

On the Legality of Nuclear Deterrence

NEWELL L. HIGHSMITH



Livermore Papers on Global Security No. 6

Lawrence Livermore National Laboratory

Center for Global Security Research

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About the Author

Newell Highsmith served for 30 years as an attorney at the U.S. Department of State with primary responsibility for legal issues related to arms control and the nonproliferation of weapons of mass destruction and missiles. He was the Assistant Legal Adviser for Arms Control and Nonproliferation from 2002 to 2013 before taking on broader responsibilities as a Deputy Legal Adviser from 2013 to 2017. He served as primary or sole legal adviser on the U.S. delegations that negotiated the 1994 Agreed Framework with North Korea; the 2008 Agreement for Nuclear Cooperation with India; and the 2015 Joint Comprehensive Plan of Action with Iran.

In addition, he was directly involved in: analyzing the legal issues raised by Syria's use of chemical weapons and its construction of a clandestine nuclear reactor; evaluating Russia's violations of its arms control obligations; responding to Indian and Pakistani nuclear testing; facilitating Libya's renunciation of weapons of mass destruction; establishing dual-use export controls in the Nuclear Suppliers Group; negotiating elements of the New START treaty with Russia; and responding to the revelations regarding Iraq's nuclear weapons program. On an ongoing basis, he was responsible for the legal interpretation of numerous arms control and nonproliferation treaties and statutes, including the Nuclear Nonproliferation Treaty, the Statute of the IAEA, the U.S. Atomic Energy Act, relevant UN Security Council resolutions, and a broad array of U.S. sanctions laws.

Newell Highsmith received a B.A. in English from the University of North Carolina at Chapel Hill, a J.D. from Harvard Law School, and an LL.M. in International Law from George Washington University Law School. He is currently an adjunct professor of law at Georgetown University Law Center (teaching "Nuclear Nonproliferation Law and Policy") and has regularly written, spoken, and consulted on nuclear issues since retiring from the State Department in April 2017.

Preface

One of the central claims made by supporters of the recently negotiated Treaty on the Prohibition of Nuclear Weapons (also known as the Ban treaty) is that nuclear weapons violate international law. Is this so? It is not difficult to understand that their employment for simple mass slaughter would violate the international legal requirements for proportionality and discrimination in the use of military force. But would every possible use necessarily be illegal? Are the weapons themselves illegal? Is nuclear deterrence illegal? Might the ban treaty have some impact on the answers to such questions?

In the debate about such questions, the central point of reference is the review in 1996 by the International Court of Justice (ICJ) of the legality of the threat or use of nuclear weapons. The court's advisory opinion offered a split decision: unanimity on one judgment and deep division on another. A central question today is whether a return of the issue to the ICJ would produce a different result. Ban supporters have made the argument that the treaty will expand the scope of international law in a way that will tip the scales decisively against nuclear weapons in a re-review. Others are more skeptical.

To help shed light on these important questions, we have turned to Newell Highsmith, who spent a career in the Office of the Legal Advisor at the U.S. Department of State and now teaches law and nuclear policy at Georgetown University. He brings an exceptional knowledge of international law to this question, as well as a deep understanding of the international nuclear policy debate. He narrows his focus to the question of the legality of nuclear deterrence. The result is a timely and practical guide to a complex set of issues, with clear implications for policymakers coming to terms with the ban campaign and for the associated expert community.

Brad Roberts

Director

Center for Global Security Research

Introduction

Since the birth of nuclear weapons in 1945, the morality of nuclear weapons has been debated vigorously and often heatedly. This debate will continue as long as civilian populations are potentially subject to the immediate and long-term horrors of nuclear blast and radioactive fallout; the use of nuclear weapons in the world today would almost certainly constitute a profound moral failure. While fully acknowledging the importance of debating the morality of nuclear weapons, this paper focuses on the legality of nuclear weapons, in particular the legality of nuclear deterrence.

Why nuclear deterrence? Because the primary—and we must hope the only—function of nuclear weapons is to deter attacks, especially nuclear attacks. If nuclear deterrence is not legally defensible, then, as a practical matter, the possession of nuclear weapons would not be legally defensible.

In 1996, the International Court of Justice (ICJ) issued a sharply divided advisory opinion on the “legality of the threat or use of nuclear weapons,” which concluded:

[T]he 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, . . . the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.¹

International humanitarian law includes the three fundamental principles of necessity, proportionality, and discrimination, which establish the following limits on a state’s use of force: (1) a state may use all measures (not prohibited by the law of war) as may be *necessary* to defeat the enemy quickly and efficiently; (2) incidental harm resulting from the use of military force must not be excessive—that is, must

be *proportional*—to the legitimate military objective being pursued; and (3) a military attack must *discriminate* between combatants and noncombatants.²

In the next chapter, this paper examines the ICJ's central finding on the legality of the threat or use of nuclear weapons, which is the most important *judicial* pronouncement on the subject,³ and the court's not-very-instructive statements regarding nuclear deterrence. This is followed by an examination of some of the factors that might affect any future consideration by the ICJ of the legality of nuclear weapons, including the adoption of the Treaty on the Prohibition of Nuclear Weapons (TPNW). The fourth chapter analyzes the procedural hurdles facing any effort to bring the legality of nuclear weapons before the court again, followed by a chapter that analyzes how the substantive issues ought to be resolved in the event the court entertained such a case. Finally, this paper offers some conclusions and observations.

In brief, this paper concludes that, while an undeniable tension exists between nuclear deterrence strategy and the principles of international humanitarian law (especially the principle of proportionality and the obligation to distinguish between combatants and noncombatants), nuclear deterrence is legally reconcilable with these principles, at least with regard to the primary objective of deterring nuclear attack by an adversary.⁴ Specifically, although the 1996 Advisory Opinion found that a “threat” to use nuclear weapons would “generally” be contrary to the rules of international law applicable in armed conflict, nuclear deterrence (at least in its most important role) cannot be treated to the same kind of “threat” analysis as a specific, immediate threat to use nuclear weapons, much less the actual use of nuclear weapons. Nuclear deterrence consists of a range of possible options for responding to a range of possible attacks and in that sense is too non-specific and contingent for a meaningful “threat” analysis under international humanitarian law. The ICJ would not advance the objective of eliminating nuclear weapons if it were to interpret the principles of international humanitarian law without regard to established state practice, the realities of war, and the imperatives of protecting national security. The only realistic means of eliminating nuclear weapons is a verifiable treaty, but, as a practical matter, the international security environment must undergo significant changes before states possessing nuclear weapons will contemplate joining such a treaty. Until those changes occur, nuclear

deterrence is not only legal but essential. Indeed, under the current international security environment, the primary objective of nuclear deterrence might even be considered morally compelling.

The fourteen ICJ judges disagreed sharply over the legality of the threat or use of nuclear weapons. The extensive literature on nuclear issues reflects the same sharp divide. Striking differences exist in fundamental perceptions regarding such key issues as the utility of nuclear weapons, the proper role of nuclear weapons, the possibility of legal use of nuclear weapons, and the mechanics of nuclear deterrence. The (fortunate) dearth of data on the actual use of nuclear weapons allows for a wide range of views that can be neither confirmed nor categorically rebutted. Like the judges on the court, the various commentators on nuclear issues come from specific political, legal, and economic environments that invariably affect their views on those issues.

For that reason, I should say a few words about my background and biases. I worked for 30 years in the Office of the Legal Adviser at the Department of State, and for almost all that time, I worked on legal issues regarding nuclear nonproliferation and arms control. I was not a member of the legal team that developed and presented the U.S. position in the 1996 Advisory Opinion case, but I was aware that the United States argued that, as a procedural matter, the court should not consider the case, and that, as a substantive matter, the threat or use of nuclear weapons could not be deemed illegal in all circumstances. Despite not working on the case, I regularly defended the U.S. position on other nuclear issues, most notably with regard to U.S. compliance with its obligation under Article VI of the Treaty on the Non-Proliferation Nuclear Weapons (NPT) to “pursue negotiations in good faith on effective measures relating . . . to nuclear disarmament.”

In my experience, antinuclear activists who pressured Western democracies to eliminate nuclear weapons often seemed to ignore the inconvenient reality that some nations—including several potential adversaries (Russia, China, and North Korea)—had no intention of giving up nuclear weapons. These activists’ legal arguments tended to give short shrift to the well-established state practice of nuclear weapons possession and nuclear deterrence, despite the importance of state practice in establishing customary international law.⁵ Similarly, such initiatives as the 2017 TPNW tended to give short shrift to the technical (not to mention political) complexity of eliminating nuclear weapons.

At the same time, the arguments of nuclear weapons strategists often seemed detached from the reality that the use of nuclear weapons would likely constitute a historic political and moral failure.⁶ The United States maintains that its nuclear employment plans comply with international humanitarian law.⁷ The strategic planners who devise these plans, as well as their lawyers, are sincere in their efforts to reconcile these plans with international humanitarian law, including by ensuring against the targeting of civilians or civilian property “as such.” Nevertheless, in most realistic scenarios, it is difficult to imagine that actual use of nuclear weapons would not have grave humanitarian consequences, even if such use followed exactly the script laid out by planners (which often is not the case in the fog of war). These plans, if carried out, might well be seen as failing the tests of proportionality and discrimination under international humanitarian law (a topic that will be discussed further in the section addressing legal developments since the 1996 Advisory Opinion in the fifth chapter).

The sharp divide in perceptions of nuclear weapons is further reflected in views on the historic role of nuclear weapons. Some have argued nuclear weapons account for the absence since 1945 of wars between the major powers and, in that way, are a significant factor in the current era’s historically low risk of violent death.⁸ While it seems simplistic to credit nuclear weapons as the sole reason for the absence of wars between the major powers since 1945, with millennia of violent human history as a guide, it does seem improbable that, if not for the risk of total annihilation from nuclear weapons, two rival powers as viscerally and philosophically opposed to each other as the United States and the Soviet Union would have refrained from direct, large-scale conflict during the Cold War period.

Other commentators discount the effect of nuclear weapons on the absence of wars between major powers and the low risk of death from violence; they counter that numerous other factors should be considered, including an increasingly interconnected global system in which the costs of major wars far outweigh the potential benefits.⁹ Arguably, nuclear weapons, rather than deterring direct conflict between the two sides, have deepened and prolonged animosity and distrust.¹⁰

Antinuclear activists and nuclear strategists do seem to agree on one thing: the risk from nuclear weapons is an urgent issue that must be dealt with as a high priority (though they have quite different pre-

scriptions for addressing that risk, the former favoring prohibition and the latter improvements in nuclear deterrence). In the 1996 Advisory Opinion, several judges wrote passionately of a world living in constant terror of nuclear holocaust.¹¹ Yet even that issue is not free from dispute. Some have argued that the risk of intentional use of nuclear weapons by the five nuclear-weapon states (NWSs)—China, France, Russia, the United Kingdom, and the United States—may in fact be quite low.¹² This low risk arguably results in large part from the Cold War coming to an end, but also from several overlapping factors. First, nuclear deterrence makes clear to potential adversaries that a preemptive nuclear attack would be suicidal. Even a limited use of nuclear weapons is potentially suicidal because of the risk of nuclear escalation, the uncertainty of which is heightened by the lack of any historical examples to guide a risk assessment. Second, the principles of international humanitarian law severely constrain the scenarios for legal use of nuclear weapons, and the five NWSs have committed not to threaten or use nuclear weapons against almost all non-nuclear-weapon states (NNWSs).¹³ Third, a moral taboo has developed regarding the use of nuclear weapons.¹⁴ Since the first and only uses of nuclear weapons in war in 1945, numerous opportunities have arisen for states possessing nuclear weapons to use them in war, yet no state has done so.¹⁵ Leaders in the states possessing nuclear weapons do not necessarily “honor” the taboo for reasons of morality or conscience. However, the taboo must affect their *political* calculations, as use of nuclear weapons would likely lead to profoundly adverse results, such as loss of allies, loss of national prestige, and economic costs (not to mention the risk of going down in history as a pariah).¹⁶ Fourth, the risk of intentional use of nuclear weapons is arguably reduced by the high level of interconnection and cooperation in the modern world.¹⁷ Most states in the current international system have little to gain from large-scale war, and even less from nuclear war.¹⁸ While the international environment seems beset by conflict, most states continue to rely on other states for their prosperity (if not their survival) through international trade, transportation, and communications.¹⁹

These factors do not *eliminate* the risk of nuclear weapons use. In particular, the risk may well be highest in South Asia and the Korean Peninsula where the factors discussed in the previous paragraph have not necessarily matured sufficiently.²⁰ In addition, these factors do not

affect the risk of accidental launch or detonation, miscommunication between states possessing nuclear weapons, or theft and use of nuclear weapons by terrorists. Nevertheless, the factors arguably create a kind of “risk management” system limiting the likelihood that nuclear weapons will be used.

The purpose of this discussion is *not* to suggest the risk of intentional use should not be a concern. On the contrary, the use of nuclear weapons is the classic example of low risk/high cost, justifying the most vigorous efforts to minimize or eliminate the risk. Nor is the purpose to pick sides in these debates, especially since these are largely philosophical and moral perceptions that cannot be “proven” one way or the other. Rather, the purpose of this discussion is to acknowledge that perceptions regarding nuclear issues can affect policy views profoundly, which in turn can affect a commentator’s views on the related legal issues. Any commentary on nuclear issues should be read with these perceptions and biases in mind.

References

1. *Legality of the Threat or Use of Nuclear Weapons*, International Court of Justice, Advisory Opinion, ICJ Reports 1996, p. 226, at 266 <https://www.icj-cij.org/files/case-related/95/095-19960708-ADV-01-00-EN.pdf> (accessed April 24, 2019) (hereafter ICJ Advisory Opinion).
2. These principles will be discussed further in subsequent chapters of this paper.
3. The UN General Assembly has made numerous *political* pronouncements on the legality of nuclear weapons, but its resolutions do not have binding effect.
4. “The fundamental role of U.S. nuclear weapons, which will continue as long as nuclear weapons exist, is to deter nuclear attack on the United States, our allies, and partners.” “2010 Nuclear Posture Review,” US Department of Defense (April 2010), 15. https://dod.defense.gov/Portals/1/features/defenseReviews/NPR/2010_Nuclear_Posture_Review_Report.pdf (accessed April 24, 2019); “The highest U.S. nuclear policy and strategy priority is to deter potential adversaries from nuclear attack of any scale.” “2018 Nuclear Posture Review,” US Department of Defense, 2018, 20; page VII. <https://dod.defense.gov/News/SpecialReports/2018NuclearPostureReview.aspx> (accessed April 26, 2019)
5. See, e.g., Dean Granoff and Jonathan Granoff, “International Humanitarian Law and Nuclear Weapons: Irreconcilable Differences,” *Bulletin of the Atomic Scientists* 67, no. 6 (2011); Charles J. Moxley Jr., Jonathan Granoff, and John Burroughs, “Nuclear Weapons and Compliance with International Humanitarian Law and the Nuclear Non-Proliferation Treaty,” *Fordham International Law Journal* 34, no. 4 (2011).
6. See McGeorge Bundy, “To Cap the Volcano,” *Foreign Affairs* 48, no. 1 (October 1969). He notes the “enormous gulf” between how nuclear strategists and political leaders think about the use of nuclear weapons.

7. “The law of war governs the use of nuclear weapons, just as it governs the use of conventional weapons. For example, nuclear weapons must be directed against military objectives. In addition, attacks using nuclear weapons must not be conducted when the expected incidental harm to civilians is excessive compared to the military advantage expected to be gained.” “Department of Defense Law of War Manual,” U.S. Department of Defense, Office of General Counsel, December 2016, paragraph 6.18; “The new guidance makes clear that all [nuclear employment] plans must also be consistent with the fundamental principles of the Law of Armed Conflict. Accordingly, plans will, for example, apply the principles of distinction and proportionality and seek to minimize collateral damage to civilian populations and civilian objects. The United States will not intentionally target civilian populations or civilian objects.” “Report on Nuclear Employment Strategy of the United States,” U.S. Department of Defense, Specified in Section 491 of 10 U.S.C., 4-5; see also Robert Kehler, “Nuclear Weapons and Nuclear Use,” *Daedalus: Journal of the American Academy of Arts & Sciences* (Fall 2016): at 50, 55-56, 58-59. General Kehler, a retired former commander of the U.S. Strategic Command, confirmed this guidance “is explicit and its implementation is rigorous at every step in the [nuclear employment] planning process.” Kehler, “Nuclear Weapons and Nuclear Use,” at 58-59.

8. See, e.g., Kehler, “Nuclear Weapons and Nuclear Use,” 50, 52; 2018 Nuclear Posture Review, 16-18; Brad Roberts, *The Case for U.S. Nuclear Weapons in the 21st Century* (Stanford: Stanford University Press, 2016), at 40 (notes arguments made to this effect).

9. See, e.g., Nina Tannenwald, “Stigmatizing the Bomb,” *International Security* 29, no. 4 (Spring 2005); John Mueller, “Nuclear Weapons Don’t Matter,” *Foreign Affairs* (Nov/Dec 2018); Yuval Noah Harari, *Sapiens: A Brief History of Humankind* (New York: Harper Perennial, 2015), 364-375.

10. As early as 1953, Robert Oppenheimer said: “We may be likened to two scorpions in a bottle, each capable of killing the other, but only at the risk of his own life.” Kai Bird and Martin Sherwin, *American Prometheus: The Triumph and Tragedy of J. Robert Oppenheimer* (New York: Vintage Books, 2005), 465.

11. “With nuclear weapons, humanity is living on a kind of suspended sentence. . . . Since Hiroshima, on the morning of 6 August 1945, fear has gradually become man’s first nature. His life on earth has taken on the aspect of what the Koran calls ‘a long nocturnal journey,’ like a nightmare whose end he cannot yet foresee.” ICJ Advisory Opinion, at 268 (Separate Opinion of President Bedjaoui); the “‘shadow of the mushroom cloud’ . . . pervades all thoughts about the human future. This fear, which has hung like a blanket of doom over the thoughts of children in particular, is an evil in itself and will last so long as nuclear weapons remain.” ICJ Advisory Opinion, at 470 (Dissenting Opinion of Judge Weeramantry).

12. See, e.g., Kehler, “Nuclear Weapons and Nuclear Use,” 50-51; Mueller, “Nuclear Weapons Don’t Matter.” One judge on the Advisory Opinion panel also noted a low risk of nuclear war. ICJ Advisory Opinion, 364, 369 (Dissenting Opinion of Judge Oda). For a cautionary note, see Roberts, *Case for U.S. Nuclear Weapons*, 6. “Our historical experience of nuclear war as unthinkable should not blind us to the possibility that it has been made thinkable for the leaders of countries with a different historical experience and a different strategic problem.”

13. While international law may not exert the same influence on all national leaders, some (including the leaders of the Western democracies) operate in systems that require consideration of international law. See, e.g., Kehler, “Nuclear Weapons and Nuclear Use,” 50, 56, 58-59. Other leaders with less respect for international humanitarian law may nevertheless feel some constraint to the extent that they want to avoid being labeled—or prosecuted as—a war criminal.

14. Moral concerns (not legal arguments) have led almost every U.S. president to declare nuclear war unthinkable. The historical development of this taboo, as well as the forces that have shaped it, have been described in detail in Tannenwald, "Stigmatizing the Bomb." Efforts to "normalize" nuclear weapons during the Eisenhower administration were unsuccessful. Eventually, even Eisenhower joined the chorus pronouncing nuclear war unthinkable. Tannenwald, "Stigmatizing the Bomb," 23-27.

15. Some advisers urged the use of nuclear weapons in the Vietnam War, but Presidents John F. Kennedy and Lyndon B. Johnson opposed their use (President Richard Nixon had fewer qualms but still did not approve using nuclear weapons). Tannenwald, "Stigmatizing the Bomb," 30-31. See also Nina Tannenwald, "Nuclear Weapons and the Vietnam War," In *The Nuclear Taboo: The United States and the Non-Use of Nuclear Weapons Since 1945* (Cambridge: Cambridge University Press, 2007). The Russians refrained from using nuclear weapons in a losing campaign in Afghanistan. Tannenwald, "Stigmatizing the Bomb," 34.

16. See Tannenwald, "Stigmatizing the Bomb," 11-14; Jeffrey G. Lewis and Scott D. Sagan, "The Nuclear Necessity Principle: Making U.S. Targeting Policy Conform with Ethics and the Laws of War," *Daedalus: Journal of the American Academy of Arts & Sciences* (Fall 2016): 62, 70.

17. See Thomas Friedman, *The Lexus and the Olive Tree* (New York: Farrar, Straus, Giroux, 1999). See also ICJ Advisory Opinion, at 270-271 (Separate Opinion of President Bedjaoui) and 294 (Dissenting Opinion of Judge Shahabuddeen).

18. See Harari, *Sapiens*, 369-375.

19. Modern states are further linked by multinational corporations, international investment, and national debt relationships. Multilateral treaties govern many aspects of life formerly the exclusive province of sovereign nations, such as trade, enforcement of contracts, currency exchange, use of the seas, and environmental protection. International organizations play key roles in governing everything from the use of force (UN Security Council) to the use of atomic energy (International Atomic Energy Agency) and the handling of air traffic and mail (International Civil Aviation Organization and Universal Postal Union, respectively). States are further connected through multinational and regional organizations such as the European Union, the Organization of African States, and the Organization of American States. International nongovernmental organizations connect states below the governmental level. In general, national wealth and influence are now determined by territory and natural resources to a lesser extent than at any time in human history.

20. However, see argument that the nuclear taboo restrained India and Pakistan during border crises in 1999 and 2002. Mario E. Carranza, "Deterrence or Taboo? Explaining the Non-Use of Nuclear Weapons During the Indo-Pakistani Post-Tests Nuclear Crises," *Contemporary Security Policy* 39, no. 3 (2018), 441. Further, both North Korea and Pakistan obtained nuclear weapons as a deterrent to a much stronger enemy, hence both would presumably be loath to use those weapons absent a perceived threat to their survival. Unfortunately, given the nature of the regimes in North Korea and Pakistan, the risk of miscalculation regarding such a threat is not negligible. Another factor for North Korea may be its heavy dependence on China and, hence, a fear that its use of nuclear weapons would cause China to end its support. However, whether the fear of alienating China would affect North Korea's nuclear weapons decision-making in a real (or perceived) crisis is not clear.

A Review of the 1996 Advisory Opinion

For decades, the UN General Assembly has challenged the legality of the use of nuclear weapons. In 1961, it adopted a resolution finding the use of nuclear and thermonuclear weapons would be “contrary to the rules of international law and to the laws of humanity,” as well as a violation of the UN Charter.¹ These assertions were repeated in subsequent resolutions over the years. However, a substantial minority of states, especially the states possessing nuclear weapons and their allies, opposed these resolutions.

