

# INTERNATIONAL COURT OF JUSTICE

LEGALITY OF THE USE BY A STATE OF NUCLEAR  
WEAPONS IN ARMED CONFLICT

(REQUEST FOR AN ADVISORY OPINION)

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RESPONSE TO SUBMISSIONS OF  
OTHER STATES BY THE REPUBLIC OF NAURU

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## Introduction

Thirty-five statements were made to the International Court of Justice on the question asked by the World Health Organization on whether the use of nuclear weapons by a State in an armed conflict would be a breach of its obligations under international law including the WHO Constitution.

Of these, nine States argued that the Court should not consider the case stating that the WHO did not have the mandate to request such an opinion or that the Court should use its discretion not to respond. Five of these nine States argued that should the Court decide to consider the merits of the case, it should determine that the use of nuclear weapons is not illegal per se. Five States argued that the case was admissible and that the Court should give an opinion. Twenty two States took the position that the use of nuclear weapons is illegal.

We support the argument that WHO is competent to request the opinion from the Court on the grounds that the use of nuclear weapons has implications for health which are a legitimate and long standing concern of the WHO.

We disagree with the argument that the Court should use its discretion to decline to give a reply to the WHO. It is the responsibility of the Court to so respond unless there are compelling reasons not to do so. We believe that the support from the United Nations General Assembly for this request indicates that a response from the Court will aid rather than hinder international efforts for disarmament.

We disagree with the argument that the lack of a specific convention prohibiting the use of nuclear weapons means that such use is therefore legal. The use of nuclear weapons is clearly prohibited by a vast body of humanitarian, human rights and environmental law, without specific reference to such weapons. In this connection, we support the arguments submitted to the Court by other States that the use of nuclear weapons is illegal on the grounds that any such use would violate the right to life and laws of war which prohibit weapons or tactics which cause unnecessary or aggravated suffering, are indiscriminate, use poisonous gases, liquids or analogous substances, violate the neutral jurisdiction of non-participating States, cause widespread, long term and severe damage to the environment and are disproportionate to antecedent provocations. We support in particular the detailed arguments submitted by . . . Solomon Islands, Mexico and Malaysia.

In addition opinio juris and the dictates of public conscience support the argument that any use of nuclear weapons is illegal. Evidence of public conscience was presented unofficially to the Court by representatives of Non-Governmental Organizations on 20 June 1994.

In sum, we fail to comprehend how a weapon of totally unprecedented destructiveness, which is the weapon of mass

destruction par excellence and which has the capacity to destroy life on entire sections of the globe, if not the globe itself, could be treated, for legal purposes, as "just another weapon", to be judged like a bomb or an artillery shell according to the specific circumstances of its use. Indeed, the awesome power of the nuclear weapon, which according to its adherents makes it a tool of deterrence, is the reverse side of the coin of illegality.

### 1. Admissibility

Substantial portions of the statements submitted to the Court by States opposing the WHO request deal with the question of admissibility, i.e. WHO's competence in the matter. We firmly believe that such competence exists in view of WHO's past concerns with the health and environmental effects of nuclear war and the fact that the potential health hazards resulting from such a war dwarf any other health hazard imaginable. However, the question of WHO's competence to request such an opinion is now moot in light of the request by the UN General Assembly for an advisory opinion on the question "Is the threat or use of nuclear weapons in any circumstance permitted under international law?" This question subsumes the question requested by WHO. Article 96 (1) of the UN Charter provides that the General Assembly may request an advisory opinion on "any legal question". Therefore, there is now no reason for the Court to turn down the request on grounds of admissibility.

Should the Court however wish to enter into the merits of the admissibility of WHO's request, additional support for the argument that WHO has the competence to request such an opinion is ~~attached as Appendix II~~ was submitted as Nagasaki Memorial No. 2.

### 2. Discretion

A number of States, including the US, UK, Australia, Finland, France, Germany and the Netherlands argued that even if WHO has the mandate to request this advisory opinion the Court should use its discretion not to give an opinion. Below are some of their arguments and our response to them.

#### 2.1 This is a Political not a Legal Question

Some States argued that the question of the use of nuclear weapons is primarily a political question not suited to legal inquiry.

Australia stated that "The subject matter of the question is unsuitable for adjudication as it clearly goes beyond a definable field of judicial enquiry and enters into the wider realms of

policy and security doctrines of states." (p. 3)

France stated that "Despite the legal guise in which it has been decked out, the question thus put is of an exclusively political nature." (p. 12)

The United Kingdom argued that the WHO request is "a device to tempt the Court into an involvement in an essentially political debate." (p. 55)

Response:

The question asked of the Court is clearly a legal question. The Court is being asked only to determine whether the use of nuclear weapons by a State would be a breach of its obligations under international law and the WHO Constitution. The Court is not being asked to comment on the effect any use of nuclear weapons would have on the political relationships between States or on international peace and security, nor to determine what political steps should or could be taken in the area of nuclear disarmament.

Although the question undoubtedly has major political significance, it is a legal question, that is, one which can be answered on the basis of law. The Court is invited "to undertake an essentially judicial task" (Expenses Case, 1962 ICJ Reports, p.155), i.e., to pronounce on the legal principles and rules applicable to the question submitted to it.

As this Court noted in the Interpretation of Peace Treaties Case (1950 ICJ Reports, p. 71), "The Court's opinion is not given to the States but to the organ which is entitled to request it. . . [T]he reply of the Court, itself an 'organ of the UN' represents its participation in the activities of the organisation, and, in principle, should not be refused."

It should be noted that the political question doctrine, on the basis of which courts may refuse to entertain questions capable of resolution by other branches of government, is a doctrine peculiar to the jurisprudence of the United States. It is not present or at least not firmly implanted in the jurisprudence of other countries, much less in international law. It would seem therefore not to be a proper principle to be applied by the International Court of Justice.

