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Christine J. Vachon

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# Sovereignty Versus Globalization: The International Court of Justice's Advisory Opinion on the Threat or Use of Nuclear Weapons

Christyne J. Vachon

## I. INTRODUCTION

In recent history, the interdependence among nations increased.<sup>1</sup> Despite the changing world, sovereignty remains a central issue in international affairs.<sup>2</sup> As nation-states conduct their affairs, traditionally their primary concern has been for the independence of their statehood or sovereignty.<sup>3</sup> Despite such concerns, issues of war and peace drove nation-states to build alliances.<sup>4</sup> Modern developments, however, emphasize global concerns placing globalization at the forefront and national sovereignty in peril.<sup>5</sup> With increased globalization of the world community, the efficacy and, consequently, the validity of the individual nation is greatly weakened unless it acts in concert with other nations.<sup>6</sup> Thus a sovereign state must establish a balance between self-determination and independence on the one hand, and the necessary

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1. Miguel De La Madrid H., *National Sovereignty and Globalization*, 19 HOUS. J. INT'L L. 553, 555 (1997)(discussing the role of increased commercial activity, investments, financial transactions, tourism, and technological exchanges and their effects on the interconnection of nation-states).

2. John B. Attanasio, *Rapporteur's Overview and Conclusions: Of Sovereignty, Globalization, and Courts*, 28 N.Y.U. J. INT'L L. & POL. 1, 25 (1996). De La Madrid H., *supra* note 1, at 554 (indicating that sovereignty causes great international conflicts).

3. William R. Moomaw, *International Environmental Policy and the Softening of Sovereignty*, 21 FLETCHER F. WORLD AFF. 7, 7 (1997)(discussing traditional concerns for maintaining national sovereignty over one's own territory and defending boundaries from neighbors).

4. *Id.* (concluding that "[t]his is not surprising, since the rise of the nation-state was premised on the concept of territoriality: a particular piece of land was subject to the jurisdiction of a sovereign, who ruled and defended it from both physical encroachment by other states and undue outside influence in the governance of its internal affairs."). The U.N. Charter in art. 2 recognizes this concern.

5. Lan Cao, *Toward a New Sensibility for International Economic Development*, 32 TEX. INT'L L.J. 209, 246-47 (1997); De La Madrid H., *supra* note 1.

6. John Dunn, *Introduction: Crisis of the Nation State*, in CONTEMPORARY CRISIS OF THE NATION STATE? 3, 6 (John Dunn ed., 1995)

development and strengthening of the international community on the other.<sup>7</sup> A law, universally accepted by the community of sovereign states, will define this balance.<sup>8</sup> Key to the development of an international rule of law, judicial institutions such as the International Court of Justice (ICJ) craft customary law into broadly accepted regulations.<sup>9</sup>

Increasing globalization and decreasing sovereignty impact the international legal debate<sup>10</sup> on the legality of nuclear weapons. Before the end of the Cold War, nuclear weapons represented a necessary evil for nation-state security. However with the advent of increased globalization, nuclear weapons may not be such a necessary or desired security device.<sup>11</sup> The threat or use of nuclear weapons raises a number of global threats including: human rights, the environment,<sup>12</sup> and economics.<sup>13</sup> In fact, with the increase in global concerns of nuclear weapons, the General Assembly request for the advisory opinion of the ICJ on the legality of the use or threat of nuclear weapons represented a perfect opportunity for the Court to set the standard on the illegality of nuclear weapons.

Each global threat involves the tug o' war between globalization and sovereignty.<sup>14</sup> The sovereignty of the nation-state diminishes when international threats become equally important as national, state, and local matters.<sup>15</sup> The International Court of Justice addressed these

7. De La Madrid H., *supra* note 1, at 562.

8. *Id.*

9. Attanasio, *supra* note 2, at 26.

10. The international legal debate on nuclear weapons mutually affects and is affected by the international political debate on nuclear weapons.

11. Since the end of the Cold War, the opportunity for globalization has increased and polarization has decreased. Globalization has increased the amount of regional institutions for economic, political, juridical, and social integration. De La Madrid H., *supra* note 1. These regional institutions include the European Union, the North American Free Trade Agreement, the Forum of the Asian Pacific Economic Cooperation, and the South American Common Market. *Id.* at 555-56. There has been a similar movement on an even grander international scale. The more universal institutions include: the International Monetary Fund, the World Bank, and the World Trade Organization. *Id.*

12. J. William Futrell, *International Environmental Legal Framework*, SB79 ALI-ABA 1, 5 (1997)(indicating that climate change, depletion of the stratospheric ozone, the world wide spread of persistent organic pollutants, bio diversity depletion, and ocean degradation are listed among the top environmental concerns). I believe the international exchanges concerning the necessity and legality of nuclear weapons, in turn, increases globalization and decreases sovereignty.

13. These are not the only sub-topics.

14. Globalization has been identified in terms of economic globalization, political globalization, and social globalization. De La Madrid H., *supra* note 1. I believe that these areas reflect the sub-topics that I have identified.

15. Alex Y. Seita, *Globalization and the Convergence of Values*, 30 CORNELL INT'L L.J. 429, 429 (1997)(defining globalization). "Globalization means many things. It is foremost an economic process. Economic globalization refers to the world-wide integration of markets. . . . A paramount consequence of market integration has been increased economic interdependence among nations." *Id.* at 429-30. "Globalization is also a political event, as

global threats as part of its advisory opinion on the legality of the threat or use of nuclear weapons as requested by the General Assembly.<sup>16</sup> The implications of the ICJ's decision vary.<sup>17</sup> However, those issues unanswered by the Court are even more compelling than what the Court articulated.<sup>18</sup>

This piece explores the relationship of the nuclear debate to the globalization versus sovereignty debate. Central to this exploration is the ICJ's advisory opinion on the legality of the threat or use of nuclear weapons and its discussion of global concerns. Part II explains the concepts of globalization and sovereignty. Part III discusses nuclear weapons in general. Part IV explores the ICJ's advisory opinion and any other relevant opinions and agreements. Finally, Part V analyzes the implications of the ICJ decision, the issues articulated in the decision and those that are not. Part VI concludes.

## II. GLOBALIZATION VERSUS SOVEREIGNTY

### A. *Sovereignty*

In the sixteenth century, a nation-state's concern for its sovereignty grew out of the divine law of kings and the monarchical struggle in Western Europe to impose the supremacy of the king on the empire.<sup>19</sup> The Treaty of Westphalia of 1648<sup>20</sup> marked a turning point in history.

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evidenced by the spread of democracy and human rights among nations." *Id.* at 430. "The ideology of globalization can be broadly divided into substantive and procedural components. The most important procedural element is the rule of law - - the idea that disputes will be settled and agreements negotiated through the observance of established principles rather than the use of force or the intimidation of power. In turn the substantive principles, what the rule of law *seeks* to enforce, are those that nations have selected to settle disputes and negotiate agreements. The rule of law can be a way of resolving conflicts effectively, peacefully, and cooperatively." *Id.*

16. Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, July 8, 1996, 35 I.L.M. 809 [hereinafter General Assembly].

17. Antonio F. Perez, *The Passive Virtues and the World Court: Pro-Dialogic Abstinence By the International Court of Justice*, 18 MICH. J. INT'L L. 399, 430 (1997).

18. *Id.*

19. Moomaw, *supra* note 3 (concluding that "[t]his is not surprising, since the rise of the nation-state was premised on the concept of territoriality: a particular piece of land was subject to the jurisdiction of a sovereign, who ruled and defended it from both physical encroachment by other states and undue outside influence in the governance of its internal affairs."). De La Madrid H., *supra* note 1, at 554. The imposition of the supremacy of the monarchy is termed the doctrinal justification of absolutism. The struggle to impose supremacy of the monarchy resulted in the establishment of the absolutist state. *Id.*

20. The Treaty of Westphalia ended the Thirty-Years War and provided incentives to princes of France, Germany, and Sweden to form a loose confederation of independent states. Matthew D. Peter, *The Proposed International Court: A Commentary on the Legal and Political Debates Regarding Jurisdiction That Threaten the Establishment of an Effective Court*, 24 SYRACUSE J. INT'L L. & COM. 177, 177 n.3 (1997). This treaty initiated

The supremacy of the state displaced the church and the state asserted its absolute authority within its territorial boundaries.<sup>21</sup> Furthermore during the late eighteenth century, some states experienced democratic revolutions which transposed the political legitimacy of the country from the king to the people.<sup>22</sup> This process gradually occurred in more and more states.<sup>23</sup> Finally, modern constitutionalism made its world debut in the Charter that established the League of Nations and later the United Nations Charter.<sup>24</sup> Since, the glory of sovereignty of the nation-state continues to inspire the birth of new independent political units.<sup>25</sup> "Developing countries that were formerly colonies are particularly sensitive to the possibility that relinquishing any of their sovereignty would subjugate them to a new form of colonialism."<sup>26</sup>

The sovereignty debate includes issues such as the meaning of sovereignty, the circumstances that characterize sovereignty depending on the time and geography, and the changing national and international political structures.<sup>27</sup> By definition a state is a grouping of individuals who are entirely subject to their "own sovereign legal authority."<sup>28</sup> The most extreme sovereignty, is strict national sovereignty. "[N]ations are sovereigns over international law . . . international law exists only to the extent that each nation decides to obey it . . . [and] a nation may change its mind at any time . . . [and] the rule loses its force against

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traditional international law with the principles of territory and state autonomy, emphasizing sovereign state actors. Review Essay, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2607 (1997).

21. Cao, *supra* note 5.

22. De La Madrid H., *supra* note 1, at 554. The democratic revolutions that took place were sparked primarily by the English constitutional system. The belief that only the popular will can establish a legitimate and legal state power established the new doctrine of popular sovereignty. *Id.* This whole evolution coincided with the development of the doctrine of the rights of men and the theory of division of powers. *Id.* The French Revolution is another example of a revolt that toppled a "seemingly entrenched regime." Bruce Fein & Ward Warren, *Failure is Ever an Orphan*, WASH. TIMES, Mar. 13, 1998, at A16.

23. See, e.g., *id.* (indicating that the Russian Revolution occurred in 1917).

24. De La Madrid H., *supra* note 1, at 554-55 (indicating that juridical equality of nation-states and the principle of non-intervention are logical results of this process).

25. *Id.* at 555 (indicating that currently the United Nations, which started with only 51 member states, now has 185 members). The doctrine of sovereignty has pushed the decolonization process as a result of the two World Wars and the disintegration of the Soviet Empire. *Id.* In Asia and Africa from 1955 to 1975, the right to independence and self-determination for colonial peoples sparked a period of de-colonization. Gerry J. Simpson, *The Diffusion of Sovereignty: Self-Determination in the Postcolonial Age*, 32 STAN. J. INT'L L. 255, 263 (1996). See generally Diane F. Orentlicher, *Separation Anxiety: International Responses to Ethno-Separatist Claims*, 23 YALE J. INT'L L. 1 (1998) (discussing ethnic conflict and decolonization in several states).

