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Using the Unprecedented Nuclear Weapons Advisory Opinion as Precedent in the Marshall Islands Cases

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Abstract

The issue of nuclear weapons is long-standing and controversial. This article uses the nuclear weapons advisory opinion issued by the International Court of Justice on July 8, 1996 as precedent to determine the imagined outcome of the cases filed by the Republic of the Marshall Islands against three nuclear powers in 2014.

Introduction

The issue of nuclear weapons is a very controversial one on which states have differing opinions. Some states possessing nuclear weapons are not parties to the Treaty on the Non-Proliferation of Nuclear Weapons (“NPT”).¹

‘The NPT is a landmark international treaty whose objective is to prevent the spread of nuclear weapons and weapons technology, to promote cooperation in the peaceful uses of nuclear energy and to further the goal of achieving nuclear disarmament and general and complete disarmament. The Treaty represents the only binding commitment in a multilateral treaty to the goal of disarmament by the nuclear-weapon States. Opened for signature in 1968, the Treaty entered into force in 1970. On 11 May 1995, the Treaty was extended indefinitely. A total of 191 States have joined the Treaty.’²

Another relevant legal instrument is the Comprehensive Nuclear-Test-Ban Treaty (CTBT) opened for signature in September 1996, article I(1) of which states that ‘Each State Party undertakes: not to carry out any nuclear weapon test explosion or any other nuclear explosion, and to prohibit and prevent any such nuclear explosion at any place under its jurisdiction or control.’³ The CTBT has not

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¹ *Treaty on the Non-Proliferation of Nuclear Weapons NPT*, 729 UNTS 16, signed on 1 July 1968, entered into force 5 March 1970. (“NPT”)

² ‘Treaty on the Non-Proliferation of Nuclear Weapons’, *United Nations Office for Disarmament Affairs* available at <https://www.un.org/disarmament/wmd/nuclear/npt/>, accessed on 4 January 2017.

³ *Comprehensive Nuclear Test Ban Treaty*, 35 ILM 1439, adopted on 10 September 1996, art I(1).

entered into force because some of the countries mentioned in its Annex 2 have not yet ratified it, as required by its article XIV(1).⁴

Apart from these treaties, the issue of nuclear weapons has also found its way into judicial settlement. The International Court of Justice (“ICJ” or Court) has been confronted with the issue of nuclear weapons on the following occasions, listed chronologically:

1. Australia versus France 1973;⁵
2. New Zealand versus France 1973;⁶
3. Request for advisory opinion by the World Health Organization (“WHO”) 1993;⁷
4. Request for advisory opinion by the United Nations General Assembly (“UNGA”) 1995;⁸
5. New Zealand versus France 1995;⁹ and
6. The Republic of the Marshall Islands (the Marshall Islands) versus India, Pakistan, and the United Kingdom (“UK”) 2014.¹⁰

The first section of this article discusses the aforementioned cases in detail. This is followed by a critical examination of the precedential value of advisory opinions of the ICJ in the second section. The third section uses the nuclear weapons advisory opinion as precedent to determine the imagined outcome of the contentious cases filed by the Marshall Islands before the ICJ.

⁴ ‘Comprehensive Nuclear-Test-Ban Treaty (CTBT)’, *United Nations Office for Disarmament Affairs* available at <https://www.un.org/disarmament/wmd/nuclear/ctbt/>, accessed on 9 May 2017.

⁵ *Case concerning Nuclear Tests (Australia v France)*, ICJ, Application instituting Proceedings filed in the Registry of the Court (9 May 1973).

⁶ *Nuclear Tests Cases Volume II, (New Zealand v France)*, ICJ, Pleadings, Oral Arguments, Documents, Application instituting Proceedings submitted by the Government of New Zealand (9 May 1973).

⁷ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, ICJ, Request for Advisory Opinion transmitted to the Court under a World Health Assembly resolution (14 May 1993).

⁸ *Legality of the Threat or Use of Nuclear Weapons*, ICJ, Request for Advisory Opinion transmitted to the Court under the United Nations General Assembly resolution 49/75 K (15 December 1994).

⁹ *Nuclear Tests Case* (n 6), Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court’s Judgment of 20 December 1974 in the Nuclear Tests Case (22 September 1995).

¹⁰ Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (*Marshall Islands v India*), ICJ, *Application instituting Proceedings against the Republic of India by the Republic of the Marshall Islands* (24 April 2014); Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (*Marshall Islands v Pakistan*), ICJ, *Application instituting Proceedings against Pakistan by the Republic of the Marshall Islands* (24 April 2014);

Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (*Marshall Islands v United Kingdom*), ICJ, *Application instituting Proceedings against the United Kingdom by the Republic of the Marshall Islands* (24 April 2014).

I. ICJ's Brush with Nuclear Weapons

On 9th May 1973, Australia and New Zealand introduced parallel applications against France in the ICJ in view of its nuclear tests in the Pacific Ocean. The complainants asked the Court to rule that atmospheric nuclear tests leading to radioactive fallout were inconsistent with international law and constituted a violation of their rights in international law. Therefore, they asked the Court to rule that France to refrain from conducting further atmospheric nuclear tests. In a letter to the ICJ, dated 16th May 1973, France argued that the Court was not competent in the case hence refused to accept the Court's jurisdiction. The Court, however, held that it was competent. It indicated interim measures of protection and recommended that the governments of the three disputing countries had to avoid any act which would aggravate the dispute before the Court or which would breach the right of the other party to the execution of any judgment that the Court might render in the case. It, especially, asked the French government to abstain from conducting nuclear tests.¹¹ However, France conducted another set of atmospheric tests in July - August 1973 and June - September 1974. But it did declare its intention to cease conducting atmospheric nuclear tests once the test campaign of 1974 had concluded. Such a unilateral declaration can create legal obligations. The Court considered this declaration as an engagement of France. Therefore, the complainants had achieved their objective. As a judicial body, the Court decides existing disputes between parties but these disputes must have existed at the time it rules. The disputes having come to an end, the applications had no purpose and there was nothing to adjudicate.¹² The case did not stop here. On June 13, 1995, France announced that it would conduct underground nuclear tests in the South Pacific. New Zealand instituted an application in the ICJ referring to the decision of 1974 according to which non-compliance by France with its unilateral engagement would allow New Zealand to go to the ICJ. France objected saying that the set of tests envisaged in 1995 were underground whereas the decision of 1974 covered atmospheric tests. The Court admitted this objection and rejected the application of New Zealand.¹³ Thus, the ICJ did not get the opportunity to decide the contentious cases against France.¹⁴

