Testing the Effectiveness of the International Court of Justice: The Nuclear Weapons Case

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TESTING THE EFFECTIVENESS OF THE INTERNATIONAL COURT OF JUSTICE: THE NUCLEAR WEAPONS CASE

The panel was convened at 8 p.m., Wednesday, April 9, by its Chair, John B. Rhinelander, who introduced the panelists: Laurence Boisson de Chazournes, World Bank; Peter Weiss, Center for Constitutional Rights; Ronald D. Neubauer, U.S. Department of Defense; Michael J. Matheson, U.S. Department of State.

REMARKS BY JOHN B. RHINELANDER*

The subject of this panel tonight is the International Court of Justice (ICJ) and the Nuclear Weapons case.1 Preliminarily, I have six points to make on the nuclear age.

First, the nuclear weapons age is now more than fifty-one years old. I date it from July 1945, when the first atomic device was exploded near Alamogordo, NM. My second point is that while the focus of the world is on the United States and Russia, there are many other states that are nuclear-weapon capable. Five states acknowledge possessing nuclear weapons: the United States, Russia, the United Kingdom, France and China. (By this I mean they have either highly enriched uranium or plutonium, either of which is necessary in making nuclear weapons, plus the diversity of means of delivering those weapons on target.) There are three threshold states (sometimes called the undeclared states): India, Israel and Pakistan. They are generally recognized as nuclear-weapon capable, either possessing now or capable of assembling a bomb quickly, although they have not stated that they have that capability. There is one state that has given up nuclear weapons—six bombs, to be more precise: South Africa. There are a number of states that could have nuclear weapons in a relatively short time if they wanted. The key is the access to the highly enriched uranium or plutonium, which makes nuclear weapons different from all other weapons around.

The third point I want to make—and it really is quite dramatic for those who have studied history, and particularly the history of this century—is that no nuclear weapons have been used in war since 1945. I doubt whether many of those who were involved in the decision to use the atomic bomb could have predicted with confidence that that would be the case. People can disagree as to why that is; some will credit deterrence. You cannot prove deterrence works since you cannot prove a negative, but in fact nuclear weapons have not yet been used.

My fourth point, I think of particular importance, is that the United States and Russia have by far the largest nuclear-weapon capacities. They have thousands and thousands of nuclear weapons targeted or targetable wherever they want. Intercontinental ballistic missiles (ICBMs) can in fact strike a target in thirty minutes or less from the time that they are fired. You cannot call the missiles back once they are fired, and there is no way to intercept.

The fifth point I would make is a relatively new one, at least for those of us like myself who have been involved in arms control for a long time: Terrorism may well be the most important and most dangerous global threat. If terrorists can get hold of enough plutonium or highly enriched uranium, they will have a weapon. And that could be the kind of weapon deliverable by a truck or boat.

* Vice Chairman, Arms Control Association.

1 Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809 (Advisory Opinion of July 8, 1996).
Finally, a word about negotiations to date. I would list five important treaties. The first is the Nuclear Non-Proliferation Treaty (NPT) of 1968. The second is the Anti-Ballistic Missile Treaty (ABM Treaty) of 1972. That treaty in fact denies to the United States and Russia the prerogative to develop or even test certain systems that are important to implementing a nuclear defensive system. The third one, and perhaps the least known, is the Intermediate Forces Treaty (IMF Treaty) of 1987. This is particularly important because it is the first one under which on-site inspections were accepted by both sides. This was a particularly major concession by the Soviet Union, which previously rejected out of hand any kind of on-site inspection. Since 1987 on-site inspections have been possible, at least conceivably, in all other agreements.

Three other treaties can be grouped together: START I, START II and START III. (START stands for Strategic Arms Reduction Talks.) START I has reduced the number of Russian and U.S. long-range strategic weapons. START I in fact is a five-party agreement, but all of the East's weapons are now back in Russia. START II has been signed but is not yet in force because the Duma has not yet acted on it. It was the subject of the recent Helsinki summit. START III has not even been negotiated, but START III is becoming a political condition precedent for favorable Duma consideration of START II. It is important to note that if and when START III comes into force, the number of U.S. and Russian long-range strategic weapons will be about at the level it was when the Strategic Arms Limitation Talks (SALT) process started in 1969. So it is not as though these weapons are going to disappear. The fifth treaty I would mention is the Comprehensive Test Ban Treaty of September 1996. It has been signed by many, but has not yet entered into force, and entry into force is going to be very difficult indeed since forty-four named countries must ratify it, including India, which rejects it.

You should know that none of the treaties I have mentioned deal with use or nonuse of nuclear weapons. In fact, there have never been any serious negotiations on a legal agreement on nonuse. I would note also that it is absolutely critical in dealing with this area to be able to verify and, if and when we ever get to lower and more intrusive systems, to enforce agreements which have been signed, because the lower the numbers go, the question of cheating could become a direct threat to the peace.

**Remarks by Laurence Boisson de Chazournes***

With the requests for Advisory Opinions on the legality of the use of nuclear weapons, the International Court of Justice (ICJ) was being asked to make its most direct foray into peace and security issues. At the same time, the ICJ was given an almost impossible task, taking into account all the interests at stake, not the least of which was its credibility and standing among the different groups of states. In this particular case, civil society placed great expectations on the ICJ. Therefore, the Court had to ensure that it lived up to these expectations.

The ICJ opinion given to the United Nations General Assembly has great merit. It is not a trompe l'oeil decision, as some want to pretend it to be, for watering down its

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1 The Court declined to answer the question posed by the World Health Organization (WHO) but agreed to answer the one posed by the General Assembly. The Court's decision on WHO's request (Legality of the Use by a State of Nuclear Weapons in Armed Conflict, 1996 I.C.J. 66 (Advisory Opinion of July 8)) was based on conditions under which the judicial body would be prepared to review the legality of acts of international
content. But it is true that the Advisory Opinion given to the General Assembly seems to have pleased almost everybody, and this may raise some concern. This general satisfaction is mainly due to drafting compromises and sometimes enigmatic formulations used in order to satisfy all interests at stake. In certain respects, the quality of the legal reasoning has been sacrificed. This being said, the decision has nevertheless achieved a lot. Its impact should not be undermined. I will highlight this with an assessment of the process put in place and of the content of the Advisory Opinion and its outcome.

