A Critique of the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons, 8 July 1996: The Nuclear Weapons Case

Christopher Hubbard

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A Critique of the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons, 8 July 1996: the “Nuclear Weapons Case”

by

Christopher Hubbard B.A.

A thesis submitted in fulfilment of the requirements for the degree of Bachelor of Arts (Honours) (Legal Studies).

Faculty of Arts, Edith Cowan University (October, 1997).
The Use of Thesis statement is not included in this version of the thesis.
“Salus populi suprema est lex,”

Marcus Tullius CICERO (106 - 44 BCE).
DECLARATION

I certify that this thesis does not incorporate without acknowledgement any material previously submitted for a degree or diploma in any institution of higher education; and that to the best of my knowledge and belief it does not contain any material previously published or written by another person except where due reference is made in the text.

Signature

Date
DEDICATION

This work is dedicated, with love, to my father, Michael John Hubbard,
to my brothers, Paul and Richard,
and to my mother, Marjorie Mary Hubbard, 1926 - 1976.

Requiescat in Pace.
ACKNOWLEDGMENTS

This thesis is due in no small part to a number of people, who deserve acknowledgment for their interest and efforts on my behalf.

Firstly, I must thank my supervisor, Dr. Gail Lugten, who was instrumental in fostering my interest for postgraduate work in international law. Her enthusiasm, her generous allocation of precious time to the development of my work, and her invaluable counsel have each helped to make the past year academically fulfilling.

Several people from outside the university community have lent their advice and resources. Jo Valentine, an indefatigable opponent of nuclear weapons, provided me with access to a wealth of documents from the World Court Project campaign.

Gareth Evans QC found time to encourage my studies, and provided me with valuable research vectors, as did John Griffin of the Peace, Arms Control and Disarmament Branch of the Department of Foreign Affairs and Trade.

The Arts Faculty library staff at Mount Lawley Library have cheerfully and efficiently answered my many queries.

Finally, I must acknowledge the support of my family, on both sides of the continent, for their unstinting support (of all kinds) for my endeavours.

It is not enough to care about the future of this world. Thoughts must be followed by actions.
ABSTRACT


The General Assembly of the United Nations, by Resolution, requested the International Court of Justice to give its Advisory Opinion on the following legal question:

Is the threat or use of nuclear weapons in any circumstance permitted under international law?

The question raises a number of legal, political and moral issues which go to the heart of the development of public international law, and of relations between States in the United Nations era.

Central to all such issues is the tension, both legal and political, which exists between the five declared nuclear weapon States (the Permanent Members of the United Nations Security Council) and most non-nuclear weapon States. Essentially, the latter take the view that the threat or use of nuclear weapons should be illegal in all circumstances, largely in terms of the humanitarian laws of armed conflict. The former insist that, in the absence of specific prohibition, nuclear weapons are not illegal in all foreseeable circumstances.

This dichotomy has been institutionalised in the 1968 Nuclear Non-proliferation Treaty, which solidified the discriminatory treatment accorded to nuclear weapons by the nuclear weapon States during the Cold War practice of deterrence.

The nub of the Court's findings was that it was unable to conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in extreme circumstances of self-defence, in which the very survival of a State would be at stake.
This thesis examines, in five Chapters, the legal and political background to the Case, the text of the Opinion, and the evidence and argument led by States. It evaluates the Opinion in terms of the Dissenting and other Opinions of individual judges of the Court, its dicta, and the coherence of its argument. Finally, it draws conclusions concerning the outcomes, relevance and impact of the Opinion for the judicial independence and integrity of the Court; nuclear deterrence, non-proliferation and disarmament; principles of self-defence in international law; and a rights-based approach to international relations and law.
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<table>
<thead>
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<th>Abbreviation</th>
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<tr>
<td>A.J.I.L.</td>
<td>American Journal of International Law.</td>
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<tr>
<td>B.Y.I.L.</td>
<td>British Yearbook of International Law.</td>
</tr>
<tr>
<td>C., Cd., Cmd., Cmd., Cm.</td>
<td>United Kingdom Command Papers.</td>
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<tr>
<td>C.T.S.</td>
<td>Consolidated Treaty Series.</td>
</tr>
<tr>
<td>I.C.J.</td>
<td>International Court of Justice.</td>
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<tr>
<td>I.L.M.</td>
<td>International Legal Materials.</td>
</tr>
<tr>
<td>Int. &amp; Comp. L. Q.</td>
<td>International and Comparative Law Quarterly.</td>
</tr>
<tr>
<td>L.N.T.S.</td>
<td>League of Nations Treaty Series.</td>
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<td>P.C.I.J.</td>
<td>Permanent Court of International Justice.</td>
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<td>R.I.A.A.</td>
<td>Reports of International Arbitral Awards.</td>
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<td>Treaties and Other International Acts Series.</td>
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**Trail Smelter Arbitration.** (United States v. Canada) (1938 and 1941) 3 *R.I.A.A. 1905*


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Treaty on the Non-proliferation of Nuclear Weapons, 1 July 1968 [7 I.L.M. 809; 1973 Aust. T.S. No. 3].


United Nations General Assembly Declaration on the Prohibition of the Use of Nuclear and Thermo-Nuclear Weapons, 1961 [A/RES/1653 (XVI)].

Universal Declaration of Human Rights, 1948 [UN Doc. A/810].


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FOREWORD.

The Advisory Opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons, given in response to United Nations General Assembly Resolution 49/75 K and handed down on 8 July 1996, was the culmination of several years of activity at both State and Non-Governmental Organisaton (NGO) levels around the world.

From an unpromising beginning in the form of private representations to the Governments of New Zealand and Australia in 1987, NGO activity aimed at obtaining a General Assembly “Request for Opinion” Resolution intensified rapidly, especially in the work of three large international bodies: the International Physicians for the Prevention of Nuclear War (IPPN), the International Peace Bureau (IPB) and the International Association of Lawyers against Nuclear Arms (IALANA).

These organisations initiated a global alliance of over 700 NGOs, known as the “World Court Project”, which played a leading role in the sponsorship and adoption of the United Nations General Assembly Resolution referred to above. The Draft Resolution, sponsored by Indonesia on behalf of the Non-Aligned Movement of States, was passed by a vote of 78 in favour, 43 against, with 38 abstentions on 15 December 1994.

A total of 43 States made written statements and oral submissions in the course of Pleadings before the Court, far greater than any previous case.

A similar question was put to the Court by Resolution of the Forty-sixth World Health Assembly of the World Health Organisation, a specialised Agency of the United Nations:

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? (Resolution 46/40, of 14 May 1993).
The Court declined to consider the request of the WHO, having regard for its jurisdiction in terms of Article 65 of its Statute, a component of the Charter of the United Nations.
This thesis comprises a critique of the Court’s Advisory Opinion in terms of the evidence of fact, and the law before it. By reviewing the strength of both (their relevance, interpretation and application to the question posed) it will assess the arguments led on both sides, and draw these together in order to evaluate the Court’s ratio decidendi.

Further, it will examine a range of possible effects and implications of the Opinion for the development of international law, while attempting, with respect, to indicate the circumstances from which it may be possible to impute a level of extra-juridical influence upon the Court which tends to call into question its standing as an international tribunal, and as an independent institution within the United Nations system.

With this in mind, it must be stated at the outset that this thesis takes the general position that the Court erred in its dispositif, at least to the extent of its finding of non-liquet on elements of fact, and of law available to it.¹

There can be little doubt that this Opinion, by far the largest matter ever brought before the International Court of Justice, is also one of its most important. As a signal example of the values assigned by the international community to the Court’s jurisprudence, the Opinion highlights the dual realities of its judicial and political roles.

The wide divergence of views surrounding the interpretation of international law, evident in the Pleadings by States before it, is reflected in the individual Opinions of Judges on the Court’s Bench. The Advisory Opinion stands as a sobering affirmation of the need to continue efforts to develop a positive Law of Nations which is capable of support from the entire international community.

¹ See Chapter II, Section 2.1, for the text of the Court’s dispositif.
CHAPTER I.

LEGAL AND POLITICAL PERSPECTIVES.

1. INTRODUCTION.

In order to develop a coherent and comprehensive critique of the Advisory Opinion, and one which takes account of both its legal and political contexts, it is necessary to draw together the threads of the evolution of public international law within the United Nations system since its inception in 1945, and to place the International Court of Justice within that frame. In doing so, it is essential to review the development of the international geopolitical system of States since that time, in the context of alternative theoretical analyses of the international system of relations between them.

An understanding of the juxtaposition and interdependence of these two fields of international affairs is vital to an integrated judgment of the tasks which the international community expects its “World Court” to perform, and of the Court’s success in discharging its duties.

2. STATEMENT OF AIMS.

The thesis has the following aims:

1. To examine critically the Advisory Opinion of the Court in respect of its jurisprudential coherence, having regard for:

   1 The time-frame referred to here includes the transitional period which the international system has now entered following the dissolution of the Soviet Union and the ending of the Cold War, both of which began during 1989. Wiener has asserted that the continued international leadership of the United States is central to the question of the effectiveness of the United Nations in the “new world disorder” of diffuse axes of power and lack of direction. He also quotes former U.S. President Bush, stating before Congress on 11 September 1990 that “we are now in sight of a United Nations which performs as envisioned by its founders”, and in January 1991 that: “we are the only nation on this earth that could assemble the forces of peace. This is the burden of leadership”. Wiener, J. (1995). Leadership, the United Nations, and the New World Order. In D. Bourantonis & J. Wiener (Eds.), The United Nations in the New World Order (pp. 41-63). Houndmills: Macmillan.
(a). The argument and evidence led and adduced before it by States;

(b). Its identification and interpretation of relevant law and evidence of fact from the corpus both of law and of evidence available to it.

2. To undertake a comprehensive review of all sources of international law in order to identify those relevant to the question posed by the General Assembly Resolution.

3. To ascertain the extent of available evidence of fact relevant to the question.

4. To interpret and apply relevant applicable law, and evidence of fact, in order to draw conclusions about the strengths and weaknesses of the Court's Opinion.

5. To examine, analyse and interpret the geo-political context in which the Advisory Opinion has been given, and the range of possible effects and implications of the Opinion in terms of the future course of international law, geo-political relationships, and nuclear disarmament.

6. To reach general and specific conclusions summarising the legal and political positions on both sides of the question, and defend the final position of the thesis.

3. THE GENESIS OF THE UNITED NATIONS SYSTEM.

Modern public international law may be said to have had its genesis in the constitution of the United Nations Charter at San Francisco in 1945. From that point on, international law has been progressively codified through an increasingly complex matrix of conventional instruments, such as Covenants, Conventions, bilateral and multi-lateral

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Treaties, and other agreements and Declarations, which modify, extend and are declaratory of the customary international law, and "general principles of law" which have mediated relations between Western nations since ancient times.

It is necessary here to emphasise that this form of public international law, understood traditionally as the product of the European mind, and having its modern origins in the Sixteenth and Seventeenth Century work of scholars such as Vitoria, Gentili, Grotius and Hobbes, represents only one part of a rich, world-wide landscape of legal traditions founded on religious, social, ethical and cultural structures. Its arena was the European system of nation-States which had been developing in the century before the 1648 Pact of Westphalia, and it served from that time as a unifying force within Europe, in the absence of centralised political authority.

Such a secularised, "Enlightened" legal system contrasted sharply with others throughout the world. In Asia, the Vedic law traditions of Hinduism had greatly influenced the "inter-state" law of South and Southeast Asia from around 1500 BC, as had the Buddhist world view, beginning a full million later. The international law of the Muslim world presented a further distinction from Euro-centric legal traditions, founded as it was on the religious teachings of the Prophet Mohammed in the Seventh century, and embodied in

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4 Eyffinger, Chief Librarian in the Court's Registry (1996), provides an overview of the development of international law from its European genesis in the century leading up to the Peace of Westphalia of 1648, during which the modern State system became established, to the present day. Loc. cit. at Note 2 above, pp. 4 - 14.

5 Ibid. The humanist legal scholar Hugo Grotius, who has long been considered one of the founders of international law, solidified the form of a Euro-centric public international law in his seminal work De jure belii ac pacis ("The laws of war and peace") of 1625. His works were based on the notion that the core of civilization was founded on the cumulation, repetition and synthesis of the works of prominent minds from all ages, which constituted its intellectual legacy and the essence of human conscience. At p.14.

6 Ibid, Ch. 8. A detailed, but somewhat arbitrary categorisation of world legal systems includes their European, Asian, Islamic, Latin American and African components.

7 Ibid, p.184. The Pact of Westphalia established the sovereign independence, territorial integrity and equality of States, while establishing instruments of diplomacy for the resolution of disputes within the doctrine of bellum iustum, or "just war".

8 Ibid, p.10.

9 Ibid p.9. The Reformation ethos which rejected the moral theology and religious bonds of the Church formed the foundation of the secular, positivist formulation of international law, as propounded by Grotius.

10 Ibid, p.203.

11 Ibid, p.208. Unlike the secular international law of the European tradition, the international law traditions of many Asian regions are rooted firmly in religious faith and social organisation.
the Qur'an. Further distinctive international legal systems are represented by the vast complexity of pre-colonial social structures in Latin America and Africa, and their effects on the ways in which the post-colonial States of these regions have been incorporated into the modern (post-1945) international legal and political regimes.

It is clear, then, that international law, as it developed under the aegis of the United Nations system after the Second World War, could not rely for its philosophical and intellectual foundations solely on the European legal tradition if it was to reflect the religious, social or cultural needs of States widely differentiated in these spheres.

For this reason, the International Court of Justice, “an intrinsic part of the UN Organisation [and]...the cornerstone of a multi-faceted structure of dispute settlement” is constituted to take account of, and represent, the principle legal systems of the world.

Since 1987, the distribution of appointments to the fifteen seats on the Bench of the Court has been as follows: the “Western” group of States (Western Europe, the United Kingdom, the “Old Commonwealth” and the United States): 5 seats; the [ex] Socialist States of the former Soviet bloc: 2 seats; the Afro-Asian group: 6 seats (African and Asian States each with 3 seats), with one seat each to Latin America and the Caribbean region.

Any such distribution can probably never avoid controversy based on perceptions of relative political influence between States, but it appears, at least superficially, that the

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12 *Ibid*, p.221. The predominant position of religious law over secular law in the Islamic world is pervasive. Its influence has been perceived as growing with the rise, in recent years, of Islamic Fundamentalism, and the establishment of theocratic States (in, for example, Iran since 1979).

13 *Ibid*, p.232. Eysfnger indicates the influence which African members of the Court have had in pressing for a new and contemporary international law, one which rejects the stasis of the past for recognition of the principle of progressive development of the law.

14 The United Nations system nevertheless acknowledges the organisational legacy of the League of Nations and the “Versailles System” (notwithstanding its ultimate failure), as does the I.C.J. to its predecessor, the Permanent Court of International Justice. In particular, the Statute of the Permanent Court served as the basis for its successor, allowing a large degree of continuity of judicial practice between the two institutions, even though the present Court, unlike its predecessor, is an integral organ of the international body. Gill, T. (1989). *Litigation strategy at the International Court: A case study of the Nicaragua v. United States dispute*. Dordrecht: Martinus Nijhoff, at pp.5-9; Singh, N. (1989). *The role and record of the International Court of Justice*. Dordrecht: Martinus Nijhoff, p.8.

15 Loc. cit. at Note 2 above, p.2.

16 The term “Old Commonwealth” is used here to describe those countries which attained responsible parliamentary government and Dominion status within the British Empire during the Nineteenth Century. They include Australia, Canada and New Zealand.

17 Article 9 of the Statute of the Court provides, *inter alia*, that the body of members of the Court should represent “the main forms of civilisation and of the principle legal systems of the world”. *Op. cit.* at Note 5, p.991. See Appendix 2.
majority of the world's legal, political, economic, social, cultural, ethical and religious systems have gained a measure of representation on the Court's Bench.

4. PUBLIC INTERNATIONAL LAW SINCE 1945.

The history of the development of international law since 1945 can be viewed as an analogue of the fundamental changes, discussed below, which have evolved over the past fifty years in the geo-political relationships between States. If it can be said to have a coherent goal towards which its evolution might be directed, then that articulated by Allott in 1990 may serve the purpose:

The new international law will be as dynamic and as rich as the law of any subordinate society, organizing human willing and acting in every field which concerns the survival and prospering of the society of which it is the law. 18

In contrast with this universalist vision, other writers, such as Green and De Visscher, 19 are pessimistic about the ability of the universal rule of international law to serve the disparate attitudes and interests of geo-political State groupings. As political realists they cannot comprehend a legal regime able to transcend the power of individual States.

Nevertheless, this is precisely what the Charter of the United Nations seeks to do. As the legal and political keystone of the modern era, its dual function gives it the inherent strength with which to resist any opposition by States, or other international actors, to the overarching system it supports.

In this role it may be said to gain strength from the overtly positivist tenor of its text. 20 The clear pronouncement of rights and duties of States, unencumbered by allusion to meta-theoretical discourses (such as those concerned with natural rights or virtue) 21 places

the Charter within a long tradition of legal positivist philosophy, and allows its universal acceptance as the benchmark against which to measure the behaviour of all actors with international personality.22

The International Court of Justice holds a position of great importance within the United Nations system, since its primary function is to analyse and apply the law as it exists (lex lata) in order to render clear judgments, and opinions, in accordance with its obligations under its Statute (which is itself a part of the UN Charter).23

Its function as the pre-eminent legal arbiter of disputes between States, and of all aspects of public international law, gives the Court the character of a mediator, or pivot, through which turns the dialectic which modifies and develops international law. As it arbitrates disputes between States through the discovery, interpretation and application of the law, and renders opinions on questions raised by States, the Court reveals, by its published deliberations, the degree of its significance for (and influence upon) the rule of law among them.

This is not to deny that the Court suffers from procedural difficulties in the course of its jurisprudence. Examples may be taken from customary and conventional sources, or a combination of both. The so-called “Optional Clause” (Article 36 (2) of the Court’s Statute) allows States to declare that they recognise as compulsory ipso facto the jurisdiction of the Court, while sub-paragraph 3 of the same Article allows States to place reciprocal and temporal caveats on those declarations.24 In the history of cases before the Court, the 1984 Military and Paramilitary Activities in and against Nicaragua Case (Nicaragua v United

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22 The San Francisco Conference was able to begin with a tabula rasa, on which it could inscribe a Constitution for “We the peoples of the United Nations...” (in the Preamble of the Charter) which was open for membership “...to all other peace-loving states...” (Article 4 of the Charter). The term “international personality” refers not only to independent sovereign States within the international community, but also to international organisations, such as those created by international conventions, and to the United Nations Organisation itself. Certification of the existence of such derivative subjects of law is given at: Advisory Opinion on Reparations for Injuries Suffered in the Service of the United Nations, 1949 I.C.J. Reports 174 at 174, 178-9 and 185. Cited in von Glahn, G. (1992). Law among nations: an introduction to public international law (5th rev. ed.). New York: Macmillan, at p.133. See Appendix 1.

23 The competence of the Court is laid down in Chapter 2 of its Statute, in Articles 34 to 38, and covers such matters as: who may seise the Court, the extent of its jurisdiction, continuity with the Permanent Court’s competence, and the sources of international law applicable to its jurisprudence. Loc. cit. at Note 5.

24 Ibid.
States of America\textsuperscript{25} provides a clear example of the problems which this Article can produce.\textsuperscript{26}

Secondly, the codification of the customary law of treaties in the 1969 Vienna Convention on the Law of Treaties\textsuperscript{27} has introduced a new dimension of certainty (but analytical complexity) to the adjudication of disputes turning on the interpretation of rights and duties arising from treaty obligations.\textsuperscript{28}

A third example of potential for jurisprudential impairment, and one central to this thesis, is the practice of Dissenting and Separate Opinions, and individual Declarations, in the published decisions of the Court, as provided in Article 57 of the Court's Statute.

Each has served to circumscribe the jurisprudence of the Court, although Hussain points to individual opinions as nothing more than the external manifestation of the Court's "dialectical process" of judgment in a collegiate setting (surely an overly optimistic view). He also sees no possibility of damage to its "moral authority".\textsuperscript{29}

The International Court of Justice occupies a central position in the international system, from both a legal and a political perspective. Its ability to maintain that position will depend on its capacity accurately to modulate the relative weight it should accord in its judgments to each of these domains of international affairs.

\textsuperscript{25} \textsc{1984 I.C.J. Reports} 392. See Ch. II, Note 22.

\textsuperscript{26} In this case, the United States made a Declaration modifying its "Optional Clause" Declaration after realising that its dispute with Nicaragua would come before the Court, thus seeking to deny the Court's jurisdiction to hear the matter. In the event, it did not succeed because of self-declared time constraints, but the potential for manipulation by States of the Court's jurisdiction is undeniable. \textit{Op. cit.} at Note 20, p.529.

\textsuperscript{27} 155 U.N.T.S. 331.


\textsuperscript{29} Hussain summarises arguments for and against the practice of allowing Dissenting Opinions in a collegiate curial setting. Its opponents are said, unsurprisingly, to decry the perception of its enfeebled solidarity, a "rule of minorities" within the Bench, and susceptibility of individual Judges to political pressures. Its supporters are cast as champions of judicial pluralism, as envisaged in Article 9 of the Statute of the Court (See Note 8, supra). They also assert that Dissenting Opinions ensure greater judicial responsibility, and are useful \textit{obiter dicta} for understanding majority decisions. Hussain, I. (1984). \textit{Dissenting and separate opinions at the World Court}. Dordrecht: Martinus Nijhoff, at pp. 2-4, and 73. While not denying the force of these arguments, it seems equally open to hold that one compelling reason for the use of Article 57 is, as J. S. Mill pointed out in his 19th Century Utilitarian tracts, that minority-based opposition is better viewed in the cold light of day, and required to justify itself, rather than be suppressed.
5. INTERNATIONAL GEO-POLITICAL DEVELOPMENT SINCE 1945.

It is in the nature of the human race, as within the natural world, that the rules are made by the victors of struggle, and not by the losers; that new turns in the international legal road are determined by those with political strength. Such was the case during April - June 1945 at San Francisco as the form and constitution of the United Nations Organisation was negotiated, by which time it had become clear to the Western Allies, and to the Soviet Union, that the Axis Powers would be defeated. The United Nations Charter was negotiated, by the fifty nations then comprising the bulk of the international community, on the basis of the Dumbarton Oaks Proposals of 1944 for the establishment of “an international organisation for the maintenance of peace and security.”

The impulse for the Western Allies to seek a new international regime was the failure of its predecessor. The twenty year period between the 1919 Treaty of Versailles and the beginning of the Second World War was one of insularity, instability, and ultimately of breakdown in relations between nation-States. The Treaty itself, in its attempt utterly to subdue the German nation and its former allies through military and economic sanctions, contained the seeds of a second, even more devastating world conflict. The idealism inherent in U.S. President Woodrow Wilson’s “Fourteen Point Plan” for world peace and stability provided a further avenue for complacency, drift and appeasement of aggression in the context of isolationism, and deep economic and geo-political dislocation among the Western liberal democracies.

30 Refer to Note 2, supra.
31 While the war in Europe was entering its final stages, Japan showed no sign of an intention to surrender its Home Islands. The anticipated fanatical defence of their homeland by the Japanese people, and the potential loss of up to 500,000 US troops has been proposed as the primary reason for President Truman’s decision to use nuclear weapons at Hiroshima and Nagasaki in 1945. Yergin, D.H. (1990). Shattered peace: the origins of the Cold War. New York: Penguin, at p.115.
33 Glynn describes the liabilities of liberalism for liberal democracies, and the need for a balance between liberalism and foreign policy realism. He describes “...the arduous path by which liberal societies gradually attained a level of realism in foreign affairs, often only to lose sight of it and then be forced by events to recover it again”. Glynn, P. (1992). Closing Pandora’s box: arms races, arms control, and the history of the Cold War. New York: BasicBooks. At p. xi.
34 Ibid, pp. 51-55.
35 Ibid, pp. 47-50. The Treaty of Versailles was more armistice (seen by Germany as fundamentally unjust) than peace treaty. Wilsonian Idealism, and the institution of the League of Nations, were no match for such deeply-
The victors of San Francisco (all except one of which was, at that time, ignorant of the existence of practical and deliverable nuclear weapons) were determined that the outcome of the second conflagration would be a mechanism which could, through the codification of international law and the use of institutions for the settlement of disputes, ensure that no nation would be able to escape the sanction of the international community. The Clausewitzian use of force in international relations, except in the case of self-defence (and then only according to strictly delineated rules) was to be consigned to history. 36

Perhaps the most distinctive aspect of international relations in the period from 1945 to the present has been the transformation of a Euro-centric international system into one of global reach and significance. 37

A second fundamental and defining event was the development, prosecution and cessation of the "Cold War" between the American and Soviet spheres of influence, and the economic and political collapse of the Soviet Union which gathered pace during 1989. The bipolar struggle for ascendency between irreconcilable ideological antagonists began in earnest in 1949, with the explosion of an atomic bomb by the Soviet Union. The subsequent forty-year balance of terror, epitomised by the United States' strategy of "Mutually Assured Destruction", needs no embellishment. 38

A third event crucial to an understanding of post-war international relations and the development of international law, and one which is related to the first, is the dismantling of the Asian and African empires of European States, a process which began after 1919, and accelerated after 1945. By that time, the metropolitan States of Britain, France, Belgium and the Netherlands had lost credibility as colonial hegemons, in consequence of their fortunes in war against the Axis Powers.

