

# Transformation in the Approach of the International Court of Justice from Legality to Legitimacy in the Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons

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## Abstract

The advisory opinion of the International Court of Justice (ICJ) regarding the legitimacy of nuclear weapons created a fundamental shift in international legal reasoning, moving from a formalistic emphasis on legality to an essentialist focus on legitimacy. This article examines how the ICJ integrates broader humanitarian and environmental considerations into its interpretation of international law, particularly through the right to life, the prohibition of indiscriminate attacks, and the preservation of the environment. This shift reflects an emerging trend in the philosophy of international law that prioritizes collective human and environmental welfare over rigid state sovereignty. Key findings highlight the ICJ's acknowledgment of the catastrophic consequences of nuclear weapons for both humanity and the environment. While the Court refrained from explicitly declaring nuclear weapons illegal, it established fundamental principles underscoring their incompatibility with humanitarian law and environmental protection. This transformation represents a broader movement in international law toward incorporating human rights and sustainability into the framework of state conduct. The study concludes by considering the implications of the ICJ's approach for contemporary issues such as disarmament, environmental treaties, and the evolving concept of state responsibility in a globalized legal order.

**Keywords:** Rule of law, International Court of Justice, nuclear weapons, legality, legitimacy.

Received: 16 November 2023

Revised: 29 December 2023

Accepted: 13 January 2024

Published: 25 January 2024



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**Citation:** Rouhi, E., Mousavi, S. F., & Hemti Khah, F. (2024). Transformation in the Approach of the International Court of Justice from Legality to Legitimacy in the Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons. *Legal Studies in Digital Age*, 3(1), 46-55.

## 1. Introduction

Over the past several decades, advisory proceedings at the International Court of Justice (ICJ) have become some of the most controversial matters in international affairs. Among the significant advisory opinions are the 2010 opinion on the

Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo and the 1996 opinion on the Legality of the Threat or Use of Nuclear Weapons. Advisory opinions directly impact the vital interests of states. An advisory opinion is a judicial opinion that provides guidance to natural or legal persons on a legal issue. Lawmaking by the Court is a method through which it can influence state behavior. Certainly, the laws previously declared have had an impact. If the Court can continue to create law in an appropriate manner to ensure its legitimacy, it can seize this opportunity to expand its influence (Park, 2018).

Typically, national advisory opinions are issued by the supreme court of a country and are non-binding unless expressly mandated by specific legislation. The same idea underpins the advisory opinions of the ICJ. The aim of the Court's advisory opinions is to assist other organs of the United Nations in carrying out their activities (Stavridi, 2024). Considering that the issuance of judicial decisions is one of the mechanisms for the exercise of the rule of law, and taking into account the consensual nature of jurisdiction, the Court, invoking Article 96(1) of the UN Charter and Article 65(1) of its Statute, issues advisory opinions without the agreement or consent of the states concerned. Advisory opinions are not formally binding on states. Nevertheless, the Court exercises its authority to determine the precise scope of states' rights and obligations and declares what international law requires a state to do or to refrain from doing. Therefore, the Court can play a decisive role in international bargaining and in the resolution of many disputes. One important issue concerning advisory opinions is their relation to political interests, which directly address state sovereignty and the legality of state actions.

The purpose of this study is to review the function of the ICJ's advisory opinion on the issue of legitimizing the use of nuclear weapons from a legal perspective and to highlight the strengths and weaknesses of the advisory opinion in this regard. On December 15, 1994, the United Nations General Assembly, through the adoption of a resolution, welcomed the request for an advisory opinion submitted by the World Health Organization and, in turn, submitted its own request to the Court, posing the question of whether the threat or use of nuclear weapons is permitted under international law under any circumstances. Consequently, the legality of the threat or use of nuclear weapons was addressed in the Court's 1996 advisory opinion. This opinion states that while the threat or use of nuclear weapons is generally contrary to international humanitarian law, it cannot be conclusively determined that such a threat or use would be unlawful in a situation where the survival of a state is at stake. The Court declared that no source of international law explicitly authorizes or prohibits the threat or use of nuclear weapons, but such threat or use must comply with the United Nations Charter and the principles of international humanitarian law. This is because these weapons are capable of causing extensive and unlimited contamination and, while undermining the principles of international humanitarian law, qualify as weapons of mass destruction (Shah-Hosseini, 2002).

