ARTICLE

THE NUCLEAR WEAPONS OPINIONS: REFLECTIONS ON THE ADVISORY PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE

Liz Heffernan*

I. INTRODUCTION

On July 8, 1996, in response to a request by the United Nations (UN) General Assembly, the International Court of Justice (ICJ) delivered an advisory opinion on the legality of nuclear weapons.[1] On the same day, it refused a similar request made by the World Health Organization (WHO).[2] These events represent a significant development in the recent history of the ICJ. Although the legality of nuclear weapons has been the subject of ongoing and occasionally heated debate in diplomatic and academic circles,[3] judicial pro-

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* LL.B., University of Dublin, Trinity College; LL.M., Dalhousie University; LL.M., University of Chicago; Barrister-at-Law (Ireland); Law Clerk to Judge William T. Hart, United States District Court for the Northern District of Illinois; former Legal Officer, United Nations Food and Agriculture Organization; former Lecturer in Law, University of Dublin, Trinity College. My thanks to Professor Kenneth Dam of the University of Chicago for his helpful comments and to Maureen Sullivan of the International Court of Justice for her generous assistance in obtaining research materials. All opinions and errors remaining are mine alone.

1. *See* Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226 (July 8) [hereinafter General Assembly Opinion]; *see also International Court of Justice: Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, 35 I.L.M. 809, 809 (1996); *International Court of Justice (ICJ), The Hague: Advisory Opinion of 8 July 1996: Legality of the Threat or Use of Nuclear Weapons*, 17 HUM. RTS. L.J. 253, 253 (1996).

2. *See* Legality of the Use by a State of Nuclear Weapons in Armed Conflict, 1996 I.C.J. 66 (July 8) [hereinafter WHO Opinion]; *see also International Court of Justice (ICJ), The Hague: Advisory Opinion of 8 July 1996; Legality of the Threat or Use of Nuclear Weapons*, *supra* note 1, at 392 (1996) (summarizing the ICJ's opinion for the WHO).

3. *See*, *e.g.*, ELLIOTT L. MEYROWITZ, PROHIBITION OF NUCLEAR WEAPONS: THE RELEVANCE OF INTERNATIONAL LAW (1990); JUDGE NAGENDRA SINGH & EDWARD MCWHINNEY,

nouncements relating to nuclear weapons have been rare,[4] particularly at the international level.[5] This was the first occasion on which the ICJ directly addressed the fundamental issue of the status of nuclear weapons under international law.[6] On such an emotive and divisive topic, the publication by the ICJ of an opinion of any hue was destined to prove controversial.[7]

The ICJ's views on the legality of nuclear weapons have already inspired considerable comment.[8] But even putting aside the substan-

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NUCLEAR WEAPONS AND CONTEMPORARY INTERNATIONAL LAW (2d rev. ed. 1989); Malcolm N. Shaw, *Nuclear Weapons and International Law*, *in* NUCLEAR WEAPONS AND INTERNATIONAL LAW 1 (Istvan Pogany ed., 1987); Harry H. Almond, Jr., *Nuclear Weapons, Nuclear Strategy and Law*, 15 DENV. J. INT'L L. & POL'Y 283 (1987); Richard Falk et al., *Nuclear Weapons and International Law*, 20 INDIAN J. INT'L L. 541 (1980); Burns H. Weston, *Nuclear Weapons Versus International Law: A Contextual Reassessment*, 28 MCGILL L.J. 542 (1983).

4. Occasionally, issues relating to nuclear weapons have been raised before national courts. *See, e.g.*, Tokyo District Court, Dec. 7, 1963, 1964 JAPANESE ANN. INT'L L. NO. 8, at 212 (translating the Japanese decision, *Shimoda v. State*, into the English language). In the only direct judicial appraisal of the legal implications surrounding a use of nuclear weapons, the District Court of Tokyo concluded in *Shimoda* that the bombings of Hiroshima and Nagasaki by the United States violated international law and, specifically, that these particular attacks breached the laws of war. *See id.* at 234–47. However, the District Court of Tokyo refrained from delivering a general pronouncement on the question of the legality of nuclear weapons. *See id.* at 250; *see also* Richard A. Falk, *The Shimoda Case: A Legal Appraisal of the Atomic Attacks upon Hiroshima and Nagasaki*, 59 AM. J. INT'L L. 759, 792 (1965).

5. *See, e.g.*, *Human Rights Committee, General Comment 14, Article 6 (Twenty-Third session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1, at 18 (1994)*, ¶¶ 4–6 (visited June 17, 1998) <http://www.umn.edu/humanrts/gencomm/hrcom14.htm> [hereinafter *General Comment*].

6. The issue of the legality of nuclear weapons has been raised before the ICJ on just two previous occasions, both relating to France's testing of nuclear weapons in the South Pacific. *See* Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. 253 (Dec. 20); Nuclear Tests (N.Z. v. Fr.), 1974 I.C.J. 457 (Dec. 20). The judgments fall short of any decision about the legality of state action in the testing of nuclear weapons. *See* Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. at 272; Nuclear Tests (N.Z. v. Fr.), 1974 I.C.J. at 477: *see also* Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (N.Z. v. Fr.), 1995 I.C.J. 288 (Sept. 22) (dismissing New Zealand's request to examine the French government's announcement of nuclear weapons tests in the South Pacific to begin in September 1995).

7. The detailed and numerous state submissions, made in writing and during oral proceedings before the ICJ, reflect the range and depth of state opinion. *See* General Assembly Opinion, *supra* note 1, at 229–32.

8. *See, e.g.*, Judith Hippler Bellow & Peter H. Bekker, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion. 35 ILM 809 & 1343 (1996). International Court of Justice, July 8, 1996*, 91 AM. J. INT'L L. 126 (1997); Roger S. Clark, *The Laws*

tive findings, the Nuclear Weapons Opinions raise many intriguing issues. Principal among them are questions relating to the ICJ's working practices and its role in the international community. The Nuclear Weapons Opinions cast a quizzical light on the processes of judicial consensus-building and decisionmaking. They reveal a bench that is deeply divided in its vision of the theory and practice of international law and of its own role in its development. In addition, the Nuclear Weapons Opinions send mixed messages regarding the wisdom and propriety of judicial intervention into the politically-charged domain of nuclear weapons policy and practice. In short, the ICJ has turned a secondary spotlight on itself, adding fuel to a fire ignited by recent criticisms of its working practices.[9]

This Article analyzes the Nuclear Weapons Opinions from what might loosely be termed an internal institutional perspective. It opens with an examination of the advisory jurisdiction of the ICJ that formed the procedural basis for the Nuclear Weapons Opinions.[10] Next, this Article analyzes the ICJ's decision to accept the UN's request and to reject the WHO's request.[11] This Article then offers some comments regarding the implications of the Nuclear Weapons Opinions for future practice.[12] The remainder of this Article is directed toward an issue that straddles the distinction between substance and procedure, namely the scope of the ICJ's adjudication.[13] In analyzing the framework set by the ICJ to facilitate its determination on the merits, particular emphasis is placed on the nature and extent of the rules of law which the ICJ deemed applicable to the General Assembly request.

II. THE ADVISORY PROCEDURE

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of Armed Conflict and the Use or Threat of Use of Nuclear Weapons, 7 CRIM. L.F. 265 (1996); Richard A. Falk, *Nuclear Weapons, International Law and the World Court: A Historic Encounter*, 91 AM. J. INT'L L. 64 (1997); Nicholas Grief, *Legality of the Threat or Use of Nuclear Weapons*, 46 INT'L & COMP. L.Q. 681 (1997); Michael J. Matheson, *The Opinions of the International Court of Justice on the Threat or Use of Nuclear Weapons*, 91 AM. J. INT'L L. 417 (1997).

9. *See*, *e.g.*, D. W. Bowett et al., *The International Court of Justice: Efficiency of Procedures and Working Methods*, 45 INT'L & COMP. L.Q. S1 (Supp. 1996) (criticizing, for example, the ICJ's case-load management).

10. *See* discussion *infra* Part II.

11. *See* discussion *infra* Parts III, IV.

12. *See* discussion *infra* Parts V, VI.

13. *See* discussion *infra* Part VII.

The ICJ is "the principal judicial organ of the United Nations."[14] Comprised of fifteen judges, its membership reflects a measure of geographical diversity.[15] However, five of the fifteen judicial seats have been steadfastly reserved for nationals of each of the five permanent members of the Security Council. This practice is a controversial one and does not find express support in either the Statute of the International Court of Justice (ICJ Statute) or the Rules of the International Court of Justice (ICJ Rules). It is particularly relevant to the ICJ's handling of the nuclear weapons issue since the states in question — China, France, the Russian Federation, the United Kingdom, and the United States — represent the exclusive membership of the Nuclear-Weapon-States (NWS).[16]

The ICJ exercises contentious and advisory jurisdiction.[17] The contentious jurisdiction of the ICJ is limited to disputes between states and does not extend to other internationally recognized entities, such as organizations or natural persons.[18] While all UN members are "*ipso facto* parties to the Statute of the International Court of Justice,"[19] and even non-members may become a party,[20] the ability of the ICJ to adjudicate any specific legal dispute is subject to the

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14. U.N. CHARTER art. 92, *reprinted in* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY xix, xix–xxxviii (Bruno Simma ed., 1994) [hereinafter U.N. CHARTER]. The ICJ functions on the basis of its Statute and supporting Rules of Procedure. *See* Statute of the International Court of Justice, art. 1, *reprinted in* 4 SHABTAI ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920–1996, at 1803–20 (3d ed. 1997) [hereinafter ICJ Statute]; *see also* Rules of Court, *reprinted in* SHABTAI ROSENNE, THE WORLD COURT: WHAT IT IS AND HOW IT WORKS 295–329 (5th rev. ed. 1995) [hereinafter ICJ Rules]. The ICJ has its seat at The Hague. *See* ICJ Statute, *supra*, art. 22.

15. *See* ICJ Statute, *supra* note 14, art. 3. The judges are full-time and sit in an individual capacity. *See id*. arts. 2, 23. They are elected by the General Assembly and the Security Council for nine-year terms. *See id*. art. 4, para. 1 & art. 13, para. 1. No two members of the ICJ may be nationals of the same state. *See id*. arts. 4–13.

16. NWS are states that have entered into international agreements on the premise of their possession of and capacity to use nuclear weapons. *See*, *e.g.*, Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 [hereinafter Treaty on the Non-Proliferation of Nuclear Weapons]. Certain other states, notably India, Pakistan, and Iraq, are thought to have the capability to develop and even use nuclear weapons. However, these threshold NWS have not ratified international agreements on the basis of such a capability. This Article was completed in advance of the recent nuclear weapons tests conducted by India and Pakistan.

17. *See* ARTHUR EYFFINGER, THE INTERNATIONAL COURT OF JUSTICE, 1946–1996, at 146 (1996).

18. *See* ICJ Statute, *supra* note 14, art. 34, para. 1.

