are also binding in the "traditional sense" domestically, although not always in a "statutelike" sense. In the United States, it can be argued (and this author has so argued), the WTO rules, and certainly therefore the results of a dispute settlement panel, do not "ipso facto" become part of the domestic jurisprudence that courts are bound to follow as a matter of judicial notice, etc. However, the international law "bindingness" of a report certainly can and should have an important effect in domestic U.S. jurisprudence, as in the jurisprudence of many other nation-states.

JOHN H. JACKSON

NUCLEAR WEAPONS, INTERNATIONAL LAW AND THE WORLD COURT: A HISTORIC ENCOUNTER

The International Court of Justice has issued an advisory opinion of great weight on the legality of nuclear weaponry.[1] It is the first time ever that an international tribunal has directly addressed this gravest, unresolved threat to the future of humanity. The case divided the judges jurisprudentially and doctrinally in fundamental ways, with a narrow majority (that depended on a second casting vote by the President of the Court, Judge Mohammed Bedjaoui of Algeria[2]) forging a consensus that lends strong, yet partial and somewhat ambiguous, support to the view that nuclear weapons are of dubious legality.

In an important sense the narrowness of the majority is misleading, as three of the six dissenting judges refused to support the decision because it failed to find that existing international law supported a categorical prohibition on the threat or use of nuclear weapons. In another sense, the absence of a clear majority reflects the Court's failure fully to resolve the legal status of nuclear weapons. In fact, those judges that favored a stronger legal condemnation of nuclear weaponry appear to have regarded the majority decision as, if anything, a step backward, undermining the claims of scholars and others who had previously maintained that any threat or use of nuclear weaponry was illegal *as such*, without any consideration of context. What does seem definite, however, is that a fair reading of the decision represents a serious setback for the legal rationale relied upon by the nuclear weapons states, and their academic supporters.

The most crucial aspect of the *dispositif* on the core issue of legality reached a result that surprised those who had anticipated an either/or outcome, the Court having created some new doctrinal terrain by deciding that the threat or use of nuclear weapons is prohibited by international law, subject to a *possible* exception for legal reliance on such weapons, but only in extreme circumstances of self-defense in which the survival of a state is at stake.

It seems helpful to distinguish the common ground that united the Court as a whole from the narrowly crafted majority that (arguably) accentuates the uncertainty surrounding the applicability of international law and from the various minority positions that gave rise to a series of dissenting opinions. An impression of the dispersion of views, as well as the importance attached to the case by the Court's members, is confirmed by the fact that all fourteen participating judges saw fit to write an opinion or statement of some kind that set forth their individual views.

[1] Legality of the Threat or Use of Nuclear Weapons, General List No. 95 (Advisory Opinion of July 8, 1996) [hereinafter Nuclear Weapons].

[2] *See* INTERNATIONAL COURT OF JUSTICE STATUTE Art. 55(2).

COMMON GROUND

Most obviously, the common ground is established by those elements of the *dispositif* that enjoyed the unanimous or near-unanimous support of the fourteen participating judges. Thus, the advisory opinion concludes unanimously that "neither customary nor conventional international law" contains "any specific authorization of the threat or use of nuclear weapons."[3] In somewhat more contested fashion, the judges voted eleven to three that "neither customary nor conventional international law" contains "any comprehensive and universal prohibition of the threat or use of nuclear weapons as such."[4]

A second unanimous conclusion is that any use of nuclear weapons contrary to Article 2(4) of the United Nations Charter, and not vindicated by Article 51, is "unlawful."[5] It was agreed by all the judges as well that a threat or use of nuclear weapons is governed by "the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law, as well as [by] specific obligations" arising from treaties and other undertakings that "expressly deal with nuclear weapons."[6] None of this is very startling, and was not challenged by any nuclear weapons states in their pleadings.[7]

More significant, undoubtedly, especially if read in conjunction with the reasoning in the text of the decision,[8] is paragraph 2F of the *dispositif*, which unanimously calls upon states to uphold their "obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects."[9] This emphasis in the advisory opinion on the obligatory character of Article VI of the Non-Proliferation Treaty (NPT) appears to represent common legal ground between nuclear and non-nuclear weapons states. It is a tacit acknowledgment of the deep split among the judges and in international society generally as to the legal status of nuclear weapons. This split makes it unlikely that regimes of prohibition of the sort negotiated for biological and chemical weapons could be achieved for nuclear weapons. The constructive alternative is to give weight to the legal commitment by the nuclear weapons states to pursue disarmament as a serious policy goal. Although the decision refrains from criticizing the current behavior and practice of particular states, it seems rather evident that the most important nuclear weapons states have for several decades preferred, and even insisted upon, an arms control approach based on minimizing the risks of possessing nuclear weapons. In diplomatic practice, this reliance on arms control has led to a repudiation of general and complete disarmament as a policy goal, and an unwillingness to submit or consider nuclear disarmament proposals as a basis for international negotiations.[10] The unanimity

[3] Nuclear Weapons, para. 105(2)(A).

