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IN JULY 1996, THE INTERNATIONAL COURT OF JUSTICE (ICJ) issued an opinion on the use of nuclear weapons that has since generated both confusion and controversy in the legal, military, and policy communities. Did it outlaw the threat or use of nuclear weapons? If not, under what circumstances might those weapons be used? What effect should the opinion have on existing nuclear arsenals? To what extent, if any, is it binding on states? Is the thirty-four-page pronouncement, with lengthy dissenting and separate opinions attached, nothing more than jurisprudential chitchat?[1]

The brouhaha has been engendered by a number of factors. There is little question that the matter is highly emotive; indeed, the mayors of Hiroshima and Nagasaki testified at the hearings in The Hague.[2] It is also a politically charged topic, in some respects a battle between the nuclear haves and have-nots. The fact that a group of antinuclear nongovernmental organizations was the driving force behind the effort to have the Court address the issue only exacerbated matters. However, neither emotionalism nor politicization contributes much to defusing the threat that all rational people and entities recognize in nuclear weaponry.

This article will attempt to clarify the substance and meaning of the case known as *Legality of the Threat or Use of Nuclear Weapons,* one clearly unique, in terms of both import and subject matter, in the ICJ's fifty-two-year history.[3]

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The intent is to clear away some of the fog that surrounds the decision, a necessary first step for those who are charged with making, executing, or analyzing national policy. The discussion begins with a survey of how the matter came to the ICJ's attention, why the Court declined to rule in a companion case, and the decision to exercise jurisdiction. With the groundwork laid, the findings and their legal basis will be analyzed and assessed. The article will conclude with reflections on the significance of the Court's decision.

Genesis of the Case

Cases that come before the International Court of Justice usually involve either disputes over territory or questions regarding the competence of United Nations organs.[4] The present case breaks this mold, being instead the product of global interest-group pressure. Interestingly, however, the effort to seek international adjudication on the subject of nuclear weapons has an extensive lineage. A seminal event in the process was the publication in 1980 of an article by Richard Falk, Elliot Meyrowitz, and Jack Sanderson arguing the illegality of nuclear weapons.[5] Soon thereafter, a group of attorneys in the United States formed the Lawyers' Committee on Nuclear Policy, which in 1988 joined antinuclear legal organizations from abroad to establish the International Association of Lawyers Against Nuclear Arms (IALANA).[6] Equally active in the antinuclear movement was the medical community; in fact, the International Physicians for the Prevention of Nuclear War (IPPNW) was awarded the Nobel Peace Prize in 1985.

It was individual activism that instigated the move towards judicial attention, when Harold Evans, a retired judge in Christchurch, New Zealand, launched his own campaign against nuclear weapons. In a 1987 open letter to the prime ministers of New Zealand and Australia, and in separate letters to other governments, he urged the steps necessary to bring the issue before the ICJ. The following year he secured the support of the New Zealand chapter of the IPPNW, which led in turn to backing for the idea by the organization as a whole. In 1989, it suggested that the matter be brought to the ICJ through the World Health Organization (WHO), a specialized United Nations agency entitled to seek opinions of the Court under the United Nations Charter.[7]

Meanwhile, activists in the legal community were headed in the same direction. During its 1989 convention at The Hague, the IALANA adopted a declaration labeling the use of nuclear weapons a war crime and a crime against humanity, and calling on United Nations member states to seek a General Assembly resolution requesting an ICJ advisory opinion on the subject.[8] Less than four years later, the IALANA and IPPNW joined forces with the International Peace Bureau, a

nongovernmental organization, to launch the World Court Project on Nuclear Weapons and International Law.[9]

The Project leaders viewed the time as ripe for an attempt to bring the issue before the Court. First and foremost, the Cold War was over, and nations were now free to consider nuclear weapons in terms of the general threat they represent to the global community rather than of their deterrent utility in a bipolar, nuclearized paradigm. Additionally, there was increasing apprehension about weapons proliferation and also about the environmental risks nuclear assets pose. Finally, activists were concerned that the absence of a convention outlawing nuclear weapons would weaken the new restrictive legal regimes governing chemical and biological weapons.[10] In particular, they feared that non-nuclear states would hesitate to dispense with their chemical and biological weapons lest they might one day have to face a nuclear-equipped adversary.[11]

The question was how to get a judicial pronouncement on the issue. There was no specific dispute between states over the weapons to resolve; only nations are entitled to be parties in ICJ cases, and a matter cannot be brought before the Court by an individual country.[12] The only alternative was to seek an advisory opinion, a statement by the Court intended to clarify the law. Though nonbinding, advisory opinions have enormous authority, for they represent articulations of what the world's most senior jurists believe the law to be.

The Statute of the Court allows a number of bodies so authorized in the United Nations Charter to request advisory opinions. Article 96 grants that right to the General Assembly, the Security Council, and "other organs of the United Nations and specialized agencies."[13] Inasmuch as all five veto-wielding members of the Security Council are nuclear-weapons states, the Council was not an attractive option for the World Court Project; thus it decided to pursue a two-tracked approach, one through the General Assembly, the other via the WHO.[14] The effort to convince states to act in both fora was eventually successful.

In 1992, fourteen nations attempted to put the nuclear weapons question on the agenda of the WHO's forty-fifth World Health Assembly.[15] The attempt failed, in great part because many representatives held that the issue was a legal one that did not fall within the competence of the organization. Nonetheless Vanuatu, Ecuador, Panama, and Mexico got the matter on the Assembly's agenda for the following year.[16] Predictably, the proposal generated substantial opposition in that Assembly, particularly from the United States, which countered with a draft resolution declaring the matter to be outside the WHO's responsibility. The U.S. proposal was rejected in committee in favor of a resolution requesting an advisory opinion.[17] The United States fought, again unsuccessfully, against the resolution in plenary session.[18] On 14 May 1993, in a 73–40 vote, the plenary session adopted World Health Assembly Resolution 46.40. It

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requested an advisory opinion on the following question: "In view of the health and environmental effects, would the use of nuclear weapons by a State in war or armed conflict be a breach of its obligations under international law including the WHO Constitution?"[19]

That same year the second track of the international effort was opened with the introduction on behalf of the Non-Aligned Movement (NAM) of a proposed General Assembly resolution requesting an ICJ advisory opinion on the subject. As might be expected, the United States, the United Kingdom, and France were vociferous in opposition to the measure. The NAM, supported by the World Court Project's aggressive international lobbying, overcame that opposition.[20] Passed on 15 December 1994, General Assembly Resolution 49/75K asked the Court: "Is the threat or use of nuclear weapons in any circumstances permitted under international law?"[21]

This was a broader question than the WHO had posed to the Court. It did not limit itself to health and environmental effects or to periods of war or armed conflict. In fact, whereas the WHO was asking whether there were "prohibitions" on the use of nuclear weapons, the General Assembly phrasing seemed to be looking for a specific *authorization* to employ them. As a legal matter, this is more than mere semantics.[22] Because under international law sovereign states are generally free to do whatever is not proscribed, the apt legal question is not "What says I can?" but "What says I can't?" Framed as it was, the General Assembly's query seemed to shift the burden of persuasion to the nation. Ultimately, the Court acknowledged this issue but summarily dismissed it as a distinction "without particular significance."[23] However, as will be seen, and despite claims to the contrary, it proved relevant in the Court's ultimate position.

Proceedings in the International Court of Justice

When the International Court of Justice receives a request for an advisory opinion, it determines whether there are states or organizations that can provide it with information useful in its deliberations. If so, the Court allows them to submit written briefs, as well as a written comment on the briefs submitted by others. They may also be allowed to offer oral statements. Oral argument is generally made before the entire Court, in a proceeding open to the public. The advisory opinion is issued at a later public sitting.

This was the procedure that was followed in these cases. In August 1993, the World Health Organization's resolution was transmitted to the ICJ, which responded in September by issuing an order authorizing the WHO and its member states to submit written statements in the case. By the September 1994 deadline, thirty-five had done so.[24] Soon thereafter the Secretary-General of the United Nations communicated the General Assembly resolution to the

Court. As in the WHO case, the ICJ allowed interested nations to forward written comments; twenty-eight did so by the September 1995 due-date.[25] The Court then decided to allow a single oral argument on both cases by states wishing to make one. Twenty-two countries took advantage of the opportunity, most of which had previously presented written statements.[26]

The WHO Query. In the WHO case, known as *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, nine states objected to ICJ jurisdiction, arguing that the WHO did not have authority under the United Nations Charter to seek this particular advisory opinion.[27] Though raised by a minority of nations making submissions to the Court, the contention proved persuasive.