The Process

Let me first recall that the Court was asked to give decisions in its advisory capacity. It was not asked to resolve a dispute between two or more states in its contentious capacity. This is important to keep in mind, as the two capacities are procedurally very different. The Court was asked, as the principal judicial organ of the United Nations, to assist and give legal guidance to the General Assembly and the World Health Organization (WHO) on a legal matter of great importance to both institutions.

As the Court has repeatedly said in the course of its practice, in giving Advisory Opinions it participates in the activities of the UN system, and in principle, its contribution should not be refused. At this stage in the case, nobody expected the Court to resolve the problem of the resort to nuclear weapons in its entirety. The request for Advisory Opinions was, in fact, part of a process. As was then recalled by the General Assembly, in Resolution 45 O, adopted December 10, 1996, member states should take into account the Advisory Opinion in determining future actions involving nuclear weapons, and especially in interpreting Article VI of the Nuclear Weapons Non-Proliferation Treaty (NPT). States will have to give a meaning to the dictum of the Court according to which states have 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.” As can be seen, the decision has pushed forward the cause of a future general prohibition of the use of nuclear weapons. It requires states to achieve a precise result, which consists of disarmament in all its aspects.

The Nuclear Weapons case shows the virtue of the advisory procedure, some aspects having not been explored so far. For the first time in the ICJ’s history, the doors of the organizations. Although not contesting the sharing of competence which is to prevail among institutions of the UN system, one may regret the formalistic interpretation the Court gave of “the principle of speciality” which had been invoked for justifying its decision. Id. at 78–79, para. 25. The question of the threat or use of nuclear weapons and their legal aspects are surely among the problems that cut across all lines and fall within the United Nations’ purview as well as specialized agencies’ mandate. Speciality should not be seen as a static concept but as an evolving one.


4 Treaty on the Non-Proliferation of Nuclear Weapons, July 7, 1968, 21 U.S.T. 483, 729 U.N.T.S. 169 (entered into force Mar. 5, 1970). Article VI reads as follows: “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 control.”

5 Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 831, para. 105(F) (Advisory Opinion of July 8, 1996).
Court were open to civil society. Nongovernmental organizations (NGOs) played a crucial role in the questions being brought before the Court and were also present during the proceedings. The oral pleadings were telecast on the American cable channel Court TV, a first for the Court. In addition, some governments invited representatives of civil society to make statements before the Court.\(^6\)

With respect to the participation of UN member states, it is to be recalled that all of them have the right to express their views, making the ICJ advisory procedure a multilateral and open forum. Altogether more than forty states participated in the written phase of the pleadings, the largest number ever to participate in proceedings before the Court. It was the first time many developing countries had presented their opinions before the principal judicial organ of the United Nations. Of the five declared nuclear powers, only China did not participate. Of the three “threshold” nuclear powers, only India participated.

During the oral pleadings, twenty-two states participated, as did WHO. Although the UN Secretariat did not appear, it filed with the Court a dossier of documents relating to the case. With respect to this last matter, the proceedings having been largely open, and different actors having utilized this opportunity, it is unfortunate that representatives of the UN Secretariat did not appear, as such involvement may have helped the judges better assess the legal parameters of the activities that have been conducted since the 1960s. The intervention of other institutions, such as the United Nations Environment Programme (UNEP), would also have been of great benefit in stressing that the question of the use of nuclear weapons was to be seen in a broad context, and not only as a strategic matter.

The Decision and Its Outcomes

I will now turn to the Advisory Opinion given in response to the General Assembly’s request. Putting aside certain shortcomings (such as issues relating to the law of neutrality and to the theory of sources in international law), I do think that one of the great achievements of the decision is to have publicized and legalized the issue of the resort to nuclear weapons.

We had been told for many years that the question of the resort to nuclear weapons was so important that it should only be dealt with in adequate fora, meaning, for the nuclear states, diplomatic and confidential fora.

We had been told that if the question of the use of nuclear weapons was to be dealt with at the universal level, this should be under the jurisdiction of political organs, such as the Security Council, as it was a political and strategic question.

We were told that nuclear weapons were unique and therefore were not to be covered by general international law. We also were told that adherence to the Additional Protocol to the Geneva Conventions would not imply that nuclear powers should be submitted to all the rules prescribed by the instrument.

Finally, we were told that it was very important for nuclear states to remain the sole arbiters of any decision to be taken, as such an arrangement served as a guarantee against international insecurity.

The decision of the ICJ broke new grounds in this discourse:

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\(^6\) For example, a resident of the Marshall Islands described what has happened following the series of hydrogen bomb tests conducted in the 1950s (i.e., the long-term physical and psychological effects those Marshall Islanders present at the time of the detonations have continued to experience). CLARK & SANN, supra note 2, at 239-43.
The ICJ has said that the threat and resort to nuclear weapons is a legal question even though it has political characteristics, and that it is a question to be dealt with by a judicial organ.

The ICJ has made it clear that the threat and resort to nuclear weapons is subject to an array of principles and rules of international law, including the *jus ad bellum*, humanitarian law, international environmental law and human rights.

The ICJ also stated 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."7

All that being said, one must not, however, forget the conservative element of the decision, the part that has been sacrificed for political purposes. This most troublesome statement of the decision of the ICJ is the fact that the Court stated 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, in which the very survival of a State would be at stake."8

With this affirmation of "a right of survival of a state," an unknown concept so far,9 which would give the state the right to derogate from the respect of international law, the Court left the door open for diverging interpretations, and perhaps for the prevalence of *jus ad bellum* over humanitarian considerations in extreme cases. As rightly noted by Judge Rosalyn Higgins, this conclusion "goes beyond anything that was claimed by the nuclear weapons States appearing before the Court, who fully accepted that any lawful threat or use of nuclear weapons would have to comply with both the *jus ad bellum* and the *jus in bello*."10

Nuclear weapons are a product of the twentieth century, and every effort should be made to achieve resolution on the resort to nuclear weapons before the new millennium. Present generations have responsibilities toward future generations. The proceedings that took place before the ICJ helped reassert the reality of all the detrimental consequences attached to the resort to nuclear weapons and set a legal precedent for dealing with these issues.

I would like to highlight two important issues that are related to the resort to nuclear weapons: (1) the diverting from civil uses to military uses of nuclear energy and (2) the transportation and disposal of nuclear waste.

