INTRODUCTION

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International Court Fudges Nuclear Arms Ruling; No Ban . . .
Guardian, 9 July 1996

Use or Threat of Nuclear Arms 'Unlawful'
Financial Times, 9 July 1996

Hague Court Declines to Give Ruling
The Times, 9 July 1996

On 8 July 1996 the International Court of Justice handed down long-awaited decisions in the requests from the World Health Organization[1] and the United Nations General Assembly[2] for Advisory Opinions on the legality of the use of nuclear weapons. The Court declined to give the Advisory Opinion requested by the WHO Assembly. However, it did give an Advisory Opinion in the request from the General Assembly, ruling by the narrowest of majorities that the threat or use of nuclear weapons 'would generally be contrary to the rules of international law applicable in armed conflict', subject to one apparent exception. The ambiguity of the Court's main conclusions is amply reflected in the headlines of three of Britain's leading daily newspapers the following morning, as reproduced above.

The two Opinions were accompanied by Declarations, Separate

1 *Legality of the Use by a State of Nuclear Weapons in Armed Conflict,* Advisory Opinion, ICJ Reports, 1996, p. 66 (WHO Opinion), *infra*, at p. 520.
2 *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion, ICJ Reports, 1996, p. 26 (General Assembly Opinion), *infra*, at p. 561.

Opinions or Dissenting Opinions from all fourteen judges sitting on the cases. These texts, together with the transcript of the oral proceedings, provide a wealth of material for analysis and critique on a range of major international law issues. There are few other issues which could generate such widespread interest and such a broad range of views on international law and politics, and their interrelationship. For this reason alone what the Court had to say and how it said it, as well as what the Court did not say, are of considerable interest. This is irrespective of one's views as to whether the requests for the Opinions should have been made at all and as to the substance of the Court's conclusions. [3]

In addressing the issues the Court made its most direct foray into peace and security issues, touching upon some enormously contentious questions of international law. Beyond the central questions put to the Court on the legality of the use or threatened use of nuclear weapons, a myriad of more general issues was touched upon by the Court or raised in the pleadings. These were both institutional and substantive: the proper role of the International Court and international judicial bodies, the Court's advisory function, the competence of international organisations, the judicial review of acts of international organisations, the interaction of various branches of international law, the normative value and effect of the rules established under those branches, and the various sources of international legal obligation and their interaction. In addition, the proceedings raised issues such as the possibility of a *non liquet* (expressing the view that there exists a gap or lacuna in the law) and the status today of the '*Lotus* approach' (traditionally treated as expressing the view that that which is not explicitly prohibited by international law should be permitted). There were also strategic questions such as the legality of the practice of nuclear deterrence or the meaning of Article VI of the 1968 Treaty on the Non-Proliferation of Nuclear Weapons ('NPT').[4]

Of the institutional issues concerning the Court three seem to us to stand out: whether the WHO and the UN General Assembly had the competence to ask for an Advisory Opinion on this subject, whether the Court should exercise its discretion in favour of answering either (or both) of the requests, and what was the proper role of the 'principal judicial organ' of the United Nations. The main substantive issues addressed by states

3 On these issues Michael Reisman, 'The political consequences of the *Nuclear Weapons* Advisory Opinion, *infra*, at p. 473.

4 729 UNTS 161.

during argument included the status and effect of various norms of international humanitarian law (*jus in bello*) in the context of the use or threatened use of nuclear weapons, the relevance of the rules governing the use of force (*jus ad bellum*), and the relationship between these two branches of international law. Since some states had also raised other branches of general international law – the law on human rights (especially the right to life and the prohibition on genocide) and international environmental law – the Court was called upon to deal with the relationship between these norms and the laws governing armed conflict. This required it to touch upon the interrelationship of rules of international law arising in separate and apparently distinct areas, in the face of conflicting arguments as to fact and evidence.

These and other issues presented to the Court transcended the specificity of the legal issues raised by the two requests before it. They raised general, broader issues about the nature of international law and society towards the close of the twentieth century, providing a window through which the state of international law at this time can be observed and commented upon.

In inviting contributions to this collection of essays we had this aspect of the proceedings and the opinions in mind. We wanted the contributors to address the issues which we had identified as being especially pertinent. These could be grouped into three categories: those relating to the actors involved (including the institutions); those relating to the substantive questions which the Court addressed; and those relating to the broader context of international law against which the Opinions were handed down. This collection of essays reflects that broad categorisation, although we appreciate that there will inevitably be overlap since the subject does not lend itself to neat categorisation, nor should it. We invited authors to provide insight into the specific issues which were put to the Court, and to clarify what the Court had (and had not) decided. Beyond this we also wanted our contributors – and the collection as a whole – to provide a basis for assessing the state of international law as we reach the millennium. Readers will be able to judge for themselves whether, as David Kennedy puts it, the story of these proceedings is 'less about nuclear weapons than about law'.[5] In inviting the various authors we were

5 David Kennedy, 'The *Nuclear Weapons* case', *infra,* p. 462.

conscious of the need to canvass a wide range of views. Some of the contributors were involved in the proceedings before the Court, representing different interests. Others were not involved but have a particular connection with the topics they address. Yet others have not previously been connected with this issue. Most of these essays are original, but a small number have appeared elsewhere.