36 Ibid, p.176. The Clausewitzian Doctrine of War asserts the subordination of means to ends, and war as an extension of national policy. It also asserts that victory in warfare comes as the result of the maximum possible application of force, in space and time; in other words, through total war.

37 This is not to contend that the international system (of law, commerce, inter-State relations and so on) did not exist on the same geographical scale prior to 1945. It does suggest, however, that the plurality, density, diversity and instability of the system became fundamentally different and exponentially greater in degree.

The aspirations of the many newly-created sovereign States, and of their constituent tribal, ethnic, cultural, economic and religious groupings, many of which spanned artificially mandated international borders, is one further key to understanding the dynamics of international relations and law after 1945.  

These aspects of inter-State relationships form the basis for relating evidence of historical political events to the range of theoretical perspectives and ideologically-dependent frameworks which have been proposed as ways of constructing and comprehending the realities of international relations.

In this way, theoretical accounts of the practise of inter-State relations (which itself generates and develops international law) will condition analysis of actual events within those relations. In the context of this thesis, the issue becomes the ways in which analyses of the origin, conduct and cessation of the Cold War (and the role of nuclear weapons) are coloured by international theory. Such an awareness is necessary to support a broad understanding of the legal and political background of the Court’s Advisory Opinion.

6. INTERNATIONAL RELATIONS THEORY.

Contemporary international relations theory represents a contested, idiosyncratic, and didactic domain of political thought in which practitioners assert a wide range of more, or less, mutually exclusive world views, causal relationships and categories. Perhaps the only proposition each would agree on is the fundamental importance of applying some definition of power in modulating their understanding of relations between States.

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39 One regional example of this process is provided by McCloud’s study of the colonisation of Southeast Asia, bringing as it did the break-up of traditional polities, their social organisations and economic frameworks. The new post-colonial States of the region had to build national unity and independence despite, rather than because of, their international boundaries. McCloud, D.G. (1986). System and process in Southeast Asia: the evolution of a region. Boulder, Co.: Westview Press.

40 The vast literature in international relations theory reflects the wide diversity of approaches to the study of this discipline. An introduction to the main strands of thinking in modern structuralist (as opposed to post-modern) contemporary theory would include, but not be limited to, Wight (1966), Bull (1972 and 1976), Keohane (Ed. 1986, and 1988), Lijphart (1974b), Skocpol (1979), Walz (1979) and Wallerstein (1991).

41 One widely accepted definition of power is the ability to influence an agent in such a way as to cause that agent to do something he, she or it would not otherwise have done. Paolini’s study of the work of Foucault on alternative post-modern conceptions of power relations is one example of the persuasive use of a post-
To illustrate this point, one need look no further than the development of international theory since the publication of Martin Wight’s influential 1966 paper, in which he claimed the non-existence of international theory, given the domination of the State in general political theory (which as a result was inappropriate to a sphere in which survival was the paramount concern).

Such an extreme position does not advance discussion, which takes as fundamental the necessity for international relations analysis to accept the agency of individuals, groups of individuals, and institutions in international, as well as domestic political affairs.

Nevertheless, analysis of the role of individual agency in theories of international relations, as opposed to that of institutions and ideologies, is problematic in several widely accepted theories which have been advanced during the last thirty years to explain and structure inter-State and global relationships.

6.1. ALTERNATIVE DISCOURSES IN INTERNATIONAL THEORY.

The first a priori debate of recent note has been that between communitarian and cosmopolitan paradigms in the development of theory. As Smith notes, a communitarian perspective emphasises the assignment of rights and duties in international society to political communities, as such. By contrast, cosmopolitan theories stress the need for moral arguments in this sphere to be based on individuals, or on humanity as a collective whole.

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45 Ibid. There is no doubt that a perception of international relations which is built on recognition of the self-worth of the individual, and on individual moral transcendence, is one far removed from that of (neo)realists.
This dichotomy tends to pose more questions than it answers. Not the least of its difficulties is the question of the practical relevance of moral argument to theories incorporating a realist slant or component. It is possible, however, to argue that much contemporary conventional international law, such as the 1966 International Convention on the Elimination of all Forms of Racial Discrimination, and the 1984 UN Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment do indeed assign moral rights to individuals within the international sphere, and that this trend is likely to increase as Kantian humanists gain ground.

An early schematic useful for comprehending international relations theory was that expounded by Wight in the 1950s, which identified three traditions: realism, rationalism and revolutionism, or alternatively that of Machiavellians, Grotians and Kantians. This convenient trichotomy comprehends, respectively, international anarchy, mixed conflict and co-operation, and transcendent humanity. Its most fundamental difficulty may be that such categories are not obviously mutually compatible, and that they depend on discrete epistemologies. From a practical perspective, it may not be defensible to privilege one tradition while excluding its rivals completely.

A third categorisation has been that of the division of Twentieth century international relations theory between the three “Waves” (The Wilsonian idealism of the interbellum, the “realism” of the post-war world, and the social-scientific “behaviouralist” approach of the 1960s), together with the two “Great Debates” which separated them.
Lijphart has argued for the falsity of such a division on the grounds that a more defensible discrimination is that between the traditional paradigms of idealism and realism, on one hand, and the scientific paradigm of the behaviouralists, on the other. Here the issue has become the dispute concerning the utility of a natural science approach to theories of international relations, all of which must necessarily incorporate more qualitative rather than quantitative analyses of data and other evidence.

A further debate in international theory, and one its detractors would argue mimics the difficulties of Wight's structure noted above, is the more recent “Inter-Paradigm” debate of the mid-1980s onward. Now, theorists such as Wallerstein argue that there are still three substantial accounts of international politics, but that they are located within the same framework, and as such are reasonably coherent as between each other.

The basic categories of disputants have become (and allegedly largely remain): neorealism (also termed “structural realism”), liberalism/globalism/pluralism, and neo-Marxism/structuralism. As Smith indicates, this schema is helpful in any attempt to understand international relations since each paradigm can be summarised in terms of its answers to questions about the main or predominant actors, issues, processes and outcomes in the international political arena. In reality, it must be acknowledged that the Marxist/structuralist component is becoming rapidly less relevant to analysts following the end of the Cold War, and that the substantive debate is now that between the realists and the liberals. In this way, current debates seem to turn, perhaps not surprisingly, on alternative accounts of human nature.

Nevertheless, the now-familiar trichotomy tends to suggest over-simplification of categories, and the suspicion, alluded to above, of “warehousing” or privileging of one

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53 The behavioural, “natural science” phase of social science, prevalent during the 1950s and 1960s, parallels the realist political ethos of the Cold War era to the extent of its assumption of the efficacy of determinist solutions to problems. The logics of “Massive Retaliation” in US nuclear warfare strategy of that era, and measurable behaviour vectors in contemporaneous psychology are both underpinned by determinism.

54 Ibid, Note 45.


56 Ibid, Note 45, at p.18.
category to the detriment of overall coherence.\textsuperscript{57} In addition, the inherent inflexibility of labels is a methodological criticism, especially for those theorists who work within a post-modernist or post-positivist epistemology.\textsuperscript{58}

The realist/liberal dichotomy can, in fact, never be mutually impermeable, since each paradigm contains elements of its rival. A more efficient perspective would be a relativist one in which a comparison of tendencies and trends does the explanatory work. In this way, the relative weight accorded by each world view to such concerns as the use of force in inter-State relations, basic international co-operation, absolute as opposed to relative gains, and the role of positive law becomes measures for assessing the strength of either a (neo) realist slant or perspective, as opposed to a liberal one, in explanations of international relations.

As noted above, theoretical accounts of the ways in which States relate to each other will condition analyses of actual events within those relations. To that extent, the account of theory which predominates in this thesis is the neo-liberalist story,\textsuperscript{59} summarised as complex interaction between States, universal acceptance of norms of international behaviour, and the prominent place of non-State actors in the international sphere. While this explanation of reality is, like many, vulnerable to accusations of being reflexively constitutive of that reality, rather than explaining it\textsuperscript{60} (a methodological conundrum) it nevertheless seems more capable than others of approaching and explaining such contemporary phenomena as pluralism, inter-connectivity, flexibility in rapid change, and humanism in the inter-state field.

It also appears to have the explanatory strength to explicate the origins, conduct and ultimate cessation of the Cold War, and its relevance to the present Opinion, especially

\textsuperscript{57} Note 52, \textit{supra}.

\textsuperscript{58} Note 43, \textit{supra}. It is not proposed to canvass in detail the work of this school of theory in the field of international relations, but merely to acknowledge the influence of writers such as Foucault, Derrida and Habermas, especially in relation to their work on the nature of power and knowledge. These writers offer alternative epistemologies concerning, \textit{inter alia}, discontinuities rather than historical progress, relative rather than absolute outcomes, the contingent nature of facts and truth, and the social construction of reality. \textit{Loc. cit.}, Note 45, \textit{supra}, at Ch. 10: Vasquez, J. A. The post-positivist debate: Reconstructing scientific enquiry and international relations theory after Enlightenment’s fall. \textit{Loc. cit.}, at Note 43, pp. 217-240.

\textsuperscript{59} See infra, Chapter II, at Note 12.

\textsuperscript{60} The question is whether the social world has an existence external to its observers, or whether it just is what observers make it. This methodological and philosophical complexity is addressed by practitioners of the critical school of social theory who assert that knowledge is not value-free.
when, as discussed above, the neo-realist perspective is enlisted to add a measure of theoretical balance.

7. CONCLUSION.

As an institution whose primary task is the settlement of inter-State disputes, the International Court of Justice must operate in the political, as well as the legal domain. As such, its judgments must be considered in light of contemporary international political theory and reality, and in particular of the imputable world views of its Bench.

Representing as it does the range of the world's societies, decisions of the Court will reflect, and be seen as reflective (in whatever degree) of the political, as well as juridical positions and influences of their assentient and dissentient Judges. Explanations of the ways in which States relate to each other will play a role in determining and explaining its decisions.
CHAPTER II.

OVERVIEW OF THE OPINION.

1. INTRODUCTION.

On 8 July 1996 the International Court of Justice delivered its Advisory Opinion, General List No. 95, "Legality of the threat or use of nuclear weapons", in response to United Nations General Assembly Resolution 49/75 K, adopted on 15 December 1994.\(^1\)

The operative paragraph of that Resolution incorporated the following question: "Is the threat or use of nuclear weapons in any circumstance permitted under international law?"\(^2\) Some measure of the importance with which the international community of nations viewed this matter can be gained by the fact that no less than twenty-two States appeared before the Court to present oral submissions,\(^3\) while forty-three States submitted written material.\(^4\)

This Advisory Opinion of the International Court of Justice is of great significance for the international community for fundamental and complex reasons. It is the first occasion on which the pre-eminent judicial body concerned with the international legal regime has addressed the cardinal question of the legal status of nuclear weapons in international law.\(^5\)

Engaging as it does one of the most controversial political issues touching modern international law, the Opinion can be seen as a test of the Court's judicial independence.

\(^1\)The full text of the Advisory Opinion is available [on-line]: http://web.inter.NL.net/hcc/A.Malten/Unan5-A.html. It incorporates UN General Assembly Resolution 49/75K, together with a detailed description of the conduct of the case, and of States appearing before the Court. [35 I.L.M. 809 (1996)]. The only previous case before a superior court which concerned the question of the legality of nuclear weapons was the 1963 Shimoda Case, brought before the District Court of Tokyo by five Japanese citizens against the Japanese Government. The Court held that the bombings of Hiroshima and Nagasaki were not justified by military necessity, and that the United States had thereby violated international law. 8 Japanese Ann. Int'l. L. 212 (1964); 58 A.J.I.L. 1016 (1964).

\(^2\) Ibid, para 1.

\(^3\) Ibid, Note 1, para. 9.


\(^5\) The Court has now delivered a total of 23 Advisory Opinions since its constitution in 1946. Loc. cit., at Ch.I, Note 2, p. 369.
within the United Nations system, and the degree to which it may be susceptible to political pressures from States in a rapidly evolving international environment.  

In this context, a distinction may be drawn between those States which seek to emphasise the value of the Court’s deliberations to the international system, and the development of international law, and those which would diminish its standing and influence over issues which they regard as falling outside its purview (indeed, several States argued before the Court that it was not competent to give an Advisory Opinion in the present case, having regard to its duties under its Statute).  

From this perspective, the Opinion can be seen as representative of a fundamental antinomy lying at the heart of international relations. Should relations between States be mediated through the acknowledgment of the rule of international law (as exemplified in the principle of pacta sunt servanda, and the text of the Charter of the United Nations) in order to impose coherence and comity? Conversely, should they be governed, at the most basic level, by those long-established customary principles and rules, founded on State sovereignty, neutrality and consent, which “shape and reinforce international anarchy”?  

Put another way, is the nation-State still adequate to maintain order and avoid wars in

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6 The issue of the character, location and intensity of political influence, whether formal or informal, on individuals, organisations and States, as well as the International Court of Justice itself, forms an important theme in this thesis. One component of that debate will involve the Statute of the Court, and the provenance of its Judges. An introduction to this debate is provided by Gill, T. D. (1989). Litigation strategy at the International Court. Dordrecht: Martinus Nijhoff, especially Part One, Section I: “The Changing Political Environment and its Impact on the Court.”, at pp. 5 - 36.

7 The Oral Submissions of States such as France and the Russian Federation, which challenged the competence of the Court to deliver an Opinion, are available (to the extent of their relevance here) at [on-line]: http://www.icjquote.html. That source also includes edited transcripts of Submissions representing a range of positions taken by States on the law, and evidence of fact, available to the Court.

8 Kegley, C. W. & Wittkopf, E. R. (1993). World politics: trend and transformation (3rd rev. ed). Houndmills: Macmillan, at p.501. These authors provide a discussion of the structural limits of the international legal system, at p.501 et seq., which canvases both its institutional constraints (such as the lack of supra-national rule enforcement) and its relevance based on the overwhelming preponderance of those States acknowledging basic principles of international law (such as treaties, conventions and formal declarations) which they recognise and respect. See also Starke, J. G. (1986): The science of peace (rev. ed.). Sydney: Legal Books Pty. Ltd, at Ch. 8: “The Legal Framework of Peace”, and specifically pp. 130-133: “Weaknesses of international law”; in which he states (p.130), inter alia, that “The crucial weakness remains...that international law suffers from the absence of external force or sanctions to ensure the observance of its rules under all circumstances.”
a world in which military imbalances are underpinned by the reality that every State is "unconditionally vulnerable to virtually total destruction"?9

These questions are driven by the debate in the philosophy of international law between those who regard municipal and international law as separate legal orders which dispute for primacy, and those who see them as part of the same order, one or other being supreme within that order.10

This so-called monist/dualist debate forms the foundation upon which the arguments led by States in the present Opinion were based, in respect both of the competence of the Court to deliver an Opinion, and its substance, based on fact and law.

This thesis, as a critique of the present Opinion, will address, inter alia, the issues noted above. In doing so it will necessarily be concerned with the legal character of the Court's argument and conclusions. However, it must be emphasised that the Opinion has been rendered in the context of both the global arena of geo-politics and international relations, and a range of influences, both tacit and overt, upon the Court itself. No worthwhile examination of the provenance, nature and possible effects of the Opinion can ignore this duality.

Finally, the fundamental assumptions concerning the nature of international politics, and of the international system, will be informed here by the structural theory, canvassed in Chapter I, of "neo-liberal institutionalism" or "neo-liberalism".11 The basic tenets of such an understanding of international affairs can be summarised as:

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10 Harris, D. J. (1991). Cases and materials on international law (3rd rev. ed.). London: Sweet & Maxwell, at pp. 69-72. Fain, H (1987) Normative politics and the community of nations. Philadelphia: Temple University Press, elaborates the dichotomy between the Monist concept, epitomised by Hans Kelsen's grund norm that "the States ought to behave as they have always behaved", and the Dualist (or pluralist) view that the jurisprudential relationship between the international legal system and the separate domestic legal systems is problematic. Most Dualists contend that governments may legally prefer domestic law when it conflicts with international law (pp. 39-41).

11 Loc. cit., supra, Note 9, at Chapter 2. These authors discuss a range of "rival perspectives in changing contexts" in terms of alternative images, or "mental models" of objective realities. Conceding that the quest for theory is "elusive", they offer the political Idealism of U.S. President Woodrow Wilson, in contrast with the Realist project of those who view the State-based, Hobbesian "balance-of-power" thesis as objective reality. A third, now largely discredited approach (as they point out) is the empirical, pseudo-scientific behavioural approach of the 1960s and early 1970s. See particularly pp. 20-28.
(a.) Co-operation and complex interdependence between States in all spheres of activity;
(b.) Universal adherence to principles and norms of international behaviour by States;
(c.) The essential role of non-State actors in the international arena.\textsuperscript{12}

2. OVERVIEW OF THE OPINION.

A review of the \textit{dispositif} of the Opinion will be followed by a summary of the substantive arguments developed in its text.\textsuperscript{13}

2.1. THE COURT’S \textit{DISPOSITIF}.

From its deliberations as to the facts and law applicable to the question before it, the Court delivered its \textit{dispositif} in the following terms:

A.

Unanimously,

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

B.

By eleven votes to three,

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

\textsuperscript{12} \textit{Ibid.} Such “non-State actors” include, for example, the Court itself, other specialist U.N. Organisations, and many Non-Governmental Organisations (NGOs). For a discussion of the implications of “Globalism” for the international system, see: Holsti, O. R. (1989) Models of international relations and foreign policy. \textit{Diplomatic History}, 13, 15-43.

\textsuperscript{13} \textit{Ibid}, Note 1.
C.
Unanimously,
A threat or use of force by means of nuclear weapons that is contrary to Article 2, paragraph 4, of the United Nations Charter and that fails to meet all the requirements of Article 51, is unlawful;

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

E.
By seven votes to seven, by the President’s casting vote,
It follows from the above-mentioned requirements that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law;

However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in extreme circumstances of self-defence, in which the very survival of the state would be at stake.14

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F.

Unanimously,
There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.

The Court had concluded, unanimously, that no State may point to customary international law, nor to treaty law, as in any way authorising the use, or threat of use, of nuclear weapons (Paragraph 105 2A). However, it found (by eleven votes to three) that no such laws specifically prohibited the threat or use of nuclear weapons in a general and comprehensive way (Paragraph 105 2B).

Secondly, it reaffirmed, unanimously, the principles of non-use of force, and self-defence in relations between States, as incorporated in Articles 2 (4) and 51 of the United Nations Charter, and their applicability to nuclear weapons (Paragraph 105 (2)C).

Thirdly, it identified, unanimously, the international law which applies to the threat or use of nuclear weapons, nominating the international humanitarian law applicable in armed conflict, and the lex specialis of treaty obligations and other express undertakings in respect of nuclear weapons as international law most particularly applicable to the question (Paragraph 105 2D).

Fourthly, it found that the threat or use of nuclear weapons would generally be contrary to principles and rules of humanitarian law in armed conflict (emphasis added), but that it was unable to conclude whether this was so in an extreme circumstance of self-
defence “in which the very survival of the State would be at stake” (Paragraph 105 (2)E).\(^{16}\) (It is notable that these findings turned on the casting vote of the President of the Court, since voting on this section of the dispostif was split equally).\(^{17}\)

Finally (at Paragraph 105 (2) F) the Court identified the international community’s obligation to pursue in good faith negotiations which would lead to meaningful and permanent nuclear disarmament “in all its aspects”.

2.2 THE TEXT OF THE OPINION.

2.2.1. PRELIMINARY CONSIDERATIONS.

The Court found that it was competent under the terms of Article 96 of the Charter of the United Nations \(^{18}\) to give an Advisory Opinion on a legal question to the General Assembly, and that there were no “compelling reasons” for it to refuse to give such an Opinion.\(^{19}\)

Before seeking to define the extent of relevant international law norms available to it, the Court had first to address the argument that the word “permitted” in the “Request for Opinion” implies a negative understanding of the basis of international law. Thus, and contrary to the principles of sovereignty and consent, the threat or use of nuclear weapons were said to be subject only to prohibition in either conventional or customary law.\(^{20}\) It was argued by some States that the dicta in the “Lotus”\(^{21}\) Case of the Permanent Court, and those

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\(^{16}\) The second limb of Para. 105 (2)E consists of a reply to a question which was not put to the Court by the General Assembly of the United Nations, namely the “extreme circumstances of self-defence” in which the survival of a State would be at risk. This in itself serves to bring the entire Opinion, prima facie, into question.


\(^{18}\) Ibid, Note 10, at p.987.

\(^{19}\) Ibid, Note 1, paras. 10-19. The Court affirmed that the question posed was of a “legal” nature, notwithstanding its political elements, and that it should exercise its discretionary power under Article 65 of its Statute (Op. cit., supra, Note 10, at p.1001) to give an opinion. The question did not lack relevance or precision, and an Advisory Opinion would not move the Court beyond its judicial role, and into the realm of law-making. See Appendix 2, the Statute of the International Court of Justice.

\(^{20}\) The representative of France, in Oral Submissions before the Court, was forceful in articulating this argument. International Court of Justice, Oral submissions, written statements and responses. Unpublished material.

\(^{21}\) P.C.I.J Reports, Series A, No. 10. The Lotus Case (France v. Turkey (1927)) turned on France’s contention that Turkey had acted in conflict with principles of international law by prosecuting a French national for involuntary manslaughter of eight passengers and crew of the Turkish vessel Boz-Kourt in international waters.
in the "Nicaragua" Case of the present Court supported their contention that States are able legally to threaten or use nuclear weapons unless specifically and expressly prohibited from doing so by treaty or custom.

The Court's apparently peremptory dismissal of these arguments rested on the fact that the nuclear-weapon States acknowledged the restrictions imposed on their actions by the general principles and rules of humanitarian law. Hence, there was no question of a pre-determined burden of proof imposed on those States seeking to promote the cause of illegality of nuclear weapons.  

2.2.2. RELEVANT LAW.

The Court then considered relevant applicable law, noting Article 6 of the 1966 International Covenant on Civil and Political Rights, and Article II of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.

The Court examined a range of norms relating to the safeguarding and protection of the natural environment, together with provisions of various treaties and other instruments which have that aim. While their applicability in times of war was acknowledged to be

following its collision with the French steamer Lomi. The Judgment of the Court rejected France's contention that Turkey should be able to point to "some title to jurisdiction recognized by international law in favour of [it]". It stated that international law governs relations between "independent States", and that restrictions upon that independence "cannot be presumed" (para 3).

I.C.J. Reports 1986, p.4. The Nicaragua Case (Merits) (Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)) concerned military and other measures taken by the United States against the Sandanista Government of Nicaragua, including direct attack on Nicaraguan strategic assets, and assistance to the Contra rebels seeking its overthrow. Nicaragua alleged that the United States had infringed customary and conventional international law, and Article 2 (4) of the United Nations Charter, in terms of its use of force. In its Judgment, the Court stated (para 269) "in international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited".

Ibid, Note 1., paras. 20-22. The Court's conclusion here is based on induction from the particularity of humanitarian law to the general corpus of international law.

Ibid, Note 10, at p. 612. [999, U.N.T.S. 171; 61 A.J.I.L. 870 (1967)]. Para. 1. of Article 6 states: "Every human being has the right to life. This right shall be protected by law. No one shall be arbitrarily deprived of (his) life." Bailey states that, if the I.C.C.P.R. is declaratory of existing law, rather than creative of new international law, then all States will be bound by the principle, whether or not they have ratified the Covenant.


78 U.N.T.S. 277; 45 A.J.I.L., Supp., 5 (1951). Article II lists acts "committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such".

contentious, the Court recognised the real environmental threat, in both space and time, of the existence of nuclear weapons. Nevertheless, it stated its view, at Paragraph 30, that the obligations of States to protect the natural environment during military conflict were not absolute, although regard for environmental considerations must form part of the assessment of the necessity and proportionality of actions in self-defence.27

The substantive finding in respect of environmental international law was that it does not specifically prohibit the use of nuclear weapons.