In regard to the first issue, legal guarantees have to be developed to ensure that the development of civil uses for nuclear energy is not in fact benefiting the production of nuclear weapons. It is well known that the switch from one use to another is relatively

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7 Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. at 831, para. 105(E).
8 Id. It is to be noted that on this central issue facing the Court, i.e., the legality of the use of nuclear weapons, the majority was achieved only on the casting vote of the President. In addition, the majority was able to support paragraph 105(E) for very different reasons. Some have argued "that the seven-seven division came because three judges wanted to go further in circumscribing the nuclear deterrent, so there was actually a 10-4 vote for illegality." Use or Threat of Nuclear Arms Unlawful, 26 ENVTL. POL'Y & L. 192 (1996).
9 Unless reference is made to theories such as the one developed by Vattel in the eighteenth century and quoted by Dap6 Akande in *The Role of the International Court of Justice in the Maintenance of International Peace*, in REVUE AFRICAINE DE DROIT INTERNATIONAL ET COMPARE 595 n.15 (1996). Vattel is quoted as saying "when one should seek to rob [a nation] of an essential right, of a right without which it cannot hope to maintain its existence," the duty of the nation is not even to attempt pacific settlement but to "exhaust its resources, and nobly shed the last drop of its blood." 2 LE DROIT DES GENS, OU PRINCIPES DE LA LOI NATURELLE, APPLIQUÉ À LA CONDUITE ET AUX AFFAIRES DES NATIONS ET DES SOUVERAINS, ch. 18 (1758).
10 Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. at 937, para. 29 (dissenting opinion of Judge Higgins).
easy to make. The growth of the cohort of threshold nuclear countries is a matter of serious concern which must be faced.

To the second issue, the generation of nuclear waste, its transportation and disposal, be it for military or civil uses, must also be addressed. Nuclear waste never disappears. The present legal regime is weak, nonbinding and nontransparent. In this context, the ICJ Advisory Opinion is a good indication that this legal regime should be developed in accordance with the obligation not to cause any damage to other countries and to the principle of intergenerational equity. It is also a matter of responsibility, the developed countries having an obligation in providing adequate and safe technology to developing countries for bringing nuclear waste under proper management.

Just as the resort to nuclear weapons is a matter of great concern, so are the uses of nuclear energy for so-called pacific purposes.

**Remarks by Peter Weiss**

I am happy to say that I am probably the only member of the panel who does not have to start out with a disclaimer. I speak not only for myself but for the International Association of Lawyers against Nuclear Arms and its U.S. affiliate, the Lawyers' Committee on Nuclear Policy, and for a network of some 700 civic organizations throughout the world, called Abolition 2000. The aim of this network is to bring about, by the end of this century, not necessarily the abolition of the last nuclear weapon, but the signing and ratification of a convention achieving that purpose.

Laurence Boisson de Chazournes has laid out for you the general parameters of the International Court of Justice (ICJ) opinion in the Nuclear Weapons case, and I thought in view of the fact that perhaps not all of you have read every word of it, I might take you quickly through it, and tell you how the Court arrived at its "Solomonic" decision. It is important that we do this because the Court says up in paragraph 104 of the Avis Consultatif, or Advisory Opinion, that everything in that opinion and in the dispositif must be read in the light of everything else.

The Court started out by saying in paragraph 13 that "[t]he fact that this question also has political aspects, as, in the nature of things, is the case with so many questions which arise in international life, does not deprive it of its character as a 'legal question.'" That was a very important holding because, unfortunately, there is a trend now to attempt to export the United States' unique political question doctrine to the ICJ and to courts of other countries.

Second, the Court addressed the suggestion that the right to life as laid down in the International Covenant on Civil and Political Rights had a role to play here: the Court suggested that it did have such a role, but only by reference to the laws of war; in other words, not per se.

Another argument made to the Court was that genocide should be considered as a ground prohibiting the use and threat of use of nuclear weapons. The Court said yes, but only where there is intent.

Then the Court, citing Principle 24 of the Rio Declaration, which provides that "Warfare is inherently destructive of sustainable development" and that "States shall
therefore respect international law providing protection for the environment in times of armed conflict," said that international environmental law does not prohibit the use of nuclear weapons as such, but must be taken into account in the context of the implementation of the principles and rules of the law applicable in armed conflict. This again was an important statement in view of the fact that some countries, including the United States, took the position in the Court that the Rio Declaration and other instruments of international environmental law were not intended to deal with war situations.

The Court then devoted several paragraphs to the unique characteristics of nuclear weapons, the potentially catastrophic consequences that would flow from their use, the fact that they cannot be contained in space or in time and that they have a potential to destroy all civilization and the entire ecosystem of the planet. This was an important point to make in view of the fact that a number of states came before the Court arguing that the laws of war apply to nuclear weapons just as they do to any other weapon. But the Court said this is not like every other weapon. The right of self-defense, the Court said, is subject to the rules of necessity and proportionality, but “a use of force that is proportionate . . . must, in order to be lawful, also meet the requirements of the law applicable in armed conflict which comprise in particular the principles of and rules of humanitarian law.” So here again the Court was speaking directly to the argument that proportionality might justify the use of nuclear weapons: That is, if you are facing a very great danger you can use a terrible weapon against it. The Court said, yes, you can use force proportionate to the force being applied to you, but your use of force is still subject to the rules of humanitarian law.

Then the Court said something that rather pleased all of us opposed to nuclear weapons: “No State . . . suggested . . . that it would be lawful to threaten to use force if the use of force contemplated would be illegal.” I think my colleagues to the right (at least in their placement tonight) will be interested to hear that we were concerned that the Court might not actually equate threat with use, that is, the illegality of threat with the illegality of use, which it did. Then the Court went on to say something rather unfortunate: that the prohibition of poisonous substances and of “analogous liquids, materials and devices” in the Geneva Protocol of 1925 and the Hague and Geneva Conventions did not apply to nuclear weapons. I think the Court could have said that the prohibition did apply, but I think it is also clear why it did not, since in that case there would have been no room for even a minuscule exception to the ultimate holding of illegality.

In a passage certain to elicit lively academic debate, the Court said that the various treaties that were brought to its attention, including the Treaties of Tlatelolco and Rarotonga, and other treaties creating nuclear-weapon-free zones could be read as creating a nascent but not yet a complete opinio juris prohibiting the use of nuclear weapons.

In what is probably the core of its opinion, the Court discussed humanitarian law. It said the cardinal principles of humanitarian law are the principles of discrimination—every weapon or tactic used in war has to be used in such a way as to discriminate between military and civilian targets, the principle of avoiding unnecessary suffering, and the Martens Clause of the Hague and Geneva Conventions, which states that the legality of any weapon not specifically prohibited has to be looked at in the light of the dictates of

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3 Id. at 821, para. 30.
4 Id. at 822, para. 42.
5 Id. at 823, para. 47.
6 Id. at 824–26, paras. 58–63.
the public conscience. The Court referred to the Statute of the Yugoslav Tribunal\(^7\) in support of the continuing viability of these basic principles.

