The Nuclear Weapons Advisory Opinion of the International Court of Justice and the Fundamental Distinction Between the *Jus ad Bellum* and the *Jus in Bello*

Terry Gill[*]

Keywords: International Court of Justice; nuclear weapons; the right to use force (*jus ad bellum*); the (humanitarian) law of warfare (*jus in bello*).

Abstract: The 1996 Nuclear Weapons Advisory Opinion of the International Court has been both hailed and criticized on various grounds. However, one area, namely the Court's treatment of the distinction between the law regulating the use of force and the humanitarian law of armed conflict, has received relatively little attention. This author is convinced and concerned that the Court's treatment of this issue misconstrued the relationship between these two branches of the law, and in doing so potentially weakened any restraining influence the law of armed conflict might have on the potential use of nuclear weapons.

1. INTRODUCTION

The Nuclear Weapons Advisory Opinion which was handed down by the Court in 1996 in response to a request by the UN General Assembly was the first decision by the Court decided by a casting vote of the President since the controversial *South West Africa* Judgment of 1966[1] and the first *non-liquet* the Court has pronounced in its history. While these reasons would explain significant interest, most of the attention devoted to the advisory opinion has related to the larger question of whether or not the Court has provided support for those who believe that the use of nuclear weapons is illegal *per se*, or those who take the position that some conceivable uses of nuclear weapons are at least potentially compatible with international humanitarian law. Since the Court was unable to make up its mind on this crucial point, both sides on this issue have been able to cry victory and claim that the Court's opinion provides support for their position.[2]

* Associate Professor Public International Law, Utrecht University, The Netherlands.

1. South West Africa Cases (2nd Phase) (Ethiopia *v.* South Africa; Liberia *v.* South Africa) Judgment of 18 July 1966, 1966 ICJ Rep. 6.
2. *See* Falk, *Nuclear Weapons, International Law and the World Court: A Historic Encounter*, 91 AJIL 64 (1991). At 64, Falk concludes that the opinion provides "strong, yet partial and somewhat ambiguous, support to the view that nuclear weapons are of dubious legality". Michael Matheson, a legal adviser at the US State Department provides a contrasting assessment in an article entitled *The Opinions of the International Court of Justice on the Threat or Use of Nuclear Weapons*, 91 AJIL 417-435 (1997), where, at 417, he says "I do not believe that the Court's Opinions suggest a need for any change in the nuclear posture and policy of the United States or the NATO Alliance". Needless

12 Leiden Journal of International Law 613-624 (1999)

One of the most thoughtful commentaries on the Court's Opinion appeared in this Journal from the eminent scholar of legal theory, Professor Koskenniemi,[3] who argued the question presented to the Court was essentially non-justiciable, *inter alia*, because the conflict between politics, law and values in the request was overwhelming and because of what he referred to as the impossibility of lifting the moral *taboo* against the use of nuclear weapons by engaging in contextual reasoning which would necessarily have resulted in the Court's concluding that some uses of nuclear weapons were potentially lawful.[4]

While I largely agree with this assessment I would like to address another aspect of the Court's opinion which I find deeply disturbing and which has received somewhat less attention than the points mentioned previously; namely the implied relationship between the *jus ad bellum* – the law relating to the right to use force, and the *jus in bello* – the law of warfare, nowadays often referred to as humanitarian law. In my view the Court fundamentally misconstrued this relationship and did international law a disservice in the way it linked the two.

For considerations of space, I will abstain from summarizing the Court's opinion or commenting on other related aspects of the opinion beyond what is strictly necessary, in the assumption that those who read this commentary are already familiar with the Court's decision.

2. THE FUNDAMENTAL DISTINCTION BETWEEN THE *JUS AD BELLUM* AND THE *JUS IN BELLO*

One of the oldest and best established *axiomata* of international law and its predecessor 'just war doctrine'[5] is the distinction between the *jus ad bellum* and *jus in bello*. The former is related to the question when the use of force is justified or legal; while the latter is concerned with the actual conduct of hostilities, including which weapons and tactics are permissible and with the status and treatment of various categories of persons involved with or which are affected

to say these two viewpoints are virtually irreconcilable since the nuclear policy of the United States (and that of NATO) is clearly that nuclear weapons are legal means of warfare, even if used first against a conventional attack.

