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The Prospects for Challenging U.S. Nuclear Weapons Policy in Light of the World Court's Advisory Opinion on the Legality of the Threat or Use of Such Weapons Comment.

Stephen Gordon

COMMENTS

THE PROSPECTS FOR CHALLENGING U.S. NUCLEAR WEAPONS POLICY IN LIGHT OF THE WORLD COURT'S ADVISORY OPINION ON THE LEGALITY OF THE THREAT OR USE OF SUCH WEAPONS

STEPHEN GORDON

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"The desert winds, blowing in varying directions at different altitudes, shaped the mushroom cloud into a giant question mark."[1]

I. INTRODUCTION

Are nuclear weapons illegal? This question was recently put before the International Court of Justice by a resolution of the United Nations' General Assembly.[2] Many commentators have characterized the question as

1. EDWARD TELLER & ALLEN BROWN, THE LEGACY OF HIROSHIMA 18 (1962) (observing aftermath of first atom bomb detonation).

2. *Request for an Advisory Opinion from the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons*, G.A. Res. 75, U.N. GAOR, 49th Sess., 90th plen. mtg. at 15-16, U.N. Doc. A/RES/49/75 (1994); *see* Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 809-31 (July 8, 1996) (granting request and finding threat or use of nuclear weapons to be illegal under most circumstances), *available in* WL, International Legal Materials Index. The World Health Organization had also submitted a similar request. *See Request for Advisory Opinion on the Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, WHA Res. 46.40,

the most crucial and challenging the court has ever faced.[3] The significance of the court's decision to render judgment on the issue is evidenced in part by the fact that so many countries, including the United States, vigorously urged the court not to do so.[4] It seems somehow fitting that on the fiftieth anniversary of both the development of nuclear weapons and the establishment of the International Court of Justice itself, the court would be called upon to make such a historic determination.

The International Court of Justice (I.C.J.), or World Court, as it is commonly referred to, is the judicial arm of the United Nations (U.N.).[5] Its

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WHO 46th Sess. (May 14, 1993) (requesting opinion on same question, which was not granted due to lack of organization's standing).

3. *See* Christopher Bellamy, *D-day for Nuclear Arms Powers Threat*, INDEP. (London), July 8, 1996, at 9 (describing upcoming opinion as "a landmark judgment"), *available in* 1996 WL 10944205; Brahma Chellaney, *Next on the World Court's Docket: Are Nuclear Arms Legal?*, INT'L HERALD TRIB., Oct. 28, 1995, at 6 (predicting that advisory opinion will have "profound impact" on nuclear disarmament issue), *available in* 1995 WL 11288148; Andrew Gilligan, *World Powers Fear Nuclear Weapons Ruling*, DAILY TELEGRAPH (London), July 7, 1996, at 26 (calling opinion "perhaps the most politically explosive question ever put to a court of law"), *available in* 1996 WL 3963229; Abraham C. Keller, *Is Threat to Use Nukes a Global Law Violation?*, SEATTLE POST-INTELLIGENCER, May 4, 1996, at A5 (labeling prospect of court's ruling on issue "a sensational event"); Norbert Reintjens, *United Nations-Disarmament: Nuclear Weapons on Trial*, INTER PRESS SERV., Oct. 30, 1995 (referring to openings of hearings on issue as "unprecedented"), *available in* 1995 WL 10135330; *see also* Christopher Bellamy, *D-day for Nuclear Arms Powers Threat*, INDEP. (London), July 8, 1996, at 9 (emphasizing that decision is "the first time the court has been asked to give its opinion on the legality of any weapon"), *available in* 1996 WL 10944205.

4. *See* Christopher Bellamy, *D-day for Nuclear Arms Powers Threat*, INDEP. (London), July 8, 1996, at 9 (noting that "the NATO nuclear states and Russia," as well as Great Britain, had all asked court not to rule on issue), *available in* 1996 WL 10944205; Douglass W. Cassel, Jr., *World Court Unanimous in Urging Disarmament*, CHI. DAILY L. BULL., Aug. 13, 1996, at 6 (recalling that "the United States and other nuclear powers argued that the court lacked competence to address the question"), *available in* WL, ALLNEWS Database; *France Urges I.C.J. Not to Comment on Nuclear Arms Legality*, AGENCE FRANCE-PRESSE, Nov. 1, 1995 (revealing that France accused court of "not [being] qualified to comment on the issue"), *available in* 1995 WL 11464501; *U.S. Defends Nuclear Arms*, GUARDIAN (London), Nov. 16, 1995, at 17 (documenting how United States urged court to "throw out" request to rule on question), *available in* 1995 WL 9952941; *see also* Andrew Gilligan, *World Powers Fear Nuclear Weapons Ruling*, DAILY TELEGRAPH (London), July 7, 1996, at 26 (pointing out that World Court's opinion "is being treated with deadly earnestness by the major nuclear powers"), *available in* 1996 WL 3963229.

5. *See* U.N. CHARTER art. 92 (establishing that court "shall be the principal judicial organ of the United Nations"); *see also* Georges Abi-Saab, *The International Court As a World Court* (defining court's mission as to "uphold the global values" of international community), *in* FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE 3, 7 (Vaughan Lowe & Malgosia Fitzmaurice eds., 1996); SHABTAI ROSENNE, THE WORLD COURT: WHAT IT IS AND HOW IT WORKS 36 (1962) (explaining that duty of court is to help further objectives of United Nations). *See generally* NAGENDRA SINGH, THE ROLE AND RECORD

authority is limited to cases where a question of international law is specifically at issue,[6] and to exercise jurisdiction, it must have the consent of the parties involved.[7] The court's ability to find consent to its jurisdiction is still somewhat open to interpretation.[8] Since in this case the court was only called upon to give an advisory opinion, consent of the countries involved or affected by its decision was not needed.[9] However, the mere

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OF THE INTERNATIONAL COURT OF JUSTICE 10 (1989) (retracing steps of how idea for establishing court arose during World War II from meeting between China, United States, Soviet Union, and United Kingdom). Apparently, the founders of the court envisioned a revamped version of the old Permanent Court of Justice, set up by the now defunct League of Nations following World War I. *Id.* Nagendra Singh served as president of the International Court of Justice from 1985 until 1988. YEARBOOK 1988-1989, 1989 I.C.J.Y.B. 43, at 9, U.N. Sales No. 568.

6. *See* I.C.J. STAT. art. 36, para. 1 (referring to competence of court to settle disputes involving "all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force"); *id.* art. 38, para. 1 (describing court's function as "to decide [disputes] in accordance with international law").

7. *See* I.C.J. STAT. art. 36, para. 1 (stating that "[t]he jurisdiction of the Court comprises all cases *which the parties refer to it* and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force") (emphasis added); Hazel Fox, *Jurisdiction and Immunities*, (noting "the lack of compulsory jurisdiction of the International Court"), *in* FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE 210, 211 (Vaughan Lowe & Malgosia Fitzmaurice eds., 1996). *But see* I.C.J. STAT. art. 36, para. 6 (providing that "[i]n the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court").

8. *Compare* SHABTAI ROSENNE, THE WORLD COURT: WHAT IT IS AND HOW IT WORKS 73 (1962) (asserting that "[t]he International Court receives . . . power only from the consent of the States concerned"), *and* NAGENDRA SINGH, THE ROLE AND RECORD OF THE INTERNATIONAL COURT OF JUSTICE 25 (1989) (emphasizing that "[i]f a sovereign State has not accepted jurisdiction under the optional clause of the Statute, and is not party to a treaty conferring jurisdiction in the relevant domain, it is certainly not under an obligation to accept the submission of disputes to the Court"), *with* MALCOLM N. SHAW, INTERNATIONAL LAW 400-01 (1977) (explaining how court can sometimes find implied consent on part of country to submit to its assertion of jurisdiction), *and* RENATA SZAFARZ, THE COMPULSORY JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE 14-16 (1993) (referring to court's ability to assess boundaries of own jurisdiction as "well established principle of international law" and "one of [its] most important powers"). The United States withdrew its acceptance of the court's compulsory jurisdiction in 1985 over a dispute as to whether the court properly exercised its jurisdiction in the case of Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 4 (June 27). *See* ANTHONY CLARK AREND, THE UNITED STATES AND THE COMPULSORY JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE vii (1986) (explaining United States' dissatisfaction with court's ruling that found its actions in Nicaragua to be in violation of international law).

9. *See Request for an Advisory Opinion from the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons*, G.A. Res. 75, U.N. GAOR, 49th Sess., 90th plen. mtg. at 15, U.N. Doc. A/RES/49/75 (1994) (requesting World Court to "urgently" provide advisory opinion on nuclear weapons question). "The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request." I.C.J.

fact that an opinion is issued in advisory form does not mean that a nation is exempt from all of its holdings and proclamations.[10]

While the court's role in the establishment of international law has been substantial, its overall impact has not been as great as many of its supporters had hoped.[11] As this latest opinion indicates, however, the court's role in settling matters of crucial international importance may be expanding quite significantly in years to come.[12] Whether the World

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STAT. art. 65, para. 1; Interpretation of Peace Treaties with Bulgaria, Hungary, and Romania, 1950 I.C.J. 65, 71 (Mar. 30) (contrasting prerequisites for issuing advisory opinions as opposed to binding ones by holding that "[t]he situation is different in regard to advisory proceedings even where the Request for an Opinion relates to a legal question actually pending between States . . . [N]o State . . . can prevent the giving of an [a]dvisory [o]pinion which the United Nations considers to be desirable in order to obtain enlightenment as to the course of action it should take. . . .").

10. *See* CHRISTINE D. GRAY, JUDICIAL REMEDIES IN INTERNATIONAL LAW 116 (1987) (finding that "as Advisory Opinions purport to state international law it is difficult to see why they should be regarded as somehow less binding than declaratory judgments"); NAGENDRA SINGH, THE ROLE AND RECORD OF THE INTERNATIONAL COURT OF JUSTICE 25 (1989) (warning that, although "it is of the essence of an advisory opinion that is not binding upon any State . . . the State which chooses to contravene what has been defined by the Court as a rule of law in an advisory opinion will find it difficult to claim that it is not in breach of international law"); *see also* Andrew Gilligan, *World Powers Fear Nuclear Weapons Ruling*, DAILY TELEGRAPH (London), July 7, 1996, at 26 (explaining that "[a]ny decision to ignore an adverse verdict could open [the United States up] to accusations of undermining international law"), *available in* 1996 WL 3963229.

11. *Compare* SIR HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 5 (1982) (declaring that court has made "tangible contribution to the development and clarification of the rules and principles of international law"), *and* NAGENDRA SINGH, THE ROLE AND RECORD OF THE INTERNATIONAL COURT OF JUSTICE 147-72 (1989) (outlining progress of court in development of various facets of international law, including: law of sea, law of decolonization, law of treaties, law of international organizations, and environmental law), *with* R.P. Anand, *Role of International Adjudication* (referring to what author labels as "crisis of confidence" in World Court), *in* 1 THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE 1, 2-3 (Leo Gross ed., 1976), *and* Stephen Schwebel, *Reflections on the Role of the International Court of Justice* (lamenting "unused potential" of World Court), *in* JUSTICE IN INTERNATIONAL LAW 3, 4-11 (1994). *See generally* MALCOLM SHAW, INTERNATIONAL LAW 409 (1977) (pointing to reluctance of many countries to accept compulsory jurisdiction and tendency to maintain independence as reasons why World Court has not been more effective).

12. *See Speech by Sir Robert Jennings, President of the International Court of Justice, to the U.N. General Assembly*, UN Doc. A/48/PV.31, 1, 2-4 (1993) (noting favorably court's expanding role in solving international disputes), *reprinted in* 88 AM. J. INT'L L. 421, 421–24 (1994); Georges Abi-Saab, *The International Court As a World Court* (finding that countries are now becoming more willing to submit their disputes to court), *in* FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE 3, 14–15 (Vaughan Lowe & Malgosia Fitzmaurice eds., 1996); STANIMIR A. ALEXANDROV, RESERVATIONS IN UNILATERAL DECLARATIONS ACCEPTING THE COMPULSORY JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE vii (1995) (claiming that court now has more cases before it than at any other time).

Court is to be viewed as merely an advisory panel as opposed to an actual force for regulating the behavior of nations remains to be seen. The answer may depend in large part on whether enforcement of the principles set out in this latest opinion is ever sought and successfully achieved against any of the current nuclear powers.

In seeking to answer the question of whether nuclear weapons are illegal under international law, the court found it necessary to draw upon a number of different sources.[13] Among the most significant of these were: certain widely accepted covenants and conventions protecting basic human rights,[14] a number of multilateral and bilateral agreements concerning environmental protection,[15] a variety of nuclear arms control treaties,[16] the United Nations Charter,[17] and the customary laws gov-

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13. *See* I.C.J. STAT. art. 38 (directing court to apply "1. international conventions, whether general, or particular, establishing rules expressly recognized by contesting states; 2. international custom, as evidence of a general practice accepted by law; 3. the general principles of law recognized by civilized nations; 4. . . . judicial decisions and the teachings of the most qualified publicists of the various nations"). *See generally* TASLIM O. ELIAS, THE INTERNATIONAL COURT OF JUSTICE AND SOME CONTEMPORARY PROBLEMS 13 (1983) (suggesting that above cited authorities are arranged from most persuasive to least persuasive); Maurice Mendelson, *The International Court of Justice and Sources of International Law* (illustrating how court has used various sources to reach decisions), *in* FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE 3, 63-89 (Vaughan Lowe & Malgosia Fitzmaurice eds., 1996).

14. *See* International Covenant on Civil and Political Rights, Dec. 19, 1966, S. TREATY DOC. 95-2, 645, 999 U.N.T.S. 171, 171-84 (establishing basic human rights along lines of U.S. Bill of Rights); Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, S. TREATY DOC. 81-1, 267, 78 U.N.T.S. 277, 280 (prohibiting variety of inhumane acts specifically directed at members of particular racial, ethnic, national, or religious groups).

15. *See* Additional Protocol I to the Geneva Conventions of 1949, June 8, 1977, 16 I.L.M. 1391, 1409 (outlawing "methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment"); Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, May 18, 1977, 31 U.S.T. 333, 336, T.I.A.S. No. 9614 (banning use of weapons that cause "widespread, long-lasting or severe" environmental effects); *see also Report of the United Nations Conference on the Human Environment*, U.N. GAOR, 26th Sess., 21st plen. mtg., U.N. Doc. A/CONF.48/14 and Corr. 1 (1972) (reminding countries of their responsibility to protect and preserve environment for future generations), *reprinted in* 11 I.L.M. 1416, 1420; *United Nations Conference on Environment and Development: Convention on Biological Diversity*, United Nations Environmental Programme (1992) (reflecting agreement of various states that they have obligation not to engage in any action that would damage environment of neighbors), *reprinted in* 31 I.L.M. 818, 824.

16. *See* Southeast Asia Nuclear Weapon-Free Zone Treaty, Dec. 15, 1995, 35 I.L.M. 635, 640 (forbidding any of its signatories to "develop, manufacture or otherwise acquire, possess or have control over nuclear weapons"); African Nuclear-Weapon-Free Zone Treaty, June 21, 1995, 35 I.L.M. 698, 705 (placing ban of nuclear weapons from region of Africa); South Pacific Nuclear-Free Zone Treaty, Aug. 6, 1985, 24 I.L.M. 1440, 1444-45 (committing countries "not to manufacture or otherwise acquire, possess or have control

erning acceptable behavior during armed conflict.[18] After careful exami-

over any nuclear explosive device . . . inside or outside the South Pacific"); Treaty on Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed, and on the Ocean Floor, and in the Subsoil Thereof, Feb. 11, 1971, 23 U.S.T. 701, 703-04, 955 U.N.T.S. 115, 118 (prohibiting attempts to "emplant or emplace on the seabed or ocean floor and in the subsoil thereof beyond the outer limit of a seabed zone . . . any nuclear weapons"); Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483, 487, 729 U.N.T.S. 161, 171 (undertaking "not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices . . . directly, or indirectly; and not in any way to assist, encourage, or induce any non-nuclear weapon State to manufacture or otherwise acquire nuclear weapons"); Additional Protocol II to the Treaty for the Prohibition of Nuclear Weapons in Latin America, Feb. 14, 1967, 22 U.S.T. 754, 755, 634 U.N.T.S. 364, 364 (embodying agreement of parties not to threaten or use nuclear weapons against any parties to original treaty banning nuclear weapons in region of Latin America); Additional Protocol I to the Treaty for the Prohibition of Nuclear Weapons in Latin America, Feb. 14. 1967, 33 U.S.T. 1792, 1796, 634 U.N.T.S. 360, 362 (committing parties to "apply the status of denuclearization . . . in Latin America in territories for which . . . they are internationally responsible and which lie within the limits of the geographical zone established in that Treaty"); Treaty for the Prohibition of Nuclear Weapons in Latin America, Feb. 14, 1967, 634 U.N.T.S. 282, 326-30 (agreeing to prohibit receipt, storage, installation, and deployment of nuclear weapons in Latin America); Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, 2413, 610 U.N.T.S. 205, 208 (committing parties "not to place in orbit around the Earth any objects carrying nuclear weapons, . . . install such weapons on celestial bodies, or station such weapons in outer space in any other manner"); Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, Aug. 5, 1963, 14 U.S.T. 1313, 1316, 480 U.N.T.S. 43, 45 (banning nuclear weapons tests "in the atmosphere; beyond its limits, including outer space; or underwater, including territorial waters or high seas").

17. *See* U.N. CHARTER art. 2, para. 4 (stating that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state"); *id.* art. 51 (preserving right of individual and collective self-defense).

18. *See* Additional Protocol I of 1977 to the Geneva Conventions of 1949, June 8, 1977, 16 I.L.M. 1391, 1408-09 (emphasizing that "in any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited" and banning use of weapons which "cause superfluous injury or unnecessary suffering"); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 3516-20, 75 U.N.T.S. 287, 288-90 (prohibiting acts that result in "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture" of innocent civilians); Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 3328, 75 U.N.T.S. 135, 146 (requiring humane treatment of prisoners of war and protection "particularly against acts of violence or intimidation and against insults and public curiosity"); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 3226-28, 75 U.N.T.S. 85, 92-94 (calling for respectful treatment and protection of shipwrecked "in all circumstances"); Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 3124, 75 U.N.T.S. 31, 40 (committing parties to "take all possible measures to search for and collect the wounded and sick, to protect them against pillage

nation of each, the court eventually came to the conclusion that "the threat or use of nuclear weapons would *generally* be contrary to the rules of international law."[19] The only possible exception envisioned by the court where the threat or use of nuclear weapons might be legal was "in an extreme circumstance of self-defense, in which the very survival of a State is at stake."[20]

The World Court's opinion could be read as prohibiting the most common ways in which the United States has incorporated nuclear weapons into its defense strategy.[21] First and foremost, it may prevent the United

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and ill-treatment [and] to ensure their adequate care"); Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 575, 94 L.N.T.S. 65, 67 (prohibiting use of such poisons in wartime, as well as "all analogous liquids, materials or devices"); Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 2301-02 (outlawing use of "poison or poisoned weapons" and "arms, projectiles, or material calculated to cause unnecessary suffering"); Convention with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, 1817, 1 Bevans 247, 256 (prohibiting use of "poison or poisoned arms" and weapons "of a nature to cause superfluous injury"); *see also* Case Concerning Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 94 (June 27) (referring to fact that "self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law").

19. Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 831 (July 8, 1996) (emphasis added), *available in* WL, International Legal Materials Index.

20. *Id.* at 827-29.

21. *See* Christopher Bellamy, *D-day for Nuclear Arms Powers Threat*, INDEP. (London), July 8, 1996, at 9 (warning that "the policy of deterrence upon which U.S. . . . [has] rested for decades [could be] in violation of international law"), *available in* 1996 WL 10944205; Thalif Deen, *Anti-War Activists See Virtue in Nuclear Ruling*, INTER PRESS SERV., July 8, 1996 (quoting Daniel Ellsberg, formerly with United States Defense Department as stating "the opinion expressed by the I.C.J. contradicts the U.S. view" on use of nuclear weapons), *available in* 1996 WL 10768038. Ellsberg went on to list several examples of American foreign policy in which he claims the United States improperly threatened use of nuclear weapons, contrary to the World Court's holding. *Id.* He specifically stated that the United States had threatened to use nuclear weapons in "Indo-China, the Middle East, and in the Taiwan Strait [all of which were illegal because] none of the military developments in these regions constituted a threat to the survival of the United States." *Id*; *see also* Nicholas Grief, *The Legality of Nuclear Weapons* (asserting belief that use of nuclear weapons has long been prohibited by international law), *in* NUCLEAR WEAPONS AND INTERNATIONAL LAW 22, 40-41 (Istvan Pogany ed., 1987); *Disarmament: World Court Decision "Misunderstood"*, INTER PRESS SERV., July 10, 1996 (quoting from representative of Greenpeace, pro-environmental activist group, as interpreting decision in manner that "any use of nuclear weapons could be in breach of international law"), *available in* 1996 WL 10768077; Burns H. Weston, *Court: Disarm Nuclear Weapons*, DES MOINES REG., July 17, 1996 (declaring that U.S. policy envisions use of nuclear weapons in cases not approved by World Court and that "the practical effect of [the decision] is to rule out virtually any first use of nuclear weapons"), *available in* 1996 WL 6246590.

