The International Court of Justice Advisory Opinion in the *Nuclear Weapons Cases*

A first appraisal

by John H. McNeill †

Introduction

There were two requests for advisory opinions from the International Court of Justice — the first from the World Health Organization (WHO), and the second from the United Nations General Assembly.

WHO asked: "In view of the health and environmental effects, would the use of nuclear weapons by a state in war or other armed conflict be a breach of its obligations under international law, including the WHO Constitution?" The Court held by eleven votes to three (Judges Shahabuddeen, Weeramantry and Koroma dissenting), that it was not able to give the advisory opinion requested by WHO. The Court's opinion was consistent with the position argued by the United States and other countries and, in our view, is correct. As the WHO opinion primarily concerned jurisdictional issues, we will focus on the advice given in response to the request of the General Assembly.

John H. McNeill was Senior Deputy General Counsel at the United States Department of Defense. He sadly died on 26 October 1996, and Commander Ronald D. Neubauer, Judge Advocate General's Corps, US Navy, one of his associate deputy general counsels, completed this article. Mr McNeill was an advocate and Commander Neubauer was a counsel on behalf of the United States in the *Nuclear Weapons Cases*. The views expressed in this article are the authors', and do not reflect the official policy or position of the Department of Defense, the Department of the Navy, or the US government.

The UN General Assembly asked: "Is the threat or use of nuclear weapons in any circumstance permitted under international law?"[1] Over the sole objection of Judge Oda, the Court decided to hear the case. There were six specific findings in the Court's Advisory Opinion. The ultimate advice of the Court, approved by seven of fourteen judges, with President Bedjaoui (Algeria) casting the deciding vote, was

> "... that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict (...). However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake".[2]

President Bedjaoui and Judges Herczegh, Shi, Vereshchetin and Ferrari Bravo appended Declarations to the Court's Advisory Opinion. Judges Guillaume, Ranjeva and Fleischhauer issued Separate Opinions. Vice-President Schwebel and Judges Oda, Shahabuddeen, Weeramantry, Koroma and Higgins appended Dissenting Opinions. This diversity of views makes distilling the Court's advice to the General Assembly a daunting task. In this first appraisal, we will confine our analysis principally to the Court's Advisory Opinion. We shall begin with some initial observations. We shall then consider the Court's contributions regarding its general jurisprudence. Finally, we will discuss the contributions of the Advisory Opinion to the Court's jurisprudence regarding the use of force in general, and the threat or use of nuclear weapons in particular.

Initial observations

Three underlying themes of the Court's Advisory Opinion

As an aid to understanding the Court's Advisory Opinion, we suggest that three general considerations might have informed the deliberations of the judges who constituted the majority. The first is a recognition that no State is eager to detonate nuclear weapons in armed conflict, and that, hopefully, nuclear weapons would be employed — as they have for the past fifty years — only as a deterrent against unlawful aggression. The other considerations derive from what the eighteenth-century philosopher David Hume called the "is-ought fallacy": one cannot derive an *is* from

[1] International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996 (hereinafter referred to as "Opinion"), para. 1.

[2] Opinion, para. 105(2)E.

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 fact that the destructive force of nuclear weapons is in order of magnitude greater than that of conventional weapons does not render the threat or use of nuclear weapons unlawful *per se*.

What is the anticipated impact of this case?

Decisions of the Court are made by a majority of the sitting judges — normally fifteen.[3] However, owing to an unfilled vacancy, there were only fourteen judges in this case. Article 55(2) of the Court's Statute provides that, in the event of an equality of votes, the President shall cast the deciding vote. In essence, in case of a tie, the President votes twice, which is what occurred in this case.

Whereas decisions in contentious cases bind only the parties, advisory opinions have no "binding force".[4] However, as Judge Mohamed Shahabuddeen stated in his recently published book, *Precedent in the World Court*, ". . . although an advisory opinion has no binding force under article 59 of the Statute, it is as authoritative a statement of the law as a judgment rendered in contentious proceedings".[5] That said, it is generally accepted that the larger the majority the more influential the decision. This case had the smallest possible majority, with a significant number of substantially different opinions on the state of the law. Our view is that the Court's Advisory Opinion in the *Nuclear Weapons Cases* is generally reflective of the state of the law, and that the Declarations, and the Separate and Dissenting Opinions accurately reflect the range of opinion in the international legal community.

The contributions of the Nuclear Weapons Cases toward the Court's general jurisprudence

The role of non-governmental organizations

The Statute of the Court provides that, in contentious cases, only States may be parties in cases before the Court.[6] The Court may give advisory

[3] Statute of the International Court of Justice (hereinafter referred to as "Statute"), Article 3.