On September 3, 1993, the WHO requested the ICJ for an advisory opinion on the following question: 'in view of the health and environmental effects, would the use of nuclear weapons by a State in war or other armed conflict be a breach

¹¹ *Nuclear Tests Case (Australia v France)*, Interim Protection (22 June 1973), ICJ Rep 1973 p. 99; *Nuclear Tests Case (New Zealand v France)*, Interim Protection (22 June 1973), ICJ Rep 1973, p. 135.

¹² *Nuclear Tests Case (Australia v France)*, Judgment, ICJ Rep 1974, p. 253; *Nuclear Tests Case (New Zealand v France)*, Judgment, ICJ Rep 1974, p. 457.

¹³ Request for an Examination (n 9) p. 288.

¹⁴ *Nuclear Tests Case, Australia v. France* (n 12); *Nuclear Tests Case New Zealand v. France* (n 12); *Request for an Examination* (n 9).

of its obligations under international law including the WHO Constitution?’¹⁵ The Court stated that:

‘[t]he question put to the Court in the present case relates (...) *not 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*. Whatever those effects might be, the competence of the WHO to deal with them is not dependent on the legality of the acts that caused them.’¹⁶

The Court, after analyzing the Constitution of the WHO, concluded that the organization was not competent to deal with questions of legality of nuclear weapons.¹⁷ It, therefore, refused to give an advisory opinion to the WHO.¹⁸ Consequently, the only statement on the nuclear issue from the ICJ came in the form of an advisory opinion issued to the UNGA on July 8, 1996.¹⁹

On January 6, 1995, the UNGA asked the ICJ for an advisory opinion on the following question: does international law allow use of nuclear weapons in any circumstance?²⁰ The Court’s advisory opinion revealed the divergence within the Court²¹ and the casting vote of the President of the Court was necessary to adopt its crucial paragraph which states 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-defense, in which the very survival of a State would be at stake.’²²

The advisory opinion states that international law does not permit or prohibit the threat or use of nuclear weapons.²³ The Court declared a *non liquet* on this point

¹⁵ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (n 8).

¹⁶ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, ICJ Rep 1996, p. 66, para 21.

¹⁷ *Ibid.*

¹⁸ *Ibid.*, p. 66.

¹⁹ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Rep 1996, p. 226.

²⁰ *Legality of the Threat or Use of Nuclear Weapons* (n 8), p. 2.

²¹ *Legality of the Threat or Use of Nuclear Weapons* (n 19), para 105(2). *Also see* declarations, separate opinions, and dissenting opinions of all the fourteen judges, appended to the advisory opinion, indicating their agreement or disagreement with the different aspects of the advisory opinion.

²² *Legality of the Threat or Use of Nuclear Weapons* (n 19), para 105(2) (E).

²³ *Ibid.*, para 105(2)(A and B) which states:

‘For these reasons,

instead of clarifying the applicability of the principles of customary international law and international humanitarian law to nuclear weapons.²⁴ In other words, a comprehensive agreement on complete nuclear disarmament is required because the current international law is imperfect in the sense that there is a lacuna preventing an adequate legal response.

After this advisory opinion, the ICJ was once again confronted with the issue of nuclear weapons. On April 25, 2014, the Marshall Islands filed separate cases against nine states for their alleged failure to fulfill their obligations with respect to the cessation of the nuclear arms race at an early date and nuclear disarmament. The United States conducted 67 nuclear weapon tests in the Marshall Islands between 1946 and 1958, and the negative effects of which continue to plague the people of the island nation.²⁵ Tony deBrum, the Foreign Minister of the Marshall Islands, at the time of the filing, stated that '[o]ur people have suffered the catastrophic and irreparable damage of these weapons, and we vow to fight so that no one else on earth will ever again experience these atrocities.'²⁶ Thus, it would seem that the Marshall Islands had purely altruistic motives in filing the cases. The cases proceeded against the three states (India, Pakistan, and the UK) that have recognized the Court's compulsory jurisdiction. Out of these three states, only the UK is a party to the NPT.²⁷ The Marshall Islands alleged that India, Pakistan, and the UK had not fulfilled their obligation to pursue in good faith and conclude negotiations leading to nuclear disarmament. It based its claims

THE COURT,

(2) *Replies* in the following manner to the question put by the General Assembly :

A. Unanimously,

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

B. By eleven votes to three,

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

IN FAVOUR : *President* Bedjaoui; *Vice-President* Schwebel; *Judges* Oda, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Ferrari Bravo, Higgins;

AGAINST : *Judges* Shahabuddeen, Weeramantry, Koroma;

²⁴ Timothy L.H. McCormack, 'A *non liquet* on nuclear weapons The ICJ avoids the application of general principles of international humanitarian law', no. 316, *International Review of the Red Cross* p. 76, 1997, pp. 77-78.