26. Moomaw, *supra* note 3, at 13.

27. De La Madrid H., *supra* note 1, at 554.

28. Dunn, *supra* note 6, at 3. "A true nation state, therefore, would consist only of those who belonged to it by birth and of those who were fully subject to its sovereign legal authority." *Id.*

that nation.”<sup>29</sup> In this case, international law essentially does not exist.<sup>30</sup> It has been argued that, in this form, the principles of sovereignty serve as justifications for violations of international law and extreme brutality.<sup>31</sup> Sovereignty allows a country to patrol its borders and to require all foreigners desiring to enter the state to stop at the border and submit to an inspection.<sup>32</sup> When travel by sea on ships was the main mode of transport, nations were better equipped to control flow across their borders.<sup>33</sup> However, with the advent of air travel, violations of sovereignty in the air became a new dilemma.<sup>34</sup> The establishment of laws that regulate commonly scheduled aircraft and seacraft so that stops and inspections were not required for each new sovereign airspace entered solved this dilemma.<sup>35</sup>

### *B. Globalization*

Globalization is not a recent phenomenon.<sup>36</sup> The nation-state's independence to control events within its borders is challenged by transnational corporations, economic globalization and trade, international crime and the rise of global communications and technology.<sup>37</sup> The validity of the nation-state weakens as the gap grows between the capabilities of the individual state and the demands placed on the state.<sup>38</sup> The great appeal of the idea of a nation-state is its “presumed efficacy.”<sup>39</sup> Indeed, the capabilities of most developed states far exceed their capabilities of years gone by.<sup>40</sup> States are better equipped to communicate, develop communities, and defend themselves.<sup>41</sup> The question remains whether these capabilities can meet the demand of new threats to the nation's security.

New security concerns emanate from global threats to human secu-

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29. Anthony D'Amato, *Human Rights as Part of Customary International Law: A Plea for Change of Paradigms*, 25 GA. J. INT'L & COMP. L. 47, 59 (1996).

30. *Id.*

31. HENRY L. BRETTON, *INTERNATIONAL RELATIONS IN THE NUCLEAR AGE* 153 (1986).

32. DAVID W. ZIEGLER, *WAR, PEACE, AND INTERNATIONAL POLITICS* 155 (1977).

33. *Id.* (indicating that border checks would be administered before foreigners disembarked from boats).

34. *Id.*

35. *Id.* (indicating that these procedures were worked out in Paris in 1919 and Chicago in 1944).

36. David P. Fidler, *Caught Between Traditions: The Security Council in Philosophical Conundrum*, 17 MICH. J. INT'L L. 411, 444 (1996) (indicating that globalization includes the old liberal belief in economic interdependence and is therefore not so recent).

37. Moomaw, *supra* note 3.

38. Dunn, *supra* note 6, at 11.

39. As opposed to the nation-states' actual efficacy. Dunn, *supra* note 6, at 5.

40. *Id.* at 11. For a discussion on the development of warfare and the ultimate weapons, see *infra* notes 68-73 and accompanying text.

41. Dunn, *supra* note 6, at 11.

rity such as devastation of the environment.<sup>42</sup> Acting alone, individual nation-states can no longer expect to overcome current national and international problems.<sup>43</sup> This process, described as a crisis for nation-states, challenges a state's sovereignty and requires a change from the old way.<sup>44</sup> Globalization requires greater cooperation among nation-states.<sup>45</sup> The World Bank's recent reaffirmation of its commitment to improving the global environment provides evidence of continuing globalization. Pursuant to its articles of incorporation, the World Bank should not take human rights concerns into account when lending money. However, the World Bank indicated that improvements in the global environment directly affect a country's development.<sup>46</sup> Similarly, the recent international effort to save the troubled Asian economies demonstrates the necessity of global aid to secure a country from crisis. As the Asian economies went into a "free fall," the international financial community cringed in fear.<sup>47</sup> The Asian economies ability to pull themselves back together requires international financial assistance.<sup>48</sup> Going forward it is anticipated that the international community, especially foreign banks, will continue to play an impressive role in the Asian economies.<sup>49</sup>

Globalization increases the need for international institutions to

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42. *Id.* (construing THE INTERNATIONAL POLITICS OF THE ENVIRONMENT (Andrew Hurrell & Benedict Kingsbury, eds., 1992)).

43. De La Madrid H., *supra* note 1, at 560. Dunn, *supra* note 6, at 4 (discussing that the nation state crisis is as a result of the inability of the nation state to master its own problems and the origins of the crisis are from two different shifts: first, the decrease in appeal of the concept of the individuality of the nation state; second, the increase in awareness of several global, economic, ecologic, military and political challenges that necessitate world involvement). In order for a nation state to be political active, it needs to work with other nation states and not individually. *Id.* at 5.

44. *Id.* at 1.

45. Attanasio, *supra* note 2 (indicating that without the existence of international institutions globalization would continue because capital is exchanged so frequently across borders that globalization is a necessary evolution). "Japan's support for U.S. forces, however, expressly excludes weapons and ammunition supplies, although Japan will transport such materials on behalf of the U.S.. Japan continues to adhere to its 'three non-nuclear principles' and will not permit nuclear weapons to be brought to Japanese soil." John R. Schmertz & Mike Meier, *Japan and U.S. Further Develop Defense Guidelines to Adapt Them to Post Cold War Conditions*, 3 INT'L UPDATE 129 (1997).

46. *World Bank Reaffirms Commitment to the Global Environment and a Strong GEF*, M2 PRESSWIRE, April 4, 1998 (indicating that "actions that help the global environment can help enhance national development and reduce poverty").

47. Les Blumenthal, *World Bank Head Says U.S. Can't Just Moralize About Asian Crisis*, MORNING NEWS TRIBUNE, Mar. 29, 1998, at B13.

48. The United States' \$18 billion additional funding to the IMF was at issue. The World Bank indicated that the U.S. could not "claim to be a world power without contributing." *Id.* Great Britain proposed a multi-million dollar trust fund to aid the Asian banks to recover. Eileen Ng, *Asia-Europe Trust Fund to be Leading Item on ASEM Agenda*, AGENCE FR. PRESSE, Mar. 29, 1998.

49. Keith B. Richburg, *Asia Looks For Cash For Its Ailing Banks; Solution Likely to Boost Foreign Influence*, WASH. POST, Mar. 30, 1998, at A21.

implement limitations and regulations.<sup>50</sup> These institutions assist in a smooth transition from a collection of sovereign states to a global community by establishing universal rules.<sup>51</sup> Judicial institutions, such as the ICJ are key to the development of an international rule of law.<sup>52</sup> The judicial institutions must be able to reliably resolve disputes using the international rule of law.<sup>53</sup> Through resolution of disputes, judicial institutions will also develop new aspects of the rule of law.<sup>54</sup>

At present, a state needs to accept the jurisdiction of the judicial institution before the rule of law applies to that state. Acceptance of the

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50. Attanasio, *supra* note 2, at 26. If international institutions are viewed as pervading over nation-states, international institutions should be able to regulate nation-states to ensure the preservation of global interests. This is similar to state government's ability to regulate businesses which are connected with public health and welfare. As an exercise of the state government's police power, it has the ability to regulate business. Cf. DAN R. WILLIAMS & LARRY GOOD, *GUIDE TO THE ENERGY POLICY ACT OF 1992* (1994). In the case of nuclear weapons, international institutions regulating nuclear weapons must balance between regulating potentially harmful nuclear technology and permitting peaceful uses. Greg Rattray, *The Emerging Global Information Infrastructure and National Security*, 21 FALL FLETCHER F. WORLD AFF. 81, 91 (1997) (indicating that this approach is called "arms control for everyone"). Even the NPT in Article IV(1) states that parties to the NPT have an "inalienable right" to develop, research, produce, and use nuclear technology for peaceful purposes. Seth Grae, *The Nuclear Non-Proliferation Treaty's Obligation to Transfer Peaceful Nuclear Energy Technology: One Proposal of Technology*, 19 FORDHAM INT'L L.J. 1985, 1985 (1996) (indicating that nuclear technology can be applied in many ways such as cancer treatment or riding crops of pest infestation or nuclear reactors for peaceful energy production).

51. Attanasio, *supra* note 2, at 26 (indicating that the attention is directed to judicial bodies since the rule of law is so important globally).

Various reasons may help to account for why the economic realm may sometimes precede the recognition of decisions of international tribunals in human rights and other areas. If one looks at the incentive that nation-states possess, there are strong reasons to cooperate in the economics area. Fewer incentives exist to follow the decisions of international tribunals in the human rights area, in part because their decisions may make nation-states look bad. Another deterrent may be that human rights cases involve values that are more fundamental than the utilitarian or efficiency ones that often dominate cases about economic matters. The fundamentality of human rights values such as equality or autonomy may render them more central to a nation-state's culture and sovereignty, consequently making them values over which nation-states seek to retain their own enforcement power.

*Id.* at 29.

52. *Id.* at 26.

53. *Id.* De La Madrid H., *supra* note 1, at 556 (indicating that art of the lack of social and economic development is due to the financial weakness of the World Trade Organization). "The inadequacy of political and social institutions in dealing with the growing complexity of international social relations, accelerated to a certain extent by the global demographic explosion of the twentieth century, is also expressed in the generically labeled "ungovernability phenomena. . ." *Id.* at 559-560.

54. Attanasio, *supra* note 2, at 26. The need to be able to punish international crimes is apparent with the globalization of drug trafficking. The drug traffic wars has become a symbol of the ineptitude of nation-states to cooperate to prevent crimes. ). De La Madrid H., *supra* note 1, at 560.



international decision limits the state's sovereignty.<sup>55</sup> However, as the most viable solution to international concerns, globalization increases in popularity. "Globalization increasingly offers incentives to nation-states to surrender bits of their sovereignty consensually through treaties to fashion advantageous economic arrangements."<sup>56</sup> Once a state accepts jurisdiction and the international rule of law, the national courts should enforce the international decisions.<sup>57</sup>

### III. WARFARE AND NUCLEAR TECHNOLOGY

#### A. War

Historically, warfare is characterized by the continuing opposition of offensive and defensive weapons.<sup>58</sup> Successful defense of territorial sovereignty always necessitated a strong military, backed by a nation's resources and economic wealth.<sup>59</sup>

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55. Attanasio, *supra* note 2, at 26 (indicating that national courts' acceptance of decisions of international institutions is a very important channel through which international law limits state sovereignty).

56. *Id.* An example is the ECJ. The acceptance of the decisions by the ECJ was gradual. Regionalism is accountable for the success of the ECJ. Another key to the ECJ success was the ability of individuals and not just nation states to bring issues forward. The ICJ's acceptance may be greatly hindered by the fact that its jurisdiction is exclusive to nation-states. *Id.* at 24.

57. *Id.* at 26. "[N]ational courts have often displayed a reluctance to accept the decisions of international tribunals. National courts frequently have displayed greater reluctance in receiving these decisions as precedents than in enforcing judgments by giving them *res judicata* effects." *Id.* at 27.

58. MICHAEL NACHT, *THE AGE OF VULNERABILITY: THREATS TO THE NUCLEAR STALEMATE* 55 (1985)(indicating that this pattern includes: measure, countermeasure and counter-countermeasure).