States from ever using such weapons again in a legal manner. Second, if the opinion does not render the use of nuclear weapons illegal in all circumstances, it might at least prohibit the United States from ever being the first to use them in a given conflict, especially in response to a mere conventional forces attack. Third, it calls the whole strategy of deterrence into question, in that the United States may no longer be justified in even threatening to use nuclear weapons. Finally, the court's opinion may require the United States to completely give up its nuclear arsenal sometime in the near future.

Part II of this Comment presents background information on early attempts to establish international control over nuclear weapons. It also describes the underlying activities that led to the presentation of this question to the court. Part III analyzes the court's opinion. Part IV discusses a number of crucial questions that the court left unanswered, and briefly summarizes the official United States position regarding the threat or use of nuclear weapons in an attempt to determine if it conforms to the principles of international law enunciated by the court. Part V examines the prospects for obtaining and enforcing a legally binding judgment against the United States for its nuclear policy in the International Court of Justice. Finally, Part VI considers whether such a judgment could be successfully pursued in a U.S. court.

II. BACKGROUND

A. *International Control over Nuclear Weapons*

Apparently, the decision of the United States to drop the first nuclear bomb on Japan during World War II was a foregone conclusion.[22] Less certain, however, was how the United States would handle the issue of nuclear weapons after it had used them to win the war.[23] Aware of the

22. *See* WILLIAM H. CHAFE, THE UNFINISHED JOURNEY: AMERICA SINCE WORLD WAR II 58 (1986) (quoting Henry Stimson, Secretary of War, who recalled that he never heard any of Truman's top advisors question use of bomb against Japan); RONALD E. POWASKI, MARCH TO ARMAGEDDON 25 (1987) (quoting Truman, who stated that he "never had any doubt that [the bomb] would be used"); EDWARD TELLER & ALLEN BROWN, THE LEGACY OF HIROSHIMA 15 (1962) (stating that Interim Committee of nuclear weapons policy issued unanimous report to Roosevelt, urging that atom bomb be dropped on Japan "without specific warning—as soon as possible").

23. *See* RONALD E. POWASKI, MARCH TO ARMAGEDDON 7 (1987) (quoting Niels Bohr, one of first physicists to convince United States of urgency to begin work on bomb, as warning that "the only way to prevent a nuclear Armageddon was through international control of atomic energy"); *see also id.* at 9 (revealing belief of Vannevar Bush, chairman of newly established National Defense Research Committee set up by Roosevelt to head scientific research arm of war effort, that international control of nuclear technology was essential to preventing inevitable arms race); *id.* at 29 (describing Secretary of War Stim-

potential danger such weapons might cause in the hands of its enemies, and partly in response to public opinion, the United States soon took the lead in trying to establish a system of international control over the bomb.[24] Initially, the prospects for such control appeared promising, and the United States was able to persuade the Soviet Union to accept the idea of establishing the United Nations Atomic Energy Commission to deal with the matter.[25] Shortly thereafter, the United States presented to this body a proposal that called for an end to the manufacture of new bombs, and a gradual elimination of its own existing stock.[26] Although the plan was adopted by the General Assembly, the Soviet Union rejected it out of hand, primarily because the Soviets preferred a course of

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son's reversal of position and new belief that international agreement with Soviet Union was proper course of action); *id.* at 30-31 (noting Secretary of Navy James Forrestal's disagreement with Stimson and his belief that United States should not attempt to appease Soviet Union); *id.* (citing belief of General Leslie Groves, director of the Manhattan Project, that if United States refused to share information with Soviets they would not be able to develop bomb for another twenty years); *see also id.* at 32 (detailing pressure on Truman to make proper decision, and noting his initial promise to share information with other countries in manner that would not reveal specifics of how bomb was developed).

24. *See* DIMITRIS BOURANTONIS, THE UNITED NATIONS AND THE QUEST FOR NUCLEAR DISARMAMENT 9 (1993) (describing initiation of United Nations in confronting "nuclear question"); Jonathan Medalia, *The Test-Ban Debate: Forty Years of New and Recurring Themes* (recalling early attempts to put bomb under control of international apparatus, and position of many that total abolition was only real answer), *in* NUCLEAR WEAPONS AND SECURITY 19, 19-20 (Jonathan Medalia et al. eds., 1991). Among those fervently arguing in favor of the idea of placing nuclear weapons under international control was Robert Oppenheimer, director of the Los Alamos site of the Manhattan Project. DAVID SHUKMAN, TOMORROW'S WAR: THE THREAT OF HIGH-TECHNOLOGY WEAPONS 23-24 (1996). Oppenheimer warned that the United States would not long enjoy its status as the sole nuclear power. *Id.*

25. *See Resolution Presented by the Delegates of the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, the United States of America, France, China and Canada*, G.A. Res. A/3, U.N. GAOR, 1st Sess., at 7 (1946) (establishing Commission composed of one member of each country that had seat in newly created United Nations Security Council), *in* UNITED NATIONS RESOLUTIONS (Dusan J. Djonovich ed., 1973); DIMITRIS BOURANTONIS, THE UNITED NATIONS AND THE QUEST FOR NUCLEAR DISARMAMENT 8-12 (1993) (noting debate among United States, England, and Canada as to how to get Soviet Union's approval to set up Commission). After the Soviets tested their first atom bomb, the Commission was disbanded. *Id.* at 16.

26. *See* Jonathan Medalia, *The Test-Ban Debate: Forty Years of New and Recurring Themes* (citing "Baruch plan" designed to control "all phases of the development and use of atomic energy"), *in* NUCLEAR WEAPONS AND SECURITY 19, 19-20 (Jonathan Medalia et al. eds., 1991); *see also* MICHAEL SHEEHAN, ARMS CONTROL 3 (1988) (referring to Baruch plan as "the last chance to achieve a complete ban on nuclear weapons").

action requiring disarmament first and international control over nuclear materials and technology second.[27]

Soon after its rejection of the United States' plan, the Soviets responded with a plan of their own that envisioned the complete elimination of all nuclear weapons within three months of the agreement's ratification.[28] In the meantime, both houses of the United States Congress also began calling for an end to the manufacture and testing of nuclear weapons, and passed resolutions to that effect.[29] However, neither the Soviet nor Congressional proposals ever gained enough support to be enacted.[30] Furthermore, when the Soviet Union tested its first bomb in 1949,[31] political opinion in the United States began to change, from generally favoring disarmament to accepting the notion of a massive build-up of such weapons to remain competitive with the Soviets.[32] This shift in opinion marked the beginning of the arms race and consequently snuffed out the early prospects for placing control of nuclear weapons in the hands of the international community.[33]

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27. *See* DIMITRIS BOURANTONIS, THE UNITED NATIONS AND THE QUEST FOR NUCLEAR DISARMAMENT 15 (1993) (relaying fears of Soviets that they were being bullied into accepting proposal by "pro-Western majority" in United Nations); MICHAEL SHEEHAN, ARMS CONTROL 3 (1988) (spelling out Soviets' suspicions that proposal would be used to stifle their ability to research and test atomic bomb, while at same time, allowing United States to draw down its own stockpile at gradual pace); DAVID SHUKMAN, TOMORROW'S WAR: THE THREAT OF HIGH-TECHNOLOGY WEAPONS 31 (1996) (suggesting that America's refusal to first place its arsenal in hands of United Nations led to Soviet's rejection of Baruch plan).

28. *See* Jonathan Medalia, *The Test-Ban Debate: Forty Years of New and Recurring Themes* (noting how "Gromyko plan" came about in response to "Baruch" plan), *in* NUCLEAR WEAPONS AND SECURITY 19, 19-20 (Jonathan Medalia et al. eds., 1991).

29. S. Res. 248, 79th Cong., (1946); H.R. Cong. Res. 146, 79th Cong. (1946); *see* Jonathan Medalia, *The Test-Ban Debate: Forty Years of New and Recurring Themes* (citing aforementioned resolutions), *in* NUCLEAR WEAPONS AND SECURITY 19, 20 (Jonathan Medalia et al. eds., 1991).

30. *See* Jonathan Medalia, *The Test-Ban Debate: Forty Years of New and Recurring Themes* (explaining factors that led to failure of proposals to become enacted), *in* NUCLEAR WEAPONS AND SECURITY 19, 20 (Jonathan Medalia et al. eds., 1991). According to Medalia, "[t]he Senate resolution was tabled; the House resolution was referred to the Committee on Foreign Affairs and received no further action." *Id.* at 45 n.4.

31. *See* ROLAND E. POWASKI, MARCH TO ARMAGEDDON 53 (1987) (noting how Truman discovered Soviets' detonation of nuclear device).

32. *See id.* at 19-20 (documenting shift in public opinion).

33. *See id.* at 20 (stating that "initial repugnance to nuclear weapons felt by many in the United States gave ground to a perceived need to build more and better nuclear weapons"); *see also* MICHAEL SHEEHAN, ARMS CONTROL 3 (1988) (pointing out how news of Soviet's first successful test of atom bomb in 1949 made United States re-think its position as to placing its nuclear arsenal under international control). *See generally* DAVID SHUKMAN, TOMORROW'S WAR: THE THREAT OF HIGH-TECHNOLOGY WEAPONS 35-40

Although the initial hopes for a comprehensive ban on all nuclear weapons through a system of international control never came to fruition, the all-out nuclear holocaust predicted and feared by some commentators never took place either. This dreadful scenario was averted in large part by the development of a number of different mechanisms that played a key role in preventing the use of nuclear weapons. First among these mechanisms was the establishment of the United Nations, which helped provide a forum for discussion of the difficult questions associated with nuclear weapons, in a manner that set the stage for the subsequent arms control treaties agreed upon by the major world powers.[34] Second was the establishment of the International Court of Justice, which has helped elucidate the principles of international law that give those treaties legal effect.[35] Third, and most important, was the sporadic, yet gradually for-

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(1996) (chronicling how quickly other countries began to develop capacity to construct nuclear weapons).

34. *See* U.N. CHARTER preamble (specifying that primary goals of organization are "to save succeeding generations from the scourge of war" and "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained"); *id.* art. 1, para. 1 (stating that additional purpose is "to maintain international peace and security"); OLIVER J. LISSITZYN, THE INTERNATIONAL COURT OF JUSTICE: ITS ROLE IN THE MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY 2 (1972) (dividing role of United Nations into 3 categories: "(1) the creation and maintenance of conditions conducive to peaceful relations among states and to a general feeling of security; (2) peaceful settlement or adjustment of international disputes and situations likely to disturb friendly relations between states; (3) effective action to prevent or suppress breaches of the peace"); *see also* President Harry S. Truman, Speech to Opening Session of the United Nations Conference on International Organization (April 25, 1945) (stating that "[t]he essence of our problem here is to provide sensible machinery for the settlement of disputes among nations"), *in* Doc. 8, G/5, 1 U.N.C.I.O. Docs. 111 (1945). *But cf.* DIMITRIS BOURANTONIS, THE UNITED NATIONS AND THE QUEST FOR NUCLEAR DISARMAMENT 7 (1993) (referring to fact that United Nations was not given authority to regulate armaments as "a missed opportunity"). *See generally id.* at 30-31 (outlining how United Nations became, at some points, battleground for propaganda wars, with both United States and Soviet Union presenting proposals and counter-proposals in effort to show how serious each country was about achieving solution to arms race problem).

35. *See* I.C.J. STAT. art. 36, para. 2 (describing World Court's role in settling "legal disputes concerning: (a) the interpretation of a treaty; (b) any question of international law; (c) the existence of any fact which, if established, would constitute a breach of an international obligation; (d) the nature or extent of the reparation to be made for the breach of an international obligation"); *id.* art. 38 (directing court to apply "international conventions, whether general or particular, establishing rules expressly recognized by the contesting States; international custom, as evidence of a general practice accepted as law; the general principles of law recognized by civilized nations . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations"); *see also* Georges Abi-Saab, *The ICJ As a World Court* (noting that "in parallel with the rapidly growing complexity and intensity of international relations, international law has undergone pro-

malized process of treaty negotiations between the major world powers, which resulted in certain limits on the testing,[36] deployment,[37] and

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digious developments both in updating its traditional fields and in covering new and more specialized ones"), *in* FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE 3, 13 (Vaughan Lowe & Malgosia Fitzmaurice eds., 1996); Maurice Mendelson, *The International Court of Justice and Sources of International Law* (asserting that "[t]he Court has undoubtedly had an important influence on the law of treaties"), *in* FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE 63, 63 (Vaughan Lowe & Malgosia Fitzmaurice eds., 1996); MALCOLM SHAW, INTERNATIONAL LAW 32-44 (1977) (commenting on growing influence and recognition of international law in twentieth century).

36. *See* Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, Aug. 5, 1963, 14 U.S.T 1313, 1316, 480 U.N.T.S. 43, 45 (prohibiting nuclear weapons testing in earth's atmosphere, in space and underwater); Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, 796, 402 U.N.T.S. 71, 76 (prohibiting explosion of any nuclear device in Antarctic region). A wealth of information exists concerning the history of the outer space treaties, and their development. *See, e.g.*, P.K. MENON, THE UNITED NATIONS' EFFORTS TO OUTLAW THE ARMS RACE IN OUTER SPACE 14-22 (1988) (outlining how outer space was targeted by U.S. and Soviet military planners as next new frontier for arms race); *id.* at 38-50 (illustrating early attempts at constructing such treaties and documenting subsequent progress); OGUNSOLA O. OGUNBANWO, INTERNATIONAL LAW AND OUTER SPACE ACTIVITIES 12-24 (1975) (listing early U.N. resolutions addressing problem of preventing arms race from spreading out into space, and legal effect of those resolutions); *id.* at 50-62 (recounting difficulty in arriving at clear-cut definition of term "outer space"); IVAN A. VLASIC, UNITED NATIONS INSTITUTE FOR DISARMAMENT RESEARCH, PEACEFUL AND NON-PEACEFUL USES OF SPACE 51-55 (Bhupendra Jasani ed., 1991) (discussing problems associated with verifying compliance); *id.* at 42-47 (analyzing meaning of terms "peaceful purposes" and "peaceful uses").

37. *See* Treaty on the Reduction and Limitation of Strategic Offensive Arms (START Treaty), July 31, 1991, U.S.-U.S.S.R., S. TREATY DOC. 102-20, 461 (calling for reduction of stockpiles of nuclear weapons); INF Treaty on the Elimination of Intermediate-Range and Shorter-Range Missiles, Dec. 8, 1987, U.S.-U.S.S.R., S. TREATY DOC. 100-11, 293 (doing away with certain types of nuclear weapons); Treaty on the Limitation of Anti-Ballistic Missile Systems, May 26, 1972, U.S.-U.S.S.R., 23 U.S.T. 3435, 3442 (limiting particular types of nuclear missile defense systems); Additional Protocol II to the Treaty for the Prohibition of Nuclear Weapons in Latin America, Feb. 14, 1967, 22 U.S.T. 754, 755, 634 U.N.T.S. 364, 364 (reinforcing agreement to terms set out in original treaty banning nuclear weapons in region of Latin America and adding assurances to all parties to treaty that nuclear weapons will never be used against them); Additional Protocol I to the Treaty for the Prohibition of Nuclear Weapons in Latin America, Feb. 14. 1967, 33 U.S.T. 1792, 1796, 634 U.N.T.S. 361, 362 (continuing agreement to keep nuclear weapons out of Latin America); Treaty for the Prohibition of Nuclear Weapons in Latin America, Feb. 14, 1967, 634 U.N.T.S. 281, 330 (arriving at consensus to keep Latin America "forever free from nuclear weapons"); Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, 2413, 610 U.N.T.S. 205, 208 (outlawing placement in orbit of "any objects carrying nuclear weapons or any other kinds of weapons of mass destruction"). For details on the history of the ABM treaty, see John W. Finney, *A Historical Perspective*, *in* THE ABM TREATY: TO DEFEND OR NOT TO DEFEND 29, 29-44 (Walter Stutzle et al. eds., 1987), in which the author discusses the views expressed by the Secretary of Defense and certain congressmen as to the wisdom of missile defense systems. *See also* Gerard C.

proliferation[38] of nuclear weapons. Significantly, all three of these mechanisms played a critical role in this latest development in the World Court.

B. *Origin of the World Court's Advisory Opinion*

Credit for bringing the question of the legality of nuclear weapons before the court belongs to a number of different organizations that have been working diligently over the past few decades to realize their goal of complete nuclear disarmament.[39] In an effort to obtain a legal ruling favorable to their cause, these groups first put pressure on the World

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Smith, *The Treaty's Basic Provisions: View of the US Negotiator*, *in* THE ABM TREATY: TO DEFEND OR NOT TO DEFEND 45, 45-61 (Walter Stutzle et al. eds., 1987), in which the author outlines each component of the ABM treaty separately. To gain a better understanding of the basics of the arms control process in general, *see* MICHAEL SHEEHAN, ARMS CONTROL 1-40 (1988), which helps distinguish between the concepts of arms control and disarmament, and also traces the development of arms control discussions among the superpowers.

38. *See* Final Document on Extension of the Treaty on the Non-Proliferation of Nuclear Weapons, May 11, 1995, 34 I.L.M. 959, at 969 (reaffirming principles of following treaty), *available in* WL, International Legal Materials Index; Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483, 487, 729 U.N.T.S. 161, 171 (banning any attempt to spread information on construction of nuclear weapons or provide nuclear materials and assistance to non-nuclear countries). See Brahma Chellaney, *Regional Proliferation: Issues and Challenges*, *in* NUCLEAR PROLIFERATION IN SOUTH ASIA: THE PROSPECTS FOR ARMS CONTROL 298, 298-329 (Stephen Philip Cohen ed., 1991), for a summary of the challenges that lie ahead in preventing nuclear proliferation that points to South Asia, Middle East, and Latin America, as primary areas of concern.

39. *See* Mike Moore, *World Court Says Mostly No to Nuclear Weapons*, BULL. ATOM. SCIENTISTS, Sept. 19, 1996 (listing groups such as Lawyer's Committee on Nuclear Policy, International Association of Lawyers Against Nuclear Arms and International Physicians for the Prevention of Nuclear War, that worked to put disarmament issue before World Court), *available in* 1996 WL 8994384. The International Association of Lawyers Against Nuclear Arms and the International Physicians for the Prevention of Nuclear War teamed up with the International Peace Bureau in order to establish the World Court Project, which dedicated itself to bringing the issue of nuclear disarmament before the International Court of Justice. *Id.*; *see* Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 845 (July 8, 1996) (Oda, J., dissenting) (refusing to vote in favor of hearing case because of his view that request was merely attempt of various pro-disarmament groups to accomplish through legal system what they could not do through political persuasion), *available in* WL, International Legal Materials Index; Burns H. Weston, *Lawyers and the Search for Alternatives to Nuclear Deterrence*, 54 U. CIN. L. REV. 451, 451-66 (1985) (lamenting failure of United Nations to achieve complete disarmament and suggesting proposals for how to do so in future); Joseph Cirincione, Executive Director for the Committee on Nuclear Policy, at the Center for Strategic & International Studies (C-SPAN television broadcast, Feb. 19, 1997) (announcing that "[o]ur ultimate objective must be the elimination of all nuclear weapons by all nations through a verifiable and enforceable international agreement") (on file with the *St. Mary's Law Journal*).