²⁵ 'Pacific Nation Challenges Nine Nuclear-Armed States in Lawsuits before the World Court', 24 April 2014, *Nuclear Age Peace Foundation* available at <http://www.wagingpeace.org/pacific-nation-challenges-nine-nuclear-armed-states-in-lawsuits-before-the-world-court/>, accessed on 4 January 2017.

²⁶ John Burroughs, 'The Marshall Islands' Two-Front Fight to Survive and Thrive: Climate Protection and Nuclear Disarmament', vol. 37, no. 2, *Disarmament Times* p. 3, 2014, p. 4 available at http://lcnp.org/pubs/DT_Winter_2014.pdf, accessed on 4 January 2017.

²⁷ ICJ Press Release, 'The Republic of the Marshall Islands files Applications against nine States for their alleged failure to fulfil their obligations with respect to the cessation of the nuclear arms race at an early date and to nuclear disarmament', 25 April 2014, No. 2014/18, *ICJ* available at <http://www.icj-cij.org/presscom/files/0/18300.pdf>, accessed on 21 January 2016.

against the three respondents on the nuclear weapons advisory opinion. However, the three respondents argued that there was no dispute between them and the complainant. This argument was upheld by the ICJ disallowing itself on jurisdiction to proceed to the merits of the cases. According to the ICJ, a dispute exists if the complainant and respondent hold opposite views regarding the performance or non-performance of an international obligation. In these cases, the Marshall Islands argued that its statements in favor of nuclear disarmament made at multilateral fora proved the existence of a dispute between the respondents and itself. However, the ICJ felt that the respondents were not required to react to these general statements. Thus, the absence of a reaction did not imply the presence of opposite views between the complainant and respondents.²⁸ But what would have been the outcome if the ICJ had proceeded to the merits of the case? The question that arises here is whether or not the nuclear weapons advisory opinion could have served as precedent were the ICJ to decide on merits the cases filed by the Marshall Islands.²⁹ To answer this question, we must look at the advisory jurisdiction of the ICJ and the precedential value, if any, of its advisory opinions.

II. The Precedential Value of Advisory Opinions

Like its predecessors, the Permanent Court of International Justice (“PCIJ”), the ICJ has an advisory function. It has its origin in article 14 of the Covenant of the League of Nations³⁰ which invested the PCIJ with this function. Today, the basis and conditions of exercise of this function are laid down in article 96 of the United Nations (“UN”) Charter and Chapter IV of the ICJ Statute.³¹ As per article 96 of the UN Charter, the ICJ can give advisory opinions on any legal question

²⁸ ICJ Press Release, ‘Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v India)’, 5 October 2016, No. 2016/29, *ICJ* available at <http://www.icj-cij.org/docket/files/158/19128.pdf>, accessed on 28 October 2016; ICJ Press Release, ‘Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v Pakistan)’, 5 October 2016, No. 2016/30, *ICJ* available at <http://www.icj-cij.org/docket/files/159/19130.pdf>, accessed on 28 October 2016; ICJ Press Release, ‘Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom)’, 5 October 2016, No. 2016/31, *ICJ* available at <http://www.icj-cij.org/docket/files/160/19132.pdf>, accessed on 28 October 2016.

²⁹ Of course, one may ask if an advisory opinion that does not answer the question raised should be used as precedent to decide a case, but this issue will not be examined here.

³⁰ *The Covenant of the League of Nations*, 28 April 1919, art 14: ‘The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly.’

³¹ *Charter of the UN and Statute of the ICJ*, 1 UNTS XVI, signed on 26 June 1945, entered into force 24 October 1945.

submitted to it by the UNGA, the Security Council (“SC”), and all other organs and specialized agencies of the UN authorized by the UNGA to request advisory opinions on legal questions arising within the scope of their activities. The ICJ can rule only if these conditions are satisfied.

For our purposes, it is important to determine whether advisory opinions of the ICJ have precedential value or are subject to the doctrine of *stare decisis*, according to which ‘courts are bound by the reasoning of the judgments already rendered.’³² According to Judge Tomka, ‘the concept of *stare decisis*, or binding precedent (...) is - strictly speaking - absent from international judicial decision-making’³³ therefore, the ICJ’s ‘jurisprudence is not imbued with the force of *stare decisis*.’³⁴ Thus, the Court may refer to its precedent but is not obliged to follow it.³⁵ There are two points here: first, that the Court is not obliged to refer to its previous cases; and second, that it is not obliged to follow precedent even if precedent is referenced.

Before proceeding to examine this topic, it is important to distinguish between binding effect and precedential value. Judgments of the ICJ have binding effect on the parties to the dispute³⁶ but advisory opinions do not have binding effect on the body/bodies that request them.³⁷ Even so, advisory opinions of the ICJ have been accepted by the UNGA.³⁸ For example, the UNGA recommended that its members and those of the SC act in accordance with the ICJ’s advisory opinion on Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter);^{39,40} it referred to the advisory opinion on Reparation for Injuries Suffered in the Service of the United Nations⁴¹ in authorizing the Secretary-General to bring an international claim against the

³² Gilbert Guillaume, ‘The Use of Precedent by International Judges and Arbitrators’, vol. 2, no. 1, *Journal of International Dispute Settlement* p. 5, 2011, p. 6.

³³ Peter Tomka, ‘The Rule of Law and the Role of the International Court of Justice in World Affairs’, 2 December 2013, Inaugural Hilding Eek Memorial Lecture by H.E. Judge Peter Tomka, President of the International Court of Justice, at the Stockholm Centre for International Law and Justice, *ICJ*, p. 7 available at <http://www.icj-cij.org/presscom/files/9/17849.pdf>, accessed on 22 January 2016.