The advisory opinions of the Court have contributed to the development of the rule of law at both domestic and international levels and, in some instances, have led to the progressive development of existing international law. Advisory opinions can be seen as a means to compensate for the inability of the United Nations and specialized agencies to act effectively before the Court. Although the advisory opinion functions as a soft strategy for states and aids in the judicialization of international relations, it remains non-binding and therefore unreliable. Conducting this study, given the nature and specific scope of the subject matter, holds scientific and legal significance and can assist in providing legal solutions. Moreover, it can contribute to the advancement of humanitarian law and the protection of the environment through the formulation of a set of laws aimed at reducing conflict and safeguarding individuals. Therefore, this article examines and analyzes the legitimizing role of the ICJ's advisory opinion on the use of nuclear weapons from a legal perspective and endeavors to identify its strengths and weaknesses.

## **2. The Role of the International Court of Justice in the Development of International Law**

### *2.1. The Court as an Active Agent in the Development of International Law*

Nuclear weapons, as symbols of the military and political power of the states possessing them, have always raised significant concerns regarding global security. After World War II and with the emergence of the Cold War, the arms race between major powers intensified, making the use of nuclear weapons a hotly contested issue in political and legal arenas. The findings before the Court emphasize the catastrophic nature of nuclear weapons for humanity and the environment. Given that no provision in the United Nations Charter explicitly prohibits nuclear weapons and that the prohibition on the use of nuclear weapons has not yet crystallized into a peremptory norm of international law, the Court has played an active role in the development of

international law. Nevertheless, the Court has refrained from intervening in the legislative process and infringing upon state sovereignty.

Despite rejecting any explicit denial of the Court's involvement in law-making processes, it is important to recall that the Court has remained the principal judicial organ of the United Nations rather than a global legislator. The Court has repeatedly emphasized its strong commitment to its purely judicial role. In its repeated statements in the Nuclear Weapons advisory opinion, the Court refused to adopt the proposals of certain states seeking a law-making role, stating: "It is clear that the Court cannot legislate... its task is to engage in its normal judicial function of ascertaining the existence or otherwise of the legal principles and rules... it states the law as it is, not as it might be". Similarly, in the Fisheries Jurisdiction case involving Iceland, the Court declared that, as a judicial body, it cannot legislate or anticipate the law before it has been made by the competent law-making authorities (Mayr & Mayr-Singer, 2016).

The ICJ's repeated reaffirmation of its purely judicial role stems from the nature of the international judicial system and rests on the fundamental principles of international law. A basic assumption of the international legal order is that only rules resulting from the express will of states can bind them. Thus, in order to preserve the essential element of its legitimacy, the Court must base its judgments on existing law. The Court's approach allows it to maintain claims of objectivity and preserve the trust of member states. Simply put, the Court has an interest in upholding the view that it merely applies existing law. This perspective enables it to affirm the consent of the parties and deny any function as a law-creating agent, thereby supporting the legitimacy of its reasoning as a mere reflection of existing law (Hernández, 2014).

The Court's opinion holds particular significance for the development of international law, as its advisory opinion has important implications for other matters such as the right to self-determination and the confrontation of nuclear threats (Omid, 2013).

## 2.2. *The Legal Approach of the International Court of Justice in the Advisory Opinion*

Beyond the broader obligations of nuclear disarmament, the prohibition of atmospheric nuclear testing has now crystallized into customary international law. However, this is not easily said regarding underground testing. Nevertheless, the Rarotonga, Bangkok, Pelindaba, and Semipalatinsk treaties require their member states not to conduct nuclear tests and call upon them to prevent such tests within their territories (Nystuen et al., 2014).

Thus, under international regulations, there is no explicit rule against the use of nuclear weapons, although specifically, the possibility of lawful use has been significantly restricted. Regarding the possession, production, and storage of nuclear weapons, several countries have established important regulatory frameworks aimed at preventing nuclear proliferation. Therefore, considering the issue of nuclear disarmament as also referenced in the Non-Proliferation Treaty (NPT), and the prohibition of atmospheric nuclear testing (both treaty-based and customary), by extension, the use of nuclear weapons should logically be prohibited.