In its decision, the Court held that Article 96(2) of the Charter established three requirements for requests for advisory opinions: that the agency be authorized to do so, that the question posed be a legal one, and that the question be within the agency's scope of activities.[28] The first requirement had been easily complied with, for by its own Constitution the WHO was competent to seek an advisory opinion when authorized by the General Assembly or in accordance with an agreement within the United Nations. In 1948, agreement as to the WHO's right to request advisory opinions had been reached between it and the General Assembly; in fact, the organization had since requested and received one.[29] According to the Court, the second requirement was likewise met. Quoting from an earlier decision, it held that questions "framed in terms of law and rais[ing] problems of international law . . . are by their very nature susceptible of a reply based on law . . . [and] appear . . . to be questions of a legal character."[30] In this case, the WHO's query had specifically requested a legal analysis as to the obligations of states. Of course, the question of nuclear weapons is a highly politicized one, a fact the Court acknowledged; nevertheless, it held, the political aspects of an issue do not deprive it of its legal nature, and indeed in politically charged cases it might be very useful to have an advisory opinion that clarifies the applicable legal principles.[31] Thus, even if the motivations for bringing the matter before the Court were political, the ICJ could still render an opinion so long as the question was susceptible to resolution by resort to the law.[32]

On the third requirement, however, the case foundered. To determine the competence of the WHO it was necessary to examine its constitution. Since that document is actually a multilateral agreement, accepted principles of treaty interpretation applied, in particular those emphasizing its object and purpose, the context in which it operates, and how it has been implemented.[33] The Court concluded that none of the functions set forth in the WHO's constitution depended on the legality of the situation to which it was responding: "Whether nuclear weapons are used legally or illegally, their effects on health would be

the same."[34] At the same time, the overall United Nations system is one of complementary, not overlapping or contradictory, components; questions concerning the use of force are properly the province of other UN entities (especially the Security Council), not the WHO.[35] Finally, as to practice, the Court could find no historical pattern establishing such matters as within the WHO's purview; to the contrary, the same request had been rejected at the previous year's World Health Assembly.[36] Ultimately, in an 11–3 decision, the Court held that it could not issue an advisory opinion in the matter, because the WHO was not competent to make the request for one.[37]

The General Assembly Query. Jurisdiction over the General Assembly question in the companion case, *Legality of the Threat or Use of Nuclear Weapons* (hereafter referred to as *Legality*), was legally a very different matter. Pursuant to Article 96 (1) of the United Nations Charter, "the General Assembly or the Security Council may request the International Court to give an advisory opinion on any legal question."[38] As might be expected, some of the same arguments against jurisdiction were made—for instance, that the General Assembly, like the WHO, was attempting to pose arguments outside its competence. This contention was quickly dismissed on the basis that the "within the scope" requirement applied only to specialized agencies and other organs, and that in any case such matters as the use of force, disarmament, and the development of international law fell within the General Assembly's scope.[39]

Most states opposed to the rendering of an opinion focused instead on the "may" language of Article 65(1) of the Court's Statute, arguing that it should decline, in an exercise of discretion, for any number of reasons. That article provides that "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." Some nations, including the United States and Germany, highlighted the topic's political nature, submitting that any decision would prove counterproductive.[40] In response, the Court reiterated the point it had made in the WHO case, that the question remained a legal one and that resolving political issues along legal lines could be stabilizing.[41]

The argument was also made (by Finland, strikingly, for one) that the question posed was vague and abstract, that it was incapable of being answered in the absence of many facts which the Court did not have at its disposal. After all, since the threat or use of nuclear weapons might occur in an infinite variety of circumstances, any opinion would be purely speculative.[42] However, the Court held that abstractness is insufficient justification alone for refusing to issue an advisory opinion; even if it were, in this case the Court felt it would not "necessarily have to write 'scenarios,' to study various types of nuclear weapons,

[or] to evaluate highly complex and controversial technological, strategic, and scientific information" before it could issue an opinion.[43]

A third argument not to issue an opinion was that it would have an adverse effect on disarmament negotiations. The premise was that by putting aside the theoretical issue of lawfulness, states could focus on matters having practical effect—disarmament and non-proliferation. An opinion of the Court, whatever the result, would cause attention to be diverted to a "fruitless debate about the legal implications of the Court's pronouncement."[44] The Court agreed that its decision could affect ongoing negotiations but rejected the assertion that the effect would necessarily be negative. This, therefore, was not held to be an adequate ground on which to avoid the issue.[45]

Finally, it was argued that if the ICJ answered the question posed, it would effectively be making law rather than explicating it, thus assuming a legislative, vice judicial, role. The Court rather summarily dismissed this view, insisting that it would have to inquire into existing legal norms in order to respond to the General Assembly's query. Indeed, to accept the contention would be to presume a lacuna in the body of law regarding nuclear weapons. The Court was unwilling to admit such a possibility at this juncture.[46]

Overall, the ICJ counseled against reading too much into the discretionary character of its jurisdiction in such cases. Never had it exercised its discretion to decline to issue an advisory opinion;[47] as the principal judicial organ of the UN it was responsible for assisting other agencies in carrying out their functions by providing them legal guidance. Only for "compelling reasons" should it refuse to exercise its advisory power.

Ultimately, the ICJ agreed to hear the case, finding both that it had jurisdiction to do so and that there were no "compelling reasons" not to. There was but one dissenting vote on this issue, that of Judge Shigeru Oda of Japan, who was concerned that by answering a question of a general nature without any practical need, its unquestioned jurisdiction notwithstanding, the Court risked eventually becoming a "consultative or even a legislative organ."[48] The Court proceeded to the merits of the case.

Legality: The Court's Decision on the Merits

The Court approached the question of whether or not the use or threat of use of nuclear weapons is illegal under international law by determining what broad bodies of law were or were not relevant. It then moved serially into the two interrelated categories that it found to be applicable, the law of the United Nations Charter and the law of armed conflict. In examining the latter, the ICJ looked first for specific prohibitions therein and then applied the broad humanitarian principles which that body of law contains.

Applicable Law. The first step for the Court was to determine what body of law to apply in the case. In their written submissions and oral statements, some states had asserted that human rights law was applicable, most often citing either the Covenant on Civil and Political Rights, or the Genocide Convention. Article 6 of the former instrument provides that "every human being has the inherent right to life. . . . No one shall be arbitrarily deprived of his life."[49] While the Court rejected assertions that the Covenant did not apply during hostilities, it held that without reference to the law of armed conflict it was impossible to determine whether a use of force was arbitrary.[50] Thus it was there that the Court had to look for prohibitions, not the Covenant. As for the Genocide Convention, the purportedly applicable provision, Article 11, prohibits various acts "committed with intent to destroy, in whole or part, a national, ethnic, racial or religious group, as such."[51] While acknowledging that a state might employ nuclear weapons to do so, the Court found that intent was case-specific.[52] In other words, motivation, not the weapon used, would determine legality under the Convention. But the issue facing the Court was that of weapons, not motivation, so the Genocide Convention could not be determinative.

A number of nations also maintained that the use of nuclear weapons would violate a myriad of international agreements protecting the environment. For instance, Protocol I Additional to the Geneva Conventions prohibits "methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment," while the Environmental Modification Convention disallows "use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury."[53] Again the Court discarded any contention that these and other environmental instruments prohibited nuclear employment as such; instead, the particular use of the weapon would determine whether or not it complied with environmental legal norms. The extent of environmental damage would be relevant in determining whether other nonenvironmental prohibitions, such as the requirements of proportionality and necessity, had been violated.[54]

As can be seen, the Court rejected all attempts to apply law other than treaties specifically dealing with nuclear weapons or the law directly governing the use of force. It then turned its analytical focus to the UN Charter, possible law of armed conflict treaty prohibitions, and general principles of the law of armed conflict and customary international law, especially *jus ad bellum* (when a state can resort to force) and *jus in bello* (how force can be used).[55]

The United Nations Charter. The United Nations Charter is at the center of debate over the appropriateness of any international use of force. Today,

condemnations of the use of force generally take the form of allegations that the Charter has been violated, while justification is universally framed in Charter terms. The Charter regime for the use of force is, at least textually, fairly straightforward. First, Article 2(4) forbids the use or threat of force by member states "against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations." Those purposes include the "maintenance of peace and security." Should the Security Council find that there has been a "threat to the peace, breach of the peace, or act of aggression"—in other words that Article 2(4) has been violated—it can take measures to resolve the situation. Under Article 42 such measures range from making recommendations to "operations by air, sea, or land forces" (known as "Chapter VII" operations).

