Limits on the Use of Nuclear Weapons
Under the International Law of Self-Defence

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1. The International Court of Justice made some important points about the limits imposed by international law on the use of nuclear weapons. As is well known, the Court could not conclude definitively whether 'the threat of 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'. This brief intervention looks at the other parts of the advisory opinion: at the limits that the Court could agree would apply in the circumstances that self defence was relied on. The key to understanding these limits is that there are two separate branches of law that have to be satisfied when such weapons are used in the exceptional circumstances that might conceivably justify their use in self-defence. First, there is the law on the use of force, and second the law of armed conflict. Sometimes these are known as *jus ad bellum* and *jus in bello*. Whatever might have been the relationship between these rules in the past the Court makes it clear that the test for legality is a cumulative one. One has to satisfy the rules on the use of force (as found in the UN Charter), as well as the rules of armed conflict. The Court is clear in paragraph 42 that:

> a use of force that is proportionate under the law of self-defence, must, in order to be lawful, **also** meet the requirements of the law applicable in armed conflict which comprise in particular the principles and rules of humanitarian law.

2. My brief remarks then will only cover the self-defence test and not the second test which relates to the rules of international humanitarian law. On self-defence the Court speaks of a 'dual condition' for the exercise of self-defence under customary international law and under the UN Charter. The dual conditions are necessity and proportionality. Necessity is fairly self-explanatory, the action in self defence has to be necessary to prevent further destruction, it cannot be simply retaliatory. The 2005 Chatham House Principle number 3 on the use of force synthesizes the rule in the following way:

> 3. Force may be used in self-defence only when this is **necessary** to bring an attack to an end, or to avert an imminent attack. There must be no practical alternative to the proposed use of force that is likely to be effective **in ending or averting** the attack.

3. The Court's second part of the dual condition is proportionality. Here again we should be clear what proportionality means in this context, it does not mean that the response in self-defence is proportionate to the damage done in attack. Commentators and judges have highlighted this approach, which one can find reflected in the general law on countermeasures under law of state responsibility. For example Professor Greenwood, now a Judge on the Court, has stated that the Court's conclusion that nuclear weapons might in some circumstances be a proportionate measure:

> ‘appears to have accepted that proportionality has to be assessed as Judge Higgins put it [in her separate dissenting opinion], by considering “what is proportionate to repelling the attack” and not treated as “a requirement of symmetry between the mode of initial attack and the mode of response.”[1]

4. So the dual conditions of necessity and proportionality apply, even before we get to the question of what is a legitimate military objective and questions of civilian damage. Necessity means that there is no other choice of means available to deal with the ongoing attack and that all diplomatic and other options have been exhausted, proportionality relates to the general requirement that only such force is used as is needed to repel the attack. We can recall that under the law of countermeasures in article 49 of the ILC Articles on State Responsibility: ‘An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act **in order to induce that State to comply with its obligations** under part two.’

5. The Court also addresses, in this section on the law on the use of force, the issue of belligerent reprisals. Here the Court, without judging the legality of such reprisals states that ‘in any case **any** right of recourse to such reprisals would like self-defence, be governed *inter alia* by the principle of proportionality.’ Para 46.

6. In closing, let me refer to a third condition mentioned by the International Court of Justice. In para. 44 the Court stated:

> 44. Beyond the conditions of necessity and proportionality, Article 51specifically requires that measures taken by States in the exercise of the right of self-defence shall be immediately reported to the Security Council; this article further provides that these measures shall not in any way affect the authority and responsibility of the Security Council under the Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security. These requirements of Article 51 apply **whatever the means of force used** in self defence.

7. In summary, the court, even if it did not conclude on the legality of the use of nuclear weapons in self defence, took the opportunity to separate out the rules of self defence from those of international humanitarian law. On the applicability of the rules of the use of force to nuclear weapons used in self-defence the Court was unanimous. In *dispositif* para 2 C it stated: 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.

Like the Court, this intervention has been careful to separate out the question of the legality of self-defence, from the rules applicable to an armed conflict, whatever the legality of the self defence measures taken. Those issues will be addressed in a moment by Louise Doswald-Beck.

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[1] '*Jus ad Bellum* and *Jus in Bello in the Nuclear Weapons Advisory* in L. Boisson de Chazournes and P. Sands (eds), *International Law, The International Court of Justice and Nuclear Weapons*, (Cambridge: Cambridge University Press, 1999) 247-266 at 259.