

# THE INTERNATIONAL COURT OF JUSTICE AND HIGHLY POLITICAL MATTERS

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*[Many commentators, including even some members of the International Court of Justice itself, have expressed concerns about the Court's ability to make a valid contribution to the resolution of highly political matters — those matters where the national interests of nation states are threatened. Such criticism is based on the obvious problems of the international legal system: its basis of consensual jurisdiction and the reluctance, and at times the recalcitrance, of states to comply with the Court's decisions. The purpose of this article is to examine whether the Court is able to make a contribution to the resolution of highly political disputes. It firstly examines some of the most highly political matters heard by the Court, such as Nicaragua, the Nuclear Weapons Opinion, the Lockerbie Case, and the Arrest Warrant Case, and secondly considers the impact these decisions have had on subsequent actions of states. In conclusion, this article argues that it is the nature of the Court — a legal body comprised of objective, trained personnel — that ensures it is an appropriate body to assist in the resolution of highly political disputes. This is a significant contribution not only to the parties involved in a dispute, but also to the international community as a whole.]*

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[T]he plain fact [is] that nations no less than men are ruled by law and are so ruled at all times.<sup>1</sup>

## I INTRODUCTION

Traditionally, domestic or national courts in western legal systems have considered themselves to be inappropriate fora for resolving highly political issues.<sup>2</sup> This judicial reticence is based on the separation of powers theory advanced by the French political theorist Baron de Montesquieu, but also exists for pragmatic reasons.<sup>3</sup> At the international level, concerns about the ability of the International Court of Justice ('ICJ') to participate in and make a valid contribution to the resolution of highly political issues have often been expressed, even by members of the Court itself.<sup>4</sup> For example, Helmut Steinberger, the Vice-President of the Court of Conciliation and Arbitration of the Organization for Security and Cooperation in Europe, observes that:

Experienced observers of international relations are right when they consistently note that the function of international law and of international jurisdiction in the area of the peaceful settlement of highly political disputes, and in particular of

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<sup>1</sup> Clive Parry in his criticisms of Sir Edward Grey, the UK Foreign Minister between 1905–16, cited in Eugene Rostow, 'Disputes Involving the Inherent Right of Self-Defense' in Lori Damrosch (ed), *The International Court of Justice at a Crossroads* (1987) 264, 267.

<sup>2</sup> Except for such courts as the US Supreme Court or the Australian High Court.

<sup>3</sup> Takane Sugihara, 'The Judicial Function of the International Court of Justice' in A S Muller, D Raič and J M Thuránszky (eds), *The International Court of Justice: Its Future Role after Fifty Years* (1997) 117, 130; Edward McWhinney, *Judicial Settlement of International Disputes: Jurisdiction, Justiciability and Judicial Law-Making on the Contemporary International Court* (1991) 40–3. McWhinney rejects the argument that this applies equally to the international legal system by identifying an important distinction between the international community and domestic systems. In domestic systems, the legal sources of the power of the respective institutions of governance — the legislature, the judiciary and the executive — are all contained in the one constitution, whereas in the international system, the International Court of Justice has its own 'autonomous constitutional basis'; its constitutive document, the *Statute of the International Court of Justice*, is distinct from the *UN Charter*.

<sup>4</sup> See, eg, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US) (Merits)* [1986] ICJ Rep 14, 168 ('*Nicaragua*') (Separate Opinion of Judge Lachs), in which his Honour noted that whilst almost all international disputes raise both political and legal questions and that political organs, including states, are under an obligation to comply with international law, '[t]his does not mean that all disputes arising out of them are suitable for judicial solution.'

disputes containing a threat to peace or international security, is of necessity quite limited.<sup>5</sup>

As Mohamed Shahabuddeen, a former member of the ICJ, has said, '[t]o be sure, judicial process alone cannot banish war'.<sup>6</sup> This raises the important question of 'whether the Court, as a court of justice, has a limitation on its judicial function, and is legally prevented from dealing with a dispute in which highly political issues are predominant.'<sup>7</sup>

It is the purpose of this article to examine this question and determine whether the Court is able to make a contribution to the resolution of highly political disputes — that is, those disputes where the national interests or perceived national interests of nation states are threatened — and what form that contribution should take. It is argued here that criticisms of the ICJ's role are really criticisms of the nature of the international legal system rather than of the Court itself and that, in reality, the Court can and does make a significant contribution to the peaceful resolution of highly political disputes.<sup>8</sup>

## II THE NATURE OF INTERNATIONAL DISPUTES

International disputes basically arise from the discordant or competing 'national interests' of states as they play what Kipling termed the 'great game'.<sup>9</sup> Whilst debate and controversy continue regarding increasing globalisation and the creation of supranational entities such as the European Union, the fact remains that the international community is comprised of political communities called 'nation states' that consider themselves to be independent sovereign entities. In accordance with theories of national sovereignty, these independent sovereign states are reluctant to admit, and indeed on occasion even deny (where

<sup>5</sup> Helmut Steinberger, 'The International Court of Justice' in Max Planck Institute for Comparative Public Law and International Law, *Judicial Settlement of Disputes: International Court of Justice, Other Courts and Tribunals, Arbitration and Conciliation — An International Symposium* (1974) 193, 207. Steinberger notes further: 'From all this it may be concluded that, in view of the conditions existing in the international society of States today, a central role in the settlement of highly political disputes should not generally be expected of the Court': *ibid* 209.

<sup>6</sup> Judge Mohamed Shahabuddeen, 'The World Court at the Turn of the Century' in A S Muller, D Raič and J M Thuránzsky (eds), *The International Court of Justice: Its Future Role after Fifty Years* (1997) 3, 18. At the ICJ/UNITAR Colloquium to celebrate the 50<sup>th</sup> anniversary of the ICJ, Prosper Weil, in reply to a paper given by Sir Robert Jennings, stated that some conflicts could not be resolved by the ICJ: 'General Discussion Chaired by Judge Carl Fleischhauer' in Connie Peck and Roy Lee (eds), *Increasing the Effectiveness of the International Court of Justice: Proceedings of the ICJ/UNITAR Colloquium to Celebrate the 50<sup>th</sup> Anniversary of the Court* (1997) 90, 93–4. See also Jennings' more detailed discussion in Sir Robert Jennings, 'The Proper Work and Purposes of the International Court of Justice' in A S Muller, D Raič and J M Thuránzsky (eds), *The International Court of Justice: Its Future Role after Fifty Years* (1997) 33, 45. Note in particular his mention of the US Supreme Court decision in *Dred Scott v Sandford*, 60 US (19 Howard) 393 (1857), and the claim that it failed to prevent the American Civil War.

<sup>7</sup> Sugihara, above n 3, 118–19.

<sup>8</sup> An earlier attempt to measure the effectiveness of the ICJ in resolving international disputes can be seen in Susan Tiefenbrun, 'The Role of the World Court in Settling International Disputes: A Recent Assessment' (1997) 20 *Loyola of Los Angeles International and Comparative Law Journal* 1.

<sup>9</sup> The reference is to Kipling's great work *Kim*, set in India, with its tale of intrigue and adventure as the empires of Russia and England played the 'great game': Rudyard Kipling, *Kim* (1901).

it suits their interests) the existence of higher political authority.<sup>10</sup> Thus, in a world of competing sovereignties, the protection of real and perceived vital national interests becomes a higher priority for national governments than strict adherence to international law.<sup>11</sup>

The desire of states to protect their national interests means that all international disputes will inevitably be 'political' in nature; what varies is merely the degree of political volatility.<sup>12</sup> Just how political a dispute will be is extremely subjective. It is dependent upon a matrix of diverse factors that affect the national interest, including external economic pressures, domestic needs, and even national pride and prestige.<sup>13</sup> The willingness of states to allow a third party to resolve a dispute is also heavily influenced by the political nature of the matter. The more vital the outcome of a dispute, the less prepared states are to devolve control of its resolution to an independent body.<sup>14</sup>

Thus, many authors would question the Court's suitability, and indeed its capacity, to comprehend and consider highly political matters or 'non-justiciable' issues.<sup>15</sup> For example, Sir Robert Jennings (himself a judge of the ICJ for many years) refers to the weapons embargo put in place by the Security Council during the conflict in Bosnia-Herzegovina.<sup>16</sup> He argues that if the Court were faced with the question of whether such an embargo was a denial of the Yugoslavian right to self-defence, a legal right contained in art 51 of the *Charter of the United Nations*, then this would involve the Court passing judgement on United Nations policy.<sup>17</sup> Such a judgement would be inappropriate, he argues, since the Court, as

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<sup>10</sup> In view of the historical development of national sovereignty and the interaction between supposedly absolute sovereigns, it is not surprising that a nation state's government acts primarily in its own 'self-interest'. However, the pursuit of national interests is one reason given for arguing that the ICJ is prevented from hearing highly political disputes: see, eg, McWhinney, above n 3, 39.

<sup>11</sup> In the words of Anand, the international community is a 'jungle world': R P Anand, 'Role of International Adjudication' in Leo Goss (ed), *The Future of the International Court of Justice* (1976) vol 1, 1, 1.

<sup>12</sup> Simpson uses the expression 'contentious political disputes' to describe clashes between vital national interests that involve deep ideological rifts: Gerry Simpson, 'Judging the East Timor Dispute: Self-Determination at the International Court of Justice' (1994) 17 *Hastings International and Comparative Law Review* 323, 330.

<sup>13</sup> A good example of the interplay of these factors is the background surrounding *Nicaragua (Merits)* [1986] ICJ Rep 14, which is discussed in further detail below at part IV(A).

<sup>14</sup> Nation states prefer a 'political' solution because of their belief that they will be able to influence the outcome in their favour.

<sup>15</sup> McWhinney, above n 3, 41; Simpson, above n 12, 330; Sugihara, above n 3, 117–18, 137. See also Sir Robert Jennings, 'Presentation by Sir Robert Jennings' in Connie Peck and Roy Lee (eds), *Increasing the Effectiveness of the International Court of Justice: Proceedings of the ICJ/UNITAR Colloquium to Celebrate the 50<sup>th</sup> Anniversary of the Court* (1997) 78, 81: 'the judgments of the Court are binding in law, but do they, in fact, resolve the matter?'

<sup>16</sup> *Resolution 713*, SC Res 713, UN SCOR, 46<sup>th</sup> sess, 3009<sup>th</sup> mtg, art 6, UN Doc S/RES/713 (1991).

<sup>17</sup> Judge Lauterpacht mentioned this very issue in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia) (Provisional Measures)* [1993] ICJ Rep 325, [106] (Separate Opinion of Judge Lauterpacht). His Honour discussed whether *Resolution 713*, which imposed the arms embargo in the conflict in Bosnia-Herzegovina, contradicted a principle of *jus cogens*. His Honour went on to state that:

a court of law, could not understand or attach the same degree of importance to such issues as the overriding need to contain violence and the fear of escalation of violence in the delicate balance of affairs in the Balkans powder keg.<sup>18</sup> He goes further and also asserts that in such a situation the Court may actually exacerbate a highly political dispute.<sup>19</sup>

States have realised that there are advantages in having a third party adjudicate their disputes. This recognition led to the adoption of the 1899 and 1907 *Hague Conventions for the Pacific Settlement of International Disputes*<sup>20</sup> and of compulsory arbitration as a means of avoiding armed conflict. States, however, still sought to retain as much control as possible. Consequently, they developed the concept of ‘political disputes’ or ‘matters’ as an exception to compulsory arbitration, and a distinction between legal and political questions emerged.<sup>21</sup> Although the use of arbitration as a means of conflict avoidance has declined since the end of the Second World War, the distinction between political and legal disputes or questions can still be found in the Draft Convention on Conciliation and Arbitration,<sup>22</sup> and also in the *UN Charter* and the *Statute of the ICJ*.<sup>23</sup>

Article 36 of the *Statute of the ICJ* restricts the jurisdiction of the Court to legal questions. So, what is a ‘legal dispute’? There have been many attempts to

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There is, however, another possibility that is, perhaps more in accord with the realities of the situation. ... Instead, it would seem sufficient that the relevance here of jus cogens should be drawn to the attention of the Security Council, as it will be by the required communication to it of the Court’s Order, so that the Security Council may give due weight to it in future reconsideration of the embargo.

<sup>18</sup> Jennings, ‘The Proper Work and Purposes of the International Court of Justice’, above n 6, 40.

<sup>19</sup> What Jennings believes would be necessary is ‘clever “management”’ of the situation: Jennings, ‘Presentation by Sir Robert Jennings’, above n 15, 78. See also Jerzy Sztucki, ‘International Organizations as Parties to Contentious Proceedings before the International Court of Justice?’ in A S Muller, D Raič and J M Thuránszky (eds), *The International Court of Justice: Its Future Role after Fifty Years* (1997) 141, 155–6:

all the repetitious statements to the contrary notwithstanding, international litigation is still regarded, rightly or wrongly, depending on the circumstances — as something that may exacerbate rather than attenuate a disagreement, especially when proceedings are instituted by unilateral applications.

<sup>20</sup> *Convention for the Pacific Settlement of International Disputes*, opened for signature 29 July 1899, [1901] ATS 130 (entered into force 29 July 1899); *Convention for the Pacific Settlement of International Disputes*, opened for signature 18 October 1907, [1997] ATS 6 (entered into force 18 October 1908).

<sup>21</sup> See, eg, *Arbitration Agreement between Great Britain and France*, opened for signature 14 October 1903, 194 ConTS 194, art 1 (entered into force 14 October 1903), which stated that only matters of a ‘legal nature’, that is, those relating to the interpretation of a treaty, should be referred to arbitration. Those disputes that were vital to the respective parties’ national interest were exempt. Other treaties containing the distinction between legal and political disputes include the *Arbitration Convention between Germany and Belgium*, opened for signature 16 October 1925, 54 LNTS 303 (entered into force 14 September 1926) and the *General Act of Arbitration (Pacific Settlement of International Disputes)*, League of Nations Doc 2123 (1929). See also Vera Gowlland-Debbas, ‘The Relationship Between the International Court of Justice and the Security Council in Light of the *Lockerbie Case*’ (1994) 88 *American Journal of International Law* 643, 649–50.

<sup>22</sup> Conference for Security and Cooperation in Europe, *Final Act of the Conference on Security and Cooperation in Europe* (1975) <<http://www.osce.org/docs/english/1990-1999/summits/helfa75e.htm>> at 1 May 2003.

<sup>23</sup> Gowlland-Debbas, above n 21, 649–50.

distinguish a legal or justiciable dispute from a political or non-justiciable one, but it is difficult, if not impossible, to do so.<sup>24</sup> Several leading authors reject an absolutist position that defines international disputes as either entirely legal or political (that is, as mutually exclusive).<sup>25</sup> As Jennings notes, for all practical purposes, all serious international disputes contain both political and legal elements.<sup>26</sup>

So is it possible to reduce or to refine a political dispute into questions of facts and law? Can judges isolate and identify 'justiciable issues' that courts and judges have been trained to face and resolve?<sup>27</sup> Many authors would agree with Jennings that, in an international dispute, a mixture of law and politics is unavoidable, and would also be sceptical of any claims to an ability to distinguish between political and legal questions within a dispute.<sup>28</sup>

This argument was used by the United States Government to justify its withdrawal from any further involvement in *Nicaragua*.<sup>29</sup> The US Government stated that the conflict was not a 'narrow legal dispute' suitable for resolution by the ICJ, and that '[t]he International Court of Justice was never intended to resolve issues of collective security and self-defence and is patently unsuited for such a role.'<sup>30</sup> Further, due to the nature of international disputes, there are certain areas, described as 'political/legal "No-Man's Lands"' where it is too dangerous for an international institution such as the Court to venture.<sup>31</sup> This is so for a number of reasons, including that 'with public passions running too

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<sup>24</sup> McWhinney, above n 3, 40–6.

<sup>25</sup> See, eg, Westlake, cited in Jennings, 'The Proper Work and Purposes of the International Court of Justice', above n 6, 43.

<sup>26</sup> *Ibid.* See also *Nicaragua (Merits)* [1986] ICJ Rep 14, 168 (Separate Opinion of Judge Lachs).

<sup>27</sup> Jennings, 'The Proper Work and Purposes of the International Court of Justice', above n 6, 33.

<sup>28</sup> This is one of the traditional reasons for denying the Court a role in highly political disputes, with some commentators questioning the existence of legal or 'justiciable' issues. See McWhinney's discussion of Judge ad hoc Mosler's arguments in *North Sea Continental Shelf (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands) (Merits)* [1969] ICJ Rep 3, in which his Honour stated his belief that it was impossible to draw a distinction between legal and political disputes: McWhinney, above n 3, 40–3.

<sup>29</sup> McWhinney, above n 3, 39. It was also used by critics of the Court's decision, mainly from the US (and including Eugene Rostow). See also the panel discussion of *Nicaragua* in 'The World Court' (1986) *American Society of International Law: Proceedings of the 80<sup>th</sup> Annual Meeting* 201–21; Ibrahim Wani, 'The Future of Compulsory Jurisdiction: Rethinking the Political Question Doctrine After *Iran* and *Nicaragua*' (1986) *American Society of International Law: Proceedings of the 80<sup>th</sup> Annual Meeting* 468, 468–9; and the series of articles in Harold Maier (ed), 'Appraisals of the ICJ's Decision: *Nicaragua v United States (Merits)*' (1987) 81 *American Journal of International Law* 77.

<sup>30</sup> The US Government statement attached to their formal withdrawal of January 1985, cited in McWhinney, above n 3, 38–9.

<sup>31</sup> McWhinney, above n 3, 39.

high', there is the danger that individual judges may be unable to resist becoming embroiled in the political aspects and controversies of a dispute.<sup>32</sup>

However, the attitude of the Court to this perceived problem was clearly stated in *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)*:

once the Assembly has asked, by adopting a resolution, for an advisory opinion on a legal question, the Court, in determining whether there are any compelling reasons for it to refuse to give such an opinion, will not have regard to the origins or to the political history of the request, or to the distribution of votes in respect of the adopted resolution.<sup>33</sup>

One very pragmatic approach, taken by Mosler, involves clarifying whether the Court is able, through the existing state of the law, to actually resolve the issue.<sup>34</sup> The views of other commentators would support such a definition. Kelson writes that:

The legal or political character of the dispute does not depend, as the traditional doctrine seems to assume, on the nature of the dispute, that is to say, on the subject matter to which the dispute refers, but on the nature of the norms to be applied in the settlement of the dispute. A dispute is a legal dispute if it is to be settled by the application of legal norms, that is to say, by the application of existing law.<sup>35</sup>

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<sup>32</sup> Ibid 42. This concern is evident in allegations of a lack of impartiality of members of the bench who are nationals of one of the parties to a dispute before the Court, and in the procedure of appointing a judge ad hoc when the Court does not have a judge of that nationality sitting on the bench. An example of this can be seen in the series of cases brought by Yugoslavia against the member states of NATO during NATO's bombing campaign in 1999: *Legality of Use of Force (Yugoslavia v Belgium; Yugoslavia v Canada; Yugoslavia v France; Yugoslavia v Germany; Yugoslavia v Italy; Yugoslavia v Netherlands; Yugoslavia v Portugal; Yugoslavia v UK; Yugoslavia v Spain; Yugoslavia v US)* <<http://www.icj-cij.org>> at 1 May 2003.