Until the Security Council acts, individual states may respond to "armed attack" in self-defense pursuant to Article 51.[56] They may also seek and receive assistance from other states in defending themselves; the Article 51 right to collective self-defense is the basis for such collective security arrangements as Nato and the Western European Union. Thus the Charter envisions only two instances in which a state is authorized to use armed force: as part of a UN-authorized Chapter VII operation, or in self-defense, collective or individual.

In applying the Charter provisions, the Court distinguished between *jus ad bellum* and *jus in bello* issues. Noting that the Charter itself contained no proscriptions on particular types of weaponry, the Court held that Article 2(4) is not directly relevant to the legality of the use of nuclear weapons. On the contrary, it found, the focus must be on the rationale for the use of force, not on the weapon selected. Thus, whereas use of a nuclear weapon would not of itself necessarily violate Article 2(4), neither would compliance with the provision automatically render the use of a nuclear weapon legitimate.[57]

A related question arose involving Article 2(4)'s prohibition on the *threat* of force. Of course, the threat to use nuclear weapons has been the underpinning of the deterrent posture of many nuclear powers, as well as of non-nuclear powers that could receive nuclear weapons during collective defense operations. To be viable as a component of national policy, threats to use nuclear weapons must be credible. But are they violations of the Charter? The Court held that as in standard criminal law, it is unlawful to threaten an act that one cannot lawfully commit. Thus, in the international arena, it would be illegal to threaten the use of nuclear weapons in order to "secure territory from another State, or to cause it to follow or not to follow certain political or economic paths."[58] However, it would not be wrongful to threaten a use of force permitted under the Charter, including Chapter VII operations and Article 51 self-defense. The Court did not specify, in this connection, what uses of nuclear weapons might be permissible in these two cases.

Actual self-defense is more complex, for when a state acts pursuant to Article 51 it must comply with the principles of *necessity* and *proportionality*.[59] Necessity allows resort to force only if there are no reasonable alternatives; while the standard is subjective, it is well accepted. The proportionality principle, by contrast, raises the question of what that force is to be proportional *to*—the armed attack to which it is responding, the danger facing the state, or the amount of force necessary to cause the offending nation to desist. A number of states raised this issue, but the Court simply pointed to the test without exploring it.[60] In the end, the ICJ found that since the matter is situational, "the proportionality principle *may* thus not in itself exclude the use of nuclear weapons in self-defense in all circumstances," given compliance with all other "principles and rules of humanitarian law."[61] This assessment presaged the final holding in the overall case.

Also sidestepped was the issue of whether nuclear use in reprisal during armed conflict (belligerent reprisal) is permissible. Reprisals are unlawful acts committed by a state that has itself been the victim of an unlawful act, in order to compel the wrongdoer to desist; international law stringently limits reprisals. After raising the issue, the Court refrained from settling it, other than to pronounce peacetime reprisals illegal.[62]

Finally, the Court elected not to explore the questions of whether nuclear weapons could be used in Chapter VII operations or within a state's own territory.[63] Neither of these matters had been raised in any significant way in the submissions made to the ICJ by interested states. Its conclusion about the Charter's relevance to this case was simply that "a threat or use of force 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."[64] This is true of the use of any weapon, for in such *jus ad bellum* matters the proper questions are why force is being used and how much, not what kind.

The Law of Armed Conflict: Specific Prohibitions. In its search for law specifically applicable to nuclear weapons, the Court began by clarifying a basic characteristic of the law of armed conflict—that it prohibits, not authorizes, particular weapons. Therefore, the Court would seek not a provision of law authorizing use of nuclear force, but rather one restricting it. Absent such a prescriptive limitation, the weapon would be legal, at least when the manner in which it is employed is legitimate. The Court sought these restrictions in treaties and in customary international law.[65]

First, the Court examined treaties limiting the use of poisons. There are three: the Second Hague Declaration of 1899, prohibiting "the use of projectiles the object of which is the diffusion of asphyxiating or deleterious gases"; the Hague

Convention IV of 1907, stating that it is "especially forbidden . . . to employ poison or poisoned weapons"; and the Geneva Gas Protocol of 1925, forbidding the "use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials, or gases."[66] Because the terms (e.g., "poison" itself) used in these conventions are ill defined, the Court looked to their ordinary meaning and the practice of states regarding them, finding that they have not been treated as including nuclear weapons.[67] Accordingly, the Court found these treaties irrelevant to the case.

That brought the ICJ to prescriptions involving "weapons of mass destruction" (WMD). Prohibitions in international agreements on WMD tend to be set forth in very specific terms; the Court could identify no WMD treaty directly bearing on the question before it.[68] There is, however, an array of international agreements that address *aspects* of nuclear weapons; they impose various limits on acquisition, manufacture, deployment, and testing.[69] Of these, three merited particular attention, because they prohibit use in certain situations. The first, the Treaty of Tlatelolco, governs nuclear weapons in Latin America, specifically prohibiting their use by Latin American signatories.[70] All of the announced nuclear powers (China, France, Russia, the United Kingdom, and the United States) have signed an Additional Protocol by which they agree not to use nuclear weapons against any of the parties to the treaty.[71] However, the nuclear powers have limited this commitment by issuing corresponding declarations. The United States, Britain, and Russia, for example, reserve the right to reassess the pledge if a party to the treaty carries out aggression supported by one of the nuclear states. China made a "no-first use" guarantee—one implying, however, it might employ nuclear weapons if others did. Finally, the French declaration excludes actions in self-defense from coverage by the protocol.[72]

The Treaty of Rarotonga analogously addresses nuclear weapons in the South Pacific. By its terms, parties agree not to possess nuclear weapons; use is by definition forbidden as well. As in the Treaty of Tlatelolco, there is a protocol to which nuclear states can subscribe; it expresses a commitment not to use nuclear weapons either against parties to the treaty or within the confines of the South Pacific Nuclear-Free Zone, which it establishes.[73] Russia and China are parties to the protocol, though both reserve the "right to reconsider" their commitment should circumstances merit. France, the United Kingdom, and the United States had signed but not ratified it as of the date of the Court's decision.[74]

A third agreement, involving a no-use commitment, is the Non-Proliferation Treaty (NPT), which was extended indefinitely in 1995. Each of the five nuclear powers have issued unilateral statements pledging not to use nuclear weapons against non-nuclear NPT states. However, as with the previous two treaties, their commitments are conditional. In particular, all but China stated that they would

not be bound in cases of collective or individual self-defense in which the aggressor was, or was supported by, a nuclear-weapons state. They also agreed to come to the assistance of any non-nuclear nation attacked with nuclear weapons.

Predictably, the opposing camps in the case drew contradictory conclusions from the relevant treaties. The illegality side argued that the treaties were evidence that a new rule of international law had emerged proscribing nuclear weapons altogether. The other side pointed to the treaties as reflecting an international acknowledgment that there were no prohibitions on the weapons per se; thus it had been necessary to fashion more limited ones, that is, the treaties. For instance, it would be illogical to place certain limits on the emplacement of these weapons if they were unlawful *ab initio*. As Judge Stephen Schwebel of the United States noted in his dissent (on other issues), "the negotiation and conclusion of these treaties only makes sense in the light of the fact that the international community has not comprehensively outlawed the possession, threat or use of nuclear weapons in all circumstances, whether by treaty or through customary international law."[75]

The Court came down in the middle, concluding that the treaties "could . . . be seen as foreshadowing a future general prohibition of the use of such weapons, but they do not constitute such a prohibition by themselves."[76] With regard to the three singled out for discussion (Rarotonga, Tlatelolco, and the NPT), it highlighted the fact that the reservation by the nuclear powers of the right to use nuclear weapons in particular circumstances had met with no objections from either the parties of the first two treaties or the Security Council. The Court concluded that the treaties did indeed point to international abhorrence of nuclear weapons and a general movement of the law against them—but that the law had not moved as far as those arguing the illegality of nuclear weapons claimed. Ultimately, the Court found in treaty law no specific prohibitions on nuclear weapons.