[4] *Ibid.*, Article 59.

[5] M. Shahabuddeen, *Precedent In The World Court*, Grotius Publications, Cambridge University Press, Cambridge, 1996, p. 171.

[6] Statute, Article 34.

opinions on legal questions at the request of a body authorized by the UN Charter to make such a request.[7] In the *Nuclear Weapons Cases*, the principal force behind the raising of these issues was a group of non-governmental organizations (NGOs) that successfully persuaded member States of WHO, and subsequently the UN General Assembly, to ask the Court for its advisory opinion. This initiative, named the "World Court project," was launched by the International Association of Lawyers Against Nuclear Arms, the International Physicians for the Prevention of Nuclear War, and the International Peace Bureau, none of which were authorized to put the question to the Court. We will not debate the merits of this manner of obtaining the jurisdiction of the Court. Suffice it to say that this method was successful and might portend further such initiatives in the future.[8]

The Court decided to render the advisory opinion requested by the General Assembly

As a priliminary matter, the Court, by thirteen votes to one, decided to comply with the General Assembly's request for an advisory opinion. The United States, along with other States, argued that the Court, while possessing the authority to issue the advisory opinion, should exercise its discretion to decline to respond. The main argument advanced was that the question posed by the General Assembly was so hypothetical — so dependent on facts that were not ascertainable — that the Court could not, consistent with its judicial function, afford meaningful guidance to the General Assembly. Those who criticize the Court's opinion as non-dispositive or evasive have quoted Vice-President 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".[9] We 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, we 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

[7] *Ibid.*, Article 65.

[8] Judge Oda, the lone dissenter on the Court's finding to render the advisory opinion, offers some insightful thoughts on this and related issues.

[9] Dissenting Opinion Schwebel, p. 8.

law that we find instructive and helpful. Although the Court's ultimate advice lacks clarity and does not articulate the law as we see it, we think its Advisory Opinion is not inconsistent with US and NATO nuclear doctrine or deployments.

Non liquet

The final clause of Paragraph 2E of the Court's findings states: "... the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake". Vice-President Schwebel criticized the Court in harsh terms for this finding of *non liquet* ("it is not clear"). If this were a contentious case, we would share Vice-President Schwebel's sense of astonishment that the Court left the issue unresolved, especially as the Statute of the Court clearly implies that in contentious cases the Court must decide disputes brought before it.[10] However, as Judge Vereshchetin highlighted in his Declaration, there is no dispute to decide in advisory cases. When issuing an advisory opinion, the Court is essentially in the position of a general counsel advising its client as to what the law is. In this role the Court can, we think, legitimately advise its client that there is a lacuna in the law or that the law on a certain point is unclear. A detailed discussion of whether or not the Court has a role as law-creator, in addition to law-identifier and law-applier, exceeds the scope of this paper. In brief, at least with respect to advisory opinions, our view is that the Court should limit itself to advising on what the law is, and eschew the role of law-maker.

Law of permission or prohibition?

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".[11] The Court thus correctly recast the General

[10] See, for example, Statute, Articles 38(1) and 55(1).

[11] Opinion, para. 52.

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 on 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'".[12] The Court sought to determine the existence or emergence of an *opinio juris* from the way in which nuclear weapons have been used in the past fifty years — namely, for purposes of deterrence — and from a series of General Assembly resolutions affirming the illegality of nuclear weapons.

The Court first considered *opinio juris* in connection with the policy of deterrence. Proponents of the illegality of nuclear weapons argued that the fact that nuclear weapons have not been detonated in armed conflict since 1945 is evidence of *opinio juris* that their use would be unlawful. The States that adhere to the policy of deterrence argued that nuclear weapons have not been detonated in armed conflict since 1945 because the circumstances that might have justified such use have fortunately not arisen, and that the employment of nuclear weapons in the service of deterrence is evidence of *opinio juris* that the threat or use of nuclear weapons is not unlawful. The Court's conclusion was reasonable: with the international community profoundly divided on the issue, there is no *opinio juris* supporting either proposition.[13]

The Court also examined General Assembly resolutions "affirming" the illegality of nuclear weapons for evidence of the *opinio juris* requisite for the establishment of a new customary rule of international law. The Court noted that the proponents of the illegality of the use of nuclear weapons argued that the non-utilization of nuclear weapons since 1945, plus a series of General Assembly resolutions (beginning with resolution 1653 (XVI) of 24 November 1961) to the effect that nuclear weapons are illegal, express the requisite *opinio juris* in support of their proposition. The States that assert the legality of the threat and use of nuclear weapons in certain circumstances argued that the General Assembly resolutions

[12] *Ibid.*, para. 64.