Health Organization (WHO) and then on the U.N. General Assembly to present the question of nuclear weapons' legal status to the court in their capacity as officially recognized U.N. bodies.[40]

Prior to these efforts, the WHO had issued two reports detailing the devastating health effects of a nuclear blast.[41] Nevertheless, many of its members still were wary of putting this particular question before the

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40. *See* Nicholas Rostow, Comment, *The World Health Organization, The International Court of Justice, and Nuclear Weapons*, 20 YALE J. INT'L L. 151, 185 n.2 (1995) (calling WHO's request "narrower" than that hoped for by members of World Court Project); Mike Moore, *World Court Says Mostly No to Nuclear Weapons*, BULL. ATOM. SCIENTISTS, Sept. 19, 1996 (pointing out that only specific groups authorized under U.N. Charter to bring such questions to court may do so), *available in* 1996 WL 8994384; Jeremy J. Stone, *Less Than Meets the Eye (Ruling That Makes Use of Nuclear Weapons Illegal)*, BULL. ATOM. SCIENTISTS, Sept. 19, 1996 (congratulating various pro-disarmament groups for getting U.N. General Assembly to adopt their agenda), *available in* 1996 WL 8994386; *Landmark Ruling on Nuke Arms by International Court*, NEW STRAITS TIMES, July 10, 1996 (documenting role of various pro-disarmament groups in convincing WHO to seek opinion from World Court), *available in* 1996 WL 10463713; *see also Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Request for an Advisory Opinion)*, WHA Res. 46.40, WHO, 46th Sess. (May 14, 1993) (requesting opinion from World Court); *Request for an Advisory Opinion from the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons*, G.A. Res. 75, U.N. GAOR, 49th Sess., 90th plen. mtg. at 15-16, U.N. Doc. A/RES/49/75 (1994) (requesting opinion from World Court on same issue).

41. World Health Organization, *Effects of Nuclear War on Health and Health Services: Report of the WHO Management Group on Follow-up of Resolution WHA 36.28: "The Role of Physicians and Other Health Workers in the Preservation and Promotion of Peace . . ."* (2d ed. 1987); World Health Organization *Effects of Nuclear War on Health and Health Services: Report of the International Committee of Experts in Medical Sciences and Public Health to Implement Resolution WHA34.38* (1st ed. 1984). Several World Health Organization resolutions have also been passed relating to these reports, including: *Effects of Nuclear War on Health and Health Services*, WHA Res. 40.24, WHO, 40th Sess. (May 15, 1987) (urging countries to take note of conclusions of second WHO report), *reprinted in World Health Organization, Effects of Nuclear War on Health and Human Services: Report of the WHO Management Group on Follow-Up of Resolution WHA 36:28: "The Role of Physicians and Other Health Workers in the Preservation and Promotion of Peace . . ." (2d ed. 1987)*; *The Role of Physicians and Other Health Workers in the Preservation and Promotion of Peace As the Most Significant Factor for the Attainment of Health for All*, WHA Res. 36.28, WHO, 36th Sess. (May 16, 1983) (endorsing conclusions of first WHO report), *reprinted in World Health Organization, Effects of Nuclear War on Health and Human Services: Report of the International Committee of Experts in Medical Sciences and Public Health to Implement Resolution WHA 34.38 (1984)*; *The Role of Physicians and Other Health Workers in the Preservation and Promotion of Peace As the Most Significant Factor for the Attainment of Health for All*, WHA Res. 34.38, WHO, 34th Sess. (May 22, 1981) (requesting Director-General of WHO to establish committee of international medical experts to consider health consequences of nuclear war), *reprinted in World Health Organization, Effects of Nuclear War on Health and Human Services: Report of the International Committee of Experts in Medical Sciences and Public Health to Implement Resolution WHA 34.38 (1984).*

International Court of Justice because they considered it more a political than medical issue.[42] Despite these protests, however, a majority of their members voted in favor of submitting the request to the court.[43] Ironically, the complaints of the dissenting members were vindicated when the I.C.J. found that the WHO had no standing to seek an opinion on the matter.[44] This setback did not put an end to the process, however, because the U.N. General Assembly submitted a similar request a few

42. Martin M. Strahan, Comment, *Nuclear Weapons, The World Health Organization, and the International Court of Justice: Should an Advisory Opinion Bring Them Together?*, 2 TULSA J. COMP. & INT'L L. 395, 399-401 (1995) (reporting that United States delegate Boyer and Dr. Piel, WHO's legal representative, argued against submission of question to court, pointing out that any such request should instead come from General Assembly).

43. *See id.* at 401-02 (explaining how alternative approach of forwarding question to General Assembly, rather than having WHO directly present issue to World Court itself, was rejected).

44. *See Advisory Opinions Must Relate to Duties of Requesting Body: International Law Report*, TIMES (London), July 18, 1996 (noting court's refusal to grant WHO's request and outlining three conditions which must be met before I.C.J. will agree to issue advisory opinion), *available in* 1996 WL 6507467. First, the issue the party presents to the court must be phrased in the form of a legal question. I.C.J. STAT. art. 65; U.N. CHARTER art. 96, para. 1. Second, the party seeking the request must be authorized by the U.N. Charter to do so. I.C.J. STAT. art. 65; U.N. CHARTER art. 96, para. 1. Third, the question has to address an issue that falls within the scope of the requesting body's mandate. U.N. CHARTER art. 96, para. 1. It was the third criteria that the WHO was unable to fulfill. *Advisory Opinions Must Relate to Duties of Requesting Body: International Law Report*, TIMES (London), July 18, 1996, *available in* 1996 WL 6507467. The WHO had argued that the nuclear weapons issue had profound implications from a public health standpoint. *See Request for Advisory Opinion on the Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, WHA Res. 46.40, WHO, 46th Sess. (Sept. 13, 1993) (requesting opinion from World Court, and emphasizing importance of ruling for future of world population). While the court found no difficulty in acknowledging the medical implications of a decision on the nuclear weapons issue, it still maintained that the WHO's official duties did not extend to seeking a judgment prohibiting countries from using such weapons. *Advisory Opinions Must Relate to Duties of Requesting Body: International Law Report*, TIMES (London), July 18, 1996, *available in* 1996 WL 6507467; *see also* Martin M. Strahan, Comment, *Nuclear Weapons, The World Health Organization, and the International Court of Justice: Should an Advisory Opinion Bring Them Together?* 2 TULSA J. COMP. & INT'L L. 395, 404-08 (1995) (arguing that WHO was not entitled to have request granted, because question was not within WHO's competence). In contrast to the decision regarding the WHO's authority, the court found that the question of the legality of nuclear weapons was squarely within the province of the General Assembly, as evidenced by a number of specific U.N. Charter provisions. Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 817-19 (July 8, 1996) (detailing why General Assembly had authority to seek such ruling), *available in* WL, International Legal Materials Index.

months later.[45] In contrast to the WHO's request, the General Assembly's request was granted.[46]

III. Substance of the Advisory Opinion

After deciding that the General Assembly had standing to request a ruling on the issue,[47] and finding no compelling reason not to grant that request,[48] the I.C.J. moved on to consider the substance of the question

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45. *Request for Advisory Opinion from the International Court of Justice on the Legality of the Threat or Use Of Nuclear Weapons*, G.A. Res. 75, U.N. GAOR, 49th Sess., 90th plen. mtg. at 15, U.N. Doc. A/RES/49/75 (1994).

46. Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 817 (July 8, 1996), *available in* WL, International Legal Materials Index.

47. *See id.* (outlining particular provisions that gave General Assembly legal right to make request); *see also* I.C.J. Stat. art. 96, para. 1 (establishing that "[t]he General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on *any legal question*.") (emphasis added); U.N. Charter art. 10 (stating that "[t]he General Assembly may discuss any questions or any matters within the scope of the present Charter"); *id.* art. 11, para. 1 (allowing General Assembly to "consider the general principles of cooperation in the maintenance of international peace and security, *including the principles governing disarmament and the regulation of armaments*") (emphasis added); *id.* art. 13, para. 1 (encouraging the General Assembly to "initiate studies and make recommendations for the purpose of: promoting international co-operation in the political field *and encouraging the progressive development of international law and its codification*") (emphasis added).

48. *See* Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 818-19 (July 8, 1996) (considering arguments that question was based on mistaken premise and worded poorly; that granting request would have destabilizing effect on present arms reduction negotiations; and that ruling on issue would turn court into legislating body), *available in* WL, International Legal Materials Index. A number of countries argued that this issue was essentially a political, not a legal, question. *Id.* at 818. The court rejected this argument by explaining that a question's political overtones do not "suffice to deprive it of its character as a 'legal question.'" *Id.*; *see* Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, 1980 I.C.J. 73, 100 (finding that presence of important political implications do not deprive court of competence to adjudicate matters rightly before it); Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, 1973 I.C.J. 166, 171 (holding that the existence of political implications "in the background of a dispute, the parties to which may be affected as a consequence of the court's opinion, does not change the advisory nature of the court's task"). A second argument that a number of countries presented to the court in order to persuade it not to issue an opinion concerned the phrasing of the question. *See* Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 819 (July 8, 1996) (arguing that asking court to determine if threat or use of nuclear weapons is ever "permitted" was based on faulty assumption of international law, one which "implied that the threat or use of nuclear weapons would only be permissible if authorization could be found in a treaty provision or in customary international law"), *available in* WL, International Legal Materials Index. According to these objectors, international law is not designed to permit any particular conduct; in fact, just the opposite is true: countries are free to engage in any act not specifically prohibited under international

regarding the legality of the threat or use of nuclear weapons.[49] Its next task was to identify which sources of law were most relevant to the question raised, and how each should be interpreted.[50] The first legal instru-

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law, and therefore "States are free to threaten or use nuclear weapons unless it can be shown that they are bound not to do so by reference to a prohibition in either treaty law or customary international law." *Id.* at 819; *see* Case Concerning Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 135 (June 27) (emphasizing that "in international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the armaments of a sovereign State can be limited"); The S.S. Lotus (Fr. v. Turk.), 1927 W.C.R. 1, 35 (Sept. 7) (revealing that "[t]he rules of law binding upon states . . . emanate from their own free will [and] restrictions upon the independence of States cannot therefore be presumed"). The court took note of this objection, and clearly endorsed its rationale later in its opinion, but at the same time the court did not consider the flawed construction of the question important enough to prevent it from addressing the question. *See* Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 823 (July 8, 1996) (explaining that nuclear weapons cannot be ruled illegal merely because there is no specific authorization for their use in international law); *id.* at 819 (characterizing distinction as one merely relating to "burden of proof" which was "without particular significance for the disposition of the issues before the court"). Another argument put forth against granting the request was that, in determining whether the use of a particular weapon is to be authorized or prohibited, the court would "be going beyond its judicial role and would be taking upon itself a law-making capacity." *Id.* at 819. The court said that to accept this argument would be to deny that there already exists a body of law which relates to this issue, and by way of reassurance promised that its only task would be to interpret such law and not legislate. *Id.* For a contrary view on the issue of the validity of the question posed to the court, see the dissenting opinion in Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 844, 860 (July 8, 1996) (Oda, S. dissenting), *available in* WL, International Legal Materials Index, where Judge Oda expressed his belief that the question presented to the court was not truly a legal one, criticized the lack of a specific definition for the term "threat," and ultimately voted against the decision to grant the General Assembly's request.

49. *See* Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 820 (July 8, 1996) (turning to sources of international law for guidance).

50. *See* Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 820-30 (July 8, 1996) (analyzing number of different documents, including international covenants, treaties, and prior World Court decisions), *available in* WL, International Legal Materials Index. At this point, it is helpful to examine a crucial distinction in the question itself which the court chose not to address until roughly halfway through its opinion. *See id.* at 823 (distinguishing between threat of use versus actual use of nuclear weapons). According to the court, these two issues did not really need to be addressed separately, for under international law the *threat* of a specific use of force is only justified when the *actual use* of that force would also be justified. *Id.* (emphasis added). Conversely, as the court pointed out "if the use of force itself in a given case is illegal . . . the threat to use such force will likewise be illegal." *Id.* While this distinction simplifies the court's approach to the question, it still leaves room for considerable confusion, for the court never adopted a specific definition of the term "threat." *See id.* (concluding that "[w]hether a signaled intention to use force if certain events occur is or is not a 'threat' within Article 2, paragraph 4, of the Charter depends upon various factors"); *see also id.* at

ment examined by the court to determine if the use of nuclear weapons was contrary to principles of international law was the International Covenant on Civil and Political Rights (Covenant).[51]

A. *The International Covenant on Civil and Political Rights*

The Covenant commits its signatories to protect certain basic human rights, such as the right to liberty, minimum due process guarantees, and the right to be free from torture and slavery.[52] The main provision at issue in this case was the Covenant's command that "[n]o one shall be arbitrarily deprived of his life."[53] Several countries objected to consideration of the Covenant, as it makes no specific reference to nuclear weapons and was apparently written in the context of peacetime protection of rights.[54] In response, the court emphatically stated that whatever the Covenant's original context, its mandate did not automatically cease to apply during warfare.[55]

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844 (Oda, S. dissenting) (pointing to ambiguity of terminology as one reason why he voted against granting request to give opinion). This lack of a concrete definition of the term "threat" is noteworthy because a number of States put forth the argument that the mere possession of nuclear weapons, in itself, constitutes a "an unlawful threat to use force." *Id.* at 823. The court admitted that the possession of nuclear weapons indicates a willingness to use them, at least under certain circumstances, and therefore could constitute a threat; however, the court also went on to state that possession of these weapons would only be unlawful if "the particular use of force envisaged [for those weapons] would be directed against the territorial integrity or political independence of a State . . . [or] would necessarily violate the principles of necessity and proportionality." *Id.* The impetus behind those arguments obviously concerned the policy of "nuclear deterrence," upon which a number of countries rely to justify their deployment of nuclear weapons. *See id.* at 823, 826 (considering deterrence policy and ultimately deciding not to comment on its legal validity). Therefore, this discussion of the court's opinion will now continue by addressing only the issue of whether or not the *use* of nuclear weapons is lawful. The legality of the *threat* to use them hinges on the answer to this question. *Id.* at 826.

51. Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 820 (July 8, 1996), *available in* WL, International Legal Materials Index; International Covenant on Civil and Political Rights, Dec. 19, 1966, S. TREATY DOC. 95–2, 645, 999 U.N.T.S. 171.

52. *See* International Covenant on Civil and Political Rights, Dec. 19, 1966, S. TREATY DOC. 95-2, 457, 999 U.N.T.S. 171, 175 (outlining variety of important protections which must be provided).

53. *Id.* at 174; *see* Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 820 (July 8, 1996) (addressing applicability of Covenant and its various provisions), *available in* WL, International Legal Materials Index.

54. *See id.* (rejecting argument that Covenant loses its force in times of war), *available in* WL, International Legal Materials Index.

55. *Id.* The court then softened its position by noting that certain provisions of the Covenant may be temporarily abrogated in times of national emergency. *See id.* (pointing to Article 4 of Covenant as place where exceptions to its applicability are itemized). However, as the court explained, "respect for the right to life is not . . . such a provision." *Id.*;

Having thus settled the Covenant's applicability, the court then examined whether it was to be interpreted in such a way so as to prohibit the use of nuclear weapons.[56] The court found this task difficult, however, because the Covenant only forbade the taking of a life in a manner that was "arbitrary," a term not defined in the Covenant itself.[57] This ambiguity led the court to conclude that it would have to consult the laws of armed conflict in order to determine what amounts to an arbitrary deprivation of life during wartime.[58] In so doing, the court passed up an important opportunity to help clarify the concept of arbitrariness. Therefore, the most the court could hold was that the Covenant, standing alone, did not necessarily forbid the use of nuclear weapons.[59]

B. *The Convention on the Prevention and Punishment of Genocide*

The next document that the court examined was the Convention on the Prevention and Punishment of the Crime of Genocide (Convention).[60] The Convention defines genocide by reference to a number of inhumane

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see International Covenant on Civil and Political Rights, Dec. 19, 1966, S. TREATY DOC. 95-2, 457, 999 U.N.T.S. 171, 174 (stating that "[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the State Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, [but] [n]o derogation from articles 6, 7, 8 . . . may be made under this provision"). Article 6 reads: "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." *Id.*

56. *See* Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 820 (July 8, 1996) (deciding ultimately that proclamation of Covenant does not completely rule out use of nuclear weapons in all cases), *available in* WL, International Legal Materials Index.

57. International Covenant on Civil and Political Rights, Dec. 19, 1966, S. TREATY DOC. 95-2, 457, 999 U.N.T.S. 171, 174; *see* Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 820 (July 8, 1996) (specifying that "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, [cannot be] deduced from the terms of the Covenant itself"), *available in* WL, International Legal Materials Index.

58. *See* Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 820 (July 8, 1996) (determining that term "arbitrary" was open to different interpretations), *available in* WL, International Legal Materials Index.

59. *See id.* at 820 (failing to resolve issue using Covenant as guide).

60. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277; *see* Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 820 (July 8, 1996) (scrutinizing Convention, and concluding that it does not render threat or use of nuclear weapons illegal *per se*), *available in* WL, International Legal Materials Index.

acts[61] "committed *with intent to destroy*, in whole or in part, a national, ethical, racial, or religious group as such."[62] Again, without more information, the court held that it could not find the use of nuclear weapons illegal per se under this document because the use of such weapons is not always motivated by desire to attack a group of people based on such characteristics.[63] The court explained that it would have to examine the particular circumstances of any nation's use of nuclear weapons in order to determine what the specific intent was behind such use.[64] No guiding principles were enunciated to outline how such a determination would ever be made.

C. *International Environmental Agreements*

The next body of law the court examined governs the protection of the environment.[65] The court looked at four particular documents in this regard, including: the Additional Protocol I to the Geneva Conventions of 1949,[66] which outlaws "methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage

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61. *See* Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, 280 (listing particular inhumane acts). The Covenant lists acts such as:

> (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring the children of the group to another group.

Id.; *see* Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 820 (July 8, 1996) (reprinting above quoted list of prohibited acts), *available in* WL, International Legal Materials Index.

62. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, 280 (emphasis added); *see* Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 820 (July 8, 1996) (reprinting section of Convention and ultimately concluding that it does not necessarily render threat or use of nuclear weapons illegal under all circumstances), *available in* WL, International Legal Materials Index.

63. *See* Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 820 (July 8, 1996) (explaining that court would have to consider each use of nuclear weapon on case-by-case basis), *available in* WL, International Legal Materials Index.

64. *See id.* (rejecting arguments of some countries that intent could be automatically inferred by general knowledge of enormous numbers of deaths that would likely follow use of nuclear weapon).

65. *See id.* at 820-21 (analyzing effect of those documents on legality of use of nuclear weapons).

66. Additional Protocol I to the Geneva Conventions of 1949, June 8, 1977, 16 I.L.M. 1391.

to the natural environment;"[67] the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques,[68] which also forbids those actions that result in "widespread, long-lasting or severe effects" detrimental to the environment;[69] the Stockholm Declaration of 1972;[70] and finally, the Rio Declaration of 1992.[71] The Stockholm and Rio Declarations reflect the agreement of their signatories that they have an obligation "to ensure that 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."[72]

States arguing in favor of the legality of nuclear weapons voiced a number of objections to the court's reliance on these environmental declarations.[73] For example, some countries argued that they had never signed on to these declarations, or had signed on with certain reservations that left the treaties inapplicable to questions concerning national defense.[74] Other countries echoed the same arguments used to object to the court's earlier reliance on the International Covenant for Political and Civil Rights, and accused the court of taking these environmental documents out of context.[75] These countries warned the court that they, as well as others, would be wary in the future of entering into international agreements dealing with one topic, if these same agreements might be later interpreted in such a way as to restrict their behavior in other areas not specified at the time of signing.[76]

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67. *Id.* at 1409.

68. The Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, May 18, 1977, 31 U.S.T. 333, 1108 U.N.T.S. 152.

69. *Id.* at 336, 1108 U.N.T.S. 153.

70. *Report of the United Nations Conference on the Human Environment*, U.N. Doc. A/Conf./48/14 and Corr. 1 (1972), *reprinted in* 11 I.L.M. 1416.

71. *United Nations Conference on Environment and Development: Rio Declaration on Environment and Development*, A/Conf.151/5/Rev.1 (1992), *reprinted in* 31 I.L.M. 818.

72. *United Nations Conference on Environment and Development: The Rio Declaration on Environment and Development*, A/Conf.151/5/Rev.1, at 2 (1992), *reprinted in* 31 I.L.M. 818, 824; *Report of the United Nations Conference on the Human Environment*, U.N. Doc. A/Conf./48/14 and Corr. 1 (1972), *reprinted in* 11 I.L.M. 1416, 1420.

73. *See* Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 820-22 (July 8, 1996) (repeating objections to applicability of environmental treaties), *available in* WL, International Legal Materials Index.

74. *See id.* at 821 (relating argument of some nation-states that they were not unconditionally bound to various environmental treaties).

75. *See id.* (arguing essentially that said environmental treaties were meant to apply only in peacetime).

