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„The International Court of Justice and nuclear weapons - an attempt to explain judicial self-restraint“

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1. Introduction

The International Court of Justice (ICJ) was established as the principal judicial organ of the United Nations (UN) at the end of World War II. The direct cause of international war and violence is often a dispute between States. With the destruction and atrocities of World War II fresh in mind the aim of the ICJ was to peacefully settle legal disputes in accordance with international law. In particular, this can be confirmed through the following passage from a report by the First Committee of the San Francisco Conference:

> "*In establishing the International Court of Justice, the United Nations hold before a war-stricken world the beacons of Justice and Law and offer the possibility of substituting orderly judicial processes for the vicissitudes of war and the reign of brutal force*."[1]

Ironically, nuclear weapons with the power to destroy all life on earth were developed at the same time. Since the end of the Cold War, there has been a reduction in global stockpiles of nuclear weapons. However, nine States still possess an estimated 13,400 nuclear warheads.[2] Instead of planning for nuclear disarmament, they appear to have bolstered their arsenals and increased the role that such weapons play in their national strategies.

During its existence, the ICJ dealt with issues related to nuclear weapons on three occasions, issuing two judgments[3] and one Advisory Opinion[4]. However, the Court did not address the central issues in these cases. The two contentious cases were dismissed for procedural reasons. In its *Advisory Opinion on Nuclear Weapons* the Court addressed the issue whether the threat or use of nuclear weapons in any circumstance was permitted under international law. However, it left open the crucial

[1] Report of the Rapporteur of Committee IV/1 to Commission IV, Doc. 913 (June 12) 13, U.N.C.I.O. Docs. 381f, 393, https://digitallibrary.un.org/record/1300969 (accessed 10 October 2021).
[2] https://www.icanw.de/fakten/weltweite-atomwaffen/ (accessed 26 May 2021).
[3] *Nuclear Tests (New Zealand v. France)*, Judgment, ICJ Reports 1974, p. 457; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, Preliminary Objections, Judgment, ICJ Reports 2016, p. 833.
[4] Legality of the Threat or Use of Nuclear Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 226.

question of the use of such weapons in self-defence, referring to a *non-liquet* situation for the first time in its history.

The common element in these three pronouncements is the very restrictive position adopted by most of the judges. In general, they often abstain from substantially contributing to the resolution of cases that could be considered as "highly political matters". This thesis aims to explain why the judges adopted such a restrictive approach.

The first part of the thesis is introductory and provides an overview of the development of nuclear weapons followed by a summary of the international legal framework. The latter provides the background necessary to understand the broader topic addressed in this thesis. Then, the ICJ's three pronouncements are summarised.

The main part of the thesis identifies and discusses four factors that could explain why the judges followed a restrictive approach to nuclear weapons. There is an ongoing debate about whether the Court is limited to stating and applying the law to the questions and facts presented before it or is required to contribute to the development of international law. In particular, by providing Advisory Opinions according to Article 65 of the Statue of the ICJ the Court plays a special role compared with other judicial organs because the persuasive strength of its non-binding opinions is frequently superior to legally binding but hardly enforceable judgments.[5] In general, judges must apply the law in force. However, the thesis shows that there is a fine line between applying, developing and creating the law and that there is indeed room for judicial caution. Another reason for judicial self-restraint may be the optional basis of the ICJ's jurisdiction. By following a more progressive judicial approach, the ICJ would risk a drastic reduction in the number of States that recognise its jurisdiction. There is some tension between jurisdictional matters and the predictability of judicial activities. States will more readily accept the ICJ's jurisdiction if its judgments are predictable. The thesis includes highly political issues that have been presented to the ICJ.

In the next chapter the structure of domestic legal systems and the international legal system are compared. In this context, the questions whether the role of a

[5] *Lachs*, Some Reflections on the Contribution of the International Court of Justice to the Development of International Law, Syracuse Journal of International Law and Commerce Vol. 10, No. 2 1983, Art. 2 239 at 249.

constitutional court is to act as a "negative" or "positive legislator" and the separation of powers and the role of constitutional courts in domestic legal systems are raised, with Austria serving an example. The structure of international law is entirely different. It is based on regulating relations between sovereign States without a central government or parliament. Therefore, the need for judicial action is presumably greater in the international sphere than in domestic systems because the means of creating or modifying the law are limited.

Finally, legal provisions on the composition of the Court explain why judges may use very formalistic reasoning to avoid pronouncements on the merits of issues related to nuclear weapons. States that possess nuclear weapons have been and continue to be well-represented on the ICJ's bench. Pursuant to Article 4 para 1 of the Statute of the ICJ[6] members of the Court are elected by the UN General Assembly (GA) and the Security Council (SC) from a list of candidates nominated by the national groups in the Permanent Court of Arbitration. The question arises whether this election process, which has apparent political dimensions, could be linked to the restrictive approach adopted by the judges. Based on concepts established in previous chapters, the thesis critically evaluates the ICJ's pronouncements on nuclear weapons.

The last part of the thesis focuses on the problem of nuclear disarmament. Nuclear disarmament should be a joint effort of all States. Although not ratified by nuclear-weapon States and their allies, the Treaty on the Prohibition of Nuclear Weapons (TPNW) adopted in 2017 that entered into force in January 2021 suggests that multilateral negotiations may have some impact on nuclear disarmament. However, the refusal of nuclear-weapon States and their allies to sign the treaty has given rise to concerns about its ineffectiveness. Given the ICJ's restrictive approach to nuclear weapons, the question arises of whether it would be more appropriate to regard international litigation as complementary to multilateral negotiations and place greater emphasis on States and their role in making international law. For the sake of completeness, a reform of the election process provided for in the Statute of the ICJ as an integral part of the UN Charter[7] will be looked at, though having in mind that the

[6] Charter of the United Nations and Statute of the International Court of Justice, 24 October 1945, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=I-3&chapter=1&clang=_en (accessed 14 November 2021).
[7] *Ibid*.

permanent members of the SC would most likely not ratify an amendment of the UN Charter that reduces their influence on the composition of the ICJ.[8]

2. Development of nuclear weapons and overview of the relevant international legal framework

2.1. Brief history of the development of nuclear weapons

The beginning of the nuclear weapons era coincides with the end of World War II. Following the development of the first nuclear weapons by the United States, atomic bombs were dropped on Hiroshima and Nagasaki in August 1945, which accelerated the end of World War II and heralded the birth of the atomic age. These nuclear attacks caused the deaths of hundreds of thousands of people, severe radiation-related diseases for decades and serious damage to the environment. The two uses of nuclear weapons, atmospheric nuclear testing and nuclear power accidents have formed the basis of knowledge about the potential and actual effects of nuclear weapons.[9]

During the Cold War, the United States and the Soviet Union developed numerous nuclear weapons. First, the United States believed that building a nuclear arsenal would serve as a deterrent, help prevent a third world war and put it into a position to defeat the Soviet Union, if the latter invaded Europe. However, the Soviet Union also launched nuclear armament and the nuclear arms race began. Over the following years, other States also developed nuclear weapons.

Nuclear weapons pose an enormous threat to humanity. Their detonation produces both short- and long-term effects. Immediate effects include blast waves, thermal radiation and prompt ionizing radiation and can cause destruction within seconds or minutes. Longer-term effects, such as radioactive fallout, can harm human health and well-being and damage the environment over a period that ranges from hours to

[8] According to Article 108 of the UN-Charter amendments to the present Charter shall come into force for all Members of the United Nations when they have been adopted by a vote of two-thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two-thirds of the Members of the United Nations, including all the permanent members of the Security Council.

[9] https://cnduk.org/the-effects-of-nuclear-weapons/ (accessed 26 December 2021).

decades.[10] When assessing the destructive potential of nuclear weapons, it is important to note that some of the nuclear weapons available today are more than 3,000 times as powerful as the bomb dropped on Hiroshima. These thermonuclear bombs are based not on the fission of heavy metal nuclei like the atomic bombs dropped over Japan in 1945 but on the fusion of the hydrogen isotopes deuterium and tritium into helium nuclei. The explosive force of atomic bombs is measured in kilotons, 1000 tons of TNT, that of thermonuclear bombs in megatons, 1 million tons of TNT.[11]

Within the UN, the SC has paid attention to nuclear weapons and declared on several occasions that nuclear weapons are a threat to international peace and security.[12] In the GA, a majority of members are aware of the threat posed by nuclear weapons; they have declared their use to be a violation of the UN Charter and international law.[13] In essence, these resolutions support a legal regime and a customary international law obligation that lead to complete nuclear disarmament.[14]

2.2. The Concept of nuclear deterrence

Nuclear-weapon States, as well as States without such weapons, that refuse to become parties to the TPNW[15], rely in their security policies on nuclear deterrence. Since the ICJ also referred to this strategy, it will be briefly described in this sub-chapter. The basic requirement of nuclear deterrence is a nuclear second-strike capability: the ability of an attacked State to protect a sufficient part of its nuclear arsenal and inflict

[10] https://www.icrc.org/en/document/humanitarian-impacts-and-risks-use-nuclear-weapons (accessed 26 December 2021).
[11] https://www.popularmechanics.com/military/a23306/nuclear-bombs-powerful-today/ (accessed 26 December 2021).
[12] *Resolution* 2105 SC Res 2105, S/Res/2105 (2013); *Resolution* 1540 SC Res 1540, S/Res/1540 (2004); *Resolution* 2094 SC Res 2094, S/Res/2094 (2013); *Resolution* 1977 SC Res 1977, S/Res/1977 (2011).
[13] *Declaration on the prohibition of the use of nuclear and thermos-nuclear weapons* GA Res 1653, XVI (1961); *Non-Use of Nuclear Weapons and Prevention of Nuclear War* GA Res 33/71B, A/Res/33/71B (1978); *Non-Use of Nuclear Weapons and Prevention of Nuclear War* GA Res 34/83G, A/Res/34/83G (1979); *Non-Use of Nuclear Weapons and Prevention of Nuclear War* GA Res 35/152D, A/Res/35/152D (1980); *Convention on the Prohibition of the Use of Nuclear Weapons* GA Res 46/37D, A/Res/46/37D (1991); *Convention on the Prohibition of the Use of Nuclear Weapons* GA Res 65/80, A/Res/65/80 (2010); *Convention on the Prohibition of the Use of Nuclear Weapons* GA Res 70/62, A/Res/70/62 (2015); and *Universal Declaration on the Achievement of a Nuclear-Weapon-Free World* GA Res 70/57, A/Res/70/57 (2015).
[14] *Anastassov*, Are Nuclear Weapons Illegal? The Role of Public International Law and the International Court of Justice, Journal of Conflict & Security Law (2010) 65 at 72.
[15] See below.

unacceptable damage on the aggressor with a retaliatory attack - a prospect too terrible for the latter to accept.[16]

Three decades after the fall of the Soviet Union and the end of the Cold War nuclear weapons remain an important factor in world politics. The five “established” nuclear-weapon States China, France, the United Kingdom, Russia and the United States have endorsed the concept of nuclear deterrence and use it to justify their possession of nuclear weapons. Moreover, Israel, India, Pakistan and North Korea have also developed nuclear weapons. In Iran's case, its nuclear programme is suspected to be ultimately intended for the production of nuclear weapons.[17]

Motives for possessing or striving to possess nuclear weapons differ in individual cases and have considerably changed during the nuclear age. Nevertheless, it is possible to identify some core functions ascribed to nuclear weapons, which justify their attractiveness to current and aspiring nuclear-weapon States.[18]

Firstly, as pointed out above, nuclear weapons are intended to deter a potential aggressor from using its nuclear weapons. Nuclear-weapon States regard nuclear deterrence as a key factor in the prevention of war amongst major powers and a central component of their security policies. In addition, they argue that these policies will contribute to international stability.

Secondly, nuclear weapons are intended to ensure the safety of non-nuclear allies by not ruling out a nuclear counterattack if the latter are attacked. Within the framework of the North Atlantic Treaty Organization (NATO), "extended deterrence" expanded the American "nuclear umbrella" over the alliance area, which currently consists of 30 States, but this “umbrella” also protects Japan, South Korea and Australia.[19]

The third and second functions of nuclear weapons are closely related. Promises of security for non-nuclear-weapon States prevent the proliferation of nuclear weapons.

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[16] *Oam*, Nuclear Deterrence Theory - A Threat to Inflict Terror, 15 Flinders L.J. (2013) 257 at 258.

[17] https://www.science.org/content/article/iran-vows-build-two-new-nuclear-facilities-alarming-observers (accessed 19 December 2021).

[18] https://internationalepolitik.de/de/kernwaffen-im-21-jahrhundert (accessed 19 December 2021).

[19] https://www.armscontrol.org/act/2017-03/features/challenge-nuclear-deterrence (accessed 19 December 2021); https://www.doctrine.af.mil/Portals/61/documents/AFDP_3-72/3-72-D12-NUKE-OPS-Extended-Deterrence.pdf (accessed 24 December 2021).

The spread of the American "nuclear umbrella" ensured that countries such as South Korea, Taiwan and Turkey did not develop their own nuclear weapons.

The fourth function of nuclear weapons is particularly important for aspiring nuclear-weapon States. The possession of nuclear weapons would make the use of force against them less likely and increase their political and military options.

Lastly, possessing nuclear weapons dramatically changes a State's international standing. In particular, India and Pakistan have been treated as major actors on the international stage since their nuclear weapon tests in 1998.

For successful nuclear deterrence, the mere possession of nuclear weapons is insufficient. Their use must be credible and plausible. In addition to technical requirements, in particular invulnerable delivery systems (submarines, aircraft and missiles), this also requires political measures and planning that show that the use of nuclear weapons is being seriously considered. Nuclear weapons are a core component of NATO's overall capabilities of deterrence and defence. NATO is committed to arms control, disarmament and non-proliferation, but as long as nuclear weapons exist, it will remain a nuclear alliance.[20] Nuclear sharing among allies is an important part of NATO's nuclear deterrence strategy. NATO members make joint decisions on nuclear policy and planning and some of them have US nuclear weapons deployed on their territories.[21] Currently, Belgium, Germany, Italy, the Netherlands and Turkey host American nuclear weapons as part of NATO's nuclear sharing policy.[22]

However, most States oppose nuclear deterrence. The vast majority are non-nuclear-weapon States in regions that are free from nuclear weapons, such as Latin America or Africa. Within this group, a widely held view is that nuclear weapons deserve little to no credit for what has is sometimes been called the "Long Peace" since 1945.[23]

[20] https://www.nato.int/cps/en/natohq/topics_50068.htm (accessed 24 December 2021).
[21] https://www.nato.int/cps/en/natohq/topics_50068.htm (accessed 19 December 2021).
[22] https://www.armscontrol.org/act/2020-10/features/creating-opportunity-withdraw-us-nuclear-weapons-europe (accessed 19 December 2021).
[23] *Ibid*.

2.3. Overview of the international legal framework for nuclear weapons

Bi- and multilateral agreements contain various limitations on nuclear weapons, including possession, development, testing, deployment and use or the threat of use. Beyond regional constraints that prohibit nuclear weapons in Antarctica[24], Latin America and the Carribean[25], the South Pacific[26], South-East Asia[27] and Africa[28] many treaties also prohibit testing, deployment or use of nuclear weapons in outer space, on the moon and on other celestial bodies[29]. The contents of the most important multilateral treaties are briefly described in the following subsections.

2.3.1. The Limited Test Ban Treaty

The 1963 Limited Test Ban Treaty (LTBT)[30] is an arms control agreement that restricts the testing of nuclear weapons and nuclear proliferation. It prohibits atmospheric and underwater testing but does not exclude underground testing. Therefore, the LTBT is considered to have contributed little to limit the nuclear arms race amongst great powers. However, it serves as an important precedent for future arms control. Today, more than 120 States are parties to the LTBT.[31]

2.3.2. The Treaty on the Non-Proliferation of Nuclear Weapons

The 1968 Treaty on the Non-Proliferation of Nuclear Weapons (NPT)[32] entered into force in March 1970 and was indefinitely extended on 11 May 1995. It is the only international convention that contains far-reaching norms on non-proliferation and nuclear disarmament, as it prescribes the prevention of the spread of nuclear weapons

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[24] Antarctic Treaty, 01 December 1959, https://treaties.un.org/doc/Publication/UNTS/Volume%20402/volume-402-I-5778-English.pdf (accessed 04 October 2021).

[25] Treaty for the Prohibition of Nuclear Weapons in Latin America, 14 February 1967, https://treaties.un.org/pages/showDetails.aspx?objid=08000002801273c1 (accessed 04 October 2021).

[26] South Pacific Nuclear Free Zone Treaty, 06 August 1985, https://treaties.un.org/pages/showDetails.aspx?objid=08000002800cea40 (accessed 04 October 2021).