In the matter of nuclear weapons and the prohibition of their use, the International Court of Justice has also intervened and articulated its advisory opinion within the framework of international legal obligations and in accordance with legal procedures (Nystuen et al., 2014). This is because the nuclear threat is regarded as one of the acts constituting a violation of humanitarian law. Furthermore, the proliferation of nuclear weapons leads to nuclear extortion and the threat to states (Meshkat & Asgarkhani, 2019).

## 3. **The Function of the Advisory Opinion of the Court in the Settlement of International Disputes**

International arbitral institutions have significantly increased over past decades both in number and institutional design. However, depending on the design and the framework of the relevant treaty, their role and function also differ, especially when moving beyond the traditional dispute settlement function. While the nature of international arbitration might be considered sufficient for "dispute settlement," some international institutions have more readily adopted a new perspective (Hernández, 2014). This shift is due to the increasing complexity of disputes over time.

The Court, in particular, has been criticized for not always embracing this role, often restricting itself to functioning as a strictly bilateral dispute settlement body. Some scholars argue that the Court's exercise of advisory jurisdiction differs from the limited approach of aiding dispute settlement and thus promotes a "collective-centered system" (Collier & Lowe, 1999). Nevertheless, the precise role and function of advisory opinions vary depending on the institutional framework employed. It is noteworthy that the primary purpose of such opinions is to respond to legal questions in a general manner.

This distinguishes advisory opinions from the function of a permanent legal advisor established for the benefit of specific organs and reinforces the mission of "peace through law," based on the idea that the work of independent international judicial bodies can serve as a suitable alternative to war (Hofbauer, 2023).

The Court can issue an advisory opinion on any legal question at the request of any organization or institution authorized under the United Nations Charter. When a dispute is ongoing between states, and the United Nations, at the request of the Security Council or the General Assembly, seeks an advisory opinion from the Court, no state can prevent the proceedings. It appears that the advisory opinion, by its very nature, serves the "public interest" better than proceedings concerning specific disputes.

Therefore, states widely resort to the Court's advisory opinion to resolve their disputes (D'Argent, 2019). Although the Court's advisory opinions, especially when accompanied by separate and dissenting opinions, are rich in statements and interpretations concerning international humanitarian law and its interaction with other areas of international law, many of its functions are particularly significant within humanitarian law (Doswald-Beck, 2010).

In particular, the Court stated in paragraph 90 of the 1996 advisory opinion that the principle of proportionality must be regarded as one of the fundamental principles of humanitarian law (Aghalar & Raei, 2022).

#### **4. Shift Toward Legitimacy in the Court's Reasoning to Support Human Rights**

In its advisory opinion on the legality of the threat or use of nuclear weapons (1996), the Court referred to the International Covenant on Civil and Political Rights (ICCPR) and stated: "The protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant, whereby certain provisions may be derogated from during a public emergency threatening the life of the nation, but respect for the right to life is not among these. This right cannot be suspended and must be respected even in wartime, and must be applied together with humanitarian law".

Thus, the Court considers the right to life as non-derogable and applicable at all times and in all places. In relation to the prohibition of the use of nuclear weapons under Article 2 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the Court stated that the use of such weapons would constitute genocide if it were carried out with "intent to destroy" a national, ethnical, racial, or religious group.

Considering the destructive effects and devastating potential of nuclear weapons, the Court stated that inflicting unnecessary suffering on combatants is prohibited, and nuclear weapons have the capability to inflict severe suffering on humanity and to harm future generations. States are not completely free to use any weapon they choose.

The Court distinguished between military and civilian targets and properties and stated that one of the fundamental rules of humanitarian law, which in effect protects civilian lives and property during armed conflict, is the prohibition of indiscriminate attacks. The Court identified the principles of distinction and the prohibition of indiscriminate attacks as customary international law and inviolable humanitarian law rules. Therefore, the Court stated that states are prohibited from using weapons that cannot distinguish between military and civilian targets and properties.

The Court considers all states bound to prohibit the use of indiscriminate weapons under treaty obligations, whether or not they have ratified the relevant treaties, recognizing this prohibition as arising from "customary international law".

The Court stated that the use of force exercised under the right of self-defense must comply with the applicable law of armed conflict, which is embodied in the principles and rules of humanitarian law, in order to be considered legitimate.