76. *See id.* (predicting that "it would be destabilizing to the rule of law and to confidence in international negotiations if those treaties were now interpreted in such a way as to prohibit the use of nuclear weapons").

In response, the court stated flatly that all of these covenants are "now part of the corpus on international law," and rejected the arguments that nuclear weapons are somehow exempt from their provisions.[77] The court also countered the argument that it was taking these agreements out of context by quoting from a portion of the Rio Declaration, which states that "[w]arfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment *in times of armed conflict*."[78]

After holding that all nations are bound by the environmental obligations imposed by these instruments, the court also added an important caveat.[79] Environmental treaties cannot be construed so as to deprive a nation of the right to take defensive action, a right enshrined in the U.N. Charter.[80] Therefore, the court concluded, these treaties do not necessarily prohibit the use of nuclear weapons outright, but only constrain their use to a manner consistent with protection of the environment and the right to self-defense.[81] As the court explained: "respect for the environment is one of the elements that go to assessing whether an action is in conformity with [international law]."[82]

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77. Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 821 (July 8, 1996), *available in* WL, International Legal Materials Index.

78. *United Nations Conference on Environment and Development: The Rio Declaration on Environment and Development*, A/Conf.151/5/Rev.1 (1992), *reprinted in* 31 I.L.M. 818, 880 (emphasis added); *see* Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 821 (July 8, 1996) (citing portions of Rio Declaration), *available in* WL, International Legal Materials Index; *see also Report of the United Nations Conference on the Human Environment*, U.N. Doc. A/Conf./48/14 and Corr. 1 (1972) (opining that "[m]an and his environment must be spared the effects of nuclear weapons and all other means of mass destruction. States must strive to reach prompt agreement, in the relevant international organs, on the elimination and complete destruction of such weapons."), *reprinted in* 11 I.L.M. 1416, 1421.

79. *See* Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 821 (July 8, 1996) (limiting application of treaties when right of self-defense is at stake), *available in* WL, International Legal Materials Index.

80. *See id.* (revealing context in which environmental treaties must be read); *see also* U.N. CHARTER art. 51 (stating that "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations.").

81. Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 821 (July 8, 1996), *available in* WL, International Legal Materials Index.

82. *Id.* The court further noted that these environmental protection limits were affirmed in the recent U.N. General Assembly resolution: *Concerning Protection of the Environment in Times of Armed Conflict*, G.A. Res. 37, U.N. GAOR, 47th Sess., 73rd plen. mtg. at 2, U.N. Doc. A/RES/47/37 (1992). *Id.* at 821. The resolution warns that "destruction of the environment, not justified by military necessity and carried out wantonly, is clearly contrary to existing international law." *Concerning Protection of the Environment in Times of Armed Conflict*, G.A. Res. 37, U.N. GAOR, 47th Sess., 73rd plen. mtg. at 2,

D. *The United Nations Charter*

Having determined that the previous legal instruments did not conclusively rule out the use of nuclear weapons, the court moved on to consider some other sources of law that it believed were more directly on point.[83] The first of these were the relevant U.N. Charter provisions.[84] In regard to the threat or use of force, Article 2 of the Charter reads: "[a]ll members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State."[85] However, according to the court, this prohibition must be read in light of two other relevant provisions, specifically Articles 51 and 42.[86] Article 51 states that "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an

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U.N. Doc. A/RES/47/37 (1992). The court acknowledged that U.N. resolutions are not binding, but nevertheless held that the principle expressed in this particular resolution was already firmly engraved in the fabric of international law. Advisory Opinion On the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 821 (July 8, 1996), *available in* WL, International Legal Materials Index. The court also quoted from one of its recent decisions involving a dispute between New Zealand and France over underground nuclear testing to affirm the same principle. *Id*; *see* Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of December 1974 in the *Nuclear Test* (N.Z. v. Fr.) Case, 1995 I.C.J. 288, 306 (Sept. 22) (reminding countries of their obligation to protect environment from damage which may result from such tests).

83. *See* Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 821-26 (July 8, 1996) (considering whether threat or use of nuclear weapons is illegal under U.N. Charter or under laws of armed conflict), *available in* WL, International Legal Materials Index.

84. *See id.* (citing portions of U.N. Charter and analyzing each for their effect on legality of threat or use of nuclear weapons).

85. U.N. CHARTER art. 2, para. 4; *see* Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 822 (July 8, 1996) (reprinting portion of U.N. Charter), *available in* WL, International Legal Materials Index. *See generally* Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1624 (1984) (discussing difficulties in interpreting term "force"). As the author illustrates, the term force "can be used in a wide sense to embrace all types of coercion: economic, political, and psychological as well as physical." *Id.* Furthermore, even if the term is limited to situations involving actual armed force, a number of problems develop when considering the concept of indirect versus direct force. *See id.* at 1624-25 (questioning whether providing indirect assistance to aggressor classifies as use of force).

86. *See* Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 822 (July 8, 1996) (explaining that use of force is specifically sanctioned in certain circumstances), *available in* WL, International Legal Materials Index; *see also* U.N. CHARTER art. 51 (declaring that nothing in Charter prevents countries from exercising right of self-defense, alone, or in cooperation with others); *id.* art. 42 (approving threat or use of force by United Nations' Security Council to settle international conflicts).

armed attack occurs against a Member of the United Nations."[87] Article 42 states that "[t]he Security Council . . . may take such action . . . as may be necessary to maintain or restore international peace and security."[88] The court concluded that these provisions neither endorse nor prohibit the use of any particular weapon, but instead merely place general certain limits on the use of force.[89] The most obvious of these limits forbids a country from the use of any force except in self-defense.[90] Furthermore, as the court explained, there are even limits that are placed on the use of force in self-defense, limits that are governed by the principles of "necessity and proportionality."[91] The crux of these principles is simple: to be legitimate, any use of force must be a truly necessary response for the achievement of self-defense, and the destruction caused by that use of force must be proportionate to the attack that made resort to self-defense necessary.[92]

At this point in the court's opinion, it addressed an issue raised by representatives of some countries, including the United States and the United Kingdom, that the principle of proportionality should not be read so as to apply to the use of nuclear weapons.[93] These representatives rationalized that since nuclear weapons are by their very nature capable of such massive destruction, and difficult to employ in a carefully controlled manner, any use of them at all would be subject to charges of

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87. U.N. CHARTER art. 51; *see* Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 822 (July 8, 1996) (reprinting portion of U.N. Charter), *available in* WL, International Legal Materials Index.

88. U.N. CHARTER art. 42; *see* Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 822 (July 8, 1996) (reprinting portion of U.N. Charter), *available in* WL, International Legal Materials Index.

89. Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 822 (July 8, 1996), *available in* WL, International Legal Materials Index; *see* U.N. CHARTER art. 51 (allowing countries to take defensive action only "until the Security Council has taken the measures necessary to maintain international peace and security," and requiring countries to report any defensive actions to Security Council).

90. *See* Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 822 (July 8, 1996) (recognizing that while countries should refrain from using force, force is acceptable for purpose of self-defense), *available in* WL, International Legal Materials Index.

91. *Id.*; *see* Case Concerning Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 94 (June 27) (re-emphasizing long-standing rule of customary international law that use of force must be necessary to fend off attack and must also be proportionate response to such attack).

92. *See* Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 822 (July 8, 1996) (referring to obligation to adhere to principles of necessity and proportionality as "a rule of customary international law"), *available in* WL, International Legal Materials Index.

93. *Id.*

disproportionality.[94] However, the court refused to accept those countries' call for what amounted to an exception from the proportionality requirement, and likewise refused to accept the assumption upon which it was premised: that nuclear weapons can never be used in a manner consistent with the principle of proportionality.[95] According to the court, to accept this assumption would first require a determination of the degree of precision with which those weapons can currently be employed, a determination the court apparently believed was beyond its competence.[96] In conclusion, the court essentially warned all countries that if they decide to unleash a weapon of such potentially destructive power, they run the risk of having their actions ruled illegal.[97] Having resolved these issues, and ultimately finding nothing in the U.N. Charter that would amount to a complete prohibition on the use of nuclear weapons, the court next turned to the laws of armed conflict to see if any prohibition against nuclear weapons could be found.[98]

E. *The Absence of a Specific Provision of International Law Authorizing the Use of Nuclear Weapons*

At this point in its opinion, the court noted that there is clearly no specific authorization in international law for the use of nuclear weapons in combat.[99] However, it then went on to state that this absence of specific authorization does not automatically render such weapons illegal.[100] Indeed, as the court explained, international law does not authorize the use of any specific weapon, for it is assumed that all weapons not specifically prohibited are legal to begin with, and therefore need no additional explicit authorization before being employed.[101] With this distinction in

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94. *Id.*

95. *Id.* The court also refused to automatically sanction the use of nuclear weapons utilized in the context of a reprisal for a prior nuclear attack, but instead repeated that the proportionality requirement would still need to be observed. *Id.* at 823.

96. *See id.* at 822 (deciding that it is not essential for court to "embark upon the quantification of such risks").

97. International Court of Justice: Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 823 (July 8, 1996), *available in* WL, International Legal Materials Index.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* The view expressed by the court on this issue conforms precisely to the view expressed by a number of other countries early in the opinion, wherein they argued that the question was phrased improperly. *See id.* at 819-20 (arguing that asking whether or not threat or use of nuclear weapons is "permitted" under international law is based on false assumption; the assumption being that in order to lawfully use weapon, one must first find specific authorization to do so under international law).

mind, the court moved on to consider whether nuclear weapons are illegal under the doctrine of customary international law.[102]

F. *Customary International Law*

1. Poisoned Gas Prohibitions

The doctrine of customary international law allows the court to give binding legal effect to principles that are adhered to on a regular, continuing basis by a country (state practice), and which that country also recognizes as having the force of law (*opinio juris*).[103] Attempting to use this doctrine to support their view, some countries put forth the proposition that nuclear weapons should be treated as synonymous with poison gas weapons,[104] which are prohibited under the Second Hague Declaration of 1899,[105] the follow-up Hague Declaration of 1907,[106] and the subsequent Geneva Convention of 1925.[107] In examining these documents, however,

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102. Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 823 (July 8, 1996), *available in* WL, International Legal Materials Index.

103. *See Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta*, 1985 I.C.J. 13, 29 (June 3) (finding that evidence of "customary international law is to be looked for primarily in the actual practice and *opinio juris* of States"); Case Concerning Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 97-98 (June 27) (commenting on required elements of international customary law). The court held that:

> [w]here two States agree to incorporate a particular rule in a treaty, their agreement suffices to make that rule a legal one, binding upon them; but in the field of customary international law, the shared view of the Parties . . . is not enough. The court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice.

Id.; *see* LELAND M. GOODRICH ET AL., CHARTER OF THE UNITED NATIONS, COMMENTARY & DOCUMENTS 707 (3d & Rev. ed. 1969) (directing the court, in its deliberations, to apply "international custom, as evidence of *a general practice accepted as law*" (emphasis added); NAGENDRA SINGH, THE ROLE AND RECORD OF THE INTERNATIONAL COURT OF JUSTICE 144-45 (1989) (distinguishing between doctrine of customary law and other general principles of law). *See generally* Maurice Mendelson, *The International Court of Justice and the Sources of International Law* (documenting inconsistency in court's application of doctrine), *in* FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE 63, 68 (Vaughan Lowe & Malgosia Fitzmaurice eds., 1996).

104. Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 823-24 (July 8, 1996), *available in* WL, International Legal Materials Index.

105. Convention with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803.

106. Convention Respecting Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277.

107. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65. A follow-up convention to these three agreements was concluded in 1972, outlining the same prohibitions, and committing a number of countries to destruction of any of these weapons they might still possess. *See* Convention on the Prohibition of the

the court confronted a recurring problem, as the specific definition of "poison or poisoned weapons" is not provided.[108] Following the doctrine of "customary international law," it then tried to deduce how the States who had agreed to these prohibitions have commonly interpreted the terms.[109] The resulting definition the court adopted for "poisoned weapons" was "weapons whose prime, or even exclusive, effect is to poison or asphyxiate."[110] Apparently, the court was not convinced that the definition necessarily included nuclear weapons. Furthermore, the court noted that when countries have chosen to render a weapon of mass destruction illegal in the past, they have usually done so in the context of agreements that make specific reference to that weapon.[111] This practice lends credence to the idea that nuclear powers have not accepted as *opinio juris* that all such weapons are already made equal under international law. Therefore, according to the court, treaties prohibiting the use of poisoned-gas weapons do not also, as a consequence, forbid the use of nuclear weapons.[112]

2. Specific Nuclear Weapons Treaties

Having found no prohibition of nuclear weapons in the treaties banning poisoned weapons, the court next briefly summarized the numerous arms control treaties specifically designed to place restrictions on nuclear

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Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, April 10, 1972, 26 U.S.T. 583, 585, 1015 U.N.T.S. 163, 166 (acknowledging important role Geneva Conventions against poisonous gases have played in "mitigating the horrors of war," and reaffirming commitment of signatories to abide by Conventions' prohibitions).

108. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 571-82, 94 L.N.T.S. 65, 65-74; Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277-2309; Convention with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803-26; *see* Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 824 (July 8, 1996) (pointing out that "different interpretations exist on the issue" of what exactly meets definition of "poisoned gas" or "poisonous" weapons), *available in* WL, International Legal Materials Index.

109. *See* Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 824 (July 8, 1996) (looking to common practice of signatory nations in interpreting terms "poisoned weapons" to see if customary international law can be found to ban nuclear weapons under such definition), *available in* WL, International Legal Materials Index.

110. *Id.*

111. *See id.* (proceeding to examine different treaties requiring certain limits on nuclear weapons).

112. *See id.* (finding that common practice has been not to interpret poisoned weapon prohibitions as applying to nuclear weapons).

weapons.[113] After careful scrutiny, the court found that although the treaties reflected promises not to resort to the use of nuclear weapons in particular areas[114] or against particular countries,[115] none of the treaties

113. *See id.* at 824-26 (listing variety of treaties outlining limits on nuclear weapons). Specifically, the court examined treaties concerning "the acquisition, manufacture and possession of nuclear weapons," such as: the Final Document on Extension of Treaty on the Non-Proliferation of Nuclear Weapons, May 11, 1995, 34 I.L.M. 959; the Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161; Additional Protocol II to the Treaty for the Prohibition of Nuclear Weapons in Latin America, Feb. 14, 1967, 22 U.S.T. 754, 634 U.N.T.S. 364; Additional Protocol I to the Treaty for the Prohibition of Nuclear Weapons in Latin America, Feb. 14. 1967, 33 U.S.T. 1792, 634 U.N.T.S. 360; and the Treaty for the Prohibition of Nuclear Weapons in Latin America, Feb. 14, 1967, 634 U.N.T.S. 281. *Id.* at 824. It then examined those dealing with "the deployment of nuclear weapons," including: the Treaty on Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed, and on the Ocean Floor, and in the Subsoil Thereof, Feb. 11, 1971, 23 U.S.T. 701, 955 U.N.T.S. 115; Additional Protocol II to the Treaty for the Prohibition of Nuclear Weapons in Latin America, Feb. 14, 1967, 22 U.S.T. 754, 634 U.N.T.S. 364; Additional Protocol I to the Treaty for the Prohibition of Nuclear Weapons in Latin America, Feb. 14. 1967, 33 U.S.T. 1792, 634 U.N.T.S. 360; the Treaty for the Prohibition of Nuclear Weapons in Latin America, Feb. 14, 1967, 634 U.N.T.S. 281; Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205; and the Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, 402 U.N.T.S. 71. *Id.* Finally, the court considered those treaties regarding "the testing of nuclear weapons," including: Additional Protocol II to the Treaty for the Prohibition of Nuclear Weapons in Latin America, Feb. 14, 1967, 22 U.S.T. 754, 634 U.N.T.S. 364; Additional Protocol I to the Treaty for the Prohibition of Nuclear Weapons in Latin America, Feb. 14. 1967, 33 U.S.T. 1792, 634 U.N.T.S. 360; the Treaty for the Prohibition of Nuclear Weapons in Latin America, Feb. 14, 1967, 634 U.N.T.S. 281; the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205; the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Underwater, Aug. 5, 1963, 14 U.S.T. 1313, 480 U.N.T.S. 43; and the Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, 402 U.N.T.S. 71. *Id.*

114. *See* Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 824-26 (July 8, 1996) (citing various treaties and areas in which they forbid use of nuclear weapons), *available in* WL, International Legal Materials Index. The regions in which the presence of nuclear weapons are specifically forbidden are Southeast Asia, Africa, the South Pacific, Latin America, and Antarctica, as is required by the following treaties: the Treaty on the Southeast Asia Nuclear Weapon-Free Zone, Dec. 15, 1995, 35 I.L.M. 635; the African Nuclear Weapon-Free Zone Treaty, June 21, 1995, 35 I.L.M. 698; the South Pacific Nuclear-Free Zone Treaty, Aug. 6, 1985, 24 I.L.M. 1440; the Additional Protocol II to the Treaty for the Prohibition of Nuclear Weapons in Latin America, Feb. 14, 1967, 22 U.S.T. 754, 634 U.N.T.S. 364; the Additional Protocol I to the Treaty for the Prohibition of Nuclear Weapons in Latin America, Feb. 14. 1967, 33 U.S.T. 1792, 634 U.N.T.S. 360; the Treaty for the Prohibition of Nuclear Weapons in Latin America, Feb. 14, 1967, 634 U.N.T.S. 281; and the Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, 402 U.N.T.S. 71.

contained any language that could be interpreted as recognizing a total prohibition on nuclear weapons.[116]

Several countries had cited the doctrine of customary international law for the proposition that the nuclear powers, by taking steps to eliminate nuclear weapons in some circumstances, had bound themselves to the principle that these weapons must be eventually eliminated in all circumstances.[117] In their view, there was ample evidence of both state practice and *opinio juris* to support the conclusion that the signatories to the above treaties have implicitly acknowledged "the emergence of a rule of complete prohibition of all uses of nuclear weapons."[118] In response, the nuclear powers argued that this assertion was based on an illogical premise: that countries would negotiate a treaty calling for various specific limits on nuclear weapons when those weapons were already completely outlawed altogether.[119] In other words, the notion of seeking to regulate an object implies that it is currently legal in at least some cases. The court accepted the position of the nuclear powers on this issue, and noted that recognition of the danger nuclear weapons pose does not equate to acceptance of the proposition that they are automatically illegal.[120] Therefore, according to the court, no evidence of state practice existed to show that the countries that signed these treaties viewed them as a complete ban on nuclear weapons in all circumstances.

3. Consistent Non-Utilization of Nuclear Weapons

The court then proceeded to examine the closely related issue of whether nuclear weapons are illegal under customary international law

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115. *See* the Additional Protocol II to the Treaty for the Prohibition of Nuclear Weapons in Latin America, Feb. 14, 1967, 22 U.S.T. 754, 755, 634 U.N.T.S. 364, 364 (declaring that "[t]he Governments represented . . . undertake not to use or threaten to use nuclear weapons against the Contracting Parties of the Treaty for the Prohibition of Nuclear Weapons in Latin America"); the Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483, 487, 729 U.N.T.S. 161, 171 (assuring all parties to treaty that nuclear weapons will never be used against them).

116. Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 824 (July 8, 1996), *available in* WL, International Legal Materials Index.

117. *See id.* at 825 (arguing that number of above treaties establishing various individual limits on nuclear weapons "bear witness, in their own way, to the emergence of a rule of complete legal prohibition of all uses of nuclear weapons").

118. *Id.*

119. *See id.* (arguing that specific assurances given to some states who became parties to these treaties would have been useless if those same countries knew nuclear powers could not ever use their arsenal under any circumstances anyway).

120. *See id.* (emphasizing lack of objections raised in response to nuclear powers specific reservations in treaty of Tlatelolco and Raratonga of option to use nuclear weapons in certain cases).

based on the fact that not a single country has chosen to use them in the past fifty years.[121] Several countries had argued that the nuclear powers have not resorted to the use of such weapons because they implicitly recognize that to do so would be a clear violation of international law.[122] In response, the nuclear powers asserted that the only reason they have not resorted to the use of nuclear weapons since World War II is because "circumstances that might justify their use have fortunately not arisen," and not, as their opponents charged, because of any particular legal custom in place to prevent such use.[123] The court agreed with the position of the nuclear powers on this point and acknowledged that although they have deliberately chosen not to employ the use of any of their nuclear arsenal since World War II, those countries have, at the same time, expressly reserved the right to use those weapons under certain limited circumstances.[124] In other words, the court determined that if any established custom could be found in the consistent practice of non-use by the nuclear powers, it was that of making a concerted effort to avoid the use of nuclear weapons except as an absolute last resort, not of having ruled out such use altogether.[125]

4. United Nations Resolutions

The court also failed to find the establishment of a customary principle of international law against nuclear weapons in the numerous U.N. resolutions that have been passed over the years commenting on the legality of nuclear weapons.[126] These resolutions state that the use of nuclear weapons would amount to a clear violation of the U.N. Charter, as well as "a crime against humanity," and should thus be prohibited.[127] The court

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121. Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 826 (July 8, 1996), *available in* WL, International Legal Materials Index.