19. U.N. CHARTER, *supra* note 14, art. 93, para. 1.

20. *See id*. art. 93, para. 2.

parties' consent. Many states have accepted the jurisdiction of the ICJ as a general, compulsory matter in relation to any other state accepting the same obligation.[21] A significant number of states have not done so or, alternatively, have done so only subject to far-reaching reservation. The ICJ is a court of last resort;[22] however, it is also a court of first resort in all but one relatively minor respect.[23] UN members undertake compliance with ICJ decisions.[24] In theory, failure to do so may result in coercive action on the part of the Security Council.[25]

The advisory jurisdiction of the ICJ is considerably less well known than its contentious counterpart. Like many other aspects of the ICJ's practice, competence to render advisory opinions was inherited from its predecessor, the Permanent Court of International Justice (PCIJ).[26] The decision to vest an advisory jurisdiction in the

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21. *See* ICJ Statute, *supra* note 14, art. 36, para. 2. In addition to ad hoc referrals to the ICJ, consent to its jurisdiction is manifest in dispute resolution mechanisms contained in international agreements. *See*, *e.g.*, Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.K.), 1992 I.C.J. 3 (Apr. 14); Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.), 1992 I.C.J. 114 (Apr. 14); Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.), 1995 I.C.J. 285 (Sept. 22).

22. *See* ICJ Statute, *supra* note 14, art. 60 (declaring that judgments of the ICJ are "final and without appeal"). The ICJ retains the power to interpret a judgment if a request to do so is made by any party and the judgment's meaning or scope is disputed. *See id.*

23. Decisions rendered by the Administrative Tribunal of the International Labor Organization (ILO), which adjudicates staff disputes arising within the ILO and other specialized agencies, may be reviewed by the ICJ. *See* 1 C.F. AMERASINGHE, THE LAW OF THE INTERNATIONAL CIVIL SERVICE 248 (2d ed. 1994); EYFFINGER, *supra* note 17, at 148. Until 1995, the ICJ also had authority to review decisions of the UN Administrative Tribunal. *See* AMERASINGHE, *supra*, at 248; EYFFINGER, *supra* note 17, at 148.

24. *See* U.N. CHARTER, *supra* note 14, art. 94, para. 1.

25. *See id*. art. 94, para. 2. Pursuant to Article 94(2):

> If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

Id.

26. *See generally* STEPHEN M. SCHWEBEL, *Was the Capacity to Request an Advisory Opinion Wider in the Permanent Court of International Justice Than It Is in the International Court of Justice?*, *in* JUSTICE IN INTERNATIONAL LAW 27, 27–71 (1994) (discussing how the ability to request advisory opinions from the PCIJ was applied, compared with that of the ICJ).

PCIJ was a controversial one.[27] The resistance to the notion of judicial advisory opinions that is characteristic of many national legal systems, notably that of the United States,[28] is well known and is reflected in certain limitations that surround the ICJ's advisory practice.[29] The advisory function informs the nature of that practice which is not so much to offer opinions regarding international disputes that fall short of the mark of contentious cases as to provide legal advice regarding the administration of the UN.[30]

Pursuant to Article 65(1) of the ICJ Statute, the ICJ "may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request."[31] Competence to request an advisory judicial opinion is reserved to a limited category of bodies within the UN family.[32] The right of the General Assembly and of the Security Council to issue such a request is expressly enshrined in Article 96(1) of the UN Charter.[33] Paragraph two of that Article extends that right to other organs of the UN and to specialized agencies.[34] However, the ability of these entities to request opinions is

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27. *See* EYFFINGER, *supra* note 17, at 146; SHABTAI ROSENNE, THE WORLD COURT: WHAT IT IS AND HOW IT WORKS 106–07 (5th rev. ed. 1995).

28. *See* U.S. CONST. art. III; *see also, e.g.*, Raines v. Byrd, 117 S. Ct. 2312, 2317–18 (1997) (noting that, in strict adherence to the doctrine of the separation of powers, the Supreme Court has consistently declined to exercise any powers other than those which are strictly judicial in nature); Clinton v. Jones, 117 S. Ct. 1636, 1642 n.11 (1997) (referring to the Court's considered practice not to decide abstract, hypothetical or contingent questions (citing Alabama State Fed'n of Labor v. McAdory, 325 U.S. 450, 461 (1945))).

29. *See* EYFFINGER, *supra* note 17, at 146; ROSENNE, *supra* note 27, at 109.

30. *See* H.W.A. Thirlway, *Advisory Opinions of International Courts*, *in* 1 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 38, 38 (Rudolf Bernhardt ed., 1992).

31. ICJ Statute, *supra* note 14, art. 65, para. 1. *See generally* KENNETH JAMES KEITH, THE EXTENT OF THE ADVISORY JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE (1971); DHARMA PRATAP, THE ADVISORY JURISDICTION OF THE INTERNATIONAL COURT (1972); 1 SHABTAI ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920–1996 (3d ed. 1997).

32. *See* KEITH, *supra* note 31, at 35–132 (discussing the ICJ's advisory competence); PRATAP, *supra* note 31, at 116; ROSENNE, *supra* note 31, at 289.

33. *See* U.N. CHARTER, *supra* note 14, art. 96, para. 1; *see also* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 1008 (Bruno Simma ed., 1994). Article 96(1) states: "The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question." U.N. CHARTER, *supra* note 14, art. 96, para. 1.

34. *See* U.N. CHARTER, *supra* note 14, art. 96, para. 2. Article 96(2) states: "Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities." *Id.*

subject to the General Assembly's authorization and is limited to matters arising within the scope of their activities.[35]

Although states enjoy a monopoly of the ICJ's contentious jurisdiction, they are excluded from the ambit of its advisory jurisdiction. In the absence of a *de facto* dispute, states, whether acting individually or collectively, may not seek the advice of the ICJ on any legal question. Nor can states obstruct the delivery of an advisory opinion once a request has been made. Of course, they are not excluded entirely from the process of formulating requests since the very bodies which request the ICJ's guidance embody the collective actions of the states which comprise their membership. Moreover, states may participate in the subsequent proceedings before the ICJ by way of written and oral submission.[36] Nevertheless, political influence aside, a state or group of states that objects to the role of the ICJ, in a particular case, is powerless to prevent an exercise of its advisory competence.[37] In recent years, proposals to extend to states and to other actors the authority to request advisory opinions have been advanced and rejected.[38]

A further distinction between an advisory opinion and a contentious case is the absence of a binding decision. Strictly speaking, advisory opinions are addressed to the organs from which the requests emanate and, as the term suggests, they encourage rather than compel a particular result.[39] However, just as in the case of contentious decisionmaking, the advisory function may serve as a springboard for the elucidation and development of general principles and rules of international law. In practice, however, advisory

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35. *See* EYFFINGER, *supra* note 17, at 147. "At present . . . 22 organs are authorized to request Advisory Opinions, including all the principle organs and Specialized Agencies of the United Nations." *Id.* However, the UN Secretary-General has no such authority. *See id.*

36. *See* ICJ Statute, *supra* note 14, art. 66, paras. 1–2; ICJ Rules, *supra* note 14, art. 105.

37. *See* ROSENNE, *supra* note 27, at 106. In contrast, the institutional structure of the PCIJ afforded it less independence than the ICJ. *See id.* at 107.

38. *See generally* Stephen M. Schwebel, *Authorizing the Secretary-General of the United Nations to Request Advisory Opinions of the International Court of Justice*, 78 AM. J. INT'L L. 869, 869–78 (1984) (arguing in favor of giving the Secretary-General such authority); Louis B. Sohn, *Broadening the Advisory Jurisdiction of the International Court of Justice*, 77 AM. J. INT'L L. 124, 124–29 (1983) (discussing various proposals for broadening advisory jurisdiction).

39. *See* ICJ Statute, *supra* note 14, art. 59; *see also* Roberto Ago, *"Binding" Advisory Opinions of the International Court of Justice*, 85 AM. J. INT'L L. 439, 439–40 (1991).

opinions have only occasionally realized this potential. The prevailing international view is that advisory opinions are most effective when used to obtain authoritative answers to legal questions relating, for example, to functional aspects of institutional administration or to matters of general interest,[40] as opposed to controversial aspects of international relations.[41] In recent years, requests for advisory opinions have been relatively infrequent,[42] prompting Boutros-Boutros Ghali, during his tenure as UN Secretary-General, to call for more frequent recourse to the advisory jurisdiction.[43]

Since the ICJ is first and foremost an arbiter of contentious disputes, its advisory competence is assimilated as far as possible into its general practice, and for the most part, the advisory procedure tracks its contentious counterpart.[44] Once a request has been formulated by the organ or agency in question,[45] it is formally submitted to the ICJ.[46] The ICJ then notifies all states entitled to appear before it that a request has been received, and at its discretion, solicits written submissions and convenes oral hearings.[47]

Generally, the evidentiary process tends to be less extensive in

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40. *See* EYFFINGER, *supra* note 17, at 147. *See generally* Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, 1989 I.C.J. 177 (Dec. 15); Certain Expenses of the United Nations (Article 17, paragraph 2 of the Charter), 1962 I.C.J. 151 (July 20); Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, 1954 I.C.J. 47 (July 13); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16 (June 21).

41. *See* ROSENNE, *supra* note 27, at 110. Rosenne comments that when a request and subsequent advisory opinion encounter strong political opposition, neither the advisory process nor the general standing of the Court is enhanced. *See id.* In support of this assertion, Rosenne referred to certain cases in which this occurred, including: Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), 1948 I.C.J. 57 (May 28); International Status of South-West Africa, 1950 I.C.J. 128 (July 11); Western Sahara, 1975 I.C.J. 12 (Oct. 16).

42. The Nuclear Weapons Opinions bring the number of advisory opinions entertained and issued by the ICJ to 21. *See* EYFFINGER, *supra* note 17, at 147. Over half of the requests on which these opinions were based were issued by the General Assembly, whereas only one was made by the Security Council. *See id.*

43. *See An Agenda for Peace*, UN GAOR, 47th Sess., ¶¶ 38–39, UN Doc. A/47/227–S/24111 (1992).

44. *See* ICJ Rules, *supra* note 14, art. 102.

45. The Request is usually set out in a resolution or decision of the referring institution or an organ thereof.

46. *See* ICJ Statute, *supra* note 14, art. 65, para. 2; ICJ Rules, *supra* note 14, art. 104.

47. *See* ICJ Statute, *supra* note 14, art. 66, paras. 1–2; ICJ Rules, *supra* note 14, art. 105.

advisory cases than in contentious cases. However, the Nuclear Weapons Opinions proved to be an exception, for a wealth of evidentiary material was presented to the ICJ by way of written and oral submissions.[48]

Interesting questions arise regarding the use of this material in the judicial deliberative process. In the context of these Nuclear Weapons Opinions, the ICJ is vague as to the evidentiary sources on which it bases particular aspects of its analysis. The Nuclear Weapons Opinions are sprinkled with generalized references to the evidence before the ICJ, but rarely is there any specific guidance as to which sources it found persuasive and why.[49] At the same time, the ICJ considered itself to be confined to the four corners of the evidence presented. With respect to important questions, such as the implications of its findings on collective enforcement action under Chapter VII of the UN Charter, the ICJ declined to express a view, citing the lack of argument presented by way of state submission.[50]

Given the fact that states are technically not parties to the advisory process, it is appropriate to consider the role that state submissions play in the advisory process. At several junctures in these Nuclear Weapons Opinions, the ICJ makes plain the general significance of state submissions to its deliberations.[51] They assist the ICJ in reaching its conclusions both in the general sense of sharpening its assessment of the issues, and in certain particular senses, for example, in confirming or disputing its assessment of *opinio juris*. At the same time, by virtue of state submissions, the sentiments of individual states are explicitly made known to the ICJ. Moreover, a clear message is conveyed as to how a proposed opinion will be received in various quarters of the international community. The propriety of state participation is underscored by a tension between the desirability of letting states have their say and the need to preserve judicial independence.