Finding no prohibition on nuclear weapons in treaty law, the Court turned to the second major source of the international law of armed conflict. Customary international law emerges from the widely followed practice of states over time—specifically when nations engage in a practice out of a sense that they are legally bound to do so. The requirement is called *opinio juris:* a belief that the customary rule is obligatory, as a matter of law.[77]

In attempting to find customary rules that had emerged regarding nuclear weapons since their creation, the Court was faced with a classic logical conundrum. In terms of practice, nuclear weapons had been actually employed only twice, over fifty years before; despite a subsequent plethora of armed conflict, no state had resorted to them. But to be considered customary law, this

non-use must have arisen from a sense of legal obligation. Was the practice of not using nuclear weapons indicative of *opinio juris?*

Those who considered use of the weapons illegal pointed to United Nations General Assembly resolutions extending back to 1961 in which nuclear weapons had been condemned, or that called for nuclear disarmament.[78] They argued that though General Assembly resolutions are not binding, these particular ones "did no more than apply to nuclear weapons the existing rules of international law applicable in armed conflict; they were no more than the 'envelope' or *instrumentum* containing certain pre-existing customary rules of international law."[79]

But was actual detonation "in anger" the proper characterization of non-use, or would it be more appropriate to focus on the role of nuclear weapons in deterrence? States denying the existence of customary law on this point contended that the decisions not to use nuclear weapons had far less to do with the law than with their effectiveness for suasion. Further, many maintained that on closer inspection the General Assembly resolutions evidenced disagreement, not international consensus.[80] The mere fact that the votes were not unanimous, that indeed nuclear states had often opposed them, illustrated the absence of the requisite agreement.

The Court adopted the latter position, though without ruling on deterrence. It simply stated that given the differences of opinion among nations with regard to nuclear weapons, there was clearly no *opinio juris*.[81] In making this finding, the Court acknowledged that General Assembly resolutions "may sometimes have normative value" as evidence of an emerging customary rule, but not, given the many votes against them, in this case.[82] Therefore, whether the weapons were legal or not, they were not illegal per se as a matter of customary law.

The Law of Armed Conflict: Humanitarian Principles. Having found the use of nuclear weapons not inherently illegal under the Charter of the United Nations and having unsuccessfully searched for a specific prohibition in treaty or customary law, the Court applied the "principles and rules of humanitarian law" contained in the law of armed conflict. That is, would the employment of nuclear weapons be unlawful because it cannot meet the legal humanitarian standards?

The Court began by noting that the law governing armed conflict can be divided into "Hague law" and "Geneva law." The former, which takes its title from the 1899 and 1907 Hague conventions, refers to limitations on the methods and means of warfare. All such limitations derive from Article 22 of the 1907 Hague Convention (IV), that "the right of belligerents to adopt means of injuring the enemy is not unlimited." Thus, for instance, the Chemical Weapons

Convention is Hague law. By contrast, Geneva law (its name recalls the Geneva conventions of 1864, 1906, 1929, and 1949) provides protection to people and places—prisoners of war, civilians, religious facilities, etc. The Cultural Property Convention is an example.[83] Collectively, Geneva and Hague law are known by a variety of terms, most often either the "law of armed conflict" or "humanitarian law"; the Court used the latter term.[84]

Within humanitarian law are numerous core principles (among them necessity and proportionality, discussed above). The Court singled out two as especially relevant in this case: *distinction* (also referred to as discrimination), and *unnecessary suffering*.[85] Distinction prohibits direct targeting of noncombatants or civilian objects, or the employment of weapons that cannot distinguish between lawful and unlawful targets. Of course, injuries to civilians and damage to civilian property are often an inevitable collateral result of attacking even clearly legitimate targets; however, the principle of proportionality would limit that incidental harm to a level proportional to the military advantage to be secured. Necessity, by contrast, disallows weapons that cause unnecessary suffering even to combatants, who are legitimate targets. The Court defines unnecessary suffering as "a harm greater than that unavoidable to achieve legitimate military objectives."[86]

These principles can be found in treaty law.[87] However, the Court went to great pains to emphasize that they are by now customary law, because of a principle known as the Martens Clause. Found in both Hague Convention IV and Additional Protocol I to the Geneva Conventions, the Martens Clause provides that regardless of whether an act or weapon is specifically addressed in an international agreement, "civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience."[88] The Court expressly accepted the present validity of the Clause, referring to it as "an effective means of addressing the rapid evolution of military technology."[89] Thus the fact that, as the Court had determined, there are no specific proscriptions on nuclear weapons does not release states from customary law obligations to distinguish and avoid unnecessary suffering even with respect to weapons technologies that the law has had no opportunity to address. Similarly, treaty provisions that become customary law are binding even on nations not party to the treaty. That the principles of distinction and unnecessary suffering had become customary law was not controverted in any of the states' submissions.

The Court now made a brief incursion into the topic of neutrality. A number of states argued, as did the World Court Project, that the use of nuclear weapons would violate the tenets of neutrality because their effects would spread into inviolable neutral territory.[90] Others, including the United States and the

United Kingdom, took the position that absent knowledge of the particular circumstances of a use of nuclear weapons, it was impossible to know whether or not neutral territory would be affected. Further, the key document on the topic, Hague Convention V of 1907, had been intended to preserve the inviolability of neutral territory against armed attack, not spillover from conflict elsewhere.[91] The Court, without making any effort to analyze the content of neutrality law, simply stated that it was "applicable . . . to all international armed conflict, whatever the type of weapons [that] might be used."[92] But it never returned to the topic.

By this point, the Court had determined that international humanitarian law (along with that of neutrality) was applicable to the use of nuclear weapons. However, whether that law *prohibited* it involved the Court's view on a question very much unsettled in international law: whether it is possible, without knowing the situation, to assess legality. A grouping of nations argued that it was not. The position of the United States was typical: it reminded the Court of "the ability of modern delivery systems to target specific military objectives with nuclear weapons, and the ability of modern weapon designers to tailor the effects of a nuclear weapon to deal with various types of military objectives." Further, the United States asserted, "whether an attack with nuclear weapons would be disproportionate depends entirely on the circumstances. . . . Nuclear weapons are not inherently disproportionate."[93]

The argument was conclusory, as the Court was quick to point out; the nations arguing against illegality were unable to suggest examples of nuclear weapons use that might actually comport with the requirements of humanitarian law.[94] Nonetheless, the Court did not reject the view outright, since, as noted, international law is a body of prohibitions, not authorizations; the burden of persuasion was on those who argued that the use of nuclear weapons was *un*lawful. Those who did tended toward conclusory statements as well, arguing that nuclear weapons would inevitably cause death and destruction well beyond the limits of proportionality and were inherently incapable of adequate distinction.

In a statement of some normative significance, the Court found that "in view of the unique characteristics of nuclear weapons, . . . the use of such weapons in fact seems scarcely reconcilable with respect for such requirements."[95] Specifically, nuclear weapons "release not only immense quantities of heat and energy, but also powerful and prolonged radiation. . . . These characteristics render the nuclear weapons potentially catastrophic. The destructive power of nuclear weapons cannot be contained in either space or time. They have the potential to destroy all civilization and the entire ecosystem of the planet." There was no effort to carve out an exception to this characterization for the limited use of tactical nuclear weapons.

Having come so far, the Court now qualified its own decision. Finding that it did "not have sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in *any* [emphasis added] circumstance," it held that "it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defense, in which its very survival would be at stake." Thereby, the Court found the use of nuclear weapons to be illegal except in those unique circumstances where the existence of the nation itself was at stake. As to such a situation, it expressed no opinion.

The Opinion of the Court

The Court's formal *dispositif* (holding) contained six substantive findings.

A. There is in neither customary nor conventional international law any specific authorization of the threat or use of nuclear weapons;

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

C. 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;

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

E. It follows from the above-mentioned requirements 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-defense, in which the very survival of a State would be at stake;

F. 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.

The decision was far from an expression of shared views by the ICJ's fourteen judges. In a clear demonstration of the lack of consensus, five declarations, three separate opinions, and six dissents were appended to the opinion as a whole.[96] That is, all fourteen judges had felt obliged to clarify in some way their thoughts or express contrary views.