<sup>33</sup> [1996] 1 ICJ Rep 226, [16] ('*Nuclear Weapons Opinion*'). This stance has been repeated often by the Court both in contentious cases and advisory opinions: see, eg, *Questions of Interpretation and Application of the 1971 Montréal Convention Arising from the Aerial Incident at Lockerbie (Libya v UK) (Order)* [1992] ICJ Rep 3, 56 (Dissenting Opinion of Judge Weeramantry) ('*Lockerbie Case*'); *Questions of Interpretation and Application of the 1971 Montréal Convention Arising from the Aerial Incident at Lockerbie (Libya v US) (Order)* [1992] ICJ Rep 114, 166 (Dissenting Opinion of Judge Weeramantry). The *Lockerbie Case* involved a dispute between Libya and both the UK and the US. The judgment relating to the US follows that relating to the UK and is virtually identical. Henceforth, all citations from the *Lockerbie Case* shall refer to the UK dispute. See also *Certain Expenses of the United Nations (Advisory Opinion)* [1962] ICJ Rep 151, 155. This stance has also been used by other international tribunals such as the the International Criminal Tribunal for the Former Yugoslavia ('ICTY'):

The doctrines of 'political questions' and 'non-justiciable disputes' are remnants of the reservations of 'sovereignty', 'national honour', etc in very old arbitration treaties. They have receded from the horizon of contemporary international law, except for the occasional invocation of the 'political question' argument before the International Court of Justice in advisory proceedings and, very rarely, in contentious proceedings as well. The Court has consistently rejected this argument as a bar to examining a case. It considered it unfounded in law.

*Prosecutor v Tadic (Defence Motion for Interlocutory Appeal on Jurisdiction)*, Case No IT-94-1-AR72 (2 October 1995) [24] ('*Tadic*').

<sup>34</sup> Cited in Gowlland-Debbas, above n 21, 652-3.

<sup>35</sup> Ibid.

A similar approach was taken in *Tadic*, where the ICTY considered the distinction regarding political matters or non-justiciable questions as simply a residue of antiquated concepts of national sovereignty. The ICTY, following the ICJ in *Certain Expenses of the United Nations (Advisory Opinion)*, considered that a legal dispute was one that ‘turns on a legal question capable of a legal answer.’<sup>36</sup>

Can highly political disputes ever be resolved by a simple legal decision? Some authors, such as former judge of the ICJ, Sir Hersch Lauterpacht, think so:

there is no fixed limit to the possibilities of judicial settlement. All conflicts in the sphere of international politics can be reduced to contests of a legal nature. The only decisive test of the justiciability of the dispute is the willingness of the disputants to submit the conflict to the arbitrament of law.<sup>37</sup>

The willingness of states to submit disputes to the jurisdiction of the Court is indeed crucial. This can be seen by examining the legal system that states have adopted to resolve their disputes.

### III THE INTERNATIONAL LEGAL SYSTEM

The legal system that states have chosen to administer and resolve their disputes is a voluntary one. Likewise, the basis of the contentious jurisdiction of the ICJ is consensual in nature.<sup>38</sup> Consent to the jurisdiction of the ICJ can be provided in a variety of ways. It can be provided through a special bilateral agreement between the parties to a dispute — a *compromis*, which is essentially a ‘one-off’ agreement designed to grant consent to the jurisdiction of the ICJ for one specific matter.<sup>39</sup> Whilst this method of conferring jurisdiction was unpopular in the early years of the ICJ’s history, it has shown some evidence of a strong resurgence.<sup>40</sup>

Consent can also be granted through the ratification of a treaty that contains a provision referring disputes to the ICJ. Article 37 of the *Statute of the ICJ* also enables the ICJ to hear disputes which the Permanent Court of International Justice (‘PCIJ’) was entitled to hear by way of treaty.

The third method used by states to grant consent is a unilateral declaration in which a state agrees to accept in advance the ICJ’s jurisdiction in a range of

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<sup>36</sup> *Tadic*, Case No IT-94-1-AR72 (2 October 1995) [24]; *Certain Expenses of the United Nations (Advisory Opinion)* [1962] ICJ Rep 151, 155.

<sup>37</sup> Hersch Lauterpacht, *The Function of Law in the International Law* (1933) 389, cited in *Nicaragua (Merits)* [1986] ICJ Rep 14, 169 (Separate Opinion of Judge Lachs).

<sup>38</sup> For a state to consent to the jurisdiction of the ICJ, it first needs to be a party to the *Statute of the ICJ*: art 35(1). The *UN Charter* art 93(1) states that any member of the UN is also a party to the *Statute of the ICJ*.

<sup>39</sup> *Statute of the ICJ* art 36(1). One disadvantage of this method is that the parties must first agree on the nature and scope of the question to be resolved. One option is to allow the parties to draft a framework agreement and then have the ICJ decide the relevant legal principles that would apply, leaving the final resolution to the parties themselves. This is analogous to an out-of-court settlement in domestic courts: see, eg, Shabtai Rosenne, *The World Court: What It Is and How It Works* (5<sup>th</sup> revised ed, 1995) 86.

<sup>40</sup> *Ibid* 87. Some argue that a *compromis* is one of the most efficient and best methods of dispute resolution: see, eg, Renata Szafarz, *The Compulsory Jurisdiction of the International Court of Justice* (1993) 7.

matters listed in art 36(2) of the *Statute of the ICJ*.<sup>41</sup> Once such a declaration is made, no subsequent consent is required when a dispute involving that state arises. This method is often misleadingly referred to as a form of compulsory jurisdiction, however states must still give their consent, albeit in advance. Finally, the declaration of consent is subject to such reservations as are listed within the declaration that essentially detail any matters that are not included within the consent granted.<sup>42</sup>

This phenomenon of consensual jurisdiction is a direct result of national sovereignty.<sup>43</sup> Originally, the Committee of Jurists, which was tasked with designing the new world court, intended to make the jurisdiction of the ICJ completely compulsory. However, according to Steinberger, voluntary jurisdiction was chosen by the victors of World War II as part of a deliberate policy to ensure they could retain the ability to protect their national interests in the postwar world.<sup>44</sup>

Voluntary jurisdiction in contentious matters has been described as the ICJ's greatest weakness.<sup>45</sup> In my view this is not an exaggeration, since in real terms the Court's ability to function, indeed its very existence, is totally dependent upon the consent of states.<sup>46</sup> If not a single state granted consent, then, with the exception of delivering advisory opinions, the Court would not have a function.<sup>47</sup>

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<sup>41</sup> The declarations are deposited with the Secretary-General of the UN. Under the *UN Charter* art 102, the Secretary-General registers the declarations as international agreements in the United Nations Treaty Series.

<sup>42</sup> Indeed it is difficult to imagine any nation state accepting compulsory jurisdiction with no reservations at all: Steinberger, above n 5, 196–7. Alexandrov would agree, and writes, expressing this concern regarding the effect of reservations: 'The permissibility of reservations, particularly of some types of reservations, appears to weaken the Optional Clause. This, however, may have been precisely what States concerned preferred: a weak Optional Clause rather than a strong one or not at all': Stanimir Alexandrov, *Reservations in Unilateral Declarations Accepting the Compulsory Jurisdiction of the International Court of Justice* (1995) 19.

<sup>43</sup> Szafraz, above n 40, 3.

<sup>44</sup> In fact, opposition to compulsory jurisdiction came from the 'stronger' Western powers, in particular those that later became permanent members of the Security Council. It was so intense that it was felt that if compulsory jurisdiction were pursued, it would jeopardise the very existence not just of the ICJ, but also of the UN. Jurisdiction thus became optional in the *Statute of the ICJ* art 36(2): Steinberger, above n 5, 196. The First Committee of Commission IV of the San Francisco Conference decided by 31 votes to 14 to retain the optional clause; see also Alexandrov, above n 42, 8.

<sup>45</sup> See, eg, Joaquin Tacsan, *The Dynamics of International Law in Conflict Resolution* (1992) 138.

<sup>46</sup> Once again it should be remembered that the so-called 'compulsory jurisdiction' implemented by art 36(2) of the *Statute of the ICJ* is still dependent upon an initial act of consent, and that this consent can be so watered down as to be no true consent at all.

<sup>47</sup> This possibility is not as far-fetched as it may appear. For a substantial period the ICJ was virtually at a standstill, prompting some to declare that the Court could not make a contribution to the resolution of disputes: see, eg, Anand, above n 11, 2; Leo Gross, 'The International Court of Justice: Consideration of Requirements for Enhancing its Role in the International Legal Order' (1971) 65 *American Journal of International Law* 253, 262.

Furthermore, not all states have given their consent,<sup>48</sup> and there is nothing to prevent a state from withdrawing its consent after making the declaration.<sup>49</sup> When these difficulties are combined with the use of reservations by states when accepting jurisdiction, the potential for non-appearance or non-participation by parties when the Court seeks to invoke its jurisdiction in accordance with art 36(2) is significant.<sup>50</sup> Indeed, as noted by Janis, there were many incidents of non-appearance in cases involving the application of art 36(2) during the 1970s and 1980s<sup>51</sup> (eg Iceland in the *Fisheries Jurisdiction Cases*,<sup>52</sup> France in the *Nuclear Tests Cases*,<sup>53</sup> Turkey in *Aegean Sea Continental Shelf (Greece v Turkey) (Jurisdiction)*<sup>54</sup> and Iran in *United States Diplomatic and Consular Staff in Tehran (US v Iran) (Order)*<sup>55</sup>).

In highly political matters, non-appearance may be a tempting proposition for states that feel that they can achieve more advantageous outcomes through a purely political solution. The non-appearance of parties in contentious cases (as opposed to those cases where jurisdiction is granted by a *compromis* or special agreement) poses a difficult problem. Regardless of which action the Court takes — to proceed or not proceed — one party will be disadvantaged. This may raise concerns that justice has not been done in two ways. First, when a party fails to appear, it may allow that party ‘to profit from their absence’. If the matter were not to proceed to judgment, then the claim of the party which did appear would be defeated not because of a deficiency in the merits of its claim, but because of the recalcitrance of the other party whose own claims may actually be insupportable. States could easily abuse this as a particularly useful tactic when

<sup>48</sup> The statistics have varied over the years. As of 1988–89, only 49 nation states had given their consent: ICJ, *Yearbook 1988–1989* (1989) 60–95; Mark Janis, ‘The International Court’ in Mark Janis (ed) *International Courts for the Twenty-First Century* (1992) 13, 22. In 1992, only 29 per cent of the UN members had accepted the ICJ’s jurisdiction, a decline from 55 per cent in 1955. Of the 46 who had accepted jurisdiction, 27 reserved the right to modify or terminate their acceptance at any stage: ICJ, *Yearbook 1991–1992* (1992) 71–110; Tacsan, above n 45, 138. In 1995, however, only 58 of the 186 states who were parties to the *Statute of the ICJ* — a total of 31 per cent — reserved this right: International Court of Justice, *Yearbook 1994–1995* (1995) 79–118; Philippe Couvreur, ‘The Effectiveness of the International Court of Justice’ in A S Muller, D Raič and J M Thuránszky (eds), *The International Court of Justice: Its Future Role after Fifty Years* (1997) 83, fn 30.

<sup>49</sup> See, eg, the US withdrawal of its consent after *Nicaragua*. Also, Australia qualified its consent under art 36(2) in relation to maritime boundary disputes in the wake of *East Timor (Portugal v Australia) (Judgment)* [1995] ICJ Rep 90; *Declaration under the Statute of the International Court of Justice Concerning Australia’s Acceptance of the Jurisdiction of the International Court of Justice* [2002] ATS 5 (entered into force 21 March 2002).

<sup>50</sup> The ICJ’s predecessor honoured such reservations: see *Phosphates in Morocco (Italy v France) (Preliminary Objections)* [1938] PCIJ Rep 10, 23, where the PCIJ held that the Court’s jurisdiction ‘existed only within the limits within which it has been accepted’.

<sup>51</sup> Mark Janis, ‘Somber Reflections on the Compulsory Jurisdiction of the International Court’ (1987) 81 *American Journal of International Law* 144, 144.

<sup>52</sup> *Fisheries Jurisdiction (UK v Iceland) (Interim Measures)* [1972] ICJ Rep 12; *Fisheries Jurisdiction (Federal Republic of Germany v Iceland) (Interim Measures)* [1972] ICJ Rep 30; *Fisheries Jurisdiction (UK v Iceland) (Jurisdiction)* [1973] ICJ Rep 3; *Fisheries Jurisdiction (Federal Republic of Germany v Iceland) (Jurisdiction)* [1973] ICJ Rep 49; *Fisheries Jurisdiction (UK v Iceland) (Merits)* [1974] ICJ Rep 3; *Fisheries Jurisdiction (Federal Republic of Germany v Iceland) (Merits)* [1974] ICJ Rep 175.

<sup>53</sup> *Nuclear Tests (Australia v France) (Judgment)* [1974] ICJ Rep 253; *Nuclear Tests (New Zealand v France) (Judgment)* [1974] ICJ Rep 457.

<sup>54</sup> [1978] ICJ Rep 3.

<sup>55</sup> [1979] ICJ Rep 7 (‘*Hostages Case*’).

the legal merits of their claims are dubious or weak at best, or when their national interest would not be served by having the matter adjudicated by the ICJ.<sup>56</sup> Second, if the matter were to proceed to judgment, then the non-appearing party would be unable to counter any of the arguments presented or examine any of the witnesses, and would also be unable to present its claim.<sup>57</sup>

It could be argued that the disadvantages caused by non-appearance where the case proceeds to judgment are a concern only for the non-appearing party and are entirely self-inflicted. What non-appearance does, however, is raise a perception in the broader international community of the irrelevance of the ICJ in resolving international disputes. If it is perceived that a party is the victor simply by virtue of its appearance in the absence of the other party, rather than due to the strength of its claim, then this raises serious concerns about the validity of the Court's findings, undermining the Court's credibility in the eyes of the international community. Credibility is important to all courts, but particularly to the ICJ given the problems of enforceability that it faces.

Even if states do consent to the ICJ's jurisdiction, who or what enforces the Court's decision? Whilst provision is made in both the *Statute of the ICJ* and the *UN Charter* for the Court's judgments and advisory opinions to be enforced through resolutions of the Security Council,<sup>58</sup> there is no international police force that will actually ensure compliance with the resolution itself. As Couvreur notes,

in municipal orders, the court, whose jurisdiction is compulsory, acts on behalf of and in the capacity of ... the fully integrated sovereign state; the latter is responsible for the continuity and efficacy of the peacemaking process initiated by the court ... The case is patently quite different in the international order: ... this community, which is not integrated, or scarcely so, and which itself is entirely based on a juxtaposition of sovereignties, is in no wise [sic] comparable to a sovereign state.<sup>59</sup>

The lack of an overall sovereign means there is no real means of enforcement other than 'peer group pressure' from other nation states.<sup>60</sup> Indeed, Ojo writes that '[t]here is no independent international legal system, capable of enforcing agreements and international law. The system is defective because it depend [sic] so much on the behavior and attitude of those it is suppose [sic] to regulate.'<sup>61</sup>

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<sup>56</sup> *Nicaragua (Merits)* [1986] ICJ Rep 14, [32] (Separate Opinion of Judge Lachs).

<sup>57</sup> The Court mentioned this concern specifically in *Nicaragua (Merits)* [1986] ICJ Rep 14, [67] (Judgment of the Court).

<sup>58</sup> The *Statute of the ICJ* art 59 states that the judgment of the ICJ is binding on the parties to the dispute. Article 60 states that the judgment of the ICJ is final and without appeal. See also *UN Charter* art 94(1). This assumes, however, that the self-interests of the respective members of the Security Council, in particular the permanent members, can be put aside to enable such a resolution to be made.

<sup>59</sup> Couvreur, above n 48, 104–5.

<sup>60</sup> See *ibid* 111.

<sup>61</sup> Bamidele Ojo, *Human Rights and the New World Order: Universality, Acceptability and Human Diversity* (1997) 53. Charney would agree with this summation; see his comparison with domestic courts: Jonathan Charney, 'Disputes Implicating the Institutional Credibility of the Court: Problems of Non-Appearance, Non-Participation, and Non-Performance' in Lori Damrosch (ed), *The International Court of Justice at a Crossroads* (1987) 288, 303–4.

This dependency provides states with the ability, unheard of in domestic legal systems, to avoid the ICJ's authority<sup>62</sup> to a degree that leads some to argue that the expectations placed upon international adjudication as an instrument of international dispute resolution have been unable to be realised.<sup>63</sup> The history of noncompliance with the Court's rulings strengthens this already substantial argument.

Charney, in an analysis of states' resistance to the authority of the ICJ, notes that in contentious cases, excluding those subject to a special agreement, states have refused to participate or even comply in at least 10 instances. In fact, during the period 1972–86, the only decisions that met with no resistance were those that were the subject of a special agreement.<sup>64</sup> The record of the ICJ, in this respect, appears to be worse than that of the PCIJ.<sup>65</sup> Pratap believes that the decline of compliance with the ICJ, when compared with the PCIJ, is mainly due to the attitude of distrust or indifference which states exhibit towards the ICJ.<sup>66</sup>

The potential for states to resist the authority of the ICJ would appear to be even greater when the ICJ exercises its advisory jurisdiction, since the parties are not bound to comply with the opinion.<sup>67</sup> States can declare, in advance, their willingness to accept 'unreservedly' the decision of the advisory opinion even if it would contradict their position on the matter.<sup>68</sup> But, as Lissitzyn notes, only a small proportion of states do so.<sup>69</sup> This is self-explanatory, since the very nature of the advisory jurisdiction implies that the parties are not bound to honour their

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<sup>62</sup> This ability to resist the authority of the ICJ is due to the concept of national sovereignty. Ojo, in his discussion of human rights, said that '[t]he existence of sovereignty constitute [sic] an obstacle to the effectiveness of international legal institution [sic]': Ojo, above n 61, 53. The suggestion that the jurisdiction of a domestic court should be dependent on the consent of the parties to the dispute would be regarded by practitioners, judges and citizens as nonsense for many reasons and would quite clearly render any domestic legal system unworkable. However, few of these parties would be capable of causing the destruction of the globe.

<sup>63</sup> Charney, above n 61, 299.