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48. A total of 41 states submitted either oral or written statements relating to the issue raised in the Nuclear Weapons Opinions. *See* General Assembly Opinion, *supra* note 1, at 229–32.

49. For example, in formulating a definition of nuclear weapons, reference is simply made to "the material before the Court." General Assembly Opinion, *supra* note 1, at 243. Such material primarily takes the form of state submissions, which in turn refer to a plethora of interdisciplinary sources.

50. *See* General Assembly Opinion, *supra* note 1, at 247.

51. *See, e.g.*, *id*. at 236–38, 245, 259–62.

III. THE NUCLEAR WEAPONS OPINIONS

On May 14, 1993, the World Health Assembly, the plenary body of the WHO, adopted a resolution deciding to request an advisory opinion of the ICJ on the following question: "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?"[52] On December 15, 1994, a similar resolution was adopted by the UN General Assembly seeking an advisory opinion addressing the question: "Is the threat or use of nuclear weapons in any circumstance permitted under international law?"[53]

On July 8, 1996, the ICJ delivered the Nuclear Weapons Opinions in response to the requests made by the WHO and the UN General Assembly, respectively.[54] With regard to Article 65 of its Statute, the ICJ declined to deliver an advisory opinion on the substantive question raised by the WHO.[55] While recognizing that the WHO does possess the power to request advisory opinions, the ICJ held

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52. Legality of the Use by a State of Nuclear Weapons in Armed Conflict, 1993 I.C.J. 467 (Sept. 13) (requesting an advisory opinion); *see also* W.H.A. Res. 46.40, *Health and Environmental Effects of Nuclear Weapons*, WHO, 46th Sess., 13th plen. mtg. (copy on file with author). The resolution was actively opposed by the United States. *See* Leonard M. Marks & Howard H. Weller, *Is the Use of Nuclear Weapons Illegal?*, 212 N.Y. L.J. 1, 1 (1994); Nicholas Rostow, *The World Health Organization, the International Court of Justice, and Nuclear Weapons*, 20 YALE J. INT'L L. 151, 158 (1995); Martin M. Strahan, *Nuclear Weapons, the World Health Organization, and the International Court of Justice: Should an Advisory Opinion Bring Them Together?*, 2 TULSA J. COMP. & INT'L L. 395, 400 (1995). It was adopted by 75 votes in favor, 33 against, and 5 abstentions. *See* Marks & Weller, *supra*, at 1; Rostow, *supra*, at 156 & n.20; Strahan, *supra*, at 401 & n.52.

53. Legality of the Threat or Use of Nuclear Weapons, 1995 I.C.J. 3 (Feb. 1) (requesting an advisory opinion); *see also* G.A. Res. 49/75K, UN GOAR, 49th Sess., 90th plen. mtg., Agenda Item 62, UN Doc. A/49/699 (1995).

54. *See* General Assembly Opinion, *supra* note 1, at 226; WHO Opinion, *supra* note 2, at 66. The ICJ was composed as follows: President, Mohammed Bedjaoui (Algeria); Vice-President, Stephen M. Schwebel (United States); Judges Luigi Ferrari Bravo (Italy); Carl-August Fleischhauer (Germany); Gilbert Guillaume (France); Geza Herczegh (Hungary); Rosalyn Higgins (United Kingdom); Shi Jiuyong (China); Abdul G. Koroma (Sierra Leone); Shigeru Oda (Japan); Raymond Ranjeva (Madagascar); Mohammed Shahabuddeen (Guyana); Vladlen S. Vereshchetin (Russian Federation); and Christopher G. Weeramantry (Sri Lanka). *See* General Assembly Opinion, *supra* note 1, at 227; WHO Opinion, *supra* note 2, at 66.

55. *See* WHO Opinion, *supra* note 2, at 71–84.

that the WHO was not competent to submit the particular request.[56] In the ICJ's view, the subject-matter of the request fell outside the scope of the WHO's activities, as contemplated by Article 96(2) of the UN Charter.[57]

In contrast, the ICJ, by thirteen votes to one, decided to comply with the General Assembly's request for an advisory opinion.[58] In addition to holding that the request was within the competence of the General Assembly, the ICJ found that there were no compelling reasons that would justify the exercise of its discretion not to render an advisory opinion.[59] The decision of the ICJ to accept jurisdiction was virtually unanimous.[60] The sole dissenting voice was that of Judge Oda who, in a lengthy opinion, set out his view that the ICJ should have exercised its discretion to refuse jurisdiction in this case on grounds of "judicial propriety and economy."[61] Judge Oda raised several objections to the exercise of advisory jurisdiction, principally that the request was not based on any meaningful consensus within the General Assembly,[62] that it was inadequate in a number of respects,[63] and that "there was . . . no imminent need to raise the question of the legality or illegality of nuclear weapons."[64]

In response to the substantive question raised by the General Assembly, the ICJ made several findings. First, it unanimously determined that "[t]here is in neither customary nor conventional international law any specific authorization of the threat or use of nuclear weapons."[65] Second, "[b]y eleven votes to three," the ICJ found that "[t]here is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons."[66]

Third, the ICJ unanimously determined that a threat or use of nuclear weapons must comply with three categories of international legal rules: the rules regarding non-use of force contained in Articles

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56. *See id.* at 72–81.
57. *See id.* at 84.
58. *See* General Assembly Opinion, *supra* note 1, at 265.
59. *See id.* at 238.
60. *See supra* note 58 and accompanying text.
61. General Assembly Opinion, *supra* note 1, at 332, 372–73 (Oda, J., dissenting).
62. *See id.* at 334–41.
63. *See id.* at 332–34.
64. *Id.* at 369.
65. *Id*. at 266 (majority opinion).
66. *Id*.

2(4) and 51 of the UN Charter;[67] the rules regarding armed conflict, particularly the rules and principles of humanitarian law;[68] and the specific obligations contained in treaties and other undertakings which address nuclear weapons.[69]

In light of these findings, by the slimmest of majorities — seven votes to seven with the President's vote cast in favor — the ICJ concluded:

> that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law; However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense, in which the very survival of a State would be at stake . . . .[70]

Finally, the ICJ unanimously found the existence of an "obligation to pursue in good faith and to bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control."[71]

IV. COMPETENCE TO REQUEST AN ADVISORY OPINION

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67. *See* General Assembly Opinion, *supra* note 1, at 266. Article 2(4) of the UN Charter states: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." U.N. CHARTER, *supra* note 14, art. 2, para. 4. Article 51 of the UN Charter states:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defen[s]e shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Id.

68. *See* General Assembly Opinion, *supra* note 1, at 266.

69. *See id*.

70. *Id*.

71. *Id*. at 267.

In the past, the ICJ identified certain conditions which must be satisfied in order to exercise its advisory jurisdiction upon a request submitted by a specialized agency: the agency has to be authorized to request opinions in general; the question on which the opinion is to be based must be a legal one; and the question must be one arising within the scope of the requesting agency's activities.[72] Applying these conditions to the WHO request, the ICJ found that while the first two conditions had been met,[73] the third had not been satisfied.[74] The ICJ found that, as a general matter, the WHO is empowered by its Constitution to request opinions of the ICJ.[75] In addition, the actual question posed by the WHO was deemed to be a legal one.[76] Nevertheless, the ICJ determined that the question did not come within the WHO's area of competence.[77] On this basis, it declined to render an advisory opinion.

The field of activity or the area of competence of an international organization is determined principally by reference to its constituent instruments,[78] in this case, the WHO Constitution.[79] While acknowledging the special characteristics of the constituent instruments of international organizations,[80] the ICJ noted that

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72. *See* WHO Opinion, *supra* note 2, at 71 (citing Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal, 1982 I.C.J. 325, 333–34 (July 20)).

73. *See id.* at 72–74 (citing Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt, 1980 I.C.J. 73 (Dec. 20), in support of the first condition).

74. *See id*. at 81.

75. *See id.* at 72. Established in 1948, the WHO is a specialized agency of the UN. *See* Agreement Between the United Nations and the World Health Organization, Nov. 12, 1948, art. I, 19 U.N.T.S. 193, 194 (entered into force July 10, 1948). *See generally* U.N. CHARTER, *supra* note 14, arts. 57, 63 (discussing specialized agencies). "The General Assembly authorize[d] the [WHO] to request advisory opinions of the [ICJ] on legal questions arising within the scope of its competence . . . ." Agreement Between the United Nations and the World Health Organization, *supra*, art. X, para. 2, 19 U.N.T.S. at 202.

76. *See* WHO Opinion, *supra* note 2, at 73.

77. *See id.* at 74–81. The WHO is dedicated to the objective of "the attainment by all peoples of the highest possible level of health." Constitution of the World Health Organization, *opened for signature* July 22, 1946, art. 1, 62 Stat. 2679, 14 U.N.T.S. 185. Its practical functions include: conducting and coordinating research; disseminating information regarding the prevention, control and cure of disease and illness; and providing technical assistance, particularly to developing countries. *See* Rostow, *supra* note 52, at 160–61.

78. *See* WHO Opinion, *supra* note 2, at 72, 74.

79. *See id.*

80. *See id.* at 74. The ICJ observed that treaties of this type can raise specific problems of interpretation owing to the fact that their character is both conventional and

such instruments are subject to the well-established rules of treaty interpretation as expressed in Article 31 of the 1969 Vienna Convention on the Law of Treaties.[81] Applying such rules, the ICJ concluded that although the subject of nuclear weapons implicated the WHO mandate in a general sense, the actual request fell outside the scope of its activities.[82] The WHO is authorized to deal with the effects hazardous activities have on health.[83] However, the WHO's request for an advisory opinion did not relate to the effects of the use of nuclear weapons on health, it related to the legality of such use, merely taking into account health and environmental effects.[84] The ICJ concluded that, regardless of the effects of the use of nuclear weapons, the WHO's competence to deal with those effects is not dependent on the legality of the precipitating acts.[85]

The ICJ bolstered its conclusion by considering the WHO's role in the UN family. It recalled the principle of speciality to underscore the fact that, as a specialized agency, the WHO is an organization of a particular kind, invested with sectoral power within the UN system.[86] Restricted to the sphere of public health, the WHO's responsibilities do not extend to questions concerning the use of force and the regulation of armaments and disarmament which lie within the competence of the UN.[87] The vulnerability of the WHO's standing was one of the factors which prompted the drive for an additional request from the General Assembly.

Whether the ICJ has jurisdiction to entertain a request for an advisory opinion is more straightforward when that request emanates not from a specialized organ or agency but from the General Assembly or the Security Council.[88] Yet, in their submissions to the

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institutional. *See id.* at 75.

81. *See id.* at 74–75. Article 31 provides that "the terms of a treaty must be interpreted `in their context and in the light of its object and purpose,'" due regard being had to any subsequent practice in the application of the treaty. *Id.* at 75; *see also* SIR IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 119 (2d ed. 1984).