At the recent UN Congress on Public International Law, H.E. Mohammed Bedjaoui (President of the ICJ) and Sir Ninian Stephen (Judge, International Tribunal for the Former Yugoslavia) urged greater use of the Court's advisory jurisdiction as an integral

part of the work of preventive diplomacy.

Indeed it is precisely for the sake of propriety that the Court should not decline to answer WHO's question. If "the principal judicial organ of the United Nations" (Article 92, UN Charter) will not answer this most fundamental question and safeguard the rule of law on behalf of "the peoples of the United Nations" (preamble, UN Charter), then which court can?

## 2.2 Nuclear Weapons are Political Weapons

This is a variant of the political question argument, but one which needs to be considered separately.

Opponents of WHO's request for an advisory opinion describe nuclear weapons as "political weapons" essential for deterrence and thus for security (France, pp. 1-2, Germany p.4, Russian Federation, p.2).

Response:

If it were true that nuclear weapons are essential for security, every nation would require to be defended by them. The fact that the majority of countries have signed the Non-Proliferation Treaty as non-nuclear States renouncing any intention of acquiring nuclear weapons, indicates that nuclear weapons are not required for security.

Nuclear weapons not only do not provide security, they generate insecurity. This belief is reflected in the Final Document of the First Special Session of the General Assembly on Disarmament 1978, adopted by consensus, which noted in its opening:

Alarmed by the threat to the very survival of mankind posed by the existence of nuclear weapons. . . . Convinced that disarmament and arms limitation, particularly in the nuclear field, are essential for the prevention of the danger of nuclear war and the strengthening of international peace and security. . . .

Enduring international peace and security cannot be built on the accumulation of weaponry by military alliances nor be sustained by a precarious balance of deterrence or doctrines of strategic superiority. (Resolution. 13)

It is a truism that deterrence does not work unless it is credible, i.e. unless the party to be deterred believes that the deterring party is prepared to proceed from threat to use as a last resort. The narrowness of the gap between "political" use and

actual use is illustrated by the following account by a former high official of the U.S. Department of Defense:

[I]n the thirty-six years since Hiroshima, every president from Truman to Reagan, with the possible exception of Ford, has felt compelled to consider or direct serious preparations for possible imminent U.S. initiation of tactical or strategic nuclear warfare, in the midst of an ongoing, intense, non-nuclear conflict or crisis. . . . [H]ere briefly listed are more of the actual nuclear crises than can now be documented from memoirs or other public sources (in most cases after long periods of secrecy. . .):

- \* Truman's deployment of B-29s, officially described as 'atomic-capable,' to bases in Britain and Germany at the outset of the Berlin Blockade, June 1948.
- \* Truman's press conference warning that nuclear weapons were under consideration, the day after marines were surrounded by Chinese Communist troops at the Chosin Reservoir, Korea, November 30, 1950.
- \* Eisenhower's secret nuclear threats against China, to force and maintain a settlement in Korea, 1953.
- \* Secretary of State Dulles' secret offer to Prime Minister Bidault of three tactical nuclear weapons in 1954 to relieve the French troops besieged by the Indochinese at Dienbienphu.
- \* Eisenhower's secret directive to the Joint Chiefs during the 'Lebanon Crisis' in 1958 to prepare to use nuclear weapons, if necessary, to prevent an Iraqi move into the oil fields of Kuwait.
- \* Eisenhower's secret directive to the Joint Chiefs in 1958 to plan to use nuclear weapons, imminently, against China if the Chinese Communists should attempt to invade the island of Quemoy, occupied by Chiang's troops, a few miles offshore mainland China.
- \* The Berlin crisis, 1961.
- \* The Cuban Missile Crisis, 1962.
- \* Numerous 'shows of nuclear force' involving demonstrative deployments or alerts - deliberately visible to adversaries and intended as a 'nuclear signal' - of forces with a designated role in U.S. plans for strategic nuclear war.
- \* Much public discussion, in newspapers and in the Senate, of (true) reports that the White House had been advised of the possible necessity of nuclear weapons to defend marines surrounded at Khe Sanh, Vietnam, 1968.
- \* Nixon's secret threats of massive escalation, including possible use of nuclear weapons, conveyed to the

North Vietnamese by Henry Kissinger, 1969-72.

\* The Carter Doctrine on the Middle East (January 1980) as explained by Defense Secretary Harold Brown, Assistant Secretary of State William Dyess, and other spokesmen, reaffirmed, in essence, by President Reagan in 1981. (Daniel Ellsberg, "How We Use Our Nuclear Arsenal" Protest and Survive, E.P. Thompson and Dan Smith, eds., reprinted in *The Nuclear Predicament: A Sourcebook*, edited by Donna Uthus Gregory, A Bedford Book, St. Martin's Press, NY (1982).)

The risk of use of nuclear weapons is not confined to intentional use. The UN Human Rights Committee has warned of "the danger that the actual use of such weapons may be brought about, not only in the event of war, but even through human or mechanical error or failure". It has also noted that nuclear weapons "absorb resources that could otherwise be used for vital economic and social purposes, particularly for the benefit of developing countries" (UN Doc A/39/644; CCPR/c/21/Add.4)

### 2.3 The Question is Too Abstract for Judicial Consideration

The United States and France argued that the question is an abstract one to which it is not possible to give a specific reply. "These matters cannot be usefully addressed in the abstract without reference to the specific circumstances under which any use of nuclear weapons would be contemplated." (United States, p. 14. Cf. France, pp. 11-12.)