³⁴ *Ibid.*

³⁵ Guillaume (n 32), p. 9.

³⁶ *ICJ Statute* (n 31), art 59: ‘The decision of the Court has no binding force except between the parties and in respect of that particular case.’

³⁷ Edvard Hambro, ‘The Authority of the Advisory Opinions of the International Court of Justice’, vol. 3, no. 1, *International and Comparative Law Quarterly* p. 2, 1954, p. 5; Michla Pomerance, ‘The ICJ’s Advisory Jurisdiction and the Crumbling Wall between the Political and the Judicial’, vol. 99, no. 1, *American Journal of International Law* p. 26, 2005, p. 36; Anthony Aust, ‘Advisory Opinions’, vol. 1, no. 1, *Journal of International Dispute Settlement* p. 123, 2010, pp. 133, 150.

³⁸ Hambro (n 37), pp. 13-14.

³⁹ *Admission of a State to the United Nations (Charter, Art. 4)*, Advisory Opinion, ICJ Rep 1948, p. 57.

⁴⁰ UNGA Resolution 197(III) of 8 December 1948 (Admission of new Members).

⁴¹ *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion, ICJ Rep 1949, p. 174.

government of a state;⁴² and it accepted⁴³ the advisory opinion on the International Status of South West Africa.⁴⁴ However, precedential value is not a function of binding effect of the pronouncements of the Court and can exist independently of it. As previously mentioned, precedent entails a situation in which the Court refers to its previous cases, whether judgments or advisory opinions, while ruling on a later case. It can and does do so irrespective of the binding effect of judgments and advisory opinions to which it refers.

The phenomenon of precedent is present in common law systems but is not altogether absent in civil law systems.⁴⁵ According to Judge Guillaume, it is present even in the international sphere.⁴⁶ Rosenne has written about the ICJ's 'consistent reference to its own judicial precedents.'⁴⁷ A look at the Court's jurisprudence shows the important role of precedent.⁴⁸ According to Judge Tomka, '[t]he Court itself relies rather liberally on its own jurisprudence when adjudicating disputes and formulating its judgments.'⁴⁹ In fact, the reference to previous cases has become a characteristic feature of the Court's practice.⁵⁰ For example, the ICJ used the phrase 'the Court recalled in the *Nuclear Tests* cases'⁵¹ while quoting from those cases in a later case⁵² and referred to paragraph 23 of the advisory opinion on Western Sahara⁵³ while rendering a later advisory opinion.⁵⁴ However, rules governing the use of precedents in international tribunals, in this case the ICJ, have not been laid down.⁵⁵

Judge Shahabuddeen states that '[i]t is scarcely necessary to state that the [ICJ] also follows its own case law. [I]t frequently makes use of short phrases to show that it is following the previous case.'⁵⁶ Indeed, 'the Court's practice 'ranges from

⁴² UNGA Resolution 365(IV) of 1 December 1949 (Reparation for injuries incurred in the service of the United Nations).

⁴³ UNGA Resolution 449(V) of 13 December 1950 (Question of South West Africa).

⁴⁴ *International Status of South-West Africa*, Advisory Opinion, ICJ Rep 1950, p. 128.

⁴⁵ Mohamed Shahabuddeen, *Precedent in the World Court*, Cambridge University Press, Cambridge, 1996, p. 6.

⁴⁶ Guillaume (n 32), p. 5.

⁴⁷ Shabtai Rosenne, *The Law and Practice of the International Court Volume II*, Leiden, 1965, p. 612 cited in Shahabuddeen (n 45), p. 7. Also see Shabtai Rosenne, 'Article 27 of the Statute of the International Court of Justice', vol. 32, *Virginia Journal of International Law* p. 213, 1991, p. 231.

⁴⁸ Volker Röben, 'Le précédent dans la jurisprudence de la Cour internationale', vol. 32, *German Yearbook of International Law* p. 382, 1989, p. 382.

⁴⁹ Tomka (n 33), p. 7; Also see Guillaume (n 32), p. 9.

⁵⁰ Röben (n 48), p. 387.

⁵¹ *Nuclear Tests Case, Australia v. France* (n 12); *Nuclear Tests Case, New Zealand v. France* (n 12).

⁵² *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment, ICJ Rep 1986, p. 14, para 58.

⁵³ *Western Sahara*, Advisory Opinion, ICJ Rep 1975, p. 12.

⁵⁴ *Application for Review of Judgment No. 333 of the United Nations Administrative Tribunal*, Advisory Opinion, ICJ Rep 1987, p. 18, para. 25.

⁵⁵ Shahabuddeen (n 45), pp. 7-8; R. Y. Jennings, 'General Course on Principles of International Law', vol. 121, *Recueil des cours*, The Hague Academy of International Law, 1967, p. 342.

⁵⁶ Shahabuddeen (n 45), p. 26.

mere illustration and “distinguishing” to a form of speech apparently indicating the authoritative character of the pronouncement referred to.⁵⁷ The practice of distinguishing, in which the Court differentiates between the past and present case so as not to apply the former to the latter, does not compromise the authority of the former; instead, it only serves to highlight the Court’s scrupulous attitude towards its own jurisprudence and thus towards its precedential value.⁵⁸ The Court either explicitly refers to its precedents or relies on them without such explicit reference. According to Judge Fitzmaurice...