59. Moomaw, *supra* note 3.

TABLE: Nation Statistical Information

Country	Defense Spending (\$)	Area (km <sup>2</sup> )	Total Population (thousands)	GDP Per Capita (US\$)	Life Expectancy (years) M/F
United States	271,600,000,000	9363520	271648	18635	72.5/80.7
Russia	79,000,000,000	147709	147709	1951	61.7/73.6
China	27,400,000,000	9596961	1243738	440	66.7/70.4
N.Korea	5,300,000,000	99274	45717	8519	67.3/74.9
Iraq	2,600,000,000	438317	21177	2855	64.5/67.5
Iran	2,300,000,000	1633188	71518	1151	67/68
Cuba	270,000,000	110861	11068	1627	73.5/77.5

For defense spending statistics, *see*

<http://www/infomanage.com/nonproliferation/usvsworld.html>. For other statistical infor-

The ability and means by which a State secures itself has direct, global implications.<sup>60</sup> In the global arena of conflicts between States, a state confronts an adversary in two ways. The first is “dissuasion by defense” whereby the defender assembles a strong army and constructs sturdy battalions.<sup>61</sup> The risks and stakes in the outcome differ for each country involved. If the costs of war are low, a country will act with less care than if the costs are high.<sup>62</sup> A country’s risk of retaliation increases as it moves closer to winning, especially if the stakes are high. The greater the risk of retaliation, the greater the country risks its own destruction.<sup>63</sup>

The second approach is “dissuasion by deterrence” in which the defender uses fear of incredible suffering to confront an aggressor.<sup>64</sup> This approach characterizes warfare as a face-off between countries that oppose each other with deterrent threats.<sup>65</sup> This second approach applies to nuclear weapons.<sup>66</sup> The deterrent effect of nuclear weapons is contingent upon the willingness of a state to use them.<sup>67</sup>

Historically, the development of several “ultimate” weapons characterized deterrent warfare.<sup>68</sup> With each new “ultimate” weapon, new technology quickly rendered them obsolete and established a new “ultimate” weapon in its place.<sup>69</sup> Before World War I, it could take a cen-

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mation, see <http://www.UN.org/Pubs/CyberSchoolBus/menureso.html>. It is interesting to compare the expense a country allocates to maintain the security of its borders to the amount it spends to maintain the security of its people.

60. SCOTT D. SAGAN & KENNETH N. WALTZ, *THE SPREAD OF NUCLEAR WEAPONS* 4 (1995).

61. *Id.* at 3 (indicating that this is the “defensive ideal” because a defense that no one believes they could surmount would maintain tranquility in international relations). *But see* NACHT, *supra* note 58, at 56. “The stone castle, a quintessential defensive weapon, prompted knights to make offensive forays into the countryside confident that they could then retreat to their impregnable fortress. In other words, a powerful defensive capability has often encouraged offensive attack.”

62. SAGAN & WALTZ, *supra* note 60, at 5.

63. *Id.*

64. *Id.* at 3 (stating that “[d]eterrence is achieved not through the ability to defend but through the ability to punish.”).

65. *Id.* at 5.

66. *Id.* at 4. *But see* NACHT, *supra* note 58 (indicating that from 1945 to 1985 no nuclear weapon was used in warfare).

67. SAGAN & WALTZ, *supra* note 60, at 6. As opposed to the acquisition of territory in warfare, the deterrent effect of nuclear weapons tends to increase a state’s security more. *Id.* at 5.

68. NACHT, *supra* note 68, at 56.

[T]he experience of war from ancient times through the end of World War II reveals one overriding fact: most shots missed their target. Weapons have always been categorized by their range, lethality, and accuracy. The history of military technology is the story of man seeking to perfect weapons of longer range and greater power and accuracy.

*Id.* at 57.

69. *Id.* at 56 (indicating that the twentieth century is particularly noteworthy for the

tury to classify a new weapon as an "ultimate" weapon.<sup>70</sup> Following World War I, technological innovation rapidly accelerated the aging of modern weaponry.<sup>71</sup> The advent of nuclear weapons removed the need to focus technological efforts on improving accuracy.<sup>72</sup> Instead, direct confrontation of superpowers hallmarked most of the post World War II period.<sup>73</sup> In particular, the direct confrontation of the United States and the Soviet Union, the two superpowers, became known as the Cold War. The majority of the Cold War occurred in Europe.<sup>74</sup> However, disputes also arose over the Pacific region.<sup>75</sup> Although the superpowers claimed to be at peace, the risk of nuclear war or accident continued to mount.<sup>76</sup>

A remarkable event, the collapse of the Soviet Union, focused international concern on the proliferation of weapons of mass destruction.<sup>77</sup> In order to understand the full import of that event, it is beneficial to briefly describe the history of the Cold War. The Cold War lasted for approximately forty years. "The Cold War was not a simple case of Soviet expansionism and American reaction. Realpolitik held sway in the Kremlin. Ideology played an important role in shaping their perceptions, but Soviet leaders were not focused on promoting worldwide revolution. They were concerned mostly with configurations of power. . . ."<sup>78</sup>

On August 6, 1945, the United States dropped the bomb on Hiroshima.<sup>79</sup> Buildings three kilometers away from the explosion burned; the bomb incinerated anything within a 500 meters its explosion.<sup>80</sup> On August 10, 1945 the United States dropped a second bomb on Na-

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rapid pace of technological development).

70. *Id.*

71. *Id.*

72. *Id.* at 57.

73. Peter Hayes & Lyuba Zarsky, *Pacific Arms Control and Regional Initiatives*, in *THE PACIFIC: PEACE, SECURITY AND THE NUCLEAR ISSUE* 73, 73 (Ranginui Walker & William Sutherland eds., 1988).

74. "The Cold War was a competition between the United State [sic] and the Soviet Union over the heads of their West and East European allies." Richard Halloran, *The Rising East*, *FOREIGN POL'Y*, Mar. 1, 1996, at 3.

75. Hayes & Zarsky, *supra* note 73.

76. *Id.* at 79 (indicating that such factors as "[h]air trigger weapons, rigid and inadequate structures of command and control, sectarian rivalries between military services, fluid political situations. . ." combined to create the instability).

77. Rattray, *supra* note 50 (indicating that the break up of the Soviet Union and the Gulf War were remarkable events that focused attention on proliferation). Weapons of mass destruction include nuclear weapons. *Id.*

78. Melvyn P. Leffler, *Inside Enemy Archives: the Cold War Reopened*, *FOREIGN AFFAIRS*, July, 17, 1996, at 120.

79. James Chace, *Sharing the Atom Bomb: after Hiroshima*, *FOREIGN AFFAIRS*, Jan. 11, 1996, at 129.

80. *Id.*

gasaki.<sup>81</sup> The two explosions killed more than 150,000 people and injured over 100,000 others.<sup>82</sup> The results stunned the world. America's possession and use of the bomb terrorized Stalin, adding to his obsession with the security of the Soviet Union.<sup>83</sup>

The American approach to the bomb eroded the American/Soviet relationship.<sup>84</sup> Although the United States considered efforts to appease the Soviet Union and to integrally involve them in the postwar world, Truman ultimately abandoned the issue to the international community.<sup>85</sup> Klaus Fuchs, a German émigré, provided the Russians with a hand-drawn model of the bomb dropped on Nagasaki and theoretical plans for making the hydrogen bomb.<sup>86</sup> The Soviets tested their first atomic weapon in 1949 and this set Washington and U.S. scientists in motion to build something more powerful than the atomic bomb.<sup>87</sup> President Truman ardently advocated development of the hydrogen bomb.<sup>88</sup> On November 1, 1952 the United States tested its first hydrogen bomb.<sup>89</sup> The bomb actually catalyzed the Cold War.<sup>90</sup>

The struggle over Germany took center stage in the Cold War.<sup>91</sup> Similar struggles ensued in Poland, Hungary, Romania, other European states, and China.<sup>92</sup> The Kremlin sought to gain the respect of and security from the United States by increasing the Soviet Union's power.<sup>93</sup> Likewise, the United States increased its power and these attitudes increased the tensions of the Cold War.<sup>94</sup> "[E]ach . . . mistook

81. *Id.*

82. *Id.*

83. Leffler, *supra* note 78.

84. One intent was to share the basic scientific information but not the actual bomb design. Chace, *supra* note 79.

85. *Id.* (indicating that Truman was very distrustful of the Soviets but that he recognized the need to inform them of the scientific information and that the issue ultimately ended up with the United Nations for resolution).

86. Richard Stengel, Book Review, *Brink of Armageddon*, TIME MAG., Aug. 21, 1995, at vol.146, no.8 (reviewing Richard Rhodes, *Dark Sun: The Making of the Hydrogen Bomb*).

87. *Id.* (discussing the unveiling of the plans for the hydrogen bomb).

88. *Id.* The administration even toyed with the idea of a preemptive strike on the Soviets with an armada of U.S. planes carrying more than 100 atom bombs to destroy 70 Soviet cities. *Id.*

89. *Id.* (indicating that the resulting force was one thousand times more powerful than the bomb that destroyed Hiroshima).

90. Gar Alperovitz Kai Bird, *The Centrality of the Bomb*, FOREIGN POLICY, Mar. 22, 1994, at 3.

91. Leffler, *supra* note 78.

92. *Id.* (indicating that although the Soviet Union took action in these countries, no concrete plans for communist take over have been discovered).

93. *Id.*

94. *Id.* (indicating that the Cuban missile crisis of 1962 and the Middle East crisis of 1973 characterized these tensions).

defensive initiatives for aggressive ones."<sup>95</sup>

In recognition of the tremendous impact of nuclear weapons, multilateral measures existed during the Cold War to control nuclear weapons and other weapons of mass destruction.<sup>96</sup> For example, the Treaty on the Non-Proliferation of Nuclear Weapons ("NPT") sought to stop the proliferation of nuclear weapons.<sup>97</sup> Furthermore, it necessitated that all countries with peaceful nuclear technology should transfer it to countries without that technology.<sup>98</sup> The NPT required that parties who are capable will work together to further develop peaceful uses of nuclear technology.<sup>99</sup>

The Soviet Union's and United States' concern for their security and the preservation of their borders and allies, emphasizes the central role of sovereignty at this time.<sup>100</sup> Non superpowers possessed an equal concern for their sovereignty. In the first fifty years of the nuclear age, the number of States with nuclear capabilities grew to *twelve*.<sup>101</sup> Between the years 1940 and 1993, the United States nuclear weapons industry produced approximately 60,000 warheads.<sup>102</sup> The spread of nu-

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95. *Id.* (construing Lebow and Stein).

96. Rattray, *supra* note 50.

97. Grae, *supra* note 50 (indicating that the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) in Article IV(1) states that parties to the NPT have an "inalienable right' to develop, research, produce, and use nuclear technology for peaceful purposes).

98. *Id.*

99. Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 7 I.L.M. 809, art. IV(2) (1968). See generally Rattray, *supra* note 50.

100. Leffler, *supra* note 78 (indicating that the Soviet concern for Japan and Germany were residual from the war and concern for the United States was dictated by the U.S. wealth and possession of the bomb).

101. SAGAN & WALTZ, *supra* note 60, at 1. The Soviet Union and the United States collectively possessed about 60,000 nuclear weapons after only forty years since the first use of the atomic bomb. NACHT, *supra* note 68, at 55. In 1991, the Soviet Union collapsed and four new states - Russia, Ukraine, Belarus, and Kazakhstan - were "born nuclear," inheriting portions of the Soviet nuclear weapons arsenal. In 1991, after the Gulf War, [the United States] discovered that Iraq had been only two years or so away from making atomic bombs, before the Desert Storm attack and the subsequent dismantlement by international inspectors of their weapons development facilities. In 1992, Pakistani officials admitted that they had developed a nuclear weapons capability, after over two decades of dedicated effort. In 1993, the South African government acknowledged that it had constructed a small nuclear arsenal in the 1980s, but said that it had dismantled and destroyed its weapons. North Korea was in the headlines in 1994, when the Pyongyang government refused to permit full international inspection of its nuclear facilities and the CIA presented the White House with its estimate that North Korea had processed enough plutonium for one or more bombs. What will come next? Other potential nuclear powers appear on the horizon: leading Japanese politicians no longer rule out acquisition of nuclear weapons and a growing number of developing nations, such as Iran, Libya, and Algeria, seem to have nuclear weapons programs. SAGAN & WALTZ, *supra* note 60, at vii-viii.