122. *Id.*

123. *Id.*

124. *See id.* (explaining that "the Members of the international community are profoundly divided on the matter of whether non-recourse to nuclear weapons over the past fifty years constitutes the expression of an *opinio juris*. Under these circumstances, the Court does not consider itself able to find that there is such an *opinio juris*."), *available in* WL, International Legal Materials Index.

125. *Id.*

126. *See* Advisory Opinion on the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 826 (July 8, 1996) (holding that U.N. resolutions, in and of themselves, cannot be relied on to establish rule of customary international law), *available in* WL, International Legal Materials Index.

127. *Convention on the Prohibition of the Use of Nuclear Weapons*, G.A. Res. 37, U.N. GAOR, 46th Sess., 65th plen. mtg. at 6, U.N. Doc. A/RES/46/37 (1991); *Convention on the Prohibition of the Use of Nuclear Weapons*, G.A. Res. 59, U.N. GAOR, 45th Sess., 54th plen. mtg. at 3, U.N. Doc. A/RES/45/59 (1990); *Non-Use of Nuclear Weapons and Prevention of Nuclear War*, G.A. Res. 92, U.N. GAOR, 36th Sess., 91st plen. mtg. at 12, U.N. Doc.

ruled that, although U.N. resolutions are often a valid indicator of prevailing political opinion, they are not binding upon any particular country unless based upon some other established legal authority.[128] In so holding, the court pointed out that these resolutions merely cited a host of general principles of international law as the source for their declaration that nuclear weapons are illegal.[129] Therefore, according to the court, the resolutions in and of themselves could not be relied upon to establish the

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A/RES/36/92 (1982); *Non-Use of Nuclear Weapons and Prevention of Nuclear War*, G.A. Res. 152, U.N. GAOR, 35th Sess., 94th plen. mtg. at 5, U.N. Doc. A/RES/35/152 (1980); *Nuclear Weapons in All Aspects*, G.A. Res. 83, U.N. GAOR, 34th Sess., 97th plen. mtg. at 12, U.N. Doc. A/RES/34/83 (1979); *Non-Use of Nuclear Weapons and Prevention of Nuclear War*, G.A. Res. 83, U.N. GAOR, 34th Sess., 97th plen. mtg. at 8, U.N. Doc. A/RES/34/83 (1979); *Non-Use of Nuclear Weapons and Prevention of Nuclear War*, G.A. Res. 71, U.N. GAOR, 33d Sess., 84th plen. mtg. at 2, U.N. Doc. A/RES/33/71 (1978); *Declaration on the Prohibition of the Use of Nuclear and Thermo-Nuclear Weapons*, G.A. Res. 1653, U.N. GAOR, 16th Sess., 1063d plen. mtg., Supp. No. 17 at 4, U.N. Doc. A/5100 (1962); *see* Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 814, 826 (July 8, 1996) (taking note of various U.N. resolutions), *available in* WL, International Materials Index.

128. *See* Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 826 (July 8, 1996) (pointing to large number of countries who repeatedly voted against above resolutions), *available in* WL, International Legal Materials Index. *See generally* Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1622 (1984) (explaining that U.N. resolutions "are not binding under the Charter [but] [t]hat does not mean that they lack 'authority,' for at least in some cases such resolutions will be regarded as expressing the 'general will' of the international community and as persuasive evidence of legal obligation"). The court also noted that even a number of non-nuclear countries have objected to the passage of the above U.N. resolutions characterizing the use of nuclear weapons as illegal in all cases, apparently indicating that the resolutions were entitled to even less weight given the lack of consensus they achieved. Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 826 (July 8, 1996), *available in* WL, International Legal Materials Index; *see also* Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1622 (1984) (detailing factors to consider when assessing legal effect of U.N. resolutions, such as: "the intent and circumstances of the resolution's adoption, the composition of the supporting majority, the effect on state behavior both in the short and long run, the impact of attitudes of relevant publics, and so on").

129. Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 826 (July 8, 1996), *available in* WL, International Legal Materials Index. The court noted that the first of these U.N. resolutions, passed in 1961, merely applied its own interpretation of the general rules of armed conflict to nuclear weapons, and determined that such weapons could not meet the requirements for humanitarian concerns enunciated within those documents, and were therefore, illegal. *Id.* The specific international agreements relied upon by the U.N. General Assembly in reaching this conclusion were: the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65, 67; the Convention Respecting Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277; and the Convention With Respect To the Laws and Customs of War On Land, July 29, 1899, 32 Stat. 1803. *Id.* at 826-27.

opinio juris necessary to support that same declaration as a matter of customary international law.[130] As the court explained: "if such a [specific rule of customary international law which prohibited the use of nuclear weapons] had existed, the General Assembly could simply have referred to it and would not have needed to undertake such an exercise of legal qualification."[131]

G. *The Laws of Armed Conflict*

1. International Humanitarian Law

One of the last sources of law that the court turned to was that regarding accepted international norms for conduct engaged in during armed conflict.[132] The foremost subject of rules in this area, referred to as international humanitarian law, can be summed up as containing two basic principles: (1) innocent civilians cannot be the object of attack, and (2) any use of force related to self-defense must be employed only to accomplish some legitimate military objective and not simply to kill or wound the largest number of people.[133] These principles, in turn, are derived from the long-standing rule of international law that "the right of belligerents to adopt means of injuring the enemy is not unlimited."[134] The court rejected the notion that these laws might not be universally applica-

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130. *Id.*

131. *Id.*

132. *See id.* at 826-28 (listing number of different legal sources). Among the most prominent antecedents the court cites for this body of law are: the Additional Protocol I of 1977 to the Geneva Conventions of 1949, June 8, 1977, 16 I.L.M. 1391, 1409; the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65; the Convention Respecting Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, the Convention with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803. *Id.*

133. *See* Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 829 (July 8, 1996) (enunciating principle that "methods and means of warfare, which would preclude any distinction between civilian and military targets, or which would result in unnecessary suffering to combatants, are prohibited"), *available in* WL, International Legal Materials Index.

134. Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 2301; *see* International Court of Justice: Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 827 (July 8, 1996) (reprinting portion of above agreement), *available in* WL, International Legal Materials Index.

ble, or that countries might deviate from them in certain situations without any form of legal sanction.[135] Furthermore, the court specifically found that these principles unquestionably apply to nuclear weapons.[136] Before addressing the result of the application of this body of law to the question put before it, the court first examined another closely related sub-set of the laws of armed conflict, namely, the law of neutrality.[137]

2. The Law of Neutrality

This body of law requires respect for the sovereign integrity of countries not engaging in hostilities that take place in an armed conflict between other warring parties.[138] The court refused to adopt a narrow interpretation of this principle, which might only outlaw an intentional and direct attack against a neutral territory by such parties.[139] Instead, it extended the principle to prohibit even indirect or collateral damage to a

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135. *See* Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 827 (July 8, 1996) (holding that "these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law"), *available in* WL, International Legal Materials Index. The court rejected the argument of some countries that this body of laws does not apply to nuclear weapons because such weapons were invented after these principles came into existence. *Id.* at 828. It also dismissed as irrelevant the fact that several other key documents which affirmed and codified these principles in the years subsequent to the invention of nuclear weapons made no reference to nuclear weapons either. *Id.* Furthermore, the court ruled that international humanitarian law applies to the use of all weapons, even those not yet contemplated that may arise in the distant future. *See id.* at 827 (quoting from portion of Additional Protocol I of 1977 to the Geneva Conventions of 1949, June 8, 1977, 16 I.L.M. 1391, 1396-97, which states that "[i]n cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience").

136. Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 829 (July 8, 1996), *available in* WL, International Legal Materials Index.

137. *See id.* (considering applicability of various international agreements recognizing principle of neutrality).

138. *See* Pan American Maritime Neutrality Convention, Feb. 20, 1928, 47 Stat. 1989, 1989 (noting that "neutral states have equal interest in having their rights respected by the belligerents"); Convention Concerning the Rights and Duties of Neutral Powers in Naval Warfare (Hague XIII), Oct. 18, 1907, 36 Stat. 2415, 2427 (declaring that "[b]elligerents are bound to respect the sovereign rights of neutral Powers"); Convention Respecting the Rights and Duties of Neutral Powers and Persons in War on Land (Hague V), Oct. 18, 1907, 36 Stat. 2310, 2322 (stating that "[t]he territory of neutral Powers is inviolable"); Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 829 (July 8, 1996) (examining above agreements for applicability to use of nuclear weapons), *available in* WL, International Legal Materials Index.

139. Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 829 (July 8, 1996), *available in* WL, International Legal Materials Index.

neutral state that spills over from the use of a weapon against a neighboring belligerent state.[140] Adding to the list of unanswered questions, however, the court failed to adequately resolve the issue of whether an unintentional violation of the principle could ever be justified in self-defense.

It is at this point that the court, in applying these principles, delved into the heart of the question: can nuclear weapons ever be employed in a manner that does not inevitably injure a large number of innocent bystanders? Some states argued to the court the answer to that question was "yes;" at least in certain limited circumstances.[141] Others argued "no;" it would be impossible, given that the effects of a nuclear bomb would be too indiscriminate and uncontrollable, even in a "best case scenario."[142] The court appeared especially skeptical of the former argument, given that its proponents were unable to provide the court with any examples of a circumstance that would justify a small-scale exchange of nuclear weapons or to assure the court that even the use of even one such weapon in a sparsely populated area would not quickly escalate into an all-out nuclear holocaust.[143] After considering both arguments, however, the court finally decided that it could not completely rule out the possibility that a nuclear weapon might be employed in a manner consistent with the requirements of the international law of armed conflict.[144] Although leaving that possibility open, the court candidly admitted that "the use of such weapons seems scarcely reconcilable with respect for such requirements."[145]

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140. *See id.* (recognizing "transborder damage caused to a neutral State by the use of a weapon in a belligerent State" as violation of law of neutrality).

141. *See id.* (considering scenarios in which nuclear weapons are used against enemy warship out in middle of ocean, or in sparsely populated region).

142. *See id.* (concluding that "[s]uch weapons would kill and destroy . . . on account of blast, heat and radiation occasioned by nuclear explosion").

143. *See id.* (noting that no country arguing in favor of legality of nuclear weapons has provided definitive examples of how such use could be undertaken in conformity with principles of international humanitarian law).

144. *See* Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 829 (July 8, 1996) (holding that it could not "make a determination on the validity of the view that the recourse to nuclear weapons would be illegal in any circumstance owing their inherent and total incompatibility with the law applicable in armed conflict"), *available in* WL, International Materials Index.

145. *Id.*

H. *Final Conclusions of the World Court*

1. The Right to Self-Defense

Perhaps in a move to help justify what it feared might be viewed as a seemingly indefensible position, the court concluded its opinion by once again emphasizing the importance of a nation's inherent right to self-defense.[146] Its definition of the term "self-defense" was rather narrow, however, and strictly limited to situations where a nation's "very survival would be at stake."[147] In choosing to reemphasize this principle, the court did not necessarily rule that a nation can violate provisions of international law simply on the grounds that it is acting in self-defense.[148] Instead, the court merely held that because the right to self-defense is so fundamental, it is unwise to place limits on it regarding the use of a particular weapon under theoretical circumstances, even if it is shown that the use of that weapon is extremely likely to violate the laws of armed conflict in almost every conceivable case.[149]

2. Arms Control Negotiations

Having arrived at no definite conclusion on the central question, the court closed by stating its conclusion: that the real answer to the nuclear weapons dilemma was for the nuclear powers to continue down the path of voluntary disarmament.[150] In its next breath, however, the court indicated that this path to disarmament may not be so voluntary after all.[151] As its final pronouncement, the court held that under the principles of international customary law, the nuclear powers must eventually achieve a state of complete nuclear disarmament.[152] According to the court, the

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146. *See id.* at 830 (stating that it "cannot lose sight of the fundamental right of every state to survival, and thus its right to resort to self-defense").

147. *Id.*

148. *See id.* at 829 (citing with approval statement by United Kingdom that summarized requirements imposed on nation when engaged in use of nuclear weapons: "[a]ssuming that a State's use of nuclear weapons meets the requirements of self-defence, it must then be considered whether it conforms to the fundamental principles of the law of armed conflict").

149. *See* Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 829 (July 8, 1996) (rationalizing that "the Court [cannot] conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstance"), *available in* WL, International Legal Materials Index.

150. *See id.* at 830 (noting with appreciation commitment of parties to Treaty on Non-Proliferation of Nuclear Weapons to continue pursuit of disarmament).

151. *See id.* (referring to "two-fold obligation to pursue and to conclude negotiations" on nuclear disarmament).

152. *See id.* (citing number of sources in which nuclear powers have demonstrated committment to achieve goal of nuclear disarmament); *see also* the Treaty on the Non-

nuclear powers have this obligation because in implicitly agreeing that disarmament is the ultimate goal of their negotiations, they have now formally bound themselves to follow through on achieving that goal.[153]

IV. Does U.S. Policy Concerning the Use of Nuclear Weapons Conform to the World Court's Opinion?

A. *Restatement of the Court's Central Holdings*

Although the World Court was not really able to come to a definitive answer to the question it faced, it did enunciate a number of principles to bear in mind when examining whether the use of a nuclear weapon would be legal in a given circumstance. According to the court, these principles can be summarized as the following: (1) a nuclear weapon must be used only in self-defense, (2) its use must be necessary as part of a self-defense strategy to ensure the continued survival of a nation, (3) the damage it causes to the enemy cannot be disproportionate to the threat encountered, and (4) it cannot be used to cause indiscriminate injury to innocent civilians or neutral parties.[154]

Proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483, 490, 729 U.N.T.S. 161, 173 (requiring each party "to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control"); *Resolution Presented by the Delegates of the Union Of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, the United States of America, France, China and Canada*, G.A. Res. A/3, U.N. GAOR, 1st Sess., at 7, 8 (1946) (directing Commission to offer proposals "[f]or the elimination from national armaments of atomic weapons and of all other major weapons adaptable to mass destruction").

153. *See* Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 830 (July 8, 1996) (emphasizing that "[t]he obligation expressed in Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons includes its fulfillment in accordance with the basic principle of good faith"), *available in* WL, International Legal Materials Index; *see also* the Vienna Convention on the Law of Treaties of May 23, 1969, 25 I.L.M. 543, 576 (stating that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith"); Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case Concerning the Continental Shelf Tunisia/ Libyan Arab Jamahiriya (Tunis. v. Libyan Arab Jamahiriya), 1985 I.C.J. 192, 229 (Judgment of Dec. 10) (enunciating principle that "there is an obligation to conclude a treaty"); Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. 268, 284 (Dec. 20) (holding that "[o]ne of the basic principles governing the creation and performance of legal obligation, whatever, their source, is the principle of good faith. Trust and confidence are inherent in international cooperation").

154. *See supra* Part III (elucidating international legal principles used by World Court to determine propriety of use of nuclear weapons).

B. *Unanswered Questions*

In enunciating these principles, however, the court failed to answer a number of important questions. The first of these questions concerns the concept of self-defense. Specifically, would a country have to wait until it was actually attacked before resorting to the use of a nuclear weapon? What if that country had reliable evidence that its neighbor was amassing enough offensive troops at its border to overwhelm its own conventional forces? What if it had further evidence that its neighbor was preparing to launch a nuclear missile of its own? Would that first country then have to wait until an attack was actually launched before resorting to the use of a nuclear weapon? Would it be legally acceptable to even threaten such use if its neighbor did not remove its troops from an offensive position within a specified time frame, or cancel the launch of its nuclear missile?

A second question left unanswered by the court's opinion concerns the concept of necessity. How would a country go about demonstrating that the use of a nuclear weapon was actually necessary to defend itself? Would it first have to attempt to defend itself through the use of conventional or other forces? Furthermore, would it have to demonstrate that the use of a nuclear weapon was truly necessary for "its very survival,"[155] or would it merely have to show that it legitimately perceived a serious threat to its livelihood?

A third question left unanswered concerns the doctrine of proportionality. The court clearly held that this doctrine must be followed with respect to the use of nuclear weapons.[156] However, it failed to enunciate any practical criteria to assess whether a country has complied with the doctrine in its use of nuclear weapons, beyond requiring that the amount of force used in self-defense be "proportional to the armed attack and necessary to respond to it."[157] How is one to gauge whether one particular exercise of the use of force is proportional to another? Furthermore, must a use of force truly be limited to merely responding to an attack, or can it continue to be used to the point of ensuring that the initial aggressor no longer has the capability to launch such an attack against it again in the near future?

The final unresolved question concerns the security of innocent civilians and neutral parties. The court stated bluntly that international humanitarian law and the law of neutrality governs the use of a nuclear

155. Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 830 (July 8, 1996), *available in* WL, International Legal Materials Index.

156. *See id.* at 822-23 (holding that condition of proportionality applies "whatever the means of force employed").

157. *Id.* at 822.

weapon.[158] With regard to civilians, the court specifically held that countries "must never make civilians *the object of attack* and must consequently never use weapons that are *incapable of distinguishing* between civilians and military targets."[159] Does the court mean to imply with this statement that it is not a violation of law to act in a manner that unintentionally results in civilian casualties, as long as the civilians were not the object of the attack? Furthermore, does the court mean to outlaw only weapons that are incapable *in all cases* of distinguishing between civilians and military targets, or instead the use of all weapons *in a manner* that makes it impossible to distinguish between the two? Nowhere in its opinion did the court state that *any* damage inflicted upon innocent civilians or neutral countries was forbidden. Therefore, another question left unanswered is how many civilian or neutral party casualties are generally acceptable in the exercise of self-defense.

The failure of the court to adequately address and settle these questions renders it extremely difficult to assess whether current United States policy with respect to the use of nuclear weapons conforms to the restrictions outlined in its opinion. The difficulty will become evident when this Comment undertakes to analyze two particular scenarios in which the United States has indicated a willingness to use such weapons as part of its national defense strategy. Before these scenarios are addressed however, a brief overview of the United States' general position on the use of nuclear weapons is warranted.

C. *The Official U.S. Position on the Use of Nuclear Weapons*

The United States has long held the view that the use of nuclear weapons is not illegal per se.[160] Nevertheless, it has also acknowledged its

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158. *See id.* at 829 (affirming that "there can be no doubt as to the applicability of humanitarian law to nuclear weapons" and "the principle of neutrality . . . is applicable to all international conflict, whatever type of weapons might be used").

159. *Id.* at 827 (emphasis added).

160. *See* U.S. DEP'T OF AIR FORCE, INTERNATIONAL LAW—THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS, 6-5, Sec. 6-5, AF Pamphlet 110-31 (Nov. 19, 1976) (concluding that "[n]uclear weapons can be directed against military objectives as can conventional weapons"); U.S. DEP'T OF ARMY, INTERNATIONAL LAW VOL. II, Army Pamphlet 27-161-2 (Oct. 23, 1962) (quoting from unpublished annotation to paragraph 35 of 1956 U.S. Army Field Manual 27-10 which rationalizes legality of use of nuclear weapons by stating that "[t]he weapon has gained such acceptance that it is spoken of in the context of disarmament rather than illegality"); ELLIOT L. MEYROWITZ, PROHIBITION OF NUCLEAR WEAPONS: THE RELEVANCE OF INTERNATIONAL LAW 29 (1990) (noting official U.S. Navy position that no international law prohibits use of nuclear weapons during war); *id.* at 30 (citing 1956 U.S. Dep't of Army manual: "[t]he use of explosive 'atomic weapons,' whether by air, sea, or land forces, cannot as such be regarded as violative of international law in the absence of any customary rule of international law or international convention

duty to follow the general principles of the laws of armed conflict in undertaking such use.[161] The United States attempted to justify its use of the bomb during World War II primarily on the grounds of necessity.[162] Whether the use of nuclear weapons was truly necessary to win the war has been subject to extensive debate;[163] but in any event, the United

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restricting their employment"); *id.* at 31 (quoting from 1976 U.S. Dep't of Air Force manual, which concludes that "[n]uclear weapons can be directed against military objectives as can conventional weapons").

