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Human Rights
And
Humanitarian Law

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The ASIL program lists this panel's topic as "Human Rights & International Law: [It asks] Are There Some Individuals Bereft of All Legal Protections." The program notes that "[f]or many years it was widely assumed that international humanitarian law and international human rights law were two entirely separate bodies of law and that [humanitarian law] applied in times of war and [human rights law] applied in times of peace." Furthermore, the program states that the International Court of Justice, "in paragraph 25 of its Advisory Opinion on Nuclear Weapons, seemed to say that there was a greater degree of overlap between the two." We, the panelists, are supposed to discuss this issue as it relates to the detainees at Guantanamo Bay, Cuba.

I would like to begin by an examination of the ICJ's advisory opinion concerning the "Legality of the Threat or Use of Nuclear Weapons."

The ICJ opinion was offered in response to a request from the UN General Assembly in UNGA Resolution 49/75K of 15 December 1994. The second preambular paragraph of that resolution, which I find of note, stated that the General Assembly was:

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Mindful that States have an obligation under the Charter of the United Nations to refrain from the threat or use of force against the territorial integrity or political independence of any State. that States have an obligation under the Charter of the United Nations to refrain from the threat or use of force against the territorial integrity or political independence of any State.

I will return later to this apparent predicate for the UNGA request.

The request of the UNGA [in the English text] was that the International Court of Justice render an advisory opinion on the following question:

Is the threat or use of nuclear weapons in any circumstance permitted under international law?

Before addressing the merits, the Court addressed a number of antecedent questions. Among those was whether the question put by the UNGA was relevant to the work of the UNGA. In this regard the Court observed that:

12. The question put to the Court has a relevance to many aspects of the activities and concerns of the General Assembly including those relating to the threat or use of force in international relations, the disarmament process, and the progressive development of international law. The General Assembly has a long-standing interest in these matters and in their relation to nuclear weapons. This interest has been manifested in the annual First Committee debates, and the Assembly resolutions on nuclear weapons; in the holding of three special sessions on disarmament (1978, 1982 and 1988) by the General Assembly, and the annual meetings of the Disarmament Commission since 1978; and also in the commissioning of studies on the effects of the use of nuclear weapons.

I would note that none of these UNGA activities give

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rise to binding obligations upon States Members of the UN, nor do they necessarily bind the Organization.

On the issue of whether the request posed a "legal question," the Court concluded that:

The question put to the Court by the General Assembly is indeed a legal one, since the Court is asked to rule on the compatibility of the threat or use of nuclear weapons with the relevant principles and rules of international law. To do this, the Court must identify the existing principles and rules, interpret them and apply them to the threat or use of nuclear weapons, thus offering a reply to the question posed based on law.

In response to criticisms by States Members that offering an advisory opinion on this question would not be productive, the Court stated that:

In contending that the question put to the Court is vague and abstract, some States appeared to mean by this that there exists no specific dispute on the subject-matter of the question. In order to respond to this argument, it is necessary to distinguish between requirements governing contentious procedure and those applicable to advisory opinions. The purpose of the advisory function is not to settle "at least directly" disputes between States, **but to offer legal advice to the organs and institutions requesting the opinion** (cf. *Interpretation of Peace Treaties I.C.J. Reports 1950*, p. 71). The fact that the question put to the Court does not relate to a specific dispute should consequently not lead the Court to decline to give the opinion requested.

So this panel has been convened today to discuss the impact of this advisory opinion on the conduct of States Members of the UN; actually on the conduct of one State

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Member of the UN, namely the United States. Whereas, as noted above, the Court did not purport in this Advisory Opinion to interpret the obligations of States Members. Rather, it purported to give the UN General Assembly and other UN organs, its "legal advice." Legal advice based on "the relevant principles and rules of international law."

Based on Paragraph 25 of the Court's opinion, it appears that the Court concluded that the International Covenant on Civil and Political Rights formed part of that relevant law. Paragraph 25 states:

25. The Court observes that the protection of the International Covenant of 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 in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.