[4] *Id.*, para. 105(2)(B).

[5] *Id.*, para. 105(2)(C).

[6] *Id.*, para. 105(2)(D).

[7] Although the Court's conclusion here does seem to support strongly the view that the authority of Article 2(4) persists despite a great deal of contrary state practice. Given the importance of the issues, much scholarly attention has been devoted to this tension between Charter norms and the claims of states to use force. *See* Thomas M. Franck, *Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force by States*, 64 AJIL 809 (1970); Louis Henkin, *The Reports of the Death of Article 2(4) Are Greatly Exaggerated*, 65 AJIL 544 (1971); Oscar Schachter, *In Defense of International Rules on the Use of Force*, 53 U. CHI. L. REV. 113 (1986); MYRES S. MCDOUGAL & FLORENTINE P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER (1961); ANTHONY CLARK AREND & ROBERT J. BECK, INTERNATIONAL LAW AND THE USE OF FORCE (1993).

[8] Nuclear Weapons, paras. 98–103.

[9] *Id.*, para. 105(2)(F).

[10] This posture can be contrasted with the proclaimed disarmament goals of the nuclear superpowers that held up through the mid-1960s. The official framework for disarmament policy was set forth in the famous McCloy-Zorin Agreed Principles on Disarmament Negotiations, Sept. 20, 1961. For a skeptical interpretation of this alleged pursuit of disarmament goals, see RICHARD J. BARNET, WHO WANTS DISARMAMENT? (1960). A momentary glimmer of commitment to nuclear disarmament occurred at the minisummit of November 1986, when General Secretary Gorbachev and President Reagan met in Reykjavik, Iceland.

of the Court as to the disarmament obligation thus goes against the prevailing outlook of the declared nuclear weapons states, especially that of the United States and the United Kingdom, and could become *substantively* important at some subsequent time. Indeed, it gives indirect encouragement to peace groups around the world that have been calling for nuclear disarmament ever since the first atomic explosions in 1945. This legal endorsement of disarmament also amounts, even if unwittingly, to a sharp criticism of the nuclear weapons states for their abandonment of any serious pursuit of disarmament goals in recent decades.

In addition, there is a broad consensus among the judges on a positivist assessment of international law obligations, resting on evidence that states have directly or indirectly consented to the applicability of given rules and standards. None of the judges rested their legal analysis on naturalist or Marxist canons of jurisprudence, although the three dissenters favoring an unconditional prohibition arguably blended a positivist conclusion with some natural law reasoning, especially Judge Christopher G. Weeramantry. Also, Judge Rosalyn Higgins seems somewhat enigmatically to reflect the value-oriented contextualism of the New Haven School in the final, decisive sentence of her dissent: "It is not clear to me that either a pronouncement of illegality in all circumstances of the use of nuclear weapons or the answers formulated by the Court in paragraph 2E best serve to protect mankind against the unimaginable suffering that we all fear."[11] Implicit here is the view that if the normative end of avoiding nuclear catastrophe could be reliably discerned, then international law would be construed to prohibit it. In effect, the Court exhibits acceptance of a "soft *Lotus*" approach, namely, the view that limitations on a state's freedom of action cannot be presumed or deduced from world order values, but must rest on the consent of the state or the application of legal rules and principles to the context of actual use. The majority did not favor the "hard *Lotus*" view, namely, that whatever is not explicitly forbidden to a state is permitted.[12]

Also of great importance is the near-unanimity of the Court on the matter of complying with the request of the General Assembly for an advisory opinion on the legality of a threat or use of nuclear weapons. The judges voted thirteen to one in favor, with only Judge Shigeru Oda opposed, not on jurisdictional grounds but through reliance on the discretionary power of the Court to decline to respond.[13] The majority opinion convincingly explains the importance of responding to questions properly put to it by UN organs, as provided for by Article 96(1) and (2) of the Charter, and disregards the strongly argued objections of several states, including the United States, that the question was too vague and abstract, too fraught with political baggage, and too obstructive of other, more appropriate diplomatic efforts to control the dangers posed by the existence of nuclear weapons. The approach of the Court to the delimitation of its advisory role gains in clarity because of the reasoned refusal to respond in the companion case arising out of a request by the World Health Organization for an advisory opinion on the legality of using nuclear weapons, which was treated by an eleven-to-three majority as an inappropriate question, given the proper scope of WHO concerns.[14]

The acceptance of the General Assembly's request in this instance is also important as an expression of judicial independence by the Court. After all, such an outcome was strongly opposed by all of the permanent members of the Security Council except China,

[11] Nuclear Weapons, Dissenting Opinion of Judge Higgins, para. 41.

[12] This reading is strongly supported by Nuclear Weapons, Declaration of Judge Bedjaoui, paras. 12–16.