[27] Treaty on the Southeast Asia Nuclear Weapon-Free Zone, 15 December 1995, https://treaties.un.org/pages/showDetails.aspx?objid=08000002800a38cd (accessed 04 October 2021).

[28] African Nuclear Weapon Free Zone Treaty, 11 April 1996, https://treaties.unoda.org/t/pelindaba (accessed 04 October 2021).

[29] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, 27 January 1967, https://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/outerspacetreaty.html (accessed 04 October 2021).

[30] Treaty banning nuclear weapon tests in the atmosphere, in outer space and under water, 10 October 1963, https://treaties.un.org/pages/showDetails.aspx?objid=08000002801313d9 (accessed 8 December 2021).

[31] https://treaties.un.org/pages/showDetails.aspx?objid=08000002801313d9 (accessed 8 December 2021).

[32] Treaty on the Non-Proliferation of Nuclear Weapons, 12 June 1968, https://www.un.org/disarmament/wmd/nuclear/npt/text (accessed 04 October 2021).

and weapons technology, the promotion of cooperation in the peaceful use of nuclear energy and general and complete disarmament. 191 States are parties to the NPT[33]; thus it is nearly universally applied. However, major actors, namely India, Israel, Pakistan, and South Sudan have not signed the NPT[34]; North Korea withdrew from the treaty. States that are parties to the NPT are divided into nuclear-weapon States and non-nuclear-weapon States that renounce nuclear weapons.

Article VI of the NPT is of particular relevance to this thesis. It obliges nuclear-weapon States to "*pursue negotiation 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*." Nuclear-weapon States interpret the NPT as placing emphasis on the non-proliferation of nuclear weapons, whereas non-nuclear-weapon States stress the obligation to achieve nuclear disarmament.[35] The ICJ concluded that Article VI goes "*beyond a mere obligation of conduct*". Instead, in the view of the Court, this article imposes a positive obligation to "*achieve a precise result*" of nuclear disarmament "*by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith*".[36]

2.3.3. The Comprehensive Nuclear Test Ban Treaty

The 1996 Comprehensive Nuclear Test Ban Treaty (CTBT)[37] prohibits any nuclear weapon test explosion or nuclear explosion and thus closes the gap in PTBT. The CTBT has not yet entered into force due to a lack of the required ratifications, but it represents a major achievement in the international nuclear non-proliferation and disarmament regime. Although the treaty has not yet become legally binding, its verification system is operating effectively. The purpose of the system is to monitor a party´s compliance with the CTBT; to this end, it can detect any nuclear explosions

[33] https://treaties.unoda.org/t/npt (accessed 31 July 2021).
[34] https://treaties.unoda.org/t/npt (accessed 04 October 2021).
[35] *Joyner*, The Legal Meaning and implications of Article VI of the Non-Proliferation Treaty in *Gro Nystuen/Casey-Maslen/Golden Bersagel* Nuclear Weapons under International Law (2014) 397.
[36] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion,* ICJ Reports 1996, p. 226 para 99.
[37] Comprehensive Nuclear-Test-Ban Treaty, 10 September 1996, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-4&chapter=26 (accessed 04 October 2021).

that occur throughout the globe.[38] The CTBT's entry into force would represent an important milestone in the prohibition of nuclear weapons. However, to enter into force it must be ratified by all 44 States that possessed nuclear technology in 1995, which is higly unlikely: it has not been ratified, in particular, by China, India, Israel, Pakistan, the United States and North Korea.

2.3.4. Treaty on the Prohibition of Nuclear Weapons (TPNW)

In 2016, the GA adopted a resolution[39] to convene a UN conference to negotiate a legally binding multilateral instrument to prohibit nuclear weapons, which would lead to their total elimination. On 7 July 2017, the GAadopted the resulting draft treaty, which was then opened for signature by the Secretary-General of the UN. Pursuant to Article 15 para 1, the treaty entered into force in 2021 following the deposit of the 50th instrument of ratification or accession.[40] It is the first legally binding multilateral instrument on nuclear disarmament and prohibits contracting parties, without excluding the five "established" nuclear-weapon States, from developing, testing, producing, manufacturing, acquiring, possessing, or stockpiling nuclear weapons or other nuclear explosive devices. It also prohibits the deployment of nuclear weapons and the provision of assistance to any State in the conduct of prohibited activities. The treaty's intent is to delegitimise nuclear deterrence as the most relevant concept that has been used to justify the possession of nuclear weapons by nuclear-weapon States.

The treaty was adopted by 122 States, with one vote against (the Netherlands) and one abstention (Singapore). However, nuclear-weapon States and their allies did not participate in the negotiations nor sign the treaty. Notably, they include the United States, the United Kingdom, Russia, China, France, India, Pakistan, Israel, North Korea, Italy and Japan.

[38] https://www.ctbto.org/verification-regime/background/overview-of-the-verification-regime/ (accessed 8 December 2021).
[39] GA Res A/RES/71/258.
[40] https://www.un.org/disarmament/wmd/nuclear/tpnw/ (accessed 26 October 2021).

3. Nuclear weapons before the ICJ

3.1. The Nuclear Tests Cases[41]

3.1.1. The claims of the plaintiffs

On 9 May 1973, Australia and New Zealand instituted proceedings against France after a long dispute about the legality of atmospheric nuclear tests conducted over many years by France in the South Pacific. The applicant States claimed that these tests violated their rights under customary international law that prohibited such atmospheric explosions. They based their claims on the CTBT and several UNGA resolutions condemning atmospheric tests. In addition, both applicants asserted their right not to be affected on their territories by radioactive fallout from nuclear tests conducted by another State. Moreover, they asserted their sovereign right to freedom of the high seas, including freedom of navigation and overflight without interference from nuclear testing. In the first part of their claims, the applicants sought to establish the ICJ's jurisdiction. They invoked Articles 36 para 1 and Article 37 of the Statute of the ICJ and Article 17 of the General Act for the Pacific Settlement of International Disputes of 1928[42]. According to these provisions, the ICJ had jurisdiction concerning "*all disputes with regard to which the parties are in conflict as to their respective rights*", which would establish a comprehensive understanding of jurisdiction. Alternatively, the applicants referred to their declarations made under the optional clause according to Article 36 para 2 of the Statute of the ICJ. Furthermore, they requested interim protection measures under Article 41 of the same Statute. However, France did not appear before the Court as the respondent. The French government was of the view that the ICJ did not have jurisdiction over this case.

On 22 June 1973, the ICJ issued the following order:

> "*The Governments of Australia and France should each of them ensure that no action of any kind is taken which might*

[41] *Nuclear Tests (New Zealand v. France)*, Judgment, ICJ Reports 1974, p. 457; *Tokarz*, A Golden Opportunity Dismissed: The New Zealand v. France Nuclear Test Case, 26 Denv. J. Int'l L. & Pol'y (1998) 745; *Dugard*, The Nuclear Tests Cases and the South West Africa Cases: Some Realism about the International Judicial Decision, 16 Virginia Journal of International Law (1976) 463; *McWhinney*, International law-making and the judicial process: The World Court and the French Nuclear Tests Case, Syracuse Journal of International Law and Commerce, Vol. 3, No. 1 1975 Art. 3, 9.

[42] General Act of Arbitration (Pacific Settlement of International Disputes), 26 September 1928, https://treaties.un.org/pages/LONViewDetails.aspx?src=LON&id=573&chapter=30&clang=_en (accessed 05 October 2021).

> *aggravate or extend the dispute submitted to the Court or prejudice the rights of the other Party in respect of the carrying out of whatever decision the Court may render in the case; and, in particular, the French Government should avoid nuclear tests causing the deposit of radio-active fallout on Australian (New Zealand) territory*."[43]

At the same time, the ICJ decided that the proceedings should "*first be addressed to the questions of the jurisdiction of the Court to entertain the dispute, and of the admissibility of the Application(s)*."[44] At that point, the ICJ found it unnecessary to "*satisfy itself that it [had] jurisdiction on the merits of the case*"[45] because it issued an interim order. Instead, for the ICJ, the claims of the applicants "*appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded*.[46]".

Meanwhile, France was unimpressed by the Court's order and conducted another series of atmospheric nuclear tests in the South Pacific in July and August 1973 and from June to September 1974, which led Australia and New Zealand to assert to the ICJ that the interim order had been violated by France. In July 1974, the Court heard oral arguments by counsel that represented the applicant States on the questions of jurisdiction and admissibility, but France still refused to participate in the proceedings.

3.1.2. The judgment

In its judgment of 20 December 1974, the ICJ examined the question of whether - as a preliminary matter - a dispute still existed between the parties. Although Australia had asked the Court to "*adjudge and declare that, for the above-mentioned reasons or any of them or for any other reason that the Court deems to be relevant, the carrying out of further atmospheric nuclear weapon tests in the South Pacific Ocean is not consistent with applicable rules of international law*"[47], the ICJ stated that the true objective of Australia's application was not to obtain a declaratory judgment, but

[43] *Nuclear Tests (Australia v. France)*, Interim Protection, Order of 22 June 1973, ICJ Reports 1973, p. 99 para 35.
[44] *Ibid* para 35.
[45] *Ibid* para 13.
[46] *Ibid* para 13.
[47] *Ibid* para 11.

rather a termination of the tests.[48] Whilst New Zealand's application was more akin to a request for a declaratory order, the ICJ also deemed the plaintiff´s application's main objective to be the termination of the tests.

After determining the plaintiff´s aims, the Court assessed several events, which had occurred after the submission of the claims, notably, a number of public statements made by the French government outside the Court with regard to its future nuclear testing strategy. A communiqué was issued by the French government on 8 June 1974, which stated that "*France will be in a position to pass on to the stage of underground explosions as soon as the series of tests plan-ned for this summer is completed*.[49]" On 25 July 1974, the French president announced at a press conference that "*this round of atmospheric tests would be the last*"[50]. Similar statements were made in August and October 1974 by the French minister of defence and by the French minister for foreign affairs. The ICJ found that through these announcements France had "*made public its intention to cease the conduct of atmospheric nuclear tests following the conclusion of the 1974 series of tests*"[51] and that public statements of this kind were binding on France, since "*interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected*"[52].[53] The ICJ stated that "*these Statements were made not in vacuo but rather in relation to the tests which constitute the very object of the present proceedings although France had not appeared in the case*[54]". The cited declarations were, in the Court´s opinion, intended by the French government to demonstrate to the applicants its intention to abstain from conducting further nuclear tests in the atmosphere. The ICJ ruled that the applicant States had thus achieved their objective and that there was no longer any dispute between the parties and "*the dispute having disappeared, the claim advanced by Australia [New Zealand] no longer has any object. It follows that any further finding would have no raison d'etre.*[55]". In addition, the ICJ found that "*no further pronouncement is required in the present case. The object of the claim having clearly disappeared, there*

[48] *Ibid* para 30.
[49] *Ibid* para 34.
[50] *Ibid* para 37.
[51] *Ibid* para 41.
[52] *Ibid* para 46.
[53] Hence unilateral legal acts are regarded as binding in international law.
[54] *Ibid* para 50.
[55] *Ibid* para 56.

is nothing on which to give judgment"[56]. Thus, it did not proceed to the merits of the case.

3.1.3. Separate and dissenting opinions

In the *Nuclear Tests Cases,* the Court reached its decision by nine votes to six. The majority included President Lachs (Poland) and Judges Forster (Senegal), Gros (France), Bengzon (Philippines), Petrén (Sweden), Ignacio-Pinto (Benin, then Dahomey), Morozov (Soviet Union), Nagendra Singh (India), and Ruda (Argentina).

Judges Forster, Gros, Petrén and Ignacio-Pinto added separate opinions. They regarded the dispute as non-justiciable *ab initio,* with the reasoning that there was no rule of law that prohibited atmospheric nuclear tests. Thus, the conflict was of a political rather than of a legal nature. According to Judge Gros "*in the absence of any rule which can be opposed to the French Government for the purpose of obtaining from the Court a declaration prohibiting the French tests and those alone, the whole case must collapse*.".[57]

Judges Onyeama (Nigeria), Dillard (United States), Jiménez de Aréchaga (Uruguay) and Sir Waldock (United Kingdom) submitted a joint dissenting opinion. They rejected the reasoning of the majority, particularly with regard to the interpretation of the applicants' claims. The dissenting judges emphasised that the applicant States had clearly sought a declaration on the illegality of the French nuclear tests under international law, not only an order prohibiting further tests. Judge De Castro disagreed with the majority that the French declarations were legally binding. "*In my view*," he commented, "*the attitude of the French Government warrants ... the inference that it considers its Statements on nuclear tests to belong to the political domain and to concern a question which inasmuch as it relates to national defence, lies within the domain reserved to a State's domestic jurisdiction*"[58].

[56] *Ibid* para 59.
[57] Separate Opinion of Judge Gros, para 21, https://www.icj-cij.org/public/files/case-related/58/058-19741220-JUD-01-04-EN.pdf (accessed 06 October 2021).
[58] Dissenting Opinion of Judge De Castro p. 375, https://www.icj-cij.org/public/files/case-related/58/058-19741220-JUD-01-08-EN.pdf (accessed 06 October 2021).

3.2. The Advisory Opinion on the Legality of Nuclear Weapons[59]

3.2.1. The issue

On 15 December 1994, the GA adopted Resolution 49/75K to urgently request the ICJ to render its Advisory Opinion on the following question: "Is the threat or use of nuclear weapons in any circumstance permitted under international law?". On 8 July 1996 the ICJ delivered its Advisory Opinion according to the GA's request.

3.2.2. The Advisory Opinion

The ICJ confirmed the GA's competence to make such a request, which derives from the UN Charter and the GA's longstanding activities regarding disarmament and nuclear weapons.[60] To answer the question of whether the threat or external use of nuclear weapons was legal, the ICJ decided that it was crucial to consider the unique characteristics of nuclear weapons - primarily, that their destructive capacity could cause untold human suffering for generations.[61]

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[59] Legality of the Threat or Use of Nuclear Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 226; *Hubbard*, A Critique of the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons, 8 July 1996: The Nuclear Weapons Case, 1997 (https://ro.ecu.edu.au/ theses_hons/685); *Akande*, The Competence of International Organizations and the Advisory Jurisdiction of the International Court of Justice, EJIL 9 (1998), 437; *Thürer*, The Legality of the Threat or Use of Nuclear Weapons: The ICJ Advisory Opinion Reconsidered in *Hafner/Matscher/Schmalenbach (ed.)*, Völkerrecht und die Dynamik der Menschenrechte (2012); *Vincuillo*, Is the Threat or Use of Nuclear Weapons Permitted under International Law: A Case Note on the Nuclear Weapons Advisory Opinion, 1 Perth ILJ (2016) 101; *Akande*, Nuclear Weapons, Unclear Law? Deciphering the Nuclear Weapons Advisory Opinion of the International Court, British yearbook of international law, 1998, Vol. 68 (1) 165; *Aznar-Gomez*, The 1996 Nuclear Weapons Advisory Opinion and Non Liquet International Law, 48 Int'l & Comp. L. Q. 3 (1999) 3.

[60] The World Health Organization (WHO) had also requested an Advisory Opinion from the ICJ concerning the legality of nuclear weapons. The Court considered that there are three conditions, which must be met in order to establish its jurisdiction when a request for an Advisory Opinion is submitted to it by a specialized agency. The agency requesting the opinion must be duly authorized under the Charter to request opinions from the Court; the opinion requested must be on a legal question, and this question must be one arising within the scope of the activities of the requesting agency. The first two conditions had been met. With regard to the third, however, the Court found that although the WHO is authorized to deal with the effects on health of the use of nuclear weapons, or of any other hazardous activity, and to take preventive measures aimed at protecting the health of populations in the event of such weapons being used or such activities engaged in, the question put to the Court in the present case does not relate to the effects of the use of nuclear weapons on health, but to the legality of the use of such weapons in view of their health and environmental effects. Conversely, the question put to the ICJ by the GA is indeed a legal one, since the Court is asked to rule on the compatibility of the threat or use of nuclear weapons with the relevant principles and rules of international law. *Strahan*, Nuclear Weapons, the World Health Organization, and the International Court of Justice: Should an Advisory Opinion Bring Them Together, 2 Tulsa J. Comp. & Int'l L. 1994 395; *Bekker*, Legality of the Use by a State of Nuclear Weapons in Armed Conflict, 91 Am. J. Int'l L. 1997 134.

[61] Legality of the Threat or Use of Nuclear Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 226, para 36.

In the first part of the Advisory Opinion, the ICJ considered the relevant provisions of the UN Charter relating to the threat or use of force. Article 2 para 4 prohibits the threat or use of force, Article 51 recognises every State's inherent right to individual or collective self-defence in the event of an armed attack, and Article 42 authorises the SC to adopt military enforcement measures. However, none of these articles mentions specific types of weapons. Nevertheless, the Court held that "*they apply to any use of force, regardless of the type of weapon employed*"[62]. Moreover, it stated that the UN Charter "*neither expressly prohibits nor permits the use of any specific weapon (including nuclear weapons) and that a weapon that is already unlawful per se by treaty or custom does not become lawful by reason of its being used for a legitimate purpose under the Charter*"[63].

