

The Relevance of International Court of Justice Advisory Opinions: Nuclear Weapons, Climate Change and Other Global Issues

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Panel 1. *Further reflections on the ICJ Advisory Opinion on nuclear weapons*

I want to begin by paying tribute to Peter Weiss and Judge Christopher Weeramantry, both co-presidents of IALANA. Until he died last year a few weeks short of 100 years old, Peter continued to stress the illegality of nuclear arms and the imperative of their abolition. The late Judge Weeramantry wrote a long dissenting opinion examining in depth the incompatibility of nuclear weapons with law and morality. It includes a rich discussion of the ancient roots of international humanitarian law, for example the prohibition of the use of “hyperdestructive weapons” referred to in Indian epics about three thousand years ago. They both were wonderful people to work with.

I will discuss the Court’s analysis of the nuclear disarmament obligation in its 1996 opinion, with some reference to its 2025 opinion on climate change.

One of the most important passages in the ICJ opinion on nuclear weapons precedes the Court’s analysis of that obligation. The Court stated:

“In the long run, international law, and with it the stability of the international order which it is intended to govern, are bound to suffer from the continuing difference of views with regard to the legal status of weapons as deadly as nuclear weapons. It is consequently important to put an end to this state of affairs: the long-promised complete nuclear disarmament appears to be the most appropriate means of achieving that result.” (para. 98)

This passage reflects the fact that the majority felt unable to fully resolve disputes over the legality of threat and use, and indeed expressly did not address the legal status of reprisal, nuclear deterrence, and an extreme circumstance of self-defense involving the survival of a state. I think those issues are interlinked, and in particular the majority was not ready to take the step to declare that reliance on nuclear arms to deter a nuclear attack is illegal. By saying “majority”, I am referring to the seven members of the Court who voted for the extreme circumstance provision; they carried the day because the Court’s president was one of their number.

Yet at the same time the Court was acutely aware of the extraordinary dangers posed by nuclear arms, stating at one point that the “destructive power of nuclear weapons cannot be contained in either space or time. They have the potential to destroy all civilization and the entire ecosystem of the planet.” (para. 35)

In its 2025 climate opinion, the Court found that the duty to prevent significant harm to the environment applies not only to specific acts causing harm in another state but also to patterns of ongoing activity that cumulatively cause harm to the global climate system. In fact, the Court cited the 1996 opinion for the proposition that “the duty to prevent significant harm to the environment is not confined to instances of direct cross-border harm and that it applies to global environmental concerns.” (para. 134, also paras. 276, 277)

As I said, in the 1996 opinion the Court recognized the potential of nuclear arms to destroy the “entire ecosystem of the planet.” The Court, however, integrated the principle of prevention of harm to the environment into law regulating the conduct of warfare. I would suggest, though, that in turning to the nuclear disarmament obligation, the Court was in effect calling for applying a prevention of harm principle writ large, prevention not only of harm to the environment but also harm to civilian populations and infrastructure and indeed civilization. That move frees the principle from the balancing and flexibility involved in key rules of the law of armed conflict, notably proportionality. There are also complications arising from the fact that most nuclear-armed states are not party to Protocol I to the Geneva Conventions and some have claimed limits on its application to nuclear weapons. In contrast, an agreement or set of agreements on the prohibition and elimination of nuclear arms would, like the conventions on biological and chemical weapons, be categorical.

And so, in a unanimous conclusion, the Court declared: “There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.”

In its analysis of the obligation, the Court drew attention to the importance of good faith, trust, and cooperation. It cited an earlier case stating that “One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation ...” (para. 102)

That same case is cited in the climate advisory opinion (para. 303), and that opinion finds that there is a duty to cooperate for the protection of the environment. It explains that “The duty to co-operate lies at the core of the Charter of the United Nations. Article 1 of the Charter commits States “[t]o achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character”. (para. 140) The Court found that “The duty to co-operate requires sustained and continuous forms of co-operation, of which treaties and their coordinated forms of implementation are a principal expression.” (para. 304)

In its 1996 nuclear weapons opinion, the Court did not expressly refer to a duty to cooperate, highlighting instead the legal principle of good faith. That principle requires abiding by agreements in a manner true to their purposes and working sincerely, by negotiations or other means, to attain agreed objectives. It is fair to say that the Court's discussion of the nuclear disarmament obligation is animated by the imperative of cooperation to prevent catastrophe through negotiation of elimination of nuclear weapons.