In addition, the UN General Assembly’s view was not reflected in the numerous agreements governing nuclear weapons negotiated prior to the 1996 Advisory Opinion. These agreements constrained nuclear weapons testing and deployment² and nuclear weapons stockpiles,³ and, more importantly, they produced legal commitments by almost all nations of the world to forgo nuclear weapons altogether.⁴ However, none of these agreements prohibited nuclear weapons absolutely. On the contrary, they acknowledged continued possession of nuclear weapons and the continued possibility of nuclear weapons use. Most notably, the NPT did not specifically address the threat or use of nuclear weapons and, moreover, recognized the continued possession of nuclear weapons by five parties—China, France, Russia, the United Kingdom, and the United States.⁵

Also, nuclear-weapon-free zone (NWFZ) treaties included protocols under which the five NWSs committed not to use or threaten to use nuclear weapons against states in the region that were parties to the NWFZ treaties, underscoring that the NWSs had not otherwise committed not to take such actions. Indeed, the NWSs issued statements clarifying their obligations, and some of these statements confirmed their belief that the use of nuclear weapons might be warranted in some circumstances even within the NWFZs.⁶ Likewise, around the time the ICJ issued the Advisory Opinion, the NWSs renewed their *political* commitments not to use nuclear weapons against non-nuclear-weapon state parties to the NPT (commitments known as “negative security assurances”). Four of the NWSs announced caveats similar to

those under the NWFZ treaty protocols.⁷ Again, non-nuclear-weapon state parties to the NPT sought these negative security assurances because they otherwise enjoyed no assurance by the NWSs against nuclear attack; the NNWSs and the UN Security Council both welcomed the negative security assurances.⁸

In 1990 and 1991, the UN General Assembly resolutions condemning nuclear weapons also included draft elements of a convention against the use of nuclear weapons “under any circumstances.”⁹ These resolutions noted explicitly that the dramatic change in relations between the United States and the Soviet Union enhanced the chances for achieving such a convention. In short, these resolutions proposed a continuation of the *treaty-based* approach to constraining nuclear weapons.

Nevertheless, within a few years, some states and groups began pursuing a *judicial* solution. On September 3, 1993, the World Health Organization (WHO) sought an advisory opinion from the ICJ on the legality of the *use* of nuclear weapons,¹⁰ and on December 15, 1994, the UN General Assembly adopted a resolution seeking an advisory opinion on the legality of the *threat or use* of nuclear weapons.¹¹ The UN General Assembly resolution was predictably controversial, adopted by a vote of 78-43, with 38 countries abstaining and 26 not voting.¹² The NWSs and most of their allies opposed the court’s consideration of this issue.

The 1996 Advisory Opinion

The remainder of this chapter examines the key elements of the 1996 Advisory Opinion, including a brief summary of the declarations and the separate and dissenting opinions of all 14 judges.

While carrying a certain legal weight, advisory opinions are not legally binding.¹³ Moreover, the 14 judges on the ICJ were deeply divided over the question of the legality of the threat or use of nuclear weapons. The vote on the central finding of the Advisory Opinion was 7-7, with the president of the court providing the “casting vote.”¹⁴ Every single judge wrote a declaration or a separate or dissenting opinion on the question. In addition, the Advisory Opinion does not necessarily predict how current or future judges would rule if the court were to entertain a renewed challenge to the legality of nuclear weapons. The court’s composition is changeable, and one cannot predict either how the question would be presented or the international security environment in which it would be presented. Nevertheless, the Advisory Opinion is the most

important judicial pronouncement on the legality of the threat or use of nuclear weapons and, therefore, provides an appropriate starting point for an analysis of the legality of nuclear deterrence.

Absence of a Per Se Prohibition

The court concluded by a vote of 11-3: “There is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such” (in this context “conventional” international law means obligations undertaken pursuant to treaties).¹⁵ The court also examined whether the threat or use of nuclear weapons was rendered illegal—either in most cases or all cases—by other principles of international law. The court concluded unanimously that the threat or use of nuclear weapons, like other means of warfare, must be “compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law.”¹⁶

In this context, the court noted the unique characteristics that “render the nuclear weapon potentially catastrophic”:

The destructive power of nuclear weapons cannot be contained in either space or time. They have the potential to destroy all civilization and the entire ecosystem of the planet. . . . Further, the use of nuclear weapons would be a serious danger to future generations. Ionizing radiation has the potential to damage the future environment, food and marine ecosystem, and to cause genetic defects and illness in future generations.¹⁷

Even taking into account the widespread, devastating effects of nuclear weapons and the risk of escalation inherent in the use of nuclear weapons, the court rejected the view that nuclear weapons would necessarily, and in all cases, violate the principles limiting the exercise of the right of self-defense, specifically the requirement that any use of force be *proportional* to the military objective to be achieved¹⁸:

[Some states] contend that the very nature of nuclear weapons, and the high probability of an escalation of nuclear exchanges, mean[s] that there is an extremely strong risk of devastation. The risk factor is said to *negate the possibility of the condition of proportionality*

being complied with. The Court does not find it necessary to embark upon the quantification of such risks; nor does it need to enquire into the question whether tactical nuclear weapons exist which are sufficiently precise to limit those risks: it suffices for the Court to note that the very nature of all nuclear weapons and the profound risks associated therewith are *further considerations to be borne in mind* by States believing they can exercise a nuclear response in self-defense in accordance with the requirements of proportionality.¹⁹

In other words, the requirement of proportionality in the use of force cannot be said to create a *per se* prohibition against the threat or use of nuclear weapons—that is, a prohibition that applies in all circumstances. Rather, proportionality is a principle of international humanitarian law that states must satisfy in carrying out a threat or use of force based on a *case-by-case* evaluation. (The court would return to international humanitarian law principles later in the Advisory Opinion as a basis for its central finding that the threat or use of nuclear weapons would “generally” be contrary to that body of law.)

The court further found that prohibitions against the use of poisoned weapons did not result in a specific legal prohibition against nuclear weapons, as these prohibitions were aimed at weapons intended primarily to poison or asphyxiate. Moreover, the practice of states has been to use specific treaties to create prohibitions against weapons of mass destruction²⁰—for example, the Chemical Weapons Convention and the Biological Weapons Convention.

Some states argued to the court that the many nuclear weapons treaties—for example, treaties constraining acquisition, testing, and deployment—somehow created a prohibition against nuclear weapons.²¹ The court rightly rejected this argument.²² In fact, these treaties highlight the absence of such a prohibition.

First, states know how to prohibit comprehensively the use of weapons of mass destruction when that is their intention, as demonstrated by the Chemical Weapons Convention.²³ By contrast, the NPT did not address the threat or use of nuclear weapons and recognized the continued possession of nuclear weapons by five parties. Second, none of the pre-1996 treaties that imposed restrictions on nuclear weapons testing and deployment imposes a comprehensive prohibition against the threat or use of nuclear weapons.²⁴ Third, in the proto-

cols to the treaties establishing NWFZs in Latin America and the South Pacific, the five NWSs committed (with certain stated caveats) not to use or threaten to use nuclear weapons against states in the region, a commitment that was significant because otherwise the use or threat of nuclear weapons would not be legally prohibited.²⁵ The same reasoning applies to the negative security assurances under which the NWSs committed (politically) not to use nuclear weapons against non-nuclear-weapon state parties to the NPT.

The Advisory Opinion also addressed the argument that the non-use of nuclear weapons since 1945 evidenced the emergence of a prohibition against nuclear weapons use as a matter of *customary international law*. Customary international law is considered binding on all states based on two elements: (1) the settled practice of states; and (2) *opinio juris*. In a different case, the ICJ described the relationship between the settled practice of states and *opinio juris* as follows:

[N]ot only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.²⁶

The court further found:

State practice, including that of *States whose interests are specially affected*, should have been both extensive and virtually uniform in the sense of the provision invoked; and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.²⁷

The court did not accept the argument that the nonuse of nuclear weapons since 1945 had established a customary international law prohibition against the threat or use of nuclear weapons in all circumstances.²⁸ As a number of states pointed out, the nonuse of nuclear weapons since 1945 was readily attributable to factors other than a customary international law prohibition, including the effectiveness of nuclear deterrence. Indeed, to the extent that nuclear deterrence constituted a “threat to use nuclear weapons,” as the advocates for illegality argued, the settled practice of states pointed in the opposite di-

rection, as the NWSs had possessed nuclear weapons and relied upon them for deterrence without interruption throughout the nuclear era. Although limited in number, these states represent a significant portion of the land mass and population of the earth, and their significance in world affairs is magnified further by the number of allied nations that rely on their “extended” nuclear deterrent. Moreover, these are the states “whose interests are specially affected” by the purported prohibition against nuclear weapons, given the importance of such weapons to their national security.²⁹ In short, state practice has clearly *not* been “extensive and virtually uniform” in support of a prohibition against the threat or use of nuclear weapons.

The argument for a customary international law prohibition also failed on the element of *opinio juris*. The states possessing nuclear weapons—as well as many of their allies—have consistently and vocally rejected the notion that the nonuse of nuclear weapons was “rendered obligatory by the existence of a rule of law requiring it.” Some NWSs reserved the possibility of using nuclear weapons even against states in the Latin America and South Pacific NWFZs (under certain circumstances), as well as against non-nuclear-weapon state parties to the NPT (under certain circumstances). And, as the court noted, the very practice of nuclear deterrence demonstrated that some states—the states possessing nuclear weapons and their allies—did not believe a rule of law prohibited the threat or use of nuclear weapons.³⁰ The court also recognized that, although numerous resolutions in the UN General Assembly had condemned nuclear weapons as illegal, such resolutions lacked direct legal effect and, moreover, could not be seen as evidence of an emergent *opinio juris* supporting such illegality given the “substantial numbers of negative votes and abstentions.”³¹ In fact, these UN General Assembly resolutions provided regular opportunities for many states to indicate by voice and vote that they rejected any suggestion that a customary international law prohibition against the threat or use of nuclear weapons had come into existence.

Application of International Humanitarian Law

Having found no treaty prohibition “nor a customary rule specifically proscribing the threat or use of nuclear weapons *per se*,” the court considered whether use of nuclear weapons might be deemed “illegal

in the light of the principles and rules of international humanitarian law applicable in armed conflict and of the law of neutrality.”³² The court noted especially the international humanitarian law obligations to avoid unnecessary suffering and to distinguish between combatants and noncombatants (the latter obligation necessarily entailing an analysis of proportionality).³³ The court found—and all participants in the proceedings agreed—that these legal principles applied to the threat or use of nuclear weapons. In other words, nuclear weapons were not in a special category separate from other weapons.

The court did not provide a detailed analysis of these legal principles in the context of nuclear weapons but did find a tension between these principles and the established practice of states with respect to nuclear weapons:

[M]ethods and means of warfare, which would preclude any distinction between civilian and military targets, or which would result in unnecessary suffering to combatants, are prohibited. In view of the unique characteristics of nuclear weapons, . . . the use of such weapons in fact seems *scarcely reconcilable* with respect for such requirements. 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*.

Furthermore, the Court cannot lose sight of the fundamental right of every State to survival, and thus its right to resort to self-defense, in accordance with Article 51 of the Charter, when its survival is at stake. Nor can it ignore the practice referred to as “policy of deterrence,” to which an appreciable section of the international community adhered for many years. The Court also notes the reservations which certain nuclear-weapon states have appended to the undertakings they have given, notably under the Protocols to the Treaties of Tlatelolco and Rarotonga, and also under the declarations made by them in connection with the extension of the Treaty on the Non-Proliferation of Nuclear Weapons, not to resort to such weapons.

Accordingly, in view of the present state of international law viewed

as a whole, as examined above by the Court, and of the elements of fact at its disposal, the Court is led to observe that it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake.³⁴

Thus, although the court had already found that international humanitarian law did not create a *per se* prohibition, it decided these same principles would render the threat or use of nuclear weapons illegal in all but a narrow set of circumstances involving self-defense and the survival of the state.³⁵

This distinction between *per se* prohibition and case-by-case consideration of international humanitarian law is legally sound, as the applicability of these principles is dependent on the facts of a particular case: What is the nature and magnitude of the threat giving rise to the right of self-defense? What military objective(s) are to be achieved by threatening or using nuclear weapons? What is the risk of harm to noncombatants and nonmilitary property, including the risk of nuclear escalation and nuclear holocaust? What is the risk of harm to neutral countries and to future generations?

The court might have done well to end its analysis with the finding that the use or threat of nuclear weapons would generally be contrary to international humanitarian law. But it did not. Instead, it posited a single scenario in which it could not decide whether the threat or use of nuclear weapons would violate international humanitarian law: extreme self-defense with the survival of the state at stake. This finding is problematic for a number of reasons.

First, as one commentator has noted, the court did not describe what it meant by “survival of the state”—“the political survival of the government of a state, the survival of the state as an independent entity, or the physical survival of the population”?³⁶ The consequences could be significantly different depending on which definition applied.

Second, no legal or factual analysis supported this single scenario. The practice of states with nuclear weapons has been to define “vital interests” that might warrant use of nuclear weapons without necessarily limiting those “vital interests” to survival of the state. For example, the 2018 U.S. Nuclear Posture Review stated:

The United States would only consider the employment of nuclear weapons in extreme circumstances to defend the vital interests of the United States, its allies, and partners. Extreme circumstances could include significant non-nuclear strategic attacks. Significant non-nuclear strategic attacks include, but are not limited to, attacks on the U.S., allied, or partner civilian population or infrastructure, and attacks on U.S. or allied nuclear forces, their command and control, or warning and attack assessment capabilities.³⁷

This statement of vital interests was not limited to “survival of the state.” The court did not cite any state practice indicating states possessing nuclear weapons so limited their options for threatening or using nuclear weapons. It also did not offer a detailed rationale for carving out survival of the state as the sole possible exception. In fact, survival of the state cannot be the sole legally defensible scenario in which threatening or using nuclear weapons might be consistent with international humanitarian law. As the court noted, some participating states cited examples of limited uses of nuclear weapons in which proportionality and discrimination between combatants and noncombatants might be met (e.g., use against military targets at sea or in sparsely populated areas, such as deserts).³⁸ More broadly, a state possessing nuclear weapons, responsibly applying international humanitarian law, might rationally conclude in a particular case that, even though it did not believe its survival was at stake, threatening or using nuclear weapons in self-defense would likely result in less harm to civilians and civilian property than the deployment of overwhelming conventional forces. The court provided no reasoning that would rule out that possibility.

Third, the possible “survival of the state” exception seems at odds with the court’s conclusion that it lacked sufficient information to opine on the permissibility of limited uses of tactical nuclear weapons:

The Court would observe that none of the States advocating the legality of the use of nuclear weapons under certain circumstances, including the “clean” use of smaller, low yield, tactical nuclear weapons, has indicated what, supposing such limited use were feasible, would be the precise circumstances justifying such use; nor

whether such limited use would not tend to escalate into the all-out use of high yield nuclear weapons. This being so, the Court does not consider that it has a sufficient basis for a determination on the validity of this view.³⁹

While low-yield nuclear weapons might be used in a “survival of the state” scenario (e.g., as a warning to an adversary to desist in its attack), that is not the role normally envisioned for such weapons. If the court was *unable* to opine on the legality of low-yield weapons (which would more likely be used in contained, tactical scenarios), how was the court nonetheless able to conclude that *only* survival of the state would justify the threat or use of nuclear weapons (which would seem to preclude tactical nuclear weapons in their most common uses)?

Following on this line of reasoning, the “survival of the state” scenario would in many cases involve a particularly *wide* use of nuclear weapons—certainly in the case of the classic nightmare scenario of responding to a significant nuclear first strike. The same might well be true in responding to a massive conventional invasion that puts at risk the survival of the state. These are the scenarios that come to mind when the court refers to survival of the state. And yet, paradoxically, these scenarios may be the *most* likely to result in massive civilian casualties, catastrophic long-term effects, and the degradation of civilized society—that is, the outcomes most at odds with the goals of international humanitarian law.

The best explanation for the court’s invocation of the “survival of the state” scenario may be that, to scrape together enough votes for the Advisory Opinion, the Court had to reject the argument that nuclear weapons are illegal *per se*, but it edged as close as possible to that view by citing survival of the state as the sole scenario in which the threat or use of nuclear weapons *might* be legal. The seven judges supporting the opinion of the court avoided making new law (as they would have done if they had declared the threat or use of nuclear weapons illegal in all circumstances), while at the same time finding the threat or use of nuclear weapons illegal in all but the most extreme circumstances. This approach is *legally* defensible only on the dubious assumption that *any* use of nuclear weapons would likely lead to escalation and, hence, to nuclear holocaust, with little or no discrimination possible between combatants and noncombatants. The survival of the state exception is

unsatisfying from a legal perspective, but it reflects the court's struggle with the tension between the threat or use of nuclear weapons and the principles of international humanitarian law.

Advisory Opinion View on Nuclear Deterrence

The Advisory Opinion is equally unsatisfying in terms of legal guidance on the concept of nuclear deterrence. In rejecting the argument that the nonuse of nuclear weapons since 1945 established a *per se* prohibition under customary international law, it stated as follows:

Some other States, which assert the legality of the threat and use of nuclear weapons in certain circumstances, invoked the doctrine and practice of deterrence in support of their argument. They recall that they have always, in concert with certain other States, reserved the right to use those weapons in the exercise of the right to self-defense against an armed attack threatening their vital security interests. In their view, if nuclear weapons have not been used since 1945, it is not on account of an existing or nascent custom but merely because circumstances that might justify their use have fortunately not arisen.

The Court does not intend to pronounce here upon the practice known as the "policy of deterrence." It notes that it is a fact that a number of States adhered to that practice during the greater part of the Cold War and continue to adhere to it. Furthermore, the members of the international community are profoundly divided on the matter of whether non-recourse to nuclear weapons over the past 50 years constitutes the expression of an *opinio juris*. Under these circumstances the Court does not consider itself able to find that there is such an *opinio juris*.⁴⁰

The Advisory Opinion did, however, find that nuclear deterrence might involve a "threat" to use force that would be subject to the same international humanitarian law constraints as the actual use of force:

In order to lessen or eliminate the risk of unlawful attack, States sometimes signal that they possess certain weapons to use in self-defense against any State violating their territorial integrity or political

independence. . . . [I]t would be illegal for a State to threaten force to secure territory from another State, or to cause it to follow or not follow certain political or economic paths. The notions of “threat” and “use” of force under Article 2, paragraph 4, of the [UN] Charter stand together in the sense that *if the use of force itself in a given case is illegal—for whatever reason—the threat to use such force will likewise be illegal.* . . .

Some States put forward the argument that possession of nuclear weapons is itself an unlawful threat to use force. Possession of nuclear weapons may indeed justify an inference of preparedness to use them. In order to be effective, the policy of deterrence, by which those States possessing or under the umbrella of nuclear weapons seek to discourage military aggression by demonstrating that it will serve no purpose, necessitates that the intention to use nuclear weapons be credible. Whether this is a “threat” contrary to Article 2, paragraph 4, depends upon whether the particular use of force envisaged would be directed against the territorial integrity or political independence of a State, or against the Purposes of the United Nations or whether, in the event that it were intended as a means of defence, it would necessarily violate the principles of necessity and proportionality. In any of these circumstances the use of force, and the threat to use it, would be unlawful under the law of the Charter.⁴¹

Thus, the court suggested: (1) possession of nuclear weapons “may” justify an inference of intent to use those weapons in self-defence; (2) nuclear deterrence depends upon that intention being credible; and (3) whether this is an illegal “threat” depends on the purpose of the threat and its conformity with international humanitarian law. Based on the court’s central finding on the threat or use of nuclear weapons, it presumably would follow that, if it constituted a “threat” to use nuclear weapons, nuclear deterrence would “generally” be contrary to the laws of war, with the possible exception of the “survival of the state” scenario.

On the other hand, by confirming that legality would depend on the purpose of the threat and its conformity with international humanitarian law (e.g., necessity⁴² and proportionality), the court acknowledged such

an analysis would be fact-specific (an issue to be considered further in the chapter on substantive law of nuclear deterrence). Again, the conclusions of the court underscore its difficulty in reconciling the settled state practice regarding nuclear weapons (and nuclear deterrence) with international humanitarian law. The declarations and the separate and dissenting opinions demonstrate the difficulties and uncertainties in even greater detail.

Declarations and Separate and Dissenting Opinions

The declarations and separate and dissenting opinions of the judges in the Advisory Opinion paint a tangled legal picture. Some judges voted in favor of the central finding in the Advisory Opinion even though their own statements indicated they leaned toward finding the threat or use of nuclear weapons illegal in all circumstances, while others voted in favor because they believed the threat or use of nuclear weapons could be legal in some circumstances. Similarly, some judges voted against this central finding because they believed the court should have gone further and found illegality in all circumstances, while others voted against because they believed the court went too far in finding illegality in all but a narrowly defined circumstance (extreme self-defense involving survival of the state).

The judges are listed below along with their nationalities, even though, in an ideal world, their national origins would not affect their legal views. Including nationalities is not meant to suggest the judges voted as directed by political authorities in their home countries or out of fear of the consequences if they did not toe a particular political line; rather, they are included because a judge's judicial mindset is formed in a specific political, legal, and economic environment, which can affect the worldview underpinning that judge's legal views.⁴³

The judges listed first voted in favor of the central finding in the Advisory Opinion. Four appeared ready to take the further step of declaring the threat or use of nuclear weapons illegal in *all* circumstances.

- President Mohammed Bedjaoui (Algeria) cast the deciding vote in the 7-7 split but clearly leaned toward illegality, writing in his Declaration: "*Atomic warfare and humanitarian law therefore appear to be mutually exclusive, the existence of the one automatically implying the non-existence of the other.*"⁴⁴ In addition, despite

supporting the court's survival-of-the-state decision, he noted the risk of escalation in such a case and wrote that it would be "foolhardy unhesitatingly to set the survival of a State above all other considerations, in particular above the survival of mankind itself."⁴⁵

- Judge Géza Herczegh (Hungary) wrote that, although he did not want to dissent and therefore disassociate himself from many of the findings in the Advisory Opinion, he would have gone further and found illegality in all circumstances: "The fundamental principles of international humanitarian law, rightly emphasized in the reasons of the Advisory Opinion, categorically and unequivocally prohibit the use of weapons of mass destruction, including nuclear weapons. International humanitarian law does not recognize any exceptions to these principles."⁴⁶
- Judge Luigi Ferrari Bravo (Italy) wrote that the illegality of nuclear weapons began from the first UN General Assembly resolutions condemning them. Even though the NWSs had impeded the full development of that illegality, the "naked" prohibition remained, and nuclear deterrence was a purely political practice and had "no legal force."⁴⁷
- Judge Raymond Ranjeva (Madagascar) viewed the threat or use of nuclear weapons as illegal ("the legality of its exercise is more than improbable in actuality"⁴⁸) and would not have made any exception for survival of the state.
- Judge Carl-August Fleischhauer (Germany) agreed that international humanitarian law would limit use of nuclear weapons to exceptional circumstances, but unlike the judges above, he found the "survival of the state" exception to be reasonable, writing: "recourse to [nuclear] weapons could remain a justified legal option in an extreme situation of individual or collective self-defence in which the threat or use of nuclear weapons is the last resort against an attack with nuclear, chemical or bacteriological weapons or otherwise threatening the very existence of the victimized State."⁴⁹ Further, with respect to deterrence, he concluded: "the practice which finds expression in the *policy of*

deterrence, in the reservations to the security guarantees and in their toleration, *must be regarded as State practice in the legal sense.*"⁵⁰

- Judge Vladlen S. Vereshchetin (Russia) believed the court should not shy away from finding the law imperfect in this area and should resist the temptation to fill in the gaps or "legislate."⁵¹
- Judge Shi Jiuyong (China) wrote essentially for one purpose—to emphasize nuclear deterrence was a matter of policy, with no legal force, which suggests that he was otherwise in accord with the central finding of the Advisory Opinion.⁵²

The dissenting judges were also split between those who believed the court did not go far enough in finding illegality and those who believed the court went too far.

