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LEGALITY OF THE THREAT OR USE OF NUCLEAR WEAPONS: ENVIRONMENTAL AND HUMANITARIAN LIMITS ON SELF-DEFENSE

I. Introduction

In its recent opinion, Legality of the Threat or Use of Nuclear Weapons, the International Court of Justice (ICJ) considered the legality of nuclear weapons in the context of environmental law and the law of armed conflict.¹ The United Nations General Assembly (General Assembly) had requested an advisory opinion on the issue, "Is the threat or use of nuclear weapons in any circumstance permitted under international law?"² In response to the General Assembly’s request, the Court unanimously agreed on three of five "subholdings."³ Despite

¹ I.L.M. 814 (1996). The International Court of Justice is the principle judicial organ of the United Nations. It was established in 1945 by the Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1031. The Court consists of fifteen members, including a President and Vice President.


³ First, the Court decided, thirteen votes to one, to "comply with the request for an advisory opinion." Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 814, 831 (1996). Second, the Court unanimously held that "[t]here is in neither customary nor conventional international law any specific authorization of the threat or use of nuclear weapons." Id. at 831. Third, the Court held by eleven votes to three that "[t]here is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such." Id. Fourth, the Court unanimously held that "[a] threat or use of force by means of nuclear weapons that is contrary to Article 2, paragraph 4, of the United Nations Charter and that fails to meet all the requirements of Article 51, is unlawful." Id. Fifth, the Court unanimously held that:

A threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons.

Id.
general agreement on the subholdings, the Court split seven to seven on its main holding, with President Bedjaoui casting the deciding vote.\(^4\)

\[T\]he threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law; however, in view of the current state of international law, and the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.\(^5\)

The first part of the holding was generally accepted by the Court. The second part of the holding, in which the Court refused to decide the legality of using nuclear weapons in a case of extreme self-defense, was the major point of dissent.

In arriving at its holding, the Court considered three potentially controlling areas of international law: human rights (including the right to life and the prohibition against genocide), environmental law, and the law of armed conflict. The Court found that the human rights norm guaranteeing that "[n]o one shall be arbitrarily deprived of his life," \(^6\) must, during wartime, be analyzed under the law of armed conflict.\(^7\) It then found that international law prohibiting genocide would forbid the use of nuclear weapons if the intent to destroy human groups were present. In the absence of facts that could lead to a showing of intent, however, the prohibition of genocide did not control.\(^8\)

Turning next to environmental law, the Court cited Additional Protocol I of 1977 to the Geneva Convention of 1949 (Protocol I), the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD), Principle 2 of the Rio Declaration (Rio 2), and Principle 21 of the Stockholm Declaration (Stockholm 21).\(^9\) Protocol I\(^10\) and ENMOD\(^11\) prohibit means

\(^4\) "In the event of an equality of votes, the President . . . shall have a casting vote." Statute of the International Court of Justice, June 26, 1945, art. 55(2), 59 Stat. 1031, 1062.

\(^5\) _Legality of the Threat or Use of Nuclear Weapons_, 35 I.L.M. at 831.


\(^7\) _Legality of the Threat or Use of Nuclear Weapons_, 35 I.L.M. at 820.

\(^8\) _Id._

\(^9\) _Id._ at 820–21.

of warfare or weapons that cause widespread or severe effects on the environment. Rio 212 and Stockholm 213 declare the duty of States not to cause transboundary environmental harm. The Court questioned whether these rules and principles apply as obligations of total restraint during wartime. In answering this question, it made two important statements concerning international environmental law. First, the Court recognized the substance of Rio 2 and Stockholm 21 as customary international law.14 Second, the Court considered environmental law when analyzing the humanitarian principles of necessity and proportionality.15 Though the Court decided that the issue was governed by the law of armed conflict, it encompassed environmental concerns in its analysis.

The Court then analyzed the issue under the international law of armed conflict. The relevant principles in the Court's analysis included those found in humanitarian law, self-defense doctrine, and the principle of neutrality. Analyzing the issue with respect to these principles, the Court arrived at its holding.

This Comment addresses two areas in which the Court's decision could significantly affect international law. First, the Comment examines the Court's recognition of the duty not to cause transboundary harm as customary law and the inclusion of environmental concerns in necessity and proportionality analysis. Second, the Comment examines the treatment of nuclear weapons under humanitarian law, specifically the interaction of humanitarian protections and self-defense. It should be noted that this case presents other significant international law issues, such as the Court's increased utilization of soft

14 "The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment." Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 814, 821 (1996).
15 "Respect of the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality." Id.
The Court's application of Lotus to authorize or prohibit international conduct, and the increased role before the Court of the private sector and non-governmental organizations. In order to more fully develop the environmental and humanitarian law implications, this Comment does not explore the other issues.

Part II of the Comment discusses the Court's analysis in *Legality of the Threat or Use of Nuclear Weapons*. Part III examines the implications of the opinion on environmental and humanitarian law. The Comment concludes that the Court provided further evidence of the international customary duty not to cause transboundary harm. It also concludes that the Court recognized environmental law, through necessity and proportionality, as a limit to the right to self-defense. Turning to humanitarian law, the Comment concludes that the failure of the Court to clearly limit self-defense with humanitarian law could lead to the erosion of humanitarian protections generally.

II. LEGALITY OF THE THREAT OR USE OF NUCLEAR WEAPONS

On the same day that the International Court of Justice refused to give an advisory opinion on a similar request from the World Health Organization (WHO), the Court issued an advisory opinion on substantively the same question posed by the General Assembly. The General Assembly resolution asked the Court: "Is the threat or use of nuclear weapons in any circumstance permitted under international law?" The Court reasoned that it was jurisdictionally permit-

16 The Court relied extensively on non-binding case law throughout its opinion. See *Legality of the Threat or Use of Nuclear Weapons*, 35 I.L.M. 814, *passim* (1996). For example, in examining the legal nature of the issue, the Court cited eleven I.C.J. advisory opinions. See id. at 817–18. Throughout its opinion, the Court also relied on several General Assembly and Security Council resolutions. See, e.g., id. at 822–23, 826–28.

17 See discussion *infra* Part II.A.


19 The World Health Organization (WHO) requested that the Court respond to the question, "In view of the health and environmental effects, would the use of nuclear weapons by a State in war or other armed conflict be a breach of its obligations under international law including the WHO Constitution?" WHA 46.40 (May 14, 1993). By a margin of eleven votes to three, the Court decided to refuse to grant the opinion on the grounds that it did not have proper jurisdiction. *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, I.C.J. (July 8, 1996) (visited Feb. 23, 1997) <http://www.mdfait-maeci.gc.ca/english/foreignp/disarm/icj/whopinio.txt>. The Court ruled that the question did not arise within the scope of the activities of the WHO and was therefore precluded from granting the opinion by the Charter of the United Nations. Id.

ted to grant an advisory opinion on a legal question presented by the General Assembly. Upon finding the question to be a valid legal question, and noting no compelling reasons for refusal, the Court exercised its discretion to grant the opinion.

A. Pre-existing Norms and Lotus

In the initial stages of its analysis, the Court noted some States' objection to the language of the inquiry. Some States argued that by asking whether the threat or use of nuclear weapons was permitted by international law, the question assumed that the threat or use of nuclear weapons would be illegal without such permission. As an alternative phrasing, these States requested that the word permitted be replaced with the word prohibited. In support, these States quoted dictum from the 1927 case S.S. Lotus.