The ICJ further addressed the question of whether a signalled intention to use force if certain events occurred qualified as an unlawful "threat" under Article 2 para 4 of the UN Charter. According to the Court, "*the notions of "threat" or "use" of force under Article 2 para 4 of the 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*"[64]. In this context, the Court stated that the mere possession of nuclear weapons would not constitute an unlawful "threat" to use force contrary to Article 2 para 4 of the UN Charter, unless the particular use of force envisaged would be directed against the territorial integrity or political independence of a State, or in any manner inconsistent with the purposes of the UN or, violate the principles of necessity and proportionality in the event that it was intended as a means of defence.[65]

Then, the Court also dealt with "nuclear deterrence policy" in its reasoning, stating that "*in order to lessen or eliminate the risk of unlawful attack, States sometimes signal that they possess certain weapons to use in self- defence against any State violating their territorial integrity or political independence*"[66]. The Court stated that "*whether a signalled intention to use force if certain events occur is or is not a "threat" within Article 2, paragraph 4, of the Charter depends upon various factors*"[67]

[62] *Ibid* para 39.
[63] *Ibid* para 39.
[64] *Ibid* para 47.
[65] *Ibid* para 48.
[66] *Ibid* para 47.
[67] *Ibid para 47.*

but it did not specify the latter.

The Court then examined the applicable law in situations of armed conflict by addressing two questions. First, it looked for specific rules in international law that regulated the legality or illegality of recourse to nuclear weapons per se. Second, it considered the implications of the principles and rules of humanitarian law applicable in armed conflict and the law of neutrality. The ICJ stated that "*international customary and treaty law do 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 that 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 is rather formulated in terms of prohibition*"[68].

The Court examined whether any such prohibition of recourse to nuclear weapons could be found in international conventions. This analysis showed that these treaties "*point to an increasing concern in the international community*"[69] with regard to nuclear weapons. The ICJ concluded that they "*could therefore be seen as foreshadowing a future general prohibition of the use of such weapons, but they do not constitute such a prohibition by themselves*[70]." Moreover, it found that treaties that address the issue of recourse to nuclear weapons "*testify to a growing awareness of the need to liberate the community of States and the international public from the dangers resulting from the existence of nuclear weapons, but that these treaties also do not amount to a comprehensive and universal conventional prohibition on the threat or use of nuclear weapons as such*[71]".

Subsequently, the ICJ examined potentially applicable customary international law. It emphasised the importance of state practice and *opinio juris* as preconditions for the emergence of customary law and determined that the non-use of nuclear weapons did not amount to a customary prohibition because the world community was profoundly

[68] *Ibid* para 52.
[69] *Ibid* para 62.
[70] *Ibid* para 62.
[71] *Ibid* para 63.

divided on the matter. The Court further identified divisions between States that view the use of nuclear weapons as illegal and those that assert the legality of the threat and use of nuclear weapons. According to the Court, the former refers to a consistent practice of non-use of nuclear weapons by States since 1945 as an expression of an *opinio juris*, whilst the latter invoke the policy and practice of deterrence in support of their argument. They argue that the only reason why nuclear weapons have not been used since 1945 is the fact that "*circumstances that might justify their use have fortunately not arisen*"[72]. Under these circumstances, the Court did not consider itself able to determine the existence of such an *opinio juris*.[73]

In addition, the Court examined whether the GA resolutions that addressed nuclear weapons signified the existence of a rule of customary international law that prohibited recourse to nuclear weapons. In the Court's view, although these resolutions were "*a clear sign of deep concern regarding the problem of nuclear weapons*"[74] and revealed the "*desire of a very large section of the international community to take, by a specific and express prohibition of the use of nuclear weapons, a significant step forward along the road to complete nuclear disarmament*,"[75] they fell short of establishing a customary rule that specifically prohibited the use of nuclear weapons. Its reasoning was that "*the emergence, as lex lata, of a customary rule specifically prohibiting the use of nuclear weapons as such is hampered by the continuing tensions between the nascent* opinio iuris *on the one hand, and the still strong adherence to the practice of deterrence on the other*"[76].

Next, the ICJ addressed the question of whether recourse to nuclear weapons should be considered illegal in light of the principles and rules of international humanitarian law applicable in armed conflict and the law of neutrality. The Court stated that the cardinal principles of international humanitarian law were the distinction between combatants and non-combatants and the prohibition of causing unnecessary suffering to combatants through the use of certain weapons. According to the Court "*the fundamental rules of humanitarian law applicable in armed conflict must be observed by all States whether or not they have ratified the conventions that contain them,*

[72] *Ibid* para 66.
[73] *Ibid* para 67.
[74] *Ibid* para 71.
[75] *Ibid* para 73.
[76] *Ibid* para 73.

because they constitute intransgressible principles of international customary law"[77]. In this context, the ICJ agreed with the vast majority of States on the applicability of humanitarian law to nuclear weapons.

However, a crucial conclusion of the ICJ was that it was unable to definitively conclude whether the threat or use of nuclear weapons was lawful or unlawful in extreme circumstances of self-defence, in which the very survival of a State was at stake.[78] In this context, the Court stated that it "*cannot lose sight of the fundamental right of every State to survival, and thus its right to resort to self-defence, 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*"[79]. It is notable that these findings were based on the casting vote of the President of the Court, since the judges´ votes on this issue were split equally.[80]

Finally, the ICJ turned to the obligation to negotiate in good faith a treaty on complete nuclear disarmament in Article VI of the NPT. As mentioned above[81] the judges unanimously held that the obligation enshrined in Article VI involved "*an obligation to achieve a precise result - nuclear disarmament in all its aspects - by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith*.[82]" The Court indicated that this twofold obligation to pursue and conclude negotiations in accordance with the basic principle of good faith bound the then 182 contracting parties to the NPT, which constituted the majority of the international community.[83]

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[77] *Ibid* para 79.
[78] *Ibid* para 97.
[79] *Ibid* para 96.
[80] President Mohammed Bedjaoui of Algeria used his casting vote for including the terms of para 105 (2 E).
[81] See p. 10.
[82] Legality of the Threat or Use of Nuclear Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 226, para 96.
[83] In the Advisory Opinion on Nuclear Weapons, the Court reached the following conclusions:
2A. Unanimously, that there is in neither customary nor conventional international law any specific authorization of the threat or use of nuclear weapons.
2B. By eleven votes to three that 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 favour: President Bedjaoui (Algeria), Vice-President Schwebel (United States), Judges Oda (Japan), Guillaume (France), Ranjeva (Madagascar), Herczegh (Hungary), Shi (China), Fleischhauer (Germany), Vereshchetin (Russia), Ferrari Bravo (Italy) and Higgins (United Kingdom). Against: Judges Shahabuddeen (Guyana), Weeramantry (Sri Lanka) and Koroma (Sierra Leone).

3.2.2. Separate and dissenting opinions

All 14 judges added separate or dissenting opinions or statements to the ICJ's judgment. In general, they restricted their arguments to the material presented before the Court, and did not attempt to introduce substantially new perspectives or interpretations to the application of relevant law to the available facts.

Several judges[84] mentioned that, for the first time, the ICJ had unambiguosly stated that the threat or use of nuclear weapons was contrary to the international law of armed conflict, particularly the principles and rules of humanitarian law. Others considered that the inherent right of a State to self-defence could not be abolished by the UN Charter nor by any conventional or customary rule. Consequently, the legality of resorting to nuclear weapons *in extremis* could not be denied by the law.[85]

In his dissenting opinion, Judge Oda indicated that the question was political in nature and more subject to negotiation between States in Geneva or New York than argument before the ICJ, where an interpretation of existing international law could only be given in response to a genuine need.[86] He positioned his opinion within the context of the NPT and the continuing failure of States to conclude an international convention that prohibits any use or threat of use of nuclear weapons.[87]

2C. Unanimously, that a threat or use of force by means of nuclear weapons that is contrary to Article 2 para 4 of the UN Charter and that fails to meet all the requirements of Article 51 is unlawful.
2D. Unanimously, that a threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law, as well as with specific obligations under treaties and other undertakings, which expressly deal with nuclear weapons.
2E. By seven votes to seven, by the President's casting vote that it follows from the above-mentioned requirements that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law. However, in view of the current State of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake. In favour: President Bedjaoui (Algeria), Judges Ranjeva (Madagascar), Herczegh (Hungary), Shi (China), Fleischhauer (Germany), Vereshchetin (Russia) and Ferrari Bravo (Italy). Against: Vice-President Schwebel (United States), Judges Oda (Japan), Guillaume (France), Shahabuddeen (Guyana), Weeramantry (Sri Lanka), Koroma (Sierra Leone) and Higgins (United Kingdom).

[84] Among them were Judges Weeramantry, Koroma, Ranjeva and Vereshchetin in their dissenting and seperate opinions and declarations.

[85] Separate opinion of Judge Guillaume, para 8, https://www.icj-cij.org/public/files/case-related/95/095-19960708-ADV-01-06-EN.pdf (accessed 08 October 2021).

[86] Dissenting Opinion of Judge Oda, para 54, https://www.icj-cij.org/public/files/case-related/95/095-19960708-ADV-01-10-EN.pdf (accessed 08 October 2021).

[87] Dissenting Opinion of Judge Oda, para 24, https://www.icj-cij.org/public/files/case-related/95/095-19960708-ADV-01-10-EN.pdf (accessed 08 October 2021).

In his dissenting opinion, Judge Weeramantry presented an extensive review of law and facts and concluded that the use or threat of use of nuclear weapons was illegal "*in any circumstances whatsoever*" [88], and represented the very negation of humanitarian concerns at the heart of humanitarian law.

Vice-President Schwebel stressed in his dissenting opinion that the use of nuclear weapons did not necessarily violate humanitarian law in extreme cases of self-defence, although "*the deaths of many millions of people through indiscriminate inferno and far- reaching fallout*" could not be accepted as lawful.[89]

3.3. The Marshall Islands Case[90]

3.3.1. The claims of the plaintiffs

In the 1950s, the population and the natural environment of the Marshall Islands suffered as a result of extensive nuclear testing by the United States. Nuclear weapons literally vaporised entire islands, and the inhabitants of the remaining islands still experience radiation-related cancer and birth defects. On 24 April 2014, the Marshall Islands submitted separate applications against the nine nuclear-weapon States. In the cases against India, Pakistan and the United Kingdom, the Marshall Islands' claim was based on the optional clause declarations of these States according to Article 36 para 2 of the Statute of the ICJ as the basis for the Court's jurisdiction. Due to a lack of a consent-based jurisdictional basis to pursue its claims against China, France, Russia, the United States, Israel and North Korea, the Marshall Islands invited their acceptance of the Court's jurisdiction. Unsurprisingly, none of these States complied with this request; therefore these cases were not entered on the Court's General List.

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[88] Dissenting Opinion of Judge Weeramantry, p. 306, https://www.icj-cij.org/public/files/case-related/95/095-19960708-ADV-01-12-EN.pdf (accessed 08 October 2021).

[89] Dissenting opinon of Judge Schwebel, p. 98, https://www.icj-cij.org/public/files/case-related/95/095-19960708-ADV-01-09-EN.pdf (accessed 08 October 2021).

[90] *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, Preliminary Objections, Judgment, ICJ Reports 2016, p. 833; *Bonafé*, Establishing the existence of a dispute before the International Court of Justice: Drawbacks and implications, QIL 45 (2017), 3; *Becker*, The Dispute That Wasn't There: Judgments in the Nuclear Disarmament Cases at the International Court of Justice, 6 Cambridge J. Int'l & Comp. L. 2017, 4; *Bianchi*, Symposium on the Marshall Islands case choice and (the awareness of) its consequences: The ICJ's "structural bias" strikes again in the Marshall Islands case, AJIL unbound (2017) Vol. 111, 81; *Ranganathan*, Symposium on the Marshall Islands case nuclear weapons and the court, AJIL unbound (2017) Vol. 111 88; *Black-Branch*, International obligations concerning disarmament and the cessation of the nuclear arms race: Justiciability over justice in the Marshall Islands cases at the International Court of Justice, Journal of conflict & security law (2019) Vol. 24 (3) 449; *Kishore*, Using the unprecedented Nuclear Weapons Advisory Opinion as Precedent in the Marshall Islands Cases, Kathmandu School of Law Review (2017) 136.

In the cases against India, Pakistan and the United Kingdom the Marshall Islands claimed that they had failed to fulfil their obligation to pursue and conclude in good faith "*negotiations leading to nuclear disarmament in all its aspects under strict and effective international control*"[91] under customary international law and, where applicable, the NPT. Furthermore, the Marshall Islands asserted that efforts by the three respondent States to develop and maintain their nuclear weapons systems breached their obligation to pursue in good faith and achieve nuclear disarmament and that each respondent State was "*effectively preventing the great majority of non-nuclear-weapon States' from fulfilling their own obligations with regard to nuclear disarmament*"[92]. Despite the extensive damages suffered, the plaintiff did not seek reparations, but rather to enforce the respondents' obligations *erga omnes*.[93]

India, Pakistan and the United Kingdom filed preliminary objections that called into question the Court's jurisdiction and the admissibility of the claims. Although the formulations varied, each respondent State referred to the absence of a legal dispute - or, in the submission of the United Kingdom, a "justiciable dispute" - with the Marshall Islands at the time of the filing of the application and the fact that a judgment on the merits of the case would have no significance or legal effect.

The Marshall Islands put forward four arguments to maintain that there was in fact a dispute. Firstly, it argued that its claim was clearly "formulated in multilateral fora". Secondly, it argued that the filing of the application and the views expressed by the parties during the proceedings showed the existence of a dispute between them. Thirdly, it relied on the United Kingdom's voting records on nuclear disarmament in multilateral fora. Fourthly, it contended that the respondent's opposing view was demonstrated by its conduct both before and after the filing of the application by failing to pursue nuclear disarmament. Therefore, the applicant contended that it had clearly stated its claim.

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[91] Application instituting proceedings filed in the Registry of the Court on 24 April 2014 para 16, https://www.icj-cij.org/public/files/case-related/160/160-20140424-APP-01-00-EN.pdf (accessed 09 October 2021).

[92] *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, Preliminary Objections, Judgment, ICJ Reports 2016, p. 833, p. 60.

[93] Application instituting proceedings filed in the Registry of the Court on 24 April 2014 p. 58 (remedies).

3.3.2. The judgment

Due to the similarities of the claims, the ICJ's judgments were largely identical. The Court found that no legal, justiciable dispute existed between the Marshall Islands and the respondent State prior to the filing of the application. For such a dispute to exist, the parties had to hold opposite views on the performance or non-performance of certain obligations under international law. The ICJ held that a dispute existed when evidence showed that the respondent was aware that the applicant expressly opposed its views. In addition, the existence of a dispute was to be determined from the date of the submission of the application to the Court. Having examined the statements and conduct of the parties in each of the cases, the ICJ considered that according to those criteria they did not provide a basis for a dispute before the Court. Accordingly, there was a lack of jurisdiction under Article 36 para 2 of the Statute of the ICJ, and further consideration of any other objections and whether there was any customary international law obligation relating to nuclear disarmament was unnecessary.

3.3.2. Separate and dissenting opinions

In the *Marshall Islands Case* the Court reached its decision by nine to seven votes in the India and Pakistan cases and eight to eight votes in the United Kingdom case, with the president of the Court casting the deciding vote. The majority included President Abraham (France) and Judges Owada (Japan), Tomka (Slovakia), Greenwood (United Kingdom), Xue (China), Donoghue (United States), Gaja (Italy), Bhandari (India) and Gevorgian (Russia). Judges Owada, Tomka, Sebutinde and Bhandari wrote separate opinions, Judges Yusuf, Bennouna, Trindade, Robinson, Crawford and Bedjaoui dissenting opinions.