<sup>64</sup> Ibid 293–7. The decisions Charney lists are as follows: *Corfu Channel (UK v Albania) (Merits)* [1949] ICJ Rep 4; *Monetary Gold Removed from Rome in 1943 (Italy v France, UK and the US) (Merits)* [1954] ICJ Rep 19; *Asylum (Columbia v Peru) (Merits)* [1950] ICJ Rep 266; *Haya de la Torre (Colombia v Peru) (Merits)* [1951] ICJ Rep 71; *Anglo-Iranian Oil Co (UK v Iran) (Interim Measures)* [1951] ICJ Rep 89; *Nottebohm (Liechtenstein v Guatemala) (Preliminary Objection)* [1953] ICJ Rep 111; *Right of Passage over Indian Territory (Portugal v India) (Merits)* [1960] ICJ Rep 6; *Trial of Pakistani Prisoners of War (Pakistan v India) (Interim Measures)* [1973] ICJ Rep 328; *Fisheries Jurisdiction (UK v Iceland) (Merits)* [1974] ICJ Rep 3; *Nuclear Tests (Australia v France) (Judgment)* [1974] ICJ Rep 253; *Nuclear Tests (New Zealand v France) (Judgment)* [1974] ICJ Rep 457; *Aegean Sea Continental Shelf (Greece v Turkey) (Jurisdiction)* [1978] ICJ Rep 3; *Hostages Case (Judgment)* [1980] ICJ Rep 3; *Nicaragua (Jurisdiction)* [1984] ICJ Rep 392.

<sup>65</sup> Charney notes that of the 49 cases heard by the PCIJ, none of the 'losing' states refused to comply with its decision and there were only three cases in which one of the parties unexpectedly refused to appear: Charney, above n 61, 293.

<sup>66</sup> Dharma Pratap, *The Advisory Jurisdiction of the International Court* (1972) 267–8. Pratap also notes that the prevailing view amongst members of the UN has been that law 'has little relevance to the problems of the United Nations.'

<sup>67</sup> In fact, neither the requesting body nor the parties are actually bound to accept the advice. The ICJ is not even bound to actually provide the opinion: *Statute of the ICJ* art 65(1).

<sup>68</sup> Pratap refers to delegates from the following nation states who have done so in various cases: Australia, Argentina, Norway, US and Venezuela: Pratap, above n 66, 245.

<sup>69</sup> Oliver Lissitzyn, *The International Court of Justice: Its Role in the Maintenance of International Peace and Security* (1978) 84.

commitments to accept the *advisory* opinion.<sup>70</sup> Charney's analysis shows that in seven situations states have refused to act in accordance with the advisory opinion when that opinion opposed their positions and national interest.<sup>71</sup> However, it must also be remembered that since the advisory jurisdiction is not dependent upon the consent of states, they cannot prevent the Court from considering the legal question that is the subject of the request.<sup>72</sup>

The governments of nation states have thus constructed a system whereby the simple action of non-participation — either through not granting an initial consent, granting consent subject to reservations, or by withdrawing their consent — arms them with the ability to undermine the authority of the Court. Hence, for the Court to succeed, indeed for the Court to even function, it appears to be dependent upon the attitude and actions of states — almost, it would appear, on the whims of an aggrieved party.

The combination of nation states' belief in the absoluteness of their sovereignty and their reluctance to surrender total control over the dispute resolution process has resulted in the traditional distinction between legal and political disputes.<sup>73</sup> The distinction is based on the argument that there are specific international disputes — 'highly political matters' — that, because of their nature, would be inappropriate to resolve before a court or, indeed, any non-political organ. In other words, such disputes require a particular methodology that a Court is unable to provide: a 'political' solution.<sup>74</sup>

Given these problems, it is difficult to believe that the Court is able to make a contribution to the resolution of highly political disputes. It is in such disputes that national interests are threatened in such a manner that the respective parties

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<sup>70</sup> Ibid 84:

The very fact that a request for an advisory opinion on a question directly connected with a dispute between states is made by an international political organ is usually an indication that the states concerned have not agreed to settle the dispute by a binding judicial decision within the framework of existing law.

<sup>71</sup> Charney, above n 61, 298. The decisions he listed were: *Conditions of Admission of a State to Membership in the United Nations (Article 4 of Charter) (Advisory Opinion)* [1947–48] ICJ Rep 57; *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* [1949] ICJ Rep 174; *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (1<sup>st</sup> Phase) (Advisory Opinion)* [1950] ICJ Rep 65; *International Status of South West Africa (Advisory Opinion)* [1950] ICJ Rep 128; *Certain Expenses of the United Nations (Advisory Opinion)* [1962] ICJ Rep 151; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* [1971] ICJ Rep 16 ('*Namibia Opinion*'); *Western Sahara (Advisory Opinion)* [1975] ICJ Rep 12. However, since 1947 there has been a total of 24 advisory opinions, so the fear of noncompliance is not as great as it would seem. A further 28 were provided by the PCIJ.

<sup>72</sup> *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (1<sup>st</sup> Phase) (Advisory Opinion)* [1950] ICJ Rep 65, 71, affirmed in the *Western Sahara (Advisory Opinion)* [1975] ICJ Rep 12, 19.

<sup>73</sup> This can be traced as far back as Vattel's theories in 1758: see Gowlland-Debbas, above n 21, 649. See also *Tadic (Defence Motion for Interlocutory Appeal on Jurisdiction)*, Case No IT-94-1-AR72 (2 October 1995) [24].

<sup>74</sup> Essentially, a political solution is implemented by political organs such as the General Assembly or the Security Council of the UN: see *Lockerbie Case (Provisional Measures)* [1992] ICJ Rep 3, 57, where Judge Weeramantry referred to Kelsen's statement that the Security Council was not a judicial body *simply* because its members were not independent and therefore were not impartial. See also the distinction between legal and political solutions made in the *Lockerbie Case (Provisional Measures)* [1992] ICJ Rep 3, [1] (Separate Opinion of Judge Kooijmans).

seek to use political methodology simply because they believe they stand a better chance of protecting their interests. Nevertheless, the Court does firmly believe that it can contribute in such cases.

#### IV THE COURT'S ATTITUDE AND ITS CONTRIBUTION

To state that the Court is not ignorant of the overall political context of international legal problems brought before it would appear to be obvious and unnecessary. However, the Court has felt that it should indeed make such a statements. An example can be found in the *Hostages Case (Merits)*, where the Court noted that 'legal disputes between sovereign States by their very nature are likely to occur in political contexts, and often form only one element in a wider and longstanding political dispute between the States concerned.'<sup>75</sup>

Whilst there have been occasions where individual members of the Court have expressed concern regarding the Court's role in highly political matters,<sup>76</sup> the Court has consistently held, both in deciding contentious cases and when providing advisory opinions, that the reality of mixed legal and political aspects to disputes *does not* prevent the Court from deciding upon the legal issues before it.<sup>77</sup> For example, in the *Nuclear Weapons Opinion*, the Court was united in its attitude that the political background of the issue should not interfere with its decision on whether to provide an advisory opinion. Similarly, in *Nicaragua (Merits)*, the Court was adamant that it could enter the so-called 'no-man's lands' where political and legal questions were mixed including, in that particular opinion, the issue of the right of individual or collective self-defence.<sup>78</sup>

<sup>75</sup> [1980] ICJ Rep 3, 20 (Judgment of the Court).

<sup>76</sup> See, eg, *Nicaragua (Merits)* [1986] ICJ Rep 14, [59], [72] (Dissenting Opinion of Judge Oda):

Considering these two characteristics together, I came to the conclusion that it would not be consonant with judicial propriety for the Court to entertain Nicaragua's Application. ... In my opinion, however, judicial propriety dictates that the correct manner for dealing with the dispute would have been, and still may prove to be, a conciliation procedure through the political organs of the United Nations or a regional arrangement such as the Contadora Group and not reference to the International Court of Justice.

However, as noted by Oscar Schachter, Judge Oda's concern did not extend to denying the Court's ability to become involved simply because the dispute involved armed force: see Oscar Schachter, 'Disputes Involving the Use of Force' in Lori Damrosch (ed), *The International Court of Justice at a Crossroads* (1987) 229. See also Sugihara, above n 3, for further discussion of this point.

<sup>77</sup> There are many examples. Among contentious cases, consider *Aegean Sea Continental Shelf Case (Greece v Turkey) (Jurisdiction)* [1978] ICJ Rep 3, 13; *Hostages Case (Provisional Measures)* [1979] ICJ Rep 7, 15; *Nicaragua (Jurisdiction)* [1984] ICJ Rep 392, 437–8; *East Timor (Portugal v Australia) (Merits)* [1995] ICJ Rep 90, 219 (Dissenting Opinion of Judge Weeramantry). However, see *Nicaragua (Merits)* [1986] ICJ Rep 14, [55]–[59] (Separate Opinion of Judge Oda), where his Honour suggested that the Court should not be involved in highly political matters. However, his Honour did not believe that the dispute involving armed force was a non-justiciable one beyond the jurisdiction of the Court: [53]. With regard to providing advisory opinions, see *Conditions of Admission of a State to Membership in the United Nations (Article 4 of Charter) (Advisory Opinion)* [1948] ICJ Rep 57, 107–9; *Certain Expenses of the United Nations (Advisory Opinion)* [1962] ICJ Rep 151, 155. The PCIJ came to a similar conclusion in *Customs Régime between Germany and Austria* [1931] PCIJ Rep 41, 68–9. See also *Nuclear Weapons Opinion* [1996] 1 ICJ Rep 226.

<sup>78</sup> Sugihara, above n 3, 121.

In the *Lockerbie Case (Provisional Measures)*, Judge Weeramantry, after emphasising the judicial integrity and independence of the Court, stated that:

As a judicial organ, it will be the Court's duty from time to time to examine and determine from a strictly legal point of view matters which may at the same time be the subject of determination from an executive or political point of view by another principal organ of the United Nations. ... What pertains to the judicial function is the proper sphere of competence of the Court. The circumstance that political results flow from a judicial decision is not one that takes it out of that sphere of competence.<sup>79</sup>

As mentioned above, Sir Hersch Lauterpacht believed that all political disputes could be rendered down to legal questions, *if* there was sufficient political will.<sup>80</sup> However, he also conceded that the Court was a better vehicle for developing the rules of international law than maintaining international peace.<sup>81</sup> Takane Sugihara, in his article on the Court and its role in highly political matters, reminds readers of an old Anglo-Saxon saying that 'hard cases make bad law,' implying that, in the context of international law, highly political cases made 'bad international law'.<sup>82</sup> However, an examination of *Nicaragua*, the *Nuclear Weapons Opinion*, the *Lockerbie Case* and *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* ('*Arrest Warrant Case*'), each of which involved some of the most highly controversial and political matters brought before the Court, reveals that the Court, in fact, makes a valuable contribution even in such complex cases.

#### A *Nicaragua*

*Nicaragua* unquestionably involved highly political issues dealing with armed intervention by one party into the territory of the other party.<sup>83</sup> *Nicaragua* claimed that:

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<sup>79</sup> *Lockerbie Case (Provisional Measures)* [1992] ICJ Rep 3, 56. Such statements have also been noted and approved by other international tribunals, such as the ICTY. See *Tadic (Defence Motion for Interlocutory Appeal on Jurisdiction)*, Case No IT-94-1-AR72 (2 October 1995) [24].

<sup>80</sup> Hersch Lauterpacht, *The Function of Law in the International Law* (1933) 389, cited in *Nicaragua (Merits)* [1986] ICJ Rep 14, 169 (Separate Opinion of Judge Lachs).

<sup>81</sup> Cited in Janis, above n 51, 145.

<sup>82</sup> Sugihara, above n 3, 138.

<sup>83</sup> The context in which the dispute took place, in particular the secrecy surrounding the intervention into *Nicaragua*, the involvement of intelligence organisations such as the Central Intelligence Agency (US) and the political interests of the parties involved, added to the difficulty of resolving the dispute. To make matters worse, the US, perhaps the most powerful state in all senses of the term, withdrew from the dispute after unsuccessfully contesting the original questions of jurisdiction.

- 1 The US had acted in violation of art 2(4) of the UN Charter and customary international law by the use of force against it;
- 2 The actions of the US — through supporting the armed opposition to the Nicaraguan government, known as the Contras, mining of Nicaraguan harbours, and other attacks — amounted to intervention in the internal affairs of Nicaragua, in breach of the Charter of the Organization of American States and of rules of customary international law;
- 3 The US had violated the national sovereignty of Nicaragua; and
- 4 The actions of the US also defeated the object and purpose of a Treaty of Friendship, Commerce and Navigation concluded between the parties in 1956,<sup>84</sup> and put it in breach of provisions of that Treaty.

In its Counter-Memorial on jurisdiction and admissibility, the US asserted that its actions constituted collective self-defence in response to requests from El Salvador, Honduras and Costa Rica for assistance against armed aggression by Nicaragua. The US alleged that Nicaragua had ‘promoted and supported guerrilla violence in neighboring countries’ — specifically in El Salvador in early 1981 — and also that Nicaragua had conducted cross-border military attacks on Honduras and Costa Rica.<sup>85</sup> The US argued further that it was entitled and indeed obliged to provide assistance to these countries in accordance with the terms of the *Inter-American Treaty of Reciprocal Assistance*.<sup>86</sup>

The Court rejected this argument of collective self-defence and held that by training, arming and providing overall military support for the Contras, the US had breached its obligation under customary international law not to intervene in the affairs of another state. Further, the Court held that the US had, through certain attacks on Nicaraguan territory in 1983–84 — specifically the mining of harbours and attacks on Nicaraguan port facilities — breached its obligations under customary international law not to use force against another nation state and not to violate the sovereignty of another nation state.<sup>87</sup> These attacks had also placed the US in violation of its obligations pursuant to the *Treaty of Friendship, Commerce and Navigation* between the parties.<sup>88</sup> Consequently, the Court ordered the US to make reparations to Nicaragua for all injury caused by the said breaches.<sup>89</sup>

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<sup>84</sup> *Treaty of Friendship, Commerce and Navigation (with Protocol)*, opened for signature 21 January 1956, US–Nicaragua, 367 UNTS 3 (entered into force 24 May 1958).

<sup>85</sup> *Nicaragua (Merits)* [1986] ICJ Rep 14, [128].

<sup>86</sup> Opened for signature 2 September 1947, 21 UNTS 77 (entered into force 3 December 1948).

<sup>87</sup> *Nicaragua (Merits)* [1986] ICJ Rep 14, [292(6)] (President Nagendra Singh, Vice-President de Lacharrière, Judges Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni and Evensen, Judge ad hoc Colliard; Judges Oda, Schwebel and Sir Robert Jennings dissenting)

<sup>88</sup> *Nicaragua (Merits)* [1986] ICJ Rep 14, [292(7)] (President Nagendra Singh, Vice-President de Lacharrière, Judges Lachs, Ruda, Elias, Oda, Ago, Sette-Camara, Sir Robert Jennings, Mbaye, Bedjaoui, Ni and Evensen, Judge ad hoc Colliard; Judge Schwebel dissenting).

<sup>89</sup> Wisely choosing the reality of a friendly relationship with the US over the theoretical value of a monetary judgment that was unlikely ever to be satisfied, President Chamorro of Nicaragua agreed to withdraw Nicaragua’s request for reparations in 1991. That marked the end of all proceedings.

In spite of the very difficult circumstances in this dispute, the Court was not only prepared to, but actually did perform its task. The withdrawal of the US from proceedings did not prevent the Court from reaching its findings and also, it is argued, did not affect the *quality* of the Court's findings. The Court's decision contributed to the development of international law in a number of areas, such as: the importance of art 36(2) of the *Statute of the ICJ* and the nature of a party's consent to the ICJ's jurisdiction; the effect of non-appearance on the legal process, in particular the ability to determine evidence and, of course, in relation to substance; and, perhaps most importantly, the interpretation of art 2(4) of the *UN Charter* and the use of force.

The significance of the Court's approach to questions of consensual jurisdiction in *Nicaragua* has been highlighted in other cases.<sup>90</sup> The ICJ applied a ruling from *Nicaragua* in *Oil Platforms (Iran v US) (Preliminary Objections)*<sup>91</sup> when considering whether a treaty provision denied it jurisdiction to hear the dispute, thus rejecting the US's preliminary objection and concluding that the Court had jurisdiction to hear the dispute.<sup>92</sup>

Whilst the ICJ expressed regret at the non-appearance of the US in *Nicaragua*, the Court firmly stated that non-appearance should not prevent it from performing its judicial role. More importantly the Court also held that the non-appearance of the respondent state does not result in an 'automatic judgment,' in accordance with art 53 of the *Statute of the ICJ*, in favour of the appearing party.<sup>93</sup> Rather, the Court must proceed on the basis of a fundamental commitment to justice for both parties to the dispute before it. The Court held that:

The intention of Article 53 was that in a case of non-appearance *neither party* should be placed at a disadvantage; therefore the party which declines to appear cannot be permitted to profit from its absence, since this would amount to placing the party appearing at a disadvantage. The provisions of the *Statute* and *Rules of Court* concerning the presentation of pleadings and evidence are designed to secure a proper administration of justice, and a fair and equal opportunity for each party to comment on its opponent's contentions ... The vigilance which the Court can exercise when aided by the presence of both parties to the proceedings has a counterpart in the special care it has to devote to the proper administration of justice in a case in which only one party is present.<sup>94</sup>

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<sup>90</sup> See, eg, *Legality of Use of Force (Yugoslavia v US) (Provisional Measures)* [1999] ICJ Rep 916.

<sup>91</sup> [1996] ICJ Rep 803.

<sup>92</sup> Basically, the issue was whether the *Treaty of Amity, Economic Relations and Consular Rights*, opened for signature 15 August 1955, US–Iran, 284 UNTS 93 (entered into force 16 June 1957) removed disputes involving the use of force from the jurisdiction of the Court. The Court rejected the US's submission that it did on the basis of the rules of interpretation as derived from *Nicaragua*: see *Oil Platforms (Iran v US) (Preliminary Objections)* [1996] ICJ Rep 803, 811.

<sup>93</sup> *Nicaragua (Merits)* [1986] ICJ Rep 14, [28] (emphasis in original). *Statute of the ICJ* art 53(1): 'Whenever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favour of its claim.'

<sup>94</sup> *Nicaragua (Merits)* [1986] ICJ Rep 14, [28] (emphasis in original).

How does the ICJ ensure justice in the face of non-appearance of a party? To what extent must the Court fulfil its judicial obligation to ‘satisfy itself’?<sup>95</sup> The Court stated that:

The use of the term ‘satisfy itself’ in the English text of the *Statute* (and in the French text the term ‘s’assurer’) implies that the Court must attain the same degree of certainty as in any other case that the claim of the party appearing is sound in law, and, so far as the nature of the case permits, that the facts on which it is based are supported by convincing evidence.<sup>96</sup>

In *Nicaragua*, the Court, through the application of the principle of *jura novit curia*, was able to lessen the impact of the absence of one party.<sup>97</sup> The Court was supplied with a liberal amount of information, sufficient to ‘satisfy itself’ of the merits of Nicaragua’s claim.<sup>98</sup> Also, a number of witnesses were called and oral testimony was used by the Court to resolve particular issues.<sup>99</sup> The inability of the US to cross-examine was not an obstacle to the Court’s capacity to determine the validity of the evidence presented by witnesses. The Court itself asked questions, and, in a sense, assumed the role of a cross-examiner.<sup>100</sup>

The approach of Judge Oda was indicative of that of the Court as a whole. He divided witnesses into two distinct categories that reflected their level of credibility; those who constituted a ‘disinterested witness’ and those who did not.<sup>101</sup> Accordingly, the evidence and testimony of the latter were treated ‘with great reserve.’<sup>102</sup> In spite of the Court’s stated attitude and the obvious steps taken to ‘satisfy itself,’ many commentators still felt that the decision could be

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<sup>95</sup> In *Nicaragua (Jurisdiction)* [1984] ICJ Rep 392, [28], the Court stated:

A State which decides not to appear must accept the consequences of its decision, the first of which is that the case will continue without its participation; the State which has chosen not to appear remains a party to the case, and is bound by the eventual judgment in accordance with Article 59 of the *Statute*. There is however no question of a judgment automatically in favour of the party appearing, since the Court is required, as mentioned above, to ‘satisfy itself’ that that party’s claim is well founded in fact and law.