[13] *Ibid.*, para. 67 and 74.

declaring nuclear weapons to be illegal neither reflect existing customary international law nor generated sufficient support to create customary international law. These States reiterated that nuclear weapons have been employed every day since 1945 in the service of deterrence.

The Court determined that the relevant General Assembly resolutions evidence a "deep concern" regarding the problem of nuclear weapons, yet "they still fall short of establishing the existence of an *opinio juris* on the illegality of the use of such weapons".[14] The Court concluded that the "emergence, as *lex lata*, of a customary rule specifically prohibiting the use of nuclear weapons as such is hampered by the continuing tensions between the nascent *opinio juris* on the one hand, and the still strong adherence to the practice of deterrence on the other".[15] The Court's conclusion thus affirms that State practice, not rhetoric, is the decisive factor for determining *opinio juris*.

The Court's contributions regarding the use of force in general, and the threat or use of nuclear weapons in particular

The applicable law

The Court conducted a methodical and comprehensive survey of the law that might inform its advice to the UN General Assembly. At the outset, it eliminated those sources of law that were not applicable to the matter at hand.

Some of the proponents of the illegality of the use of nuclear weapons asserted that Article 6 of the International Covenant on Civil and Political Rights, which guarantees the right of persons not to be arbitrarily deprived of life, precludes the use of nuclear weapons. The Court stated that although Article 6 is applicable in hostilities, the law of armed conflict — not the Covenant itself — is relevant to determining whether loss of life resulting from use of a particular weapon during armed conflict would be an arbitrary deprivation of life.[16] We fully agree with the Court's view.

Some proponents of the illegality of the use of nuclear weapons contended that their use could violate the Convention of 9 December 1948

[14] *Ibid.*, para. 71.

[15] *Ibid.*, para. 73.

[16] *Ibid.*, para. 25.

on the Prevention and Punishment of the Crime of Genocide. The Court correctly pointed out that the use of nuclear weapons, like any conventional weapon, would only violate the Genocide Convention if such use was accompanied by the "*intent* to destroy, in whole or in part, a national, ethnical, racial or religious group, as such" (emphasis added).[17]

Some proponents of the illegality of the use of nuclear weapons contended that any use of nuclear weapons would violate existing norms relating to the safeguarding and protection of the environment. The Court determined that "existing international law relating to the protection and safeguarding of the environment does not specifically prohibit the use of nuclear weapons", but in light of the general obligation of States to respect the environment, environmental factors are to be considered "in the context of the implementation of the principles and rules of the law applicable in armed conflict" — namely, necessity and proportionality.[18] We could not agree more with these conclusions of the Court.

The Court completed its analysis of possibly relevant sources of international law by concluding that the law germane to the question before it was the law relating to the use of force "enshrined" in the UN Charter and the law applicable in armed conflict, along with any pertinent treaties on nuclear weapons.[19] Again, we could not agree more.

Law of the UN Charter

The Court's examination of the relevant law of the UN Charter began, logically, with Article 2(4), which prohibits "the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations". This article has come to be known as the prohibition on unlawful aggression. The complementary provision to Article 2(4) is Article 51, which codifies the inherent right of individual or collective self-defence. The right to use armed force in self-defence is still subject to the customary international law norms of necessity and proportionality.[20] The Court's analysis here closely tracks the position of the United States' and other States' written and oral statements before the Court.

[17] *Ibid.*, para. 26.

[18] *Ibid.*, para. 33.

[19] *Ibid.*, para. 34.

[20] *Ibid.*, para. 41.

The third of the Court's six findings was:

"(2)C. Unanimously,

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".[21]

We agree that the limitations on the use of force found in the Charter "apply whatever the means of force used in self-defence".[22]

Conventional international law

The Court first surveyed conventional international law. Some proponents of the illegality of the use of nuclear weapons contended that the use of nuclear weapons should be treated in a similar manner to that of poisoned weapons which are prohibited under the Second Hague Declaration of 29 July 1899 (which prohibits the use of projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases); Article 23(a) of the Regulations respecting the laws and customs of war on land annexed to the Hague Convention IV of 18 October 1907 (especially prohibiting the employment of poison or poisoned weapons); and the Geneva Protocol of 17 June 1925 (prohibiting "the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices").[23] The Court concluded, we think correctly, that none of these conventional provisions specifically prohibits the use of nuclear weapons.