At this stage, the Court was able to conclude that the laws most relevant to the question posed were those relating to the use of force within the terms of the Charter of the United Nations, the law applicable in armed conflict which regulates the conduct of hostilities, and any specific treaties on nuclear weapons that the Court might determine to be relevant.28

2.2.3. APPLICATION OF LAW.

The remaining part of the text of the Opinion is devoted to the application of the identified relevant law, and to the conclusions which the Court drew from its own jurisprudence and the submissions of States in framing its dispositif. In a systematic review, it began by emphasising the primacy of U.N. Charter provisions concerning the use of force and self-defence, their applicability to nuclear weapons, and the fundamental difficulties in the legal use of nuclear weapons, given the unique characteristics of these devices. It found that the threat of use explicit in the notion of deterrence must conform with Charter provisions, and that any legal use of force in self-defence, while proportionate to the force used by an aggressor, must also conform with humanitarian law.29

28 Ibid, Note 1., para. 34.
29 Ibid, Note 1., paras. 37-50. The Court's acknowledgement of the political reality of "deterrence" in international relations is apparent in para. 45, in which it takes note of the terms of Security Council Resolution 984 (1995). That Resolution concerns security assurances made by each of the declared nuclear weapon States (United States, United Kingdom, France, Russia and China) in the context of the extension of the Treaty on the Non-proliferation of Nuclear Weapons in 1995 [1973 Aust. T.S. No.3]. Most Dissenting Opinions state without equivocation that the latter proposition is fundamentally and absolutely impossible of performance.
It moved on to consider the law applicable to armed conflict, in terms both of specific rules, and of general principles and rules of humanitarian law. Finding that illegality, according to State practice, must be based on prohibition, and *not* on the absence of authorisation, the Court examined the *Hague Conventions for the Pacific Settlement of Disputes* of 1899 and 1907, the *Geneva Protocol* of 1925 in respect of “poison or poisoned weapons”, and conventional prohibition of other weapons of mass destruction. It found no express prohibition in any case. It reviewed treaty law relevant to nuclear weapons (their acquisition, manufacture, possession, deployment and testing), and here approached the essence of contention surrounding the issue of the legality of nuclear weapons. The fundamental tension between the competing claims of humanitarian law and the doctrine of deterrence is nowhere more evident than here.

That tension was reflected, in the Court’s view, in the competing claims made by States in respect of the effect of the various nuclear weapon treaties on international law. It referred to those States which contended that such treaties “bear witness, in their own way, to the emergence of a rule of complete prohibition of all uses of nuclear weapons.” By contrast, it noted the argument of States which hold the view that treaties which acknowledge the existence of the principle of deterrence (such as the 1968 *Treaty on the Non-proliferation of Nuclear Weapons* and its indefinite extension in 1995), together with their acceptance as a *fait accompli* by non-nuclear weapon States, “confirm[s] and reinforce[s] the evident logic upon which those instruments are based.” Any imputed prohibition of the use of nuclear weapons would “be contrary to the very text of those instruments.”

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31 The latter comprised the 1972 *Convention on the prohibition of the development, production and stockpiling of bacteriological (biological) and toxin weapons and on their destruction* [*26 USTS 583; T.I.A.S. 8062; 1015 U.N.T.S. 163*], and the 1993 *Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction* [*Misc 21 (1993), Cm. 2331; 32 I.L.M. 800*].


34 *Ibid*, Note I., para. 60.

35 *Ibid*, Note I., para 61. See also *supra*, Note 8. The Oral Submission of Malaysia, forthrightly characterising the doctrine of nuclear deterrence as “at best an Atlantic concept of the Cold War”, went on to assert that the invocation of the right to self-defence perverts that right in the context of deterrence, which denies “the
The Court concluded that treaties dealing with nuclear weapons, as a corpus of conventional law, did not constitute a prohibition by themselves, but that they could be seen as foreshadowing a future general prohibition. 36

It then turned to customary international law to determine whether a prohibition of the threat or use of nuclear weapons flowed from that source of law. 37 The practices of States were examined insofar as they could demonstrate the existence of a customary rule of prohibition. The Court noted that no nuclear weapon State had used nuclear weapons in war since 1945, but that those States had, through their doctrine of deterrence, reserved the right to use them. It also noted the manifold General Assembly resolutions, beginning with Resolution 1653 (XVI) of 24 November 1961, which have consistently affirmed the illegality of nuclear weapons. 38 However, it concluded that neither practice constituted a customary rule specifically proscribing nuclear weapons. In respect of General Assembly resolutions, it noted that many had received substantial negative votes, and that the emergence, as lex lata, of a customary rule of prohibition by this route was hampered by the tension, referred to above, between this nascent opinio juris, and the continuing adherence to the doctrine of deterrence. 39

Having found no fully-formed opinio juris on the question before it, the Court moved on to canvass the vast body of humanitarian law; the codified provisions of Hague and Geneva law which encapsulate the extent of customary humanitarian law, and are brought together in the two 1977 Additional Protocols to the 1949 Geneva Conventions. It found that international law, predating as it does the advent of nuclear weapons, applies to them as to any other weapon. It reinforced its findings by referring to the celebrated "Martens Clause", fundamental principles of humanity. In such a case, international law could not be utilised to support State practices which deviate from those principles and "mainstream aspirations." Loc. cit., at Note 20.

36 Ibid, Note 1, paras. 62, 63. See also supra, Note 15, in respect of the Dissenting Opinion of Judge Weeramantry, at Part VII (1): "The Non-Proliferation Treaty."
37 Ibid, Note 1, paras 64 - 73.
which affords general humanitarian protection in the absence of specific agreements, based on established custom, the principles of humanity, and the dictates of public conscience.\textsuperscript{40}

In its survey of humanitarian law applicable in armed conflict the Court emphasised that the fundamental rules of this domain of law must be observed by all States, since they "constitute intransgressible principles of international customary law."\textsuperscript{41} The extensive codification of humanitarian law merely gave expression to pre-existing customary law, such as that constituted by the "Martens Clause" discussed above.

The Court turned finally to consider the principle of neutrality, finding that it applies to all international armed conflicts, "whatever type of weapons might be used".\textsuperscript{42}

2.2.4. LEGALITY IN CERTAIN CIRCUMSTANCES.

The remainder of the Opinion concerns itself with argument on the legality of the threat or use of nuclear weapons in certain circumstances. In contrast to the view of many States that the nature of nuclear weapons (their massive, uncontrollable and indiscriminate effects) determines their absolute illegality in terms of humanitarian law and the principles of neutrality,\textsuperscript{43} some held that this was not the case.

The United Kingdom asserted that, given their use was lawful in terms of self-defence and the principles of necessity and proportionality, their legality in terms of humanitarian law must be determined on the particular circumstances of each use.\textsuperscript{44}

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\textsuperscript{40} Ibid, Note 1., paras 74-87. As the Court states, the "Martens Clause" was first included in the 1899 Hague Convention with Respect to the Laws and Customs of War on Land, (supra, Note 30), and is now incorporated, \textit{inter alia}, within Article 1, para. 2 of the 1977 Additional Protocol I of the 1949 Geneva Conventions [1125 U.N.T.S. 609].

\textsuperscript{41} Ibid, Note 1., para. 79. See also Note 30. The Court reinforced its argument by noting, at para. 80, that the Nuremberg International Military Tribunal had found in 1945 that the \textit{Regulations} annexed to the Hague Convention IV of 1907 "were recognised by all civilised nations, and were regarded as being declaratory of the customs and laws of war." (\textit{International Military Tribunal, Trial of the Major War Criminals}, 14 November 1945 - 1 October 1946, Nuremberg, 1947, vol. 1, p.245; 41 A.I.L.L. 224 (1947)).

\textsuperscript{42} Ibid, Note 1., paras 88, 89, cited at para. 89. The Court quoted, with approval, the position of an (unnamed) State that "The principle of neutrality...was aimed at preventing the incursion of belligerent forces into neutral territory, or attacks on the persons or ships of neutrals."

\textsuperscript{43} Ibid, Note 1., paras. 92 - 93.

\textsuperscript{44} Ibid, Note 1., para. 91. See also Notes 27 and 35, supra. Counsel for the United Kingdom, in his Oral Statement before the Court on 15 November 1995, made the assertion that "It is an inescapable feature of the rule [against disproportionate civilian casualties] itself that the greater the military advantage that can reasonably be expected to result from the use of a weapon in a particular case, the greater the risk of collateral civilian casualties which may have to be regarded as within the law."
The Court noted that it had no precise evidence of the nature of such a circumstance, nor on the risk of escalation of a limited use of nuclear weapons towards an "all-out use of high yield nuclear weapons."\(^{45}\)

It further stated that it did not have "sufficient elements" to allow it to determine with certainty the illegality of nuclear weapons in terms of the principles and rules of law in armed conflict *in any circumstances* (emphasis added).\(^{46}\)

### 2.2.5. THE PRINCIPLE OF "STATE SURVIVAL".

At this point, the Court referred "to the fundamental right of every state to survival"\(^{47}\) and to self-defence in accordance with Article 51 of the United Nations Charter. It pointed to the established "policy of deterrence", and to security declarations made by nuclear weapon-declared States (in connection with the 1995 Indefinite Extension of the Treaty on the Non-proliferation of Nuclear Weapons) not to resort to them.\(^{48}\)

### 3. CONCLUSION.

The Court was thus constrained "in view of the present state of international law viewed as a whole ... and of the elements of fact at its disposal"\(^{49}\) to state that it could not reach a definitive conclusion as to the legality or illegality of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake.\(^{50}\)

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\(^{45}\) *Ibid.,* Note 1., para. 94.

\(^{46}\) *Ibid.,* Note 1., para. 95.

\(^{47}\) *Ibid.,* Note 1., para. 96, the first indication by the Court of its promulgation of this novel *dictum*.

\(^{48}\) *Ibid.,* Note 38. Judge Oda, at paras. 37-39 of his Dissenting Opinion, argues that the indefinite extension of the Treaty at the 1995 Review and Extension Conference, in which one hundred and seventy-five member States participated, has firmly established "the NPT regime" in the international community. He states that favourable note was taken of the decision of the Conference by General Assembly Resolution 50/70Q, on 12 December 1995, by a recorded vote of 161 in favour with none against, India and Israel abstaining.

\(^{49}\) *Ibid.,* Note 1., para. 97.

\(^{50}\) This conclusion constitutes the substantive finding in the Court's *dispositif*, at Paragraph 105 (2E). See *supra*, at Note 14.
This conclusion was echoed in the second limb of the substantive Paragraph of the Court's dispositive, Paragraph 105 (2) E, in which, as noted above, it also found that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and particularly the principles and rules of humanitarian law.

There is no doubt that the Opinion represents a comprehensive survey of international law relevant to the question, in the context of the use of force by States.

It concluded with a call for all States to negotiate, in good faith, a nuclear disarmament convention in terms of their obligations under Article VI of the 1968 Treaty on the Non-proliferation of Nuclear Weapons.51

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51 Ibid, Note 1., paras. 98 -104; Also Note 29, supra. Paragraph 105 (2) F of the dispositive echoed this appeal. [79 U.N.T.S. 161].
CHAPTER III.

EVIDENCE AND ARGUMENT LED BY STATES.

1. INTRODUCTION.

Having examined the text of the Opinion, and the legal and political frameworks within which it was given, it is necessary now to approach the substantive component of the thesis.

Broadly speaking, this will take the form of a critique of the Opinion in terms of its interpretation and application of relevant applicable law and fact before it, and of the Court's jurisprudence.

That will require an examination of evidence from a representative sample of the Pleadings of States, in the form both of Written Statements and Oral Submissions made before the Court at its public hearings. This will reveal the positions of States as to:

(a.) The Court's jurisdiction in the case, together with its discretion not to hear the matter, given that jurisdiction.

(b.) The most defensible interpretation and application of relevant law and facts to the question, as well as the degree of divergence of opinion among States.

This analysis, together with a selective review, in Chapter IV, of the Dissenting, Separate and Individual Opinions, and Declarations of individual Judges on the Court's Bench (all Judges having appended their own Opinion or Declaration) will assemble the range of views on both sides of the question.

With these in mind, it will then be possible to examine critically the strength of the Court's Opinion, having regard for:

1 The Statute of the International Court of Justice forms part of the Charter of the United Nations. Article 66, Paragraph 2, authorises the Court to seek information on a question which is the subject of a request for an Advisory Opinion, in both written and oral forms. The response of States to the Court's request will be termed "Pleadings". Refer to Appendices 1 and 2.
2 Ibid.
(a.) Its comprehensiveness.
(b.) The internal logic and coherence of its argument.
(c.) The continuity and extension of its jurisprudence.

While the question at issue - "Is the threat or use of nuclear weapons in any circumstance permitted under international law?" - is of universal concern, it is relevant, in a narrower sense, to two groups of States: those that possess nuclear weapons, and those that do not.

To this extent, the position of the declared "nuclear weapon States" (The United States, the United Kingdom, Russia, France and China) will play a pivotal role in any critique of the Opinion. The Pleadings of the United States, the United Kingdom and, to a lesser extent, France will be synthesised in determining the position of States which contend the legality of a use, or a threat to use, nuclear weapons in war.\(^3\)

Of the many States which asserted the opposite conclusion, those which made the most useful contributions to the Court's evidence included, but were not limited to, Australia, Malaysia, Nauru and the Solomon Islands. The Pleadings of these States, together with others, will be used to exemplify the views of the non-nuclear weapon States.

2. ARGUMENT LED BY STATES FOR THE LEGALITY OF NUCLEAR WEAPONS.

The United States, in its Written Statement to the Court, and in its Oral Submission,\(^4\) expounded its view that the Court should decline to issue an Opinion, but that, if it chose to do so, it should find that no prohibition exists in international law against either the use of nuclear weapons, or a threat to use such weapons. The United Kingdom and France, in their

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\(^3\) The Pleadings of the Russian Federation are less comprehensive (and carefully argued) than those of the other three nuclear weapon States represented before the Court, although their thrust and conclusions are substantially similar. (China, for no reason discernible in the public domain, took no part in the proceedings). \textit{Pleadings of States - Written Statements} received by the Court from 1 February - 20 June 1995, pursuant to Article 66, Paragraph 2 of the \textit{Statute of the International Court of Justice}, at The Hague. \textit{Loc. cit. Ch. II, at Note 20.}

\(^4\) \textit{Ibid.}
Pleadings, largely echoed or expanded on the forms of argument and reasoning deployed by the United States.

2.1 THE COURT'S DISCRETION NOT TO ISSUE AN OPINION.

The nuclear weapon States acknowledged the right of the General Assembly of the United Nations to request the Court to give an advisory opinion on any legal question. However, they argued that the Court has discretion, pursuant to its Statute, not to issue such an opinion.

Both the United States and the United Kingdom expressed their view that the Court had characterised the relevant operative Article of its Statute as permissive, while the United States pointed to the Court's jurisprudence in support of its argument that there were "compelling reasons" for the Court to decline to issue an Opinion. The United Kingdom raised the further issue of judicial propriety, citing judgments of the Court which may be "devoid of object or purpose", may be "remote from reality", or be incapable of effective application. In its view, such judgments must "jeopardise its judicial propriety".

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5 Ibid.
6 Charter of the United Nations, Article 96, para. 1. Refer to Appendix I.
7 Statute of the International Court of Justice, Article 65. Articles 65-68 are concerned with the Court's jurisdiction in the issuing of Advisory Opinions. The Court's Statute forms part of the Charter of the United Nations. At Appendix 2.
8 Ibid, Note 7. Article 65, para. 1, provides that "The Court may give an advisory opinion on any legal question at the request of whatever body may be authorised by or in accordance with the Charter of the United Nations to make such a request." (emphasis added).
9 In the Judgments of the Administrative Tribunal of the International Labour Organisation Upon Complaints Made Against the United Nations Educational, Scientific and Cultural Organisation, Advisory Opinion, I.C.J.Reports 1956, p.86, the Court concluded that "Notwithstanding the permissive character of Article 65...only compelling reasons could cause the Court to adopt...a negative attitude...." Cited in the Written Statement of the United States of America, 20 June 1995, at pp. 3, 4. The Hague. Loc Cit., Ch. II, Note 20.
11 Ibid., Note 10. At p. 21 the Court stated: "In exercising this discretion, the International Court of Justice, like the Permanent Court of International Justice, has always been guided by the principle that, as a judicial body, it is bound to remain faithful to the requirements of its judicial character even in giving advisory opinions. If the question is a legal one which the Court is undoubtedly competent to answer, it may none the less decline to do so. As this Court has said in previous Opinions, the permissive character of Article 65, paragraph 1, gives it the power to examine whether the circumstances of the case are of such a character as should lead it to decline to answer the question".
12 Ibid.
The nuclear weapon States expressed their opinion that these *dicta* were relevant to the present request on the grounds that:

(a.) The question was vague and abstract, and that the Court could never have sufficient material to enable it to determine all the numerous combinations of circumstances in which a threat or use of nuclear weapons might arise.

(b.) It addressed complex issues which are the subject of consideration among interested States, and within other bodies of the United Nations which have an express mandate to address these matters.

(c.) An Opinion by the Court would provide no practical assistance to the General Assembly in carrying out its functions under its Charter.

(d.) An Opinion by the Court would have the potential to undermine progress already in train on this sensitive subject (most particularly in respect of disarmament negotiations) and, therefore, is contrary to the interest of the United Nations Organisation.\(^\text{13}\)

In general terms, these submissions reflect a "black-letter" perspective of international law which, perversely, denies its application to the special case of nuclear weapons (seen as qualitatively different from all other types). It is submitted that this is not, obviously, the case.

\(^{13}\) *Loc. cit.*, Note 9, at pp. 1-7; *Loc. cit.*, Note 10, at pp. 1; 9-20. Also cf. the Written Statement of France, 20 June 1995, pp. 4-20, which canvasses substantially similar grounds (given in French; no translation is available from the Court). *Loc. cit.*, Ch. II, at Note 20. These Pleadings may be considered in conjunction with the statement of Mr. Harold Heilsnis, Director for Public Communications, Office of the Assistant to the Secretary of Defense, United States of America, that:

The elimination of nuclear weapons remains a long-term goal for the United States, but implementing such a goal in the short-term implies an extremely optimistic scenario of world events.

2.2 THE SUBSTANCE OF THE QUESTION POSED.

In general terms, the United States founded its position (that nuclear weapons are not prohibited \textit{per se}, nor in terms of their use) on four propositions:

(a.) That there is no general prohibition on the use of nuclear weapons.

(b.) That the law of armed conflict does not prohibit the use of nuclear weapons.

(c.) That international environmental and human rights instruments do not prohibit the use of nuclear weapons.

(d.) That these conclusions apply equally to a threat to use such weapons.$^{14}$

The United Kingdom added a further step in the Pleadings of nuclear weapons States by its contention that there are circumstances of self-defence, in the last resort, in which the use of nuclear weapons must be regarded as legal. This is the first appearance of a principle which became central to the Court's Judgment, and must be seen as an intrusion of the discriminatory doctrine of deterrence into the customary and \textit{Charter} law of self-defence.$^{15}$

2.2.1. GENERAL PROHIBITION.

The nuclear weapons States asserted that "it is a fundamental principle of international law that restrictions on States cannot be presumed".$^{16}$ Further, a customary law

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\footnotesize{$^{14}$ \textit{Loc. cit.}, at Note 9, pp. 7-47.}

\footnotesize{$^{15}$ \textit{Loc. cit.}, at Note 10, pp. 36-39, especially at para. 3.37. At para 3.38 the United Kingdom stated, \textit{inter alia}, "Whatever the theoretical criticisms voiced of the idea of deterrence, the fact is, first, that it has worked and, second, that for many years a number of States have based their self-defence upon it." Many non-nuclear States would see this as affirmation of a willingness on the part of nuclear weapon States to sacrifice the rule of international law for pragmatic self-interest.}

\footnotesize{$^{16}$ \textit{Loc. cit.}, at Note 9, p.8. The United Kingdom cited the \textit{dicta} in the \textit{Nicaragua Case}, in which the Court stated that : "...in international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited, and this principle is valid for all States without exception." \textit{Military and Paramilitary Activities in and Against Nicaragua (Merits)}, \textit{I.C.J.Reports}, 1986, p.14, at paragraph 269. \textit{Loc. cit.} at Note 10, p. 21.See Chapter II, Section 2.2.1. for an expanded examination of this argument. France contended that the question posed by the General Assembly: "Is the threat or use of nuclear weapons in all circumstance permitted under international
prohibition could not be created over the objection of the nuclear weapons States, and was not created by abstaining from the use of nuclear weapons in war for humanitarian, political or military reasons, rather than a belief in a legal requirement. 17

Moreover, they expressed their understanding that there is no international agreement which contains a general prohibition on the use of nuclear weapons. To the contrary, the very existence of a range of agreements on aspects of nuclear weapons was evidence of the absence of such a general prohibition. 18

Addressing these instruments categorically, the United States and the United Kingdom pointed to:

(a.) Agreements on the use of other weapons, the pattern of which was said to imply a lack of general prohibition in the absence of a similar agreement on nuclear weapons. 19

Loc. cit., (emphasis added) must receive a negative reply, since it is clearly to be understood as being inclusive of their illegal use in aggressive war, as well as in self-defence. Loc. cit., at Note 13, p.21. This is a translation of the question posed to the Court in French: "Est-il permis en droit international de recourir à la menace ou à l'emploi d'armes nucléaires en toute circonstance?" The English version refers to "any circumstance", allowing France its disingenuous reply that, of course, nuclear weapons may not be used in every conceivable circumstance. The Court dealt peremptorily with this legal tactic at Paragraph 20 of its Opinion by stating that, notwithstanding the divergence in the two texts, the object of each was equally clear: to determine the legality of the threat or use of nuclear weapons.

17 Loc. cit., at Note 9, pp. 8-9. The United States sought to extend the meaning of "State practice" as evidence of a customary norm by adding a requirement that such practice must not only be "extensive and virtually uniform", but also include States whose interests are "specially affected". It cited the dicta in the North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands), I.C.J. Reports, 1969, p.3, at p.43 in support of its position. A contrary view is supported by Judge Tanaka in his Dissenting Opinion in the Smith West Africa Cases, Second Phase, I.C.J. Reports, 1966, p.6, at p. 291, in which he stated that the objection of one, or a few, States against a practice cannot prevent it from establishing a custom, since Article 38, paragraph 1 (b.) of the Court's Statute (establishing international custom as an applicable source of law) does not exclude the possibility of dissentent States. In Harris, D.J. (1991). Cases and materials on international law (3rd rev. ed.). London: Sweet & Maxwell, at p.60.

19 Loc. cit., at Note 9, p.10. The United States argued that these instruments establish a regime of general prohibition of certain classes of weapons. The absence of a similar Convention in respect of nuclear weapons was held out as evidence that, in this case, no such general prohibition exists. Those cited included:

St. Petersburg Declaration, 1868, prohibiting the use of projectiles under 400 grammes weight which are explosive or charged with fulminating of inflammable substances. [138 C.T.S. (1868-69): LXIV U.K.P.P. (1869) 659].

Hague Declaration No. 2, 1899, banning the use of projectiles the sole object of which is the distribution of asphyxiating or deleterious gases. [187 C.T.S. (1898-99) 453; U.K.T.S. 32 (1907) Cd. 3751].

Hague Declaration No. 3, 1899, prohibiting the use of bullets which expand or flatten easily in the body. [187 C.T.S. (1898-99) 459; U.K.T.S. 32 (1907) Cd. 3751].

(b.) Regional nuclear weapons treaties,\textsuperscript{20} the existence of which were held to have the same effect.

(c.) Agreements on the manufacture, testing or possession of nuclear weapons, the most important of which is the 1968 \textit{Nuclear Non-proliferation Treaty},\textsuperscript{21} and which again are premised on a lack of general prohibition.\textsuperscript{22}

Insofar as customary law is concerned in the question of general prohibition, the United States sought to emphasize that its own conduct, in bearing the burden of acquiring and maintaining nuclear weapons, indicated its belief in their legality, as did "the variety and disparity of views expressed by States" on the matter.\textsuperscript{23} In its view, these circumstances precluded a customary general prohibition against nuclear weapons.\textsuperscript{24}

\textit{Geneva Gas Protocol}, I\textsuperscript{st} 1925, prohibiting the use of asphyxiating, poisonous or other gases, or analogous liquids, materials or devices, and bacteriological methods of warfare. [XCV \textit{L.N.T.S.} (1929) 65; \textit{U.K.T.S.} 24 (1930). Cmd.3604].

\textit{Convention on the Prohibition of the Development, Production and stockpiling of Bacteriological(Biological) and Toxin Weapons and on their Destruction}, 1972, prohibiting possession of bacteriological and toxin weapons, and reinforcing the prohibition on their use. [1015 \textit{U.N.T.S.} 164].

\textit{Chemical Weapons Convention}, 1993, prohibiting all use of chemical weapons, and requiring the destruction of existing stocks. [32 \textit{L.M.} 800 (1993)].


\textsuperscript{21} \textit{Treaty on the Non-proliferation of Nuclear Weapons}, 1 July 1968. [79 \textit{U.N.T.S.} 161].

\textsuperscript{22} Other treaties of this nature include:

\begin{itemize}
  \item \textit{Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies}, 1967. [610 \textit{U.N.T.S.} 205];
  \item \textit{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}, 1971. [955 \textit{U.N.T.S.} 115];
  \item \textit{Treaty on the Limitation of Anti-Ballistic Missile Systems}, 1972 [944 \textit{U.N.T.S.} 13];
\end{itemize}

\textsuperscript{23} \textit{Loc. cit.}, at Note 9, pp. 14-15.