In support, these States quoted dictum from the 1927 case S.S. Lotus. In Lotus, the French and Turkish governments made a special agreement referring to the Permanent Court of International Justice the question whether Turkey had acted in conflict with the principles of international law in assuming jurisdiction over an officer of a French vessel on the high seas. The Court determined that Turkey had not violated international law.
prohibitive rules." The States used the *Lotus* dictum to argue that "States are free to threaten or use nuclear weapons unless it can be shown that they are bound not to do so by reference to a prohibition in either treaty law or customary international law." The Court could have addressed the issue of whether the existing norm in international law was a prohibition or authorization of the threat or use of nuclear weapons. Using this norm as a basis, the Court could have searched for international law contravening that norm. Instead, the Court chose to bypass the issue, noting that all the States agreed (or at least did not dispute) that "their independence to act was . . . restricted by the principles and rules of international law, more particularly humanitarian law." Thus, the Court introduced the *Lotus* dictum in detail but chose to ignore its application as "without particular significance for the disposition of the issues before the Court."

**B. Determination of Applicable Law**

The Court next evaluated three areas of international law as potentially relevant to the resolution of the issue: human rights (the right to life and the prohibition against genocide), environmental law, and the law of armed conflict.

1. **Human Rights—The Right to Life and the Prohibition Against Genocide**

   The Court first considered the international law principle of the right to life. "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of

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24 *Legality of the Threat or Use of Nuclear Weapons*, 35 I.L.M. at 819 (quoting S.S. *Lotus*, 1927 P.C.I.J. (ser. A) No. 10, at 18–19 (Sept. 7)). The Court also noted dicta from *Military and Paramilitary Activities (Nicar. v. U.S.)*: "in international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited." *Id.* (quoting *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 135 (June 27)).


26 *Legality of the Threat or Use of Nuclear Weapons*, 35 I.L.M. at 820.

27 *Id.*
his life." Concluding that the right to life exists in war as well as peacetime, the Court determined that the test of arbitrary deprivation of life in wartime must be determined according to the international law of armed conflict.

Next, the Court applied the definition contained in the Genocide Convention. The Convention defined genocide as follows:

- Any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
  - Killing members of the group;
  - Causing serious bodily or mental harm to members of the group;
  - Deliberately inflicting on the group conditions of life calculated to being [sic] about its physical destruction in whole or in part;
  - Imposing measures intended to prevent births within the group;
  - Forcibly transferring children of the group to another group.

The Court determined that the prohibition against genocide would be pertinent to the intentional threat or use of nuclear weapons. Noting, however, that intent is a necessary element, the Court ruled that it was unable to apply the rule due to the absence of specific facts. Reasoning that the right to life during wartime was absorbed by the law of armed conflict and the prohibition against genocide was inapplicable without specific facts, the Court next turned to environmental law.

2. Environmental Law

In considering environmental law, the Court cited two treaties and two declarations. The Court first cited Protocol I, prohibiting the employment of "methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment." The Court next introduced a similar provision in ENMOD which prohibited the use of weapons which have "'widespread, long-lasting, or severe effects' on the environment." Turning to soft law documents, the Court then noted the common

28 Id. (quoting the International Covenant on Civil and Political Rights, supra note 6, art. 6) (emphasis added).
29 Id.
31 Id. (quoting Protocol I, supra note 10, art. 35(3)).
32 Id. at 821 (quoting ENMOD, supra note 11, art. 1(1)).
principle of Rio 2 and Stockholm 21. "States . . . have a duty 'to ensure that activities within their jurisdiction and control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.'"\(^{33}\) The States that opposed these four precedents did so on many bases including: certain States were not parties to the treaties or had made reservations before signing the treaties; nuclear weapons were not addressed in the treaties; the treaties and declarations applied during peacetime only; and application of the treaties and declarations to nuclear weapons would be destabilizing to international law.\(^{34}\)

In response to the objections, the Court made two statements about environmental law. First, in response to States claiming that either they were not parties to the treaties or that the declarations were not binding, the Court declared that the duty not to cause transboundary harm was customary international law.\(^{35}\) Second, in response to States claiming that this duty did not apply in wartime, the Court responded by evaluating whether the customary duty was one of total restraint during wartime.\(^{36}\) The Court recognized that respect for the environment was an element considered when evaluating necessity and proportionality in self-defense.

The Court does not consider that the treaties in question could have intended to deprive a State of the exercise of its right of self-defense under international law because of its obligations to protect the environment. Nonetheless, States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality.\(^{37}\)

\(^{33}\) Id. (quoting Rio Declaration, supra note 12, principle 2).

\(^{34}\) Id.

\(^{35}\) The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment." Id. (emphasis added).

\(^{36}\) Id.

\(^{37}\) Id. (emphasis added). The Court supplied support for this proposition in hard and soft law. The Court quoted Principle 24 of the Rio Declaration: "Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary." Id. (quoting Rio Declaration, supra note 12, principle 24). The Court also cited G.A. Res. 37, U.N. GAOR, 47th Sess., U.N. Doc. A/RES/47/37 (1994), in support of the proposition that wartime destruction of the environment when not justified by military necessity was unlawful under international law.
With this statement the Court drew a balance between the right to self-defense and the duty to respect the environment.

C. Application of the Law of Armed Conflict

Concluding that the law of armed conflict and nuclear weapons treaties were the most directly applicable law, the Court first examined the Charter of the United Nations (U.N. Charter), especially the articles pertaining to the legal use of force and self-defense. The Court then addressed potentially applicable nuclear weapons treaties. Next, the Court explored customary international law for a prohibition or authorization of the threat or use of nuclear weapons. Finally, the Court examined humanitarian law and the principle of neutrality.

1. The U.N. Charter

After discussing the unique destructive capacity of nuclear weapons, the Court examined the use of force provision of the U.N. Charter: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.” Article 51, the self-defense provision of the U.N. Charter, contains an exception to this prohibition. The Court noted some limitations to the right to self-defense.

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38 Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. at 822 (quoting the U.N. Charter, art. 2, para. 4). Article 2, paragraph 4 applies equally to the threat and use of force. The Court explained:

The notions of “threat” and “use” of force under Article 2, paragraph 4, of the Charter stand together in the sense that if the use of force itself in a given case is illegal—for whatever reason—the threat to use such force will likewise be illegal. In short, if it is to be lawful, the declared readiness of a State to use force must be a use of force that is in conformity with the Charter.

Id. at 823.

The Court analyzed possession as a potential threat and concluded that whether possession may be considered a threat depends upon:

[Whether the particular use of force envisaged would be directed against the territorial integrity or political independence of a State, or against the Purposes of the United Nations or whether, in the event it where intended as a means of defence, it would necessarily violate the principles of necessity and proportionality.

Id.

39 See U.N. Charter, art. 51. Another lawful use of force mentioned by the Court is addressed in the U.N. Charter, art. 42, by which the Security Council may take military enforcement measures in conformity with Chapter VII of the Charter. The Court did not analyze such a use of force since it considered it outside the scope of
First, any self-defense use of force must in fact be an act of self-defense. Second, Article 51 requires that the defending State report all measures taken to the Security Council of the United Nations. Such action must not interfere with the Security Council's ability to take action to maintain or restore international peace. Third, the self-defense measures must meet the customary international law principles of necessity and proportionality.