161. *See* U.S. DEP'T OF ARMY, INTERNATIONAL LAW VOL. II, Army Pamphlet 27-161-2 (Oct. 23, 1962) (making reference to number of international documents which it determined might be relevant in assessing legality of nuclear weapons and their use). These documents include:

> (1) Article 23(a) of the Hague Regulations prohibiting poisons and poisoned weapons; (2) the Geneva Protocol of 1925 which prohibits the use not only of poisonous and other gasses but also of 'analogous liquids, materials or devices; (3) Article 23(c) of the Hague Regulations which prohibits weapons calculated to cause unnecessary suffering; and (4) the 1868 Declaration of St. Petersberg which lists as contrary to humanity those weapons which needlessly aggravate the sufferings of disabled men or render their death inevitable.

Id. Furthermore, the United States has specifically recognized that the concepts of necessity and proportionality must be adhered to in the use of nuclear weapons. *See* U.S. DEP'T OF AIR FORCE, INTERNATIONAL LAW—THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS 6-5, Sec. 6-5, AF Pamphlet 110-31 (Nov. 19, 1976) (asserting that "military necessity protects the right to use any degree or means of force, not forbidden, *necessary* to achieve the objective sought") (emphasis added); *id.* at 6-1, 6-2, at Sec. 6-3(a) (acknowledging that "the principle of proportionality is a well recognized legal limitation on weapons or methods of warfare which requires that injury or damage to legally protected interests must not be disproportionate to the legitimate military advantages secured by the weapons"). While acknowledging the applicability of these international agreements and principles, however, the manual clearly leaves open the possibility that the use of nuclear weapons might be an appropriate response in some cases. *See id.* at 6-2, Sec. 6-3(b)(2) (explaining that "[a]ll weapons cause suffering. The critical factor . . . is whether the suffering is needless or disproportionate to the military advantages secured by the weapon, not the degree of suffering itself"); *id.* at 6-3, Sec. 6-3(c) (claiming that existing law of armed conflict does not prohibit use of nuclear weapons whose destructive force cannot be strictly confined to specific military objective).

162. *See* U.S. DEP'T OF AIR FORCE, INTERNATIONAL LAW—THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS 5-5, Sec. 5-2(d), AF Pamphlet 110-31 (Nov. 19, 1976) (revealing that "[t]he U.S. justified the use of [nuclear] weapons on the basis that the two cities destroyed were involved in war production"); ELLIOT L. MEYROWITZ, PROHIBITION OF NUCLEAR WEAPONS: THE RELEVANCE OF INTERNATIONAL LAW 222 n.2 (1990) (explaining that "[u]nder the concept of target area bombing, if the war industries and other vital targets were inseparable from the population centers, then target area bombing was justified, since the selection of specific military targets was impracticable").

163. *Compare* WILLIAM H. CHAFE, THE UNFINISHED JOURNEY: AMERICA SINCE WORLD WAR II 58 (1986) (quoting Japanese military expert who said that if bomb had not been dropped, "'we would have fought until all 80 million Japanese were dead'"), *with* RONALD E. POWASKI, MARCH TO ARMAGEDDON 19 (1987) (quoting Admiral William D. Leahy, Truman's Chief of Staff, as asserting that complete blockade of Japan would have

States has relied on the potential exercise of the nuclear option as a key part of its national defense strategy ever since.[164] Even with the end of the Cold War, the United States continues to rely on essentially the same policy, and will likely continue to do so for some time to come.[165] In fact, shortly after the International Court of Justice handed down its opinion, a spokesman for the U.S. State Department was quick to declare that "the ruling changes nothing in U.S. policy."[166]

D. *Different Scenarios Involving the Use of Nuclear Weapons by the United States*

Does the United States' current policy regarding the threat or use of nuclear weapons conform to the restrictions outlined in the World Court's opinion? To answer this question, one must examine specifically when the United States has used or threatened to use nuclear weapons in the past, as well as under what circumstances it proposes to do so in the future. In undertaking this task, this Comment now examines two different scenarios in which the United States has indicated a willingness to use nuclear weapons: (1) as a first-strike measure under the NATO commit-

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been sufficient to defeat Japanese). Powaski also refers to two Air Force surveys, published after the war, which found that "Japan would have surrendered, even if the atomic bombs had not been dropped, even if Russia had not entered the war, and even if no invasion had been planned or contemplated." *Id.* at 19.

164. *See* ROBERT JERVIS, THE MEANING OF THE NUCLEAR REVOLUTION: STATECRAFT AND THE PROSPECT OF ARMAGEDDON 16-17 (Robert J. Art & Robert Jervis, eds. 1989) (summarizing heart of U.S. strategy as having capability "'to ensure that the United States would emerge from a nuclear war in discernibly better shape than the Soviet Union'").

165. *See* CHARLES W. KEGLEY & KENNETH L. SCHWAB, AFTER THE COLD WAR: QUESTIONING THE MORALITY OF NUCLEAR DETERRENCE 8 (Charles W. Kegley, Jr. & Kenneth L. Schwab eds., 1991) (reiterating Dick Cheney's 1990 report to President and Congress wherein Cheney affirms that "deterrence of nuclear attack remains the cornerstone of U.S. national security"); *id.* at 7-10 (discussing effect that end of Cold War has had on United States' nuclear deterrence policy); *see also* Paul Doty & Antonio Handler Chayes, *"Introduction and Scope of Study"* (finding that "the United States will continue to rely on deterrence provided by offensive nuclear weapons well into the next century"), in DEFENDING DETERRENCE 1, 1-16 (Antonio Handler Chayes & Paul Doty eds., 1989); Jim Hoagland, *Bush Urges NATO to Change Strategy on Atomic Response*, INT'L HERALD TRIB., July 3, 1990, at A12 (reporting that despite certain changes, United States has reaffirmed its commitment to nuclear deterrence); Morton Halperin, Council on Foreign Relations, Remarks Before the Committee on Nuclear Policy, at the Center for Strategic & International Studies (C-SPAN television broadcast, Feb. 19, 1997) (asserting that "American nuclear planning and policy has not changed in any fundamental way since the end of the Cold War") (on file with the *St. Mary's Law Journal*).

166. Burns H. Weston, *Court: Disarm Nuclear Weapons*, DES MOINES REG., July 17, 1996, *available in* 1996 WL 6246590.

ment to protect Europe from a conventional attack;[167] and (2) in response to a first-strike directed against the United States, either by the former Soviet Union by or a third world country that has somehow acquired the capacity to construct and deliver a nuclear warhead.[168] These two scenarios are not meant to serve as a comprehensive overview of United States nuclear policy, but instead consider a few of many possible foreseeable situations in which nuclear weapons might be used.

1. First-Use of a Nuclear Weapon to Counter a Conventional Military Forces Attack in Western Europe

The first scenario involves the United States launching one or more nuclear weapons to stop a conventional forces attack against countries in Western Europe. This scenario is one that the United States has long envisioned as part of its NATO commitment to a "flexible response" doctrine.[169] Although the likelihood of such an attack seems somewhat re-

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167. *See* JONATHAN HASLAM, THE SOVIET UNION AND THE POLITICS OF NUCLEAR WEAPONS IN EUROPE, 1969-1987, at 8 (1990) (documenting how Eisenhower ordered deployment of "considerable numbers of tactical nuclear weapons in Western Europe . . . [as] a logical counter to Soviet conventional military predominance in the theatre"). *See generally* JONATHAN DEAN, WATERSHED IN EUROPE: DISMANTLING THE EAST-WEST MILITARY CONFRONTATION 3-4 (1987) (detailing objections to strategy by number of Western European countries).

168. *See* MICHAEL KLARE, ROGUE STATES AND NUCLEAR OUTLAWS 18-23 (1995) (detailing how U.S. military planners underwent shift in thinking to prepare for nuclear attack by Third World countries).

169. *See* Paul C. Warnke, *Now More Than Ever: No First Use* (discussing how "flexible response" doctrine came to replace doctrine of "massive retaliation"), *in* AFTER THE COLD WAR: QUESTIONING THE MORALITY OF NUCLEAR DETERRENCE 55, 55 (Charles W. Kegley, Jr. & Kenneth L. Schwab eds., 1991). Warnke has worked for a number of key foreign policy related groups, including the Department of Defense, the U.S. Arms Control and Disarmament Agency, the Council on Foreign Relations, and the Trilateral Commission. *Id.* at 260; *see also* JONATHAN DEAN, WATERSHED IN EUROPE: DISMANTLING THE EAST-WEST MILITARY CONFRONTATION 5 (1987) (asserting that "[t]he object of Western defense measures—as it has been from the end of World War II—is to prevent the extension of dominant Soviet influence over Western Europe through the use of Soviet armed forces, whether by conquest or by intimidation"). Dean explains the role nuclear weapons have played in the defense of Western Europe:

> [i]n the early 1950's, the NATO governments rapidly decided that they could not match [the conventional force strength of the Soviets]. Instead of trying to match estimated Warsaw Pact strength man for man, tank for tank, aircraft for aircraft, the NATO coalition . . . has placed primary reliance on U.S. superiority in nuclear weapons, with conventional forces playing a lesser role.

JONATHAN DEAN, WATERSHED IN EUROPE: DISMANTLING THE EAST-WEST MILITARY CONFRONTATION 6 (1987); *see* DAVID SHUKMAN, TOMORROW'S WAR: THE THREAT OF HIGH-TECHNOLOGY WEAPONS 45 (1996) (citing statement of former Defense Secretary Les Aspin for proposition that United States policy has been to use the nuclear threat "to counter-balance the larger conventional forces of the Soviet Union").

mote now that the Cold War has ended and the Soviet Union has officially dissolved, the United States' position in this regard has remained essentially the same.[170]

Assuming that the United States did launch a nuclear weapon in response to a conventional forces attack on Western Europe by a reborn Soviet Union or a renegade Russia, the first point it would have to establish is that such use was justified in terms of self-defense. The United States would obviously be justified in responding with some use of force under this scenario, for although American soil itself would not have been invaded, the United Nations Charter clearly authorizes collective self-defense measures "if an armed attack occurs against a member of the United Nations."[171] The next question to be addressed, then, is whether the specific use of a nuclear weapon would be necessary to counter such a conventional forces attack.

If the attack had taken place in the years immediately following the end of World War II and the formation of NATO, the United States could have probably successfully argued that a nuclear response was the only practical way to oust the aggressor, given the large conventional forces advantage that the Soviets maintained at the time.[172] However, according to some commentators, since the end of the Cold War the situation in Western Europe has changed to such an extent that the United States

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170. *See* Paul C. Warnke, *Now More Than Ever: No First Use* (affirming that "first use of nuclear weapons remains the declaratory policy of the United States and its allies in the North Atlantic alliance," although they are only to be used as last resort), *in* AFTER THE COLD WAR: QUESTIONING THE MORALITY OF NUCLEAR DETERRENCE 55, 55 (Charles W. Kegley, Jr. & Kenneth L. Schwab eds., 1991); Morton Malperin, Council on Foreign Relations, Remarks Before the Committee on Nuclear Policy, at the Center for Strategic & International Studies (C-SPAN television broadcast, Feb. 19, 1997) (explaining that "American nuclear strategy and planning . . . are still based on the same assumptions.") (on file with the *St. Mary's Law Journal*).

171. U.N. CHARTER art. 51.

172. *See* JONATHAN DEAN, WATERSHED IN EUROPE: DISMANTLING THE EAST-WEST MILITARY CONFRONTATION 6 (1987) (stating that "from NATO's inception, and ever since, the military balance has seemed hopelessly in favor of the Warsaw pact [in terms of conventional forces]"). As it stands now, the United States position has evolved to the point of calling for the use of a nuclear weapon in Europe to counter an attack only if the use of conventional forces have already failed in stopping that attack. *See* JONATHAN HASLAM, THE SOVIET UNION AND THE POLITICS OF NUCLEAR WEAPONS IN EUROPE, 1969-1987, at 29 (1990) (outlining U.S. shift in nuclear policy toward adoption of "flexible response" doctrine); DAVID SHUKMAN, TOMORROW'S WAR: THE THREAT OF HIGH-TECHNOLOGY WEAPONS 47 (1995) (noting that "[t]he circumstances in which nuclear weapons may be used against the Warsaw Pact [became] relatively clear: they would be launched if conventional defence failed").

could no longer successfully make that argument.[173] Obviously there is room for debate on this issue, and unfortunately, the court's opinion does not clarify exactly how one would go about determining whether the use of a nuclear weapon was necessary in a given circumstance.

Assuming that the United States could meet the criteria of necessity, however, the next question would be whether such a response could be carried out without injuring an indiscriminate number of innocent bystanders or neutral parties. A key factor in determining whether the United States could satisfy that particular criteria in such a scenario would depend on the number of nuclear warheads it decided to employ. Its stated objective is to launch enough to destroy the bulk of the aggressor's military forces, supply bases, and command centers, including the headquarters of the political entities that ordered such an attack.[174] The difficulty with this response, as noted by one analyst, is that "such targets, while unquestionably military and combatant in themselves, are collocated with centers of population so that any attack upon the targets would result in extensive civilian casualties."[175] This analyst further states that justifying such damage on the grounds that it was unintended would not absolve the United States of responsibility, given its awareness that civilian casualties are a virtual certainty when the use of nuclear weapons are involved.[176]

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173. *See* Charles W. Kegley, Jr. & Kenneth L. Schwab, *At Issue: Deterrence in the Post-Cold War Era* (concluding that Soviets no longer pose same threat in Europe they once did), *in* AFTER THE COLD WAR: QUESTIONING THE MORALITY OF NUCLEAR DETERRENCE 1, 9-10 (Charles W. Kegley, Jr. & Kenneth L. Schwab eds., 1991); Paul C. Warnke, *Now More Than Ever: No First Use* (reasserting view that policy of threatening first use of nuclear weapons to meet conventional force attack is no longer necessary to ensure defense of Europe), *in* AFTER THE COLD WAR: QUESTIONING THE MORALITY OF NUCLEAR DETERRENCE 55, 63 (Charles W. Kegley, Jr. & Kenneth L. Schwab eds., 1991); *see also* Thalif Deen, *Anti-War Activists See Virtue in Nuclear Ruling*, INTER PRESS SERV., July 8, 1996, (quoting Daniel Ellsberg, former employee of U.S. Department of Defense, as saying that United States could no longer justify the continued presence of hundreds on its nuclear weapons in Europe as self-defense measure), *available in* 1996 WL 10768038; Molly Moore, *Pentagon Said to Imply Need Has Faded from Atom Arms In Europe*, WASH. POST, Mar. 14, 1990 at A12 (quoting United States military planners as asserting that "for the first time in the postwar era . . . the Western alliance could now defeat any conventional Soviet military invasion of Europe without resorting to nuclear weapons").

174. *See* Sir Hugh Beach, *What Stakes Would Justify the Use of Weapons of Mass Destruction?* (spelling out United States' policy on use of nuclear weapons to protect Europe), *in* AFTER THE COLD WAR: QUESTIONING THE MORALITY OF NUCLEAR DETERRENCE 39, 43 (Charles W. Kegley, Jr. & Kenneth L. Schwab eds., 1991).

175. *Id.* at 44.

176. *See id.* (outlining possible scenarios for use of nuclear weapons in Western Europe).

One study of the scenario outlined above concluded that even in the event that the United States decided to launch only a small-scale nuclear attack on portions of Central Europe to deter a Soviet conventional assault, the number of casualties could run as high as nine million.[177] Furthermore, the study found that "[e]ven if the attack is aimed only at military targets, the civilian casualties would outnumber the military casualties by 16 to 1."[178] If these findings are accurate, it seems unlikely that the United States could make the case that its use of nuclear weapons was a legitimate response under the principles of international humanitarian law.[179] This conclusion cannot be stated with any certainty, however, because the court failed to address the issue of what might be an acceptable overall number of civilian casualties, or ratio of civilians injured versus military personnel in the exercise of self-defense.

Furthermore, one must consider what the United States would hope to accomplish by launching nuclear weapons toward the occupied parts of Europe, or even toward the home territory of the aggressor. This consideration is important because

> [t]o be legitimate, a strategy must not only threaten the aggressor with an unacceptable amount of damage but also satisfy the further condition that the total damage suffered—by the belligerents, by the neutrals, and by the world at large—must be proportional to the good that is achieved.[180]

The United States' stated objective in such a situation would be to immediately stop the aggressor in its tracks and force it to retreat.[181] If the aggressor actually did respond in this manner, perhaps an argument could

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177. World Health Organization, *Effects of Nuclear War on Health and Health Services: Report of the International Committee of Experts in Medical Sciences and Public Health to Implement Resolution WHA 34.38* (1st ed. 1984) at 71-72; *see also* World Health Organization, *Effects of Nuclear War on Health and Health Services: Report of the WHO Management Group on Follow-up of Resolution WHA 36.28: "The Role of Physicians and Other Health Workers in the Preservation and Promotion of Peace . . ."* (2d ed. 1987) 121-25 (estimating deaths between 7.4 and 15.6 million under similar scenario).

178. World Health Organization, *Effects of Nuclear War on Health and Health Services: Report of the International Committee of Experts in Medical Sciences and Public Health to Implement Resolution WHA 34.38* (1st ed. 1984) at 72.

179. *See* Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 827 (July 8, 1996) (holding that countries "must never use weapons that are incapable of distinguishing between civilian and military targets"), *available in* WL, International Legal Materials Index.

180. Sir Hugh Beach, *What Stakes Would Justify the Use of Weapons of Mass Destruction?*, *in* AFTER THE COLD WAR: QUESTIONING THE MORALITY OF NUCLEAR DETERRENCE 39, 44 (Charles W. Kegley, Jr. & Kenneth L. Schwab eds., 1991).

181. *See id.* at 49 (summarizing justifications offered by both Great Britain and United States for retention of first-strike policy).

be made that the damage inflicted through the use of nuclear weapons was justified by the greater damage averted. However, there is obviously no guarantee that this result would follow. In fact, it is equally plausible that the aggressors would refuse to retreat, and instead, respond in kind with a nuclear attack of their own, a prospect that could be repeated over and over again, leaving all countries involved devastated.[182] Given this possibility, it seems unlikely that in this first scenario the United States could successfully argue that its nuclear policy is justified under the rules of armed conflict.

2. Use of Nuclear Weapons As a Reprisal Against a Third World Nuclear Power

The next scenario envisions a future small-scale nuclear attack against the United States by a Third World nuclear power of some kind. This scenario has been anticipated and played out by the Pentagon in its war-planning exercises.[183] In one case, it was assumed that Iran exploded a nuclear weapon, the effects of which spread throughout the state of Florida, and that it also possessed at least five other such weapons.[184] The main question at issue was whether the United States should respond in kind by launching one or more of its own nuclear missiles at Iran, specifically targeting the Iranian leadership.[185]

Again, the first question to be addressed in such a scenario is whether the use of a nuclear weapon would be necessary for self-defense. Assuming that Iran had already exploded a nuclear weapon on U.S. soil and had several other such weapons, the need for the United States to resort to

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182. *See id.* (asserting that "in military circles, the likelihood has been rated very high that the Soviet Union would retaliate on at least the same scale as NATO's attack").

183. *See* DAVID SHUKMAN, TOMORROW'S WAR: THE THREAT OF HIGH-TECHNOLOGY WEAPONS 42-48 (1996) (relaying scenario in which nuclear armed Iran, working in combination with North Korea, detonates nuclear bomb off coast of Florida); *see also* MICHAEL KLARE, ROGUE STATES AND NUCLEAR OUTLAWS 19 (1995) (quoting from report entitled *Discriminate Deterrence*, warning that "[i]n the years ahead . . . many lesser powers will have sizable [nuclear] arsenals"). The report was published by a Pentagon-associated think tank called the U.S. Commission on Integrated Long-Term Strategy. *Id.* Klare summarizes the report as emphasizing "the prospect of high-tech, all-out war rising Third World Powers not necessarily affiliated with the Soviet Union." *Id.* at 19-20. According to the author, this report, along with others relaying the same general theme, caused "military planners [to prepare for] a new enemy type: aggressively-minded Third World powers armed with nuclear and/or chemical weapons and the means of delivering them to distant lands." *Id.* at 23.

184. *See* DAVID SHUKMAN, TOMORROW'S WAR: THE THREAT OF HIGH-TECHNOLOGY WEAPONS 45-47 (1996) (documenting strategy sessions among top Pentagon officials).