Response:

This Court has determined that a "legal question refers to one which may be answered on the basis of law." (*Western Sahara Case*, 1975 ICJ Reports, p. 18) It does not matter that the question is specific to one set of circumstances, or more general to cover a range of circumstances. The Court has accepted that it is proper to consider legal questions which do not refer to one specific circumstance, but may relate more widely. (1975 ICJ Reports, p. 20)

The arguments supporting the illegality of the use of nuclear weapons are not based on the circumstances in which they are used, but on the fact that the very nature of the weapons is such that any use would violate principles of international law. The Court is therefore not being asked to consider different abstract scenarios, but rather to consider the concrete scientific evidence concerning the health and environmental effects of any use of nuclear weapons, and from that determine whether any use would be



illegal.

#### 2.4 The Request is Devoid of Object or Purpose: The Court's Opinion Will Have No Practical Effect

Some States, including Australia (p. 7) and the UK (p.58), argued that the request to the Court is devoid of object or purpose as the Court's opinion would not be enforceable, nor have any effect on the policies of the nuclear-weapon States.

Response:

It would be strange indeed if the international community were to adopt the principle that only those international law rulings likely to lead to immediate and full compliance are worth rendering. There may be a certain time lag between ruling and compliance, which may be greater or less in proportion to the vital interests affected. But in a world subject to the rule of law, to which all States profess to be committed, the rulings of this Court, the highest tribunal on questions of international law, must sooner or later become the guiding norm for behavior of States.

Furthermore this Court has determined that the question of whether its opinions will be honored or not is not a factor in deciding whether to give an opinion. In the case of *Nicaragua v. United States*, this Court observed that it "neither can nor should contemplate the contingency of the judgement not being complied with." (1984 ICJ Reports 1984, p. 437.) This Court, for example, delivered an advisory opinion on Namibia (South West Africa) despite the very real uncertainty as to whether South Africa would comply with any opinion adverse to its practice. (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, 1971 ICJ Reports, p.16)

The ability to enforce an opinion from the Court is not the only factor in determining the value and influence of an opinion. States comply with international law to a large degree without enforcement mechanisms. At the recent UN Congress on Public International Law (United Nations, March 1995) Sir Ninian Stephen of the Tribunal for the Former Yugoslavia, when asked how the nuclear-weapon States would likely respond to an opinion that the use of nuclear weapons is illegal, said that "...the nuclear-weapon States should react to the Court's judgment in the same way as any citizen should react to the judgement of a domestic court: they should respect it."

The precedent of the Nuclear Tests Case is instructive in this respect. In 1973, Australia and New Zealand sought this Court's

protection against France's atmospheric nuclear testing in the South Pacific. France challenged the justiciability of the case on grounds of standing and of its non-adherence to the Test Ban Treaty of 1963, and declared that it would not abide by the decision of the Court. Nevertheless, France abandoned its program of atmospheric testing during the pendency of the case, rendering it moot. (Nuclear Tests Case, 1973 ICJ Reports, p. 99. 1974 ICJ Reports, p. 253)

## 2.5 An Opinion Not Complied With Would Undermine the Court's Authority

Some States, e.g. Australia (p.6), have argued that if the nuclear weapon States failed to respect the opinion of the Court, this would undermine the Court's authority.

Response:

- i) The opinion requested is an advisory one. Coming from this tribunal it would carry great weight but would not be binding or self executing per se.
- ii) So long as no State used nuclear weapons in armed conflict, no State would be in violation of an opinion that such use was in violation of international law.
- iii) Since seventy three member States of the World Health Assembly, a vast majority of those voting, have requested this opinion, it would, on the contrary, undermine the authority of the Court if it refused the request.

## 2.6 The Court's Opinion Would Damage Disarmament Negotiations

Some States, including United States, United Kingdom, Australia and France, maintain that the nuclear states are disarming and that an opinion from the Court could undermine current disarmament negotiations.

"An opinion on this complex and sensitive matter could serve to complicate the work of States or other United Nations bodies, perhaps undermining the progress already made in this area." (USA p. 14. Cf. Australia p. 6, France p. 13, U.K. p. 60)

Response:

- i) The claim that disarmament negotiations are in progress is not borne out by the facts. The United States and the Russian Federation have agreed to cut their nuclear

arsenals by the year 2003 to a total of 19,580 warheads, the equivalent of approximately 200,000 Hiroshima sized bombs (Center for Defense Information, Nuclear Weapons Facts, 1995). Despite the demands of most non-nuclear States, the recent Non Proliferation Treaty Review and Extension Conference concluded without any firm commitment by the nuclear weapon States for further cutbacks, much less the ultimate elimination of nuclear weapons. There is no evidence that any negotiations with a view to further cutbacks are currently under way or contemplated.

In addition, at least four of the five declared nuclear weapon States continue to invest in research, development, testing and modernization of their nuclear arsenals (Defense Monitor, Vol XXII, Number 1, 1993).

ii) It is not the role of the Court to encourage or discourage disarmament negotiations. Its role is to provide an advisory opinion on the question referred to it by the World Health Organization.

iii) It is difficult to see how an opinion holding the use of nuclear weapons to be in violation of international law would impede disarmament negotiations. It is reasonable to assume that, quite on the contrary, such an opinion would provide an impetus to such negotiations.

iv) The question asked by WHO on the legality of the use of nuclear weapons has now been supported by the United Nations General Assembly.

Welcoming resolution 46\40 of 14 May 1993 of the Assembly of the World Health Organization, in which the organization requested the International Court of Justice to give an advisory opinion on whether the use of nuclear weapons

by a state in armed conflict would be a breach of its obligations under international law, including the Constitution of the World Health Organization. (UNGA resolution A\49\699K, 1994)

The General Assembly, the principal organ of the United Nations dealing with disarmament, in deciding to support the WHO request, has determined that such a request would be an aid, not a hindrance to its efforts in the field of disarmament.