102. Dan W. Reicher, *Nuclear Energy and Weapons*, in SUSTAINABLE ENVIRONMENTAL LAW (Celia Campbell-Mohn, et al, 1993). The Department of Energy manages many of the facilities for production of nuclear weapons. Since the revelation of safety and environmental hazards, the Department of Energy has either cut back or completely halted pro-

clear weapons is slow, which is useful to help contain the number of weapons States.<sup>103</sup>

After the end of the Cold War and without competing superpowers, the risk of surprise nuclear attacks and the expense of costly arms races declined.<sup>104</sup> However, only the naïve would neglect the ongoing concern of states with nuclear weapons.<sup>105</sup> Treaties establish international norms to deal with the misuse of nuclear technologies<sup>106</sup> but the mere existence of nuclear weapons serves a potential threat to all.<sup>107</sup> "Even if never used, a handful of nuclear weapons merely in possession of an unfriendly country could change a regional balance of power . . ."<sup>108</sup> A nuclear world commands a different type of philosophy applying to conflict. If countries armed with nuclear capabilities participate in war, they are aware that suffering may be unlimited.<sup>109</sup> Instead, the arms control efforts should focus on achieving the sharing of information globally on the dissemination of technologies for weapons of mass destruction.<sup>110</sup>

### B. Nuclear Technology

Understanding the basic functioning of nuclear energy helps to conceptualize the implications of nuclear technology.<sup>111</sup> The key to nuclear energy is radiation.<sup>112</sup> The damage to living tissues by radiation depends on the type of radiation (alpha, beta, or gamma)<sup>113</sup> and the ra-

duction at these facilities.

103. SAGAN & WALTZ, *supra* note 60, at 1-2.

104. Rattray, *supra* note 50, at 91.

105. See generally Karsten Prager, *China: Waking Up to the Next Superpower*, TIME MAG., Mar. 25, 1996, at vol.147, no.13 (discussing China's possible role as the next superpower). Michael Mandelbaum, *Lessons of the Next Nuclear War*, FOREIGN AFFAIRS, Mar. 1, 1995, at 22 (indicating that the collapse of the Soviet Union has increased the demand for weapons).

106. Rattray, *supra* note 50, at 92. Warren Christopher, *America's Leadership, America's Opportunity*, FOREIGN POLY, Mar. 22, 1995, at 6.

107. Cf. Phil Williams & Paul N. Woessner, *The Real Threat of Nuclear Smuggling*, SCI. AM., Jan. 1996, at 40; Bruce W. Nelan, *Formula for Terror*, TIME MAG., Aug. 29, 1994, at vol.144, no.9 (indicating that the former Soviet arsenal is leaking into the West, igniting fears of a brand new nuclear terror).

108. Mandelbaum, *supra* note 105.

109. SAGAN & WALTZ, *supra* note 60, at 7.

110. Rattray, *supra* note 50, at 91.

111. The Department of Energy has attempted to improve the public's understanding of nuclear technology. U.S. Department of Energy, Office of the Press Secretary, <http://apollo.osti.gov/ostii/opennet/document/press/pc8.html>.

112. "Some atoms are naturally unstable; their nuclei continuously emit alpha, beta, or gamma radiation until they achieve a stable state." Reicher, *supra* note 102.

113. *Id.* "Alpha radiation consists of positively charged particles made up of two neutrons and two protons, while beta particles are electrons. Gamma rays are essentially highly energetic X-rays except that they are emitted naturally by radioactive substances instead of machines." *Id.*

diation dose.<sup>114</sup> Scientists consider both of these factors when measuring radiation.<sup>115</sup>

Nuclear energy has several uses. For instance, nuclear power plants provide twenty percent of the U.S. electrical needs.<sup>116</sup> Although harnessing nuclear energy has many purposes, in the mid 1980's there were three focuses of nuclear research and development: developing directed-energy weapons, exploiting space as a theater of war, and creating a third generation of nuclear weapons.<sup>117</sup> Even before the discovery of nuclear technology,<sup>118</sup> it was clear that once the atom's energy was harnessed the world would be opened to great risks.<sup>119</sup> Since the discovery of nuclear technology, transboundary disputes pervade the industry.<sup>120</sup> Despite the great security nuclear weapons offer for national sovereignty, few states possess them.<sup>121</sup>

#### IV. THE INTERNATIONAL COURT AND IT'S ADVISORY OPINION

##### A. *International Court of Justice: General Background*

###### 1. The International Court of Justice

The Permanent Court of International Justice (PCIJ), the precursor to the International Court of Justice (ICJ) was a product of the 1919 peace settlement.<sup>122</sup> In 1945 the International Court of Justice (ICJ)

114. *Id.*

115. *Id.* The unit of measurement for radiation is the rem. *Id.*

116. *Id.* Nuclear power is second to coal as a source of electricity. *Id.*

117. NACHT, *supra* note 68, at 76. President Ronald Reagan emphasized these areas in his call for the Strategic Defense Initiative (SDI).

118. The artificial fissioning of the uranium atom was discovered by Otto Hahn and Fritz Strassman in 1938. Reicher, *supra* note 112.

119. Monica J. Washington, Note, *The Practice of Peer Review in the International Nuclear Safety Regime*, 72 N.Y.U. L. REV., 430, 430 (1997).

120. *Id.* *But see* NACHT, *supra* note 58, at 57 (discussing the fact that the military strategy applied to nuclear weapons dates much further back than when the first nuclear bomb was dropped in 1945 and the essential elements of that strategy can be found in classics). The work of Sun Tzu from around 500 B.C. establishes that deception is the basis of warfare. Sun Tzu elaborates. The ultimate goal of warfare is victory but warfare should be as quick as possible to decrease costs. Sun Tzu further discusses the strategy. *Id.* at 57-8. Strategy has expanded to include unity of command and emphasizing initiative, concentration of forces, maintaining local superiority and maneuverability, flexibility, and simplicity. *Id.* at 58.

121. Mandelbaum, *supra* note 105.

122. J.G. MERRILLS, *INTERNATIONAL DISPUTE SETTLEMENT* 93 (1984). During the years of the PCIJ, the Court primarily reflected European values and was a compelling force in international relations. *Id.* See also Keith Highet, et al., *International Courts and Tribunals*, 31 INT'L LAW. 599, 599 (1997);

succeeded the Permanent Court of Justice.<sup>123</sup> The ICJ has gone through several crises arising out of a loss of confidence by the international community in its abilities.<sup>124</sup> To make itself more attractive as a forum for dispute settlement, the Court revised its rules in 1978.<sup>125</sup> The Statute of the Court outlines the rules and regulations of the International Court of Justice<sup>126</sup> and the processes available to the Court.

The ICJ was designated the principle judiciary body of the United Nations.<sup>127</sup> Currently, the International Court of Justice is increasingly involved in dispute resolution.<sup>128</sup> As opposed to its previous role as the last resort to resolution of disputes, countries often include the ICJ as a step in normal diplomatic negotiations.<sup>129</sup> The Court has three types of jurisdiction:<sup>130</sup> contentious,<sup>131</sup> incidental, or advisory.<sup>132</sup> Contentious jurisdiction is for dispute resolution. Only states may be parties to dis-

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123. MERRILLS, *supra* note 122.

124. Georges Abi-Saab, *The International Court as a World Court, in FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE* 3, 4 (Vaughan Lowe & Malgosia Fitzmaurice, 1996). The first crisis: "the decline of the optional clause," occurred during the late 1940's into the 1950's as a result of the consistently negative attitude towards the Court by the Soviet Union and its allies. The USSR refused to submit to the Court's jurisdiction, whether by acceptance of the optional clause, treaty, or special agreement. *Id.* The second crisis was at the start of the 1960's during the move towards decolonization of colonial territories. After obtaining independence, these former colonies were skeptical of the Court because it was unfamiliar, complex, and most importantly did not adequately represent their interests. Following this crisis, the Court took inventory and re-adjusted itself to better reflect the changing international community. *Id.* at 5.

125. *Id.* at 8-9. The revised Rules incorporated the system of *ad hoc* Chambers under Article 17(2). It was the *Beagle Channel* Case, 15 I.L.M. 634 (1978) in which Chile and Argentina chose five members of the Court to comprise an arbitral tribunal, that brought about this change. Following this decision, the Court sought to provide the same opportunity within the Court. The *ad hoc* chambers allow parties to a dispute to have a temporary member in the ICJ. *Id.* It was anticipated that the *ad hoc* capacity would decrease the stability and continuity of the decisions and increase the risk of non-universality of judges, (ex: Gulf of Maine) but the *ad hoc* chambers have not been used frequently. *Id.* at 10.

126. MERRILLS, *supra* note 122, at 102-03.

127. *Id.*; Highet, *supra* note 122.

128. A new crisis arose in 1986 with the Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27). Some critics claim that, based on this decision, the Western world no longer had confidence in the Court. The fear was that the Court was applying contemporary law with an "anti-Western bias." Abi-Saab, *supra* note 124, at 6. However, as time passed, the decision in the *Nicaragua* cases demonstrated the stability and independence of the Court and thus increased its credibility. Since that time, the Court has increased its role in dispute settlement. However, it wasn't until 1990 that the Court allowed itself to be involved in third party intervention. Under Article 62, the Court admitted to intervention in its judgment in the Land, Island, & Maritime Frontier Dispute (El Salv. v. Hond.) 1990 I.C.J. 92 (Sept. 13). Abi-Saab, *supra* note 124, at 14.

129. Abi-Saab, *supra* note 124, at 14.

130. MERRILLS, *supra* note 122, at 94.

131. Highet, *supra* note 122.

132. *Id.*



putes,<sup>133</sup> with jurisdiction established by consent.<sup>134</sup> Incidental jurisdiction allows the Court, without state consent, to "indicate interim measures of protection, to allow intervention in a case by third parties and to interpret a previous judgment."<sup>135</sup> Advisory jurisdiction is the Court's power to declare advisory opinions at the request of international organizations.<sup>136</sup> Through its preventive methods, the ICJ promotes the UN's goals of peace and security.<sup>137</sup>

## 2. The Advisory Jurisdiction of the ICJ

When the Permanent Court was given advisory jurisdiction,<sup>138</sup> it was a precedent in international law<sup>139</sup> and of uncertain scope.<sup>140</sup> The actual Statute of the PCIJ did not provide for advisory jurisdiction in Article 14.<sup>141</sup> After deliberation and attempts to include the provision in the subsequent versions of Article 14, it was finally included in 1919.<sup>142</sup> The PCIJ was very cautious and adopted four articles about the advisory process. These four articles were a framework for the procedure in advisory cases. The writers were careful to stipulate that the advisory jurisdiction is an opportunity for parties to settle disputes but

133. MERRILLS, *supra* note 122, at 94.

134. *Id.* There are a few ways: 1) Compromissory clause in a treaty before the dispute arises in multilateral treaties or Subject treaties; 2) by declaration under Article 36(2) of the Court's Statute, "optional clause" and establishes states' acceptance of jurisdiction on certain terms and conditions or by special agreement after the dispute has begun. *Id.* at 94-95. 3) Specialized Agreement. *Id.* One example of the Court's exercising jurisdiction by a special agreement is in the Gulf of Maine case. *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, I.C.J. Reports 1984. Judgment was submitted to the Court and both sides agreed to comply with the verdict. Canada and the United States wanted jurisdiction over more extensive ocean areas for fishing and the exploration of commercial offshore oil deposits. Negotiations had broken down a number of times, and strenuous political opposition in the United States had begun to interfere. "Adjudication in the Court provided a way for domestic politicians to resolve the controversy with finality in a way that did not cause political damage to the incumbent American administration or the U.S. senators who would have had to vote to give their advice and consent to a boundary settlement treaty." Martin A. Rogoff, *International Politics and the Rule of Law: The United States and the International Court of Justice*, 7 B.U. INT'L L.J. 267, 280-81 (1989). This special agreement between the U.S. and Canada absolved the Court of any jurisdictional problems that the Court may have had to encounter. The special agreement also bypassed admissibility requirements and proceeded directly to the merits of the problem.