I have talked about the duty of prevention of harm and the duty of cooperation embedded in the climate change and nuclear weapons advisory opinions.

Let me now focus on the Court's reasoning justifying its conclusion regarding the nuclear disarmament obligation. The ICJ provided a strong interpretation of Article VI of the Nuclear Non-Proliferation Treaty, which requires the pursuit in good faith of negotiations 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. But I want to emphasize that the Court's conclusion does not depend on the NPT alone; the Court also highlighted UN General Assembly resolutions. It cited as an example a unanimous 1954 resolution which calls for development of "a draft international disarmament convention providing for [among other things] the total prohibition of the use and manufacture of nuclear weapons and weapons of mass destruction of every type." (para. 101)

Not cited by the ICJ but important is a resolution unanimously adopted in 1978 in which a Special Session of the General Assembly established the UN disarmament machinery in its current form. (A/RES/S-10/2) The General Assembly identified general and complete disarmament under effective international control as the "ultimate objective", and gave first priority in negotiations to nuclear weapons.

Three notable aspects of the Court's analysis are that the obligation is one of result as well as conduct; that the obligation of nuclear disarmament is not dependent on the achievement of comprehensive disarmament; and the strong implication that the obligation is universal.

As to the first point, the ICJ has noted in general that when there is an obligation to negotiate, the legal principle of good faith requires "meaningful negotiations" but does not require that an agreement be reached. In the context of the NPT, however, the Court found that under Article VI there "is an obligation to achieve a precise result—nuclear disarmament in all its aspects" through good-faith negotiations. (para. 99)

The objective of the elimination of nuclear weapons is clearly identified in the NPT, and its structure provides a vehicle: prevent the spread of nuclear arms—horizontal proliferation;

negotiate an end to the nuclear arms race—vertical proliferation; and negotiate the elimination of nuclear weapons. The finding that the NPT imposes an obligation of result is a reasonable one. But I think that the Court’s recognition of the imperative to prevent the catastrophe of nuclear war played a role in reaching that finding.

Second, the Court separated the objective of nuclear disarmament from the objective of general and complete nuclear disarmament. Taking note of the 1972 Biological Weapons Convention and the 1993 Chemical Weapons Convention, the Court stated that “The pattern until now has been for weapons of mass destruction to be declared illegal by specific instruments.” (para. 57)

That from a legal point of view nuclear disarmament is not contingent upon general disarmament remains a highly relevant proposition. For example, in a statement at this year’s NPT Review Conference, Russia came close to asserting the opposite, stating that “the ultimate objective of building a nuclear-weapon-free and safer world for all must be pursued through a fundamental approach that ensures that such efforts are seamlessly integrated into the framework of general and complete disarmament.” From a policy point of view, it is likely true that the elimination of nuclear arms will require some limits on non-nuclear military capabilities such as missile defenses and non-nuclear-armed missiles. But this is not a legal requirement arising from the reference to a treaty on general and complete disarmament in the third prong of Article VI.

The third notable aspect of the Court’s analysis of the nuclear disarmament obligation concerns its universality. There are four nuclear-armed states outside the NPT: India, Israel, North Korea, and Pakistan. While the Court did not expressly say that the rule contained in Article VI of the NPT has customary and therefore universal status, applying to non-NPT states parties, the recognition of such status can be inferred from the Court’s reasoning. In particular, the Court appeared to base such a view mainly on the norm-creating character of Article VI and on the unanimous adoption of UN General Assembly resolutions concerning nuclear disarmament. After referencing a 1995 UN Security Council resolution calling on *all* states, not just NPT states parties, to fulfill Article VI, the Court concluded its discussion of the disarmament obligation by stating that nuclear disarmament “remains without any doubt an objective of vital importance to the whole of the international community today.” (para. 103) I think that a close reading of the Court’s analysis virtually compels the conclusion that the obligation is universal.

Thank you for listening!