Although the Court, adopting a formalist approach to the rule of law, did not regard the principle of proportionality as an absolute obstacle to the use of nuclear weapons in the exercise of self-defense, it emphasized that the use of force must comply with humanitarian law principles and rules to be legitimate. By recognizing the principles of the prohibition of indiscriminate attacks and the principle of distinction as inviolable principles of customary international law, the Court affirmed that states must not use weapons incapable of distinguishing between military and civilian targets and properties.

Although the Court, considering the existing state of treaty and customary international law, concluded that it could not reach a definitive conclusion regarding the legality or illegality of the use of nuclear weapons in extreme cases of self-defense where the survival of a state is at stake, it invoked Article 6 of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) and called upon all parties to the NPT to pursue negotiations in good faith towards the cessation of the nuclear arms race and nuclear disarmament.

The Court stated that "the legal obligation under Article 6 entails not only an obligation to pursue negotiations but also to achieve a precise result: nuclear disarmament in all its aspects, accomplished through good faith negotiations".

In this advisory opinion, the Court offered a definition of good faith and took a step toward nuclear disarmament, recognizing a reciprocal relationship between the maintenance of international peace and security and nuclear disarmament, with significant implications for peace and security, the primary objective of the United Nations.

## **5. Shift Toward Legitimacy in the Court's Reasoning for the Protection of the Environment**

The Court, emphasizing the catastrophic nature and destructive and annihilating power of nuclear weapons and the impossibility of containing them, stated that nuclear weapons have the capability to destroy all civilization and the ecosystem of the planet. Referring to certain capabilities of nuclear weapons, such as the release of vast amounts of heat and energy and powerful and long-lasting radiation, the Court, based on the documents before it, concluded that the damage caused by nuclear weapons is significantly greater than that caused by other weapons. The Court referred to various treaties concerning the production, acquisition, use, and testing of nuclear weapons and stated that these treaties express the deep concern of the international community about nuclear weapons and could be seen as a prospect toward the future prohibition of such weapons, although they themselves do not establish such a prohibition.

The Court emphasized that the use of nuclear weapons constitutes a catastrophe for the environment and that states are obliged to ensure that activities conducted within their territory or areas under their control do not cause damage to the environment of other states or areas beyond national jurisdiction. The Court also stated that environmental treaties and obligations under international environmental law do not preclude the exercise of the right of self-defense under existing international law. Nevertheless, states must respect the principles of necessity and proportionality when evaluating their lawful actions to protect the environment. In its advisory opinion, the Court demonstrated that the prevention of transboundary environmental harm forms part of customary international law (Park, 2018).

The Court emphasized that Article 35(3) and Article 55 of Additional Protocol I to the 1977 Geneva Conventions afford greater protection to the environment but stated that these provisions are binding only upon states that have ratified the Protocol. Furthermore, the Court concluded that these two articles have not yet attained customary and binding status. The Court referred to United Nations General Assembly Resolution 47/37, stating that the destruction of the environment without military necessity and unlawfully constitutes a violation of existing international law, and called upon states to take appropriate measures to ensure compliance with international environmental law during armed conflicts and to join international treaties in this field.

Ultimately, the Court concluded that although international environmental law does not explicitly prohibit the use of nuclear weapons, environmental elements must be respected in the application of principles and rules applicable to armed conflict.

The Court examined the principles and provisions of the United Nations Charter, particularly Article 2(4) and Article 51, and concluded that the Charter's provisions on the prohibition of the threat or use of force and the principle of self-defense do not refer to any specific type of weapon. Therefore, the use of force, regardless of the weapon employed, must comply with these principles. The Court further stated that a weapon which is deemed unlawful either under treaty law or customary law cannot become lawful merely because it is used for a legitimate purpose under the United Nations Charter.

Thus, the Court did not consider the mere possession of nuclear weapons as an unlawful threat to use force. The Court affirmed that states' obligations under international environmental law do not prevent the exercise of the right of self-defense under existing international law, except when the use of force is directed against the territorial integrity or political independence of a state or is inconsistent with the purposes of the United Nations, or when states fail to observe the principles of necessity and proportionality in their acts of self-defense. Accordingly, based on existing international law, the Court could

not reach a definitive conclusion regarding the legality or illegality of the use of nuclear weapons by a state when its survival is at stake.