\textsuperscript{24} \textit{Ibid.} Also, \textit{Loc. cit.}, at Note 10, pp.27-32. Both the United States and the United Kingdom indicated that their position was reinforced by their respective Security Declarations made at the conclusion of the 1995 New York Conference on the Indefinite Extension of the \textit{Nuclear Non-proliferation Treaty}. These Declarations, given by all five declared nuclear weapon States, are both positive and negative. These States will, according to their Declarations:

(a.) "...provide or support immediate assistance, in accordance with the \textit{Charter}, to any non-nuclear weapon State Party to the \textit{Treaty on the Non-proliferation of Nuclear Weapons} that is a victim of an act of, or an object of a threat of, aggression in which nuclear weapons are used" [\textit{U.N. Docs. S} 1995/261-265], and
As far as other sources declaratory of customary law are concerned, the United States addressed the many General Assembly Resolutions which condemn nuclear weapons as contrary to the U.N. Charter (and to international law generally), and which seek their permanent prohibition.\textsuperscript{25}

It rejected any assertion, however, that such Resolutions create legally binding obligations on States, especially since they could not declare custom when “a significant number of nuclear weapon States have not accepted them.”

The more reasonable view, as David points out, is that these Resolutions reflect ambivalence among non-nuclear weapon States towards two different problems: possession, and use (or threatened use) of nuclear weapons. Resigned acceptance of the practice of deterrence does not imply acceptance of their use.

More generally, the whole question of the perception of the role of State consent in the customary process, as Lobo de Souza has shown, is internationally contested ground, weakening argument relying on some common understanding of its nature.\textsuperscript{26}

\textsuperscript{25} Loc. cit., at Note 9, pp.17-20. The first such Resolution, No.653 (XVI) of 1961 has been followed by many more, which have appeared annually on the Agenda of Plenary Sessions of the General Assembly since the 33rd Session in 1978. Dissenting Opinion of Judge Oda, para. 18. 35 I.L.M. 809 (1996).

\textsuperscript{26} David, E. (1997). The Opinion of the International Court of Justice on the legality of the use of nuclear weapons. \textit{International Review of the Red Cross}, 37 (1), 21-34, at 31. Lobo de Souza, L. (1995) The role of state consent in the customary process. \textit{Int. & Comp. L.Q.} 44, 521-539, at 539. The United Kingdom, in fact, asserted its view that the practice of the General Assembly may be taken as reinforcing the absence of evidence of an \textit{opinio juris} on the illegality of nuclear weapons, since it has supported, or even launched, initiatives leading to Treaties such as the Nuclear Non-proliferation Treaty. \textit{Loc. cit.}, at Note 10, p.35.
2.2.2. THE LAWS OF ARMED CONFLICT DO NOT PROHIBIT THE USE OF NUCLEAR WEAPONS.

In view of the Court's dispositif, this assertion formed the pivotal component of the Pleadings of the nuclear weapon States. While they conceded the applicability of the international law of armed conflict, they denied that any part of the humanitarian law of war prohibited the use of these devices.

More specifically, they argued that it is insupportable to contend that nuclear weapons must, by their nature, transgress the rules of humanitarian law when used in war, and that the precise nature of each instance of use must be known to the Court to enable it to judge its legality or otherwise. General evaluations in the abstract were held to be inappropriate.

Given the known effects of even the smallest nuclear weapon, it is impossible, it is submitted, to characterise the circumstances of any nuclear explosion as abstract in any way.

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27 At Introduction, Chapter II, Section 2.1, supra.
28 Loc. cit., at Note 9, p.21; See also the Written Statement of Russia, at p. 18: "Even if the use of nuclear weapons is in principle justifiable - in individual or collective self-defence - that use shall be made within the framework of limitations imposed by humanitarian law with respect to means and methods of conducting military activities".
29 Interestingly, evidence in the present Opinion omitted many technical aspects of the effects of nuclear explosions, although much evidence of this kind accompanied the Written Statements of some States in the rejected request of the World Health Organisation (see Foreword). It was thus generally more descriptive and discursive (since the request was from the General Assembly, rather than a specialist U.N. organisation). In essence, the humanitarian law of war embraces "...general principles of prevention of human suffering that goes beyond the needs of war". (Dissenting Opinion of Judge Weeramantry, Part III (3): "Outline of Humanitarian Law" 35 I.L.M. 809 (1996)). It is also encapsulated in Article 22 of the Regulations on Land Warfare annexed to the IVth Hague Convention of 1907 (U.K.T.S. 9 (1910), Cd. 5030):
The right of belligerents to adopt means of injuring the enemy is not unlimited.

Its other pre-eminent conventional components, constituted in the Twentieth Century, have been the four 1949 Geneva Conventions [75 U.N.T.S. 3], and their Protocols I and II of 1977 [1125 U.N.T.S. 3, and 1125 U.N.T.S. 609 respectively].
It has been stated that the basic function of all humanitarian law is simply to protect, to the greatest possible extent, the victims of armed conflicts, of whatever nature or cause (McCoubrey, H. (1990). International humanitarian law: the regulation of armed conflicts. Aldershot: Dartmouth Publishing, at p. 5). Such a perspective carries with it the universalist's vision of human rights in international law, and would more easily incorporate human rights precepts into the jus in bello.
The United States addressed the various rules of customary and conventional humanitarian and other relevant law used by opponents of nuclear weapons to assert their illegality. It dealt with them in the following manner:\(^\text{30}\)

(a.) *Attacks on the civilian population.*

Civilian injury or damage resulting indirectly from a legitimate military attack, as such, was not prohibited.\(^\text{31}\)

(b.) *Indiscriminate weapons.*

Modern nuclear weapons can be aimed at specific military targets to achieve a given military objective. They are not inherently indiscriminate.

(c.) *Proportionality.*

The disproportion of a nuclear attack would be wholly dependent on its circumstances.\(^\text{32}\)

(d.) *Poison weapons.*

Nuclear weapons do not violate the prohibition on poison weapons in humanitarian law, which does not apply to them.\(^\text{33}\)

\(^{30}\) *Loc. cit.,* at Note 9, pp. 22-34.

\(^{31}\) The United States pointed here to the fact that the relevant Articles of *Additional Protocol I* of the *Geneva Conventions* of 1949 (for example, those relating to the protection in war of property and the natural environment, and of civilians subjected to reprisal (Articles 48, 51 (6), 52 (1), 53 (a), 54 (4), 55 (2), and 56 (4) ) were never intended to apply to nuclear weapons, as indicated by the *International Committee of the Red Cross* in a statement appended to the text of the *Draft Additional Protocol.* It added that the United States is not a party to the Protocol, not having ratified it. Explicit statements (rather than *Reservations*) to this effect were made during negotiation of the Protocol by each nuclear weapon State except China, and no comment or objection was made from any source. The relevant question here is why statements of "understandings" were not converted into Reservations to the Protocols, in terms of the 1969 *Vienna Convention on the Law of Treaties,* [1135 *U.N.T.S. 351.* *Loc. cit.* Note 9, at p.27; *Verbatim* record of the Oral Submission of the United States before the Court, 15 November 1995, by Mr. J. H. McNeill, Senior Deputy General Counsel, U.S. Department of Defense, pp. 92-93. *Loc cit.,* Ch. II, at Note 20.

\(^{32}\) For example, the nature of the threat; the importance of destroying the objective; the character, size and expected effects of the device, and the magnitude of the expected risk to civilians. *Supra,* at Note 30, p. 23. The customary international law rules on necessity and proportionality have their *locus classicus* in the *Caroline Case,* 1841-42 [29 *B.F.S.P. 1137-1138; 30 B.F.S.P. 195-196].

\(^{33}\) The use of poison in war is addressed by Article 23 (a) of the *Hague Regulations* appended to the 1907 *Hague Convention (IV) Respecting the Laws and Customs of War on Land* (*Loc. cit.,* at Note 19) which prohibits the use of "poison" or "poisoned weapons". Castren, (cited in Singh, N. & McWhirney, E. (1989).
(e.) *The 1925 Geneva Protocol.* Nuclear weapons do not violate the provisions of this important instrument, which condemns "asphyxiating, poisonous or other gases, and ... all analogous liquids, materials or devices", and which again does not apply to them.

(f.) *Unnecessary suffering.* Suffering is only unnecessary when it exceeds that sufficient to achieve a military objective. Thus, the effects of nuclear weapons, however severe, may be necessary to accomplish a military mission.

(g.) *Environmental effects prohibited by the 1977 Environmental Modification Convention.* Environmental modification in war must entail a demonstrable intent in order to be caught by the provisions of this instrument.

(h.) *Belligerent Reprisals.* The use of nuclear weapons would not be inconsistent with the customary law of reprisal.

(i.) *Neutrality.*

_Nuclear weapons and contemporary international law* (2nd rev. ed.), Dordrecht: Martinus Nijhoff, at p. 121) argues that, since the regulation "especially forbids" the use of "poison" or "poisoned weapons", the prohibition should be considered to be absolute.

34 *Supra,* Note 19.

35 *Supra,* Chapter 1, at Note 40. Also *Loc. cit.,* at Note 19. The concomitant principle, expressed in the St. Petersburg Declaration of 1868, of avoiding actions which would "render death inevitable" is similarly discounted in terms of its relevance to nuclear weapons. *Loc. cit.,* at Note 9, p.33.

36 [1125 *U.N.T.S.* 3] Articles 1, 35 (3) and 55 effectively prohibit "environmental modification techniques" for military or other hostile purposes which have "widespread, long-lasting or severe effects [on the natural environment] as the means of destruction, damage or injury to any other State Party".

37 The customary law principle of belligerent reprisal has its locus classicus in the Nautilus Case (*Portugal v. Germany,* 2 *R.L.A.A.* 1012, at p.1026), whose *dicta* assert that the object of a reprisal must be "to effect reparation from the offending State for the offence or a return to legality by the avoidance of further offences". Bowett, cited in Judge Weeramantry's Dissenting Opinion, has proposed that reprisals are now illegal in terms of the Charter of the United Nations. *Loc. cit.,* at Note 29. Schwezenberger (cited in Singh & McWhinney (*Op. cit.,* Note 3, p.101)), in respect of the use of prohibited weapons by way of reprisal, comments that:

.... International law does not limit reprisals to identical acts. The better opinion... is probably that reprisals must be proportionate to the offence against which they are directed.
The inviolability of neutrals is not absolute, and the inevitable violation consequent on a use of nuclear weapons is speculative and abstract.\(^{38}\)

\textit{(j). Genocide.}\n
The 1948 \textit{Convention on the Prevention and Punishment of the Crime of Genocide}\(^{39}\) requires "intent to destroy ... a national, ethnical, racial or religious group, as such."\(^{40}\) Thus, it does not render nuclear weapons illegal \textit{per se}.\n
Apart from universal principles of humanity, application of most of the above turn on the principles of distinction between combatants and civilians, of proportionality, and of necessity in humanitarian law. Each one, it is submitted, is capable, in light of their known effects, of rendering nuclear weapons irretrievably unlawful.

\subsection{INTERNATIONAL ENVIRONMENTAL AND HUMAN RIGHTS INSTRUMENTS DO NOT PROHIBIT THE USE OF NUCLEAR WEAPONS.}\n
In general terms, both the United States\(^{41}\) and the United Kingdom\(^{42}\) disingenuously asserted their position that conventional law protecting the environment and human rights has little, if any, relevance for the use of nuclear weapons.\(^{43}\)

\footnotesize
\begin{itemize}
\item \(^{38}\) Supra, Note 32
\item \(^{39}\) \[78 \textit{U.N.T.S. 277}].
\item \(^{40}\) \textit{Ibid}, Article II.
\item \(^{41}\) \textit{Loc. cit.}, at Note 9, pp. 34-46.
\item \(^{42}\) \textit{Loc. cit.}, at Note 10, pp. 68-71.
\end{itemize}
These instruments, they contended, were never intended for this purpose, and cannot be construed as such. Indeed, their general nature prohibits their construal as specifically prohibitory of the use of nuclear weapons.44

Again, they were intended for operation in times of peace, and not in terms of legitimate armed conflict.45

2.2.4. THE THREAT TO USE NUCLEAR WEAPONS.

The nuclear weapon States shared the view that the absence of a prohibition against nuclear weapons per se must lead to the same conclusion in respect of a threat to use them.46

They noted that, while little work has been undertaken on the definition of a threat to use force in terms of Article 2 (4) of the United Nations Charter,47 such a threat involves more than mere possession of a weapon. Even deployment of weapons does not, of itself, constitute intent to use, since all States may deploy any weapon in self-defence, individually or collectively, as provided in Article 51 of the Charter.

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44 The United Kingdom conflated the construal of a particularity from a generality with the caveat that, unless expressly provided, "a treaty must be construed against the background of [a State's] inherent right of self-defence". It also enlisted the rule that treaties must be applied and interpreted against the background of general principles of international law, in order to reinforce its argument that legitimate self-defence is a sine qua non for the correct interpretation of all international treaties. Loc. cit., at Note 10, p.63. Cf. Article 31 (3) (c) of the Vienna Convention on the Law of Treaties, 1969. [1155 U.N.T.S. 331]. This argument must be balanced by consideration of the intention of the Parties to any particular treaty, even in matters bearing upon jus cogens. 62 B.Y.I.L. 1 (1991), at 60.

45 Supra, Note 42. The United States pointed to Article 6 (1) of the International Covenant on Civil and Political Rights, 1966, which states: "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" (sic.) (Emphasis added). It thus sought, in a semantic and self-serving way, to underline the legitimacy of the taking of life in legitimate warfare. Loc. cit., at Note 9, p.44.

46 Loc. cit., at Note 9, p.47.

47 Article 2 (4) of the U.N. Charter provides that:

"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".
Such a conflation of nuclear and conventional weapons reveals a fundamental contradiction for the nuclear weapon States when they seek, in terms of nuclear deterrence doctrine, to differentiate qualitatively between the two.

2.2.5. INTERIM SUMMARY.

In summary, the nuclear weapon States submitted that the Court should exercise its discretion, and decline to give a reply to the request of the General Assembly.\(^{48}\)

However, should the Court reject that assertion, it should nevertheless conclude that there is no general prohibition in customary or conventional international law against the use of nuclear weapons, and that their prohibition under the law of armed conflict would depend on insupportable speculation as to its applicability in an abstract or hypothetical future situation.

3. ARGUMENT LED BY STATES FOR THE ILLEGALITY OF NUCLEAR WEAPONS.

These States contended, firstly, that the General Assembly was competent to request an Advisory Opinion, that the Court was competent to comply, and that it should exercise its discretion to do so.\(^{49}\)

As to the substance of their arguments, and in contrast with the congruence of arguments led by the declared nuclear weapon States, those of the non-nuclear weapon States unsurprisingly exhibited a degree of divergence of approach which reflects their own diversity.

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\(^{48}\) Supra, Notes 6 and 7.

\(^{49}\) For example, the Written Observations of the Solomon Islands, 19 June 1995, contends that the request fulfills the requirements of Article 96 of the UN Charter, being a "legal question", and that the permissive nature of Article 65 of the Statute of the Court (the enabling provision for Advisory Opinions) should not be invoked, having regard for the non-binding nature of the Opinion, its practical significance, the strict judicial function of the Court, and the Court's practice of responding positively to requests seeking legal enlightenment. At pp. 6-22. Loc. cit., Ch. II, at Note 20. Refer to Appendices 1 and 2.
With the notable exception of the Netherlands,\footnote{Observations of the Government of the Kingdom of the Netherlands, Written Statement to the Court, 16 June 1995, which follow the United States in terms both of the Court’s discretion to hear the Case, and the findings it was open to hold. \textit{Ibid.}} they presented a collective view that there are no circumstances in which the threat or use of nuclear weapons may be permitted in international law.

For analytical purposes, the arguments of States may be divided between:

(a.) Those, of which Australia is representative, which sought to show that nuclear weapons are, by their nature, illegal in customary international law (and, hence, that it is unnecessary to address the circumstances of their use, and the applicable law, as separate and discrete issues),\footnote{Oral Statement on behalf of Australia by the Hon. Gareth Evans QC, Minister for Foreign Affairs, The Hague, 30 October 1995. Personal communication to this author.} and

(b.) Those, exemplified by the Solomon Islands,\footnote{\textit{Supra, Note 49.}} which engaged in a wide-ranging and complex survey of the obligations, rules and practices of international law in order to deny the legality of these weapons, both \textit{per se} and in terms of their use.

### 3.1. ILLEGALITY \textit{PER SE}.

Australia submitted its belief that the inherent illegality of nuclear weapons in customary international law leads to the conclusion that it is also illegal to acquire, test or possess them. It argued that, as a consequence, an obligation exists for all States to move towards their total elimination, but within an interim framework of stable deterrence.\footnote{\textit{Supra, Note 49.}}

Australia’s central proposition was that the most directly relevant principles in the question before the Court were those embraced by humanitarian law.\footnote{\textit{Ibid., p. 3. Australia asserted that the jurisprudence of the Court has recognised these “fundamental principles” in, for example, the \textit{Corfu Channel Case}, [\textit{I.C.J. Reports} 1949, p.4 ] in which the Court referred to “certain general and well-recognized principles, namely: elementary considerations of humanity”. These principles may be broader than any existing treaty provision (in, for example, the 1949 \textit{Geneva Conventions}). See also Note 29, \textit{supra.}} The threat or use of nuclear weapons, in view of their nature, their ability to annihilate Mankind, and the

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50 Observations of the Government of the Kingdom of the Netherlands, Written Statement to the Court, 16 June 1995, which follow the United States in terms both of the Court's discretion to hear the Case, and the findings it was open to hold. \textit{Ibid.}


52 \textit{Supra, Note 49.}

53 \textit{Loc. cit., at Note 51, pp. 1,2.}

54 \textit{Ibid., p. 3. Australia asserted that the jurisprudence of the Court has recognised these “fundamental principles” in, for example, the \textit{Corfu Channel Case}, [\textit{I.C.J. Reports} 1949, p.4 ] in which the Court referred to “certain general and well-recognized principles, namely: elementary considerations of humanity”. These principles may be broader than any existing treaty provision (in, for example, the 1949 \textit{Geneva Conventions}). See also Note 29, \textit{supra.}
probability of their proliferation were, in the modern era, contrary to those principles, and thus to customary international law.\textsuperscript{55}

Furthermore, the progressive restrictions on the manufacture, acquisition, deployment, testing and military use of nuclear weapons since 1945\textsuperscript{56} were evidence of international attempts ultimately to eliminate them as fundamentally inhumane and inconsistent with the dictates of public conscience. Taken together with the many condemnatory General Assembly resolutions,\textsuperscript{57} Australia asserted that these instruments serve to extend the illegality of nuclear weapons, a principle since 1945 \textit{de lege ferenda}, to one with the status of \textit{lex lata}.

Australia supported its assertions with reference to the developing conventional (and customary) international law of non-derogable human rights, together with the "international civilian protection law" advanced by the 1977 \textit{Protocol I} to the 1949 \textit{Geneva Conventions}, and the growing awareness of the environmental effects of nuclear weapons.\textsuperscript{58}

In essence, Australia sought to show that these developments confirm the international community's growing abhorrence of war, and the increasingly high standards it uses in assessing the humanity of weapons. In turn, this must impact on the dictates of public conscience, and on customary international law.\textsuperscript{59} This is a rare, and welcome,
acknowledgment of rising *absolute* standards of morality within the development of international law.

Australia concluded its Oral Submission with an appraisal of the illegality of the *possession* of nuclear weapons, together with the obligation of States to eliminate them. As with other weapons of mass destruction (biological and chemical) their very existence offended fundamental principles of humanity. Like them, prohibition against their threat or use must be guaranteed through their destruction, and through prohibition against their acquisition and possession.

In Australia's view, the forum most effective for these practical reforms must be the 1968 *Nuclear Non-proliferation Treaty*, specifically its disarmament provisions under Article VI and, by implication, its acceptance of deterrence, and the differential treatment of nuclear and non-nuclear weapon States as continuing principles of international law.

### 3.2 ILLEGALITY IN THREAT OR USE.

The Written Statement of Nauru is an exemplar of the many States which addressed the various principles and rules of international law to show that nuclear weapons are illegal in all circumstances.

Focussing on the *jus ad bellum*, Nauru pointed to the following sources of law to support its contention that threats, or use of force are contrary to law:

- (b.) *United Nations Resolutions and Declarations*.
(c.) **Collective Security Treaties.**

(d.) **The Nuremberg Principles.**

(e.) **Opinio Juris on the nature of a threat.**

The Written Statement of the Solomon Islands enlarged on the above in its concentration on the proposition that the threat or use of nuclear weapons is subject and contrary to the international law of armed conflict, the *jus in bello*, having regard for the nature of the effects of their use, and irrespective of the circumstances in which they are used.

This extensive and fine-grained review of the customary and conventional humanitarian law of nations, and of the wider laws of war, argued forcefully that the quantitative and qualitative destructive effects of the detonation of nuclear devices are such that they are rendered illegal in terms of:

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67 Ibid., at Note 63, p.9. Collective security treaties such as the 1949 North Atlantic Treaty are symbolic of the obligation to refrain from the threat or use of force. *Stat.* 2241; *T.I.A.S.* No. 1964; *4 Bevans* 828; *34 U.N.T.S.* 243 (1949) Art. I.

68 Ibid., at Note 63, p.10. The International Law Commission has codified “the principles of international law recognised by the *Charter of the Nuremberg Tribunal*” as:

1. Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances, and
2. Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (1) above.

Boyle has stated that these principles “have since been universally considered to constitute an authoritative statement of the rules of customary international law”. Boyle, F. (1986). The relevance of international law to the “paradox” of nuclear deterrence. *Nu. U.L. Rev.*, 80 (6), 1407-1448, at 1416.

69 Supra, Section 2.2.4; Ibid., at Note 63, pp. 22, 23, 31. Nauru asserted that the concepts of “threat” and “use” in Article 2 (4) of the UN *Charter* merge in most circumstance. Thus, *threat* of use is itself a *kind* of use, when “‘threat’ is defined as a declaration to inflict punishment...in retaliation for, or conditionally upon some action or course. An indication of probable...violation to come.” In any event, a threat to commit an illegal act is also illegal as a general principle of law recognised by civilized nations.

70 Supra, at Note 49.


72 For example, the *jus ad bellum* customary principles of neutrality and reprisal, and the 1948 *Convention on the Prevention and Punishment of the Crime of Genocide* [78 *U.N.T.S.* 277].
(a.) The limitation on the choice of means of attacking the enemy.\textsuperscript{72}

(b.) The obligation to discriminate between combatants and civilians.\textsuperscript{73}

(c.) The prohibition against attacking civilian targets.\textsuperscript{74}

(d.) The prohibition against the use of poisons, or weapons having indiscriminate effects.\textsuperscript{75}

(e.) The prohibition against the use of weapons which render death inevitable or cause unnecessary suffering.\textsuperscript{76}

(f.) The prohibition against violating the territorial integrity and neutrality of third States.\textsuperscript{77}

(g.) The prohibition against causing widespread, long-term and severe damage to the natural environment.\textsuperscript{78}

(h.) The obligation to respect the principles of proportionality and humanity.\textsuperscript{79}

\textsuperscript{72} Supra, at Note 29.
\textsuperscript{73} Supra, at Note 31.
\textsuperscript{74} Ibid.
\textsuperscript{75} Supra, at Notes 29 and 33. Article 51 (4), (5) of Additional Protocol I to the Geneva Conventions. Article 51 (5) (b) prohibits the use of an indiscriminate weapon causing incidental loss to civilian life or objects which is excessive in relation to any anticipated military advantage.
\textsuperscript{76} Ibid. (In terms of the provisions of the St. Petersburg Declaration of 1868).
\textsuperscript{77} Articles 2 (4) and 74 of the Charter of the United Nations.
\textsuperscript{78} The general obligation to avoid trans-boundary environmental damage is reflected in the dicta of the Trail Smelter arbitration [United States v. Canada, 3 R.I.A.A., p.1907, (1938 and 1941)]. More recent conventional instruments are listed supra, at Note 43.
(i). The prohibition against genocide, or crimes against humanity.\textsuperscript{80}

The above, it is submitted, represents a comprehensive taxonomy of the international law applicable in armed conflict, and particularly international humanitarian law. It is also a powerful exposition of the legal incommensurability of the positions of those States with nuclear weapons, and those without.

3.3 SUMMARY.

This selective review of the Pleadings of States has served to establish the range of argument led for and against the question before the Court. It remains, in the substantive component of the thesis, to examine the individual Opinions of Judges.

It will then be possible, as indicated in the Introduction to this Chapter, to assess the strengths and deficiencies of the Court's Opinion.

\textsuperscript{80} Supra, at Note 67. See also Section 2.2.2.
CHAPTER IV.

THE OPINION EVALUATED.

1. INTRODUCTION.

A review of the Opinions of individual Judges will complete an examination of the extent of fact, and of applicable law available to the Court, enabling a range of normative judgments concerning the comprehensiveness, coherence and jurisprudential continuity of the Opinion.

2. DISSENTING AND OTHER OPINIONS.

As previously noted, all fourteen Judges appended individual Opinions or Statements to the Court’s Judgment. In general terms, they confined their remarks to the material presented before the Court, and did not seek to introduce substantially novel perspectives or interpretations to the application of relevant law to available fact. ¹

However, a sample of individual Opinions from Judges who voted on each side of the question, while instructive, is anomalous to the extent that several Judges appear to have held views at odds, in some degree, with their recorded votes. ² Nevertheless, and whatever

¹ This is an example of the unsurprising juridical caution of the International Court of Justice. Nagendra Singh, a former President of the Court, has stated, significantly, that the Court must, in his view, acknowledge the principle jura novit curia. Nevertheless, it is limited in its ability to contribute to the progressive development of international law through the need to guard its judicial integrity by not anticipating the law before it is laid down by legislators. Judgment's sub specie legis ferenda would violate the essential canons of adjudication. (Singh, N. (1989). The role and record of the International Court of Justice. Dordrecht: Martinus Nijhoff, at pp. 174-5).