In this introduction our purpose is not to summarise or comment upon the essays in this book. Commentary upon commentary would not add value. Rather, we want to try to draw together some of the principal themes which recurred or were alluded to in the proceedings – and in the essays which follow – and which bear on the state of international law at the close of the twentieth century. We address four aspects of the contemporary international legal order which offer some perspective as to its current state. These are: the role of the various actors in international legal society; the extent to which the international legal order constitutes a 'system' which is sectional and fragmented or integrated and holistic; the function of international judicial bodies in applying the law and contributing to political developments; and the place of the rule of law in international relations, and its limits. Before turning to these aspects it is appropriate to summarise briefly the proceedings and consider the context in which they took place.

The proceedings and their context

The formal history of the two sets of proceedings can be briefly stated. On 3 September 1993 the Court Registry received a request from the Director-General of the World Health Organization for an Advisory Opinion from the Court. The request was made pursuant to a Resolution adopted by the World Health Assembly on 14 May 1993 (Resolution WHA 46.0). It asked the Court to address the following question:

> In view of the health and environmental effects, would the use of nuclear weapons by a state in war or other armed conflict be a breach of its obligations under international law including the WHO Constitution?

The Resolution was adopted in the face of stiff opposition from many industrialised states, some indicating that they considered the request to be *ultra vires* as it addressed an issue which lay beyond the WHO's competence. This view was shared by the then WHO Legal Adviser, and appar-

ently contributed to the three-month delay in transmitting the request to the Court. The Court duly fixed 10 June 1994 as the time limit within which written statements were to be submitted to it by the WHO and those of its members entitled to appear before it. Thirty-four states submitted written statements by the Court's extended filing date of 20 September 1994. The WHO itself made no filing.

On 15 December 1994 the UN General Assembly adopted Resolution 49/75K. This asked the Court urgently to render its advisory opinion on the following question: 'Is the threat or use of nuclear weapons in any circumstances permitted under international law?' The resolution, submitted to the Court on 19 December 1994, was adopted by 78 states voting in favour, 43 against, 38 abstaining and 25 not voting. The General Assembly had flirted with the possibility of asking a similar question in the autumn of 1993, at the instigation of the Non-Aligned Movement (NAM), which ultimately did not that year push its request. It seems that the NAM was more willing the following year, in the face of written statements submitted in the WHO proceedings from a number of nuclear-weapon states (and others) indicating strong views to the effect that the WHO lacked competence in the matter. The Court subsequently fixed 20 June 1995 as the filing date both for written statements for the General Assembly request, and further written statements for the WHO request. By that date twenty-eight states had filed written statements for the former,[6] and nine filed further written statements for the latter.[7] By 20 September 1995 three states had filed further written observations in the General Assembly request.[8]

Altogether forty-two states participated in the written phase of the pleadings, the largest number ever to join in proceedings before the Court.[9] Of the five declared nuclear-weapon states only China did not participate. Of the three 'threshold' nuclear-weapon states only India participated. Many of the participants were developing states which had not previously contributed to proceedings before the International Court, a reflection perhaps of the unparalleled interest in this matter and the growing willingness of developing states to engage in international judicial proceedings in this post-'post-colonial' period.

6 See General Assembly Opinion, para. 5.
7 See WHO Advisory Opinion, para. 5.
8 See General Assembly Opinion, para. 5.
9 On the implications of this unusually broad participation, see Thomas Franck, 'Fairness and the General Assembly Advisory Opinion', *infra*, p. 511.

Oral hearings were held from 30 October to 15 November 1995. Twenty-two states participated,[10] as did the WHO. The secretariat of the UN did not appear, but filed with the Court a dossier explaining the history of resolution 49/75K. Each state was allocated 1½ hours to make its statement. States generally appeared in alphabetical order on the basis of the English language. The United Kingdom and the United States were expected to close the proceedings. At a late stage, however, Zimbabwe expressed its intention to participate and, in accordance with the alphabetical approach, was allowed to do so at the end of proceedings. On 8 July 1996, nearly eight months after the close of the oral phase, the Court rendered its two Opinions.