In the case concerning the legality of the use of nuclear weapons, the Court relied on the Hague and Geneva Conventions, the International Covenant on Civil and Political Rights, the principles and provisions of the United Nations Charter, the 1948 Genocide Convention, the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), relevant General Assembly and Security Council resolutions, the Convention on the Prevention of Transboundary Harm, the 1969 Vienna Convention on the Law of Treaties, and several instruments regarding the capabilities of nuclear weapons, including the 1993 Paris Convention on Chemical Weapons and the 1972 Biological Weapons Convention.

The Court examined the Hague and Geneva Conventions, General Assembly Resolution 47/37, the Convention on the Prevention of Transboundary Harm, numerous documents concerning the capabilities of nuclear weapons, and the principles and provisions of the United Nations Charter and relevant General Assembly and Security Council resolutions. Despite its formalist approach, the Court reiterated that obligations under international environmental law do not preclude the right of self-defense under existing international law. It stated that the Additional Protocol I to the Geneva Conventions is binding only on states that have ratified it, and that Articles 35(3) and 55 of the Protocol have not yet achieved customary and binding status.

The Court adopted a substantive approach toward the rule of law for the protection of the environment and stated that states must observe the principles of necessity and proportionality regarding environmental protection when evaluating their lawful actions. The Court called upon states to take appropriate measures during armed conflict to ensure compliance with international environmental law and regarded the unlawful destruction of the environment without military necessity as a violation of existing international law. The Court further urged states to join international environmental treaties.

The Court also defined the environment as belonging to future generations. This statement assigns an essential role to environmental elements. Accordingly, in this case, the Court considered international environmental law rules as dynamic norms that must be interpreted in light of the evolving conditions of the international system. This signals a shift in the Court's formalist approach toward a substantive orientation favoring the protection of the environment, future generations, and the establishment of the rule of law.

## **6. The Imposition of Limitations by the Court on the Use of Nuclear Weapons**

In this advisory opinion, reporting to the Security Council and the requirement that self-defense must be proportionate to the armed attack and necessary were considered limitations on the exercise of the right of self-defense. By recognizing these limitations, the Court followed a substantive approach to the rule of law when exercising the right of self-defense. Thus, states must provide strong justifications to defend the use of nuclear weapons in emergency situations.

Despite the Court's formalist approach, which did not consider mere possession of nuclear weapons as an unlawful threat to use force, the Court nevertheless stated that the threat or use of nuclear weapons is generally contrary to the rules of international law applicable in armed conflict, which are embodied in the principles and rules of humanitarian law. Therefore, in this opinion, the Court adopted a substantive approach supporting human rights as a component of the rule of law and contributed to the progressive development of international law.

The Court also offered an expansive interpretation of the right to life, emphasizing the observance of the right to life during armed conflicts and the non-derogability of this right. The Court referred to the destructive potential of nuclear weapons against national, ethnic, religious groups, and humanity as a whole, as well as their harm to future generations. Accordingly, the Court stated that states are not free to use any weapon of their choosing.

In this opinion, the Court emphasized the observance of humanitarian law principles and rules in the use of nuclear weapons and moved towards a substantive approach to human rights as a pillar of establishing the rule of law. It also questioned whether it is possible to use nuclear weapons while simultaneously respecting humanitarian law principles and regulations.

Despite the Court's formalist tendency, which concluded that international environmental law does not explicitly prohibit the use of nuclear weapons, it recognized that a substantive approach to the rule of law must prevail, requiring the protection of environmental elements during the application of principles and rules applicable in armed conflict.

The Court, referring to the catastrophic characteristics and destructive power of nuclear weapons, stated that they have the capability to destroy all civilization and ecosystems. It classified the use of nuclear weapons as an environmental catastrophe.



The Court then emphasized that states must ensure that activities conducted within their controlled areas do not harm the environment of other states or areas beyond national jurisdiction, holding states accountable for destructive activities carried out within their territories and accepting the principle of state responsibility for environmental damages, as accountability and responsibility before the law are fundamental components of the rule of law.

The Court accepted the principle of the use of force within the framework of self-defense and stated: "The Court cannot disregard the practice of the right of self-defense, which has been followed by the international community for many years". Although the Court recognized the right of self-defense as an exception to the prohibition on the use of force, it did not accept that the use of force under the pretext of self-defense legitimizes the use of any means of warfare; it conditioned the legitimacy of self-defense on the observance of the principles of necessity and proportionality.