The dissenting opinions held that the introduction of the new criterion of awareness conflicted with the jurisprudence of the ICJ, as the existence of a dispute was to be determined by an objective assessment.[94] All dissenting judges found that a dispute

[94] Dissenting opinion of Vice-President Yusuf, para 60, https://www.icj-cij.org/public/files/case-related/160/160-20161005-JUD-01-02-EN.pdf (accessed 24 December 2021); Dissenting opinion of Judge Bennouna, p. 74, https://www.icj-cij.org/public/files/case-related/160/160-20161005-JUD-01-05-EN.pdf (accessed 24 December 2021); Dissenting opinion of Judge Trindade, paras 16, 17, https://www.icj-cij.org/public/files/case-related/160/160-20161005-JUD-01-06-EN.pdf (accessed 24 December 2021); Dissenting opinion of Judge Robinson, para 58, https://www.icj-cij.org/public/files/case-related/160/160-20161005-JUD-01-12-EN.pdf (accessed 24 December 2021); Dissenting opinion of Judge Crawford, paras 28, 29, https://www.icj-cij.org/public/files/case-related/160/160-20161005-JUD-01-13-EN.pdf (accessed 24 December 2021); Dissenting opinion of

existed between the Marshall Islands and the United Kingdom on the date the application was filed. They determined that the statements made by the Marshall Islands, in multilateral fora, at the 2013 High-level Meeting of the GA of the UN and the 2014 Conference on the Humanitarian Impact of Nuclear Weapons, were enough to objectively demonstrate that the parties held opposing views about their obligations under Article VI of the NPT.

Judge Robinson stated his disapproval of the new awareness criterion developed in the judgment, since this requirement could only be confirmatory and not serve as a prerequisite for determining the existence of a dispute. He pointed out that by introducing new criteria that had not been supported by the Court's case law so far, most of the judges in favour of this criterion detracted from the Court's role as a standing body for the peaceful settlement of disputes. He went further and added "*with this judgment, it is as though the Court has written the Foreword in a book on its irrelevance to the role envisaged for it in the peaceful settlement of disputes that implicate highly sensitive issues such as nuclear disarmament*"[95].

3.4. Common features of the ICJ's pronouncements on nuclear weapons

To fulfill its tasks, the Court is bound by the provisions of the UN Charter and its Statute. However, the Statute leaves some room for discretion with regard to the Court's performance of its duties as the principal judicial organ of the UN.[96] Judges can choose to follow a restrictive or cautious approach. *Lauterpacht* referred to this as an "*attitude of mind resulting, in addition to ordinary counsels of prudence, from the fact that courts have to apply the law and that they have to apply the law in force. They have to apply - and no more than that - the law. It is not within their province to speculate on the law or to explore the possibilities of its development*[97]". This leaves little room for the development of international law and indicates a preference for more formalistic approaches, which can be defined as "*judicial self-restraint*". By contrast, judges may also choose "*judicial activism*" or judicial action that addresses

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Judge ad hoc Bedjaoui, para 47, https://www.icj-cij.org/public/files/case-related/160/160-20161005-JUD-01-14-EN.pdf (accessed 24 December 2021).

[95] Dissenting opinon of Judge Robinson para 70, https://www.icj-cij.org/public/files/case-related/160/160-20161005-JUD-01-12-EN.pdf (accessed 10 October 2021).

[96] *Wellens*, The International Court of Justice, Back to the Future: Keeping the Dream Alive, Neth Int Law Rev (2017) 193 at 198.

[97] *Lauterpacht*, The development of International Law by the International Court (1982) p. 75.

the "*legitimate needs and aspirations of the international community*" [98] in an extensive, proactive and more conscious[99] way, which allows more room to develop relevant legal provisions. By acting more proactively, judges may consider changing societal and economic needs and adapting their jurisprudence to the changing frameworks in which they act. Certainly, exploring the limits of the conditions established in the Statute of the ICJ could also mean that the judicial function begins to encroach on the competences of other UN organs. *Zarbiyev* defined judicial activism as interference between judicial organs and political organs insofar as courts tend to decide questions that would be subject to a decision in the relevant political organs.[100]

Instead of addressing the merits of the *Nuclear Tests Cases* the Court concluded that the applicant States had achieved their objective and that there was no longer any dispute between the parties. This conclusion was derived from the content of unilateral declarations made by France, to which the Court attributed normative legal effect; this allowed the judges to refrain from addressing the highly controversial issues of testing nuclear weapons.[101] In its *Advisory Opinion on Nuclear Weapons* the Court accepted the request to deliver an Advisory Opinion and addressed some of the questions raised. Nevertheless, the judges left open the question of the use of nuclear weapons in a situation of self-defence by an extremely narrow vote and applied the *non-liquet* doctrine. In the *Marshall Islands Case,* they held that the Court had no jurisdiction under Article 36 para 2 of the Statute of the ICJ as there was no legal dispute. In each of the three pronouncements, the judges invoked various legal doctrines for the first time in the Court's history. By limiting themselves to a very formalistic approach, without considering the negative attitude of many States towards nuclear weapons, they refused to proceed to the merits of the cases and thus exercised judicial self-restraint.

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[98] *Kooijmans*, The ICJ in the 21st century: judicial restraint, judicial activism, or proactive judicial policy, International and Comparative Law Quarterly vol 56, October 2007 741 at 743.
[99] *McWhinney*, The International Court of Justice and International Law-Making: The Judicial Activism/Self-Restraint Antinomy, 5 Chinese J. Int'l L. 3 (2006) 3 at 11.
[100] *Zarbiyev*, Judicial activism in international law - a conceptual framework for analysis, Journal of International Dispute Settlement, 2012-07-01, Vol. 3 (2) 247 at 250.
[101] On unilateral declarations under international law see e.g. *Saganek*, Unilateral acts of States in public international law (2016); *Kassoti*, The Juridical Nature of Unilateral Acts of States in International Law (2015); *Eckart/Tomuschat*, Promises of States under international law (2012); *Rubin*, The International Legal Effects of Unilateral Declarations, The American Journal of International Law, Jan. 1977, Vol. 71, No. 1, 1.

4. An attempt to explain judicial self-restraint exercised by the judges in the field of nuclear weapons

4.1. Historical overview of the ICJ's place in the international legal system

According to Article 92 of the UN Charter, the ICJ is the principal judicial organ of the UN. It functions in accordance with the Charter and the annexed Statute, which is based on the Statute of its predecessor, the Permanent Court of International Justice (PCIJ), and forms an integral part of the Charter.

In 1920, the PCIJ was founded on the initiative and within the framework of the League of Nations but was a separate institution. The aim of the PCIJ was to introduce a World Court with the power to exercise universal jurisdiction in all legal disputes between all States.[102] However, the jurisdiction of the PCIJ was optional and thus depended on the conflicting parties' willingness to recognise it and submit disputes to the Court. The PCIJ was dissolved in 1946.

After long discussions on whether to re-establish the PCIJ or create a new institution, the United States, the United Kingdom, the Soviet Union and China - the Four Great Powers at the end of World War II - chose the latter option. Ultimately, the ICJ was established as the principal judicial organ of the UN at the San Francisco Conference in 1945.

4.2. The ICJ's functions as the UN's principal judicial body

Pursuant to Article 38 para 1 of the Statute of the ICJ the Court's function is to decide legal disputes submitted to it in accordance with international law. The 15 judges are obliged to apply international law based on the sources listed in Article 38 para 1 to contentious cases and requests for Advisory Opinions. They must apply existing law, not create new law. However, the application and development of existing law cannot easily be separated from each other. The law to be applied consists of rules "*that some claim to know and others continue to discover*"[103]. Thus, the application of legal

[102] *Simma/Khan/Nolte/Paulus (eds.)*, The Charter of the United Nations: A Commentary, Vol, II, 3rd ed. (2012) Art 92 para 2.
[103] *Lachs*, Some reflections on the contribution of the international Court of Justice to the development of international law, Syracuse Journal of International Law and Commerce, Vol. 10, No. 2 [1983], Art. 2 239 at 241.

provisions often involves aspects of the development of the law, at least to a certain extent. Therefore, judges play a vital role in the life of the law.[104] Whether the judges of the ICJ only apply the law in a rather static way or may or should make a contribution to the development of international law is relevant for answering the central question of this thesis.

The ICJ has two ways of addressing issues of international law. Firstly, it may hand down binding judgments in contentious proceedings. However, according to Article 59 of the Statute of the ICJ, they have no binding force except between the parties and with respect to a particular case. Secondly, the GA or the SC, as well as other UN organs and specialised agencies, which may at any time be so authorised by the GA, may request the ICJ to deliver an Advisory Opinion pursuant to Article 96 of the UN Charter and Articles 65 to 68 of the Statute of the ICJ. These Opinions are non-binding and serve as guidance on a certain point of international law. Therefore they may be referred to as "soft law" since there would be no legal consequences in the event of a breach.

The reasoning in judgments in contentious cases is strictly limited to the facts and arguments presented by the parties to the dispute. The judicial process seems to have an essentially reactive character[105] and takes place after a certain situation has occurred. The process of settling disputes through judicial means implies the task of ascertaining and determining the applicable law. By fulfilling this task, the Court must clarify underlying legal problems and establish the relevant rules of international law.[106] The Court itself has emphasised this aspect of its judicial function in the *Northern Cameroons Case,* stating that its function was "*to state the law*" and establish certainty with regard to legal relations between the disputing parties.[107]

In principle, the creation of law should be strictly differentiated from the development of existing law. Creating law can be defined as making new, amending or abrogating existing legal rules. Developing the law may be understood as interpreting existing

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[104] *Ibid* p. 241.
[105] *Mayr/Mayr-Singer*, Keep the Wheels Spinning: The Contributions of Advisory Opinions of the International Court of Justice to the Development of International Law, ZaöRV (76) 2016 425 at 435.
[106] *Wittich*, The Judicial Functions of the International Court of Justice in International Law between Universalism and Fragmentation (Festschrift in Honour of Gerhard Hafner) (2008) 981 at 991.
[107] *Case concerning the Northern Cameroons (Cameroon v. United Kingdom)*, Preliminary Objections, Judgment of 2 December 1963: ICJ Reports1963, p. 15, 33f.

law by a more flexible and dynamic exploration of the limits of existing legal rules. To this end, judges examine and determine the intended meaning of a certain provision. Because of their different nationalities and backgrounds, this aspect may be more relevant in international than in national courts. Some judges interpret the law by focusing on the "ordinary" meaning of a provision, whilst others apply wider rules of interpretation and are often said to "legislate from the bench".

A comparison with other international courts shows that the European Court of Human Rights (ECtHR) with the more solid basis of its jurisdiction[108] developed its own method of evolutive interpretation that considers the European Convention on Human Rights (ECHR) as a "living instrument" which must be adapted to changing social realities through a dynamic interpretation particularly relevant in the field of human rights, which is subject to rapid changes in social reality.[109] By applying this approach, the judges of the ECtHR recognise that the law changes through societal processes even when written provisions have remained the same.[110] Thus, they contribute to the development of the law. In many cases, the statements made in a judgment can serve as a basis to develop legal arguments in future cases.[111]

As regards the ICJ, whenever it addresses questions of international law that have not yet been authoritatively decided, its decision inevitably features a measure of development.[112] *Akande´s* arguments follow this direction, but he goes a bit further by contending that the judicial function always involves a law-making function to some extent. According to this view, the ascertainment, interpretation and application of a legal provision to the facts of a case require a certain degree of creativity, which in itself justifies the assertion that judges are also law-makers.[113] By contrast, the Court

[108] The Court has jurisdiction amongst the member States of the Council of Europe which includes almost every country in Europe. The jurisdiction of the Court is generally divided into inter-state cases, applications submitted by individuals against contracting States, and advisory opinions. All Council of Europe Member States have ratified or acceded to the European Convention on Human Rights, thereby accepting the compulsory jurisdiction of the Court.
[109] *Binder*, The European Court of Human Rights and the Law of Treaties: Sign of Fragmentation or Unity? in *Binder/Lachmayer (eds.)*, The European Court and Public International Law – Fragmentation or Unity? (2014) 43 at 53.
[110] *Venzke*, The Role of International Courts as Interpreters and Developers of the Law: Working Out the Jurisgenerative Practice of Interpretation, 34 Loy. L.A. Int'l & Comp. L. Rev. 99 (2011) 99 at 105.
[111] *Bogdandy/Venzke,* Beyond Dispute: International Judicial Institutions as Lawmakers, German Law Journal [Vol. 12 No. 05 2011] 979 at 987.
[112] *Wittich*, The Judicial Functions of the International Court of Justice in International Law between Universalism and Fragmentation (Festschrift in Honour of Gerhard Hafner) (2008) 981 at 995.
[113] *Akande*, The Competence of International Organizations and the Advisory Jurisdiction of the International Court of Justice, EJIL 9 (1998), 437 at 464.

itself has stated that "*it is clear that it cannot legislate*"[114]. In the same vein, some authors have denied the creation of new law by the ICJ.[115]

Advisory Opinions play a unique role within the framework of international law. Typically, courts do not provide advice but rather focus on the legally binding settlement of disputes. Advice is normally given by lawyers or specified institutions.[116] Non-binding Advisory Opinions are intended to clarify rules of international law or establish basic doctrines. Organisations that are authorised to seek advice will only do so when the meaning of a treaty provision or the state of customary international law is controversial. In contrast to contentious proceedings, the scope of an Advisory Opinion is much broader with regard to the issues addressed, and judges enjoy greater freedom in formulating their statements in Advisory Opinions by referring to aspects that are only indirectly related to the facts and arguments of the respective questions.[117] Advisory Opinions arguably carry high authority[118] and are suitable for sustainably influencing international law. States and international organisations that comply with the content of Advisory Opinions are presumed to act in accordance with international law.

For example, in its *Genocide Convention Advisory Opinion*[119] the Court addressed the admissibility and effect of reservations to multilateral treaties in the event of objections or lack thereof by other parties to the treaties. The principal finding of the ICJ, which emphasised the special character of the convention, was that "*a State which has made ... a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as being a party to the*

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[114] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, ICJ Reports 1996, p. 226, para 18.

[115] *Anastassov*, Are Nuclear Weapons Illegal? The Role of Public International Law and the International Court of Justice, Journal of Conflict & Security Law (2010) 65 at 86; *Lachs*, Some reflections on the contribution of the international Court of Justice to the development of international law, Syracuse Journal of International Law and Commerce, Vol. 10, No. 2 [1983], Art. 2 239 at 239; *Oellers-Frahm*, Lawmaking Through Advisory Opinions?, German Law Journal 2011 (12) 1033 at 1054; *Pellet*, Shaping the Future of International Law: The Role of the World Court in Law-Making in *Pellet/ Arsanjani/ Wiessner/Cogan/ Sloane (eds.)* Looking to the Future (2011) 1065 at 1082 f.

[116] *Lachs*, Some Reflections on the Contribution of the International Court of Justice to the Development of International Law, Syracuse Journal of International Law and Commerce 1983 (10) 239 at 246.

[117] *Lachs*, Some Reflections on the Contribution of the International Court of Justice to the Development of International Law, Syracuse Journal of International Law and Commerce 1983 (10) 239 at 250.

[118] *Mayr/Mayr-Singer*, Keep the Wheels Spinning: The Contributions of Advisory Opinions of the International Court of Justice to the Development of International Law, ZaöRV 2016 (76) 425 at 430.

[119] *Reservations to the Convention on Genocide*, Advisory Opinion, ICJ Reports 1951, p. 15.

Convention if the reservation is compatible with the object and purpose of the Convention"[120]. The International Law Commission (ILC) addressed reservations to multilateral treaties from both the perspectives of codification and the progressive development of international law since 1950.[121] In its reaction to the Advisory Opinion the ILC initially rejected the criterion of compatibility with the object and purpose of the convention, arguing that "*integrity and the uniform application of the convention are more important considerations than its universality*"[122] and that the criterion was too subjective to be generally applied to multilateral conventions.[123] It was only in 1962 that the ILC accepted the "compatibility rule", still with a certain amount of hesitation, and incorporated it into its draft articles[124] that resulted in Article 19 of the Vienna Convention on the Law of Treaties.[125] This indicates that the Court had a broader function in triggering the process that led to a binding provision in a treaty where there might have been ambiguity before.[126]

4.3. The ICJ's optional jurisdiction

There are three procedural options for the recognition of the ICJ's jurisdiction. Firstly, parties may refer a particular existing dispute to the Court by means of a special agreement. To this end, they conclude a "*compromis*", which specifies the framework and terms of the dispute[127]. This means that parties know the stakes of the dispute, the likelihood of a favourable or unfavourable decision, the identity of the other party and their role in the proceedings - plaintiff or defendant - in advance[128]. This first option is

[120] *Ibid* p. 29.
[121] By resolutions 478 (V), adopted on 16 November1950, the General Assembly assigned the ILC to conduct a study on this issue. See ILC Yearbook 1951/Vol. II, p. 125 para 12.
[122] ILC Yearbook 1951/Vol. II, p. 128 para 22.
[123] In this context, the permissibility and the role of reservations to treaties was discussed when the Vienna Convention on the Law of Treaties was drafted. Some members of the ILC feared that reservations would prejudice the integrity of the treaty, while others defended the position that there was a political need to allow reservations, which could pave the way for more participants in the sense of universalism of the treaty. *Ferreira*, The impact of treaty reservations on the establishment of an international human rights regime, The Comparative and international law journal of southern Africa, 2005-07-01, Vol.38 (2) 148; *Ziemele/Liede*, Reservations to Human Rights Treaties: From Draft Guideline 3.1.12 to Guideline 3.1.5.6, The European Journal of International Law Vol. 24 no. 4 1135.
[124] Draft Articles on the Law of Treaties 1966, ILC Yearbook 1962/Vol. II, p. 175, para 81.
[125] Vienna Convention on the Law of Treaties 1969, 23 May 1969, https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf (accessed 15 November 2021).
[126] *Mayr/Mayr-Singer*, Keep the Wheels Spinning: The Contributions of Advisory Opinions of the International Court of Justice to the Development of International Law, ZaöRV 2016 (76) 425 at 447.
[127] *Shaw*, International Law (2017)[8] 817.
[128] *Neuhold*, The Law of International Conflict (2015) 186.

the most predictable one for parties to the dispute in terms of stakes and the expected results.