<sup>96</sup> *Nicaragua (Merits)* [1986] ICJ Rep 14, [29].

<sup>97</sup> This requires the ICJ to take a more interventionist role in resolving practical questions regarding evidence led in support of either party’s claim.

<sup>98</sup> *Nicaragua (Merits)* [1986] ICJ Rep 14, [62].

<sup>99</sup> See, eg, the issue regarding the ability of the US to observe and prevent the alleged arms trafficking by Nicaragua into El Salvador. Nicaragua made the most of their witnesses: see Terry Gill’s explanation of the relative importance and significance of the witnesses called by Nicaragua in Terry Gill, *Litigation Strategy at the International Court: A Case Study of the Nicaragua v United States Dispute* (1989) 186–200.

<sup>100</sup> The Court noted in *Nicaragua (Merits)* [1986] ICJ Rep 14, [67] that:

As regards the evidence of witnesses, the failure of the respondent State to appear in the merits phase of these proceedings has resulted in two particular disadvantages. First, the absence of the United States meant that the evidence of the witnesses presented by the Applicant at the hearings was not tested by cross-examination; however, those witnesses were subjected to extensive questioning from the bench.

See also Separate Opinion of Judge Oda [67].

<sup>101</sup> *Ibid* [69] (Separate Opinion of Judge Oda). Those who were not disinterested included representatives of the parties’ national governments and those who had been actively involved in the preparation of public statements regarding the dispute and the events in Nicaragua.

<sup>102</sup> *Ibid* [70].

questioned simply because of the absence of the US.<sup>103</sup> In contrast, other commentators noted that the actions of the Court, in giving the US the 'benefit of the doubt' in 'grey areas' and bending over backwards in consideration of the US's non-appearance, gave great weight to the decision.<sup>104</sup>

Much of the controversy surrounding the Court's decision relates to the majority's ruling in regard to the definition of an armed attack and the interpretation of art 2(4) of the *UN Charter*, which was crucial to the basis of the US's claim of collective self-defence.<sup>105</sup> Whilst the Court rejected many of the allegations made against Nicaragua, it did hold that Nicaragua had supplied arms and provided limited support to rebels in El Salvador. This, however, fell short of an 'armed attack'.<sup>106</sup> Rather, what these actions constituted was an 'unlawful use of force' which may or may not justify the use of armed force by the victim nation state.<sup>107</sup> The importance of the Court's conclusion was that a third party, the US, is not justified under the grounds of collective self-defence to intervene using armed force to counter something less than an armed attack.<sup>108</sup>

The Court's finding that the supply of arms and equipment did not constitute an armed attack, albeit an indirect form of aggression, justifying a military response in self-defence, has puzzled some commentators and raised the ire of others.<sup>109</sup> Some authors point out inherent limitations in the applicability of the Court's statement.<sup>110</sup> Others criticise the Court's narrow definition of armed attack for offering protection to those revolutionary groups fostered or sponsored by a nation state, and also because it would restrict the development of

<sup>103</sup> See, eg, Thomas Franck, 'Some Observations on the ICJ's Procedural and Substantive Innovations' (1987) 81 *American Journal of International Law* 116, 117; Anthony D'Amato, 'Trashing Customary International Law' (1987) 81 *American Journal of International Law* 101, 105.

<sup>104</sup> Richard Falk, 'The World Court's Achievement' (1987) 81 *American Journal of International Law* 106, 106–7, 110, describes the Court's approach as 'exemplary' and argued that the failure of the US to appear did not result in a failure to examine a factual or legal position favourable to the US. Falk concludes that anyone with a '25% open mind' would accept the majority's opinion: *ibid* 112.

<sup>105</sup> The majority of the Court firmly stated that the right of self-defence existed only in the event of an 'armed attack'. The Court essentially denied that the alleged support to the rebels in El Salvador, ie the supply of arms and training, did not constitute an 'armed attack'. Thus the Court rejected the US's claim of the right to act in collective self-defence: *Nicaragua (Merits)* [1986] ICJ Rep 14, [238].

<sup>106</sup> This prompted some commentators to suggest even where a nation state provides 'direct' or 'active' support to terrorist groups, it would still not be considered an armed attack under the *UN Charter* art 51: Gregory Travalio, 'Terrorism, International Law, and the Use of Military Force' (2000) 18 *Wisconsin International Law Journal* 145, 158.

<sup>107</sup> *Nicaragua (Merits)* [1986] ICJ Rep 14, [238].

<sup>108</sup> For a detailed discussion and analysis of the Court's findings in regard to the definition of armed attack, see generally Christopher Greenwood, 'The International Court of Justice and the Use of Force' in Vaughan Lowe and Malgosia Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (1996) 373, 380–1; John Hargrove, 'The *Nicaragua* Judgment and the Future of the Law of Force and Self-Defence' (1987) 81 *American Journal of International Law* 135, 137–8.

<sup>109</sup> In particular, Judge Schwebel in his dissenting opinion in *Nicaragua (Merits)* [1986] ICJ Rep 14. See also Greenwood, 'The ICJ and the Use of Force', above n 108, 380; John Moore, '*Nicaragua* and the Deterioration of World Order' (1987) 81 *American Journal of International Law* 151, 152–3. For a more balanced critique, see Hargrove, above n 108, 135–43.

<sup>110</sup> See, eg, Travalio, above n 106, 158, where, *inter alia*, he asks if it would make a difference to the definition of armed attack if the terrorists were operating from a secure base protected by the patron nation state, or alternatively if the terrorists were armed with nuclear weapons.

humanitarian intervention.<sup>111</sup> Abraham Sofaer, in his examination of NATO's intervention in Kosovo, argues that the Court's definition of armed attack raises concern about the legality of NATO's actions in preventing genocide and other war crimes committed against the Kosovar Albanians. He also claims that the narrow approach taken by the Court limits the right of regional organisations to act in self-defence — a right envisaged by the drafters of the *UN Charter* and enshrined in art 51.<sup>112</sup>

US criticism of the case verged on hyperbole, containing protestations that the US Government 'will not risk US national security by presenting such sensitive material in public or *before a Court that includes two judges from Warsaw Pact nations*.'<sup>113</sup> One of the grounds of criticism was that the Court had made bad law because of its desire not to be seen to be intimidated by powerful states, making a political statement at the cost of the principles of international law.<sup>114</sup> Others alleged that while the Court may have had 'good motives', it had actually worsened respect for human rights, the rule of law, and the political chaos in Central America — hardly a ringing endorsement of the potential of the Court in helping to monitor or restore world order.<sup>115</sup>

However, not all commentators criticise the Court's decision in this respect. Some believe that it reflects state practice since 1945 and therefore is a true reflection of customary international law.<sup>116</sup> Some of those commentators who disagree with the Court's decision and interpretation of the relevant legal principles do not doubt the significance of the Court's contribution.<sup>117</sup> As Richard Falk notes, even Judge Schwebel in dissent felt that the majority opinion was deserving of respect.<sup>118</sup> The majority's decision did appear to undermine the whole system of covert warfare employed through client states in the broader context of the Cold War.<sup>119</sup>

As the Court stated, to allow the US to intervene in the domestic affairs of Nicaragua simply at the request of the Contras would seriously undermine the

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<sup>111</sup> See, eg, Michael Glennon, 'The New Interventionism (Getting Involved in Other Nations' Conflicts and Affairs)' (1999) 78(3) *Foreign Affairs* 1, 2–3; Hargrove, above n 108, 139.

<sup>112</sup> Abraham Sofaer, 'International Law and Kosovo' (2000) 36 *Stanford Journal of International Law* 1, 9. However, the ICJ's approach is justified, since the right of self-defence is indeed tightly controlled under the *UN Charter*, through the Security Council. This is an intentional response to the problems experienced by the League of Nations. See *Lockerbie Case (Provisional Measures)* [1992] ICJ Rep 3, 57–8 (Dissenting Opinion of Judge Weeramantry): 'The *Charter*, whose genesis marked a new stage in the course of history, features some essential differences in comparison with its predecessor, the *Covenant of League of Nations*.'

<sup>113</sup> *Statement of the US Withdrawal*, cited in Keith Highet, 'Between a Rock and a Hard Place — The United States, the International Court, and *Nicaragua*' (1987) 21 *The International Lawyer* 1083, 1086 (emphasis added). As noted by Highet, this statement received a 'stinging rebuke' from Judge Lachs, the member of the bench towards whom it was directed.

<sup>114</sup> See, eg, Hargrove, above n 108, at 143.

<sup>115</sup> Moore, above n 109, 152. Moore acted as Counsel for the US in *Nicaragua*.

<sup>116</sup> Greenwood, 'The ICJ and the Use of Force', above n 108, 379.

<sup>117</sup> See Richard Falk, above n 104, 106; Franck, 'Some Observations on the ICJ's Procedural and Substantive Innovations', above n 103, 116; Hargrove, above n 108, 135–43; Fred Morrison, 'Legal Issues in the *Nicaragua Opinion*' (1987) 81 *American Journal of International Law* 160, 163.

<sup>118</sup> Falk, above n 104, 111.

<sup>119</sup> This point is made particularly strongly by Moore, above n 109, 152.

principle of non-intervention and would be disastrous for the international community.

Indeed, it is difficult to see what would remain of the principle of non-intervention in international law if intervention, which is already allowable at the request of the government of a State, were also to be allowed at the request of the opposition. This would permit any State to intervene at any moment in the internal affairs of another State, whether at the request of the government or at the request of its opposition. Such a situation does not in the Court's view correspond to the present state of international law.<sup>120</sup>

Whilst it can be said that this decision reflects the ICJ's desire to protect a small nation state,<sup>121</sup> no state would, as a general principle, disagree with the right to non-intervention. Even the US would defend its right to non-intervention. Going one step further, would any state disagree with the proposition that there is no right to intervene at the request of a party *opposed* to the central government? Would the US countenance intervention by another state simply because that state disagreed with the political philosophy and structure of representative democracy?<sup>122</sup> The answers to these questions are self-evident. There is no reason why any state should feel any differently to the US. In other words, there is a strong element of universalism to the decision.

Richard Falk commented upon this aspect of the majority's decision. He noted that in the majority decision not one legal school of thought, including the 'implicit legal hegemony of Western approaches', dominated.<sup>123</sup>

As such, the majority opinion is of great help to all sectors of world public opinion seeking to comprehend the contours of minimum world public order on matters of war and peace. The possibility of legal universalism has been powerfully validated.<sup>124</sup>

The significance and correctness of the Court's interpretation of armed attack in *Nicaragua* has yet to be tested before the Court. However, with the series of important cases relating to the NATO bombing of Serbia during the crisis in Bosnia-Herzegovina still before the Court, it is only a matter of time before the

<sup>120</sup> *Nicaragua (Mertis)* [1986] ICJ Rep 14, [246].

<sup>121</sup> In the words of Richard Falk, above n 104, 108:

As seems appropriate, the Court chooses ... the statist approach, one generally favourable to the jural implications of state equality and sovereign rights and to the geopolitical implications of shifting the weight of international law behind the situation and reality of weak states.

<sup>122</sup> Many commentators since the end of the Cold War have argued that the right to self-determination includes a right to democracy: see, eg, Thomas Franck, 'The Emerging Right to Democratic Governance' (1992) 86 *American Journal of International Law* 46, 90; see also the series of articles in Gregory Fox and Brad Roth (eds), *Democratic Governance and International Law* (2000). Whilst there is much support for this view, the current state of international law, both customary and treaty law, does not grant representative democracy any special status. (A discussion of the right to democracy is contained in the Andrew Coleman, 'The Democratic Entitlement and Freedom from Repression' (2003) 28 *Alternative Law Journal*, forthcoming July 2003). However, the point being made here is that intervention on the grounds of a disapproval of any political system is not permitted under international law.

<sup>123</sup> Falk, above n 104, 107.

<sup>124</sup> *Ibid.*

principles, and indeed the definition of armed attack developed in *Nicaragua* will be examined in great detail and applied.<sup>125</sup>

## B The Nuclear Weapons Opinion

Another case that examined and developed the rules relating to the use of force was the *Nuclear Weapons Opinion*. The Court was asked by the UN General Assembly for an advisory opinion on whether ‘the threat or use of nuclear weapons in any circumstance [is] permitted under international law.’<sup>126</sup> Like *Nicaragua*, this advisory opinion involved intensely political issues.<sup>127</sup> In fact, many authors believe that the *Nuclear Weapons Opinion* was, and arguably remains, one of the most controversial and highly political matters ever examined by the Court.<sup>128</sup> In the words of Judge Schwebel, the position of nuclear weapons in the international community was a problem of ‘titanic tension between State practice and legal principle.’<sup>129</sup> Given the increasing support for nuclear disarmament and also for *armament* within the international community, it was inevitable that any decision would have received intense examination and criticism was inevitable.

The Court concluded by eleven votes to three that in customary and conventional international law there is no comprehensive and universal prohibition of the threat or use of nuclear weapons.<sup>130</sup> However, it also held unanimously that ‘there is in neither customary nor conventional international

<sup>125</sup> *Legality of Use of Force (Yugoslavia v UK) (Provisional Measures)* [1999] ICJ Rep 826. See also the series of cases against the members of NATO, above n 32.

<sup>126</sup> *General and Complete Disarmament*, GA Res 49/75, UN GAOR, 49<sup>th</sup> sess, 90<sup>th</sup> plen mtg, [K], UN Doc A/RES/49/75 (‘the Request’).

<sup>127</sup> As an indication of how significant this matter was to the international community, a record 43 states supplied written statements to the Court. A further 23 provided oral statements. See Manfred Mohr, ‘Advisory Opinion of the International Court of Justice on the Legality of the Use of Nuclear Weapons Under International Law — A Few Thoughts on its Strengths and Weaknesses’ (1997) 316 *International Review of the Red Cross* 92, 94.

<sup>128</sup> Eric David described it as a landmark decision in ‘the history of the Court, if not in history itself’: Eric David, ‘The Opinion of the International Court of Justice on the Legality of the Use of Nuclear Weapons’ (1997) 316 *International Review of the Red Cross* 21, 21. See also Luigi Condorelli, ‘Nuclear Weapons: A Weighty Matter for the International Court of Justice’ (1997) 316 *International Review of the Red Cross* 9, 11; Christopher Greenwood, ‘*Jus ad Bellum* and *Jus in Bello* in the *Nuclear Weapons Advisory Opinion*’ in Laurence Boisson de Chazournes and Phillipe Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons* (1999) 247, 249. Greenwood states that the request was one ‘which the Court might well have preferred to do without’: Christopher Greenwood, ‘The *Advisory Opinion on Nuclear Weapons* and the Contribution of the International Court to International Humanitarian Law’ (1997) 316 *International Review of the Red Cross* 65, 65. McNeill claims that this was one of the ‘hardest cases ever’ addressed by any court: John McNeill, ‘The International Court of Justice Advisory Opinion in the *Nuclear Weapons Cases* — A First Appraisal’ (1997) 316 *International Review of the Red Cross* 103, 117.

<sup>129</sup> *Nuclear Weapons Opinion* [1996] 1 ICJ Rep 226, 311 (Dissenting Opinion of Judge Schwebel). Part of the reason for such levels of tension is the important role nuclear weapons play in the defence policies of many of the dominant states in the international community, in particular the permanent members of the Security Council of the UN: David, above n 128, 21.

<sup>130</sup> *Nuclear Weapons Opinion* [1996] 1 ICJ Rep 226 [105(2)] (President Bedjaoui, Vice-President Schwebel, Judges Oda, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Ferrari Bravo and Higgins; Judges Shahabuddeen, Weeramantry and Koroma dissenting).

law any specific authorization of the threat or use of nuclear weapons'.<sup>131</sup> Similarly, and again unanimously, it held that:

A threat or use of force by means of nuclear weapons that is contrary to Article 2, paragraph 4, of the *United Nations Charter* and that fails to meet all the requirements of Article 51, is unlawful; ... [and that a] threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons.<sup>132</sup>

The most controversial part of the opinion concerned the legality of the use of nuclear weapons in situations *in extremis* — where the survival of the nation state is dependent upon the threat of or the actual use of nuclear weapons. The Court concluded by the narrowest of majorities, the decision being determined by the President's casting vote, that the existing state of international law was insufficient to support a conclusion regarding whether the use of nuclear weapons in the situation of the survival of a nation state was illegal or legal.<sup>133</sup>

Given the split decision, it may be argued that the Court in the *Nuclear Weapons Opinion* did not actually clarify international law on the use of nuclear weapons and that it may, in fact, have muddied it even further.<sup>134</sup> However, such criticism is overly harsh. Mohr's analysis of the voting patterns reveals that three of the 14 judges refused to vote for the contentious paragraph 2E because it did not *definitively* hold that the use or threat of use of nuclear weapons was *always illegal*. Thus, in reality, 10 of the 14 judges supported, at the very least, the proposition that *generally* speaking nuclear weapons were illegal. Also, examining the Separate Opinions reveals that it was really only the use of nuclear weapons in situations of national survival that divided the Court, and that there was no doubt that use in other circumstances would be illegal.<sup>135</sup> It was also very clear, in spite of the number of dissenting and separate opinions, that the Court as a whole believed that the principles and rules of armed conflict, both *jus ad bellum* (the concept of proportionality) and *jus in bello* (the concept of necessity in self-defence) as well as the principles of international humanitarian law, applied to the use of nuclear weapons and indeed *any* weapon.

The *Nuclear Weapons Opinion* provided an exhaustive examination of both customary international law and treaty law, including the *UN Charter* and art 6

<sup>131</sup> Ibid [105(A)]. However as noted by Timothy McCormack, 183 states are now party to the *Treaty on the Non-Proliferation of Nuclear Weapons*, opened for signature 1 July 1968, 729 UNTS 169 (entered into force 5 March 1970), and thus there is an effective comprehensive worldwide ban on nuclear weapons: Timothy McCormack, 'A *Non Liqueur* on Nuclear Weapons: The ICJ Avoids the Application of General Principles of International Humanitarian Law' (1997) 316 *International Review of the Red Cross* 76, 80.

<sup>132</sup> *Nuclear Weapons Opinion* [1996] 1 ICJ Rep 226, [105(2)(C)]–[105(2)(D)].

<sup>133</sup> Ibid [105(2)(E)] (President Bedjaoui, Judges Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Ferrari Bravo; Vice-President Schwebel, Judges Oda, Guillaume, Shahabuddeen, Weeramantry, Koroma and Higgins dissenting).