82. *See supra* note 77 and accompanying text.

83. *See* WHO Opinion, *supra* note 2, at 76 (interpreting Article 2 of the WHO's Constitution).

84. *See id.*

85. *See id.*

86. *See* Antonio F. Perez, *The Passive Virtues and the World Court: Pro-Dialogic Abstention by the International Court of Justice*, 18 MICH. J. INT'L L. 399, 427 (1997).

87. *See* WHO Opinion, *supra* note 2, at 80.

88. *See* U.N. CHARTER, *supra* note 14, art. 96, para. 1; *see also supra* text accompanying note 36.

ICJ, some states had argued that it is incumbent upon the General Assembly, just as much as a specialized agency, to establish that the question to be resolved comes within the scope of its activities.[89] The ICJ neither endorsed nor dismissed this interpretation of the Charter, for it had ample evidence at its disposal that the matter fell squarely within the competence of the General Assembly.[90] Citing several duties specifically entrusted to the General Assembly by the terms of the Charter, the ICJ concluded that the General Assembly had a long-standing interest in the impact of nuclear weapons on many of its activities and concerns.[91] In addition to its mandate with respect to the non-use of force, the General Assembly, over the years, has assumed primary responsibility for disarmament and non-proliferation efforts within the UN.[92] Thus, the ICJ's determination in this regard comes as no surprise.

The ICJ's rebuff to the WHO suggests that it will not be a party to attempts by specialized agencies to extend their competence, particularly if this involves an encroachment on the competence of the principal UN organs. In this respect, the Opinion represents a useful restatement of the principle of speciality. Ideally, requests for advisory opinions should emanate from the organizational source with the strongest mandate, whether in terms of expertise or political support.[93] However, dividing lines may be thinly drawn in practice, given the overlapping agendas of various agencies within the UN family. Moreover, it may be prudent to approach the ICJ determination with a degree of caution. Since the General Assembly had submitted a similar, although by no means identical request, the ICJ could reject the WHO request without losing an opportunity to address the substantive issue of the legality of nuclear weapons. In effect, this two-track request enabled the ICJ to be legally exact and politically pragmatic at the same time.

One of the unusual features of the Nuclear Weapons Opinions is

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89. *See* General Assembly Opinion, *supra* note 1, at 232–33.

90. *See id.* at 233.

91. *See id.* The fact that the General Assembly does not enjoy an institutional monopoly over nuclear weapons issues and that its actions in the field have been limited to recommendations rather than binding decisions, in no way impaired the General Assembly's ability to refer the question to the ICJ. *See id.*

92. *See* UNITED NATIONS, THE UNITED NATIONS AND DISARMAMENT: 1945–1985, at 11–14, 34–48 (1985).

93. *See* Matheson, *supra* note 8, at 419.

their civic, populist origins: The idea of obtaining an advisory opinion on the legality of nuclear weapons was the inspiration of Non-Governmental-Organizations (NGOs) dedicated to the pursuit of global disarmament.[94] NGOs have no direct access to the ICJ's advisory or contentious jurisdiction. But, by lobbying States, first in the WHO and then in the General Assembly, these NGOs indirectly activated the advisory competence of the ICJ. The experience of these Nuclear Weapons Opinions may well encourage other NGOs to lobby international organizations with a view to obtaining advisory opinions, whether from the ICJ or other international courts. Yet, in some respects, the rejection of the WHO request works against the indirect expansion of the advisory procedure at the behest of NGOs or interest groups. In effect, the ICJ has warned against the potential abuse of the right of institutions and agencies to seek advisory opinions. At the same time, by accepting the General Assembly request, the ICJ created a unique precedent for successful recourse to judicial intervention by NGOs.

In refusing the WHO request, the ICJ may also have sought to discourage forum-shopping by potential beneficiaries of the advisory jurisdiction, whether states, NGOs, or interest groups. The international institutional context is particularly ripe for forum-shopping since the balance of political power, as well as the structure of decisionmaking, varies from institution to institution. Clearly this was a concern shared by the several states that argued against the admissibility of the WHO request. In fact, the combined effect of the Nuclear Weapons Opinions sends mixed messages regarding the practice of forum-shopping for an institution from which to issue a request. By emphasizing the principle of speciality, the ICJ has em-

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94. *See* General Assembly Opinion, *supra* note 1, at 335 (Oda, J., dissenting). In 1988, the International Association of Lawyers Against Nuclear Arms (IALANA) was founded by lawyers from 11 states. *See* NICHOLAS GRIEF, THE WORLD COURT PROJECT ON NUCLEAR WEAPONS AND INTERNATIONAL LAW vii (2d ed. 1993); *see also* Saul Mendlovitz & Peter Weiss, *Judging the Illegality of Nuclear Weapons: Arms Control Moves to the World Court*, ARMS CONTROL TODAY, Feb. 1996, at 10–11. The following year, meeting for its First World Congress at The Hague, the IALANA adopted a declaration against nuclear arms which included an appeal to all UN members to take immediate steps towards obtaining a resolution of the UN General Assembly requesting an advisory opinion of the ICJ on the issue. *See* GRIEF, *supra*, at xiii. In 1989, the International Physicians for the Prevention of Nuclear War (IPPNW) canvassed the possibility of mobilizing support in the WHO for a submission to the ICJ. *See id*. In 1992, the IALANA and IPPNW joined with the International Peace Bureau (IPB) to establish the World Court Project on Nuclear Weapons and International Law. *See id*. at xiv.

phasized the limited availability of legitimate fora in respect of any particular subject-matter. At the same time, the acceptance of the General Assembly's request is an example of successful strategizing in the use of the advisory procedure. As such, it is a vindication of those who advocated shopping in alternative institutional fora to secure a copper-fastened guarantee of access to the ICJ.

V. THE POLITICAL QUESTION DOCTRINE AND THE ICJ'S DISCRETION TO REFUSE A REQUEST

Having acknowledged the competence of the General Assembly to request an advisory opinion, there remained two further grounds on which the ICJ might reject its request: first, the ICJ's duty to refuse to respond to political as opposed to legal questions; and second, its residual discretion to refuse any request for an advisory opinion.

The political question doctrine requires that the question be framed in terms of law and that it raise problems that are susceptible to a reply based on law.[95] In fact, the political question doctrine has proved hollow in practice, for the ICJ has tread cautiously when asked to draw fine-line distinctions between the legal and the political in international affairs.[96] Specifically, the ICJ has resisted allowing the political aspects of a question to overshadow its legal content. The present case proved no exception to this practice. The General Assembly's question was found to be satisfactory for it required the ICJ to identify, interpret, and apply existing principles and rules of international law to the threat or use of nuclear weapons, "thus offering a reply to the question posed based on law."[97] Moreover, even though the question presented by the General Assembly had political aspects, it did not deprive it of its character as a legal question.[98] The ICJ's deference to the legal as opposed to the political

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95. *See* Western Sahara, 1975 I.C.J. 12, 18 (Oct. 16) (referring to Article 65 of the ICJ Statute).

96. *See*, *e.g.*, Certain Expenses of the United Nations (Article 17, paragraph 2 of the Charter), 1962 I.C.J. 151 (July 20); Competence of the General Assembly for the Admission of a State to the United Nations, 1950 I.C.J. 4 (Mar. 3); Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), 1948 I.C.J. 57 (May 28); Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt, 1980 I.C.J. 73 (Dec. 20).

97. General Assembly Opinion, *supra* note 1, at 234 (majority opinion).

98. *See id.* (citing Application for Review of Judgment No. 158 of the United Na-

character was seen not as a matter of choice, but of compulsion.[99]

So it seems that at the kernel of the political question doctrine lies just one simple requirement, namely the presence of a single issue which is susceptible to judicial review. Once this "legal character" of the question has been established, the ICJ can and must exercise jurisdiction "[w]hatever its political aspects."[100] The implication is that neither the weight nor the extent of the political aspects will impact upon the ICJ's determination that a question is a legal one. In the wake of this Opinion, it might be said that the political question doctrine is a feature of the ICJ's jurisprudence only in name.[101]

The limitations of the political question doctrine highlight the significance of the ICJ's discretion to refuse to deliver an advisory opinion, satisfaction of the formal requirements notwithstanding.[102] However, the ICJ has recognized in the past that its discretion is not unfettered.[103] Institutional deference demands that, in principle, a request for assistance in the form of advice from one UN organ to another should not be refused.[104] Hence the ICJ has indicated that there must be "compelling reasons" to justify an exercise of its discretion.[105] In the history of the ICJ to date, circumstances that would compel it to decline jurisdiction have never been adduced.[106] In part, this may be explained by the absence of requests for advisory opinions implicating the rationale underlying the discretionary power — the power was designed, at least in part, to preserve the exclusivity of the advisory jurisdiction by ensuring that it would not

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tions Administrative Tribunal, 1973 I.C.J. 166, 172 (July 12)).

99. *See id.* "Whatever its political aspects, the Court cannot refuse to admit the legal character of a question which invites it to discharge an essentially judicial task, namely, an assessment of the legality of the possible conduct of States with regard to the obligations imposed upon them by international law." *Id.*

100. *Id*.

101. *See* Geoffrey R. Watson, *The ICJ and the Lawfulness of the Use of Nuclear Weapons*, ASIL INSIGHT, June 1995, *available in* LEXIS, Intlaw Library, Asilnw File.

102. *See* ICJ Statute, *supra* note 14, art. 65.

103. *See* General Assembly Opinion, *supra* note 1, at 234–35.

104. *See id.* at 235.

105. *See id.* (citing Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, 1989 I.C.J. 177, 191 (Dec. 15); Certain Expenses of the United Nations (Article 17, paragraph 2 of the Charter), 1962 I.C.J. 151, 155 (July 20); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, 27 (June 21)).

106. *See id.* at 235–36.

become a mechanism for the adjudication of contentious disputes through the back door.[107]

At the same time, the advisory function was not intended to provide a springboard for judicial consideration of vague or spurious questions. In submissions before the ICJ, several states argued in favor of a purposive test for the exercise of judicial discretion.[108] It was suggested that a judicial opinion would not provide any practical assistance to the General Assembly and would risk undermining progress on nuclear weapons issues in other international fora.[109] However, the ICJ was not persuaded that such considerations should cause it to abstain.[110] The abstract nature of the General Assembly's question might have been thought to provide the most compelling argument against jurisdiction. The ICJ rejected this view[111] and dismissed the concern expressed by some states that the General Assembly's question might cause the ICJ to reach hypothetical or speculative conclusions:

> The Court does not consider that in giving an advisory opinion in the present case, it would necessarily have to write "scenarios", to study various types of nuclear weapons and to evaluate highly complex and controversial technological, strategic and scientific information. The Court will simply address the issues arising in all their aspects by applying the legal rules relevant to the situation.[112]

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107. *See id.* at 236. As the ICJ recalls, "The purpose of the advisory function is not to settle — at least directly — disputes between States, but to offer legal advice to the organs and institutions requesting the opinion." *Id.* (citations omitted).

108. *See* General Assembly Opinion, *supra* note 1, at 236–37.

109. *See id.* at 236.