[13] The considerable irony here is that Japan has suffered more directly than any other country from the contested weaponry, and it was Japanese society more than any other that exhibited grassroots support for recourse to the International Court of Justice.

[14] Legality of the Use by a State of Nuclear Weapons in Armed Conflict, General List No. 93 (Advisory Opinion of July 8, 1996).

both in the debates on the General Assembly resolution and in the written and oral pleadings before the Court. Not only did all but one of the judges support jurisdiction and refuse to use their discretion to refrain from issuing a response, but the Court as a whole substantively affirmed the applicability of international law to the status of nuclear weapons.[15] Part of the common ground among the judges, then, is a broad duty to respond to appropriate requests for advisory opinions, despite the objections of leading states and the political difficulties arising from the poor prospects that the advice proffered will be accepted, or even treated by affected governments with seriousness and respect.

THE DECISION

The official response to the most crucial aspect of the question put by the General Assembly is contained in paragraph 2E of the *dispositif* and was supported by seven of the fourteen judges, with the majority needed for the decision depending on the casting, second vote of President Bedjaoui. Does this suggest a 50:50 split with respect to legality? Not really. If the decision is read as in important respects constraining the discretion of states to threaten to use or use nuclear weapons, the three dissenting judges who believe that nuclear weapons are categorically illegal can be counted as part of the majority, creating a ten-to-four vote. Furthermore, the arguments of the seven judges who dissented (counting Judge Gilbert Guillaume's "individual opinion" as a dissent) lack any internal coherence, and only Judges Stephen Schwebel, Higgins and Guillaume gave support to the claim of the nuclear weapons states that, although international law applies, it does so only in the context of an actual threat or use of nuclear weapons. However, it must be acknowledged that the important supporters of the General Assembly resolution among the UN membership did not give much prominence to their request for an advisory opinion, and seemed to opt for a low-profile approach in the setting of written and oral pleadings, quite possibly reflecting the partial effectiveness of United States diplomacy, which tried hard to discourage any recourse to the Court on these matters.

The substantive issue that the judges agreed was at the core of the General Assembly's question is addressed in paragraph 2E of the *dispositif*. It is here that the Court breaks new ground that will invite controversy about the correct interpretation of international law, generating criticism and commentary from the two main camps—those who believe that nuclear weapons are a legitimate weapon unless used in a manner otherwise violative of international law and those who are convinced that nuclear weapons are inherently illegal. In this crucial respect, the decision will disappoint both those who endorse the approach of the nuclear weapons states and those who attack reliance on any threat or use of nuclear weaponry as automatically a violation of international law; but it will not disappoint them equally, its overall reasoning being far more supportive of the latter than the former outlook.

Paragraph 2E contains only two sentences. The first part, resting on the earlier aspects of the *dispositif*, states a general conclusion: "It follows from the above-mentioned require-

[15] This outcome helps to neutralize the impression of the *Lockerbie* decision that a majority of the Court is subservient to geopolitical pressures, especially in light of the repudiation of the authority of its earlier decision in the *Nicaragua* case (Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, 1986 ICJ REP. 14 (June 27)). *See* Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. UK; Libya v. U.S.), Provisional Measures, 1992 ICJ REP. 3, 114 (Orders of Apr. 14). For an important jurisprudential interpretation of the outcome in the *Nicaragua* case, arguing that the decision was diplomatically effective in shaping a peace process despite the rejection of the authority of the Court by the U.S. Government, see JOAQUIN TACSAN, THE DYNAMICS OF INTERNATIONAL LAW IN CONFLICT RESOLUTION (1992).

ments 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."[16] The innovative orientation toward the issue of legality arises from the insertion of the word "generally," giving a conditional character to the language of prohibition. The second sentence of 2E reduces somewhat the ambit of ambiguity:

> However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.[17]

Note, especially, that the Court is clearly not validating a threat or use of nuclear weapons in "an extreme circumstance of self-defence" but asserting that it "cannot conclude definitively" one way or the other with respect to the legality of such a claim even in that situation. This acknowledged inability to describe the legal character of a threat or use of nuclear weapons in extreme self-defense introduces the issue of *non liquet* centrally into the legal debate among the judges on the Court, and will undoubtedly divide the scholarly community in an analogous fashion.

In a somewhat unusual move, but one that deserves serious notice, the decision precedes the *dispositif* with a call to comprehend and interpret the conclusions it contains by referring back to the reasoning in the body of the opinion:

> [T]he Court emphasizes that its reply to the question put to it by the General Assembly rests on the totality of the legal grounds set forth by the Court above (paragraphs 20 to 103), each of which is to be read in light of the others. Some of these grounds are not such as to form the object of formal conclusions in the final paragraph of the Opinion; they nevertheless retain, in the view of the Court, all their importance.[18]

Such a mandate to interpreters underscores the sensitivity and nuanced character of the vital issues being addressed, suggesting immersion in the overall decision, and to some extent merges the holdings or conclusions reached and the legal reasoning relied upon.

