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# NUCLEAR OBJECTIONS: THE PERSISTENT OBJECTOR AND THE LEGALITY OF THE USE OF NUCLEAR WEAPONS

## INTRODUCTION

The Charter of the United Nations begins with a stern charge, inspired by the horrible war which led to its crafting: "to save succeeding generations from the scourge of war . . . and to reaffirm faith in fundamental human rights [and] in the dignity and worth of the human purpose."<sup>1</sup> It was this faith that had been severely shaken by the pictures emerging from the German death camps. Thus, the United Nations ("UN") embarked upon its primary mission in defense of the human purpose—to safeguard the global community from war by not only keeping peace, but by making peace as well.<sup>2</sup> While the United Nations has grown in its scope and commitment to social and economic development, the basic commitment to peace remains the cornerstone of the organization. This commitment is exemplified by the continued growth of United Nations peacekeeping missions around the world: Currently over 26,000 civilian and military personnel are engaged in sixteen different peacekeeping operations.<sup>3</sup> Despite a budgetary

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<sup>1</sup> U.N. CHARTER pmbl.

<sup>2</sup> This commitment to seek peace is embodied in the concept of "collective security." Under collective security, a group of states accepts a legal obligation to move promptly to counter any act of aggression against a member of the community. The specific procedure for the implementation of a collective security system is outlined in Chapter VII of the Charter, entitled "Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression." Chapter VII gives the Security Council the authority to respond to events that threaten international peace with economic or diplomatic sanctions or, if these measures fail, with military force. Further, the chapter binds member states to comply and assist with actions taken by the Council. However, Article 51 of the Charter was carefully drafted to state that "nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations . . . ." *Id.* at art. 51.

<sup>3</sup> *The Year in Review 1996: UN Peace Missions* (visited May 20, 1997) <<http://www.un.org/depts/dpkp/yir96/peace96.htm>>.

crisis at the United Nations, the demands and complexity of peacekeeping operations have expanded, and the Secretary-General has stated that such expansion is necessary to move the United Nations toward its goal to be a peacemaker.<sup>4</sup> That wars still occur does not mean that the United Nations has failed in its duty to curtail the use of force in international relations, but rather that the challenge of doing so is a complex and ever-evolving one. The United Nations itself is but part of a larger process of international law, and a relative newcomer in a field of law that has been evolving for well over a thousand years: *jus in bello*, the law of war.<sup>5</sup>

In its attempts to regulate the conduct of states and their use of force, the Charter of the United Nations represents another step forward in the evolution of *jus in bello*.<sup>6</sup> Such an evolutionary step must have been prompted not only by the horrible crimes perpetrated by the Nazis over the course of World War II, but also by the new weapon which the Allies had raced to develop to bring an end to the war—the atomic bomb. This weapon of immense destructive power represented a revolutionary leap forward in the methods of war, and yet another challenge for the system of law which arose to govern the use of force among states. This new threat has engendered an effort to contain it in many ways similar to past efforts to control weapons which pose such threat to humanity that their use, even in war, is unacceptable.<sup>7</sup>

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<sup>4</sup> BOUTROS BOUTROS-GHALI, BUILDING PEACE AND DEVELOPMENT 1994: ANNUAL REPORT ON THE WORK OF THE ORGANIZATION 151-63 (1994). The recent UN peacekeeping operations in Rwanda and Bosnia-Herzegovina are indicative of the expanded scope of UN peacekeeping. In Rwanda, UN forces took on the responsibility of supplying and maintaining refugee camps. The United Nations Protection Forces in Bosnia-Herzegovina were in place long before the warring factions had agreed to a peace plan. *Id.* at 225-28, 250-52.

<sup>5</sup> The law of war, one of the oldest fields of international law, has engendered much scholarly work. For a general discussion, see, e.g., HUGO GROTIUS, THE LAW OF WAR AND PEACE (Francis W. Kelsey et al. trans., 1925).

<sup>6</sup> On the Charter provisions concerning the use of force by states, see generally D.W. BOWETT, SELF DEFENCE IN INTERNATIONAL LAW (1958); IAN BROWNIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES (1963); HAYS KELSEN, COLLECTIVE SECURITY IN INTERNATIONAL LAW (1957).

<sup>7</sup> History marks many attempts to regulate the use of particular means and methods of warfare, such as the complete banning of the use of chemical and biological weapons. Similar prohibitions reach to the earliest recorded history of international law. See *infra* notes 100-105 and accompanying text; see generally THE LAW OF WAR: A DOCUMENTARY HISTORY (Leon Friedman ed., 1972).

A weapon capable of devastating an entire city or country in a brief time lent a new urgency to the old threat of war.<sup>8</sup> In response to this increased threat, the International Court of Justice ("ICJ") has been asked several times over the past decades to apply the principles of international law to the varied threats presented by nuclear weapons.<sup>9</sup> The latest appearance of nuclear weapons before the ICJ did not come in the form of a dispute between states, but rather as a request from the General Assembly for an advisory opinion—a far more general statement on the status of international law. The request itself was no less general, asking the court to rule on the legality, under any circumstances, of a state's threat to use, or the actual use of nuclear weapons.<sup>10</sup> On July 8, 1996, the court answered with a qualified "no," stating that "the threat or use of nuclear weapons would generally be contrary

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<sup>8</sup> Some scholars hold that during the Cold War, détente between the superpowers was actually encouraged through a policy of "mutually assured destruction": Neither power would risk confrontation when any such confrontation could potentially escalate to nuclear holocaust. Of course, a system of deterrence based on mutually assured destruction always carries with it this destruction as the price of failure. See generally Kenneth Waltz, *The Spread of Nuclear Weapons: More May Be Better*, ADELPHI PAPERS, Autumn 1991. But see Lewis Dunn, *Nuclear Proliferation: A Defense In-Depth*, in *LIMITING NUCLEAR PROLIFERATION* 283 (Jed Snyder ed., 1985). After the Cold War, nuclear proliferation presents the additional threat of nuclear weapons spreading to already destabilized regions. See Dunn, *supra*, at 283-99; Victor Gilinsky, *Restraining the Spread of Nuclear Weapons: A Walk on the Supply Side*, in *LIMITING NUCLEAR PROLIFERATION*, *supra*, at 255-75; Jed C. Snyder & Samuel F. Wells, Jr., *Introduction to LIMITING NUCLEAR PROLIFERATION*, *supra*, at xvii-xxvii.

<sup>9</sup> The United Nations Charter split the United Nations into six main divisions, or "principal organs": the Secretariat, the Trusteeship Council, the Security Council, the General Assembly ("GA"), the International Court of Justice, and the Economic and Social Council ("ECOSOC"). The Secretariat is the administrative body of the United Nations. The Trusteeship Council was established to supervise the administration of the trust territories left by the mandates of the League of Nations. The Security Council is entrusted with the primary responsibility for keeping world peace. The ICJ is the principal judicial organ of the UN and functions in accordance with its Statute. The court is empowered to decide, in accordance with international law, such cases as are submitted to it by states. It may also choose to grant advisory opinions at the request of the General Assembly or Security Council on any legal question and, at the request of other organs of the UN and specialized agencies, on any legal question within the scope of the organs' or agencies' activities. See *New Zealand Ministry of Foreign Affairs and Trade, UNITED NATIONS HANDBOOK* 1-20 (1994).

<sup>10</sup> For the text of the request, see *infra* note 18 and accompanying text.

to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law."<sup>11</sup>

The "rules of international law applicable in armed conflict" may be among the oldest fields of international law. Yet, the process and formation of *jus in bello* derives from the same sources, and is governed by the same factors, which control the formation of other aspects of the law of nations. It was these basic principles of international law that governed the court's treatment of the Request.<sup>12</sup> This Note, however, is concerned primarily with the use of one of those sources of law as it may relate to nuclear weapons: customary international law.

International custom generally can be defined as "law resulting from a general and consistent practice of States—*opinio juris*—with a sense that the practice is required by law, not merely done as an act of courtesy or grace."<sup>13</sup> If enough states follow a practice for a sufficient time period and, more importantly, do so out of a sense of legal obligation, that

<sup>11</sup> Legality of the Threat or Use of Nuclear Weapons at 36, 1996 I.C.J. \_\_\_\_ (July 8) [hereinafter Advisory Opinion] (as the opinion had not been published at press time, hereinafter pinpoint citations will refer to the original draft of the decision rendered) (on file with author and also available on the Internet at Cornell Law Library, *Legality of the Threat or Use of Nuclear Weapons* (last modified Sept. 1996) <<http://www.law.cornell.edu/icj/icj1/opinion.htm>>). The court followed this broad statement with a narrow qualification:

[I]n the view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitely whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.

*Id.*

<sup>12</sup> Advisory Opinion, *supra* note 11, at 36. Article 38 of the Statute of the International Court of Justice lists the sources from which international law may be drawn. They include:

- a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b) international custom, as evidence of a general practice accepted as law;
- c) the general principles of law recognized by civilized nations;
- d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 38 [hereinafter ICJ STATUTE].

<sup>13</sup> Louis Henkin, *General Course on Public International Law*, 216 REC. DES COURS 1, 46 (1989-IV).

particular practice may assume the status of a rule of international law. To require unanimity among states, however, would condemn the role of custom to mere theory. But attempting to bind a sovereign state to a rule it finds offensive invites that state to remove itself from the process of lawmaking entirely, threatening the very idea of an international community. In response to this dilemma, a specialized mechanism of customary law formation has arisen: the Persistent Objector Rule ("Rule").<sup>14</sup>

In answering the Request, the court did indeed find that certain rules of customary international law prohibited, or severely curtailed, the threat or use of nuclear weapons.<sup>15</sup> Therefore, should the nuclear states be brought before the court for their continued use of nuclear weapons, or continued policies constituting a threat to use nuclear weapons, these states may choose to cast themselves in the role of persistent objector.<sup>16</sup> This Note analyzes the ramifications of such a use of the Rule, and examines whether the Rule's use should be permitted under such circumstances. Part I examines the nature of the Request made by the General Assembly, the opinion of the court and the possible place for the persistent objector in nuclear politics. Part II outlines the history, elements, and policy goals of the Rule as a tool of international lawmaking. Part III seeks to apply the Rule to the circumstance of the

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<sup>14</sup> The Rule attempts to provide a place for the objector within the community by allowing a state to exempt itself from an emerging custom of international law. In order to avail itself of the Rule, however, the objector must satisfy two elements, revealed in the name of the Rule itself: The objecting state must lodge its objection to a common practice of states before a rule of custom has formed, and must object both persistently and consistently so as to put all states adhering to the forming custom on notice that the objector will not be bound to the practice. Thus, where the formation of custom might otherwise drive a state from the international legal system, the Rule not only provides a place for the objector within the system, but also demands that the objector be an active participant in the legal process in order to preserve its place as objector. For an in depth discussion of the nature and elements of the Rule, see *infra* notes 30-64 and accompanying text; see also Ted L. Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT'L L.J. 457 (1985).

<sup>15</sup> See Advisory Opinion, *supra* note 11, at 31.

<sup>16</sup> The members of the so-called "nuclear club" included, as of 1993, Belarus, China, Kazakhstan, Russia, Ukraine, the United Kingdom and the United States. Also, while they do not officially admit to possessing nuclear weapons, India, Israel and Pakistan are widely suspected of maintaining a nuclear arsenal. See NATURAL RESOURCES DEFENSE COUNCIL, NUCLEAR NOTEBOOK (Dec. 1993).

nuclear case, by examining whether the Rule can and should be applied to the nuclear states in light of the nature of the customs limiting the use of nuclear weapons and the goals of the Rule.

The rules of customary law that the court found to limit the threat or use of nuclear weapons are rooted in principles of already existing and forming rules of humanitarian and environmental law. These principles, in turn, are rules of *jus cogens*: rules upon which international relations are based, and from which no derogation is permitted. This exclusive property of rules of *jus cogens* serves to bind even the persistent objector. Allowing a state to derogate from a fundamental principle of international law would create an intolerable inequality among nations, and among their citizens as well, since state would be acting under, essentially, a different set of fundamental principles defined by previous objections. Thus, the nuclear objector, while fitting the definition of the persistent objector, should be denied any potential benefit from the Rule.

## I. THE CASE BEFORE THE COURT

### A. *The Request and Opinion on the Legality of the Threat or Use of Nuclear Weapons*

On December 15, 1994, the United Nations General Assembly ("General Assembly") adopted Resolution 49/75K, making the following request:

*The General Assembly . . .*

*Decides, pursuant to Article 96, paragraph 1, of the Charter of the United Nations, to request the International Court of Justice urgently to render its advisory opinion on the following question:*<sup>17</sup>

*"Is the threat or use of nuclear weapons in any circumstances permitted under international law?"*<sup>18</sup>

The passage of this resolution was the product of a combined effort of nonaligned nations<sup>19</sup> and nongovernmental organiza-

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<sup>17</sup> Article 96 grants, in part, the General Assembly and Security Council authority to request of the ICJ an advisory opinion on "any legal question." U.N. CHARTER art. 96.

<sup>18</sup> G.A. Res. 49/75K, U.N. GAOR, 49th Sess., Supp. No. 49, at 1, U.N. Doc. A/49/49 (1994) [hereinafter Request].

<sup>19</sup> The draft resolution, which was passed as Res. 49/75K, was introduced in

tions ("NGOs")<sup>20</sup> who shared a growing concern over the proliferation of nuclear weapons in the post-Cold War era. The urgency was compounded by the perception of many non-nuclear states that the nuclear states had failed to live up to their promises of disarmament included in the Nuclear Non-Proliferation Treaty.<sup>21</sup>

This is not the first time the legality of nuclear weapons has come into question. As early as 1961, the General Assembly had passed a resolution condemning the weapons. That resolution reads in part:

*The General Assembly,*

Believing that the use of weapons of mass destruction, such as nuclear and thermonuclear weapons, is a direct negation of the high ideals and objectives which the United Nations has been established to achieve . . .