The Court further said that there was no doubt that the principle of neutrality, according to which belligerents may not adversely affect neutral states, applies to nuclear weapons.\(^8\)

In summing up its discussion of humanitarian law, the Court said that no state had presented precise circumstances justifying the use of nuclear weapons, nor dealt with the problem of escalation.\(^9\) On the other hand, as you have heard from Laurence Boisson de Chazournes, the Court could not reach definitive conclusions on "the legality or illegality of the threat or use of nuclear weapons by a State in an extreme circumstance of self-defense, in which its very survival would be at stake."\(^10\)

Now to the Solomonic part of the Court's ruling. It said, in effect, having waffled somewhat on the principal question, it was now going to be very precise about what needed to be done. Given the horror of these weapons, their potentially catastrophic consequences, whether by accident or design, and given the obligation assumed by all the nuclear weapons states in Article VI of the Nuclear Non-Proliferation Treaty (NPT), it is clear what the next step is: There is an obligation to conduct and bring to a conclusion negotiations for nuclear disarmament in all of its aspects.\(^11\)

Now what does all of this mean? I think it means that, as you have heard, the Court was caught between the devil and the deep blue sea and came up with a ruling that said in principle, yes, nuclear weapons are illegal but we know that the great powers of this world (who incidentally are responsible for the financial upkeep of the Court) are totally wedded to the principle of deterrence. So we are going to leave a little loophole here in the form of a non liquet; we are not going to decide about the extreme circumstance. But note that ICJ President Mohammed Bedjaoui in his separate statement said, in effect, don't take that as a green light. It is not a green light, it is a non liquet.\(^12\)

I wish the Court had refrained from referring to the extreme circumstance of self-defense, because I think it could easily have done something different. In our discussions prior to the hearing, we used to talk about the scenario of "the mininuke in the Gobi Desert." A mininuke in the Gobi Desert dropped on a company of soldiers arguably would not violate any principles of humanitarian law, and if the Court had said, "That's what we mean by not in all circumstances," those of us on this side of the question would have been quite happy because our concern here is with weapons of mass destruction. We are not talking about mininukes in the Gobi Desert. The Court did not do that, and it confused the issue considerably by its reference to the extreme circumstance of self-defense whereby the very survival of a state is involved.

A footnote on that point: In the dispositif the article is in the indefinite form: "Where the very survival of a state is at stake."\(^13\) In the discussion of this question, the Court uses the possessive pronoun "its very survival,"\(^14\) referring to the state using nuclear weapons. I would submit to you that in view of what the Court said in Article 104, that everything has to be read in the light of everything else, what it means in Section F of the dispositif is that the very survival of a nuclear-weapons state is involved. In other words, a nuclear-

\(^7\) Report of the Secretary-General pursuant to para. 2 of Security Council Resolution 808 (1993).
\(^8\) Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. at 829, para. 89.
\(^9\) Id. para. 94.
\(^10\) Id. at 830, para. 97.
\(^11\) Id. at 830-32, paras. 98ff, 105(F).
\(^12\) Id. at 1343, 1346, para. 11 (declaration of President Bedjaoui).
\(^13\) Id. at 831, para. 105(F).
\(^14\) Id. at 830, para. 97.
weapons state may not use nuclear weapons where the survival of a non-nuclear state is involved.

Commentators have seized on the Court’s mention of the absence of a specific prohibition of nuclear weapons, in order to bring the question within the confines of the moribund Lotus principle. But I think the real tension here, what Judge, and now President, Schwebel calls the titanic tension of this case, is between international law and practice, because he devotes a considerable portion of his Dissenting Opinion to practice, including about four pages on the Gulf War and how the threat to use nuclear weapons, even though it was not explicit, may have stopped the Iraqis from using biological and chemical weapons.

The really important and really unambiguous part of the case is the unanimous holding in Section F concerning the obligation to negotiate a treaty abolishing nuclear weapons. There will be discussion from here until the end of the century about what the holding on legality and illegality means, but there can be no discussion about the Court’s holding that there is a general obligation to proceed forthwith (that is my term; they did not say “forthwith,” they said “bring to a conclusion,” which cannot mean fifty or a hundred years from now) with the negotiation and conclusion of a nuclear weapons convention. Two days ago a draft of such a convention was released at the United Nations by the organizations for which I speak. Let us hope that this is the next step.

Remarks by Ronald D. Neubauer*

Let me make the obligatory disclaimer. Although I am an active-duty Navy judge advocate, the views expressed here are my own, and do not reflect the official policy or position of the Department of the Navy, the Department of Defense, or the U.S. Government.

Initial Observations

Two themes underlie the Advisory Opinion of the International Court of Justice (ICJ): First, no state is eager to detonate nuclear weapons in armed conflict. One hopes that nuclear weapons will only be employed—as they have for the past half-century—to deter unlawful aggression.

The other theme derives from what the eighteenth-century philosopher David Hume called the “is–ought fallacy”: one cannot derive an is from an ought. The is–ought fallacy seems to be relevant in two respects. First, the existence of broad agreement that there ought to be nuclear disarmament does not guarantee the immediate achievement of that goal. Second, the tremendous destructive force of nuclear weapons does not render their threat or use unlawful per se.

What Will Be the Anticipated Impact of the Nuclear Weapons Case?

In assessing the effectiveness of the Court generally, and the impact of the Nuclear Weapons cases specifically, it is crucial to keep in mind the Court’s role within the UN system: deciding contentious cases over which it has jurisdiction and which are properly brought before it, and rendering Advisory Opinions when requested and authorized.

15 The Lotus Case (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sep. 7) (a relic of the age of positivism, standing for the proposition that a state is permitted to do whatever is not expressly forbidden by a rule of international law to which it has assented).
16 Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. at 840–42 (dissenting opinion of Vice-President Schwebel).
17 Available from the Lawyers’ Committee on Nuclear Policy, 666 Broadway, New York, NY 10012.
* Associate Deputy General Counsel, U.S. Department of Defense (International Affairs & Intelligence).
Much of the Court’s credibility is based on being perceived as faithful to its role as specified in the UN Charter and its own statute.