The most problematic character of the majority decision is its failure to clarify its understanding of the restrictions to be placed upon a potential self-defense argument on behalf of a particular threat or use of nuclear weaponry. It does seem clear that a claimant state can legally threaten or use nuclear weapons only in a situation of self-defense, and then only in extreme circumstances where survival is at stake. What is confusing, however, is the extent of this possible loophole. The *dispositif* declares that a self-defense claim could be legally valid in situations in which the survival of "a State" is sufficiently threatened, apparently opening the door to claims of collective self-defense. However, a narrower construction of the conceivable legal right to threaten or use nuclear weapons in self-defense does seem implied by the language in the decision that limits such a right to "an extreme circumstance of self-defence, in which *its* very survival would be at stake."[19] This view is reinforced by the observation in the separate opinion of Judge Carl-August Fleischhauer that "[t]he margin that exists for considering that a particular threat or use of nuclear weapons could be lawful is therefore extremely narrow."[20] It is unfortunate that the majority did not resolve this internal tension between

[16] Nuclear Weapons, para. 105(2)(E).
[17] *Id.*
[18] Nuclear Weapons, para. 104.
[19] *Id.*, para. 97 (emphasis added).
[20] *Id.*, Separate Opinion of Judge Fleischhauer, para. 6, as reinforced by Declaration of President Bedjaoui, *supra* note 12, paras. 11, 15.

the language of the *dispositif* and the legal reasoning of paragraph 97. But it should be emphasized that the Court is not confirming the legality of such a self-defense exception but arguing that at present international law does not definitively rule out such an exception.

On a related matter, the decision unfortunately also does not address the status of self-defense claims in circumstances where no nuclear weapons are threatened, used, or even possessed by an aggressor state that has put the survival of its adversary at risk. It thus undermines, by implication, the argument of those who contend that, by practice and formal action, the nuclear weapons states have already substantially renounced first-use options against non-nuclear adversaries, at least where the claim is one of collective, rather than individual, self-defense.[21]

The Court never gives concrete instances to clarify what is specifically entailed by its doctrinal statement on self-defense, possibly for reasons of discreetness, possibly as a tacit acknowledgment of the limits to its competence to address strategic questions with any authority. But it would appear, at the very least, that the atomic attacks on Hiroshima and Nagasaki, given the imminent defeat of Japan in August 1945, should be regarded as violative of international law, and quite independently of whether in the context of use there were parallel violations of rules and principles of international humanitarian law pertaining to discrimination, avoidance of unnecessary suffering, and proportionality.[22] In effect, the Court has endorsed a partial prohibition on the threat or use of nuclear weapons as embodied in *existing* international law that would forbid any future threat or use even if the claim of extreme self-defense had been available at the start of the war and the main American justification of "saving lives" that had been relied upon in relation to the atomic attacks at the end of World War II was treated as persuasive on the facts. Nuclear weaponry would also seemingly not be available to punish or deter a state that resorted to illegal tactics in the course of armed conflict, as Iraq did to some extent in the Persian Gulf war.[23] Nor would threats to use nuclear weaponry to deter a so-called rogue state that possessed a limited nuclear (or chemical or biological) capability be compatible with the broad outlines set forth, especially the impression conveyed that threats and uses of nuclear weapons are only legally available, if at all, under the pressure of necessity, that is, in the absence of alternatives when aggression threatens the survival of the state.

What would the scope of legality be? In the first instance, it would be a plausible claim of self-defense in a situation where the survival of the state was credibly at stake. Possibly, on the basis of such reasoning, an Israeli threat or use during the opening days of the 1973 Arab-Israeli War would qualify. But would a Soviet attack on Florida during the Cuban missile crisis give the United States a legal right to respond with nuclear weapons? Or a Soviet military challenge to the viability of West Berlin at the height of the Cold War? The formal answer provided by the Court is that, in accordance with Article 51, the legality of any use of nuclear weapons in circumstances of a claimed right of self-defense would in the first instance be made by the claimant state or its ally, but subject to the procedural requirements of immediately reporting to the Security Council for a final determination as to lawfulness.[24]

[21] For a forceful argument along this line, see Jeremy J. Stone, *Less than meets the eye*, BULL. ATOM. SCIENTISTS, Sept./Oct. 1996, at 43–45.

[22] It was on such contextual grounds that a Japanese domestic court legally condemned the atomic attacks in the only formal judicial appraisal of these events. For commentary, see Richard A. Falk, *The* Shimoda *Case: A Legal Appraisal of the Atomic Attacks upon Hiroshima and Nagasaki*, 59 AJIL 759 (1965).

