Nuclear Weapons and the World Court: The ICJ's Advisory Opinion and Its Significance for U.S. Strategic Doctrine

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Introduction

By the narrowest of votes (a 7 to 7 split on perhaps its most controversial conclusion), in fifteen opinions (including six dissents), totaling 270 pages, following eleven days of hearings during which twenty-five States testified and more than 30 submitted written materials, the International Court of Justice (ICJ or World Court), on 8 July 1996, provided the United Nations General Assembly with a nonbinding advisory opinion on the lawfulness of using, or threatening to use, nuclear weapons. In the process, it solemnly affirmed the obvious, obfuscated the serious, and on at least one important issue that was not even raised by the General Assembly's request almost certainly reached the wrong conclusion with decisive unanimity. In the
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process, it may have inadvertently and gratuitously undermined the prospects for international peace and world order on the eve of the new millennium.

Perhaps not surprisingly, the opinion was quickly "interpreted" for the media by the "spin-doctors" representing such groups as the original "ban-the-bomb" Campaign for Nuclear Disarmament (CND), Greenpeace, and the International Association of Lawyers Against Nuclear Arms, as a decisive victory for opponents of nuclear weapons—ignoring the fact that their most vociferous defenders on the Court had issued strong dissenting opinions, while at the same time the opinion was generally welcomed by prominent U.S. Government lawyers as about as harmless a decision as anyone could have anticipated under the circumstances, especially given the opinion's political genesis.

Particularly revealing were the reactions of the Japanese mayors of Hiroshima and Nagasaki, who had made impassioned appeals to the Court to declare nuclear weapons illegal. Hiroshima Mayor Takashi Hiraoka told reporters that "the outcome looks as if to approve of the status quo," and suggested that "the court is controlled by nuclear powers." Nagasaki Mayor Itcho Ito expressed his "anger" at the World Court's opinion, declaring to the press: "I felt enraged..."

In reality, despite some serious shortcomings, once properly understood, the core of the advisory opinion was consistent with well-established principles of international law and is largely to be welcomed. Nevertheless, because it will certainly continue to be cited in national and international policy debates in the coming years—and some generally reputable authorities have already clearly been misled—it is important to understand what the Court did and did not say, and to identify a few clear shortcomings in the opinion.

There were initially two separate requests before the World Court for an advisory opinion on this issue, but the one brought by the World Health Organization was turned down by the Court because it was outside the lawful scope of the WHO's responsibilities. While the United States and several other countries urged the Court to use its discretion and reject the companion request from the General Assembly as well, the authority of the Assembly to seek such an opinion was obvious.

The General Assembly had taken the position in nonbinding resolutions as early as 24 November 1961, that "the use of nuclear and thermo-nuclear weapons is... a direct violation of the Charter of the United Nations;" however, these were typically approved by narrow votes that were hardly indicative of a broad international consensus. Furthermore, even some of the General Assembly resolutions seemed to recognize that no legal rule had yet
been established outlawing nuclear weapons per se; for example, an ambiguous 1978 resolution asserted that “the use of nuclear weapons . . . should . . . be prohibited. . . .”

Responding to an initiative launched by several anti-nuclear Non-Governmental Organizations (NGOs), on 15 December 1994, the UN General Assembly approved Resolution 49/75 K, which provided in part that the Assembly:

Decides, pursuant to Article 96, paragraph 1, of the Charter of the United Nations, to request the International Court of Justice urgently to render its advisory opinion on the following question: “Is the threat or use of nuclear weapons in any circumstances permitted under international law?”

The resolution was approved by a vote of 78 to 43, with 38 abstentions. Thus, only a plurality of those States voting registered support for such an advisory opinion; or, put differently, a slight majority of the organization did not approve the request. While the Charter seems to exclude abstentions in determining the outcome of a vote,17 the Court might certainly have considered this reality in deciding whether to respond positively to the request.

More significantly, an argument might be made that the resolution itself required a two-thirds majority to pass pursuant to the second paragraph of Article 18 of the Charter—on the theory that urging the World Court to declare nuclear weapons per se illegal (the clear objective of the resolution) could have the potential to undermine the entire system of nuclear deterrence upon which international peace and stability have been premised for fifty years. Writing about the Court’s decision while still a New York University law professor, the current Deputy Legal Adviser to the United Nations argued that “it would not have been difficult to hold that a question relating to the threat or use of nuclear weapons” falls under the two-thirds majority requirement, but noted that “inexplicably no representative objected” on these grounds. Nevertheless, he concluded: “It would seem that the Court, in perhaps unseemly eagerness to address what is evidently one of the most interesting and important current legal questions, failed to consider the possibly most serious objection to its jurisdiction to do so.”

Misstating the Question

There is a more fundamental problem with the General Assembly resolution: It was not phrased in the language of international law, and indeed
seemed calculated to shift the burden of proof from those who argued that nuclear weapons were unlawful to those who felt otherwise. The underlying premise of modern international relations is that sovereign States are coequal and generally independent of constraints except to the degree they consent to limitations on their freedom of action (normally in exchange for similar constraints on the conduct of other States), either through treaties and other international agreements or by a consistent practice that States recognize as reflecting a legal obligation. The burden thus falls upon those who claim a breach has occurred to identify the conventional or customary legal rule that limits the sovereign discretion of the State accused of the breach.

The classic statement of this principle was made by the Permanent Court of International Justice—the predecessor to the ICJ established under the League of Nations—in the landmark 1927 case of the S.S. Lotus:

International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.20

This principle was reaffirmed by the ICJ as recently as the 1986 Paramilitary Activities case,21 and the improper wording of the 1994 resolution was objected to by several States in their written and oral presentations to the Court.22 The Court essentially ruled this harmless error,23 while at the same time acknowledging: "State practice shows that the illegality of the use of certain weapons as such does not result from an absence of authorization but, on the contrary, is formulated in terms of prohibitions.24

However, it was clear from the declarations and opinions of the individual judges that accompanied the Court's opinion that the Lotus principle is under assault by judges from the Third World who wish to see greater constraints placed upon States without having to obtain their consent. Thus, President Bedjaoui of Algeria contended in his Declaration that, while the Lotus case had "expressed the spirit of the times":

It scarcely needs to be said that the fact of contemporary international society is much altered... The resolutely positivist, voluntarist approach of international law which still held sway at the beginning of the century—and to which the Permanent Court also gave its support in the aforementioned [Lotus] judgment—has been replaced by an objective conception of international law, a
law more readily seen as the reflection of a collective juridical conscience and as a response to the social necessities of States organized as a community.25

Restricting the Right of Self-Defense

The real question before the Court was actually far narrower than might at first appear from a reading of the General Assembly's Resolution, as it was universally agreed that possession of nuclear weapons did not confer some sort of immunity from the prohibition against the aggressive use of force embodied in the UN Charter.26 Thus, the only real question to be addressed was not whether the threat or use of nuclear weapons was ever lawful, but whether international law prohibited a State in possession of nuclear weapons from using them, or threatening to use them, under any conceivable circumstances in a defensive response to armed international aggression.27

Indeed, since deterrence itself is premised upon an implied "threat" to use whatever existing weapons may be necessary and otherwise lawful in the event of aggression, the ICJ was essentially being asked to outlaw the most powerful instrument in international relations for the dissuasion of aggression and the promotion of peace.28 The Court does not appear to have focused on this reality, although it was at least implicit in the statements of some of the States who provided comments.29 One of the most compelling reasons for the Court to have exercised its discretion30 and not issued the requested opinion—in addition to the fact that a majority of the General Assembly had not supported the request, and several States had warned that such an opinion might undermine diplomatic negotiations—was that the most likely consequence of even hinting that nuclear weapons were per se unlawful might well be to undermine the policy of nuclear deterrence that has worked so well for half-a-century in keeping the world out of World War III. This point will be addressed infra.31

The Proper Legal Standard

The proper role of the International Court of Justice is not to decide what result a majority of judges believe to be good public policy or "fair" or "just,"32 or to divine legal rules from deep meditation, but to determine whether the presumptive right of sovereign States to pursue their perceived interests in a specific manner has been limited by an established rule of international law. As the Court acknowledged: "It is clear that the Court cannot legislate..."33
Article 38 of the Statute of the ICJ sets forth the sources of international law the Court may use in deciding whether conduct has been prohibited:

Article 38

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations;
d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Ascertaining the Relevant Law

Thus, the role of the Court was to examine each of these sources of law to ascertain whether, and if so to what extent, they might limit the threat or use of nuclear weapons and then to inquire whether there were any conceivable defensive settings in which the threat or use of a nuclear weapon might not be in conflict with any such legal rules. The basic inquiry was whether international law included a per se prohibition against every threat or use of nuclear weapons and that the proper test was not the “worst case” setting of a massive aggressive assault involving the delivery of thousands of large nuclear devices against another State’s cities, but rather the “best case”—such as a use of a nuclear weapon on the High Seas to destroy an enemy warship preparing to launch weapons of mass destruction against the civilian population of the State seeking to defend itself.34

International Conventions. Quite correctly, no State contended before the Court that nuclear weapons were free from constraints under international law. On the contrary, the nuclear powers readily conceded that any threat or use of such weapons must comply with the jus ad bellum governing the initiation of hostilities and the jus in bello regulating the conduct of military operations—some provisions of which were embodied in treaties and others in customary law.35

For example, it was universally acknowledged that the UN Charter limited any threat or use of nuclear (or any other) weapons to acts of individual or
collective self-defense or when authorized by the UN Security Council.\textsuperscript{36} Similarly, it was accepted without dissent that the laws of armed conflict—prohibiting such behavior as attacks on noncombatants, the infliction of unnecessary suffering, and the use of weapons that are incapable of discriminating between combatants and noncombatants—are applicable to nuclear weapons.\textsuperscript{37}

The Court is to be commended for rejecting a variety of assertions by opponents of nuclear weapons, such as that Article 6 of the International Covenant on Civil and Political Rights (guaranteeing the "inherent right to life") outlawed the defensive use of nuclear weapons in combat (a contrary holding would presumably have outlawed all lethal weapons).\textsuperscript{38} It also rejected claims that a variety of environmental treaties implicitly outlawed nuclear weapons,\textsuperscript{39} that various treaties prohibiting "poisonous weapons" applied to nuclear weapons,\textsuperscript{40} or that any use of nuclear weapons would constitute genocide.\textsuperscript{41}

The States which denied the existence of a \textit{per se} prohibition on nuclear weapons recognized that there were a variety of treaties and international agreements imposing legal limits on nuclear weapons, ranging from bilateral arms control agreements negotiated by the United States and the former Soviet Union to multilateral treaties prohibiting the emplacement of nuclear weapons in outer space, on the seabed or ocean floor, and in several geographic "nuclear-free" zones.\textsuperscript{42}

After a lengthy discussion, the Court concluded that while the growing number of treaties limiting nuclear weapons might be seen as "foreshadowing a future general prohibition on the use of such weapons, . . . they do not constitute such a prohibition by themselves."\textsuperscript{43} In this connection, the Court noted that under several of these treaties "the nuclear-weapon States have reserved the right to use nuclear weapons in certain circumstances," and "these reservations met with no objection from the [other treaty] parties . . . or from the Security Council."\textsuperscript{44}

\textbf{International Custom.} As already noted, historically, and as a general principle today, States are only obligated to abide by legal rules to which they have individually consented—either by entering into treaties or other international agreements intended to be binding under international law, or by joining in a widespread practice with other States out of the belief \textit{(opinio juris)} that it is an obligation of international law. The provisions of treaties do not normally constrain States which have not consented to be so bound, and a State which
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Persistently registers its objection to an emerging rule of customary international law is normally not bound by that rule.

However, there is an exception to the general principle that a State must consent to be bound by a legal rule. Since the Court’s Statute was written, a consensus has emerged that certain “peremptory norms” of international law are of such fundamental importance that they will be imposed even upon persistent objectors despite their lack of consent. Often identified by the Latin expression *jus cogens*, these principles have been so universally embraced through all major legal systems, and the consequences of their breach are viewed as so objectionable, that the collective world community basically agreed to impose them on all States. Classic examples include the prohibition embodied in Article 2(4) of the UN Charter prohibiting the aggressive use of military force, the prohibition against certain categories of large-scale murder contained in the Genocide Convention, and the prohibitions against piracy and the slave trade.

The Court acknowledged the existence of such “intransgressible principles of international customary law” in the Nuclear Weapons case, but such norms were not critical to the decision. The standard for constituting a preemptory norm of international law is considerably higher than that for normal rules of customary law, and there are no *jus cogens* rules that are not clearly also customary law. Once having found that there were no rules of customary law prohibiting every threat or use of nuclear weapons, it was unnecessary for the Court to ask whether these norms had achieved peremptory status.

To be sure, no country has actually used a nuclear weapon in hostilities since 1945; but the Court rejected assertions that this was evidence of customary law because of the clear absence of an *opinio juris*. Another contention that was rejected was that a series of UN General Assembly resolutions should be accepted as evidence of a customary rule. While the General Assembly has no general “lawmaking” authority, its resolutions can, when overwhelmingly supported by member States, serve as evidence of the existence of an *opinio juris*. However, as the Court observed, the antinuclear resolutions often provided that nuclear weapons “should be prohibited,” and they were “adopted with substantial numbers of negative votes and abstentions,” leading the Court to conclude: “although those resolutions are a clear sign of deep concern regarding the problem of nuclear weapons; they still fall short of establishing the existence of an *opinio juris* on the illegality of the use of such weapons.”

*General Principles of Law, National Judicial Decisions, and Scholarly Writings.* The basic nature of the issue before the Court precluded serious
recourse to “general principles of law recognized by civilized nations,” as the question of threatening or using nuclear weapons is inherently international in character. While the Court did note that it was “not called upon to deal with an internal use of nuclear weapons,” it is obvious that “civilized nations” have not formulated special “principles of law” governing the domestic use of nuclear weapons. Similarly, there was little recourse to such “subsidiary means” for determining legal rules as national judicial opinions and scholarly treatises.