² This may be a consequence of the complex internal arrangements used by the Court in the development of a Judgment which represents the majority view of its members. In general terms, these procedures aim progressively to develop a Judgment which will attract majority support in the Court (whose member Judges must, as a collegial court, bear joint responsibility for its jurisprudence). They are outlined by Singh (Op. cit., at Note 1, pp. 383-5). The most striking example is contained in President Bedjaoui’s Declaration. Although he voted in favour of operative paragraph: 105 (2) E, he was constrained to state: "... the Court’s inability to go beyond the conclusion it reached cannot in any manner be interpreted as having opened the door to the recognition of the
their final decision, each individual Judge brought to the collegiate Advisory Opinion a complexity of judicial argument and relevant law which, as obiter dicta, enlarges and explains it.

For example, Judge Oda, in his Dissenting Opinion, was concerned to point out that principles of judicial propriety and economy should have led the Court to decline to give an Opinion. He contended that the question was political in nature, more suited to negotiation between States in Geneva or New York than in a curial setting at The Hague, and that the Opinion had the potential to damage the Court’s credibility with the international community. Significantly, he went on to place the Opinion within the context of the 1968 Nuclear Non-proliferation Treaty, and the continuing failure to conclude a Convention prohibiting any use or threat of use of nuclear weapons.

Several Judges emphasised the fact that, for the first time, the Court had stated unambiguously that the threat or use of nuclear weapons is contrary to the international law of armed conflict, and particularly to the principles and rules of humanitarian law. Others indicated that the natural right of a State to self-defence cannot be denied by the United Nations Charter, nor by any conventional or customary rule. As a consequence, resort to nuclear weapons in extremis cannot be denied in law.

Judge Weeramantry, in an extensive and discursive review of law and fact, concluded that the use or threat of use of nuclear weapons was illegal in any circumstances whatsoever, being the very negation of the humanitarian concerns lying at the heart of humanitarian law.
He undertook a comprehensive discussion of the scientific and technical effects of the detonation of fission and fusion devices on human beings and their environment, and applauded the Court's acknowledgment of the relevance of nuclear weapons to the environmental strictures of the 1977 Additional Protocol I to the 1949 Geneva Conventions.  

Again, Vice-President Schwebel expressed his opinion that the use of nuclear weapons did not necessarily violate humanitarian law in extreme cases of self-defence, even though "the deaths of many millions of people through indiscriminate inferno and far-reaching fallout" could not be accepted as lawful.  

In short, the views of individual Judges of the Court, as expressed in their Dissenting and other Opinions, echoed the widely divergent views of States represented before it, but did not (with the exception of the principle of extreme self-defence) seek to introduce elements of law which had not previously formed a part of the jurisprudence of the Court.

3. THE OPINION REVIEWED.

It is now possible, in light of the material set out in the Opinion itself, the Pleadings of States before the Court, and the Dissenting and other Opinions and Statements of individual Judges, to form conclusions concerning the strengths and weaknesses of the Advisory Opinion.

The Opinion appears, prima facie, as a compromise between two incommensurate positions. In its dispositif, the Court found, firstly, that it could find no specific authorisation for the threat or use of nuclear weapons in customary nor conventional law (as contended by those States without such weapons).  Conversely, it could find no "comprehensive nor

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10 Loc. cit., at Note 6. Paragraph 105 (2) A of the Advisory Opinion. Decided unanimously. The precise text of the Court's dispositif may be found at Chapter II, Section 2.1.
universal" prohibition within the same sources, as asserted by the declared nuclear weapon States.  

Thirdly, it found, unanimously, that any threat or use of force involving nuclear weapons in violation of Article 2 (4) of the United Nations *Charter*, which prohibits such action "against the territorial integrity or political independence of any state" is unlawful. It found the same to be true in terms of a threat or use of force which did not meet the self-defence requirements of Article 51 of the *Charter*.  

Fourthly, and unanimously, it found that any such action *should* comply with the principles and rules of international humanitarian law (emphasis added), and with the terms of the *lex specialis* of conventional instruments specific to nuclear weapons.  

Finally, in the operative Paragraph of the Opinion, and by the narrowest of simple majorities, the Court found, following from the above, that a 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 (emphasis added).  

It attempted to enlarge on its caveat by concluding its Judgment with a *non liquet*, in which it averred its inability, given the current state of international law, and of the elements of fact at its disposal, to conclude definitively whether such action would be lawful or unlawful in a circumstance of self-defence which threatened the survival of a State. It may be observed here parenthetically that this final holding can be construed as a concession to

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12 *Ibid.*, Paragraph 105 (2) C. The United Kingdom asserted that the use of force is not prohibited by Article 2 (4) if it is authorised by a competent organ of the United Nations (presumably the Security Council), or if it is undertaken in the exercise of self-defence as defined by Article 51. Written Statement of the United Kingdom, p.34, para. 3.33.  
13 *Ibid.*, Paragraph 105 (2) D. The use of "should" rather than "must" tends to mitigate the strength of this finding, since "should" has, as its most common meaning in modern English, the sense "ought to" rather than anything stronger. *Collins English Dictionary* (1990), (rev. ed.). London: Harper Collins. This is capable of construal as an attempt to accommodate two irreconcilable positions in respect of the relevance of humanitarian law.  
14 *Ibid.*, Paragraph 105 (2) E. Those Judges in favour: President Bedjanui (Algeria); Judges Ranjeva (Malagasy); Herczegh (Hungary); Shi (China); Fleischhauer (Germany); Vereschelin (Russia) and Ferreri-Bravo (Italy).  
Those against: Vice-President Schwebel (United States); Judges Oda (Japan); Guillaume (France); Shahabuddeen (Guyana); Weeramantry (Sri Lanka); Koroma (Sierra Leone) and Higgins (United Kingdom). The fifteenth position on the Bench was vacant, following the death of Judge Aguirre-Mawdsley (Venezuela) in November 1995. He was replaced by Judge Farn-Aranguren (Venezuela), who was elected in February 1996.
nuclear weapon States, and to the doctrine of nuclear deterrence. It may also be seen as lending precedence to the survival of a single State over that of the rest of humanity.

3.1. EVALUATION OF THE OPINION.

What, then, are the strengths and weaknesses of the Opinion? As noted above, it is capable of interpretation by the nuclear weapon States as acknowledgment of their general position with regard to nuclear weapons: that there are foreseeable circumstances in which a use of nuclear weapons in war would not be illegal. By the same token, the Court's perplexing inability to declare such an action illegal in all cases without exception may be interpreted as a significant rebuff to the rest of the international community.

3.1.1. THE COURT'S DICTA.

The Opinion's greatest strength may be its dicta, expressed in Paragraphs 79 and 85, that the body of international humanitarian law contained in major conventions is, in essence, general and customary international law, and that it applies to nuclear weapons in the same way as to any other weapon.\[15\]

Paragraph 79 states:

It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and "elementary considerations of humanity" as the Court put it in its Judgment of 9th April 1949 in the Corfu Channel case (I.C.J. Reports 1949, p.22), that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.\[16\]

Condorelli notes that the expression "intransgressible principles of international law" seems to suggest that the Court was attempting by its jurisprudence to bring the status of

\[15\] Humanitarian law is understood here as a sub-division of the jus in bello.

\[16\] Loc. cit., at Note 6.
humanitarian law closer to *jus cogens*, while not attempting its inclusion within that domain.\textsuperscript{17} As will be discussed in Chapter V, this result has far-reaching implications for the legal status of the 1968 *Nuclear Non-proliferation Treaty*, and for the doctrine of deterrence in international law.

A second important characteristic of the Opinion is its treatment of the distinction between *jus ad bellum* and *jus in bello*.\textsuperscript{18} It is possible to read paragraph 105 (2) E of the *dispositif* (paraphrased above) as discriminating between the two when, by well established principle and custom, they have equal status, and must both be satisfied before a use of force is lawful. In other words, necessary and proportionate self-defence by means prohibited in humanitarian law would be unlawful.

It appears that the Court has, by its *non liquet*, allowed the possibility that a use of nuclear weapons (which, it is submitted, would violate the humanitarian components of *jus in bello*) could, in undefined circumstances, be justified by a principle of *jus ad bellum* (that of extreme self-defence).\textsuperscript{19} There is room here for concern about the negative impact of this

\textsuperscript{17} *Supra*, at Note 2, p. 17. At Paragraph 83, the Court declined to rule on the *jus cogens* nature of humanitarian law since the question of its legal character, *per se*, was not at issue.

\textsuperscript{18} The *jus ad bellum* comprises, in the modern era, the principles of lawful self-defence against unlawful aggression embodied in the *Charter* of the United Nations. Its origin is found in the medieval principle of "just war", as further developed by Grotius in the early part of the Seventeenth Century. Its focus, in order to impose limits on a State's ability to resort to war, was placed principally on the authority and state of mind of the person declaring war, the condition and intentions of those waging war, the justice of the cause of war, and the deserts of those against whom it was waged. *Kingsbury, B., & Roberts, A.* (1992). *Introduction: Grotian thought in international relations*. In *H. Bull, B. Kingsbury & A. Roberts* (Eds.), *Hugo Grotius and international relations* (pp. 20-21). Oxford: Clarendon Press.

The *jus in bello* addresses the means by which war may be pursued, and encompasses the principles of humanitarian law applicable in war: the Hague and Geneva Conventions, Protocols and Regulations, and other instruments which codify customary law (and more directly so, in view of the present Advisory Opinion).

\textsuperscript{19} Greenwood has played down the significance of this apparent disjunction, which would, he asserts, threaten a return to a Grotian conception of *just war* in place of the United Nations *Charter* provisions on use of force. He does not concede the proposition that all use of nuclear weapons would transgress humanitarian law. Greenwood, C. (1997). *The Advisory Opinion on nuclear weapons and the contribution of the International Court to international humanitarian law*. *Loc. cit.*, at Note 2, 65-75.

The opposite view is put cogently by Judge Shahabuddin, who, noting that the Court has recognised that the destructive power of nuclear weapons, unrestrained in space or time, nonetheless is overborne in its judgment by the principle of resort to self-defence, or "State survival", stated:

It would ... seem curious that a World Court should consider itself compelled by law to reach the conclusion that a state has the legal right, even in limited circumstance, to put the planet to death .... .

equivocation on the Court’s standing in the international community. Such an outcome would be regrettable, especially as the result of its putative, and surprising, inability to ascertain the law applicable to a case before it.

Nevertheless, that may be the consequence of the development of the Court’s jurisprudence through the evolution of the entirely new principle of the *survival of a State* which, it may be argued, is a retrograde step for a Court which completed its Judgment with a call for comprehensive nuclear disarmament.\(^{20}\) It also calls into question the regime of self-defence enshrined in the *Charter* of the United Nations.

While it is undeniably “the job of the Court ... to apply the law as it is.”\(^{21}\) it must also, in Nagendra Singh’s words, be “very careful and selective of the time and the circumstances in which it could proceed to look to the developmental aspect of the law it administers”.\(^{22}\) This may be one occasion on which the Court has over-stepped the bounds of prudence, and is a second negative aspect of the Opinion.

A more basic criticism, and one discussed by Judge Koroma in his Dissenting Opinion,\(^{23}\) concerns its focus on the nature of the legal matter before it. The Court was asked whether it is lawful to use nuclear weapons, and *not* about the juridical priority to be assigned to the survival of a State. In Judge Koroma’s words: “... the Court flinched and failed to reach the only and inescapable finding” [that the use of nuclear weapons is prohibited in all circumstances by the rules of humanitarian law].\(^{24}\)

Further notable *dicta* in the Opinion are derived from its treatment of international human rights and environmental law. While neither was held to be substantively decisive in the Court’s deliberations, nonetheless, both domains of law were relevant to its reasoning, and both were strengthened by the Opinion.\(^{25}\)

It will be recalled that the United States and the United Kingdom were dismissive of the relevance of each domain to the threat or use of nuclear weapons.\(^{26}\) Other States, such as

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20 Paragraph 105 (2) F of the Court’s *dispositif*. *Loc. cit.*, at Note 2.
21 *Supra*, at Note 19, p.75. See also Note 1.
22 *Loc. cit.*, at Note 1, p.175.
23 *Loc. cit.*, at Note 2, pp. 4 , 18.
25 Some of the most important international conventional instruments in the fields of human rights and the environment are listed at Chapter III, Note 43.
26 Chapter III, at Section 2.2.3.
the Solomon Islands and Egypt, held that a non-derogable right to life exists at all times in terms of international human rights instruments, and that the many treaties aimed at the protection of human health and the environment have attracted such widespread accession as now to reflect rules of customary law.

The Court addressed the relevance of the right to life at Paragraphs 24 and 25 of its Opinion and, while affirming that human rights law continues to apply in war, went on to place the test of what constitutes "arbitrary deprivation of life" for determination in terms of "the law applicable in armed conflict, which is designed to regulate the conduct of hostilities." In other words, human rights rules are to be interpreted in terms of humanitarian law, bringing them firmly within that domain in the context of armed conflict. This is a significant advance for the status of human rights rules generally, and in particular the universal right to life.

As for environmental law, the Opinion has strengthened greatly its emerging status as a body of rules which, given the wide adoption of the 1992 Rio Declaration, must now be taken seriously into account when action is contemplated which would conflict with its.

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27 Cf. Article 6 (1), *International Covenant on Civil and Political Rights*, 1966 (1999 U.N.T.S. 171). Written Comments of Egypt on Other Written Statements, September, 1995, at pp. 27, 28, in which Egypt noted that this Article 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 [sic].

It also cited Article 40 of the *Fourth Geneva Convention*, 1949 (75 U.N.T.S. 287), which states "[T]he law is prohibited to order that there shall be no survivors". *Loc. cit.*, Ch. II, at Note 20.

28 *Ibid.* Written Observations of Solomon Islands, 20 June 1995, at p.86, paras. 4.21-4.30. This view reflects the position of the "revolutionist" or Kantian theorists of international relations; those who champion the transcendence of individuals as the superior moral and political agents in the world. Such a position is a basic premise of the international law of human rights. A broad discussion of this vital area of the legal and philosophical sub-structure of human rights can be found in: Shestak, J. L. (1985). The jurisprudence of human rights. In T. Meron (Ed.), *Human rights in international law.* (pp. 69 - 117). Oxford: O.U.P.

29 *Loc. cit.*, at Note 2, para. 25.

30 One commentator has drawn attention to the fact that such a conflation of the two spheres of law is less comfortable when associated with the rights of those in the custody of an "authority". Here, human rights treaty bodies have tended to ignore the Geneva Conventions, and applied the human rights texts within their own terms. Doswald-Beck, L. (1997). International humanitarian law and the Advisory Opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons. *Loc. cit.*, at Note 2, 35-55, at 52.

31 [UN Doc. A/CONF. 151/Rev.1]. In addition to environmental law instruments, *per se*, the term "environmental law" is used here to include those provisions of Geneva Law which regulate the effects of conflict on the natural environment, such as Article 35, paragraph 3 of *Additional Protocol I*, 1977 to the *Geneva Conventions* of 1949, and conventional law having the same effect (such as the 1977 *Convention on the*...
This principle is clear when the Court states:

The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.\(^{32}\)

The Court emphasised the fact that environmental treaties could not have been intended to deprive a State of its right of self-defence, but that they must be taken into account when assessing whether “an action is in conformity with the principles of necessity and proportionality”.\(^{33}\)

In summary, then, the Opinion has considerable merit in terms of its enunciation of dicta whose effect is to strengthen and extend the reach of international humanitarian, human rights and environmental law, both customary and conventional, in their application to the international law of armed conflict.

These advances are tempered by the Court’s confusing treatment of the relationship between jus ad bellum and jus in bello, its finding of a non liquet on a question which it had not been asked to address, and its “legislative” development of a principle of extreme circumstances of self-defence involving the survival of the State.

This last criticism, as noted above, has wide ramifications for the entire regime of self-defence in the international community and, most importantly, must be seen in light of the status of the doctrine of deterrence in its relationship to customary and conventional international law. Indeed, the issues surrounding this question lie at the heart of the Opinion and its significance for nuclear disarmament.

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Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques. [1125 U.N.T.S. 3]

\(^{32}\) Loc. cit., at Note 2, paragraph 29.

\(^{33}\) Ibid., paragraph 30. Doswald-Beck has pointed to the ambiguity of the reference to “necessity and proportionality”, which the Court may have intended as a reference to this principle in the general context of the law of self-defence, or alternatively to the principle of proportionality of collateral damage in humanitarian law. If the latter, she contends, this means, in effect, that “environment” is a “civilian object”, the damage to which must be proportionate to the value of a military objective. This argument appears redundant to the extent that it seems unnecessary to extend the scope or range of “civilian objects”, in the sense of artefacts and service providers, already afforded protection by “Geneva Law”. Ibid., at Note 30.
3.1.2. **COHERENCE OF ARGUMENT IN THE OPINION.**

The coherence of the reasoning and argument presented in the text of the Opinion should be understood with reference to the evidence of fact before the Court, and of the relevant law available for application to that evidence.

In general terms, the deficiencies apparent in the raciocination and analyses made by the Court are all the more perplexing when viewed against the Opinion in toto. There is no doubt that the Court addressed the broad span of spheres or domains of law which might apply to a question concerning the legality of a threat or use of force employing a weapon of mass destruction. It had been addressed at length on the question by 43 States in written statements, and by 23 of those States in oral submissions. Its own jurisprudence, that of its predecessor, the Permanent Court of International Justice, and the composition of its distinguished Bench combined to ensure that such was the case. However, when viewed at the level of specific applicable law, anomalous and contradictory reasoning begins to appear.

The Court began with a convincing discussion of its jurisdiction, and of its discretion to hear the matter. An examination of its Statute, and an extensive review of the Court's jurisprudence, led it with little difficulty to a positive conclusion.

It moved on to consider relevant law, visiting each of the substantive arguments of States for and against the applicability of a wide range of international law norms, and identifying (apparently without consulting its own jurisprudence) the United Nations Charter provisions on the use of force, the law of armed conflict, and specific treaties on nuclear weapons as the law most relevant to the question posed.

There is little with which to take issue to this point. However, when it approached more closely each area of law, the Opinion's flow of reasoning became less certain. For example, its examination of the principles and rules of humanitarian law applicable in armed

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35 These comments are intended to indicate the general comprehensiveness of the text of the Opinion, rather than that of the individual opinions, or alternative commentaries, of Judges, which vary greatly in length and thoroughness. The text of the Opinion is summarised at Chapter II, Section 2
36 *Loc. cit.*, at Note 2, Paragraphs 10 - 19 of the Opinion.
conflict is both comprehensive and rigorous. However, its conclusion, at Paragraph 95, that the use of nuclear weapons was "scarcely reconcilable with respect for [the requirements of international humanitarian law]" is followed by the observation that:

Nevertheless, the Court considers that it does not have sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstance (emphasis added).

What is lacking in this instance is any indication of the circumstances which would allow the lawful use of nuclear weapons. The Court, lacking sufficient information with which to judge the best position, on either side of the question, would have been better served had it been swayed by its own argument as to incommensurability of principles of humanity and the detonation of nuclear devices.

The reluctance of the Court to follow the lines of its argument to their most logically defensible conclusion is reflected in the non liquet of the second limb of the operative Paragraph of the dispositif. While the practical consequences of the Opinion's non-finding may be apparent to all interested parties, nonetheless it appears open to hold that, given the legal and factual tools at its disposal, the Court's apparently disabled jurisprudence lacks coherence. It is simply not supported by the text which leads to its terms.

Of the many alternative ways of establishing this conclusion, perhaps the most cogent, given the central position of humanitarian law in the Opinion, is to indicate, with respect, the manner in which the Court could have approached its treatment of this area of law.

It had first to determine whether the threat or use of nuclear weapons is lawful in relation to the humanitarian law protecting combatants, and then to address that which protects civilians in war. This is a vital first step in any analysis, since the principle of

38 Ibid., Paragraphs 74-87 of the Opinion.
39 This deficiency is echoed in the first limb of Paragraph 105 (2)E of the Court's dispositif, where the term "generally" in relation to the applicability of humanitarian law to nuclear weapons in war is left without any explanatory addendum (or apologia).
40 Several Judges asserted this to be the case in Dissenting Opinions. E.g. Dissenting Opinion of Judge Shahabuddeen, at Part VI, Conclusion. 35 LLM 809 (1996).
discrimination between the two is a fundamental component of international humanitarian law.41

Having done so, the Court could then have judged whether nuclear weapons cause suffering which is "unnecessary" in terms of the 1868 St Petersburg Declaration,42 and the Hague Regulations of 1907.43

Finally, the Court would then have been in a position to address the issue of the claimed indiscriminate effects of nuclear weapons, which would bear upon the prohibition against attacking civilians if unavoidable civilian casualties were expected to result from a military attack.44

Had the Court proceeded in this way, it is difficult to believe that it would have reached the conclusion contained in Paragraph 95 (above).

4. CONCLUSION.

A selective survey of the individual opinions and statements of Judges has been used in conjunction with the pleadings of States, and the Opinion itself, to review and evaluate the strengths and weaknesses of the Opinion in terms of its *dicta*, the continuity of its jurisprudence, and the coherence of its argument.

It remains to place the Advisory Opinion in the wider context of its importance for the international community of nations within the United Nations system. There can be no doubt that the Opinion carries great legal, political and moral significance for the prospects

41 1977 Protocol I to the 1949 Geneva Conventions. [1125 U.N.T.S. 3], states at Article 48:

*Parties to ... conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objects and accordingly shall direct their operations only against military objectives.*


44 Mohr has pointed to the fact that the principle of proportionality, *per se*, would not unconditionally exclude any recourse to nuclear weapons in self-defence (although it is very difficult to conceive of a circumstance in which it could sanction such use). The Court has distinguished between this principle and international humanitarian law (to which reference must ultimately be made in determining lawfulness). However, humanitarian law is *itself* influenced by the principle of proportionality, which provides its linkage to the Charter law of *jus ad bellum*. This is tantamount to conceding that aggressive use of nuclear weapons is always disproportionate *and* because it is contrary to international humanitarian law. *Loc. cit.*, Note 34, at 97.
of nuclear non-proliferation and disarmament in the opening years of the Twenty-first Century.

From this perspective, the ways in which it affects or modulates efforts in these directions will be of immense importance, not only for the future standing and relevance of the International Court of Justice, but also for the success of international efforts to moderate and confine aggressive use of force through legal and moral strictures, as well as by political means.
CHAPTER V.

CONCLUSION: OUTCOMES, RELEVANCE AND IMPACT.

1. INTRODUCTION.

The final Chapter of the thesis will draw together the threads of argument, dispute and evidence in order to assert a range of implications and possible (or imputable) outcomes flowing from the Advisory Opinion. The breadth and depth of issues surrounding its genesis, direction and resolution are sure indicators of its importance on the widest international scale.

With that in mind, it will focus, firstly, on the most important direct implications of the Court's Opinion. This will encompass some consideration of its impact on perceptions of the Court's judicial independence and integrity as an integral component of the United Nations Organisation, together with implications for the Court's ability to develop international law through its jurisprudence. The thesis will also consider its significance for the future of the regime of deterrence surrounding the 1968 Nuclear Non-proliferation Treaty, the prospects of comprehensive nuclear disarmament, and perceptions of the principles of self-defence in international law.

Secondly, and in a more general or contextual sense, the thesis will consider the importance of the Opinion as a commentary on the post-World War II development of public international law, and on the plural model of international relations offered, respectively, in Chapters I and II.

Finally, it will close with a general appraisal of the Opinion in terms of the alternative findings that were open for the Court to hold.

1 Loc. cit., Ch. III, at Note 21. Hereafter termed "NPT".
2.1. JUDICIAL INDEPENDENCE AND INTEGRITY.

The dual questions of the Court's integrity, and of its ability to maintain its judicial independence within the United Nations system, generate a range of theoretical and practical conundra. That does not disqualify them from consideration, not least because the present Opinion, as much as judgments in compulsory jurisdiction, illustrates many of the dilemmas faced by the Court.

Its very nature as a collegial international court, reflecting on its Bench widely disparate legal, political, social and cultural systems, encourages a perception that its judges will discharge their duties in some nationally-determined way.\(^2\) Such an assertion is by no means obvious, although it is possible to argue that the Court’s record over the past decade, especially concerning the continuity of its jurisprudence, indicates that politically-motivated pressures upon it, whether implicit or more forcefully expressed, may be growing.

In such circumstances, it is increasingly vital, in terms of the Court’s judicial independence, and relevance for the development of international law, that it resist with the full weight of its judicial, statutory and moral authority all attempts at extra-juridical influence from States.