110. *See id.* at 236–37. The fact that the General Assembly's question did not relate to a specific dispute was no bar. *See id.* at 236. Nor was it the function of the ICJ to second-guess the purposes for which the opinion had been sought, for only the General Assembly could determine the utility of an advisory opinion in the terms of its own agenda. *See id.* at 237. In the absence of clear evidence that an opinion would adversely affect disarmament negotiations, the ICJ stated that it could not regard this factor as compelling. *See id.*

111. *See* General Assembly Opinion, *supra* note 1, at 236 (citing Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), 1948 I.C.J. 57, 61 (May 28); Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, 1954 I.C.J. 47, 51 (July 13); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, 27 (June 21)).

112. *Id.* at 237.

But was the task at hand as simple as the ICJ suggests? Consistent with the policy underlying the advisory function and bearing in mind the nature of the question presented, the ICJ's opinion would invariably be general in character. After all, an advisory opinion stands independent of any specific legal dispute and is directed not to any state or group of states but to the institution seeking the request. But, the WHO and General Assembly requests were based on the premise that the ICJ would address the contentious aspects of that debate. Meaningful judicial guidance on the subject of nuclear weapons requires detail and precision. Yet, it is difficult to see how the ICJ could advance the nuclear debate — a debate of staggering complexity and diversity of opinion — from a standpoint of generality.

This tension between the general and the specific runs like a thread through the Opinion. It explains certain fundamental flaws, including the failure of the ICJ to come to grips with crucial issues such as the practice of nuclear deterrence.[113] In the ICJ's defense, it might be said that the open-ended nature of the General Assembly's question presented it with an impossible task. But by the same token, the ICJ was left with extraordinary freedom to structure its response to so broad a question. It was left to the ICJ to decide how

113. *See id.* at 254–55. The impact of the policy of deterrence on customary international law was debated in several state submissions. *See id.* at 253–54. Stating that it did not intend to pronounce on the policy per se, the ICJ simply noted that a number of states adhere to it. *See id.* at 254. Such adherence to the policy of deterrence was a factor in the ICJ's determination that there is no customary rule specifically prohibiting the use of nuclear weapons. *See id.* at 254–55. Although voting with the majority, Judge Shi Juiyong cautioned against confusing law and policy in assessing the formation of custom. *See* General Assembly Opinion, *supra* note 1, at 277–78 (declaration of Judge Shi). He criticized the ICJ for placing undue emphasis on the practice of certain states, thereby making the law accord with the needs of the policy of deterrence. *See id.* (declaration of Judge Shi). This conclusion was echoed by Judge Koroma who contended that the ICJ had gone too far in affording legal recognition to the policy of deterrence. *See id.* at 579 (Koroma, J., dissenting); *see also id.* at 414 (Shahabuddeen, J., dissenting). In contrast, in espousing the legal option of recourse to nuclear weapons in an extreme circumstance of self-defense, Judge Fleischhauer relied not merely on NWS policy but also on the practice of Non-Nuclear-Weapons States (NNWS) in tolerating that policy. *See id.* at 305–10 (Fleischhauer, J., separate opinion). Vice-President Schwebel asserted more boldly the conclusion that the acquiescence of a large number of NNWS has placed the practice of deterrence at the heart of international relations. *See id.* at 311–29 (Schwebel, V.P., dissenting). *See generally* Francis A. Boyle, *The Relevance of International Law to the "Paradox" of Nuclear Deterrence*, 80 NW. U. L. REV. 1407 (1986) (asserting the U.S. "cannot lawfully threaten to use nuclear weapons in accordance with any theory of nuclear deterrence without violating international law").

wide a net to cast in establishing the scope of its adjudication.

This precedent tends to confirm the ICJ's practice of treating its discretion as something close to a rule in favor of jurisdiction. The ICJ may have been mindful of the adverse consequences that may have flowed from a decision to decline jurisdiction. Arguably, the ICJ has bolstered its prestige. By accepting jurisdiction, it has demonstrated its willingness to grapple with a complex and contentious legal issue and underlined its independence from the permanent members of the Security Council. However, the ICJ added a curious caveat to its determination that there were no compelling reasons against giving an advisory opinion: "An entirely different question is whether the Court, under the constraints placed upon it as a judicial organ, will be able to give a complete answer to the question asked of it. However, that is a different matter from a refusal to answer at all."[114]

This disclaimer served to foreshadow the *non liquet* at paragraph 2(E) of the *dispositif*,[115] whereby the ICJ declared:

> [I]n view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense, in which the very survival of a State would be at stake.[116]

The disclaimer contrasted starkly with the confidence with which the ICJ had asserted its competence to adjudicate the matter at hand. The difficulty of the task prompted the ICJ to presage its findings with this disclaimer, but it was not a sufficiently compelling reason for the ICJ to decline jurisdiction altogether. The ICJ's finding that the General Assembly posed a legal question sits uneasily with its concession that the question may not be susceptible to a complete answer by a judicial organ.

VI. NON LIQUET

114. General Assembly Opinion, *supra* note 1, at 238 (majority opinion).
115. *See* Perez, *supra* note 86, at 430–35.
116. General Assembly Opinion, *supra* note 1, at 266.

Various schools of thought have emerged over the decades regarding the options available to the ICJ in dealing with unsettled questions of law.[117] For some, the undesirable specter of judicial indecision and ambiguous pronouncement compels the ICJ to grapple as best it can with legal conundrums and to refrain from declaring a *non liquet*. Others would permit the ICJ the freedom of judicial restraint and even mandate a *non liquet* in certain circumstances. This debate has been waged almost exclusively in the context of the ICJ's contentious jurisdiction.

Several of the judges took issue with the majority's *non liquet.* Indeed, it is ironic that this provides the only clear ground on which the dissenting justices agreed. Vice-President Schwebel roundly condemned the failure of the ICJ to pronounce on the issue of the legality of recourse to nuclear weapons in self-defense.[118] He marshalled commentary and precedent against the possibility of a *non liquet*, particularly on so fundamental an issue.[119] Similarly, Judge Higgins pointed to the inconsistency between the ICJ's rejection of its discretion to decline jurisdiction and its pronouncement of a *non liquet.*[120] Judge Oda saw the equivocations of the majority as vindication for his view that the ICJ should have refused the General Assembly's request.[121]

Those judges that argued in favor of a comprehensive prohibition on the threat or use of nuclear weapons were similarly critical of the ICJ's finding of a *non liquet.* Judge Shahabuddeen contended that the ICJ "should and could have answered the General

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117. *See*, *e.g.*, SIR HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 152 (rev. ed., Grotius Publications Ltd. 1982) (1958); Julius Stone, *Non Liquet and the Function of Law in the International Community*, 1959 BRIT. Y.B. INT'L L. 124 (1960).

118. *See* General Assembly Opinion, *supra* note 1, at 322 (Schwebel, V.P., dissenting).

119. *See id*. at 322–33. In his dissenting opinion, Vice-President Schwebel states:

> [T]he Court concludes on the supreme issue of the threat or use of force of our age that it has no opinion. . . . After many months of agonizing appraisal of the law, the Court discovers that there is none. . . . If this was to be its ultimate holding, the Court would have done better to have drawn on its undoubted discretion not to render an opinion at all.

Id. at 322.

120. *See id*. at 583 (Higgins, J., dissenting).

121. *See id*. at 373–74 (Oda, J., dissenting). Judge Oda contends that the majority's solution does not serve to enhance the credibility of the ICJ. *See id*.

Assembly's question — one way or another."[122] In his view, the General Assembly did not receive an answer to the question's substance.[123] Judge Koroma attributed the majority result in part to a failure to apply the full ambit of international law.[124] Even if the challenge facing the ICJ could be characterized as a choice between two competing principles, Judge Koroma contended that the ICJ "should jurisprudentially assign a priority to one of them and cause it to prevail."[125]

The position of the majority is reflected in the comments of President Bedjaoui.[126] The issue, he declared, gives rise to no immediate and clear answer, and the ICJ is driven by a desire "to state the law as it is, seeking neither to denigrate nor embellish it."[127] President Bedjaoui expressed the hope that "the international community will give the Court credit for having carried out its mission — even if its reply may seem unsatisfactory . . . ."[128] It is for states and not the ICJ to correct the imperfections of the law, he suggested.[129]

These comments explain the decision but ultimately fail to provide a satisfactory response to its critics. The majority stance is essentially one of political compromise. As such, it confirms the artificiality of the distinction between the legal and the political drawn

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122. General Assembly Opinion, *supra* note 1, at 375–76 (Shahabuddeen, J., dissenting).

123. *See id*. at 376. Judge Shahabuddeen noted the contradiction between the promise implicit in the ICJ's finding that it had jurisdiction to entertain the request and the performance exemplified by its equivocal findings. *See id*. at 375–76. He examined the doctrine of *non liquet* and concluded that it had no place in the present context. *See id*. at 389–90.

124. *See id*. at 558 (Koroma, J., dissenting).

125. *Id*. at 559.

126. *See* General Assembly Opinion, *supra* note 1, at 268–74 (declaration of President Bedjaoui).

127. *Id*. at 269.

128. *Id*.

129. *See id*. at 269–70. Judge Vereshchetin cited the character of the advisory jurisdiction as the principal justification for declaring a *non liquet*. *See id*. at 279–80 (declaration of Judge Vereshchetin). In his view, the ICJ was requested not to resolve a dispute but to state the law as it finds it; the ICJ can identify gaps but it cannot fill them. *See id*. Judge Vereshchetin analogized the establishment of a total prohibition on the use of nuclear weapons with the construction of an edifice. *See* General Assembly Opinion, *supra* note 1, at 281. Although the construction is underway, it is incomplete due to the unwillingness of a sizeable number of the builders. *See id*. "[I]t is the States themselves . . . that must shoulder the burden of bringing the construction process to completion." *Id*.

by the ICJ in its discussion of the political question doctrine. In characterizing the question, the ICJ extrapolated its legal characteristics. But in answering the question, it ultimately held fast to the political dimension of the issue.

VII. THE SCOPE OF THE ICJ'S ADJUDICATION

A preliminary step for any court that is asked to deliver an advisory opinion is to scrutinize the underlying request so as to identify the nature and extent of the issue or issues presented. Interpreting the request is crucial, for it establishes the scope of the ICJ's adjudication and, in certain instances, it may prove outcome-determinative. In the case of the ICJ, the process may be particularly significant given the fact that international law is generally more open-ended than national or regional law. The question presented by the General Assembly in this case is perhaps the most extreme example of an abstract mandate to date. The General Assembly had asked: "Is the threat or use of nuclear weapons in any circumstance permitted under international law?"[130] The question's breadth and generality presented several definitional puzzles which were the subject of many and varied arguments by way of state submission.

The generality of this question effectively presented the ICJ with carte blanche to determine the scope of its analysis, not merely in terms of substance, but also with regards to form and methodology. Yet, for the most part, the ICJ followed a somewhat predictable pattern of discussion, which has proved to be the standard-form of academic debate over the legality of nuclear weapons and which was perpetuated in many of the state submissions to the ICJ. As a consequence, and regardless of substance, certain of the separate and dissenting opinions are more creative in their approach.[131]

The ICJ found it unnecessary to pronounce on possible diver-

130. *Id*. at 228 (majority opinion). The WHA was more reserved in the formulation of its question. *See* WHO Opinion, *supra* note 2, at 66–68. That question refers to: (1) obligations under international law, including the WHO Constitution regarding (2) the use of nuclear weapons, (3) by a state, (4) in war or other armed conflict, (5) in terms of health and environmental effects. *See id*. Clearly, in drafting the question, the WHA was conscious of the limitations of its substantive mandate and of the importance of remaining within the terms of that mandate in order to seize the advisory jurisdiction of the ICJ. But this explains only certain of the contextual qualifications, such as (2) and (5).