On the other hand, the dissenting opinions did not diverge widely in practical effect from the Court's ruling. The greatest apparent division was over the core finding that the use of nuclear weapons would be illegal except perhaps in the extremity of self-defense. In fact, three of the dissenters were objecting to the *exception*, and the fourth to the ICJ's having heard the case at all. The "actual" vote on legality itself was, then, 10–3, with one abstention. Indeed, no dissenters argued that the use of nuclear weapons was legal in all instances; the most common theme was that its legality was a situational matter. Thus, at bottom, all the judges agreed that it would be difficult to employ nuclear weapons in a fashion consistent with international law.[97]

What are we to make of this decision? The issue is complicated by the presence of a number of debatable points in the holding itself. In fact, those trained in the law are likely to find the decision less than fully satisfactory, not necessarily due to disagreement with the conclusions drawn, but rather because of weakness in the decision itself. To begin with, the Court may be "guilty" of a *non liquet*, a failure to render a judgment on the legal question at hand. (However one comes down on this criticism, it does not bear on the substance of the opinion itself; rather it is an issue of the responsibility and functions of the ICJ.) Also, the Court seems to have fallen into the very trap it had criticized the legality supporters for—a failure to set forth circumstances demonstrating its assertions. What readers find is a mere two-paragraph, worst-case description. The Court never explicated the circumstances in which the employment of nuclear weapons would prove "catastrophic." Neither was there any discussion of such obviously relevant matters as yields, delivery techniques, radiation patterns, the effect of weather, tactical use, employment scenarios, or expected damage.

Further, a lack of definitional precision compounded the factual paucity of the opinion. For example, what is meant by a state's "survival"? Does it imply physical survival, as in the case of a massive attack with weapons of mass destruction? Or is it to be understood as an extreme case of an Article 2(4) threat to territorial integrity or political independence? By that token, does it

matter what weapons are involved? For example, if the threat to its survival derives from chemical or biological weapons, or even conventional weapons, may the state mount a nuclear response? Perhaps more importantly, given the various security guarantees that have been made by the nuclear powers, does the non-decision on self-defense embrace *collective* self-defense? While that would be a logical conclusion, the matter is left unclear. The only mention of collective self-defense comes in the restatement of Article 51. Yet, in its substantive discussion, the Court states that it

> cannot lose sight of the fundamental right of every State to survival, and thus its right to resort to self-defense, in accordance with Article 51 of the Charter, *when its survival* is at stake. . . . [Thus, the Court] cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defense, in which its very survival would be at stake.[98]

In addition to factual and definitional shortcomings, the Court's legal reasoning is hard to discern. For instance, the Court blends the *jus in bello* proportionality principle into the concept of distinction and then complicates the matter by failing to address the criterion fully.[99] Proportionality calculations require a balancing test in which collateral damage and incidental injury are weighed against military advantage. Yet the Court never conducts such a test. Instead, it comes close to applying as a standard a tort law concept, that "the thing speaks for itself"—of which the inappropriateness is demonstrable.

As to the principle of distinction, the Court failed to discuss either the precision of nuclear systems or the target sets against which they can be targeted. Why, for instance, would a strike upon troops and armor in an isolated desert region with a low-yield air-burst in conditions of no wind not be discriminatory enough? Similarly, in assessing compliance with the unnecessary-suffering proscription, the Court failed to consider how a military objective that a nuclear power might seek could be achieved with less suffering than nuclear weapons would cause. In other words, what aspect or portion of the suffering caused by the nuclear weapon is excessive, and therefore avoidable, given the objective?

More problematic is a logical flaw in the Court's position, that it cites the worst case to support its holding, as evidenced by its use of the modifier "potentially" when speaking of "catastrophic" consequences. However, given the prohibitory character of international law, the Court's obligation was to assess the *best* case—that is, to explore the *least* destructive scenario to determine whether it violated the prescriptive norms. Only if it did could one logically arrive at the Court's conclusion, that the use of nuclear weapons would be illegal in all cases except, possibly, ultimate self-defense.

All of this is not to say that the substantive conclusions of the Court were incorrect. On the contrary, they probably were, as Judge Schwebel has called

them, "not unreasonable." Although in the judgment of many legal scholars it fell short, the ICJ might indeed have crafted a well reasoned, factually and legally sound, adequately illustrated, and definitionally precise conclusion along the lines it chose.

Ultimately, however, while the finding will undoubtedly generate considerable analysis and debate in legal and policy circles, its practical impact will be marginal. First, it is by definition nonbinding; it is simply a statement of what a majority of the International Court believes to be the law. Though advisory opinions are certainly persuasive, they nevertheless remain advisory.

In any case, the issues on which the Court achieved unanimity are already commonly accepted by the majority of states. The lack of consensus within the ICJ as to whether prohibitions on the use of nuclear weapons exist in conventional or customary law is also likely to prove meaningless for practical purposes. Since nuclear weapons states agree with the majority that no such prohibitions exist, and because international law is a body of prohibitions, the Court's conclusion requires no alteration in their practices.

Even the decision that the use of nuclear weapons would violate the principles and rules of humanitarian law is of negligible concrete import. Its advisory nature aside, nations are unlikely to find it hard to live with. Most already characterize potential uses of nuclear weapons primarily in self-defense terms (if sometimes with intentional imprecision), proclaiming fidelity to the concept of use only in the last resort.[100] Thus, states may argue legal niceties before the ICJ, but for domestic and international political reasons they will seldom see the need to *articulate* a policy contrary to the Court's view of the law.

A critical reason that the opinion has minimal practical effect is the Court's nondecision on the issue of self-defense. In that international law is prohibitory in nature, there is a presumption here that limitations on state action do not exist. That being the case, the Court's quandary over how to resolve the self-defense issue allows nations to maintain their arsenals as a matter of survival-based self-defense. It also permits continuance of deterrent nuclear strategies. As the Court noted, the lawfulness of a threat is dependent on the legality of the threatened actions. It avoided addressing the matter head-on, but even if deterrence is characterized as a threat, it remains lawful, because international law outlaws only what it specifically prohibits.

This lack of practical effect explains the Court's final finding on the obligation of states to negotiate towards complete disarmament. It is a curious clause, in that the entire issue was clearly extraneous to the question the General Assembly had posed. Yet, if the Court's core holding was of little concrete impact on a situation that clearly troubled it, perhaps the judges could in this way at least

influence the progress of something that would be meaningful—disarmament. The pronouncement seems almost an act of frustration, of thwarted noble ambitions.

Certainly the International Court of Justice demonstrated institutional courage in taking on a highly politicized and extremely difficult issue, one from which it could easily, and within its discretion, have turned away. Therefore, in the long term the Court enhanced its credibility by hearing the case. The Court's opinion also makes it quite clear that the use of nuclear weapons is of questionable legality, that they are a suspect class. Those attempting to justify their employment in legal terms will henceforth bear a heavy burden indeed.

Furthermore, perhaps the Court went as far as it could have, given the realities of the global context in which it was operating. Had it gone further, it would have been ignored. Surely, no one would argue that the nuclear states would suddenly have dispensed with their nuclear arsenals had the International Court of Justice decided their use was illegal. The Court would thereby only have drawn attention to its own relative impotence. So for the same institutional reasons that led the judges to take the case, they needed to avoid deciding it definitively. The Court could, of course, have held nuclear use to be legal, but the opinion makes clear that as a whole the ICJ was strongly disposed towards the opposite conclusion. Thus, *Legality* was an exercise in jurisprudential realism.

On the other hand, those who hoped for more from the Court may find the criticism of Judge Schwebel of the United States, then vice-president of the ICJ and now its president, most stinging:

> After many months of agonizing appraisal of the law, the Court discovers that there is none. When it comes to the supreme interests of State, the Court discards the legal progress of the Twentieth Century, puts aside the provisions of the Charter of the United Nations of which it is "the principal judicial organ," and proclaims, in terms redolent of *Realpolitik*, its ambivalence about the most important provisions of modern international law. If this was to be its ultimate holding, the Court would have done better to have drawn on its undoubted discretion not to render an Opinion at all.[101]

The advisory opinion exhibits an ambivalence that fully satisfies no one—not the nuclear weapons states, who see a Court that has gone too far, and not those opposed to nuclear use in any circumstances, who must feel the Court pulled up short when its jurisprudential mettle was truly tested.

Notes

1. Discussion of this case can also be found at Peter H.F. Bekker, "Legality of the Threat or Use of Nuclear Weapons," *American Journal of International Law*, vol. 91, 1997, p. 126; Richard A. Falk, "Nuclear Weapons, International Law and the World Court: A Historic Encounter," *American Journal of International*

Law, vol. 91, 1997, p. 64; and John H. McNeil and Ronald D. Neubauer, "The International Court of Justice Advisory Opinion in the Nuclear Weapons Cases (8 July 1996): A First Appraisal," *International Review of the Red Cross*, January–February 1997, p. 103.

2. International Court of Justice, Public Hearing Verbatim Record, *Legality of the Threat or Use of Nuclear Weapons* and *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Compte Rendue (CR) 95/27, 7 November 1995, pp. 25–46.

