



Advisory Opinion: Legality of the Threat or Use of Nuclear Weapons (Italy, Marshall Islands, Netherlands, Qatar)

ARGUED: 20 November 2023

DECIDED: 21 November 2023

1 This Concurring Opinion was agreed to and signed by Justice Barness of Malta and Justice Policastro of
2 Ghana.

3 The Court has jurisdiction to produce an Advisory Opinion in response to Resolution 49/75 K by the
4 General Assembly which submitted the question “ Is the threat or use of nuclear weapons in any circumstance
5 permitted under international law?” Article 96 of the Charter of the United Nations (Charter) states: “ The General
6 Assembly or the Security Council may request the International Court of Justice to give an Advisory Opinion on
7 legal questions.” Article 65 of the Statute of the International Court of Justice (Statute) further grants the Court
8 jurisdiction, stating: “The Court may give an Advisory Opinion on any legal question at the request of whatever
9 body may be authorized by or in accordance with the Charter of the United Nations to make such a request.” In the
10 light of these factors, we assert our finding of jurisdiction. In accordance with Resolution 2444 passed in the 23rd
11 session of the General Assembly in 1968, the Justices of the Concurring Opinion find that the resolution establishes
12 a legal framework determining the illegality of the use or threat of nuclear weapons. The resolution put forth by
13 the General Assembly affirms Resolution 28 of the 20th International Conference of the Red Cross which lays down
14 principles for all governmental and other authorities with respect to human rights in armed conflicts. Resolution
15 2444 affirms the three following principles:

16 That the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited;

17 That it is prohibited to launch attacks against civilian populations as such;

18 That distinction must be made at all times between persons taking part in the hostilities and members of
19 the civilian populations to the effect that the latter be spared as much as possible;

20 Due to the ambiguities of the effects of nuclear weapons both on humans and the environment the usage of
21 nuclear weapons poses a threat that can not be contained and may have lasting effects. Furthermore, Article 32 of
22 the Fourth Geneva Convention of 1949 states that all signatories to said Treaty are expressly prohibited from taking
23 any action causing the physical suffering or extermination of civilian or military targets, including any measures
24 of brutality. The universally shared view of the inherently destructive nature of nuclear weapons, physically and
25 environmentally, has demonstrated its effects on the Marshall Islands, Hiroshima, and Nagasaki. Thus, the Court
26 holds that there is no instance under international law where the use of nuclear weapons is considered legal.

27 The Justices of the Concurring Opinion acknowledge that all States who brought this case before the Court
28 are not in the possession of their own nuclear weapons on their soil. The Justices also recognize the comprehensive
29 treaties that have accomplished significant steps toward nuclear weapons disarmament. The Treaty on the Nonprolif-
30 eration of Nuclear Weapons of 1968 (NPT) compels existing nuclear powers to progress toward total and permanent
31 disarmament, and its 191 signatories reflect the will of the global community to eliminate the use of nuclear weapons.
32 Additionally, the Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological
33 and Toxin Weapons and on their Destruction of 1968 (The 1968 Treaty and Convention on the Prohibition of the
34 Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction of 1992 (The 1992
35 Treaty) present promising developments in States acting in their sovereign will to further discuss the nature of steps
36 that may be taken toward disarmament. The 1992 Treaty is currently open for signatories and will be enforced
37 upon its 65th accession. While the Concurring Justices recognize that the will of the international community trends
38 toward nuclear disarmament, these Justices also hold that several factors of disarmament are not reflected in these
39 treaties, which likely provide various views for prescribed scenarios for nuclear weapons. Such factors include the

40 specific definition of a threat, in the context of nuclear deterrence, scenarios in which the legality of the use may be
41 rendered (which have not yet occurred), and the nature of a ban that may be enforced on rogue or non-participating
42 states.

43 Thus, the Concurring Justices are hesitant to comment on how State sovereignty interacts with the possession
44 of nuclear weapons until further international law is developed regarding the nature of nuclear weapons threat and
45 possession. Given that the Court's role is not to formulate laws but to interpret and apply existing laws, we exercise
46 caution in providing further details regarding nuclear weapons. With hesitancy, the Concurring Justices understand
47 that while the nature of the Court's Advisory Opinion is not legally binding, they carry significant legal and moral
48 significance in the realm of international law. Further, for situations of unprecedented global warfare or more specific
49 instances of the threat or use of nuclear weapons, cannot be pre-dictated by the Court without additional law dictated
50 by the desires of the nations represented in the General Assembly for the definition of "threat", "use", and "ban".

51 Therefore, the Concurring requests:

52 a.) First, The General Assembly of the United Nations holds an urgent meeting to give equal weight
53 to the voices of all countries, those with and without nuclear weapons, to further deliberate on instances in which
54 international law may need to be cultivated to legally define the threat, as well as the legality in certain circumstances,
55 to discuss a complete ban further.

56 b.) Second, after these steps have been met, the Court may further interpret laws according to statutes on
57 sovereignty to determine the country's individual rights in the cases of a complete ban and once "threat" is defined.

58 c.) Lastly, while the Concurring Justices recognize the devastating effects brought upon innocent civilians
59 by nuclear weapons, the Concurring Justices encourage further diplomatic discussion and possible amendments to
60 international law with countries considered hostile or leaning toward proliferation prior.

61 Respectfully, the Concurring Majority.

Signed By

A highly stylized, cursive handwritten signature in blue ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

Justice Alana Policastro

A handwritten signature in blue ink that reads "Emma Barnes" in a cursive script. The "B" is particularly large and loops around the "a".

Justice Emma Barnes