These proceedings and the Opinions raised interesting perspectives on different approaches to international law and on the relationships between law and politics in the international context. They revealed a range of international law styles both of presentation and of substance: states addressed the different sources of obligation (and their interrelationship), approaches to reasoning and interpretation, and assessment of consequences. Widely differing views were expressed on the consequences of supposed silence in international law, on the continued relevance of the dictum of the Permanent Court of International Justice in the *Lotus* case, and on the principle of sovereign equality. There were also obviously issues concerning the role of courts in the international legal process, and in particular the role of the International Court of Justice and its relationship to the other organs and institutions of the United Nations system, in particular to the political organs. Finally, haunting the proceedings but rarely articulated, a key question: What are the limits of international law when faced with a subject which goes to the core of the exercise of state power?[11]

It is evident that international law finds itself in a different and altogether more complex situation than that which prevailed at the close of previous centuries. There are more actors on the international stage (state and non-state), more areas subject to international regulation, and more approaches. An observer at the close of the nineteenth century would have

10 Australia, Egypt, France, Germany, Indonesia, Mexico, Iran, Italy, Japan, Malaysia, New Zealand, Philippines, Qatar, Russian Federation, San Marino, Samoa, Marshall Islands, Solomon Islands, Costa Rica, United Kingdom, United States, Zimbabwe.

11 See Martti Koskenniemi, 'The silence of law/the voice of justice: reflections on the International Court of Justice', *infra*, p. 488.

had little difficulty in identifying the limited issues facing international law and international lawyers. The idea that states or other actors could, in the late nineteenth century, have aired views on issues analogous to the legality of nuclear weapons before the principal judicial organ of an international organisation of almost global state membership would have been unimaginable. There were no permanent international jurisdictions and very few international organisations, and it is doubtful that there would have been much law for such bodies to have considered in dealing with a question without a nineteenth-century equivalent.

At the close of the twentieth century the outlook appeared rather different, both *ratione personae* and *ratione materiae*. Beyond the significant increase in the number of states since the mid-1940s, there is also a host of other actors on the international scene. These include many international organisations and an even larger number of non-governmental actors. Moreover, international law plays a growing role in the conduct of many aspects of international relations, in the public and private sectors. Norms of international law now touch upon virtually every aspect of human activity. To a greater extent than ever international law regulates many matters which would previously have been considered to remain within an exclusively domestic setting, such as human rights, environmental standards and the treatment of investments. And it does so with increasing sophistication. This has led commentators to identify a tendency towards specialisation and fragmentation.[12] Whilst traditionalists may have referred to an apparently simple distinction between a law of war and a law of peace, we are now faced with strands within the international legal order which transcend the distinction between the *jus in bello* and the *jus ad bellum*, establishing specialised rules for different categories of weaponry, applying specific rules on health, human rights, the environment and a multitude of other topics, and which organise the relationship among states, as well as among a wide array of other actors. It may indeed be that we stand on the brink of the first universal organised (albeit embryonically) international community known to humanity. It is in this context that we address the four themes of this introduction.

12 See R. St. J. Macdonald and D. M. Johnston (eds.), *The Structure and Process of International Law* (The Hague, 1983), p. 3.

Are new actors emerging in international legal society?

At the close of the twentieth century it has become increasingly clear that international law is no longer a field in which states have an absolute monopoly of interest and action. Although states undoubtedly retain a pre-eminent role in the 'making' of international law and in its implementation and enforcement, the activities of other actors – international organisations and non-state actors – are increasingly relevant, either directly or, as in the nuclear weapons proceedings, indirectly. The fact that these two requests reached the Court at all is due to the convergence of several factors: non-governmental organisations committing themselves to an opinion from the Court through the 'World Court Project';[13] these groups having sufficient resources and influence to persuade enough states of the merits of this legal approach; and the events taking place against a background of on-going negotiations to extend the 1968 NPT and to adopt a comprehensive Test-Ban Treaty to prohibit all nuclear tests.[14] In this context states were, in the eyes of some observers, merely a conduit through which the consciousness of a part of civil society could be channelled. And it is evident that in giving its Opinions the Court had a broader audience in mind.[15]

These unprecedented proceedings raised issues about the proper role, rights and prerogatives of international organisations and non-governmental organisations in the context of an international legal order traditionally organised around the primacy of the state. It may be, as some of our contributors suggest, that the ambiguity of the Court's conclusions should be understood as reflecting the tension between a view of the legal order – inherited from the nineteenth century – which gives primacy to the interests and rights of states, and a view – the more modern one to our mind – which increasingly recognises the interests and rights of persons.[16] If this is the case the proceedings reflect a particular moment – a

13 *The World Court Project on Nuclear Weapons and International Law* (2nd edn, 1993).