Secondly, the parties may include a compromissory clause in a bilateral or multilateral treaty in which they agree to refer all future disputes about the application and interpretation of the treaty in question to the ICJ (Article 36 para 1, 37 of the Statute of the ICJ).[129]

Thirdly, Article 36 para 2 of the Statute of the ICJ contains the so-called optional clause: "*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*.". This clause is the product of political compromise during the establishment of the ICJ[130] and provides for the most far-reaching acceptance of the ICJ's jurisdiction in advance. The compromise in Article 36 para 2 was necessary when the Great Powers opposed the ICJ's general compulsory jurisdiction over international disputes, which less powerful States were ready to accept, expecting to become more equal to the Great Powers. In turn, the Great Powers refused to risk their power and influence by accepting a comprehensive clause on compulsory jurisdiction that would have subjected them to unpredictable proceedings.[131] This was reflected in the fact that most of the Great Powers either withdrew their acceptance of the ICJ´s jurisdiction pursuant to Article 36 para 2 or never accepted it at all. From the perspective of the parties jurisdiction according to Article 36 para 2 of the Statute of the ICJ carries the greatest risk. Furthermore, parties do not know t the issues and stakes of future disputes, the identity of the other parties and whether they will act as plaintiff or defendant.[132]

[129] *Neuhold*, The Law of International Conflict (2015) 187. *Charney*, Compromissory Clauses and the jurisdiction of the International Court of Justice, The American journal of international law, 1987-10, Vol. 81 (4), 855.
[130] *Rosenne*, The Law and Practice of the International Court (1965) 364-367.
[131] *Scott/Carr*, The ICJ and compulsory jurisdiction: The case for clausing the clause, The American Journal of International Law , Jan., 1987, Vol. 81, No. 1, 57 at 57 f.; *Lloyd*, A Springboard for the Future: A Historical Examination of Britain's Role in Shaping the Optional Clause of the Permanent Court of International Justice, 79 AM. J. Int'l L. (1985) 28 at 29.
[132] *Neuhold*, The Law of International Conflict (2015) 187.

The common element in the three options is, that the ICJ's jurisdiction is based on the parties' consent, which must be clearly expressed.[133] Over the past few decades, several States have withdrawn their acceptance of jurisdiction under the optional clause, including the United States during the *Nicaragua* proceedings in 1985, France during those in the *Nuclear Tests* cases in 1974.[134] Since then, there has been no visible progress towards the declarations under the optional clause. Today, 73 States have recognised the ICJ's compulsory jurisdiction according to Article 36 para 2 of the Statute.[135] Notably, the United Kingdom is the only permanent member of the SC that is subject to the Court's general jurisdiction.

According to *Lauterpacht*, optional jurisdiction and its historical development cannot be underestimated when discussing potential reasons for the judicial self-restraint exercised by international judges. The ICJ finds itself captured between the exercise of its judicial function and the risk of a curtailment of its activities. Whenever a judgment is handed down in a contentious case, a party dissatisfied with the decision can express its dissatisfaction through a withdrawal of its recognition of the Court´s jurisdiction under the optional clause clause, a refusal to conclude a *compromis* or hesitation to invoke compromissory clauses at any time. This problem does not exist, for example, for the European Court of Justice in Luxembourg or the European Court of Human Rights; their jurisdiction flows from their basic treaties, and judges are not forced to consider any of the disputing parties' expectations.

Because the ICJ's jurisdiction is based on State consent, the predictability of judgments becomes important. In national systems, precedent constitutes the starting point of the judges' reasoning, particularly in common law States due to the *stare decisis* principle.[136] In international law, the role precedent is limited by Article 59 of the Statute of the ICJ, which States that the Court's decision has no binding force except between the parties and with respect to a particular case. Furthermore, according to Article 38 para 1 of the Statute of the ICJ judicial decisions are only subsidiary means for the determination of rules of law. Yet respecting precedent is a

[133] *Corfu Channel Case*, Judgment on Preliminary Objection: ICJ Reports 1948 p. 15 p. 26.
[134] https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=I4&chapter=1&clang=_en#9 (accessed 21 August 2021).
[135] https://www.icj-cij.org/en/declarations (accessed 21 August 2021).
[136] *Guillaume*, The Use of Precedent by International Judges and Arbitrators, Journal of international dispute settlement, 2011-02, Vol.2 (1), 5 at 5.

guarantee of certainty and equality in the treatment of litigants. If judicial decisions in international law are not predictable, additional obstacles to concluding a *compromis* or compromissory clauses between States or accepting optional jurisdiction under Article 36 para 2 of the Statute of the ICJ will be created. However, constantly following precedent also brings the law to a standstill and prevents it from progressing according to the new demands of society. Therefore, judges must strike a balance between the necessary certainty and predictability of cases and development of the law.[137]

4.4. Approaches of national courts to political matters

The issue of nuclear weapons is one of the most controversial and highly political matters examined by the ICJ in its history.[138] To explain why ICJ judges restrictively address issues concerning nuclear weapons, the structural peculiarities of the international legal system that are different from their domestic counterparts ought to be examined.

4.4.1. The theory of the separation of powers in domestic systems and different approaches of supreme courts to political issues

In national societies, history has shown that the unlimited concentration of power in the hands of a single individual or group involves high potential for absuse of power. In the 18th century, the French social and political philosopher Montesquieu developed the concept of "separation of powers", which divides a State's powers into three branches: the legislative branch, the executive branch and the judicial branch. Each branch must only perform the tasks that it has been assigned and must not interfere with the tasks of other branches. The aim of the separation of powers is to ensure that none of the branches can become so powerful that it can destroy the system as a whole. The legislative branch passes laws and is represented by national parliaments elected by the people. The judicial branch independently and impartially exercises judicial power and decides contentious cases by applying the laws created by the legislative branch. Finally, the executive branch applies and enforces the law.

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[137] *Ibid* 6.

[138] *McNeill*, The International Court of Justice Advisory Opinion in the Nuclear Weapons Cases — A First Appraisal in International Review of the Red Cross 1997 316, 103 at 116; *David*, The Opinion of the International Court of Justice on the Legality of the Use of Nuclear Weapons in International Review of the Red Cross 1997 316, para 17 (https://www.icrc.org/en/doc/resources/documents/article/other/57jnfl.htm (accessed 19 October 2021).

Whilst this system appears to be well-structured *prima facie*, difficulties may arise when delineating the scope of the powers and functions of each branch.

For example, the so-called political question doctrine was developed in the jurisprudence of the United States. According to this doctrine, national courts should refrain from hearing a case if they conclude that it presents a political question and that another branch within the system of powers is competent or appropriate to address the issue. The origins of the doctrine lie in the *Marbury v. Madison* case[139].[140] The latter was subsequently reinforced in the landmark decision *Baker v. Carr*[141] in 1962, when the U.S. Supreme Court developed the six criteria that should be considered when deciding whether a dispute is justiciable:

> *Prominent on the surface of any case held to involve a political question is found:*
> *(1) a textually demonstrable constitutional commitment of the issue to a coordinate political department;*
> *(2) or a lack of judicially discoverable and manageable standards for resolving it;*
> *(3) or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;*
> *(4) or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;*
> *(5) or an unusual need for unquestioning adherence to a political decision already made;*
> *(6) or the potentiality of embarrassment from multifarious pronouncements by various departments on one question*.[142]

This means that the Court itself must decide whether a question is justiciable. Although the U.S. Supreme Court defined the above-mentioned guidelines, there is

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[139] *U.S. Reports: Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), https://www.loc.gov/item/usrep005137/ (accessed 20 October 2021).
[140] *Cole/Nolan/Doyle*, Constitutional Inquiries: The Doctrine of Constitutional Avoidance and the Political Question Doctrine (2015) 41.
[141] *Baker v. Carr*, 369 U.S. 186 (1962), https://www.loc.gov/item/usrep369186/ (accessed 20 October 2021).
[142] *Ibid* p 217.

still room for interpretation in the application of the political question doctrine due to a certain degree of flexibility present in the criteria.[143] Through the exercise of its discretion, the Court could refuse cases and develop a method of judicial self-restraint during the application of the doctrine.

Similar to the United States, the Constitution of Austria is based on the principle of the separation of powers. Therefore, the Austrian Constitutional Court is not competent to engage in the law-making process but to act as "negative legislator", which means that the primary power is the review of laws in accordance with the constitution's relevant provisions.[144] As a result of these reviews, it can only remove norms from the legal order. There is no leeway for the creation of new rules because this task is reserved for "positive legislators", namely the parliament and – under certain limited circumstances – the government. If the Court acted as positive legislator, it would compete with the elected parliament (i.e. the legislative branch) and claim powers that does not belong to the judicial branch.[145] Over the past decades, the jurisprudence of the Austrian Constitutional Court suggests that its self-perception has shifted from that of a negative legislator to a positive legislator.[146] Consequently, the scope of action of the legislative branch has been increasingly challenged. Based on a material interpretation of fundamental rights[147], the Austrian Constitutional Court has extended its competences and corrected assessments made by the legislative branch when it viewed this as required by constitutional law. The Court seems to demand that the individual values protected by fundamental rights be made as effective as possible. In particular, human dignity appears to be a "general evaluation principle" ("allgemeiner Wertungsgrundsatz") in the Austrian legal system.[148] In 2017, the Austrian Constitutional Court ruled on provisions regarding same-sex marriage

[143] *David*, Passport to Justice: Internationalizing the Political Question Doctrine for Application in the World Court, 40 Harv. Int'l. L. J. 81 (1999) 81 at 132.
[144] *Gamper*, Constitutional Courts and Judicial Law-Making: Why Democratic Legitimacy Matters, 4 Cambridge J. Int'l & Comp. L. (2015) 423 at 425.
[145] *Wimmer*, Von "gelungenen" und "misslungenen" Entscheidungen in den ersten 100 Jahren des Verfassungsgerichtshofes, ZÖR 2021, 143 at 149.
[146] A change in the interpretation of fundamental rights by the Austrian Constitutional Court has taken place since the 1980s. The adjudication of fundamental rights became more oriented on material principles and social values. Judges began to consider the changing environment, expanded the criteria of their examination and tried to adapt the law to the changing environment. This caused the transition from judicial self-restraint (a self-restrained judge is someone who chooses the option that best preserves the previous legal situation) to the opposite, the so-called judicial activism.
[147] This means the consideration of different social values in the adjudication of fundamental rights.
[148] *Kirste*, Das B-VG als Werteordnung - Zum Abschied vom Mythos einer wertneutralen Spielregelverfassung? ZÖR 2020, 173 at 180.

and annulled different regulations for heterosexual and same-sex couples; as a result, same-sex couples could get married.[149] This decision faced harsh criticism.[150] According to the critics, the judgment would not only annul a legal rule but also create a new legal situation with regard to a social question that had not been addressed by the legislative branch. Accordingly, the repeal of a legal provision should only result in a return to the status quo ante, not new legal rules.[151] By creating a new legal situation (namely, that same-sex couples may marry in the future), the constitutional court acted as a positive legislator and exceeded its competences. Another example of the Austrian Constitutional Court acting as a positive legislator was the abolition of criminal liability for assisting suicide,[152] which fundamentally changed the Austrian legal landscape with regard to euthanasia.

It could be argued that legal effects must be accepted to a certain extent whenever a constitutional court annuls a provision.[153] Nevertheless, critical voices have raised sound arguments by emphasising the organisation of the democratic State based on the rule of law and the fact that exceeding their competences may entail a loss of legitimacy for the involved courts because they should be above politics.[154] Based on these considerations, another view would be to regard the Constitutional Court's competences as more far-reaching from the outset and in relation to the control of the other branches' activities. The emergence of the "constitutional legislator" gradually broadened the powers of the Constitutional Court over the past 100 years and enabled it to play a stronger and more prominent role[155]. This means that the law is no longer the exclusive product of the parliament and the government but also of constitutional courts, which become actors in the law-making process,[156] including decisions on highly relevant political questions.

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[149] VfGH 04.12.2017, G 258-259/2017-9.
[150] See e.g. *Ruppe*, Ehe für alle - Grundrechtejudikatur auf neuen Wegen? in JBl 2018, 428.
[151] *Cornides*, Ist dem VfGH die "Öffnung" der Ehe missglückt?, ZÖR 2018, 239 at 242.
[152] VfGH 11.12.2020, G 139/2019-71.
[153] See also *Cornides*, Ist dem VfGH die "Öffnung" der Ehe missglückt?, ZÖR 2018, 239 at 243.
[154] *Wimmer*, Von "gelungenen" und "misslungenen" Entscheidungen in den ersten 100 Jahren des Verfassungsgerichtshofes, ZÖR 2021, 143 151.
[155] *Eberhard*, The Austrian Constitutional Court after 100 years: Remodelling the Model? ZÖR 2021, 395 at 396.
[156] *Safta*, Developments in the Constitutional Review - Constitutional Court between the Status of Negative Legislator and the Status of Positive Co-Legislator, 1 Persp. Bus. L.J. 1 (2012) 1 at 3.

4.4.2. Separation of powers (or lack thereof) in the international legal system

Compared to the constitutions of various nation States, the UN Charter does not assign exclusive powers to any of UN organs. To date, whether the UN Charter (as the constituent document of the UN) can be considered the constitution of the UN remains controversial.[157]. The question arises of whether UN organs can be compared to the relevant branches of domestic systems according to the separation of powers.

The SC can be described as the UN organ vested with executive power. It is responsible for maintaining international peace and security, and its decisions are highly important, including universally binding sanctions and the use of military force.[158] When fulfilling its tasks, the SC is bound by the provisions of the UN Charter and must act in accordance with the purposes and principles of the UN and the broader principles of justice and international law.[159]

Although the UN Charter does not provide for a legislator in the true meaning of the term,[160] the legislative branch could be represented by the GA, apart from States concluding bilateral and multilateral treaties. The GA comprises all member States of the UN and has the authority to discuss any question or matter that falls within the scope of the UN Charter and make recommendations to members of the UN, the SC or both.[161] The rules that are applicable to the GA's procedures can be compared to those that are applicable to legislative branches in domestic systems. The most comparable criterion is the adoption of resolutions by a majority vote. That being said, the GA lacks a crucial aspect of the legislative branch: except decisions on internal matters like the budget, it cannot pass laws or decisions binding on member States.

Identifying the ICJ as the judicial branch of the UN is relatively simple. The Court's tasks are to deliver binding decisions according to the applicable law, systematised

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[157] See e.g. *Doyle*, Dialectics of a global constitution: The struggle over the UN Charter in European Journal of International Relations 18 (4) 601; *Paulus*, The International Legal System as a Constitution, in *Dunoff/Trachtman (eds.)* Ruling the World? Constitutionalism, International Law, and Global Governance (2009) 100; *Tomuschat*, "International Law as the Constitution of Mankind" in *International Law on the Eve of the 21st Century: Views from the International Law Commission* (United Nations, 1997) 37 at 37.

[158] *Cullen*, Separation of Powers in the United Nations System?, International Organizations Law Review, 17 (2020) 492 at 506.

[159] *Ibid* 508.

[160] *Paulus*, The International Legal System as a Constitution, in *Dunoff/Trachtman (eds.)* Ruling the World? Constitutionalism, International Law, and Global Governance (2009) 100.

[161] Articles 10, 12 para 1 of the UN Charter.

court proceedings, assessments of evidence and determinations of law that are independent of and free from political bias. Tellingly, the ICJ is based in The Hague, separate from the UN's political branches in New York.[162] As described above, the ICJ has no *a priori* compulsory jurisdiction, and the binding effect of its judgments is limited to the parties to the dispute.