3. M. Koskenniemi, *Faith, Identity, and the Killing of the Innocent: International Lawyers and Nuclear Weapons*, 10 LJIL 137-162 (1997).
4. *Id.*, at 150-153.
5. Just war doctrine is defined as the (meta) legal body of writing dealing with the just causes and purposes of warfare and the conduct of hostilities which is based upon natural law philosophy, Christian theology, and Renaissance humanism and covers roughly the period stretching from the Roman orator-philosopher Marcus Tullius Cicero, writing in the 1st Century BCE, through the writing of Vattel in the 18th Century. For a good overview, *see* W. La Croix , War and International Ethics (1988). Just war doctrine is widely seen as the predecessor of the modern *jus ad bellum* and *jus in bello*. The tradition has been carried on by modern philosophers such as M. Walzer whose book Just and Unjust Wars (1977) is a modern classic in the field.

by the conduct of hostilities, such as civilians, the wounded and prisoners of war. This distinction, which can be traced back through the writings of Grotius[6] to even earlier contributions in doctrine relating to the use of force, is the reason why on the one hand the bombardment of Dresden and of Hiroshima are so controversial despite the Allies legal right to wage war in response to aggression; and on the other hand it is possible for history to judge a man like General Erwin Rommel as an honourable and decent soldier – even to the extent that the United Kingdom and the United States named their recent joint military operation after the nickname he acquired in North Africa, despite the fact that he served a thoroughly illegal and indecent cause.[7]

In the international law of today, this distinction still clearly exists and underlay the reservations that some felt concerning the aerial campaign during Operation *Desert Storm*, notwithstanding the clear legality of the use of force in *jus ad bellum* terms (and the general compliance with the *jus in bello* on the part of the Coalition Forces) in that conflict.[8]

It hardly needs pointing out that the contemporary *jus ad bellum* is contained in the relevant UN Charter provisions and related customary rules and principles pertaining to the prohibition of the use of force in international relations and the exceptions to the prohibition, such as self-defense and the use of force in the context of the UN collective security system; while the contemporary *jus in bello* is provided for in the Hague and Geneva Conventions – and the Protocols thereto, as well as in a number of other treaties and customary rules relating to 'the laws and customs of war'. While few would deny that there is a general relationship between the two, or that any given use of force must comply with both sets of criteria in order to be devoid of illegality, the basic distinction is still

6. H. Grotius, De Jure Belli ac Pacis (2 vols.) (1646). Text in Classics of International Law series (1925) translated by F. W. Kelsey et al. (1925). Vol. II consists of three books, the first two of which deal with the *jus ad bellum* while the last deals with the *jus in bello*.
7. *See, e.g.*, Walzer, *supra* note 5, at 38-39 (on Rommel), at 260-261 (Dresden) and at 263-265 (Hiroshima). The operation referred to is of course *Desert Fox* in mid-December 1998. General Rommel's nickname acquired in North Africa was the 'Desert Fox'.
8. The bombing and strafing of retreating Iraqi columns in the closing phase of Desert Storm was seen by many as unnecessary at the time and the misgivings it caused among both policy makers and the public were at least partially responsible for the ending of the hostilities. Similar comments were made in relation to the extent of the destruction of the Iraqi power and water supply grid by aerial bombardment and the effect of this upon the Iraqi civilian population. *See, e.g.*, D. Hiro, Desert Shield to Desert Storm; The Second Gulf War 286-391 (1992), and O. Schachter, *United Nations Law in the Gulf Conflict*, 85 AJIL 452, at 465-467 (1991). The distinction and principle of equal application of the *jus in bello* were explicitly reconfirmed by the Nuremburg Tribunal and ensuing war crimes trials *e.g.* in the United States *v.* Von Leeb (High Command) case , 15 Ann. Dig. 620 (1948) and in the 1977 Additional Protocol 1 (1977), which states in its preamble, that "the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances [...] without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict". *See* D. Schindler & J. Toman, The Laws of Armed Conflict 627 (1988).

generally considered to be of importance in both state practice and in legal doctrine.