Opponents of nuclear weapons argued that proportionality is impossible in the case of nuclear weapons due to the unique destructive capabilities of such weapons. The Court responded that proportionality did not itself exclude the use of nuclear weapons, but any proportionality analysis must consider the unique aspects of nuclear weapons. The analysis must consider the destructive capacity of nuclear weapons, the heat and energy output, the radiation released, the risk of escalation, and the associated potential to destroy the entire ecosystem and human civilization. Thus, the Court recognized the possibility of a lawful threat or use of nuclear weapons under Article 51 of the U.N. Charter; contingent upon the threat or use meeting necessity and proportionality requirements. While these standards might, in the case of nuclear weapons, be difficult or impossible to attain, they do not make the threat or use of nuclear weapons per se unlawful.

2. Nuclear Weapons Treaties

The Court next turned to specific treaties to ascertain whether the threat or use of nuclear weapons was per se prohibited or authorized by such treaties. The Court first determined that poison weapons treaties did not apply to nuclear weapons because States understand such treaties to include only weapons whose prime or exclusive effect is to poison or asphyxiate. Next, the Court considered nuclear treaties addressing the acquisition, manufacture, possession, deployment,
and testing of nuclear weapons. The Court concluded that such treaties pointed to an increasing concern about nuclear weapons in the international community, possibly even a foreshadowing of a general prohibition of the use of nuclear weapons. But since none of the treaties cited covered use, the Court considered them inapplicable to the threat or use of nuclear weapons.

Three treaties discussed by the Court do address the use of nuclear weapons. First, the Treaty of Tlatelolco directly prohibits the threat or use of nuclear weapons in Latin America. Second, the Treaty of Rarotonga indirectly prohibits the threat or use of nuclear weapons in the South Pacific. Third, the Treaty on the Non-Proliferation of Nuclear Weapons, signed by the five nuclear weapon States, provides positive and negative assurances against the use of nuclear weapons. In all three treaties, some or all of the nuclear weapon States reserved the right to resort to the use of nuclear weapons. Opponents of nuclear weapons pointed to the regional and local treaties as evidence of the emergence of an international rule of complete prohibition by law of all uses of nuclear weapons. The States arguing that nuclear weapon use may be legal in some circumstances contended that acceptance of the possession of nuclear weapons by the five States was tantamount to recognizing that they may be used in certain circumstances. The Court pointed to the reservations contained in the treaties:

[A] number of States have undertaken not to use nuclear weapons in specific zones . . . or against certain other States . . . . [N]evertheless, even within this framework, the nuclear weapon States have reserved the right to use nuclear weapons in certain circumstances; and these reservations met with no objection from the parties [to the treaties] or from the Security Council.

Analyzing these treaties, the Court concluded that they did not provide a universal prohibition on the threat or use of nuclear weapons.

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44 Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. at 824.
47 Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 169 [hereinafter NPT]. The five nuclear weapon States are China, France, Russia, the United Kingdom, and the United States.
48 Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. at 825.
49 Id. at 826.
50 Id.
Finding that the threat or use of nuclear weapons was not per se prohibited by treaty, the Court next examined customary international law for a per se authorization or prohibition.

3. Customary International Law

After finding no per se prohibition of the threat or use of nuclear weapons in treaties, the Court turned to customary international law. Mirroring its treaty analysis, the Court examined whether customary international law provided a per se prohibition or authorization of the threat or use of nuclear weapons. The Court adopted the universally accepted formula for establishing customary international law: State practice plus *opinio juris*.

The main state practice argument between the States concerned non-use of nuclear weapons since World War II and the cold war policy of deterrence. The Court found neither practice determinative on the question of customary international law. Next, the Court considered General Assembly resolutions declaring nuclear weapons illegal. The Court first noted that a series of resolutions could be sufficient basis for establishing *opinio juris*. The Court noted, however, that the resolutions in question received a substantial number of negative votes and abstentions, causing them to fall short of *opinio juris*. Thus, the Court found neither a conventional rule nor a customary rule authorizing or prohibiting the threat or use of nuclear weapons per se.

51 *Id.* The two components necessary to form customary international law are material and psychological in nature. State practice refers to the behavior of a State. *Opinio juris* refers to the elusive psychological component—"what States think." LAKSHMAN D. GURUSWAMY ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND WORLD ORDER 80 (1994).

52 The Court cited General Assembly resolution G.A. Res. 1653, U.N. GAOR, 16th Sess, Supp. No. 17, at 4, U.N. Doc. A/5100 (1961), as the first of the "important series of General Assembly resolutions," but did not list the subsequent resolutions. *Legality of the Threat or Use of Nuclear Weapons*, 35 I.L.M. at 826. The Court noted that had a customary international rule of law prohibiting the threat or use of nuclear weapons existed when G.A. Res. 1653 was passed, the resolution would have referred to that rule of law, rather than applying past precedent in an attempt to qualify that law.

The Court's analysis of G.A. Res. 1653 is an indication of the weight to be given to a General Assembly resolution. Three conclusions may be drawn from the Court's treatment of the resolution. First, a series of General Assembly resolutions can meet the *opinio juris* requirement of customary international law. Second, substantial negative votes and abstentions may block such *opinio juris* from forming. Third, when a resolution incorporates precedent in an attempt to qualify a rule of law, that rule of law may not yet be customary international law. If such a customary international rule of law existed at the time of the resolution, a strong resolution would announce rather than try to derive such a rule of law.
4. Humanitarian Law and the Principle of Neutrality

Finding no per se prohibition of the threat or use of nuclear weapons, the Court next evaluated the issue with regard to the humanitarian law of armed conflict and the principle of neutrality.

a. Acceptance of the Humanitarian Law of Armed Conflict and the Principle of Neutrality

The Court noted that the States did not dispute the existence of either the humanitarian law of armed conflict or the principle of neutrality. The Court broke down humanitarian law into two main principles: the prohibition against indiscriminate effects, and unnecessary suffering. The opinion stated these principles as follows:

States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets. ... It is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering.\textsuperscript{53}

The Court stated that these principles were intransgressible principles of customary international law and therefore applied to all States.\textsuperscript{54} Rejecting the argument made by a few States that humanitarian law was not customarily binding, the Court based its conclusion on the Martens Clause as stated in Protocol I:

\[ \text{In cases not covered by this Protocol or by international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.} \]

\textit{Legality of the Threat or Use of Nuclear Weapons}, 35 I.L.M. at 827 (quoting \textit{Protocol I, supra} note 10, art. 1(2)).