3. *Legality of the Threat or Use of Nuclear Weapons*, General List no. 95 (Advisory Opinion of the International Court of Justice, 8 July 1996), reprinted in *International Legal Materials* [hereafter ILM], vol. 35, 1996 [hereafter *UNGA Opinion*], p. 809. Declarations and separate opinions not initially reproduced here are found at 35 ILM 1343 (1996). The composition of the Court at the time of the decision was as follows: President Bedjaoui (Algeria), Vice President (now President) Schwebel (United States), Judge Oda (Japan), Judge Guillaume (France), Judge Shahabuddeen (Guyana), Judge Weeramantry (Sri Lanka), Judge Ranjeva (Madagascar), Judge Herczegh (Hungary), Judge Jiuyong (China), Judge Fleischhauer (Germany), Judge Koroma (Sierra Leone), Judge Vereshchetin (Russia), Judge Ferrari Bravo (Italy), and Judge Higgins (United Kingdom).

4. On the International Court of Justice generally, see Shabtai Rosenne, *The World Court: What It Is and How It Works*, 5th rev. ed. (Dordrecht, Boston: Martinus Nijhoff, 1995); and Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice* (Cambridge, U.K.: Grotius Publications, 1986).

5. Richard Falk, Elliot Meyrowitz, and Jack Sanderson, "Nuclear Weapons and International Law," *Indian Journal of International Law*, vol. 20, 1980, p. 541, reprinted as Occasional Paper no. 10 (Princeton, N.J.: Princeton Univ. Center of International Studies, 1981).

6. Peter Weiss, Burns H. Weston, Richard A. Falk, and Saul H. Mendlovitz, "Introduction to the Draft Memorial in Support of the Application of the World Health Organization for an Advisory Opinion by the International Court of Justice on the Legality of the Use of Nuclear Weapons under International Law, including the WHO Constitution," *Transnational Law and Contemporary Problems*, vol. 5, 1994, pp. 714–5.

7. See Keith Mothersson, *From Hiroshima to The Hague: A Guide to the World Court Project* (Geneva: International Peace Bureau, 1992), pp. 31–2.

8. "The Hague Declaration of the International Association of Lawyers against Nuclear Arms," 24 September 1989, reprinted in Nicholas Grief, *The World Court Project on Nuclear Weapons and International Law*, 2d ed. (Northampton, Mass.: Aletheia Press, 1993), app. I.

9. Ibid., p. xiv. The International Peace Bureau had been awarded the Nobel Peace Prize in 1910.

10. Progress had been made on both the chemical and biological fronts in recent decades. See "Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr. 10, 1972," *United States Treaties and Other International Agreements* [hereafter UST], vol. 26, p. 583, and 11 ILM 310. See also "Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993," 32 ILM 800.

11. See Grief, pp. x–xi.

12. Statute of the International Court of Justice, June 26, 1945, art. 34(1), 59 Stat. 1031, *Year Book of the United Nations* [hereafter YBUN], 1976, p. 1052.

13. On advisory opinions generally, see Kenneth J. Keith, *The Extent of the Advisory Jurisdiction of the International Court of Justice* (Leyden: A.W. Sijthoff, 1971). As of 1 January 1997 the Court had issued twenty-three advisory opinions. By contrast, it had issued sixty judgments in contentious cases, i.e., in which actual disputes were to be decided. Because advisory opinions are nonbinding and are issued at the request of one of the six United Nations organs or its sixteen specialized agencies, individual states cannot prevent their issuance. This principle was set forth in *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, 1950 ICJ 65, and was reaffirmed in *The Western Sahara*, 1975 ICJ 12, reprinted in 14 ILM 1355 (1975). Opinions of the ICJ are available on the World Wide Web at a site maintained by Cornell University, <http://www.law.cornell.edu/icj>.

14. Mothersson, pp. 119–20.

15. Forty-Fifth World Health Assembly, *Summary Records and Reports of Committees*, WHA45/1992/REC/3 (1992), pp. 4–5.

16. Director General, *Report, Health and Environmental Effects of Nuclear Weapons*, Doc. A 46/30, World Health Organization, 25 April 1993.

17. Forty-Sixth World Health Assembly, *Summary Records and Reports of Committees*, WHA46/1993/REC/3 (1993), p. 278.

18. Interestingly, U.S. opposition was consistent with the views of the WHO legal counsel that "it is not within the normal competence of the WHO to deal with the lawfulness or illegality of the use of nuclear

weapons." Forty-Sixth World Health Assembly, *Verbatim Records of Plenary Meetings*, 13th Plenary Meeting, WHA46/1993/REC/2 (1993), p. 278.

19. World Health Assembly Resolution 46.40, 14 May 1993, reprinted in *Legality of the Use by a State of Nuclear Weapons*, General List no. 93 (Advisory Opinion of the International Court of Justice, July 8, 1996) [hereafter *WHO Opinion*], para. 1.

20. Some have argued that the NAM's success was in part due to its conscious effort to maintain a united front as negotiations on the Non-Proliferation Treaty approached. It has also been suggested that the achievement reflected frustration over the alleged indifference of nuclear states toward completing a comprehensive test ban. Notwithstanding, the opposition pressure did delay a vote on the proposal until the following year. See Mark Shapiro, "Ban the Bomb?" *The Nation*, 9 January 1995, p. 40, and "Mutiny on the Nuclear Bounty," *The Nation*, 27 December 1993, p. 798.

21. General Assembly Resolution 49/75K (15 December 1994), reprinted in *UNGA Opinion*, para. 1. The vote in the General Assembly was seventy-eight for the resolution, forty-three opposed, and thirty-eight abstentions.

22. This point was raised by a number of states. For an illustrative sample of such criticism, see *Written Statement and Comments of the Russian Federation on the Issue of the Legality of the Threat or Use of Nuclear Weapons (Legality of the Threat or Use of Nuclear Weapons)*, 16 June 1995, p. 5.

23. *UNGA Opinion*, para. 22.

24. Australia, Azerbaijan, Colombia, Costa Rica, the Democratic People's Republic of Korea, Finland, France, Germany, India, Ireland, the Islamic Republic of Iran, Italy, Japan, Kazakhstan, Lithuania, Malaysia, Mexico, Nauru, the Netherlands, New Zealand, Norway, Papua New Guinea, the Philippines, the Republic of Moldova, the Russian Federation, Rwanda, Samoa, Saudi Arabia, the Solomon Islands, Sri Lanka, Sweden, Uganda, Ukraine, the United Kingdom of Great Britain and Northern Ireland, and the United States. Written comments on these statements were filed by Costa Rica, France, India, Malaysia, Nauru, the Russian Federation, Solomon Islands, the United Kingdom, and the United States.

25. Bosnia and Herzegovina, Burundi, North Korea, Ecuador, Egypt, Finland, France, Germany, India, Ireland, Iran, Italy, Japan, Lesotho, Malaysia, the Marshall Islands, Mexico, Nauru, the Netherlands, New Zealand, Qatar, Russia, Samoa, San Marino, the Solomon Islands, Sweden, the United Kingdom, and the United States. Comments thereon were filed by Egypt, Nauru, and the Solomon Islands.

26. Australia, Egypt, France, Germany, Indonesia, Mexico, Iran, Italy, Japan, Malaysia, New Zealand, the Philippines, Qatar, Russia, San Marino, Samoa, the Marshall Islands, the Solomon Islands, Costa Rica, the United Kingdom, United States, and Zimbabwe. Many of both the written and oral statements were of extraordinarily high quality, for they had been prepared and presented by some of the most prominent lawyers and academics in the international legal community.

27. Australia, Finland, France, Germany, Italy, the Netherlands, Russia, the United Kingdom, and the United States.

28. *WHO Opinion*, para. 10. Article 96, paragraph 2, of the United Nations Charter provides that "specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities."

29. WHO Constitution, 22 July 1946, art. 76, *United Nations Treaty Series* [hereafter UNTS], vol. 14, p. 185. The authorizing agreement was the Agreement between the United Nations and the WHO, 10 July 1948, 19 UNTS 193. Article X, paragraph 2, reads, "The General Assembly authorizes the World Health Organization to request advisory opinions of the International Court of Justice on legal questions arising within the scope of its competence." The previous case in which the WHO had been involved was *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, 1980 ICJ 73.

30. *WHO Opinion*, para. 16, citing *Western Sahara*, para. 15.

31. Ibid. This point had previously been made by the ICJ in *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal*, 1973 ICJ 166, para. 14, and *Western Sahara*, para. 15.

32. *WHO Opinion*, para. 17.