The Dispositif

The Dispositif, or operative provisions, of the Nuclear Weapons case consisted of six conclusions in paragraph 105 of the opinion, half of which were little more than what the Court’s Vice President (and current President) acknowledged to be “anodyne asseveration[s] of the obvious . . .” Thus, no State has ever contended that there was any “specific authorization of the threat or use of nuclear weapons” in customary or conventional international law, and including a sentence on this point made little legal sense other than as a political concession to the framers of the General Assembly Resolution who had couched their request in such terms.

Similarly, deciding 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,” is obviously tautological—akin to solemnly declaring that “an act prohibited by international law is unlawful.” Again, the inclusion of such an obvious and unquestioned conclusion presumably can be explained as a concession either to the supporters of the General Assembly Resolution or to the Court dissenters who had wished to declare a per se prohibition.

Of an essentially similar nature is the Court’s unanimous conclusion that:

A threat or use of force by means 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.

Again, the nuclear-weapons States had conceded all of these points, which have to this writer’s knowledge never been seriously in dispute. Such obvious conclusions hardly justified the time and money invested in the process by the General Assembly, the Court, or the member States.
Turning to more controversial matters, by a still decisive vote of eleven-to-three, the Court decided:

There is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such. . . .

This was perhaps the most important part of the decision, both because of the Court's nearly four-to-one majority on the issue and because it answered the basic legal questions implicit in the General Assembly's request.

To be sure, the Assembly had actually asked whether there were any circumstances in which the threat or use of nuclear weapons was permitted under international law, but the Court quite properly had rephrased the answer to be consistent with the reality that international law permits that which is not prohibited. Indeed, had the Court limited its reply to this sentence—perhaps accompanied by language noting that the lawfulness of any use of a nuclear weapon, like all other weapons not prohibited per se by international law, must be determined in the context of both why and how they are threatened or used—it would have been an excellent opinion.

Perhaps the most controversial of the Court's conclusions reads:

It follows from the above-mentioned requirements [of the international law of armed conflict] that the 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 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. . . .

Perhaps the first observation that should be made about this part of the Court's Dispositif is that it was not initially reached by the majority vote normally required by the Court's Statute. Judge Andres Aguilar Mawdsley, of Venezuela, died in October 1995, a month before the case was argued—leaving a Court of only fourteen members, who divided evenly, seven-to-seven, on this conclusion. Since in contentious cases it is highly undesirable for tribunals to be unable to reach a decision, the Court's Statute provides:

In the event of an equality of votes, the President or the judge who acts in his place shall have a casting vote.
Because of the application of this rule, President Bedjaoui of Algeria—who in his separate Declaration characterized nuclear weapons as "the ultimate evil"—was permitted to cast a second vote, bringing the official count on this provision to eight-to-seven. One might note that this outcome was totally a coincidence of timing, for had the vote occurred less than a year later, after the distinguished American jurist Steven Schwebel was elected President of the Court, a different opinion would presumably have resulted.

As an aside, one might argue that the Court has the discretion to withhold the "casting vote" procedure in advisory opinions. The considerations which encourage the definitive resolution of contentious disputes between or among States are not so clearly applicable in the case of a request for an advisory opinion. The Statute gives the Court discretion to decide which of its procedural rules are "applicable" to an advisory opinion, and it would have been consistent with the Statute and fully responsive to the General Assembly to reply that:

1. International law does not prohibit the threat or use of nuclear weapons per se;

2. Like all weapons, the threat or use of nuclear weapons must comply with existing jus ad bellum and jus in bello,

3. Based upon the Court's understanding of the nature of such weapons, their use would only be lawful in an exceptional setting; and

4. In the absence of more detailed information about the characteristics of the weapon in question, its intended target, the purpose for which the threat or use of nuclear weapons is made, and many other circumstances, the Court is unable to provide more specific meaningful advice that would be applicable to every situation.

In any event, the weight to be accorded the Court's nonbinding "advice" to the General Assembly on this point ought to be evaluated in the context of the evenly split vote that produced it; and the "casting vote" procedure should be recognized as the jurisprudential equivalent of a coin toss.

However, having said that, one might also note that, under the circumstances, the basic conclusion is not all that remarkable. Essentially, the Court is saying that by the narrowest of possible margins it has decided that it cannot decide whether the threat or use of nuclear weapons would be lawful, even "in an extreme circumstance"; and, given the horrific consequences commonly associated with any use of nuclear weapons, such a cautious
conclusion is not all that surprising—particularly in the absence of a concrete case or detailed information about the characteristics of modern (or future generations of) nuclear weapons.

Indeed, had the Court merely reported that it "cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense," omitting the further qualifying language "in which the very survival of a State would be at stake," this writer would probably have found that reasonable and acceptable. Given the stakes involved, speculative conclusions in the absence of necessary facts probably serve little purpose.

One certainly can embrace the Court's recognition that international humanitarian law would preclude the use of nuclear weapons in other than "extreme circumstances," but to conclude further than such circumstances would necessarily have to involve "a threat to the survival of a State" is unwarranted by any established or identified legal rule. As shall presently be demonstrated, there are easily conceivable settings in which a State might have no effective alternative to using a nuclear weapon to neutralize a threat to the lives of millions of its civilians, even though the State might nevertheless continue to exist if it elected to endure such a sacrifice. And if there is any principle of international humanitarian law that precludes even a threat to use nuclear weapons as a means of deterring illegal international aggression involving the use of unlawful weapons of mass destruction, the Court has failed to identify it. Indeed, any rule that would prohibit a State in lawful possession of nuclear weapons from even threatening to use them defensively to preserve the lives of tens of millions of innocent noncombatants would stand as clear evidence that law had become part of the problem—or, in the words of Dickens: "If the law supposes that, the law is a ass, a idiot."67

**Dangerous Ambiguity: The World Court and the Use of Nuclear Weapons in Defense of Third States**

The Court does not in the Dispositif clarify whether a distinction exists between threatening or using nuclear weapons in response to "extreme circumstances of self-defense" threatening the survival of the nuclear-weapons State itself, and a threat by such a State to use nuclear weapons in collective defense against a threat to the survival of a third State; however, elsewhere in the opinion there is a reference to a State using nuclear weapons "in an extreme circumstance of self-defence, in which its very survival would be at stake."68 This is an alarming statement, and it is contrary to the spirit of the
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United Nations Charter, which expressly recognizes "the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations." Senator Arthur Vandenberg, who chaired the subcommittee of Commission III at San Francisco that actually drafted Article 51, explained to his Senate colleagues in 1949:

To make a long story short, Latin-America rebelled—and so did we. If the omission [of the right of collective self-defense] had not been rectified there would have been no Charter. It was rectified, finally, after infinite travail, by agreement upon article 51 of the Charter. Nothing in the Charter is of greater immediate importance and nothing in the Charter is of equal potential importance.70

Similarly, in explaining this provision to the Senate Foreign Relations Committee in July 1945, John Foster Dulles affirmed:

At San Francisco, one of the things which we stood for most stoutly, and which we achieved with the greatest difficulty, was a recognition of the fact that that doctrine of self-defense, enlarged at Chapultepec to be a doctrine of collective self-defense, could stand unimpaired and could function without the approval of the Security Council.71

There is a strong argument that the right of sovereign States to use necessary and proportional lethal force in defense against armed international aggression is not only "inherent," as the English-language text of Article 51 terms it, but also "impresscriptable" (as the Russian text of Article 51 asserts72) or "inalienable" (as the United States argued in 192873). In his separate opinion, Judge Fleischhauer (Germany) argued that the Court could also have found legal support for this right in "the general principles of law recognized in all legal systems," as it is universally recognized "that no legal system is entitled to demand the self-abandonment, the suicide, of one of its subjects."74 This view was also embraced by President Bedjaoui, who acknowledged that "[a] State's right to survival is ... a fundamental law, similar in many respects to a 'natural' law."75 It is certainly not a right to be narrowed by judicial fiat of the World Court, and anyone asserting that a victim of aggression may not defend itself by the use of lawful weapons, against lawful targets, in compliance with the law of armed conflict—or may not obtain voluntary assistance from other peaceloving States in meeting the aggression collectively—has the burden of identifying the legal basis for such a rule in conventional or customary international law. The principle of acting collectively to meet threats to the peace is not only unimpaired by the Charter, it is the very first objective
embodied in the Charter; and simple declarations, unsupported by compelling legal authority, asserting or implying such limitations, are insufficient—even when they emanate from the World Court. As the Court has acknowledged, it “cannot legislate,” yet a careful reading of their opinions suggests that “legislate” is exactly what some of the judges attempted to do.

Few legal doctrines have been more critical in deterring aggression and promoting peace than the recognized right of relatively weak victims of aggression to call upon other peaceloving members of the world community for assistance in the event they are victims of armed international aggression; and why the World Court seems determined to undermine this important Charter principle is unclear. In essence, the World Court seems to be announcing that States that can acquire weapons of mass destruction and do not respect the rule of law will be free to use them at will against weaker peaceloving States that lack such weapons—because the nuclear-weapons States will be prohibited by international law from responding (or even threatening to respond) in kind to even the most flagrant criminal acts of aggression. This point is of more than academic importance, because one of the incentives in the Nuclear Non-Proliferation Treaty (NPT) to encourage States to forego their right to develop nuclear weapons was a promise, endorsed by the Security Council, that the nuclear-weapon States would come to their defense in the event they were threatened with nuclear weapons. As Judge Oda (Japan) said in the conclusion of his dissenting opinion in the case:

One can conclude from the above that, on the one hand, the NPT régime which presupposes the possession of nuclear weapons by the five nuclear-weapon States has been firmly established and that, on the other, they have themselves given security assurances to the non-nuclear weapon States by certain statements they have made in the Security Council. . . . It is generally accepted that this NPT régime is a necessary evil in the context of international security, where the doctrine of nuclear deterrence continues to be meaningful and valid.

**Pactum de Contrahendo** or **Pactum de Negotiando?**

The final paragraph of the **Dispositif** was also reached by unanimous decision:

There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.
This part of the opinion may warrant more consideration than it has thus far received. While the General Assembly's request for an advisory opinion was clearly politically motivated and poorly phrased, the question focused entirely upon the existing legal status of the threat or use of nuclear weapons, and did not even suggest that advice was being sought on obligations to negotiate new limitations. Nevertheless, the Court \textit{sua sponte} elected to address this issue—presumably as another consolation to States that had hoped or expected a decision that nuclear weapons are unlawful \textit{per se}.

Not surprisingly, this \textit{dicta} did not escape the attention of the General Assembly, which in December 1996 approved a resolution thanking the Court, "taking note" of the opinion, and then resolving that the General Assembly:

3. \textbf{Underlines} the unanimous conclusion of the Court that there exists an obligation to pursue in good faith \textit{and bring to a conclusion} negotiations leading to nuclear disarmament in all its aspects under strict and effective international control;

4. \textbf{Calls upon} all States to fulfill that obligation immediately by commencing multilateral negotiations in 1997 \textit{leading to an early conclusion} of a nuclear-weapons convention prohibiting the development, production, testing, deployment, stockpiling, transfer, threat or use of nuclear weapons and providing for their elimination.

Because \textit{dicta} from the ICJ advisory opinion is being used to argue that a legal duty now exists to reach agreement on these issues, it is important to look more carefully at this part of the Court's opinion and at the legal theories upon which it is premised.

By way of background, paragraph F of the \textit{Dispositif} was premised upon Article VI of the Nuclear Nonproliferation Treaty, which provides:

\textbf{Article VI}

Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.

In paragraphs 99 and 100 of its advisory opinion, the Court quotes this provision and then provides this conclusion:

The legal importance of that obligation goes beyond that of a mere obligation of conduct; the obligation involved here is an obligation to achieve a precise
result—nuclear disarmament in all its aspects—by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith. . . . This twofold obligation to pursue and to conclude negotiations formally concerns the 182 States parties to the Treaty . . . or, in other words, the vast majority of the international community.88

Despite the unanimous vote on paragraph F of the Dispositif, the Court seems clearly to have confused two related legal concepts: an agreement to conclude a specific agreement in the future (pactum de contrahendo) and an agreement to negotiate in good faith in the future in an effort to reach agreement on a specified issue (pactum de negotiando). In this case, the Court’s conclusion is simply not reconcilable with the text or travaux of the agreement. It is submitted that Article VI of the NPT does not, and cannot reasonably be interpreted to,89 obligate treaty parties to conclude anything—the obligation is clearly only to “pursue negotiations in good faith” towards that end.

The basic principles for interpreting international agreements are set forth in the Vienna Convention on the Law of Treaties,90 which, while not binding as conventional law on all parties to the NPT, are widely recognized as reflecting customary international law. Under the heading “General rule of interpretation,” the Convention provides, inter alia:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

The “ordinary meaning” of a promise to “pursue negotiations” is not “to reach an agreement”—which, if it has any meaning, presumably would require States to accept the best terms the other side was willing to offer.91 To be sure, the same obligation would exist for the second State—or in this instance for all of the 185 parties to the treaty. Does this mean that the first State to get to the World Court can obtain a judgment requiring all of the other treaty parties to “conclude” the treaty favored by the petitioning State? Since the so-called “obligation to . . . conclude negotiations” is not simply for a disarmament treaty, but one incorporating “strict and effective international control,” is it the proper role of the Court to consider the first proposal brought before it, and if in the Court’s wisdom that proposal includes such control, to compel every other treaty party to adhere to those terms? Or does the Court instead intend to assume the legislative task of drafting perhaps hundreds of pages of highly
detailed and intrusive inspection and verification terms, to be imposed upon sovereign States irrespective of their consent?