The Court noted that, up to the present, weapons of mass destruction had been declared illegal by specific instruments, including the Convention of 10 April 1972 on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction; and the Convention of 13 January 1993 on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction. The Court found no "specific prohibition of recourse to nuclear weapons in treaties expressly prohibiting the use of certain weapons of mass destruction".[24]

---

[21] *Ibid.*, para. 105(2)C.

[22] *Ibid.*, para. 44.

[23] *Ibid.*, para. 54.

[24] *Ibid.*, para. 57.

The Court next reviewed a number of specific treaties concluded in order to limit the acquisition, manufacture and possession of nuclear weapons; the deployment of nuclear weapons; and the testing of nuclear weapons.[25] States believing that recourse to nuclear weapons is illegal argued that these treaties reflect "the emergence of a rule of complete legal prohibition of all uses of nuclear weapons".[26] States defending the position that recourse to nuclear weapons is legal in certain circumstances argued that this body of treaty law does not contain any general prohibition on the use of nuclear weapons and, of equal or greater importance, some of these treaties presuppose that nuclear weapons might be used under certain circumstances. The Court concluded that "these treaties could therefore be seen as foreshadowing a future general prohibition of the use of such weapons, *but they do not constitute such a prohibition by themselves*" (emphasis added).[27]

Customary international law

Having exhausted conventional international law, the Court then examined customary international law to determine if there is a prohibition on the threat or use of nuclear weapons. As indicated above in the discussion of *opinio juris* in customary international law, the Court found none.

[25] Peace Treaties of 10 February 1947; State Treaty for the Re-establishment of an Independent and Democratic Austria of 15 May 1955; Antarctic Treaty of 1 December 1959; Treaty of 5 August 1963 Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and under Water; Treaty of 27 January 1967 on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies; Treaty of Tlatelolco of 14 February 1967 for the Prohibition of Nuclear Weapons in Latin America, and its Additional Protocols; Treaty of 1 July 1968 on the Non-Proliferation of Nuclear Weapons; Treaty of 11 February 1971 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; Treaty of Rarotonga of 6 August 1985 on the Nuclear-Weapon-Free Zone of the South Pacific, and its Protocols; Treaty of 12 September 1990 on the Final Settlement with respect to Germany; the Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons in 1995; the Treaty on the Southeast Asia Nuclear-Weapon-Free Zone of 15 December 1995; and the Treaty on the Creation of the Nuclear-Weapons-Free Zone in Africa of 11 April 1996. The Court also considered UN Security Council Resolutions 255 (1968) and 984 (1995) addressing security assurances given by nuclear-weapon States to the non-nuclear-weapon States.

[26] Opinion, para. 60.

[27] *Ibid.*, para 62.

The first two of the Court's six findings were:

"(2)A. Unanimously,

There is in neither customary nor conventional international law any specific authorization of the threat or use of nuclear weapons;[28]

(2)B. By eleven votes to three [against, Judges Shahabuddeen, Weeramantry and Koroma],

There is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such."[29]

International humanitarian law

The Court, having found no conventional or customary international law proscribing the threat or use of nuclear weapons *per se*, moved to a consideration of whether "recourse to nuclear weapons *must* be considered as illegal in the light of the principles and rules of international humanitarian law applicable in armed conflict and of the law of neutrality" (emphasis added).[30]

It is beyond reasonable dispute that international humanitarian law applies to nuclear weapons in the same way as it applies to conventional weapons. Analysis of international humanitarian law begins with the fundamental principle that the "right of belligerents to adopt means of injuring the enemy is not unlimited".[31] There are two "cardinal" rules. First, the principle of distinction holds that States must not make civilians the object of attack and must not use weapons that are incapable of distinguishing between civilian and military targets. Second, it is prohibited to use weapons that cause unnecessary suffering, that is, weapons that cause "harm greater than that unavoidable to achieve legitimate military objectives".[32]

The Court found that the Martens clause is part of customary international law. The Martens clause first found expression in Hague Con-

[28] *Ibid.*, para. 105(2)A.

[29] *Ibid.*, para. 105(2)B.

[30] *Ibid.*, para. 74.

[31] *Ibid.*, para. 77, quoting Article 22 of the 1907 Hague Regulations relating to the laws and customs of war on land.