Axiomata are supposed to be so self-evident and self-explanatory that they hardly require further explanation; much less proof.[9] This would certainly seem to apply to the above-mentioned distinction concerning the law relating to the right to use force and the law of armed conflict. However, what is obvious in a general sense is not always so clear in the heat of controversy, or when a number of differing sets of considerations is at issue. This seems to have been the reason why the Court lost sight of this fundamental distinction at various points in its advisory opinion – most particularly in the closing paragraphs of the *dispositif* where the Court refers to "the fundamental right of every state to survival" and to "the impossibility of a definite conclusion on the illegality of the use of nuclear weapons in an extreme circumstance of self-defence".[10] In my opinion, this linking of the possible legality or illegality of the use of nuclear weapons in terms of the law of armed conflict with the right of self-defence – in extreme circumstances or otherwise – was fundamentally flawed and incorrect, in both legal terms and in its policy implications, for reasons I will set out below.

3. THE COURT'S REASONING ON THE COMPATIBILITY OF NUCLEAR WEAPONS AND THE CHARTER *JUS AD BELLUM*

The Court devoted a dozen paragraphs of reasoning in its opinion to the question of the compatibility of the threat or use of nuclear weapons with the contemporary *jus ad bellum* – i.e. the Charter provisions and related customary rules relating to the legality of the use of force.[11] The Court, not surprisingly, identified two grounds for legally employing force at the international level, the use of force in self-defense and within the context of the collective security provisions of the Charter.[12]

With regard to self-defense, the Court repeated the general conditions for the lawful use of force in self-defense which it had stated in its earlier *Nicaragua* judgment of 1986.[13] These included the principles of necessity and proportional-

9. The Webster's Encyclopedic Dictionary defines an axioma as "a self-evident truth or proposition; a proposition whose truth is so evident at first sight that no process of reasoning or demonstration can make it plainer".
10. Legality of the Use by a State of Nuclear Weapons in Armed Conflict (World Health Organization), Advisory Opinion of 8 July 1996, 1996 ICJ Rep. 66, at 226 *et seq.* and 263, 266. The Advisory Opinion will hereafter be referred to as 'Opinion' with indication of the relevant page number and paragraph.
11. Opinion, *supra* note 10, at 244-247, paras. 37-50.
12. *Id.*, at 244, para. 42.
13. Military and Paramilitary Activities in and against Nicaragua (Nicaragua *v.* United States of America), Merits, Judgment of 27 June 1986, 1986 ICJ Rep. 14.

ity (in relation to self-defense). In this context the Court pointed out that these applied, whatever the means of force employed.

The Court went on to say that while the proportionality principle "may thus not exclude the use of nuclear weapons in all circumstances" that any such use would also have to "meet the requirements of the law applicable in armed conflicts which comprise in particular the principles and rules of humanitarian law".[14] As to the other exception to the Charter prohibition of the use of force, the Court found it "unnecessary" to examine the question of the use of nuclear weapons within the context of the UN collective security system.[15]

The Charter provisions relating to the prohibition of the use of force and to these two exceptions were silent on the question of any specific weapons including nuclear weapons. This is of course inherent in the distinction between the *jus ad bellum* and the *jus in bello.* In this context the Court pointed out that "the Charter neither expressly prohibits, nor permits the use of any specific weapon, including nuclear weapons".[16] The *jus ad bellum* is and always has been concerned with the purpose or grounds for using force, not with the question of which weapons may be employed and which are unlawful *per se*, nor with the "means and methods of combat" which belong to the *jus in bello*. This distinction is (rather implicitly) recognized by the Court in this portion of its opinion. In a nutshell, the Court says that force used for an illegal purpose is illegal under the Charter *jus ad bellum*, while force which is used in the context of a recognized lawful purpose is lawful, provided it meets the criteria for lawful use under the *jus ad bellum* such as the principle of proportionality in relation to self-defense *and* meets the criteria of the *jus in bello*.[17] Since the *jus ad bellum* has nothing directly to do with the question of the legality of specific weapons or the means and methods of combat in a more general sense, it was necessary to refer to the *jus in bello* to determine whether the use of nuclear weapons for a legitimate purpose would also comply with the 'law applicable to armed conflict'.