What, pray tell, is the Court then to do with the States that are not parties to the NPT and thus have clearly not consented to this alleged “obligation . . . to conclude negotiations?” Having declared that all treaty parties must enter into “a treaty on general and complete disarmament under strict and effective international control,” what is the Court then to do about the small number of non-parties to the treaty who do not elect either to surrender all of their weapons or to submit to the controls the Court seeks to impose upon treaty parties? Are they to be rewarded by being allowed to remain outside the disarmament regime—presumably expanding their arsenals (at “going-out-of-business” discount prices) as their neighbors are compelled by the Court to rid their territory of all weapons—or will the Court anoint the first “acceptable” draft treaty submitted to it by any treaty party as establishing a jus cogens obligation erga omnes?

Perhaps the most interesting practical question raised by such an approach is how long the NPT would continue to exist before one State after another invoked its right under Article X to withdraw from the treaty—citing the out-of-control World Court as the “extraordinary event” that has “jeopardized the supreme interests of its country?”92 Surely world peace and the rule of law would not be furthered by such an obvious misinterpretation of the NPT.

Fortunately, the NPT is safe, because the World Court clearly reached the wrong conclusion in this nonbinding advisory opinion. The issue raised by Article VI of the NPT is not one of first impression in international law. Even when the language of an agreement clearly provides that the parties will not just negotiate but conclude a future agreement, unless the terms are essentially fixed by reference to the original agreement, tribunals tend to treat them as nothing more than a commitment to negotiate in good faith. Thus, in the 1925 Tacna Arica Award (Chile v. Peru)—which involved an agreement to conclude a future protocol to prescribe “the manner in which the plebiscite is to be carried out, and the terms and time for the payment by the nation which remains the owner of the provinces of Tacna and Arica”93—the arbitrator found:

As the Parties agreed to enter into a special protocol, but did not fix its terms, their undertaking was in substance to negotiate in good faith to that end. . . . Neither Party waived the right to propose conditions which it deemed to be reasonable and appropriate to the holding of the plebiscite, or to oppose conditions proposed by the other Party which it deemed inadvisable. The agreement to make a special protocol with undefined terms did not mean that either Party was bound to make an
agreement unsatisfactory to itself provided it did not act in bad faith. Further, as the special protocol was to be made by sovereign States, it must also be deemed to be implied in the agreement . . . that these States should act respectively in accordance with their constitutional methods, and bad faith is not to be predicated upon the refusal of ratification of a particular proposed protocol deemed by the ratifying authority to be unsatisfactory.94

In 1931, the predecessor to the current World Court—the Permanent Court of International Justice (PCIJ)—issued an Advisory Opinion on Railway Traffic between Lithuania and Poland95 at the request of the League of Nations. Summarized briefly, in an effort to resolve a quarrel between the two countries, the Council of the League of Nations had approved a resolution recommending “the two Governments to enter into direct negotiations as soon as possible in order to establish such relations between the two neighbouring States [as] will ensure ‘the good understanding between nations upon which peace depends’. . . .”96 This resolution was accepted by both countries, and Poland subsequently contended that Lithuania was obligated to agree to reopen a section of railway between Vilna and Livau that had been destroyed during World War I.

The PCIJ concluded that both States were legally bound by the “agreement to negotiate” contained in the Council’s resolution, but rejected the Polish view that this was in reality a legal obligation “not only to negotiate but also to come to an agreement,” explaining:

The Court is indeed justified in considering that the engagement incumbent on the two Governments in conformity with the Council’s Resolution is not only to enter into negotiations, but also to pursue them as far as possible, with a view to concluding agreements . . . But an obligation to negotiate does not imply an obligation to reach an agreement . . .97

In 1950 the newly established International Court of Justice was asked for an advisory opinion on whether South Africa had a legal duty to negotiate a trusteeship agreement to place the former German colony of South-West Africa—which had been placed under South African control by a League of Nations mandate following World War I—under the new UN trusteeship system.98 While the Court majority found no such obligation, in his dissent, Judge Alvarez found not only a duty to negotiate but also an “obligation” to reach an agreement. However, he acknowledged: “even admitting that there is no legal obligation to conclude an agreement, there is, at least, a political obligation . . .”99
Consider as well a 1972 arbitral award by a tribunal established to resolve disputes between Greece and Germany resulting from World War II. The tribunal was asked to decide whether an undertaking to engage in "further discussions" and "negotiations" included an obligation to reach an actual agreement. The tribunal held;

With the ratification of the Agreement, the parties . . . undertook to negotiate their dispute anew notwithstanding the earlier refusals of both sides to retreat from positions that had hardened over the years. Article 19 must be considered as a pactum de negotiando. The arrangement arrived at between the parties in the present case is not a pactum de contrahendo as we understand it. This term should be reserved to those cases in which the parties have already undertaken a legal obligation to conclude an agreement . . .

The tribunal went on to note that even a pactum de negotiando creates legal obligations for the parties:

However, a pactum de negotiando is also not without legal consequences. It means that both sides would make an effort, in good faith, to bring about a mutually satisfactory solution by way of a compromise, even if that meant the relinquishment of strongly held positions earlier taken. It implies a willingness for the purpose of negotiation to abandon earlier positions and to meet the other side part way.

An article published in the highly acclaimed Encyclopedia of Public International Law in 1997 on these two types of agreements concluded that neither contains an enforceable legal obligation to do more than negotiate in good faith:

In the author's view there is no relevant distinction between the two pacta in the legal quality of the obligations resulting from these instruments. There is no case where an absolute "agreement to agree" has been recognized by an international tribunal. Therefore, the contractual obligations to negotiate in good faith with a view to concluding a subsequent agreement, laid down in pactum—be it named pactum de contrahendo or pactum de negotiando—will only differ slightly according to the circumstances in the particular case: the margin of negotiation on matters of substance left open to the parties for shaping the ultimate agreement will be larger or smaller according to the degree to which the substantive contents of the final agreement can be determined by means of the pactum itself.

International and National Treatises. If one were to examine "judicial decisions and the teachings of the most highly qualified publicists of the various
nations,"103 one would find similar conclusions. One of the world's foremost authorities on treaty law was Lord Arnold Duncan McNair, who during his distinguished career served as president of both the International Court of Justice and the European Court of Human Rights. He provides this discussion in his classic 1961 treatise, *The Law of Treaties*:

Pactum de contrahendo

This term is correctly applied to an agreement by a State to conclude a later and final agreement, and these preliminary agreements are of frequent occurrence. . . . When they are expressed with sufficient precision, they create valid obligations. . . .

It is, however, necessary to distinguish between a true obligation to enter into a later treaty and an obligation merely to embark upon negotiations for a later treaty and to carry them on in good faith and with a genuine desire for their success. Less happily in our opinion, the term *pactum de contrahendo* is applied to an obligation assumed by two or more parties to negotiate in the future with a view to the conclusion of a treaty. This is a valid obligation upon the parties to negotiate in good faith, and a refusal to do so amounts to a breach of the obligation. But the obligation is not the same as an obligation to conclude a treaty or to accede to an existing or future treaty, and the application to it of the label *pactum de contrahendo* can be misleading and should be avoided.104

Turning to United States law, Professor Allan Farnsworth served as Reporter to the *Second Restatement of Contracts*, and his multivolume treatise, *Farnsworth on Contracts*, is among the leading texts on the issue in the United States. He discusses a variety of judicial opinions refusing to enforce agreements to agree on the grounds that they were "vague and indefinite," and under the heading "Agreements to Negotiate" writes:

Under an agreement to negotiate, the parties negotiate with the knowledge that if they fail to reach ultimate agreement they will not be bound. The parties to an agreement to negotiate do, however, undertake a general obligation of fair dealings in their negotiations. . . . [H]ere there is no way of knowing what the terms of the ultimate agreement would have been, or even whether the parties would have arrived at an ultimate agreement. . . . Because of the uncertain scope of an undertaking to negotiate, a court cannot be expected to order its specific performance, though it might enjoin a party that had undertaken to negotiate exclusively from negotiating with others.105

Professor Farnsworth notes that English courts have been "adamant" on this issue, quoting "a distinguished English judge" as having "condemned an
agreement 'to negotiate fair and reasonable contract sums'" by saying: "If the law does not recognise a contract to enter into a contract (where there is a fundamental term yet to be agreed) it seems to me it cannot recognise a contract to negotiate."  

The Travaux Préparatoire. If there is any remaining doubt about whether Article VI of the NPT is an agreement to conclude a future agreement, it is useful to return to the Vienna Convention on the Law of Treaties:

**Article 32**

*Supplementary means of interpretation*

Recourse may be had to supplementary means of interpretation, including the preparatory works of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.  

While it is difficult to contend that the language of Article VI is ambiguous or obscure—or otherwise meets the test for resorting to supplementary means of interpretation—it is nevertheless useful to consult the *travaux préparatoires* to confirm that the unanimous World Court reached the wrong result. The standard reference on the NPT is Mohamed I. Shaker's multivolume study, *The Nuclear Non-Proliferation Treaty: Origin and Implementation 1959–1979*, which provides useful background on Article VI. Dr. Shaker notes that the original drafts included merely preambulatory references to the importance of ending the nuclear arms race and achieving disarmament, and notes that "the two super-Powers preferred a simple treaty without linking it with any other arms control and disarmament measures. . . . India, however, "advocated that a non-proliferation treaty must embody an article of solemn obligation under which nuclear-weapon States would negotiate a meaningful programme of reduction of existing stockpiles of weapons and their delivery vehicles. . . . The obligation was therefore not merely to negotiate a meaningful programme but to undertake certain measures." Similarly, Romania proposed that "(t)he nuclear weapon States Parties to this Treaty undertake to adopt specific measures. . . ." However, as Dr. Shaker observes:

[I]t was realised that it would not have been accepted by both the Soviet Union and the United States. Moreover, it was pointed out that it would have hardly been
feasible in legal terms to enter into obligations to arrive at agreements. The least [sic] that could be done, therefore, was to introduce in the NPT an obligation "to pursue negotiations in good faith" as proposed by Mexico, or "to negotiate" as proposed by Brazil. . . . The Mexican formula was the one adopted by the two co-Chairmen in their identical treaty drafts of 18 January 1968.\textsuperscript{111}

Lest there be any doubt about the obligation that resulted, Dr. Shaker notes:

Under the pressure of the non-aligned States as well as from some of their own allies, the two super-Powers merely accepted in the NPT to undertake to pursue negotiations in good faith, but not, as pointed out by one American negotiator, "to achieve any disarmament agreement, since it is obviously impossible to predict the exact nature and results of such negotiations."\textsuperscript{112}

It is thus clear from the text, the travaux, and the underlying legal principles involved, that Article VI of the NPT constitutes only a pactum de negotiando—an obligation to negotiate in good faith towards the specified end—and, despite the unanimous character of the Nuclear Weapons advisory opinion on this point to the contrary, it does not constitute a pactum de contrahendo. Indeed, the very language of the agreement—with references to "effective measures" and "strict and effective international control"—explains why this was but an undertaking "to pursue negotiations in good faith" on the subject.

It might be added that if, despite the clear language to the contrary, this was a pactum de contrahendo, the terms of this agreement would presumably need to be objectively ascertainable with reasonable clarity. Unless the Court is prepared to spell out the precise terms of a "treaty on general and complete disarmament under strict and effective international control," including identifying when, where, by whom, and under what conditions the highly intrusive international verification inspections are to occur—so that it will be possible to identify which States are in breach for failing to anticipate and accept those terms—it is difficult to take this portion of the Court's decision very seriously. It is mere brutum fulmen.

It is evident that the Court cannot flush out even basic terms for any such agreement, because no such agreement ever existed in the minds of the parties when they entered into the treaty. Presumably, they all shared a vision that someday the world might live at peace without war, and some may well have had in mind specific provisions they intended to try to insert in any convention promoting this end. But the convention travaux provide no suggestion that anything approaching final treaty terms was ever discussed as the NPT was drafted.
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Equally clearly, one can be confident that few countries would have ratified the NPT with the expectation that the World Court might subsequently declare them in breach of an obligation to ratify a subsequent treaty containing highly intrusive but unknowable verification and inspection provisions—not to mention to surrender all of their arms—and premise their security upon the Court imposing a verifiable and effective machinery to prevent all possible violations of this unknown future convention. Put simply, Article VI of the NPT creates nothing more than an obligation to negotiate in good faith; and the Court’s 1996 advisory opinion cannot change that.

A Legal Use of Nuclear Weapons: The Missing Hypothetical

The World Court is, in the view of the present writer, clearly mistaken in its conclusion that the only conceivable lawful use of nuclear weapons would involve a threat to the survival of a State, but the fault may not be entirely that of the judges. Much of the public debate on this issue has been fueled by scholarship and government studies, dating from the 1950s and 1960s, on the destructive nature of nuclear weapons, and the nuclear-weapons States have understandably surrounded their more recent weapon-development programs in a shroud of secrecy.

One would have thought, given the importance of the issue and the widespread reports of the existence of a new generation of low-yield, highly accurate nuclear weapons, that at least one of the nuclear powers would have set forth at least one hypothetical that the Court could use in its legal analysis phase—applying the law to specific facts—but other than a few vague references to “High Seas,” “submarines,” and “deserts,”113 this does not appear to have been done.