This aim was not assisted by its Judgment in the Nicaragua Case,\(^3\) in which, as Reisman has indicated, the Court used a truncated citation of its own jurisprudence in order to leave the impression that it was thereby entitled to reach judgment in a non-appearance case (pursuant to Article 53 (2) of its Statute) without satisfying itself that the applicant State’s factual claims were well-founded. Having regard to the full extent of its

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\(^2\) Judge Manfred Lachs, a former President of the International Court of Justice (1973-1976), has stated that judges of the Court have, through their training, experience, impartiality and conscience, displayed a level of objectivity, detachment, disinterest and lack of bias which confounds the frequent claims made, especially in the world’s press, that the I.C.J. is nothing more than a “legal” Security Council. His comments were made in the context of the debate among American jurists following the Nicaragua Case of 1986 [Nicaragua v. United States, I.C.J.Reports, 1986, p.4]. He indicates examples of the Court’s unanimous judgments to illustrate his point (which is reinforced by the unanimous voting recorded on all but one limb of the dispositif in the present Opinion). While acknowledging the fact that many of its detractors are motivated by an aversion against allowing any foreign involvement in sovereign State interests, he emphasises the Court’s primary goal of global representation, rather than any out-moded conception of it as “a like-minded, Western-oriented club”. Lachs, M. (1987) A few thoughts on the independence of judges of the International Court of Justice. Col. J. Trans. L. 25 (3), 593-600.

\(^3\) Loc. cit., ibid., at Note 2.
jurisprudence, it was not so entitled. As discussed in Chapter IV, the present Opinion contains examples of equally impaired (and puzzling) jurisprudence.

In the face of growing concerns for the future judicial independence and perceived integrity of the Court as it fulfils its remit, the premises underlying this discussion must be brought constantly to the fore: that the juridical resolution of legal disputes, and the Court's central role in that process, are fundamental to any hope for a peaceful world. All States must have confidence in the procedural and substantive probity of all aspects of its work.

2.1.1. JURISPRUDENTIAL EVOLUTION.

The Court's most important relationship, from both a judicial and political/diplomatic perspective, is that with the United States. International legal idealism will not alter this reality. As a consequence, its ability to develop or direct the growth and universal influence of public international law, especially in the domain of the use of force in international relations, was severely curtailed by the United States' withdrawal from the Court's compulsory jurisdiction in the 1986 *Nicaragua* Case.

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4 Refer to Appendix 2. The Court, in *Nicaragua*, invoked the *Corfu Channel Judgment* ([U.K. v. Albania] I.C.J. Reports 1949, p.248) as authority for a partial default judgment in the absence of extensive questions of fact from the United States (which had withdrawn its limited accession to the "Optional clause" of the I.C.J. Statute (contained in Article 36) and absented itself from proceedings). In doing so, however, it omitted to cite its coterminous dicta that, in satisfying itself that the applicant State's claim is well-founded, it should have resort to methods different from those the absent defendant might have used. Reisman, W. M. (1989). Respecting one's own jurisprudence: A plea to the International Court of Justice. 83 A.J.L.L. 312 (1989). At 312-314.

5 At Section 3.1.2.

6 Gordon has described the Court's character in the following way:

The Court is unique: a hybrid of arbitral tribunal, legal adviser and court of law; of trial and appellate court; of "principle judicial organ" of the United Nations and autonomous adjudicative body; of civil law and common law formalities and techniques; of diplomacy and law. Its jurisdiction is not so much prescribed by constitution or statute, as it is created, in effect, by contract with and among the parties...[as] independent states. ....virtually every case the Court hears is of a "political" nature.... Gordon, E. (1987). Legal disputes under Article 36 (2) of the Statute. In L.F. Damrosch (Ed.), *The International Court of Justice at a crossroads* (pp.183-222). Dobbs Ferry: American Society of International Law. At p.185. This hints at the undoubted importance of non-judicial methods of dispute resolution, such as negotiation, good offices, mediation, conciliation and arbitration in universal U.N. or regional fora.

7 Not least in view of its predominance over the administrative and financial functions of the United Nations Organisation, of which the I.C.J. is a component.

8 *Loc cit.*, at Note 2. On 8 October 1985 the United States withdrew its acceptance of the Court's jurisdiction under its "Optional Clause" Declaration in terms of Article 36 (2) of the *Statute of the Court*, It offered the following explanation:
America's subsequent ambivalence and caution in several contentious cases has, it is submitted, continued in the present Opinion. As its written and oral statements show, the United States displayed a cautious, legally conservative (and, paradoxically, functionalist) approach to its evidence on this most fundamental of questions.

Until confidence in the impartiality and utility of the Court in a politically and socially divided world is engendered in, or returns to, the governments of the world's powerful nations, its jurisprudential potential will remain truncated.

2.2. NUCLEAR DETERRENCE, NON-PROLIFERATION AND DISARMAMENT.

The issues surrounding nuclear deterrence strategies, the regime of nuclear non-proliferation, and comprehensive nuclear disarmament can be condensed to form a single discourse - that which was placed before the Court in the present Opinion by the opposing claims of the nuclear and non-nuclear weapon States.

The dispute, examined extensively in Chapters II, III and IV, may be summarised as a fundamental disagreement between the two sides about the legitimacy of discriminatory approaches towards a type of weapon which confers immense powers and responsibilities on its manipulators, and incalculable danger on all States.

Essentially, those States which possess nuclear weapons have arrogated to themselves the right to continue lawfully to do so (and have expressed an intention to use them, at any time, in self-defence). Other States have agreed not to acquire them, (1).

(1) The majority of other nations (most notably the Soviet Union and its allies) had never accepted the Court's compulsory jurisdiction.
(2) The Court had been misused for political reasons (emphasis added).
(3) Continued acceptance was contrary to...the principle of the equal application of the law.
(4) [Continued acceptance] would endanger the United States' vital national interests.


11 A taxonomy of which includes Japan, the nations of Western Europe and East Asia, as well as the United States, its other Western allies and the remaining Permanent Members of the U.N. Security Council.
understanding that the nuclear weapon States will eventually disarm, but on their own terms, and with no specific obligations touching on methods, time-scales or any other consideration. 12

That discrimination, in the form of the 1968 Nuclear Non-proliferation Treaty, 12 took the form of a bargain or contract (now tantamount to *opinio juris*) between the two sides which was negotiated under conditions of duress. The overwhelming military strength of the five Permanent Members of the United Nations Security Council served to ensure the accession of most members of the international community to a treaty premised on a fundamental inequity, and one which can have no rational defence in terms of "the general principles of law recognised by civilised nations", 14 nor indeed international law generally.

The primary significance of the Opinion is that it has revealed, by its affirmation of the application of peremptory norms of general international law to questions of the legality of nuclear weapons (of which the principle norm is *jus cogens*), 15 the insupportable status of the NPT, a treaty which has manifestly failed in its principal aims of limiting, and then eliminating, nuclear weapons.

By its implicit recognition that the fundamental humanitarian rules of the 1907 *Hague Convention IV and Regulations*, 16 and the 1949 *Geneva Conventions* 17 and 1977 *Additional Protocols I and II* 18 bear attributes approaching *jus cogens* (in that they are "intransgressible principles of customary international law") 19 the Court has effectively

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12 *Supra*, at Note 1, Articles I-VI, which was extended indefinitely at the NPT Review and Extension Conference, New York, April, 1995.


14 Refer to Appendix 2: The Statute of the International Court of Justice, Article 36, para. 2 (a.) confers the jurisdiction of the Court in matters concerning the interpretation of treaties, while Article 38, para. 1 (c.) allows the Court to apply "the general principles of law recognised by civilised nations".


19 Refer to Chapter IV, Section 3.1.1. Opinion, para. 79. [35 J.I.M. 809 (1996)]. Boyle (*Loc. cit.*, at Note 15, at 1445) has argued persuasively that any international agreement which purports to create a legal status impermissible in international law (since it violates a peremptory norm of international law) is void in accordance with Article 53 of the 1969 *Vienna Convention on the Law of Treaties* [1155 U.N.T.S. 331]. Article 53 states:
rejected the lawfulness of the doctrine of deterrence, the cornerstone of arguments before it contending the legality of the threat or use of nuclear weapons.

Arguably, its finding of *non liquet* on the question of legality in circumstances of extreme self-defence\(^{20}\) has given some comfort to the declared nuclear weapon States, since it echoes Article X of the NPT, which gives each State Party the sovereign right to "withdraw from the Treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardised the supreme interests of its country".\(^{21}\) In other words, the Court was not prepared to deny the supremacy of national interest over international law. Nevertheless, such an outcome is still far removed from an affirmation of such supremacy.

The only possible justification for the continued existence of a regime of non-proliferation is as a transitional phase in the progress of disarmament.\(^{22}\) Since the NPT has failed as an instrument capable of supporting comprehensive disarmament initiatives, its discredit should form the starting point for moves to abandon it as a *prerequisite* for the development of a comprehensive Nuclear Weapons Convention constructed along the lines of other Conventions banning weapons of mass destruction.\(^{23}\)

These alternative analyses of the significance of the Opinion lend credence, as Andrew Mack asserts,\(^{24}\) to its perception as a two-edged sword. This aspect of the decision is most vulnerable to interpretation as the inevitable result of extra-judicial influence,

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A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

It is submitted that, even had the Court chosen not to characterise the fundamental tenets of humanitarian law in armed conflict as amounting to *jus cogens* (as it did at para 79 of the Opinion), such rules would still now carry that attribute as customary international law. Thus, the NPT cannot escape nullity on the grounds of retroactivity.

\(^{20}\) Loc. cit., supra, at Chapter IV, Section 3.1. Opinion, para. 105 (2) E.

\(^{21}\) Loc. cit., at Note 13. See also Appendix 3.


especially from the United States. Nevertheless, the absence of strong evidence to that effect must work in the Court’s favour. 25

2.3. PRINCIPLES OF SELF-DEFENCE.

As the thesis has stressed, the nub of the Opinion is its penultimate holding that the Court could not conclude definitively, given the current state of international law and elements of fact before it, whether a State could use nuclear weapons lawfully in defence of its very existence. 26

This outcome has called into question the relationship between the *jus ad bellum* customary rules governing resort to war, now codified in the United Nations *Charter*, and the humanitarian laws of armed conflict, the modern *jus in bello*. 27 Judge Weeramantry has expressed in his Dissenting Opinion the current position of the law as it resolves the blurred distinction which the Opinion makes between the two:

Whatever be the merits or otherwise of resorting to the use of force (the province of the *jus ad bellum*), when once the domain of force is entered, the governing law in that domain is the *jus in bello*. The humanitarian laws of war take over and govern all who participate, assailant and victim alike. The argument before the Court has proceeded as though, once the self-defence exception to the use of force comes into operation, the applicability of the *jus in bello* falls away. This supposition is juristically wrong and logi-

25 But note that there are unsubstantiated reports of extra-juridical influences on the Court, most substantially (and unsurprisingly) from NGOs. Two examples:

In response to the insistent urgings of the nuclear weapon states (NWS), the Court could have used its discretionary power to refuse to consider the case altogether.


More prosaically:

The former President of the Court, Sir Robert Jennings, warned that budget cuts had forced the Court typing pool to be closed. He appealed for everyone to use their influence to protect the Court "at this decisive moment for this precious creation" (original emphasis).

*World Court Project U.K.* (no date), [Leaflet]. Hailsham. Still waiting for nuclear judgment day: The Court under pressure. Author.

26 Ibid, Note 20.

27 Refer to Chapter IV, Section 3.1.1.
-cally untenable....The contention that the legality of the use of force justifies a breach of humanitarian law is ...a total non-sequitur.28

This appears, with respect, unequivocally to state lex lata on the question of the applicability of humanitarian law to armed conflict. There is no doubt that a State, when attacked, may, in the first instance, lawfully defend itself with whatever methods are consonant with the rules governing the use of force. It may use those which are necessary, and in proportion to those used against it, and even in anticipation of an imminent attack upon it.29

However, it seems impossible to deny the irrelevance of any concept of proportionality in the case of a use of nuclear weapons in self-defence, which, in any event, would almost certainly take the form of anticipatory self-defence using a first-strike launch of nuclear weapon delivery systems.

Further, it has been suggested by Brownlie and Singh that Article 51 of the United Nations Charter, concerning measures for immediate self-defence, precludes any resort to armed force which does not follow from a previous armed attack.30 This interpretation subordinates the customary law of jus ad bellum to positive conventional law, and renders a first-strike nuclear attack in anticipatory self-defence illegal.31

The issues surrounding the principles of self-defence as they relate to the use of nuclear weapons, of which the above discussion represents only a small part, are of surpassing importance in the question put by the U.N. General Assembly: “Is the threat or use of nuclear weapons in any circumstance permitted under international law?”32 That alone required the International Court of Justice carefully to consider, interpret and apply

29 The dicta in the Caroline Case, Loc. cit., at Ch. III, Note 32.
31 It must be acknowledged that this argument has its detractors, such as Bowett, who contends that all customary rights not inconsistent with those held under the U.N. Charter remain unimpaired. Loc. cit., at Note 30.
those principles to the wealth of evidence of fact before it, as it delivered its Judgment. Its failure to do so is a matter for regret.

3. INTERNATIONAL RELATIONS, RIGHTS, AND LAW.

It will be recalled that the thesis has taken as fundamental certain principles concerning the nature of international politics and the normative structure of the international system; the so-called "neo-liberal" approach. These were summarised as:

(a). Co-operation and complex interdependence between States in all spheres of activity.

(b). Universal adherence to principles and norms of international behaviour by States.

(c). The essential role of non-State actors in the international arena.

These are the attributes of a community of peers whose individual sovereign members have relinquished their absolute sovereignty by the fact of their statehood, and the rights and obligations they acknowledge as residing in that status.

The United Nations era has seen a rapid growth in the rate of development of the system of relations between States. The fifty States of 1945 have today become almost two hundred, while conventional international law has multiplied exponentially. The result has been that the importance, as well as the quantum, of rights and duties which States mutually acknowledge, and which they seek to exercise, has also expanded rapidly. As a consequence,

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33 See Chapter II, Section 1: Introduction.

Only a few decades ago, international law applied exclusively to States. Today, it is an intricate network of laws governing myriad rights and duties that stretch across and beyond national boundaries, piercing the statist veil even while sometimes pretending that nothing has changed. (p.24).
the successes and failures of the International Court of Justice as an effective World Court have been thrown into sharp relief.

The central difficulty for the Court is that States are, on the whole, reluctant to concede any decision-making control to an external agent, and especially a non-State entity such as the Court. One telling statistic is that, by August 1995, only 61 States, less than one-third of the Member States of the United Nations, had agreed to compulsory jurisdiction under the Optional Clause arrangements of Article 36 (2) of the Court’s Statute. Of the five Permanent Members of the Security Council, only the United Kingdom currently endorses them.35

This reality is ameliorated somewhat by the appearance in the present Opinion of the United States, the United Kingdom, the Soviet Union and France, but remains of serious concern.

The most pressing problem for the international community, in this context, is the need to seek ways in which the most important judicial component of the United Nations Organisation can be incorporated more closely into the global system of dispute resolution. Very few States are willing to risk the adverse consequences of denying the validity of rules of recognition in international law, such as the binding nature of treaty obligations and the practices of States.36 For the rest, such rules are known to obligate States, and to form the foundation on which rights subsist in international law. The International Court of Justice must be the forum of last resort for the resolution of disputes, and for advisory opinions, involving the substantive components of those rights.

The solution of this highly complex problem will involve issues of confidence-building among States, of the Court’s relevance to international relations and law in the coming century, of its flexibility in accommodating rapid change, and of its efficiency and effectiveness in discharging its duties.

Most fundamentally, it must be allowed to address solutions to disputes, and render Advisory Opinions, in ways which incorporate an overtly political component. As Gordon

35 Ibid., at Note 34, p.170.
36 Although the so-called “outlaw” or “pariah” States, such as North Korea, Libya, Iraq and Iran have been accused by Western nations of having done so, routinely, over many years.
has observed, the Court is, and has always been, much more than simply a court of law (which, given the nature of international law, it could never be).

Any perusal of a list of cases decided before the present Court, and its predecessor, will show that, with few exceptions, those cases incorporated issues carrying political or diplomatic dimensions. The present Opinion is no exception to that truism. Should the Court begin to leaven its work in the legal domain with a greater measure of pragmatic political reality, it will enhance its ability to assist the development of international law which better serves the needs of its subjects. In the final analysis, the public Law of Nations is, like politics, the art of the possible.

4. A FINAL APPRAISAL.

The Advisory Opinion called by resolution of the United Nations General Assembly resulted in the most extensive proceedings in the history of the Court. The significance of the question, and its subject, served to ensure intense global interest, and wide participation by the community of nations.

The substantive content of the Opinion has created as many legal and political questions as it has answered. As Judge Shahabuddeen commented, any legal right of a State "to put the planet to death" is surely the most literal and indefensible application of the maxim fiat justitia ruat coelum.41

What, in fact, impelled the Court to its finding of non liquet? Surely it is a primary characteristic of all courts that the law is known to them. Again, on what basis has the

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37 Ibid., Note 6.
38 The Permanent Court of International Justice (1922-1940).
40 See Foreword.
41 "Let justice be done, though the heavens fall". Dissenting Opinion, Loc. cit., Ch. IV, at Note 19. Judge Shahabuddeen also noted here his predecessor, Judge Carneiro's, view in the Minquiers and Ecrelws Case, (France v. United Kingdom) [I.C.J. Reports 1953 p.109] that "...no judge nowadays can blindly follow the obsolete rule fiat justitia, pereat mundus". In Shahabuddeen's view, that rule should, undoubtedly, now be "fiat justitia, ne pereat mundus" - "Let justice be done, and the world not be endangered".
42 As embodied in the maxim jura novit curia. One of the Court's most strident critics has stated "...the Court's often Delphic pronouncements warrant the concern of anyone interested in enhancing the integrity of
Court sought to subordinate the settled humanitarian rules of armed conflict to a nascent principle of "State Survival", and what are the components of that principle? These and many other uncertainties infuse and surround the Opinion.

To conclude: the Court had three alternative legal paths on which to travel:

(a.). It could find that, given the evidence of facts before it, and the current state of international law, it was not able to express an opinion on the legality or illegality of nuclear weapons when used in exceptional or extreme circumstances.

(b.). It could find that the threat or use of nuclear weapons was unlawful in all circumstance, without exception, on the basis of the universal nature of humanitarian law.

(c.). It could find that there are circumstances, however limited, in which the threat or use of nuclear weapons is lawful.

Its ambiguous embrace of the first alternative continues the legal uncertainty surrounding this greatest of questions. Only a specific convention requiring complete nuclear disarmament will remove it.43

The legal status of the threat or use of nuclear weapons ought, in fact, to be abundantly clear. Nuclear weapons are irretrievably illegal, in all circumstances, in terms of international humanitarian law, and their use would constitute a crime against humanity. As this thesis has demonstrated, no alternative exists in fact, or in law.44
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APPENDIX 1.

CHARTER OF THE UNITED NATIONS

26 JUNE 1945
WE THE PEOPLES OF THE UNITED NATIONS DETERMINED to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom, AND FOR THESE ENDS to practice tolerance and live together in peace with one another as good neighbours, and to unite our strength to maintain international peace and security, and to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and to employ international machinery for the promotion of the economic and social advancement of all peoples, HAVE RESOLVED TO COMBINE OUR EFFORTS TO ACCOMPLISH THESE AIMS Accordingly, our respective Governments, through representatives assembled in the city of San Francisco, who have exhibited their full powers found to be in good and due form, have agreed to the present Charter of the United Nations and do hereby establish an international organization to be known as the United Nations.

CHAPTER I

PURPOSES AND PRINCIPLES

Article 1

The Purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;

2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and

4. To be a centre for harmonizing the actions of nations in the attainment of these common ends.

Article 2

The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

1. The Organization is based on the principle of the sovereign equality of all its Members.

2. All Members, in order to ensure to all of them the rights and benefits resulting from membership,
shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.

3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

4. 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.

5. All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.

6. The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.

7. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

CHAPTER II

MEMBERSHIP

Article 3

The original Members of the United Nations shall be the states which, having participated in the United Nations Conference on International Organization at San Francisco, or having previously signed the Declaration by United Nations of 1 January 1942, sign the present Charter and ratify it in accordance with Article 110.

Article 4

1. Membership in the United Nations is open to other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.

2. The admission of any such state to membership in the Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council.

Article 5

A Member of the United Nations against which preventive or enforcement action has been taken by the Security Council may be suspended from the exercise of the rights and privileges of membership by the General Assembly upon the recommendation of the Security Council. The exercise of these rights and privileges may be restored by the Security Council.

Article 6

A Member of the United Nations which has persistently violated the Principles contained in the present Charter may be expelled from the Organization by the General Assembly upon the recommendation of
the Security Council.

CHAPTER III

ORGANS

Article 7

1. There are established as the principal organs of the United Nations: a General Assembly, a Security Council, an Economic and Social Council, a Trusteeship Council, an International Court of Justice, and a Secretariat.

2. Such subsidiary organs as may be found necessary may be established in accordance with the present Charter.

Article 8

The United Nations shall place no restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs.

CHAPTER IV

THE GENERAL ASSEMBLY

Composition

Article 9

1. The General Assembly shall consist of all the Members of the United Nations.

2. Each Member shall have not more than five representatives in the General Assembly.

Functions and Powers

Article 10

The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters.

Article 11

1. The General Assembly may consider the general principles of co-operation in the maintenance of international peace and security, including the principles governing disarmament and the regulation of armaments, and may make recommendations with regard to such principles to the Members or to the Security Council or to both.

2. The General Assembly may discuss any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations, or by the Security Council, or by a state which is not a Member of the United Nations in accordance with Article 35, paragraph 2,
and, except as provided in Article 12, may make recommendations with regard to any such questions to the state or states concerned or to the Security Council or to both. Any such question on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion.

3. The General Assembly may call the attention of the Security Council to situations which are likely to endanger international peace and security.

4. The powers of the General Assembly set forth in this Article shall not limit the general scope of Article 10.

Article 12

1. While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.

2. The Secretary-General, with the consent of the Security Council, shall notify the General Assembly at each session of any matters relative to the maintenance of international peace and security which are being dealt with by the Security Council and similarly notify the General Assembly, or the Members of the United Nations if the General Assembly is not in session, immediately the Security Council ceases to deal with such matters.

Article 13

1. The General Assembly shall initiate studies and make recommendations for the purpose of:

   a. promoting international co-operation in the political field and encouraging the progressive development of international law and its codification;

   b. promoting international co-operation in the economic, social, cultural, educational, and health fields, in assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

2. The further responsibilities, functions and powers of the General Assembly with respect to matters mentioned in paragraph 1 above are set forth in Chapters IX and X.

Article 14

Subject to the provisions of Article 12, the General Assembly may recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations.

Article 15

1. The General Assembly shall receive and consider annual and special reports from the Security Council; these reports shall include an account of the measures that the Security Council has decided upon or taken to maintain international peace and security.

2. The General Assembly shall receive and consider reports from the other organs of the United Nations.

Article 16
The General Assembly shall perform such functions with respect to the international trusteeship system as are assigned to it under Chapters XII and XIII, including the approval of the trusteeship agreements for areas not designated as strategic.

Article 17

1. The General Assembly shall consider and approve the budget of the Organization.

2. The expenses of the Organization shall be borne by the Members as apportioned by the General Assembly.

3. The Assembly shall consider and approve any financial and budgetary arrangements with specialized agencies referred to in Article 57 and shall examine the administrative budgets of such specialized agencies with a view to making recommendations to the agencies concerned.

Voting

Article 18

1. Each member of the General Assembly shall have one vote.

2. Decisions of the General Assembly on important questions shall be made by a two-thirds majority of the members present and voting. These questions shall include: recommendations with respect to the maintenance of international peace and security, the election of the non-permanent members of the Security Council, the election of the members of the Economic and Social Council, the election of members of the Trusteeship Council in accordance with paragraph 1 of Article 86, the admission of new Members to the United Nations, the suspension of the rights and privileges of membership, the expulsion of Members, questions relating to the operation of the trusteeship system, and budgetary questions.

3. Decisions on other questions, including the determination of additional categories of questions to be decided by a two-thirds majority, shall be made by a majority of the members present and voting.

Article 19

A Member of the United Nations which is in arrears in the payment of its financial contributions to the Organization shall have no vote in the General Assembly if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. The General Assembly may, nevertheless, permit such a Member to vote if it is satisfied that the failure to pay is due to conditions beyond the control of the Member.

Procedure

Article 20

The General Assembly shall meet in regular annual sessions and in such special sessions as occasion may require. Special sessions shall be convoked by the Secretary-General at the request of the Security Council or of a majority of the Members of the United Nations.

Article 21

The General Assembly shall adopt its own rules of procedure. It shall elect its President for each
Article 22

The General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions.

CHAPTER V

THE SECURITY COUNCIL

Composition

Article 23

1. The Security Council shall consist of fifteen Members of the United Nations. The Republic of China, France, the Union of Soviet Socialist, the United Kingdom of Great Britain and Northern Ireland, and the United States of America shall be permanent members of the Security Council. The General Assembly shall elect ten other Members of the United Nations to be non-permanent members of the Security Council, due regard being specially paid, in the first instance to the contribution of Members of the United Nations to the maintenance of international peace and security and to the other purposes of the Organization, and also to equitable geographical distribution.