135. MERRILLS, *supra* note 122, at 97.

136. *Id.*

137. *Abi-Saab*, *supra* note 124, at 14.

138. LEAGUE OF NATIONS COVENANT, art. 14.

139. DHARMA PRATAP, *THE ADVISORY JURISDICTION OF THE INTERNATIONAL COURT* 1 (1972).

140. *Id.* at 2.

141. *Id.*

142. *Id.* at 2-3. The drafting of the new version of Article 14 was politically motivated. *Id.*

the decisions do not bind.<sup>143</sup> The intention of the League of Nations was to assist the Council and the Assembly in their role, to conciliate and report on disputes submitted to them, to give authoritative opinions on legal issues, and to respond to request by organizations for opinions.<sup>144</sup> There were thirteen submissions to the advisory jurisdiction of the ICJ since the first session in June 1922, and the eleventh session in July 1926. Each submission was admitted whether it was oral or written.<sup>145</sup>

The original version of the provision for the advisory jurisdiction was written in English. The style of writing implied that the Court had the power to decide which questions it would accept for arbitration.<sup>146</sup> It has been determined that "the provision . . . provided for giving the Permanent Court advisory jurisdiction in any dispute or question and at the same time authorized the Council and the Assembly of the League of Nations to request an opinion from the Court."<sup>147</sup> The French version followed. There was a serious discrepancy between the English and French versions. While the English text used the word "may", the French text used the French equivalent of "will give". The French text would render the advisory jurisdiction as an obligation on the Court. There would be no element of discretion.<sup>148</sup> In the decision on the legality of the threat or use of nuclear weapons, the ICJ determined that it was unnecessary to make a pronouncement on the differences between the English and French versions.<sup>149</sup>

There are certain international and inter-governmental bodies that have been authorized to request advisory opinions.<sup>150</sup> Originally, only two bodies of the League were given the power to request opinions from the PCIJ.<sup>151</sup> Currently, according to the Charter for the ICJ, only two principal bodies of the UN are empowered to make this request. There is a provision in the Charter for other UN bodies and specialized agencies to be given authorization as well.<sup>152</sup>

143. *Id.* at 4.

144. *Id.* at 5. Since then, there has been a gradual evolution of the advisory procedure. *Id.* at 2.

145. *Id.* at 15.

146. *Id.* at 4 (indicating that the wording "to hear and determine" allowed for the interpretation that the Court could decide which cases to accept).

147. *Id.* at 5.

148. *Id.* at 6. (indicating that the French version was never presented to the Drafting Committee and therefore changes were not made to make the French version consistent with the English version).

149. General Assembly, *supra* note 16, at 819.

150. *Id.* at 51.

151. LEAGUE OF NATIONS COVENANT

152. PRATAP, *supra* note 139, at 51.

*B. The International Court of Justice and Its Advisory Opinion to the General Assembly*

1. Can the ICJ render an Advisory Opinion?

The ICJ rendered an advisory opinion to the U.N. General Assembly on the question: "Is the threat or use of nuclear weapons in any circumstance permitted under international law?" The Court performed a step by step analysis. First, the Court concluded that the General Assembly's request contemplated legal issues.<sup>153</sup> Second, the Court certified that the competence of the General Assembly includes nuclear weapons.<sup>154</sup> The Court concluded that the question had relevance to several aspects of General Assembly concern "including those relating to the threat or use of force in international relations, the disarmament process, and the progressive development of international law."<sup>155</sup> Third, since the competency of the General Assembly was not an issue, the ICJ could offer an advisory opinion on the legal question presented.<sup>156</sup> In paragraph 14 of its' decision, the Court concludes that it can give an advisory opinion but is not required to pursuant to Article 65, paragraph 1 of the ICJ Statute.<sup>157</sup>

Finally, the Court explored whether a "compelling reason" dictated that a decision not be rendered.<sup>158</sup> The Court acknowledged its role as the "principal judicial organ of the United Nations" and should not therefore, in principle, refuse to provide an advisory opinion.<sup>159</sup> The Court articulated the "compelling reason" standard for determining whether the ICJ should not render an advisory opinion.<sup>160</sup> The Court

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153. General Assembly, *supra* note 16, at 817-18, para. 13. *See also* Perez, *supra* note 17, at 429-30.

154. General Assembly, *supra* note 16, at 817, para. 11. The Court reached this decision by consulting the United Nations Charter articles 10, 11 & 13. *See also* Perez, *supra* note 17, at 429-30.

155. General Assembly, *supra* note 16, at 817, para. 12.

156. Perez, *supra* note 17, at 429-30.

157. For a discussion about the difference between whether the Court *can* or *will* give an advisory opinion, *see supra* note 146 and 149. General Assembly, *supra* note 16, at 818, para.14.

158. General Assembly, *supra* note 16, at 818, para. 14 & 15. Perez, *supra* note 17, at 429-30.

159. General Assembly, *supra* note 16, at 818, para.14 (construing the United Nations Charter, art. 92).

160. *See e.g.*, Judgments of the Administrative Tribunal of the ILO upon Complaints made against UNESCO, Advisory Opinion, I.C.J. Reports 1956, p. 86; Certain Expenses of the United Nations, art. 17, para.2 of the Charter, Advisory Opinion, I.C.J. Reports 1962, p. 155; Legal Consequences for States of the Continued Presence of South Africa in Namibia not withstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p.27.

considered the "vague" and "abstract" nature of the original question;<sup>161</sup> whether the question should be addressed by other U.N. bodies according to express mandate;<sup>162</sup> whether an advisory opinion by the ICJ would be of practical assistance; whether an advisory opinion would undermine progress already made or being made on the question presented;<sup>163</sup> and whether the advisory opinion would be overall contrary to the interests of the United Nations.<sup>164</sup> The Court concluded that no "compelling reason" determined that it should not render an advisory opinion.<sup>165</sup>

In the history of the ICJ, the Court has never refused based on its discretionary power to render an advisory opinion. The PCIJ once declined to render an advisory opinion. The PCIJ declined to advise on the question because "the question directly concerned an already existing dispute, one of the States parties to which was neither a party to the Statute of the Permanent Court nor a Member of the League of Nations, objected to the proceedings, and refused to take part in any way."<sup>166</sup>

## 2. What Is The Relevant Applicable Law?

Next, the Court determined that the law applicable to the case "is that relating to the use of force enshrined in the United Nations Charter and the law applicable in armed conflict which regulates the conduct of hostilities, together with any specific treaties on nuclear weapons that the Court might determine to be relevant."<sup>167</sup> The Court reached this conclusion by analyzing three issues. First the Court analyzed the right to life according to the International Covenant on Civil and Political Rights.<sup>168</sup> It determined that the right not to be arbitrarily deprived of one's life applies also in hostilities, such as nuclear war.<sup>169</sup> To reach a determination of an arbitrary deprivation of life, the Court concluded that it must analyze the "law applicable in armed conflict."<sup>170</sup> Second,

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161. General Assembly, *supra* note 16, at 818-19, para. 15.

162. *Id.* at 819, para. 18.

163. *Id.* at 819, para. 17.

164. *Id.* at 819, para. 17.

165. *Id.* at 819, para. 19. The Court voted thirteen votes to one to comply with the request for an advisory opinion. Judge Oda rendered the one vote against. *Id.* at 831.

166. *Id.* at 818, para. 14 (discussing Status of Eastern Carelia, P.C.I.J., Series B, No.5).

167. *Id.* at 821, para. 34.

168. International Covenant on Civil and Political Rights, Dec. 16, 1966, 6 I.L.M. 368, art. 6, para. 1 (1967) [hereinafter ICCPR] (guaranteeing the right to life) and art. 4 (indicating that certain provisions may be derogated in times of national emergency).

169. General Assembly, *supra* note 16, at 820, para. 25.

170. *Id.* "Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself." *Id.*

the Court determined that the prohibition against genocide<sup>171</sup> applied only when an intent to destroy a particular group existed.<sup>172</sup>

Third, the Court addressed whether certain agreements<sup>173</sup> required protection for the environment at all times, even during times of war. The Court acknowledged the pervasive concern for the environment but concluded the agreement did not intend to restrain the ability of a state to defend itself.<sup>174</sup> The Court determined that the Additional Protocol I<sup>175</sup> provided further protection for the environment from "widespread, long-term and severe [damage]" and prohibits "methods and means of warfare which are intended, or may be expected, to cause such damage;" and prohibits "attacks against the natural environment by way of reprisals."<sup>176</sup> In addition, the Court concluded that the environment should be considered when implementing the law applicable in armed conflict.<sup>177</sup> Ultimately the Court concluded, with respect to the environment, that "the existing international law relating to the protection and safeguarding of the environment does not specifically prohibit the use of nuclear weapons, it indicates important environmental factors that are properly to be taken into account in the context of the implementation of the principles and rules of the law applicable in armed conflict."<sup>178</sup>

### 3. Unique Characteristics of Nuclear Weapons?

After determining the law applicable in the case, the Court made a

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171. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S., art. II (entered into force Jan. 12, 1951) [hereinafter Genocide Convention].

172. General Assembly, *supra* note 16, at 820, para. 26.

173. The agreements cited for protection of the environment include: Additional Protocol I to the Geneva Conventions of 12 August 1949, and Relating to the Protocol of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 16 I.L.M. 1391, art. 35, para. 3 (entered into force Dec. 7, 1978) [hereinafter Additional Protocol I] (prohibiting the employment of "methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment"); the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, May 18, 1977, 16 I.L.M. 88, art. I (prohibiting the use of weapons which have "widespread, long-lasting or severe effects" on the environment); the Stockholm Declaration of 1972, 11 I.L.M. 1416, principle 21; and the Rio Declaration of 1992, 31 I.L.M. 818, principle 2 (expressing the common conviction of the States concerned with a duty "to ensure the activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.").

174. General Assembly, *supra* note 16, at 821, para. 30. "Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality."

175. Additional Protocol I, *supra* note 173, arts. 35, paras. 3, 55.

176. General Assembly, *supra* note 16, at 821, para. 31.

177. *Id.* at 821, para. 32 (considering Protection of the Environment in Times of Armed Conflict, G.A. Res. 47/37, Nov.25, 1992).

178. *Id.* at 821, para. 33.

special note to take into account the "unique characteristics of nuclear weapons."<sup>179</sup> The Court created a laundry list of the catastrophic capabilities of nuclear weapons including: destruction of civilization, destruction of the planet's ecosystem; negative affects on health, agriculture, natural resources, and demography; damage to future generations, environment, food and marine ecosystems; cause genetic defects and illness.<sup>180</sup> In order to render an accurate opinion, the Court indicated that it must take these characteristics into consideration.<sup>181</sup>

#### 4. The Final Verdict<sup>182</sup>

First, the Court unanimously concluded that "neither customary nor conventional international law [specifically authorized] the threat or use of nuclear weapons."<sup>183</sup> Second, the Court concluded eleven votes to three that "neither customary nor conventional international law comprehensive[ly] and universal[ly] prohibit[ed] the threat or use of nuclear weapons as such."<sup>184</sup> The Court concluded unanimously that: third, "[a] threat or use of force by means of nuclear weapons that is contrary to article 2 paragraph 4 of the United Nations Charter and that fails to meet all the requirements of article 51 is unlawful"<sup>185</sup> and fourth "[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."<sup>186</sup> Fifth the Court concluded seven votes to seven, with the President casting his vote that:

[i]t 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;

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179. *Id.* at 821-22, para. 35.