Candidly, even these brief references should have given the Court sufficient insight to envision some possible uses of nuclear weapons that would not necessarily conflict with existing laws—a single example would have permitted a conclusion that under certain conceivable circumstances the threat or use of nuclear weapons may be lawful. The ICJ Statute provides that in its advisory functions the Court shall be “guided by the provisions of the present Statute which apply in contentious cases to the extent to which it recognizes them to be applicable,”114 and those provisions provide a plethora of fact-finding instruments. Unlike the situation in American courts, where the absence of a party permits the tribunal to accept the facts as properly pleaded by the other party, the World Court must before rendering a decision in the absence of a party “satisfy itself . . . that the claim is well founded in fact and law.”115 It may

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also call upon parties to a case “to produce any document or to supply any explanation,”116 and may “entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an inquiry or giving an expert opinion.”117

Sadly, instead of asking States who argued that not all potential threats or uses of nuclear weapons were \textit{per se} unlawful to provide one or more examples, the Court essentially bypassed the task of applying the law to the most favorable conceivable set of facts implicit in the question before it.118 As Judge Higgins observed:

\begin{quote}
It is not sufficient, to answer the question put to it, for the Court merely briefly to state the requirements of the law of armed conflict (including humanitarian law) and then simply to move to the conclusion that the threat or use of nuclear weapons is generally unlawful by reference to the principles and norms. . . . At no point in its Opinion does the Court engage in the task that is surely at the heart of the question asked: the systematic application of the relevant law to the use or threat of nuclear weapons. It reaches its conclusions without the benefit of detailed analysis. An essential step in the judicial process—that of legal reasoning—has been omitted.119
\end{quote}

This is unfortunate, because there are any of a number of hypotheticals which the Court could have envisioned (or which the nuclear-weapon States might have suggested) that might be used to illustrate a lawful use of a nuclear weapon. A single case should have allowed the Court to inform the General Assembly that in at least some circumstances the threat or use of nuclear weapons would be lawful—as the Court was neither requested nor expected to provide a comprehensive legal evaluation of every conceivable circumstance. Even at this date, it would seem useful to have such a hypothetical.

Consider for a moment the plight of the Russian Navy, whose sailors have often been required to go months without a paycheck and for whom the new regime promises little of the glory of earlier decades. Imagine that a group of Russian officers and their crew decide that action is warranted, and they decide to sell their \textit{Delta IV}, \textit{Typhoon}, or newer \textit{Borey}-class120 nuclear submarine to a terrorist group or international criminal cartel for a few million dollars. Alternatively, imagine they decide themselves to use this powerful weapons system to compel the world to restore Leninists to power throughout the old Soviet Empire—demanding in the process that all elected leaders of each current regime be publicly executed, \textit{or else}.

To enforce these demands and illustrate the \textit{else}, the group controlling the submarine launches three \textit{SS-N-18}121 sea-launched ballistic missiles (SLBM)
from the mid-Atlantic, each with three 500-kiloton reentry vehicles (each with more than twenty-five times the destructive power of the device detonated over Hiroshima in 1945), targeted for air bursts over London, Paris, and Berlin during afternoon rush hour. Within less than an hour, millions of casualties are reported in Europe, and the long-term projections are even more frightening.

Having demonstrated its seriousness, the submarine continues towards the American coastline, its captain announcing that three of its remaining missiles will soon be fired at targets in the Washington, D.C., New York and Chicago areas. It will then move to the Pacific and attack targets in Los Angeles, San Diego, and Mexico City; and if confirmation has not been received that the changes in regimes and executions of "traitors" have taken place, similar attacks will be made in Japan, China, and perhaps other population centers in Asia. To deter any foolish efforts to destroy the submarine, the captain explains that all of his missiles will be launched immediately at American cities upon any detection of another submarine or warship in its vicinity, or if the sound of a launched torpedo is detected.

Let us suppose further that, with the cooperation of the Russian Government, the United States has been able to track the movement of the submarine. The Military Committee at the United Nations convenes, and upon its advice the Security Council immediately asks the United States to take effective military action to destroy the submarine before it launches the missile now reported to be aimed to impact within 500 meters of the UN Headquarters.

Does international law really require the American representative to the Security Council to announce:

Mr. President and Members of the Security Council. I have been in contact with my Government, and I have some good news and some bad news. The good news is that our Air Force reports that its pilots have the skill to drop a 20-kiloton nuclear device sufficiently close to the submarine that they are certain it would be destroyed instantaneously and without any warning, before any additional missiles could be launched. The bad news is that, pursuant to the legal principles enunciated by the International Court of Justice in the 1996 Advisory Opinion on the Threat or Use of Nuclear Weapons, since the United States could clearly "survive" the attacks which are being threatened—albeit with the projected loss of 10-20 million of our people—it is unlawful for us to attempt effective measures to defend ourselves (or the United Nations) in this situation. Indeed, the weapons that previously would have been available to address such a threat were removed from our inventory and dismantled some years ago. Let us pray.
Perhaps the threat instead would come from a Libya, Iran, Sudan, North Korea, or even Cuba that had purchased a used Soviet diesel submarine and installed primitive ballistic missiles designed to disperse toxic anthrax or other biological agents across population centers in various countries. One could hypothesize numerous such scenarios that would be as credible as any suggestion in 1989 that a year later Saddam Hussein would invade Kuwait and threaten to use weapons of mass destruction against UN sanctioned forces trying to protect Kuwait and its neighbors. One could multiply such examples several fold as the venue shifted from destroying submarines or other warships on the High Seas, to striking tanks or super-hardened military command posts or weapons bunkers in the desert, to assorted other options not involving direct attacks near population centers.

Indeed, as this writer has suggested elsewhere, one of the most effective means of deterring aggression is to have the capability to attack radical regime elites who initiate aggressive wars. Possession of a highly-accurate, low-yield, deep penetrating “bunker-buster” nuclear device might well persuade a future Saddam Hussein—who had sacrificed hundreds of thousands of Iraqi soldiers in his war against Iran and was clearly willing to risk massive troop loses in his 1991 resistance to the UN Security Council—that initiating or continuing massive international aggression might well have negative consequences of a highly personal nature. One need not devote pages of analysis to demonstrate that using a nuclear weapon against a terrorist submarine on the high seas, if necessary to terminate an ongoing barrage of far more destructive weapons of mass destruction against innocent civilians, is clearly consistent with jus ad bellum and jus in bello. It follows as well that the hypothesized attacks would not “threaten the survival of the State.” Therefore, the Court’s extremely narrow exception in paragraph E of the Dispositif is simply wrong as a matter of international law. Fortunately, of course, advisory opinions of the World Court have no binding authority over States.

Making the World Safe for World War III: Limiting Defense and Undermining Deterrence

For anyone who has witnessed the inhumanity of war firsthand and cares about the preservation of peace, portions of the Court’s advisory opinion are disquieting. Without in the least disputing the horrendous consequences likely to be associated with any use of nuclear weapons, one can still wonder whether the judges have forgotten the frightening realities of conventional warfare?
Why, one must wonder, are they so eager to outlaw even the threat of a nuclear response to major acts of armed international aggression—is there some sense of "fair play" that leads them to wish to assure future Adolph Hitlers and Saddam Husseins that the consequences of massive aggression will never be too unacceptable?

The primary reason for the establishment of the United Nations, of which the International Court of Justice is the "principal judicial organ,"126 is "to save succeeding generations from the scourge of war. . . ."127 Yet many of the leaders of the antinuclear campaign which precipitated the General Assembly's request for an advisory opinion view the problem not as stopping aggression—irrespective of the weapons used—but as merely eliminating nuclear weapons. One scholar, for example, envisions "an unprecedented opportunity" as the world approaches the new century "to create a world in which our children will be free from the threat of nuclear war."128 One is tempted to respond: "You mean like in Europe in 1915 and 1943?"

He tells us that "[s]ince 1945, humanity has lived on the edge of a precipice, with human history literally hanging in the balance,"129 and that "[f]or over forty years, the world has lived with the relentless and harrowing fear that the nuclear arms race might eventually result in a nuclear war."130 One need not quarrel with such conclusions to note, as well, that in no small part because of the perceived horrendous consequences of such a war, during this same period, most of the world has also lived in peace.

This same writer expresses understandable alarm at estimates that a strategic nuclear exchange attacking only "key military targets" could kill 10 to 20 million people;131 but he fails to remind us that two-to-four times that many people died in the conventional phases of World War II,132 that more than 100 million people have died in major conventional wars in this century,133 and that advances in conventional military technology in the past half-century strongly suggest that a non-nuclear World War III could be far more destructive of human life than were any earlier wars—even if one assumes that, once started, such a conflict would not ultimately escalate to the use of even illegal weapons of mass destruction.

The most vociferous critics of nuclear deterrence apparently see no distinction between the possession of such weapons by liberal democracies firmly committed to upholding the Charter principles and possession by rogue States and terrorist groups—ignoring a compelling body of political science that demonstrates that by far the most important variable in predicting the outbreak of war is not the existence or absence of any category of weapons, but the nature of the political systems of the potential parties to the conflict.134
Compelling statistical data indicate that democracies do not attack democracies, and aggression results not from peaceloving States being too well armed, but far more commonly from a relatively small number of radical regime leaders concluding that they will benefit from aggression because their potential adversaries lack either the will or the ability to respond effectively to aggression.\textsuperscript{135} As the American Founding Fathers understood,\textsuperscript{136} and as the Latin maxim \textit{qui desiderat pacem praeparet bellum}\textsuperscript{137} affirms, it is perceived weakness, rather than strength, in its potential victims that encourages aggression.

Indeed, the most impressive contemporary scholarship demonstrates with remarkable clarity that both World War I and World War II resulted in large part from perceptions by potential aggressors that their victims, and States which might come to their aid, lacked both the will and the ability to respond effectively to aggression.\textsuperscript{138} Thus, the eminent Yale University Historian Donald Kagan notes that, following World War I, “British leaders disarmed swiftly and thoroughly and refused to rearm in the face of obvious danger until it was too late to save France and almost too late to save Britain,”\textsuperscript{139} and he observes that the failure of the League of Nations to act to defend Ethiopia from aggression in 1936 helped persuade Mussolini to join forces with Hitler: “The democracies seemed weak, indecisive, and cowardly, and their failure and inaction gave courage to their enemies.”\textsuperscript{140}

When Hitler moved to remilitarize the Rhineland in violation of the Versailles Treaty, Professor Kagan notes that “British policy was to avoid war at all costs,”\textsuperscript{141} and that Hitler had actually promised his generals that he would withdraw his forces at the first sight of French resistance. He quotes Hitler as later writing: “The forty-eight hours after the march into the Rhineland were the most nerve-wracking in my life. If the French had then marched into the Rhineland we would have had to withdraw with our tails between our legs, for the military resources at our disposal would have been wholly inadequate for even a moderate resistance.”\textsuperscript{142} Professor Kagan writes:

There is no doubt that some leaders of the German Army were powerfully opposed to an attack on Czechoslovakia... [in 1938] because they believed it would lead to a general war for which Germany was not prepared and which it was bound to lose. When they confronted Hitler he assured them that Britain and France would not fight... Perhaps the most important reason for the failure of this belated attempt at deterrence was that it lacked credibility. Whatever its military capabilities, would Britain have the will to use them? Whatever their commitments, would the British have the courage to honor them?... Small wonder that Hitler never seems to have taken his opponents’ warnings seriously.
As he laid plans for the attack on Poland he discounted the danger from the leaders of Britain and France. "I saw them at Munich," he said. "They are little worms."143

World War II did not result from a failure of "arms control" or the presence of too many weapons. The London and Washington naval agreements helped weaken the military power of the democracies, and after the war was over, Japanese leaders explained that watching movie newsclips of American soldiers in Mississippi training with wooden rifles had helped convince them of American weakness—and thus strengthened the case for attacking Pearl Harbor.144

Properly utilized, international law has a powerful contribution to make to the cause of international peace and security. But parchment barriers like the NPT, the Geneva Protocol on chemical and bacteriological warfare,145 and the Chemical Weapons Convention (CWC),146 are not enough to guarantee peace. The reason Hitler did not use his chemical weapons when the tides of battle turned against him during World War II was not out of respect for international law, but because he knew the Allies would retaliate in kind as a belligerent reprisal. Indeed, if all that were necessary to control aggression were more solemn, legally-binding, promises, we would need no new treaties—for any act of aggression will automatically breach the most fundamental principle of the UN Charter.147 Why assume that a tyrant who is willing to ignore the UN Charter is going to abide by any lesser legal obligation that is not self-enforcing?

The world should have learned from recent experiences with North Korea and Iraq that, by itself, the NPT is not likely to prevent the unlawful procurement of nuclear weapons. As has been noted time and again, that "genie" is out of the bottle, and the basic technology is reportedly even available in public libraries and on the Internet. Efforts to erect new legal barriers to the possession, threat, or use of nuclear weapons—while not necessarily unhelpful or a bad idea—risk missing the point that the primary goal is to prevent war of any kind.

University of Iowa Professor Burns Weston is certainly one of the most intelligent, articulate, and respected scholars in the "ban-the-bomb" camp; and in a 1989 address to the First World Congress of the International Association of Lawyers against Nuclear Arms, Professor Weston observed: "to rid ourselves of the nuclear habit we must rid ourselves also of the war habit."148 Yet he acts as if there were no distinction between aggressor and victim, contending that "nothing is more menacing to the long-term well-being of our planet than the sincerely communicated threat to use nuclear weapons if and when sufficiently provoked."149 He apparently sees no moral distinction, and
no implication for the preservation of peace, between that “threat” being made by someone like Saddam Hussein to compel peaceful Kuwait to submit to his aggression, and such a “threat” being made by a State that is being “provoked” by a flagrant act of armed international aggression and is acting under the authority of a resolution of the Security Council, in order to dissuade the aggressor from resorting to the illegal use of weapons of mass destruction that might claim millions of innocent lives. There is a difference.

Rather than permitting peaceloving States to use the threat of a nuclear response to deter aggression and protect peace, Professor Weston would have us disarm them of the weapons that have proven most effective in deterring massive acts of international aggression for most of this century; suggesting in the alternative that all the world really needs are a few new “mutual nonaggression” pacts. In 1989 he wrote of the need for such treaties between NATO and the Warsaw Pact, and between the United States and the Soviet Union; and one might assume that today his solution to what might be called the “Saddam Hussein problem” would be to get the Iraqi leader to sign a new binding international agreement promising, henceforth, to be good.