[i]t is ... evident that the phraseology of certain passages in the statements of the Court, and of individual Judges, is not infrequently taken from, or reflects, language used in previous decisions that are not actually mentioned, and in these cases it is usually clear that something like a constant practice (*a jurisprudence constante*) exists, by which the Court regards itself as *de facto* bound.⁵⁹

This *jurisprudence constante* requires a certain ‘degree of clarity, continuity and permanence.’⁶⁰ The explicit or implicit reference to precedent shows that the Court wants to maintain consistency in its holdings⁶¹ apart from using its jurisprudence to formulate rules or legal principles,⁶² as well as to justify its decisions.⁶³ The use of precedent guarantees certainty and equality of treatment to the parties,⁶⁴ leading to predictability in the decisions which, in turn, helps the Court win the trust of states.⁶⁵ Moreover, the Court and the parties appearing before it can also rely on the jurisprudence of the PCIJ and, in fact, do so often.⁶⁶

Individual judges from different legal cultures have also expressed opinions to this effect. Judge Ehrlich stated that *stare decisis* dictates that the Court should apply, as far as possible, the decisive rule of law in one case to subsequent cases.⁶⁷ Likewise, Judge Koretsky stated that a decision in a case binds the parties as well as the Court because the principle of consistency in judicial decisions is more important

⁵⁷ Sir Hersch Lauterpacht, *The Development of International Law by the International Court*, London, 1958, p. 9 cited in Shahabuddeen (n 45), p. 28.

⁵⁸ Röben (n 48), p. 389.

⁵⁹ Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice Volume II*, Cambridge, 1986, p. 583 cited in Shahabuddeen (n 45), p. 28.

⁶⁰ Guillaume (n 32), p. 6.

⁶¹ Shahabuddeen (n 45), p. 29; Guillaume (n 32), p. 9.

⁶² Röben (n 48), p. 394.

⁶³ Ibid, p. 403.

⁶⁴ Guillaume (n 32), p. 6.

⁶⁵ Röben (n 48), p. 404.

⁶⁶ Tomka (n 33), p. 4.

⁶⁷ *Case concerning the Factory At Chorzów (Germany v Poland)*, Merits, Publications of the PCIJ Series A.-No. 17 Collection of Judgments No. 13, Dissenting Opinion by M. Ehrlich, p. 5, 1928, p. 76.

for international tribunals than for domestic tribunals.⁶⁸ He also said that the ICJ pays a lot of attention to its previous judgments and argued in favor of an advisory opinion being binding for the Court if not for the body which requests it.⁶⁹ Although these observations do not prove that the Court is subject to a doctrine of binding precedent, they do show that the Court pursues a policy of precedential consistency.⁷⁰ Thus, the non-applicability of *stare decisis* does not deny precedential effect to the decisions of the Court.⁷¹ This is because the Court is bound to take into account a precedent if it is based on the principles of international law.⁷² Moreover, counsels for the parties do rely on previous cases. Indeed, previous cases may directly inspire the substantive arguments of counsel.⁷³

The question of precedential value of advisory opinions must be examined in light of article 59⁷⁴ and 38(1) (d)⁷⁵ of the ICJ Statute. These two articles use the words 'decision' and 'decisions' without clarifying whether they include advisory opinions specifically. Other provisions of the ICJ Statute are similarly silent on the issue. Does this mean that advisory opinions do not have precedential value? If the response is in the affirmative, how do we explain the fact that judgments and advisory opinions of the ICJ frequently refer to prior ICJ cases without making a distinction as to whether the prior cases were contentious cases or advisory proceedings? Judge Lauterpacht states that the Court's pronouncements have authority and influence due to their intrinsic power.⁷⁶ According to Judge Shahabuddeen, the ICJ, being a court of justice, invests its advisory opinions with precedential value normally exerted by opinions of a judicial body.⁷⁷ Thus, their arguments are independent of the ICJ Statute. Therefore, we can conclude that the ICJ operates a *de facto*, not *de jure*, system of precedent. However, Hambro's argument is a bit more nuanced; he states that the precedential value of advisory opinions is determined by their intrinsic merits.⁷⁸ Thus, he argues that advisory opinions have precedential value due to their intrinsic merits (and not because they emanate from the ICJ).

⁶⁸ *South West Africa Cases (Ethiopia and Liberia v South Africa)*, Second Phase, Judgment, Dissenting Opinion of Judge Koretsky, p. 6, ICJ Rep 1966, pp. 240-241.

⁶⁹ Ibid, p. 241.

⁷⁰ Shahabuddeen (n 45), p. 31.

⁷¹ Ibid, p. 107.

⁷² *Interpretation of Peace Treaties*, Advisory Opinion, Dissenting Opinion by Judge Zoričić, p.65, ICJ Rep 1950, p. 104.

⁷³ Shahabuddeen (n 45), pp. 213-214; *Also see* Röben (n 48), pp. 388-389.

⁷⁴ ICJ Statute (n 31), art 59: "The decision of the Court has no binding force except between the parties and in respect of that particular case."

⁷⁵ Ibid, art 38(1)(d): "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (...)

d. subject to the provisions of Article 59, judicial decisions (...) as subsidiary means for the determination of rules of law."

⁷⁶ Lauterpacht (n 57), p. 22 cited in Shahabuddeen (n 45), p. 167.

⁷⁷ Shahabuddeen (n 45), p. 167.

⁷⁸ Hambro (n 37), pp. 21-22.