185. *See id.* at 47-48 (relating debate among military planners as to proper course of action).

self-defense would be fairly evident under the World Court's rationale, because even a few small nuclear weapons could threaten "its very survival."[186] The next question, of course, would be whether retaliation in the specific form of a nuclear weapon would be a necessary.

Once again, here the court's opinion fails to provide a clear-cut answer to the question. Since the United States has overwhelming conventional force superiority compared to smaller countries like Iran,[187] would it first have to attempt to counter such an attack through the use of such forces before resorting to the nuclear option? Certainly, it would seem that the United States could make a fairly successful case for the necessity of responding in a quick and decisive manner under such circumstances, given the urgency of the situation, and the possibility that its adversary might be readying the launch of another missile while it prepared its own conventional forces. However, in order to establish that the use of a nuclear weapon was necessary, it would seem that the United States would at least have to prove that such use would actually result in warding off further attack. This proof might be hard to establish, as even the military planners in the war-games exercise who examined this scenario could not reach a unanimous conclusion on the issue.[188] A key belief among those arguing in favor of the use of nuclear weapons in the above scenario was that only through response with a nuclear weapon could further attacks be ruled out.[189] Those arguing against such a response, however, noted the equally plausible possibility that it might actually provoke Iran into launching even another nuclear weapon at the United States, a pattern which would merely escalate the damage to both sides and accomplish nothing.[190]

Assuming the United States could satisfy both the self-defense and necessity prongs of the court's opinion, the next issues to be considered concern the principle of proportionality and the likely harm to innocent civilians. In regard to the first issue, simple logic dictates that the use of

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186. *See* Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 830 (July 8, 1996) (noting that all states have the right to survival and therefore, to engage in self-defense), *available in* WL, International Legal Materials Index.

187. *See* MICHAEL KLARE, ROGUE STATES AND NUCLEAR OUTLAWS 28-34 (1995) (revealing that Iran's entire armed forces number only roughly 604,000). The U.S. Army alone has over 650,000 active duty personnel. THE WORLD ALMANAC AND BOOK OF FACTS, PUB. NO. 0084-1382 (Mark S. Hoffman ed., 1993).

188. DAVID SHUKMAN, TOMORROW'S WAR: THE THREAT OF HIGH-TECHNOLOGY WEAPONS 47-48 (1996) (revealing five to four split against responding with nuclear weapons among participants in exercise).

189. *See id.* at 48 (quoting former National Security Council member Peter Zimmerman as claiming "nothing else gives us the high probability of success").

190. *See id.* (showing how disagreement among participants led to deadlock on central question of whether nuclear response would be appropriate).

one nuclear weapon in response to another is a proportionate response. Therefore, if the United States actually limited its retaliation to one such weapon it probably would be in compliance with the principle of proportionality. Determining if the second requirement has been complied with is a bit more problematic, however, and raises a number of difficult questions.

For example, how could the United States launch a nuclear weapon into any area other than a remote battle-zone where only combatants are present without necessarily killing a large number of innocent civilians? Would it be completely prohibited from the use of nuclear weapons in an area that is populated with civilians, even if it showed that the enemy against whom it launched an attack had deliberately surrounded itself with those civilians in order to immunize itself from attack?[191] These are typical of the troubling questions that the court left unanswered.

V. Challenging U.S. Nuclear Weapons Policy in the World Court

If, as this Comment asserts, the United States' policy regarding the threat or use of nuclear weapons does not conform to the World Court's opinion, it is necessarily a violation of international law. What are the ramifications for the United States should this be the case? This Comment proposes that there will be few besides perhaps putting further political pressure on the U.S. to move closer towards nuclear disarmament, or, at least rethink its current nuclear weapons policy. The primary reason why the impact of the opinion may not be as significant as some of its supporters hope is that the World Court lacks any practical and firmly established mechanism for enforcement of its rulings. Furthermore, there are still a number of events that would have to transpire before the court's holdings could have any binding legal effect. Before analyzing the effects that any such potential future events would still have, or whether the remedies for violations of the court's opinion would be enforceable, a brief overview of remedies actually available in the World Court is in order.

A. *Remedies in the World Court*

The World Court has the authority to issue a wide variety of different remedies for the violation of international law. If a valid judgment were

191. *See generally* Jack R. Payton, *Gadhafi Should Think Twice Before Taking Western Hostages,* St. Petersberg Times, Apr. 1, 1992, at 2A (detailing Saddam Hussein's "human shield" strategy during Gulf War in which he held over 2,000 American citizens hostage near key military centers as defense mechanism).

to be rendered against the United States, compliance would be required under the terms of the U.N. Charter.[192] These remedies can be broken down into three general categories: declaratory judgments, orders for specific performance, and awards of damages. Declaratory judgments are designed to clarify the state of the law in a given area, or with respect to a specific dispute.[193] An order for specific performance may instruct the losing party to take particular steps to comply with the opinion.[194] Finally, an award of damages may require compensation for past violations.[195]

Bearing these alternatives in mind, if a party was able to obtain a judgment against the United States for its nuclear weapons policy in the World Court, the party would be entitled to seek several forms of relief. In the case of the actual use of nuclear weapons against it, the party could obviously demand an end to such use and reparations for damages caused. In the case of a mere threat of the use of nuclear weapons, the party could request an order for specific performance to make the United

192. *See* U.N. CHARTER art. 94, para. 1 (requiring "[e]ach member of the United Nations . . . to comply with the decision of the International Court of Justice in any case to which it is a party").

193. *See* Northern Cameroons Case, 1963 I.C.J. 15, 37 (Dec. 2) (affirming idea that "the Court may, in an appropriate case, make a declaratory judgment" as "indisputable"); Interpretation of Judgments Nos. 7 and 8 (the Chorozow Factory), 1927 P.C.I.J. Series A, No. 13, 20 (describing purpose of declaratory judgment as "to ensure recognition of a situation at law, once and for all and with binding force as between the [p]arties; so that the legal position thus established cannot again be called in question in so far as the legal effects ensuing therefrom are concerned"); *see also* Case Concerning United States Diplomatic and Consular Staff in Tehran, 1980 I.C.J. 3, 45 (May 24) (declaring Iran to be in continuing violation of international law by detaining American diplomats); Corfu Channel Case, 1949 I.C.J. 4, 36 (Apr. 9) (issuing declaratory judgment finding Albania responsible for damage caused as result of mining its own waters).

194. *See* Case Concerning United States Diplomatic and Consular Staff in Tehran, (May 24) 1980 I.C.J. 3, 44-45 (ordering Iran to "immediately terminate the unlawful detention of the United States Charge d'affaires and other diplomatic and consular staff . . . [and] to ensure that all the said persons have the necessary means of leaving Iranian territory"); Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand) (June 15), 1962 I.C.J. 6, 37 (instructing Thailand "to withdraw any military or police forces . . . stationed by her at the Temple, . . . [and] to restore to Cambodia any objects . . . which may . . . have been removed from the Temple").

195. *See* Corfu Channel Case, 1949 I.C.J. 244, 248 (Dec. 15) (rejecting argument that court lacked competence to assess compensatory damages); *see also* Case Concerning Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 149 (June 27) (commanding United States to make reparations to Nicaragua for mining its harbors and supporting Contra rebels); Case Concerning United States Diplomatic and Consular Staff in Tehran 1980 I.C.J. 3, 45 (May 24) (ordering Iran to make reparations for detention of American hostages); Corfu Channel Case, 1949 I.C.J. 244, 250 (Dec. 15) (instructing Albania to pay "pounds sterling 843,947" as compensation for damages to ships and injuries to naval personnel).

States reduce its nuclear arsenal, or in an extreme case, even disarm altogether. Failing that, the party might at least successfully obtain an order that the United States alter its nuclear policy so as to rule out the possibility that the party would ever again be the direct target of such an attack. Before a party would be allowed to seek any of these remedies, however, there are several steps it would have to take.

B. *Using the Advisory Opinion to Obtain a Legally Enforceable Judgment Against the United States*

Since the court's opinion was merely advisory in character, it alone cannot be relied upon to create any binding legal obligation.[196] Therefore, a party seeking to force a change in U.S. nuclear weapons policy would have to bring suit against the United States before the court in order to obtain a legally enforceable judgment.[197] In order to successfully do so and achieve its ultimate objective of affecting a change in U.S. policy, however, a party would have to overcome a number of daunting obstacles. The first of these are procedural in nature, and relate to the issues of standing and jurisdiction. The second relates to the issue of proof. Finally, the third obstacle concerns finding a body capable of enforcing a ruling of this magnitude against the most powerful country in the world.

1. Standing

In order to bring suit against the United States to force a change in its nuclear weapons policy, a party would first need to have some sort of standing before the court to receive its recognition. The most important point to remember in this respect is that "[o]nly states may be parties in cases before the Court."[198] In addition, the state must either be a mem-

196. *See* Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, 1950 I.C.J. 65, 71 (Mar. 30) (explaining that in case at bar, "[t]he Court's reply is only of an advisory character: *as such, it has no binding force*") (emphasis added). *But see* CHRISTINE D. GRAY, JUDICIAL REMEDIES IN INTERNATIONAL LAW 115-16 (1987) (asserting that "[t]hose Advisory Opinions given to decide what is in reality a dispute between two or more states—whatever the form of the question put to the Court, however apparently abstract the Court's reply . . . do not seem very different in substance from judgments in contentious cases").

197. *See* Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 818-19 (July 8, 1996) (noting that "[t]he purpose of the advisory function is . . . to offer legal advice to the organs and institutions requesting the opinion"); CHRISTINE D. GRAY, JUDICIAL REMEDIES IN INTERNATIONAL LAW 116 (1987) (noting that "Advisory Opinions merely state the law, they are not coercive remedies").

198. I.C.J. STAT. art. 34, para. 1.

ber of the United Nations,[199] or get special approval on a case-by-case basis in accordance with the rules established by the General Assembly and the Security Council.[200] These restrictions necessarily rule out the possibility of suit by private individuals or groups. However, as one author has noted, "this does not prevent private interests from being the subject of proceedings before the court, for it is always open to a State to take up the complaint of one of its nationals against another State, and to bring a case before the court."[201]

If the United States was to actually use nuclear weapons against another country, the issue of standing would probably not be much of a legal barrier in the pursuit of a case against it. Undoubtedly, the targeted country itself, if a member of the U.N. and party to the court's statute, would want to bring suit against the United States. If the mere threat of such use was at issue, the likelihood of a country bringing suit is naturally much less. Certainly no country has seen fit to do so yet, even though a case could have been made even prior to the issuance of the advisory opinion. However, since the opinion has now been issued, the argument that the threat of nuclear weapons is incompatible with principles of international law seems much more persuasive.[202] The opinion may serve as a catalyst to persuade a country to act, especially if pressure from inside the country grows to push the issue.

As outlined in Section II-B, there are a number of different disarmament groups around the world that would undoubtedly be willing to put the issue of the threat of nuclear weapons before the court again. These groups could perhaps be more successful in obtaining a ruling against nuclear weapons in a contentious case than an advisory opinion, because the court would have a specific threat to deal with, as opposed to a merely hypothetical one. Given their influential role in pressuring the WHO and the General Assembly to bring this issue before the court in the first place, there is a strong chance that they would also be able to influence some government to take up their cause on behalf of its inhabitants. One

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199. *See* U.N. CHARTER art. 93, para. 1 (stating that "[a]ll Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice").

200. *See* U.N. CHARTER art. 93, para. 2 (stating that "a State which is not a Member of the United Nations may become a party to the Statute of the International Court of Justice on conditions to be determined in each case by the General Assembly upon the recommendation of the Security Council"); *see also* I.C.J. STAT. art. 35, para. 2 (reading "[t]he conditions under which the Court shall be open to other states shall . . . be laid down by the Security Council").

201. U.N. DEP'T OF PUB. INFO., THE INTERNATIONAL COURT OF JUSTICE at 7, U.N. Sales No. E.83.I.20 (1982).

202. *See* Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 829 (July 8, 1996) (holding that use (and by implication, threat of use) of nuclear weapons "seems scarcely reconcilable" with respect for laws of armed conflict).

country in particular that has repeatedly brought the nuclear issue before the court, at least in the context of the dangers of testing such weapons, is New Zealand.[203] In addition, the countries that argued before the court in this latest advisory opinion that the threat or use of nuclear weapons was illegal could also be expected to be sympathetic to the idea of bringing suit on the issue.

2. Jurisdiction

The second obstacle a party suing the United States would have to overcome concerns the issue of whether the World Court has jurisdiction over the United States. This step is key because the International Court of Justice is without power to render a binding judgment against countries that have refused to accept its authority.[204] In fact, only after a country has formally registered its consent to be bound by the court's rulings may the court later assert its jurisdiction.[205] A country can agree in advance to accept the court's jurisdiction in all subsequent cases,[206] or only on those with respect to disputes with certain states, and under certain conditions.[207] In addition, a country may agree to accept the court's jurisdic-

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203. *See* Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (N.Z. v. Fr.) Case, 1995 I.C.J. 288, 289-90 (Sept. 22) (asking court to address France's legal obligation to refrain from testing nuclear weapons in light of that country's announcement of decision to resume such testing); Nuclear Tests (N.Z. v. Fr.), 1974 I.C.J. 457, 460 (Dec. 20) (requesting court to declare under international law that France's nuclear testing program in South Pacific was violation of New Zealand's rights).

204. *See* International Court of Justice, Case of the Monetary Gold Removed from Rome in 1943 (Italy v. Fr., U.K., N. Ir., and U.S.), 1954 I.C.J. 19, 32 (June 15) (re-emphasizing principle that "the Court can only exercise jurisdiction over a State with its consent"); International Court of Justice, Anglo-Iranian Oil Co. Case (U.K. v. Iran), 1952 I.C.J. 93, 103 (July 22) (holding that "[u]nless the Parties have conferred jurisdiction on the Court . . . the Court lacks such jurisdiction"); STANIMIR A. ALEXANDROV, RESERVATIONS IN UNILATERAL DECLARATIONS ACCEPTING THE COMPULSORY JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE 2 (1995) (declaring that "[t]he jurisdiction of the Court to consider and decide a specific case on the merits depends on the will of the parties").

205. *See* U.N. CHARTER art. 36, para. 4 (requiring that such declarations "be deposited with the Secretary-General of the United Nations").

206. *See id.* art. 36, para. 2 (establishing that "parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* . . . the jurisdiction of the Court").

207. *See id.* art. 36, para. 3 (providing that declarations of acceptance of court's jurisdictions "may be made unconditionally or on condition of reciprocity on the part of several or certain states"); Case Concerning Military and Paramilitary Activities (Nicar. v. U.S.), 1984 I.C.J. 392, 418, 419-21 (Nov. 26 Jurisdiction of the Court) (outlining principle of reciprocity and holding that "[i]n making the declaration [to accept the court's jurisdiction] a State is . . . free either to do so unconditionally . . . or to qualify it with conditions or reservations").

tion for a limited period of time.[208] The United States has a rather inconsistent history in acceding to the court's jurisdiction.

When the World Court was first established in 1946, the United States declared its general acceptance of jurisdiction in all cases regarding international law,[209] with certain reservations,[210] in accordance with Article 36 of the Court's Statute.[211] Later, in 1984, the United States abruptly withdrew its acceptance of the court's jurisdiction to render a judgment involving "disputes with any Central American State or arising out of or related to events in Central America,"[212] in protest over the court's decision to rule on the legality of its covert activities in Nicaragua.[213] Although the court refused to recognize the validity of the United States withdrawing its consent in the middle of the proceedings,[214] and later proceeded to render a judgment against it,[215] the court did recognize the right of a country to withdraw its acceptance of jurisdiction according to

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208. *See* U.N. CHARTER art. 36, para. 3 (adding that declarations accepting court's jurisdiction may specify they are only to be in effect "for a certain time"); Case Concerning Military and Paramilitary Activities (Nicar. v. U.S.), 1984 I.C.J. 392, 418 (Nov. 26 Jurisdiction of the Court) (adding that countries "may specify how long the declaration itself shall remain in force, or what notice (if any) will be required to terminate it").

209. *See* I.C.J.Y.B. No. 39, 1984-1985, at 99-100, U.N. Sales No. 515 (reprinting text of President Truman's declaration on behalf of the United States).

210. *See id.* (listing three such reservations). These reservations state that the United States did not accept the court's jurisdiction in the following disputes: those that are submitted to other tribunals; those that deal with matters primarily within the U.S.'s domestic jurisdiction; and those that arise under multilateral treaties, unless every party to the treaty is also a party to the case, and the U.S. specifically agrees to accept the jurisdiction of the court in such a case. *Id.*

211. *See* I.C.J. STAT. art. 36, para. 2 (allowing countries to "at any time declare that they recognize as compulsory *ipso facto* and without special agreement . . . the jurisdiction of the Court").

212. *See* I.C.J.Y.B. No. 39, 1984-1985, at 100, U.N. Sales No. 515 (reprinting letter sent by then Secretary of State George Schultz to court, limiting terms of acceptance of its jurisdiction); *see also* Case Concerning Military and Paramilitary Activities (Nicar. v. U.S.), 1984 I.C.J. 392, 398 (Nov. 26 Jurisdiction of the Court) (referring to Schultz's letter); ANTHONY CLARK AREND, THE UNITED STATES AND THE COMPULSORY JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE 211 (1986) (reprinting Schultz's letter).

213. *See* STANIMIR A. ALEXANDROV, RESERVATIONS IN UNILATERAL DECLARATIONS ACCEPTING THE COMPULSORY JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE 63-66 (1995) (discussing arguments as to whether manner in which United States withdrew its acceptance was legal); ANTHONY CLARK AREND, THE UNITED STATES AND THE COMPULSORY JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE vii (1986) (outlining basic parameters of dispute).

214. *See* Case Concerning Military and Paramilitary Activities (Nicar. v. U.S.), 1984 I.C.J. 392, 421 (Nov. 26 Jurisdiction of the Court) (finding that, even after United States announced its intention to withdraw its consent, court still had jurisdiction to hear case).

215. Case Concerning Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 146–49 (June 27).

the terms specified in its original declaration of acceptance.[216] Subsequently, in 1986, the United States exercised that right and completely withdrew acceptance of the court's jurisdiction in all cases.[217]

The United States might decide to renew its acceptance of the court's jurisdiction sometime in the future. However, that would not guarantee that a suit against it could be maintained before the court successfully, for it is clear that the United States would be free to again revoke its acceptance upon giving proper notice before a suit was instituted. There is a strong possibility, given its prior conduct, that it would again revoke its acceptance should it anticipate that proceedings of the type envisioned here were imminent. Even if the proceedings were begun while the United States remained under the court's jurisdiction, the United States could be expected to vigorously argue that it is entitled to back out, and subsequently do so, as it did in the Nicaragua case.

Absent a renewal of its acceptance of the court's jurisdiction, the United States would have an extremely persuasive argument that it is presently immune from suit in the International Court of Justice over its nuclear weapons policy. However, there is still the possibility that the court could find that it has jurisdiction over the United States despite the absence of a formal renewal of its acceptance. For even if a country has not accepted the court's jurisdiction *ipso facto*, or has withdrawn such acceptance, the court may nevertheless attempt to use as a basis for exercising jurisdiction that country's agreement to abide by certain rules in accordance with its treaty obligations.[218] As illustrated by Section III of

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216. *See* Case Concerning Military and Paramilitary Activities (Nicar. v. U.S.), 1984 I.C.J. 392, 418 (Nov. 26 Jurisdiction of the Court) (outlining role good faith plays in allowing withdrawal). The problem in the Nicaragua case was that the United States had agreed to give six months notice before withdrawing its acceptance of the World Court's jurisdiction in its original declaration, but nevertheless tried to terminate it immediately upon learning of the court's decision to render a judgment on the matter. *Id.* at 398, 419-21.

217. *See* ANTHONY CLARK AREND, THE UNITED STATES AND THE COMPULSORY JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE 213 (1986) (reprinting letter of former Secretary of State Schultz stating that United States was terminating its declaration of acceptance, which was to take effect upon the expiration of six months as per original declaration).