This was why comparatively little space or attention is devoted to the *jus ad bellum* aspects of the question. Since this commentary is focused on the Court's handling of the distinction between the *jus ad bellum* and *jus in bello,* I will abstain from commenting on its treatment of the rules and principles of either branch of the law as such, beyond stating that the Court seems to go out of its way to skirt or avoid any issue which could give rise to potential controversy – including some of real potential relevance, such as the possible use of nuclear weapons within the context of collective security.[18]

---

14. *Supra* note 10, at 247, para. 49.
15. *Id.*, at 245,. para. 42.
16. *Id.*, at 244, para. 39.
17. *Id.*, at 245, para. 42.
18. *See* note 13 *supra.* The Court decided that it was unnecessary to examine the use of nuclear weapons in the context of collective security, internal conflict and belligerent reprisal (*see supra* note 10,

What about the Court's treatment of the distinction between the two branches of the law up to this point in its opinion? The Court correctly points out that the *jus ad bellum* neither rules out, nor rules in the use of nuclear weapons and even concedes that their use may not be disproportionate "under all circumstances". (This is as close as the Court gets to any contextual reasoning in its opinion. While one might have wished the Court to explore this further, it is correct as far as it goes). Likewise, the Court clearly has the distinction between the two branches of the law in mind when it concludes that a use of force which is proportionate under the law of self-defense also has to meet the criteria of the *jus in bello* to be lawful. This is an unexceptionable statement which seems to keep clear the distinction between the two branches of the law. However, I do feel the Court could have been more clear here.

The legality of the use of force in terms of the *jus ad bellum* and the legality of the means of its employment in *jus in bello* terms, including the question of the legality of the use of any specific weapon, are completely separate questions. While any given use of force must, of course, comply with both sets of criteria to be lawful under both branches of the law, the fact that any given use of force may or may not be legal in *jus ad bellum* terms does not affect the question whether the use of a particular weapon, or the means of its employment is or is not in compliance with the *jus in bello* or *vice versa*. This is true whether or not we are dealing with a conventional or a nuclear weapon. Even though a nuclear weapon is significantly different in terms of its destructive power and long term effects, this does not affect the distinction between the lawfulness of its use for a particular purpose (e.g. self-defense) in terms of the Charter *jus ad bellum* and the status of nuclear weapons as a prohibited or non-prohibited weapon and the means of its employment in terms of the (humanitarian) law of armed conflict.

While the Court correctly emphasized the fact that the use of nuclear weapons (like any weapon) would have to comply with both sets of criteria to be lawful in its treatment of the compatibility of nuclear weapons with the Charter *jus ad bellum*, it did so in a way which could be construed as linking the two sets of criteria. For example, the Court correctly pointed out in its treatment of the lawful exceptions to the prohibition of force, that "[a] weapon that is 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".[19] This statement is certainly true as far as it goes. However, it does at least potentially raise the impression that the lawfulness in *ad bellum* terms is somehow related to the status of a weapon in *jus in bello* terms. In my opinion, the Court should have made this distinction clear(er) early in its opinion. This would have perhaps made it easier

paras. 49, 50 and 46 respectively). It should be pointed out that the question of the use of nuclear weapons in the context of belligerent reprisal was done in the portion of the opinion relating to the use of force under the Charter and not in relation to the law of armed conflict where it belongs.

19. Opinion, *supra* note 10, at 244, para. 39.

to avoid the confusion of the two issues it displayed later on its reasoning concerning cases of 'extreme self-defense'.

4. THE COURT'S TREATMENT OF NUCLEAR WEAPONS UNDER THE *JUS IN BELLO* AND 'EXTREME SELF-DEFENSE'

Having dealt with the Charter *jus ad bellum*, the Court devotes the remainder of its opinion, with the significant exception of the closing paragraphs, to the question of the compatibility of the use of nuclear weapons with the rules and principles of the law of armed conflict – the *jus in bello*.[20] This part of the opinion understandably comprised the bulk of the opinion, since it is only by reference to this branch of the law that the question can be determined.