[23] See Judge Schwebel's dissent for an argument as to the contextual legality of nuclear weapons, but without consideration of claims that run counter to U.S. foreign policy, for example, if China threatens to reincorporate Taiwan.

[24] Nuclear Weapons, para. 44.

The most obviously controversial aspect of the decision is the central conclusion that *existing* international law embodies a position situated somewhere between those who argue the hard *Lotus* view that any weapon not expressly forbidden is permitted, provided it conforms in actual use to the law of armed conflict, and those who contend that the various prohibitions of customary international law, reinforced by application of the Martens Clause, make illegal any and every threat or use of nuclear weapons. The scholarly literature did not anticipate the result reached by the Court, but tends to divide between the contextualists (legal if used in accordance with rules and principles of the law of war) and the prohibitionists (illegal under all circumstances).[25]

In support of the Court's position is the view that its conclusion most accurately reflects the complex and contradictory mixture of normative elements, including the tension between the logic of prohibiting all weaponry of mass destruction and the logic of self-defense, as well as the cumulative impact of antinuclear efforts in global civil society and the UN General Assembly to delegitimize reliance upon, and even the retention of, nuclear weaponry. As the Court expresses its own sense of this evolution by reviewing various treaties and assurances associated with limiting the domain of nuclear weapons, concluding that this trend "certainly point[s] to an increasing concern in the international community with these weapons; the Court concludes from this that these treaties could therefore be seen as foreshadowing a future general prohibition of the use of such weapons."[26] To similar effect, the Court finds "a growing awareness of the need to liberate the community of States and the international public from the dangers resulting from the existence of nuclear weapons," but not so much as to establish "a comprehensive and universal conventional prohibition on the use, or the threat of use, of those weapons as such."[27]

The Court also gives certain normative weight to the resolutions of the General Assembly over the years that have disclosed "the desire of a very large section of the international community to take, by a specific and express prohibition of the use of nuclear weapons, a significant step forward along the road to complete nuclear disarmament."[28] While the Court notes a deep concern about legality in international society, it concludes that it is not yet of such a character as to satisfy the requirements of *opinio juris* associated with the emergence of a customary rule of unconditional prohibition specifically associated with nuclear weapons. The Court uses an intriguing formulation to express its perception of the current legal status of nuclear weaponry, discerning "the continuing tensions between the nascent *opinio juris* on the one hand, and the still strong adherence to the practice of deterrence on the other."[29] It explicitly avoids making any legal assessment of deterrence in theory and practice.[30] At the same time, the decision does circumscribe the legal right to threaten or use nuclear weaponry in a manner that seems inconsistent with the practice of deterrence in most of its forms, other than possibly so-

[25] The academic treatment of these issues that most closely resembles the approach and substantive conclusions of the World Court is that of Burns H. Weston, *Nuclear Weapons versus International Law: A Contextual Reassessment*, 28 McGILL L.J. 542 (1983). The main difference is that the majority in the advisory opinion stresses legal uncertainties arising from claims of self-defense in extreme circumstances, whereas Professor Weston focuses on comparable uncertainties associated with first and second defensive uses, that is, differentiating between introducing nuclear weapons into a conflict (first use) and responding to a prior reliance by the aggressor on nuclear weaponry (second use). Since both uses are qualified by Weston as "defensive," his distinction is an alternative to the Court's way of identifying extreme occasions of self-defense where recourse to nuclear weapons might be legal. Weston's approach would meet the objection to the advisory opinion that it potentially authorizes a defensive first use. *See* note 21 *supra*.

[26] Nuclear Weapons, para. 62.

[27] *Id.*, para. 63.

[28] *Id.*, para. 73.

[29] *Id.*

[30] Nuclear Weapons, para. 67.

called minimum deterrence. A problematic character of the decision arises from this failure to address more directly the current doctrines and practice of nuclear weapons states, which leaves in doubt the policy implications of the legal advice being given. Admittedly, the Court was confronted by a dilemma: had it attempted to remove doubt as to the legality of current practice by making detailed commentary on strategic doctrines in various settings, it would have manifested a degree of technical incompetence that would likely have considerably damaged its reputation as a responsible judicial body.

Judge Higgins based her dissent in relation to paragraph 2E mainly on a critique of the inconclusiveness of the outcome, considering it to be a decision that reaches a formally unacceptable result of *non liquet* tantamount to acknowledging the incompleteness of international law as a legal system.[31] The Russian judge, Vladlen S. Vereshchetin, in a helpful declaration, offered a response to Judge Higgins, arguing that, if the Court is to avoid "the burden of law-creation," it must refuse to fill in the gaps and acknowledge the inconclusiveness that it finds. This view is particularly persuasive, according to Judge Vereshchetin, in the setting of the Court's "advisory procedure" where there is no need "to resolve an actual dispute between actual Parties," but where the appropriate role of the Court is "to state the law as it finds it at the present stage of its development."[32]