The Court's opinion utilized the Martens Clause to support the applicability of humanitarian law to nuclear weapons, while the dissenting opinions of Judges Shahabuddeen and Weeramantry used the Martens clause to support the per se prohibition of nuclear weapons. The dissenting judges argued that weapons of such unique destructive capacity could not be used in accordance with the dictates of pub-
rian law did not apply to nuclear weapons since such weapons were invented after the principles were established, the Court further held that humanitarian principles applied to the threat or use of nuclear weapons.\textsuperscript{55} The Court stated the principle of neutrality in this way "[t]he territory of neutral powers is inviolable."\textsuperscript{56} The Court then gave several variants of the principle and stated that the principle was an established part of customary international law.\textsuperscript{57} As the Court noted, the fact that humanitarian law and the principle of neutrality apply to nuclear weapons was largely not in controversy. The controversial aspect of the issue was the \textit{application} of the principles to the threat or use of nuclear weapons.

b. Application of the Humanitarian Law of Armed Conflict and the Principle of Neutrality

In applying the principles of humanitarian law and neutrality, the Court did not conduct extensive balancing and analysis. Rather, it stated the relative positions of States who argued that nuclear weapon use might be legal in some circumstances and States who argued that the threat or use of nuclear weapons was unlawful in all circumstances. The States proposing legality in some circumstances argued that the threat or use of nuclear weapons might be lawful in two instances: in self-defense and in the case of a low yield tactical nuclear weapon. These States proposed that a nuclear weapon might meet the self-defense limitations of necessity and proportionality. In self-defense or otherwise, the States also argued that a low yield nuclear weapon might be used without significant civilian casualties.\textsuperscript{58} The States holding the view that the use of nuclear weapons would always be illegal argued that nuclear weapons were largely uncontrollable in time and space and in all circumstances would indiscriminately inflict

\textsuperscript{55} \textit{Legality of the Threat or Use of Nuclear Weapons}, 35 I.L.M. at 871-73 (dissenting opinion of Judge Shahabuddeeen); \textit{id.} at 900-01 (dissenting opinion of Judge Weeramantry).

\textsuperscript{56} \textit{Legality of the Threat or Use of Nuclear Weapons}, 35 I.L.M. at 828. The Court again cited the Martens Clause in support of its position. \textit{Id.}


\textsuperscript{58} \textit{Legality of the Threat or Use of Nuclear Weapons}, 35 I.L.M. at 827.

\textit{Id.} at 829. The scenarios envisioned include attacks against ships on the high seas or against military targets in sparsely populated areas.
civilian casualties, violating principles of humanitarian law and neutrality.\textsuperscript{59}

After listing the positions of the competing States, the Court first ruled that it had insufficient evidence regarding the use of nuclear weapons, the effects of tactical nuclear weapons, and the probability of escalation to determine whether the threat or use of nuclear weapons could be legal in a particular circumstance. Acknowledging that nuclear weapons were generally incompatible with the law of armed conflict, the Court stated that it was unable to make the determination that the threat or use of nuclear weapons was illegal in all circumstances.\textsuperscript{60} The Court then stated that the use of nuclear weapons seemed scarcely reconcilable with respect for humanitarian law and the principle of neutrality. Withdrawing, however, the Court noted that it did not have the specific facts necessary to determine that the use of nuclear weapons could never conform to such principles.\textsuperscript{61} This analysis led to the Court's first major holding: "[T]he threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and the rules of humanitarian law."\textsuperscript{62}

Next, the Court acknowledged a State's right to survival and self-defense as a fundamental right. Considering the nature of the right of self-defense and the reservations made by nuclear weapon States in regional treaties, the Court concluded in its second major holding that it could not determine the legality of the use of nuclear weapons in an extreme case of self-defense:

However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.\textsuperscript{63}

Thus the Court determined that it could not answer the question, "Is the threat or use of nuclear weapons in any circumstance permitted under international law?"

Given the abstract nature of the advisory opinion request, the Court determined that there existed no per se prohibition on the use of nuclear weapons, identified the relevant principles under which an analysis of particular facts should take place, and determined that gen-

\textsuperscript{59} Id.
\textsuperscript{60} Id.
\textsuperscript{61} Id.
\textsuperscript{62} Id. at 831.
\textsuperscript{63} Id.
nuclear weapons would not conform with humanitarian law and the principle of neutrality. It did suggest that the circumstance of extreme self-defense could bear upon the issue. Beyond that, the Court determined that it could not adequately answer the presented question.

D. Promotion of Disarmament

The Court concluded its opinion with an appeal to States to continue good faith negotiations toward nuclear disarmament. The Court pointed out that States have a legal obligation not only to pursue negotiations but to conclude negotiations that bring about complete nuclear disarmament under strict and effective international control.

III. ENVIRONMENTAL LAW IN ARMED CONFLICT

A. Background

Environmental protection during war is both an old and a new concept. The law of armed conflict has long contained rules that are not environment specific, yet provide environmental protection. More recently, environment-specific protections have been incorporated into the law of armed conflict. Peacetime environmental law has also recently been recognized as a potential source for environmental protection during war.

The law of armed conflict has historical roots in medieval times when knights recognized a code of chivalry. Throughout history, the prevailing view has been that sovereignties do not have unlimited discretion as to the means they may employ for injuring the enemy. Proscriptions against harming civilians, plundering villages, or killing captives have been historically recognized as applicable in war. The codification of the laws of armed conflict in the late nineteenth and

64 Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. at 830 (citing NPT, supra note 47, art. IV).

twentieth centuries has resulted in two groups of rules: "Hague Law" based on the Hague Conventions of 1899 and 1907; and "Geneva Law" based on the Geneva Conventions of 1864, 1906, 1929, 1949 and the Additional Protocols I and II of 1977. Both the Hague and Geneva Conventions recognized the preexistence of rules of armed conflict. These conventions generally codified existing customary international law but in some instances expanded upon such laws.

1. Non-Environment-Specific Protections in the Law of Armed Conflict

The law of armed conflict has been codified in modern times most notably in the Hague and Geneva Conventions. A basic precept of the law of armed conflict is that "[t]he right of belligerents to adopt means of injuring the enemy is not unlimited." Hague and Geneva law recognize four principles of limitation. Military necessity, discrimination, prevention of unnecessary suffering, and proportionality limit States' actions during war. These four principles have become part of customary international law. While principles of limitation do not expressly protect the environment, they could be applied during war to provide environmental protection.

Military necessity requirements in Hague and Geneva law could limit environmental harm during war. Article 23 of the Fourth Hague Convention prohibits destruction of enemy property unless demanded by military necessity. Article 53 of the Fourth Geneva Conven-

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66 Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. at 827.
67 See Green, supra note 65, at 94.
68 The Geneva texts were drawn up solely for the benefits of war victims, while the Hague texts regulate hostilities by granting States certain rights to the detriment of individuals and by prohibiting certain State acts in war. Jean Pictet, Introduction: International Humanitarian Law: Definition, in INTERNATIONAL DIMENSIONS OF HUMANITARIAN LAW, supra note 65, at xix, xx. The terms Hague and Geneva law refer to the laws codified in the various Hague and Geneva Conventions.
69 Hague Convention (IV) of 1907, supra note 43, art. 22; see also Betsy Baker, Legal Protections for the Environment in Times of Armed Conflict, 33 Va. J. Int’l L. 351, 360 (1993); Green, supra note 65, at 89.
71 See Falk, supra note 70, at 84.
72 Hague Convention (IV) of 1907, supra note 43, art. 25.
vention contains a similar prohibition on occupying forces. Either customary rule could limit transboundary environmental harm during war.

Similarly, Protocol I’s prohibition against *indiscriminate attacks* on civilians could provide environmental protection. Article 52(1) of Protocol I prohibits attacks against non-military targets, including the “natural environment.” Protocol I does not define “natural environment,” so doubt remains as to whether the environment can be given civilian status under Article 52(1) or whether it is a military objective under Article 52(2). To the extent the environment can be assigned civilian status, the prohibition against attacks on civilian objects could provide a measure of environmental protection during war.