33. Vienna Convention on the Law of Treaties, 23 May 1969, art. 31, 1155 UNTS 331, 8 ILM 679. The Court noted that it has proceeded in this fashion in multiple earlier cases. See, for instance, *Arbitral Award of 31 July 1989 (Guinea Bissau v. Senegal)*, 1991 ICJ 53; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua Intervening)*, 1992 ICJ 351; *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, 1994 ICJ 6; and *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Jurisdiction and Admissibility*, 1995 ICJ 6.

34. *WHO Opinion*, para. 20. The WHO's functions are set forth in Article 22 of its Constitution. Several judges dissented on this matter. For instance, see *WHO Opinion*, Dissenting Opinion of Judge Shahabuddeen, p. 2, and Dissenting Opinion of Judge Weeramantry, sect. IV.3. WHA Resolution 46.40 addressed this issue head-on in its preamble, which states that "primary prevention" is a responsibility of the WHO and that

"primary prevention of the health hazards of nuclear weapons requires clarity about the status in international law of their use." The resolution cites World Health Organization, *Effects of Nuclear Weapons on Health and Health Services*, 2d. ed. (Geneva: World Health Organization, 1987) as support for its contention that primary prevention is the only effective "treatment" for the effects of nuclear weapons.

35. *WHO Opinion*, para. 26. Interestingly, WHO Legal Counsel Piel appeared to concur with this position: "My considered opinion is that the matter is too complicated, and risks serious embarrassment and overlap within the United Nations system for the health assembly to decide on." Forty-Fifth World Health Assembly, *Records and Reports of Committees*, WHA45/1992/REC/3 (1992), at (summary) pp. 4–5.

36. *WHO Opinion*, para 27. For an extensive discussion of this point, see the dissenting opinion of Judge Oda.

37. The dissents came from Judges Shahabuddeen, Weeramantry, and Koroma. On the case, see Bekker, p. 134.

38. UN Charter, Art. 96, para. 1.

39. *UNGA Opinion*, paras. 11–2. Note the broad competence of the General Assembly as set forth in the Charter: in Article 10, "The General Assembly may discuss any questions or any matters within the scope of the present Charter"; in Article 11, "The General Assembly may consider the general principles of co-operation in the maintenance of international peace and security, including the principles governing disarmament and the regulation of armaments, and may make recommendations with regard to such principles to the Members or to the Security Council or both"; and in Article 13, "The General Assembly shall initiate studies and make recommendations for the purpose of . . . a) . . . encouraging the progressive development of international law and its codification."

40. *Written Statement of the Government of the United States of America, June 20, 1995 (Legality of the Threat or Use of Nuclear Weapons)*, p. 6; *Statement by the Government of the Federal Republic of Germany, June 1995 (Legality of the Threat or Use of Nuclear Weapons)*, pp. 2–6.

41. *UNGA Opinion*, para. 13. This would, as the Court noted, not be the first time it had handled a case with political overtones. See, e.g., *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, 1947–1948, ICJ 57 (28 May 1948); *Competence of the General Assembly for the Admission of a State to the United Nations*, 1950 ICJ 4; and *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)*, 1960 ICJ 151.

42. See, e.g., *Statement of the Government of the United Kingdom, June 1995 (Legality of the Threat or Use of Nuclear Weapons)*, p. 1; and the U.S. Statement, p. 4. For Finland, see *Written Statement of the Government of Finland, June 13, 1995 (Legality of the Threat or Use of Nuclear Weapons)*, n.p. The Finnish stance demonstrates the interesting alliances that were forged by the case; Finland was anti-nuclear but believed a decision by the Court would interfere with diplomatic efforts to reduce the threat posed by the weapons.

43. *UNGA Opinion*, para. 15. As to previous cases involving "abstract" matters, the Court cites *Conditions of Admission*, *Competence of the General Assembly*, and *Certain Expenses of the United Nations*.

44. U.S. Statement, p. 16. See also *UNGA Opinion*, para. 5, and U.K. Statement, pp. 19–20, and German Statement, p. 5. for illustrative arguments along these lines.

45. *UNGA Opinion*, para 17.

46. Ibid., para. 18.

47. In the WHO case, the decision was that the WHO was not legally competent to request the advisory opinion—not that the question was properly before the ICJ, but that the Court, in its discretion, would not consider it.

48. *UNGA Opinion*, Dissenting Opinion of Judge Oda, para 53.

49. *International Covenant on Civil and Political Rights*, 16 December 1966, art. 6, 999 UNTS 171, 6 ILM 368 (1967).

50. *UNGA Opinion*, paras. 24–5. The Netherlands pointed out that lawful acts of war have been cited as examples of acts that were not arbitrary. Netherlands Statement, p. 10. Malaysia, by contrast, noted that the United Nations Human Rights Committee, which supervises implementation of the Convention, found that "the designing, testing, manufacture, possession and deployment of nuclear weapons are among the greatest threats to the right to life which confront mankind today." *Statement by the Government of Malaysia, June 19, 1995 (Legality of the Threat or Use of Nuclear Weapons)*, p. 13, citing *Report of the Human Rights Committee, General Comment 14(23) on Article 6 of the Covenant, Nov. 2, 1984*, UN GAOR (40th sess.) Supp. no. 40, Annex VI, UN Doc. A/40/40.

51. *Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948*, art. 11, 78 UNTS 277.

52. *UNGA Opinion*, para. 26.

53. Protocol Additional to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflict, art. 55, 8 June 1977, UN Doc. A/32/144, 16 ILM 1391 [hereafter Additional Protocol

I] (and see also art. 35[3]); and Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques, art. I(1), 10 December 1976, 31 UST 333, 1108 UNTS 152. The latter instrument is not applicable, because it addresses modifying the environment as a method of warfare, rather than the much broader issue of damage to the environment per se. Other instruments mentioned by the Court included the Stockholm and Rio Declarations. United Nations Conference on the Human Environment, *Stockholm Declaration on the Human Environment*, art. 21, 16 June 1972, UN Doc. A/CONF.48/14 (1972), revised by UN Doc. A/CONF.48/14/Corr. 1 (1972), reprinted in 11 ILM 1416; and *Rio Declaration on Environment and Development*, princ. 2, UN Doc. A/CONF.151/Rev. 1(1992), reprinted in 31 ILM 874.

54. *UNGA Opinion*, paras. 27–33. On the environmental law of war generally, see Michael N. Schmitt, "Green War: An Assessment of the Environmental Law of International Armed Conflict," *Yale Journal of International Law*, vol. 22, 1997, p. 1.

55. Nauru perceptively noted the connection between the two components of the law of armed conflict: "The use of force in self-defense is subject to the rules of *jus in bello*. Hence, if the use of nuclear weapons is prohibited under the rubric of *jus in bello*, the threat to use nuclear weapons can never be sanctioned under the rubric of *jus ad bellum*." *Memorial of the Government of the Republic of Nauru, June 15, 1995 (Legality of the Threat or Use of Nuclear Weapons)*, p. 3.

56. UN Charter, Art. 51.

57. *UNGA Opinion*, para. 39.

58. Ibid., para. 47.

59. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, 1986 ICJ 14, para. 176.

60. *UNGA Opinion*, paras. 41–3.

61. Ibid., para. 42. Emphasis supplied.

62. *UNGA Opinion*, para. 46.

63. Ibid., paras. 49–50.

64. Ibid., para. 105(2)C. The vote of the judges on this point was unanimous.

65. Article 38 of the Court's statute articulates the sources of international law: international conventions, whether general or particular, establishing rules expressly recognized by contesting states; international custom, as evidence of a general practice accepted as law; the general principles of law recognized by civilized nations; and, as a subsidiary means for the determination of rules of law and subject to Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations. (Article 59 provides that the decisions of the Court are only binding on the parties to the case.) ICJ Statute, arts. 38(1), 59.

66. Declaration Concerning Asphyxiating Gases, 29 July 1899, reprinted in *American Journal of International Law*, vol. 1, Supp. 1907, p. 157; Convention Respecting the Laws and Customs of War on Land (Annexed Regulations), 18 October 1907, art. 23(a), 36 Stat. 2277, 205 Consol. TS 277 [hereafter Hague IV]; and Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 17 June 1925, 26 UST 571, 14 ILM 49 (1975). The Gas Protocol entered into force for the United States in 1975.

67. *UNGA Opinion*, paras. 54–6. Many states agreed.

68. Ibid., para. 57. Neither the 1972 Convention on Bacteriological and Toxin Weapons nor the 1993 Chemical Weapons Convention mention nuclear weapons.