- Judge Christopher Weeramantry (Sri Lanka) wrote a 127-page dissent that described in detail the suffering and devastation that would result from nuclear war, explored the philosophical grounds for rejecting nuclear weapons, and, finally, found the threat or use of nuclear weapons to be illegal in all circumstances based on a number of legal principles.⁵³ He also found nuclear deterrence to be illegal.⁵⁴ He further questioned how any credible legal system could include rules allowing for actions that would destroy the civilization that created that legal system.⁵⁵
- Judge Abdul Koroma (Sierra Leone) wrote that the threat or use of nuclear weapons should be illegal in all circumstances based on both treaties and international humanitarian law, and he emphatically rejected the possible exception for "survival of the state."⁵⁶ He noted that the use of force was allowed only in self-defense, not as punishment or retaliation,⁵⁷ and argued that the court should not have opined on nuclear deterrence, which he viewed as a "non-legal" matter.⁵⁸
- Judge Mohammed Shahabuddeen (Guyana) conducted a legal review of relevant treaties and international humanitarian law

in reaching his conclusion that nuclear weapons were illegal in all circumstances. Underpinning his dissent was the view that international law's purpose is to preserve mankind and civilization, and it cannot have a rule that would allow for the destruction of the very civilization that created international law.⁵⁹ In his view, "once it is shown that the use of a weapon could annihilate mankind, its repugnance to the conscience of the international community is not materially diminished by showing that it need not have that result in every case; it is not reasonable to expect that the conscience of the international community will, both strangely and impossibly, wait on the event to see if the result of any particular use is the destruction of the human species. . . . The risk may be greater in some cases, less in others; but it is always present in sufficient measure to render the use of nuclear weapons unacceptable to the international community in all cases."⁶⁰

- Judge Gilbert Guillaume (France) acknowledged the threat or use of nuclear weapons would be limited to extreme circumstances, but he believed "no system of law could deprive one of its subjects of the right to defend its own existence and safeguard its vital interests."⁶¹ While he thought the court should have confirmed legality outright, he wrote that the court's finding "implicitly but necessarily" means that states "*can* resort to 'the threat or use of nuclear weapons . . . in an extreme circumstance of self-defence, in which the very survival of a State would be at stake'. This has always been the foundation of the policies of deterrence whose legality is thus recognized."⁶²
- Vice President Stephen Schwebel (United States) wrote that it was "not unreasonable" for the court to find the threat or use of nuclear weapons would "generally" be contrary to international humanitarian law, but it would depend upon the facts of the specific case.⁶³ However, he criticized the court for failing to find unequivocally that "contemporary events rather demonstrate the legality of the threat or use of nuclear weapons in extraordinary circumstances."⁶⁴ He buttressed this position with a detailed discussion of how an implicit threat of nuclear weapons use in 1990 may have deterred Iraq from using chemical weapons against U.S.

forces in Desert Storm, which he viewed as “not only eminently lawful but intensely desirable” and in accordance with the goals of the UN Charter.⁶⁵

- Judge Rosalyn Higgins (United Kingdom) criticized the central finding because (1) the court did not explain what it meant by “generally” contrary to international humanitarian law and (2) the court failed to reach a conclusion whether the threat or use of nuclear weapons would be lawful or unlawful in extreme circumstances involving survival of the state.⁶⁶ She concluded: “If a substantial number of States in the international community believe that the use of nuclear weapons might *in extremis* be compatible with their duties under the Charter (whether as nuclear powers or as beneficiaries of “the umbrella” or security assurances) they presumably *also* believe that they would not be violating their duties under humanitarian law.”⁶⁷
- Judge Shigeru Oda (Japan) took the view that the court should have declined to hear the case both because the question posed by the UN General Assembly lacked clarity and because, with the countries of the world sharply divided on the nuclear weapons issue, the request for an advisory opinion appeared politically motivated—that is, designed to promote a political agenda rather than clarify the law.⁶⁸ He believed the proper course was for countries to pursue diligently a treaty on nuclear disarmament. He also addressed specifically the risk of nuclear war and the policy of nuclear deterrence. Citing the negative security assurances offered by the NWSs in connection with the NPT and the NWFZs, he concluded “there is little risk of the use of nuclear weapons at present by the five declared nuclear-weapon States.”⁶⁹ Further: “It is *most unlikely* that those nuclear-weapon States will use those weapons, even among themselves, but the possibility of the use of those weapons cannot be totally excluded in certain special circumstances. That is the meaning of the Non-Proliferation Treaty. It is generally accepted that this NPT regime is a necessary evil in the context of international security, *where the doctrine of nuclear deterrence continues to be meaningful and valid.*”⁷⁰

The separate and dissenting opinions of the fourteen judges can be

summarized as follows:

- All but three judges (Shahabuddeen, Weeramantry, and Koroma) agreed international law established no *per se* prohibition against the threat or use of nuclear weapons.
- All 14 judges agreed international humanitarian law applied to the threat or use of nuclear weapons and would, at a minimum, severely constrain the circumstances in which nuclear weapons could be used lawfully.
- Seven judges appeared to favor (or lean toward) illegality in all circumstances: Bedjaoui, Herczegh, Ferrari Bravo, and Ranjeva in support of the central finding; and Weeramantry, Koroma, and Shahabuddeen in dissent. These judges came from five non-aligned states plus Hungary—not yet a member of the North Atlantic Treaty Organization (NATO) in 1996—and NATO member Italy.
- Seven judges appeared to favor *legality* in limited circumstances: Fleischhauer, Vereshchetin, and Shi in support of the central finding; and Guillaume, Schwebel, Higgins, and Oda in dissent. The judges came from the five NWSs and two of their closest allies, Germany and Japan.

The Advisory Opinion and most individual opinions conducted standard legal analyses of existing treaties and customary international law. However, a few of the dissenting opinions raised interesting, interrelated themes regarding the fundamental bases of international law: first, that international relations and international law have been moving from a primary emphasis on sovereignty toward an emphasis on international cooperation; and second, that international law cannot harbor a rule that would allow for destruction of the civilization that created it.

With regard to the first theme, Judge Shahabuddeen sought to elaborate this concept:

First, as set out in Article 2, paragraph 4, of the Charter [of the United Nations], and following on earlier developments, the right of recourse to force has come under a major restriction. This is a significant

movement away from the heavy emphasis on individual sovereignty which marked international society as it earlier existed. . . .

Second, there have been important developments concerning the character of the international community and of inter-State relations. While the number of States has increased, international relations have thickened; the world has grown closer. In the process, there has been a discernible movement from a select society of States to a universal international community. . . . It is reasonably clear . . . that the previous stress on the individual sovereignty of each State considered as *hortus conclusus* [enclosed garden] has been inclining before a new awareness of the responsibility of each State as a member of a more cohesive and comprehensive system based on co-operation and interdependence. . . .

The Charter did not, of course, establish anything like world government; but it did organize international relations on the basis of an "international system"; and fundamental to that system was an assumption that the human species and its civilization would continue.⁷¹

President Bedjaoui and Judge Weeramantry expressed similar ideas.⁷²

Several judges (Bedjaoui, Weeramantry, and Shahabuddeen) also questioned how international law could tolerate a rule that allowed for the destruction of mankind and civilization:

[H]owever far-reaching may be the rights conferred by sovereignty, those rights cannot extend beyond the framework within which sovereignty itself exists; in particular, they cannot violate the framework. The framework shuts out the right of a State to embark on a course of action which would dismantle the basis of the framework by putting an end to civilization and annihilating mankind. It is not that a State is prohibited from exercising a right which, but for the prohibition, it would have; a State can have no such right to begin with.⁷³

In a sense, these judges challenged the fundamental principle—

relied upon by Judges Guillaume, Higgins, and Schwebel—that states may lawfully engage in activities that are not prohibited by a treaty, customary international law, or a decision of the UN Security Council.⁷⁴ They did not rely exclusively on these themes; like the other judges, they engaged in a careful examination of treaties and international humanitarian law principles, which in their view established a prohibition against the threat or use of nuclear weapons. However, by raising these themes, they suggested implicitly that the standard legal analysis may not be the end of the discussion when dealing with nuclear weapons. They may have been suggesting the *moral* issues regarding nuclear weapons are also *legal* issues.

These judges deserve credit for expanding the discussion, bringing a moral and philosophical perspective to the legal questions before the court. Only with difficulty is it possible to dismiss their observations regarding the illogic of interpreting the law of self-defense to allow for the possible annihilation of mankind and civilization. The possibility that a handful of nations could—through malice, stupidity, or miscalculation—devastate most of the planet is frightening.

The international legal regime may be well developed for addressing most interactions between individual states, but it can appear inadequate for addressing global threats such as nuclear war and climate change. International law develops slowly and incrementally, and this is especially true of customary international law, which evolves based on the practice and legal views of states. The treaty approach may allow individual states or groups of states to block action on global issues; the same is true of UN Security Council resolutions. Facing imminent risks and a slow-moving international legal system, states and non-governmental organizations may understandably be tempted to try to nudge the process forward through judicial means.

In the end, the other judges did not embrace a more expansive approach but instead conducted standard analyses of the law as it is. The emerging world of community and cooperation envisioned by Judges Bedjaoui, Weeramantry, and Shahabuddeen has not yet—and may never—modify the current international legal regime.⁷⁵ Sovereign states create and develop international law through treaties, UN Security Council resolutions, and state practice ripening into customary international law. Most states are concerned first and foremost with their own rights and obligations and only secondarily with the development

of global governance systems—and then only when they perceive that doing so is in their individual interests. At the operational level, international lawyers and policy-makers—at least in the most powerful states—will not keep their jobs long if they advise national leaders to forgo sovereign flexibility in favor of nascent global restrictions in the hope that other nations will follow suit. Rather, in the arms control area, they will advise that treaties (and sometimes nonbinding international arrangements) are the appropriate vehicles, creating specific, reciprocal commitments by all relevant international parties, with verification measures to assure all parties live up to the new standards.

States used this approach with both the NPT and the TPNW, as well as the Paris Agreement to address climate change. The failures (or shortcomings) of these treaty vehicles in achieving their stated objectives—whether elimination of nuclear weapons or reduction of greenhouse emissions—do not change the fact that a treaty was the only realistic vehicle for achieving these objectives.⁷⁶

References

1. UN General Assembly, Resolution 1653 (XVI), Declaration on the Prohibition of Use of Nuclear and Thermonuclear Weapons (Nov. 24, 1961).
2. See, e.g., the Antarctic Treaty, December 1, 1959; Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and Under Water, U.S.-U.K.-U.S.S.R., Aug. 5, 1963, 14 U.S.T. (also known as the Limited Nuclear Test Ban Treaty); Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, Jan. 27, 1967 (Outer Space Treaty); Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil thereof, Feb. 11, 1971 (Seabed Treaty); and Treaty on the Limitation of Underground Nuclear Weapon Tests, July 3, 1974 and 1990 protocols (Threshold Nuclear Test Ban Treaty). See also the treaties creating NWFZs, which prohibited both possession of nuclear weapons by states in the zone and testing and deployment of nuclear weapons within the zone by any state: Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean (Treaty of Tlatelolco), February 14, 1967; South Pacific Nuclear-Free-Zone Treaty (Treaty of Rarotonga), August 6, 1985; and Southeast Asia Nuclear-Weapon-Free Zone Treaty (Treaty of Bangkok), December 15, 1995. Subsequent NWFZ treaties: Treaty of Pelindaba (Africa), April 11, 1996; and Treaty of Semipalatinsk (Central Asia), September 8, 2006.
3. See Interim Agreement Between the United States of America and the Union of Soviet Socialist Republics on Certain Measures with Respect to the Limitation of Strategic Offensive Arms, May 26, 1972 (SALT I); Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Strategic Offensive Arms, Together with Agreed Statements and Common Understandings Regarding the Treaty, June 18, 1979 (SALT II); and Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Reduction and Limitation of Strategic Offensive Arms and Associated Documents, July 31, 1991 (START).

4. See NPT, July 1, 1968. See also the treaties creating NWFZs for Latin America, the South Pacific, Southeast Asia, Africa, and Central Asia.
5. The NPT does not name these states, but rather provides that “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” (Article IX.3). This definition captures the five states named in the text. The NPT imposes different obligations on NWSs (Article I) and NNWSs (Article II) with regard to the possession and manufacture of nuclear weapons, but it does not address the threat or use of nuclear weapons. (In this paper, the five states will be referred to as the “nuclear-weapon states” or “NWSs” per the definition in the NPT; “states possessing nuclear weapons” or “nuclear-armed states” will be used to include these five states plus the other four states that reportedly possess nuclear weapons—India, Israel, North Korea, and Pakistan), as defined in UNIDIR 2017, “Negotiation of a Nuclear Weapons Prohibition Treaty: Nuts and Bolts of the Ban – A New Treaty: Taking Stock,” page 3.
6. In adhering to Protocol II to the Treaty of Tlatelolco, the United States, the United Kingdom, and Russia issued statements that had the effect of reserving the possibility of using nuclear weapons in response to an attack in which a Latin American nation was in some way allied with a NWS. For example, the United States stated it “would have to consider that an armed attack by a [party to the treaty], in which it was assisted by a nuclear-weapon state, would be incompatible with [that party’s] corresponding obligations under Article I of the Treaty.” See Proclamation by President Nixon on Ratification of Additional Protocol II to the Treaty for the Prohibition of Nuclear Weapons in Latin America, <https://www.state.gov/p/wha/rls/70658.htm> (accessed April 24, 2019). The thrust of this statement is that, if such an attack occurred, the United States could treat it as a breach of the treaty, relieving it of its obligations as a matter of treaty law. The states in the NWFZs sought these protocols because they understood they would not otherwise enjoy legally binding assurances against nuclear attack from the NWSs; they welcomed the participation of the NWSs, notwithstanding the caveats expressed in their statements. (The NWFZ treaties for the South Pacific, Southeast Asia, Africa, and Central Asia have similar protocols, so the same analysis would apply to them. Not all of the NWSs have ratified the protocols to all of these treaties.)
7. These four NWSs agreed on a common exception “in the case of an invasion or any other attack against them, their territories, armed forces or allies, or on a State towards which they had a security commitment, carried out or sustained by a nonnuclear-weapon State party to the Non-Proliferation Treaty in association or alliance with a nuclear-weapon State.” China has not had to state any exceptions because it has historically maintained a “no first use” policy.
8. See UN Security Council, Resolution 984 (1995).
9. See UN General Assembly, Resolutions 33/71 B (December 14 1978), 35/152 D (December 12, 1980), 36/92 I (December 9 1981), 45/59 B (December 4, 1990) (attaching draft convention with operative provision stating: “The States Parties to this Convention solemnly undertake not to use or threaten to use nuclear weapons under any circumstances”), and 46/37 D (December 6, 1991).
10. The ICJ concluded the WHO request related to a question not within the scope of the organization’s competence. See further discussion of WHO case in chapter on procedural obstacles to a judicial challenge to nuclear weapons, subsection on state-instituted proceedings.
11. UN General Assembly, Resolution 49/75 K (December 15, 1994).
12. See vote count for Resolution 49/75 K, <https://research.un.org/en/docs/ga/quick/regular/49> (accessed April 24, 2019).

13. The court's website describes the effect of advisory opinions: "Contrary to judgments" in contentious cases between states, "the Court's advisory opinions are not binding. The requesting organ, agency or organization remains free to decide, as it sees fit, what effect to give to these opinions. Despite having no binding force, the Court's advisory opinions nevertheless carry great legal weight and moral authority. They are often an instrument of preventive diplomacy and help to keep the peace. In their own way, advisory opinions also contribute to the clarification and development of international law and thereby to the strengthening of peaceful relations between States." See <https://www.icj-cij.org/en/advisory-jurisdiction> (accessed April 24, 2019). See also Rosalyn Higgins, *Themes and Theories* (Oxford: Oxford University Press, 2009) (noting the "uncertain legal effect of Advisory Opinions" in the chapter "A Comment on the Current Health of Advisory Opinions from 50 Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings").

14. The votes in favor of the central finding were President Bedjaoui and Judges Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, and Ferrari Bravo. The votes against were Vice President Schwebel and Judges Oda, Guillaume, Shahabuddeen, Weeramantry, Koroma, and Higgins. The Statute of the International Court of Justice provides for majority decisions on all questions, but: "In the event of an equality of votes, the President or the judge who acts in his place shall have a casting vote" (Article 55).

15. ICJ Advisory Opinion, at 266. The court elaborated on this finding as follows: "international customary and treaty law does not contain any specific prescription authorizing the threat or use of nuclear weapons or any other weapon in general or in certain circumstances, in particular those of the exercise of legitimate self-defence. Nor, however, is there any principle or rule of international law which would make the legality of the threat or use of nuclear weapons or of any other weapons dependent on a specific authorization. State practice shows that the illegality of the use of certain weapons as such does not result from an absence of authorization but, on the contrary, is formulated in terms of prohibition." ICJ Advisory Opinion, at 247. The court also rejected numerous arguments for the illegality of the threat or use of nuclear weapons based on human rights, environmental, and similar legal restrictions. This paper will not delve into all of these arguments, but instead focus on the international humanitarian law arguments that ultimately underpinned both the ICJ's Advisory Opinion and the views of most of the 14 judges. For a summary of the court's handling of these other issues, see Michael J. Matheson, "The Opinions of the International Court of Justice on the Threat or Use of Nuclear Weapons," *Am. Journal of Int'l Law* 91, no. 3 (July 1997): 417-435, at 421-423.

16. ICJ Advisory Opinion, at 266.

17. ICJ Advisory Opinion, at 243.

18. The principle of proportionality "creates obligations to refrain from attacks in which the expected harm incidental to such attacks would be excessive in relation to the concrete and direct military advantage anticipated to be gained and to take feasible precautions in planning and conducting attacks to reduce the risk of harm to civilians and other persons and objects protected from being made the object of attack." "Department of Defense Law of War Manual," at paragraph 2.4.1.2. See also, Rome Statute of the International Criminal Court (July 17, 1996), Article 8(2)(b)(iv) (defining war crimes to include "serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: . . . (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would

be clearly excessive in relation to the concrete and direct overall military advantage anticipated"); International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict (Protocol I)*, Art. 51(5)(b), June 8, 1977 (finding unlawful "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated"). Proportionality applies in both *jus ad bellum* and *jus in bello* contexts: in the former, it means that "the overall goal of the State in resorting to war should not be outweighed by the harm that the war is expected to produce"; in the latter, it means that "the expected incidental harm to the civilian population and civilian objects should not be disproportionate to the anticipated military advantage from an attack." "Department of Defense Law of War Manual," at paragraph 3.5.1. In other words, a state must consider proportionality both in deciding to go to war and in evaluating specific attacks in prosecuting the war. Further, "States fighting against one another must adhere to rules relating to the conduct of hostilities (*jus in bello*), regardless of whether a State may be considered the aggressor or whether the initial resort to force was lawful under *jus ad bellum*." "Department of Defense Law of War Manual," at paragraph 3.5.2.1. Both aspects of proportionality may apply to the use of nuclear weapons, depending on the context.

19. ICJ Advisory Opinion, at 245 (italics added).

20. ICJ Advisory Opinion, at 248.

21. ICJ Advisory Opinion, at 252.

22. ICJ Advisory Opinion, at 253.

23. Under Article I of the Chemical Weapons Convention, "Each State Party to this Convention undertakes never under any circumstances: (a) To develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone; (b) To use chemical weapons."

24. See Antarctic Treaty, Limited Test Ban Treaty, Threshold Test Ban Treaty, Outer Space Treaty, Seabed Treaty, and NWFZ treaties.

25. See ICJ Advisory Opinion, at 249-250 (discussing the Treaty of Tlatelolco and the Treaty of Rarotonga and its Protocols. The court specifically cited the United Kingdom's statement that "in the event of any act of aggression by a Contracting Party to the Treaty in which that Party was supported by a nuclear-weapon State," the UK government would "be free to reconsider the extent to which they could be regarded as committed by the provisions of Additional Protocol II." ICJ Advisory Opinion, at 250.

26. North Sea Continental Shelf Cases, Judgment, I.C.J. Reports 1969, paragraph 77. While not determinative regarding the legality of nuclear weapons, the relative importance of state practice and *opinio juris* has been subject to considerable debate. Some experts take the view that *opinio juris* need not be demonstrated, at least where state practice is constant and uniform. See, e.g., International Law Association, Committee on the Formation of Customary (General) International Law, Statement of Principles Applicable to the Formation of General Customary International Law (London Conference 2000), 8-10, 29-42, <https://www.law.umich.edu/facultyhome/drwcasebook/Documents/Documents/ILA%20Report%20on%20Formation%20of%20Customary%20International%20Law.pdf> (accessed April 24, 2019).

27. International Law Association, paragraph 74 (italics added).

28. ICJ Advisory Opinion, at 255.

29. One ICJ judge argued that "all states are specially affected" because of the potential global effects of nuclear war. See ICJ Advisory Opinion, at 535-536 (Dissenting

Opinion of Judge Weeramantry). Such an interpretation would deprive the term “specially affected” of any meaning.

30. ICJ Advisory Opinion, at 253-254.

31. ICJ Advisory Opinion, at 254-255.

32. ICJ Advisory Opinion, at 256.

33. See “Department of Defense Law of War Manual,” at paragraph 2.5: “Distinction, sometimes called discrimination, obliges parties to a conflict to distinguish principally between the armed forces and the civilian population, and between unprotected and protected objects”; ICRC, *Protocol Additional to the Geneva Conventions of 12 August 1949*, Art. 51(2): “The civilian population as such, as well as individual civilians, shall not be the object of attack.” See also “Department of Defense Law of War Manual,” at paragraph 2.5.2: “persons using force must discriminate between legitimate and illegitimate objects of attack in good faith based on the information available to them at the time.”

34. ICJ Advisory Opinion, at 262-263 (*italics added*).

35. To be clear, even though the laws of armed conflict might not render the use of nuclear weapons illegal in the extreme self-defense scenario, these laws would still apply to such use, requiring the user of nuclear weapons, for example, to discriminate between combatants and noncombatants and avoid collateral damage to the extent possible.

36. Matheson, “Opinions of the International Court,” 430. See also Burns H. Weston, “Nuclear Weapons and the World Court: Ambiguity’s Consensus,” 7 *Transnational Law & Contemporary Problems* 371, 386-387 (1997); and criticism of this exception by other judges in the case, for example ICJ Advisory Opinion, at 301-303 (Separate Opinion of Judge Ranjeva, who believed no exception was warranted from a finding of illegality) and at 558-563 (Dissenting Opinion of Judge Koroma).

37. 2018 Nuclear Posture Review, 20.

38. ICJ Advisory Opinion, at 261.

39. ICJ Advisory Opinion, at 262.

40. ICJ Advisory Opinion, at 254 (*italics added*).

41. ICJ Advisory Opinion, at 246-247.

42. “Military necessity may be defined as the principle that justifies the use of all measures needed to defeat the enemy as quickly and efficiently as possible that are not prohibited by the law of war.” “Department of Defense Law of War Manual,” at paragraph 2.2. “Military necessity may consider the broader imperatives of winning the war and not only the demands of the immediate situation.” “Department of Defense Law of War Manual,” at paragraph 2.2.3.1.

43. Interestingly, one judge cited a test of fairness of a legal system based on a “veil of ignorance,” meaning a fair outcome is one that members in that system “would be prepared to accept if they were behind a veil of ignorance, not knowing where they would stand in that system.” ICJ Advisory Opinion, at 522-523 (Dissenting Opinion of Judge Weeramantry, citing John Rawls, *A Theory of Justice*, 1972). As applied in the nuclear weapons context, Weeramantry posited no state would accept the legality of nuclear weapons without knowing whether it would possess such weapons. This proposed test recognized that where a judge’s state stands in the international security system could affect their judgment.