<sup>134</sup> This is the *non liqueur* argument raised by commentators, and was even addressed by the Court itself: see *Nuclear Weapons Opinion (Advisory Opinion)* [1996] 1 ICJ Rep 226, [7] (Dissenting Opinion of Judge Higgins); 279 (Declaration of Judge Vereshchetin); 389 (Dissenting Opinion of Judge Shahabuddeen); see also McCormack, above n 132.

<sup>135</sup> Mohr, above n 127, 102.

of the *International Covenant on Civil and Political Rights*.<sup>136</sup> The Court clarified some important applications of international law, such as that in any armed conflict parties are required by international law to take into account environmental considerations,<sup>137</sup> and that art 6 of the *ICCPR* does not override the law of armed conflict.<sup>138</sup> The Court's examination of humanitarian law has been used in subsequent cases, such as *Legality of Use of Force (Yugoslavia v UK) (Provisional Measures)*, where the Court examined the definition of genocide.<sup>139</sup>

Despite its contribution to the development of the law of armed conflict, the Court's Opinion received much criticism, mainly for not taking the opportunity to finally end one of the greatest threats posed to humanity's existence.<sup>140</sup> There are several arguments that can be raised supporting the notion that the use of nuclear weapons even *in extremis* (where the survival of the nation state is at stake) will not comply with the laws of armed conflict.

For example, the situation of a nation state fighting for its survival conjures images of foreign armies *invading its territory* with an inevitable confusion of troops and civilians fleeing the invaders. In such a context it is difficult to imagine a defending force being able to isolate a military target within its own borders. Under the enormous pressure of the need to survive, will states be willing or able to comply with international law? What target would be chosen? Would a state choose an isolated military target as a method of sending a clear message to the attackers that if they do not desist, they will be attacked with nuclear weapons?<sup>141</sup> Would a state use the weapons to destroy the attacking forces? Or would it simply decide to obliterate the territory of the attacker together with its civilians?<sup>142</sup>

There is, perhaps, an even more important and fundamental matter. Consideration of the use of nuclear weapons by states *in extremis* raises a very important question that strikes at the heart of international law. At the core of the *Nuclear Weapons Opinion* lies an examination of the relative importance of the

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<sup>136</sup> Opened for signature 16 December 1966, 999 UNTS 171, art 6 (entered into force 23 March 1976) ('*ICCPR*').

<sup>137</sup> In *Nuclear Weapons Opinion* [1996] 1 ICJ Rep 226, [30], the Court stated that '[s]tates must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objections'.

<sup>138</sup> Greenwood, 'The ICJ and the Use of Force', above n 108, 68–75.

<sup>139</sup> [1999] ICJ Rep 826, 838.

<sup>140</sup> Some members of the Bench expressed this view: see, eg, Judge Weeramantry who criticised his brethren for failing to seize the day and denounce the use of nuclear weapons as always being illegal. His reasoning was partly based on the law regarding the use of force and also humanitarian concerns: *Nuclear Weapons Opinion* [1996] ICJ Rep 226 (Dissenting Opinion of Judge Weeramantry).

<sup>141</sup> This is similar to the so-called 'low-yield warning shot' raised by Malaysia and dismissed comprehensively by Judge Weeramantry who asked how the 'other side' would know that this exchange was not a prelude to an attack using strategic nuclear weapons?: *ibid* 538–42 (Dissenting Opinion of Judge Weeramantry). What would be the response of the party attacked with tactical nuclear weapons? Would it heed such a 'warning shot'? Or if it were a nuclear power, would it respond in kind, thus escalating the conflict?

<sup>142</sup> In discussing the effect of nuclear weapons, Judge Weeramantry wrote that an attacked nation state would be 'so ravaged that it will not be able to make fine evaluations of the exact amount of retaliatory force required. In such event, the tendency to release as strong a retaliation as is available must enter into any realistic evaluation of the situation': *ibid* 470 (Dissenting Opinion of Judge Weeramantry).

nation state in the context of the international legal system and the international community in general. Another way of expressing this question is ‘are nation states more important than the international community or humanity itself?’

Many of those criticising the *Opinion* feel strongly that no nation state is more important than any other nation state, and certainly not more so than humanity itself.<sup>143</sup> Kohen summarises this point very well:

Even assuming that the existence of states is considered a basic value, this existence cannot be seen in an isolated way: the existence of one state cannot be considered more important than the existence of any other, and even less can it be considered more important than the existence of the whole international community.<sup>144</sup>

In another brilliant statement, Kohen argues that ‘[i]nternational law has as its main social function not to ensure the continued existence of single states, but to guarantee the *coexistence* of states.’<sup>145</sup> This issue raises the ongoing debate of positivism and natural law, and once again Kohen expresses the issue very well:

The assumption that sovereign states are not subordinated to any higher power does not entail the negation of the simple — but often neglected — idea that they are subordinated to international law. It is important not to lose sight of the fact that the existence of any society implies that its members do not have absolute freedom to act, that their rights must be exercised within the rules they have adopted to regulate their relations. This is the main difference between society and the state of nature.<sup>146</sup>

Many members of the Court, in particular Judges Weeramantry, Koroma and Shahabuddeen, would agree with Kohen. They argued that, since nation states are part of a highly interdependent community, no single state has a *legal right* to possess or use weapons that are able to destroy the entire community.<sup>147</sup> This

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<sup>143</sup> Gardam states that the Separate Opinion of Judge Fleischhauer ‘places considerations of state sovereignty ahead of the interests of humanity, an approach that fails to reflect the developing emphasis of international law’: Judith Gardam, ‘Necessity and Proportionality in *Jus ad Bellum* and *Jus in Bello*’ in Laurence Boisson de Chazournes and Phillippe Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons* (1999) 275, 287. The use of the expression ‘humanity’ is deliberate, and is in the sense of the language used in the *UN Charter*: ‘We the peoples...’. This involves adopting a non-statist perspective of international law and which is in contradiction to a purely positivist approach.

<sup>144</sup> Marcelo Kohen, ‘The Notion of “State Survival” in International Law’ in Laurence Boisson de Chazournes and Phillippe Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons* (1999) 293, 312. Kohen also concludes that it is not the survival of nation states that is at stake but the survival of international law: 313.

<sup>145</sup> *Ibid* 312 (emphasis in original).

<sup>146</sup> *Ibid* 311.

<sup>147</sup> See, eg, *Nuclear Weapons Opinion* [1996] 1 ICJ Rep 226, 465 (Dissenting Opinion of Judge Weeramantry):

Such is the risk attendant on the use of nuclear weapons — a risk which no single nation is entitled to take, whatever the dangers to itself. An individual’s right to defend his own interests is a right he enjoys against his opponents. In exercising that right, he cannot be considered entitled to destroy the village in which he lives.

See especially *ibid* 393–4 (Dissenting Opinion of Judge Shahabuddeen):

constitutes a very clear rejection of a positivist approach and a clear message to states that their sovereignty is far from absolute.<sup>148</sup> Judge Shahabuddeen wrote:

Thus however far-reaching may be the rights conferred by sovereignty, those rights cannot extend beyond the framework within which sovereignty itself exists; in particular, they cannot violate the framework. The framework shuts out the right of a State to embark on a course of action which would dismantle the basis of the framework by putting an end to civilisation and annihilating mankind. It is not that a State is prohibited from exercising a right which, but for the prohibition, it would have; a State can have no such right to begin with.<sup>149</sup>

International law has chipped away at the so-called ‘absoluteness’ of national sovereignty for decades in a variety of areas. The statements referred to above, however, are unusually frank, and the implications of such judgments for the international community are important. The reference to a ‘framework’ implies that there exists a higher authority to which states are answerable. In essence, Judge Shahabuddeen’s statement above rejects the positivist ‘*Lotus Case* principle’, which claims that states have a sovereign right to do whatever is not prohibited under international law.<sup>150</sup> Judge Shahabuddeen further states that:

There is not any convincing ground for the view that the ‘*Lotus*’ Court moved off on a supposition that States have an absolute sovereignty which would entitle them to do anything however horrid or repugnant to the sense of the international community, provided that the doing of it could not be shown to be prohibited under international law. The idea of internal supremacy associated with the concept of sovereignty in municipal law is not neatly applicable when that concept is transposed to the international plane. The existence of a number of sovereignties side by side places limits on the freedom of each State to act as if the others did not exist. These limits define an objective structural framework within which sovereignty must necessarily exist.<sup>151</sup>

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So a prior question in this case is this: even if there is no prohibition, is there anything in the sovereignty of a State which would entitle it to embark on a course of action which could effectively wipe out the existence of all States by ending civilization and annihilating mankind? An affirmative answer is not reasonable; that sovereignty could not include such a right is suggested by the fact that the acting State would be one of what the Permanent Court of International Justice, in the language of the times, referred to as ‘co-existing independent communities’, with a consequential duty to respect the sovereignty of other States. It is difficult for the Court to uphold a proposition that, absent a prohibition, a State has a right in law to act in ways which could deprive the sovereignty of all other States of meaning.

<sup>148</sup> In fact, Judge Weeramantry went even further and stated: ‘my considered opinion on this matter is that the use or threat of use of nuclear weapons is incompatible with international law and with the very foundations on which that system rests’: *ibid* 553 (Dissenting Opinion of Judge Weeramantry) (emphasis added).

<sup>149</sup> *Ibid* 393 (Dissenting Opinion of Judge Shahabuddeen).

<sup>150</sup> *SS Lotus Case (France v Turkey)* [1927] PCIJ (ser A) No 10 (‘*Lotus Case*’).

<sup>151</sup> *Nuclear Weapons Opinion* [1996] 1 ICJ Rep 226, 393. Judge Shahabuddeen added that the *Lotus Case* should be distinguished on the basis that that decision concerned a case of collision at sea and not the survivability of the human race. He believed that if, at the time the PCIJ handed down its decision, it had been aware of the possibility that a few nuclear-armed nation states could destroy the planet, it would not have developed such a wide rule without some form of disqualification: *Nuclear Weapons Opinion* [1996] 1 ICJ Rep 226, 394.

However, the full potential of such findings was not realised as the Court split when deciding the question of whether nuclear weapons were *always* illegal. This question rested on whether existing principles of international law, both treaty and customary, were sufficient to provide an answer.<sup>152</sup> The Court was not assisted by the wording of the Request, which according to Greenwood, forced the Court to consider two ridiculous extremes: that nuclear weapons are either *always* illegal or *always* legal.<sup>153</sup> This made the Court's conclusion, expressed in the controversial paragraph 2E of the *Dispositif* inevitable.<sup>154</sup> As such, the *Opinion* received admiration as well as criticism. For example, Mullerson writes:

The Hague Court probably did its best in this near-impossible task for any judicial body, rather adroitly avoiding potential damage first of all to its own prestige and reliability. At the same time, the *Advisory Opinion* (which has to be read together with the Separate and Dissenting Opinions of all the judges) reflects existing real world controversies.<sup>155</sup>

The questionable existence of sufficient principles of international law to answer the Request caused the split in the Court. In the opinion of the majority they did not exist and, if the Court were to go beyond the existing principles of international law, to 'fill the gap', as it were, the Court would be exposed to the argument that it had overstepped its role as a judicial body and had become a 'legislator'.<sup>156</sup> Simpson discusses the criticism levelled at the ICJ for

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<sup>152</sup> This, not surprisingly, split the Court, due to the differing interpretations of whether existing international law was sufficient to answer this question. In the eyes of the majority and some commentators it was not, and to proceed further was going beyond the role of the Court as a judicial entity. One member of the bench, Judge Fleischhauer, felt that even to find that the use of nuclear weapons was illegal in self-defence would breach the principle of sovereign equality: *Nuclear Weapons Opinion* [1996] 1 ICJ Rep 226, [3] (Separate Opinion of Judge Fleischhauer).

<sup>153</sup> Greenwood, '*Jus ad Bellum* and *Jus in Bello*', above n 128, 249. Luigi Condorelli would also agree, describing the two extremes of the Request to be 'two utterly irreconcilable positions': Condorelli, above n 128, 11. Peter Bekker similarly concluded that it was 'unrealistic to expect the International Court of Justice to solve this immense problem by way of an advisory opinion in reply to a vigorously contested request that consisted of a mere fifteen words': Peter Bekker, '*Legality of the Use by a State of Nuclear Weapons in Armed Conflict*' in Peter Bekker (ed), *Commentaries on World Court Decisions (1987-1996)* (1998) 233, 242.

<sup>154</sup> *Nuclear Weapons Opinion* [1996] ICJ Rep 66, [105(2)(E)] (Judgment of the Court):

It follows from the above-mentioned requirements that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law; However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.

<sup>155</sup> Rein Mullerson, 'On the Relationship between *Jus ad Bellum* and *Jus in Bello* in the General Assembly *Advisory Opinion*' in Laurence Boisson de Chazournes and Phillippe Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons* (1999) 267, 274. See also Mohr, above n 127, 102.

<sup>156</sup> Greenwood agrees with the majority of the Court that to have found that nuclear weapons are illegal in all situations would have meant going beyond the Court's judicial function: Greenwood, '*The Advisory Opinion on Nuclear Weapons*', above n 128, 74. This issue played a crucial role in President Bedjaoui casting his vote with the majority:

overreaching its jurisdiction in, for example, the *Nicaragua (Jurisdiction)*<sup>157</sup> and *Nuclear Tests (Australia v France) (Judgment)*.<sup>158</sup> Other similar examples include *Western Sahara (Advisory Opinion)*<sup>159</sup> as mentioned above, and *South West Africa (Ethiopia v South Africa; Liberia v South Africa) (Second Phase) (Judgment)*.<sup>160</sup> Despite the differences of opinion among members of the bench, the Court was united in its belief that it should act as a judicial body only and not as a legislator.<sup>161</sup> Any criticism of the *Nuclear Weapons Opinion* overlooks this one important fact.

It is not surprising that current treaty law does not state that the use of nuclear weapons would be illegal since, as Greenwood notes, the powers that signed and ratified the treaties were nuclear powers themselves.<sup>162</sup> This raises the argument that the Court should have taken on the role of legislator in this instance, as it was aware of the improbability of nuclear powers adopting a treaty to deprive them of the very weapons that maintain their status and security in the international community. The Court, however, refused to do so.<sup>163</sup> This approach was appropriate. If international law is insufficient, then it is imperative that the ICJ reveal such flaws to the international community for it to make the necessary changes.<sup>164</sup>

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As its *Advisory Opinion* shows, at no time did the Court lose sight of the fact that nuclear weapons constitute a potential means of destruction of all mankind. Not for a moment did it fail to take into account this eminently crucial factor for the survival of mankind. ... But the Court could obviously not go beyond what the law says. It could not say what the law does not say.

*Nuclear Weapons Opinion* [1996] 1 ICJ Rep 226, [9] (Declaration of President Bedjaoui).

<sup>157</sup> [1984] ICJ Rep 392.

<sup>158</sup> [1974] ICJ Rep 253. See Simpson, above n 12, 330.

<sup>159</sup> [1975] ICJ Rep 12. This decision in particular created a problem of perception, since many former colonies and non-European states viewed it as another attempt at re-colonisation and, in particular, the establishment of European dominance. However, this may not be as valid an argument today. Mohamed Shahabuddeen writes that although this perception may have been valid two decades ago, today the ICJ is in 'no danger of developing law from a preponderantly European standpoint': Shahabuddeen, above n 6, 20.

<sup>160</sup> [1966] ICJ Rep 6.

<sup>161</sup> Judge Guillaume expressed this succinctly in *Nuclear Weapons Opinion* [1996] 1 ICJ Rep 226, [14] (Separate Opinion of Judge Guillaume):

I should like solemnly to reaffirm in conclusion that it is not the role of the judge to take the place of the legislator. ... It is the mark of the greatness of a judge to remain within his role in all humility, whatever religious, philosophical or moral debates he may conduct with himself.

See also *ibid* [9] (Declaration of President Bedjaoui).

<sup>162</sup> Greenwood, 'The Advisory Opinion on Nuclear Weapons', above n 128, 65–75.

<sup>163</sup> Since 1991, the trend has been increased usage of the Court by states and thus the Court has been able to continue the development of international law, to the extent that there is a rich source of knowledge and the idea of 'gaps' within international law is fast becoming an issue of the past.

<sup>164</sup> Condorelli, above n 128, 11; Bekker, 'Legality of the Use by a State of Nuclear Weapons', above n 153, 241–2.

C *The Lockerbie Case*

There are two ICJ decisions that relate to the tragedy that occurred in the skies above Lockerbie, Scotland.<sup>165</sup> The first decision refers to the virtually identical orders of April 1992 made in relation to the request from Libya for provisional measures in accordance with art 41 of the *Statute of the ICJ* against the United Kingdom and the US.<sup>166</sup> The second decision concerns Preliminary Objections and was finally resolved in 1998.<sup>167</sup>

On 21 December 1988, Pan Am Flight 103 exploded in mid-air above Lockerbie, Scotland, killing 270 crew and passengers, mainly American and British citizens.<sup>168</sup> As a result of investigations by US and UK police and intelligence organisations, the cause of the explosion was attributed to an act of terrorism by two Libyan nationals, Fhimah and Megrahi, who were then charged with the destruction of Pan Am Flight 103 by the Lord Advocate of Scotland. Further, it was alleged by the US and UK that the two were sponsored by the Libyan Government.<sup>169</sup> The US and the UK then issued a joint request to Libya to surrender the two charged for trial in the US or UK. The Security Council subsequently endorsed this request in *Resolution 731* on 21 January 1992.<sup>170</sup> Libya responded by instituting proceedings against both the US and the UK before the ICJ on 3 March 1992.

Libya, in its applications to the ICJ, sought to obtain declarations in the following terms, that:

- 1 Libya had complied fully with the 1971 *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*;<sup>171</sup>
- 2 The US and the UK had breached, and continued to breach, various articles of the *Montréal Convention*; and
- 3 The US and the UK should cease to use or threaten to use force against Libya, as well as to violate Libyan sovereignty and territorial integrity.

Furthermore, Libya also sought provisional measures under art 41 of the *Statute of the ICJ* seeking to prevent the US and the UK from taking action to force Libya to surrender the two men alleged to be responsible for the Lockerbie Incident.<sup>172</sup>

On 31 March 1992, a mere three days after the close of the ICJ's oral hearings of Libya's request for provisional measures, the Security Council adopted

<sup>165</sup> For an idea of the impact the tragedy has had upon families of those killed see the article by Aphrodite Tsairis, 'International Terrorism: Prevention and Remedies: Lessons of Lockerbie' (1996) 22 *Syracuse Journal of International Law and Commerce* 31, 31–40.

<sup>166</sup> *Lockerbie Case (Provisional Measures)* [1992] ICJ Rep 3.

<sup>167</sup> *Lockerbie Case (Preliminary Objections)* [1998] ICJ Rep 115.

<sup>168</sup> In fact, the 270 killed were from a total of 21 different countries: Tsairis, above n 165, 31.

<sup>169</sup> *Ibid* 31–2.

<sup>170</sup> SC Res 731, UN SCOR, 47<sup>th</sup> sess, 3033<sup>rd</sup> mtg, art 3, UN Doc S/RES/731 (1992).

<sup>171</sup> Opened for signature 23 September 1971, 974 UNTS 178 (entered into force 26 January 1973) ('*Montréal Convention*').