The Role of Nongovernmental Organizations (NGOs)

The statute of the Court provides that, in contentious cases, only states may be parties in cases before the Court. The Court may give Advisory Opinions on legal questions to UN bodies authorized by the UN Charter to make such requests. In the Nuclear Weapons cases, the principal force behind raising these issues was a group of NGOs that successfully persuaded member states of the World Health Organization (WHO), and subsequently the UN General Assembly, to ask the Court for its Advisory Opinion. This initiative, named the “World Court Project,” was begun by the International Association of Lawyers against Nuclear Arms, International Physicians for the Prevention of Nuclear War, and the International Peace Bureau, none of which was authorized to put the question to the Court. What is the impact of NGOs on the jurisprudence of the Court, and what impact might this influence have on the credibility and effectiveness of the Court? I’m not sure. Suffice it to observe that this method of gaining the Court’s jurisdiction was successful, which might portend similar initiatives in the future.

Two Advisory Opinions

The Court was asked to provide two Advisory Opinions: one to the WHO and one to the General Assembly. I think the Court’s determination was correct that it was not authorized to provide the requested opinion to the WHO; had it determined otherwise, I think its credibility would have been undermined and its effectiveness thus diminished. Although I think the Court should have used its discretion to decline to provide the Advisory Opinion requested by the General Assembly, certainly there was no question that the Court was authorized to provide the requested opinion.

The General Counsel Analogy

In thinking about the Court’s advisory jurisdiction, I could not help but analogize to the position of a general counsel advising its client as to what the law is. The Court was not charged with deciding a dispute (a “case and controversy” in terms of U.S. jurisprudence), but only with advising its client, the General Assembly, as to its opinion about what the law is. What is the precedential value of an Advisory Opinion? First, even in contentious cases, decisions bind only the parties. Advisory Opinions have no “binding force.” Moreover, it is generally accepted that the larger the majority, the more influential the decision. This case had the smallest possible majority (seven to seven, with the President of the Court casting the deciding vote), with a significant number of substantially different opinions on the state of the law. It is fair to state that the Court’s Advisory Opinion, including the declarations and separate and dissenting opinions, accurately reflects the range of opinion in the international legal community.

Non Liquet

What about the notion of non liquet (“it is not clear”)? Then Vice-President—now President—Stephen Schwebel criticized the Court in harsh terms for its ultimate finding on the issue—a finding he viewed as non liquet. If this were a contentious case, I would share Judge Schwebel’s sense of astonishment that the Court left the issue unresolved, especially as the Statute of the Court fairly implies that in contentious cases the Court

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1 ICJ Statute, art. 34.
2 Id. art. 65.
3 Id. art. 59.
must decide disputes brought before it. However, as Judge Vladlen Vereshchetin highlighted in his declaration, there is no dispute to decide in advisory cases. In this role, the Court can, I think, legitimately advise the General Assembly (its client) that the law on a certain point is unclear. This might not be the time for a detailed discussion of whether the Court has a role as law creator, in addition to law identifier and law applier. In brief, at least with respect to Advisory Opinions, my view is that the Court should limit itself to advising on what the law is, and eschew the role of lawmaker.

Some who have criticized the Court’s opinion as nondispositive or evasive have quoted Judge Schwebel’s statement that “[i]f 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.” I agree with those who argued that the Court should have declined to issue the Advisory Opinion requested by the UN General Assembly. However, given that the Court did provide the requested Advisory Opinion, I tend to agree with the thoughts expressed by Judge Vereshchetin in his declaration. The Court’s Advisory Opinion clarified and confirmed some aspects of use-of-force law and general international law that are instructive and helpful. Although the Court’s ultimate advice lacks clarity and does not articulate the law as I see it, the Court’s Advisory Opinion is not inconsistent with U.S. and North Atlantic Treaty Organization (NATO) nuclear doctrine or deployments.

The Contributions of the Nuclear Weapons Cases toward the Court’s General Jurisprudence

Law of permission or prohibition? Recall that the UN General Assembly asked the Court to advise on whether “the threat or use of nuclear weapons in any circumstance [is] permitted under international law.” Phrased in this way, the question incorrectly assumed that international law addressing the use of weapons is permissive rather than prohibitory. The Court affirmed that “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 prohibition.” The Court thus correctly recast the General Assembly’s question and proceeded to evaluate whether the threat or use of nuclear weapons is prohibited.

Opinio juris. In considering whether there exists in customary international law a prohibition of the threat or use of nuclear weapons, the Court affirmed its traditional approach to customary international law by emphasizing that “the substance of that law must be ‘looked for primarily in the actual practice and opinio juris of States.’”

Conclusion

Common law lawyers have an expression: “Hard cases make bad law.” Surely, Nuclear Weapons had to be among the hardest cases ever addressed by any court. Although this Advisory Opinion does not “make law”—it provides a response to a question asked by the General Assembly—the legal advice provided is not “bad.” My sense is that of the twenty-eight states that made written statements to the Court (twenty-two states made oral statements to the Court during its public sittings from October 30 to November 15, 1995), few are totally satisfied with the Court’s Advisory Opinion. However, my sense is that most of these states can live with the Court’s Advisory

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4 Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 840 (dissenting opinion of Vice-President Schwebel).
5 Id. at 815, para. 1.
6 Id. at 823, para. 52.
7 Id. at 826, para. 64.
Opinion, which is not seriously inconsistent with their national interests or their view of international law.

**Remarks by Michael J. Matheson**

The International Court of Justice (ICJ) opinions on nuclear weapons are not yet a year old, but they already have been the subject of considerable commentary in scholarly journals and elsewhere. Naturally, the primary focus of this commentary has been on the Court's conclusions concerning the legality of the threat or use of nuclear weapons—and its avoidance of conclusions on some key aspects of the matter. For reasons I will describe, I do not believe that the Court's opinions suggest a need for any change in the nuclear posture and policy of the United States or the North Atlantic Treaty Organization (NATO) alliance—which is, in fact, the position already taken by the United States and NATO. But I do believe that the Court's opinions are likely to have an important influence on the use of the Advisory Opinion mechanism, and may also have significant and helpful effects on the application of the law concerning the use of force in more conventional circumstances.

On the issue of the advisory opinion mechanism, the Court acknowledged, on the one hand, that it had discretion to refuse a request for an Advisory Opinion from the UN General Assembly, but would only do so for "compelling reasons," which it did not find in this case. On the other hand, the Court did reject the request of the World Health Organization (WHO) for a similar Advisory Opinion, on the grounds that the legality of the use of nuclear weapons was not a matter within the competence of the WHO. I believe the Court was correct in doing so, and that its rejection of the WHO request should have a useful effect in restraining inappropriate attempts to use a UN specialized agency or other technical body to pursue Advisory Opinions on issues that go beyond its technical mandate.