Of course, Iraq is already a party to the UN Charter, the Nuclear Nonproliferation Treaty, and various other solemn international treaties which clearly prohibit the things Saddam has been doing (invading his neighbors, developing chemical, biological, and nuclear weapons, etc.); but surely if we could just get him to sign one more piece of paper he would change his ways—especially if we could assure him that his victims will no longer be able to respond most effectively if he violates his promise.

The logic is so compelling that one can only wonder why the world didn’t think of it earlier? Imagine the lives that might have been saved had we just been able to get Germany and Japan to ratify a binding international treaty condemning “recourse to war for the solution of international controversies” and renouncing war “as an instrument of national policy” a decade before the outbreak of World War II. Readers who recall the optimism that greeted the 1928 Kellogg-Briand Pact may recall as well that it was solemnly ratified by both Japan and Germany—leading many people to conclude after the outbreak of World War II that international law was inherently ineffective as an instrument of peace. A better lesson to draw from this unfortunate experience is that unenforced international law is an unreliable barrier to aggression, and a corollary may well be that aggression is encouraged when law-abiding States are denied the legal right to seek to deter aggression with their most effective legal weapons and the aid of other peaceloving States.
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Put simply, the (former) President of the World Court was mistaken when he described nuclear weapons as being "the ultimate evil..." In this context, if there is an "ultimate evil" it is probably the kind of armed international aggression that results in the large-scale slaughter of innocent people and the subjugation of human freedom. When nuclear weapons—or any weapons—are used for that purpose, they are used in an evil manner. When they are used to dissuade potential aggressors from slaughtering or enslaving their neighbors, they serve a positive moral value. The weapons themselves have no inherent moral content.\textsuperscript{159}

The Military Utility of Nuclear Weapons

A central theme of much of the legal criticism of nuclear weapons is that, because of their inherent nature, they have no legitimate military purpose or value. Thus, States should not hesitate to give them up, and there is no legitimate "cost" in banning them. For example, in his book \textit{Prohibition of Nuclear Weapons: The Relevance of International Law}, Elliott L. Meyrowitz asserts that "the nature and effect of nuclear weapons are such that they are inherently incapable of being limited with any degree of certainty to a specific military target."\textsuperscript{160} From such reasoning he concludes that "nuclear weapons have no military utility."\textsuperscript{161}

This is simply mistaken. Even if one were to assume that no State would ever likely again elect to resort to such weapons during combat, it is a dangerous fallacy to assume that weapons can have no utility or "military value" outside of combat. Indeed, the great Chinese strategist Sun Tzu emphasized this point well more than 2,500 years ago when he wrote: "For to win one hundred victories in one hundred battles is not the acme of skill. To subdue the enemy without fighting is the acme of skill."\textsuperscript{162}

A thorough discussion of the utility of nuclear weapons is far beyond the scope of this short chapter, but two examples should suffice to establish the point. The first is the critically important role that nuclear weapons obviously played in keeping Europe at peace throughout the Cold War; and the second is the successful use of the implied threat of a nuclear reprisal if Saddam Hussein continued with his plans to use chemical or biological weapons during the 1990-91 Persian Gulf conflict.

\textit{Nuclear Deterrence and the Cold War}. It is critically important to keep in mind, as the world seeks relief from its fear of intentional or accidental nuclear holocaust, that the world as a whole has seen a remarkable era of relative peace for more than half-a-century, and that no single factor has likely played a more
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decisive role in bringing this about than the shared perception of the unacceptability and futility of nuclear war and the realization that such an outcome might be an unintended consequence of the escalation of any major act of aggression by conventional weapons.

Conrad Harper, the Legal Adviser to the U.S. Department of State in 1995, cautioned the Court that “nuclear deterrence has contributed substantially during the past 50 years to the enhancement of strategic stability, the avoidance of global conflict and the maintenance of international peace and security.”

Similarly, Sir Nicholas Lyell, Agent for the United Kingdom, observed:

[These two requests [by the General Assembly and World Health Organisation] ignore . . . the somber but vital role played by nuclear weapons in the system of international security over the past 50 years . . . . Our real world remains a fragmented and dangerous place, and in this real world, to call in question now the legal basis of the system of deterrence on which so many States have relied for so long for the protection of their people could have a profoundly destabilizing effect.

Perhaps no one formally involved in the case expressed this point more eloquently than Judge Rosalyn Higgins (United Kingdom):

One cannot be unaffected by the knowledge of the unbearable suffering and vast destruction that nuclear weapons can cause. And one can well understand that it is expected of those who care about such suffering and devastation that they should declare its cause illegal. It may well be asked of a judge whether, in engaging in legal analysis of such concepts as “unnecessary suffering,” “collateral damage” and “entitlement to self-defence,” one has not lost sight of the real human circumstances involved. The judicial loadstar . . . must be those values that international law seeks to promote and protect. In the present case, it is the physical survival of the peoples that we must constantly have in view. We live in a decentralized world order, in which some States are known to possess nuclear weapons but choose to remain outside of the non-proliferation treaty system; while other such non-parties have declared their intention to obtain nuclear weapons; and yet other States are believed clandestinely to possess, or to be working shortly to possess nuclear weapons (some of whom indeed may be a party to the NPT). It is not clear to me that either a pronouncement of illegality in all circumstances of the use of nuclear weapons or the answers formulated by the Court in paragraph 2E best serve to protect mankind against that unimaginable suffering that we all fear.

Deterring Saddam’s WMDs in the Gulf War. Anyone who doubts that the threat of a nuclear response can deter wrongful conduct should read the
Dissenting Opinion in the Nuclear Weapons case of then-World Court Vice President (now President) Steven M. Schwebel (United States), who cites chapter and verse in demonstrating that in 1990–91, American threats to retaliate with nuclear weapons persuaded the Iraqi regime not to make use of the 150 bombs and 25 ballistic-missile warheads filed with anthrax toxin that had been specially prepared for use during the war. Judge Schwebel quotes at length, for example, from a Washington Post article of 26 August 1995:

Iraq has released to the United Nations new evidence that it was prepared to use deadly toxins and bacteria against U.S. and allied forces during the 1991 Persian Gulf War that liberated Kuwait from its Iraqi occupiers, U.N. Ambassador Rolf Ekeus said today.

Ekeus, the chief U.N. investigator of Iraq's weapons programs, said Iraqi officials admitted to him in Baghdad last week that in December 1990 they loaded three types of biological agents into roughly 200 missile warheads and aircraft bombs that were then distributed to air bases and a missile site. . . .

U.S. and U.N. officials said the Iraqi weapons contained enough biological agents to have killed hundreds of thousands of people and spread horrible diseases. . . .

Ekeus said Iraqi officials claimed they decided not to use the weapons after receiving a strong but ambiguously worded warning from the Bush administration on Jan. 9, 1991, that any use of unconventional warfare would provoke a devastating response.

Iraq's leadership assumed this meant Washington would retaliate with nuclear weapons, Ekeus said he was told.166

Judge Schwebel also quotes from an interview with Iraqi Foreign Minister Tariq Aziz on the U.S. public television program Frontline, in which Aziz was asked why the expected chemical attack on U.S. forces "never came." He replied: "We didn't think that it was wise to use them. That's all what I can say. That was not—was not wise to use such kind of weapons in such kind of a war with—with such an enemy."167

After placing on the record an abundance of evidence of the impact on Iraqi policy of the American threat168 to retaliate with nuclear weapons in the event of an Iraqi use of weapons of mass destruction (even though such a response had apparently been eliminated as an option before the war started169), Judge Schwebel concluded:
Thus there is on record remarkable evidence indicating that an aggressor was or may have been deterred from using outlawed weapons of mass destruction against forces and countries arrayed against its aggression at the call of the United Nations by what the aggressor perceived to be a threat to use nuclear weapons against it should it first use weapons of mass destruction against the forces of the coalition. Can it seriously be maintained that Mr. Baker’s calculated—and apparently successful—threat was unlawful? Surely the principles of the United Nations Charter were sustained rather than transgressed by the threat.170

The Characteristics of Modern Nuclear Weapons. For perhaps understandable reasons, governments are reluctant to discuss publicly the details of their most sensitive military programs. Former government officials and employees who have been granted access to highly classified defense programs are usually prohibited from discussing such details as well. Having been personally involved—quite unsuccessfully—in trying to persuade the United States Government to declassify persuasive evidence in connection with an earlier ICJ case more than a dozen years ago,171 the present writer is not completely surprised that the official submissions to the Court did not focus on the technical details of the latest generation of nuclear weapons. Perhaps the strongest statement in this regard was by the Government of the United Kingdom, which told the Court:

[M]uch of the writing on nuclear weapons on which these arguments rely dates from the 1950’s and early 1960’s. Modern nuclear weapons are capable of far more precise targeting and can therefore be directed against specific military objectives without the indiscriminate effect on the civilian population which the older literature assumed to be inevitable.172

Many references to the nature of nuclear weapons in presentations to the Court, and even portions of the Court’s opinion,173 suggest that this observation by the United Kingdom is correct. Not all “nuclear weapons” are identical. The Soviet Union, for example, once designed a nuclear weapon with a yield of 150 megatons and tested one with a yield of approximately 50 megatons.174 Identifying a use for such weapons consistent with the law of armed conflict would be extremely difficult, and most possible uses of a weapon capable of 1/100th of that level of destructiveness might well conflict with the law—particularly if used anywhere near a concentration of noncombatants. But the reported trend in the latest generation of nuclear weapons is towards much smaller and far more accurate devices, and it is these devices that must be considered—in the light of all of the circumstances of a given situation—in
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assessing the lawfulness of a potential use. The Court seems to have made no effort to inquire into the characteristics of such weapons,\textsuperscript{175} apparently finding it more convenient to make assumptions based upon knowledge acquired in earlier decades and undocumented assertions made by critics who quite likely were also not privy to information on highly classified defense programs of the nuclear-weapons States.

Thus, the President of the Court concluded that:

Nuclear weapons can be expected—in the present state of scientific development at least—to cause indiscriminate victims among combatants and non-combatants alike, as well as unnecessary suffering among both categories. The very nature of this blind weapon therefore has a destabilizing effect on humanitarian law which regulates discernment in the type of weapon used. . . . Until scientists are able to develop a "clean" nuclear weapon which would distinguish between combatants and non-combatants, nuclear weapons will clearly have indiscriminate effects and constitute an absolute challenge to humanitarian law.\textsuperscript{176}

The present writer has had no access to classified information on this topic in well over a decade, but judging from readily available press reports it seems likely that modern nuclear weapons have already satisfied this requirement. A report in \textit{Time} magazine in connection with the recent confrontation between Saddam Hussein and the UN Security Council, for example, noted that "New weapons with ever increasing accuracy led the Pentagon to be confident that few will stray, thus limiting what military euphemists refer to as 'collateral damage'—innocent, but dead, civilians."\textsuperscript{177} It notes that in the September 1995 attacks on Bosnian Serb strongholds that led to the Dayton Accord, the Air Force reported 97 percent accuracy of its "smart bombs"—far superior to the success record in Operation Desert Storm less than five years earlier. By using Global Positioning System (GPS) satellites for guidance (rather than lasers, which could be thrown off target by smoke or bad weather), and new high-tech fuses that can actually "count" floors in an underground bunker and explode only upon reaching a pre-selected level, the United States had achieved weapons of unprecedented accuracy.\textsuperscript{178}

Because of the increased accuracy, most targets can be defeated by the use of conventional high-explosive warheads, such as the GBU-28\textsuperscript{179} and GBU-35\textsuperscript{180} 5,000-pound "bunker busters;" however, the highly regarded \textit{Aviation Week & Space Technology} quotes a retired senior Air Force general as saying "You can't attack all the chemical and biological weapons storage sites" in Iraq, because "[s]ome are too far underground. . . ."\textsuperscript{181}
Frank Robbins, Director of the Precision Strike Weapons Technology Office at Eglin Air Force Base in Florida, was quoted in Defense Week as stating that GPS-guided munitions “could hit a target the size of a man’s upper torso within a metropolitan area as large as ... Washington-Baltimore.” However, when that man’s upper torso-size target is buried deeply underground, below the range of any conventional weapon that can be carried by the latest U.S. bombers, the only means of deterring a foreign tyrant considering launching an aggressive war—or neutralizing his supply of weapons of mass destruction before they can be fired at the civilian populations of neighboring States—may be with a nuclear warhead.

The Bulletin of the Atomic Scientists reported in late 1997 that the United States had earlier that year deployed the B61 earth-penetrating nuclear warhead to destroy “superhardened” or “deeply buried” targets “with great precision and bewildering agility, no matter their location.” The article asserts that the United States is seeking the ability to destroy “underground targets, with greater discrimination,” for possible counterproliferation purposes, and that one recent report by nuclear weapons experts suggests that “a small nuclear warhead [like the B61] is the best way to neutralize anthrax agents.” The present writer emphasizes that he has no personal knowledge about any of these programs, but assuming for the moment that these generally well-connected sources are correct, they identify critically important military missions which might not be achievable through the use of conventional ordinance. While it is obvious that the legality of any particular use of such weapons must be determined in the context of the purpose for which it is used, projected collateral damage, and other considerations, it is equally clear that not every use of such weapons would be unlawful. Indeed, one could easily conceive of settings in which such a use of nuclear weapons would claim few if any noncombatant lives, while in the process saving millions of lives that might otherwise be vulnerable to weapons of mass destruction.