## 2.7 An Affirmative Opinion by the Court Would Undermine Deterrence

Some States, including France, the Russian Federation, Germany, and the United States have argued that an opinion on the

illegality of nuclear weapons could undermine the deterrence policy which they consider to be essential to their own security and the maintenance of peace. "This policy of dissuasion has contributed to the maintenance of world stability and peace." (France p.11, Cf. USA p. 21, Russian Federation p. 2, Germany p.4)

Response:

- i) This argument is, in essence, another way of saying that nuclear weapons are merely, or primarily, "political" in character. (See in this connection section 2.2, supra).
- ii) The argument that deterrence has worked is open to debate. Nuclear deterrence has not prevented conventional war or war with chemical weapons. According to one account there have been 149 wars since 1945 resulting in 23 million deaths (Ruth Sivard, *World Military and Social Expenditures, World Priorities*, Washington 1993, p. 20). The five declared nuclear weapon States have been directly involved in 48 of these wars and indirectly in many of the others (Sivard, 1993, p.21)
- iii) Far from creating stability, continued reliance on nuclear deterrence provides justification for non-nuclear States to seek to acquire their own nuclear weapons in order to be able to respond to the use or threat of use of nuclear weapons by the nuclear armed States.
- iv) If the use of nuclear weapons is illegal, the threat of such use - which is another name for deterrence - cannot remove the taint of illegality from use, any more than the threat of torture in order to prevent crime can "legalize" torture.

### 3. The Application of Treaty Law to Nuclear Weapons

#### 3.1 Nuclear Weapons Are Legal Because They Are Not Prohibited by Any Treaty

"It is completely clear that no conventional instrument or customary rule has as yet established any prohibition in principle of the use of nuclear weapons." (France p. 15)

Conventions prohibiting or restricting chemical, biological, inhumane or environment-modifying weapons have been created to deal with specific types of weaponry. "The exacting nature of those specific conventions clearly confirms that one cannot deduce

a precise restriction on the use of specific weaponry from general principles which, by their nature, apply to all weapons without discrimination, and to any of them in particular. . . .

[C]onventions thus established are only binding upon the parties to them. .

. . ." (France, p. 22)

"No treaty specifically prohibiting the use of nuclear weapons has been adopted since 1945. Nor is the use of nuclear weapons outlawed by any provision contained in a treaty of more general application." (UK, p. 62)

There is no general prohibition on the use of nuclear weapons in any international agreement. (USA, p. 16-17)

After referring to the 1925 Geneva Protocol, EnMod Convention, St. Petersburg Decl'n. and the Inhumane Weapons Convention, the US notes that "this pattern implies that there is no such general prohibition on the use of nuclear weapons, which would otherwise have found expression in a similar international agreement." (USA, p. 18)

"[T]here are no treaties prohibiting nuclear weapons as such." (Germany, p.3)

Response:

As in the case of municipal law, treaties can be law-creating, law-codifying or both. Thus, Akehurst notes that the importance of the Vienna Convention on the Law of Treaties "lies in the fact that most of its provisions attempt to codify the customary law relating to treaties, although there are other provisions which represent a 'progressive development' rather than a codification of the law." (M. Akehurst, *A Modern Introduction to International Law*, (Third ed., 1977) p. 121).

At any rate, where the specific prohibition is subsumed in the general, there is no need for an explicit treaty prohibition of the specific. The principle of freedom of navigation on the high seas applies to all types of vessels, including those not yet invented. Article 2(4) of the United Nations Charter prohibits all forms of aggression, regardless of the means employed by the aggressor.

As amply demonstrated in several submissions before the Court, many treaties and principles of customary law already prohibit the practices and consequences which any use of nuclear weapons would inevitably entail. It is disingenuous, therefore, to claim that the absence of a specific treaty relating to nuclear weapons

somehow "legalizes" such weapons. It is also noteworthy that none of the statements made by countries defending the legality of nuclear weapons recite, hypothetically, any instances in which nuclear weapons could be used without violating any of the general principles which are the basis of their illegality.

The specificity of recent treaties prohibiting biological and chemical weapons confirms the illegality of these weapons, but does not speak for their legality prior to the enactment of these treaties. Indeed, the use and proposed use of biological and chemical weapons was widely condemned by the international community on grounds of, inter alia, international law before the enactment of the Biological and Chemical Weapons Conventions.

3.2 The existence of treaties recognizing and regulating nuclear weapons suggests that these weapons are legal

"Those treaties which may . . . relate to the use of nuclear weapons neither lay down or imply any generalized prohibition of their use. Most of the relevant instruments have to do with the installation, emplacement, possession, transfer, manufacture and testing, or even the destruction of such weapons." (France, p. 15)

"The very existence of those treaties [Treaty of Tlatelolco, Antarctic Treaty, South Pacific Nuclear Free Zone Treaty and the Outer Space Treaty] and their limited scope, together show that States are convinced that, in the absence of any special and accepted prohibition, the use of nuclear weapons is not prohibited by law." (France, p. 16)

Stating that no treaty prohibits nuclear weapons as such: "Neither is there an unwritten ban, otherwise all treaties limiting the proliferation of nuclear weapons or nuclear tests, or seeking to create nuclear-weapon-free zones or to limit the number of nuclear weapons, would be meaningless." (Germany, p. 3)

"Positive international law in force accepts the fact of existence of nuclear weapons. There is a wide range of international norms aimed at non-proliferation, non-deployment, limitation, reduction of nuclear weapons, prevention of their testing and other forms of control of nuclear weapons.