131. *See, e.g.*, General Assembly Opinion, *supra* note 1, at 311–29 (Schwebel, V.P., dissenting); *id*. at 429–554 (Weeramantry, J., dissenting).

gence between the French and English texts of the question.[132] A more serious objection was raised to the use of the term "permitted,"[133] but the ICJ was not persuaded that the legal consequences of the use of the term were particularly significant to its disposition of the case.[134] The following discussion examines three significant issues regarding the interpretation of the General Assembly's request: the subject matter, the factual context, and the applicable law.

A. The Subject Matter

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132. *See id*. at 238 (majority opinion). The French text reads: "Est-il permis en droit international de recourir a la menace ou a l'emploi d'armes nucleaires en toute circonstance?" *Id*. While the English text refers to the permissibility of recourse to nuclear weapons in "any" circumstance, it was suggested that the French text questioned whether such a recourse was lawful in "every" circumstance. *See id*. This question encouraged a simple response in the negative. *See id*. The ICJ took the view that the respective texts did not obscure the "real objective" of the question, namely, "to determine the legality or illegality of the threat or use of nuclear weapons." General Assembly Opinion, *supra* note 1, at 238.

133. *See id*. Some states complained that the term implied the legality of recourse to nuclear weapons is predicated upon authorization in treaty or customary international law. *See id*. at 238–39. This assumption was challenged on the basis that the consensual nature of international law allows states to engage in any activity which has not been proscribed by its terms. *See id*. In effect, the use of the term "permitted" served to allocate unfairly the burden of proof on proponents of the legality of nuclear weapons. *See id*. Thus, the formulation of the question constituted an inequitable starting point for the ICJ's analysis. It was argued that the term "permitted" should be replaced by the term "prohibited" so that the question would read: "Is the threat or use of nuclear weapons in any circumstance prohibited under international law?" *Id*.

134. *See* General Assembly Opinion, *supra* note 1, at 239. This conclusion was based solely on the fact that the states appearing before the ICJ — the NWS in particular — had expressly or by implication recognized that international law imposes some restraints on state action with respect to nuclear weapons. *See id*. Although the ICJ did not address this point, it is not clear that it has the authority to rewrite a question submitted to it in the context of its advisory jurisdiction. The formulation is one that was hammered out in the General Assembly. Even if the ICJ has that authority, presumably it should not exercise it lightly. Arguably, to simply replace "permitted" with "prohibited" would replace one alleged evil with another. The General Assembly formula is a closer approximation to a majoritarian international view and, as the ICJ points out, while all states concede that international law prohibits recourse to nuclear weapons in some circumstances there is no such agreement that international law permits recourse to nuclear weapons in all circumstances. *See id*. at 238–39.

In clarifying the subject matter of the request, the ICJ reflected on "certain unique characteristics" of nuclear weapons, an appreciation of which it deemed essential to a proper application of the law.[135] Above all, it was "imperative" to take account of the destructive capacity of nuclear weapons, "their capacity to cause untold human suffering, and their ability to cause damage to generations to come."[136]

The ICJ defined nuclear weapons as "explosive devices whose energy results from the fusion or fission of the atom."[137] Two factors distinguishing nuclear weapons from other weapons were identified: first, the immense strength of the release of heat and energy caused by the fusion or fission of the atom and, second, the phenomenon of radiation associated with that process.[138] The ICJ concluded that "these characteristics render the nuclear weapon potentially catastrophic."[139] Its destructive power, which "cannot be contained in either space or time" is capable of destroying "all civilization and the entire ecosystem of the planet."[140] Specifically, the ICJ noted the deleterious impact of radiation releases on the present and future state of health, agriculture, the environment, natural resources, and demography.[141]

The ICJ indicated that, in reaching these findings, it had taken note of "the definitions of nuclear weapons contained in various treaties and accords."[142] Yet, it failed to make reference to any specific definitions by way of example. In fact, the majority of disarmament and non-proliferation agreements fail to define nuclear weapons. This may be explained, in part, by the technical complexities inherent in the process. Furthermore, in the case of some such arrangements, providing a definition has been unnecessary to the objective at hand.[143] However, in other cases, international consen-

135. *Id*. at 243; *see also id*. at 434 (Weeramantry, J., dissenting).
136. *Id*. at 244 (majority opinion).
137. General Assembly Opinion, *supra* note 1, at 243.
138. *See id*.
139. *Id*.
140. *Id*.
141. *See id*. at 243–44.
142. *Id*. at 243.
143. Arms control agreements seek to limit, control or even eliminate existing weapons. These agreements tend to be directed toward specific classes of nuclear weapons which are identified by reference to names and labels rather than processes of production and effects.

sus on the definition of nuclear weapons has proven to be elusive.[144]

The nuclear-weapon-free zone treaties depart from this general practice.[145] The Treaty of Tlatelolco,[146] which established the Latin American Nuclear-Weapon-Free Zone,[147] was hailed as the first international agreement to contain such a definition.[148] It defines a nuclear weapon as "any device which is capable of releasing nuclear energy in an uncontrolled manner and which has a group of characteristics that are appropriate for use for warlike purposes."[149] The Treaty of Rarotonga,[150] establishing the South Pacific Nuclear-Free Zone, speaks in terms of nuclear explosive devices rather than nuclear weapons.[151] It applies a more comprehensive definition than the Tlatelolco formula by prohibiting "any nuclear weapon or other explosive device capable of releasing nuclear energy, irrespective of the purpose for which it could be used."[152] Since both definitions are

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144. One might assume that defining nuclear weapons would be vital in the case of non-proliferation agreements. Such agreements tend to have absolutist goals. Moreover, particular emphasis is placed on prohibiting the manufacture and production of nuclear weapons. Yet, the Treaty on the Non-Proliferation of Nuclear Weapons contains no definition of nuclear weapons. *See* Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 16.

145. However, the treaties seeking to remove nuclear weapons from uninhabited areas do not. *See, e.g.*, Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof, *opened for signature* Feb. 11, 1971, 23 U.S.T. 701, 955 U.N.T.S. 115 (entered into force May 18, 1972); The Antarctic Treaty, *opened for signature* Dec. 1, 1959, 12 U.S.T. 794, 402 U.N.T.S. 71 (entered into force June 23, 1961).

146. Treaty for the Prohibition of Nuclear Weapons in Latin America, *opened for signature* Feb. 14, 1967, 22 U.S.T. 762, 634 U.N.T.S. 326 (entered into force Apr. 22, 1968) [hereinafter Treaty of Tlatelolco].

147. *See* ALFONSO GARCIA ROBLES, THE LATIN AMERICAN NUCLEAR WEAPON FREE ZONE (1979) (Stanley Found. Occasional Paper 19); John R. Redick, *The Tlatelolco Regime and Nonproliferation in Latin America*, 35 INT'L ORG. 102 (1981); Davis R. Robinson, *The Treaty of Tlatelolco and the United States: A Latin American Nuclear Free Zone*, 64 AM. J. INT'L L. 282, 282 (1970).

148. *See* HISAKAZU FUJITA, INTERNATIONAL REGULATION OF THE USE OF NUCLEAR WEAPONS 42 & n.2 (1988).

149. Treaty of Tlatelolco, *supra* note 146, art. 5, 22 U.S.T. at 766–67; 634 U.N.T.S. at 332.

150. South Pacific Nuclear Free Zone Treaty, *opened for signature* Aug. 6, 1985, 24 I.L.M. 1440 (entered into force Dec. 11, 1986) [hereinafter Treaty of Rarotonga].

151. *See* Treaty of Rarotonga, *supra* note 150, art. 3, 24 I.L.M. at 1444–45; *see also* Nigel Fyfe & Christopher Beeby, *The South Pacific Nuclear Free Zone Treaty*, 17 VICT. U. WELL. 33, 40–45 (1987); Elizabeth Gibbs, *In Furtherance of a Nuclear Free Zone Precedent: The South Pacific Nuclear Free Zone Treaty* 4 BOSTON U. INT'L L.J. 387, 387, 400–12 (1986).

152. Treaty of Rarotonga, *supra* note 150, art. 1(c), 24 I.L.M. at 1444.

directed toward activities beyond the scope of the ICJ's inquiry, their import in the context of the Nuclear Weapons Opinions is limited. The essence of a nuclear-weapon-free zone is the prohibition of all forms of nuclear-weapon-related activity within a defined geographical area.[153] Thus, the General Assembly's question extends to just some of the activities at issue under the Tlatelolco[154] and Rarotonga[155] regimes.

The General Assembly Opinion devotes just four short paragraphs to subject matter characterization,[156] but they are important paragraphs nonetheless. The ICJ has formulated the first international judicial definition of nuclear weapons,[157] a significant step as much for what is excluded as for what is included within its terms. The ICJ has defined nuclear weapons by reference to the explosive process, the extent of heat and energy released, and the release of radiation.[158] While the second characteristic is general in nature and may potentially apply to other weapons of mass destruction, the first and third characteristics are peculiar to nuclear weapons.[159] Thus, weapons that have potentially devastating effect but which lack these characteristics are not nuclear weapons and do not come within the ambit of the ICJ's Opinion. As a consequence, while the Nuclear Weapons Opinion may have implications for other weapons of mass destruction,[160] the ICJ has made clear that it directed its

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153. *See* R. St. J. Macdonald, *Nuclear Weapon-Free Zones and Principles of International Law*, *in* INTERNATIONAL LAW AND ITS SOURCES: LIBER AMICORUM MAARTEN BOS 47, 57 (Wybo P. Heere ed., 1988).

154. In Article 18, the Treaty of Tlatelolco permits the Contracting Parties to carry out explosions of nuclear devices for peaceful purposes provided that they do not offend the terms of Articles 1 and 5. *See* Treaty of Tlatelolco, *supra* note 146, art. 18, 22 U.S.T. at 776–77; 634 U.N.T.S. at 346–48. However, these provisions combine to prohibit any form of nuclear explosion, peaceful or otherwise. *See* Treaty of Tlatelolco, *supra* note 146, arts. 1, 5, 18, 22 U.S.T. at 765–67, 776–77, 634 U.N.T.S. at 330, 332, 346–48. This contradiction effectively renders nugatory the right to conduct peaceful nuclear explosions. *See* Macdonald, *supra* note 153, at 57–58.

155. The prohibitions contained in the Treaty of Rarotonga include a ban on the manufacture, acquisition, stationing and testing of nuclear weapons and on the dumping of radioactive wastes in the territorial sea. *See* Treaty of Rarotonga, *supra* note 150, arts. 3–7, 24 I.L.M. at 1444–47.

156. *See* General Assembly Opinion, *supra* note 1, at 243–44 (majority opinion).

157. *See id*.

158. *See id*.

159. *See id*.

160. The central finding of the ICJ is that the threat or use of nuclear weapons generally contravenes the law of armed conflict. *See id*. at 256–60.

findings solely to the subject of nuclear weapons.