The attack on the majority decision made by the three dissenting judges, who argued in separate opinions that the threat or use of nuclear weapons is invariably illegal, is based on the view that the inherent characteristics of the weaponry, as well as its use in World War II and contemplated use ever since, are radically inconsistent with the existing obligations of international humanitarian law. To reach this conclusion, these judges rejected the view that there is a need for a *specific* customary or treaty norm of prohibition (as exists in the instance of other prohibited categories of weaponry). Their opinions accord priority to human survival and the unconditional nature of the restrictions of international humanitarian law even in the context of extreme self-defense, and they reject the inconsistent legal claims and practice of the important nuclear weapons states. In effect, these dissenters interpret this practice as a pattern of unlawful conduct that was commenced with the atomic attacks at the end of World War II. They regard the Court's decision in some respects as a setback, giving states a potential legal option to use nuclear weaponry that allows them to invoke claims of self-defense to reconcile such a posture with the decision.[33]

The fact that the three judges chose to dissent may deprive the decision of a higher degree of authoritativeness than might have resulted if they had decided to write separate opinions. Instead, the combination of the three antinuclear dissents and the four other dissents fosters a misimpression of a deep and essentially equal division on the core issue of legality. It is misleading because the majority judges share with the dissenters a considerable area of overlap when it comes to doubts about the legality of threats or use of nuclear weaponry. At the same time, deciding to dissent was undoubtedly a carefully considered choice and expresses deeply felt matters of jurisprudential integrity,

[31] Compare the interesting paragraph on "the question of *lacunae*" in ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 10 (1994).

[32] Nuclear Weapons, Declaration of Judge Vereshchetin, at 1.

To similar effect is the separate opinion of Judge Fleischhauer, *supra* note 20, which contains the following important sentence in paragraph 6: "The present state of international law does not permit a more precise drawing of the border-line between unlawfulness and lawfulness of recourse to nuclear weapons."

This line of interpretation is forcefully elaborated upon in President Bedjaoui's Declaration, *supra* note 12, para. 7, where he insists that the essence of judicial responsibility is to apply law as it exists, and neither "denigrate nor embellish" it. See generally on this, *id.*, paras. 6–10.

[33] This assessment is made explicit near the beginning of the Dissenting Opinion of Judge Shahabuddeen, at 1–2.

as well as concerns about the effectiveness of international law that do relate to the *non liquet* controversy, whose technical character obscures its practical relationship to varying approaches to strengthening the role of international law among states.[34]

Only the Vice-President of the Court, the American Judge Schwebel, fully argued the case for responding to the question put by the General Assembly in a generally affirmative manner, taking the view that in the absence of an explicit rule of prohibition, the legality of using nuclear weapons must be assessed in the same manner as using any other weapon that has not been banned by treaty. Judge Schwebel believes that "[t]he essence of the problem" facing the application of international law is the difficulty of reconciling the legitimating impact of "[f]ifty years of the practice of States" that "does not debar, and to that extent supports, the legality of the threat or use of nuclear weapons in certain circumstances" with the antecedent principles of international humanitarian law.[35] For Judge Schwebel, the practice of the nuclear weapons states is deserving of particular respect because they are leading members of international society, as is partly evidenced by their permanent membership on the Security Council. Unlike the majority, Judge Schwebel does not balance the practice of the nuclear weapons states against the antinuclear sentiments of the international community as a whole, ignoring the legal relevance of the latter. This selectivity as to sources facilitates the clarity of Judge Schwebel's main conclusion, but it gives his dissent a rather one-sided tone, especially as he approvingly relies exclusively on the recent practice of his own government.

Judge Schwebel bolsters his contextual approach to legality with a rather detailed presentation of what he believes to have been the constructive role played by uncertainty about when the United States might use nuclear weapons in the gulf war. His broader contention is that the Court, given the status of nuclear weapons under international law, cannot prejudge by abstract pronouncement the appropriateness of reliance on threats or uses of nuclear weaponry, and that on the basis of experience since 1945, it is preferable as a matter of policy that this authority be left in the hands of political leaders in the nuclear weapons states who have demonstrated their prudence and competence.

It is not possible to do critical justice to the full gamut of argument set forth by Vice-President Schwebel in support of his conclusions, but it is worth noting his rousing attack on the formulation by the majority of the self-defense exception in the second part of paragraph 2E. He finds it to be "an astounding conclusion" because of its confession of inconclusiveness, and stresses the utter unacceptability of what he conceives to be a *non liquet* on such a vital question.[36] In this jurisprudential concern about an indefinite outcome, the various dissenters, despite their contradictory substantive positions, are far closer to one another than to the majority.

ASSESSMENT

It is not possible to do more than consider a few highlights from various interrelated points of view: development of international law, reputation of the World Court, political impact and pedagogical significance.