According to Hambro, ‘the legal reasons behind the opinions carry the same weight and are invested with the same high authority as in the case of judgments.’⁷⁹ According to Greig, advisory opinions have great moral value and deserve greater attention in view of their weight.⁸⁰ Moreover, the authority of the ICJ, the UN’s principal judicial organ, also attaches to them.⁸¹ Referring to the PCIJ, Fachiri argued that its established practice consisted in not distinguishing between judgments and advisory opinions as regards their precedential value.⁸² Judge de Visscher made the same point with respect to the ICJ stating that ‘[d]ans le plan de leur autorité doctrinale, il n’y a guère de distinction à faire entre arrêts et avis.’⁸³ Judge Tanaka stated that since an advisory opinion is an authoritative pronouncement of the law, ‘its content will have an influence upon the Court’s decision on the same legal issue.’⁸⁴ This was reiterated by Judge de Castro when he stated that advisory opinions did not carry less authority than judgments of the ICJ.⁸⁵ According to Judge Zoričič, ‘the Court’s advisory opinions enjoy the same authority as its judgments (...). The Court itself refers to its previous advisory opinions in the same way as to its judgments.’⁸⁶ After conducting an extensive examination of the Court’s jurisprudence, Röben concludes that precedent plays an important role in contentious cases as well as in advisory opinions, and furthermore that the Court refers to its precedents without making a distinction as to whether the prior cases were contentious cases or advisory proceedings.⁸⁷ In fact, in the nuclear weapons advisory opinion under consideration in this article, the Court referred to the advisory opinion on the Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt.^{88/89} This is a concrete example of advisory opinions serving as precedent.⁹⁰

⁷⁹ Ibid, p. 5.

⁸⁰ D.W. Greig, ‘The Advisory Jurisdiction of the International Court and the Settlement of Disputes between States’, vol. 15, no. 2, *International and Comparative Law Quarterly* p. 325, 1966, p. 361.

⁸¹ Aust (n 37), p. 133.

⁸² A.P. Fachiri, *The Permanent Court of International Justice, Its Constitution, Procedure and Work*, London, 1932, p. 81 cited in Shahabuddeen (n 45), p. 168.

⁸³ Charles de Visscher, *Aspects récents du droit procédural de la Cour internationale de Justice*, Paris, 1966, p. 195 cited in Shahabuddeen (n 45), p. 168.

⁸⁴ *South West Africa Cases* (n 68), Dissenting Opinion of Judge Tanaka, p. 260.

⁸⁵ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, Separate Opinion of Judge de Castro, p. 16, ICJ Rep 1971, p. 173.

⁸⁶ *Interpretation of Peace Treaties* (n 72), p. 101.

⁸⁷ Röben (n 48), p. 395.

⁸⁸ *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, ICJ Rep 1980, p. 73.

⁸⁹ *Legality of the Threat or Use of Nuclear Weapons* (n 19), para 13; Aust (n 37), p. 136.

⁹⁰ Miller discusses the phenomenon of international tribunals referring to the cases of other international tribunals while deciding the cases at hand. He shows that many international tribunals refer to the judgments and/or advisory opinions of the ICJ. For example, the International Criminal Tribunal for the former Yugoslavia referred to the nuclear weapons advisory opinion in four cases including in *Prosecutor v Kvočka et al.*, ICTY, Decision of the

Additionally, Hambro says that advisory opinions will have the full authority of law and will contribute to the development of international law on account of their intrinsic value and if dissent has not undermined the majority opinion.⁹¹ Judge Jennings says that advisory opinions of the ICJ have contributed to the elaboration and development of international law but have not always contributed to its clarification.⁹²

As regards individual opinions of judges, Judge Lauterpacht welcomes them by stating that they help in better understanding of the judgments and/or advisory opinions to which they are appended and contribute to the development and clarification of international law.⁹³ In some cases, the Court has referred to or consulted separate opinions appended to the decision in a previous case because they may contribute to the clarification of the decision in that case.⁹⁴ The counsel arguing cases in the ICJ have also referred to the dissenting opinions in previous cases.⁹⁵ Sometimes, parties in a case also put forth a position based on a dissenting or separate opinion in a previous case.⁹⁶ For example, the joint dissenting opinion in the Nuclear Tests case (*Australia v France*) attributes the French thesis to the dissenting opinions of four judges in the Electricity Company of Sofia and Bulgaria case.^{97/98} Does this mean that dissenting or separate opinions have precedential value? According to Judge Guillaume:

Trial Chamber of 1 April 1999, footnote 28 and in *Prosecutor v Kordić & Čerkez*, ICTY, Decision of the Trial Chamber of 2 March 1999, para. 27. See Nathan Miller, 'An International Jurisprudence? The Operation of "Precedent" Across International Tribunals', vol. 15, *Leiden Journal of International Law* p. 483, 2002, pp. 510-511, 513.

⁹¹ Hambro (n 37), p. 22.

⁹² Robert Y. Jennings, 'The International Court of Justice after Fifty Years', vol. 89, no. 3, *American Journal of International Law* p. 493, 1995, p. 503.

⁹³ Lauterpacht (n 57), pp. 66-67 cited in Shahabuddeen (n 45), p. 179.

⁹⁴ See *Case concerning the Continental Shelf (Tunisia v Libyan Arab Jamahiriya)*, Application to Intervene, Judgment, ICJ Rep 1981, p. 3, para. 27 in which the Court referred to the declarations of judges appended to its order in *Nuclear Tests Case (Australia v France)* Application to Intervene, Order of 20 December 1974, ICJ Rep 1974, p. 530 and *Nuclear Tests Case (New Zealand v France)*, Application to Intervene, Order of 20 December 1974, ICJ Rep 1974, p. 535.

⁹⁵ See *Nuclear Tests (Australia v France)* Oral Arguments on the Request for the Indication of Interim Measures of Protection Minutes of the Public Sittings held at the Peace Palace, The Hague, on 21, 22, 23 and 25 May 1973, President Lachs presiding, and on 22 June 1973, Vice-President Ammoun presiding, pp. 185-186 in which Solicitor-General Mr. Ellicott, Counsel for the Government of Australia, referred to p. 232 in the *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark and The Netherlands)*, Judgment, ICJ Rep 1969, Dissenting Opinion of Judge Lachs, p. 3 stating that a dissenting opinion is not devoid of the support of the Court as a whole nor is it inconsistent with what the Court stated.