This determination is helpful for neither the cause of curbing nuclear weapons nor that relating to other weapons of mass destruction is served by the simplistic plea that all such weapons are lethal so that what applies for one necessarily applies for all. What fragile rules exist have been constructed on the premise that each category represents a distinct, albeit lethal, species of weapon. This is not to deny that the law is imbued with overarching principles, social and humanitarian, that apply across the board.

On the contrary, it is suggested below that the ICJ failed in this Opinion to vindicate such principles in determining the applicable law. But, while these principles suggest a particular result, they provide no practical guidance as to how the international community should reach that result. Concrete steps are required in order to transform the broad spectrum of state policies and practices in light of shifting emphases in international law. To suggest that specific regimes regarding chemical or bacteriological weapons exert prohibitions over nuclear weapons only serves to undermine such regimes and to discourage the development of comparable rules specific to nuclear weapons. Similarly, while the reasoning and findings of the ICJ regarding nuclear weapons can and should encourage analogous thinking with respect to other weapons of mass destruction, it is appropriate to acknowledge that the ICJ was not directing its energies to that end.

Regarding conventional weapons, the emphasis placed by the ICJ on the nature of the devastation caused by nuclear weapons and, specifically, of the consequences of releases of radiation, argue against any direct analogy. Even an overwhelming attack using conventional weapons would not give rise to a similar presumption of illegality. By extension, this also suggests that the use of nuclear weapons in self-defense in response to such a conventional attack could not meet the requirement of proportionality inherent in the right of self-defense.

The focus on the consequences of the use of nuclear weapons is particularly welcome. It is significant that the ICJ resisted a temptation to overstate the physical attributes of nuclear weapons at the expense of their effects. The productive process and functional operation of nuclear weapons render them distinctive for definitional purposes. As such, these facets are a vital component of any legal definition, imbuing it with precision and clarity. Identifying the

subject matter is, after all, primarily a quest for that elusive definition that is watertight and, at the same time, all-inclusive. But, identifying the subject matter serves a further, important purpose: It explains why we are creating a definition that draws certain matter within its terms and leaves other matter outside. In the case of nuclear weapons, it is their effects that concern us. It is by reason of their effects that they were the subject of a General Assembly request for an advisory judicial opinion. In this sense, the rationale for the definitional exercise is just as important as the exercise itself.

The ICJ's findings as to the effect of nuclear weapons provide a backdrop for its reasoning on the substantive question. Yet, reflection on the potentially devastating effect of nuclear weapons presages a conundrum lying at the heart of the Opinion. Can the law protect states, individually and collectively, from such potential devastation? Can it simultaneously protect the security interests of the majority NNWS and that of the individual NWS? Does the very concern which argues for a complete prohibition of nuclear weapons at the same time argue for an enhanced right of self-defense? It is on these questions that, ultimately, the members of the ICJ could find no answer, or at least, no common ground.

B. The Factual Context

The General Assembly question refers to both the threat and use of nuclear weapons and contains no qualifying language regarding the actors, contexts or consequences of such action. From its preliminary remarks, the ICJ seemed to take the General Assembly at its word and embrace a general reading of the question. It described its task as simply "to determine the legality or illegality of the threat or use of nuclear weapons."[161] Yet, although no formal framework was established, the ICJ went on to limit the scope of the substantive discussion in a number of respects.

The ICJ confined its discussion to armed conflict scenarios, even though the General Assembly question, unlike its WHO counterpart, did not invite a distinction between scenarios of war or armed conflict and peacetime situations.[162] Additionally, the discussion was

161. *Id.* at 238.

162. *See* General Assembly Opinion, *supra* note 1, at 247–66.

limited further to situations of international armed conflict.[163] Despite the erosion during the lifetime of the UN Charter of the principle of domestic jurisdiction,[164] the ICJ did not consider an internal use of nuclear weapons suitable for inclusion in the present discussion.[165] The cited rationale was a failure on the part of any state to raise it in written or oral submissions to the ICJ.[166] In addition, the ICJ read the question as referring only to a threat or use of nuclear weapons on the part of a state or group of states. Scenarios involving such action by private individuals or terrorist organizations were not contemplated. Similarly, the ICJ neatly side-stepped the question of military action pursuant to Chapter VII of the Charter.[167]

The ICJ adopted a narrow definition of the term "use." Specifically, it did not read the term to embrace activity such as manufacture, possession, or deployment. It also excluded discussion of the highly controversial issues of nuclear weapons testing. This interpretation is consistent with treaty practice on the subject of nuclear weapons. Furthermore, it reflects the understanding of General Assembly resolutions on the subject, the wording of which would seem to have influenced the formulation of the request for an advisory opinion in this case.[168] Even within the narrow, legal classification of the phrase "threat or use," certain interpretative issues were not determined. Principally, as noted, the ICJ was reluctant to debate whether the policy of deterrence comes within the concept of a "threat" of nuclear weapons.[169] Yet, the practice of deterrence lies at the heart of the question of the legality of the threat of nuclear weapons.

Certain limitations are rational, and moreover, inevitable, given the generality of the General Assembly's request and the need to set workable parameters to the scope of judicial discussion. At the same time, these limitations have significant consequences since the scope of judicial review necessarily influences the findings that a court ultimately reaches. Choices regarding the scope of adjudication im-

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163. *See id*. at 247.

164. *See* U.N. CHARTER, *supra* note 14, art. 2, para. 7.

165. *See* General Assembly Opinion, *supra* note 1, at 247.

166. *See id*.

167. *See id*. In any event, it might be argued that current Chapter VII practice would characterize such action as state rather than UN action.

168. *See id*. at 337 (Oda, J., dissenting).

169. *See supra* note 101 and accompanying text.

pact the tenor and emphasis of an opinion as well as the depth of the substantive discussion.

C. The Applicable Law

Before addressing the question put to it by the General Assembly, the ICJ gave some consideration to the relevant applicable law that might be drawn from "the great corpus of international law norms available to it . . . ."[170] The ICJ considered the following: human rights (specifically the right to life), the prohibition against genocide, rules relating to the protection of the environment, the law relating to the use of force, and the law of armed conflict and specific treaties dealing with nuclear weapons.[171] As among these rules, the ICJ concluded that "the most directly relevant applicable law" is the law relating to the use of force, and the law applicable in armed conflict and specific treaties dealing with nuclear weapons.[172] The relevance of rules relating to human rights, genocide, and the environment were largely discounted by the ICJ. This conclusion is contrary to the suggestion of a number of states in their submissions to the ICJ. Moreover, such rules exercised considerable influence over the dissenting opinions of Judges Koroma, Shahabuddeen, and Weeramantry.

Several states had cited the relevance of international human rights norms. Particular reliance was placed on the International Covenant on Civil and Political Rights (Covenant),[173] Article 6(1) of which protects the right to life.[174] The ICJ acknowledged the non-

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170. General Assembly Opinion, *supra* note 1, at 239 (majority opinion).

171. *See id*. at 239–48.

172. *Id*. at 243. Judge Weeramantry presented a more extensive list. *See id*. at 443 (Weeramantry, J., dissenting). In addition to the sources listed by the Court, Weeramantry cited "[t]he whole corpus of international law that governs State obligations and rights generally, which may affect nuclear weapons policy in particular circumstances." *Id*. Finally, he affirmed the relevance of national law applicable to nuclear weapon decisionmaking by national authorities. *See id*.

173. International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (entered into force Mar. 23, 1976) [hereinafter CCPR].

174. *See* CCPR, *supra* note 173, art. 6, 999 U.N.T.S. at 174–75, 6 I.L.M. at 370; *see also* DOMINICK MCGOLDRICK, THE HUMAN RIGHTS COMMITTEE: ITS ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 328 (1991). Article 6(1) provides: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." CCPR, *supra* note 173, art. 6, 999 U.N.T.S. at 174–75, 6 I.L.M. at 370.

derogable status of this right which precludes any state party from denying its application in times of war or public emergency.[175] However, in the view of the ICJ, the test of what constitutes an arbitrary deprivation of life in times of hostilities is a matter for the law of armed conflict. This analysis led the ICJ to conclude that the issue of whether loss of life through the use of a certain weapons in warfare constitutes a violation of Article 6 "can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself."[176]

The ICJ's reading of Article 6 is troubling. The suggestion that, in times of hostilities, the application of Article 6 is controlled exclusively by the law of armed conflict, undermines the standing of the Covenant guarantee and its potential development by the Human Rights Committee.[177] It suggests that Article 6 is susceptible to different meanings, based on an assumption that a bright line exists between times of hostilities and times of peace. Yet, these concepts do not coincide with the Covenant's notion of derogation and are at odds with the non-derogable character of Article 6. In effect, the ICJ excludes the possibility that Article 6 may provide a greater level of protection than the customary notion of arbitrary deprivation of life.[178]

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175. *See* General Assembly Opinion, *supra* note 1, at 240 (majority opinion). Article 4 of the CCPR recognizes that certain obligations contained in the Covenant may be suspended in a time of national emergency. *See* CCPR, *supra* note 173, art. 4, 999 U.N.T.S. at 174, 6 I.L.M. at 369–70. However, Article 6 is excluded from this catalogue. *See id.*; *see also* MCGOLDRICK, *supra* note 174, at 301.

176. General Assembly Opinion, *supra* note 1, at 240. *But see id.* at 577–78 (Koroma, J., dissenting).

177. In its second General Comment on Article 6, the Human Rights Committee recognized the application of Article 6 to the use of nuclear weapons:

> It is evident that the designing, testing, manufacture, possession and deployment of nuclear weapons are among the greatest threats to the right to life which confront mankind today. . . . the very existence and gravity of this threat . . . is in itself antagonistic to the promotion of universal respect for and observance of human rights and fundamental freedoms . . . . The production, testing, possession, deployment and use of nuclear weapons should be prohibited and recognized as crimes against humanity.

General Comment, *supra* note 5, ¶¶ 4–6; *see also* Manfred Nowak, *The Activities of the UN Human Rights Committee: Developments from 1 August 1992 to 31 July 1995*, 16 HUM. RTS. L.J. 377, 394 & nn.105–06 (1995) (discussing E.W. v. The Netherlands, Comm. No. 429/1990).

178. *See, e.g.*, American Convention on Human Rights, *opened for signature* Nov. 22, 1969, 1144 U.N.T.S. 123, 9 I.L.M. 673 (entered into force July 18, 1978); Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov.

The lack of discussion of other human rights norms is also regrettable.[179] Over the past several decades, the development of these norms has extended the substantive reach of international law and influenced legal thinking.[180] Despite the ICJ's intimation that the law of armed conflict conditions the law of human rights, evidence also exists supporting the reverse trend. One positive aspect of the UN response to the recent conflict in the Former Yugoslavia was the recognition of a formal link between the UN's human rights monitoring and the actions of the Security Council.[181]

Similar reflections surface regarding the ICJ's treatment of the prohibition on genocide.[182] Genocide is prohibited by custom, and arguably, by *jus cogens* and is at the center of international and national regimes directed toward the prosecution of war crimes.[183]

4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953); G.A. Res. 217A (III), UN Doc. A/810, at 71 (1948).