2. The non-permanent members of the Security Council shall be elected for a term of two years. In the first election of the non-permanent members after the increase of the membership of the Security Council from eleven to fifteen, two of the four additional members shall be chosen for a term of one year. A retiring member shall not be eligible for immediate re-election.

3. Each member of the Security Council shall have one representative.

Functions and Powers

Article 24

1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII.

3. The Security Council shall submit annual and, when necessary, special reports to the General Assembly for its consideration.

Article 25

The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

Article 26
In order to promote the establishment and maintenance of international peace and security with the least diversion for armaments of the world's human and economic resources, the Security Council shall be responsible for formulating, with the assistance of the Military Staff Committee referred to in Article 47, plans to be submitted to the Members of the United-Nations for the establishment of a system for the regulation of armaments.

**Voting**

**Article 27**

1. Each member of the Security Council shall have one vote.

2. Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members.

3. Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.

**Procedure**

**Article 28**

1. The Security Council shall be so organized as to be able to function continuously. Each member of the Security Council shall for this purpose be represented at times at the seat of the Organization.

2. The Security Council shall hold meetings at which each of its members may, if it so desires, be represented by a member of the government or by some other specially designated representative.

3. The Security Council may hold meetings at such places other than the seat of the Organization as in its judgment will best facilitate its work.

**Article 29**

The Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions.

**Article 30**

The Security Council shall adopt its own rules of procedure, including the method of selecting its President.

**Article 31**

Any Member of the United Nations which is not a member of the Security Council may participate, without vote, in the discussion of any question brought before the Security Council whenever the latter considers that the interests of that Member are specially affected.

**Article 32**

Any Member of the United Nations which is not a member of the Security Council or any state which is not a Member of the United Nations, if it is a party to a dispute under consideration by the Security Council, shall be invited to participate, without vote, in the discussion relating to the dispute.
Security Council shall any down such conditions as it deems just for the participation of a state which is not a Member of the United Nations.

CHAPTER VI

PACIFIC SETTLEMENT OF DISPUTES

Article 33

1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.

Article 34

The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security.

Article 35

1. Any Member of the United Nations may bring any dispute, or any situation of the nature referred to in Article 34, to the attention of the Security Council or of the General Assembly.

2. A state which is not a Member of the United Nations may bring to the attention of the Security Council or of the General Assembly any dispute to which it is a party if it accepts in advance, for the purposes of the dispute, the obligations of pacific settlement provided in the present Charter.

3. The proceedings of the General Assembly in respect of matters brought to its attention under this Article will be subject to the provisions of Articles 11 and 12.

Article 36

1. The Security Council may, at any stage of a dispute of the nature referred to in Article 33 or of a situation of like nature, recommend appropriate procedures or methods of adjustment.

2. The Security Council should take into consideration any procedures for the settlement of the dispute which have already been adopted by the parties.

3. In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.

Article 37

1. Should the parties to a dispute of the nature referred to in Article 33 fail to settle it by the means indicated in that Article, they shall refer it to the Security Council.
2. If the Security Council deems that the continuance of the dispute is in fact likely to endanger the maintenance of international peace and security, it shall decide whether to take action under Article 36 or to recommend such terms of settlement as it may consider appropriate.

**Article 38**

Without prejudice to the provisions of Articles 33 to 37, the Security Council may, if all the parties to any dispute so request, make recommendations to the parties with a view to a peaceful settlement of the dispute.

**CHAPTER VII**

**ACTION WITH RESPECT TO THREATS TO THE PEACE, BREACHES OF THE PEACE, AND ACTS OF AGGRESSION**

**Article 39**

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 40 and 42, to maintain or restore international peace and security.

**Article 40**

In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures.

**Article 41**

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

**Article 42**

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

**Article 43**

1. All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.
2. Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided.

3. The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes.

**Article 44**

When Security Council has decided to use force it shall, before calling upon a Member not represented on it to provide armed forces in fulfilment of the obligations assumed under Article 43, invite that Member, if the Member so desires, to participate in the decisions of the Security Council concerning the employment of contingents of that Member's armed forces.

**Article 45**

In order to enable the Nations to take urgent military measures, Members shall hold immediately available national air-force contingents for combined international enforcement action. The strength and degree of readiness of these contingents and plans for their combined action shall be determined, within the limits laid down in the special agreement or agreements referred to in Article 43, by the Security Council with the assistance of the Military Committee.

**Article 46**

Plans for the application of armed force shall be made by the Security Council with the assistance of the Military Staff Committee.

**Article 47**

1. There shall be established a Military Staff Committee to advise and assist the Security Council on questions relating to the Security Council's military requirements for the maintenance of international peace and security, the employment and command of forces placed at its disposal, the regulation of armaments, and possible disarmament.

2. The Military Staff Committee consist of the Chiefs of Staff of the permanent members of the Security Council or their representatives. Any Member of the United Nations not permanently represented on the Committee shall be invited by the Committee to be associated with it when the efficient discharge of the Committee's responsibilities requires the participation of that Member in its work.

3. The Military Staff Committee be responsible under the Security Council for the strategic direction of any armed forces placed at the disposal of the Security Council. Questions relating to the command of such forces shall be worked out subsequently.

4. The Military Staff Committee, with the authorization of the security Council and after consultation with appropriate regional agencies, may establish sub-committees.

**Article 48**

1. The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.
2. Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members.

Article 49
The Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council.

Article 50
If preventive or enforcement measures against any state are taken by the Security Council, any other state, whether a Member of the United Nations or not, which finds itself confronted with special economic problems arising from the carrying out of those measures shall have the right to consult the Security Council with regard to a solution of those problems.

Article 51
Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence 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.

REGIONAL ARRANGEMENTS

Article 52
1. Nothing in the present Charter the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.

2. The Members of the United Nations entering into such arrangements or constituting such agencies shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council.

3. The Security Council shall encourage the development of pacific settlement of local disputes through such regional arrangements or by such regional agencies either on the initiative of the states concerned or by reference from the Security Council.

4. This Article in no way the application of Articles 34 and 35.

Article 53
1. The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council, with the exception of measures against any enemy state, as defined in paragraph 2 of this Article, provided for pursuant to Article 107 or in regional arrangements directed against renewal of aggressive policy on the part of any such state, until such time as the Organization may, on request of the Governments
concerned, be charged with the responsibility for preventing further aggression by such a state.

2. The term "enemy state" as used in paragraph 1 of this Article applies to any state which during the Second World War has been an enemy of any signatory of the present Charter.

Article 54

The Security Council shall at all times be kept fully informed of activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security.

CHAPTER IX

INTERNATIONAL ECONOMIC AND SOCIAL CO-OPERATION

Article 55

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

a. higher standards of living, full employment, and conditions of economic and social progress and development;

b. solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and

c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Article 56

All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.

Article 57

1. The various specialized agencies, established by intergovernmental agreement and having wide international responsibilities, as defined in their basic instruments, in economic, social, cultural, educational, health, and related fields, shall be brought into relationship with the United Nations in accordance with the provisions of Article 63.

2. Such agencies thus brought into relationship with the United Nations are hereinafter referred to as specialized agencies.

Article 58

The Organization shall make recommendations for the co-ordination of the policies and activities of the specialized agencies.

Article 59
The Organization shall, where appropriate, initiate negotiations among the states concerned for the creation of any new specialized agencies required for the accomplishment of the purposes set forth in Article 55.

**Article 60**

Responsibility for the discharge of the functions of the Organization set forth in this Chapter shall be vested in the General Assembly and, under the authority of the General Assembly, in the Economic and Social Council, which shall have for this purpose the powers set forth in Chapter X.

**CHAPTER X**

**THE ECONOMIC AND SOCIAL COUNCIL**

**Composition**

**Article 61**

1. The Economic and Social Council shall consist of fifty-four Members of the United Nations elected by the General Assembly.

2. Subject to the provisions of paragraph 3, eighteen members of the Economic and Social Council shall be elected each year for a term of three years. A retiring member shall be eligible for immediate re-election.

3. At the first election after the increase in the membership of the Economic and Social Council from twenty-seven to fifty-four members, in addition to the members elected in place of the nine members whose term of office expires at the end of that year, twenty-seven additional members shall be elected. Of these twenty-seven additional members, the term of office of nine members so elected shall expire at the end of one year, and of nine other members at the end of two years, in accordance with arrangements made by the General Assembly.

4. Each member of the Economic and Social Council shall have one representative.

**Functions and Powers**

**Article 62**

1. The Economic and Social Council may make or initiate studies and reports with respect to international economic, social, cultural, educational, health, and related matters and may make recommendations with respect to any such matters to the General Assembly, to the Members of the United Nations, and to the specialized agencies concerned.

2. It may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all.

3. It may prepare draft conventions for submission to the General Assembly, with respect to matters falling within its competence.

4. It may call, in accordance with the rules prescribed by the United Nations, international conferences on matters falling within its competence.
Article 63

1. The Economic and Social Council may enter into agreements with any of the agencies referred to in Article 57, defining the terms on which the agency concerned shall be brought into relationship with the United Nations. Such agreements shall be subject to approval by the General Assembly.

2. It may co-ordinate the activities of the specialized agencies through consultation with and recommendations to such agencies and through recommendations to the General Assembly and to the Members of the United Nations.

Article 64

1. The Economic and Social Council may take appropriate steps to obtain regular reports from the specialized agencies, may make arrangements with the Members of the United Nations and with the specialized agencies to obtain reports on the steps taken to give effect to its own recommendations and to recommendations on matters falling within its competence made by the General Assembly.

2. It may communicate its observations on these reports to the General Assembly.

Article 65

The Economic and Social Council may furnish information to the Security Council and shall assist the Security Council upon its request.

Article 66

1. The Economic and Social Council shall perform such functions as fall within its competence in connexion with the carrying out of the recommendations of the General Assembly.

2. It may, with the approval of the General Assembly, perform services at the request of Members of the United Nations and at the request of specialized agencies.

3. It shall perform such other functions as are specified elsewhere in the present Charter or as may be assigned to it by the General Assembly.

Voting

Article 67

1. Each member of the Economic and Social Council shall have one vote.

2. Decisions of the Economic and Social Council shall be made by a majority of the members present and voting.

Procedure

Article 68

The Economic and Social Council shall set up commissions in economic and social fields and for the promotion of human rights, and such other commissions as may for the performance of its functions.

Article 69
The Economic and Social Council shall invite any Member of the United Nations to participate, without vote, in its deliberations on any matter of particular concern to that Member.

Article 70

The Economic and Social Council may make arrangements for representatives of the specialized agencies to participate, without vote, in its deliberations and in those of the commissions established by it, and for its representatives to participate in the deliberations of the specialized agencies.

Article 71

The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence. Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Member of the United Nations concerned.

Article 72

1. The Economic and Social Council shall adopt its own rules of procedure, including the method of selecting its President.

2. The Economic and Social Council shall meet as required in accordance with its rules, which shall include provision for the convening of meetings on the request of a majority of its members.

CHAPTER XI

DECLARATION REGARDING NON-SELF-GOVERNING TERRITORIES

Article 73

Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end:

a. to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses;

b. to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement;

c. to further international peace and security;

d. to promote constructive measures of development, to encourage research, and to co-operate with one another and, when and where appropriate, with specialized international bodies with a view to the practical achievement of the social, economic, and scientific purposes set forth in this Article; and

e. to transmit regularly to the Secretary-General for information purposes, subject to such limitation as security and constitutional considerations may require, statistical and other information of a technical
nature relating to economic, social, and educational conditions in the territories for which they are respectively responsible other than those territories to which Chapters XII and XIII apply.

Article 74

Members of the United Nations also agree that their policy in respect of the territories to which this Chapter applies, no less than in respect of their metropolitan areas, must be based on the general principle of good-neigh-bourliness, due account being taken of the interests and well-being of the rest of the world, in social, economic, and commercial matters.

CHAPTER XII

INTERNATIONAL TRUSTEESHIP SYSTEM

Article 75

The United Nations shall establish under its authority an international trusteeship system for the administration and supervision of such territories as may be placed thereunder by subsequent individual agreements. These territories are hereinafter referred to as trust territories.

Article 76

The basic objectives of the trusteeship system, in accordance with the Purposes of the United Nations laid down in Article I of the present Charter, shall be:

a. to further international peace and security;

b. to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement;

c. to encourage respect for human rights and for fundamental freedoms for all without as to race, sex, language, or religion, and to encourage recognition of the interdependence of the peoples of the world; and

d. to ensure equal treatment in social, economic, and commercial matters for all Members of the United Nations and their, and also equal treatment for the latter in the administration of justice, without prejudice to the attainment of the foregoing objectives and subject to the provisions of Article 80.

Article 77

1. The trusteeship system shall apply to such territories in the following categories as may be placed thereunder by means of trusteeship agreements:

a. territories now held under mandate;

b. territories which may be detached from enemy states as a result of the Second World War; and

c. territories voluntarily placed under the system by states responsible for their administration.

2. It will be a matter for subsequent agreement as to which territories in the foregoing categories will be brought under the trusteeship system and upon what terms.
Article 78

The trusteeship system shall not apply to territories which have become Members of the United Nations, relationship among which shall be based on respect for the principle of sovereign equality.

Article 79

The terms of trusteeship for each territory to be placed under the trusteeship system, including any alteration or amendment, shall be agreed upon by the states directly concerned, including the mandatory power in the case of territories held under mandate by a Member of the United Nations, and shall be approved as provided for in Articles 83 and 85.

Article 80

1. Except as may be agreed upon in individual trusteeship agreements, made under Articles 77, 79, and 81, placing each territory under the trusteeship system, and until such agreements have been concluded, nothing in this Chapter shall be construed in or of itself to alter in any manner the rights whatsoever of any states or any peoples or the terms of existing international instruments to which Members of the United Nations may respectively be parties.

2. Paragraph 1 of this Article shall not be interpreted as giving grounds for delay or postponement of the negotiation and conclusion of agreements for placing mandated and other territories under the trusteeship system as provided for in Article 77.

Article 81

The trusteeship agreement shall in each case include the terms under which the trust territory will be administered and designate the authority which will exercise the administration of the trust territory. Such authority, hereinafter called the administering authority, may be one or more states or the Organization itself.

Article 82

There may be designated, in any trusteeship agreement, a strategic area or areas which may include part or all of the trust territory to which the agreement applies, without prejudice to any special agreement or agreements made under Article 43.

Article 83

1. All functions of the United Nations relating to strategic areas, including the approval of the terms of the trusteeship agreements and of their alteration or amendment, shall be exercised by the Security Council.

2. The basic objectives set forth in Article 76 shall be applicable to the people of each strategic area.

3. The Security Council shall, subject to the provisions of the trusteeship agreements and without prejudice to security considerations, avail itself of the assistance of the Trusteeship Council to perform those functions of the United Nations under the trusteeship system relating to political, economic, social, and educational matters in the strategic areas.

Article 84
It shall be the duty of the administering authority to ensure that the trust territory shall play its part in the maintenance of international peace and security. To this end the administering authority may make use of volunteer forces, facilities, and assistance from the trust territory in carrying out the obligations towards the Security Council undertaken in this regard by the administering authority, as well as for local defence and the maintenance of law and order within the trust territory.

Article 85

1. The functions of the United Nations with regard to trusteeship agreements for all areas not designated as strategic, including the approval of the terms of the trusteeship agreements and of their alteration or amendment, shall be exercised by the General Assembly.

2. The Trusteeship Council, operating under the authority of the General Assembly, shall assist the General Assembly in carrying out these functions.

CHAPTER XIII

THE TRUSTEESHIP COUNCIL

Composition

Article 86

1. The Trusteeship Council shall consist of the following Members of the United Nations:

   a. those Members administering trust territories;

   b. such of those Members mentioned by name in Article 23 as are not administering trust territories; and

   c. as many other Members elected for three-year terms by the General Assembly as may be necessary to ensure that the total number of members of the Trusteeship Council is equally divided between those Members of the United Nations which administer trust territories and those which do not.

2. Each member of the Trusteeship Council shall designate one specially qualified person to represent it therein.

Functions and Powers

Article 87

The General Assembly and, under its authority, the Trusteeship Council, in carrying out their functions, may:

   a. consider reports submitted by the administering authority;

   b. accept petitions and examine them in consultation with the administering authority;

   c. provide for periodic visits to the respective trust territories at times agreed upon with the administering authority; and

   d. take these and other actions in conformity with the terms of the trusteeship agreements.
Article 88

The Trusteeship Council shall formulate a questionnaire on the political, economic, social, and educational advancement of the inhabitants of each trust territory, and the administering authority for each trust territory within the competence of the General Assembly shall make an annual report to the General Assembly upon the basis of such questionnaire.

Voting

Article 89

1. Each member of the Trusteeship Council shall have one vote.

2. Decisions of the Trusteeship Council shall be made by a majority of the members present and voting.

Procedure

Article 90

1. The Trusteeship Council shall adopt its own rules of procedure, including the method of selecting its President.

2. The Trusteeship Council shall meet as required in accordance with its rules, which shall include provision for the convening of meetings on the request of a majority of its members.

Article 91

The Trusteeship Council shall, when appropriate, avail itself of the assistance of the Economic and Social Council and of the specialized agencies in regard to matters with which they are respectively concerned.

CHAPTER XIV

THE INTERNATIONAL COURT OF JUSTICE

Article 92

The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter.

Article 93

1. All Members of the United Nations are facto parties to the Statute of the International Court of Justice.

2. A state which is not of the United Nations may become a party to the Statute of the International Court of Justice on to be determined in each case by the General Assembly upon the recommendation of the Security Council.
Article 94

1. Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.

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 to the judgment.

Article 95

Nothing in the present Charter shall prevent Members of the United Nations from entrusting the solution of their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future.

Article 96

1. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.

2. 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.

CHAPTER XV
THE SECRETARIAT

Article 97

The Secretariat shall comprise a Secretary-General and such staff as the Organization may require. The Secretary-General shall be appointed by the General Assembly upon the recommendation of the Security Council. He shall be the chief administrative officer of the Organization.

Article 98

The Secretary-General shall act in that capacity in all meetings of the General Assembly, of the Security Council, of the Economic and Social Council, and of the Trusteeship Council, and shall perform such other functions as are entrusted to him by these organs. The Secretary-General shall make an annual report to the General Assembly on the work of the Organization.

Article 99

The Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security.

Article 100

1. In the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any government or from any other authority externa to the Organization. They shall refrain from any action which might on their position as international officials responsible only to the Organization.
2. Each Member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities.

**Article 101**

1. The staff shall be appointed by the Secretary-General under regulations established by the General Assembly.

2. Appropriate staffs shall be permanently assigned to the Economic and Social Council, the Trusteeship Council, and, as required, to other organs of the United Nations. These staffs shall form a part of the Secretariat.

3. The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.

**CHAPTER XVI**

**MISCELLANEOUS PROVISIONS**

**Article 102**

1. Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.

2. No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph I of this Article may invoke that treaty or agreement before any organ of the United Nations.

**Article 103**

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

**Article 104**

The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.

**Article 105**

1. The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.

2. Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connexion with the Organization.
3. The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose.

CHAPTER XVII

TRANSITIONAL SECURITY ARRANGEMENTS

Article 106

Pending the coming into force of such special agreements referred to in Article 43 as in the opinion of the Security Council enable it to begin the exercise of its responsibilities under Article 42, the parties to the Four-Nation Declaration, signed at Moscow, 30 October 1943, and France, shall, in accordance with the provisions of paragraph 5 of that Declaration, consult with one another and as occasion requires with other Members of the United Nations with a view to such joint action on behalf of the Organization as may be necessary for the purpose of maintaining international peace and security.

Article 107

Nothing in the present Charter shall invalidate or preclude action, in relation to any state which during the Second World War has been an enemy of any signatory to the present Charter, taken or authorized as a result of that war by the Governments having responsibility for such action.

CHAPTER XVIII

AMENDMENTS

Article 108

Amendments to the present Charter shall come into force for all Members of the United Nations when they have been adopted by a vote of two thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations, including all the permanent members of the Security Council.

Article 109

1. A General Conference of the Members of the United Nations for the purpose of reviewing the present Charter may be held at a date and place to be fixed by a two-thirds vote of the members of the General Assembly and by a vote of any nine members of the Security Council. Each Member of the United Nations shall have one vote in the conference.

2. Any alteration of the present Charter recommended by a two-thirds vote of the conference shall take effect when ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations including the permanent members of the Security Council.

3. If such a conference has not been held before the tenth annual session of the General Assembly following the coming into force of the present Charter, the proposal to call such a conference shall be placed on the agenda of that session of the General Assembly, and the conference shall be held if so decided by a majority vote of the members of the General Assembly and by a vote of any seven members of the Security Council.
CHAPTER XIX

RATIFICATION AND SIGNATURE

Article 110

1. The present Charter shall be ratified by the signatory states in accordance with their respective constitutional processes.

2. The shall be deposited with the Government of the United States of America, which shall notify a the signatory states of each deposit as well as the Secretary-General of the Organization when he has been appointed.

3. The present Charter shall come into force upon the deposit of by the Republic of China, France, the Union of Soviet Socialist, the United Kingdom of Great Britain and Northern Ireland, and the United States of America, and by a majority of the other signatory states. A protocol of the deposited shall thereupon be drawn up by the Government of the United States of America which shall communicate copies thereof to all the signatory states.

4. The states signatory to the present Charter which ratify it after it has come into force will become original Members of the United Nations on the date of the deposit of their respective ratifications.

Article 111

The present Charter, of which the Chinese, French, Russian, English, and Spanish texts are equally authentic, shall remain deposited in the archives of the Government of the United States of America. Duly certified copies thereof shall be transmitted by that Government to the Governments of the other signatory states.

IN FAITH WHEREOF the representatives of the Governments of the United Nations have signed the present Charter.

DONE at the city of San Francisco the twenty-sixth day of June, one thousand nine hundred and forty-five.
APPENDIX 2

THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE

26 JUNE 1945
Statute of the International Court of Justice

Article 1

The International Court of Justice established by the Charter of the United Nations as the principal judicial organ of the United Nations shall be constituted and shall function in accordance with the provisions of the present Statute.
Statute of the International Court of Justice

CHAPTER I

ORGANIZATION OF THE COURT

Article 2

The Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law.

Article 3

1. The Court shall consist of fifteen members, no two of whom may be nationals of the same state.

2. A person who for the purposes of membership in the Court could be regarded as a national of more than one state shall be deemed to be a national of the one in which he ordinarily exercises civil and political rights.

Article 4

1. The members of the Court shall be elected by the General Assembly and by the Security Council from a list of persons nominated by the national groups in the Permanent Court of Arbitration, in accordance with the following provisions.

2. In the case of Members of the United Nations not represented in the Permanent Court of Arbitration, candidates shall be nominated by national groups appointed for this purpose by their governments under the same conditions as those prescribed for members of the Permanent Court of Arbitration by Article 44 of the Convention of The Hague of 1907 for the pacific settlement of international disputes.

3. The conditions under which a state which is a party to the present Statute but is not a Member of the United Nations may participate in electing the members of the Court shall, in the absence of a special agreement, be laid down by the General Assembly upon recommendation of the Security Council.

Article 5

1. At least three months before the date of the election, the Secretary-General of the United Nations shall address a written request to the members of the Permanent Court of Arbitration belonging to the states which are parties to the present Statute, and to the members of the national groups appointed under Article 4, paragraph 2, inviting them to undertake, within a given time, by national groups, the nomination of persons in a position to accept the duties of a member of the Court.

2. No group may nominate more than four persons, not more than two of whom shall be of their own nationality. In no case may the number of candidates nominated by a group be more than double the number of seats to be filled.

Article 6

Before making these nominations, each national group is recommended to consult its highest court of
justice, its legal faculties and schools of law, and its national academies and national sections of international academies devoted to the study of law.

Article 7

1. The Secretary-General shall prepare a list in alphabetical order of all the persons thus nominated. Save as provided in Article 12, paragraph 2, these shall be the only persons eligible.

2. The Secretary-General shall submit this list to the General Assembly and to the Security Council.

Article 8

The General Assembly and the Security Council shall proceed independently of one another to elect the members of the Court.

Article 9

At every election, the electors shall bear in mind not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured.

Article 10

1. Those candidates who obtain an absolute majority of votes in the General Assembly and in the Security Council shall be considered as elected.

2. Any vote of the Security Council, whether for the election of judges or for the appointment of members of the conference envisaged in Article 12, shall be taken without any distinction between permanent and non-permanent members of the Security Council.

3. In the event of more than one national of the same state obtaining an absolute majority of the votes both of the General Assembly and of the Security Council, the eldest of these only shall be considered as elected.

Article 11

If, after the first meeting held for the purpose of the election, one or more seats remain to be filled, a second and, if necessary, a third meeting shall take place.

Article 12

1. If, after the third meeting, one or more seats still remain unfilled, a joint conference consisting of six members, three appointed by the General Assembly and three by the Security Council, may be formed at any time at the request of either the General Assembly or the Security Council, for the purpose of choosing by the vote of an absolute majority one name for each seat still vacant, to submit to the General Assembly and the Security Council for their respective acceptance.

2. If the joint conference is unanimously agreed upon any person who fulfills the required conditions, he may be included in its list, even though he was not included in the list of nominations referred to in Article 7.