As shown in the previous paragraphs, UN organs may be assigned to the three branches encompassed by the separation of powers, albeit with some difficulty. Overall, reasons against applying the concept of the separation of powers to the international system prevail. Firstly, the separation of the powers aims to prevent the concentration of power against individuals. The international community does not pose such a risk. International law addresses nation States vested with national sovereignty, and the entire system is based on the consent of States. *Cullen* made a substantial argument by raising the issue of targeted sanctions regime towards individuals. The SC began to make direct decisions over individuals through its amended sanctions programme, which was implemented in the late 1990s and early 2000s.[163] However, it should be noted that this is another argument for the non-applicability of the concept of separation of powers because it is exactly the SC's role in the system of governance of the UN, which does not allow to speak of separation of powers. The SC acts as the executive branch and in addition exercises the judicial function in the realm of targeted sanctions towards individuals, which is a contradiction in itself and violates the rule of law as the centrepiece of the concept of separation of powers.[164].

The lack of an international legislator means that there is no central body to to create rules on political issues – except for the GA, which cannot pass binding laws. The States that are most likely to be regarded as legislators only act based on consent,

[162] *Cullen*, Separation of Powers in the United Nations System?, International Organizations Law Review, 17 (2020) 492 at 520.

[163] According to Article 41 UN Charter the Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations. This regime has shown that imposing sanctions may lead to sanctioning the entire population and not only responsible individuals. Therefore, targeted sanctions aimed at individuals or groups per se were increasingly imposed such as travel bans or the freezing of bank accounts.

[164] In addition, there are no remedies against targeted sanctions and therefore no right to a fair trial (Article 6 ECHR).

which has often proved an impediment to the further development of international law. The non-applicability of the concept of separation of powers may allow the ICJ to act more progressively in all those questions that relate to political issues. As domestic constitutional courts have shown (albeit exceeding competences by them is in general not to be agreed with), the ICJ should refrain from dismissing or declaring cases non-justiciable due to their alleged (partially) political nature for the benefit of a few States that aim to uphold their national interests. Instead, the ICJ should integrate community interests on a broader basis; consider cultural, economic, political and societal developments in the global community; and adapt its jurisprudence when the international framework evolves. This does not mean that the ICJ should disregard its Statute. The judges can and must still apply the law to cases brought before them, but they should also have enough leeway to develop the law without creating new provisions. They can look beyond existing legal provisions, critically challenge existing doctrines and yardsticks that underpin established legal rules and scrutinise the principles and structure of international law and jurisprudence. A judgment in a contentious case would still only be binding between the parties. However, the pressure put on States made in a clear pronouncement by the Court may not be underestimated and could further influence the political process. This was the case in the ICJ's *Namibia Advisory Opinion*[165], in which the Court decided that the continued presence of South Africa in Namibia was illegal and that South Africa was under an obligation to immediately withdraw its administration. This pronouncement contributed to the end of apartheid, though this was not solely due to the Court's efforts; rather, it required the common action of all institutions of the UN.

4.5. The ICJ's composition

4.5.1. Judge's nationality and election process

Pursuant to Article 3 para 1 of the Statute of the ICJ, the Court comprises 15 members. No two members may be nationals of the same State, and each judge is elected for a nine-year term and eligible for re-election (Article 13 para 1). The Statute of the ICJ further establishes some key qualifications that a candidate ought to possess to be elected as an international judge. Article 2 stipulates that judges should

[165] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1979)* , Advisory Opinion, ICJ Reports 1971, p. 16.

be independent and of high moral character; and have the qualifications required in their respective countries to be appointed to the highest judicial offices, or are jurisconsults of recognised competence in international law. The Statute also requires that States should ensure that the main forms of civilisation and legal systems of the world are represented (Article 9). Although no State is legally entitled to a seat on the ICJ bench, the Court has in practice always[166] included nationals from the five permanent members of the SC.[167] The process of appointing judges has both legal and political aspects.[168] According to the Root-Phillimore plan of 1920,[169] members of the Court are elected by the SC and the GA in secret votes[170] from a list of candidates nominated by national groups in the Permanent Court of Arbitration (Article 4 para 1). For a candidate to be elected, he or she must receive an absolute majority of votes in each body (Article 10).

Although a candidate´s personal qualifications are of high importance, the question of nationality is currently the most delicate aspect.[171] As noted above, the permanent members of the SC have always been represented on the bench.[172] In fact, the Great Powers expected from the outset that their nationals would be elected to the Court, with the aim of reflecting the composition of the SC.[173] This raises the question of whether the election of ICJ judges is driven by political considerations and whether their nationality influences their decisions. It should be noted that governments may want to nominate judges who are more likely to reach decisions that coincide with

[166] With the exception, that between 1967 and 1985 there was no Chinese judge with a seat on the Court. Further, this unwritten rule appears to have ceased in 2017 when no British judge was elected.
[167] *Zimmermann/Tomuschat/Oellers-Frahm/Tams (eds.)*, The Statute of the International Court of Justice: A Commentary, 2nd ed. 2012 Art 2 para 108.
[168] *Shaw*, International Law 2017[8] 804.
[169] Elihu Root was an American lawyer, Republican politician and Statesman who served as Secretary of State and Secretary of War in the early twentieth century. Walter Phillimore was a British lawyer and judge. Both represented their States in the commission, which prepared the Statute of the PCIJ. Their plan profoundly influenced the drafting of the Statute in 1920. In their proposal they maintained that judges of the nationality of a party to the case should sit. They further recommended that nominations of international judges be made not by governments themselves but by national groups of four lawyers appointed as potential arbitrators by the member States of the Permanent Court of Arbitration. *Gordon*, The ICJ: On Its Own, 40 Denv. J. Int'l L. & Pol'y (2011) 74 at 86.
[170] Usually, the General Assembly and Security Council meet simultaneously for this purpose. There may be several rounds of voting by secret ballot.
[171] *Lachs*, Some Reflections on the Nationality of Judges of the International Court of Justice, 4 Pace Y.B. Int'l L. 49 (1992) 49 at 58.
[172] *Robinson*, Politics and Law in International Adjudication, 97 AM. Soc'y Int'l. L. Proc. (2003) 277 at 279.
[173] *Lachs*, Some Reflections on the Nationality of Judges of the International Court of Justice, 4 Pace Y.B. Int'l L. (1992) 49 at 59.

their specific political interests. Thus, they may tend to prefer candidates who share similar views on judicial philosophy, public international law or certain political issues.[174] Governments are likely to appoint members of their national groups, and the latter tend to nominate candidates, who generally support the government's positions, not those of its opponents.

4.5.2. Independence, impartiality and national bias and interests

Regarding international judges, independence can be defined as decision making that purely relies on the facts and law related to a dispute, free from any kind of pressure.[175] The only external influence that judges should be exposed to is the persuasive legal reasoning of the parties to the dispute and their representatives.[176]

However, independence should not be confused with impartiality. Whereas independence refers to external pressure, impartiality is rooted in a judge's mindset. Acting impartially means to perform one's duties without any kind of favour, bias or prejudice,[177] a subjective element. Despite this distinction, independence and impartiality are inextricably linked. Whenever judges are subject to external influences, their ability to decide the case before them without bias is called into question. Similarly, if external influences lead a judge's decision in favour of one of the parties, he or she would fail to act impartially.[178] Both, the independence and impartiality of judges are fundamental to the legitimacy of any court and prerequisites for maintaining the rule of the law.

However, in practice, there are often limitations to the full independence and impartiality of judges. As Article 9 of the Statute of the ICJ states, judges should represent the main forms of civilisation and the world's principal legal systems. As a result, judges differ – in addition to their political and ideological orientation – in their education, legal training and practice. Many candidates have served as legal advisors

[174] *Creamer/Godzimirska*, The Job Market for Justice: Screening and Selecting Candidates for the International Court of Justice, 30 LJIL (2017) 947 at 955.
[175] *Zimmermann/Tomuschat/Oellers-Frahm/Tams (eds.)*, The Statute of the International Court of Justice: A Commentary, 2nd ed. 2012 Art 2 para 9.
[176] *Dannenbaum*, Nationality and the International Judge: The Nationalist Presumption Governing the International Judiciary and Why it Must be Reversed, 45 Cornell Int'l L.J. (2013) 77 at 108.
[177] *Zimmermann/Tomuschat/Oellers-Frahm/Tams (eds.)*, The Statute of the International Court of Justice: A Commentary, 2nd ed. 2012 Art 2 para 13.
[178] *Dannenbaum*, Nationality and the International Judge: The Nationalist Presumption Governing the International Judiciary and Why it Must be Reversed, 45 Cornell Int'l L.J. (2013) 77 at 110.

for their national governments. Candidates need the support of their State throughout the election process; thus, States often invest considerable political capital and also financial resources in the campaign process.[179] This may lead judges to further loyalty to their State and subsequently to national bias. As a result, independence and impartiality are affected by the election process, and the power of the SC's permanent members over the ICJ could be seen as a major obstacle for the Court's adaptation to modern challenges.[180] Independence and impartiality may be particularly problematic when dealing with politically sensitive matters. Therefore, States may be reluctant to submit their disputes to the ICJ. This may in turn seriously threaten the scope and effectiveness of international adjudication and impede the ICJ's contributions to the peaceful settlement of disputes between sovereign States. Research has shown that judges do not seem to be exposed to direct pressure from their governments. There has been no evidence of instructions passed from a government to a judge. However, subjectivity based on a person´s political and legal preferences that lead to partiality is particularly difficult to prove.[181]

4.6. Assessment of the ICJ's pronouncements on nuclear weapons

4.6.1. Nuclear Test Cases

As pointed out above,[182] Australia and New Zealand claimed that nuclear tests conducted by France violated their rights under customary international law, which prohibited atmospheric explosions. This rule was based on the CTBT and several UN resolutions that condemned atmospheric tests. However, the Court refrained from confirming this highly debatable and controversial rule of customary law. A pronouncement on whether customary law had emerged would have undoubtedly had strong repercussions on the international community. The Court did not discuss the merits of the case "*under the guise of procedural niceties*"[183] and thus adopted a very cautious approach. Judges did not take the opportunity to set new standards, principles and guidelines on nuclear testing at the time. Considering the historical context of the

[179] *Hernandez*, Impartiality and Bias at the International Court of Justice, 1 Cambridge J. Int'l & comp. L. (2012) 183 at 198.
[180] *Ogbodo*, An Overview of the Challenges Facing the International Court of Justice in the 21st Century, Annual Survey of International & Comparative Law: Vol. 18: Iss. 1, Article 7. 93 at 105 f.
[181] *Hensley*, National Bias and the International Court of Justice, Midwest Journal of Political Science, Vol. 12, No. 4 (Nov. 1968) 568 at 580.
[182] See above, p. 12.
[183] *Dugard*, The Nuclear Tests Cases and the South West Africa Cases: Some Realism about the International Judicial Decision, 16 Virginia Journal of International Law (1976) 463 at 483.

judgment, it could be argued, that widespread awareness of environmental law and the importance of protecting the environment did not yet exist at the time, as the Stockholm Conference – the first conference to focus on the environment as a major issue – only took place two years before the ICJ's judgment was handed down. Nevertheless, it is clear that most States opposed the practice of Great Powers to test nuclear weapons at the expense of smaller States that suffered the resulting damages.

In a separate opinion, Judge Petrén concluded that the existence or non-existence of a rule of customary law was an essentially preliminary matter.[184] According to this view, the Court should have answered the question of the existence of customary international law when dealing with the preliminary objections. Although questions concerning the existence or non-existence of rules of international law have traditionally been answered whilst debating the merits of the case. Judge Petrén's statement shows that he believed the claim to be inadmissible because it "[*belonged*] *to the political domain and* [was] *situated outside the framework of international law as it exists today*"[185]. The judgement itself contained no reference to whether the issue was political in nature. Deliberations and debates in the Court are confidential; thus, one can only speculate why the judges adopted a cautious approach.

In such situations, separate and dissenting opinions may shed light on deliberations that lead to voting behaviour. In their joint dissenting opinion, Judges Onyeama, Dillard, Jimenez de Aréchaga and Sir Waldock stated that the the dispute was political and therefore non-justiciable; in other words, the claim did not rest on legal considerations and the claimant States asked for the protection of its own vital interests. However, in the present case, "*the Applicant invokes legal rights and does not merely pursue its political interest; it expressly asks the Court to determine and apply what it contends are existing rules of international law*"[186]. Thus, the issue was legal – not political – and therefore justiciable.

As the respondent, France did not invoke its vital political or military interests but rather insisted that the rules of international law asserted by the applicants did not

[184] Separate Opinion of Judge Petrén, p. 486, https://www.icj-cij.org/public/files/case-related/59/059-19741220-JUD-01-03-EN.pdf (accessed 30 October 2021).
[185] *Ibid* p. 490.
[186] Joint dissenting opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock, para 45, https://www.icj-cij.org/public/files/case-related/58/058-19741220-JUD-01-07-EN.pdf (accessed 30 October 2021).

exist. Since some of the dissenting judges were nationals of nuclear-weapon States,[187] political considerations may have played a role in their conclusions. It can be assumed that the political character of the case influenced the ICJ's evasive decision, which provided a face-saving end to the proceedings for France, a nuclear-weapon State. Still, it is remarkable that the Court did not base its reasoning for dismissing the case on its non-justiciability due to the political nature of the dispute; instead, it invoked procedural reasons to avoid proceeding to its merits.

Furthermore, the judgment reveals a crucial problem with optional jurisdiction and the Court's lack of means to enforce decisions. Australia and New Zealand submitted their complaints to the Court on 9 May 1973. France had filed its acceptance of the Court's jurisdiction on 20 May 1966. At the same time, France made a reservation to exclude "*disputes concerning activities connected with national defence*" from its recognition of the ICJ´s jurisdiction. In response to the ICJ's decision to grant an interim order on 22 June 1973, the French government withdrew its recognition of the Court´s jurisdiction on 10 January 1974. To date, France does not appear in the list of States that have recognised the Court's general jurisdiction as compulsory.[188] Had the Court proceeded to the merits of the case and handed down a judgment against France, it is very likely that France would not have complied with the judgment and blocked any enforcement measures by the SC according to Article 94 para 2 of the UN Charter by exercising its veto right.

Finally, it is important to note the subjective elements of a judgment. A judge's decision is not only based on the application of legal provisions but also on his or her position on various issues based on their particular political, religious/ideological and social background. In the case at hand, the majority included three judges who were nationals of nuclear-weapon States (France, the Soviet Union and India). To circumvent the core of the issue, they decided to raise a "*legal point of a preliminary (or antecedent) nature in technical legal language in order to avoid becoming embroiled in the "political" consequences of a judgment on the merits*".[189] However, two judges from nuclear-weapon States[190] were of the opinion that the Court had

[187] Upon these were the United States and the United Kingdom.
[188] https://www.icj-cij.org/en/declarations (accessed 30 October 2021).
[189] *Dugard*, The Nuclear Tests Cases and the South West Africa Cases: Some Realism about the International Judicial Decision, 16 Virginia Journal of International Law (1976) 463 at 492.
[190] Between 1967 and 1985 there was no Chinese judge with a seat on the Court.

jurisdiction and that the "*applicant had a right under the Statute and the Rules to have the case adjudicated*"[191]. Therefore, it can be assumed that political considerations were not decisive in this case.

4.6.2. The Advisory Opinion on Nuclear Weapons

In contrast to the *Nuclear Tests Cases*, the Court addressed the substance of the question put to it in the *Advisory Opinion on Nuclear Weapons*. The judges were unanimously of the view that the legal obligation to pursue negotiations on nuclear disarmament under Article VI of the NPT was important and existed. A substantial part of the Advisory Opinion discusses the legality of nuclear weapons within the context of the humanitarian law of armed conflict. The ICJ identified a number of basic principles of this body of law and indicated the unique character of nuclear weapons due to their destructive power and the duration of the effects of their use, highlighting their serious danger to future generations.[192] Based on this, the Court concluded that the use of nuclear weapons appeared to be "*scarcely reconcilable*"[193] with the identified requirements of humanitarian law.

Nevertheless, the Court continued to follow a cautious approach to the broad issue of the legality of nuclear weapons. It stated that neither international customary law nor international treaty law contained any rules authorising the threat or use of nuclear weapons or any other weapons in general or specific circumstances. Although the relevant UN resolutions were "*a clear sign of deep concern regarding the problem of nuclear weapons*" [194] and "[*reveal*ed] *the desire of a very large section of the international community to take, by a specific and express prohibition of the use of nuclear weapons, a significant step forward along the road to complete nuclear disarmament*,[195]" they fell short of a customary rule that specifically prohibited the use of nuclear weapons. Moreover, the Court refused to express its opinion on the legality of the strategy of nuclear deterrence and left open the crucial question of whether the threat or use of such weapons were, in fact, consistent with the rules of international

[191] Joint dissenting opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock, para 55, https://www.icj-cij.org/public/files/case-related/58/058-19741220-JUD-01-07-EN.pdf (accessed 30 October 2021).
[192] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p. 226, para 35.
[193] *Ibid* para 95.
[194] *Ibid* para 71.
[195] *Ibid* para 73.

law applicable in situations *in extremis* in which the survival of a State was at stake. In the process, the Court invoked the legal instrument of *non-liquet,* which refers to a court's refusal to answer a certain question on the grounds that the relevant law was unclear.[196] The fact that the *non-liquet* doctrine was used for the first time in the Court's history[197] demonstrates that it not only continued to take a cautious approach but again chose a legal tool for the first time as it did in the *Nuclear Tests Cases* to avoid addressing the relevant centrepieces of the topic.