The prohibition against *unnecessary suffering* has traditionally addressed the suffering of military personnel. To the extent that environmental harm could cause such suffering, environmental protection should be required. There has been a recent movement to extend this protection to civilians. Such an extension would broaden environmental protection under the principles of no unnecessary suffering.

*Proportionality* in war requires that a military action be proportional to its desired results. Article 57(2)(a) of Protocol I requires proportionality with respect to incidental civilian losses. Like military necessity, proportionality should prohibit environmental damage which exceeds military objectives.

The law of armed conflict contains provisions which do not directly protect the environment, yet should provide a measure of environmental protection during war. Such provisions, while not specific to the environment, carry strong customary international law status in their general application. To the extent that the environment can be

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73 Geneva Convention (IV) of 1949, *supra* note 68, art. 53.
74 The Court declared that the Hague and Geneva Conventions were customary law, *see supra* text accompanying note 53. For a discussion countering the point that military necessity always takes precedence over environmental concerns, see Baker, *supra* note 69, at 362.
75 Protocol I, *supra* note 10, art. 52.
76 *Id.*
79 *See id.*
80 *See id.* at 367.
included in the general scope of such law, these provisions of the law of armed conflict can provide environmental protection during war.82

2. Specific Environmental Protections in the Law of Armed Conflict

The law of armed conflict has more recently adopted specific environmental protections. Article 1(1) of ENMOD prohibits weapons causing "widespread, long lasting, or severe effects" on the environment.83 Likewise, Art 35(3) of Protocol I prohibits "methods or means of warfare which are intended, or may be expected, to cause widespread, long term and severe damage to the environment."84 Article 55(1) similarly prohibits widespread, long-term, and severe damage to the environment.85 The ENMOD and Protocol I provisions are helpful to environmental protection in that they specifically address the environment in time of war. The provisions have, however, three shortcomings. First, both ENMOD and Protocol I establish high

82 The Fourth Hague Convention contains other provisions which, though not widely recognized as such, could provide environmental protection. Article 25 prohibits attacks on undefended areas. Article 27 protects cultural monuments. Article 28 prohibits pillaging. Article 55 makes an occupying force the administrator of an enemy's captured property and requires protection of such property. Hague Convention (IV) of 1907, supra note 43, arts. 25, 27, 28, 55.


83 ENMOD, supra note 11, art. 1(1).

84 Protocol I, supra note 10, art. 35(3).

85 Article 55 states:

1. Care shall be taken in warfare to protect the natural environment against widespread, longterm and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby prejudice the health or survival of the population.

2. Attacks against the natural environment by way of reprisals are prohibited.

Id. art. 55.

Other provisions of Protocol I which could provide environmental protection include: Article 54 which prohibits methods of warfare designed to starve or displace citizens by attacking indispensable objects; Article 55(5) prohibits the merging of military targets in civilian areas; and Article 56 which prohibits attacks on non-military dams, dykes and nuclear power plants if the attack might release dangerous forces causing severe civilian losses. See id. arts. 54-56.
thresholds for prohibited environmental damage during war. The environmental damage caused by most conventional weapons would not rise to the level of wide-spread, long-term, and severe damage and would therefore not be prohibited by the provisions. Second, the provisions have only been in place since 1977 and lack the strong customary force of the older rules of armed conflict. Third, "environment" is not defined in either document, leaving the provisions somewhat vague. While specific environmental protections in the law of armed conflict have shortcomings, they stand as evidence of the trend to recognize environmental concerns in the law of armed conflict.

3. Peacetime Environmental Protections

The most applicable peacetime norm of international environmental protection is the recently introduced duty not to cause transboundary harm. This duty was first given form in Trail Smelter Arbitration. In Trail Smelter, a special arbitral tribunal applied United States and international law (as mandated by the governing treaty between the United States and Canada) in deciding that Canada was liable to the United States for damage to Washington crops resulting

86 "It is uncertain whether an argument to the effect that Articles 35(3) or 55 are now part of customary international law, or of the still more jurisprudentially suspect category of 'general principles of international law', would succeed." Falk, supra note 70, at 89.

87 Another document prescribing environmental norms during war is the 1982 World Charter for Nature, G.A. Res. 7, U.N. GAOR, 37th Sess., Supp. No. 51, at 17, U.N. Doc. A/RES/37/7 (1982), reprinted in 22 I.L.M. 455 (1983). Paragraph 5 of the Charter states: "Nature shall be secured against degradation caused by warfare or other hostile activities." Id. para. 5. Paragraph 11 is expressed in more general terms: "Activities which might have an impact on nature shall be controlled, and the best available technologies that minimize significant risks to nature or other adverse effects shall be used." Id. para. 11. The vote on the resolution was 111 States in favor, 18 abstentions, and only the United States opposed. The Charter's status as customary international law is more doubtful than that of Protocol I or ENMOD.


Principle 24 of the Rio Declaration also could provide a direct source of environmental protection during war. See supra note 37.

from sulfur dioxide fumes originating from a smelter plant in Trail, British Columbia. The tribunal concluded:

[U]nder the principles of international law, as well as the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or properties or persons therein, when the cause is of serious consequence and the injury is established by clear and convincing evidence.89

Trail Smelter is not binding international law; the tribunal was formed by a specific treaty and applied international and United States law. The holding is also limited in scope: the tribunal addressed injury caused by fumes and required clear and convincing evidence of serious harm. Although Trail Smelter has minimal precedential value in international law, the decision paved the way for the duty not to cause transboundary harm declared at the United Nations Conference on the Human Environment at Stockholm.90

Principle 21 of the Stockholm Declaration states the duty not to cause transboundary harm:

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.91

While Stockholm 21 has traditionally been applied to peacetime transfrontier pollution, it should be equally applicable to military actions. Activities within State control include military attacks. The duty not to cause transboundary harm, applied to military actions, could be a valuable source of environmental protection during war. The content of Stockholm 21 has been recognized in treaties such as the Law of the Sea Convention,92 the ASEAN Convention on the Conservation of Nature and Natural Resources,93 and the 1979 Geneva Convention

89 Id. at 1965.
90 For other decisions leading up to the declaration of the duty not to cause transboundary harm at Stockholm, see Glen Plant, Introduction to ENVIRONMENTAL PROTECTION AND THE LAW OF WAR, supra note 70, at 3, 18 n.51 (1992); ALEXANDRE KISS & DINAH SHELTON, INTERNATIONAL ENVIRONMENTAL LAW, 122–29 (1991).
91 Stockholm Declaration, supra note 13, principle 21.
on Long-Range Transboundary Air Pollution. More recently, Principle 21 was adopted in nearly identical form in the Rio Declaration.

The ICJ in *Legality of the Threat or Use of Nuclear Weapons* recognized the duty not to cause transboundary harm as international customary law. The Court went on to apply (peacetime) environmental law to armed conflict, balancing the doctrines of respect for the environment and self-defense through the well established principles of necessity and proportionality. The law of armed conflict has traditionally evaluated the legality of military action through these principles of limitation. In *Legality of the Threat or Use of Nuclear Weapons* the Court used traditional principles of limitation to draw a balance between the right to use force and the duty to respect the environment.

### B. Environmental Law and Self-Defense

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 goes toward assessing whether an action is in conformity with the principles of necessity and proportionality.

After recognizing the duty not to cause transboundary harm, the Court recognized that the environment must be considered when evaluating necessity and proportionality. At first glance it might appear that the Court designated environmental concerns as a mere element in calculating the legality of military force. The Court's recognition of the duty not to cause transboundary harm as customary law and the use of the limiting principles of necessity and proportionality, however, suggest a broader approach.