<sup>172</sup> *Lockerbie Case (Provisional Measures)* [1992] ICJ Rep 3. For an excellent summary, see Gowlland-Debbas, above n 21.

*Resolution 748*,<sup>173</sup> which stated inter alia that all states should take action (using economic as well as diplomatic measures) if Libya failed to comply with Security Council *Resolution 731*. This was clearly designed to coerce Libya to surrender the two nationals charged with the bombing. The Court dismissed Libya's request for provisional measures on the basis that the adoption of *Resolution 748* effectively destroyed the rights Libya claimed under the *Montréal Convention*, and that there were, therefore, no rights to protect by provisional measures.<sup>174</sup>

The issue before the ICJ was indeed 'highly political,' with the Security Council invoking Chapter VII of the *UN Charter* to adopt *Resolution 748*. The actions of the Security Council, therefore, appeared to conflict with the Libyan request for provisional measures, and further with the Court's ability to consider the request. This conflict between the respective organs of the UN, both in the process of resolving the same dispute, raised the issue of the legal-political dichotomy, and the role of both in the resolution of highly political matters. The matter also provided an opportunity for the ICJ to examine and clarify its relationship with the Security Council.<sup>175</sup>

There were a number of interesting aspects to the judgment. Firstly, the Court confirmed its independence and judicial integrity by reiterating that it would not allow 'political considerations' to interfere with the performance of its role as the primary judicial body of the UN.<sup>176</sup> Thus, the Court rejected the arguments put forward by both the US and UK counsels that the very fact that the Security Council was now involved meant that the Court had no role to play.<sup>177</sup> Secondly, the Court drew attention to the differences between the Security Council and the Court, noting that whilst there was a clear distinction between the two, each played a role in the pacific settlement of disputes — a role that was intended by the *UN Charter*.<sup>178</sup> Thirdly, the Court held that there was no 'exclusivity' in the nature of the power granted to the Security Council under art 24 of the *UN Charter*,<sup>179</sup> and further that the *UN Charter* does not establish a hierarchy

<sup>173</sup> SC Res 748, UN SCOR, 47<sup>th</sup> sess, 3063<sup>rd</sup> mtg, UN Doc S/RES/748 (1992).

<sup>174</sup> *Lockerbie Case (Provisional Measures)* [1992] ICJ Rep 3, [39]–[43].

<sup>175</sup> The ICJ needed to examine whether it could function as a constitutional court exercising judicial review of the Security Council. A similar issue arose in *Tadic*, where the ICTY, in a manner similar to the ICJ in the *Lockerbie Case (Provisional Measures)*, confirmed that establishing its jurisdiction was a judicial task, since it involved a task necessary to achieve its purpose as stated in art 1 of the *Statute of the International Criminal Tribunal for the Former Yugoslavia*, and thus was not a review of the Security Council's resolution establishing the tribunal. The ICTY also rejected the legal-political dichotomy: see *Tadic (Defence Motion for Interlocutory Appeal on Jurisdiction)*, Case No IT-94-1-AR72 (2 October 1995) [15]–[20], [24]; *Statute to the International Criminal Tribunal for the Former Yugoslavia*, annexed to *Resolution 827*, SC Res 827, UN SCOR, 48<sup>th</sup> sess, 3217<sup>th</sup> mtg, UN Doc S/Res/827 (1993).

<sup>176</sup> *Lockerbie Case (Provisional Measures)* [1992] ICJ Rep 3, [18].

<sup>177</sup> The argument put forward by the US and the UK was that Libya's application was intended to interfere with the Security Council's primary responsibility, namely the maintenance of peace and security, a responsibility that was within the *exclusive competence* of the Security Council: Gowlland-Debbas, above n 21, 654–5.

<sup>178</sup> See especially *Lockerbie Case (Provisional Measures)* [1992] ICJ Rep 3, [56] (Dissenting Opinion of Judge Weeramantry); [7] (Dissenting Opinion of Judge El-Koshi).

<sup>179</sup> Thus, it reaffirmed the Court's earlier decision in *Certain Expenses of the United Nations (Advisory Opinion)* [1962] ICJ Rep 151, 163.

between the ICJ and the Security Council.<sup>180</sup> Finally, the Court found that there was no provision in the *Statute of the ICJ* equivalent to art 12 of the *UN Charter* forbidding the Court from performing its role once a dispute was before the Security Council.<sup>181</sup>

There were two significant aspects of the Court's decision. Firstly, the Court affirmed that in highly political matters, its role as the principal judicial organ of the UN is to resolve legal questions so as to assist the UN to achieve its prime objective — the maintenance of peace and security.<sup>182</sup> Secondly, the Court completely rejected the 'traditional' dichotomy of legal-political questions.<sup>183</sup> This was particularly evident in the Dissenting Opinions of Judges Weeramantry and El-Koshi. The former stated that:

As a judicial organ, it will be the Court's duty from time to time to examine and determine from a strictly legal point of view matters which may at the same time be the subject of determination from an executive or political point of view by another principal organ of the United Nations. The Court by virtue of its nature and constitution applies to the matter before it the concepts, the criteria and the methodology of the judicial process which other organs of the United Nations are naturally not obliged to do. The concepts it uses are juridical concepts, its criteria are standards of legality, its method is that of legal proof. Its tests of validity and the bases of its decisions are naturally not the same as they would be before a political executive organ of the United Nations.<sup>184</sup>

Judge Weeramantry then referred to the *Aegean Sea Continental Shelf Case (Greece v Turkey) (Jurisdiction)*, where Judge Lachs stated:

The frequently unorthodox nature of the problems facing States today requires as many tools to be used and as many avenues to be opened as possible, in order to resolve the intricate and frequently multidimensional issues involved.<sup>185</sup>

The Court, as one of the organs of the United Nations, will assist the overall body to resolve international disputes and maintain peace and security by doing what it is equipped and trained to do — resolve those necessary legal questions *so that a final resolution can be achieved by the UN*. The Court does not even attempt to claim that it operates on its own, but rather has acknowledged that it works with the Security Council to achieve the maintenance of international peace and security. In other words, the Court's decision is a means to an end, not the end itself.<sup>186</sup>

<sup>180</sup> *Lockerbie Case (Provisional Measures)* [1992] ICJ Rep 3, [36]. This again reaffirmed the earlier decision in *Hostages Case (Judgment)* [1980] ICJ Rep 3.

<sup>181</sup> *UN Charter* art 12(1) states: 'While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present *Charter*, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.'

<sup>182</sup> *UN Charter* art 92.

<sup>183</sup> Gowlland-Debbas, above n 21, 653–5.

<sup>184</sup> *Lockerbie Case (Provisional Measures)* [1992] ICJ Rep 3, 56 (Dissenting Opinion of Judge Weeramantry).

<sup>185</sup> *Aegean Sea Continental Shelf Case (Greece v Turkey) (Jurisdiction)* [1978] ICJ Rep 3, 52 (Separate Opinion of Judge Lachs); *Lockerbie Case (Provisional Measures)* [1992] ICJ Rep 3, 69 (Dissenting Opinion of Judge Weeramantry).

<sup>186</sup> Thus confirming what Kelsen and Mosler had argued: see above nn 28, 34, 35 and accompanying text.

This analysis was reinforced by the ICJ's determination in 1998 of the Preliminary Objections to its jurisdiction filed by the US. The ICJ concluded that it did indeed have jurisdiction on the basis that there existed a dispute between the parties concerning the interpretation of art 7 of *Montréal Convention*, or any other legal regime applied, and that questions thus arose that could be decided by legal methodology through a judicial process.<sup>187</sup> The ICJ also confirmed its previous finding in the *Lockerbie Case (Provisional Measures)*, that for the purposes of establishing its jurisdiction, the Court's determination was unaffected by the Security Council's adoption of *Resolution 748* and *Resolution 883*, since they were adopted *after* the filing of Libya's application.<sup>188</sup>

#### D The Arrest Warrant Case

The three matters brought before the ICJ and discussed above were all highly political. One significant pattern has emerged from the ICJ's handling of these matters — that the Court is clearly able to, and does, insulate itself from the political background, thus ensuring that its decisions remain judicial in nature. This was also evident in the *Arrest Warrant Case*.<sup>189</sup>

This case arose after the former Foreign Minister of the Democratic Republic of the Congo ('DRC'), Abdoulaye Yerodia Ndongbasi, was accused of breaching humanitarian law, specifically by committing crimes against humanity, by inciting racial hatred during August 1998. Belgium charged Mr Yerodia and issued a warrant for his arrest, even though the accused's alleged offences took place outside Belgium, he was not a Belgian national, and the victims were also not Belgian nationals.<sup>190</sup> In response, the DRC filed an application with the registry of the ICJ requesting that the Court 'declare that the Kingdom of Belgium shall annul the international arrest warrant issued on 11 April 2000'.<sup>191</sup> By 13 votes to three, the Court held that the issue of the arrest warrant violated Belgium's legal obligations towards the DRC because it failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Minister for Foreign Affairs of the DRC enjoyed under international law.<sup>192</sup>

Whilst this decision can be criticised in view of the increasing recognition and willingness of the international community to prosecute crimes against humanity, it should be recognised that the Court performed its judicial function admirably. It answered the specific legal question placed before it, rather than merely responding to the political pressure and desire of the international community to bring those accused of crimes against humanity to justice. As Judge Koroma asserted:

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<sup>187</sup> *Lockerbie Case (Preliminary Objections)* [1998] ICJ Rep 115, [24]–[38] (Judgment of the Court).

<sup>188</sup> *Ibid* [38].

<sup>189</sup> (Unreported, ICJ, 14 February 2002) <<http://www.icj-cij.org>> at 1 May 2003.

<sup>190</sup> The local Belgian Law was the *Loi relative à la répression des violations graves de droit international humanitaire*, enacted on 16 June 1993, as amended by the *Law of 10 February 1999*. For an English translation, see Stefan Smis and Kim van der Borgh, *Law Concerning the Punishment of Serious Violations of International Humanitarian Law*, 38 ILM 918 (1999).

<sup>191</sup> *Arrest Warrant Case* (Unreported, ICJ, 14 February 2002) <<http://www.icj-cij.org>> at 1 May 2003, [10] (Judgment of the Court).

<sup>192</sup> *Ibid* [78(2)].

In the light of the foregoing, any attempt to qualify the Judgment as formalistic, or to assert that the Court avoided the real issue of the commission of heinous crimes is without foundation. The Court cannot, and in the present case, has not taken a neutral position on the issue of heinous crimes. Rather, the Court's ruling should be seen as responding to the question asked of it. The ruling ensures that legal concepts are consistent with international law and legal tenets, and accord with legal truth.<sup>193</sup>

Whilst it may be reassuring for the respective parties involved in the immediate dispute to know that the ICJ is not going to instigate a 'witch hunt', the decision in the *Arrest Warrant Case* raises an important question — is the Court making a 'real contribution'? Such a question is supported by criticisms of the failure of the ICJ to grant the provisional measures in the *Lockerbie Case (Provisional Measures)* and since despite, or perhaps because of, the *Nuclear Weapons Opinion*, nuclear weapons remain. Is the Court in effect a 'paper tiger'? What 'real' contribution can the Court make to a highly political dispute?

#### V WHAT 'REAL' CONTRIBUTION IS THE COURT ABLE TO MAKE?

The role of the ICJ in clarifying, indeed even developing, the relevant principles of international law, which may then assist the resolution of future disputes, is of obvious benefit to the international community. However, can the ICJ actually assist in the resolution of an immediate political dispute? The Court recognises the importance of the above question and argues that its decisions must have some real effect upon the parties in the dispute before it.<sup>194</sup> Many members of the Court believe that rather than resolve the dispute entirely, the Court's decision will *assist* in its resolution.<sup>195</sup>

For example, in *Nicaragua*, Judge Lachs said that the decision would not just assist in the resolution of the specific conflict between the US and Nicaragua, but would also assist in furthering the whole region's aim of peace and security: 'The Judgment can thus make a constructive contribution to the resolution of a dangerous dispute — paving the way to stability in a region troubled for decades by conflict and confrontation.'<sup>196</sup> Similarly, in the *Hostages Case*, his Honour stated that: 'now that the Judgment has, with force of law, determined one of the major issues in the question, it should in my opinion be possible for negotiations to be resumed with a view to seeking a peaceful solution to the dispute.'<sup>197</sup> The Court, in the *Nuclear Weapons Opinion*, also stated firmly that it had an important role to play by clarifying the legal principles:

<sup>193</sup> Ibid [11] (Separate Opinion of Judge Koroma).

<sup>194</sup> See, eg, *Northern Cameroons (Cameroon v UK) (Judgment)* [1963] ICJ Rep 15, 34: 'The Court's judgment must have some practical consequence in the sense that it can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations.'

<sup>195</sup> For example, Judge Mohamed Shahabuddeen stated that:

To be useful, the Court does not have to deal with the entirety of a dispute; it could make a substantial contribution by sorting out any particular legal aspects with a view to promoting or facilitating the final settlement of the remainder of the dispute by other methods.

Shahabuddeen, above n 6, 23. See also Gross, above n 47, 258–9.

<sup>196</sup> *Nicaragua (Merits)* [1986] ICJ Rep 14, 172–3.

<sup>197</sup> *Hostages Case (Judgment)* [1980] ICJ Rep 3, 49.

It has been argued that, whatever may be the law, the question of the use of nuclear weapons is a political question, politically loaded, and politically determined. This may be, but it must be observed that, however political be the question, there is always value in the clarification of the law. It is not ineffective, pointless and inconsequential.<sup>198</sup>

It is not surprising that members of the Court express such a strong sense of self-belief, but such an attitude, by itself, does not necessarily definitively answer the argument raised here. However, the Court's attitude has been supported by commentators such as Steinberger who, in spite of his doubt noted above, stated that the ICJ played a critical role in the maintenance of peaceful relations.<sup>199</sup> In addition, senior members of the UN itself share similar views, including the former Secretary-General of the United Nations, Dag Hammarskjöld, who stated in 1957 that '[e]ven in the present state of international society there are many disputes which would be closer to settlement if the legal issues involved had been the subject of judicial determination.'<sup>200</sup>

But are these points of view substantiated by the actions of states? Two cases, both political matters specifically involving armed conflict, would appear to support such a conclusion. They also encourage some confidence that, by resolving legal issues, a resolution of the overall political problem can be achieved. The first is the case of *Frontier Dispute (Burkina Faso v Mali)*, involving a boundary dispute which was referred to the Chamber of the Court by a special agreement by the parties who sought to use the Court's directions to support a cease-fire brokered by the Organisation of African Unity.<sup>201</sup> Not only did the cease-fire continue, but both parties then also honoured the Court's determination of the actual border dispute.<sup>202</sup> The second case is that of *Territorial Dispute (Libya v Chad)*, which again involved a special agreement between the parties to a territorial dispute.<sup>203</sup> As a consequence of the Court's determination that the territory belonged to Chad, a peace agreement was signed and, under the control and supervision of the UN, the Libyan forces withdrew from the disputed territory.

However, it could be argued that in the two examples above, the 'political effectiveness' of the Court's decision was due to the political wills of the

<sup>198</sup> *Nuclear Weapons Opinion* [1996] 1 ICJ Rep 226, 328 (Dissenting Opinion of Judge Weeramantry). Others too believed that the ICJ had a role to play. Judge Koroma stated that the ICJ's 'decision can contribute to the prevention of war by ensuring respect for the law': *ibid* 557 (Dissenting Opinion of Judge Koroma). At *ibid* [13], the Court noted that:

Furthermore, as the Court said in the *Opinion* it gave in 1980 concerning the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*:

Indeed, in situations in which political considerations are prominent it may be particularly necessary for an international organization to obtain an advisory opinion from the Court as to the legal principles applicable with respect to the matter under debate.

<sup>199</sup> 'In addition, the clarification of a legal issue relevant to a dispute can favourably influence the subsequent political settlement': Steinberger, above n 5, 210.

<sup>200</sup> *Introduction to the Annual Report of the Secretary-General on the Work of the Organization: 16 June 1956 – 15 June 1957*, UN GAOR, 12<sup>th</sup> sess, Supp No 1A, 5, UN Doc A/3594/Add.1 (1957).

<sup>201</sup> *Frontier Dispute (Burkina Faso v Mali) (Provisional Measures)* [1986] ICJ Rep 3.

<sup>202</sup> *Frontier Dispute (Burkina Faso v Mali) (Merits)* [1986] ICJ Rep 554.

<sup>203</sup> *Territorial Dispute (Libya v Chad) (Judgment)* [1994] ICJ Rep 6.

respective national governments of the parties involved. What would happen in situations involving a recalcitrant state?

A former member of the ICJ, Sir Robert Jennings, whilst acknowledging that it is inevitable the Court has to consider highly political matters, believes that the successful resolution of legal issues does not by itself provide a solution to the overall political problem. In fact, he argues that the legal element of these disputes plays a 'minor role' in comparison to the political component in the resolution of these disputes.<sup>204</sup> Others agree, arguing that a legal hearing determines a 'winner' and 'loser' in a particular dispute. The identification of a 'winner' and a 'loser' can exacerbate tensions and ultimately the dispute, since such a finding can cause a substantial loss of face for a nation state.<sup>205</sup>

An example was the US's reaction in the Security Council to *Nicaragua*. Nicaragua sought Security Council enforcement of the order of the Court after the decision was delivered,<sup>206</sup> but the US vetoed this attempt and also a later draft of a similar resolution.<sup>207</sup> After the US vetoed the Security Council draft resolution, Nicaragua then went to the General Assembly which adopted a resolution on 6 November 1986 urgently calling for compliance with the Court's decision.<sup>208</sup> However, it was not 'peer group pressure' which eventually forced the US to change its position and policies regarding Nicaragua — it was internal pressure brought about by the Court's decision.<sup>209</sup>

Falk makes an interesting point regarding the disrespect shown by the US towards the Court, arguing that *Nicaragua* forced US citizens to 'question whether we believe that national interest is served by a foreign policy that is not bound by *impartial* interpretations of international law.'<sup>210</sup> He also argues that:

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<sup>204</sup> Jennings was discussing this in the context of suggestions that the role of the ICJ should be expanded: Jennings, 'Presentation by Sir Robert Jennings', above n 15, 78–9.

<sup>205</sup> Helmut Steinberger wrote:

However, if the political relations between the disputing countries are strained, the judicial resolution of even a minor dispute could serve to worsen the situation. For such decisions often leave one country the 'winner' and the other country the 'loser', and this should be avoided if possible in international relations.

Helmut Steinberger, above n 5, 208. This could result in the 'loser' refusing to comply with the decision and perhaps even going one step further and withdrawing its consent to the ICJ's jurisdiction for future matters. The US's withdrawal from the compulsory jurisdiction of the ICJ in the wake of *Nicaragua* is a clear example.

<sup>206</sup> Highet, 'The US, the International Court, and *Nicaragua*', above n 113, 1093.