180. *Id.* at 822, para. 35.

181. *Id.* at 822, para. 36.

182. Highet, *supra* note 122, at 601.

183. General Assembly, *supra* note 16, at 831, para. 105, art. (2)(A). See also Richard A. Falk, *Nuclear Weapons, International Law and the World Court: A Historic Encounter*, 91 AM. J. INT'L L. 64, 65 (1997) (citing the Case at para. 98-103). Cf. NACHT, *supra* note 68, at 118 (indicating that from 1959 to 1974 the United States and Soviet Union created more than a dozen agreements, some involving other countries; yet there was no significant change in the rapid increase of nuclear weapons around the world). With this situation, it is no wonder that the ICJ cannot make a pronouncement on the legality of nuclear weapons. *Id.*

184. General Assembly, *supra* note 16, at 831, para. 105, art. (2)(B). Judges Shahabuddeen, Weeramantry, and Koroma voted against. *Id.*

185. *Id.* at art. (2)(C).

186. *Id.* at art. (2)(D). The President of the Court, in an unprecedented move, cast the determining vote.

[h]owever, 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.<sup>187</sup>

Sixth, the Court unanimously determined "[t]here exists an obligation to pursue in good faith and bring to an conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control."<sup>188</sup>

### C. A Relevant ICJ Decision

In 1993, the World Health Organization (W.H.O) requested an advisory opinion from the ICJ.<sup>189</sup> The ICJ made a ground-breaking decision by refusing, for the first time, to issue an advisory opinion.<sup>190</sup> The W.H.O sought an 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 of its obligations under international law including the W.H.O Constitution?"<sup>191</sup> The ICJ declined to respond to the request, determining that the request was beyond WHO's competence.<sup>192</sup>

The Charter of the United Nations<sup>193</sup> gave to the W.H.O. the authority to request advisory opinions from the ICJ. They were limited to legal questions within the competence of the W.H.O.<sup>194</sup> The ICJ adopted a three part test applicable to requests for an advisory opinion by a Specialized Agency. First, the Agency must be appropriately empowered according to the U.N. Charter to make that request. Second, the question at issue in the request must be of a legal nature. Third,

187. *Id.* at art. (2)(E). Vice-President Schwebel and Judges Oda, Guillaume, Shahabuddeen, Weeramantry, Koroma, Higgins voted against. *Id.*

188. *Id.* at art. (2)(F).

189. *Legality of the Use By a State of Nuclear Weapons In Armed Conflict*, 1993 I.C.J. 467 (Sept. 13) (Request for Advisory Opinion) [hereinafter W.H.O. Request].

190. Maureen Beuhly, et al, *International Health Law*, 31 INT'L LAW. 645, 646 (1996); Perez, *supra* note 17, at 426. The ICJ in its advisory decision to the General Assembly indicated that:

[t]here has been no refusal, based on the discretionary power of the Court, to act upon a request for advisory opinion in the history of the present Court; in the case concerning the Legality of the Use by a State of Nuclear Weapons in Armed Conflict, the refusal to give the World Health Organization the advisory opinion requested by it was justified by the Court's lack of jurisdiction in that case.

General Assembly, *supra* note 16, at 818, para.14.

191. *Id.* at 468.

192. *Id.*

193. U.N. CHARTER art. 96, para. 2.

194. U.N. CHARTER art. 96, para. 2.

the question must pertain to the competence of the Agency making the request.<sup>195</sup>

Refusing to grant jurisdiction, the ICJ determined that the W.H.O. was requesting an advisory opinion outside the scope of its legal competence.<sup>196</sup> “[T]he ICJ interpreted Article 2 of the W.H.O. Constitution to give the W.H.O. competence only to ‘deal with the effects on health of the use of nuclear weapons,’ and it found that regardless of whether the use of nuclear weapons was legal, they would have the same consequences on health and the environment.”<sup>197</sup> The Court determined that the issue presented by the W.H.O represented entirely a legal question on the use of nuclear weapons<sup>198</sup> and was about their health effects.<sup>199</sup> Pursuant to the Specialized Agency policy, the Court implied that, therefore, only the General Assembly has the competency to request advisory opinions on these legal questions.<sup>200</sup>

The dissent argued that the majority of the Court had not understood the question presented by the W.H.O. Judge Shahabudden interpreted the W.H.O.’s question to ask for an opinion whether the use of nuclear weapons violated W.H.O.’s Constitution.<sup>201</sup> Judges Koroma and Weeramantry found that W.H.O.’s question did not concern the general illegality but specifically illegality with regards to W.H.O.’s activities. The areas concerned 1) health obligations of the State; 2) environmental obligations of the State; and 3) obligations imposed on States by the W.H.O Constitution.<sup>202</sup>

## V. DETERMINING THE IMPACT OF THE COURT’S DECISION

“Reaching as far back in history, ranging over as many civilizations and cultural eras, as it does, international law by its very nature is the product of change. All law arises from an admixture of social, political,

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195. Highet, *supra* note 122, at 601.

196. John Kim, *International Institutions*, 31 INT’L LAW. 671, 674 (1997).

197. Perez, *supra* note 17, at 426-27 (construing the Agreement between the United Nations and World Health Organization, G.A. Res. 124(II), U.N. GAOR, 2d. Sess., U.N. Doc. A/124, art. X, para. 2 (1947) (entered into force July 10, 1948), and the W.H.O. Request at para. 21).

198. Highet, *supra* note 122, at 602.

199. Bezuhly, *supra* note 190 (indicating that the Court agreed that the WHO was authorized to confront the effects on health of the use of nuclear weapons).

200. Perez, *supra* note 17, at 427 (construing the W.H.O. Request at para. 30 quoting the Court as saying that “any other conclusion would render virtually meaningless the notion of a specialized agency”) The Court further elaborated on the principle of specialty by stating that specialized agencies “are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them.” W.H.O. Request at para. 25.

201. Bezuhly, *supra* note 190.

202. *Id.*



cultural, and ideological ingredients."<sup>203</sup>

Sovereignty and nonintervention principles<sup>204</sup> change based on global circumstances.<sup>205</sup> Three points in history exist when intervention was viewed as relatively acceptable: first, the period immediately following the Napoleonic Wars; second, the middle of the nineteenth century; and third, at the close of the nineteenth century.<sup>206</sup> In between these three points, the permissibility of intervention declined, in 1640, 1880, and at the beginning of the twentieth century.<sup>207</sup> Then in the mid-1960s, the world began to reconsider the legality of intervention.<sup>208</sup> These periods in time indicate that "system-transforming wars"<sup>209</sup> influence the favorably of intervention.

Currently the world is experiencing a change in the dynamics of international relations and the principle of sovereignty; intervention principles depend on the current global circumstances and the definition of sovereignty.<sup>210</sup> Two factors influenced this change: the end of the Cold War<sup>211</sup> and the change in the nature of conflicts.<sup>212</sup> Today sovereignty continues to change based on economic interdependence, technological advances, communication and transportation advances, the power and range of modern weapons, and the universal threat of nuclear weapons.<sup>213</sup>

During the Cold War, the international paradigm differed considerably compared to today. The influence of the superpowers created an emphasis on deterrence with nuclear weapons.<sup>214</sup> The sovereign of a state sought to increase the ability of the nation-state to win wars.<sup>215</sup>

203. HENRY L. BRETTON, *INTERNATIONAL RELATIONS IN THE NUCLEAR AGE* 160-61 (1986).

204. The traditional view is that "sovereignty and nonintervention are part and parcel of the same 'doctrinal mechanism to express the outer limits of permissible influence that one state may properly exert upon another.'" Charles W. Kegley, Jr., et al, *The Rise and Fall of the Nonintervention Norm: Some Correlates and Potential Consequences*, 22 FLETCHER F. WORLD AFF. 81, 82 (1998).

205. *Id.*

206. *Id.* at 84.

207. *Id.*

208. *Id.*

209. *Id.* at 84-85 (indicating that "the largest inflection points in this time series appear in the wake of major periods of global instability suggesting that discontinuities have been precipitated by changes in levels of interstate aggression in the world."). *Id.* at 85.

210. *Id.* at 84-85.

211. For a discussion, see *infra* notes 77-1012 and accompanying text.

212. Robert C. Loehr & Eric M. Wong, *The U.N. and Humanitarian Assistance: Ambassador Jan Eliasson*, J. INT'L AFF., Winter, 1995, at 491 (indicating that conflicts have changed in that they "are now concentrated in the realm of civil war and internal conflict.").

213. Bretton, *supra* note 203, at 165.

214. Jim Falk, *War and Peace Studies: Towards a Peace Paradigm*, in THE PACIFIC: PEACE, SECURITY & THE NUCLEAR ISSUE 205, 207 (1988).

215. *Id.* at 207.

The global approach treated nation-states as single actors, not as part of a functioning whole.<sup>216</sup>

Since the end of the Cold War the lack of a bipolar world decreases the need for nuclear weapons competition. The global community is opening its eyes to global human rights, environmental concerns, and economic issues. In response, nation-states recognize the need to cooperate to address these issues. To achieve this end, an independent body must facilitate this process by identifying the concerns, the goals, and the means.

Among other things, the lack of a competent system for implementation of international nuclear safety standards leads to faulty international regulation of nuclear weapons.<sup>217</sup> Nation-states cooperated to establish a peer review process to promote domestic implementation of internationally recognized nuclear safety standards. The peer review process evaluates the conditions and safety procedures of a nation-state's nuclear power plants.<sup>218</sup> This system is not self enforcing and the control of violent conflicts resides with the nation-state rather than international institutions.<sup>219</sup> Without militia provided by the nation-states, the international institutions are close to powerless to respond to violent conflicts.<sup>220</sup> Second, the reluctance of nation-states to relinquish control of standards to an international body maintains the continuing belief that such decisions should be determined by the national government.<sup>221</sup>

The ICJ, in its advisory opinion to the General Assembly, should have taken control of the global issue of nuclear weapons. The responsibility of the ICJ is to identify the needs of and concerns of the international community in order to create an international standard. The Court needs to take a position on the legality of the threat or use of nuclear weapons when a state existence is at stake.

Too many pleas for consistency or against inevitable selectivity amount to arguing that the United Nations should not intervene anywhere unless it can intervene everywhere. . . . But in light of genocide, misery, and massive human rights abuses in war zones around the world, should Pontius Pilate be the model

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216. *Id.* at 208.

217. Washington, *supra* note 119, at 440.

218. *Id.* at 430. Nuclear safety has two different forms of peer review. The first involves "the technical, on-site review of nuclear installations by nuclear plant operators. This method is most frequently used by the International Atomic Energy Agency, the World Association of Nuclear Operators, and the Institute of Nuclear Power Operations. The second peer review process monitors state compliance with the provisions of the Convention on Nuclear Safety." *Id.* at 431.

219. Attanasio, *supra* note 2.

220. *Id.* However, international institutions have control over capital which has a great influence on the nation state. *Id.* at 26.