Once again, the utility of such weapons must also be evaluated in terms of their contribution to maintaining peace by deterring potential aggressors from initiating conflict. If small nuclear weapons make it possible for the United States to place the potential aggressor State’s leadership at risk, and to neutralize an anthrax bomb before it can harm anyone, this serves both to diminish the perceived value of anthrax weapons and to place at personal risk decision makers who may be contemplating threatening the peace. Both of these consequences are highly desirable—irrespective of whether such weapons would ever actually be used in combat.
Perhaps it was inevitable—and even wise—for the Court to refrain from making a detailed speculative inquiry into the technological characteristics of modern nuclear weapons. But without doing so, the Court obviously lacked the knowledge necessary to draw legal conclusions based upon the application of the legal principles it had identified as being germane to the threat or use of these weapons. Its conclusions must therefore be considered in the light of this shortcoming.

There are some very able, knowledgeable, and respected military professionals who have concluded that nuclear weapons are unnecessary and inherently immoral. Their technical understanding of such weapons is far superior to that of the present writer, and in terms of the actual use of such weapons they may well be right. Surely, anyone with an ounce of sense realizes that nuclear war would be horrible beyond description. But precisely because of their perceived horror, the existence of these weapons has ironically thus far been a powerful force for world peace. And with admitted exceptions, military and political leaders in the democracies who know the most about these weapons continue to believe they have military utility.

Nuclear Weapons as a Force for Peace

Perhaps it is time for a “reality check.” Strategic nuclear weapons are capable of incomprehensible devastation, and it doesn’t require a World Court decision to make this point. It is not coincidental that they have not been used a single time in more than half-a-century since they were first developed and used to bring an end to World War II. One can only pray that they will never have to be used again.

But one can also look back at the Cold War era and realize that the world might well be a far different place today had such frightening weapons not been introduced into national inventories. They have imposed a level of sanity on world leaders who otherwise had considerable incentives to promote violent change. Largely because of the respect among decision makers on all sides for the consequences of nuclear conflict, an unstable political confrontation that might easily have resulted in World War III was replaced by nearly half-a-century of political struggle and occasional détente, punctuated on occasion by relatively minor coercive settings on the periphery of the presumptive battlefield.

The foes of nuclear weapons will not acknowledge it, but it is quite probable that the existence of nuclear weapons was the single most important factor in keeping Europe at peace for nearly half-a-century following World War
II—longer than Europe had experienced peace in many centuries. To be sure, the standoff was frightening and the risks of error were horrific; but the existence of a nuclear-armed NATO probably saved tens of millions of lives in Europe alone.

Complete Disarmament Is an Impractical Dream

In a 1793 letter to James Monroe, Thomas Jefferson remarked, with his characteristic perception: “I believe that through all America there has been but a single sentiment on the subject of peace and war, which was in favor of the former. . . . We have differed, perhaps, as to the tone of conduct exactly adapted to secure it.” We may also have differed on the price to be paid for it, for as John Stuart Mill once noted:

War is an ugly thing, but not the ugliest of things: the decayed and degraded state of moral and patriotic feeling which thinks nothing worth a war, is worse. . . . A man who has nothing which he is willing to fight for, nothing which he cares more about than he does about his personal safety, is a miserable creature who has no chance of being free, unless made and kept so by the exertions of better men than himself.

Who doesn't want peace? No rational, sane citizen of any country favors war when peace can be had without price, and the vision of a world without war is enticing. A simple—perhaps overly so—logic suggests that since wars are fought with weapons, if we can just rid the world of weapons we can guarantee peace. Wars, by this theory, result largely from the existence of weapons and from military imbalances which promise benefits for the strong. (The wisdom of this theory is easily established by reviewing the past two centuries of U.S.-Canadian relations.)

Since we all in principle favor peace and would welcome a world in which all beings lived in peace and respected the rights of others, it follows that we would incorporate the aspirational goal of general and complete disarmament in precatory language designed to make everyone feel good at the conclusion of a less ambitious effort to control instruments of war—as was apparently done in Article VI of the NPT. This is not to suggest that the parties were disingenuous in committing to pursue negotiations “on a treaty on general and complete disarmament under strict and effective international control”—presumably every peaceloving State would favor such a goal, if the control machinery were certain to be effective and could be implemented without totally undermining the sovereignty of individual States and the privacy of their citizens—but it is
likely that only the most naive delegates anticipated witnessing the conclusion of such an agreement in their own lifetimes.

Professor Richard B. Bilder is but one of many respected commentators to observe that the "nuclear genie" is "out of the bottle," and that "[t]here are already over 50,000 of those weapons, knowledge of how to build them will never disappear. . . ."191 Certain chemical and biological weapons are even simpler to build and to conceal. The inability of the world community to control illicit drugs provides some insight to this dilemma, and much of that activity takes place despite serious efforts by host States to prevent it. Those who recall the experience of the Gulf War will realize that it is necessary to be able to send inspectors not only to established military installations and chemical or medical laboratories, but also to inspect such places as "baby milk" factories192—and quite likely alleged "religious" and "cultural" properties as well. Indeed, one might anticipate that if any single category of facility were declared "off limits" for inspectors, that would be the most attractive place to engage in prohibited behavior.

One would certainly expect a clever leader who wished to engage in covert development and production of prohibited weapons to try to "raise the costs of inspection" by concealing such activities in locations that might prove embarrassing for foreigners to enter, and then to use political warfare techniques to intimidate and discredit the inspectors if they nevertheless endeavored to do their job. At the same time, potential violators would presumably demand the most intrusive inspections within democratic States—both as an intelligence-gathering technique and as a means of pressing other States to accept what might be called "informal accommodations" which would lessen the mutual inconvenience of inspections (and probably in the process make them virtually meaningless).193

Professor Almond has observed: "Because disarmament agreements are very difficult to verify without major intrusions into the territory of each of the parties, the possibility of concluding such an agreement is slight."194 Other experts have made similar points.195 It is also clear that the closer one comes to total disarmament, the more significant a small amount of "cheating" becomes and thus the greater the incentive to cheat. In a world with tens of thousands of nuclear weapons, a State that can covertly manufacture half-a-dozen nuclear devices is not going to dramatically transform the balance of power—especially if the Security Council can remain functional. But if all law-abiding countries eliminate all of their nuclear weapons—and, pursuant to the Court's interpretation of Article VI of the NPT, their conventional weapons as well—then the incentives for an ambitious tyrant to secretly build a small
inventory of prohibited weapons are considerably enhanced. A tyrant with a global monopoly on weapons of mass destruction, and a willingness to actually use them, would be a powerful actor indeed. So, in the absence of "strict and effective international control" to guarantee (assuming that were even theoretically possible) that no State was "breaking the rules," an unenforceable agreement requiring States to destroy all nuclear weapons (or all weapons of any kind) could well prove highly counterproductive to such Charter values as international peace, human dignity, and freedom.

Today, any tyrant contemplating building nuclear weapons for aggressive purposes must consider the assurances of the world's strongest military powers that they will come to the defense of any NPT party that is a victim of aggression or a threat of aggression involving nuclear weapons. That is a fairly strong disincentive: Why bother to build a small nuclear stockpile to harass your neighbors if the immediate consequence will be to bring you into conflict with the major nuclear powers? We must ask why the World Court seems so anxious to undermine this disincentive, in the process increasing the relative political and military value of a small stock of illicit nuclear weapons (and thus the incentive to acquire them) perhaps a thousand-fold?

Any country that pretends to take seriously the vision of general and complete disarmament ought first to be willing to demonstrate the effectiveness of such a concept at the national level. Let them first take the guns and clubs from their own military and police forces, remove all kitchen knives from their homes, and display for the world to admire a functioning utopian model of universal peace and tranquillity without the threat or use of force. (To paraphrase a comment once made about the practical shortcomings of socialism: "nice idea; wrong species." ) Until that is done, the serious business of trying to promote a more peaceful world ought not be distracted by such silly, dangerous, illusions.

Given the political nature of the entire process, and the risk that under pressure from so-called "peace" groups, NGOs, and numerous Third-World States, the Court would have ignored the law and pronounced a dangerous new doctrine limiting the rights of States to use nuclear weapons to deter aggression and defend themselves and their allies if necessary, one must on balance view the advisory opinion with relief and some satisfaction. Basically, the Court got the law right. It overwhelmingly concluded that there is no conventional prohibition per se against the threat or use of nuclear
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weapons, and similarly found no rule of customary law to support the position embodied in the General Assembly Resolution. It also quite properly noted that, like all weapons, nuclear weapons may not be used in violation of jus ad bellum or jus in bello—such as to commit aggression against a prohibited target or in a manner disproportional or unnecessary to the legitimate defensive needs of a particular situation. It also noted that the highly destructive nature of such weapons, and the commonly associated collateral effects like fallout and radioactive contamination, clearly made such weapons unsuitable for any but the most serious of settings. From the standpoint of its proper function and the rules of international law, had the opinion stopped there it would have been not only unobjectionable but quite commendable.

From a political standpoint, however, such an opinion would have been less than ideal, as it would have constituted a complete rejection of the views of the countries and NGOs that had championed the initiative. While the Court’s courage in resisting political pressure on the fundamental legal issues raised by the request is commendable, its decision to go further and include language apparently carefully designed to placate this considerable political bloc (and presumably the personal preferences of several of the judges) is regrettable. The decision led the Court first to depart from the judicial task of identifying and applying legal principles to specific facts associated with the highly technical and secretive field of modern nuclear weapons technology for which it lacked both the necessary factual information and the scientific expertise to make meaningful judgments; and secondly to gratuitously address an issue that had not been part of the request—and, more sadly still, to arrive unanimously at the wrong answer.

As has been discussed, the Court’s speculation about possible uses of nuclear weapons that might comply with existing jus in bello quickly took the judges into a realm where they lacked sufficient expertise or information to make sound judgments. Apparently (and understandably) not being familiar with the characteristics of the latest generation of nuclear weapons, the Court seems to have assumed that any such weapons would necessarily and indiscriminately slaughter hundreds of thousands if not millions of combatants and noncombatants alike; and trying to hypothesize any scenario in which such conduct would not conflict with the laws governing military operations was, not surprisingly, difficult.

Trying to emphasize the extreme nature of any such exception, the Court spoke in terms of defending against a threat to the survival of a State—which is not a bad example of a situation in which resort to a nuclear weapon might be justified. But it is hardly the only example. It would seem clear, for example,
that a victim of aggression that concluded that the use of nuclear weapons against an aggressor's underground stockpiles of weapons of mass destruction (or hardened military delivery systems for such weapons) was the only defense likely to save the lives of tens of millions of its citizens—even though the State might ultimately "survive" with even half of its original population—would be permitted under international law to make use of such weapons. The mere threat of such a defensive response is still less objectionable as a means of dissuading aggressive intentions.

As an aside, some confusion may result from a misreading of the quite accurate and important language in paragraph 47 of the Court's opinion linking the lawfulness of a "threat" to use force with the underlying question of whether the actual use of force in that setting is permissible under the Charter. The Court concluded:

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. \(^{197}\)

This is correct. But it does not follow that this rule—which governs *jus ad bellum* and is associated with Article 2(4) of the Charter—applies in analyzing a threat or use of force under *jus in bello*. A State is required to consider the probable magnitude and risk of collateral damage to noncombatants when deciding whether it is lawful to attack an otherwise lawful military target, and for that reason, some tyrants find it convenient to place important military targets in the middle of population centers—presumably hoping that even if it remains "legal" for a country like the United States to attack the target (which it generally does), considerations of humanity and more pragmatic concerns of public opinion will act as a deterrent. But a threat to use nuclear (or other) weapons in a defensive response to armed aggression does not endanger the interests protected by international humanitarian law. \(^{198}\) Since, as already noted, the aggressive threat or use of nuclear weapons is already prohibited by the Charter, any analysis of potential defensive behavior needs to discriminate between actual use (which must comply with *jus in bello*) and expressed or implied threats aimed at enhancing deterrence. Deterring armed international aggression, after all, is an important Charter value.

The legal test that ought to be used in responding to the General Assembly's question is not whether the Court majority successfully anticipated every future act of aggression which might legally be met with a particular defensive
nuclear response, but whether in every given situation the use of such weapons necessarily violates some governing legal principle. The Court's ignorance about recent (or future) technological developments in the characteristics of nuclear weapons does not alter the principle legal conclusions of the opinion. The proper test of the lawfulness of nuclear weapons is precisely the same as the test applied to any other weapon that has not been expressly banned: Does the action under all of the relevant circumstances violate any applicable provision of international law?

Applying this test, it is abundantly clear that:

Nuclear weapons may not be used aggressively, or in any other manner contrary to a State's relevant treaty commitments;

Nuclear weapons may not be used contrary to any applicable rule of customary international law binding upon the State considering their use;

Nuclear weapons may not be used against targets prohibited by international law;

Nuclear weapons may not be used even defensively except consistent with the legal rules which constrain the use of all force in self-defense and collective self-defense, such as necessity, proportionality, and discrimination.

These principles are uncontroversial, unobjectionable, and fully consistent with United States military doctrine dating back more than four decades. Beyond that, the Court's speculation that the horrendous inherent characteristics of all nuclear weapons would preclude any use from satisfying these legal tests that did not involve a threat to "the very survival of a State" is only legally meaningful to the extent that the Court's comprehension of the nature of such weapons—today and tomorrow—was accurate. The legally significant point to the opinion is the test to be applied, not the prescience of the judges in foreseeing every conceivable circumstances that might threaten a State in the years ahead, or their perspicacity in understanding current military technology. To the extent the Court's uninformed and speculative inquiry—one might better say noninquiry, as there was little evidence of serious inquiry in the opinion—into the technical nature of modern nuclear weapons was unsoundly premised, the legal conclusions seven of the fourteen judges drew from that factual predicate are of little value. They certainly do not constitute binding rules limiting the conduct of States.
Nuclear Weapons and the World Court

As much as the sponsors of the General Assembly request may have wished, once the Court properly recognized that neither conventional nor customary international law prohibits the defensive threat or use of nuclear weapons (so long as such conduct complies with the law of armed conflict), the Court clearly lacked the authority to modify those legal rules to conform to the political preferences of members of the Court or a plurality of members of the United Nations. Therefore, the Court’s subsequent speculation about possible settings in which the use of such weapons would comply with the laws of armed conflict may have been a useful reminder of the potential horror of nuclear weapons, but to the extent it was premised upon factual error or limited vision, it is of no legal significance. The test remains whether a threat or use of nuclear weapons is consistent with the relevant rules of international law under all of the specific circumstances in which it occurs. It is a good test, and it is precisely the test that the United States has long recognized as controlling. The fact that the judges who most strongly favored a per se prohibition on the threat or use of nuclear weapons found it necessary to dissent from the majority opinion stands in clear refutation of the “spin control” efforts of antinuclear activists to portray the advisory opinion in a light more favorable to their political perspective. The clear reality is that they lost, and, as ironic as it may seem to some, the cause of international peace and effective deterrence emerges clearly victorious from a proper reading of the case.