⁹⁶ Shahabuddeen (n 45), p. 215.

⁹⁷ *The Electricity Company of Sofia and Bulgaria*, Preliminary Objection (*Belgium v Bulgaria*) Judgment, 1939, PCIJ Series A./B. Judgments, Orders and Advisory Opinions Fascicule No. 77, p. 64.

⁹⁸ *Nuclear Tests Case, Australia v France* (n 12), Joint Dissenting Opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldoock, para 87.

‘judgments or advisory opinions adopted as a full Court, unanimously or by a very large majority—as well as oft-cited decisions—naturally carry more weight than isolated judgments, adopted by Chambers, or decided by a narrow majority. Similarly, the reasons behind the operative paragraphs will weigh heavier than *obiter dicta* inserted to address one judge’s concerns. However, it is difficult to generalize in this area.’⁹⁹

In view of the above, the following section uses the nuclear weapons advisory opinion as precedent to determine the imagined outcome of the Marshall Islands’ complaints on merits.

III. Examining the Marshall Islands’ Complaints in Light of the Nuclear Weapons Advisory Opinion

The Marshall Islands accused India, Pakistan, and the UK of violating a number of obligations which will be examined below. Each allegation made by the complainant will be tested with respect to the nuclear weapons advisory opinion.

1. First, the Marshall Islands alleged a violation of the treaty obligation laid down in article VI of the NPT which requires parties to pursue negotiations in favor of cessation of nuclear arms race and nuclear disarmament.¹⁰⁰ Since only the UK is party to the NPT, the Marshall Islands alleged that it had not actively pursued negotiations leading to nuclear disarmament and had breached its obligation regarding cessation of nuclear arms race at an early date, both of which were violations of article VI of the NPT.¹⁰¹ It supported its case by referring to the unanimous statement of the Court in the operative part of the nuclear weapons advisory opinion that ‘[t]here 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.’^{102/103} The discussion in the previous section demonstrated that advisory opinions, especially those rendered unanimously, have precedential value. Thus, it is possible that the Marshall Islands could have proved its case.
2. Second, the Marshall Islands alleged a violation of the customary international law obligation laid down in article VI of the NPT.¹⁰⁴ It supported its case by

⁹⁹ Guillaume (n 32), p. 10.

¹⁰⁰ NPT (n 2), art VI: ‘Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.’

¹⁰¹ *Marshall Islands v United Kingdom*, Application (n 10), paras 104, 106-107, 113.

¹⁰² *Legality of the Threat or Use of Nuclear Weapons* (n 19), para 105(2)(F).

¹⁰³ *Marshall Islands v United Kingdom*, Application (n 10), para 101.

¹⁰⁴ *Marshall Islands v India*, Application (n 10), para. 41; *Marshall Islands v Pakistan*, Application (n 10), para 36; *Marshall Islands v United Kingdom*, Application (n 10), para 86.

referring to President Bedjaoui's separate declaration in the nuclear weapons advisory opinion where he said that 'this twofold obligation to negotiate in good faith and achieve the desired result has (...) acquired a customary character.'

¹⁰⁵ It also supported its case with two more statements made by the ICJ in the nuclear weapons advisory opinion. First, the ICJ stated (in the non-operative part of the advisory opinion) that even though the obligations in article VI of the NPT formally concern states parties to it, 'any realistic search for general and complete disarmament, especially nuclear disarmament, necessitates the co-operation of all States.'¹⁰⁶ Second, the ICJ stated (unanimously, in the operative part of the advisory opinion) that '[t]here exists an obligation to pursue in good faith and bring to a conclusive negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.'¹⁰⁷ According to the Marshall Islands, the respondents had breached their legal duty to perform in good faith, the customary international law obligations of nuclear disarmament and cessation of nuclear arms race at an early date enshrined in article VI of the NPT.¹⁰⁸ It would have been difficult for the Marshall Islands to prove its case since the nuclear weapons advisory opinion does not state explicitly that article VI of the NPT constitutes customary international law.

3. Third, the Marshall Islands alleged a violation of the *erga omnes* obligation laid down in article VI of the NPT. The concept of *erga omnes* obligations was recognized by the ICJ in the Barcelona Traction, Light and Power Company, Limited case wherein the Court stated that *erga omnes* obligations are 'the obligations of a State towards the international community as a whole, and (...) are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection.'¹⁰⁹ The Marshall Islands supported its case by referring to President Bedjaoui's separate declaration in the nuclear weapons advisory opinion where he said that:

¹⁰⁵ *Legality of the Threat or Use of Nuclear Weapons* (n 19), *Déclaration de M. Bedjaoui*, para 23; *Marshall Islands v India*, Application (n 10), para 44; *Marshall Islands v Pakistan*, Application (n 10), para 39; *Marshall Islands v United Kingdom*, Application (n 10), para 89.

¹⁰⁶ *Legality of the Threat or Use of Nuclear Weapons* (n 19), para 100; *Marshall Islands v India*, Application (n 10), para 42; *Marshall Islands v Pakistan*, Application (n 10), para 37; *Marshall Islands v United Kingdom*, Application (n 10), para 87.

¹⁰⁷ *Legality of the Threat or Use of Nuclear Weapons* (n 19), para 105(2) (F). *Marshall Islands v India*, Application (n 11), para 43; *Marshall Islands v Pakistan*, Application (n 10), para 38; *Marshall Islands v United Kingdom*, Application (n 10), para 88.