221. Washington, *supra* note 119, at 441.

for both American and the international response? The fatalism and isolationism that flow from most objections to humanitarian intervention are as distressing as the situation in the countries suffering from ethnic conflict where such an action is required. . . . A purely non interventionist position amounts to abstinence from the foreign policy debate.<sup>222</sup>

In order to be fair to the international populace and to be a credible international judicial institution,<sup>223</sup> the ICJ needs to opine.<sup>224</sup>

The ICJ determined that ultimately it could not conclude whether the threat or use of nuclear weapons was illegal under circumstances when the safety of a state is at stake. The Court fails to realize that neutrality is a false ideal.<sup>225</sup> The Court's inability to reach a decision really says a great deal. The Court used neutrality to promote the advancement of the international community's goal towards the obliteration of nuclear weapons.<sup>226</sup> Neutrality is usually applied to the political ideals of a state.<sup>227</sup> If a state wants to remain autonomous instrumental neutrality is not the way, the state must "promote the autonomous way of life non-neutrality by guaranteeing that certain valuable options are made available to its citizens."<sup>228</sup> This analysis should be applied to the ICJ's neutral position.

Often it is argued that either a state can chose one of two options: neutrality among conflicting ideals or coercive imposition of its position on those that do not agree.<sup>229</sup> In this instance, an institution without enforcement power, like the ICJ, might opt for neutrality and thereby acknowledge its impotence. However, coercion is not the only means to solidify power.<sup>230</sup> "[P]romotion of moral ideals can be highly controver-

222. Anne Orford, *Locating the International: Military and Monetary Interventions After the Cold War*, 38 HARV. INT'L L.J. 443, 448 (1997).

223. See *supra* notes 217-221 and accompanying text, discussing the role of international judicial institutions.

224. It is suggested that a lack of international law and international engagement were contributing factors in the crisis in Yugoslavia. Orford, *supra* note 222, at 444.

225. Cf. Stephen A. Gardbaum, *Why the Liberal State Can Promote Moral Ideals After All*, 104 HARV. L. REV. 1350, 1352 (1991).

226. *Id.* at 1354 (indicating that non-neutral defenses of neutrality is when "the state seeks to promote a particular way of life by means of its neutrality: This may be termed instrumentality or weak neutrality, or neutrality as a means.").

227. *Id.* (construing Joseph Raz).

228. *Id.* (construing Joseph Raz).

229. *Id.* at 1364. The argument is construed: "1) the ends of political power must be justified to those subject to it, and coercion is the opposite of such justification; 2) promotion of a moral ideal is necessarily coercive; 3) therefore neutrality is the only reasonable response to the fact of pluralism." *Id.* at 1366.

230. *Id.* at 1367 (indicating that not every act by a state to promote an ideal needs to be coercive).

The state can promote or foster a particular way of life in a number of noncoercive ways. For example, the establishment clause's prohibition against state promotion of religious ways of life is not limited to coercive means of

sial and, in certain cases, can threaten the basic structure of political association."<sup>231</sup> The abolition of slavery in the United States is an example.<sup>232</sup> The ICJ would increase its role in the international community as a guarantee for redress of wrongs if it takes a stand as "a strong force in place with the means and mandate to thwart."<sup>233</sup>

The Court's decision was not actually neutral.<sup>234</sup> The Court's decision seems very narrow.<sup>235</sup> However, this narrowness misleads because three out of the six judges did not support the majority simply because the majority decision did not conclude that existing international law banned the threat or use of nuclear weapons. "[T]he absence of a clear majority reflects the Court's failure fully to resolve the legal status of nuclear weapons."<sup>236</sup> To reach its decision, the Court considered certain areas of international law: human rights and genocide, and environmental law.<sup>237</sup> The implication of the Court's "neutrality" on these global issues is detrimental.

#### A. *The Case and Environmental Law*

With rapid population growth across the globe, the impact that humans have on the earth increases significantly.<sup>238</sup> Since environmental degradation continues at a remarkable pace, individual nations can no longer act alone and expect to improve environmental quality.<sup>239</sup>

promotion. Thus, such noncoercive ways of promoting religion as tax breaks and financial aid for parochial schools and placing a crèche in a courthouse have been found unconstitutional.

*Id.*

231. *Id.* at 1369 (discussing promotion of ideals by states). I believe it is applicable to the International Court of Justice as well.

232. *Id.* at 1369.

233. Orford, *supra* note 222, at 450 (construing Fernando Teson).

234. Several of the resolutions were adopted with a number of negative votes. With these negative votes, the ICJ decision is arguably not *opinio juris*.

235. Highet, *supra* note 122, at 601.

236. Falk, *supra* note 183, at 64.

237. Timothy J. Herverin, Case Comment, *Legality of the Threat or Use of Nuclear Weapons: Environmental and Humanitarian Limits on Self Defense*, 72 NOTRE DAME L. REV. 1277, 1278 (1997).

238. Futrell, *supra* note 12 (indicating that "[n]ew technologies . . . have allowed us to dig deeper, cut faster, and reroute large quantities of water."). De La Madrid H., *supra* note 1, at 560 (indicating that the rapid deterioration of the planet and its natural resources has severe implications for sustainable development as the human population continues to grow rapidly).

239. Futrell, *supra* note 12. See also Marcia L. Goldstein, et al., *Current Issues in Bankruptcy and Environmental Law*, 474 PLILit 651, 675 (1993).

The public's concern with the presence of hazardous and toxic waste sites that endanger the environment and public health has prompted the federal and numerous state governments to enact a variety of environmental protection legislation. Increasingly, the significant costs of complying with these regulations are forcing industrial polluters to seek protection under title 11

Sovereignty will have to be second to the quest to ameliorate environmental problems and create treaties in that direction.<sup>240</sup> Nations should be concerned about the environment not only because it causes threats to human health and ecosystems in the their nation,<sup>241</sup> but there are more global concerns that result.<sup>242</sup> Instead, nations tend to hide behind a the cloak of sovereignty and keep their environmental concerns from the rest of the world.<sup>243</sup>

Before 1972, only a few international agreements existed addressing resources shared across borders, such as water or wildlife; setting liability rules for oil spills; or regulating fisheries and whaling. These agreements barely influenced nation-states' sovereignty. In 1972, at the time of the UN-sponsored Stockholm Conference on the Human Environment, the global community acknowledged that the nature of the global environmental problem differed from that of trade and traditional international law. The international community concluded that this required a new approach.<sup>244</sup>

The world recognizes the threat to the environment of nuclear weapons and nuclear weapons making.<sup>245</sup> The Chernobyl accident in

of the United States Code. . . . As the federal Environmental Protection Agency (the "EPA") and various state agencies have sought to enforce environmental protection legislation within these bankruptcy cases, the conflict between the Bankruptcy Code and federal and state environmental statutes has become apparent.

*Id.* Examples of federal environmental statutes are the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-57 (1982) ("CERCLA") and the Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-87 (1983 & Supp. 1985) ("RCRA").

240. Moomaw, *supra* note 3, at 8 (concluding that "[m]ost importantly, national boundaries are porous to pollution or global environmental degradation, and no amount of military force or economic power can fully insulate a country from their consequences. Environmental diplomacy and the negotiation process to create treaty and soft-law regimes often differ from traditional diplomatic practices. International and global environmental problems promote alliances that are often quite different from those formed to address traditional diplomatic issues. International environmental treaties often commi [sic] nations to an ongoing process instead of, or in addition to, the achievement of specific treaty goals. Environmental problems can be classified into four useful categories to analyze the implications for diplomacy and national sovereignty: 1) domestic, internal issues, 2) common concern assets, 3) transboundary movements of resources, pollution and migratory species, and 4) global and commons issues.").

241. Futrell, *supra* note 12 (indicating that the positive side effect of the trouble with the environment for the United States is that it creates more jobs for environmental engineers and experts in the field).

242. For example, the environmental degradations in the United States have repercussions in other countries. Futrell, *supra* note 12. As resources across the world decrease in availability, global competition has risen for those scarce resources left. This could possibly lead to war. *Id.* Current environmental problems will create bigger problems for future generations. *Id.*

243. Moomaw, *supra* note 3, at 14-15.

244. *Id.* at 8.

245. Kenneth J. Garcia, *The Towns the Bomb Built/War Threat Eases-Economic Fall-*

April 1986 helped to open the eyes of the world to the horrors of a nuclear accident.<sup>246</sup> After the Chernobyl incident, some countries even abandoned plans to develop new nuclear power plants.<sup>247</sup> The international community knows of the dangers of diverting nuclear materials for the use of nuclear weapons and established international nuclear safeguards to monitor and halt the diversion of nuclear materials.<sup>248</sup> The ICJ advisory opinion and wide sentiment indicate, that the effects of a nuclear war would devastate the natural environment.<sup>249</sup> The every day effect of nuclear testing and nuclear weapons manufacturing receives less acknowledgment.<sup>250</sup> But these threats continue to grow as nuclear weapons exist.

The Court identified several environmental norms and rules that address these threats.<sup>251</sup> The Court acknowledged the importance of a sound environment for the quality of life and health of those born and unborn; yet, the Court indicated that despite these concerns the norms established by treaties do not place obligations of total restraint on countries.<sup>252</sup> The Court concluded "there was no general prohibition on the threat or use of nuclear weapons."<sup>253</sup> In its analysis of the human right to life, the Court indicated that the International Covenant on Civil and Political Rights and the Charter of the United Nations, which uphold this right, apply during times of peace and war. However, the Court did not consider the International Covenant on Economic, Cultural and Social Rights which guarantee the right to health,<sup>254</sup> among

*out Begins*, S.F. CHRON., April 11, 1995, at A1.

246. Washington, *supra* note 119, at 432 (indicating that "under ordinary operating conditions only negligible amounts of radioactive materials escape from a reactor, more dangerous quantities of these materials can enter the atmosphere due to accidents or to the inadequate disposal of nuclear waste").

247. LKSHMAN D. GURUSWAMY, ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND WORLD ORDER 539 (1994).

248. Washington, *supra* note 119, at 432 (indicating that the danger of nuclear weapons has been confronted by the international community for some time and the international community is just starting to take steps towards preventing damages by peaceful uses of nuclear energy). "[N]uclear weapons proliferation is not likely to be halted until there is a total renunciation of nuclear power for whatever purpose, on the part of the nuclear weapons States especially. . . ." GURUSWAMY, *supra* note 247.

249. GURUSWAMY, *supra* note 247, at 985.

250. *Id.* The damage to the environment is caused by above ground and underground testing which release radioactive gases into the air and risk contaminating ground water. Nuclear wastes have long term environmental effects as well.

251. "[T]he Court cited Additional Protocol I of 1977 to the Geneva Convention of 1949 (Protocol I), the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD), Principle 2 of the Rio Declaration (RIO 2), and Principle 21 of the Stockholm Declaration (Stockholm 21)."

252. Herverin, *supra* note 237, at 1279.

253. Kim, *supra* note 196, at 674.

254. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1996, 6 I.L.M. 360, art. 12 (1967) [hereinafter ICESCR].

other rights,<sup>255</sup> which nuclear weapons and the externalities thereof derogate. Nuclear contamination and fall-out impact the human right to health.<sup>256</sup>

Since the ICJ refused to declare the outright illegality of nuclear weapons no matter the circumstances, it subordinates 1) the long term survival of our planet (in essence the security of each sovereign nation), 2) the rights encompassed in the ICCPR and the ICESCR, and 3) the purpose of the United Nations as embodied in the United Nations Charter to the sovereignty concerns of military security of each nation.