The Court's treatment of the legality of the use of nuclear weapons under the law of armed conflict is not the main subject of this commentary. It would be out of place to review its treatment of this issue at any length. However, since a treatment of the Court's rendition of the legality of the use of nuclear weapons under the law of armed conflict in cases of 'extreme self-defense when the survival of the State is at issue' is central to this commentary, some comment is inevitable.

There were a number of considerations which influenced the Court's treatment of the legality of the use of nuclear weapons in terms of the law of armed conflict, some of which were stated explicitly while others were only implicit. These included the following:

1. Nuclear weapons have unique characteristics in terms of their destructive power and long term effects;[21]
2. Nuclear weapons are not prohibited *per se* under either conventional or customary law in the way chemical or bacteriological weapons are;[22]
3. The legality of the use of nuclear weapons under the law of armed conflict can only be determined by means of reference to the cardinal principles and rules of that branch of the law;[23] and
4. State Practice on the question is extremely divided with one group of States clearly taking the position that the use of nuclear weapons is not (necessarily) incompatible with the law of armed conflict and another

20. The Court examines the legality of the use of nuclear weapons within the context of the law of armed conflict, *see* Opinion, *supra* note 10, at 247-261, paras. 51-95.
21. *Id.*, at 243-244, paras. 355-365.
22. *Id.*, at 256, para. 74.
23. *Id.*, para 78 *et seq.*

> group of States which take the position that any use of nuclear weapons would automatically violate the law of armed conflict.[24]

This division in opinion was reflected within the Court itself and was at least partly responsible – together with the reasons advanced by Professor Koskenniemi in his previously mentioned commentary[25] – for the fact that the Court was unable or unwilling to engage in any sort of contextual reasoning in its treatment of the question.

The above mentioned considerations led in my view to the Court's rather rigid and simplistic rendition of the basic principles and rules of the law of armed conflict. The Court identified some, but by no means all of these basic rules and principles. Because of these considerations, the Court's treatment of those rules and principles it did identify resulted in their being presented almost exclusively in terms of absolute generalized prohibitions without any reference to the balancing of interests and contextual considerations that are as much a part of the law of armed conflict as the absolute prohibitions that the Court put forward in its reasoning. Some of these oversimplifications were pointed to by several of the judges in their dissenting opinions. In my view, the Court's overall analysis and interpretation of the law of armed conflict fell considerably short of what could be expected of a tribunal of its stature and importance in interpreting international law, regardless of the position one takes on the question of the compatibility of the use of nuclear weapons with the law of armed conflict.

The fact that this is understandable and perhaps inevitable due to the considerations mentioned above and the reasons advanced by Professor Koskenniemi may explain the Court's less than satisfactory performance in this regard. However, it is something to be borne in mind when referring to this opinion as an interpretation of the general rules and principles of the law of armed conflict.

Be that as it may, after examining (some of) the fundamental rules and principles of the law of armed conflict, among which the Court identified the "overriding consideration of humanity", the prohibition of means and methods of warfare which precluded any distinction between civilian and military targets, and the unique characteristics of nuclear weapons,[26] the Court concluded that "the

---

24. The division in state practice between nuclear weapons states and their allies and states which are opposed to the use of nuclear weapons on any grounds is referred to repeatedly throughout the Court's opinion, *e.g.* in discussing the position of states in relation to UNGA Resolutions on the question. *See* in this respect Opinion, *supra* note 10, paras. 68-73; *see also id.*, at 261-262, paras. 91-91 of the Opinion.
25. *See* note 3 *supra*. The Court was deeply divided as evidenced by the necessity of the President using his casting vote on the basis of Art. 55 (2) of the Court's Statute to even reach a majority.
26. *See* Opinion, *supra* note 10, at 262, para. 95; *see also* note 21 *supra*. The Court misconstrued the place of the principle of humanity in this portion of its Opinion in my view. The principle of humanity is not 'overriding' in any meaningful sense within the overall context of the law of armed conflict. Rather it must be applied as part of an equation alongside the principle of military necessity in order to ascertain whether the use of a particular weapon in a given situation is or is not permissible. While

use of such [nuclear] weapons seems scarcely reconcilable with such requirements". The Court added that it did not possess sufficient "elements" [facts] to definitely conclude "that the use of nuclear weapons would necessarily be at variance with the law of armed conflict in any circumstance".[27]