*1. Declares that:*

(a) The use of nuclear and thermo-nuclear weapons is contrary to the spirit, letter and aims of the United Nations and, as such, a direct violation of the Charter of the United Nations [and] . . . contrary to the rules of international law and to the laws of humanity.<sup>22</sup>

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the First Committee (Disarmament) by Indonesia on behalf of the Non-Aligned Countries. See United States, First Committee, General and Complete Disarmament: Request for an Advisory Opinion from the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons, U.N. GAOR 48th Sess., Agenda Item 72, U.N. Doc. A/C.1/48/L.25 (1993).

<sup>20</sup> In January of 1992, the International Association of Lawyers Against Nuclear Arms ("IALANA"), in conjunction with the International Peace Bureau and International Physicians for the Prevention of Nuclear War, established the World Court Project, an effort to lobby countries in support of the submission of a request for an advisory opinion and an eventual finding of a prohibition against nuclear weapons. See NICHOLAS GRIEF, *THE WORLD COURT PROJECT ON NUCLEAR WEAPONS AND INTERNATIONAL LAW* (2d ed. 1993).

<sup>21</sup> Treaty on the Non-Proliferation of Nuclear Weapons, opened for signature July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 (entered into force Mar. 5, 1970) [hereinafter NPT]. In Article VI of the NPT, state parties pledge to "pursue negotiations in good faith on effective measures relating to . . . nuclear disarmament." Dissatisfaction with the progress made by the nuclear states on this promise was a major theme marking the NPT renewal talks in 1994. See Douglas Jehl, *U.S. in New Pledge on Atom Test Ban*, N.Y. TIMES, Jan. 31, 1995, at A5.

<sup>22</sup> G.A. Res. 1653, U.N. GAOR, 16th Sess., Supp. No. 17, at 4, U.N. Doc. A/5100 (1961). This resolution has been reaffirmed twice, once in 1972 by G.A. Res. 2936, U.N. GAOR, 27th Sess., Supp. No. 30, at 5, U.N. Doc. A/8730 (1972), and again in 1980 by G.A. Res. 35/152D, U.N. GAOR, 35th Sess., Supp. No. 48, at 68, U.N. Doc. A/35/48 (1980). While each of these resolutions passed by a wide margin, it was over the objections, in most cases, of the nuclear states. Hence, these resolutions have not had an effect on the nuclear policy of these states.



Nuclear weapons, however, have only rarely been a topic before the ICJ, appearing only twice in 1974 in the Nuclear Tests Cases.<sup>23</sup> Notably, the ICJ recently refused to reopen consideration of the New Zealand Nuclear Test Case to consider the resumption of French nuclear testing in islands in the South Pacific, leaving the current request for an advisory opinion the first before the court since 1974.<sup>24</sup> The willingness of the General Assembly to submit such a request may mark an increase in concern over the threat presented by nuclear weapons, a response to Secretary-General Boutros Boutros-Ghali's request that "United Nations organs turn to the court more frequently for advisory opinions."<sup>25</sup>

The ICJ responded to the "urgency" cited in the Request by choosing to reach the merits of the question. The ICJ's power to grant advisory opinions is discretionary.<sup>26</sup> It is the exer-

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However, the court did take note of the fact that these resolutions are proof of "the desire of a very large section of the international community to take, by a specific and express prohibition of the use of nuclear weapons, a significant step forward along the road to complete nuclear disarmament . . . ." Advisory Opinion, *supra* note 11, at 27.

<sup>23</sup> Both of the 1974 Nuclear Test Cases sprung from French nuclear testing. Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. 253 (Dec. 20); Nuclear Tests (N.Z. v. Fr.), 1974 I.C.J. 457 (Dec. 20). New Zealand and Australia argued that the radioactive fallout from the French nuclear testing posed an illegal threat to the territory of both nations. Responding to this argument, the court issued an "interim order of protection" calling for France to cease testing while the cases were pending. Nuclear Tests (Austl. v. Fr.), 1973 I.C.J. 99 (June 22). France ignored this order and refused to recognize the proceedings before the court. However, France ceased testing before the case could be considered in full and declared that no further testing would be performed in the region. Nuclear Tests (N.Z. v. Fr.), 1974 I.C.J. 457, 478 (Dec. 20). Accordingly, the court found the cases moot, dismissing them without reaching the merits. See BURNS H. WESTON ET AL., *INTERNATIONAL LAW AND WORLD ORDER* 1003 (1980). Notably, the court recently refused to reconsider the cases in light of the resumption of French testing in the region. 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 Case (N.Z. v. Fr.), 1995 I.C.J. 288, 307 (Sept. 22).

<sup>24</sup> See *Hague Denies Injunction on French Nuclear Tests*, N.Y. TIMES, Sept. 23, 1995, at A4.

<sup>25</sup> BOUTROS BOUTROS-GHALI, *AN AGENDA FOR PEACE: PREVENTIVE DIPLOMACY, PEACEMAKING, AND PEACE-KEEPING* 22 (1992).

<sup>26</sup> ICJ STATUTE art. 65 reads in pertinent part: "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." See *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion), 1951 I.C.J. 15, 19 (May 28).

cise of this discretion that was the first point of contention between the nuclear and non-nuclear states. The court had to first determine that the Request constituted a "legal," as opposed to political, question, and that the General Assembly was competent to certify such a question to the court.<sup>27</sup> The court held that:

The fact that this question also has political aspects . . . does not suffice to deprive it of its character as a "legal question" and to "deprive the Court of a competence expressly conferred on it by its Statute." Whatever its political aspects, the Court cannot refuse to admit the legal character of a question which invites it to discharge an essentially judicial task, namely, as assessment of the legality of the possible conduct of states with regard to the obligations imposed upon them by international law.<sup>28</sup>

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<sup>27</sup> Each of the nuclear states submitting written arguments to the court argued that the court should have used its discretionary power to decline an advisory opinion on the grounds that the Request did not embody a "legal" question, as is required by the court for the exercise of discretion. This argument was usually presented in two parts: First, the nuclear states argued that the Request was too vague to be analyzed effectively. Since there has not been a threat or use of nuclear weapons provoking the current case, there would be an insufficient factual basis upon which the court could work. See Written Submission of France at 13-15 (as the written submissions had not been published at press time, hereinafter pinpoint citations will refer to the original draft of the statement submitted by each state) (on file with author); Written Submission of the United Kingdom at 28-29. Second, it was argued that nuclear weapons were, in fact, a political tool and a political problem to be solved through the treaty-making process. To give a legal opinion on nuclear weapons, it was feared, would hinder this process. See Written Submission of the Federal Republic of Germany at 4-5; Written Submission of the Russian Federation at 2; Written Submission of the United States at 5-6. See also *Certain Expenses of the United Nations (Advisory Opinion)*, 1962 I.C.J. 151, 155 (July 20) ("[I]n accordance with Article 65 of its Statute, the Court can give an advisory opinion only on a legal question. If a question is not a legal one, the Court has no discretion in the matter; it must decline to give the opinion requested. But even if the question is a legal one, which the Court is undoubtedly competent to answer, it may nonetheless decline to do so.").

<sup>28</sup> *Advisory Opinion*, *supra* note 11, at 9 (citations omitted). The court also responded to the more specific arguments of the nuclear states. In response to the vagueness argument, the court stated: "The purpose of the advisory function is not to settle—at least directly—disputes between States, but to offer legal advice to the organs and institutions requesting the opinion. The fact that the question put to the court does not relate to a specific dispute should consequently not lead the court to decline to give the opinion requested." *Advisory Opinion*, *supra* note 11, at 10-11 (citations omitted). In response to the argument that an opinion would hinder disarmament negotiations, the court found no convincing evidence that such damage would occur, and pointed out that an opinion would only be an "additional element" in the continuing disarmament and arms control process. See *Advisory Opinion*, *supra* note 11, at 11.

Having reached the merits of the question presented to it, the court found that the threat or use of nuclear weapons is illegal in all but the most extreme circumstance of self-defense. Moreover, the grounds for this decision lay in the customary rules of humanitarian law.<sup>29</sup> Thus, the nuclear states are faced with the possibility of finding not only their arsenals, but parts of their foreign policy, on the wrong side of international law.

### B. *Custom and the Role of the Persistent Objector*

The development of international law is often far more difficult to track than that of domestic common law. Rules of law are defined by the actions of states, whether by their participation in treaties or their adherence to custom. That customs may develop without a written instrument makes them no less binding upon states than treaties—once the existence of a customary rule has been acknowledged.<sup>30</sup> Article 38 of the Statute of the ICJ acknowledges such unwritten law by recognizing both “international custom, as evidence of a general practice of law [and] the general principles of law recognized by civilized nations.”<sup>31</sup> The former of these sources, a rule of international customary law, is formed when a significant group of states follow a certain practice or rule consistently out

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<sup>29</sup> See *supra* note 11 and accompanying text.

<sup>30</sup> Waldock compares the systems of international law and domestic common law, writing:

The great difference between them is that, whereas centuries of judicial action have crystallized the common law into a body of well-defined principles, the judicial process is so recent a phenomena [sic] in international law and its operation so intermittent that the unwritten element in the international system is still, much of it, undefined.

Humphery Waldock, *General Course on Public International Law*, 106 REC. DES COURS 1, 38 (1962-II).

<sup>31</sup> ICJ STATUTE art. 38. Importantly, international custom, while not formed through written instruments, does not necessarily remain unwritten. United Nations resolutions, which do not by themselves create rules of law, nonetheless may be cited as embodiments of already existing custom, provided that the traditional criteria for the formation of customs are met. In this way, UN resolutions, especially those passed by a large majority of states, may be cited as evidence of the *opinio juris* of states. See Advisory Opinion, *supra* note 11, at 26.

of a sense of legal obligation.<sup>32</sup> Custom, then, is a means by which law may be formed by acclamation of the international community.

Custom as a source of law in no way provides a bright line indicator of when a rule may be formed or even the exact boundaries of the rule itself. Another ambiguity presented by the use of custom as a source of international law is the status of a state that stands apart from its fellow states by rejecting a practice. Custom requires a significant number of states to participate in a particular practice before such a practice may be even considered to have achieved the position of customary rule of law. Yet the requirement of a general and consistent practice among states in no way demands unanimity among all members of the international community. A custom may still be recognized as a rule of international law despite the vociferous objections, in word and deed, from a particular state.<sup>33</sup> But in considering the place of this objector state, the essential anarchy of the international system must be remembered—no overarching authority exists for the enforcement of international law. A sovereign state can be pressured diplomatically, economically and even militarily, but its sovereignty remains. There is no international government or police force which can compel a state to act, even in accordance with international rules of law.<sup>34</sup>

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<sup>32</sup> WESTON ET AL., *supra* note 23, at 77-100.

<sup>33</sup> For an in-depth treatment of the elements of custom, see, e.g., Michael Akehurst, *Custom as a Source of International Law*, [1974-1975] BRIT. Y.B. INT'L L. 1, 24 (1977).

<sup>34</sup> The anarchy of the international system, the absence of an overarching authority to compel the observance of law, must not be confused with chaos, an absence of the rule of law altogether. Despite this anarchy states still have a strong incentive to follow some rule of law, whether that law is expressed in terms of treaty, custom or the ruling of a court. At the most basic level, the incentive toward law springs from the need to avoid and deter war. Historically, interstate violence has been most infrequent when there exists a strong international community subscribing to an accepted body of law. See generally ROBERT J. ART & ROBERT JERVIS, *INTERNATIONAL POLITICS, ANARCHY, FORCE, POLITICAL ECONOMY AND DECISION MAKING* (2d ed. 1985). With the end of the Cold War, a transition from a system of deterrence through balance of power between the superpowers to a system of collective security will require an even greater respect for the rule of law. See BOUTROS-GHALI, *supra* note 25, at 43-134.

## II. THE NATURE AND HISTORY OF THE PERSISTENT OBJECTOR

Clearly, a tension exists between the formation of rules of law through the international acclaim of custom and the almost inevitable existence of an objector. Law created by acclamation conflicts with the traditional notion that states may only be bound by their consent.<sup>35</sup> The Rule of the Persistent Objector has developed to remedy this problem. The Rule holds that a state that persistently objects to an emerging rule of customary international law will not be bound by it, despite the new rule's binding effect upon other members of the international community.<sup>36</sup> The application of the Rule, however, adds further ambiguities to the already ambiguous nature of customary law. How persistent must the objector be? What manner of objections are acceptable? Are all customs susceptible to the Rule? These uncertainties may account for the fact that the Persistent Objector Rule, while widely acclaimed by international jurists, has not been frequently referred to by the court. Moreover, it has never served as the primary basis for an ICJ decision. Still, the Persistent Objector Rule remains, at least in theory, a viable mechanism of international law. As states turn themselves more and more to lawmaking in areas of global effect, the role of objector may become more attractive to states that fear the possible tyranny of the majority. Thus, the scope of both terms used in the Rule's name remains unclear—there is much debate regarding what demonstrations of objection a dissenting state must make, and how persistent those objections must be.<sup>37</sup>

### A. *Elements of the Rule*

Defining the persistent objector rule as a mechanism of international customary law becomes more difficult when the boundaries of custom itself remain unclear. The court defines

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<sup>35</sup> See *infra* notes 65-75 and accompanying text.

<sup>36</sup> See Stein, *supra* note 14.