<sup>207</sup> UN Doc S/PV.2704, 54–5, 57–61 (1986) rejecting the draft resolution proposed by the Congo, Ghana, Madagascar, Trinidad and Tobago and the United Arab Emirates: UN SCOR, 41<sup>st</sup> sess, 2703<sup>rd</sup> mtg, UN Doc S/18250 (1986). The US had also vetoed Nicaragua's initial resolution before the Security Council: Morrison, above n 117, 160.

<sup>208</sup> *Judgment of the International Court of Justice of 27 June 1986 Concerning Military and Paramilitary Activities in and against Nicaragua: Need for Immediate Compliance*, GA Res 41/31, UN GAOR, 41<sup>st</sup> sess, 53<sup>rd</sup> plen mtg, Supp 53, 23 UN Doc A/RES/41/L.22 (1986). The vote was 93 members in favour, three against (US, El Salvador and Israel), 43 abstentions. See Highet, 'The US, the International Court, and *Nicaragua*', above n 113, fn 59.

<sup>209</sup> The contentious jurisdiction of the ICJ, being voluntary in nature, has prompted the argument that the enforceability of the court is best achieved through pressure applied by other states.

<sup>210</sup> Falk, above n 104, 108 (emphasis in original). Falk also went on to say that:

It was not necessary to change everyone's thinking on US policy toward Nicaragua. All that was required to defeat Contra aid was to change the votes of about fifteen or twenty members of Congress, most of them House Democrats. Public opinion and media attention stirred by Nicaragua's suit was certain to be helpful in facilitating their conversion.<sup>211</sup>

Was such a conversion evident? In fact public opinion had begun to turn against the US Government well before the final decision on the merits. This was due, as Reichler writes, at least in part to the Court's decision regarding interim measures:

The decision [for interim measures] was published on May 10, 1984. The House of Representatives voted on Contra aid on May 25. The final tally was 177 in favor and 241 against. Contra aid was defeated for the first time. And it was not the last. For the next two years, the House of Representatives consistently opposed the White House's requests for renewed aid to the Contras. While a number of factors contributed to the House's defeat of Contra aid, Nicaragua's suit and its focus on international law, the Reagan Administration's ham-handed attempts to escape judgment, and the Court's rulings in Nicaragua's favor on interim measures and (later) jurisdiction indisputably played their part.<sup>212</sup>

The significance that this had for the military aspect of the conflict within Nicaragua cannot be underestimated. Congress, by banning aid to the Contras for a two-year period, enabled the Nicaraguan government forces to regain the military initiative which they had previously lost, and the Contras failed to pose a serious threat to Nicaragua thereafter.<sup>213</sup> But the ban by Congress had an even more significant effect — it forced the Reagan Government to use illegal methods to continue their assistance to the Contras and inevitably led to the scandal involving Lieutenant Colonel Oliver North and the so-called 'Irangate' affair.<sup>214</sup> This scandal ultimately led to the destruction of the credibility of the

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If the effect of the World Court decision is to shift even slightly the internal and international balance of opinion on the wisdom and propriety of further uses of force against the Sandinista Government, it may yet contribute to the political process whereby legal claims are indirectly upheld.

Ibid 112. Francis Boyle also wrote:

In the unfortunate event that the Reagan administration is allowed to escalate its war against Nicaragua any further, the American people will forfeit any right to claim political or moral leadership of the democratic peoples in Europe, the Western Hemisphere and the Pacific.

Francis Boyle, 'Determining US Responsibility for Contra Operations Under International Law' (1987) 81 *American Journal of International Law* 86, 92.

<sup>211</sup> Paul Reichler, 'Holding America to its Own Best Standards: Abe Chayes and Nicaragua in the World Court' (2001) 42 *Harvard International Law Journal* 15, 23.

<sup>212</sup> Ibid 34.

<sup>213</sup> Ibid.

<sup>214</sup> The Iran-Contra scandal began with the capture of a downed CIA pilot named Hussenfas who had been supplying arms to the Contras. He was revealed to the media and the trail eventually led to Lieutenant Colonel Oliver North: *ibid* 44; Boyle, above n 210, 87–8.

Reagan Government's Central American policies within US public opinion.<sup>215</sup> It also led to a number of influential US politicians taking action to end US support to the Contras and to find a peaceful solution in Central America.<sup>216</sup>

In the words of Reichler, which echo the words of Judge Lachs above:<sup>217</sup>

Thus, the World Court delivered what turned out to be a devastating blow to the Reagan Administration's war on Nicaragua. It set off a chain reaction that helped convince Congress to cut off funding for the Contras, gave Nicaragua the respite it needed to turn the tide of battle, and forced the White House into egregious tactical errors that ultimately undid its entire policy.<sup>218</sup>

The Court, through its expertise and objective analysis of the facts presented to it, was able to draw and *publicly express* conclusions that a state never could nor would do. For example, in *Nicaragua*, although the US had claimed collective self-defence as its justification for intervention — that is, to stop the arms flow into El Salvador — the Court found that the US wished to change the nature and political 'type' of government in Nicaragua.<sup>219</sup> The Court stated that

it strains belief to suppose that a body formed in armed opposition to the Government of Nicaragua, and calling itself the 'Nicaraguan Democratic Force', intended only to check Nicaraguan interference in El Salvador and did not intend to achieve violent change of government in Nicaragua.<sup>220</sup>

That US support for such a body was quite clearly in breach of international law was also evident to the Court:

The Court considers that in international law, if one State, with a view to the coercion of another State, supports and assists armed bands in that State whose purpose is to overthrow the government of that State, that amounts to an intervention by the one State in the internal affairs of the other, whether or not the

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<sup>215</sup> For a discussion of the US domestic response see Boyle, above n 210, 91, where he discusses the acquittal by a US domestic court of protestors who were charged with serious offences such as 'mob action' after demonstrating against the US involvement in Nicaragua. He claims that many of the jurors responsible for the acquittal based their decision on the acceptance of the defence of necessity, based on the 'shocking' evidence of US involvement in Nicaragua.

<sup>216</sup> US House of Representatives Speaker Jim Wright appointed Representative David Bonior of Michigan to head a specially created House Task Force on Central America, with these objectives in mind. Also in the Senate, Christopher Dodd of Connecticut, who spoke Spanish fluently and knew Latin America well, became the leading spokesman for a new, peace-oriented policy in Central America: Reichler, above n 211, 44. This eventually led to the adoption of a peace plan developed by President Oscar Arias of Costa Rica, who was awarded the Nobel Peace Prize for his efforts.

<sup>217</sup> See above nn 196–7 and accompanying text.

<sup>218</sup> Reichler, above n 211, 35.

<sup>219</sup> This involved the Court concluding that Nicaragua's obligation in the 1979 *Resolution of the OAS Meeting of Consultation* to install a democratic government was not a *legal obligation but a political one*: see, eg, Falk, above n 104, 110.

<sup>220</sup> *Nicaragua (Merits)* [1986] ICJ Rep 14, [243]. The Court, in the same paragraph, stated that:

It appears to the Court to be clearly established first, that the United States intended, by its support of the contras, to coerce the Government of Nicaragua in respect of matters in which each State is permitted, by the principle of State sovereignty, to decide freely (see paragraph 205 above); and secondly that the intention of the contras themselves was to overthrow the present Government of Nicaragua. The 1983 Report of the Intelligence Committee refers to the contras' 'openly acknowledged goal of overthrowing the Sandinistas'.

political objective of the State giving such support and assistance is equally far-reaching.<sup>221</sup>

The exposure the Court's findings regarding a party's actions and intentions receives, not just amongst elements within the party's own government but also amongst the international community of other nation states, NGOs and the political organs of the UN, therefore has a significant effect.<sup>222</sup> It enables the international community to discuss and pass judgement upon the relative merits of the parties' actions in the appropriate forum, such as the UN General Assembly. In Reichler's words, it enables the international community to see who has acted in the more appropriate manner and gained the so-called 'moral high ground'. As such, the Court appears to have acted as the international community's conscience.

In 1980, the Carter Administration applied to the Court to challenge Iran's seizure of the US embassy in Tehran and scores of diplomatic personnel. The Court responded with a unanimous condemnation of Iran's actions and an order to return the Embassy and free the hostages. The moral and legal authority of the Court's order strengthened the US position vis-a-vis Iran and helped persuade the latter to accept a diplomatic settlement. Nicaragua's suit was similarly designed to capture the moral high ground and to use it to win the support of the international community, US public opinion and, ultimately, US Congress. Reichler writes that '[i]n its suit, Nicaragua would carry the same banner that the United States had against Iran — fighting for compliance with international law. Like Iran, the United States would be cast in the role of defending the indefensible.'<sup>223</sup>

The significance of being 'right' in the eyes of the international community cannot be underestimated. Kornbluh, writing in his work on the US intervention in Nicaragua, noted that:

Flouting the institutions of international law and order established to promote peace in a dangerous world carried real and potential security repercussions for the United States; the Reagan Doctrine of fostering a militarist counterrevolution in Central America incurred widespread enmity in the Third World. And in Europe, ... US policy contributed to 'strains' in America's number one military alliance, the North Atlantic Treaty Organization.<sup>224</sup>

The European Economic Community twice urged the US to cease its intervention because of the Community's concern that the impression of the US as an 'uncontrolled gunslinger' was particularly hypocritical. The US, which publicly spouted concern for, and a commitment to, democracy and the protection of human rights, now operated in a secret war where human rights abuses were committed by the forces it supported. This caused such a degree of

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<sup>221</sup> *Nicaragua (Merits)* [1986] ICJ Rep 14, [243].

<sup>222</sup> Falk stated that '[w]e must rethink the question of judicial effectiveness in the broader setting of public opinion and political democracy, and not confine our evaluation to conventional concerns about governmental nonresponsiveness': Falk, above n 104, 112.

<sup>223</sup> Reichler, above n 211, 23. Reichler was a member of Nicaragua's legal team in the action against the US before the Court.

<sup>224</sup> Peter Kornbluh, *Nicaragua, the Price of Intervention: Reagan's Wars against the Sandinistas* (1987) 218.

distrust amongst the European members of NATO that it threatened to cause NATO's collapse.<sup>225</sup>

So, Steinberger's concern about the perception of a 'winner' and a 'loser' exacerbating tensions is unwarranted and also ignores the fact that such a fear may actually prompt settlement of a dispute. A party may be *persuaded* to compromise or to alter its position simply because it does not wish such exposure to judgment by its peers. For example, the French discontinued atmospheric testing in Polynesia in the early 1970s in part because Australia and New Zealand filed actions with the ICJ.<sup>226</sup> Similarly, in the *Trial of Pakistani Prisoners of War Case (Pakistan v India)*,<sup>227</sup> although Pakistan failed to 'drag' India before the ICJ, the threat of legal proceedings assisted the two entering into a bilateral settlement, the *Agreement on Bilateral Relations* of 1974.<sup>228</sup> Pakistan then withdrew its action.<sup>229</sup> Another example can be seen in *Border and Transborder Armed Actions (Nicaragua v Honduras)*.<sup>230</sup> Here Honduras 'attributed significance in the context of political negotiations to the withdrawal by Nicaragua of its parallel application instituting proceedings against Costa Rica'.<sup>231</sup>

Portraying the role of the Court as the international community's conscience is perhaps melodramatic, but can be accurate. Judge Weeramantry noted that whilst the Court in the *Namibia Opinion* did not immediately cause the end of apartheid, it assisted and indeed paved the way for its end with the increased *international public* awareness of the illegality of the regime.<sup>232</sup> Judge Weeramantry in the *Nuclear Weapons Opinion* believed that the ICJ, by clarifying the legal position, was able to widen the comprehension and understanding of the general public in the international community:<sup>233</sup>

The Court's decision on the illegality of the apartheid régime had little prospect of compliance by the offending Government, but helped to create the climate of opinion which dismantled the structure of apartheid. Had the Court thought in

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<sup>225</sup> Ibid.

<sup>226</sup> The ICJ took France's actions as a confirmation by France that there existed a binding obligation to discontinue and so the Court dismissed the case: *Nuclear Tests (Australia v France) (Judgment)* [1974] ICJ Rep 253.

<sup>227</sup> [1973] ICJ Rep 347.

<sup>228</sup> *Agreement on Bilateral Relations*, opened for signature 2 July 1972, India–Pakistan, 858 UNTS 71 (entered into force 4 August 1972).

<sup>229</sup> *Trial of Pakistani Prisoners of War (Pakistan v India) (Order)* [1973] ICJ Rep 347.

<sup>230</sup> *Border and Transborder Armed Actions (Nicaragua v Costa Rica; Nicaragua v Honduras) (Merits)* [1988] ICJ Rep 69.

<sup>231</sup> Transcript of Proceedings, *Border and Transborder Armed Actions (Nicaragua v Honduras)* (ICJ, 6 June 1988) 11, cited in Nagendra Singh, *The Role and Record of the International Court of Justice* (1989) 30.

<sup>232</sup> This point was also noted by John Burroughs, *The Legality of Threat or Use of Nuclear Weapons: A Guide to the Historic Opinion of the International Court of Justice* (1998) 68.

<sup>233</sup> The Court itself noted the value of clarification:

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 (cf *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Advisory Opinion)* [1950] ICJ Rep 64). 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.

*Nuclear Weapons Opinion* [1996] 1 ICJ Rep 226, [15].

terms of the futility of its decree, the end of apartheid may well have been long delayed, if it could have been achieved at all. The clarification of the law is an end in itself, and not merely a means to an end. When the law is clear, there is a greater chance of compliance than when it is shrouded in obscurity.

The view has indeed been expressed that, in matters involving ‘high policy’, the influence of international law is minimal. However, as Professor Brownlie has observed in dealing with this argument, it would be ‘better to uphold a prohibition which *may* be avoided in a crisis than to do away with standards altogether’.

I would also refer, in this context, to the perceptive observations of Albert Schweitzer, cited at the very commencement of this opinion, on the value of a greater public awareness of the illegality of nuclear weapons.<sup>234</sup>

Others, such as Burroughs, also believe that ICJ decisions, by exposing the limits or flaws within existing international law, may prompt new action that could eventually lead to a treaty signed by members of the UN forever banning nuclear weapons:

The landmark opinion of the International Court of Justice reflects that our thinking has finally begun to change, and stimulates further change. It marks and reinforces a global shift in attitudes that is making the threat, use, and possession of weapons of mass destruction the object of a planetary taboo, and points the way toward what for half a century has been practically unthinkable — the abolition of nuclear weapons.<sup>235</sup>

There is no doubt that if the Request had been left to the Security Council it would not have been answered in a way that was contrary to the interests of the nuclear powers. All five of the permanent members of the Security Council are ‘the’ nuclear powers and have been for some time.<sup>236</sup> Even in the General Assembly there were some concerns raised by the voting process for the Request of the Opinion.<sup>237</sup> As Judge Koroma argued:

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, both for the States that may be directly involved in conflict, and for those nations not involved, but may also suggest that such an

<sup>234</sup> Ibid 550 (Dissenting Opinion of Judge Weeramantry) (footnotes omitted).

<sup>235</sup> Burroughs, above n 232, 69.

<sup>236</sup> This is not strictly true since Israel, Pakistan and India are also nuclear powers. However, the statement makes sense when considering that the five permanent members of the Security Council are also the five ‘nuclear-weapon States’ of the *Treaty on the Non-Proliferation of Nuclear Weapons*, opened for signature 1 July 1968, 729 UNTS 169, (entered into force 5 March 1970). It is also interesting to note that it is customary practice for judges from the five permanent members to sit on the bench, and the Court still found that generally that the nuclear weapons were illegal. This is indicative of the relative impartiality of the ICJ bench as compared to the Security Council.

<sup>237</sup> The vote in the General Assembly was 78 votes for, 43 against and 38 abstentions. In actual fact the affirmative vote was 64 per cent and therefore not the required two-thirds majority required for ‘important questions’ by the *UN Charter* art 18(2)–(3): Paul Szasz, ‘Addendum: The Vote in the General Assembly’ in Peter Bekker (ed), *Commentaries on World Court Decisions (1987–1996)* (1998) 243, 243. Contrast this with the voting in the World Health Organisation, where there were 73 affirmative votes to 40 opposing with only 10 abstentions: Peter Bekker, ‘*Legality of the Use of Nuclear Weapons*’ in Peter Bekker (ed), *Commentaries on World Court Decisions (1987–1996)* (1998) 247, 247.

option is not legally reprehensible. Accordingly, the Court, instead of leaving it to each State to decide whether or not it would be lawful or unlawful to use nuclear weapons in an extreme circumstance of 'State survival', should have determined whether or not it is permissible to use nuclear weapons even in a case involving the survival of the State.<sup>238</sup>

The Court, because of its impartiality, is able to do what the Security Council cannot.<sup>239</sup> The UN Security Council is a political body. It was established that way and is likely to continue to operate that way.<sup>240</sup> As the Court noted in *Nicaragua*:

A member of the government of a State engaged, not merely in international litigation, but in litigation relating to armed conflict, will probably tend to identify himself with the interests of his country, and to be anxious when giving evidence to say nothing which could prove adverse to its cause.<sup>241</sup>

Academics have attempted to measure the impartiality of the ICJ by examining the voting patterns of individual judges. In an early work completed in 1968, Hensley noted that judges had a tendency to vote in favour of their national government more often than other judges. However, from the evidence obtained, the strategic importance of the matter — that is, the degree of significance to the national policies of their government — did not appear to influence judges voting patterns.<sup>242</sup> Further, ad hoc judges had a tendency to vote in favour of the nation state that appointed them.<sup>243</sup> However, there have been situations where ad hoc judges have voted against the nominating government.<sup>244</sup> Also, as Hensley noted, other judges may have voted in favour of another

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<sup>238</sup> *Nuclear Weapons Opinion* [1996] 1 ICJ Rep 226, 552 (Dissenting Opinion of Judge Koroma).

<sup>239</sup> 'The task of the International Court of Justice as well as the Permanent Court of Arbitration is to bring an element of impartiality and objectivity to bear on dealings between states': Pope John Paul II, quoted in Szafarz, above n 40, vii.

<sup>240</sup> The same can be said of the UN General Assembly:

The General Assembly is easily accessible to the aggrieved party in its capacity as a United Nations member, permitting it to ventilate its grievances in public on the floor of the Assembly, and thus gain world wide publicity for its problems, even though the State against which its grievances are directed may not like such an action. ... This does not settle the dispute; it does no more than furnish a platform for ventilating grievances, which is of course better than nothing.

Singh, above n 231, 29.

<sup>241</sup> *Nicaragua (Merits)* [1986] ICJ Rep 14, [70] Judgement of the Court).

<sup>242</sup> Thomas Hensley, 'National Bias and the International Court of Justice' (1968) 12 *Midwest Journal of Political Science* 568, 568. This trend was observed both in contentious matters and in advisory opinions: *ibid* 572, 579.

<sup>243</sup> For example, Judge ad hoc El-Kosheri in *Lockerbie Case (Preliminary Objections)* [1998] ICJ Rep 115. However Il Ro Suh has noted this should not be surprising given that national governments prior to making their selection are unlikely to choose a tribunal member that is opposed to their cause: Il Ro Suh, 'Voting Behaviour of National Judges in International Courts' (1969) 63 *American Journal of International Law* 224, 226.