179. Examples of other human rights norms include: the freedom from torture and cruel, inhuman or degrading treatment or punishment; the right to health; environmental rights; and the right of self determination. These and related rights find expression in several human rights instruments. *See, e.g.*, CCPR, *supra* note 173; International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3, 6 I.L.M. 360 (entered into force Jan. 3, 1976).

180. *See* Richard B. Bilder, *Distinguishing Human Rights and Humanitarian Law: The Issue of Nuclear Weapons*, 31 AM. U. L. REV. 959, 961 (1982) ("Transcending as it does, any single field, the potential use of nuclear weapons requires the widest possible debate.").

181. The link was established specifically through the reporting functions of the Special Rapporteur on the Former Yugoslavia, appointed by the UN Human Rights Commission. *See, e.g.*, Karen E. Kenny, *Formal and Informal Innovations in the United Nations Protection of Human Rights: The Special Rapporteur on the Former Yugoslavia*, 48 AUSTRIAN J. PUB. INT'L L. 19 (1995).

182. By 1946, the UN General Assembly had recognized genocide as an international crime, paving the way for the unanimous acceptance of a Convention on the Prevention and Punishment of the Crime of Genocide. *See* Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) [hereinafter Genocide Convention]. The offense of genocide is defined as comprising an *actus rea* and a *mens rea*. The need for a showing of intent heightens the evidentiary burden and may explain, in part, the lack of enforcement activity generated during the lifetime of the Genocide Convention. The ICJ has examined the Genocide Convention on just two occasions. *See* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo.), 1993 I.C.J. 325 (Sept. 13); Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15 (May 28); *see also* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo.), 1995 I.C.J. 279 (July 14).

183. Genocide is implicit in the Nuremberg Charter. *See* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, *opened for sig-*

The consequences of the use of nuclear weapons suggest that the threshold of genocide could be readily crossed by a use of nuclear weapons, or, indeed, by a threat to use such weapons.[184] Yet, even if it is assumed that not every use of nuclear weapons would invariably constitute genocide, this does not render the prohibition against genocide irrelevant to the ICJ's analysis, anymore than the law of the Charter or the rules of armed conflict do. The ICJ's holding would have been stronger if it had stated that, if applied with the requisite intent and direction, a use of nuclear weapons would contravene the prohibition against genocide.

Finally, the rapidly developing field of international law governing environmental concerns has placed additional limitations on the conduct of hostilities. Certain limitations stem from the general corpus of international environmental law.[185] Additional limita

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nature Aug. 8, 1945, Charter of the International Military Tribunal, 59 Stat. 1544, 1546, 82 U.N.T.S. 279, 284 (entered into force Aug. 8, 1945). It is expressly addressed by the statutes of the Criminal Tribunals for the Former Yugoslavia and Rwanda. *See* Statute of the International Tribunal for Rwanda, *reprinted in* 16 HUM. RTS. L.J. 124, 125 (1995); Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia Since 1991, *reprinted in* 32 I.L.M. 1163, 1192 (1992).

184. For example, under the Genocide Convention, the partial destruction of any national group constitutes genocide. *See* Genocide Convention, *supra* note 182, art. II, 78 U.N.T.S. at 280. The issue of intent is no more problematic than in any other scenario. In fact, applying the principle of constructive intent, the requirement may be more easily satisfied in the case of nuclear weapons.

185. For example, application of the rules of state responsibility, in this field, date back at least fifty years to the *Trail Smelter Arbitration*, which determined that states are liable for actions or activities which pollute or are otherwise injurious to the environment. *See* Trail Smelter Arbitration (U.S. v. Can.), 35 AM. J. INT'L L. 684, 684 (1941). The Tribunal considered it a principle of international law that:

> [N]o State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.

Id. at 716. This principle was resoundingly endorsed in state acceptance of the Stockholm Declaration on the Human Environment. *See* Declaration of the United Nations Conference on the Human Environment, June 16, 1972, 11 I.L.M. 1416. Principle 21 provides:

> States have, in accordance with the Charter of the United Nations and the principle of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

Id. at 1420. Regarding nuclear weapons, it may be noted that this principle extends

tions result from the incorporation of environmental concerns into international treaties concerning armed conflict.[186] The contribution of these rules was deemed relevant to the Nuclear Weapons Opinions only to the extent that they have been subsumed into the law of armed conflict. Environmental rules are mere factors which may be taken into account in the application of that law, just as genocide is embodied in the criminalization of the laws of war, and as the right to life protected by human rights treaties is overshadowed by the protection against arbitrary life contained in humanitarian law.

A crucial consequence of the ICJ's narrow definition of the applicable law is the fact that these rules are not reflected in the final holdings of the ICJ.[187] It is regrettable that the import of such rules is underestimated by the ICJ.[188] It is one thing to say that human rights and environmental rules influence the law of armed conflict, but it is quite another to make them a living and vibrant part of the law. It might be said that with respect to nuclear weapons there is no *lex specialis*: whether rules regarding armed conflict, the environment or human rights, it is all international law. Sadly, in this respect, the ICJ fails to vindicate the strides in international legal

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responsibility not only to activities within a state's jurisdiction but also to activities within its control. Principle 22 embodies an undertaking to cooperate in the development of the international law concerning liability and compensation for victims of pollution and other environmental damage. *See id*.

186. For example, the protection of the natural environment in armed conflict is specifically addressed in Article 55 of Additional Protocol I to the Geneva Conventions of 1977 (Protocol). *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 16 I.L.M. 1391, 1415 (1977); *cf.* Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, *opened for signature* Dec. 10, 1976, 31 U.S.T. 333, 1108 U.N.T.S. 152 (entered into force Oct. 5, 1978) (protecting the environment). It provides that "[t]his protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby prejudice the health or survival of the population." Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *supra*, at 1415. In addition, "[a]ttacks against the natural environment by way of reprisals are prohibited." *Id*. These provisions are new rules introduced by the Protocol, legally binding only upon parties to the Protocol and not declaratory of custom as it existed at the time of the signing of the Protocol. *See id*. at 1396–97.

187. This conclusion is tempered only marginally by the ICJ's statement in paragraph 104 of the General Assembly Opinion, to the effect that "its reply to the question put to it by the General Assembly rests on the totality of the legal grounds set forth" in its discussion on the merits. General Assembly Opinion, *supra* note 1, at 265.

188. *See also* Clark, *supra* note 8, at 283. *But see* Matheson, *supra* note 8, at 423.

thinking over the past several decades.

VIII. CONCLUDING REMARKS

The Nuclear Weapons Opinions may hold interesting insights for the future practice of the ICJ. While the issues of jurisdiction and applicable law are essentially procedural and, as such, secondary to the substantive findings of the ICJ, they are nevertheless significant and should not be overlooked. Indeed, the conclusions of the ICJ on the legality of nuclear weapons can be understood only in the context and form in which they were delivered. At the same time, just as the institutional background of a judicial opinion can increase our understanding of its reasoning and result, so can a particular precedent influence the development of judicial procedures.

The Nuclear Weapons Opinions have brought considerable publicity to the ability of the ICJ to issue advisory opinions. To date, advisory opinions have been relatively infrequent and greatly overshadowed by the ICJ's decisions in contentious cases. By seeking the advice of the ICJ on such a controversial issue, the WHO and General Assembly have focused international attention on this dimension of the ICJ's practice. Given the degree of contention surrounding the General Assembly request, it is a significant matter that the ICJ decided to hear the case at all. The ICJ could have staged a respectable retreat from the issue, citing the political sensitivity of the subject matter or the generality of the question presented.

The acceptance of the General Assembly request suggests an expansive understanding of the advisory jurisdiction. It makes plain the fact that the advisory function may provide a conduit for judicial examination of all subject matter touching upon UN concerns, regardless of political dimension. This is an important characterization, for it confirms that the advisory procedure is not limited to questions of international administration but extends to questions of state action and policy of which international organizations play only a peripheral role.

At the same time, the Nuclear Weapons Opinions highlight the shortcomings of judicial intervention into a politically-charged domain. In terms of substance, the ICJ pitched its tent in the middle-ground of international opinion, formulating a compromise that affords no viewpoint, neither absolute victory nor absolute defeat.

Nevertheless, both Opinions taken as a whole, as well as the sound bite of the ICJ's actual holding in response to the General Assembly request, offer considerably more for anti-nuclear advocates to cheer about. To the extent to which that Opinion implies that existing nuclear policies and practices are out of step with international law, it represents a direct challenge to the NWS. Although the non-binding character of the Opinion provides some shelter, the ICJ has run the risk that its dictate will be ignored with impunity by the most powerful states in the international community: the permanent members of the Security Council.

When a request for an advisory opinion faces staunch state opposition in the requesting institution, the opinion that follows is particularly vulnerable to attack. It behooves neither the advisory procedure nor the ICJ itself for an opinion to be resisted, or worse still, ignored.[189] But fear of state opposition should not prevent the ICJ from exercising jurisdiction altogether. The fact that the General Assembly request came to fruition, despite the efforts of the most powerful states to block it, represents a small victory for the cause of democracy in the international community. Regardless of the form of the Opinion itself, it is a significant affirmation of the principles of justice and equality that a majority of the community's less powerful members were able to have their day in court. In this respect, the ICJ has regained some ground in maintaining a semblance of a separation of powers within the international government of the UN.[190]

It is ironic that in the context of the Nuclear Weapons Opinions, the ICJ may be spared the fate of excessive criticism or undue resistance by virtue of friction within its own ranks. In the absence of an authoritative, collective, judicial stance, states have ample scope to put their own gloss on the common ground mustered by the majority of the ICJ. While the ICJ should be applauded for grasping the nettle and opting to exercise jurisdiction, it is regrettable that the

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189. *See* ROSENNE, *supra* note 27, at 109.

190. For a considerably more deferential approach on the part of the ICJ to the interests of the permanent members of the Security Council, see Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.), 1992 I.C.J. 114 (Apr. 14); *see also* Dapo Akande, *The International Court of Justice and the Security Council: Is There Room for Judicial Control of Decisions of the Political Organs of the United Nations?*, 46 INT'L & COMP. L.Q. 309 (1997); Ken Roberts, *Second-Guessing the Security Council: The International Court of Justice and Its Powers of Judicial Review*, 7 PACE INT'L L. REV. 281 (1995).

judges could not forge greater common ground. In this respect, the threat to the prestige of the ICJ has come not only from outside but also from within.

Whether the Nuclear Weapons Opinions will lead to increased recourse to the advisory function remains an open question. One interesting legacy is the signal regarding NGOs participation on the fringes of the advisory procedure. The Nuclear Weapons Opinions establish an interesting precedent for the use of the advisory jurisdiction to circumvent the bar on the standing of individuals or NGOs imposed by its Statute.[191] But while the notion of extending standing is a welcome one, expansion by the backdoor is clearly not the optimum means of achieving it. At a general level, and aside from the question of access to the ICJ, these Opinions may encourage increased NGO participation in the activities of the UN organs and the specialized agencies.

At the end of the day, in many of the respects discussed, it may be wise not to overstate the lessons to be learned from the Nuclear Weapons Opinions. History is likely to show that these Opinions represent a unique episode in the operation of the ICJ.

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191. Article 34(1) of the ICJ statute states that "[o]nly States may be parties in cases before the Court." ICJ Statute, *supra* note 14, art. 34, para. 1.