[34] It is not possible here to discuss in an adequate manner the various positions argued by the three dissenters, each of whom contributed a comprehensive and important assessment of the main question as to legality. Judge Weeramantry's 85-page dissent is likely to be widely studied, commented upon, and quoted, especially by transnational social groupings that over the years since 1945 have been mainly responsible for mounting a challenge to those governments relying on nuclear weaponry and by scholars attentive to the legal debate likely to be generated by the advisory opinion.

[35] Nuclear Weapons, Dissenting Opinion of Judge Schwebel, at 1.

[36] *Id.* at 8.

Development of International Law

In my view the majority reaches *a* plausible, but not the only plausible, conclusion, given the contradictory elements associated with the status of nuclear weapons under existing international law; and it does so in a manner that impressively comes to grips with the complexity of the issues. Significantly, it attaches legal weight to the antinuclear consensus among the UN membership and trends in global civil society without overlooking the contrary practice and legal views of the nuclear weapons states and some of their allies.[37] To do this, however, results in an element of inconclusiveness about the legal result, which introduces learned discussion of whether a *non liquet* has been declared and, if so, whether this itself is contrary to international law in the setting of an advisory opinion.

It is important to appreciate that legal uncertainty pertains to only one aspect of the main conclusion of the majority: that the threat or use of nuclear weapons is unlawful except possibly in extreme circumstances of self-defense where survival of a state is at stake. As suggested above, aside from these circumstances, any threat or use of nuclear weapons would seem contrary to international law. What constitutes a threat, however, is not clarified in relation to deterrence, and this leaves considerable discretionary scope to the nuclear weapons states. This discretion can be viewed as itself somewhat contingent, if the legal duty to pursue nuclear disarmament is diligently pursued in good faith.

Would the majority have made a larger contribution to the development of international law if it had definitively concluded that the threat or use of nuclear weapons was illegal except in circumstances of extreme self-defense, understood as involving the survival of the claimant state? Such clarity would have undercut the objections by various dissenters as to the inconclusiveness of the central legal holding, but in its place it would have raised the more dangerous contention of judicial legislation. There was no way for the majority to avoid this dilemma in view of its assessment of the incoherent interplay of rules, principles and practice that constitutes existing international law. In this regard, careful students of international law will appreciate the challenge confronting the Court and give respect to its response to the General Assembly, even if they disagree to varying extents with the legal assessments made. Whether international law will develop in accordance with the advice given, namely, in the direction of nuclear disarmament, depends on the reception of the decision in various arenas of influence, including those within government, the United Nations system, civil society, academia and the media. Also relevant, of course, are views among policy makers as to the viability of nuclear disarmament, given current world conditions.

Reputation of the World Court

It is difficult to tell at this point whether the decision will be treated as sufficiently significant to affect the Court's reputation one way or the other as a judicial organ. It appears, in the very short run, that the impact of the decision will be marginalized. The nuclear weapons states have an obvious interest in minimizing the attention accorded to it, and are not so centrally challenged in their current policy postures as to induce frontal attacks on the Court (of the sort made by the United States Government after losing out in the context of its anti-Sandinista policies in Nicaragua).[38] In the longer run, I believe, the decision will enhance the reputation of the Court, first of all, by its strong consensus in favor of taking on such a politically sensitive and geopolitically risky request from the General Assembly, especially in light of the mood in the United Nations

[37] For support of such an approach, see Richard A. Falk, *The World Order between Inter-State Law and the Law of Humanity: The Role of Civil Society Institutions, in* COSMOPOLITAN DEMOCRACY 163 (Daniele Archibugi & David Held eds., 1995).

[38] See citations and discussion in note 15 *supra.*

at this time. Further, I think the decision will receive a significant response from civic groups around the world concerned with nuclear issues, including professional lawyers' associations that had been so active in encouraging recourse to the Court by the World Health Organization and the General Assembly.[39]

Political Impact

In one central regard, it is necessary to be skeptical. States are habitually resistant to legal challenges directed at their national security policies, and powerful states are especially so. There is little likelihood in the near future that the decision will have any discernible impact on the behavior of nuclear weapons states, either with respect to the roles assigned to nuclear weapons or with regard to the duty to seek nuclear disarmament. This prospect is reinforced by the reluctance of most non-nuclear states to take a confrontational stance toward the nuclear weapons states at this time, and by the overall current weakness of the General Assembly as an organ of decision and influence. This set of conditions is likely to be intensified if nuclear testing is stopped, either by treaty or otherwise, as much of the grassroots antinuclear pressure of recent decades has been associated with continued testing, rather than with the existence of the weapons.