This would seem to be as close as one can come to saying that any use of nuclear weapons would violate the law of armed conflict, without actually saying it. One can agree or disagree with the Court's analysis, but the Court's conclusion is arrived at by an interpretation of the *jus in bello* and so necessarily the reasons for agreeing or disagreeing with the Court would likewise have to be based on the *jus in bello*. However, it is at this point the Court loses sight of the distinction between the law pertaining to the justifiability of the use of force and the law which governs the employment of specific weapons and the actual conduct of hostilities when it makes the following statement in the immediately subsequent paragraph of its opinion:

> Furthermore the Court cannot lose sight of the fundamental right of every State to survival, and thus its right to resort to self-defence, in accordance with Article 51 of the Charter, when its survival is at stake.[28]

Not only does this statement almost flatly contradict the Court's conclusion that the use of nuclear weapons seems "scarcely reconcilable" with the rules and principles of the law of armed conflict, it completely and incorrectly mixes the two sets of criteria pertaining to the *jus ad bellum* and the *jus in bello* in a way that misinterprets and undermines the law and has grave policy implications.

This is obviously a strong statement which requires some explanation. Firstly, the question whether nuclear weapons are used in self-defense, in accordance with Article 51 of the Charter, is totally irrelevant to the question whether the use of nuclear weapons and the means and methods of their employment is reconcilable with the rules and principles of the law of armed conflict. The Court had already pointed out that the Charter provisions relating to the use of force – in self-defense or otherwise – had nothing to say on the question of nuclear weapons, or any other weapons for that matter.[29] We have already examined that portion of the Court's opinion and need not repeat what was said, beyond stating that the question of the legality of a particular weapon or the means

---

certain weapons are totally prohibited, those which are not, such as nuclear weapons, must be assessed in terms of whether the amount of suffering which the use of a particular weapon would cause in a given situation exceeds the concrete military advantage which would result from its use. This is why the Court's refusal to employ contextual reasoning made its analyses somewhat artificial and incomplete. *See* for further information, *inter alia*, F. Kalshoven, Constraints on the Waging of War 159-160 (1987); L.E. Green, The Contemporary Law of Armed Conflict 121-126 (1993); D. Fleck (ed.), The Handbook of Humanitarian Law in Armed Conflict 111-116 (1995).

27. *Id.*
28. Opinion, *supra* note 10, at 263, para. 96.
29. *Id.*, at 244, para. 39. *See also* Section 3 of this commentary.

and methods of its employment are not governed by the *jus ad bellum*, but by the law of armed conflict. A weapon which is (not) prohibited by the *jus in bello* can be used for either aggressive or defensive purposes.

Secondly, if the Court is correct that the use of nuclear weapons is "scarcely reconcilable" with the law of armed conflict, why would this change because a state felt its survival to be at stake and used them in self-defense to counter a threat to its existence? If the 'overriding' principle of humanity would be violated by virtually any use of nuclear weapons, would this change because of the 'fundamental' right of a state survival in self-defense? Do the rules and principles of the *jus in bello* become somehow less binding because a State violates them in self-defense when it feels its survival is at stake?

If, however, the Court is incorrect in its interpretation of the law of armed conflict and its conclusion that virtually any use of nuclear weapons would almost inevitably violate the law of armed conflict, then it follows that at least some uses of nuclear weapons are potentially compatible with the law of armed conflict. This is the position of the nuclear weapons powers and their allies. The examples most often cited by these states, which would be potentially compatible with the law of armed conflict are usually in the realm of battlefield or tactical nuclear weapons used against significant military targets, such as massive tank or troop formations, or enemy warships (ideally) in thinly populated areas and under relatively controlled circumstances, i.e. at a level well below all-out nuclear exchange.[30] This position is disputed by those states that oppose any use of nuclear weapons on the grounds that such battlefield use cannot be controlled and that any use of nuclear weapons is likely to escalate to all-out nuclear warfare.[31]