44. ICJ Advisory Opinion, at 273 (Declaration of President Bedjaoui, *italics in the original*).

45. ICJ Advisory Opinion, at 273
46. ICJ Advisory Opinion, at 275 (Declaration of Judge Herczegh).
47. ICJ Advisory Opinion, at 283-285 (Declaration of Judge Ferrari Bravo).
48. ICJ Advisory Opinion, at 303 (Separate Opinion of Judge Ranjeva).
49. ICJ Advisory Opinion, at 307 (Separate Opinion of Judge Fleischhauer).
50. ICJ Advisory Opinion, at 307 (italics added).
51. ICJ Advisory Opinion, at 280 (Declaration of Judge Vereshchetin).
52. ICJ Advisory Opinion, at 277 (Declaration of Judge Shi).
53. ICJ Advisory Opinion, at 508-512 (illegality based on treaty prohibitions against poisonous gases), 513-518 (illegality based on numerous principles of international humanitarian law) (Dissenting Opinion of Judge Weeramantry).
54. ICJ Advisory Opinion, at 538-542 (Dissenting Opinion of Judge Weeramantry). In opining on nuclear deterrence, Judge Weeramantry sought to draw a meaningful distinction between possession and deterrence. However, since every state possessing nuclear weapons uses them for deterrence—that is, no state merely places its nuclear weapons in a warehouse—the distinction (if any) seems irrelevant as a practical matter.
55. ICJ Advisory Opinion, at 520-523 (Dissenting Opinion of Judge Weeramantry).
56. ICJ Advisory Opinion, at 556-582 (Dissenting Opinion of Judge Koroma).
57. ICJ Advisory Opinion, at 562-563 (Dissenting Opinion of Judge Koroma).
58. ICJ Advisory Opinion, at 579 (Dissenting Opinion of Judge Koroma).
59. ICJ Advisory Opinion, at 381, 392-393 (Dissenting Opinion of Judge Shahabuddeen).
60. ICJ Advisory Opinion, at 386-387 (Dissenting Opinion of Judge Shahabuddeen).
61. ICJ Advisory Opinion, at 290 (Separate Opinion of Judge Guillaume).
62. ICJ Advisory Opinion, at 292 (Separate Opinion of Judge Guillaume). Judge Guillaume voted against the central finding in the Advisory Opinion, but wrote a separate opinion rather than a dissenting opinion: “the Court, in my view, ought to have carried its reasoning to its conclusion and explicitly recognized the legality of deterrence for defence of the vital interests of States. It did not do so explicitly, and that is why I was unable to support operative paragraph 2E. But it did so implicitly, and that is why I appended to the Advisory Opinion a separate opinion and not a dissenting one.”
63. ICJ Advisory Opinion, at 321-322 (Dissenting Opinion of Vice President Schwebel).
64. ICJ Advisory Opinion, at 323 (Dissenting Opinion of Vice President Schwebel).
65. ICJ Advisory Opinion, at 323-328 (Dissenting Opinion of Vice President Schwebel). Some historical evidence indicates Iraq’s nonuse of chemical weapons was not attributable to this implicit threat, but this example is still useful in understanding Judge Schwebel’s dissent.
66. ICJ Advisory Opinion, at 583-584, 589-591 (Dissenting Opinion of Judge Higgins).
67. ICJ Advisory Opinion, at 591 (Dissenting Opinion of Judge Higgins).
68. ICJ Advisory Opinion, at 334-342 (Dissenting Opinion of Judge Oda). He detailed how the non-aligned movement and nongovernmental organizations debated the proposed advisory opinion request and concluded the request derived not from a desire to better understand the law but to have the court confirm one side’s view of the political question.

69. ICJ Advisory Opinion, at 369 (Dissenting Opinion of Judge Oda).
70. ICJ Advisory Opinion, at 364 (Dissenting Opinion of Judge Oda) (emphasis added). He further wrote: “The doctrine, or strategy, of nuclear deterrence, however it may be judged and criticized from different angles and in different ways, was made a basis for the NPT regime which has been legitimized by international law, both conventional and customary, during the past few decades.”
71. ICJ Advisory Opinion, at 394-395 (Dissenting Opinion of Judge Shahabuddeen). Judge Shahabuddeen cited a prior case to support this notion: “Other judges observed that it was ‘an undeniable fact that the tendency of all international activities in recent times has been towards the promotion of the common welfare of the international community with a corresponding restriction of the sovereign power of individual States’ (Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, I.C.J. Reports 1951, p. 46, joint dissenting opinion of Judges Guerrero, Sir Arnold McNair, Read and Hsu Mo).”
72. See ICJ Advisory Opinion, at 270-271 (Declaration of President Bedjaoui): “Despite the still modest breakthrough of ‘supra-nationalism’, the progress made in terms of the institutionalization, not to say integration and ‘globalization’, of international society is undeniable. Witness the proliferation of international organizations, the gradual substitution of an international law of co-operation for the traditional international law of co-existence, the emergence of the concept of ‘international community’ and its sometimes successful attempts at subjectivization. . . . The resolutely positivist, voluntarist approach of international law still current at the beginning of the century . . . has been replaced by an objective conception of international law, a law more readily seeking to reflect a collective juridical conscience and respond to the social necessities of States organized as a community.” See also ICJ Advisory Opinion at 551; Saul Mendlovitz and Merav Datan, “Judge Weeramantry’s Grotian Quest,” 7 *Transnational Law & Contemporary Problems* 401, 416-420 (1997).
73. ICJ Advisory Opinion, at 393 (Dissenting Opinion of Judge Shahabuddeen). See also ICJ Advisory Opinion, at 521-522 (Dissenting Opinion of Judge Weeramantry).
74. For a useful discussion of the state-centric (or sovereign-centric) tradition in international law, see Mendlovitz and Datan, “Judge Weeramantry’s Grotian Quest,” 401-413.
75. But see Rebecca Johnson, “Arms Control and Disarmament Diplomacy,” in *Oxford Handbook of Modern Diplomacy* (Oxford, Oxford University Press, 2013), making the case that international lawmaking increasingly bypasses sovereign states, relying on networking among civil society, scientific organizations, and like-minded governments, with a particular focus on humanitarian consequences. She cites the 1997 Mine Ban Treaty, the 2001 Programme of Action on Small Arms and Light Weapons, and the 2008 Cluster Munitions Convention. Notwithstanding Johnson’s theory, each of these initiatives was accomplished by a treaty among sovereign states. Moreover, civil society can persuade like-minded governments to adopt treaties, but it cannot change customary international law, which is based on state practice.
76. The United States has relied on nonbinding arrangements in some nonproliferation situations, notably North Korea in the 1994 Agreed Framework and Iran in the 2015 Joint Comprehensive Plan of Action, but in both cases, legally binding verification measures were applied by the International Atomic Energy Agency. The elimination of nuclear weapons would require rigorous and intrusive verification measures that could not realistically be implemented under a nonbinding arrangement.

Is Another ICJ Challenge Likely?

The period leading up to the 1996 Advisory Opinion saw the end of the Cold War and growing cooperation between the two major nuclear powers (the United States and Russia) on a wide variety of issues, such as Iraq's invasion of Kuwait, North Korea's nuclear program, bilateral arms control, and reduction of stockpiles of weapons-usable nuclear material. The 9/11 terrorist attacks had not yet occurred. The European Union was moving toward greater integration, and books such as Thomas Friedman's *The Lexus and the Olive Tree* (1999) described the globalization of the world economy and the diminished role of states and geographical boundaries, with the risk of war greatly reduced among the nations participating in this global economy. Democratic capitalism appeared to have triumphed.

By contrast, the current political climate appears divisive and pessimistic, with relations between the United States and Russia at a post-Cold War low ebb, tensions rising between the United States and China, North Korea engaged in nuclear saber rattling, persistent terrorist threats and regional unrest in the Middle East, possible cracks in the NATO alliance, British withdrawal from the European Union, and lack of multilateral cooperation on climate change and Iran diplomacy. The apparent deterioration in international cooperation would seem to repudiate the trend toward global cooperation and connectedness described by Judges Shahabuddeen and Weeramantry.

During this same period, a movement to ban nuclear weapons gained momentum, culminating in the 2017 TPNW. This chapter examines how the prospects for a renewed challenge to nuclear weapons at the ICJ might be affected by both the TPNW and the current nuclear postures of Russia and the United States.

The Treaty on the Prohibition of Nuclear Weapons

The movement that led to the TPNW sought to alter the political climate regarding nuclear weapons. Nongovernmental organizations (NGOs) and the governments of certain activist countries drove the process, with a renewed focus on the humanitarian threat posed by nuclear

weapons. The movement was also an expression of frustration with the lack of progress by the NWSs in negotiating nuclear disarmament.

All parties to the NPT are under a legal obligation to pursue negotiations on nuclear disarmament.¹ This obligation falls principally on the five countries recognized as NWSs under the treaty. During the Cold War, nuclear arms control had been (fitfully) successful at capping the expansion of U.S. and Soviet stockpiles, but it did not produce deep cuts in those stockpiles. Many of the non-nuclear-weapon state parties to the NPT criticized the pace of nuclear disarmament. They argued that their commitment under the treaty not to obtain nuclear weapons was based on an expectation of *expeditious* elimination of nuclear weapons by the five NWSs. Throughout the Cold War, the UN General Assembly periodically adopted resolutions reiterating its 1961 finding that the use of nuclear and thermonuclear weapons would be “contrary to the rules of international law and to the laws of humanity,” as well as a violation of the UN Charter.² The unrelenting criticism by the NNWSs, echoed by numerous NGOs around the world, resulted in steady (if ineffectual) pressure that periodically galvanized public opinion, such as during the nuclear freeze movement of the 1980s.

The breakup of the Soviet Union produced the kind of sea change in the international security environment necessary for meaningful progress toward nuclear disarmament, and the United States and Russia took a number of steps in that direction in the following two decades. President George H. W. Bush signed the Strategic Arms Reduction Treaties (START and START II) with Russia, which significantly reduced the nuclear warheads and delivery vehicles of both sides. Bush also ended deployment of nuclear depth charges, made unilateral cuts in tactical nuclear weapons, took nuclear-armed bombers off alert status, and terminated a number of nuclear weapons programs, among other actions. Some years later, President Bill Clinton signed the Comprehensive Nuclear-Test-Ban Treaty (CTBT). President George W. Bush signed the Strategic Offensive Reductions Treaty to make further significant cuts in U.S. and Russian nuclear warheads (but he also took steps to expand nuclear forces and capabilities and withdrew the United States from the Anti-Ballistic Missile Treaty). The New START Treaty, concluded in 2010, established the current limits on nuclear warheads and delivery vehicles in the U.S. and Russian arsenals.³ At that time, officials discussed proposals for reducing nuclear forces by an additional one-third,

and the United States also sought to negotiate limits on nonstrategic and nondeployed nuclear weapons. The 2010 Nuclear Posture Review emphasized reducing the role of nuclear weapons in the national security strategy, with the goal of making deterrence of nuclear attack the sole role of nuclear weapons until the ultimate goal of eliminating nuclear weapons worldwide could be achieved.⁴ It took a step in that direction by stating the United States would no longer rely on nuclear weapons to deter chemical or biological weapons attacks.

Alongside these post-Cold War arms control measures, antinuclear momentum was building among NGOs, including through the founding in 2007 of the International Campaign to Abolish Nuclear Weapons (ICAN), which spearheaded negotiations on the TPNW. In addition, beginning in 2007, four prominent former government officials—George P. Shultz, William J. Perry, Henry A. Kissinger, and Sam Nunn—published a series of editorials in the *Wall Street Journal* concluding that: Cold War-era nuclear deterrence was obsolete; reliance on nuclear deterrence was “increasingly hazardous and decreasingly effective”; and urgent efforts were needed to reduce these risks and move toward the elimination of nuclear weapons.⁵

Similarly, about the time that the United States and Russia reached final agreement on the New START Treaty, the Final Document of the 2010 NPT Review Conference expressed deep concern over the “catastrophic humanitarian consequences” of the use of nuclear weapons and noted the “proposals and initiatives from Governments and civil society related to achieving a world free of nuclear weapons.”⁶ In early 2013, the UN General Assembly adopted a resolution establishing an “open-ended working group to develop proposals to take forward multilateral nuclear disarmament negotiations for the achievement and maintenance of a world without nuclear weapons.”⁷

Paradoxically, as negotiations on the TPNW moved forward, it became clear the Obama administration’s “reset” of U.S.-Russia relations had failed. By the time the UN General Assembly decided in January 2017 to convene a negotiating conference,⁸ Russia had annexed Crimea (2014) and continued to threaten Ukraine, bringing Russian relations with the Western powers to a new post-Cold War low. China had engaged in extensive muscle flexing in the South China Sea and elsewhere. And the 2016 U.S. presidential election created additional uncertainties regarding the future role of the United States in the

world, its nuclear strategy, its openness to nuclear arms control, and its relations with the other nuclear-armed countries.

Thus, the political climate surrounding the TPNW might best be described as “mixed.” On one hand, the treaty created a groundswell against nuclear weapons, at least initially, with 122 states voting to adopt the treaty at the negotiating conference, a wide range of NGOs enthusiastically supporting the outcome, and the chief NGO proponent of the treaty (ICAN) winning the Nobel Peace Prize. On the other hand, advocates had hoped for speedy ratification by the 50 states needed for the treaty’s entry into force, but as of early 2019 less than two dozen states had ratified.⁹ Many states appear to be reassessing their support for the TPNW.

Most proponents of the TPNW are under no illusion that the states possessing nuclear weapons will ever become parties. The treaty was not drafted with a view to encouraging adherence by the states possessing nuclear weapons, so it cannot be considered a viable vehicle for accomplishing the stated goal of outlawing nuclear weapons.¹⁰ Rather, it was drafted with political objectives in mind: proponents argued the treaty would stigmatize possession of nuclear weapons, contributing to the establishment of a “norm” against possession of nuclear weapons. Some proponents have used language that arguably blurs the line between “norms” in a nonlegal sense and norms of customary international law:

This treaty is a clear indication that the majority of the world no longer accepts nuclear weapons, and creates a new norm that can be the foundation for their elimination.¹¹

Since treaty proponents seek a ban on nuclear weapons and yet most recognize the treaty alone will not accomplish that goal, they can be expected to pursue other avenues as well.¹² In the absence of political progress to achieve their objectives, advocates might decide to press for reconsideration in the ICJ.¹³

U.S. and Russian Nuclear Postures

The current nuclear weapons postures of Russia and the United States may also affect the political climate for a legal challenge to nuclear weapons and nuclear deterrence. For example, the United States predicated the 2018 Nuclear Posture Review on the need to address a “rapid deterioration” in the threat environment since 2010, most notably the

alarming direction of the Russian nuclear doctrine.¹⁴ It noted Russia's "willingness to use force to alter the map of Europe and impose its will on its neighbors, backed by implicit and explicit nuclear first-use threats," as well as Russia's violations of arms control agreements.¹⁵ Most telling was the U.S. description of Russia's nuclear strategic thinking:

While nuclear weapons play a deterrent role in both Russian and Chinese strategy, Russia may also rely on threats of limited nuclear first use, or actual first use, to coerce us, our allies, and partners into terminating a conflict on terms favorable to Russia. Moscow apparently believes that the United States is unwilling to respond to Russian employment of tactical nuclear weapons with strategic nuclear weapons.¹⁶

Based on this assessment of Russian thinking, the 2018 Nuclear Posture Review emphasized the importance of low-yield nuclear weapon options to persuade Russia that the United States had options other than strategic weapons to respond to any tactical weapons use by Russia.¹⁷

In addition, the 2018 Nuclear Posture Review called for efforts to meet "asymmetric" Russian and Chinese capabilities aimed at U.S. detection and command-and-control capabilities:

Russia and China are pursuing asymmetric ways and means to counter U.S. conventional capabilities, thereby increasing the risk of miscalculation and the potential for military confrontation with the United States, its allies, and partners. Both countries are developing counter-space military capabilities to deny the United States the ability to conduct space-based intelligence, surveillance, and reconnaissance (ISR); nuclear command, control, and communications (NC3); and positioning, navigation, and timing. Both seek to develop offensive cyberspace capabilities to deter, disrupt, or defeat U.S. forces dependent on computer networks.¹⁸

Based on this assessment, the 2018 Nuclear Posture Review described the U.S. policy regarding the use of nuclear weapons as follows:

The United States would only consider the employment of nuclear weapons in extreme circumstances to defend the vital interests of the United States, its allies, and partners. Extreme circumstances

could include significant non-nuclear strategic attacks. Significant non-nuclear strategic attacks include, but are not limited to, attacks on the U.S., allied, or partner civilian population or infrastructure, and attacks on U.S. or allied nuclear forces, their command and control, or warning and attack assessment capabilities.¹⁹

This statement acknowledges that the United States might consider using nuclear weapons in a wide range of scenarios *other than a nuclear first strike* against the United States—that is, scenarios in which the United States might carry out a first nuclear strike.

Overall, the 2018 Nuclear Posture Review reflected an increased risk the United States might have to respond to nuclear weapon use by Russia, especially if the U.S. assessment was correct that Russia would be willing to consider first use of tactical weapons based on a belief that no other country would respond with nuclear weapons. Further complicating the nuclear landscape has been the emergence of North Korea as a nuclear power, following (reasonably) successful tests of nuclear weapons and ballistic missiles that may be capable of reaching some parts of the United States. It is too soon to tell whether the current downturn in U.S.-Russia relations and U.S.-China relations is the beginning of a long-term trend or will move back in a positive direction. But the current environment suggests an increased risk that nuclear weapons might be relied upon outside their singular role of deterring nuclear attack. Even if the risk is not in fact higher, the perception of an increased risk—coupled with the rhetoric on both sides—might lend urgency to the efforts of antinuclear states and groups to challenge the legality of nuclear weapons.

In this regard, the change in tone between the 2010 Nuclear Posture Review and the 2018 Nuclear Posture Review is significant. The 2010 Nuclear Posture Review stated that the United States sought to reduce the roles for nuclear weapons with the ultimate goal of relying on nuclear weapons solely to deter nuclear attacks, and it cited the obligation to pursue nuclear disarmament under Article VI of the NPT. The 2018 Nuclear Posture Review did not include these elements. The United States and Russia blamed each other for the failure to continue post–New START arms control negotiations.²⁰ Progress in nuclear disarmament seems improbable when the two major nuclear powers are at such an impasse. Under such circumstances, some states may be

tempted to push the UN General Assembly to request the ICJ to issue another advisory opinion on either the legality of nuclear weapons or, possibly, a particular facet of the legality issue—for example, whether Russia and the United States have failed to meet their obligations under Article VI of the NPT to “pursue negotiations in good faith on effective measures relating . . . to nuclear disarmament.”

References

1. “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.” Treaty on the Non-Proliferation of Nuclear Weapons, Article VI, 1970.
2. UN General Assembly, Resolution 1653 (XVI) (November 24, 1961).
3. Treaty Between the United States of America and the Russian Federation on Measures for the Further Reduction and Limitation of Strategic Offensive Arms, April 8, 2010, www.state.gov/t/avc/newstart/c44126.htm (New START). The treaty establishing the following limits on U.S. and Russian nuclear forces: (1) 700 deployed intercontinental ballistic missiles (ICBMs), deployed submarine-launched ballistic missiles (SLBMs), and deployed heavy bombers equipped for nuclear armaments; (2) 1,550 nuclear warheads on deployed ICBMs, deployed SLBMs, and deployed heavy bombers equipped for nuclear armaments (each such heavy bomber is counted as one warhead toward this limit); and (3) 800 deployed and non-deployed ICBM launchers, SLBM launchers, and heavy bombers equipped for nuclear armaments. The Treaty has a 10-year duration with an option to extend for up to an additional 5 years.
4. 2010 Nuclear Posture Review, at 15-17.
5. George P. Shultz, William J. Perry, Henry A. Kissinger, and Sam Nunn, “A World Free of Nuclear Weapons,” *Wall Street Journal*, January 4, 2007, www.nti.org/analysis/opinions/world-free-nuclear-weapons/ (accessed April 24, 2019).
6. Final Document of 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, NPT/CONF.2010/50 (Vol. I), at paragraphs 80-81 (2010), [http://undocs.org/NPT/CONF.2010/50%20\(VOL.I\)](http://undocs.org/NPT/CONF.2010/50%20(VOL.I)) (accessed April 24, 2019).
7. UN General Assembly, Resolution 67/56 (January 4, 2013).
8. UN General Assembly, Resolution 71/258 (January 11, 2017): “Decides to convene in 2017 a United Nations conference to negotiate a legally binding instrument to prohibit nuclear weapons, leading towards their total elimination.”
9. See tally at www.icanw.org/status-of-the-treaty-on-the-prohibition-of-nuclear-weapons/ (accessed April 24, 2019).
10. See Newell Highsmith and Mallory Stewart, “The Nuclear Ban Treaty: A Legal Analysis,” *Survival* 60, no. 1 (February-March 2018): 129-152. In brief, the TPNW imposes verification requirements that would be unacceptable to states possessing nuclear weapons while also failing to establish a verification regime that would provide confidence that all other states are complying with their obligations. For example, the treaty fails to require NNWSs to implement the IAEA’s Additional Protocol, the gold standard in nuclear verification. The treaty also includes a withdrawal provision that would not be acceptable to states possessing nuclear weapons.

11. "UN Nuclear Weapon Ban Treaty Opens for Signature," International Campaign to Abolish Nuclear Weapons (ICAN), <https://www.icanw.org/campaign-news/un-nuclear-weapon-ban-treaty-opens-for-signature/> (accessed April 24, 2019). The William J. Perry Project issued a similar statement: "This treaty is a clear indication that the majority of the world no longer accepts nuclear weapons and do not consider them legitimate weapons, creating the foundation of a new norm of international behavior." "UN Adopts New Treaty on the Prohibition of Nuclear Weapons," William J. Perry Project, July 7, 2017, <https://www.wjperryproject.org/notes-from-the-brink/un-adopts-new-treaty-on-the-prohibition-of-nuclear-weapons> (accessed April 24, 2019).

12. One approach would be to pressure governments and private businesses to cease doing business with entities involved in nuclear weapons activities, similar to the campaign against landmines. Another possible avenue would be to seek executive or legislative action in countries that currently allow stationing of nuclear weapons or that participate in military planning with states that possess nuclear weapons. The courts of such countries might also provide an avenue for judgments declaring nuclear weapons illegal (at least within those states). These other possible courses of action are beyond the scope of this paper. However, the approach taken with landmines—bottom-up pressure on governments and businesses—may not translate to nuclear weapons, which are essential pillars of many states' national security strategies. Landmines, conversely, have not generally been fundamental to a state's defense against existential threats.

13. See, e.g., Marianne Hanson, "Normalizing Zero Nuclear Weapons: The Humanitarian Road to the Prohibition Treaty," *Contemporary Security Policy* 39, no. 3 (2018), 464-486: "As with other disarmament projects (for instance the campaigns to ban landmines, chemical weapons, and biological weapons) advocates have sought to employ a three-staged process: first, to stigmatize the weapon by publicizing its inhumane effects; next, to delegitimize the weapon through a legal ruling against its manufacture, possession and use; and third, to eliminate the weapon from the arsenals of states, over a period of time."