<sup>37</sup> For an in-depth discussion of the requirements of state practice, see, e.g., ANTHONY A. D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 88 (1971); H.W.A. THIRLWAY, *INTERNATIONAL CUSTOMARY LAW AND CODIFICATION* 58 (1972); David A. Colson, *How Persistent Must the Persistent Objector Be?*, 61 WASH. L. REV. 957 (1986).

custom as: (1) the general and or universal acceptance; (2) of a uniform practice; (3) for a considerable time period; and (4) *opinio juris*.<sup>38</sup> While seemingly clear, the problems of finding the limits set by this definition become apparent when words such as "general," "uniform" and "considerable" are applied to the practices of states. Questions of how custom may be formed and proven still trouble the international legal system, highlighting the difficulties in defining a rule which is itself an outgrowth of a still-changing sphere of law.<sup>39</sup>

The name of the Rule itself suggests its elements. First, a state must make an objection to an emerging custom so as to put its neighbors on notice of its views. Second, such objection must be made before the custom is formed, both persistently and consistently, so as to solidify the state's status as an objector.<sup>40</sup> The objection itself may come in two forms: (1) action, in which the state exercises a particular legal right that is threatened by the potential rise of a new custom; and (2) statements, through which a state makes a declaration of position on a legal right.<sup>41</sup>

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<sup>38</sup> Fisheries Jurisdiction (U.K. & N.I. v. Ice.), 1974 I.C.J. 3 (Dec. 18) (separate opinion of de Castro, J.)

<sup>39</sup> Gary L. Scott & Craig L. Carr, *The International Court of Justice and the Treaty/Custom Dichotomy*, 16 TEX. INT'L L.J. 347 (1981). Scott and Carr go so far as to argue that even the effort of seeking such boundaries is futile. They state:

It is a mistake to regard international law as a set of authoritative rules and principles for the standardization of conduct between nation states. The nations of the world can and do violate or disregard international legal standards when they think it is in their best interest to do so. . . . [T]here is little purpose in continuing the fiction that the rules and principles associated with international law speak directly and primarily to the nations of the world.

*Id.* at 357. While this view may be considered ultra-realist to the point of cynicism, it does highlight a truism of the international system: Operating in a state of anarchy, there is no authoritative force by which nations may be bound to follow the rules to which they themselves profess to subscribe. A full analysis of the nature of custom in international law is beyond the scope of this Note, but it will be necessary to an understanding of the persistent objector since the criticisms of the Rule will be similar to the criticisms of the system of international law itself.

<sup>40</sup> See Stein, *supra* note 14, at 457-58.

<sup>41</sup> See Colson, *supra* note 37, at 958.

## 1. Manner of Objections

It may seem that the express statement of a government provides the clearest indication of that state's policy and legal views. The weight of such express statements, however, is often difficult to determine due to the varied motivations with which official statements may be made and the context within which they are issued. Statements of policy are most often made outside of a courtroom setting and thus may lack the explicitness or precision needed for a legal analysis.<sup>42</sup> The different categories and contexts of statements highlight these varied considerations.<sup>43</sup>

(a) *Statements made during the establishment of a rule.* These statements offer perhaps the clearest indication of a state's legal position, as they are made in a legal context. Such statements include reservations or declarations filed upon signing or ratifying a treaty or international agreement; statements made during the final acts of diplomatic conferences and other forms of diplomatic communication. Occurring during legal acts, these statements may be phrased more deliberately than statements made in other settings.<sup>44</sup> Such a statement was issued by the United States in its reservation to the 1977 Geneva Protocol Additional Number I.<sup>45</sup> At the time of signature, the United States filed an "understanding" stating that the regulations of the Protocol, addressing the treatment of civilians in combat, "were not intended to have any effect on and do not regulate or prohibit the use of nuclear weapons."<sup>46</sup> This statement, accompanying an act creating a legal obligation, sought to define the state's understanding of that legal act, and prevent that state from being bound later by a custom formed by the practice evidenced in signing the treaty.

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<sup>42</sup> See Colson, *supra* note 37, at 958.

<sup>43</sup> These categories are taken from Colson, *supra* note 37, at 959-60.

<sup>44</sup> Colson, *supra* note 37, at 959.

<sup>45</sup> See *infra* note 100 and accompanying text.

<sup>46</sup> DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 920 (John A. Boyd ed., 1977). For a further discussion of statements issued by nuclear states regarding the threat or use of nuclear weapons, see *infra* notes 145-152 and accompanying text.

(b) *Statements during negotiations.* In this context, international law is used as a negotiating tool. States will invoke international law as a justification or defense of their position, or offer to change their position only so far as is necessary not to prejudice a legal right.<sup>47</sup> The purpose with which such statements may be offered, however, is in doubt—since the parties to the negotiations usually are already aware of their opponent's legal position, an invocation of international law in this context "serves as filler, a means by which to posture, to play to a domestic audience, or to make a statement for the record with an eye to the future."<sup>48</sup> Such a future, of course, may include an appeal to the Persistent Objector Rule. Statements of this type were used by the United States in negotiations surrounding the entry into force of the United Nations Conference on the Law of the Sea III ("UNCLOS III"). The United States sought to preserve deep-seabed mining rights, an area of the law of the sea regulated by this latest classification of the law of the sea. The U.S. argued that existing law already made the seabed *res communis* and, therefore, it should remain free to exploit as states are able. This position paved the way for the U.S. to sign UNCLOS III, with a separate agreement on rights to the deep seabed.<sup>49</sup>

(c) *Statements during domestic law making.* International law may be viewed as a coherent spectrum, ranging from laws governing a small national municipality to the rules that states agree upon to govern human relations.<sup>50</sup> With this cohesive character in mind, it may be understood that a state, realizing that its domestic policy must be equally in accordance with principles of international law as with those of its own legal system, will make statements of domestic law necessarily informed by an understanding of any international legal principle which may affect the operation of the domestic law.<sup>51</sup>

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<sup>47</sup> Colson, *supra* note 37, at 958.

<sup>48</sup> Colson, *supra* note 37, at 959.

<sup>49</sup> United Nations Convention on the Law of the Sea, With Annexes, and the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea, With Annexes, *signed by the United States* July 29, 1994, 1992 WL 725374.

<sup>50</sup> Colson, *supra* note 37, at 959.

<sup>51</sup> Monism, the theory that national and international law are part of the same system of law, stands in opposition to dualism, which holds that lawmaking inside and outside of states are merely parallel processes. For a more extensive discus-



Thus, the passage of a domestic law which carries with it international legal repercussions may be accompanied by a statement of national position on the relation between the new domestic statute and existing international law.<sup>52</sup> The United States and the law of the sea provide an example. In the 1983 Ocean Policy Statement, President Reagan proclaimed a 200-nautical-mile Exclusive Economic Zone, but stated that the establishment of this zone did not affect already existing rights regarding migratory fish stocks.<sup>53</sup>

The slippery nature of the naked statement has led some to discount it entirely as a source of custom and, therefore, a tenable method of objection.

A State may make certain claims in its diplomatic correspondence, but these often clash with competing claims of other States and thus are not a reliable indicator of the content of international law . . . . A State may say many things; it speaks with many voices, some reflecting divisions within top governmental circles . . . . But a State can act in only one way at one time, and its unique actions, recorded in history, speak eloquently and decisively.<sup>54</sup>

While a physical act certainly provides the most easily understood example of a state's legal position, only a minority subscribe to such a strict definition of state action.<sup>55</sup> The problem

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sion of the competing theories, see WESTON, *supra* note 23, at 171-201.

<sup>52</sup> Colson cites statements issued by the United States in connection with the law of the sea as a prime example of this practice, including the 1945 Truman Proclamation, the Outer Continental Shelf Lands Act, the Magnuson Fishery Conservation and Management Act, the 1983 Reagan Economic Zone Proclamation and the 1983 Ocean Policy Statement. See Colson, *supra* note 37, at 959 (citations omitted).

<sup>53</sup> *Statement by the President on United States, Oceans Policy*, Mar. 10, 1983, 19 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 383-84 (Mar. 14, 1983), reprinted in 22 I.L.M. 461, 464-65 (1983). The United States, along with the United Kingdom and Japan, were among the last countries to accept the right of states to legally claim territorial seas in excess of three nautical miles. The U.S. finally acceded to the established custom allowing a 12-mile territorial sea and 200-mile Exclusive Economic Zone, in which a state would have sole jurisdiction over economic activity, such as fishing. However, when making this statement, the President was careful to state that the acceptance of this custom did not change existing United States policies on migratory fish stocks. *Id.* This statement would seem to protect the right of U.S. fishing boats to pursue highly migratory tuna stocks into the economic zones of other states. See Jonathan Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 56 BRIT. Y.B. INT'L L. 1, 12-15 (1985).

<sup>54</sup> See D'AMATO, *supra* note 37, at 45.

<sup>55</sup> D'AMATO, *supra* note 37, at 45.

inherent in requiring action in order to defend a legal right becomes readily apparent—an objector would be compelled to confront its adversaries not just on the diplomatic level, but physically as well. Placing a state in a position where it must make active use of a right or forfeit it permanently would invite constant exercise of rights for the sole purpose of preserving them. Further, the exercise of an unpopular right could provoke acts by the objector state's legal opponents.<sup>65</sup> To require such confrontation in order for a state to assert a legal position seems both to defeat the legal process, designed to avoid confrontation, and to waste the resources of the state compelled to act for no other reason than to make a legal assertion. A broader and less confrontational definition of state action would include not just physical acts, but a variety of the statements discussed above. Of course, including statements as state action forces the international lawmaker to interpret the often equivocal nature of such statements.<sup>67</sup>

The problem presented by a strict definition of state action is illustrated by the obvious problems that would arise in limiting the nuclear objector to acts alone: No one would advocate a renewal of the use of nuclear weapons merely to safeguard a legal right.<sup>68</sup> Thus, given the peculiar nature of the practices governed by the ICJ's decision on the use or threat of nuclear weapons, evidence of physical acts may be unavailable, and dependence on statement and treaty must serve to constitute the necessary element of state action.

### B. *The Element of Persistence*

In analyzing the necessary quantitative element of the rule, the lack of an actual example of the persistent objector among international actors poses a problem: Because the rule has been infrequently invoked, the boundaries of objection remain unclear.<sup>69</sup> Still, certain objective facets of this element

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<sup>66</sup> See WESTON ET AL., *supra* note 23, at 81.

<sup>67</sup> See *infra* notes 162-165 and accompanying text.

<sup>68</sup> It must be remembered that the GA request did not speak only to the legality of the use of nuclear weapons in wartime, but to the use or threat of use of nuclear weapons at any time. See U.N. CHARTER art. 96.

<sup>69</sup> See *infra* notes 65-75 and accompanying text for a discussion of the historical application of the Rule.

must remain. First, the objection must be lodged before the formation of a recognized custom of international law. Because customs are often the product of decades, if not centuries, of conduct, the precise moment of a custom's formation may be difficult to pinpoint. A dissenting state can and should be expected to voice an objection in response to a forming custom in some public forum, most notably through treaty reservations, statements of policy or United Nations resolutions.<sup>60</sup> The dissenting state should meet public statements of legal policy with a public objection if it hopes to put the global community on notice that it plans to reserve a certain legal right under current international law. Second, and closely related to the element of time, is an element of consistency—a state must frame and adhere to an objection in such a way as to make its legal position clear. "Such a requirement would push potential objectors to formulate their objections in principled terms, and this might result in a fuller consideration of the general international interest."<sup>61</sup>

In evaluating the boundaries of the necessary persistence required under the Rule, the nature of the custom itself must determine the nature of the objection required. In a case such as that confronting the court when it evaluated a possible custom prohibiting the use of nuclear weapons, the anticipated scope of effect of the customary rules prohibiting the threat or use of nuclear weapons will concern the entire international community. The custom will speak directly to the manner in which global peace and security are maintained. Within such a large group of concerned states, it is most likely that there will be no consensus regarding a newly recognized rule of law but rather, sharply divided groups of states.<sup>62</sup> Under these conditions, an objector need not be as aggressive in its objection as a state fending off the pressure of an international community

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<sup>60</sup> See Stein, *supra* note 14, at 467. Stein observes that the ICJ "has not made clear what a dissenting state must do to maintain an objection." The Asylum Case (Colom. v. Peru), 1950 I.C.J. 266, 277-78 (Nov. 27), implies that a refusal to join a multilateral convention because of an objection to one or more of its provisions suffices to qualify a state as a persistent objector. But the North Sea Continental Shelf Case (F.R.G. v. Den./Neth.), 1969 I.C.J. 3 (Feb. 20), implies that such an act must be accompanied by other manifestations of dissent. Stein, *supra* note 14, at 478 n.62.

<sup>61</sup> Stein, *supra* note 14, at 479.

<sup>62</sup> Colson, *supra* note 37, at 967.

united behind a new custom. Rather, the objector may phrase its argument in such a manner so as to attempt to persuade other states that its view is not an exception, but should be considered the rule.<sup>63</sup> Indeed, as will be shown, the tack taken by the nuclear states in the debates surrounding the case before the ICJ has been to argue that nuclear weapons are legal under all existing international law, rather than to acknowledge, and object to, any perceived emerging customs of law.<sup>64</sup>

### C. *History of the Rule*

The ICJ has expressed support for the Rule in two cases. In the *Asylum Case*,<sup>65</sup> Columbia argued that Peru was bound by a Latin American custom allowing a particular type of political asylum. The court found insufficient evidence to support the formation of even a regional custom. Instead, the court stated that "even if it could be supposed that such a custom existed between certain Latin-American States only, it could not be invoked against Peru which, far from having by its attitude adhered to it, has, on the contrary, repudiated it."<sup>66</sup> In the *Anglo-Norwegian Fisheries Case*, the ICJ found that a coast-line delimitation rule espoused by the United Kingdom "would appear to be inapplicable as against Norway, in as much as she has always opposed any attempt to apply it to the Norwegian coast."<sup>67</sup> Interestingly, these dual affirmations of the Persistent Objector Rule were not part of the holding of either case, but "pure dictum."<sup>68</sup> While these cases support the Rule in theory, the court has yet to use it in a decisive manner.<sup>69</sup>

Of course, disuse by the court, or even by states, does not vitiate a rule of international law. The Persistent Objector Rule draws its strongest support from publicists, the scholars of international law. The writings of "noted publicists" are not only commentary on the international system, but may them-

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<sup>63</sup> Colson, *supra* note 37, at 968.

<sup>64</sup> See *infra* notes 147-153 and accompanying text.

<sup>65</sup> *Asylum Case* (Colom. v. Peru), 1950 I.C.J. 266 (Nov. 27).

<sup>66</sup> *Id.* at 277.