However, it would be a mistake to confine inquiry to short-term intergovernmental impact. The decision is likely to have a consciousness-raising effect on informed public opinion around the world, which might at some point result in renewed and intensified antinuclear pressures, especially if there are any new catastrophic events, even if not of a strictly military character (e.g., Chernobyl). Such pressures could be made more effective if there is a heightened belief in governmental circles that present security requirements can be satisfied without any reliance on nuclear weapons, including in their deterrent mode. Also important would be the resolution of festering regional conflicts, especially in the Middle East and East Asia, and the emergence of visionary individuals as political leaders of one or more of the nuclear weapons states. The language and reasoning of the decision of the Court provides strong encouragement to antinuclear social and political forces to push for abolition, with respect to both existing security policy and nuclear disarmament.[40] It also provides a legal grounding for the advocacy of antinuclear positions *within* government. And it strengthens the bargaining positions of non-nuclear states in relation to the nonproliferation agenda, especially with respect to the Article VI obligation of the NPT.

Pedagogic Significance

There is little doubt that the decision will have a major impact on study and reflection associated with the legal status of nuclear weapons. The decision, read in conjunction with various of the dissents, is a unique and invaluable pedagogic tool for addressing the question put by the General Assembly to the World Court and, beyond this, for considering the relationship between law and politics in international relations and the function of the World Court, especially its advisory role within the UN system. I anticipate a surge of scholarly attention to the legal status of nuclear weapons in light of the decision, as well as to the legal scope of the right of self-defense, which in turn will stimulate greater academic and public interest.

[39] I have in mind particularly the International Association of Lawyers against Nuclear Arms and the U.S. Lawyers Committee on Nuclear Policy.

[40] This encouragement is also strongly promoted by the issuance of REPORT BY THE CANBERRA COMMISSION ON THE ELIMINATION OF NUCLEAR WEAPONS (Aug. 14, 1996). The Canberra Commission is an independent body consisting of 17 eminent persons, appointed by the Australian Government in November 1995.

CONCLUSION

The Court lived up to its historic challenge by responsibly addressing the momentous question posed by the General Assembly about the legal status of a threat or use of nuclear weapons. As suggested, alternative readings of international law were plausible, but the conclusions reached by the Court represent a large step forward with respect to doctrinal clarification. As the majority itself suggests, there remains significant work to be done, through either a specific prohibition of nuclear weapons or nuclear disarmament, but the direction of effort is clear, and of great encouragement to all those who have struggled since 1945 for the legal prohibition and physical elimination of nuclear weapons. As with other normative projects, such as the abolition of slavery and the repudiation of apartheid, perseverance, struggle and historical circumstance will shape the future with respect to nuclear weaponry, but this process has been pushed forward in a mainly beneficial direction by this milestone decision of the World Court.

RICHARD A. FALK*

DUE PROCESS AND WITNESS ANONYMITY

In the April 1996 issue of the *Journal*, Monroe Leigh strongly criticized the pretrial ruling of the trial chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 in *Prosecutor v. Tadić*,[1] which held that "the identities of several victims and witnesses can be indefinitely withheld from the accused and his counsel."[2] Justice Stephen vigorously dissented from the ruling of the chamber. Mr. Leigh claims that the majority's ruling will deny the accused a fair trial and *may* lead to the conviction of accused persons on the basis of tainted evidence.[3] I would argue that he has failed to take into account the full details of the chamber's judgment, which recognized in particular that the accused's right to know and confront prosecution witnesses is not absolute but may have to be balanced against other important interests.

It is undoubted that those accused of offenses under the jurisdiction of the Tribunal must receive a fair trial in accordance with the human rights standards laid down in international instruments, including the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 6)[4] and the International Covenant on Civil and Political Rights (Article 14).[5] This is required by the Statute of the Tribunal (Article 21).[6] Accordingly, in drafting the Rules of Evidence and Procedure of the Tribunal, the judges incorporated throughout guarantees for the conduct of proceedings in accordance with international standards of fair trial and due process. The credibility and legitimacy of the Tribunal depend upon its fulfilling these guarantees, as does its value in setting precedents for future war crimes trials at either the international or the domestic level.

Nevertheless, the requirements of a fair trial cannot be determined in the abstract. The Tribunal was established during an armed conflict amid real fears for the safety of

* I would like to thank Burns Weston for helpful editorial suggestions, especially on the central issue of self-defense.

[1] Prosecutor v. Tadić, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, UN Doc. IT-94-1-T (Aug. 10, 1995) [hereinafter Decision].

[2] Monroe Leigh, *The Yugoslav Tribunal: Use of Unnamed Witnesses Against Accused*, 90 AJIL 235, 236 (1996).

[3] Judges McDonald and Vohrah constituted the majority of the chamber.

[4] Nov. 4, 1950, 213 UNTS 221, 228 [hereinafter European Convention on Human Rights].

[5] Dec. 16, 1966, 999 UNTS 171, 176 [hereinafter ICCPR].

[6] Article 21 is titled "Rights of the accused" and 21(2) specifies that the accused is entitled to a "fair and public hearing." *See* Statute of the Tribunal, UN Doc. S/25704, annex (1993), 32 ILM 1192, 1198 (1993).