In recognizing the duty not to cause transboundary harm as customary international law, the Court set the stage for the application of that duty during war. The Court then applied the limiting principles of necessity and proportionality to draw a balance between the justi-

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95 Rio Declaration, supra note 12, principle 2. The Rio Declaration reads “pursuant to their own environmental and developmental policies.” Id. (emphasis added). Principle 21 of the Stockholm Declaration does not include the words “and developmental.” Stockholm Declaration, supra note 13, principle 21.

96 See Kiss & Shelton, supra note 90, at 130 (arguing that Stockholm 21 is customary international law). But see Baker, supra note 69, at 355–56 (arguing that Stockholm 21 has not reached customary law status, at least with respect to wartime application).

fied use of force (in this case self-defense) and respect for the environment. Limiting principles have long been used within the law of armed conflict to balance the use of force with human rights during war. Incorporating environmental concerns into the law of armed conflict, the Court used the traditional principles of limitation to balance, through necessity and proportionality, the right to self-defense and environmental protection. Under such an approach, a State could cause environmental harm in self-defense only to the extent that the harm is necessary and proportionate to the defensive measures.

Historically, peacetime environmental law, such as the duty not to cause transboundary harm, has not been considered when analyzing the law of armed conflict. The balance struck by the Court is appropriate in that it reconciles the independent legal doctrines of self-defense and environmental law. The balance is important because it signals the growing recognition of environmental considerations whether during war or peace. The reconciliation through principles of limitation that was appropriate when the Court considered self-defense and environmental law, however, was inappropriate when the Court later addressed self-defense and humanitarian law.

IV. HUMANITARIAN LAW OF ARMED CONFLICT

A. Background

Humanitarian law is that part of the law of armed conflict that is concerned with the protection of the victims of armed conflict (all non-combatants), including civilians. Humanitarian law provides absolute protections in some cases, while in others it balances, through military necessity, a State's right to use military force with the human rights of enemy nationals. A number of human rights have been incorporated into humanitarian law. Several are included in Protocol I:

The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents:

(a) violence to the life, health, or physical or mental well-being of persons, in particular:
   (i) murder;
   (ii) torture of all kinds, whether physical or mental;

98 See McCoubrey, supra note 65, at 1.

99 See id. at 198–99. For the proposition that military necessity does not defeat overriding humanitarian protections but merely acts as a defense to tortious or criminal liability in certain military situations, see id. at 198.
(iii) corporal punishment; and
(iv) mutilation;
(b) outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault;
(c) the taking of hostages;
(d) collective punishments;
(e) threats to commit any of the foregoing acts.100

Protocol I provides absolute protection for these human rights.101 This absolute protection stems from the development of the rules of armed conflict and human rights law over hundreds of years. The absolute protection that these rights afford stands in tension with the principle of military necessity, a potential defense to the derogation of some human rights during war. Geneva law allows no such defense to the above listed protections. Other rights protected by humanitarian law can be overridden by military necessity. In prohibiting indiscriminate attacks on civilians, Protocol I defines indiscriminate as:

[A]n attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.102

By this definition of "indiscriminate," the rights of civilians with respect to incidental loss of life are probably derogable in the case of military necessity.103 Similarly, in the prohibition of unnecessary suffering, "the concept of 'unnecessary' refers not to the suffering actually endured by the individual, but to suffering which is beyond that essential for the achievement of the purpose for which it has been inflicted, that is to say, suffering which goes beyond the mere disabling of the victim."104

100 Protocol I, supra note 10, art. 75(2).
101 "Human rights" is used loosely here to refer to prohibitions of maltreatment under humanitarian law. Human rights law is formally understood as a field of law distinct from humanitarian law. While the two overlap, I will address only humanitarian law principles. In referring to human rights within humanitarian law, I am referring to the dictates of humanity found within humanitarian law. For a discussion of humanitarian law, human rights law, and their interplay, see A.H. Robertson, Humanitarian Law and Human Rights, in STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES, supra note 65, at 793.
102 Protocol I, supra note 10, art. 51(5)(b) (emphasis added).
103 That the right of civilians against indiscriminate attack is made derogable by the language of Protocol I, art. 51(5)(b) is not certain. Protocol I, art. 57(5) states: "No provision of this Article may be construed as authorizing any attacks against the civilian population, civilians or civilian objects." Id.
104 GREEN, supra note 65, at 89 (emphasis added).
In addition to the absolute protection of certain human rights in humanitarian law treaties, humanitarian law traditionally has involved voluntary agreement among sovereignties concerning prohibited conduct. Historically, sovereignties voluntarily forfeited the right to employ certain means of warfare, recognizing certain human rights, proper courses of conduct, and chivalrous codes. Similarly, the signatories to the Hague and Geneva Conventions and Protocols voluntarily renounced certain practices in war. These documents have surpassed exclusive application to signatories in the twentieth century, becoming part of customary international law. Where sovereignties voluntarily have agreed to conduct war without resorting to certain practices, these practices cannot be justified by military necessity. States consider military necessity before agreeing to absolutely refrain from certain courses of conduct in war. On the other hand, to the extent that military necessity exists as an element in the development of certain humanitarian law principles, such necessity must be recognized and respected as an element of humanitarian law. Thus, humanitarian law covers a broad and well-developed spectrum of rules relating to war. In balancing the right to use military force against human rights during war, humanitarian law contains both absolute rights and derogable rights. The derogable rights alone may yield in circumstances of military necessity.

In tracing the well-developed codification of the law of armed conflict, the ICJ in *Legality of the Threat or Use of Nuclear Weapons* recognized both Hague and Geneva law. Applying this law to nuclear weapons, the Court summarized the rules of the Hague and Geneva law into two cardinal principles: “no civilian targets or indiscriminate effects,” meant to protect civilians; and “no unnecessary suffering,” meant to protect military personnel. By doing so, the Court came to use the term “humanitarian law” to refer to these principles, having particular application to military attacks. The Court did not address the branch of humanitarian law which requires the humane treatment of war victims, probably reasoning that these rules were inapplicable to the issue at hand. More importantly, the Court did not factor military necessity into its analysis of humanitarian principles.

This Comment next addresses the Court’s major holdings in *Legality of the Threat or Use of Nuclear Weapons*. Although the Court

106 For a discussion of humanitarian laws drafted with military necessity in mind, see Baker, supra note 69, at 360–63.
107 Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. at 827.
reached several other minor holdings, I will label the two clauses in paragraph 105(2)(E)\textsuperscript{109} as the first and second holdings. The Comment addresses the first holding, especially the Court's use of the modifier "generally" in concluding that the threat or use of nuclear weapons was generally contrary to humanitarian rules of war. The Comment also analyzes the Court's failure to consider military necessity in its analysis of humanitarian principles in the first holding. The Comment then addresses the second holding, analyzing the implications on humanitarian law when self-defense is treated as external to humanitarian law.

B. Military Necessity and Humanitarian Principles

Holding One: [T]he threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in principle the rules of humanitarian law.\textsuperscript{110}

In separate opinions, three Judges took exception to the use of the word "generally" in the first holding. These Judges reasoned that the threat or use of nuclear weapons would violate humanitarian principles in all circumstances due to the indiscriminate effects and unnecessary suffering inherent in nuclear weapon use. The Court's refusal to state that nuclear weapons conclusively violate humanitarian principles was, however, consistent with the Court's conception of humanitarian principles. The serious error in the Court's reasoning was the failure to account for military necessity in its analysis of humanitarian law.