[32] *Ibid.*, para. 78.

vention II with Respect to the Laws and Customs of War on Land of 1899. The Court quoted from Article 1, paragraph 2, of Additional Protocol I of 1977 as a modern formulation of the Martens clause:

> "In cases not covered by this Protocol or by other international agreements, 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".[33]

Parenthetically, the Court perceived no need to rule on the applicability of Additional Protocol I of 1977 to nuclear weapons, because that Protocol in no way replaced the general customary rules applicable to all means and methods of combat, including nuclear weapons. In particular, the Court recalled that all States are bound by those rules in Additional Protocol I which, when adopted, were merely the expression of the pre-existing customary law.[34]

The Court briefly considered the principle of neutrality, which had been raised by several States. It declined to elaborate on the specific content of the principle of neutrality, which has been debated since the adoption of the UN Charter, stating merely that the rules of neutrality apply to "all international armed conflict, whatever type of weapons might be used".[35] We think this is correct.

The Court proceeded to determine whether the threat or use of nuclear weapons is inherently incompatible with international humanitarian law or the law of neutrality. The proponents of the illegality of nuclear weapons argued, in essence, that the destructive force of nuclear weapons is so great that any use of them whatsoever would necessarily violate the principles of distinction and prevention of unnecessary suffering. The States that assert the legality of the threat or use of nuclear weapons in certain circumstances argued that the Court had insufficient evidence to conclude that any and every use of nuclear weapons would violate the principles of distinction and preventing unnecessary suffering. The Court concluded, we think correctly, that "it does 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 circumstance."[36]

---

[33] *Ibid.*

[34] *Ibid.*, para. 84.

[35] *Ibid.*, para. 89.

[36] *Ibid.*, para. 95.

The fourth of the Court's six findings was:

> "(2)D. Unanimously,
>
> 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 humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons".[37]

We could not agree more.

The Court's ultimate advice

The fifth of the Court's six findings — its ultimate advice — was:

> "(2)E. By seven votes to seven (...) [Against, Vice-President Schwebel; Judges Oda, Guillaume, Shahabuddeen, Weeramantry, Koroma and Higgins],
>
> 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-defence, in which the very survival of a State would be at stake".[38]

If, in the first part of this advice, what the Court means by "generally" is that in most circumstances the use of nuclear weapons would be unlawful, that is consistent with the views of the United States and other States. Given the tremendous destructive force of nuclear weapons, their use — consistent with the principles of proportionality, distinction, and prevention of unnecessary suffering — would be limited.

The second part of the Court's ultimate advice is somewhat troublesome. On the one hand, the standard is ambiguous. The meaning of "an extreme circumstance of self-defence, in which the very survival of a State

[37] *Ibid.*, para. 105(2)D.

[38] *Ibid.*, para. 105(2)E.

would be at stake" is subject to wide interpretation. On the other hand, this formulation is also more limited than what the United States and other States had argued. The position of the United States and other States is that no general conclusion can be drawn about the legality of the use of nuclear weapons; a judgment can only be made in each specific case, taking into account all the particular circumstances. Certainly, the use of nuclear weapons would be a political decision of the highest order. From a more pragmatic perspective, legality of the employment of nuclear weapons would have to be considered in view of the specific target, and whether their use against that specific target would be consistent with the rules of international humanitarian law, particularly the principles of proportionality, distinction, and prevention of unnecessary suffering.

Obligation to negotiate nuclear disarmament

Finally, the Court addressed Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons, which provides:

> "Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control".[39]

The Court's sixth and final finding was:

> "(2)F. Unanimously,
>
> 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".[40]

The obligation of which the Court reminds the international community is unquestionable, although the enormity and complexity of the task of concluding negotiations is daunting. This fact must be fully appreciated.

What the Court declined to decide

The Court declined to pronounce on two important issues: (1) the use of nuclear weapons in belligerent reprisal; and (2) the policy of deterrence.

---

[39] *Ibid.*, para. 99.

[40] *Ibid.*, para. 105(2)F.

Regarding the use of nuclear weapons in belligerent reprisal, the Court declined to comment on the issue except to observe that such use would be governed by the principle of proportionality, a qualification that is consistent with international law.[41] Regarding the policy of deterrence, the Court found that, in the face of an international community profoundly divided on the issue, there is no controlling *opinio juris*.[42] Nevertheless, as mentioned in the section on *opinio juris*, the Court recognized that the policy of deterrence has a played a fundamental role in international security affairs.

Conclusion

Common-law lawyers have an expression: "Hard cases make bad law". Surely, this 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 — we submit that the legal advice provided is "not bad". Our sense is that of the 28 States that made written statements to the Court (22 States made oral statements to the Court during its public sittings from 30 October to 15 November 1995), few are totally satisfied with the Court's Advisory Opinion. However, our sense is that most of these States can live with the Court's Advisory opinion, which is not seriously inconsistent with their national interests or their view of international law.

---

[41] *Ibid.*, para. 46.

[42] *Ibid.*, para. 67.