There is a large number of effectively functioning international instruments both multilateral and bilateral dealing with this subject, including well-known bilateral agreements on the prevention of nuclear war." (Russian Federation, p. 2)

Response:

These treaties presume the existence but not the legality of nuclear weapons.

International law and custom include mechanisms for addressing breaches of legal norms and dealing with the effects of these breaches, without sanctioning them. This is no more than a recognition of the gap between the real and the ideal which exists in many areas of life, and which law seeks to close.

For example, a State which initiates an illegal armed conflict is not exempt from the standards of international humanitarian law, even though it violated international law in the first place. The Convention on Civil Liability for Nuclear Damage, 1963 U.N. Jurid. Y.B. 148, limits liability for nuclear damage without exempting those responsible for such damage from legal liability.

The Resolution Regarding Weapons of Mass Destruction In Outer Space, U.N.G.A. Res. 1884 (XVIII), adopted by the UN General Assembly by acclamation on October 17, 1963, "solemnly calls upon all States to refrain from placing in orbit around the earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction ..." It could hardly be argued that, by singling out outer space for a prohibition on the siting of weapons of mass destruction, this resolution "legalizes" the siting or use of weapons of mass destruction on earth.

An example drawn from municipal law is the practice of establishing needle exchange programs to minimize the spread of disease among drug users. These programs recognize the fact of illegal drug abuse and seek to remedy its effects, without accepting drug abuse as legal.

The following examination of the treaties invoked by France, *supra*, reveals that they are consistent with, indeed supportive of, the goal of elimination of nuclear weapons, and intended to reduce the effect of these weapons until the generally accepted goal of complete nuclear disarmament is fully realized. (See Appendix **B**.) None of the treaties regulating nuclear weapons sanctions the use of these weapons.

### 3.2.1 Treaty for the Prohibition of Nuclear Weapons in Latin America (Treaty of Tlatelolco)

The United Kingdom states, at p. 72, that "the declarations made by the nuclear-weapon States at the time of signing or ratifying the Protocol, which were not challenged by the parties to the Treaty of Tlatelolco [Done at Mexico, February 14, 1967, 634 U.N.T.S. 281], indicate that those States consider there are circumstances in which resort to nuclear weapons would be lawful."

But, except for Argentina, which abstained, and which did not ratify the Treaty until 18 January 1994, all the States Parties to the Treaty of Tlatelolco have voted for UN resolutions declaring the use of nuclear weapons to be a crime against humanity and a violation of the UN Charter. (Examples include GA Res. A/48/76B (1993) and A/49/700E (1994), both titled "Convention on the Prohibition of the Use of Nuclear Weapons"). Some States Parties (Mexico, Costa Rica, Colombia), have stated in these proceedings that they consider the use of nuclear weapons to be illegal; none have stated the contrary.

The declarations mentioned by the United Kingdom represented assurances by the nuclear-weapon States "not to use or threaten to use nuclear weapons against the Contracting Parties." (Protocol II, Art. 3) Why should any of the Contracting Parties have challenged these assurances? How, therefore, can anything be inferred from their failure to do so?

Some indication of the Contracting Parties' view of the status of nuclear weapons under international law may also be gleaned from the Preamble to the Treaty, which states, in part:

[N]uclear weapons, whose terrible effects are suffered indiscriminately and inexorably, by military forces and civilian populations alike, constitute, through the persistence of the radioactivity they release, an attack on the integrity of the human species and ultimately may even render the whole earth uninhabitable.

### 3.2.2 South Pacific Nuclear Free Zone Treaty (Treaty of Rarotonga)

Four of the Contracting Parties (Nauru, Solomon Islands, Papua New Guinea and Samoa) to the Treaty of Rarotonga (Done at Rarotonga, August 6, 1985, 24 I.L.M. 1442) have stated in these proceedings that they consider the use of nuclear weapons to be illegal. None of the Contracting Parties have stated the contrary.

The Preamble states, in part:

Convinced that all countries have an obligation to make every effort to achieve the goal of eliminating nuclear weapons, the terror they hold for humankind and the threat which they pose to life on earth.

This does not sound like a recognition of the right of any States indefinitely to own, much less use, nuclear weapons.



### 3.2.3 Treaty on the Non-Proliferation of Nuclear Weapons (NPT)

The text, context, purpose and subsequent practice of the NPT (Done at London, Moscow and Washington, July 1, 1968, 729 U.N.T.S. 161) all, to varying degrees, refute the claim that the NPT legitimizes the possession and use of nuclear weapons. The NPT acknowledges the existence of nuclear weapons and of nuclear-weapon States, but does not acknowledge any right to possess or to use nuclear weapons.

A number of rights of Parties are clearly established in the text, including the "inalienable right" to develop research, production and use of nuclear energy for peaceful purposes (Article IV (1)), the right to participate in the exchange of equipment, materials and scientific and technological information for the peaceful uses of nuclear energy (Article IV (2)), the right to benefit from the peaceful applications of nuclear explosions (Article V) and the right to conclude regional treaties in order to ensure the total absence of nuclear weapons in their respective territories (Article VII). The text of the Treaty, however, includes no reference to the right to either possession or use of nuclear weapons. The definition of a nuclear-weapon State, which would be expected to establish rights of the nuclear-weapon States, says simply "... a nuclear-weapon State is one which has manufactured and exploded a nuclear weapon or other nuclear explosive device prior to 1 January 1967."

In contrast to the claimed right to possess and use nuclear weapons, the NPT requires nuclear-weapon states to terminate their possession of nuclear weapons through the negotiation of nuclear disarmament (Article VI). The United States has noted that:

[T]he NPT is the only global treaty that requires all its parties to pursue measures related to cessation of the nuclear arms race and to nuclear disarmament. For the nuclear-weapon states, this provision is clearly aimed at their nuclear arsenals." (Ambassador Thomas Graham, Jr. US Arms Control and Disarmament Agency, Speech to the Third Preparatory Committee for the 1995 Conférence of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Geneva, September 13, 1994, published by U.S. Arms Control and Disarmament Agency, Geneva Office, p.2.)