14. 2018 Nuclear Posture Review, at 6-14.

15. 2018 Nuclear Posture Review, at 6.

16. 2018 Nuclear Posture Review, at 7. For a more detailed description of the recent evolution of the Russian nuclear doctrine, see Roberts, Case for U.S. Nuclear Weapons, 128-137; Lewis Dunn, "Redefining the U.S. Agenda for Nuclear Disarmament," *Livermore Papers on Global Security* no. 1, Center for Global Security Research (October 2016), at 28-30. See also Kehler, "Nuclear Weapons and Nuclear Use," 50, 53-54.

17. "During the Cold War, the United States possessed large numbers and a wide range of non-strategic nuclear weapons, also known as theater or tactical nuclear weapons. . . . Current U.S. non-strategic nuclear forces consist exclusively of B61 gravity bombs," which are kiloton-class weapons capable of variable yields. 2018 Nuclear Posture Review, at 48. The 2018 Nuclear Posture Review also noted the development of a nuclear-armed air-launched cruise missile (the Long Range Stand Off Weapon or "LRSO"), which could penetrate air defenses and also provide variable nuclear yields. 2018 Nuclear Posture Review, at 50.

18. 2018 Nuclear Posture Review, at 7.

19. 2018 Nuclear Posture Review, at 20.

20. See, e.g., 2018 Nuclear Posture Review, at 73-74, which cites Russian violations of several arms control agreements and notes that "Russia has also rebuffed U.S. efforts to follow New START with another round of negotiated reductions, and to pursue reductions in non-strategic nuclear forces."

Procedural Obstacles to a Judicial Challenge

The ICJ has jurisdiction under specific circumstances (1) to issue advisory opinions at the request of certain international organizations¹ and (2) to decide cases brought by states.² Both of these avenues present significant hurdles.

Seeking Another Advisory Opinion

At the same time that it issued the 1996 Advisory Opinion at the request of the UN General Assembly, the ICJ refused to issue an advisory opinion on a similar question posed by the WHO. Shortly after the founding of the WHO, the UN General Assembly had authorized it to request advisory opinions on “legal questions arising within the scope of its competence.”³ But the ICJ found the legality of the threat or use of nuclear weapons was not a question arising “within the scope of [the WHO’s] competence.”⁴ Accordingly, any international organization seeking to question the legality of nuclear deterrence would have to be authorized to request advisory opinions *and* demonstrate that the question was within its competence as an international organization. These requirements would likely limit the options for requesting an advisory opinion to the UN Security Council, the UN General Assembly, and possibly the International Atomic Energy Agency (IAEA).

The UN Security Council clearly would not request such an advisory opinion given that any of the five NWSs could veto such a request. The IAEA has authority to request advisory opinions from the ICJ “on any legal question arising within the scope of the Agency’s activities,” and both the IAEA Board of Governors and the IAEA General Conference are specifically authorized.⁵ However, the IAEA likely would not be a realistic option, especially taking into account the court’s decision in the WHO case. The IAEA has no role with regard to enforcement of the NPT other than to apply safeguards as requested by parties to that treaty.⁶ The Statute of the IAEA does not include any functions regarding nuclear weapons, only activities related to promoting and safeguarding the peaceful uses of nuclear energy.⁷ Therefore, the court would likely reject

a request from the IAEA for an advisory opinion on nuclear weapons.

Furthermore, the IAEA Board of Governors almost certainly would not approve seeking such an advisory opinion for both legal and practical reasons.⁸ And although the IAEA General Conference—like the UN General Assembly—might be more inclined to seek an advisory opinion, it seems unlikely to do so given the high risk that the court would reject the request. Equally important, the IAEA has generally sought to protect its reputation as an expert agency carrying out the specific duties assigned to it, which would not include jumping into a highly contentious international debate over the legality of nuclear weapons—a debate that sharply divides its membership.

The UN General Assembly is probably the only realistic option among international organizations for seeking another advisory opinion from the ICJ. It might do so to maintain the momentum of the TPNW, since the treaty was a UN General Assembly initiative in the first place. However, a number of factors suggest that such a request may not be likely. First, the activist states in the UN General Assembly presumably would not want to launch another case unless they had some confidence the court would render a favorable advisory opinion. If they posed the same question to the court as in 1996, they could not have high confidence that the outcome would change. They could pose a different question—for example, whether possession or deterrence (or some element of deterrence) is contrary to international law. But if the court could not find nuclear weapons *use* illegal in all circumstances, activist states could not expect it to find possession or deterrence illegal. Second, since the UN General Assembly was the catalyst for the TPNW, activist states might want to devote their efforts to bringing that treaty into force. By pursuing the TPNW, the UN General Assembly arguably accepted the view of the court in 1996 that prohibitions on particular weapons have historically been treaty based, not arising from customary international law. Third, as will be discussed further below in connection with the Marshall Islands case, the ICJ may not be eager to reenter the debate over the legality of nuclear weapons, and the court has discretion to decline a request for an advisory opinion. Nevertheless, the UN General Assembly is a political body, and it has been motivated historically to pursue the nuclear weapons issue over the objections of the states possessing nuclear weapons and their allies, so a renewed request for an advisory opinion from the court cannot be ruled out.

State-Instituted Proceedings

The other avenue for putting the nuclear weapons question before the ICJ is through a state-instituted case. A state seeking to challenge the legality of nuclear weapons in some way would have to identify both another state to bring the case against and a valid cause of action against that state. The complaining state could only bring the case against a state that has *consented* to the jurisdiction of the ICJ, which might come about in one of three ways: (1) the parties to the dispute have referred the case to the court; (2) a treaty between the parties requires that unresolved disputes be submitted to the court; or (3) all parties to the dispute have accepted the compulsory jurisdiction of the court.⁹

The first option is a nonstarter. None of the states possessing nuclear weapons would agree with a complaining party to refer a case regarding the legality of nuclear weapons to the court. (However, this did not stop the Marshall Islands from trying, as discussed below.)

The second option is possible but not likely. The NPT might provide a substantive basis for challenging the legality of nuclear weapons; article VI obligates all states to pursue nuclear disarmament, and the ICJ concluded in 1996 that this means states are obligated to achieve that result, not just engage in negotiations.¹⁰ The NWSs have not achieved disarmament and are not currently engaged in disarmament negotiations. However, the NPT does not provide for dispute resolution before the ICJ (the treaty has no dispute resolution provision, so disputes are a matter for the parties to resolve, per standard treaty law). A state might seek to bring a case under another bilateral or multilateral treaty—for example, a treaty for the protection of human rights or the environment. However, advocates for the illegality of nuclear weapons made similar arguments to the court in 1996, and the court rejected those arguments, finding the law of armed conflict was the appropriate law to apply.¹¹ A complaining state could not be optimistic that the current court would reject that precedent and entertain a new case on such grounds.

The third option is compulsory jurisdiction, but six of the nine states possessing nuclear weapons have *not* submitted to the compulsory jurisdiction of the ICJ. The other three—India, Pakistan, and the United Kingdom—have effectively excluded nuclear weapons issues in their declarations accepting the court’s compulsory jurisdiction.¹² In fact, the

United Kingdom modified its acceptance of compulsory jurisdiction in 2017 specifically to exclude nuclear weapons–related claims unless all five NWSs under the NPT were also parties to the action.¹³ It did so in the wake of the Marshall Islands case against the United Kingdom in the ICJ. The court’s handling of the Marshall Islands cases affects both the legal climate and political climate for a renewed legal challenge to nuclear weapons and therefore deserves further discussion.

The Marshall Islands was the site of extensive nuclear weapons testing early in the nuclear era. In 2014, it instituted proceedings against the five NWSs under the NPT as well as India, Israel, Pakistan, and North Korea for failing to meet their obligations under Article VI of the NPT—and customary international law—“to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament.”¹⁴ The claim that the obligation to pursue and conclude such negotiations was part customary international law—and not solely derived from Article VI—was necessary in order to bring the cases against the four states not party to the NPT.

As noted above, the NPT did not provide a treaty-based ground for the *jurisdiction* of the court, even though the *substantive* allegations by the Marshall Islands included violations of obligations under that treaty. The Marshall Islands therefore had to rely on the other two bases for establishing the jurisdiction of the court: obtaining the agreement of the states possessing nuclear weapons and proceeding against those states that had accepted the compulsory jurisdiction of the court. Accordingly, it invited the six states that had not accepted compulsory jurisdiction (China, France, Israel, North Korea, Russia, and the United States) to accept the jurisdiction of the court for purposes of that specific case. None accepted.¹⁵

The remaining cases went forward against India, Pakistan, and the United Kingdom, all of whom had accepted the compulsory jurisdiction of the court, albeit with reservations. All three states raised multiple preliminary objections to the court’s consideration of the case, and the court ultimately found it could not proceed on the merits in any of these cases based on one of these objections: the absence of a “dispute between the Parties” because the Marshall Islands failed to give notice of its claim before instituting proceedings before the court.¹⁶ As a result, the court did not reach the additional preliminary objections by India and Pakistan that, because nuclear weapons issues were part

of their national self-defense, such issues were excluded by their reservations to compulsory jurisdiction.¹⁷ As previously noted, following the court's decision, the United Kingdom modified its acceptance of compulsory jurisdiction to exclude nuclear weapons issues unless the case was joined by all five NWSs under the NPT. In other words, even if the Marshall Islands now took steps to establish a "dispute" between itself and these other parties, it would still face a range of additional preliminary objections to the court's jurisdiction to hear the case.

The Marshall Islands cases demonstrates the legal obstacles to bringing a nuclear-armed state before the ICJ in a case involving the legality of nuclear weapons.¹⁸ The court's decision on the absence of a dispute was by a close vote: 9 votes to 7 in the India and Pakistan cases, and 8 votes to 8 in the United Kingdom case (with the president of the court casting the deciding vote).¹⁹ The judges opposing the decision argued that past court precedents supported a finding of a "dispute" in these cases, while the judges supporting the decision found grounds to distinguish these precedents or to find that other precedents offered a better approach.²⁰ Although it cannot be known for certain, the decision could be seen as indicating a reluctance among the judges to reenter the fray on nuclear weapons. Nevertheless, the "lack of a dispute" was only one of the many preliminary objections from the parties; additional legal obstacles would stand in the way of a successful legal challenge by a state.

References

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." Statute of the International Court of Justice, Article 65(1).
2. "Only states may be parties in cases before the Court." Statute of the International Court of Justice, Article 34(1), <https://www.icj-cij.org/en/statute> (accessed April 24, 2019).
3. "The General Assembly authorizes the World Health Organization to request advisory opinions of the International Court of Justice on legal questions arising within the scope of its competence other than questions concerning the mutual relationships of the Organization and the United Nations or other specialized agencies." Agreement of July 10, 1948 between the United Nations and the WHO, Article X, para. 2.
4. Legality of the Use by a State of Nuclear Weapons in Armed Conflict, 1996 ICJ Rep. 66 (Advisory Opinion of 8 July 1996), at 84, <https://www.icj-cij.org/files/case-related/93/093-19960708-ADV-01-00-EN.pdf> (accessed April 24, 2019).
5. "The General Conference and the Board of Governors are separately empowered,

subject to authorization from the General Assembly of the United Nations, to request the International Court of Justice to give an advisory opinion on any legal question arising within the scope of the Agency's activities." Statute of the IAEA, Article XVII.B, www.iaea.org/about/statute. The agreement between the IAEA and the United Nations provides: "The United Nations will take the necessary action to enable the General Conference or the Board of Governors of the Agency to seek an advisory opinion of the International Court of Justice on any legal question arising within the scope of the activities of the Agency." Agreement Governing the Relationship Between the United Nations and the IAEA, Article X, October 30, 1959, www.iaea.org/sites/default/files/publications/documents/infcircs/1959/infcirc11.pdf (accessed April 24, 2019).

6. The IAEA already existed when the NPT was concluded. The treaty gave the IAEA a role in the application of safeguards (Article III) but no other role. See NPT; Statute of the IAEA.

7. See Statute of the IAEA, Articles II-III. See also Agreement Governing the Relationship Between the United Nations and the IAEA, Article I: "The United Nations recognizes the [IAEA] as the agency, under the aegis of the United Nations as specified in this Agreement, responsible for international activities concerned with the *peaceful uses of atomic energy* in accordance with its Statute, without prejudice to the rights and responsibilities of the United Nations in this field under the Charter" (italics added).

8. The IAEA Board of Governors would recognize that such a request would be outside the scope of its functions, as already noted. Moreover, the five NWSs and a number of their allies are on the 35-member Board of Governors and, as a practical matter, could likely block any effort to seek an advisory opinion.

9. Statute of the International Court of Justice, 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[questions of law and fact]."

10. ICJ Advisory Opinion, at 264.

11. ICJ Advisory Opinion, at 239-243.

12. The United Kingdom excluded "any claim or dispute that arises from or is connected with or related to nuclear disarmament and/or nuclear weapons, unless all of the other nuclear-weapon States Party to the Treaty on the Non-Proliferation of Nuclear Weapons have also consented to the jurisdiction of the Court and are party to the proceedings in question." United Kingdom, "Declarations Recognizing the Jurisdiction of the Court as Compulsory," International Court of Justice, February 22, 2017, <https://www.icj-cij.org/en/declarations/gb> (accessed April 24, 2019). Pakistan excluded both "disputes relating to questions which fall essentially within the domestic jurisdiction of the Islamic Republic of Pakistan" and "disputes relating to or connected with any aspect of hostilities, armed conflicts, individual or collective self-defence or the discharge of any functions pursuant to any decision or recommendation of international bodies, the deployment of armed forces abroad, as well as action relating and ancillary thereto in which Pakistan is, has been or may in future be involved" as well as "all matters related to the national security of the Islamic Republic of Pakistan." Pakistan, "Declarations Recognizing the Jurisdiction of the Court as Compulsory," International Court of Justice, March 29, 2017, <https://www.icj-cij.org/en/declarations/pk> (accessed April 24, 2019). India excluded both "disputes in regard to matters which are essentially within the domestic jurisdiction of the Republic of India" and "disputes relating to or connected with facts or situations of hostilities, armed conflicts, individual or collective actions taken in self-

defence, resistance to aggression, fulfilment of obligations imposed by international bodies, and other similar or related acts, measures or situations in which India is, has been or may in future be involved.” India, “Declarations Recognizing the Jurisdiction of the Court as Compulsory,” International Court of Justice, September 18, 1974, <https://www.icj-cij.org/en/declarations/in> (accessed April 24, 2019). The India Declaration arguably focuses on armed conflict and therefore is less definitive in excluding nuclear weapons issues in peacetime, but India predictably argued in the Marshall Islands case that a self-defense reservation encompassed nuclear weapons issues even in the absence of an ongoing conflict.

13. “Amendments to the UK’s Optional Clause Declaration to the International Court of Justice,” Parliament, February 23, 2017, <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2017-02-23/HCWS489> (accessed April 24, 2019).

14. See, e.g., Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and Nuclear Disarmament (Marshall Islands v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016, 833 (hereafter *Marshall Islands v. United Kingdom*), at 839. The Marshall Islands also asserted a number of related failures to meet obligations under the NPT and under customary international law.

15. *Marshall Islands v. United Kingdom*, at 845.

16. *Marshall Islands v. United Kingdom*, at 856-857; Obligations Concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016, p. 255 (hereafter *Marshall Islands v. India*), at 277; Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. Pakistan), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016, p. 552 (hereafter *Marshall Islands v. Pakistan*), at 573.

17. See Counter-Memorial of the Republic of India, *Marshall Islands v. India*, September 16, 2015, at paragraphs 53-62, <https://www.icj-cij.org/files/case-related/158/18900.pdf> (accessed April 24, 2019); Counter-Memorial of Pakistan, *Marshall Islands v. Pakistan*, December 1, 2015, at paragraphs 7.40-7.47, <https://www.icj-cij.org/files/case-related/159/18920.pdf> (accessed April 24, 2019).

18. One possible variant would be to bring the case against another NNWS that accepted compulsory jurisdiction and was allied with a NWS. The claim might be based on the stationing or transiting of nuclear weapons on the territory of the allied NNWS (or something similar), otherwise that state could not provide a remedy to the claim and, presumably, the court would refuse to hear it. In any case, the NWSs would not be bound by a decision in such a case.

19. One judge supporting the decision disagreed on the absence of a dispute but supported dismissal because all necessary parties were not part of the proceeding (another likely obstacle to any future case). See Separate Opinion of Judge Tomka, *Marshall Islands v. Pakistan*, at 604-607, <https://www.icj-cij.org/files/case-related/159/159-20161005-JUD-01-04-EN.pdf> (accessed April 24, 2019).

20. See, e.g., Dissenting Opinion of Judge Crawford, *Marshall Islands v. Pakistan*, at 794 et seq, <https://www.icj-cij.org/files/case-related/159/159-20161005-JUD-01-13-EN.pdf>; Separate Opinion of Judge Owada, *Marshall Islands v. Pakistan*, at 590-592, <https://www.icj-cij.org/files/case-related/159/159-20161005-JUD-01-03-EN.pdf>; Separate Opinion of Judge Donoghue, *Marshall Islands v. Pakistan*, at 739, <https://www.icj-cij.org/files/case-related/159/159-20161005-JUD-01-08-EN.pdf> (accessed April 24, 2019).

The Substantive Law of Nuclear Deterrence

The UN General Assembly may never request another advisory opinion on the legality of nuclear weapons, and a number of procedural obstacles would likely prevent any state from bringing a contentious case before the ICJ against the states possessing nuclear weapons. Nevertheless, this chapter examines how the court might—or ought to—decide a legal challenge to the practice of nuclear deterrence. The response of the current set of judges is difficult to predict. However, in my view, a ruling that nuclear deterrence (in all its forms) is illegal would be the wrong outcome as a legal matter.

The first section notes that since 1996 no change of legal significance would compel a different outcome in the ICJ regarding the legality of the threat or use of nuclear weapons. It supports the essence of the court's conclusion that the use of nuclear weapons would be illegal in all but a narrow set of circumstances. The next section focuses specifically on the legality of nuclear deterrence, which the 1996 Advisory Opinion did not explore with any rigor. It questions whether the primary role of deterring a nuclear attack should be subject to the same kind of "threat" analysis as more specific, immediate threats to use nuclear weapons. It concludes that even elements of nuclear deterrence that may appear disproportionate on their face would generally be consistent with international law. The final section looks at other ways nuclear weapons might be challenged legally, including via Article VI obligations under the NPT.

Legal Developments Since the 1996 Advisory Opinion

Since 1996, a number of events have occurred that tend to reinforce—rather than alter—the conclusion that customary international law does not prohibit the threat or use of nuclear weapons in all circumstances (much less the policy of nuclear deterrence). These events speak to both the settled practice of states and *opinio juris*.

First, states possessing nuclear weapons—as well as many of their allies—continue to reject the notion that a prohibition against the possession, threat, or use of nuclear weapons is "rendered obligatory

by the existence of a rule of law requiring it.”¹ Their views have been expressed openly, including through additional votes and statements in the UN General Assembly, contradicting the views of many other states.² In addition, the 2010 and 2018 U.S. Nuclear Posture Reviews reaffirmed publicly that nuclear deterrence continues to be an essential element of U.S. national security planning, which would not have been the case if the United States did not continue to view nuclear weapons, nuclear deterrence, and even nuclear weapons use as legally permissible.³

Second, since 1996, treaties have been concluded creating NWFZs in Southeast Asia, Africa, and Central Asia.⁴ As with the Latin America and the South Pacific treaties (which were discussed in the Advisory Opinion), all the new zone treaties have protocols establishing prohibitions against the five NWSs using or threatening to use nuclear weapons against any state in the zone. And again in each case, the United States indicated it would accept the obligation not to use or threaten to use nuclear weapons against a state in the zone only if that state “is a non-nuclear weapons State Party to the Treaty on the Non-Proliferation of Nuclear Weapons and in compliance with its nuclear non-proliferation obligations.”⁵ Again, the existence of these NWS protocols is consistent with the view that nuclear attacks against the zone states are not otherwise legally precluded, and the caveats to the NWS instruments of ratification confirm they share this view. In other words, the legality of the threat or use of nuclear weapons continues to be a legal premise in the establishment of NWFZs.

Similarly, the 2010 Nuclear Posture Review further revised the (non-legally binding) negative security assurance under which the United States pledges not to use or threaten to use nuclear weapons against non-nuclear-weapon state parties to the NPT. The previous negative security assurance (formulated in 1995) had applied to NNWSs except “in the case of an invasion or any other attack against them, their territories, armed forces or allies, or on a State towards which they had a security commitment, carried out or sustained by a non-nuclear-weapon State party to the Non-Proliferation Treaty in association or alliance with a nuclear-weapon State.”⁶ The 2010 Nuclear Posture Review modified the negative security assurance to apply to any state that “is a non-nuclear weapons State Party to the Treaty on the Non-Proliferation of Nuclear Weapons and in compliance with its nuclear non-proliferation

obligations.”⁷ (This remains the formulation of the U.S. negative security assurance.) Thus, the United States has continued to alter its nuclear doctrine in ways that confirm its view that the threat or use of nuclear weapons remains legally permissible in general.

Third, the 2017 negotiation of the TPNW⁸ underscored the fact that state practice has been to rely on *treaties* to prohibit specific types of weapons. This treaty expressly provided for the participation of states possessing nuclear weapons (in one way or another),⁹ and it did not make possession of nuclear weapons or the threat or use of nuclear weapons by *nonparties* to the treaty unlawful—nor could it do so consistent with international treaty law.¹⁰ In short, it did not alter the legal situation that prevailed at the time of the 1996 Advisory Opinion.

Customary international law is a creature of state practice, and, not surprisingly, state practice tends to put a premium on the rights and interests of states, including the right to take measures to protect their sovereignty and survival. The many states relying on nuclear deterrence have not negligently stumbled into a situation in which their long-time reliance on nuclear weapons has been rendered illegal. In the 1996 Advisory Opinion, the court sought to avoid creating new law in this area, as doing so would not be consistent with its mandate.¹¹ The same ought to be true today.

Likewise, nothing of legal significance has occurred since 1996 that would warrant a change in the court’s conclusion that the use of nuclear weapons would “generally” be contrary to the rules of international humanitarian law. All fourteen judges agreed with that conclusion. Despite the valid criticism that the term “generally” was susceptible to multiple interpretations, the court sent a clear message that few circumstances existed in which such use would be legal.¹² As demonstrated in Hiroshima and Nagasaki, and as detailed by several of the judges (most notably Judge Weeramantry), the consequences of nuclear weapons use would be horrific in all but the most exceptional cases. The oft-cited examples of nuclear use against military targets in sparsely populated areas or against naval vessels on the high seas are almost beside the point: the states possessing nuclear weapons have not configured their nuclear arsenals for such purposes.¹³ Further, nuclear weapons use would almost always be difficult to defend legally if conventional military means could accomplish the same mission, especially in view of the long-term effects of nuclear weapons.¹⁴ The

availability of conventional options would significantly limit the utility of low-yield nuclear weapons. Moreover, the feasibility of “limited nuclear war” or limited tactical use is unknown because of the lack of data and the risk of escalation.¹⁵

Given the risk of civilian casualties, long-term nuclear effects, and nuclear escalation, the legitimate military objective of the nuclear attack would have to be sweeping in scale—whether or not “survival of the state” is the best or most defensible description of that scale. Yet even for a suitably important military objective, *first use* of nuclear weapons would be extremely difficult to justify legally. Even during the Cold War, if Soviet forces had swarmed into Western Europe, NATO use of nuclear weapons to arrest their advance would have risked escalation and global nuclear holocaust, which would have left no “winners” at all (whereas recent history suggests that conquests are seldom permanent). Except perhaps in the most extreme circumstances, first use of nuclear weapons would likely prove difficult, if not impossible, to defend under international humanitarian law.