69. On acquisition, manufacture, and possession: Peace Treaties of 10 February 1947 (see, e.g., Treaty of Peace with Italy, 61 Stat. 1245, 49 and 50 UNTS); State Treaty for the Re-Establishment of an Independent and Democratic Austria, 15 May 1955, 6 UST 2369, 217 UNTS 223; Treaty for the Prohibition of Nuclear Weapons in Latin America (Treaty of Tlatelolco), 14 February 1967, 22 UST 762, 634 UNTS 762; Treaty on the Non-Proliferation of Nuclear Weapons (NPT), 1 July 1968, 21 UST 483, 729 UNTS 161; South Pacific Nuclear Free Zone Treaty (Treaty of Rarotonga), 6 August 1985, 24 ILM 1442 (1985), and its Protocols; and Treaty on the Final Settlement with Respect to Germany, 12 September 1990, 29 ILM 1187 (1990). On deployment: Antarctic Treaty, 1 December 1959, 12 UST 794, 402 UNTS 71; Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, 27 January 1967, 18 UST 2410, 610 UNTS 205; the Treaty of Tlatelolco; Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof, 11 February 1971, 23 UST 701, 955 UNTS 115; and the Treaty of Rarotonga. On testing: the Antarctic Treaty; Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, 5 August 1963, 14 UST 1313, 480 UNTS 43; the Outer Space Treaty; the Treaty of Rarotonga; and the Treaty of Tlatelolco.

70. Treaty of Tlatelolco, art. 1. For a discussion of this and related treaties, see Mark E. Rosen, "Nuclear-Weapon-Free Zones," *Naval War College Review*, Autumn 1996, esp. pp. 47–55.

71. Additional Protocol II to the Treaty for the Prohibition of Nuclear Weapons in Latin America, 14 February 1967, 22 UST 754, 634 UNTS 364.

72. *UNGA Opinion*, para. 59.

73. Treaty of Rarotonga, Protocol II, 24 ILM 1461. China and Russia are parties, whereas the United Kingdom, the United States, and France have signed but not yet ratified the Protocol.

74. *UNGA Opinion*, para. 59.

75. *UNGA Opinion*, Dissenting Opinion of Judge Schwebel, p. 5, 35 ILM (1996), p. 838 (1996). See also U.K. Statement, p. 30, and U.S. Statement, p. 7.

76. *UNGA Opinion*, para. 62.

77. That is, *Opinio juris sive necessitatis*. Restatement (Third) of the Foreign Relations Law of the United States, sect. 102(2) (1987), provides that "customary international law results from a general and consistent practice of States followed by them from a sense of legal obligation." See also *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya v. Malta)*, 1985 ICJ 13, para. 27. Note that the requirement that states follow the practice, especially nations most directly affected by it, is very stringent. See, e.g., *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark, and Federal Republic of Germany v. The Netherlands)*, 1969 ICJ 3, para. 74.

78. Declaration on the Prohibition of the Use of Nuclear and Thermonuclear Weapons, UNGA Resolution 1653 (XVI), 24 November 1961. It provides that "any State using nuclear and thermonuclear weapons is to be considered as violating the Charter of the United Nations, as acting contrary to the laws of humanity and as committing a crime against mankind and civilization." The vote was fifty-three for, twenty against, and twenty-six abstentions. For a more recent resolution in this lineage, see Convention on the Prohibition of the Use of Nuclear Weapons, UNGA Resolution 47/53C (1992), which reaffirms "that the use of nuclear weapons would be in violation of the Charter of the United Nations and a crime against humanity." It cites numerous prior resolutions to the same effect. The vote was 125 for (including China and Russia), twenty-one against (most of Nato), twenty abstentions, and eight absent.

79. *UNGA Opinion*, para. 69.

80. See *Written Statement of the Italian Government, June 19, 1995 (Legality of the Threat or Use of Nuclear Weapons)*, pp. 1–2.

81. *UNGA Opinion*, para. 67. The failure to do so drew a sharp rebuke from Judge Guillaume, who argued that the Court "ought to have carried its reasoning to its conclusion and explicitly recognized the legality of deterrence for defense of the vital interests of States." In fact, he voted against the core finding of the Court because of this "failure." Declaration of Judge Guillaume, para. 9. But see the declaration made by Judge Shi Jiuyong, who argued that had the Court addressed deterrence head-on it would be taking "a legal position with respect to the policy of nuclear deterrence, thus involving itself in international politics—which would be hardly compatible with its judicial function." Declaration of Judge Shi Jiuyong, p. 1, 35 ILM (1996), p. 832.

82. *UNGA Opinion*, para. 70.

83. Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, 249 UNTS 240.

84. The label to be applied is a point of some contention: "the law of war," "the law of armed conflict," and "humanitarian law" are most common. The U.S. military generally uses the first two, whereas international organizations and nongovernmental organizations favor the third. See discussion at *UNGA Opinion*, para 75.

85. Ibid., para. 78.

86. Ibid. See also International Committee of the Red Cross, *Weapons That May Cause Unnecessary Suffering or Have an Indiscriminate Effect: Report on the Work of Experts* (Geneva: ICRC, 1973), p. 13. "The concepts discussed must be taken to cover all weapons that do not offer greater military advantage than other weapons while causing greater suffering."

87. On distinction, see Additional Protocol I, arts. 44(3), 48. On unnecessary suffering, see Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight (St. Petersburg Declaration), 11 December 1868, reprinted in *American Journal of International Law*, vol. 1, 1907, Supp. 95; Hague IV, art. 23(e); and Additional Protocol I, art. 35(2).

88. Hague IV, preamble; and Additional Protocol I, art. 1(2). The Russian written submission contains a curious comment regarding the Martens Clause and nuclear weapons, that the Clause was only to remain in effect until a "more complete code of laws of war" had been completed and that occurred with the 1949 Geneva Conventions and its 1977 Additional Protocols. Thus, the submission asserted, it "may formally be considered inapplicable." *Written Statement and Comments of the Russian Federation, June 16, 1995 (Legality of the Threat or Use of Nuclear Weapons)*, p.13. The Martens Clause has become widely accepted as customary law.

89. *UNGA Opinion*, para. 78.

90. Nauru Statement, p. 35, cited by the Court at *UNGA Opinion*, para. 88. This was also the position of the World Court Project in its Legal Memorandum. Grief, p.10.

91. Convention Respecting Rights and Duties of Neutral Powers and Persons in Case of War on Land, 18 October 1907, 36 Stat. 2310.

92. *UNGA Opinion*, para. 89.

93. U.S. Statement, p. 23. See also U.K. Statement, pp. 53–4.

94. The United Kingdom perhaps came closest; it posited "use of a low-yield nuclear weapon against warships on the High Seas or troops in sparsely populated areas."

95. *UNGA Opinion*, para. 94. This is a curious comment, inasmuch as the Court had rejected the need to "write scenarios" or "evaluate highly complex and controversial technological, strategic and scientific information." Yet the Court criticized statements submitted by the nuclear weapons proponents for also rejecting it. (Additional extracts quoted from paras. 35, 94, and 97.)

96. A "declaration" is a clarification by a judge, whereas in a "separate opinion" the judge might disagree only with the reasons or the method by which the conclusion was reached. A "dissent" is outright disagreement.

97. Of the twenty-eight states presenting written statements to the Court, the following argued the absolute illegality of nuclear weapons: Ecuador, Egypt, India, Japan, Lesotho, the Marshall Islands, Mexico, Nauru, North Korea, Samoa, San Marino, the Solomon Islands, and Sweden.

98. *UNGA Opinion*, paras. 96–7.

99. The Court characterizes the principle of discrimination as incorporating a *jus in bello* proportionality component. It might have been more useful to address the two separately, first querying whether it is possible to distinguish between civilian and military targets (or whether one has done so) and then asking whether, assuming a lawful target is being attacked, the collateral damage and incidental injury outweigh the anticipated military advantage.

100. See, e.g., President William J. Clinton, *A National Security Strategy of Engagement and Enlargement* (Washington, D.C.: 1995), p. 15: "The United States will retain a triad of strategic nuclear forces sufficient to deter any future hostile leadership with access to strategic nuclear forces from acting against our vital interests and to convince it that seeking a nuclear advantage would be futile." See also House Armed Services Committee, *Briefing on Results of the Nuclear Posture Review: Hearing before the Subcomm. on Armed Services*, Statement of John M. Deutch, Deputy Secretary of Defense, 103d. Cong., 1994.

101. Dissenting Opinion of Judge Schwebel, p. 5, 35 ILM (1996), p. 838.

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