The NPT was negotiated in connection with and was annexed to United Nations General Assembly Resolution 2373 (XXII) which concludes that "...an agreement to prevent the further proliferation of nuclear weapons must be followed as soon as possible by effective measures on the cessation of the nuclear arms race and on nuclear disarmament." This explains the context

of the NPT which was not only to halt the proliferation of nuclear weapons, but also to lead towards their elimination. A Treaty which is part of a declared process for the elimination of nuclear weapons cannot be said to legitimize a so-called right, that of possession of nuclear weapons, which is in direct opposition to the declared goal.

This interpretation of the context of the NPT is confirmed by its purpose as stated in the Preamble, which includes the goal of "the cessation of the manufacture of nuclear weapons, the liquidation of all existing stockpiles, and the elimination from national arsenals of nuclear weapons and the means of their delivery..." While the NPT does not expressly prohibit the use of nuclear weapons, the reference in the preamble that the use of nuclear weapons in war would be a "devastation that would be visited upon all mankind" is evidence that the NPT definitely does not sanction the use of nuclear weapons prior to their elimination.

The subsequent practice of Parties to the NPT supports this interpretation:

Despite their involvement in several wars and other military actions, the nuclear-weapon States have completely refrained from using nuclear weapons since the enactment of the NPT. And, despite their refusal to make a clear commitment to the non-use of nuclear weapons, they have expressed their opposition to such use. In the words of President Reagan: "A nuclear war cannot be won and must never be fought." (As quoted in N.Y. Times, 6 November 1986, at A35, col. 1.)

With the possible exception of Iraq and the Democratic People's Republic of Korea, all non-nuclear States Parties have scrupulously adhered to their obligation not to acquire nuclear weapons.

The great majority of States Parties, including the Democratic People's Republic of Korea and Iraq, have routinely voted in favor of UN General Assembly Resolutions calling the use of nuclear weapons a violation of international law and a crime against humanity. (See Appendix ~~A~~<sup>B</sup>) The following States Parties are on record in these proceedings as embracing the principle of the illegality of use:

Azerbaijan Colombia Costa Rica Democratic People's  
 Republic of Korea Iran Kazakhstan Lithuania  
 Malaysia Mexico Nauru Papua New Guinea Philippines  
 Rwanda Samoa Saudi Arabia Solomon Islands Sri  
 Lanka Sweden Uganda Ukraine

India and Pakistan, which are not members of NPT, have taken the same position, thereby increasing the force of this position as a rule of customary international law.

The United States has contradicted its own claim that the NPT legitimizes possession and use with the statement that

While the NPT reflects the reality that five nuclear-weapon states existed in 1968, it does not legitimize the permanent possession of nuclear weapons.

Far from it. Rather the NPT regime creates a system of shared obligations among its parties: while non-nuclear-weapon states promise not to acquire nuclear weapons, nuclear-weapon states promise to undertake measures to reduce and eliminate their nuclear arsenals (Ambassador Thomas Graham, supra, p.14).

4. Protocol I of 1977 Additional to the 1949 Geneva Conventions and the "Nuclear Understandings" Issue

The Protocol "contains a number of new rules on means and methods of warfare, which of course apply only to States that ratify the Protocol. It is, however, clear from the negotiating and ratification record of the Protocol that the new rules contained in the Protocol were not intended to apply to nuclear weapons." (USA, p. 28)

Similar statements were made by France (p.19), the United Kingdom (p.64), the Netherlands (p.10) and the Russian Federation (p.2).

4.1 Response:

4.1.1 Protocol I is Largely Confirmatory of Preexisting Humanitarian Law

It is not true, as claimed by France (p.19), that those States upholding the thesis of illegality rely "particularly" on Arts. 35 and 51 of Protocol I, which deal, respectively, with the prohibition of weapons causing superfluous injury and with the protection of the civilian population. The illegality thesis is solidly anchored in the entire body of humanitarian law, both pre- and post-Protocol I, and would therefore remain valid even if the "Nuclear Understandings" thesis were accepted.

Protocol I did not start with a clean slate. The Diplomatic Conference which led to its adoption was called "The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts." There is general agreement that, while there was some "development", e.g. Art. 55 relating to the protection of the natural environment, by far the

bulk of the Protocol, including Arts. 35(1) and (2) and 51, consisted in "reaffirmation." To apply the "nuclear understandings" made with respect to the Protocol to the body of preexisting conventional and customary law would be a new departure indeed in the theory and practice of international law.

#### 4.1.2 The "Nuclear Understandings" Are of Questionable Validity Even With Respect to the Protocol

Art. 19 of the Vienna Convention on the Law Of Treaties requires that, in order to be valid, a reservation - and, a fortiori, an understanding, which does not rise fully to the level of a reservation - be compatible with "the object and purpose of the treaty." That purpose was defined in the Preamble of the Protocol as "to reaffirm and develop the provisions protecting the victims of armed conflict ..." It would be difficult to reconcile this purpose with the non-applicability of the Protocol to the one weapon most apt to inflict devastating damage upon the victims of armed conflict. Hence the "nuclear understandings" may be viewed, realistically, as the price extracted by the nuclear weapon States for their participation in the 1977 Diplomatic Conference, but not necessarily as a legally valid restriction on the document produced by the Conference.