Notes

1. This does not include all of the thirty-five countries which earlier submitted opinions in the companion request by the World Health Organization for an advisory opinion, which was rejected by the World Court as exceeding the proper jurisdiction of the organization.

2. Unlike the U.S. Supreme Court, which by the Constitution is limited to deciding “cases” or “controversies” (U.S. CONST. art. III, §2) the World Court is expressly authorized to give nonbinding “advisory opinions” to the Security Council, General Assembly, and other UN organs to assist them in fulfilling their own responsibilities. See U.N. CHARTER art. 96; I.C.J. STAT. arts. 65-68.

3. The CND “Information Officer” wrote in a letter to the editor: “I sat in the International Court of Justice while it ruled that the threat or use of nuclear weapons was illegal under international law.” Letters, THE INDEPENDENT (London), July 11, 1996, at 17. See also, Christopher Bellamy, World Takes First Steps to Ban the Bomb, id. July 9, 1996, at 1 (“Last night, anti-nuclear pressure groups, including CND, were claiming victory. . .”). The CND web page (http://mcb.net/cnd/cndtoday/winter97/) includes an article from CND Today (Winter 1997) which interprets the case as establishing that “The threat or use of nuclear weapons is illegal in all conceivable circumstances,” and notes that “The Court . . . found no nuclear weapon which could comply” with international humanitarian law. (Of course, by similar reasoning, one might note that the Court did not identify any nuclear weapon which could not under any circumstances comply, but how many people will read the actual case?) Interestingly, the article
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asserts that individuals being prosecuted in European courts for "serious anti-nuclear actions" (e.g., destroying government property) were successfully citing as a defense the ICJ Nuclear Weapons case. For readers who are not familiar with the CND, it was the original "ban-the-bomb" group established in Great Britain more than four decades ago and is perhaps most famous for having originated the so-called "peace sign," using a black circle around a vertical line with what might be described as an inverted "V" joining the line in the center. This symbol represents the international semaphore flag code for the letters N (flags extended downward on both sides at 45 degree angles from the legs) and D (left flag down, right flag above head—creating the appearance of a vertical line), signifying "Nuclear Disarmament."

4. A Greenpeace spokesman declared that "The ruling, in fact, means that any use or threat to use nuclear weapons could be in breach of international law," and declared the opinion to be "much stronger than I expected." Disarmament: World Court Decision "Misunderstood," INTER PRESS SERVICE, July 10, 1996, available in 1996 WL 10768077.

5. The American co-president of this group characterized the opinion as "much better than what we expected." Jonathan C. Randal, World Court: Nuclear Arms Mostly Illegal, WASH. POST, July 9, 1996, at A12.

6. This statement is based upon personal conversations by the writer with lawyers who took part in arguing the case.

7. For an excellent summary of the background to both the WHO and UNGA resolutions, see, Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 3 (July 8) [hereinafter cited as Nuclear Weapons], (Dissenting Opinion of Judge Oda at 3-23). See also Lt Col Michael N. Schmitt, USAF, The International Court of Justice and the Use of Nuclear Weapons, 51(2) NAVAL WAR C. REV. 91, 92-94 (Spring 1998); and Nuclear Weapons, Statement of the Government of the United Kingdom, June 1995, part II at 3-5.


9. Id.

10. See, e.g., Asides: In Their Opinion (editorial), WALL ST. J., July 15, 1996, at A12 (characterizing the case as ruling "that the threat or use of nuclear weapons is not only really bad, but also illegal according to international law."). See also, Thalif Deen, Use of Nuclear Weapons Illegal, Says World Court, JANE'S DEFENCE WEEKLY, July 17, 1996, at 4 (quoting Daniel Ellsberg).


12. U.N. CHARTER art. 96 ("The General Assembly . . . may request the International Court of Justice to give an advisory opinion on any legal question.").

13. The General Assembly is not a "legislative" body and its resolutions, by themselves, do not create or determine international law (except to the extent it is empowered to make binding decisions having to do with the functioning of the organization).


15. The 1961 resolution, for example, passed by a vote of 56 to 19, with 26 abstentions.


17. U.N. CHARTER art. 18 (referring to a majority or two-thirds majority "of the members present and voting." (Emphasis added.) While one might argue that registering an abstention during the electronic voting process nevertheless constitutes a "vote" for purposes of Article 18, the Rules of Procedure of the General Assembly define this language of the Charter to exclude

18. “Decisions of the General Assembly on important questions shall be made by a two-thirds majority of the members present and voting. These questions shall include: recommendations with respect to the maintenance of international peace and security . . . .” U.N. CHARTER art. 18(2).


21. “[I]n 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, and this principle is valid for all States without exception.” *Military and Paramilitary Activities (Nicar. v. U.S.) (Merits)*, 1986 I.C.J. 4 (June 27), para. 269.


24. Id., para. 52.

25. *Nuclear Weapons* (Declaration of President Bedjaoui at para. 13).

26. U.N. CHARTER art. 2, para. 4 (“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.”).


28. The writer is not suggesting that there are no dangers inherent in predicating world peace upon the hope that rational leaders will always be deterred from aggression by the knowledge that initiating a war might even unintentionally lead to nuclear holocaust. To be sure, this is a frightening thought. But one might also be concerned about legal efforts to undermine the ability of the world community to dissuade potential aggressors from initiating war in the first place. The impact of this decision on deterrence and peace is addressed infra, at notes 127–160 and accompanying text.

29. See, e.g., infra note 165 and accompanying text.

30. “The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.” I.C.J. STAT. art. 65(1) (emphasis added).

31. See *infra* notes 127–188 and accompanying text.

32. This is true unless the parties to a contentious case elect to submit a dispute for the Court to decide *ex aequo et bono* pursuant to Article 38(2) of the I.C.J. Statute.

33. *Nuclear Weapons*, para. 18.

34. See Schmitt, *supra* note 7, at 108.

35. *Nuclear Weapons*, para. 86.


37. See, e.g., id. paras. 22, 85, 86 (“None of the statements made before the Court in any way advocated a freedom to use nuclear weapons without regard to humanitarian constraints.”).

38. Id., paras. 24–25.
39. Id., paras. 27–33.

40. Id., para. 55 ("The practice is clear, and the parties to those instruments have not treated them as referring to nuclear weapons.").


42. These are discussed in id., paras. 58 & 59. For the text and background to some of these instruments, see U.S. ARMS CONTROL AND DISARMAMENT AGENCY, ARMS CONTROL AND DISARMAMENT AGREEMENTS (1996). For an excellent summary of international agreements declaring certain regions to be "nuclear-free zones," see Mark E. Rosen, Nuclear-Weapon-Free Zones, NAVAL WAR C. REV., Autumn 1996, at 47–55.

43. Nuclear Weapons, para. 62.

44. Id., para. 62.

45. Id., paras. 79, 83.

46. Indeed, as the Russian Government was quick to point out, the World Health Organization virtually conceded the lack of a customary ban in noting that "over the last 38 years marked differences of opinion have been expressed by Member States about the lawfulness of the use of nuclear weapons." Quoted in Nuclear Weapons, "Written Statement and Comments of the Russian Federation on the Issue of the Legality of the Threat or Use of Nuclear Weapons," Moscow, June 16, 1995, at 17. The Russians also noted that one of the reasons States are negotiating various international agreements placing limits on certain deployments or uses of nuclear weapons is because they recognize that there is no established customary norm, which, if it existed, would make the treaties unnecessary. Id. at 7.

47. Nuclear Weapons, para. 67.

48. Decisions of the General Assembly do have legal effect in certain specified areas, such as in setting the contributions to be paid each year by member States.


50. This may be optimistic. While one would hope that no government would contemplate using a nuclear weapon against its own nationals, the same thing might have been said about the use of other weapons of mass destruction until Saddam Hussein actually did so.

51. Nuclear Weapons, para. 50.

52. While activist scholars have in recent years produced a number of books and articles arguing that there is a "fundamental need to erect an international legal structure" to outlaw nuclear weapons, or calling for "an effort to create a legal regime for the reduction and elimination of nuclear weapons" as a "high priority," and a relatively small number assert that existing treaties already effectively outlaw any threat or use of nuclear weapons, there is certainly no consensus among "the most highly qualified publicists of the various nations" that international custom already imposes a per se ban on the threat or use of nuclear weapons. See, e.g., ELLIOTT L. MEYROWITZ, PROHIBITION OF NUCLEAR WEAPONS: THE RELEVANCE OF INTERNATIONAL LAW 197, 204, 205 (1990); NUCLEAR WEAPONS AND LAW 5–6 (Professor Richard B. Builder), 52 (Professor John Norton Moore), & 58 (Professor Harry Almond) (Arthur Selwyn Miller & Martin Feinrider eds., 1984); and Lori Fisler Damrosch, Banning the Bomb: Law and Its Limits, 86 COLUM. L. REV. 653, 667 (1986).

53. Nuclear Weapons (Dissenting Opinion of Vice-President Schwebel at 13).


55. Id., para. 105(2) (C).

56. Id., para. 105(2) (D).

57. See, e.g., Nuclear Weapons, "Written Comments of the Government of the United States of America on the Submissions of Other States," June 20, 1995, at 34 ("The United States
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has long taken the position that various principles of the international law of armed conflict would apply to the use of nuclear weapons as well as to other means and methods of warfare.

59. See supra note 24 and accompanying text.
61. "All questions shall be decided by a majority of the judges present." I.C.J. STAT. art. 55(1).
62. Id., art. 55(2).
63. Id. (Declaration of President Bedjaoui), para. 19. One might have thought that slavery, torture, or genocide might better qualify as "the ultimate evil."
64. I.C.J. STAT. art. 68.
65. It is not here suggested that the Court should alter its own procedural rules from case to case, but rather that a reasonable argument can be made that tie votes in connection with advisory opinions do not necessarily need to be artificially "broken" by permitting one judge to vote twice. Contentious cases may pertain to impassioned disputes which, if left unresolved, might lead to unpleasantness and even hostilities. A just and impartial resolution of such disputes may be important, and if dispassionate experts are evenly divided on which party is in the legally superior position, and a compromise solution is impractical, it may even be useful (and fair) to essentially have the Court "flip a coin" to resolve the matter. A United Nations agency seeking a nonbinding advisory opinion could presumably adjust to the reality that the members of the World Court are evenly divided upon a legal question.
66. Implicit or explicit here would be the point that if a "nuclear weapon" existed or was developed that either lacked, or greatly reduced, the devastating characteristics normally associated with such weapons, a different conclusion might result from the application of the governing legal principles to the facts of that specific weapon and the circumstances in which it was being threatened or used.
68. Nuclear Weapons, para. 96 (emphasis added).
69. U.N. CHARTER art. 51.
70. 95 CONG. REC. 8892 (1949) (statement of Sen. Vandenberg).
72. This translation was confirmed by the Russian Federation Mission to the United Nations in New York by telephone.
73. When questions were raised about whether the Kellogg-Briand Pact would restrict the right of States to use force in self-defense, the United States sent a diplomatic note to all countries being invited to sign the treaty which read in part: "There is nothing in the American draft of an anti-war treaty which restricts or impairs in any way the right of self-defence. That right is inherent in every sovereign State and is implicit in every treaty. Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion and it alone is competent to decide whether circumstances require recourse to war in self-defense. . . . Express recognition by treaty of this inalienable right, however, gives rise to the same difficulty

74. Nuclear Weapons (Separate Opinion of Judge Fleischhauer at 3).
75. Id. (Declaration of President Bedjaoui at para. 22).
76. The United Nations was established in the final months of World War II for the primary purpose of avoiding World War III, and the very first purpose identified in Article I is "to take effective collective measures for the prevention and removal of threats to the peace...." U.N. CHARTER art. I, sect. 1.

77. See supra note 32 and accompanying text.
78. Consider this excerpt from the Declaration of President Bedjaoui: "Humanity is subjecting itself to a perverse and unremitting nuclear blackmail. The question is how to put a stop to it. The Court had a duty to play its part, however small, in this rescue operation for humanity. ... This very important question of nuclear weapons proved alas to be an area in which the Court had to acknowledge that there is no immediate and clear answer to the question put to it. It is to be hoped that the international community ... will endeavour as quickly as possible to correct the imperfections of an international law which is ultimately no more than the creation of the States themselves. The Court will at least have had the merit of pointing out these imperfections and calling upon international society to correct them." Nuclear Weapons (Declaration of President Bedjaoui at paras. 6, 8).
80. The Court elected not to address the lawfulness of a proportional use of nuclear weapons as a belligerent reprisal to an armed attack with weapons of mass destruction. Nuclear Weapons, para. 47.
84. Nuclear Weapons, para. 105(2)F.
85. This point has been observed by commentators and was also noted in Nuclear Weapons (Minority Opinion of Vice President Schwebel at 13; Separate Opinion of Judge Fleischhauer at 4).
89. If the Court perceives a legal duty to conclude an agreement, it presumably must be able to articulate at least the basic provisions of that agreement. Were it nothing more than an agreement to destroy all of their nuclear or other weapons, that might be manageable; but Article VI speaks in terms of attempting to negotiate "effective measures ... under strict and effective international control." (Emphasis added.) Where is the Court to turn in ascertaining a set of objective treaty terms to accomplish this goal? Can anyone say with a straight face that the States which ratified the NPT would have done so had they been informed that the World Court would arbitrarily impose a set of terms to satisfy the "strict and effective international control" requirement of Article VI—terms which would either be extremely intrusive on traditional
principles of national sovereignty or would likely prove ineffective in safeguarding the security of those States? Such an idea is simply not credible.