<sup>67</sup> *Fisheries Case* (U.K. v. Nor.), 1951 I.C.J. 116, 131 (Dec. 18).

<sup>68</sup> Stein, *supra* note 14, at 460.

<sup>69</sup> Charney, *supra* note 53, at 11.

selves serve as the basis for an international rule, as recognized by the ICJ Statute.<sup>70</sup> Indeed, the writings of publicists served as the basis for the discussion of the Rule in the pleadings of the *Fisheries Case*.<sup>71</sup> Notably, none of the writers relied upon by the court used actual instances of the application of the Rule. Instead, they relied upon the logical necessity of the Rule in a consent based system of law.<sup>72</sup> If the rule of law in an international system is based upon the ultimate consent of states to be governed, it must follow that, even granting the binding power of custom upon a silent state, the state that acts to preserve its rights must be recognized.<sup>73</sup> Thus, the persistent objector has been recognized as a fundamental part of a consent based system of international law.<sup>74</sup> More recently, scholars have addressed the possible revival of the Rule in international relations to meet the needs of the changing international system. It remains to be seen whether the principle of persistent objectors, accepted by scholars, will find wider application in the practice of states.<sup>75</sup>

#### D. *The Rule and Consent in International Lawmaking*

Aside from the *Asylum Case* and *Anglo-Norwegian Fisheries Case*, the Rule has been conspicuously absent from the international scene. Potential objectors have twice refused to resort to the Rule in legal conflicts. The first of these conflicts arose in the Soviet Union's position on the development of customs regarding sovereign immunity.<sup>76</sup> While the Soviet Union had voiced continued objection to any limitations on the old rule of absolute sovereign immunity, no benefits accrued to the Soviet Union when custom placed restrictions on a sovereign's

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<sup>70</sup> ICJ STATUTE art. 39.

<sup>71</sup> Counter Memorial of Norway (U.K. v. Nor.), 1951 I.C.J. Pleadings (2 Fisheries) 381-84; Reply of the United Kingdom (U.K. v. Nor.), 1951 I.C.J. Pleadings (2 Fisheries) 428-29.

<sup>72</sup> See Stein, *supra* note 14, at 460, for citations to the scholars relied upon by Norway in their appeal to the Rule.

<sup>73</sup> The consent theory of international law is discussed at length above. See *supra* notes 65-72 and accompanying text.

<sup>74</sup> Stein, *supra* note 14, at 459-63.

<sup>75</sup> For a discussion of the possible future expansion of the use of the Rule in international law, see *infra* notes 91-93 and accompanying text.

<sup>76</sup> See Stein, *supra* note 14, at 460.

immunity to suit in a foreign country.<sup>77</sup> Soviet agencies and enterprises were placed under the same restrictions as states that had not objected, becoming subject to suit in domestic courts. Curiously, not only was the Soviet Union not granted special status as an objector, it failed to maintain a defense using the Rule in any cases that arose under the newly restrictive custom.<sup>78</sup>

The second case is that of South Africa's failure to appeal to the Persistent Objector Rule in disputing judgments that apartheid violated international law. Despite South Africa's notorious intransigence during the formation of a custom opposed to the human rights violations inherent in apartheid,<sup>79</sup> "this status did not immunize South Africa . . . from the apparent consensus of the international community that [it is] obligated not to practice apartheid . . . . In all respects, the international community has treated [it] as [a] serious violator [ ] of a rule of international law, their status as a persistent objector notwithstanding."<sup>80</sup>

In light of the paucity of real-world examples, the Rule seems to be more a tool of the scholar than of the diplomat. However, the Rule fills a logical gap in the framework of international customary law, a gap created by the "consent" theory of lawmaking. The necessity of demonstrating a "general practice" upon which custom must be built indicates the consensual nature of international law.<sup>81</sup> The Persistent Objector Rule is a logical product of the consent theory. The need for consent arises because

the international legal order lacks a hierarchically superior sovereign authorized to prescribe rules for the subjects of the order. In

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<sup>77</sup> The United States Foreign Sovereign Immunities Act states that sovereign immunity is waived, for instance, when a foreign sovereign engaged in commercial activity with a U.S. nexus or committed noncommercial torts in the United States. See Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(2), (5). For a further discussion of sovereign immunity, see GARY BORN, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 56-66 (3d ed. 1996).

<sup>78</sup> Stein, *supra* note 14, at 461.

<sup>79</sup> See International Convention on the Suppression and Punishment of the Crime of "Apartheid," G.A. Res. 3068, U.N. GAOR, 28th Sess., Supp. No. 30, at 75, U.N. Doc. A/9030 (1973). The Convention, which entered into force in 1976, was signed and ratified by 76 nations.

<sup>80</sup> Charney, *supra* note 69, at 15.

<sup>81</sup> See Akehurst, *supra* note 33, at 24.

the absence of such a sovereign, law must result from the concurrent wills of states and, at the very least, cannot bind a state that has manifestly and continuously refused to accept it.<sup>82</sup>

Yet, "general acceptance" is not synonymous with universal acceptance. The Persistent Objector Rule merely qualifies the general rule that a state's positive sign of acceptance is *not* necessary to bind a state to an emerging custom of international law. Newly established states or states not directly affected by a new rule that do not comment on a new rule and could not have objected during the rule's formation will nonetheless be bound to the custom.<sup>83</sup>

Binding a state to a custom without its express consent may seem to weaken the premise that consent forms the basis of international law. If the consent theory is indeed invalid, the Persistent Objector Rule itself would be superfluous. The Rule has no real place in the legal regime if the consent of a state is immaterial to the formation of a general rule of customary law.<sup>84</sup> However, while the consent theory may recall an older, more positivist legal system, it remains the touchstone of many theorists<sup>85</sup> and a suitable basis for sustaining the Rule. The tension between a weakened theory of consent and the persistent objector may be reconciled by focusing on the importance of consent, not from a state in particular, but from the international system as a whole.<sup>86</sup> In this case, the Rule becomes an important bridge between consent theory and custom as a source of law—while silent states may be bound to customs, consent is still respected, provided a state take a more active stance in the preservation of its interests.

An alternative basis for linking the Rule to a consent based legal system is a finding of "implied consent" through silence. This, in effect creates a legal presumption of consent if

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<sup>82</sup> Stein, *supra* note 14, at 459.

<sup>83</sup> See Akehurst, *supra* note 33, at 16-17.

<sup>84</sup> D'AMATO, *supra* note 37, at 187.

<sup>85</sup> See, e.g., D'AMATO, *supra* note 37, at 188; Akehurst, *supra* note 32, at 26; I.C. MacGibbon, *Customary International Law and Acquiescence*, 33 BRIT. Y.B. INT'L L. 115 (1957).

<sup>86</sup> Henkin, *supra* note 13, at 59 ("Consent of the system need not include the consent of all States but it must have the consent or acquiescence of many, varied States, 'active' States, influential States, those that may be deemed to represent the whole system on a particular issue . . .").

no active objection is heard from a state.<sup>87</sup> Theories of "systemic" or "implied" consent will effectively *increase* the role of the Persistent Objector Rule, especially in light of the growing place of custom in the creation of international law. Over the past several decades, there have been "organized efforts by large groups of states to change established law, or to create new norms, without resort to multilateral treaty, claiming to do so by practice resulting in customary law."<sup>88</sup> Such efforts include United Nations General Assembly resolutions to declare or to confirm principles of law by overwhelming majorities or by consensus resolutions which discourage dissent.<sup>89</sup> The growing use of custom as a means to create law marks a new development in international law, and presents a threat to those states that, in the past, have been dominant forces in international law.<sup>90</sup> In the past, when rules of international law were formed most often by treaty, an advantage accrued to those states in the strongest negotiating position. These states were usually the developed nations that had sufficient political and economic strength to push for beneficial treaty terms.<sup>91</sup> Formulation of law through custom, however, provides a greater opportunity for developing nations to play a part in the law-making process because the formation of a rule of custom does not require the explicit consent of a treaty signature. Thus, these developing nations, working through international organizations, may be able to orchestrate the purposeful formation of customs, potentially against the interests of the developed states.

The Rule will become an attractive option for two very dissimilar groups: the developed states, seeking protection from a hostile majority within international custom-making bodies; and developing, often newly independent states, wish-

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<sup>87</sup> See D'AMATO, *supra* note 37, at 188; Charney, *supra* note 69, at 16.

<sup>88</sup> Henkin, *supra* note 13, at 58.

<sup>89</sup> Henkin, *supra* note 13, at 58.

<sup>90</sup> Stein, *supra* note 14, at 465-66:

[T]he ability to exert power in defense of objectives regarding the shape of the law has diminished as the arena for law-making has become more and more formalized and institutionalized. One of the consequences of this shift is that the states controlling a preponderant portion of global military capabilities are far less able to insure that their legal views prevail than were their nineteenth century counterparts.

<sup>91</sup> Stein, *supra* note 14, at 467-68.



ing to use the international legal regime to their benefit.<sup>92</sup> The Rule appears to be a mechanism by which states may participate in the formation of international law without threatening their sovereignty. It helps to avoid the logical and practical difficulties which would arise from adherence to a strict theory of consent, or to a policy of binding dissenters to new rules of law. Under a strict consent theory, "the dissent of a single State could prevent the creation of a new rule, [and] new rules would hardly ever be created. If a dissenting State could be bound against its will, customary law would in effect be created by a system of majority voting."<sup>93</sup> The persistent objector is now only a tool for the scholar; its great utility indicates that it may soon become a tool for the lawmaker as well.

### III. SHOULD THE NUCLEAR STATES BE PERMITTED THE DEFENSE OF THE PERSISTENT OBJECTOR?

#### A. *Rules of Customary Law Limiting the Use of Nuclear Weapons*

Despite their relatively new place in the arsenal of nations, nuclear weapons fall under the jurisdiction of already existing international law. The emergence of a new weapon does not force states to adopt rules specifically governing its use. Rather, the weapon and its use must be governed by existing rules of war. Otherwise, advancing technology would render all of international law obsolete. This principle was embodied in the de Martens clause included in the Hague Peace Convention of 1907 ("Hague IV"):

Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usage established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.<sup>94</sup>

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<sup>92</sup> Stein, *supra* note 14, at 467-68.

<sup>93</sup> Akehurst, *supra* note 33, at 26.

<sup>94</sup> Convention (No. IV) Respecting the Laws and Customs of War on Land, with Annex of Regulations, *opened for signature* Oct. 18, 1907, 36 Stat. 2277, U.N.T.S. 539 (entered into force Jan. 26, 1910) [hereinafter Hague Convention].

This expression of the desire of nations has been consistently repeated in treaties following Hague IV, most notably the 1949 Geneva Convention.<sup>95</sup> Lacking an express rule speaking to the use of nuclear weapons, parties on both sides of the issue, in the spirit of the de Martens clause, turned to other recognized rules of law to regulate the use of these weapons.<sup>96</sup>

### 1. Principles of Customary Humanitarian Law

The court examined several different areas of customary law that might affect the legality of the threat or use of nuclear weapons. Primary among these were the spheres of humanitarian and environmental law. It was in the field of humanitarian law that the court found customs that would severely limit the legal use of nuclear weapons.<sup>97</sup> The de Martens clause recognizes that the use of force, even when sanctioned by rules of international law, is subject to the limitations of

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<sup>95</sup> Convention Relative to the Protection of Civilian Persons in Time of War, opened for signature Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365 (entered into force Oct. 21, 1950). For an extensive list of the appearance of the De Martens clause in international agreements, see Peter Weiss et al., Draft Memorial in Support of the Application by the World Health Organization for an Advisory Opinion by the International Court of Justice on the Legality of the Use of Nuclear Weapons Under International Law, Including the W.H.O. Constitution (1994).

<sup>96</sup> Notably, some states did indeed argue that there had developed a specific rule of customary law prohibiting the threat or use of nuclear weapons. These states pointed to the consistent passage of UN resolutions reaffirming the illegality of nuclear weapons as evidence of an emergent *opinio juris* among states. See Written Submission of the Solomon Islands at 28-29 (as the written submissions had not been published at press time, hereinafter pinpoint citations will refer to the original draft of the statement submitted by each state) (on file with author); see also Written Submission of New Zealand at 4. While such resolutions can illustrate the emergence of a custom, the court did not find sufficient unanimity among the community of states to constitute a customary rule:

Examined in their totality, the General Assembly resolutions put before the Court declare that the use of nuclear weapons would be a "direct violation of the Charter of the United Nations," and in certain formulations that such use "should be prohibited." The focus of these resolutions has sometimes shifted to diverse related matters; however, several of the resolutions under consideration in the present case have been adopted with substantial numbers of negative votes and abstentions; thus, although those resolutions are a clear sign of deep concern regarding the problem of nuclear weapons, they still fall far short of establishing an *opinio juris* on the illegality of the use of such weapons.

Advisory Opinion, *supra* note 11, at 26.

<sup>97</sup> See *supra* note 15 and accompanying text.

those same rules. The principles of humanitarian law apply to govern the manner in which violence may be used against a belligerent state—in essence, a last effort to control a situation that international law itself seeks to avoid. The St. Petersburg Declaration of 1868, one of the earliest codifications of this area of international customary law, declares that, within certain limits, “the necessities of war ought to yield to the demands of humanity.”<sup>98</sup> The states supporting a custom prohibiting nuclear weapons argued that these weapons violated several aspects of this humanitarian law.<sup>99</sup>

a. *The Prohibition Against Causing Unnecessary Suffering*

The de Martens clause also functions in close connection with another axiom of *jus in bello*—that the right to adopt means of injuring the enemy is not unlimited. As the Clause advises, the “laws of humanity” and the “dictates of the public conscience” are to govern the conduct of war.<sup>100</sup> These principles are expressed in the customary law that warfare is not to be conducted in such a way as to inflict cruel or unnecessary injury upon combatants or to aggravate suffering for civilians.<sup>101</sup> Indeed, this overarching principle, especially as applied to weapons of mass destruction, has long affected the development of *jus in bello*.<sup>102</sup>

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<sup>98</sup> Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Dec. 11, 1868, *reprinted in* 1 AM. J. INT'L L. 95 (Supp. 1907) [hereinafter St. Petersburg Declaration].