### 5. Humanitarian Law

#### 5.1 Humanitarian Law Does Not Prohibit the Use of Nuclear Weapons per se

States opposing the thesis of illegality admit, directly or indirectly, that nuclear weapons are not exempt from the reach of humanitarian law, but argue that, as in the case of other weapons, the legality vel non of their use must be judged in light of the particular circumstances of each case. (US p. 26, UK p. 77, Netherlands; pp. 14-15).

#### Response:

This argument amounts to saying that a nuclear weapon is "just another weapon." It ignores the fundamental quantitative difference between nuclear weapons and all other existing weapons in terms of their unprecedented destructiveness and the fundamental qualitative difference between nuclear weapons and all other existing weapons in terms of their uncontrollable radioactive effects. These legally significant differences have been amply substantiated in several pro-illegality statements before the Court. They have not been addressed in any significant way by any of the anti-illegality statements.

The following comments will be addressed to issues raised with respect to certain specific principles of humanitarian law.

## 5.2 The Principle of Discrimination

States admit that "attacks on civilian populations are always forbidden regardless of the weapons used" (Germany, p. 3, Netherlands, p.14, US pp. 26-27), but argue that "modern nuclear weapons are capable of precise targeting. . . against military objectives of quite small size" (UK, pp. 88, 89), that attacks on military targets are not prohibited because they may cause "collateral civilian damage" (US, p.27) and that the principle of discrimination is subject to the right of reprisal (US p.26).

Response:

In the absence of further particulars, it is difficult to comment on the United Kingdom's hypothetical reference to the precise targeting of nuclear weapons against "quite small" military objectives. (On the impossibility of "precise targeting" of nuclear weapons, see E.L.Meyrowitz, "Nuclear Weapons Are Illegal Threats", Bulletin of the Atomic Scientists, May 1985, 35 at 37.) No one has ever seen such an operation carried out. U.S. law currently forbids "research and development which could lead to the production. . . of a low-yield nuclear weapon", which is defined as having a yield of less than five kilotons. (National Defense Authorization Act for Fiscal Year (FY) 1944, Public Law 103-160, November 30, 1993.) No information is available on the existence of nuclear weapons with a yield of less than five kilotons in the arsenals of any other state. This is only a little less than half the size of the Hiroshima weapon (12.5 kilotons), which caused the death of some 200,000 civilians. If a truly small nuclear weapon - of the size, say, of a large conventional bomb or artillery shell - were ever developed, it would still have uncontrollable radioactive effects, leading to the conclusion that the use of such a weapon, instead of a conventional one of equal size and impact, would be prohibited as one causing "superfluous injury or unnecessary suffering." At any rate, speculation as to "micro-nukes" or "mini-nukes" is of a de minimis character, as long as deterrence is the primary rationale advanced by the nuclear weapon states for their continued possession of nuclear weapons. It is clear that such "tiny nukes" are useless as weapons of deterrence.

As for "collateral civilian damage", it may readily be conceded that, under generally accepted principles of humanitarian law, one cannot require a belligerent carrying out an attack on a legitimate military objective to insure that not a single civilian - or, in some cases, even dozens or hundreds - will be hurt or

killed as a result of the attack. It should be equally readily conceded by those on the other side of the argument that applying the collateral damage principle to the use of nuclear weapons results in an absurdity which necessarily wipes out the entire body of humanitarian law. As stated above, the relatively small Hiroshima bomb produced 200,000 victims. Casualty projections relating to current-day nuclear weapons are in the millions. Surely the principle of permissible collateral damage cannot be stretched that far; common sense forbids it.

The claim that nuclear weapons are subject to the right of reprisal will be dealt with in the next section.

### 5.3 The Principle of Proportionality

Germany, at p.3, and France, at p.15, argue that, while the principle of proportionality applies to nuclear weapons, each use of such weapons must be judged according to its specific circumstances (Germany) and "[the] criterion of proportionality cannot in itself exclude in principle the use, whether as a riposte or in an initial offensive, of any specific weapon and, more particularly, of nuclear weapons, once that use is aimed at countering an aggression, and it seems to be the appropriate means to bring that aggression to an end" (France).

Response:

The best answer to the absolutist position of France - any use of nuclear weapons is legitimate so long as it is "an appropriate means to bring ... aggression to an end" - and the relativist but indeterminate position of Germany - judge each case according to its circumstances - is the position of the United States:

It is unlawful to carry out any attack that may reasonably be expected to cause collateral damage or injury to civilians or civilian objects that would be excessive in relation to the military advantage anticipated from the attack. (Protocol) Whether an attack with nuclear weapons would be disproportionate depends entirely on the circumstances, including the importance of destroying the objective, the character, size and likely effects of the device, and the magnitude of the risk to civilians. (USA, p. 27)

In evaluating the "likely effects of the device, and the magnitude of the effect on civilians," the scientific evidence must be taken into account:

Nuclear weapons are not just another weapon. Their nature

and effect are such that they are inherently incapable of being limited with any degree of certainty to a specific military target. Given that the overwhelming majority of warheads in the U.S. nuclear arsenal, particularly the weapons designed for use in limited-war scenarios such as the cruise missile (200 kilotons) and the Pershing II missile (250 kilotons), exceed many times over the destructive power of the weapons used at Hiroshima and Nagasaki, and given that the targets that U.S. planners consider 'Military objectives' are generally located in or near urban areas in industrial societies, it is quite difficult to conceive of a use of nuclear weapons that would not produce extensive destruction of areas populated by civilians. . . .

It is only logical to consider the illegality of nuclear weapons in light of the scientific evidence confirming that massive civilian casualties are unavoidable in a nuclear exchange directed only against military targets.