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OBSERVATIONS:

I find the opinion to comprise a confounding mix of concepts, and I offer the following observations:

First. What does it mean to say that the meaning of Article 6 of the Covenant cannot be deduced from the text of Article 6? That one has to look to the *lex specialis* of international humanitarian law in order to determine the meaning of the right to life in times of armed conflict? I think that, on its face, this is an illogical formulation. It gives hortatory recognition to human rights law in times of armed conflict, but on substance, looks entirely to international humanitarian law. The no more than hortatory nature of this reference to human rights law in times of armed conflict is all the more evident in the Court's judgment, which makes no reference to human rights, but casts its conclusions entirely in terms of international humanitarian law.

Second. Why does the Court cite to the International Covenant on Civil and Political Rights? Yes, it does mention in its opinion that some State submissions argued that it was the applicable law and that other States argued that it was not the applicable law. Paragraph 25 resolves

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the primary dispute between those two camps by concluding that the Covenant applies during times of war as well as peace. But the Court offers no affirmative justification - no foundation - for considering that the Covenant is part of the relevant law for this case. Indeed, its conclusion, noted above, that international humanitarian law provides exclusively the substantive law needed to resolve the question before it, suggests that the Covenant did not provide part of the relevant law

Third. Why then did the Court include Paragraph 25 in its opinion? I don't know. The Court gives no justification for what - in light of the conclusions of the opinion - is at best highly gratuitous "obiter dictum." Although, it is difficult even to regard it as dictum, since it is rebutted by the conclusions of the opinion, which give no weight to human rights considerations.

Fourth. Why did the Court refer at all to the Covenant in an opinion concerned with the use of force in an international armed conflict?

Here, I recall the second Preambular Paragraph of the UNGA resolution requesting this opinion. Its focus was the

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use of nuclear weapons against the territorial integrity and political independence of a second State.

But, the obligations assumed by a State Party to the Covenant are clearly limited [in Article 2(1) of the Covenant] to "all individuals within its territory and subject to its jurisdiction." Thus the reach of the Covenant is not extraterritorial. Accordingly any reference to the Covenant in this opinion would logically have focused on the possible use by a State of nuclear weapons in its own territory. But, there is not discussion of this in the opinion

Fifth. How did the Court decide what rules and principles of international law it should examine? Had this been a contentious case, the Court would clearly have turned to the relevant bilateral or multilateral treaties ratified by the disputing Parties. But, as an advisory opinion intended solely to give "legal advice" to UN organs, the Court lacked such guidance. Instead, it reviewed a number of sources, including non-binding instruments, and from them cobbled general legal advice to UN organs that we are now - at this panel - being asked to apply to the conduct of a State - a State which may or may

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not have endorsed the non-binding instruments or even the binding instruments on which the Court relied.

Finally, as they say in basketball - or, at least, as I knew it in New York - no blood, no foul. Despite the peculiar inclusion of Paragraph 25, the Court found correctly that international humanitarian law - and not human rights law - governs armed conflict.

In terms of the immediate issue before us, that means that international humanitarian law governs the capture and detention of enemy combatants that are now or have been held at Guantanamo Bay, Cuba. That does not, however, answer the question completely because the current conflict, in my opinion, is sui generis. It is not the conventional combat between uniformed militaries of States.

In that regard, I would note that some have argued that if persons are not prisoners of war under the Third Geneva Convention, they must be protected persons under the Fourth Geneva Convention. To permit otherwise, it is said, would create "persons bereft of all legal protections."

But, this argument does not prevail even in the context of conventional warfare. Certain persons are never eligible for POW or protected person status: these include

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co-belligerents, one's own nationals, and nationals of Allies enjoying diplomatic relations. That is not to say that they are bereft of all protections, however. They are certainly entitled to the general humanitarian protections contained in Common Article 3 of the Geneva Conventions, as are the detainees at Guantanamo Bay.