218. *See* Case Concerning Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 28 (June 27) (finding that even if court had no jurisdiction over United States based on its declaration accepting court's jurisdiction, court could exercise jurisdiction based on United States being party to 1956 Treaty of Friendship with Nicaragua); *id.* (finding that even though United States had withdrawn acceptance of court's jurisdiction, "[t]hese circumstances do not . . . affect the jurisdiction of the Court under Article 36, paragraph 2, of the [World Court's] Statute, or its jurisdiction under Article XXIV, paragraph 2, of the Treaty to determine 'any dispute between the Parties as to the interpretation of application' of the Treaty"). Article 36, paragraph 2 of the World Court's statute

this Comment, the United States is party to a number of treaties that commit it to the principle of non-aggression, explicitly forbid it from using nuclear weapons against certain countries, and generally commit it to the principle of disarmament. Therefore, since the I.C.J. has the authority to settle issues of treaty interpretation, it could use such authority to find jurisdiction over the United States. Significantly, according to its statute, the court is the final arbiter concerning disputes over whether it has jurisdiction over a party.[219] This power was clearly demonstrated in the Nicaragua case, where the court found jurisdiction over the United States over its strenuous objections.[220]

3. Proving That U.S. Nuclear Weapons Policy Violates International Law

In the event that a party was able to achieve standing before the court and convince it to find jurisdiction over the United States once again, the next obstacle it would have to overcome would be proving that the United States policy with regard to the threat or use of nuclear weapons, as specifically applied to it, actually amounted to a violation of its rights under international law. This proof would have to be demonstrated in one of two ways, depending on what type of conduct was at issue. If the party was protesting the United States' actual use of nuclear weapons against it, the party would have to show that the United States did so in violation of one of the court's four principles outlined in Section IV-A of this Comment, or one or more of the United States' basic treaty obligations. If the party was protesting the mere threat of such use, it would have to prove that were the threat followed through, it would amount to such a violation.

Proving a mere threat to be a violation of international law could be rather difficult, because the party would undoubtedly have to produce some specific evidence of U.S. intent to use nuclear weapons in a particular manner, and such intentions are usually only available to the public in a generalized form. Evidence that the United States had nuclear weap-

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gives the court authority to interpret treaties; however, it does so in the context of disputes between states that have already accepted the court's jurisdiction. I.C.J. STAT. art. 36, para. 2. Therefore, it is difficult to understand how this article could give the court authority to settle a treaty dispute among parties that have not accepted its jurisdiction, unless the treaty itself explicitly makes reference to submitting disputes to the court, as did the one at issue in the above case.

219. *See* I.C.J. STAT. art. 36, para. 6 (declaring that "[i]n the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court").

220. Case Concerning Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 146-50 (June 27).

ons pointed at or near a particular country would obviously be a worthwhile starting point, perhaps followed by the type of analysis used in Section IV-D of this Comment, but much more would likely be needed. As has been illustrated, in the advisory opinion itself the court was presented with a number of different scenarios involving the use of nuclear weapons, and yet remained unconvinced of the need for a total ban on such use. An argument based upon specific facts rather than hypotheticals or general policy statements would obviously carry more persuasive weight, but it still might not be enough to obtain a ruling that the threat or use of nuclear weapons by the United States was in violation of international law.

C. *Enforcing a Judgment of the World Court*

If a party was able to successfully clear the hurdles of jurisdiction, standing, and proof, and obtain an order for remedies of the type outlined above in Section V-A, the next issue it would have to confront would be that of enforcement. If the United States accepted a ruling of the court to pay damages to a country harmed by its nuclear weapons policy, or disarm, there would obviously be no problem. However, in the only case in which the court did order it to pay compensation and alter certain aspects of its foreign policy,[221] the United States has steadfastly refused to comply.[222] Given that the stakes in that case were not nearly as significant as putting the entire United States national defense strategy at risk,[223] it seems unlikely that the United States would comply with any ruling that required it to either pay damages for the use of nuclear weapons, or substantially alter its national defense policy.

Assuming the United States refused to acquiesce in a judgment of the type discussed, the party that obtained the judgment would then have few practical options for recourse in the realm of enforcement. This dearth of choices is evidenced by the fact that the only enforcement mechanism outlined in the World Court's charter is the United Nations Security

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221. Case Concerning Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 14 (June 27).

222. *See* I.C.J.Y.B. 1988-1989, No. 43 at 167-69, U.N. Sales No. 568 (reprinting 1988 U.N. resolution calling on United States to comply with decision in Nicaragua case for third time).

223. *See* Case Concerning Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 146-50 (June 27) (requiring United States to refrain from further involvement in internal affairs of Nicaragua, and ordering it to pay compensation for damage caused by mining of harbor).

Council.[224] Furthermore, since the Security Council has the discretion as to whether to act upon a request for enforcement of the court's opinion,[225] even that lone mechanism cannot be counted on to enforce a ruling. Expecting the Security Council to enforce a decision of this magnitude, with all its underlying political implications, seems a bit unrealistic, especially since it never enforced the judgment in the Nicaragua case. This scenario is even more difficult to imagine because the United States, as well as the other major nuclear powers, currently retains an automatic veto privilege over decisions of the Security Council.[226]

The lack of a practical mechanism to enforce judgments of the World Court (as well as decisions of the United Nations and the Security Council in general) has prompted a number of scholars to suggest proposals for reform. Most of these involve enabling the United Nations and the Security Council to play a larger and more direct role in ensuring disarmament. One of the more modest of these proposals simply calls for a restructuring of the U.N. Security Council so as to revoke the nuclear powers' veto privilege.[227] Among the more radical is to establish a type of "limited world authority"[228] in line with the concept of a "new world order."[229] An example of the latter type calls for establishing a sort of global police force under the United Nations' authority to specifically enforce such a policy.[230] Another would require that the nuclear powers place part of their nuclear arsenals in the hands of the United Nations, so

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224. *See* U.N. CHARTER art. 94, para. 2 (explaining that "[i]f any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council").

225. *See id.* (adding that the Security Council "*may*, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment") (emphasis added).

226. *See id.* art. 23, para. 1 (establishing that "[t]he Republic of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America shall be permanent members of the Security Council"); *id.* art. 27, para. 3 (requiring that "[d]ecisions of the Security Council on all matters [other than procedural] shall be made by an affirmative vote of seven members, *including the concurring votes of the permanent members*") (emphasis added).

227. *See* Keith L. Sellen, *The United Nations Security Council Veto in the New World Order,* 138 MIL. L. REV. 187, 230 (1992) (claiming that "[t]he Security Council has great potential . . . as a central international authority").

228. *See* Burns H. Weston, *Lawyers and the Search for Alternatives to Nuclear Deterrence*, 54 U. CIN. L. REV. 451, 462 (1985) (calling for "functional authorities capable, on a global or regional level, of maintaining the peace").

229. *See* Keith L. Sellen, *The United Nations Security Council Veto in the New World Order,* 138 MIL. L. REV. 187, 187, 208 (1992) (asserting that "[a] new world order is . . . an aspiration—and an opportunity," and specifying need for "unity, coercion, and justice" to be enforced by "a central international authority").

230. *See* Burns H. Weston, *Lawyers and the Search for Alternatives to Nuclear Deterrence*, 54 U. CIN. L. REV. 451, 459 (1985) (suggesting use of Transnational Police Forces "to

that it could be on equal footing with parties resisting decisions relating to nuclear disarmament.[231] Given the obvious implications for U.S. sovereignty, and the mixed record of U.N. enforcement actions in the past, such proposals are not likely to be enacted anytime in the near future.

VI. Challenging U.S. Nuclear Weapons Policy in a U.S. Court

Failure of a party to obtain relief through the World Court would not completely foreclose all opportunities to force a change in U.S. nuclear weapons policy. As one scholar has suggested, countries that feel threatened by the United States' use or continued deployment of nuclear weapons might try to bring suit in an American court to settle the issue.[232] This approach may seem promising at first, given that the Supreme Court has long upheld the principles of international law in other contexts,[233] but it is fraught with perils. First, U.S. courts have traditionally given extremely broad deference to the executive branch of government when dealing with matters of foreign policy and national defense.[234] Second, although the U.S. government can be sued for some

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stop aggression, to apply sanctions, to interdict arms transfers, to help verify disarmament/arms control regimes, and so forth").

231. *See* David Shukman, Tomorrow's War: The Threat of High-Technology Weapons 29-32 (1996) (relating proposal of Edward Teller, key figure in development of first nuclear bombs at Los Alamos in the 1940s, that countries turn over control of all their nuclear weapons, weapons grade plutonium, and sizable portions of their nuclear arsenals to United Nations so that it could induce compliance with non-proliferation concept).

232. *See* John Kuhn Bleimaier, *Nuclear Weapons and Crimes Against Humanity Under International Law*, 33 Cath. Law. 161, 171 (1990) (arguing that "[w]hile the Executive Branch of government may decide to walk out on international tribunals, our judiciary has the strength to compel compliance with international law").

233. *See, e.g.*, First Nat'l City Bank v. Banco Para El Commercio Exterior de Cuba, 462 U.S. 611, 623 (1983) (reaffirming that "international law . . . is part of our law" in determining whether U.S. bank could use loss of assets seized by Cuban government to offset debt owed to Cuban bank); The Paquete Habana, 175 U.S. 677, 691, 700 (1900) (considering whether neutral fishing vessels are protected from seizure during times of war under international law); Hilton v. Guyot, 159 U.S. 113, 162 (1895) (assessing validity of monetary judgment rendered in France against U.S. trading company).

234. *See, e.g.*, Rostker v. Goldberg, 453 U.S. 57, 66 (1981) (emphasizing need for "healthy deference to legislative and executive judgments in the area of military affairs"); Gilligan v. Morgan, 413 U.S. 1, 10 (1973) (noting that "[t]he complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the legislative and executive branches"); Simmons v. United States, 406 F.2d 456, 459 (5th Cir. 1969) (stating "[t]hat this court is not competent or empowered to sit as a super-executive authority to review the decisions of the Executive and Legislative branches of government

torts,[235] it is generally immune from suit for discretionary acts committed by its employees in the exercise of their official duties.[236] Third, some courts have ruled breach of a treaty alone may not be sufficient to establish a cause of action for violations of international law.[237] The difficulty with overcoming these many obstacles is vividly illustrated by the case of *Goldstar (Panama) S.A. v. U.S.*.[238]

The plaintiffs in *Goldstar* were a group of Panamanian businessmen who sued the U.S. government for negligently failing to provide protection to the residents and businesses of Panama during its 1989 invasion and occupation.[239] The businessmen sued under the Alien Tort Statute,[240] alleging that such negligence amounted to a violation of the United States' obligation to ensure such protection under either the Hague Convention Respecting the Law and Customs of War on Land of

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in regard to the necessity, method of selection, and composition of our defense forces is obvious and needs no further discussion"), *cert. denied*, 395 U.S. 982.

235. *See* 28 U.S.C. § 1346(b) (1994) (giving district courts exclusive jurisdiction over "civil actions on claims against the United States, for money damages . . . , for injury or loss of property . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred"); 28 U.S.C. § 2674 (1994) (holding U.S. government responsible for tort claims "in the same manner and to the same extent as a private individual under like circumstances"); Vandergrift v. United States, 500 F. Supp. 229, 233 (E.D. Va. 1978) (holding that "[w]hen an agency of the United States undertakes a task, it must perform the task with due care").

236. *See* 28 U.S.C. § 2680 (1994) (providing exception to tort liability for "[a]ny claim based upon . . . the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused"); Block v. North Dakota, 461 U.S. 273, 287 (1983) (finding that "[t]he basic rule of federal sovereign immunity is that the United States cannot be sued at all without the consent of Congress"); *see also* Berkovitz v. United States, 486 U.S. 531, 536-37 (1988) (outlining criteria used to assess whether government's act of approving polio vaccine could fall within discretionary function and stating that purpose of exception is to insulate the Government "from liability if the action challenged in the case involves the permissible exercise of policy judgment"); Piechowicz v. United States, 885 F.2d 1207, 1211-12 (4th Cir. 1989) (restricting exception to cases in which act involves making judgment or choice that rests on public policy considerations).

237. *See* Goldstar (Panama) S.A. v. United States, 967 F.2d 965, 968-69 (4th Cir.) (holding that breach of treaty alone does not establish cause of action, unless treaty is self-executing or followed up with specific legislation outlining causes of action), *cert. denied*, 506 U.S. 955 (1992); Diggs v. Richardson, 555 F.2d 848, 851 (D.C. Cir. 1976) (noting that whether treaty is self-executing is matter for court to decide).

238. 967 F.2d 965 (4th Cir. 1992).

239. *Id.* at 967.

240. 28 U.S.C. § 1350 (1976). The statute reads as follows: "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." *Id.*

1907,[241] or, alternatively, under the Federal Tort Claims Act.[242] Their case was dismissed in federal court after the federal court held that the United States government is immune from suit under the Alien Tort Statute unless it has explicitly waived such immunity;[243] the United States has not waived immunity to torts brought under that statute by merely being party to the Hague Convention treaty, because treaties do not create private causes of action without further congressional action[244] unless they are self-executing;[245] and the Hague Convention is not a self-executing treaty, and therefore creates no cause of action.[246] The court also noted that the Federal Tort Claims Act contains a specific exception for "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused;"[247] determining the extent of police force needed to protect Panamanian citizens and their property was a discretionary decision falling within the immunity exception;[248] and finally, since sovereign

241. Art. 43, 36 Stat. 2295, 2306 (requiring occupying force to "take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country"); *Goldstar*, 967 F.2d at 967.

242. 28 U.S.C. § 1346(b) (1994); *Goldstar*, 967 F.2d at 967.

243. *Goldstar*, 967 F.2d at 968; *see* Sanchez-Espinoza v. Reagan, 770 F.2d 202, 207 (D.C. Cir. 1985) (holding that "[a] waiver of sovereign immunity must . . . be found" before plaintiffs could sue U.S. government and its officials under Alien Tort Statute for providing military assistance to Contra rebels in Nicaragua); Canadian Transp. Co. v. United States, 663 F.2d 1081, 1092 (D.C. Cir. 1980) (affirming dismissal of case involving suit against United States by Canadian shipping company that was refused admittance into port at Norfolk, Virginia, because plaintiffs had not shown that U.S. waived sovereign immunity claim).

244. *Goldstar*, 967 F.2d at 968; *see* Edye v. Robertson, 112 U.S. 580, 598 (1884) (characterizing treaty as "primarily a compact between two independent nations," and unenforceable by courts unless they "contain provisions which confer certain rights . . . of the nature of municipal law"); Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829) (holding that "when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court").

245. *Goldstar*, 967 F.2d at 968; *see* United States v. Thompson, 928 F.2d 1060, 1066 (11th Cir. 1991) (affirming that "a treaty must be self-executing in order for an individual citizen to have standing to protest a violation of the treaty" and that "[a] treaty is self-executing if it creates privately enforceable rights").

246. *Goldstar*, 967 F.2d at 968.

247. 28 U.S.C. § 2680(a) (1994); *Goldstar*, 967 F.2d at 970.

248. *Goldstar*, 967 F.2d at 970.

immunity exists as to the one foreseeable cause of action, the federal courts have no subject matter jurisdiction over the dispute.[249]

A party attempting to sue the United States for its nuclear weapons policy would likely encounter the same difficulties as the Panamanian businessmen in *Goldstar*. If the party alleged that U.S. policy violated one of its specific treaty obligations, it would have to show either that the treaty itself was designed to give parties a cause of action, or that Congress had later passed legislation to that effect. Proving the former would be extremely difficult, for even when certain treaties specifically call for compensation for a violation of their provisions, the courts may still find that such treaties do not create a cause of action.[250] If there were no cause of action under any specific treaty provision, the party could try to sue under the Federal Tort Claims Act. To be successful, however, it would have to first show that the part of the government's nuclear weapons policy to which it objected was not an act immune from suit as a discretionary function. It seems likely that deciding in what manner nuclear weapons should be employed to further the goal of national defense could be akin to the decision in *Goldstar* regarding in what ways a police force should be deployed during an occupation, and so ruled discretionary.

Assuming that neither of these two methods worked, the party might try to claim that the U.S. policy was a violation of customary international law generally, without specifying any particular treaties.[251] If the party had already obtained a favorable ruling from the World Court to that

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249. *Id.* at 970.

250. *See id.* at 968 (refusing to find that Hague Convention created private cause of action despite inclusion of provision requiring compensation for abrogation of treaty); Argentine Republic v. Amerada Hess Shipping Corp. 488 U.S. 428, 442 (1989) (finding that Geneva Convention did not create private cause of action despite language seemingly to the contrary). The relevant portion of the Hague Convention states that "[a] belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces." Hague Convention Respecting the Law and Customs of War on Land, (October 18) 1907, art. 3, 36 Stat. 2277, 2290. The Geneva Convention asserts that the owner of a merchant ship which was illegally boarded "shall be compensated for any loss or damage that may have been sustained." Geneva Convention of the High Seas, Apr. 29, 1958, art. 22(3), 13 U.S.T. 2312, 2319, 450 U.N.T.S. 82, 94.

251. *See* Filartiga v. Pena-Irala, 630 F.2d 876, 886-87 (2d Cir. 1980) (finding former Paraguayan police inspector liable for kidnapping and torturing son of Paraguayan activist as violation of international law). The court found that it had jurisdiction over any violation of "the law of nations" under the U.S. Constitution, art. 1, Sec. 8, cl. 10., even absent the enactment of a specific Congressional statute codifying the law. *Id.* at 887; *see also The Paquete Habana*, 175 U.S. at 700 (ruling in favor of owner of Spanish fishing vessel seized by U.S. in violation of international law against piracy, even though there was "no treaty and no controlling executive or legislative act or judicial decision" on issue).

effect, it could perhaps be successful in convincing a federal court of the merits of its case. However, at least one federal court decision has indicated that if the conduct at issue was specifically approved by the Congress and President, it could be continued even if in violation of international law.[252] Of course, the conduct at issue in that case, namely the illegal seizure of a fishing vessel,[253] is not nearly as egregious a violation of international law as would be the misuse of nuclear weapons, but the fact remains that any U.S. court would undoubtedly feel itself politically constrained to uphold the executive branch's nuclear weapons policy. Clearly, there is no question that both Congress and the President have over the years expressed general approval of the current U.S. nuclear posture.

VII. CONCLUSION

In hindsight, it might have been better for the World Court to have refused to address the hypothetical question of whether the use of nuclear weapons could ever be legal under international law. After all, determining whether the use of nuclear weapons is legal "in any circumstance" necessarily requires the court to consider an almost infinite number of possible scenarios, a daunting task well beyond any court's competence. Of course, it is understandable that the court might have wanted to rule on the issue in order to prevent a concrete scenario in which nuclear weapons are used from arising, but in doing so it has actually lent credibility to the idea that nuclear weapons can legally be used in self-defense.

The fact that the court could not definitively answer the question posed is unfortunate, but does not necessarily deprive its opinion of all validity. The mere finding that nuclear weapons are not exempt from the requirements of international law is a fairly substantial declaration in itself. If that finding cannot be relied upon to ensure that nuclear weapons are never used, it may at least cause countries to think carefully about when, where, and how they are used, so as to comply as closely as possible with the court's holdings. Furthermore, the court's finding that the nuclear powers are legally bound to conclude a complete disarmament treaty will undoubtedly put continuing pressure on them to move in that direction. For even though the court failed to specify any particular timetable for

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252. *See The Paquete Habana*, 175 U.S. at 711 (emphasizing that "enemy property . . . which by the modern usage of nations is not subject to capture as prize of war, cannot be condemned by a prize court, . . . *without express authority from Congress*") (emphasis added); *Edye*, 112 U.S. at 598 (finding that if congressional acts conflicts with treaty, congressional acts take precedence).

253. *The Paquette Habana*, 175 U.S. at 711.

when such negotiations must be concluded, countries must at least continue to demonstrate that they are making a good faith effort to do so to avoid intervention by the court in the future. And, as the court seemed to acknowledge toward the end of its opinion, a gradual move toward voluntary disarmament is probably the only true solution to the problem. Certainly voluntary disarmament would be a preferrable alternative to the type of proposals outlined above that seek to place the nuclear weapons issue in the hands of international institutions, in the event the United States does decide it can do so without compromising its national defense strategy.

Even if the current nuclear powers finally do conclude a treaty for complete disarmament, however, nuclear weapons are not likely to ever be totally eliminated from the face of the earth. There will probably always be some rogue country or terrorist group that is able to acquire the necessary expertise and materials to construct one. Throughout history, the only time people have typically stopped using certain weapons is when new, more efficient (and usually more destructive) ones have arisen to take their place. The only real solution is to discover a means of defending against the use of nuclear weapons. The much maligned "Star Wars" program of the 1980s was apparently unable to fulfill that role, but perhaps as new technologies emerge a workable system can be designed that will. Certainly, the United States does not want to remain in the position of having either absolutely no defense against a nuclear attack, or having a defense that requires the killing of thousands, if not millions, of innocent people, especially given the fact that such a defense is fundamentallly theoretical in nature.