As noted in the introduction, the United States maintains that its nuclear employment plans comply with international humanitarian law. However, U.S. nuclear plans, even if legally defensible on paper, might prove difficult to defend legally if actually carried out. First, the United States defines legitimate military objectives to include not only military forces and directly related industrial and logistical systems (e.g., bomb factories and military transportation lines), but also “war-sustaining” activities such as energy or industrial sectors only indirectly supporting the enemy’s armed forces.¹⁶ Also, legitimate targets may include facilities and activities that *could* be used to support the war, such as a civilian airstrip, even if it is not yet being used in the war effort.¹⁷ Nuclear attacks designed to suppress both war-supporting activities and war-sustaining activities could well reduce the enemy state to a nonfunctioning society. Second, nuclear strategists often plan against perceived threats of enormous magnitude (such as a first nuclear strike), which would have to be the case to satisfy the principles of necessity and proportionality. In planning a response to an enormous threat, nuclear strategists could justify enormous collateral damage.¹⁸ Thus, the broadly permissible targeting described above would be amplified by broadly permissible collateral damage. Third, the long-lasting effects of nuclear weapons make calculations of collateral damage especially uncertain. Finally, any

plans contemplating limited nuclear use are vulnerable to the criticism that, in the most important scenarios for such use (that is, scenarios that might present threats of the magnitude necessary to justify using nuclear weapons), we have no basis for confidence that nuclear escalation would not result in a nuclear holocaust. Nuclear escalation and de-escalation strategies would likely prove messier in reality than in planning (just as is the case for conventional military planning).

In addition, there is a legitimate question in many nuclear-use scenarios whether employment of nuclear weapons would serve a retaliatory (i.e., impermissible) purpose rather than a legitimate military purpose. For most of the nuclear era, nuclear deterrence has depended on the assurance of retaliatory strikes, whether under an explicit strategy of targeting population centers, the (slightly less-stark-sounding) concept of “holding at risk that which an adversary values most,” or current “counter-force” targeting that aims to conform to international humanitarian law.¹⁹ In the Desert Storm case, Secretary of State James Baker explicitly premised his implied threat to use nuclear weapons in response to any Iraqi use of chemical or biological weapons on the expectation that the American public would demand “vengeance.”²⁰ While scenarios can be imagined in which purposes like retaliation, punishment, and vengeance are absent or minimal compared to legitimate military purposes, it is just as easy to imagine scenarios in which the opposite is true.

The same legal challenges would apply to any state possessing nuclear weapons (some of which are less sensitive to international humanitarian law than the United States). Any state that used nuclear weapons would no doubt vigorously defend its action on legal grounds. Government lawyers know how to frame a persuasive legal justification, especially taking advantage of the legal latitude in assessing necessity and proportionality, as discussed above.²¹ However, persuasive lawyering would not change the fundamental difficulty of reconciling nuclear weapons use with international humanitarian law in most realistic scenarios.²² Even the dissenting U.S. judge in the 1996 Advisory Opinion could not accept as lawful nuclear weapons use on a scale that would render much of the earth uninhabitable.²³

Nevertheless, the court was right in 1996 *not* to find use of nuclear weapons illegal in all circumstances. Even if the use of nuclear weapons consistent with international humanitarian law seems improbable,

declaring blanket illegality would ignore the possibility of unusual and unforeseen factual circumstances and, therefore, would put the court in the position of making law. At the same time, the court was also right to state clearly that international humanitarian law severely constrains such use.

Legality of Nuclear Deterrence

The tension in this field arises because, on one hand, the *threat* of nuclear weapon use is subject to the same constraints under international humanitarian law as actual use and therefore “generally” inconsistent with that body of law. On the other hand, neither treaty nor customary international law creates a *per se* prohibition against nuclear deterrence; extensive and continuous state practice supports the existing broad-based reliance on nuclear deterrence; and as long as nuclear weapons exist, deterring actual use is essential.

In my view, the legality of nuclear deterrence is fully established by state practice and *opinio juris*. The discussion below further argues that international humanitarian law and the established practice of nuclear deterrence need not be seen as irreconcilable, but rather may coexist without undue tension based on the nonspecific and conditional nature of the deterrent “threat” to use nuclear weapons.

What Constitutes a “Threat”?

Every state that participated in the Advisory Opinion case agreed that law-of-war principles fully applied to nuclear weapons, and the ICJ shared that view.²⁴ However, no principle of international law specifically addresses “deterrence” as a separate concept. Rather, nuclear deterrence has generally been treated as a “threat to use nuclear weapons” and therefore subject to the same principles of international humanitarian law as the actual use of nuclear weapons.²⁵

Judge Schwebel took that position even in *defending* nuclear deterrence, arguing that, if the NPT allowed nuclear possession, it also allowed nuclear deterrence:

The policy of deterrence differs from that of the threat to use nuclear weapons by its generality. But if a threat of possible use did not inhere in deterrence, deterrence would not deter. If possession by the five nuclear Powers is lawful until the achievement of nuclear

disarmament; if possession is the better part of deterrence; if deterrence is the better part of threat, then it follows that the practice of States—including their treaty practice—does not absolutely debar the threat or use of nuclear weapons.²⁶

Equating “deterrence” with “threat” could lead to the conclusion that nuclear deterrence would “generally” be contrary to the rules of international humanitarian law, according to the key finding in the ICJ Advisory Opinion. However, this conclusion conflicts directly with extensive state practice throughout the nuclear era and, equally important, appears at odds with the reality of international affairs.

“Deterrence” and “threat” are not synonyms.²⁷ An inherent “threat of *possible* use” of nuclear weapons—to use Judge Schwebel’s words—is not the same as a direct threat to use nuclear weapons. Judge Schwebel sought to equate the two concepts for purposes of his argument but acknowledged the two concepts “differ,” twice resorting to the phrase “the better part of” in his strained formulation.²⁸

Judge Schwebel and the other ICJ judges struggled with nuclear deterrence in part because the term covers a wide range of possible actions that vary in coercive effect, specificity, and conditionality. For example, if Russia informed Ukraine it would launch a nuclear attack unless Ukraine ceded Crimea, the message would be coercive, specific, and immediate and would therefore unquestionably constitute a “threat.” Similarly, if the United States informed the government of Syria that it would use nuclear weapons if Syria used chemical weapons against U.S. personnel in the region, the message would be specific and immediate and arguably would constitute a “threat.”²⁹ At the other end of the spectrum, the most fundamental form of nuclear deterrence—deterring an adversary from attacking with nuclear weapons—includes features that do not seem to fit well within the “threat” concept.

First, this form of nuclear deterrence is not coercive in the sense that it is not a “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.”³⁰ Rather, the purpose of such deterrence is to avoid a calamitous breach of the peace—a nuclear first strike, which would be inconsistent with the purposes of the United Nations. If coercing another state is at the heart of the concept of “threat” under the UN Charter,³¹ deterring illegal aggression does not

seem to constitute such a threat.

Second, nuclear planning for deterrence purposes lacks specificity. For most, and possibly all, states possessing nuclear weapons, the planned response to a nuclear attack is not a single option—such as “launch all the missiles and bombers”—but instead a range of possible options that might be chosen by that state’s leader, including the option *not* to respond with nuclear weapons.

Third, nuclear deterrence is conditional; specifically, it is contingent on both another state acting wrongfully in such a way as to trigger the right of self-defense and the leader of the attacked state choosing to respond with nuclear weapons. Nuclear deterrence’s most important function is to dissuade potential adversaries from launching a nuclear first strike. In that context, the first contingency is unlikely to occur.

Some NWSs state publicly their nuclear deterrence policies: they do not make specific threats, but use generalized language, such as “we are prepared to use nuclear weapons to defend vital national interests.”³² Judge Schwebel acknowledged this distinction: “The policy of deterrence differs from that of the threat to use nuclear weapons by its generality.” In this sense, nuclear deterrence is hardly distinguishable from the maintenance of large-scale conventional military forces—also intended by their very existence to deter aggression. The United States enjoys conventional military superiority over every country in the world—in most cases, overwhelming superiority; its defense spending dwarfs that of every other country. As with nuclear weapons, these conventional military forces serve as a deterrent against an attack on the United States or its allies, and the United States invests in extensive planning and training to assure the effectiveness of that deterrent. In some areas of the world, most notably the Korean Peninsula, U.S. conventional forces “target” a specific potential enemy and train regularly for possible conflict with that potential enemy, all as a legitimate exercise of the right of self-defense. Yet the ICJ would never rule that the existence of extensive conventional forces, including U.S. forces on the Korean Peninsula, constitutes an illegal threat within the meaning of the UN Charter or international humanitarian law. These examples support the view that the mere existence of military forces (and contingency planning for their use) would not be analyzed in the same way as threats that are specific or unconditional (or both). The same approach should apply to nuclear weapons intended to deter

unlawful aggression.

Where the “threatened” response consists of a range of options that are dependent on specific facts and circumstances, a meaningful analysis of international humanitarian law principles is scarcely possible. The triggering event has not occurred. The “threat” to respond with nuclear weapons has not been—and may never be—carried out, or it may be carried out in an unexpected way. No specific facts are available to anchor a legal evaluation.³³ The Advisory Opinion concluded that the threat or use of nuclear weapons must be judged on a case-by-case basis, which cannot reasonably be done without a specific case to judge.

Michael Matheson, a deputy legal adviser at the State Department who helped formulate and present the views of the United States in the ICJ case, made the previous point directly after the ICJ issued the Advisory Opinion. Referring to the court’s suggestion that possession of nuclear weapons “may indeed justify an inference of preparedness to use them,” and, accordingly, the court can judge the legality of the “use of force envisaged,”³⁴ Matheson asked:

[U]nder what circumstances might a threat of a severe response by a nuclear weapon state—without explicit mention of nuclear weapons—constitute a threat of use of nuclear weapons [citing Secretary Baker’s implicit threat in Desert Storm]? How would one assess the legality of an “envisaged” use of force if (as will almost always be the case) no decision has been taken among various options as to how or even whether nuclear weapons would be used? If a particular use of nuclear weapons is thought to be unlawful because of disproportionate civilian casualties, why should a mere threat of such use be regarded as unlawful, when such a threat would cause no such casualties but might deter or halt an unlawful attack? It is difficult enough to assess the legality of hypothetical uses of nuclear weapons, and it seems even more difficult to assess the legality of hypothetical “threats” based on inference or presumed intentions.³⁵

A state must evaluate proportionality based on the nature of the threat it is facing.³⁶ For the United States, nuclear deterrence confronts a wide variety of possible threats, ranging from an all-out Russian

nuclear attack to a limited nuclear attack to a massive conventional attack, whether aimed at the United States or one or more of its allies. Which of these threats should be considered in evaluating the proportionality of nuclear deterrence? Even if one chose a specific type of threat, how could it be properly evaluated outside a specific political and military context? The United States plans for innumerable potential self-defense situations involving different adversaries, different geographical locations, and different third parties (allies, neutrals, additional adversaries). Similarly, nuclear deterrence does not consist of a specific threat to use nuclear weapons in self-defense but instead a range of potential options for use (or nonuse) of nuclear weapons that would be considered based on the political and military context. A state would have to consider a similar multiplicity of factors in complying with the principle of discrimination between combatants and noncombatants, which cannot be judged without some sense of the number and types of nuclear weapons used, the number and types of targets, measures that might be taken to minimize civilian casualties, and the magnitude of the threat involved (which affects the amount of collateral damage that may be legally inflicted). Moreover, in each potential threat situation involving legitimate self-defense, if nuclear deterrence succeeds, no attack will be made, no nuclear weapons will be used in response, and no deaths of civilians or combatants will result.

Faced with the problem of undertaking a meaningful evaluation of nuclear deterrence under the principles of international humanitarian law, critics of nuclear deterrence tend to assume a triggering event would necessarily lead the state to use the nuclear weapons it relied upon for its deterrent and to do so without a proper consideration of international humanitarian law.³⁷ They further assume nuclear deterrence constitutes a threat of all-out nuclear attack—or, alternatively, that *any* use of nuclear weapons would escalate to the level of global devastation, so that the outcome is the same regardless of the presumed scope of the nuclear deterrent threat. A nuclear exchange between the United States and Russia would indeed carry an enormous risk of devastation to mankind and civilization, even if it started as a limited nuclear exchange. The same might be true of a major nuclear exchange in South Asia.³⁸ But these are not the only possible scenarios for the use of nuclear weapons. The use of nuclear weapons against a non-nuclear-armed Middle East adversary might not present the same level

of destruction or escalation risk, and the same might be true of a nuclear exchange on the Korean Peninsula (given North Korea's relatively small nuclear arsenal). Such nuclear exchanges would likely spark international condemnation on moral and legal grounds but probably not global nuclear war. Similarly, Russian use of nuclear weapons against a non-NATO country to settle a regional dispute would be roundly condemned, would trigger economic sanctions, and might lead to covert aid to resistance groups (as occurred in the 1980s after the Soviet invasion of Afghanistan). But again this scenario seems unlikely to result in global nuclear war. The assumption of nuclear escalation and nuclear devastation becomes even more problematic when applied to nuclear deterrence. The aim of nuclear deterrence is to avoid the use of nuclear weapons, so assumptions about possible escalation are arguably irrelevant. A legal analysis relying on such a series of assumptions cannot provide the basis for finding illegal a national security strategy that the principal world powers—both the states possessing nuclear weapons and their many allies—have relied upon since the 1940s.

Critics of nuclear deterrence also argue that the whole point of deterrence is to demonstrate a *credible readiness* to use nuclear weapons under certain circumstances.³⁹ The nuclear strategists devising U.S. and Russian targeting plans would agree with that assessment: their detailed, multilevel deterrence planning is intended to demonstrate to potential adversaries a credible readiness and willingness to use nuclear weapons if attacked.⁴⁰ They are naturally concerned that if potential adversaries perceive the nuclear deterrent as remote and lacking credibility, they might dismiss U.S. nuclear strategy as mere game playing. In such a case, a reckless or malevolent leader might not be deterred from using nuclear weapons. However, the same could be said of the previously discussed conventional military examples, yet these cases are not characterized as illegal threats. The emphasis on credibility does not negate the nonspecific, conditional nature of the most important elements of nuclear deterrence. Moreover, nuclear deterrence may be no less effective if "uncertain" is substituted for "credible."⁴¹ For nuclear deterrence to succeed, uncertainty must be planted in the mind of the potential adversary.⁴² Uncertainty is the predictable result of a non-specific, contingent nuclear deterrent.

For these reasons, the most important forms of nuclear deterrence cannot be lumped in with more coercive, specific, unconditional threats

in conducting a legal analysis under the UN Charter and international humanitarian law. In the 2010 Nuclear Posture Review, the United States articulated a goal of limiting nuclear deterrence to the sole purpose of deterring a nuclear first strike, and it took steps in that direction, most notably by stating it would no longer rely upon nuclear weapons to deter chemical or biological weapons attacks.⁴³ Critics of nuclear weapons have urged the NWSs to adopt no-first-use policies, at least as a step on the road to nuclear disarmament. Under such circumstances, treating all forms of nuclear deterrence as illegal (or even “generally” illegal) would be counter-productive to future disarmament efforts as well as legally unsound. Moreover, recognizing the stark differences between different forms of nuclear deterrence accords with the reality that a strong deterrence posture that minimizes the risk of an adversary’s aggression—particularly aggression with nuclear weapons—must be viewed as permissible and, indeed, essential as long as nuclear weapons exist.

The 2018 Nuclear Posture Review noted the U.S. might consider first use of nuclear weapons in response to a range of “non-nuclear strategic attacks,”⁴⁴ suggesting the trigger event for nuclear weapons use might not be as attenuated as in the case of a nuclear first strike against the United States. At the same time, the likelihood that a U.S. president actually *would* authorize the use of nuclear weapons in response to a chemical weapons attack or a cyberattack, for example, is far *more* attenuated. In other words, with a nuclear first strike, the risk of the first contingency occurring is low, but the risk of the second contingency (a responsive nuclear strike) may be relatively high; with a chemical or cyberattack, the risk of the first contingency occurring may be relatively high, but the risk of the second contingency (a responsive nuclear strike) is low.

This section has noted the range of situations that nuclear deterrence seeks to address. However, nuclear deterrence includes at least the possibility of massive counterstrikes in response to a nuclear (or massive conventional) attack. Even if nuclear powers no longer target cities as such, large-scale nuclear war would still pose much the same risk of catastrophic loss of life and the devastation of human civilization. This nuclear scenario represents the “hard case” that is difficult if not impossible to reconcile with international humanitarian law. The next section addresses whether a nuclear deterrence strategy that includes the possibility of a massive counterstrike can be consistent with international law.

Proportionality in Nuclear Deterrence

For illustrative purposes, this discussion of proportionality assumes (1) the U.S. nuclear deterrent strategy includes a wide range of options for responding to a *limited* nuclear first strike against U.S. territory (for example, one or a few nuclear weapons) and (2) one of those options would be a major U.S. nuclear counterattack. Realistically, potential adversaries would likely assume a major U.S. nuclear counterattack would be “on the table” in response to virtually any nuclear attack, large or small, against U.S. territory. The United States does nothing to undermine this assumption and sometimes even seeks to lend credibility to it for deterrence purposes (for example, nuclear strategists often talk in terms of “holding at risk that which an adversary values the most”⁴⁵). Critics of nuclear deterrence might argue that the threat of a major U.S. counterattack would be disproportionate because the type and number of weapons threatened for the counterattack would far exceed those used in the initial limited attack. Critics might further argue that the threat of a major U.S. counterattack would violate the principle of discrimination because potential civilian casualties from such an attack (both immediate and as a result of radioactive fallout) would be excessive compared to any legitimate anticipated damage to the adversary’s war-waging or war-supporting capabilities. They might also deem the threat of such a major U.S. counterattack contrary to one or more of the principles of international humanitarian law on the grounds that it would feed an escalatory cycle potentially resulting in the devastation of some or all of the world’s land and population.

However, the contrary view is straightforward and intuitive, as Matheson expressed succinctly:

If a particular use of nuclear weapons is thought to be unlawful because of disproportionate civilian casualties, why should a mere threat of such use be regarded as unlawful, when such a threat would cause no such casualties but might deter or halt an unlawful attack?⁴⁶

As applied to a nonspecific and conditional threat (such as nuclear deterrence), *proportionality* allows for considerable latitude.

As previously discussed, a state evaluates proportionality based on the nature of the threat triggering the exercise of the right of self-

defense. The nature of the threat also affects the evaluation of the importance of specific military objectives, which, in turn, affects the evaluation of permissible collateral damage. Commenting on the ICJ decision in the *Oil Platforms Case*,⁴⁷ then-State Department legal adviser William H. Taft IV wrote:

There is no requirement in international law that a State exercising its right of self-defense must use the same degree or type of force used by the attacking State in its most recent attack. Rather, the proportionality of the measures taken in self-defense is to be judged according to the nature of the threat being addressed. . . . A proper assessment of the proportionality of a defensive use of force would require looking not only at the immediately preceding armed attack, but also at whether it was part of an ongoing series of attacks, what steps were already taken to deter future attacks, and what force could reasonably be judged to be needed to successfully deter future attacks.⁴⁸

In other words, proportionality has never been understood to constrain the right of self-defense to exactly the degree and type of force used in the wrongful aggression.⁴⁹ On the contrary, the force required to repel an attack may be significantly different from the force involved in the original attack. The same is true of the force needed to “restore the security” of the attacked party. For example, the Iraqi armed forces invaded and subjugated Kuwait with a comparatively modest use of force. The U.S.-led coalition had to employ a substantially greater degree and type of force to dislodge the large, entrenched Iraqi army from Kuwait and to push Iraqi forces back from the border to restore the security of Kuwait. The more forceful coalition assault satisfied the requirement of proportionality in the exercise of the right of (collective) self-defense.⁵⁰

Any evaluation of the “threat” inherent in nuclear deterrence should be judged by the same proportionality principles vis-à-vis the wrongful acts intended to be deterred. The nonspecific and highly conditional nature of nuclear deterrence calls for even greater latitude than in an actual use of force. Applying these principles to nuclear deterrence means the “threatened” nuclear response of the state possessing nuclear weapons:

- Need not be the same degree or type of force as the attack it is intended to deter;
- May be as robust as is necessary to deter a wrongful attack by a potential adversary; and
- May take into account that the specific attack(s) it is intended to deter may be part of a broader range of potential attacks or may lead to additional attacks.

Accordingly, the permissible level of nuclear deterrent “threat” may significantly exceed some or all of the wrongful acts of aggression to be deterred, as that level may be necessary to persuade a potential adversary not to engage in such wrongful acts. Moreover, in establishing its nuclear deterrent strategy, a state possessing nuclear weapons would be able to take into account whether a limited nuclear attack may be part of a pattern of attacks by a potential adversary or may be a prelude to additional future attacks. Proportionality does not hamstring a state by denying consideration of the full breadth of military threats that need to be deterred (whether in the case of an actual use of force or in the case of deterrence).

Returning to the example from the beginning of this section, a nuclear deterrent that includes the possibility of a major nuclear counterattack in response to even a limited nuclear first strike is consistent with the legal doctrine of proportionality, where the degree and type of nuclear deterrent is scaled both to dissuade wrongful acts by a potential adversary and to account for the full breadth of the threat posed by that potential adversary. This understanding of proportionality as applied to nuclear deterrence aligns with the intuitive sense that a truly significant threat is sometimes necessary to deter a malevolent or reckless national leader from a wrongful act of aggression (especially aggression involving nuclear weapons). It also reinforces the (nonlegal but still important) moral taboo against the use of nuclear weapons, conveying the message that any crossing of the nuclear line might lead to grave consequences.

In sum, nuclear deterrence cannot be deemed “generally” inconsistent with international humanitarian law even though actual use of nuclear weapons might be.⁵¹ International humanitarian law would have

the opposite of its intended effect if it were interpreted to weaken the effectiveness of nuclear deterrence, tempting a state possessing nuclear weapons to break the nuclear taboo or otherwise test the nuclear deterrent of another state.⁵²

Other Avenues for Legal Challenges

As demonstrated by the cases brought to the ICJ by the Marshall Islands, legal challenges to nuclear weapons may not pose the same question as that posed by the UN General Assembly in requesting the 1996 Advisory Opinion. The General Assembly requested a head-on ruling whether the threat or use of nuclear weapons would be illegal in all circumstances,⁵³ whereas the Marshall Islands brought its cases against the states possessing nuclear weapons for failing to meet their disarmament commitments under Article VI of the NPT and customary international law.⁵⁴ As discussed in earlier, the procedural obstacles to any state bringing such a case against the nuclear-armed states probably cannot be overcome. However, in the 1996 Advisory Opinion, the court concluded that parties to the NPT were obligated not only to pursue negotiations but also to bring them to a conclusion “leading to nuclear disarmament in all its aspects under strict and effective international control.”⁵⁵ This raises the question whether another advisory opinion might go further and find the five NWSs in violation of this obligation under the NPT.