<sup>99</sup> See Written Submission of the Solomon Islands, *supra* note 96, at 77-103; Written Submission of India at 3-5 (as the written submissions had not been published at press time, hereinafter pinpoint citations will refer to the original draft of the statement submitted by each state) (on file with author); Written Submission of Ecuador at 2; Written Submission of Mexico at 11-15; Written Submission of Sweden at 3-5; Written Submission of New Zealand, *supra* note 96, at 15-24.

<sup>100</sup> See, e.g., Hague Convention, *supra* note 94, § II, ch. I, art. 22; see also Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* June 8, 1977, 1977 U.N. JURID. Y.B. 95, 16 I.L.M. 1391 (1977) (entered into force Dec. 7, 1978) [hereinafter Protocol II].

<sup>101</sup> See Hague Convention, *supra* note 94, at arts. 22-23.

<sup>102</sup> G.A. Res. 1653, *supra* note 22, notes that the use of weapons of mass destruction which cause unnecessary human suffering are “contrary to the laws of humanity and international law,” and cites the Declaration of St. Petersburg of 1868, the Declaration of the Brussels Conference of 1874, the Convention of The Hague Peace Conferences of 1899 and 1907, and the Geneva Protocol of 1925 as

Significant evidence exists indicating that the necessary effects of a nuclear weapon, regardless of size, will violate this principle. Such effects range from immediate devastation of surrounding territory, to the horrible nature of radiation-induced injuries, to the long-range genetic effects on a population.<sup>103</sup> Of special note here should be the dissenting opinions of Judges Weeramantry and Koroma, both of whom argued that the court erred in not extending the prohibition on the threat or use of nuclear weapons to *any* circumstance.<sup>104</sup> Judge Weeramantry includes an extensive discussion of the effects of nuclear weapons upon a population, both in the short term, including nuclear winter and great loss of life, and more long range damages, including congenital birth defects and damage to food productivity.<sup>105</sup>

### b. *The Principle of Discrimination*

It is a central tenet of *jus in bello* that states are to conduct hostilities in such a way as is necessary to achieve a legal military objective without imposing undue suffering upon combatants. Vital to this principle is the ability of warring parties to limit damage inflicted upon an enemy. Thus, it is necessary to create regulations of the means and methods of warfare that allow for a distinction between combatants and civilian populations.<sup>106</sup> This principle is codified in international law by Protocol I of 1977,<sup>107</sup> which characterizes any attack as indis-

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examples of international instruments supporting the principle of which a "majority of nations are still parties." (citations omitted).

<sup>103</sup> On the nature and effect of nuclear weapons, see WORLD HEALTH ORGANIZATION, EFFECTS OF NUCLEAR WAR ON HEALTH AND HEALTH SERVICES (2d ed. 1987); *Report of the Secretary-General on Nuclear Weapons, General and Complete Disarmament: Comprehensive study on Nuclear Weapons*, U.N. Doc. A/45/373 U.N. Sales No. E.81I.11 (1990).

<sup>104</sup> *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. \_\_\_\_ (July 8) (dissenting opinion of Judge Koroma at 4-6) (as the dissenting opinions had not been published at press time, hereinafter pinpoint citations will refer to the original drafts of the opinions rendered) (on file with author and also available on the Internet at Cornell Law Library, *Legality of the Threat or Use of Nuclear Weapons* (last modified Sept. 1996) <<http://www.law.cornell.edu/icj/icj1/opinion.htm>>); *id.* (dissenting opinion of Judge Weeramantry at 111).

<sup>105</sup> See Dissenting Opinion of Judge Weeramantry, *supra* note 104, at 20-37.

<sup>106</sup> J.B. MOORE, INTERNATIONAL LAW AND SOME CURRENT ILLUSIONS AND OTHER ESSAYS 153 (1924) (quoted in Weiss et al., *supra* note 95, at 60).

<sup>107</sup> Protocol I, *supra* note 100, at art. 51.

criminate that is to be expected to cause injury to civilians or civilian objects "excessive in relation to the concrete and direct military advantage anticipated."<sup>108</sup>

Advocates of a custom prohibiting nuclear weapons depended upon studies of the effects of the use of nuclear weapons as weapons of mass destruction with long-lasting effects on the health of surrounding populations. These weapons, as the studies showed, by their nature violate the principle of discrimination.<sup>109</sup> In response, the nuclear states argued that the effects of nuclear weapons were highly variable and depended entirely upon the size of the particular warhead used and the circumstances surrounding its detonation. A small, relatively "clean" weapon, it was argued, could be deployed to fulfill a legitimate military objective without collateral effect upon civilian populations.<sup>110</sup> This argument was roundly rejected by the states advocating the illegality of nuclear weapons, which argued that the long term effects of even a small nuclear detonation are uncontrollable.

### c. *The Principle of Proportionality*

Closely linked to the principle of discrimination, proportionality holds that an attack or counter-attack must inflict a harm or achieve an objective in proportion to the provocation. This custom has been recognized by the court in the *Paramilitary Activities in Nicaragua Case*,<sup>111</sup> and is generally recog-

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<sup>108</sup> Protocol I, *supra* note 100, at art. 51.

<sup>109</sup> For a detailed analysis of the effects of a nuclear explosion, see *General and Complete Disarmament: Comprehensive Study on Nuclear Weapons, Report of the Secretary-General*, U.N. Doc. A/35/392, U.N. Sales No. 80-21331 (1980). Notably, this study includes analysis of small, so-called "tactical" nuclear weapons. See also Dissenting Opinion of Judge Weeramantry, *supra* note 104, at 20-35.

<sup>110</sup> The United Kingdom argued as follows:

[N]uclear weapons might be used in a wide variety of circumstances with very different results in terms of likely civilian casualties. In some cases, such as the use of a low yield nuclear weapon against warships on the High Seas or troops in sparsely populated areas, it is possible to envisage a nuclear attack which caused comparatively few civilian casualties. It is by no means the case that every use of nuclear weapons against a military objective would inevitably cause very great collateral civilian casualties.

Written Submission of the United Kingdom, *supra* note 27, at 53; see Written Submission of the United States, *supra* note 27, at 23.

<sup>111</sup> Case Concerning Military and Paramilitary Activities In and Against Nicara-

nized as grounded in the Charter of the United Nations itself. Taken together, Articles 2(4) and 33(1) of the Charter,<sup>112</sup> which command member states to refrain from the threat or use of force in their relations and to refrain from conduct which is likely to endanger international peace and security, have been interpreted to place severe constraints upon a state's right to carry out reprisals against an attacker, even in cases of self-defense.<sup>113</sup> Specifically, a state does not have the right to inflict reprisals upon civilian populations. This principle has been enunciated by the United Nations in General Assembly Resolution 2675 (XXV) on Basic Principles for the Protection of Civilian Populations in Armed Conflicts,<sup>114</sup> and in treaty through Protocol I.<sup>115</sup>

In response, the nuclear states again argued that, as with the principle of discrimination, the varied effects and uses of nuclear weapons rendered impossible a blanket finding that nuclear weapons violated the principle of proportionality.<sup>116</sup> The court, however, faced with overwhelming evidence of the widespread and devastating effects of nuclear weapons did find that the use of nuclear weapons would violate these basic tenets of humanitarian law in almost any circumstance:

[M]ethods 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. In view of the unique characteristics of nuclear weapons . . . the use of such weapons in fact seems scarcely reconcilable with respect for such requirements.<sup>117</sup>

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gua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27) (Nicaragua sued the United States for sponsoring insurgents during the Nicaraguan civil war. The court found this sponsorship to be a prohibited act of aggression.).

<sup>112</sup> U.N. CHARTER art. 2, ¶ 4; art. 33, ¶ 1.

<sup>113</sup> See GEORGE SCHWARZENBERGER, A MANUAL OF INTERNATIONAL LAW 151 (1960).

<sup>114</sup> G.A. Res. 2675, U.N. GAOR, 25th Sess., Supp. No. 28, at 76, U.N. Doc. A/8028 (1970) (stating that civilian populations shall not be the subject of reprisals).

<sup>115</sup> See Hague Convention, *supra* note 88, at art. 51(6) ("reprisals against the persons and objects protected by this Part are prohibited"), art. 51(6) ("Attacks against the civilian population or civilians by way of reprisals is prohibited."), art. 55(2) ("Attacks against the natural environment by way of reprisals are prohibited.").

<sup>116</sup> See Written Submission of the United States, *supra* note 27, at 23; see also Written Submission of the United Kingdom, *supra* note 27, at 53.

<sup>117</sup> Advisory Opinion, *supra* note 11, at 32. The court balked at applying the

Thus, the court found the threat or use of nuclear weapons to be severely curtailed not through the enunciation of a new custom of international law, but through already existing, and widely adhered to, customs of humanitarian law.

## 2. Nuclear Weapons and Customs of International Environmental Law

The same indiscriminate, adverse effects of nuclear weapons which the court found violative of existing norms of humanitarian law may also violate existing and forming rules of environmental law. Protection of the environment has become linked with humanitarian law.<sup>118</sup> The international community now recognizes that natural resources are vital and necessary to the development of many developing states, and international law has responded accordingly by codifying rules for their protection.<sup>119</sup> The non-nuclear states argued that the

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prohibition to the threat or use of nuclear weapons in any circumstance due to an unwillingness to balance the competing legal interests of humanitarian law and the right to self-defense. Where a state depended upon nuclear weapons for defense, the fundamental laws of humanitarian law would be set directly opposed to the fundamental right to self-defense in a circumstance in which the very survival of a state would be threatened. *See* Advisory Opinion, *supra* note 11, at 33. Several dissenters, however, had no trouble conducting such a balancing of interests:

[W]hen the Court is faced with two competing principles or rights, it should jurisprudentially assign a priority to one of them and cause it to prevail . . . . The suggestion that it should be left to individual States to determine whether or not it may be lawful to have recourse to nuclear weapons, is not only an option fraught with serious danger . . . but may also suggest that such an option is not legally reprehensible.

Dissenting Opinion of Judge Koroma, *supra* note 104, at 4.

<sup>118</sup> This connection is recognized by Protocol I, *supra* note 100, arts. 35(3), 55(1) ("It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long term and severe damage to the environment.").

<sup>119</sup> *See, e.g.*, Vienna Convention for the Protection of the Ozone Layer, *opened for signature* Mar. 22, 1985, 26 I.L.M. 1529 (entered into force Sept. 22, 1988) (Article 2(1) reads: "The parties shall take appropriate measures . . . to protect human health and the environment against adverse effects resulting or likely to result from human activities which modify or are likely to modify the ozone layer"); Convention on Biological Diversity, *opened for signature* June 5, 1992, 31 I.L.M. 818 (1992) (entered into force Dec. 29, 1993) (Article 3 states: "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other

unavoidable environmental effects of nuclear weapons will necessarily be so far reaching as to violate a customary prohibition of excessive environmental damage in times of war.<sup>120</sup>

However, arguments based on the protection of human health and the environment went beyond the obligations of *jus in bello* that relate to the environment to include basic elements of humanitarian law as well. The link between environmental law and human rights can be established two ways. First, nuclear weapons by their nature may already violate existing principles of international law as it relates to the obligations of a state. This was the argument made by New Zealand and Australia in the *Nuclear Test Cases*:<sup>121</sup> Radioactive fallout, through its invasive nature, violated existing rules

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States or of areas beyond the limits of national jurisdiction."). For an exhaustive list of international instruments on the protection of the environment, see Weiss et al., *supra* note 95, at 42-44.

<sup>120</sup> Protocol I provides: "It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment." Protocol I, *supra* note 100, at art. 35(3). In addition, the 1977 Convention on the Prohibition of Military or Other Hostile Use of Environmental Techniques ("ENMOD") obligates the parties "not to engage in military or other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State party." 31 U.S.T. 333, at art. 1 *reprinted in* 16 I.L.M. 88 (1977). It was argued that these two treaties illustrated a rule of customary law against harming the environment in times of war. See Written Submission of the Solomon Islands, *supra* note 96, at 62-63; see also Written Submission of Samoa at 1 (as the written submissions had not been published at press time, hereinafter pinpoint citations will refer to the original draft of the statement submitted by each state) (on file with author). The response of the nuclear states was to argue that nuclear weapons, as such, were not primarily aimed at environmental modification and, therefore, were exempted from consideration under such treaties. See Written Submission of the United States, *supra* note 27, at 29-30. The response of the non-nuclear states is summed up in Judge Weeramantry's dissent:

The question is not whether nuclear weapons were or were not intended to be covered by these formulations. It is sufficient to read them as stating undisputed principles of customary international law. To consider that these general principles are not explicit enough to cover nuclear weapons, or that nuclear weapons were designedly left unmentioned and are therefore not covered, or even that there was a clear understanding that these provisions were not intended to cover nuclear weapons, is to emphasize the incongruity of prohibiting lesser weapons of environmental damage, while leaving intact the definitely greater agency of causing the very damage which it was the rationale of the treaty to prevent.

Dissenting Opinion of Judge Weeramantry, *supra* note 104, at 66-67.

<sup>121</sup> *Nuclear Tests (N.Z. v. Fr.)*, 1973 I.C.J. 135 (June 22); *Nuclear Tests (Aust. v. Fr.)*, 1973 I.C.J. 99 (June 22).



of treaty and custom insuring national sovereignty and freedom of the seas.<sup>122</sup> These basic rights were already insured by the United Nations Charter in Articles 1 and 2.<sup>123</sup> The Charter also includes a more general provision of "good neighborliness" in Article 74,<sup>124</sup> which has been further refined in the *Corfu Channel Case*, in which the ICJ recognized "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States."<sup>125</sup> These basic obligations of environmental protection have become "so deeply rooted in the conscience of mankind that they have become particularly essential rules of general international law."<sup>126</sup> As such, it was argued by the non-nuclear states, these principles formed a solid base of customary international law which must be interpreted to prohibit the threat or use of nuclear weapons.<sup>127</sup>

A right to a clean environment may also be part of the already existing set of inalienable human rights enunciated by the basic human rights documents.<sup>128</sup> Fundamental human rights were specifically protected by both the International Covenant on Civil and Political Rights, which protected the right to life,<sup>129</sup> and the Covenant on Economic, Social and Cultural Rights, which added specific protection for physical

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<sup>122</sup> *Nuclear Tests (N.Z. v. Fr.)*, 1973 I.C.J. at 139 (June 22).