Therefore, according to the Court, even when the use of nuclear weapons is not absolutely prohibited for self-defense, nuclear deterrence itself is not legitimized. Rather than merely considering the legality or illegality of nuclear weapons, the Court focused on the legitimacy or illegitimacy of their use. Through this advisory opinion, the Court played an effective role in developing the substantive approach to the rule of law and international law.

## **7. The Impact of the Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons on International Law with an Emphasis on International Humanitarian Law**

Following the issuance of the advisory opinion on the legality of the threat or use of nuclear weapons, the right to life, along with other humanitarian rights, became applicable in armed conflicts, and the principles of distinction and the prohibition of indiscriminate attacks were recognized by the Court as customary international law.

Although the advisory opinion could not fulfill the international community's demand for complete nuclear disarmament and despite the Court's declaration of its inability to reach a decisive conclusion regarding the legality or illegality of nuclear weapons under existing treaty or customary international law, it nevertheless called upon nuclear-armed states to engage in negotiations aimed at halting the nuclear arms race. This stance was welcomed by the General Assembly and the United Nations, which subsequently invited states to initiate negotiations aimed at prohibiting the development, testing, production, transfer, accumulation, threat, or use of nuclear weapons.

What is important here is the complex relationship between international humanitarian law and human rights law, both domestically and within international human rights regulations. It is often stated that in scenarios of armed conflict, whether internal or international, extensive derogation from human rights is permitted, and international humanitarian law rules are applied as a substitute.

The Court clarified part of this debate by adopting a general rule on the continuity of obligations under the International Covenant on Civil and Political Rights (ICCPR) during armed conflicts, thereby enabling the concurrent application of the Geneva Conventions and their Protocols.

In this regard, the International Court of Justice (1996) stated in its advisory opinion that some advocates for the illegality of the use of nuclear weapons have argued that such use violates the right to life guaranteed in Article 6 of the ICCPR and in various regional human rights instruments. Article 6(1) of the ICCPR provides: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

In response, some argued that the ICCPR makes no reference to war or weapons and was never intended to regulate the legality of nuclear weapons. It could be said that the ICCPR was intended to protect human rights in peacetime, while unlawful killings in armed conflict are governed by the applicable law of armed conflict.

The Court noted that the protection of the ICCPR does not cease during armed conflict, except through the operation of Article 4, which allows for derogation from certain provisions in cases of national emergency; however, the right to life is not subject to such derogation ([Arévalo-Ramírez, 2022](#)).

In paragraphs 24 and 25 of the 1996 advisory opinion, the Court demonstrated how various situations in armed conflicts could violate both existing general norms of international human rights law and the strengthened protections of international humanitarian law. The Court also affirmed that the applicability of humanitarian law during armed conflict does not automatically displace general human rights norms; any derogation must align with specific conditions.

The advantage of this interpretation is that the distinct nature of human rights treaties can complement the combative features of international humanitarian law. However, human rights law norms provide stronger and more diverse mechanisms for monitoring, enforcement, and dispute resolution compared to those typically included in international humanitarian treaties such as the Geneva Conventions.

The continuous and concurrent application of human rights and humanitarian law during armed conflicts can thus guarantee access to justice under international human rights and humanitarian law in regional or global contexts (Milanović, 2009).

## **8. Strengths and Weaknesses of the 1996 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons**

The Court, as an active agent, has preserved its appropriate role as a judicial institution and has played a special role regarding nuclear threats. The primary objections raised against the complete elimination of nuclear weapons revolve around several mostly non-technical arguments. The first argument is that nuclear weapons and the strategies associated with their use have created a vicious cycle in which the international community is trapped. The second argument is that a world without nuclear weapons would be insecure and would harm the interests of nuclear-armed states (Ginsburg, 2021). Nevertheless, in the 1996 advisory opinion on the legitimacy of nuclear weapons, the Court brought about a fundamental transformation in international legal reasoning, shifting from a formalistic emphasis on legality to an essentialist focus on legitimacy.