The Court could have taken two alternative approaches to the crucial question of the use of nuclear weapons in extreme situations of self-defence. The first is to develop the law and proceed according to the view that legal provisions that apply to the question exist and conduct an individual examination that would yield a solution to the problem.[198] The ICJ already followed this approach in the *Norwegian fisheries Case*[199] and its *Genocide Advisory Opinion*.[200] In both cases, the ICJ stated that no existing rules of international law applied to the relevant questions, then stepped in as judicial legislator. In the *Norwegian Fisheries Case*, the ICJ accepted straight baselines, a method that was subsequently reflected in Article 4 of the 1958 Geneva Convention on the Territorial Sea[201] and Article 7 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS).[202] In the *Genocide Advisory Opinion*, the ICJ addressed the question of whether the reserving State can be regarded as a party to the Convention whilst still maintaining its reservation if the reservation is objected to by one or more of the parties to the convention but not by others[203] and the resulting legal consequences. At the time, the question of admissibility and the effect

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[196] For further information on the *non-liquet* doctrine in international law see e.g. *Jia*, The Issue of Non Liquet in Recent Advisory Proceedings of the ICJ, in *Jia/Lee/Lee*, Northeast Asian Perspectives on International Law (2013), *Enabulele*, The Avoidance of Non Liquet by the International Court of Justice, the Completeness of the Sources of International Law in Article 38(1) of the State of the Court and the Role of Judicial Decisions in Article 38(1)(d), 38 Commw. L. Bull. 2012 617; *Aznar-Gomez*, The 1996 Nuclear Weapons Advisory Opinion and Non Liquet International Law, 48 Int'l & Comp. L.Q. 1999 3; *Stone*, Non Liquet and the Function of Law in the International Community, 35 Brit. Y. B. Int'l L.1959 124.

[197] *Gill (ed.)*, Rosenne's The World Court: What It is and How It Works (2003) p. 210.

[198] *Lauterpacht*, The development of International Law by the International Court (1982) p. 186.

[199] *Fisheries Case*, Judgment of December 18th, 1951; ICJ Reports 1951, p. 116.

[200] *Reservations to the Convention on Genocide*, Advisory Opinion; I.C.J. Reports 1951, p. 15.

[201] Convention on the Territorial Sea and the Contiguous Zone, 29 April 1958, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXI-1&chapter=21&clang=_en (accessed 03 November 2021).

[202] United Nations Convention on the Law of the Sea, 10 December 1982, https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en (accessed 3 November 2021).

[203] *Ibid*, p. 16.

of reservations on multilateral treaties in case of objection (or lack thereof) to such reservations by other parties to the treaty was not settled by a binding rule in international law.[204] However, the ICJ did not restrict itself to pronouncing a *non-liquet* situation but went on to emphasise the special character of the Convention, holding that "*a State which has made … a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention*".[205] Thus, the Court laid the foundation for the ILC's further work on this issue, which ultimately led to the incorporation of the "compatibility rule" into draft articles and resulted in Article 19 of the Vienna Convention on the Law of Treaties.[206]

Due to the lack of separation of powers in the international system and the insufficient assignment of tasks to its different "branches", the ICJ may play a larger role in developing international law. In fact, the Court did not shy away from fulfilling this role in other judicial proceedings, as was the case in its *Reparation Advisory Opinion*,[207] in which it elucidated the international personality of the UN and international organisations in general and applied the "implied powers" theory, and significantly contributed to the development of international law.

The application of this first approach could have led the Court to a second possible solution: the avoidance of a *non-liquet* situation. Either the development of rules of international law by the ICJ in a first step would have laid the basis for applying the law or this would have been the case even from the outset. In his dissenting opinion, Judge Shahabuddeen expressed his views on the absence of a *non-liquet* situation: if "*international law has nothing to say on the subject of the legality of the use of nuclear weapons, this necessarily means that international law does not include a rule prohibiting such use. On the received view of the "Lotus" decision, absent such a prohibitory rule, States have a right to use nuclear weapons. On the other hand, if*

[204] *Oellers-Frahm*, Lawmaking Through Advisory Opinions?, German Law Journal 2011 (12) 1033 at 1041.
[205] *Reservations to the Convention on Genocide*, Advisory Opinion; ICJ Reports 1951, p. 15, p. 29.
[206] Vienna Convention on the Law of Treaties, 23 May 1969, https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en (accessed 3 November 2021).
[207] *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion, ICJ Reports 1949, p.174.

that view of "Lotus" is incorrect or inadequate in the light of subsequent changes in the international legal structure, then the position is that States have no right to use such weapons unless international law authorises such use. If international law has nothing to say on the subject of the use of nuclear weapons, this necessarily means that international law does not include a rule authorizing such use. Absent such authorisation, States do not have a right to use nuclear weapons". He concluded that the *non-liquet* doctrine does not apply because there is no absence of law at all that would be a prerequisite for applying this doctrine.

Instead, the majority of the ICJ judges preferred to bring into play the practice of nuclear deterrence that could not be ignored. The Court concluded that "*the emergence, as lex lata, of a customary rule specifically prohibiting the use of nuclear weapons as such is hampered by the continuing tensions between the nascent* opinio iuris *on the one hand, and the still strong adherence to the practice of deterrence on the other*".[208] Thus, the Court determined a division between States that viewed the use of nuclear weapons as illegal and States that maintained the legality of the threat and use of nuclear weapons. The former group refers to the consistent non-utilisation of nuclear weapons by States as an expression of *opinio juris* since 1945. However, the latter group invokes the practice of the strategy of deterrence to support its argument that the reason why nuclear weapons have not been used since 1945 is "*not on account of an existing or nascent custom but merely because circumstances that might justify their use have fortunately not arisen*".[209]

Although the Court clarified some relevant questions, the majority conclusion can be seen as a step backward because the Court failed to develop the law by closing the legal gap on the use or possession of nuclear weapons. In general, judges should have looked beyond the established rules of international law and exercised their discretion to resolve any ambiguities, complement the existing body of law and close legal gaps. In line with the argument that the creation of new legal provisions is reserved for sovereign States, the ICJ still had enough tools at its disposal to develop the law without creating new rules. However, the Court has shown that it places greater emphasis on the deterrence practice of nuclear-weapon States than its condemnation

[208] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p. 226, para 73.
[209] *Ibid* para 66.

[210] and accepts this as an expression of *opinio juris*, leading to the formation of customary international law. The fact that nuclear weapons were not explicitly prohibited at the time of the Advisory Opinion and the Court's acceptance of a world order in which some States maintain the strategy of nuclear deterrence, can be seen as a reason that led ICJ judges to refuse to declare the threat or use of nuclear weapons illegal under any circumstances and pronounce a *non-liquet* for the first time in its history despite having legal tools at its disposal.

The purpose of an Advisory Opinion is "*not to settle - at least directly - disputes between States, but to offer legal advice to the organs and institutions regarding the opinion*".[211] Thus, Advisory Opinions have an authoritative character and embody judicial statements with an *erga omnes* effect, because they establish the existence and content of the law in the view of the Court.[212] For example, the ICJ could have referred to UNGA resolutions that, although non-binding under international law, are widely acknowledged to influence the legal obligations of States. Over time, these resolutions may be relevant because they help to identify rules of customary international law by providing evidence of State practice, *opinio juris* or both.[213] But the ICJ did not fully use the opportunity to hand down an Advisory Opinion on nuclear weapons that carried the necessary authority to form the basis for further work in the UN's relevant political organs.

The Court itself considered that "*that the political nature of the motives which may be said to have inspired the request and the political implications that the opinion given might have are of no relevance in the establishment of its jurisdiction to give such an opinion*".[214] Compared to the *Nuclear Tests Cases*, the Court moved to the merits of the issue in the *Advisory Opinion on Nuclear Weapons*. However, the views of the judges on the crucial question on self-defence may have been similarly politically motivated. The Court was evenly divided, and therefore the president's casting vote was decisive.

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[210] *Weston*, Nuclear Weapons and the World Court: Ambiguity's Consensus, 7 Transnat'l L. & Contemp. Probs 1997 371 at 386.
[211] *Ibid* p. 236, para 15.
[212] *Oellers-Frahm*, Lawmaking Through Advisory Opinions?, German Law Journal 2011 (12) 1033 at1053.
[213] *Guzman/Meyer*, International Soft Law, Journal of Legal Analysis Spring 2010: Vol. 2 Number 1 171 at 216.
[214] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p. 226 (p. 234, para 13).

The composition of the Court and the nationality of its judges presumably played a role in their reasoning and conclusions. In the pronouncement that there is in neither customary nor conventional international law on the comprehensive and universal prohibition of the threat or use of nuclear weapons as such most of the judges from nuclear-weapon States as well as the judges from Germany and Italy, both NATO member States, and the Japanese judge from a State under the nuclear umbrella of a nuclear-weapon ally, voted in favour. Some judges voted in favour of not answering the question of whether the threat or use of nuclear weapons was lawful in extreme situations of self-defence. It is difficult to deny that they would have preferred a consistent decision insofar as the threat or use of nuclear weapons would be lawful or at least not prohibited in an extreme circumstance of self-defence with the aim of not distinguishing between normal and extreme situations of self-defence.

4.6.3. Marshall Islands Case

The *Marshall Islands Case* must be considered in the context of a growing momentum to negotiate a treaty that completely prohibits nuclear weapons amongst a majority of UN members.[215] These States had great expectations that the ICJ would provide an opinion on the issue of nuclear weapons that would provide fresh impetus to the efforts of non-nuclear-weapon States and other stakeholders such as non-governmental organisations. In his dissenting opinion, Judge Bennouna highlighted that "for *the background to the dispute in question, its human substance, we have to consider a small State, the Marshall Islands, whose population of a few tens of thousands of people has suffered terribly from the nuclear testing carried out in an area of its territory. This State has turned to the principal judicial organ of the United Nations to seek justice, so that such suffering does not occur again in future, through compliance with a conventional and/or customary obligation under international* law".[216] This statement illustrates the aspects and underlying issues that contributed to raising expectations towards international law and the ICJ. However, in continuation of the ICJ's restrictive approach to nuclear weapons, these expectations were not met. The Court repeatedly broke new legal ground in its history: in the case at hand, it refused jurisdiction on the grounds of the absence of a dispute by introducing the

[215] See GA Res 70/33, A/Res/70/33 (2015) on Taking Forward Multilateral Nuclear Disarmament Negotiations.

[216] Dissenting opinion of Judge Bennouna, p. 73, https://www.icj-cij.org/public/files/case-related/160/160-20161005-JUD-01-05-EN.pdf (accessed 02 January 2022).

subjective awareness requirement. It arguably exaggerated formalism to determine that there was no legal dispute between the parties, which prevented judges from proceeding to the merits of the case. The PCIJ had defined a legal dispute as "a *disagreement on the point of law or fact, a conflict of legal views or of* interests"[217] between the contending parties. The Marshall Islands claimed the existence of a dispute between the parties in the "positive opposition" by the respondent States in the present proceedings and their engagement in a conduct of "qualitative improvement"[218] of their nuclear arsenals. By the casting vote of its French president, the ICJ added as an additional requirement the "awareness" of the respondent regarding the claims of the applicant to establish a legal dispute between the parties. This formalistic requirement could only be met by instituting a fresh application on the same grounds against the respondent, who would then be aware of the dispute.[219]

It became clear that the Court adopted this formalistic approach to continue its judicial self-restraint. As mentioned above, it is not unlikely that sometimes judges first reach a decision, and then develop a legal reasoning around it – especially with regard to disputes of far-reaching political dimensions. Following a less demanding approach to the existence of a dispute would have allowed the judges to proceed to the merits of the case. Certainly, the dispute could have been dismissed on other grounds. However, once the dispute was declared admissible, a dismissal in substance would have been subject to proper reasoning. The close votes and comparatively high number of separate and dissenting opinions reveal tensions and difficulties judges were faced with in their conclusions. This resulted in a restrictive judgment that left a small non-nuclear-weapon State with the only option of starting fresh proceedings against powerful nuclear-weapon States.

Undoubtedly, the issue of nuclear weapons has high political relevance because it concerns the vital interests of nuclear-weapon States and their allies. Consistent with the ICJ's cautious approach in the *Nuclear Tests Cases* and its *Advisory Opinion on Nuclear Weapons*, political considerations seem to have led the Court to adopt a

[217] *Mavrommatis Palestine Concessions*, Judgment No. 2, 1924, P. C.I. J., Series A, No. 2, p. 11.
[218] "Qualitative improvement" means not to increase the number of nuclear weapons, but to enhance the quality of the existing arsenal. According to the Marshall Islands these measures were a continuation of the violation of the respondent States with regard to the international obligations under customary international law according to Article VI of the NPT.
[219] https://www.ejiltalk.org/how-the-awareness-criterion-for-establishment-of-dispute-is-antithetical-to-judicial-economy/ (accessed 02 January 2022).

restrictive approach in the *Marshall Islands Case*. Its judgment resulted from the narrowest of majorities. Judges from nuclear-weapon States[220] and States that benefitted from the nuclear deterrence offered by their nuclear-weapon allies[221] as cornerstone of their national security policies voted in favour. Twenty years earlier, in its *Advisory Opinion on Nuclear Weapons*, the ICJ gave considerable weight to the opposition of nuclear-weapon States to the existence of an *opinio juris* on the unlawfulness of nuclear weapons. The Court considered the consistent practice of deterrence as an obstacle to the formation of an *opinio juris* and a customary rule on the illegality of nuclear weapons for the benefit of a few powerful States in the context of their national strategies and interests. The ICJ's judgment in the *Marshall Islands Case* was delivered in light of increasing scepticism towards the strategy of deterrence, which was reflected in efforts to negotiate a legally binding instrument that would prohibit nuclear weapons and lead to their complete elimination. Furthermore, the numerous GA and SC resolutions[222] that condemned nuclear weapons were endowed with authority and legal value and thus could not be ignored by nuclear-weapon States that persisted in relying on deterrence. It is doubtful whether ICJ judges could have upheld their views on customary law and the prohibition of nuclear weapons had they dealt with the merits of the case. For instance, it would have been more difficult to argue that the strategy of deterrence was sufficient to deny the existence of an *opinio juris* on the illegality of nuclear weapons, although it must be mentioned that not only the nuclear-weapon States but also all non-nuclear NATO members refuse to ratify the treaty on the prohibition of nuclear weapons. Judge Trindade delivered an extensive dissenting opinion that elaborated on the strategy of deterrence and its effects on an *opinio juris*: "twenty *years after the 1996 ICJ Advisory Opinion, and with the subsequent reiteration of the conventional and customary international legal obligation of nuclear disarmament, there is no longer any room for ambiguity. There is an* opinio juris communis *as to the illegality of nuclear weapons, and as to the well-established obligation of nuclear disarmament, which is an obligation of result and not of mere conduct. Such* opinio juris *cannot be erased by the dogmatic positivist insistence on an express prohibition of nuclear weapons; on the contrary, that opinio juris discloses that the invocation of*

[220] President Abraham (France), Judge Greenwood (UK), Judge Xue (China), Judge Donoghue (USA), Judge Blhandari (India), Judge Gevorgian (Russia).
[221] Judge Owada (Japan), Judge Gaja (Italy) and Judge Tomka (Slovakia).
[222] See Chapter 2.1.

the absence of an express prohibition is nonsensical, in relying upon the destructive and suicidal strategy of "deterrence"".[223]

In light of these considerations, it would appear that the judges were aware of their duty to carefully assess the emergence of customary law concerning the illegality of nuclear weapons, conceivably with the result that there was customary law that prohibited nuclear weapons. According to Judge Trindade, "*there is a conventional and customary international law obligation of nuclear disarmament. Whether there has been a concrete breach of this obligation, the Court could only decide on the merits phase of the present* case"[224].

Instead, the Court's approach left the *status quo* unchanged, which means that the NPT's bias in favour of nuclear-weapon States remained intact. This was important for nuclear-weapon States and their allies, as an initiative of non-nuclear-weapon States to completely ban nuclear weapons was under way. Nuclear-weapon States and their allies opposed the GA resolution to open multilateral negotiations on a legally binding instrument that would prohibit nuclear weapons and lead to their complete elimination.[225] Consequently, they did not attend the GA meeting in which the text of the treaty was adopted. Through its decisions in the *Marshall Islands Case*, the ICJ continued to protect the national interests of a few powerful nuclear-weapon States and their allies rather than the general interests of the international community.