91. Article 2(4) of the UN Charter would prohibit States from attempting to coerce other States to sign an agreement (which would in any event be void ab initio under Article 52 of the Vienna Convention). Since it is axiomatic that no "agreement" can exist without the consent of all parties, if a State has a legal obligation to conclude an unspecified agreement it is presumably at the mercy of the other party or parties.

92. Article X of the NPT provides, inter alia: "Each Party shall in exercising its national sovereignty have the right to withdraw from the Treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country. It shall give notice of such withdrawal to all other Parties to the Treaty and to the United Nations Security Council three months in advance. . . ."

93. Tacna-Arica Question (Chile v. Peru), 2 R.I.A.A. 921, 926 (1925). For a useful discussion of this and other international cases of relevance, see Martin A. Rogoff, The Obligation to Negotiate in International Law, 16 Mich. J. Intl L. 141 (1994).

94. 2 R.I.A.A. 929–930.


96. Id.

97. Id. at 116 (emphasis added).


99. Id. at 184 (dissenting opinion of Judge Alvarez) (emphasis added).


101. 47 Int'l L. Rep't at 453.


105. 1 E. Allan Farnsworth, Farnsworth on Contracts 328 (1990).

106. Id. at 330.


109. Id. at 569–570.

110. Id. at 570.

111. Id. at 571 (emphasis added).

112. Id. at 567 (italicized emphasis added) (quoting U.S. negotiator Gerard Smith.) Dr. Shaker notes further that "[s]ome countries took refuge in the UN General Assembly resolution 2373(XXII) commending the final draft of the NPT, [and] interpreting it as laying upon the nuclear-weapon States a solemn obligation to agree on further constructive measures of disarmament over and above the provisions of Article VI of the NPT." Id. at 572. One might note that: (1) this is a much narrower "obligation" than that held by the World Court to exist in the Nuclear Weapons advisory opinion; (2) the United States, for its part, has in fact agreed to a wide range of "further constructive measures of disarmament" through the SALT and START
process and through various multilateral treaties; and (3) resolutions of the UN General Assembly are not binding as a source of treaty interpretation.


114. I.C.J. STAT. art. 68 (emphasis added).

115. Id., art. 53.

116. Id., art. 49.

117. Id., art. 50.

118. “The Court would observe that none of the States advocating the legality of the use of nuclear weapons under certain circumstances . . . has indicated what . . . would be the precise circumstances justifying such use . . .” Nuclear Weapons, para. 94.


120. See, e.g., OFFICE OF NAVAL INTELLIGENCE, WORLDWIDE SUBMARINE CHALLENGES 16 (1997).

121. I have chosen to use this older missile because its characteristics are better known than the newer SS-NX-28 that is reportedly being built for the new Borey-class submarines. While the Borey is expected to carry “at least 12 strategic missiles,” their characteristics and payload are not in the public domain. Id.


123. It has been widely reported that Saddam has constructed a number of hardened underground sites to protect him from personal risk. The world community has now affirmed that aggressive war is a criminal act erga omnes, and even if one assumed that a deep-penetrating small nuclear warhead would in some settings cause collateral damage claiming hundreds and perhaps thousands of innocent lives, this may be more acceptable than a prolonged conventional conflict in which hundreds of thousands or even millions of soldiers and noncombatants are slaughtered. Further, when the regime elite in question has the capability of unleashing weapons of mass destruction on innocent civilians in other countries, these risks must be balanced against anticipated collateral damage from a surgical strike against the aggressor regime elite. Each setting must obviously be evaluated in the context of all of the available information; but the idea that international law prohibits even threatening to use such a weapon to destroy the leadership of an aggressor State in an effort to deter the use of weapons of mass destruction against millions of innocent civilians is without foundation (see infra, notes 197–198 and accompanying text). To be sure, the risks of collateral damage must always be considered and might often preclude the actual use of such a weapon; but there is no per se ban on the threat of such use as an element of deterrence of international aggression.

124. The terrorists in this setting made no threat to occupy the United States or change even its form of government—and the Cambodian tragedy of two decades ago has demonstrated that a country might lose nearly a third of its population to tyranny and still “survive” as a State.

125. There is no stare decisis rule for the World Court. Even in contentious cases, “[t]he decision of the Court has no binding force except between the parties and in respect of that particular case.” I.C.J. STAT. art. 59.

126. UN CHARTER art. 92.

127. Id., pmbl.
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129. Id. at 204.

130. Id. at 206.

131. Id. at 202.


134. See, e.g., BRUCE RUSSETT, GRASPING THE DEMOCRATIC PEACE (1993); R.J. RUMMEL, POWER KILLS: DEMOCRACY AS A METHOD OF NONVIOLENCE (1997) and other works by this author; and Part IV of APPROACHES TO PEACE: AN INTELLECTUAL MAP (W. Scott Thompson et al. eds., 1991).

135. Particularly insightful on these issues is the work of my colleague, Professor John Norton Moore, who co-teaches a seminar with me at the University of Virginia School of Law on "War and Peace." While much of his work is still unwritten, a useful summary of some of his conclusions may be found in John Norton Moore, Toward a New Paradigm, 37 VA. J. INT'L L. 811 (1997).

136. See, e.g., Secretary of Foreign Affairs Thomas Jefferson's letter to James Monroe, July 11, 1790, in 17 PAPERS OF THOMAS JEFFERSON 25 (Julian P. Boyd ed., 1965) ("Whatever enables us to go to war, secures our peace.").

137. "If you desire peace, prepare for war." FLAVIUS VEGETIUS RENATUR, EPITOMA RE MILITARIS, Prologium at 3 (380 AD).


139. Id. at 302.

140. Id. at 351.

141. Id. at 359.

142. Id. at 360-361.

143. Id. at 394, 412.

144. As a junior naval officer nearly three decades before becoming Chairman of the Joint Chiefs of Staff, Admiral Thomas Moorer took part in debriefing Japanese leaders at the end of World War II. Conversation with the writer.


149. Id. at 1077.

150. See infra, notes 166-170 and accompanying text.

151. While maintaining national credibility generally militates against making threats a State is unwilling to carry out, when the stakes involve trying to deter a possible chemical, biological, or nuclear attack, there may well be settings where a country will elect to threaten a belligerent reprisal which it might ultimately decide not to actually carry out. Like "bluffing" in poker, it is seldom useful to gain a reputation for not being able or willing to back up words with deeds; and in the war-peace setting this can be especially costly in terms of undermining
deterrence. For this reason, the assertion in some recent autobiographical accounts of the 1991 Gulf War that the United States had decided in advance to strongly imply that Iraqi use of weapons of mass destruction would be decisively countered with American nuclear weapons, but not to use such weapons under any circumstances, is unfortunate. The policy itself made imminent sense, but it should have remained a secret. The next time the United States finds it necessary to make such a threat, it may prove to be far less credible. In the writer's view, a threat of belligerent reprisal by nuclear weapons as a means of deterring an aggressive chemical, biological, or nuclear attack is neither contrary to existing jus ad bellum nor with any established jus in bello principle. To be sure, it may raise the anxiety level of a tyrant contemplating aggression, but that is one of the objectives of any deterrence policy.

152. Id. at 1087.
153. Id. at 1088.
155. Japan ratified the treaty on July 24, 1929.
156. Germany ratified the treaty on March 2, 1929.
157. The unwillingness of the international community to respond seriously to the Japanese invasion of Manchuria in 1930, and the Italian invasion of Ethiopia in 1936, demonstrated the toothless character of both the League of Nations and the Kellogg-Briand Pact. In a not dissimilar manner, the world community's failure to respond seriously to Iraq's invasion of Iran in 1980 and its subsequent use of prohibited chemical weapons likely contributed to the decision to invade Kuwait in August 1990.
158. See supra note 63 and accompanying text.
159. This is not to say that there are no weapons which might be characterized as "immoral" or even "evil." While this writer believes the better approach is to ascribe moral content to human actors, he might not quarrel with the conclusion that certain weapons may be incapable of being used in a moral manner—and thus their creation may be an immoral act. However, if they are created not to facilitate aggression and the painful slaughter of the innocent, but rather to deter the use of such weapons by others, even chemical weapons may serve a moral value. Consider, for example, the role played by Allied chemical weapons during World War II in dissuading Hitler from making use of the Nazi stockpile of such weapons.
160. MEYROWITZ, supra note 52, at 201.
161. Id. at 207.
165. Nuclear Weapons (dissenting opinion of Judge Higgins at 8).
167. Quoted in Nuclear Weapons (dissenting opinion of Vice-President Schwebel at 10) (emphasis added).
168. Judge Schwebel quotes from the writings of former U.S. Secretary of State James Baker to establish that the United States "purposely left the impression that the use of chemical or biological agents by Iraq could invite tactical nuclear retaliation." Id.
169. Id. One can be pleased that the United States made this decision and at the same time alarmed that it has been made public in the memoirs of key players and in other accounts of the conflict. Presumably it will be more difficult to deter the use of weapons of mass destruction against U.S. troops in any future conflicts because of the reports that the effective 1991 threat was merely a "bluff." See supra note 151.

170. Nuclear Weapons (dissenting opinion of Vice-President Schwebel at 12).

171. The reference is to the Paramilitary Activities case, supra note 21 and accompanying text. The writer served as Principal Deputy Assistant Secretary of State for Legislative Affairs at the time, and because of his background, both in international law and with the intelligence program being examined by the Court (in an earlier position as Counsel to the President's Intelligence Oversight Board at the White House), he was asked to serve on the interagency group that ultimately (over the writer's strong objection) recommended that the United States withdraw its acceptance of the Court's jurisdiction under Article 36(2) of the ICJ Statute. During this process, the writer tried in vain to persuade Intelligence Community officials to declassify some of the powerful evidence that had persuaded the Kissinger Commission, the House and Senate intelligence committees, and various other groups, that the United States was in fact responding defensively to an effort by Nicaragua to overthrow neighboring governments.


173. See, e.g., Nuclear Weapons, para. 35.


175. Admittedly, such an effort might well have proven unsuccessful given the secrecy which usually surrounds such programs.

176. Nuclear Weapons (Declaration of President Bedjaoui at para. 20).


178. Id.


180. The GBU-37, reported to have become operational in early 1998, is designed to work with the B-2 bomber's GPS-aided weapons guidance system. Id.

181. Id. (Quoting Retired Air Force General John M. Loh).


183. An unidentified "briefing official" was quoted in Aviation Week as saying that the B-2 bomber "can carry everything from the 5,000 pounder on down." AVIATION WEEK, supra note 171.


185. I have in mind in particular the group of sixty generals and admirals from around the world who in December 1996 issued a declaration calling for the gradual destruction of all nuclear weapons. See, e.g., R. Jeffrey Smith, Retired Nuclear Warrior Sounds Alarm on Weapons, WASH. POST, Dec. 4, 1996, at A1.
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187. Having spent two tours as an Army officer in South Vietnam, the writer has no misconceptions about the horror and human tragedy of such "peripheral" events. See, e.g., NATIONAL SECURITY LAW 177 (Stephen Dycus et al. eds., 1990). But conflicts like Korea, Vietnam, and Afghanistan did not approach the global horrors of World War II, and far less a nuclear or conventional World War III.


190. Quoted supra note 87 and accompanying text.


193. To set the stage for such accommodations, one might expect States wishing to undermine the inspection regime to intentionally plant information to encourage their adversaries to demand inspections of politically-sensitive sites (e.g., religious or cultural landmarks)—and the resulting negative results will be used as evidence to show both that the State in question is being "picked on" unfairly and that the inspection regime is "out of control" and must be curtailed.

194. Harry H. Almond, Jr., Deterrence and a Policy-Oriented Perspective on the Legality of Nuclear Weapons, in NUCLEAR WEAPONS AND LAW, supra note 27, at 57, 68.

195. See, e.g., WELCH, supra note 136, at 13–14.

196. See supra note 82 and accompanying text.

197. Nuclear Weapons, para. 47.

198. It is of course conceivable that under certain circumstances such a threat might foreseeably have consequences beyond an enhanced level of anxiety for the aggressor's military command structure ("They can destroy this hardened bunker with their new deep-penetrating B61-11 warhead!")—such as producing widespread panic leading to the trampling of noncombatants near a threatened target—and such a possible reaction ought to be considered in connection with any such threat; but as a general principle, international humanitarian law is concerned with consequences of the conduct of hostilities and is not offended by mere threats.

199. While customary international law is just as "binding" as conventional law, neither category normally binds States which have not consented to the rule in question. Thus, except when they incorporate rules of such established character and fundamental importance that they have attained the character of preemptsory norms, treaties do not create obligations for non-parties. While a State may by acquiescence become bound by an emerging customary norm (conducting itself in such a manner to justify an implication of consent), a State which persistently objects or through its behavior demonstrates its unwillingness to consent to an emerging norm is not normally bound thereby.

200. This is not to say that it is per se unlawful for any such target to be destroyed or injured by an otherwise lawful use of a weapon.

201. U.S. Army Field Manual No. 27-10, for example, provides that "The use of explosive "atomic weapons," whether by air, sea, or land forces, cannot as such be regarded as violative of
international law in the absence of any customary rule of international law or international convention restricting their employment." DEPT OF THE ARMY, THE LAW OF LAND WARFARE, para. 35 (1956).