<sup>244</sup> Such as for example, Judges ad hoc Castilla of Colombia and Morelli of Italy: Table 4 in Hensley, above n 242, 574 and the discussion at 575.

member's national government more often than they themselves.<sup>245</sup> It was also clear that all judges were willing to vote against their national governments.<sup>246</sup>

The conclusion that commentators have drawn from such quantitative research is that it is more likely that judges are influenced by cultural values and other subtle influences drawn from their legal training and experience, rather than actually being guilty of voting in the national interest. This in no way 'violate[s] the criterion for impartial adjudication.'<sup>247</sup> This phenomenon was recognised by the drafters of the *Statute of the ICJ*.<sup>248</sup> Further, the ability of ad hoc or national judges to influence the outcome of the Court's decision is very minor, since they are at best two judges sitting on a bench of up to 17. In some ways, the inclusion of a national judge is important since it guards against cultural misunderstandings or problems of language, thus reassuring the litigants, and also assists to ensure that unfavourable decisions will be more 'palatable'.<sup>249</sup> What is significant is that there has never been any indication or evidence of a judge acting in accordance with instructions received from his or her national government.<sup>250</sup> On the whole, the evidence is inconclusive regarding whether there exists a national bias of some form. Certainly, the ICJ does not share the problems of bias experienced by the political organs of the UN, such as the General Assembly.

An example of the Court's impartiality can be seen in *Nicaragua*, where the Court was considering the liability of the US for the actions of the Contras. The Court held that:

It is clear that considerable economic loss and damage has been inflicted on Nicaragua by the actions of the *contras*: apart from the economic impact of acts directly attributable to the United States, ... the Court has not found the relationship between the *contras* and the United States Government to have been proved to be such that the United States is responsible for all acts of the *contras*.<sup>251</sup>

Many academic writers acknowledged the impartiality of the Court's decision.<sup>252</sup> What is more important is that the impartiality and integrity of the

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<sup>245</sup> For example, Judge Caneiro (Brazil) voted in favour of the US more times than did Judge Hackworth (US). Also whilst no other judge supported the UK more times than did Judge McNair (UK), three other judges, Judge Read (Canada), Judge Fabela (Mexico) and again Judge Caneiro (Brazil) supported the UK at least as many times as Judge McNair: Hensley, above n 242, 576 and Table 5 at 575.

<sup>246</sup> For example, Judge Schwebel, from the US, has voted against his country on nine occasions: Tacsan, above n 45, 142. The author admits that this alone is not conclusive proof, but it is persuasive. For a detailed study, see Edith Weiss, 'Judicial Independence and Impartiality', in Lori Damrosch (ed), *The International Court of Justice at a Crossroads* (1987) 82.

<sup>247</sup> Hensley, above n 242, 580.

<sup>248</sup> Article 9; Hensley, above n 242, 581–2.

<sup>249</sup> Suh, above n 243, 233–4.

<sup>250</sup> Hensley, above n 242, 585.

<sup>251</sup> *Nicaragua (Merits)* [1986] ICJ Rep 14, [278]. The Court further held that the arming and the training of the Contras constituted an act of intervention by the US but not a use of force: *ibid*.

<sup>252</sup> See, eg, Falk, above n 104, 106, who stated that 'the Judgment is exemplary in striking a balance between fairness to a sovereign states accused of serious violations of international law and a diligent effort to interpret the relevant rules and principles in a constructive manner.'

Court remained unscathed by the vigorous attacks (as mentioned above) made by the US. In fact, as Highet notes, the attack by the US did not undermine the Court's integrity as many feared, but rather reinforced the Court's position and respect in the eyes of the 'preponderance of member nation states', in particular the 'weaker nation states'. He further notes that at the time there was a noticeable increase in the actions brought by Third World states to the Court.<sup>253</sup> As Kahn writes:

The Security Council may provide for a great power veto, but there is no similar reflection of political power within the International Court of Justice. Just for this reason, appeals to international law have been one of the tools available to weaker states in their battles with more powerful states.<sup>254</sup>

What drives this impartiality is respect for the principles of international law and legal reasoning. No clearer statement of this principle can be found than that of Judge Weeramantry in his Dissenting Opinion in the *Nuclear Weapons Case*:

If indeed the principles of international law decree that the use of the nuclear weapon is legal, it must so pronounce. The anti-nuclear forces in the world are immensely influential, but that circumstance does not swerve the Court from its duty of pronouncing the use of the weapons legal if that indeed be the law. A second alternative conclusion is that the law gives no definite indication one way or the other. If so, that neutral fact needs to be declared, and a new stimulus may then emerge for the development of the law. Thirdly, if legal rules or principles dictate that the nuclear weapon is illegal, the Court will so pronounce, undeterred again by the immense forces ranged on the side of the legality of the weapon.<sup>255</sup>

Whilst the ICJ has been criticised for not going 'far enough' in its decision in the *Nuclear Weapons Opinion*, the Court did strive for a balance between jeopardising its existence and maintaining its purpose, namely of resolving legal issues to assist in the maintenance of international peace and security.

There is one other significant and 'real' contribution that the ICJ makes to the UN in its quest to maintain peace and international security, and thus to the international community: its decisions, for example, the *Lockerbie Case*, have assisted and guided other international courts and tribunals, such as the ICTY, when faced with highly political matters. The Appeals Chamber of the ICTY in *Tadic* was asked to consider its jurisdiction as established by the Security Council. It followed the example of the ICJ in the *Lockerbie* decisions (and other decisions such as the *Arrest Warrant Case*) that once a legal question was placed before it, the Tribunal would consider that question free from political influences.<sup>256</sup> The ICTY, in concluding that the Tribunal was acting *intra vires*, also adopted a similar approach and analysis to that of the ICJ in the *Lockerbie Case (Provisional Measures)* — that the Security Council is not itself 'above the law'.<sup>257</sup>

<sup>253</sup> Highet, 'The US, the International Court, and *Nicaragua*', above n 113, 109.

<sup>254</sup> Paul Kahn, 'Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order' (2000) 1 *Chicago Journal of International Law* 1, 1.

<sup>255</sup> *Nuclear Weapons Opinion* [1996] 1 ICJ Rep 226, 440.

<sup>256</sup> *Tadic*, Case No IT-94-1-AR72 (2 October 1995) [24]; *Certain Expenses of the United Nations (Advisory Opinion)* [1962] ICJ Rep 151, 155.

<sup>257</sup> *Tadic*, Case No IT-94-1-AR72 (2 October 1995) [28]; *Lockerbie Case (Provisional Measures)* [1992] ICJ Rep 3, 56 (Dissenting Opinion of Judge Weeramantry).

There is, however, one area in which the Court could make a contribution to the resolution of highly political matters that goes beyond the clarification of the legal issues involved in an international dispute — a greater use of provisional measures.<sup>258</sup> Unfortunately, the Court has been reluctant to use the full potential of provisional measures.<sup>259</sup> As Judge Weeramantry stated in the *Lockerbie Case (Provisional Measures)*:

A great judge once observed that the laws are not silent amidst the clash of arms. In our age we need also to assert that the laws are not powerless to prevent the clash of arms. The entire law of the United Nations has been built up around the notion of peace and the prevention of conflict. The Court, in an appropriate case, where possible conflict threatens rights that are being litigated before it, is not powerless to issue provisional measures conserving those rights by restraining an escalation of the dispute and the possible resort to force. That would be entirely within its mandate and in total conformity with the Purposes and Principles of the United Nations and international law. ... If international law is to grow and serve the cause of peace as it is meant to do, the Court cannot avoid that responsibility in an appropriate case.<sup>260</sup>

## VI RECENT TRENDS

The ability of the ICJ to develop international law was doubted in the aftermath of the US's withdrawal from both *Nicaragua (Merits)* and the ICJ's jurisdiction. In the fallout from *Nicaragua* some commentators, particularly in the US, expressed concern that the Court was in urgent need of reform.<sup>261</sup> However, in a manner that surprised many commentators, the Court was

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<sup>258</sup> *Statute of the ICJ* art 41.

<sup>259</sup> See, eg, the *Arrest Warrant Case*, where the DRC requested that the Court issue provisional measures ordering Belgium to cancel the warrant on the ground that Belgium had irreparably infringed the DRC's capacity to conduct foreign relations, because the arrest warrant would impede the travel of their former Foreign Minister. The Court rejected the request for provisional measures because at the time of the request Yerodia was no longer the DRC's Foreign Minister: *Arrest Warrant Case (Provisional Measures)* [2000] ICJ Rep 3 [72]–[73]. The Court did, however, adopt an Order for provisional measures in *Vienna Convention on Consular Relations (Paraguay v US) (Provisional Measures)* [1998] ICJ Rep 248.

<sup>260</sup> *Lockerbie Case (Provisional Measures)* [1992] ICJ Rep 3, 70. The ICJ also refused to grant provisional measures in the *Lockerbie Case (Preliminary Objections)*: see above n 174 and accompanying text.

<sup>261</sup> As Hight notes, seminars were held, speeches delivered and a great deal of energy was devoted to considering the future of the Court. Also, as the author notes most of the concern came from those commentators who supported US foreign policy in South America: Keith Hight, 'The Peace Palace Heats Up: The World Court in Business Again?' (1991) 85 *American Journal of International Law* 646, 646–7.

drowned under a deluge of diverse cases, in many instances initiated by states that had never previously used the Court as a means of conflict resolution.<sup>262</sup>

The Court like a phoenix, appears to have emerged from the ashes of *Nicaragua*. It has become a hot court — perhaps even a ‘hot bench’ in the American phrase. It is positioned, for the first time in its collective seventy-year history, to become the great international judicial institution that its friends and supporters always knew it could be.<sup>263</sup>

Even the US, with all its bitterness over *Nicaragua*, evidenced a renewed confidence in the Court<sup>264</sup> and, despite not being a successful litigant since *Nicaragua*, retains a positive attitude.<sup>265</sup>

The year 1991 marked a turning point for the ICJ. Developing nation states were greatly heartened by the ICJ’s decision in *Nicaragua* as it proved that the Court was indeed capable of acting impartially, and further was capable of making a significant contribution in highly political matters.<sup>266</sup> The trend of increased confidence in the Court continued, with 11 cases (at different stages of resolution) before the ICJ in October 1993.<sup>267</sup> In the period 1993–94, there were 12 contentious cases and one request for an advisory opinion before the ICJ, and the Court also delivered judgments in two cases.<sup>268</sup> This reflects a trend of increased confidence in the Court that continues to the present day. The ICJ began 2001 with 24 cases pending and during the year added a further three, delivered three judgments, and finished the year with one case in deliberation.<sup>269</sup> An additional 22 were on the Court’s docket. Put simply, the Court has never been busier.<sup>270</sup> As one commentator noted:

<sup>262</sup> A total of nine cases were brought in a two-year period following *Nicaragua: Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway) (Order)* [1988] ICJ Rep 66; *Aerial Incident of 3 July 1988 (Iran v US) (Order)* [1989] ICJ Rep 132; *Certain Phosphate Lands in Nauru (Nauru v Australia) (Order)* [1989] ICJ Rep 12; *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal) (Judgment)* [1991] ICJ Rep 53; *Territorial Dispute (Libya v Chad) (Judgment)* [1994] ICJ Rep 6; *East Timor (Portugal v Australia) (Judgment)* [1995] ICJ Rep 90; *Maritime Delimitation between Guinea-Bissau and Senegal (Guinea-Bissau v Senegal) (Order)* [1995] ICJ Rep 423; *Passage through the Great Belt (Finland v Denmark) (Provisional Measures)* [1991] ICJ Rep 12; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain) (Order)* [1991] ICJ Rep 50. Eight of these new cases were brought by application, and the Court, not a Chamber, heard all nine cases: Tiefenbrun, above n 8, 13.

<sup>263</sup> Hight, ‘The Peace Palace Heats Up’, above n 261, 654.

<sup>264</sup> The US at the time was involved in an incident involving the shooting down of Iran Air Flight 655 by the USS Vincennes in the Persian Gulf. The case concerned the use of armed force and self-defence under the *UN Charter* art 51 and, as noted at the time, the US had not disappeared as it did during *Nicaragua*: *ibid* 650.

<sup>265</sup> See the commentary by Peter Bekker on the *Lockerbie Case (Preliminary Objections)*: Peter Bekker, ‘*Questions of Interpretation and Application of the 1971 Montréal Convention Arising from the Aerial Incident at Lockerbie*’ (1998) 92 *American Journal of International Law* 503, 508.

<sup>266</sup> Tiefenbrun, above n 8, 13, 26.

<sup>267</sup> *Ibid* 14.

<sup>268</sup> *Ibid* 15–16.

<sup>269</sup> *Arrest Warrant Case* (Unreported, ICJ, 14 February 2002) <<http://www.icj-cij.org>> at 1 May 2003.

<sup>270</sup> The three judgments were *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain) (Merits)* [2001] ICJ Rep 40; *La Grand (Germany v US) (Merits)* (Unreported, ICJ, 27 June 2001) <<http://www.icj-cij.org>> at 1 May 2003; *Sovereignty over Pulau Ligitan and Pulau Sipandan (Indonesia v Malaysia) (Application by*

Until recently, an applicant State would select the World Court to adjudicate its dispute only if it believed that it would win. Or, if the applicant State wanted to make a statement or teach a lesson without using force, it also might bring its dispute before the World Court ... Until recently a State generally appealed to the World Court to settle or solve the dispute only if it were absolutely desperate.<sup>271</sup>

That, however, has changed. The Court now 'plays the role of a teacher, an advisor, a source of developing international law, and the hope of a world built on law and justice.'<sup>272</sup>

## VII CONCLUSION

Many commentators, even including former members such as Sir Robert Jennings, have questioned the Court's ability to resolve highly political matters. In every international dispute there will be political issues that loom threateningly over the legal questions. *Nicaragua* and the *Nuclear Weapons Opinion*, for example, both raised a number of issues that lie at the heart of the structure and organisation of the international community, namely the right to self-defence and the right to non-intervention. Both rules flow from the concept of national sovereignty and are concepts that most, if not all, nation states would consider essential for the maintenance of international peace and security. Further, the nature of the environment in which the ICJ operates is one that could be described as being at the very least disadvantageous and, at times, hostile. Nevertheless, the ICJ has made, and continues to make, a valuable contribution to the peaceful resolution of highly charged political disputes.

The doubts and criticisms must be viewed from a perspective of understanding. Jennings' criticism of the ICJ is simply that the successful resolution of legal issues within a political dispute between states does not of itself *automatically* resolve or provide a solution to the overall political problem. Despite his strong criticism, Jennings does not deny that the ICJ *has* a role to play. He believes that political and legal decision-making processes both were and are complementary and, if used together, can be effective.<sup>273</sup> It must be emphasised that the ICJ should not be expected to find a *political* solution. No domestic court is expected do so. Instead, the role of the Court is to resolve legal questions so that a political solution can be found either by the parties themselves or by the appropriate organ of the UN. The Court's expertise in clarifying the legal principles and applying them to the facts and its ability to sift through dubious and biased statements made by national representatives in the guise of evidence are crucial in assisting political organs to then take the appropriate political steps as part of the resolution process. If this then reduces

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*the Phillipines for Permission to Intervene*) (Unreported, ICJ, 23 October 2001) <<http://www.icj-cij.org>> at 1 May 2003. See John Crook, 'The 2001 Judicial Activity of the International Court of Justice' (2002) 96 *American Journal of International Law* 397, 397-411.

<sup>271</sup> Tiefenbrun, above n 8, 22.

<sup>272</sup> *Ibid* 24.

<sup>273</sup> 'Judicial decision-making and political decision-making are very different from each other, and sometimes, it may be necessary to choose between them in respect of a particular problem; but they are also complementary and can be used together to great effect': Jennings, 'Presentation by Sir Robert Jennings', above n 15, 79.

the likelihood of *even one* dispute escalating into an armed conflict, then this is a significant achievement.

It is self-evident that if the international community wishes to resolve and prevent conflicts in a peaceful manner, it needs an impartial third party trained to deal with legal questions. By ignoring the political issues and restricting itself to the legal issues involved in the dispute or request, as it did in the *Lockerbie Case (Provisional Measures)* and the *Arrest Warrant Case*, the Court has ensured its ongoing ability to make a contribution and fulfil its role as the chosen judicial organ of the UN.<sup>274</sup> The Court, by avoiding unnecessary political entanglements, maintains its effectiveness as an independent judicial body.<sup>275</sup>

One of the crucial aspects of any legal hearing — and one which is touted here as an important advantage of a legal tribunal over political entities such as the General Assembly when resolving highly political international disputes — is the fact that both parties are guaranteed a fair and impartial hearing, regardless of their status in the world community, and regardless of their relative strengths and weaknesses.<sup>276</sup> Recognition by states that this is indeed the role that the Court plays — that of an impartial arbitrator and not a legislator — maintains their confidence in the Court's determinations and resolutions and thus encourages nation states to bring matters before the Court.<sup>277</sup> The increased usage of the Court since 1991 is strong evidence that the level of confidence in the Court is extremely high, for the very reason that it can be trusted to be impartial *and effective*. As events unfolded in the aftermath of *Nicaragua*, the Court, as the chosen judicial organ of the UN, was able to demonstrate through its use of legal methodology that it could make a valuable contribution to the resolution of highly political matters.<sup>278</sup> As Judge Ecer has written, far from merely applying international law, the ICJ strengthens the cohesion of the international community.<sup>279</sup>

And that is a very important contribution indeed.

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<sup>274</sup> Sugihara noted that the Court has to date managed not to concern itself with the political aspects of the matters brought before it: Sugihara, above n 3, 134; Jennings, 'Presentation by Sir Robert Jennings', above n 15, 88.

<sup>275</sup> At the Colloquium celebrating the 50<sup>th</sup> anniversary of the Court, Elizabeth Zoller stated that the ICJ is 'very good' at avoiding the political entanglements in cases brought before it and mentioned the *Hostages Case* as an example. Zoller argued that if the ICJ did not step too far out of itself by focusing on resolving questions of law, albeit in an abstract manner, it could continue to avoid these political entanglements and also do something constructive by making a contribution to the resolution of international disputes: Elizabeth Zoller, 'Commentary by Elizabeth Zoller' in Connie Peck and Roy Lee (eds), *Increasing the Effectiveness of the International Court of Justice: Proceedings of the ICJ/UNITAR Colloquium to Celebrate the 50<sup>th</sup> Anniversary of the Court* (1997) 86, 88.

<sup>276</sup> This is the principle of equality between nation states: see, eg, Christian Wolff: 'By nature all nations are equal the one to the other. For nations are considered as individual free persons living in a state of nature. Therefore, since by nature all men are equal, all nations too are equal the one to the other', cited in J G Starke, *Introduction to International Law* (9<sup>th</sup> ed, 1984) 103.

<sup>277</sup> Steinberger believes that 'a party could be more willing to compromise if it had to fear the consequences of submitting the matter to the Court': Steinberger, above n 5, 210.

<sup>278</sup> Jennings discusses this in the context of suggestions that the role of the ICJ should be expanded: Jennings, 'Presentation by Sir Robert Jennings', above n 15, 79.

<sup>279</sup> Shahabuddeen, above n 6, 27.