### B. *The Case and Human Rights*

The international community has become more sensitive to global human rights.<sup>257</sup> The number of international institutions providing for the safeguard of human rights has increased.<sup>258</sup> Sovereignty and the principles of nonintervention may excuse countries that violate international human rights laws.<sup>259</sup> However, the international unveiling of violations of human rights (especially genocide)<sup>260</sup> has greatly reduced the nation-state's ability to claim, in the name of sovereignty, immunity from international accountability for domestic actions upon their own citizens.<sup>261</sup> In fact, the majority of threats to human rights occurs at the state or local level.<sup>262</sup>

It is argued that states should take collective action in favor of supporting human rights, even if that action may cause some controversy; instead of remaining inactive and thus incapable of providing assistance to combat brutality or towards achieving democracy.<sup>263</sup> If older notions of nation-state sovereignty and non intervention are abandoned in favor of a more globalist perspective, the international community will be better enabled to aid peoples in need of assistance.<sup>264</sup>

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255. Consider also the right to enjoy the benefits of scientific process. *Id.* at art. 15(1)(b).

256. ICCPR, *supra* note 168.

257. D'Amato, *supra* note 29, at 47 (indicating that the "breakthrough events for human rights were the Nuremberg trials following the Second World War (establishing that genocide was a war crime) and the Genocide Convention of 1948 (establishing genocide as a crime under international law whether committed in time of war or peace)." *Id.* De La Madrid H., *supra* note 1, at 556 (indicating that the United Nations has postponed economic and social concerns in favor of focusing on peace and international safety).

258. De La Madrid H., *supra* note 1, at 558.

259. BRETTON, *supra* note 31.

260. D'Amato, *supra* note 29, at 47 (quoting Louis Henkin as describing that the list has expanded beyond genocide to include apartheid, slavery, extra-judicial killing or disappearances, torture, and inhuman treatment).

261. *Id.*

262. Orford, *supra* note 222, at 449 (construing Fernando Teson).

263. Orford, *supra* note 222 (construing Fernando Teson).

264. Orford, *supra* note 222, at 450 (construing Fernando Teson).

Nuclear deterrence centers on the idea "that there are certain interests that, if threatened, justify the incineration of hundreds of millions of innocents."<sup>265</sup> Some critics point out that there is a "numbed acceptance" of the moral aspect of the nuclear weapons dilemma.<sup>266</sup> The ICJ seems to have accepted this numbness by enlisting its neutrality on the ultimate decision of the legality of nuclear weapons overall.

The Court approached its human rights analysis in two ways. First, the Court discussed the right to life and second, the Court discussed genocide. When applied to nuclear weapons, the Court determined that human rights norms about the right to life<sup>267</sup> must be analyzed under the law of armed conflict.<sup>268</sup> The Court further concluded that international genocide norms would prohibit the use of nuclear weapons if there was an identifiable intent to destroy human groups.<sup>269</sup> The Court concluded that with the use of nuclear weapons no such clearly identifiable intent existed. Overall, the Court reached the decision "there was no general prohibition on the threat or use of nuclear weapons."<sup>270</sup>

The Court determined that it could not reach a conclusion whether the use or threat of nuclear weapons would be unlawful in the instance of self-defense when a State's existence was at issue.<sup>271</sup>

### C. Economics

The impact of nuclear weapons on human rights and the environment are greatly affected by the economics of a sovereign state because there is a close link between the economic development of a country and its military capabilities and strategy.<sup>272</sup> The amount of money spent on nuclear weapons in one country directly implicates that money as not being spent for other internal, humanitarian objectives.<sup>273</sup> "There [is] no need to manufacture new atomic bombs without letup and to appropriate twelve billion dollars for defense in a year in which no military threat [is] to be expected for the nearest future."<sup>274</sup> For example a

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265. Richard Tanter, *Preconditions for De-linking Australia from the Nuclear System*, in THE PACIFIC: PEACE, SECURITY AND THE NUCLEAR ISSUE 141, 148 (Ranginui Walker & William Sutherland eds., 1988).

266. *Id.* (indicating that "[a]t the heart of the argument is the belief that 1939 will come again, and only the threat of nuclear annihilation will stop a Hitler.").

267. that "[n]o one shall be arbitrarily deprived of his life," ICCPR, *supra* note 168.

268. Herverin, *supra* note 237, at 1278.

269. *Id.*

270. Kim, *supra* note 196.

271. Hight, *supra* note 122, at 601.

272. Kinhide Mushakoji, *Preface*, in THE PACIFIC: PEACE, SECURITY AND THE NUCLEAR ISSUE (Ranginui Walker & William Sutherland eds., 1988).

273. For a international statistical comparison, see *supra* note 59.

274. ALBERT EINSTEIN, OUT OF MY LATER YEARS: THE SCIENTIST, PHILOSOPHER AND MAN PORTRAYED THROUGH HIS OWN WORDS 139 (1956).



study found that American people are concerned with the deficit and unnecessary government spending; yet, despite the end of the Cold War and the collapse of the Soviet Union, the U.S. currently spends at least \$33 billion a year on nuclear weapons and weapons related activities about 13 percent of all military spending.<sup>275</sup> Since World War II, nuclear weapons technology has consumed approximately one third of all U.S. defense spending.<sup>276</sup> This is a result of a lack of strong and consistent Congressional oversight, skewed intelligence estimates, pervasive secrecy, partisan politics and interservice rivalries.<sup>277</sup>

The central challenge to achieving international cooperation is global economic liberalization.<sup>278</sup> "Compared to the international market, the national market is identified as something that is 'ours,' 'in here,' and, in that sense, 'private,' and part of our 'national sovereignty.' In contrast, compared to the national market, the international market associates with something that is 'theirs,' 'out there,' and, in that sense, 'public,' and a possible intrusion on and menace to our 'national sover-

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275. An Ongoing study by the U.S. Nuclear Weapons Cost Study Project, *Atomic Audit: What the U.S. Nuclear Arsenal Really Cost* (visited Mar. 5, 1998) <<http://www.brook.edu/PA/PRESSREL/SCHWARTZ.HTM>>.

Compare this spending to spending on other government programs for the elderly or disabled.

A comparison of Medicare and Medicaid as a function of U.S. Budget (compared to Unemployment and Compensation)

Health Coverage	1962 \$ amt*/% of GDP	1978 \$ amt*/ % of GDP	1997 \$amt*/ % of GDP
Medicare	\$ 0.1/ less than 0.05%	\$10.7 / 0.5%	\$95.6 / 1.2%
Medicaid	\$ 0 / 0%	\$24.3 / 1.1%	\$207.9 / 2.6%
Unemployment & Compensation	\$3.5 / 0.6%	\$10.8 / 0.5%	\$20.6 / 0.3%

\* The amount of money allocated to these programs is in the billions of dollars.

The information obtained for this chart was provided by the Congressional Budget Office in the Table E-12: Outlays for Entitlements & the Mandatory Spending, *Fiscal Years 1962-1997 (as a percentage of GDP)* (visited Mar. 3, 1998) <<http://www.cbo.gov/showdoc.cfm?index+319&sequence=0&from=7#e-12>> and Table E-13 Outlays for Entitlements and Other Mandatory Spending, *Fiscal Years 1962-1997 (in billions of dollars)* (visited Mar. 5, 1998) <<http://www.cbo.gov/showdoc.cfm?index+319&sequence=0&from=7#e-13>>.

276. An Ongoing study by the U.S. Nuclear Weapons Cost Study Project, *Atomic Audit: What the U.S. Nuclear Arsenal Really Cost* (visited Mar. 5, 1998) <<http://www.brook.edu/PA/PRESSREL/SCHWARTZ.HTM>>.

277. *Id.*

278. Globalization has increased the amount of regional institutions for economic, political, juridical, and social integration. De La Madrid H., *supra* note 1. These regional institutions include the European Union, the North American Free Trade Agreement, the Forum of the Asian Pacific Economic Cooperation, and the South American Common Market. *Id.* at 555-56. There has been a similar movement on an even grander international scale. The more universal institutions include: the International Monetary Fund, the World Bank, and the World Trade Organization. *Id.* at 556.

eignty.”<sup>279</sup> Globalization combines the “old liberal belief in economic interdependence with new technological developments that have intensified the pace of economic interdependence. Globalization shares with the liberal faith in economic interdependence the goal of eroding state sovereignty to build connections and interests between people of the world.”<sup>280</sup> “The problem is that economics is still an evolving science. The possibility of a second Great Depression, this time in a world with nuclear weapons, is simply unacceptable.”<sup>281</sup>

## VI. CONCLUSION

Countries have been moving towards disarmament and denuclearization as part of the nation-states’ search for a national identity consistent with development and peace.<sup>282</sup> Since, the ICJ considered itself able to address several aspects of the nuclear weapons legality debate; does it make sense that it could not render the ultimate decision of total legality of nuclear weapons when the survival of a nation-state is at stake? The ICJ identified the role of the ICCPR and United Nations Charter in times of peace and war (leaving out the ICESCR);<sup>283</sup> yet failed to consider the binding Covenants in its final analysis, considering only the law of armed conflict. Surely, if the Court considered these documents, it would have found itself capable to render an ultimate decision. By not making a determination as to the legality of the threat or use of nuclear weapons when the survival of a state is at stake, the Court impliedly admits to its doubt of the effectiveness of its determinations and ultimately of international law in general. For if the Court was certain that by declaring nuclear weapons completely illegal, that all states would comply; there would be no reluctance to indicate that there is no use of nuclear weapons.<sup>284</sup>

Cyclically, if the ICJ does not make conclusive opinions it diminishes the stability of globalization and in turn a decrease in globaliza-

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279. Cao, *supra* note 5, at 211.

280. Fidler, *supra* note 36.

281. Theodore P. Seto, *Drafting a Federal Balanced Budget Amendment That Does What It Is Supposed To Do (and No More)*, 106 YALE L.J. 1449, 1536 (1997).

282. Mushakoji, *supra* note 272, at xi.

283. It is interesting to note that despite the list of terrible results of nuclear war, many of which include health risks, the ICJ declined to render an opinion on the WHO’s request for an advisory opinion.

284. In the Dissenting Opinion of Vice President Schwebel, he identifies this thought.

[A]s long as what are sometimes styled as ‘rogue States’ menace the world (whether they are or are not parties to the NPT), it would be imprudent to set policy on the basis that the threat or use of nuclear weapons is unlawful ‘in any circumstance’. Indeed, it may not only be rogue States but criminals or fanatics whose threats or acts of terrorism conceivably may require a nuclear deterrent or response.

General Assembly, *supra* note 16, at 836.

tion decreases the support for the ICJ. Military technology is constantly changing.<sup>285</sup> The principle of sovereignty constantly changes.<sup>286</sup> Global threats grow and the world recognizes the increasing need to act as a community. The ICJ should accept this change, and infact advocate change to improve the global community and environment. "In a world whose only constant is change and a perpetual realignment of forces based on response to change, failure to accept the view that nation-states are not like pieces on a chessboard 'with specified roles, set objectives and fixed configurations' seems imprudent."<sup>287</sup> Although acknowledging the international standard to take measures toward the ultimate extinction of the nuclear weapon, the ICJ failed to take the strongest step of all, declaring the weapons illegal.

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285. NACHT, *supra* note 68, at 57.

286. It is interesting to note, as Judge Weermantry did in his dissent that the United Nations Charter was written before the bomb was dropped on Hiroshima. The concepts articulated in the Charter considered the scourges of war, but not to the extent of the nuclear weapon. This may have a bearing on the interpretation of the nonintervention and sovereignty principles.

287. Jim Anthony, *Introduction*, in *THE PACIFIC: PEACE, SECURITY AND THE NUCLEAR ISSUE* xvii (Ranginui Walker & William Sutherland eds., 1988).