1. Tactical Weapons Might Not Violate Humanitarian Principles

The Court first held that the threat or use of nuclear weapons generally would be contrary to the principles of humanitarian law. In their dissenting opinions, Judges Weeramantry, Koroma, and Shahabuddeen took exception to the word "generally" modifying "contrary to international law."\textsuperscript{111} These Judges cited the devastating effects of nuclear weapons on human life and the environment, including the probability of escalation, arguing that the threat or use of nuclear weapons would always violate the humanitarian principles of no indiscriminate effects and no unnecessary suffering. The Court's use of "generally," however, was legitimate in that it accounts for the uncertainties in predicting the effects of certain nuclear strikes.

\textsuperscript{109} Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. at 831.

\textsuperscript{110} Id.

\textsuperscript{111} See id. at 881 (dissenting opinion of Judge Weeramantry); id. at 925 (dissenting opinion of Judge Koroma); id. at 861 (dissenting opinion of Judge Shahabuddeen).
Specifically discussed in the opinion were tactical nuclear weapons. While large scale nuclear weapon use would almost certainly violate humanitarian law concepts, low yield nuclear weapons might be used without indiscriminate effects or unnecessary suffering. Due to the uncertain effects of tactical nuclear weapons in wartime, including the possibility of escalation, the Court was justified in using the modifier "generally" when addressing the probability that nuclear weapons would violate humanitarian law.

Vice President Schwebel introduced an example of a nuclear attack that might fall within the Court's application of humanitarian principles. In his dissenting opinion, Vice President Schwebel introduced the scenario of a nuclear depth charge launched against an enemy submarine which is about to fire nuclear missiles. Schwebel explained that there would be no immediate civilian causalities, thus no indiscriminate effects. Furthermore, the instant deaths of the submarine's crew would constitute equal or less suffering than death by fire, drowning, or crushing—more conventional alternatives. Considering humanity's lack of experience with certain kinds of nuclear strikes (Vice President Schwebel's scenario, for example), the Court was justified in allowing for the possibility of a nuclear strike without indiscriminate effects or unnecessary suffering. The lack of specifics in the advisory opinion supports the Court's use of the modifier "generally" in referring to the threat or use of nuclear weapons as contrary to humanitarian principles.


113 For discussions of the effects and destructive capacity of nuclear weapons, see Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. at 886–95 (dissenting opinion of Judge Weeramantry); id. at 863–64 (dissenting opinion of Judge Shahabuddeen); id. at 925, 928–30 (dissenting opinion of Judge Koroma) (relating testimony by the mayors of Hiroshima and Nagasaki); Office of Technology Assessment, The Effects of Nuclear War (1983); Nageshwar Singh & Edward McWhinney, Nuclear Weapons and Contemporary International Law, 17–27 (1989).

114 One typical example of such a use is a nuclear depth charge deployed to destroy a submarine in an isolated section of the ocean. Another common hypothetical is a low tonnage nuclear weapon used against a military installation isolated by desert. In these examples, the immediate indiscriminate effects and unnecessary suffering are relatively small. The danger of escalation, however, is an uncertainty that could turn relatively discriminate initial effects into wide reaching harm to human civilization. See Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. at 839 (dissenting opinion of Vice President Schwebel).
2. The Court Failed to Factor Military Necessity into Humanitarian Law Analysis

As discussed above, humanitarian law recognizes two forms of human rights: human rights which cannot be derogated by military necessity; and human rights which may give way to necessary military force. In considering whether a nuclear attack could be consistent with humanitarian principles, the Court incorrectly analyzed the humanitarian principles of no indiscriminate effects and no unnecessary suffering, both of the second type of humanitarian protection. The terms "indiscriminate" and "unnecessary" in Protocol I are defined in terms of military necessity. In evaluating the principles of no indiscriminate effects and no unnecessary suffering, military necessity must be addressed to determine whether the projected military force is lawful or violative of human rights protections.

The Court, however, did not address military necessity in its analysis of these principles. Instead of allowing for a measure of incidental civilian casualties and military suffering in proportion to legitimate military objectives, the Court addressed whether nuclear weapons could be used with little or no incidental civilian casualties and little military suffering, such as the use of tactical nuclear weapons. At no point in its analysis did the Court include military necessity in its consideration of "no indiscriminate effects" or "no unnecessary suffering." The Court's failure to balance military force and human rights through military necessity had little effect on the outcome of its first holding but a profound effect on the Court's second holding.

C. Self-Defense Doctrine as External to Humanitarian Principles

Holding Two: However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons

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115 See Protocol I, supra note 10, art. 75(2).
116 According to Protocol I, an attack is "indiscriminate" only where it causes incidental civilian casualties excessive in relation to the military advantage gained. See Protocol I, supra note 10, art. 51(5)(b). Protocol I and the Court, however, recognize that civilians must not be the object of attack. See id. art. 57(5); Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. at 827. This statement is consistent only with the previous prohibition if read as "civilians may never be the direct object of attack."

Similarly, the principle of no unnecessary suffering defines "unnecessary" in relation to the military objective sought. See Green, supra note 65, at 89. "[T]he concept of 'unnecessary suffering' refers not to the suffering actually endured by the individual, but to suffering which is beyond that essential for the achievement of the purpose for which it has been inflicted, that is to say, suffering which goes beyond the mere disabling of the victim." Id.
would be lawful or unlawful in an extreme circumstance of self-defense, in which the very survival of a State would be at stake.117

The second major holding introduced extreme self-defense. The Court stated that it could not conclude definitively on the lawfulness of the threat or use of nuclear weapons in an extreme circumstance of self-defense. This non-statement raises questions about the application of humanitarian law. Self-defense is a form of military force. Under humanitarian law, such force is constrained by military necessity in order to maintain the balance between military force and human rights protections. As in its analysis in arriving at its first holding, the Court did not apply such a balance in the case of extreme self-defense. Rather, the Court removed extreme self-defense from humanitarian law, analyzing extreme self-defense as a doctrine independent of humanitarian law.

That the Court analyzed self-defense as independent of humanitarian law was evident in the Court’s reasoning.118 First, as in the analysis leading to its first holding, the Court did not factor military necessity into its examination of extreme self-defense. Second, the Court declared the right to extreme self-defense to be fundamental. “[T]he Court cannot lose sight of the fundamental right of every State to survival, and thus its right to self-defence . . . when its survival is at stake.”119 Third, the Court stated that it considered not merely humanitarian law, but “the present state of international law viewed as a whole.”120 In analyzing extreme self-defense, the Court did not recognize self-defense as a form of military force, subject to the limitations of humanitarian law. Rather, the Court departed from the humanitarian principles of Hague and Geneva law and analyzed self-defense as a separate doctrine under Article 51 of the U.N. Charter.

The Court stated that it could not conclude whether extreme self-defense could justify the use of nuclear weapons. In making this non-

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117 Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. at 831. “Extreme self-defense” is used in the Comment to refer to “an extreme circumstance of self-defense, in which the very survival of a State would be at stake.” Id.