In conclusion, it can be assumed that the judges were aware of the increasing difficulty of invoking the strategy of deterrence to establish an *opinio juris* on the legality of nuclear weapons compared to the advisory proceedings in late 1995. The decision showed an increasing alienation between the ICJ and most members of the international community, which could lead to the progressive failure of international law as a tool to promote justice and fairness in international affairs. In Judge Trindade's view, "*the survival of humankind cannot be made to depend on the "will" of a handful of privileged States. The universal juridical conscience stands well above*

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[223] Dissenting opinion of Judge Trindade, para 141, https://www.icj-cij.org/public/files/case-related/160/160-20161005-JUD-01-06-EN.pdf (accessed 02 January 2022).
[224] *Ibid* para 311.
[225] UN Doc A/C.1/71/L.41 (14 October 2016). On 4 and 5 March 2013, the Conference on the Humanitarian Impact of Nuclear Weapons took place in Norway. It was attended by 127 states and contributed to the momentum around the discussion on the humanitarian consequences of nuclear weapons.

the "will" of individual States".[226]

6. Potential responses to judicial self-restraint concerning nuclear weapons and prospects

6.1. Need for structural reforms

Subsection 4.5.1 established that the process of electing international judges is highly politicised. All permanent members of the SC possess nuclear weapons. Not only with regard to nuclear weapons but also other questions of fundamental interest, the promotion of the interests of the international community is largely paralysed by the political situation in the SC, the most powerful organ of the UN. The SC has often been criticised for its composition, particularly with regard to the permanent members and their veto power. Except for an expansion in the 1960s, the SC's composition has remained unchanged since its establishment in 1945. The five permanent members reflect the world order and the political balance of power at the end of World War II. Over the past few decades, the global landscape has significantly changed. The number of UN member States has rapidly grown, mainly thanks to decolonisation in various parts of the world, the breakup of the former Soviet Union, former Yugoslavia and Czechoslovakia, which led to the admission of smaller European States to the UN in the early 1990s.[227] These changing circumstances led to heated debates on the need for a reform of the SC, given the growing importance of States such as Germany, India, Brazil, Japan and populous African countries and their underrepresentation in the SC. Supporters of a reform claimed that the exclusion of those States from permanent membership would lead to a decrease in the SC's legitimacy and fail to reflect the geopolitical realities of the 21st century. Likewise, a decrease in the role of States such as the United Kingdom, particularly given its withdrawal from the European Union, as well as France had to be taken into consideration.

Articles 108 and 109 are the relevant amendment and revision clauses in the UN Charter. In principle, every provision in the Charter can be amended. However,

[226] Dissenting opinion of Judge Trindade, para 146, https://www.icj-cij.org/public/files/case-related/160/160-20161005-JUD-01-06-EN.pdf (accessed 02 January 2022).
[227] *Blum*, Proposals for UN Security Council Reform, The American Journal of International Law, Vol. 99, No. 3 (July 2005) 632 at 638.

pursuant to Article 108, ratification of the amemdment by two thirds of the members of the GA suffices, but all permanent members of the SC must be among them. Historically, this prerequisite was designed to preserve the delicate balance between the major powers at the end of World War II. However, none of the reform proposals since the creation of the UN, which ranged from a rotation of permanent members to limitations on their veto power, have led to a substantive amendment of the UN Charter to date. It seems unlikely that any of the permanent members would accept an amendment that would limit their power. Thus, political paralysis has far prevented a successful reform of the SC. Moreover, the election procedure of international judges with all its political effects remains the same.

Another area of reform is the number of judges of the ICJ. Since the Court's establishment, the number of judges has remained the same. By contrast, the composition of other UN organs has been subject to changes, which mirrored the increasing number of member States. For example, the Economic and Social Council (ECOSOC) was expanded from 18 to 54 members. The ILC was twice expanded, from 18 to 25 members, then from 25 to the current 34 members.[228] Historically, the number of judges was to be the same as in the PCIJ. Moreover, the balanced representation of judges from different legal traditions, geographical areas and main forms of civilization should be ensured (Article 9 of the ICJ Statute).[229] By increasing the number of judges, this important objective – namely, the balance between judges from different legal traditions and geographical areas – would be better achieved.

The power of the permanent members of the SC, which are all nuclear-weapon States, has proven to be an impediment to the ICJ's exercise of its functions. With one recent exception, judges from the permanent members have held a permanent seat on the Court.[230] Increasing the number of judges would better represent non-nuclear-weapon States and thus better reflect global views not only on the need for nuclear disarmament but also other questions that are of high relevance to the international community.

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[228] *Jacovides*, U.N. Reform and the International Court of Justice: Introductory Statement, ILSA Journal of International & Comparative Law Vol. 12:547 2006, 547 at 552.
[229] *Zimmermann/Tomuschat/Oellers-Frahm/Tams (eds.)*, The Statute of the International Court of Justice: A Commentary, 2nd ed. 2012 Art 3 para 16. See also above, p. 41.
[230] See above, 42.

The international community should address the concept of optional jurisdiction described in Section 4.3, which indicates the delicate balance between a legitimate and effective international court on the one hand and the risk of States withdrawing their acceptance of the optional general jurisdiction clause on the other. A measure that would truly strengthen the role of the Court would be comprehensive compulsory jurisdiction from the outset without the addititional consent of member States and without the right to withdraw from the Court´s jurisdiction. As a result, all international disputes could be submitted to the Court if they could not be settled by other means to achieve their peaceful solution.[231] Naturally, this would imply a far-reaching restriction on State sovereignty. States would expose themselves to a general risk of losing disputes. Since many international disputes have political dimensions that concern the vital interests of States, they have proved unwilling to commit themselves to international adjudication in advance. Thus, prospects for reform and progress towards genuine compulsory jurisdiction are poor.

UN Secretary-General Kofi Annan's UN reform agenda "In larger freedom: towards development, security and human rights for all"[232] dedicates a few paragraphs to the ICJ. Paragraph 139 contains the following recommendation:

> *The International Court of Justice lies at the centre of the international system for adjudicating disputes among States. In recent years, the Court's docket has grown significantly and a number of disputes have been settled but resources remain scarce. There is a need to consider means to strengthen the work of the Court.* ***I urge those States that have not yet done so to consider recognizing the compulsory jurisdiction of the Court- generally, if possible or, failing that, at least in specific situations.*** *I also urge all States to bear in mind, and make use of, the Court's advisory powers. Measures should also be taken, with the cooperation of litigating States, to improve the Court's working methods and reduce the length of its proceedings.*

[231] According to Article 33 of the UN Charter the parties to any dispute shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or any peaceful means of their own choice.
[232] https://www.un.org/ruleoflaw/files/A.59.2005.Add.3[1].pdf (accessed 30 January 2022).

Although this recommendation must be regarded as constructive, its acceptance remains an illusion. Rather, the above quote should be understood as a call to all States to accept the jurisdiction clause under Article 36, paragraph 2 of the Statute of the ICJ. However, although this clause is the most far-reaching one, it still requires the consent of States.

6.2. Multilateral efforts and the role of the Great Powers

Despite the ICJ's significant role in the peaceful settlement of international disputes, States are the main actors in international relations. The purpose of international law is to provide a framework that facilitates the cooperation of States on aims that no State would be able to achieve alone. For this purpose, they create and use international organizations, above all the UN. The GA has repeatedly demanded global international disarmament efforts. However, the ICJ's reluctance to answer questions related to nuclear weapons fuels a debate on whether it makes sense to try to resolve such issues in judicial proceedings. For the Court to adequately address questions related to nuclear weapons, the participation of all nuclear-weapon States would be required in proceedings. However, even if nuclear-weapon States were ready to submit bilateral disputes over nuclear weapons to the Court, their outcomes would not affect any general issues related to nuclear weapons. Even if the ICJ declared an obligation to negotiate and achieve nuclear disarmament, this could only be achieved with the participation of all nuclear-weapon States, particularly since Article 59 of the Statute of the ICJ states that the Court's decisions have no binding force except between the parties to a dispute and with respect to a particular case.[233]

Nevertheless, States have actively negotiated several treaties with varying scopes, ranging from non-proliferation to the prohibition of nuclear weapons. However, due to the consensual mechanism of international law, the lack of effective means to enforce judicial decisions and the compliance of contractual obligations, nuclear-weapon States have not fulfilled their commitments under the NPT and rejected the TPNW. Although adopted by 122 States, States with a nuclear-umbrella arrangement with a nuclear-weapon State have not signed the treaty either. Critics argue that, without the participation of nuclear-weapon States and their allies, the treaty will not

[233] Though clear pronouncements of the Court on applicable legal rules would make it politically more difficult for States to act contrary to these rules.

succeed and fail to yield practical outcomes. However, it could be argued that a ban on nuclear weapons would increase political pressure and influence public opinion on nuclear-weapon States to disarm. Furthermore, the treaty could create new international legal standards that would serve as a new benchmark for nuclear policies, defence policies and military plans. Subsequently, they could establish an international customary norm that prohibits the development, possession, and use of nuclear weapons, which would have implications on the ICJ's future decisions although it must be feared that the nuclear-weapon States will continue to uphold their nuclear weapons policies and thus create obstacles to the necessary state practice and *opinio juris* as preconditions for the emergence of customary law. All efforts and attempts to put pressure on nuclear-weapon States have failed thus far. The ICJ's *Advisory Opinion on Nuclear Weapons* and the *Marshall Islands Case judgment* demonstrated some States' strong adherence to nuclear deterrence. As long as the nuclear deterrence doctrine upholds the legality of nuclear weapons, the TPNW will fail to create change in the near future.

7. Conclusions

As the principal judicial organ of the United Nations, the ICJ has made pronouncements on legal aspects of nuclear weapons on three occasions. Each pronuncement was shaped by a very restrictive approach. As a result, except for its *Advisory Opinion on Nuclear Weapons*, the Court has made no substantive statements on nuclear weapons. This thesis aimed to explain why ICJ judges chose this conservative approach. It showed that the ICJ's function is to apply the law to cases brought before it, as established in the Statute of the ICJ. However, this task entails at least a partial development of the law, as the Court must critically examine existing law and provide clarification of questions that are of importance to the global community but still largely ambiguous from a legal perspective. It is impossible to apply the law without developing it to a certain extent, simply because each case is unique which means that the factual elements differ between the cases. Optional jurisdiction, i.e. the need for the consent of the parties to its jurisdiction, has proven to be one of the greatest obstacles to the ICJ's ability to play a major role in international relations. The Court must fear that States will withdraw their acceptance of the optional jurisdiction clause in its Statute, refuse to conclude a *compromis* or hesitate to invoke compromissory clauses, thus depriving the Court of its basis for adjudication. The question of how to address highly political matters entails further challenges for the ICJ. Compared to domestic systems based on the separation of powers, the international system and its institutions do not have a comparable structure. It has been demonstrated that nearly every question brought before the ICJ has had political dimensions, at least to a certain extent. These factors prevent the Court from acting in a more progressive and proactive way, filling the legal gaps in international law and taking the opportunity to fulfill its potential as a developer of international law.

In addition, the thesis examined the composition of the Court. In contrast to domestic systems, the nationality of international judges is relevant. On the assumption that the Court's role is not only to apply the law to disputes brought before it but also to contribute to the development of international law, it would appear that the politically motivated nomination of judges to secure national interests is an additional barrier to judicial contributions to questions related to nuclear weapons and disarmament.

Based on these findings, the critical assessment of the ICJ's three pronouncements on nuclear weapons showed that the Court could have arrived at more comprehensive and satisfactory results. In particular, advisory opinions on general issues contribute to the development of the law. However, the *Advisory Opinion on Nuclear Weapons* revealed that the strategy of nuclear deterrence doctrine is resilient enough to prevent a clear statement on the illegality of the threat or use of nuclear weapons in all circumstances. In the *Marshall Islands Case*, instead of more carefully examining potentially applicable law, the judges accepted preliminary objections to its jurisdiction that allowed them to refrain from addressing the merits of the case. They continued to ignore relevant GA resolutions and the demands of non-nuclear-weapon States. State practice and *opinio juris* of the nuclear-weapon States and their allies would be necessary for a universal prohibition of nuclear weapons.

Judicial self-restraint is a trend that bodes ill for future progress regarding nuclear weapon issues. The Court is likely to maintain a cautious approach in other disputes on these weapons. In view of the urgency and importance of the issue, increased attention should be given to efforts to achieve nuclear disarmament within the international legal system. Thus far, the cumbersome rules and procedures of the UN Charter have prevented necessary effective reforms. Nuclear disarmament can only be achieved by the international community as a whole. Unfortunately, rising tensions caused, in particular, by the recent invasion of Ukraine by Russia, make the crucial agreement among the nuclear-weapon States even more unlikely. More or less veiled threats to use nuclear weapons have been made. This also prevents the ICJ from playing the role it could and should with regard to nuclear weapons.

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Abstract

Over the International Court of Justice's (ICJ) existence, judges have had three opportunities to make a pronouncement on nuclear weapons. In each pronouncement (two judgments and one advisory opinion), they showed caution and judicial self-restraint. This thesis discusses the potential reasons for this restrictive approach. Undoubtedly, nuclear weapons and nuclear disarmament are of high political relevance. However, this is only one possible explanation for judicial self-restraint. First, the thesis presents useful theoretical concepts that could explain judicial self-restraint, including the system of optional jurisdiction in the international sphere and the Court's composition. As the principal judicial organ of the United Nations, the ICJ no longer primarily rules on technical disputes; instead, it has confronted an increasing number of disputes with various degrees of political involvement. However, many legal scholars have argued that the ICJ does not have legitimate authority to decide highly political matters and that such cases should be considered non-justiciable and dismissed due to a lack of jurisdiction. However, the thesis argues that all contentious cases contain political elements to a certain extent and that no valid distinctions can be drawn in practice. It also discusses the Court's judicial responsibility as an institution that contributes to the development of international law. When the applicable legal rules are ambiguous and obscure, the ICJ is empowered to fill legal lacunae. In addition, the ICJ's three pronouncements on nuclear weapons are critically examined based on previously established concepts established. Lastly, some attempts to respond to the Court's judicial self-restraint towards nuclear weapons are presented, highlighting the role of States in the international sphere and joint efforts to achieve global nuclear disarmament.

Abstract (German)

Seit Bestehen des Internationalen Gerichtshofes (IGH) hatten internationale Richter drei Gelegenheiten, sich zu Atomwaffen zu äußern. Jede dieser Äußerungen – darunter zwei Entscheidungen und ein Gutachten – war geprägt von richterlicher Zurückhaltung. In der vorliegenden Master Thesis werden die möglichen Gründe für diesen Ansatz diskutiert. Es steht außer Zweifel, dass das gesamte Thema Atomwaffen und nukleare Abrüstung von hoher politischer Relevanz ist. Dies ist jedoch nur eine mögliche Erklärung für die Anwendung der richterlichen Zurückhaltung. Zunächst stellt die Arbeit die theoretischen Konzepte vor, die als Erklärung für die richterliche Zurückhaltung dienen könnten. Darunter sind das System der freiwilligen Gerichtsbarkeit im internationalen Bereich und die Zusammensetzung des Gerichtshofs. Als Hauptorgan der Rechtsprechung der Vereinten Nationen entscheidet der IGH nicht nur über Streitigkeiten technischer Natur. Vielmehr ist er zunehmend mit Auseinandersetzungen konfrontiert, die politische Aspekte in unterschiedlichem Ausmaß aufweisen. Viele Rechtswissenschafter haben jedoch argumentiert, dass der IGH keine legitime Befugnis hat, politische Angelegenheiten zu entscheiden, sondern solche Fälle als nicht justiziell betrachtet und wegen mangelnder Zuständigkeit abgewiesen werden sollten. Es wird argumentiert, dass alle strittigen Fälle mehr oder weniger politische Elemente aufweisen und in der Praxis keine valide Unterscheidung zwischen rechtlichen und politischen Fragen getroffen werden kann. Die Autorin diskutiert weiters die Verantwortung des Gerichtshofs als eine Institution, die zur Entwicklung des Völkerrechts beiträgt. Sind die anzuwendenden Rechtsvorschriften mehrdeutig oder unklar, so ist der IGH berufen, die rechtlichen Lücken zu schließen. In einem zweiten Teil werden die drei Äußerungen zu Atomwaffen anhand der in den vorangegangenen Kapiteln dargelegten Konzepte kritisch hinterfragt. In einem letzten Teil werden einige Versuche vorgestellt, auf die richterliche Zurückhaltung der internationalen Richter im Bereich der Atomwaffen zu antworten, wobei die Rolle der Staaten im internationalen Bereich akzentuiert und die Notwendigkeit gemeinsamer Anstrengungen zur Erzielung einer weltweiten nuklearen Abrüstung betont werden.