3. If the joint conference is satisfied that it will not be successful in procuring an election, those
members of the Court who have already been elected shall, within a period to be fixed by the Security Council, proceed to fill the vacant seats by selection from among those candidates who have obtained votes either in the General Assembly or in the Security Council.

4. In the event of an equality of votes among the judges, the eldest judge shall have a casting vote.

**Article 13**

1. The members of the Court shall be elected for nine years and may be re-elected; provided, however, that of the judges elected at the first election, the terms of five judges shall expire at the end of three years and the terms of five more judges shall expire at the end of six years.

2. The judges whose terms are to expire at the end of the above-mentioned initial periods of three and six years shall be chosen by lot to be drawn by the Secretary-General immediately after the first election has been completed.

3. The members of the Court shall continue to discharge their duties until their places have been filled. Though replaced, they shall finish any cases which they may have begun.

4. In the case of the resignation of a member of the Court, the resignation shall be addressed to the President of the Court for transmission to the Secretary-General. This last notification makes the place vacant.

**Article 14**

Vacancies shall be filled by the same method as that laid down for the first election subject to the following provision: the Secretary-General shall, within one month of the occurrence of the vacancy, proceed to issue the invitations provided for in Article 5, and the date of the election shall be fixed by the Security Council.

**Article 15**

A member of the Court elected to replace a member whose term of office has not expired shall hold office for the remainder of his predecessor's term.

**Article 16**

1. No member of the Court may exercise any political or administrative function, or engage in any other occupation of a professional nature.

2. Any doubt on this point shall be settled by the decision of the Court.

**Article 17**

1. No member of the Court may act as agent, counsel, or advocate in any case.

2. No member may participate in the decision of any case in which he has previously taken part as agent, counsel, or advocate for one of the parties, or as a member of a national or international court, or of a commission of enquiry, or in any other capacity.

3. Any doubt on this point shall be settled by the decision of the Court.
**Article 18**

1. No member of the Court can be dismissed unless, in the unanimous opinion of the other members, he has ceased to fulfill the required conditions.

2. Formal notification thereof shall be made to the Secretary-General by the Registrar.

3. This notification makes the place vacant.

**Article 19**

The members of the Court, when engaged on the business of the Court, shall enjoy diplomatic privileges and immunities.

**Article 20**

Every member of the Court shall, before taking up his duties, make a solemn declaration in open court that he will exercise his powers impartially and conscientiously.

**Article 21**

1. The Court shall elect its President and Vice-President for three years; they may be re-elected.

2. The Court shall appoint its Registrar and may provide for the appointment of such other officers as may be necessary.

**Article 22**

1. The seat of the Court shall be established at The Hague. This, however, shall not prevent the Court from sitting and exercising its functions elsewhere whenever the Court considers it desirable.

2. The President and the Registrar shall reside at the seat of the Court.

**Article 23**

1. The Court shall remain permanently in session, except during the judicial vacations, the dates and duration of which shall be fixed by the Court.

2. Members of the Court are entitled to periodic leave, the dates and duration of which shall be fixed by the Court, having in mind the distance between The Hague and the home of each judge.

3. Members of the Court shall be bound, unless they are on leave or prevented from attending by illness or other serious reasons duly explained to the President, to hold themselves permanently at the disposal of the Court.

**Article 24**

1. If, for some special reason, a member of the Court considers that he should not take part in the decision of a particular case, he shall so inform the President.

2. If the President considers that for some special reason one of the members of the Court should not sit in a particular case, he shall give him notice accordingly.
3. If in any such case the member Court and the President disagree, the matter shall be settled by the decision of the Court.

Article 25

1. The full Court shall sit except when it is expressly provided otherwise in the present Statute.

2. Subject to the condition that the number of judges available to constitute the Court is not thereby reduced below eleven, the Rules of the Court may provide for allowing one or more judges, according to circumstances and in rotation, to be dispensed from sitting.

3. A quorum of nine judges shall suffice to constitute the Court.

Article 26

1. The Court may from time to time form one or more chambers, composed of three or more judges as the Court may determine, for dealing with particular categories of cases; for example, labour cases and cases relating to transit and communications.

2. The Court may at any time form a chamber for dealing with a particular case. The number of judges to constitute such a chamber shall be determined by the Court with the approval of the parties.

3. Cases shall be heard and determined by the chambers provided for in this article if the parties so request.

Article 27

A judgment given by any of the chambers provided for in Articles 26 and 29 shall be considered as rendered by the Court.

Article 28

The chambers provided for in Articles 26 and 29 may, with the consent of the parties, sit and exercise their functions elsewhere than at The Hague.

Article 29

With a view to the speedy dispatch of business, the Court shall form annually a chamber composed of five judges which, at the request of the parties, may hear and determine cases by summary procedure. In addition, two judges shall be selected for the purpose of replacing judges who find it impossible to sit.

Article 30

1. The Court shall frame rules for carrying out its functions. In particular, it shall lay down rules of procedure.

2. The Rules of the Court may provide for assessors to sit with the Court or with any of its chambers, without the right to vote.

Article 31
1. Judges of the nationality of each of the parties shall retain their right to sit in the case before the Court.

2. If the Court includes upon the Bench a judge of the nationality of one of the parties, any other party may choose a person to sit as judge. Such person shall be chosen preferably from among those persons who have been nominated as candidates as provided in Articles 4 and 5.

3. If the Court includes upon the Bench no judge of the nationality of the parties, each of these parties may proceed to choose a judge as provided in paragraph 2 of this Article.

4. The provisions of this Article shall apply to the case of Articles 26 and 29. In such cases, the President shall request one or, if necessary, two of the members of the Court forming the chamber to give place to the members of the Court of the nationality of the parties concerned, and, failing such, or if they are unable to be present, to the judges specially chosen by the parties.

5. Should there be several parties in the same interest, they shall, for the purpose of the preceding provisions, be reckoned as one party only. Any doubt upon this point shall be settled by the decision of the Court.

6. Judges chosen as laid down in paragraphs 2, 3, and 4 of this Article shall fulfil the conditions required by Articles 2, 17 (paragraph 2), 20, and 24 of the present Statute. They shall take part in the decision on terms of complete equality with their colleagues.

**Article 32**

1. Each member of the Court shall receive an annual salary.

2. The President shall receive a special annual allowance.

3. The Vice-President shall receive a special allowance for every day on which he acts as President.

4. The judges chosen under Article 31, other than members of the Court, shall receive compensation for each day on which they exercise their functions.

5. These salaries, allowances, and compensation shall be fixed by the General Assembly. They may not be decreased during the term of office.

6. The salary of the Registrar shall be fixed by the General Assembly on the proposal of the Court.

7. Regulations made by the General Assembly shall fix the conditions under which retirement pensions may be given to members of the Court and to the Registrar, and the conditions under which members of the Court and the Registrar shall have their travelling expenses refunded.

8. The above salaries, allowances, and compensation shall be free of all taxation.

**Article 33**

The expenses of the Court shall be borne by the United Nations in such a manner as shall be decided by the General Assembly.
Statute of the International Court of Justice

CHAPTER II

COMPETENCE OF THE COURT

Article 34

1. Only states may be parties in cases before the Court.

2. The Court, subject to and in conformity with its Rules, may request of public international organizations information relevant to cases before it, and shall receive such information presented by such organizations on their own initiative.

3. Whenever the construction of the constituent instrument of a public international organization or of an international convention adopted thereunder is in question in a case before the Court, the Registrar shall so notify the public international organization concerned and shall communicate to it copies of all the written proceedings.

Article 35

1. The Court shall be open to the states parties to the present Statute.

2. The conditions under which the Court shall be open to other states shall, subject to the special provisions contained in treaties in force, be laid down by the Security Council, but in no case shall such conditions place the parties in a position of inequality before the Court.

3. When a state which is not a Member of the United Nations is a party to a case, the Court shall fix the amount which that party is to contribute towards the expenses of the Court. This provision shall not apply if such state is bearing a share of the expenses of the Court.

Article 36

1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.

2. The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

   a. the interpretation of a treaty;
   b. any question of international law;
   c. the existence of any fact which, if established, would constitute a breach of an international obligation;
   d. the nature or extent of the reparation to be made for the breach of an international obligation.

3. The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time.

4. Such declarations shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the parties to the Statute and to the Registrar of the Court.
5. Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms.

6. In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

**Article 37**

Whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice.

**Article 38**

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

   a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

   b. international custom, as evidence of a general practice accepted as law;

   c. the general principles of law recognized by civilized nations;

   d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.
CHAPTER III
PROCEDURE

Article 39

1. The official languages of the Court shall be French and English. If the parties agree that the case shall be conducted in French, the judgment shall be delivered in French. If the parties agree that the case shall be conducted in English, the judgment shall be delivered in English.

2. In the absence of an agreement as to which language shall be employed, each party may, in the pleadings, use the language which it prefers; the decision of the Court shall be given in French and English. In this case the Court shall at the same time determine which of the two texts shall be considered as authoritative.

3. The Court shall, at the request of any party, authorize a language other than French or English to be used by that party.

Article 40

1. Cases are brought before the Court, as the case may be, either by the notification of the special agreement or by a written application addressed to the Registrar. In either case the subject of the dispute and the parties shall be indicated.

2. The Registrar shall forthwith communicate the application to all concerned.

3. He shall also notify the Members of the United Nations through the Secretary-General, and also any other states entitled to appear before the Court.

Article 41

1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.

2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council.

Article 42

1. The parties shall be represented by agents.

2. They may have the assistance of counsel or advocates before the Court.

3. The agents, counsel, and advocates of parties before the Court shall enjoy the privileges and immunities necessary to the independent exercise of their duties.

Article 43

1. The procedure shall consist of two parts: written and oral.
2. The written proceedings shall consist of the communication to the Court and to the parties of memorials, counter-memorials and, if necessary, replies; also all papers and documents in support.

3. These communications shall be made through the Registrar, in the order and within the time fixed by the Court.

4. A certified copy of every document produced by one party shall be communicated to the other party.

5. The oral proceedings shall consist of the hearing by the Court of witnesses, experts, agents, counsel, and advocates.

**Article 44**

1. For the service of all notices upon persons other than the agents, counsel, and advocates, the Court shall apply direct to the government of the state upon whose territory the notice has to be served.

2. The same provision shall apply whenever steps are to be taken to procure evidence on the spot.

**Article 45**

The hearing shall be under the control of the President or, if he is unable to preside, of the Vice-President; if neither is able to preside, the senior judge present shall preside.

**Article 46**

The hearing in Court shall be public, unless the Court shall decide otherwise, or unless the parties demand that the public be not admitted.

**Article 47**

1. Minutes shall be made at each hearing and signed by the Registrar and the President.

2. These minutes alone shall be authentic.

**Article 48**

The Court shall make orders for the conduct of the case, shall decide the form and time in which each party must conclude its arguments, and make all arrangements connected with the taking of evidence.

**Article 49**

The Court may, even before the hearing begins, call upon the agents to produce any document or to supply any explanations. Formal note shall be taken of any refusal.

**Article 50**

The Court may, at any time, entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion.

**Article 51**
During the hearing any relevant questions are to be put to the witnesses and experts under the conditions laid down by the Court in the rules of procedure referred to in Article 30.

**Article 52**

After the Court has received the proofs and evidence within the time specified for the purpose, it may refuse to accept any further oral or written evidence that one party may desire to present unless the other side consents.

**Article 53**

1. Whenever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favour of its claim.

2. The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law.

**Article 54**

1. When, subject to the control of the Court, the agents, counsel, and advocates have completed their presentation of the case, the President shall declare the hearing closed.

2. The Court shall withdraw to consider the judgment.

3. The deliberations of the Court shall take place in private and remain secret.

**Article 55**

1. All questions shall be decided by a majority of the judges present.

2. In the event of an equality of votes, the President or the judge who acts in his place shall have a casting vote.

**Article 56**

1. The judgment shall state the reasons on which it is based.

2. It shall contain the names of the judges who have taken part in the decision.

**Article 57**

If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.

**Article 58**

The judgment shall be signed by the President and by the Registrar. It shall be read in open court, due notice having been given to the agents.

**Article 59**

The decision of the Court has no binding force except between the parties and in respect of that
particular case.

**Article 60**

The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.

**Article 61**

1. An application for revision of a judgment may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence.

2. The proceedings for revision shall be opened by a judgment of the Court expressly recording the existence of the new fact, recognizing that it has such a character as to lay the case open to revision, and declaring the application admissible on this ground.

3. The Court may require previous compliance with the terms of the judgment before it admits proceedings in revision.

4. The application for revision must be made at latest within six months of the discovery of the new fact.

5. No application for revision may be made after the lapse of ten years from the date of the judgment.

**Article 62**

1. Should a state consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene.

2. It shall be for the Court to decide upon this request.

**Article 63**

1. Whenever the construction of a convention to which states other than those concerned in the case are parties is in question, the Registrar shall notify all such states forthwith.

2. Every state so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the judgment will be equally binding upon it.

**Article 64**

Unless otherwise decided by the Court, each party shall bear its own costs.
Chapter IV
Advisory Opinions

Article 65

1. The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.

2. Questions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request containing an exact statement of the question upon which an opinion is required, and accompanied by all documents likely to throw light upon the question.

Article 66

1. The Registrar shall forthwith give notice of the request for an advisory opinion to all states entitled to appear before the Court.

2. The Registrar shall also, by means of a special and direct communication, notify any state entitled to appear before the Court or international organization considered by the Court, or, should it not be sitting, by the President, as likely to be able to furnish information on the question, that the Court will be prepared to receive, within a time limit to be fixed by the President, written statements, or to hear, at a public sitting to be held for the purpose, oral statements relating to the question.

3. Should any such state entitled to appear before the Court have failed to receive the special communication referred to in paragraph 2 of this Article, such state may express a desire to submit a written statement or to be heard; and the Court will decide.

4. States and organizations having presented written or oral statements or both shall be permitted to comment on the statements made by other states or organizations in the form, to the extent, and within the time limits which the Court, or, should it not be sitting, the President, shall decide in each particular case. Accordingly, the Registrar shall in due time communicate any such written statements to states and organizations having submitted similar statements.

Article 67

The Court shall deliver its advisory opinions in open court, notice having been given to the Secretary-General and to the representatives of Members of the United Nations, of other states and of international organizations immediately concerned.

Article 68

In the exercise of its advisory functions the Court shall further be guided by the provisions of the present Statute which apply in contentious cases to the extent to which it recognizes them to be applicable.
CHAPTER V

AMENDMENT

Article 69

Amendments to the present Statute shall be effected by the same procedure as is provided by the Charter of the United Nations for amendments to that Charter, subject however to any provisions which the General Assembly upon recommendation of the Security Council may adopt concerning the participation of states which are parties to the present Statute but are not Members of the United Nations.

Article 70

The Court shall have power to propose such amendments to the present Statute as it may deem necessary, through written communications to the Secretary-General, for consideration in conformity with the provisions of Article 69.
APPENDIX 3

TREATY ON THE NON-PROLIFERATION OF NUCLEAR WEAPONS

1 JULY 1968

[79 U.N.T.S. 161]
Treaty on the Non-Proliferation of Nuclear Weapons


The States concluding this Treaty, hereinafter referred to as the 'Parties to the Treaty,'

Considering the devastation that would be visited upon all mankind by a nuclear war and the consequent need to make every effort to avert the danger of such a war and to take measures to safeguard the security of peoples,

Believing that the proliferation of nuclear weapons would seriously enhance the danger of nuclear war,

In conformity with resolutions of the United Nations General Assembly calling for the conclusion of an agreement on the prevention of wider dissemination of nuclear weapons,

Undertaking to co-operate in facilitating the application of International Atomic Energy Agency safeguards on peaceful nuclear activities,

Expressing their support for research, development and other efforts to further the application, within the framework of the International Atomic Energy Agency safeguards system, of the principle of safeguarding effectively the flow of source and special fissionable materials by use of instruments and other techniques at certain strategic points,

Affirming the principle that the benefits of peaceful applications of nuclear technology, including any technological by-products which may be derived by nuclear-weapon States from the development of nuclear explosive devices, should be available for peaceful purposes to all Parties to the Treaty, whether nuclear-weapon or non-nuclear-weapon States,

Convinced that, in furtherance of this principle, all Parties to the Treaty are entitled to participate in the fullest possible exchange of scientific information for, and to contribute alone or in co-operation with other States to, the further development of the applications of atomic energy for peaceful purposes,

Declaring their intention to achieve at the earliest possible date the cessation of the nuclear arms race and to undertake effective measures in the direction of nuclear disarmament,

Urging the co-operation of all States in the attainment of this objective,

Recalling the determination expressed by the Parties to the 1963 Treaty banning nuclear weapon tests in the atmosphere, in outer space and under water in its Preamble to seek to achieve the discontinuance of all test explosions of nuclear weapons for all time and to continue negotiations to this end,

Desiring to further the easing of international tension and the strengthening of trust between States in order to facilitate the cessation of the manufacture of nuclear weapons, the liquidation of all their existing stockpiles, and the elimination from national arsenals of nuclear weapons and the means of their delivery pursuant to a Treaty on general and complete disarmament under strict and effective international control,

Recalling that, in accordance with the Charter of the United Nations, States must 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, and that the establishment and maintenance of international peace and security are to be promoted with the least diversion for armaments of the world's human and economic resources, have agreed as follows:

ARTICLE I

Each nuclear-weapon State Party to the Treaty undertakes not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly, or indirectly; and not in any way to assist, encourage, or induce any non-nuclear-weapon State to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices, or control over such weapons or explosive devices.

ARTICLE II

Each non-nuclear-weapon State Party to the Treaty undertakes not to receive the transfer from any transferor whatsoever of nuclear weapons or other nuclear explosive devices or of control over such weapons or explosive devices directly, or indirectly; not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices; and not to seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices.

ARTICLE III

1. Each non-nuclear-weapon State Party to the Treaty undertakes to accept safeguards, as set forth in an agreement to be negotiated and concluded with the International Atomic Energy Agency in accordance with the Statute of the International Atomic Energy Agency and the Agency's safeguards system, for the exclusive purpose of verification of the fulfillment of its obligations assumed under this Treaty with a view to preventing diversion of nuclear energy from peaceful uses to nuclear weapons or other nuclear explosive devices. Procedures for the safeguards required by this Article shall be followed by with respect to source or special fissionable material whether it is being produced, processed or used in any principle nuclear facility or is outside such facility. The safeguards required by this Article shall be applied on all source or special fissionable material in all peaceful nuclear activities within the territory of such State, under its jurisdiction, or carried out under its control anywhere.

2. Each State Party to the Treaty undertakes not to provide: (a) source or special fissionable material, or (b) equipment or material especially designed or prepared for the processing, use or production of special fissionable materials, to any non-nuclear-weapon State for peaceful purposes, unless the source or special fissionable material shall be subject to the safeguards required by this Article.
3. The safeguards required by this Article shall be implemented in a manner designed
to comply with Article IV of the Treaty, and to avoid hampering the economic or
 technological development of the Parties or international co-operation in the field of peaceful
 nuclear activities, including the international exchange of nuclear material and equipment for
 the processing, use or production of nuclear material for peaceful purposes in accordance
 with the provisions of this Article and the principle of safeguarding set forth in the Preamble
 of the Treaty.

4. Non-nuclear-weapon States Party to the Treaty shall conclude agreements with the
 International Atomic Energy Agency to meet the requirements of this Article either
 individually or together with other States in accordance with the Statute of the International
 Atomic Energy Agency. Negotiation of such agreements shall commence within 180 days
 from the original entry into force of this Treaty. For States depositing their instrument of
 ratification or accession after the 180-day period, negotiation of such agreement shall
 commence not later than the date of such deposit. Such agreements shall enter into force not
 later than eighteen months after the date of initiation of such negotiations.

ARTICLE IV

1. Nothing in this Treaty shall be interpreted as affecting the inalienable right of all
 the Parties to the Treaty to develop research, production and use of nuclear energy for
 peaceful purposes without discrimination and in conformity with Articles I and II of this
 Treaty.

2. All the Parties to the Treaty undertake to facilitate, and have the right to participate
 in, the fullest possible exchange of equipment, materials and scientific and technological
 information for the peaceful uses of nuclear energy. Parties to the Treaty in a position to do
 so shall also co-operate in contributing alone or together with other States or international
 organizations to the further development of the applications of nuclear energy for peaceful
 purposes, especially in the territories of non-nuclear weapon States Party to the Treaty, with
due consideration for the needs of the developing areas of the world.

ARTICLE V

Each Party to the Treaty undertakes to take appropriate measures to ensure that, in
 accordance with this Treaty, under appropriate international observation and through
 appropriate international procedures, potential benefits from any peaceful applications of
 nuclear explosions will be made available to non-nuclear weapon States Party to the Treaty
 on a non-discriminatory basis and that the charge to such Parties for the explosive devices
 used will be as low as possible and exclude any charge for research and development. Non-
nuclear-weapon States Party to the Treaty shall be able to obtain such benefits, pursuant to a
 special international agreement or agreements, through an appropriate international body
 with adequate representation of non-nuclear-weapon States. Negotiations on this subject
 shall as soon as possible after the Treaty enters into force. Non-nuclear-weapon States Party
to the Treaty so desiring may also obtain such benefits pursuant to bilateral agreements.
ARTICLE VI

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

ARTICLE VII

Nothing in this Treaty affects the right of any group of States to conclude regional treaties in order to ensure the total absence of nuclear weapons in their respective territories.

ARTICLE VIII

1. Any party to the Treaty may propose amendments to this Treaty. The text of any proposed amendment shall be submitted to the Depository Governments which shall circulate it to all Parties to the treaty. Thereupon, if requested to do so by one-third or more of the Parties to the Treaty, the Depository Governments shall convene a conference, to which they shall invite all the Parties to the Treaty, to consider such an amendment.

2. Any amendment to this Treaty must be approved by a majority of the votes of all the Parties to the Treaty, including the votes of all the nuclear-weapon States Party to the Treaty and all other Parties which, on the date the amendment is circulated, are members of the Board of Governors of the International Atomic Energy Agency. The amendment shall enter force for each Party that deposits its instrument of ratification of the amendment upon the deposit of such instruments of ratification by a majority of all the Parties, including the instruments of ratification of all nuclear-weapon States Party to the Treaty and all other Parties which, on the date the amendment is circulated, are members of the Board of Governors of the International Atomic Energy Agency. Thereafter, it shall enter into force for any other Party upon the deposit of its instrument of ratification of the amendment.

3. Five years after the entry into force of this Treaty, a conference of Parties to the Treaty shall be held in Geneva, Switzerland, in order to review the operation of this Treaty with a view to ensuring that the purposes of the Preamble and the provisions of the Treaty are being realised. At intervals of five years thereafter, a majority of the Parties to the Treaty may obtain, by submitting a proposal to this effect with the Depositary Governments, the convening of further conferences with the same objective of reviewing the operation of the Treaty.
ARTICLE IX

1. This Treaty shall be open to all States for signature. Any State which does not sign the Treaty before its entry into force in accordance with paragraph 3 of this Article may accede to it at any time.

2. This Treaty shall be subject to ratification by signatory States. Instruments of ratification and instruments of accession shall be deposited with the Governments of the United Kingdom of Great Britain and Northern Ireland, the Union of Soviet Socialist Republics and the United States of America, which are hereby designated Depositary Governments.

3. This Treaty shall enter into force after its ratification by the States, the Governments of which are designated Depositaries of the Treaty, and forty other States signatory to this Treaty and the deposit of their instruments of ratification. For the purposes of this Treaty, a nuclear-weapon State is one which has manufactured and exploded a nuclear weapon or other nuclear explosive device prior to 1 January, 1967.

4. For States whose instruments of ratification or accession are deposited subsequent to the entry into force of this Treaty, it shall enter into force on the date of the deposit of their instrument of ratification or accession.

5. The Depositary Governments shall promptly inform all signatory and acceding States of the date of each signature, the date of deposit of each instrument of ratification or accession, the date of entry into force of this Treaty, and the date of receipt of any requests for convening a conference or other notices.

6. This Treaty shall be registered by the Depositary Governments pursuant to Article 102 of the Charter of the United Nations.

ARTICLE X

1. Each Party shall in exercising its national sovereignty have the right to withdraw from the Treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country. It shall give notice of such withdrawal to all other Parties to the Treaty and to the United Nations Security Council three months in advance. Such notice shall include a statement of the extraordinary events it regards as having jeopardized its supreme interests.

2. Twenty-five years after the entry into force of the Treaty, a conference shall be convened to decide whether the Treaty shall continue in force indefinitely, or shall be extended for an additional period or periods. This decision shall be taken by a majority of the Parties to the Treaty.

ARTICLE XI

This Treaty, the English, Russian, French, Spanish and Chinese texts of which are equally authentic, shall be deposited in the archives of the Depositary Governments. Duly certified
copies of this Treaty shall be transmitted by the Depositary Governments to the Governments of the signatory and acceding States.

IN WITNESS WHEREOF the undersigned, duly authorised, have signed this Treaty.

DONE in triplicate, at the cities of London, Moscow and Washington, the first day of July, one thousand nine hundred and sixty-eight.