With respect to the Court's general application of international law to the conduct of hostilities, I think that most of the opinion given to the General Assembly was excellent and should be of real value in the context of conventional armed operations. In particular, the Court wisely resisted the temptation to apply indiscriminately, to the conduct of military operations, rules that were developed for peacetime circumstances, such as the provisions on environmental damage and deprivation of human life found in various modern instruments. Instead, the Court concluded that the protection of the environment and human life must be addressed in the framework of the law of armed conflict, where collateral damage to the environment and the civilian population is weighed against the military advantage provided by the military operation in question, rather than absolutely prohibited. In my view, this approach not only protects legitimate methods of warfare, but also protects the development of strong peacetime norms from the weakening that would inevitably occur if they were regarded as applying in the same way during armed conflict as during peacetime.

With respect to the legality of the threat or use of nuclear weapons—the specific issue addressed in the General Assembly's request for an Advisory Opinion—the Court had a reasonable degree of agreement on certain issues, but was sharply divided or uncertain on others.

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In particular, the Court concluded (with only three dissenting votes) that there is no prohibition—either in conventional or customary law—on the threat or use of nuclear weapons as such. It rejected the argument that the use of nuclear weapons would intrinsically be contrary to the limits on the exercise of the right of self-defense (particularly the requirement of proportionality), concluding only that the use of nuclear weapons would pose "profound risks" that would have to be "borne in mind" by states considering such use. The Court likewise rejected the argument that nuclear weapons were constrained by the prohibitions in the law of armed conflict against the use of poison weapons and chemical weapons, and the argument that the various restrictions on the use and possession of nuclear weapons in modern arms control agreements somehow amounted to a total prohibition on their use.

Further, the Court rejected the argument that such a total prohibition had become a part of customary international law, noting that many states continue to adhere to a policy of nuclear deterrence (including those that possess nuclear weapons or rely for their security on the nuclear capabilities of their allies), and that the international community is "profoundly divided" on the legality of the use of nuclear weapons. The Court likewise found that the past resolutions of the General Assembly condemning the use of nuclear weapons did not have the effect of prohibiting such use, since the Assembly has no such authority and its decisions did not reflect an existing prohibition in customary law.

All of this reasoning by the Court was, in my mind, perfectly correct and reasonably straightforward. The more difficult issue, by far, was the degree to which the general law of armed conflict prohibits the use of nuclear weapons in some or all circumstances. Here the Court was deeply split and uncertain. The Court clearly had serious doubts as to whether most hypothetical uses of nuclear weapons could comply with the rules of neutrality, the distinction between civilian and military targets, and unnecessary suffering, pointing out the extreme effects of nuclear weapons and their inherent danger to the civilian population.

The United States and others had argued that it was impossible to draw any categorical conclusion about the compliance of all hypothetical uses of nuclear weapons with these rules, but rather that compliance had to be judged on the basis of the circumstances of each particular case. In particular, the rules about collateral injury to civilians and unnecessary suffering by combatants require a balancing of the injury and suffering caused by a particular attack against the military advantage expected from it. For example, Judge Schwebel pointed out that some hypothetical uses of nuclear weapons—such as the use of a nuclear depth-charge to destroy a submarine that is about to fire nuclear-armed missiles—"would easily meet the test of proportionality," while other uses might or might not, depending on the circumstances. A persistent flaw of much of the analysis on this point is the apparent assumption that all uses of nuclear weapons would

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2 Id. at 831, para. 105.
3 Id. at 822, para. 43.
4 Id. at 824, para. 55.
5 Id. at 825, para. 62.
6 Id. at 826, para. 67.
7 Id. paras. 70–71.
8 Id. at 829, para. 95.
9 E.g., Written Statements of Netherlands, 7–8, 12; Russia, 12–14; United Kingdom, 50–60; and United States, 28–32 (June 1995).
10 35 I.L.M. at 839 (dissenting opinion of Vice-President Schwebel).
necessarily involve the destruction of population centers and the infliction of hundreds of thousands of civilian casualties, which is not the case.

In the end, half of the Court concluded that the threat or use of nuclear weapons would "generally be contrary to the rules of international law applicable in armed conflict," with the term "generally" clearly being used as a means of avoiding the assertion that all uses of nuclear weapons would be illegal. More specifically, the Court stated that it had reached no conclusion about three fundamental aspects of the problem.

First, the Court stated that it could not conclude definitively whether the threat to use or the actual use of nuclear weapons would be lawful in a situation of "extreme self-defense, in which the very survival of a state would be at stake." Such an "extreme" circumstance of self-defense has in fact not been so infrequent in modern history, including at least the two World Wars, the Korean War, the Gulf War, and the hypothetical Warsaw Pact invasion of Western Europe, which NATO nuclear doctrine was designed to deter or defeat. It was precisely for such situations that nuclear arsenals were developed.

Second, the Court stated that it would not pronounce on the question of "belligerent reprisals"—that is, the exercise of the right to take armed action that would otherwise be unlawful in response to serious violations of the law of armed conflict by an enemy—except to note that the rule of proportionality would apply in such a case. This is very important, since one of the basic reasons states have nuclear arsenals has been to deter others from the unlawful use of weapons of mass destruction against themselves or their allies, and to halt such actions if they occur.

Third, the Court said that it would not pronounce on a "policy of deterrence"—by which it apparently meant the maintenance of stocks of nuclear weapons by a state with a stated readiness to use them if necessary to defend itself and its allies from armed attack. This is also significant, since the main purpose of nuclear arsenals is to deter enemy attack, and such a policy necessarily presumes that actual use is possible and lawful in at least some circumstances if such an attack occurs—otherwise the policy would be hollow and lack credibility.

The Court's qualified findings on the application of the rules of armed conflict to the use of nuclear weapons were adopted by a vote of seven-to-seven, with President Mohammed Bedjaoui casting the tie-breaker. Even within these two groups of seven judges, there were considerable differences of view, so it is doubly hard to say where the Court as a whole stands. But it is significant that the opinions of at least six judges (including at least two of those concurring in the Court's opinion) seem to take the view that there are indeed circumstances in which the use of nuclear weapons would not be unlawful, and the opinions of several others do not give a clear indication of their view on this question. Only three judges clearly expressed the contrary conclusion that all uses of nuclear weapons would be unlawful. So, whether one looks at the votes themselves or at the content of the various judges' statements, the conclusion is that the Court is uncertain and divided on the question of whether and in what circumstances the use of nuclear weapons is prohibited, and only a minority appears to have taken the position that all uses are prohibited.