14 The fact that the Court had, in September 1995, adopted an order rejecting New Zealand's request to re-open its 1974 case on French nuclear testing, was also not without significance: ICJ Reports, 1995, p. 288. See Philippe Sands 'L'affaire des essais nucléaires II: contribution de l'instance au droit international de l'environnement', *RGDIP*, 1997, pp. 448–74.

15 See Jean Salmon, 'Who are the addressees of the Opinions?', *infra*, p. 27.

16 See Pierre-Marie Dupuy, 'Between the individual and the state: international law at a crossroads?', *infra*, p. 449.

transitional moment – in the development of the international legal order. Readers will not need to be reminded that the Court has previously recognised aspects of this trend.[17]

What is the proper role of international organisations and non-state actors? The answer depends upon how far states will be willing to go in recognising the role of these two categories of actors in the international legal order. In this sense states continue to retain a primary role. But a notable feature of the proceedings was the general division of views, whether implicit or explicit, between different countries on the proper role of these actors.

NON-GOVERNMENTAL ORGANISATIONS

With regard to non-governmental organisations (NGOs), the views of states – and evidently of the judges also – were divided. The involvement of these actors in the whole process was the subject of considerable debate. A group of NGOs organised through the 'World Court Project' (which had been trying for some years to get a question on the legality of nuclear weapons before the Court) had played a key role in promoting the WHO Assembly and General Assembly requests. For some, the mere fact that NGOs had played such a central role in persuading states to bring the requests to the International Court of Justice was of itself a further reason why the Court should not answer the requests. According to this view the extent of NGO participation had tainted the whole process with a political flavour, reflecting the essentially non-legal nature of the questions before the Court. It was argued that these factors should preclude the Court from answering the requests.[18] A contrary view proposed that the extensive participation of NGOs in the process reflected the multiplicity

17 See Vera Gowland-Debbas, 'The right to life and genocide: the International Court of Justice and international public policy', *infra*, p. 315.

18 See e.g. the position of France: 'Il ressort nettement des conditions dans lesquelles la résolution WHA 46.40 a été adoptée que l'on espère obtenir, à des fins essentiellement politiques, le soutien de la Court . . .': Written Observations to the WHO request, p. 19 (June 1994). See also the references to NGO activity in the UK Written Observations to the General Assembly request, paras. 1.2 and 2.2–2.3 (June 1995). Also the comments by Judge Guillaume ('I wondered whether, in such circumstances, the requests for opinions could still be regarded as coming from the Assemblies which had adopted them or whether, piercing the veil, the Court should not have dismissed them as inadmissible' (ICJ Reports, 1996, at pp. 287–8).

and diversity of interests at stake and the importance of the role of other actors in the international arena. According to this view the participation of non-traditional actors made it all the more important for the Court not to decline to answer the requests.[19] The dichotomy has been aptly described by Professor (now Judge) Higgins:

> To some, these radical phenomena represent the democratisation of international law. To others it is both a degradation of the technical work of international lawyers in the face of pressure groups and a side-stepping of existing international law requirements and procedures.[20]

Whichever of these two views one subscribes to, the Court concluded that it could not object to the request of the General Assembly by reason of NGO involvement. This is consistent with emerging trends in international law. These trends recognise the growing entitlement of individuals and non-governmental organisations to a more formal and informal involvement in international judicial and quasi-judicial proceedings,[21] even if not yet at the ICJ. Without prejudice to the requirements which define states' prerogatives in presenting arguments before the Court, the role that non-governmental organisations and other non-state actors played in these proceedings offered some perspectives as to their possible contribution to international judicial procedures: direct, in invoking court procedures or appearing before courts, or indirect, in making information or arguments available in cooperation with states.[22]

INTERNATIONAL ORGANISATIONS

The proceedings also indicated the sharp differences of view held by different states as to the proper role and function of international organisations. This was particularly highlighted by the WHO request. Some states proposed the view that organisations such as the WHO are established solely to fulfil those tasks which have been expressly spelled out in their

19 See e.g. Further Written Observations of Solomon Islands, General Assembly request, para. 8 (September 1995).

20 'The Reformation in International Law', in R. Rawlings (ed.), *Law, Society and Economy: Centenary Essays for the London School of Economics and Political Science,* 1895–1995 (Oxford, 1997), p. 208 at p. 215.

21 L. Boisson de Chazournes, 'La mise en oeuvre du droit international dans le domaine de la protection de l'environnement: Enjeux et défis', *RGDIP*, 1995, 1, pp. 68–72.

22 See R. S. Clark and M. Sann, *The Case against the Bomb*, (Rutgers, NJ, 1997) pp. 27–8.