118 Two judges, in their separate opinions, found the Court’s inclusion of its extreme self-defense holding in paragraph 105(2)(E) confusing. That paragraph addressed humanitarian law. Judges Herczegh and Ranjeva thought that the extreme self-defense holding would have been more appropriately included in paragraph 105(2)(C), the paragraph addressing self-defense under Article 51. See id. at 1348 (separate opinion of Judge Herczegh); id. at 1357 (separate opinion of Judge Ranjeva). This confusion resulted because the Court removed self-defense from its humanitarian law analysis, yet retained the extreme self-defense holding in the paragraph dedicated to humanitarian law.

119 Id. at 830 (emphasis added).

120 Id. (emphasis added).
conclusive statement, the Court recognized that the effects of nuclear
weapon use in the modern world were not known. By merely raising
the issue, however, the Court suggested that nuclear weapon use
might be justified by self-defense. In light of the Court’s treatment of
self-defense as external to humanitarian law, the legality of a nuclear
attack in self-defense would depend upon reconciling independent
legal doctrines: human rights protections and the “fundamental right
of every State to survival, and thus its right to self defense.” 121

Judge Fleischhauer in his separate opinion attempted such a re-
conciliation. 122 Judge Fleischhauer reasoned that human rights and
self-defense were irreconcilable in the case of nuclear weapons. He
adopted a least common denominator approach as a means of evalu-
ating the legal principles which he considered to be of “equal rank-
ing.” 123 Like the Court, Fleischhauer treated self-defense as external
to humanitarian law. But the Court, unlike Fleischhauer, did not at-
tempt to reconcile the two doctrines. 124 When the Court failed to re-
concile the doctrines, it undercut certain human rights protections.

121 Id.

122 Judge Fleischhauer evaluated “[t]he Principles and rules of humanitarian law
and the other principles of law applicable in armed conflict such as . . . the inherent
right of self-defense.” Id. at 835.

123 Id. Fleischhauer proposed an alternative explanation in the absence of a rule
for the conciliation of conflicting legal principles, “the general principles of law rec-
ognized in all legal systems, contains a principle to the effect that no legal system is
entitled to demand the self-abandonment, the suicide, of one of its subjects.” Id.
While, this in fact, may be the case, one may find a similar (perhaps inherent) prin-
ciple stating that a legal system cannot be interpreted to allow the destruction of the
society that created the system, in this case mankind. In his dissent, Judge Weeraman-
try quoted H.L.A. Hart. “We are committed to it as something presupposed by the
terms of the discussion; for our concern is with social arrangements for continued
existence, not with those of a suicide club.” Legality of the Threat or Use of Nuclear Wea-
pons, 35 I.L.M. at 912 (dissenting opinion of Judge Weeramantry) (quoting H.L.A.
HART, THE CONCEPT OF LAW 188 (1961)); see also id. at 863 (dissenting opinion
of Judge Shahabuddeen). While a legal system should not require the suicide of one of
its members, it should also not require the suicide of all of its members; a likely result
considering the devastating effects of nuclear weapons and possibility of escalation.

124 In his separate opinion, President Bedjaoui recognized a States’ right to sur-
vival as fundamental. Analyzing self-defense as external to humanitarian law,
Bedjaoui did not try to reconcile the doctrines. Bedjaoui recognized that “self-de-
fense—if exercised in extreme circumstances in which the very survival of a State is in
question—cannot engender a situation in which a State would exonerate itself from
compliance with the ‘intransgressible’ norms of international humanitarian law.” Id.
at 1347 (separate opinion of Judge Bedjaoui). Such a recognition safeguards absolute
humanitarian law protections even where self-defense is analyzed outside of humani-
tarian law. The opinion of the Court made no such recognition.
Humanitarian law covers a broad spectrum of rules and principles. By the principle of military necessity, it balances States' right to self-defense and human rights of the enemy in the case of certain derogable human rights. Absolute human rights protections are not subject to such a balance in humanitarian law. When self-defense is removed from humanitarian law, the dichotomy of humanitarian law protection is lost. Instead of considering and rejecting military necessity within humanitarian law, such externalization pits two legal doctrines against each other. The result is that where the doctrines are irreconcilable, attempts will be made to reconcile them (such as Fleischhauer's least common denominator approach).

For example, if a prisoner of war possessed information that would prevent the destruction of the captor State, the State could argue that torture of that prisoner was justified in the extreme case of self-defense. Humanitarian law contains an absolute prohibition on torture. When self-defense is analyzed externally to humanitarian law, however, the legality of the torture (self-defense) would turn on principles of necessity and proportionality, with the likely result being legality. Similarly, such reasoning could justify the taking of hostages by a State as a self-defense measure to prevent military attack. Protocol I and customary international law clearly would not allow such an action. The accordance of absolute protection to certain human rights disappears where humanitarian law and self-defense are analyzed as independent legal doctrines. The externalization of self-defense would not affect humanitarian principles such as "no indiscriminate effects" and "no unnecessary suffering" since both humanitarian law and Article 51 would limit these protections through (military) necessity. The absolute protections of humanitarian law, however, become limited when self-defense is removed from humanitarian law. A proper interpretation of humanitarian law would not

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125 Such necessity has been considered and rejected as reflected by the absolute nature of the prohibitions.

126 For a list of actions that States' have claimed as self-defense, see *Legality of the Threat or Use of Nuclear Weapons*, 35 I.L.M. at 1357 (separate opinion of Judge Ranjeva).


128 As required by U.N. CHARTER, art. 51. See *supra* note 40 and accompanying text.


130 The Court, in its second holding, considered a defensive nuclear strike in the face of a State's destruction—extreme self-defense. The Court recognized a fundamental right to self-defense stemming from the right to survival. Perhaps the Court arrived at such a point by imagining a situation in which nuclear weapon use could
erode such human rights protections: military necessity within humanitarian law operates as a defense to the derogation of certain protections but not of others.

V. Conclusion

The Court's opinion in *Legality of the Threat or Use of Nuclear Weapons* has implications for environmental and humanitarian law. The duty not to cause transboundary harm is clearly stated by the Court to be part of international law. The Court's recognition of environmental concerns as a factor in necessity and proportionality analysis continues the trend towards recognizing the importance of environmental issues in the law of armed conflict. The Court appropriately balanced the independent legal doctrines of respect for the environment and self defense through the limiting principles of necessity and proportionality.

The Court erroneously opened the door for a similar balancing approach when it failed to recognize that humanitarian principles and self-defense are not independent legal doctrines. The Court's omission of self-defense analysis within its consideration of humanitarian law supports the Court's recognition of self-defense as independent to humanitarian law. Where self-defense—a common theme in war—conflicts with human rights of soldiers, civilians, and war victims, the result of removing self-defense analysis from humanitarian law could mean the end of absolute humanitarian protections during war.

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meet Article 51 requirements of necessity and proportionality. In recognizing self-defense as external to humanitarian law, however, the Court opened the door for the erosion of humanitarian law protections in cases of conventional self-defense, as analyzed outside the confines of humanitarian law. Judge Ranjeva, in his separate opinion noted that:

[n]either the legal precedents of the Court or of any other jurisdiction nor the doctrine offer any authority to confirm the existence of a distinction between the general case of application of the rules of the law of armed conflict and the exceptional case [such as extreme self-defense] exempting a belligerent from fulfilling the obligations imposed by those rules.

*Legality of the Threat or Use of Nuclear Weapons*, 35 I.L.M. at 1357 (separate opinion of Judge Ranjeva).

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