So what is the practical significance of all this? I do not believe the Court's opinions in these cases suggest a need for any change in the nuclear posture and policy of the

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11 Id. at 831, para. 105.
12 Id.
13 Id. at 830, para. 96.
14 Id. at 826, 830, paras. 67, 96.
United States or the NATO alliance. The Court did not find that all uses of nuclear weapons would be illegal, and expressly declined to pronounce on the legality of the use of nuclear weapons in the most likely scenarios in which such use might be considered, or on the legality of a policy of deterrence in which a state maintained a stock of nuclear weapons with a declared readiness to use them if necessary to repel serious aggression. Under these circumstances, national authorities that believe their nuclear policy is lawful and vital to national security are unlikely to change important elements of it simply because legal issues have been raised but not resolved.

It remains the fact that the elimination of nuclear weapons can only be attained through the process of negotiations among states, as called for by Article VI of the Nuclear Non-Proliferation Treaty (NPT)\(^\text{15}\), which will require the resolution of very difficult technical, political and security problems. None of these problems would have been solved or eased by an opinion from the Court that all uses of nuclear weapons are unlawful. Such an opinion could only have cast serious doubt on the credibility of the Court as a nonpolitical arbiter of legal issues and thus have impaired its effectiveness across the board.

In this sense, the Court did manage to extricate itself from the difficult position in which the General Assembly had placed it. Although the Court could not bring itself to refuse the Assembly’s request, it is to the Court’s credit that it found a way to avoid giving an incorrect categorical answer to the question posed without appearing to be indifferent to the potential horrors of nuclear war.

So I think the Court “survived” the case, if you will, and made a number of additions to the law of armed conflict which primarily will be useful outside the area of nuclear weapons. It did not solve, as it could not have solved, the basic dilemma of how to deal with nuclear weapons in the modern day. This is something the governments of the world are going to have to deal with through political channels. We all hope that this effort will in due course be successful.

**DISCUSSION**

MR. RHINELANDER: Ms. Boisson de Chazournes, let me turn to you first. I will recall at the start that the rule of the U.S. Supreme Court is to make decisions only in actual cases. It frequently dismisses cases that are loaded with political issues and refuses to exercise its jurisdiction. In the Nuclear Weapons case, there was a request for an Advisory Opinion—there were no facts before the International Court of Justice (ICJ). Why should the Court take on this kind of question? Does it help the Court or harm it over the long term as an institution?

MS. BOISSON DE CHAZOURNES: The questions of the hard facts were brought many times before the Court when some states alleged that the Court did not have any jurisdiction to answer the requests put by the General Assembly and the World Health Organization.

Let me make two points in reference to the advisory capacity of the Court. First, the Court was asked to give an opinion in its advisory capacity. In this capacity, the Court is answering legal questions, and the Court has often said that it would answer any question whether abstract or involving factual issues.

The second thing that has to be noticed when we look at the practice of the Court is that sometimes the Court has reshaped questions to make them more applicable or more abstract so that the answer will be useful to the international community at large.

In addition, notwithstanding the bombing of Hiroshima and Nagasaki, I would like to recall the issuance of books in the 1980s and 1990s describing quite precisely the circumstances in which the executive branch of certain nuclear powers had considered resorting to nuclear weapons in a number of certain situations. So I do not think that we can allege that there are no hard facts in this situation.

Mr. Matheson: The Court has issued quite a number of Advisory Opinions in its time, and many of them have been very useful. Typically, and unlike the request in the Nuclear Weapons case, they have been about particular situations: an organization that does not know how to interpret a particular provision of its charter, a particular situation that has arisen in a country, as in the South West Africa cases, where there are lots of facts and a concrete situation. It is a very useful mechanism; it is just a question of when it's an appropriate mechanism and when it's not.

Mr. Rhinelander: Mr. Weiss, you mentioned the Geneva Protocol in your talk. It's a "non-use" agreement: In fact, that means no first use, based on its ratification by most countries. No first use of chemical and biological weapons is now accepted as customary international law. Did any nongovernmental organization (NGO) urge before the Court that the rule of law for nuclear weapons ought to be "no first use" rather than no use at all?

Mr. Weiss: The Federation of American Scientists wrote a letter to all the judges telling them they should get away from the difficult question before them and just say that no-first-use is the correct outcome. But I do not think they got an answer. Incidentally, I think this is the first case in the history of the Court, and its predecessor the Permanent Court of International Justice, in which all judges participating in the case felt it necessary to write separate opinions. As far as I know, no state on either side of the question urged the Court to render a no-first-use opinion. I think it is clear why that did not happen. The anti-nuclear-weapons states did not want a first-use outcome because they wanted a per se ruling, an absolute ruling. The nuclear weapon states did not want a no-first-use outcome because they want to maintain their first-use option.

Mr. Rhinelander:Let me turn to Commander Neubauer. We have heard hypotheticals about mininukes in the Gobi Desert. Let me suggest another: Let us assume a retaliation situation between two nuclear powers, in which one has in fact initiated nuclear war. In major cities around the world—say Moscow, Los Angeles, Paris—there are many military targets within those cities that have been recognized over time. Surely World War II is the example of military targets in cities being hit. Is there anything in this opinion, in your judgment, that would limit the retaliation with a number of nuclear weapons targeted at military targets in an urban setting where the obvious result is massive destruction in the city and possibly of the entire city?

Commander Neubauer: I guess the easiest answer is no. I do not think anything in the opinion addresses specific targets or specific weapons or specific numbers of weapons that can be targeted at specific targets. There is nothing in there like that. I think the reason is clear. Even though the hypothetical situation you have depicted has more to

it than other hypotheticals, it suffers from the same problem: There is no way to draw
that calculus without a real situation. Let me try to flesh that out a bit. The requirement is
for proportionality, which, as Mr. Matheson pointed out, is a calculus which on the one
hand has to deal with the value of the military target and on the other hand has to deal
with potential collateral destruction of a civilian community. It is an extraordinarily
difficult calculus to make. There is no assessment in your hypothetical of the state of the
war, who is winning, who is losing, what destruction has already occurred, what weapons
have been taken out of each other’s arsenals. There is no way to predict that.