For decades, the United States and the Soviet Union pursued negotiations *limiting* the size of their nuclear arsenals, and, in recent decades, the United States and Russia have pursued negotiations *reducing* the size of their arsenals.⁵⁶ The other three NWSs have not been involved in such efforts. The other states possessing nuclear weapons are not parties to the NPT and, therefore, have no Article VI obligations. The Marshall Islands argued that the obligation to pursue nuclear disarmament had become customary international law, therefore the nonparties to the NPT were also subject to disarmament obligations. However, this argument is unsustainable: the uncomfortable fact is that the nonparties to the NPT have no such obligations.

Even finding the five NWSs in violation of Article VI would be problematic. First, the unanimous finding of the ICJ on Article VI ignored both the plain language of the text⁵⁷ and the fact that states cannot be *compelled* to reach agreement on nuclear disarmament, especially

given the complexity of such an endeavor both in terms of the scope of the prohibitions and the intrusiveness of the verification measures. Second, one NWS cannot be found derelict under Article VI when all five NWSs have to agree; the United Kingdom argued as much when it was the only NWS the Marshall Islands could haul before the ICJ in 2014.⁵⁸ Third, the five NWSs collectively cannot be found derelict when other states now possess nuclear weapons and are not bound by Article VI. Agreeing on nuclear disarmament without the other states would leave the five NWSs and many of their allies vulnerable to the nuclear arsenals of those non-NPT states, which would not advance the goals of the NPT. Finally, even if the ICJ concluded the NWSs were not meeting their obligation to “pursue negotiations in good faith,” what would be the remedy for such a violation? Advisory opinions are not binding, no *particular* negotiating outcome could be directed by the court, and a directive to “negotiate in good faith” would add nothing to the finding regarding Article VI in the 1996 Advisory Opinion.

Nuclear disarmament has *always* depended on fundamental changes in the international security environment.⁵⁹ Article VI was negotiated at the height of the Cold War, when the prospects for nuclear disarmament between NATO and the Soviet Union were no rosier than they are today. Moreover, the international security environment had not yet been complicated by additional nuclear-armed states in tense regions of the world, unencumbered by Article VI obligations. Nuclear disarmament also depends on the development of technical tools to verify both that no state has retained nuclear weapons and that no state can operate a clandestine nuclear weapons program.⁶⁰ Further, it depends on negotiation of legal instruments to allow for highly intrusive inspections while protecting the national security secrets of the states that give up their nuclear weapons.

For these reasons, a legal challenge based on Article VI would not likely accomplish much. On the other hand, the NWSs continue to take actions seen by the NNWSs as evincing a disregard for their Article VI obligations. Some NWSs appear determined to upgrade their nuclear arsenals. To the extent that these upgrades are for safety and security, they are defensible under Article VI; however, not all ongoing and proposed upgrades are for safety or security. Russia and the United States—which together possess 90% of the world’s nuclear weapons and therefore are generally expected to lead the nuclear disarmament

effort—are not engaged in negotiations on disarmament and blame one another for the stalemate. Both sides have taken actions that could lead to the termination of one nuclear arms control treaty that eliminated a whole class of nuclear weapons from the two states' arsenals.⁶¹ These latter actions are difficult to reconcile with Article VI. In short, although a legal case for noncompliance with Article VI ought to fail on substantive grounds, the NWSs are doing little to persuade the international community they take their nuclear disarmament obligations seriously; thus, one cannot rule out a legal challenge based on Article VI.

Another possible avenue for a legal challenge might be to focus on the risk posed to people, property, and the environment from nuclear accidents. Until nuclear weapons can be verifiably eliminated, the states possessing such weapons should view themselves as obligated to take all reasonable steps to minimize the risk of accidental launch or detonation; miscalculation leading to nuclear launch or detonation; and terrorist seizure of nuclear weapons. Failure to take such steps is not only irresponsible but also inconsistent with the policy of nuclear deterrence, which aims to minimize the risk that nuclear weapons will be used.

Although states possessing nuclear weapons should pursue more robust efforts to minimize such risks, an international legal basis for demanding such actions is unlikely to be found. A number of international agreements address the safety and security of nuclear materials in *civil* nuclear programs,⁶² but do not extend to nuclear weapons, which the NWSs have viewed as too closely associated with sensitive national security matters to be subject to international scrutiny. While customary international law may prohibit states from launching unprovoked attacks, it does not require states to take any specific measures to avoid *accidental* nuclear attacks (or to avoid actions that might be misperceived as nuclear attacks). The treaties designed to reduce such risks have not been comprehensive and have not applied to all states possessing nuclear weapons.⁶³

Efforts have been made to secure excess nuclear weapons materials, particularly in the states of the former Soviet Union.⁶⁴ Various experts have proposed a wide range of further actions that could be taken to minimize the risks.⁶⁵ The states possessing nuclear weapons should either pursue such measures or else demonstrate the infeasibility of such measures. The NNWSs and anti-nuclear groups could exert pressure along these lines. However, North Korea and Pakistan may

be immune to such pressure and may not have the resources or the safety culture to reduce the risks significantly even though their arsenals raise some of the gravest concerns (the security situation in both countries may result in nuclear weapons being kept on a hair trigger, and terrorism poses a continuing risk in Pakistan).⁶⁶ Legal challenges along these lines might be successful in domestic courts, especially in NNWSs that allow stationing or transit of nuclear weapons. However, it is beyond the scope of this paper to evaluate whether such an approach in domestic courts might be effective in either blocking the stationing or transit of nuclear weapons or compelling a nuclear-armed state to take additional measures to lessen these risks.

Another possible avenue for challenging the legality of nuclear weapons might be to focus on the renewed interest in tactical uses of nuclear weapons on the grounds that this development both heightens the risk of nuclear war in violation of international humanitarian law and demonstrates that the NWSs are violating their Article VI obligations. Nuclear strategists and critics of nuclear weapons differ sharply in their perceptions of tactical nuclear weapons. Critics argue increased planning for use of tactical nuclear weapons would lower the threshold for actual use of nuclear weapons.⁶⁷ From this perspective, lowering the threshold would be doubly problematic because: (1) actual use of nuclear weapons would pose a high risk of violating international humanitarian law, and (2) once the nuclear taboo has been broken, the risk of further use—including escalation to a large-scale nuclear exchange—would be magnified. On the other hand, advocates for increasing U.S. tactical nuclear capabilities apply the logic of strategic deterrence to tactical deterrence: if one state has tactical nuclear weapons, the best way to deter use of those weapons is to have your own tactical nuclear weapons.⁶⁸ Advocates further argue that increasing the U.S. arsenal of nonstrategic nuclear weapons would actually *raise* the nuclear-use threshold: Russia would view the threat of a U.S. response with tactical nuclear weapons as more credible than one with strategic nuclear weapons because of the relatively limited collateral damage from tactical nuclear weapons.⁶⁹ Put another way, Russia's current nuclear doctrine arguably lowered the threshold for use; therefore, the United States should acquire reciprocal tactical capabilities to *restore* the relatively high threshold that exists at the strategic level. These arguments are worth further consideration.

First, the perceived risk of Russian first use of tactical nuclear weapons rests on a series of assumptions: (1) Russia contemplates using tactical nuclear weapons against U.S. friends or allies to consolidate military gains; (2) Russia would not be deterred from using tactical nuclear weapons by U.S. conventional weapons, U.S. strategic nuclear weapons, or the limited U.S. stocks of tactical nuclear weapons; (3) Russia would not be deterred by the certainty of international condemnation, economic sanctions, political isolation, and loss of international credibility; and (4) Russia would be confident of its ability to hold onto its military gains despite ongoing resistance and the certainty of political and economic isolation.⁷⁰

Second, increased U.S. tactical nuclear capabilities would have to enhance deterrence. Strategists foresee Russian and Chinese first-use scenarios as more likely to involve regional conflicts (such as attacks on Estonia or Taiwan, respectively), not attacks on the territories of the Great Powers. Therefore, the argument for increasing U.S. tactical capabilities is that Russia and China would be persuaded that the United States would respond with nonstrategic nuclear weapons to a first use of tactical nuclear weapons in a conflict involving Estonia or Taiwan even though they are *not* persuaded that the United States would respond with *strategic* nuclear weapons in such scenarios. The greater credibility of tactical weapons presumably would be based on (1) reduced collateral damage and (2) reduced risk of escalation, especially to the level of nuclear attacks on U.S. territory. However, if Russia and China doubt the United States would risk escalation (and possible targeting of U.S. territory) by using strategic nuclear weapons, is there a basis for concluding those doubts would not also apply to U.S. use of tactical nuclear weapons?

Third, the current risk of a two-way nuclear *exchange* in a regional scenario is relatively low if the United States would hesitate to respond with strategic nuclear weapons to first use of tactical nuclear weapons by Russia or China. However, if the United States increased its tactical capabilities, and if tactical nuclear deterrence failed (which must be assumed as a possibility), then the logic of tactical nuclear deterrence would require a tactical nuclear response by the United States to maintain the credibility of deterrence, in which case the risk of a two-way nuclear *exchange* would increase. If the risk of a two-way exchange increases, the risk of escalation would also increase.⁷¹

While some might perceive a reembrace of tactical nuclear weapons as increasing the risk of nuclear war, thereby lending urgency to a legal challenge, it would not necessarily alter the legal analysis in this paper. As has been discussed, international humanitarian law cannot be applied decisively to hypothetical situations of actual use, much less deterrence. At the tactical level, there are even more permutations of possible triggering events, possible responses (including the decision *not* to respond with nuclear weapons), population and geographical variables, and other relevant factors. Such variables are especially unpredictable given that low-yield weapons would be more likely than strategic weapons to meet the test of proportionality and would allow for better discrimination between combatants and noncombatants. This breadth of possible scenarios makes it impossible to reach any definitive legal conclusions. Similarly, the enhancement of tactical nuclear capabilities would not change the analysis regarding Article VI of the NPT. Nevertheless, such enhancement would tend to further erode international confidence that the five NWSs are serious about pursuing disarmament. Thus, the enhancement of tactical nuclear capabilities might increase the risk of the UN General Assembly seeking another advisory opinion from the ICJ, particularly given the court’s 1996 conclusion that Article VI obligates NPT states parties to achieve nuclear disarmament, not just engage in negotiations. Further, it might even increase the risk that the court would find the five NWSs in violation of Article VI.

References

1. *North Sea Continental Shelf Cases*, Judgment, I.C.J. Reports 1969, paragraph 77.
2. See www.wagingpeace.org/wp-content/uploads/2012/11/2012_zaitu_unga_votes.pdf (accessed April 24, 2019) for an analysis of voting patterns on nuclear-related resolutions in the UN General Assembly between 2001 and 2011. Many of the resolutions on nuclear disarmament continue to be adopted annually. The fact that these resolutions call for negotiations on nuclear disarmament—and negotiated steps toward that ultimate objective—confirm the conclusion that nuclear disarmament is understood to be a treaty matter. Further, the cited analysis of voting patterns confirms that numerous states have voted “no” on UN General Assembly resolutions aimed at nuclear disarmament. For example, on the Convention on the Prohibition of the Use of Nuclear Weapons (A/RES/66/57)—48 states voted “no,” including the United States, the United Kingdom, France, and Israel (Russia abstained); Nuclear Disarmament (A/RES/66/51)—45 states voted “no,” including the United States, the United Kingdom, France, and Israel (Russia, Pakistan, and India abstained); Reducing Nuclear Danger (A/RES/66/48)—49 states voted “no,” including the United States, the United Kingdom,

France, and Israel (Russia and China abstained).

3. 2010 Nuclear Posture Review, at 1-2, 6, 15-17; 2018 Nuclear Posture Review, at 2-3, 20-40.

4. See Treaty of Rarotonga, Treaty of Bangkok, Treaty of Pelindaba, Treaty of Semipalatinsk.

5. See, e.g., Message from the President of the United States Transmitting Protocols I and II to the African Nuclear-Weapon-Free Zone Treaty, signed on behalf of the United States at Cairo, Egypt, on April 11, 1996, including a Third Protocol Related to the Treaty, May 2, 2011, Senate Treaty Doc. 112-3, www.congress.gov/treaty-document/112th-congress/3/document-text (accessed April 24, 2019). As of 2019, the United States has not become a party to the Treaty of Pelindaba, but that treaty and the Treaty of Rarotonga were transmitted to the Senate for its advice and consent to ratification in 2011. The transmittal documents recommended the quoted statement be included in the U.S. instrument of ratification.

6. See prior discussion of the Treaty of Tlatelolco in the second chapter.

7. 2010 Nuclear Posture Review, at 15.

8. Treaty on the Prohibition of Nuclear Weapons, 2017, <https://www.un.org/disarmament/wp-content/uploads/2017/10/tpnw-info-kit-v2.pdf> (accessed April 24, 2019).

9. Treaty on the Prohibition of Nuclear Weapons, 2017, article 4.

10. The preamble to the TPNW did state (erroneously) that “any use of nuclear weapons would be contrary to the rules of international law applicable in armed conflict, in particular the principles and rules of international humanitarian law.” Such a statement in a preamble would not create new law and, moreover, is inconsistent with the 1996 Advisory Opinion.

11. See, e.g., ICJ Advisory Opinion, at 237: “it has been contended by some States that in answering the question posed, the Court would be going beyond its judicial role and would be taking upon itself a law-making capacity. It is clear that the Court cannot legislate, and, in the circumstances of the present case, it is not called upon to do so. Rather its task is to engage in its normal judicial function of ascertaining the existence or otherwise of legal principles and rules applicable to the threat or use of nuclear weapons.”

12. Even Judge Schwebel, while defending the legality of the threat or use of nuclear weapons in some circumstances, acknowledged: “It cannot be accepted that the use of nuclear weapons on a scale which would—or could—result in the deaths of many millions in indiscriminate inferno and by far-reaching fallout, have profoundly pernicious effects in space and time, and render uninhabitable much or all of the earth, could be lawful!” ICJ Advisory Opinion, at 320.

13. See, e.g., Lewis and Sagan, *Nuclear Necessity Principle*, 62, 73.

14. This is not to say the principles of necessity and proportionality create a per se rule prohibiting the use of nuclear weapons where conventional weapons could accomplish the mission, but, rather, that the application of those principles in most factual scenarios would lead to the conclusion that nuclear weapons could not be legally justified for that mission. For a discussion of a proposed declaratory policy never to use nuclear weapons “against any military target that could be reliably destroyed” by conventional means, see Lewis and Sagan, “Nuclear Necessity Principle,” 62, 64, 71. Lewis and Sagan do not quite argue that current U.S. nuclear doctrine is inconsistent with international humanitarian law or that the proposed declaratory policy is compelled by international humanitarian law (although that conclusion could be drawn from their analysis). Rather, they argue this proposed declaratory policy would make the nuclear deterrent more

credible and, hence, more effective, as well as more ethical. Even though no state has adopted such a declaratory policy, this proposed policy arguably describes the de facto state of affairs for the states possessing nuclear weapon: that is, taking into account the nuclear taboo and the unforeseen consequences of breaking that taboo (including the possibility of nuclear escalation and global death and devastation), these states would almost certainly choose conventional options whenever possible.

15. Escalation risk is high if the adversary possesses nuclear weapons or is closely allied with a state that possesses nuclear weapons. Escalation risk may be low for other adversaries, but those adversaries are less likely to pose the kind of threat that would justify first use of nuclear weapons.

16. “Department of Defense Law of War Manual,” at paragraph 5.6.6.2: “It is not necessary that the object [of attack] provide immediate tactical or operational gains or that the object make an effective contribution to a specific military operation. Rather, the object’s effective contribution to the war-fighting or war-sustaining capability of an opposing force is sufficient. Although terms such as ‘war-fighting,’ ‘war-supporting,’ and ‘war sustaining’ are not explicitly reflected in the treaty definitions of military objective, the United States has interpreted the military objective definition to include these concepts.” “Department of Defense Law of War Manual,” at paragraph 5.6.8.5: “Economic objects associated with military operations or with war supporting or war-sustaining industries have been regarded as military objectives. Electric power stations are generally recognized to be of sufficient importance to a State’s capacity to meet its wartime needs of communication, transport, and industry so as usually to qualify as military objectives during armed conflicts. Oil refining and distribution facilities and objects associated with petroleum, oil, and lubricant products (including production, transportation, storage, and distribution facilities) have also been regarded as military objectives.” See also Lewis and Sagan, “Nuclear Necessity Principle,” 62, 66-67.

17. “Department of Defense Law of War Manual,” at paragraph 5.6.6.1: military purpose includes “intended or possible use in the future,” not just current use: “For example, runways at a civilian airport could qualify as military objectives because they may be subject to immediate military use in the event that runways at military air bases have been rendered unserviceable or inoperable. Similarly, the possibility that bridges or tunnels would be used to assist in the adversary’s military operations in the future could result in such objects providing an effective contribution to the enemy’s military action, even though they are not being used at that moment for such purposes.” See also Lewis and Sagan, “Nuclear Necessity Principle,”

18. Lewis and Sagan, “Nuclear Necessity Principle,” 67.

19. Lewis and Sagan, “Nuclear Necessity Principle.” 63. “The dominant logic underpinning nuclear deterrence has been about *punishment to noncombatants*” (italics in the original). Paradoxically, in some of the situations that seem to fit most closely the “survival of the state” exception in the 1996 Advisory Opinion, such as a nuclear second strike, the use of nuclear weapons might not accomplish the survival of the state but only punish the state that launched the first strike.

20. ICJ Advisory Opinion, at 324. Dissenting Opinion of Vice President Schwebel, quoting from James A. Baker III, *The Politics of Diplomacy—Revolution, War and Peace, 1989-1992* (New York: Putnam’s Sons, 1995), at 359. Secretary Baker wrote that he warned the Iraqi foreign minister: “If the conflict involves your use of chemical or biological weapons against our forces . . . the American people will demand vengeance. We have the means to exact it. With regard to this part of my presentation, that is not a threat, it is a promise. If there is any use of weapons like that, our objective won’t just be the liberation of Kuwait, but the elimination of the current Iraqi regime, and anyone responsible for using those weapons would be held accountable.” Baker confirmed that

he intended an implicit threat to retaliate with tactical nuclear weapons, even though President Bush had ruled out the use of nuclear weapons. (Again, some evidence suggests Iraq refrained from using chemical weapons for other reasons.)

21. The formulation of these persuasive arguments might not occur until after the fact. A decision to use nuclear weapons in self-defense might have to be made in haste with incomplete information, based on generic nuclear planning options rather than an analysis of the particular circumstances of the case. A proper evaluation of international humanitarian law prior to pressing the nuclear button might be the exceptional case.

22. In the wake of a large-scale nuclear exchange, the arguments of government lawyers might become irrelevant. Indeed, international law might become irrelevant. There might be no international legal system—or an international system of any kind—to judge the states involved and ascribe responsibility.

23. ICJ Advisory Opinion, at 320 (Dissenting opinion of Judge Schwebel).

24. ICJ Advisory Opinion, at 259-260. Although the court failed to reach a conclusion regarding the legality of the threat or use of nuclear weapons in extreme circumstances of self-defense involving survival of the state, it was not because the court could not decide which law applied.

25. See, e.g., ICJ Advisory Opinion, at 538-542 (Dissenting Opinion of Judge Weeramantry).

26. ICJ Advisory Opinion, at 314 (Dissenting Opinion of Vice President Schwebel). Judge Schwebel also wrote: the nuclear powers “have affirmed that they are legally entitled to use nuclear weapons in certain circumstances and to threaten their use. They have threatened their use by the hard facts and inexorable implications of the possession and deployment of nuclear weapons; by a posture of readiness to launch nuclear weapons 365 days a year, 24 hours of every day; by the military plans, strategic and tactical, developed and sometimes publicly revealed by them; and, in a very few international crises, by threatening the use of nuclear weapons. In the very doctrine and practice of deterrence, the threat of the possible use of nuclear weapons inheres.” ICJ Advisory Opinion, at 312.

27. For a discussion of the concept of “threat” to use force, see Romana Sadurska, “Threats of Force,” *Am. Journal Int’l Law* 82, no. 2 (1988): 239, 241-246. Sadurska argues that the concept of “threat” is under-developed in international law.

28. In the 1996 Advisory Opinion case, the United States argued that the settled *state practice* of deterrence supported the conclusion that the use of nuclear weapons could not be unlawful in all circumstances. After noting the many states relying on nuclear deterrence, it argued: “If these weapons could not lawfully be used in individual or collective self-defense under any circumstances, there would be no credible threat of such use in response to aggression and deterrent policies would be futile and meaningless. In this sense, it is impossible to separate the policy of deterrence from the legality of the use of the means of deterrence. Accordingly, any affirmation of a general prohibition on the use of nuclear weapons would be directly contrary to one of the fundamental premises of the national security policy of each of these many States.” Verbatim Record, *Legality of the Threat or Use of Nuclear Weapons*, International Court of Justice, Advisory Opinion, 1995/34, Nov. 15, 1995, <https://www.icj-cij.org/files/case-related/95/095-19951115-ORA-01-00-B1.pdf> (accessed April 24, 2019).

29. See discussion at the end of chapter two regarding Secretary of State Baker’s implicit invocation of nuclear deterrence during Desert Storm.

30. UN Charter, Chapter I, Article 2, paragraph 4.

31. See Sadurska, “Threats of Force,” 239, 241-246, 254-260. Sadurska discusses

the threats by both sides in the 1962 Cuban Missile Crisis, the 1983 Swedish warning it would take action against submarines in its waters, and the Soviet use of troop movements to intimidate Poland in the early 1980s.

32. See 2010 Nuclear Posture Review, at 16; 2018 Nuclear Posture Review, at 20; Military Doctrine of the Russian Federation, December 25, 2014 at paragraph 27, <https://rusemb.org.uk/press/2029> (accessed April 24, 2019). “The Russian Federation shall reserve the right to use nuclear weapons in response to the use of nuclear and other types of weapons of mass destruction against it and/or its allies, as well as in the event of aggression against the Russian Federation with the use of conventional weapons when the very existence of the state is in jeopardy”). See also Bruno Tertrais, “A Comparison Between US, UK, and French Nuclear Policies and Doctrines,” Centre National de la Recherche Scientifique, Feb. 2007, www.sciencespo.fr/ceri/sites/sciencespo.fr/ceri/files/art_bt.pdf (accessed April 24, 2019).

33. As discussed in the previous subsection, a threat to use nuclear weapons may in some cases be quite specific and immediate, but that is not generally the case. See also Sadurska, “Threats of Force”: “In some situations, particularly when the threat does not lead to the actual employment of armed force, it may be difficult to prove coercive intent, or a causal link between the threat and an injury.”

34. ICJ Advisory Opinion, at 246-247.

35. Matheson, “Opinions of the International Court,” 431-432 (footnote omitted).

36. See discussion and citations in next subsection.

37. As discussed in chapter on substantive law of nuclear deterrence, subsection on legal developments since the 1996 Advisory Opinion, nuclear strategies may be based on legal interpretations and factual assumptions that afford little comfort that actual use of nuclear weapons would be consistent with international humanitarian law, but that does not mean one can *assume* that the states possessing nuclear weapons would not act in accordance with the law when actually considering the use of nuclear weapons in a specific situation.

38. Detonation of 100 nuclear weapons between Pakistan and India reportedly could cause climate disruption that would subject up to two billion people to a risk of starvation. Fitzpatrick and Barnett, “Risk and Nuclear Deterrence,” 28, citing I. Helfeld, “Nuclear Famine: Two Billion People at Risk?” *Global Impacts of Limited Nuclear War on Agriculture, Food Supplies, and Human Nutrition*, 2nd ed., International Physicians for the Prevention of Nuclear War (2013).