¹⁰⁸ *Marshall Islands v India*, Application (n 10), paras 58-61, 64; *Marshall Islands v Pakistan*, Application (n 10), paras 53-56, 59; *Marshall Islands v United Kingdom*, Application (n 10), paras 109-110, 113.

¹⁰⁹ *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)*, Judgment, ICJ Rep 1970, p. 3, para 33.

[a]s the Court has acknowledged, the obligation to negotiate in good faith for nuclear disarmament concerns the 182 or so States parties to the Non-Proliferation Treaty. I think one can go beyond that conclusion and assert that there is in fact a twofold *general obligation*, opposable *erga omnes*, to negotiate in good faith and to achieve the desired result.’¹¹⁰

Noting that the judges who rendered the advisory opinion did not consider it necessary to state that the NPT contains *erga omnes* obligations, would the separate declaration of a judge (which is classified by some authors as *dicta*¹¹¹), expressed after the advisory opinion, have precedential value? As per the past practice of the Court, it could have referred to this observation while deciding the Marshall Islands cases on merits. If it had done so, what would have been the result? Hambro states that political questions should be resolved in the political organs of the UN instead of disguising them as legal questions to be resolved by the Court.¹¹²

The argument that article VI of the NPT lays down *erga omnes* obligations applicable to India and Pakistan, which nations are not signatories to the NPT, was not very strong in view of the operative part of the nuclear weapons advisory opinion, which clearly did not mention any obligations for non-NPT parties.¹¹³ The ICJ simply stated that there is neither customary nor conventional international law in any authorization or prohibition of the threat or use of nuclear weapons.¹¹⁴ Its analysis was also NPT-party specific. For example, it quoted article VI of the NPT, which states ‘Each of the Parties to the Treaty.’¹¹⁵ It also stated that article VI of the NPT ‘formally concerns the 182 States parties.’¹¹⁶ Why did the Court use the word ‘formally?’ Did the Court want to emphasize the fact that the NPT concerns non-parties informally? This was followed by the statement that nuclear disarmament requires the co-operation of all states.¹¹⁷ But can these two statements taken together lead to the finding that article VI of the NPT contains *erga omnes* obligations binding on non-parties? The Court also quoted SC resolution 984 (1995) of 11 April 1995 on ‘the need for all States

¹¹⁰ *Legality of the Threat or Use of Nuclear Weapons* (n 19), *Déclaration de M. Bedjaoui*, para 23; *Marshall Islands v India*, Application (n 10), para 40 and footnote 77; *Marshall Islands v Pakistan*, Application (n 10), para 35 and footnote 67; *Marshall Islands v United Kingdom*, Application (n 10), para 85 and footnote 122.

¹¹¹ Katherine Maddox Davis, ‘Hurting More than Helping: How the Marshall Islands’ Seeming Bravery Against Major Powers Only Stands to Maim the Legitimacy of the World Court’, vol. 25, no. 1, *Minnesota Journal of International Law* p. 79, 2016, p. 94.

¹¹² Hambro (n 37), p. 19.

¹¹³ *Legality of the Threat or Use of Nuclear Weapons* (n 19), para 105(2).

¹¹⁴ *Ibid*, para 105(2) (A and B).

¹¹⁵ *Ibid*, para 99.

¹¹⁶ *Ibid*, para 100.

¹¹⁷ *Ibid*.

Parties to the Treaty on the Non-Proliferation of Nuclear Weapons to comply fully with all their obligations’¹¹⁸ in which the SC urged:

‘all States, as provided for in Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons, to pursue negotiations in good faith on effective measures relating to nuclear disarmament and on a treaty on general and complete disarmament under strict and effective international control which remains a universal goal.’¹¹⁹

The Court, thus, referred in the advisory opinion to NPT parties a number of times. Thus, the question is whether the opinion of President Bedjaoui in his separate declaration will prevail over the Court’s statements made in the non-operative part of the advisory opinion. In other words, which of the two has greater precedential value? As mentioned earlier, Judge Guillaume has stated that even though difficult to generalize, advisory opinions adopted unanimously or with a large majority carry more weight than a single judge’s concerns.¹²⁰ As much as the Court refers to past cases including separate and dissenting opinions, it is doubtful that the opinion of President Bedjaoui- in his separate declaration- would have prevailed over the Court’s statements in the advisory opinion if the Court actually had decided the Marshall Islands cases.

Moreover, it seems highly unlikely that the Court would have interpreted a treaty-based obligation in article VI of the NPT as an *erga omnes* obligation, irrespective of the issue of precedential value. Furthermore, the Court weakened the obligations mentioned in article VI of the NPT for its parties when it stated that ‘the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense, in which the very survival of a State would be at stake.’¹²¹ Thus, it appears extremely improbable that the Marshall Islands could have used the nuclear weapons advisory opinion to prove that article VI of the NPT applies to non-parties.

Conclusion

As discussed above, the Marshall Islands could have succeeded with respect to its treaty-based allegation by using the nuclear weapons advisory opinion as precedent. However, it mainly used the separate declaration of President Bedjaoui to support its non-treaty-based allegations. Following Judge Lauterpacht’s view, these observations by President Bedjaoui may help to better understand the nuclear weapons advisory opinion or contribute to the development and

¹¹⁸ Ibid, para 103.

¹¹⁹ Ibid.

¹²⁰ Guillaume (n 32), p. 10.

¹²¹ *Legality of the Threat or Use of Nuclear Weapons* (n 19), para 105(2) (E).

clarification of international law.¹²² But despite using precedent to take into account as nuclear weapons advisory opinion, it seems unlikely that these observations could have been of much help to the Marshall Islands in the contentious cases filed before the ICJ.

¹²² Lauterpacht (n 57), pp. 66-67 cited in Shahabuddeen (n 45), p. 179.