Another point that needs to be made is that a state cannot shield a high-value military
installation by locating it in the middle of a city. That military installation remains a
viable military target, depending again on the entire calculus. In a much more narrow
way, most U.S. military installations have hospitals or churches on them. At the U.S.
naval air station at Pensacola, FL, which was my first duty station, the hospital and the
church are very close to the runway. That runway remains a valid target even though it is
likely that a hospital or a church might get damaged during an attack.

Ms. Boisson de Chazournes: I was under the impression a bit earlier that we had
all read the same decision. Now I have this impression less and less. The case of
belligerent reprisals is one example where the Court made a lot of compromises, and did
not say much. The ICJ nevertheless said that two principles should find application: the
principle of proportionality and the principle of necessity. Also, in the course of its
discussion, the Court noted that these two principles should be interpreted within the
international context generally. Taking that into account, it would be difficult to go as far
as what was stated previously.

Mr. Weiss: I would like to reply with a quote from one of the separate opinions: “It
cannot be accepted that the use of nuclear weapons on a scale which would—or could—
result in the deaths of many millions in indiscriminate inferno and, by far-reaching
fallout, have profoundly pernicious effects in space and time and render uninhabitable
much or all of the Earth, could be lawful.” That is not President Bedjaoui, it is not Judge
C.G. Weeramantry, it is Judge Schwebel, and I would ask my colleagues seated to my
right, Where does the arithmetic go from here? Would 100,000 be okay? Would 50,000?
The examples that you gave, Mr. Matheson, were really minimal: the submarine, the
mininuke in the desert. Under what circumstances could one of the nuclear weapons that
we are talking about here, weapons ten to fifteen times the size of the bomb dropped on
Hiroshima, be used without violating the principle of discrimination, the principle of
unnecessary suffering, and the Martens Clause? That’s the question.

Mr. Matheson: The point is that you cannot tell in the abstract; you cannot make
that judgment in the abstract. The mere fact that the weapon is fifteen times larger does
not tell you how many people it killed or what the military justification was for it. It does
not tell you whether this was an action that initiated nuclear warfare or was in response
or reprisal to someone else’s use of mass-destruction weapons. There are a dozen other
factors that would have to be taken into account. This is why, as we always said, and as I
think the Court had to acknowledge in the end, you cannot answer the question
categorically. You can point to the relevant law, which the Court did, and you can make
some observations about it, but you just cannot answer categorically for all nuclear-
weapons uses.

1 Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 839 (dissenting opinion of Vice-President
Schwebel).
Mr. Rhinelander: I think one of the unusual facets of the Court's opinion is its consideration of Article VI of the Nuclear Non-Proliferation Treaty (NPT), which establishes obligations to negotiate in good faith toward a nuclear-weapon-free world and toward general and complete disarmament. But the Court's opinion does not really address the obligation to negotiate; it addresses the obligation to get results. My question to you, Mr. Matheson, is, Has that opinion had any effect yet? Has it changed the position of the United States or, really, of any of the nuclear weapons states in terms of moving forward from where they were at the time the Court's opinion was announced to where we are now?

Mr. Matheson: No, I do not think there has been a change. Article VI of the NPT requires that states pursue negotiations in good faith toward these objectives. It seems to me that "pursuing negotiations in good faith toward an objective" means you are trying to achieve the objective. However, neither that nor the Court's formula tells you how you do it, when you do it, and what problems you have to solve; nor does it really tell you whether you can get there. This is one of the most difficult problems any negotiator can face—how to deal with this problem of nuclear weapons. The United States' position is that it fully accepts the obligation that it incurred in Article VI of the NPT and it is proceeding as best as it can. I think you would have to say that in the course of the past ten years the negotiated results have been startling, really, in comparison to what might have been anticipated. These negotiations have produced agreements that have drastically reduced, or would reduce if they were ratified, the stocks of nuclear weapons, and will proceed toward further reductions if the process can continue. We have a comprehensive test ban now which hopefully will be ratified. The envelope has been pushed dramatically in recent years and this is the process the United States is committed to. I do not think that the changed wording the Court used suggests that there is any different way to pursue nuclear arms control.

Ms. Boisson de Chazournes: The question you raised was, "Is the Court's Advisory Opinion going to change the position of the nuclear states?" That is one way of looking at the outcome of the advisory opinion. Another way is to ask whether it is going to affect the position of the non-nuclear states. Is this decision going to help the non-nuclear states to achieve complete disarmament? In this respect, I think we should not downgrade too much what the Court said. It said that there is an obligation of conduct but that there is also an obligation to achieve a result. And the Court said we should put in place all of the safeguards to ensure that nuclear weapons are not going to be used. That is something of the perspective we need to keep in mind—the world perspective, not just the attitudes of the nuclear states.

Mr. Weiss: Well, the Lord proceeds in strange ways His wonders to perform! One of the things that has happened as a result of the Opinion is that the non-nuclear states and the anti-nuclear-weapons states, which together certainly make up the majority of the states in the world, have been encouraged by the Court's opinion to move forward precisely into that political arena where the nuclear weapons states said all along the matter ought to be treated, rather than in the Court. So at the last General Assembly Session three resolutions were introduced and passed by overwhelming votes calling for the commencement of negotiations. The most important one, known as the Malaysian

resolution,\textsuperscript{1} calls for negotiations to begin this year, 1997. The PrepCom (preparatory conference) for the NPT, which started its annual meeting in New York two days ago, has already heard many speeches by countries asking for these negotiations to start. Eventually, the nuclear weapons states are going to have to come up with some kind of response. What I would say again to my friends seated on my right is: The United States and the other nuclear weapons states are committed to the "ultimate" abolition of nuclear weapons. But "the time is not right." When will the time be right? When there are no more terrorists in the world? When there is general and complete disarmament? When Heaven has arrived on Earth? Or a little before that?

MR. RHINELANDER: Well, Commander Neubauer, I guess you are the only one who hasn't spoken. Do you want to say anything on this one?

COMMANDER NEUBAUER: At the beginning, Mr. Rhinelander summarized the difficulties in ratifying the agreements now before the U.S. Senate and the Russian Duma. Until we can get ratification of those more modest agreements, I do not see how we can go much further.

\textit{Shirley A. Whitfield*}

\textit{Reporter}

\textsuperscript{1} G.A. Res. 45 O, 51\textsuperscript{st} Sess. (Dec. 10, 1996).

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