39. See, e.g., ICJ Advisory Opinion, at 538-542 (Dissenting Opinion of Judge Weeramantry). He opined that readiness combined with credible willingness equals an ongoing “threat” of use of nuclear weapons.

40. Kehler, “Nuclear Weapons and Nuclear Use,” 50, 56: “For deterrence to be credible, forces must be capable and ready; plans must provide the president with a flexible range of nonnuclear and nuclear options that are tailored to a variety of potential adversaries and scenarios; . . . and moral and legal standards must be understood and enforced.” See also Roberts, *The Case for U.S. Nuclear Weapons*.

41. See Mark Fitzpatrick and Marc Barnett, “Risk and Nuclear Deterrence,” In *Understanding Nuclear Weapon Risks*, United Nations Institute for Disarmament Research (2017), 23-32. The authors note it is difficult to threaten mutual nuclear suicide “credibly” and that “[i]n order to overcome this credibility problem, deterrence relies on risk, unpredictability, and extreme consequences.” See Roberts, *Case for U.S. Nuclear Weapons*, 178-179: “For deterrence of an enemy to be credible requires a relatively low standard, goes the argument, because the risks and costs of war are so high for the potential aggressor.”

42. Speculating on why Iraq did not use chemical weapons in Desert Storm, Secretary of State Baker wrote: “[President Bush] had also decided that U.S. forces would not retaliate with chemical or nuclear response if the Iraqis attacked with chemical munitions. There was obviously no reason to inform the Iraqis of this. In hope of persuading them to consider more soberly the folly of war, I purposely left the impression that the use of chemical or biological agents by Iraq could invite tactical nuclear retaliation. (We do not really know whether this was the reason there appears to have been no confirmed use by Iraq of chemical weapons during the war. My own view is that the calculated ambiguity how we might respond has to be part of the reason)” (italics added). ICJ Advisory Opinion, at 324 (Dissenting Opinion of Vice President Schwebel, quoting from Baker, *The Politics of Diplomacy*, 359).

43. 2010 Nuclear Posture Review, at 16. The 2010 policy had one caveat: “Given the catastrophic potential of biological weapons and the rapid pace of bio-technology development, the United States reserves the right to make any adjustment in the assurance that may be warranted by the evolution and proliferation of the biological weapons threat and U.S. capacities to counter that threat.”

44. 2018 Nuclear Posture Review, at 20: “Significant non-nuclear strategic attacks include, but are not limited to, attacks on the U.S., allied, or partner civilian population or infrastructure, and attacks on U.S. or allied nuclear forces, their command and control, or warning and attack assessment capabilities.” See discussion in the third chapter of this paper.

45. Kehler, “Nuclear Weapons and Nuclear Use,” 50, 52. See also 2018 Nuclear Posture Review, 30 (with regard to deterring Russia) and prior discussion of Secretary Baker “purposely” giving Iraq the impression that its use of chemical or biological weapons might trigger tactical nuclear retaliation by the United States, creating ambiguity as to U.S. intentions.

46. Matheson, “Opinions of the International Court,” 432. In his dissenting opinion, Judge Schwebel raised the same question in the context of the implied threat to use nuclear weapons in Desert Storm if Iraq used chemical or biological weapons: “Can it seriously be maintained that [Secretary of State] Baker’s calculated—and apparently successful—threat was unlawful? Surely the principles of the United Nations Charter were sustained rather than transgressed by the threat.” ICJ Advisory Opinion, at 327. See also Sadurska, “Threats of Force,” 239, 250.

47. Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, I.C.J. Reports 2003, p. 161, <https://www.icj-cij.org/files/case-related/90/090-20031106-JUD-01-00-EN.pdf> (accessed April 24, 2019) (*Oil Platforms Case*).

48. William H. Taft IV, “Self-Defense and the Oil Platforms Decision,” 29 *Yale J. Int’l L.* 295, 305-6 (2004) (footnotes omitted). The standard articulated by Taft is also quoted in “the Department of Defense Law of War Manual,” at paragraph 1.11.1.2 (footnote 191). In the Oil Platforms Case, the ICJ rejected Iran’s claim under the terms of the 1955 Treaty of Amity, Economic Relations and Consular Rights between the two countries. However, the court felt compelled to examine the legitimacy of the U.S. exercise of its right of self-defense, even though the issue did not affect the outcome of the treaty claim. The court concluded the United States had not met its burden of demonstrating that its attack on the oil platforms was (1) in response to an Iranian armed attack or (2) consistent with the requirements of necessity and proportionality. Taft criticized the court’s refusal in the *Oil Platforms Case* to accept the legality of the U.S. exercise of its right of self-defense, noting the court’s dicta regarding the U.S. exercise of self-defense “might be read as suggesting limitations on the right of self-defense that are unsupported by international law and practice and that would undermine, rather than strengthen, international peace and security.” Taft’s critique provides well-supported interpretations of the principles of

self-defense, necessity, and proportionality, in contrast to the *Oil Platforms Case* opinion. His articulation of the proper proportionality standard, as quoted above, was supported by citations to several eminent authorities, specifically: Roberto Ago, “Addendum to the Eighth Report on State Responsibility, Yearbook of Int’l L. Commission,” Vol. II-1, United Nations (1980), at 69, http://legal.un.org/ilc/documentation/english/a_cn4_318_add5_7.pdf (accessed April 24, 2019); Oscar Schachter, *International Law in Theory and Practice* (Dordrecht: Nijhoff, 1991), at 153; Louise Doswald-Beck, ed., *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (1995) at 76.

49. “Actions in self-defense must be proportionate. Force can be used in self-defense, but only to the extent that it is required to repel the armed attack and to restore the security of the party attacked.” Counter-Memorial and Counter-Claim Submitted by the United States of America, International Court of Justice, Case Concerning Oil Platforms (Iran v. United States), 141 (June 23, 1997). Quoted in “Department of Defense Law of War Manual,” at paragraph 1.11.1.2.

50. The coalition action was pursuant to authorization from the United Nations Security Council and, thus, did not rely exclusively on the right of collective self-defense, but the proportionality analysis is the same. See United Nations Security Council, Resolution 678 (1990).

51. For an analysis of state practice showing that the “threat of force” has been judged differently than the actual use of force, see Sadurska, “Threats of Force”: “in practice international actors, contrary to the official language of international agreements (which equate in this respect the use and the threat of force), recognize a separate set of criteria of lawfulness for the threat of force. This test is less stringent than the one for the use of force and includes consideration of security, the remedial nature of the threat, its rationality and economy, and its consequences.”

52. Sadurska, “Threats of Force,” 266: “In the final account, the threatener is judged by the consequences of the threatening action. The ultimate question is: have the benefits for the overall security and welfare of the community balanced the harm resulting from the conduct of the threatener? In a world full of tensions and sadly lacking in mutual trust, actions that further peace and stability deserve legal blessing.”

53. The question for which the General Assembly sought an advisory opinion was: “Is the threat or use of nuclear weapons in any circumstance permitted under international law?” UN General Assembly Resolution 49/75K (1994). The resolution’s proponents likely would have preferred a simple “no” answer from the ICJ.

54. Article VI of the NPT obligates all parties to “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.”

55. ICJ Advisory Opinion, at 263-265, 267.

56. The Article VI obligation applies to all states parties to the NPT, not just the five NWSs. However, as a practical matter, the role to be played by the NNWSs more reasonably relates to the second part of Article VI—negotiations on a “treaty on general and complete disarmament under strict and effective international control.”

57. The plain language of Article VI carefully avoids creating an obligation to reach a result. The NPT parties are required to “pursue negotiations in good faith,” not conclude a specific agreement on a specific timetable. The phrase “effective measures relating to” further qualifies the obligation, suggesting a progressive process. Finally, pairing the twin objectives of nuclear disarmament and “a treaty on general and complete disarmament” suggests that both objectives were understood to be achievable only with fundamental changes in the international security environment.

58. See discussion of the Marshall Islands cases in section chapter four of this paper.
59. Granted, nuclear disarmament can contribute to achieving such fundamental changes in the international security environment. The two processes would presumably have to advance hand-in-hand. Judicial pronouncements are unlikely to contribute effectively to nuclear disarmament unless integrated into a political process for changing the international security environment.
60. For example, work on technologies to verify dismantlement of warheads is currently being carried out by the International Partnership for Nuclear Disarmament Verification (IPNDV), a group of 25 countries working with private organizations to address the verification challenges in achieving complete nuclear disarmament.
61. The Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Elimination of Their Intermediate-Range and Shorter-Range Missiles (INF Treaty) required destruction of all ground-launched ballistic and cruise missiles with ranges between 500 and 5,500 kilometers. On February 2, 2019, the United States announced that, in response to Russian violations of the INF Treaty, it was suspending its performance under the treaty as a matter of customary international law. See <https://www.state.gov/secretary/remarks/2019/02/288722.htm> (accessed April 24, 2019). In addition, the United States notified the other parties to the treaty that it was triggering the withdrawal provision in the treaty, which began a six-month waiting period before the withdrawal could become effective. The United States stated its withdrawal would become effective unless Russia cured its violations.
62. See United Nations Security Council, Resolution 1540 (2004); Nuclear Security Recommendations on Physical Protection of Nuclear Material and Nuclear Facilities, INFCIRC/225/Rev.5 (2011); Convention on the Physical Protection of Nuclear Material (1980) and 2005 Amendments thereto; International Convention for the Suppression of Acts of Nuclear Terrorism (2005).
63. See, e.g., Memorandum of Understanding Between the United States of America and the Union of Soviet Socialist Republics Regarding the Establishment of a Direct Communications Link (June 20, 1963) (also known as the "Hotline Agreement"); the Agreement on Measures to Reduce the Risk of Outbreak of Nuclear War Between the United States of America and the Union of Soviet Socialist Republics (September 30, 1971); the Agreement Between the United States of America and the Union of Soviet Socialist Republics on the Prevention of Nuclear War (June 22, 1973); and the Agreement Between the United States of America and the Union of Soviet Socialist Republics on the Establishment of Nuclear Risk Reduction Centers (September 15, 1987). Other established hotline arrangements include those between France and the Soviet Union; the United Kingdom and the Soviet Union; Russia and China; the United States and China; India and Pakistan; North Korea and South Korea; and India and China. See "Hotline Agreements: Fact Sheets and Briefs," April 2018, www.armscontrol.org/factsheets/Hotlines (accessed April 24, 2019).
64. For a detailed description of Nunn-Lugar Cooperative Threat Reduction programs, see Mary Beth D. Nikitin and Amy F. Woolf, "The Evolution of Cooperative Threat Reduction: Issues for Congress," Congressional Research Service (June 13, 2014), <https://crsreports.congress.gov/product/pdf/R/R43143> (accessed April 24, 2019).
65. See series of editorials by Schultz, Perry, Kissinger, and Nunn, at <http://www.nti.org/newsroom/news/new-op-ed-shultz-perry-kissinger-nunn/> (accessed April 24, 2019). See also Dunn, "Redefining the U.S. Agenda for Nuclear Disarmament."
66. See Fitzpatrick and Barnett, "Risk and Nuclear Deterrence," 26-28.
67. The United States strongly opposed deployment of tactical nuclear weapons in South Asia for this reason.

68. See, e.g., 2018 Nuclear Posture Review, at 52-55; Written Statement of Secretary of Defense James Mattis, House Armed Services Committee (February 6, 2018), at 8-9, 12; Elbridge Colby, “If You Want Peace, Prepare for Nuclear War: A Strategy for the New Great-Power Rivalry,” *Foreign Affairs* (November/December 2018).

69. *Id.*

70. The same questions would apply to China or any other state considering use of low-yield nuclear weapons to achieve or consolidate military gains.

71. In a February 6, 2018, hearing before the House Armed Services Committee on the National Defense Policy and the 2018 Nuclear Posture Review, Secretary of Defense Mattis emphasized that tactical nuclear weapons development would be solely for deterrent purposes, and, in this regard, stated: “I don’t think there’s any such thing as a tactical nuclear weapon. Any nuclear weapon used any time is a strategic game changer.” See the National Defense Strategy and the Nuclear Posture Review, <https://armedservices.house.gov/2018/2/the-national-defense-strategy-and-the-nuclear-posture-review> (accessed April 24, 2019), at 1:05 in the hearing.

Conclusions

The long-standing policy of nuclear deterrence is consistent with international humanitarian law, notwithstanding that actual use of nuclear weapons would violate that law in all but the most exceptional circumstances. The ICJ was divided on the issue of nuclear weapons in 1996. With a different set of judges today, the outcome on the substantive legal issues may be difficult to predict, but would probably not differ markedly from 1996. Moreover, various procedural obstacles would have to be overcome by anyone seeking the court's reconsideration of such issues.

The 1996 Advisory Opinion essentially dodged the difficult question of nuclear deterrence (without clear legal reasoning), as well as the question of tactical nuclear weapons use. These questions would have muddied the legal waters and distracted from the central issue: the risk of global devastation from an all-out nuclear exchange. The Advisory Opinion narrowed the possibility for legal use of nuclear weapons to the scenario most likely to produce such global devastation—a scenario in which international law would likely lose all relevance, and, indeed, might cease to exist. The court opted for political focus over legal coherence, which enabled it to deliver the core message that the threat or use of nuclear weapons would “generally” violate international humanitarian law.

Faced with the risk of nuclear war (intentional or accidental), and with disarmament efforts stalled or moving in the wrong direction, some may be tempted again to push the court to expand the boundaries of international law. A return to the ICJ might focus on issues at the margins. For example, the argument for the legality of nuclear deterrence becomes less persuasive the further one moves from the core purpose of deterring a nuclear attack. It holds reasonably well for nuclear deterrence of overwhelming conventional attacks, consistent with the central finding of the Advisory Opinion regarding survival of the state. But the argument for legality begins to lose potency when nuclear weapons are invoked to deter potential adversaries from jamming satellites or inserting viruses into command-and-control systems

(for example). There is a logic to treating attacks on command-and-control and warning systems the same as attacks on the nuclear arsenal; the arsenal's effectiveness depends on the ability to detect such strikes and, as necessary, direct nuclear counterattacks. However, critics could exploit the perception that announcing such a policy appears to lower the threshold for use of nuclear weapons.¹ Similarly, a buildup of tactical nuclear capabilities would complicate any effort to defend compliance with Article VI of the NPT.

In the final analysis, international law remains a creature of the states: international obligations derive from state practice and from agreements undertaken by states. International law must comport with the current reality (in this case, the prevalence and necessity of nuclear deterrence), or it will lose relevance and effectiveness. As noted in the 1996 Advisory Opinion, the ICJ is not supposed to create new law. Rather, states have to undertake the hard work to change the international security environment to allow for nuclear disarmament; negotiate a comprehensive treaty that applies to all states; develop the verification mechanisms to prevent cheating; and persuade domestic legislatures that submitting to intrusive verification is in the national interest. There are no realistic shortcuts.

Pending such progress on disarmament, the Shultz-Perry-Kissinger-Nunn initiative provides practical steps that could be taken to minimize the risks associated with nuclear deterrence until such time as nuclear disarmament can be verifiably achieved.² These practical steps include: (1) changing the posture of deployed weapons to reduce the risk of accidental or unauthorized use; (2) reducing substantially all nuclear states' arsenals; (3) eliminating short-range, forward-deployed nuclear weapons; (4) working toward ratification of the Comprehensive Nuclear-Test-Ban Treaty; (5) providing the highest security for nuclear weapons, weapons-usable plutonium, and highly enriched uranium; (6) providing nuclear fuel guarantees to control the spread of uranium enrichment; and (7) halting the production of fissile material. These eminent experts included an eighth step: "Redoubling our efforts to resolve regional confrontations and conflicts that give rise to new nuclear powers."³ This eighth, broadly stated step stands in stark contrast to the seven specific steps that precede it. It underscores that nuclear disarmament—and an end to the current reliance on nuclear deterrence—necessarily depends on fundamental changes in the international security environment.

What then are the prospects for achieving these fundamental changes to allow for successful negotiations on nuclear disarmament (still the stated objective of the United States and others)? Taking the long view, the world has undoubtedly moved toward interconnection and cooperation over the centuries, with that trend accelerating dramatically since the end of World War II. Such global cooperation will be essential to solving the gravest threats to the planet, such as climate change and the risk of a nuclear catastrophe. But is this trend inexorable? On one hand, the current interconnected global economy seems too entrenched to be reversed; a centuries-long trend toward interconnectivity would be expected to continue on the same general path. In this view, overreaction to current divisive trends would be counterproductive. These trends would be seen as mere reactionary blips that will run their course in due time; they should be managed accordingly but should not radically alter state policies.

On the other hand, the trend toward international cooperation is not necessarily predictive. Resurgent nationalism, Islamic extremism, Russian aggression, Chinese muscle-flexing, British withdrawal from the European Union, and U.S. unilateralism might mark the beginning of a grand reversal of the centuries-long trend of history. While this outcome seems improbable, it might become more plausible if circumstances changed in fundamental ways. For example, the aftermath of a nuclear war—or even a limited nuclear exchange in South Asia, the Korean Peninsula, or a country bordering Russia or China—could produce disruptions on a global scale, causing states to withdraw from the world economy or to use force to obtain scarce resources from other states. Perhaps more likely, climate change could bring about the same global political consequences by producing mass population shifts, water shortages, and crises in food production and distribution.

In the current international security environment, the conditions for negotiating complete nuclear disarmament do not appear to be close at hand. The resumption of competition between the United States and Russia has stalled progress in reducing the two largest arsenals. Tensions between the United States and China further aggravate the situation. The continuing hostility in South Asia and the Korean Peninsula—and to a somewhat lesser extent the Middle East—significantly complicates efforts to achieve nuclear disarmament. Moreover, one of the principal obstacles to nuclear disarmament may be human nature.

Many nations continue to define themselves by opposition to foreign and domestic “enemies,” even though fewer people die from violence than ever before⁴ and the five NWSs (and most of their allies) face few national security threats and only the most remote existential threats from other states. Some political leaders capitalize upon and exacerbate these perceptions, appealing to xenophobia, ethnic hatred, and racism. These appeals tap into deep evolutionary traits in human beings that do not seem close to fading away.⁵ The persistence of national animosities strengthens the logical and moral arguments for banning nuclear weapons but, on the other hand, it highlights the extraordinary difficulty of doing so. To take one example: after the end of the Cold War, the optimistic cooperation between the United States and Russia deteriorated relatively quickly into grudging cooperation and then further into the current state of general noncooperation. Human nature being what it is, such an outcome was arguably predictable between two principal rivals, each potentially posing an existential threat to the other. In any case, nuclear disarmament will be stymied if even one of the nuclear-armed nations insists on clinging to its nuclear weapons, and in the current international security environment, the prospects for agreement among these states are not encouraging.

In the nuclear nonproliferation world, significant *failures* in the regime have sometimes been the catalyst for significant *progress* in the regime. For example, India’s 1974 nuclear detonation prompted establishment of the Nuclear Suppliers Group and important nonproliferation amendments to the Atomic Energy Act; revelations regarding Iraq’s clandestine nuclear weapons program spurred progress on controlling dual-use technologies and on the more expansive safeguards requirements of the IAEA Additional Protocol; and the 9/11 attacks led to numerous efforts to lessen the risk of nuclear terrorism. If significant progress toward nuclear disarmament also depends on the catalyst of a significant failure, we have to hope that it is *not* a failure of nuclear deterrence.

With nuclear deterrence likely to remain a core element of international security policy for the foreseeable future, some comfort may be derived from the low risk of intentional use of nuclear weapons, at least among the five NWSs. In particular, an all-out nuclear war between the United States and Russia seems implausible. However, any sense of comfort is counterbalanced by the risk of intentional use in South

Asia, which has the potential to devastate large swathes of the planet,⁶ as well as by the risk of intentional use by North Korea based on its perception (or misperception) that its survival is threatened.

Until nuclear weapons are eliminated and nuclear deterrence is no longer necessary, people will continue to question the logic and morality—as well as the legality—of nuclear weapons. Even if nuclear disarmament cannot be achieved in the current international security environment, we can hope the ongoing debate continues to reinforce the taboo against use of nuclear weapons. The leaders of the nuclear-armed countries should always be cognizant that, if they use nuclear weapons, they are likely to go down in history as pariahs.

References

1. Interestingly, in scenarios in which the argument for legality begins to lose traction, the *credibility* of the nuclear “threat” also begins to fade: Would the United States really resort to first use of nuclear weapons over an assault on its command and control capabilities? In this sense, nuclear deterrence might be seen as having a self-correcting aspect: when aimed at lesser threats, the nuclear deterrent lacks credibility and, thus, is less offensive to international humanitarian law; when aimed at grave threats—such as a threat to the survival of the state—the nuclear deterrent gains credibility but is reconcilable with international humanitarian law for the reasons discussed in the Advisory Opinion and the fifth chapter of this paper. This certainly is not what the nuclear strategists intended.
2. See Shultz, Perry, Kissinger, and Nunn, *World Free of Nuclear Weapons*.
3. See Shultz, Perry, Kissinger, and Nunn, *World Free of Nuclear Weapons*.
4. See, e.g., 2018 Nuclear Posture Review, at 16-18; Harari, *Sapiens*, 364-375.
5. See, e.g., Harari, *Sapiens*, at Chapter 8; Elizabeth Culotta, “Roots of Racism,” *Science* 336, no. 6083 (May 18, 2012), at 825-827. This evolutionary tendency to fear (and therefore to hate) outsiders is paired with the equally advantageous tendency (from an evolutionary perspective) to bond with one’s own group. But bonding with one’s own group can also exacerbate hostility to perceived “enemies.”
6. See Fitzpatrick and Barnett, “Risk and Nuclear Deterrence,” 28 (citing I. Helfeld, “Nuclear Famine”).

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For more than 60 years, LLNL has applied science and technology to make the world a safer place. The Laboratory's defining responsibility is ensuring the safety, security, and reliability of the nation's nuclear deterrent. Yet LLNL's mission is broader than stockpile stewardship, as dangers ranging from nuclear proliferation, to terrorism, to energy shortages and climate change threaten national security and global stability. The Laboratory's science and engineering are applied to strengthen United States security through the development and application of world-class science and technology.

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“ This paper addresses the legality of nuclear deterrence, through an analysis of the 1996 Advisory Opinion of the International Court of Justice. Noting that the Court declined to render a conclusion on the matter, Newell Highsmith then presents an excellent case for the legality of nuclear deterrence. He argues that it is an essential means for preventing the devastation of a nuclear exchange, even while acknowledging that the actual use of nuclear weapons would violate the law in all but the most exceptional circumstances. His paper is a fine tool for understanding the evolving legal debate, and the need for an effective deterrent capability, pending their ultimate but probably far-off elimination. ”

Michael Matheson

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“ In his timely and expertly-argued analysis of the legal issues surrounding nuclear war, Highsmith reaches a conclusion that will disappoint those who may seek to de-legitimize nuclear deterrence by once again challenging its legality—that nuclear weapons can only be eliminated by achieving a verifiable agreement supported by the nuclear-armed states and not by appeals to international law. But while defending nuclear deterrence on legal grounds (at least in its primary role of deterring nuclear attack), Highsmith laments the deterioration of the international security environment that has given nuclear weapons more salience internationally, increased the likelihood of their use, and made a world without nuclear weapons a more distant prospect. ”

Robert Einhorn

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