Regardless of which side is correct in its assessment, the Court's statement on the use of nuclear weapons under extreme circumstances when the survival of the state is threatened is irreconcilable with either position. One can hardly imagine circumstances in which the controlled use of nuclear weapons is less likely, than when a state feels its very survival to be threatened. Those states which take the position that the use of nuclear weapons would be lawful if done so in compliance with the law of armed conflict do not necessarily limit their possible use to situations when the state's survival is threatened,[32] nor do they say that a use of nuclear weapons which would otherwise be unlawful because it violated the law of armed conflict, would become lawful because it was done in

30. The Court paraphrased this position and quoted the Statements to the Court of two nuclear powers to this effect in para. 91 of its Opinion, *supra* note 10, at 263.
31. The Court paraphrased this position by a sizeable number of states in para. 92 of its Opinion, *supra* note 10, at 262.
32. For example NATO nuclear doctrine is based upon the possibility of the use – even the first use – of nuclear weapons in response to a large scale attack – even a conventional attack – upon *some* members of the alliance. Such an attack would not necessarily threaten the *survival* of any of the members, much less of all of them.

extreme self-defense in response to the threat to the survival of the state.[33] Those states opposed to any use of nuclear weapons, because any use is likely to escalate to full scale nuclear warfare, are hardly likely to agree that nuclear weapons could be used under circumstances which are probably most likely to result in uncontrolled use.

Finally, and perhaps most disturbing, is the way the Court introduces the notion that an extra-legal concept like 'the survival of the state' could override the rules and principles of the *jus in bello*. To be sure the Court couched this reference to state survival in terms of the Charter right to self-defense, but this hardly changes the issue.

Perhaps it is naive to believe that the law of armed conflict could have any regulating or restraining effect upon the decision to use nuclear weapons and the way that they were employed – especially if a State feels its survival is at stake. Nevertheless, for the Court to imply that the use of nuclear weapons under such conditions, provided it was done in self-defense, would be lawful – after having concluded that virtually any use of nuclear weapons would violate the law of armed conflict, is to my mind an untenable position for a court of law. The entire *rationale* of the distinction between the *jus ad bellum* and the *jus in bello* is that while there are only certain purposes and objectives which can justify the use of force, there are limitations to what *either* side may do in warfare, no matter what the cause is and which objectives are pursued.[34]

The distinction between the *jus ad bellum* and *jus in bello* is practically as old as warfare itself. It serves a fundamental purpose of reinforcing the restraining effect of the laws of war by providing that they apply to both sides equally, regardless which side has the right to use force on its side. If the distinction is blurred, the result is that whichever side feels it has the right to use force and 'justice' on its side will be more likely to do anything expedient to subdue the unlawful aggressor, while the side which resorts to force without a justification will have little or no motivation to observe any humanity or restraint in its conduct of hostilities. By blurring this distinction, the Court has potentially weakened any restraining influence *jus in bello* might have upon the use of nuclear weapons. In my view, the Advisory Opinion on the *Threat or Use of Nuclear Weapons* should be written off as a judicial error and relegated to the

33. The nuclear weapons states have consistently maintained that *any* use of nuclear weapons would have to be in conformity with the law of armed conflict. *See, e.g.*, para. 91 of the Opinion where the Court quotes the UK Statement to the Court to this effect.

34. This is a constant theme of the just war tradition. *See, e.g.*, Cicero, De Officiis (Loeb Edition) I, xi, at 34-36. This is the *rationale* behind the principles of non-combatant immunity, the duty to discriminate between civilian and military targets, the prohibition of denying quarter to a surrendered enemy etc. That these principles are not necessarily absolute (e.g. subject to the principles of necessity and proportionality *in bello*) a point the Court virtually ignored in its rendition of the law of armed conflict, does not change the fact that they are binding principles on *all* operations of war by *either* side to a conflict.

status of one of those cases which we would sooner forget than look to for guidance.

https://doi.org/10.1017/S092215659900031X Published online by Cambridge University Press