<sup>123</sup> U.N. CHARTER arts. 1-2. These articles state the purposes and principles of the organization, including a commitment to solve international humanitarian problems and to respect the sovereign equality of all states.

<sup>124</sup> Article 74 states as follows in pertinent part:

Members of the United Nations also agree that their policy in respect of the territories to which this Charter applies . . . must be based on the general principle of good neighborliness, due account being taken of the interests and well-being of the rest of the world, in social, economic and commercial matters.

U.N. CHARTER art. 74.

<sup>125</sup> *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4, 22 (April 9).

<sup>126</sup> *Report of the International Law Commission on the Work of Its 28th Session*, 1976 Y.B. INT'L L. COMM'N 109.

<sup>127</sup> See Written Submission of Sweden, *supra* note 99, at 5; Written Submission of the Solomon Islands, *supra* note 96, at 77-102; Written Submission of New Zealand, *supra* note 96, at 19-22.

<sup>128</sup> See *infra* notes 200-207 and accompanying text; see also PAUL GORMLEY, HUMAN RIGHTS AND ENVIRONMENT: THE NEED FOR INTERNATIONAL CO-OPERATION 40-41 (1976).

<sup>129</sup> International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, G.A. Res. 2200(XXI), U.N. GAOR, Supp. No. 16 at 52, U.N. Doc. A/6316 (1967), 6 I.L.M. 368, at arts. 1, 6 (entered into force Mar. 23, 1976).

and mental health.<sup>130</sup> If the nuclear weapons threatened these already established rights they would either have been *de jure* illegal, or their use severely circumscribed. Unfortunately, the court did not reach the merits of the *Nuclear Test Cases*, so it remains unclear if such a link between human rights and the environment might have been found.<sup>131</sup> These issues were again placed before the court in consideration of whether a custom exists prohibiting nuclear weapons. A key element of the non-nuclear states' argument was as it was in the *Nuclear Test Cases* twenty years ago: that the indiscriminate and uncontrollable nature of radioactive fallout, regardless of whether the use of nuclear weapons was peaceful, as in testing, or as a weapon of war, violated fundamental customs of humanitarian law. The disaster at the nuclear power plant at Chernobyl graphically illustrated the threat posed by this by-product of the use of nuclear weapons.<sup>132</sup> The observed ef-

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<sup>130</sup> International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, G.A. Res. 2200 (XXI), U.N. GAOR, Supp. No. 16, at 49, U.N. Doc. A/6316 (1967), 6 I.L.M. 360 (1967), at arts. 1, 12 (entered into force Jan. 3, 1976).

<sup>131</sup> *Nuclear Tests (N.Z. v. Fr.)*, 1974 I.C.J. 457 (Dec. 20). In his separate opinion, Judge Petren observed that while human rights law was evolving, its jurisprudence had not yet reached a point where it could be universally applied to a subject like nuclear testing. Judge Petren also commented on the difficulty in distinguishing the necessary element of *opinio juris* in a proposed custom against nuclear testing: It would be difficult to determine whether a state capable of nuclear testing abstained from doing so out of a sense of legal obligation. Judge Petren wrote:

It is only an evolution subsequent to the Second World War which has made the duty of States to respect the human rights of all, including their own nationals, an obligation under international law towards all States members of the international community . . . . It is certainly to be regretted that this universal recognition of human rights should not, up to now, have been accompanied by a corresponding evolution in the jurisdiction of international judicial organs. For want of a watertight system of appropriate jurisdictional clauses, too many international disputes involving the protection of human rights cannot be brought to international adjudication.

*Id.* at 487-88.

<sup>132</sup> See Lind A. Malone, *The Chernobyl Accident: A Case Study in International Law Regulating State Responsibility for Transboundary Nuclear Pollution*, 12 COLUM. J. ENVTL. L. 203 (1987). On April 26, 1986, a coolant loss in a reactor at the Chernobyl Nuclear Power Plant in the former Soviet Union precipitated "the worst accident in the history of nuclear energy." The resulting explosions and fire spread a cloud of radiation that within a month had touched all of Europe, and was even detectable in the United States, touching off panic throughout much of Europe. *Id.* at 203-06.

fects of the use of the bombs at Hiroshima and Nagasaki also offer a horrifying example.<sup>133</sup> Such a widespread threat to human health and natural resources would violate customs specifically prohibiting environmental damage, as well as impact upon principles of territorial integrity and discrimination.<sup>134</sup>

In response to these arguments, the court reaffirmed "the existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment."<sup>135</sup> But the right to self-defense again caused the court to balk at an absolute finding that nuclear weapons were prohibited:

The Court does not consider that the treaties in question could have intended to deprive a State of its right of self-defence under international law because of its obligations to protect the environment. Nonetheless, States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objections.<sup>136</sup>

However, the same balancing test that lead the court to limit a state's right to use nuclear weapons to all but the most extreme circumstance of self defense in the interest of protecting human rights should also function to limit the use of nuclear weapons to protect the environment as well. If nuclear weapons could cause a catastrophe for the environment, as the court recognized, how could their use, in any but the most extreme situation, be "proportionate" to the environmental damage caused?

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<sup>133</sup> The effects of the bombs dropped on Hiroshima and Nagasaki were well documented in Judge Weeramantry's opinion. See Dissenting Opinion of Judge Weeramantry, *supra* note 104, at 25-31.

<sup>134</sup> The most notable restatement of this custom came in the Trail Smelter Arbitration (U.S. v. Can.) (1941), 3 U.N.R.I.A.A. 1938, ¶ 157 (1949) ("[U]nder the principles of international law . . . no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another . . . when the case is of serious consequence and the injury is established by clear and convincing evidence.").

<sup>135</sup> Advisory Opinion, *supra* note 11, at 15.

<sup>136</sup> Advisory Opinion, *supra* note 11, at 15.

## B. *The Nuclear States Meet the Description of the Persistent Objector*

An appeal to the Persistent Objector Rule will, admittedly, be a last resort for the nuclear states. Such a defense would require the international community to admit that a custom exists which prohibits the use of nuclear weapons—a position the nuclear states understandably are loathe to take, even in the face of the court's recent decision.<sup>137</sup> Stronger legal arguments may be made by attacking the consistency of state practice that the non-nuclear states argue create the customs of humanitarian and environmental law addressed above.<sup>138</sup> The nuclear states also chose to argue that the court should have declined to grant an advisory opinion, finding the Request to be both prohibitively vague and political in nature.<sup>139</sup> The court, however, chose to reach the merits of the General As-

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<sup>137</sup> The United States, for instance, has been careful to make explicit that its participation in instruments defining *jus in bello* does not reach nuclear weapons. Upon signing Protocol I, the United States filed a reservation stating: "It is the understanding of the United States of America that the rules established by this Protocol were not intended to have any effect on and do not regulate or prohibit the use of nuclear weapons." See DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW (J. Boyd ed., 1977) (quoted in Weiss et al., *supra* note 95, at 51). Similar reservations were filed by the United Kingdom and France. Weiss et al., *supra* note 95, at 51. While the Cold War has ended, deterrence remains a central tenet of United States defense policy, and nuclear weapons a prime means of deterrence. See NUCLEAR ARGUMENTS 1-45 (Lynn Eden ed., 1989). Notably, of the nuclear states, only China has publicly stated that it will only use nuclear weapons if subject to a nuclear attack. See Weiss et al., *supra* note 95, at 11. This importance placed on deterrence led the court to find that deterrence cannot be considered a threat to use nuclear weapons that would be prohibited by customary law:

The Court does not intend to pronounce here upon the practice known as the "policy of deterrence." It notes that it is a fact that a number of States adhered to that practice during the greater part of the Cold War and continue to adhere to it. Furthermore, 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*.

Advisory Opinion, *supra* note 11, at 33.

<sup>138</sup> Advisory Opinion, *supra* note 11, at 15. The United States did, however, allude to its potential as an objector in its brief before the court: "With respect to the use of nuclear weapons, customary law could not be created over the objection of the nuclear-weapon States, which are States whose interests are most specifically affected." Written Submission of the United States, *supra* note 27, at 9.

<sup>139</sup> See Weiss et al., *supra* note 95, at 10.

sembly Request and, further, while not finding a rule of customary law absolutely prohibiting the use of nuclear weapons, did find that nuclear weapons threatened basic elements of humanitarian law.<sup>140</sup>

At this point, the nuclear states have the option of backing out of the legal process entirely by refusing to recognize the court's jurisdiction over the Request, and its subsequent opinion.<sup>141</sup> Such a response would represent a great failure of the system of international law, striking a severe blow to the efforts of the nuclear states to use international law to govern another aspect of nuclear politics: nuclear non-proliferation. The nuclear states already use international law to regulate the spread of nuclear weapons, through the Non-Proliferation Treaty.<sup>142</sup> This treaty seeks to extract from the non-nuclear states a pledge that they will not acquire nuclear weapons. But the treaty also imposes upon the nuclear states an obligation to pursue nuclear disarmament. The nuclear states have already drawn criticism for failing diligently to pursue this goal.<sup>143</sup> A refusal to be governed by international law in the

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<sup>140</sup> See Advisory Opinion, *supra* note 11, at 34. For a discussion of the elements of humanitarian law found to be threatened by nuclear weapons, see *supra* notes 97-117 and accompanying text.

<sup>141</sup> The United States had a similar response to a finding against it in the Case Concerning Paramilitary Activities in Nicaragua. See *supra* note 111. The possibility or probability of this response has led some to question the usefulness of an advisory opinion. Judge Weeramantry responded to these concerns in his impressive dissent:

[H]owever political the question, there is always value in the clarification of the law. It is not ineffective, pointless and inconsequential. It is important that the Court should assert the law as it is. A decision soundly based on law will carry respect with it by virtue of its own inherent authority. It will assist in building up a climate of opinion in which law is respected. It will enhance the authority of the Court in that it will be seen to be discharging its duty of clarifying and developing the law, regardless of political considerations.

Dissenting Opinion of Judge Weeramantry, *supra* note 104, at 108.

<sup>142</sup> See *supra* note 21.

<sup>143</sup> The recent controversy over the resumption of French nuclear testing highlights the seriousness with which the world community views any nuclear detonation. The NPT includes a pledge by its nuclear signatories to work toward the eventual elimination of nuclear arsenals, and accusations of failure to meet this promise marred the recent NPT renewal talks in late 1994. See Jehl, *supra* note 21, § A3. The court also made unanimous note of the obligation in the Advisory Opinion: "There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control." Advisory Opinion, *supra* note 11, at 36.

present case could cause additional doubt on the part of the non-treaty states of the sincerity of the nuclear states to abide by their treaty obligations. So if the nuclear states find their foreign policies on the wrong side of a custom prohibiting the use of nuclear weapons and yet desire to continue within the system of international law, they may be able to find protection with shield of the persistent objector.

The basis for the nuclear state's status as persistent objectors will be their participation in the treaties which govern nuclear weapons themselves. States will use these international instruments as proof of state action implicitly adverse to a custom prohibiting the use of nuclear weapons outright—if a state is party to a treaty which regulates the use of nuclear weapons, that state clearly believes that its use of such weapons is indeed legal under the regime of those particular treaties. It will be these treaties, and the conduct and statements accompanying them, which will form the basis for the satisfaction of the state action element of the Rule.

### 1. Instances of State Action

In their briefs before the court, the nuclear weapon states pointed to both the actual deployment of nuclear weapons and the existence of treaties surrounding their use as evidence of a consistent belief, at least among a certain bloc of states, in the legality of nuclear weapons.<sup>144</sup> There are a number treaties which prohibit the use of particular weapons in combat, including biological and chemical weapons; environmental modification techniques as weapons; exploding bullets; and weapons with non-detectable fragments.<sup>145</sup> The existence of these

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<sup>144</sup> See Written Submission of the United States, *supra* note 27, at 8-21; see also Written Submission of the United Kingdom, *supra* note 27, at 40-61; Written Submission of the Russian Federation, *supra* note 27, at 6-9.

<sup>145</sup> For early examples of such agreements, see, e.g., St. Petersburg Declaration, *supra* note 87 (The St. Petersburg Declaration was an effort by the Russian government to ban the use of "dum-dum" bullets—projectiles designed to explode on impact.); see also Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, *opened for signature* June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65 (taking its lead from treaties between the great powers of the time banning the use of weapons named in the title, this was an effort by the then developing countries to apply this standard to all states).

agreements may represent a pattern in international practice. If a specific prohibition against nuclear weapons existed in international law, the nuclear states argued, it would have been given form in a treaty speaking specifically to nuclear weapons.<sup>146</sup>

The nuclear states also argued that the existence of agreements governing the use of nuclear weapons was itself indicative of the absence of any general prohibition.<sup>147</sup> Primary among these agreements are those which prohibit or regulate the manufacture, testing or possession of nuclear weapons or systems for their delivery, such as the 1963 Limited Test Ban Treaty,<sup>148</sup> the 1967 Outer Space Treaty,<sup>149</sup> the 1968 Non-Proliferation Treaty,<sup>150</sup> the 1987 Intermediate-Range Nuclear Forces Treaty,<sup>151</sup> and the 1993 Treaty on the Elimination of Strategic Offensive Arms.<sup>152</sup> The terms of these treaties, the argument goes, implicitly acknowledge that the continued possession and use of such weapons within the confines of treaty limitations are not prohibited.<sup>153</sup>

Further, the nuclear states point to treaties banning the use of nuclear weapons in individual areas as indicative of an absence of any overarching custom prohibiting possession. These agreements include the Antarctic Treaty,<sup>154</sup> prohibiting

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<sup>146</sup> See Written Submission of the United States, *supra* note 27, at 10.

