- Scobbie, I. "Exceptions: self-defence as an exception to the prohibition on the use of force." In *Exceptions in international law*, edited by L. Bartels, and F. Paddeu. Oxford: Oxford University Press, 2020.
- Soares, G. *Direito internacional do meio ambiente*. São Paulo: Atlas, 2003.

- Thirlway, Hugh. "Human Rights in Customary Law: An Attempt to Define Some of the Issues". *Leiden Journal of International Law* 28, no. 3 (2015): 495-506.
- Thurer, D. "The Legality of the Use or Threat of Nuclear Weapons: The ICJ Advisory Opinion Reconsidered". *Revista da Faculdade de Direito da Universidade Federal de Minas Gerais* 61, (2012): 304-340.
- United Nations – UN. *General comment no. 36: Article 6: right to life*. New York, October 30, 2018. Access on April 6, 2025. <https://undocs.org/CCPR/C/GC/36>
- Vieira, G. O. and R. E. Batista. "Paz pelo desarmamento nuclear: desafios contemporâneos da proibição com base no impacto humanitário." *Conjuntura Global* 5, (2017): 438-459.
- Weil, P. "'The court cannot conclude definitively...' non liquet revisited." *Columbia Journal of Transnational Law* 36, (1997): 109-119.
- Zimmermann, A., C. J. Tams, J. Christian, K. Oellers-Frahm, and C. Tomuschat. *The statute of the international court of justice (3rd Edition): a commentary*. Oxford: Oxford University, 2019.