The 1996 advisory opinion should be commended for fundamentally delegitimizing the use of nuclear weapons. However, it has also been criticized for the gaps it leaves and the uncertainties it may have contributed to. In examining its strengths, the Court considered the conditions created by international humanitarian law and the elements with which the use of nuclear weapons is incompatible. According to the International Court of Justice, given the unique characteristics of nuclear weapons, their use appears difficult to reconcile with these requirements. The Court stated that "the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, particularly the principles and rules of humanitarian law."

While the use of the word "generally" has sparked significant debate over the meaning and scope of the mentioned prohibition, the better interpretation seems to be that, alongside emphasizing prohibition, some space was intentionally left for exceptions under specific circumstances. However, given the current state of international law and the factual elements available, the Court could not definitively conclude that the threat or use of nuclear weapons would be lawful or unlawful in extreme cases of self-defense where the survival of a state is at stake.

In its considerations in paragraph 95, the Court stated that "in order to conclude definitively that the use of nuclear weapons is incompatible with the applicable legal principles and rules in armed conflict in any circumstance, it would need to consider the 'policy of deterrence' and the relatively long period of peace it has ensured" (Bothe, 2016).

These findings are notable in several respects:

On the one hand, it must be emphasized that rejecting the legality of the use of nuclear weapons as a legitimate means of warfare is a significant step forward. However, it is surprising that the Court introduced a new concept into international law — the "survival of the state" — which is to be considered a justification in exceptional circumstances. Understanding the concept of the survival of the state is difficult, and it is problematic to suggest that humanitarian law principles could be overridden by other interests.

In other words, the survival of the state could prevail over humanitarian law and some of its fundamental principles. Such an assumption, which may have been questionable in 1996, is even more unstable today in 2022. Another critical point concerns other consequences of the use of nuclear weapons beyond the scope of humanitarian law, particularly regarding environmental law, where the 1996 advisory opinion shows weaknesses.

It can also be argued that, given the much greater sensitivity today, the position that nuclear weapons are not categorically prohibited under international law should be reconsidered. While recourse to "constructive ambiguity" may have been acceptable in 1996, today, given events such as the conflict in Ukraine and the proliferation of nuclear threats, a bolder position is required (Hilpold, 2023).

## **9. Conclusion**



The International Court of Justice has been profoundly shaped by its institutional environment, both formal and informal, as it seeks to provide judicial services and contribute to the development of law. Although many scholars criticize the Court's jurisprudence, it is important to understand that the International Court of Justice is inherently limited by its institutional design and the nature of the international system.

It is thus notable that its most significant contributions have been in the development of the law — a task not formally assigned to it. This reflects the usefulness of adopting a broader institutional perspective to understand how the Court functions.

The International Court of Justice has played a crucial role in regulating nuclear weapons at the international level and thus in contributing to international peace. Particularly, in the case of the legality of the threat or use of nuclear weapons, the Court moved away from a strict legality approach and leaned toward a legitimacy-based approach to law.

The advisory opinion clearly demonstrates the decisive role of the Court's jurisprudence in defining and interpreting humanitarian law, integrating it, and clarifying its relationship with general international law. The Court has consistently elevated the principles and practices of international humanitarian law to the status of customary international law with universal application and declared it "inviolable." It has also specified several particular obligations for parties engaged in armed conflicts.

Likewise, the Court clarified the relationship between customary and conventional international humanitarian law, identifying which elements constitute fundamental principles derived from the most basic tenets of humanity. In fact, the Court emphasized the catastrophic nature of nuclear weapons for both humanity and the environment.

The transformation reflected in the Court's 1996 advisory opinion on nuclear weapons signals a broader movement in international law toward the incorporation of human rights and sustainability into the framework of state conduct, ultimately focusing on human values and human rights.

Future research, by employing updated scientific findings and using the theories of legal scholars, can further advance scientific arguments for limiting the use of nuclear weapons exclusively to exceptional and clearly defined circumstances.

### **Authors' Contributions**

Authors contributed equally to this article.

### **Declaration**

In order to correct and improve the academic writing of our paper, we have used the language model ChatGPT.

### **Ethical Considerations**

All procedures performed in this study were under the ethical standards.

### **Acknowledgments**

Authors thank all individuals who helped us do this study.

### **Conflict of Interest**

The authors report no conflict of interest.

### **Funding/Financial Support**

According to the authors, this article has no financial support.

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