<sup>147</sup> See Written Submission of the United Kingdom, *supra* note 27, at 23-24; see also Written Submission of the United States, *supra* note 27, at 11.

<sup>148</sup> Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and Under Water, *opened for signature* Aug. 5, 1963, 14 U.S.T. 1313, 480 U.N.T.S. 43 (entered into force Oct. 10, 1963).

<sup>149</sup> Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, *opened for signature* Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205 (entered into force Oct. 10, 1967).

<sup>150</sup> See *supra* note 111.

<sup>151</sup> Treaty on the Elimination of Intermediate-Range and Shorter-Range Missiles, Dec. 8, 1987, U.S.-U.S.S.R., 23 U.S.T. 3435, 27 I.L.M. 84.

<sup>152</sup> Agreement Between the Department of Defense of the United States of America and the Committee for Defense Industry of the Russian Federation Concerning Co-operation in the Elimination of Strategic Offensive Arms, Aug. 23, 1993, U.S.-Russia, 1992 WL 725374.

<sup>153</sup> For instance, the United States pointed to the 1972 Anti-Ballistic Missile Treaty and the 1993 Treaty on the Reduction and Limitation of Strategic Arms as examples of treaties which specifically "sanction[ed] the need for deterrent nuclear-weapon forces, prohibit[ed] the creation of destabilizing defenses against them, and prohibit[ed] or restrict[ed] offensive forces that could destroy them." Written Submission of the United States, *supra* note 27, at 13.

<sup>154</sup> The Antarctic Treaty, *opened for signature* Dec. 1, 1959, 12 U.S.T. 794, 402

all nuclear explosions on the Antarctic continent and the Treaty of Tlatelolco, prohibiting Latin American member states from using nuclear weapons under any circumstances.<sup>155</sup> These instruments, it was argued, would be meaningless or redundant in the face of a custom prohibiting the use of nuclear weapons under any circumstances. Further, the fact that the nuclear states have not *used* nuclear weapons since World War II does not in any way imply consent to an evolving rule of custom. Such abstention from use would have to be undertaken from a sense of legal obligation in order for the practice to form the basis for a rule of customary law.<sup>156</sup> As discussed above, the action necessary to constitute an *objection* to a customary rule may take a variety of forms, from actual exercise of a legal right, to statements expressing a desire to preserve the right. The nuclear states have both issued statements particularly reserving the right to use nuclear weapons<sup>157</sup> and continue to maintain foreign policy that relies upon potential use of nuclear weapons a deterrent.<sup>158</sup> Both these statements may satisfy the "action" requirement of the Rule.

Finally, the nuclear states presented their own consistent possession and deployment of nuclear weapons as proof of an active objection to any customary prohibition.<sup>159</sup> In fact, nuclear states argue that these deployment policies<sup>160</sup> form an essential plank in their exercise of the right to self-defense under the UN Charter.<sup>161</sup> That such weapons have been used infrequently need not detract from their value as deterrents and, therefore, their continued "use" for purposes of rendering

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U.N.T.S. 71 (entered into force June 23, 1961).

<sup>155</sup> Treaty for the Prohibition of Nuclear Weapons in Latin America, *opened for signature* Feb. 14, 1967, 634 U.N.T.S. 281, 6 I.L.M. 521 [hereinafter Tlatelolco Treaty].

<sup>156</sup> For the requirements for the formation of a rule of customary law, see *supra* notes 30-34 and accompanying text.

<sup>157</sup> See, e.g., the "nuclear understanding" filed by the United States upon signing Protocol I. See *supra* note 137.

<sup>158</sup> See EDEN, *supra* note 137, at 109-72. In fact, this continued policy of deterrence, in part, stood in the way of the court finding a specific custom prohibiting nuclear weapons. See Advisory Opinion, *supra* note 11, at 33.

<sup>159</sup> See Written Submission of the United States, *supra* note 27, at 13; see also Written Submission of the United Kingdom, *supra* note 27, at 28.

<sup>160</sup> Deployment doctrines of nuclear states are discussed in the *Report of the Secretary-General on Nuclear Weapons*, *supra* note 103, at 61-71.

<sup>161</sup> See U.N. CHARTER art. 51.



the user a persistent objector. The position of the nuclear states is best illustrated by their official statements. On April 5, 1995, the United States declared, in the context of the recent conference on the extension of the NPT, that it

reaffirms that it will not use nuclear weapons against non-nuclear-weapon States Parties to the Treaty on Non-Proliferation of Nuclear Weapons except in the case of an invasion or any other attack on the United States . . . carried out or sustained by such a non-nuclear-weapon State in association or alliance with a nuclear-weapon State.<sup>162</sup>

France,<sup>163</sup> Russia<sup>164</sup> and the United Kingdom<sup>165</sup> made statements identical in substance at the same time. Similar reservations have been made by nuclear states when signing treaties that may be interpreted as encompassing nuclear weapons.<sup>166</sup> Certainly, such specific statements of a state's motivation and legal view must be taken as a valid vehicle of objection.

### C. *Nuclear Weapons and the Policy Goals of the Persistent Objector Rule*

Because the policy goal of the Rule is to facilitate smooth operation of the international community and to encourage participation in the lawmaking process, the Rule should not be used when it would defeat these purposes. If the presence of the objector is so disruptive to the international community, no amount of facilitation will help. Accordingly, several theories have arisen through which a persistent objector may be bound when the policy goals of the Rule are not met.

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<sup>162</sup> See Written Submission of the United States, *supra* note 27, at 16 (citing Letter Dated 6 April 1995 from the Charge D'Affaires A.I. of the Permanent Mission of the United States of America to the United Nations Addressed to the Secretary General, U.N. Doc. A/50/153, U.N. Sales No. 95-10060 (1995)).

<sup>163</sup> Letter Dated 6 April 1995 from the Permanent Representative of France to the United Nations Addressed to the Secretary-General, U.N. Doc. A/50/154, U.N. Sales No. 95-10060 (1995).

<sup>164</sup> Letter Dated 6 April 1995 from the Permanent Representative of the Russian Federation to the United Nations Addressed to the Secretary-General, U.N. Doc. A/50/151, U.N. Sales No. 95-10072 (1995).

<sup>165</sup> Letter Dated 6 April 1995 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations Addressed to the Secretary-General, U.N. Doc. A/50/152, U.N. Sales No. 95-10054 (1995).

<sup>166</sup> See *supra* note 137 and accompanying text.

## 1. The Objector Will Bow to Diplomatic Pressure

The Persistent Objector Rule allows dissenting states to shield themselves from expansive and rapidly developing customary law. Yet, this protection may only be transient. The absence of the persistent objector on the international scene indicates that the Rule, while legally sound, does not provide a sufficient political shield to sustain the dissenting state. Over time, that state will be pressured to accede to the will of the majority as the political isolation that comes from being in an unpopular minority grows. This isolation may be expressed through United Nations resolutions which condemn the action of the dissenting state, as well as the writings of jurists.<sup>167</sup> The pressure has been characterized as so "extreme" that few objectors will seek actively to enforce their claimed reserved rights after the custom has been formed.<sup>168</sup>

The failed objections of the United States, United Kingdom and Japan to expanded coastal state jurisdictions have been cited as examples of this effect.<sup>169</sup> Throughout the period during which the rule establishing a customary right to a 200-nautical-mile Exclusive Economic Zone was in effect, these three states clung to the twelve-mile limit established by earlier treaty.<sup>170</sup> Yet, even when accused of violating the territory of other coastal states by condoning fishing within their exclusive zone, the United States did not appeal to the Rule. Nor was there any reference on the part of the aggrieved states that the US might be due some special privilege due to its objector's status.<sup>171</sup> Even if opportunities for the objector increase in the future, through the increased rate of customary law formation, this pressure will remain, focused by the growing mechanisms through which custom is established.

Political isolation may be a strong factor in influencing state practice; however, it will necessarily be balanced by the importance of that practice to the dissenting state. It is unlike-

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<sup>167</sup> See Akehurst, *supra* note 33, at 27.

<sup>168</sup> See Akehurst, *supra* note 33, at 27.

<sup>169</sup> See Akehurst, *supra* note 33, at 22; see also Charney, *supra* note 69, at 27.

<sup>170</sup> See *supra* note 53 and accompanying text; see also, e.g., Convention on the Territorial Sea and Contiguous Zone, opened for signature Apr. 29, 1958, 15 U.S.T. 1606, 516 U.N.T.S. 205 (entered into force Sept. 10, 1964).

<sup>171</sup> See Stein, *supra* note 14, at 462.

ly, then, that the potential nuclear objector will fold to this type of pressure. Past cases of the failure of the Rule to aid an objector, such as the Soviet Union's objection over the limitation of sovereign immunity and the United States' eventual acceptance of the 200-mile fisheries zone, have not dealt with issues vital to security. The nuclear states, being among the wealthiest states in the international community, are thus well placed to resist diplomatic pressure. Further, it is doubtful that these states will give up a device central to their security schemes in the face of diplomatic protest from world bodies.

## 2. Targets of Specific Rules Will Be Bound Despite Objection

Pressure for a state to conform to a custom will be increased if the objector itself causes the new custom. Professor Stein draws an interesting parallel between the absence of an appeal to the Rule in both the cases of South Africa's apartheid and the Soviet Union's sovereign immunity.<sup>172</sup> "In each case, the state . . . identified as the objector was the specific target of the emerging norm. . . . [T]he norm in each case was motivated by the practices of these states; their exemption from its application would largely deprive the rule of its intended effect."<sup>173</sup> In each case, the potential objector was not an observer to an emergent international customary law that it feared would impact negatively on its interests. Rather, it was the specific target of the international community's effort to create a new custom. Unfortunately, Professor Stein does not offer a particular legal basis under which a dissenter may be denied the benefits of the persistent objector merely because it is the target of the custom in question. In fact, to deny access to the rule for target states would seem to work counter to the rule's function of smoothing the way for the development of new custom. Professor Stein may be observing simply an intensified version of the political pressure which acts to bind the persistent objector—if a dissenting state will bow to pressure from the majority, this pressure can only be magnified when the dissenter is the very cause of the new custom in question.

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<sup>172</sup> See *supra* note 77 and accompanying text.

<sup>173</sup> Stein, *supra* note 14, at 479.

### 3. An Objector Will be Bound to Rules of *Jus Cogens*

By far the most common circumstance under which the persistent objector may be bound occurs when the custom in question is based upon general principles of law, or *jus cogens*.

[B]road[ ] support exists for a . . . theory, according to which *jus cogens* norms reflecting the fundamental interests of the international community should bind all states without exception, notwithstanding their possible dissent.<sup>174</sup>

The scope of "norms reflecting fundamental interests" is much debated.<sup>175</sup> *Jus cogens*, also called peremptory norms, has been defined as

the body of those general rules of law whose non-observance may affect the very essence of the legal system to which they belong to such an extent that the subjects of law may not, under pain of absolute nullity, depart from them in virtue of particular agreements . . . . Thus, the *jus cogens* restricts the freedom of Parties; its rules are absolutely binding.<sup>176</sup>

This principle receives its strongest support from the 1969 Vienna Convention on the Law of Treaties, Article 53,<sup>177</sup> stating that "[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law."<sup>178</sup> A peremptory norm is defined as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted . . . ."<sup>179</sup> The principle was acknowledged by the ICJ in the *Nicaragua Case*,<sup>180</sup> in which it characterized the prohibi-

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<sup>174</sup> GENNADII MIKHAILOVICH DANILENKO, LAW MAKING IN THE INTERNATIONAL COMMUNITY 219 (1993).

<sup>175</sup> For an in-depth treatment of *jus cogens* in international law, see, e.g., LAURI HANNIKAINEN, PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW, HISTORICAL DEVELOPMENT CRITERIA, PRESENT STATUS (1988); Ronald St. John MacDonald, *Fundamental Norms in Contemporary International Law*, 25 CAN. Y.B. INT'L L. 115 (1987).

<sup>176</sup> HANNIKAINEN, *supra* note 175, at 1.

<sup>177</sup> Vienna Convention on the Law of Treaties, *opened for signature* Mar. 12, 1968, U.N. Doc. A/Conf. 39/27, at 289 (1969), 1155 U.N.T.S. 331, *reprinted in* 8 I.L.M. 679 (1969).

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *See supra* note 111.

tion on the use of force according to the UN Charter as "a conspicuous example of a rule of international law having the character of *jus cogens*."<sup>181</sup>

*Jus cogens* is also a moral principle, based in the essential rules necessary to maintain human society.<sup>182</sup> It is from this definition that some of the most commonly cited maxims of *jus cogens* spring:

(a) *principles which establish the main sovereign rights of States and peoples: equality and self-determinations [sic] of peoples, non-interference;*

(b) *principles defending the peace and security of nations: prohibition of the use or threat of use of force, peaceful solution of disputes . . . ;*

(c) *principles establishing major demands of humanity: . . . ban on genocide, apartheid and all other kinds of racial discrimination . . . ;*

(d) *principles prohibiting crimes against humanity, as established in the Statutes of the Nuremberg and Tokyo Tribunals . . . ;*<sup>183</sup>

While there is significant dispute as to the existence of a hierarchy of international law principles and the place of *jus cogens* within such a hierarchy,<sup>184</sup> the lists of many writers resemble the one above.<sup>185</sup> Whether the source of *jus cogens* rests in a theory of positivism, natural law or general principle, the rules so categorized are considered basic to the essential functioning of the international system.

Thus, there can be no persistent objector derogating from a rule of *jus cogens*. To allow such dissent would establish a basic inequity between nations: Instead of an international community rooted in a basic set of general principles, there would arise smaller communities, differentiated by the privileges granted by the exemption allowed by the Rule. Instead of facilitating the creation of a cohesive international community, the Rule would break that community apart.

<sup>181</sup> Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 16 (June 27).

<sup>182</sup> Levan Alexidze, *Legal Nature of Jus Cogens in Contemporary International Law*, 172 REC. DES COURS 219, 260 (1981-III).

<sup>183</sup> *Id.* at 262.

<sup>184</sup> See Prosper Weil, *Towards Relative Normativity in International Law*, 77 AM. J. INT'L L. 413 (1983).

<sup>185</sup> See, e.g., Alexidze, *supra* note 182, at 255; MacDonald, *supra* note 175, at 132.

Of special note is Professor Charney's argument that the concept of "universal" norms must expand to address pressing issues which threaten the global environment.<sup>185</sup> Threats such as ozone depletion and ocean dumping endanger the global environment and world population, demanding a set of laws that establish global controls.<sup>187</sup> Allowing dissent from such regulations would permit the damage to continue and, in the case of environmental regulation, would give an unfair economic advantage to the dissenter. States complying with a regulation would be forced to expend resources to change their behavior, and a dissenter could continue to take advantage of less costly, more damaging, environmental practices. This problem is analogous to the threat posed by nuclear weapons. The damage threatened by these weapons is global in scope, and allowing some states to possess them while denying that privilege to others grants an advantage in both political power and national security which non-nuclear states must overcome through more complex, collective security measures.

Even a single dissenter, Professor Charney argues, could cause serious damage to the environment and the international legal system because the dissenter would benefit from the restraint of other states while remaining unrestrained itself. A new norm of *jus cogens* should arise to protect environmental interests when "the threat is grave, the international consensus strong, and the consequences of exemptions severe."<sup>188</sup> While the international legal system is not conducive to formulating new norms with the urgency that Professor Charney suggests is necessary, the argument that these new environmental threats present a challenge to the stability of the international system as great as any violation of a currently recognized norm of *jus cogens* remains convincing.

The nuclear objector will be subject to either of these methods for binding a persistent objector to a customary rule, either by demonstrating that the nuclear state is the particular target of the rules acting to prohibit nuclear weapons or that the questionable humanitarian customs are rooted in princi-

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<sup>185</sup> Jonathan Charney, *Universal International Law*, 87 AM. J. INT'L L. 529 (1993).

<sup>187</sup> *Id.* at 542-43.

<sup>188</sup> *Id.* at 529.

ples of *jus cogens*. However, it seems doubtful that nuclear states will bow to world opinion on matters of such importance to their national security.<sup>189</sup> The nuclear states are politically and economically strong enough to withstand organized condemnation that might be brought to bear. This leaves *jus cogens* as the most likely means by which the nuclear objector will be bound. Where the opinion of international community might pressure an objector to cease an unpopular practice, a finding that the use of nuclear weapons violates *jus cogens* is a far more direct attack on the objector's position. Faced with such a finding, the nuclear objector would be compelled to either ignore the lawmaking process or be bound by it.

#### IV. CAN AN EXCLUSION TO THE RULE BE APPLIED TO NUCLEAR WEAPONS?

The elements of the discussion above now resolve themselves into the question at the heart of this analysis: whether the nuclear states may appeal to the Rule to shield themselves from customs that prohibit the use, or threatened use, of nuclear weapons? Put differently, do the customs through which nuclear weapons have been prohibited create a basis upon which the defense of the persistent objector may be denied to the nuclear states? In light of the nature of the customs discussed, both fundamental principles of human rights and younger, emerging customs of environmental protection, the answer must be yes: The customs that prohibit nuclear weapons are fundamentally based in *jus cogens* and, therefore, the persistent objector should not be a shield to their legal application to bind the nuclear objector.

The case has been made that now, more than anytime in history, there is a requirement for the emergence of universal norms from which no state may be exempt, in order to defend against an ever increasing class of global threats.<sup>190</sup>

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<sup>189</sup> See *supra* notes 167-171 and accompanying text.

<sup>190</sup> See *supra* note 182; see also *supra* notes 174-189 and accompanying text.

### A. *Human Rights as Jus Cogens*

It is unquestionable that certain customs have achieved the level of *jus cogens* among certain rules regarding human rights. Included among these are prohibitions against genocide, slavery, torture, racial discrimination, and the "protection of rights essential to the human person in times of peace and in times of war."<sup>191</sup> Obviously this list ranges from concepts reasonably well-understood, such as slavery, to those with less clear boundaries. Certainly, the human rights protected by *jus cogens* must go beyond the mere protection from being enslaved or summarily killed. It is in this expanded category of human rights covered by *jus cogens* where the customs which will be offended by the use of nuclear weapons can be found.

Support for the *jus cogens* nature of human rights during times of war may be drawn from the language employed in some of the oldest accepted treaties on human rights during times of war. For instance, the St. Petersburg Declaration of 1907 states that "the progress of civilization should have the effect of alleviating, as much as possible, the calamities of war."<sup>192</sup> The evolutionary process of the *jus in bello* continues today. Many current codifications refer to the importance of safeguarding the lives and health of noncombatants, even after all other mechanisms of international law have failed. Most notable among these agreements are the additional protocols to the 1949 Geneva Convention, which invoke the "principles of humanity [and] dictates of public conscience" to govern actions of combatants.<sup>193</sup> Again, in these protocols the right of a combatant to inflict injury on its opponent is limited, with express prohibitions on the infliction of unnecessary suffering and damage to the natural environment.<sup>194</sup> Clearly, while the customs surrounding the laws of war continue to evolve, the basic

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<sup>191</sup> Roberto Ago, *The Law of Treaties in Light of the Vienna Convention*, 134 HAGUE RECUEIL 297, 324 n.37 (1971-III).

<sup>192</sup> See St. Petersburg Declaration, *supra* note 98, at art. 1.

<sup>193</sup> See *supra* note 100. Article 35 of Protocol I, entitled "Basic Rules," explicitly states that "it is prohibited to employ weapons of a nature to cause superfluous injury or unnecessary suffering [and] it is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long term and severe damage to the environment." Protocol I, *supra* note 100, at art. 35.

<sup>194</sup> Protocol I, *supra* note 100.



principles which inform them, a desire to contain war as far as possible, remain rooted in *jus cogens*. Allowing even one combatant to exempt itself from these rules would pose a severe threat to the peace and security of the international community.

Strangely enough, the court refused to speak to the nature of the human rights norms that would be violated by a threat or use of nuclear weapons.<sup>195</sup> This was despite the fact that the court already acknowledged the fundamental nature of the human rights norms involved.<sup>196</sup> Other judges of the court were not so reserved, however, stating:

The rules of the humanitarian law of war have clearly acquired the status of *ius cogens* [sic] for they are fundamental rules of a humanitarian character, from which no derogation is possible without negating the basic considerations of humanity which they are intended to protect.<sup>197</sup>

Judge Koroma also acknowledged the commentary of noted publicists regarding the *jus cogens* nature of essential human rights, and criticized the court for failing to take the additional step of confirming the customary base of the human rights obligations of the 1949 Geneva Convention:

A pronouncement of the Court emphasizing their humanitarian underpinnings and the fact that they are deeply rooted in the traditions and values of member States of the international community and deserve universal respect and protection, and not to be derogated from by States would assist in strengthening their legal observance especially in an era which has so often witnessed the most

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<sup>195</sup> The court stated:

The request addressed to the Court by the General Assembly raises the question of the applicability of the principles and rules of humanitarian law in cases of recourse to nuclear weapons, and the consequences of that applicability for the legality of recourse to these weapons. It does not raise the question of the character of the humanitarian law which would apply to use of nuclear weapons.

Advisory Opinion, *supra* note 11, at 29.

<sup>196</sup> See Advisory Opinion, *supra* note 11, at 28 ("[T]hese fundamental rules [of humanitarian law] 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.").

<sup>197</sup> Dissenting Opinion of Judge Weeramantry, *supra* note 104, at 58; see also Dissenting Opinion of Judge Koroma, *supra* note 104, at 19.

serious and egregious violation of humanitarian principles and rules and whose very *raison d'être* is irreconcilable with the use of nuclear weapons.<sup>198</sup>

Given these strong arguments, it seems clear that should the question of the *jus cogens* nature of humanitarian law be placed squarely before the court, as it would in the case of an attempt to bind a nuclear objector to these customs, the court would find in the affirmative.

### B. *Environmental Law as Jus Cogens*

The fact that environmental protection as state obligation is a relatively recent concern within global politics is a bar neither to the finding of an emergent custom concerning it, nor to a finding that recognized principles of environmental protection as human rights are grounded in *jus cogens*. Indeed, since the court cleared the initial hurdle of recognizing customs speaking to environmental protection, grounding for these customs in *jus cogens* may be done absent the finding of consistent practice which will form an element of the initial custom analysis. There are two ways by which the recent concern over environmental protection may be translated into principles of *jus cogens*.

First, principles of environmental protection may be viewed as an extension of already existing *jus cogens* principles of humanitarian law. That environmental protection is linked to human rights is already implied by Protocol I.<sup>199</sup> This position has been strengthened by multilateral agreements such as the 1977 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Techniques.<sup>200</sup> Therefore, the court could find that a right to a clean environment is an extension of existing human rights and, as such, is already included in the customs of *jus in bello* protecting human rights.

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<sup>198</sup> Dissenting Opinion of Judge Koroma, *supra* note 104, at 18.

<sup>199</sup> See *supra* note 100 and accompanying text.

<sup>200</sup> See *supra* note 120. Article I of the Convention reads, "Each State party to this Convention undertakes not to engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party." The Convention has been accepted by over 100 states, including the nuclear states.

Second is the assertion that environmental protection itself forms the basis for an extension of the fundamental obligations of state practice. While proving the existence of a new or extended custom is challenging, significant evidence already exists pointing toward a growing feeling that environmental protection is a human right crucial enough to give rise to its own custom.<sup>201</sup> This new concern is voiced in agreements ranging from general statements, such as the 1982 World Charter for Nature,<sup>202</sup> to agreements constructed to answer very specific problems, such as the recent Protocol on Substances That Deplete the Ozone Layer,<sup>203</sup> and the Montreal Protocols.<sup>204</sup> Ironically perhaps, this concern with safeguarding the environment has been largely driven by the developed states, including those nuclear states which would be bound by this new custom.<sup>205</sup> A custom that began in a desire to curb pollution caused by developing states in their haste to industrialize was found by the court to have a more far-reaching effect, speaking not only to the right to develop, but the right to use nuclear weapons as well.<sup>206</sup>

Either of these avenues of reasoning lead to the same conclusion: Considering the fundamental nature of the customs of environmental protection, these customs must be grounded in the same *jus cogens* principles which inform other more familiar rules of human rights. Alternatively, if environmental protection is itself part of the basic obligations of humanitarian law, it becomes *jus cogens* through the same means as those

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<sup>201</sup> For additional discussion of the environmental obligations of states, see *supra* notes 128-136 and accompanying text.

<sup>202</sup> Consideration and Adoption of the Revised Draft World Charter for Nature, U.N. Doc. A/37/L.4, U.N. Sales No. 82-27864 (1982). In § 1, entitled "General Principles," the Charter states in part: "Nature shall be respected and its essential processes shall not be impaired [and] nature shall be secured against degradation caused by warfare or other hostile activities."

<sup>203</sup> 26 I.L.M. 1550 (1987).

<sup>204</sup> Protocol on Substances that Deplete the Ozone Layer, *opened for signature* Sept. 16, 1987, 26 I.L.M. 1550 (entered into force Jan. 1, 1989).

<sup>205</sup> For a discussion of the developed states' role in environmental regulation, see, e.g., RICHARD BENEDICK, *OZONE DIPLOMACY* (1991).

<sup>206</sup> While the court did not find that obligations of environmental custom operated to specifically prohibit nuclear weapons, it did recognize that "the environment is under daily threat and that the use of nuclear weapons could constitute a catastrophe for the environment." Advisory Opinion, *supra* note 11, at 15.

human rights rules. Again, allowing even one state to exempt itself from these principles poses a threat to all and, therefore, such objection should not be available to any state.

## CONCLUSION

When principles of human and environmental rights threatened by nuclear weapons are grounded in *jus cogens*, it becomes apparent that the persistent objector should not be an available route to the nuclear states in any legal defense. Threats posed by these weapons are too great to permit them to be merely curbed by non-proliferation regimes, or piecemeal nuclear-free zones. The policy goals of the Persistent Objector Rule are thus foiled: Allowing a nuclear state to exempt itself from the custom to encourage participation in the international political community would threaten or destroy the very customs that are of vital importance to that community. The exception swallows the rule.

Other means of binding the persistent objector will not function to bind the nuclear states due to the distribution of power peculiar to nuclear issues. The same external pressure which caused the persistent objections of South Africa or Japan to fail could not be brought to bear upon the nuclear states. These states, themselves great powers within the international community, cannot be cut off from the global community as South Africa was isolated. Nor will they conform their practice to those of their neighbors (as Japan and the United States did regarding their claims to their coastal jurisdiction) where a device that is viewed as vital to national security is concerned. The failure of international pressure to halt French nuclear testing in the South Pacific is a prime example of the relative impunity with which an already established nuclear state may act. This is not to say that nuclear weapons may be used with impunity, but so long as the possible use of these weapons remains a pillar of defense policy, the vital legal norms discussed above remain threatened.<sup>207</sup> Therefore, the moral force created by a norm of *jus cogens* should alone bind

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<sup>207</sup> In other words, a threat to commit an illegal act is, in itself, an illegal act. The case for prohibiting the mere threat of use is presented in Weiss et al., *supra* note 95, at 45.

the persistent objector. In the end, the choice of the nuclear state will be a moral one—to be bound by the recognition of the international community of a threat to all, or to use their unique position as political and economically powerful actors to exempt themselves from the international process when it suits their purposes. That these states have such power, and have used it in the past, is unquestionable. The question now becomes whether the exercise of such power now—in an increasingly interdependent world, on a subject of such global importance—will damage the international legal processes upon which all nations depend.

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