One recent private analysis of civilian deaths that might be expected to result from the use of small battlefield nuclear weapons estimated that, in a nuclear exchange between U.S. and Soviet forces in both Germanys using approximately 90, 200-kiloton weapons, 10 to 20 million civilian casualties would result. The same study, using a different scenario involving approximately 90 one-to two-kiloton weapons, estimated that one to 10 million civilian casualties would be produced. The conclusions of numerous governmental and private studies on the consequences of the use of nuclear weapons make it outrageous to claim that minimum collateral damage to the civilian populations will occur if nuclear weapons are restricted to military targets.

("Nuclear Weapons Are Illegal Threats" by Elliott L. Meyrowitz, Bulletin of the Atomic Scientists, May 1985, 35 at p. 37.)

Therefore, a nuclear response to a conventional attack would blatantly violate the principle of proportionality.

The same is true for a nuclear response to a nuclear attack.

In the Naulilaa Incident Arbitration, (2 Reports of Int'l Arb. Awards 1011, at 1026 and 1028 (1928)) "generally considered to be the most authoritative statement of the customary law of reprisals," (J. Brierly, *The Law of Nations* (6th ed. 1963) p. 401) the Arbitral Tribunal held, inter alia, that reprisals are limited by considerations of humanity and that the measures adopted must not be excessive, in the sense of being out of all proportion to the provocation received. Thus, as found in a RAND Corporation study, "[t]he concept of Assured Destruction, when deliberately applied to policies for the acquisition and use of nuclear weapons, appears to be directly opposed to the most fundamental principles found in the international law of armed conflict. . . .

Even as reprisal, . . . the concept of Assured Destruction is prohibited if it includes deliberate attacks on the civilian population." (C. Builder and M. Graubard, *The International Law of Armed Conflict: Implications for the concept of Mutual Assured Destruction* (1982).)

#### 5.4 The Principle of Non-Toxicity

According to the United States, the 1925 Geneva Protocol "was intended to apply to weapons that are designed to kill or injure by the inhalation or other absorption into the body of poisonous gases or analogous substances.

It was not intended to apply, and has not been applied, to weapons that are designed to kill or injure by other means, even though they may create asphyxiating or poisonous byproducts." (USA, p. 28)

Similar arguments were advanced by the Netherlands (p. 9) and the United Kingdom (pp. 85-86).

Response:

According to Art. 31(1) of the Vienna Convention on the Law of Treaties, "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." The ordinary meaning of the term "analogous", according to *The Concise Oxford Dictionary of Current English* (5th Ed.) is "similar" or "parallel." The radioactivity emitted by the explosion of nuclear weapons is absorbed into the body by inhalation and otherwise and not "by other means".

[A] strong case can be made for the assimilation of radiation and radioactive fall-out to poison. If introduced into the body in sufficiently large doses, they produce symptoms which are indistinguishable from those of poisoning and inflict death or serious damage to health in . . . a manner more befitting demons than civilized human beings." (Georg Schwarzenberger, *International Law and Order*, Praeger Publishers, New York, 1971, p. 199)

Similarly, Article 14 of the 1956 Draft Rules [of the International Committee of the Red Cross] for the Limitation of the Dangers Incurred by the Civilian Population in time of War (reprinted in D. Schindler and J. Toman, eds., *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents* (1988) p.69) expanded on the Geneva Gas Protocol in the following terms:



[T]he use is prohibited of weapons whose harmful effects—resulting in particular from the dissemination of incendiary, chemical, bacteriological, radioactive or other agents—could spread to an unforeseen degree or escape, either in space or time, from the control of those who employ them. (Emphasis added.)

#### 5.5 The Principles of Humanity and Necessity: The Prohibition on Causing Unnecessary Suffering, or Suffering Beyond That Required to Achieve a Legitimate Military Objective

"[T]he use of nuclear weapons cannot in abstracto be deemed unlawful. The question of whether a specific use is in contravention of the said obligation cannot therefore be weighed until the exact implications both at the level of military advantage gained and with regard to the injury caused, are known." (Netherlands, p. 10)

"The principle [prohibiting unnecessary suffering]. . . requires that a balance be struck between the military advantage which may be derived from the use of a particular weapon and the degree of suffering which the use of that weapon may cause. In particular, it has to be asked whether the same military advantage can be gained by using alternative means of warfare which will cause a lesser degree of suffering. The use of a nuclear weapon may be the only way in which a State can concentrate sufficient military force to achieve a particular military objective. In those circumstances, it cannot be said that the use of such a weapon causes unnecessary suffering, however great the casualties which it produces among enemy combatants." (UK, p. 87)

"It is unlawful to use weapons that are of such a nature as to cause superfluous injury or unnecessary suffering. This prohibition was intended to preclude weapons designed to increase the injury or suffering of the persons attacked beyond that necessary to accomplish the military objective. It does not prohibit weapons that may cause great injury or suffering if the use of the weapon is necessary to accomplish the military mission. For example, it does not prohibit the use of anti-tank munitions which must penetrate armor by kinetic-energy or incendiary effects, even though this may well cause severe and painful burn injuries to the tank crew. By the same token, it does not prohibit the use of nuclear weapons, even though such weapons can produce severe and painful injuries, if those weapons are required to accomplish a legitimate military mission." (USA, p. 30)

Response:

The argument of the Netherlands comes down to this: Let us

determine the "exact implications" of the use of one or more nuclear weapons; then we can decide whether such use has violated international law (presumably the principles of humanity and/or necessity). But the exact implications will not be apparent until after the use has occurred and, as demonstrated by the experience of Hiroshima and Nagasaki, not for decades after the event.

Humanitarian law, however, is intended to act as a preventive restraint, not an ex post facto criterion. On the other hand, there is a vast scientific literature enabling military decision makers to forecast the probable implications of the use of nuclear weapons, all of it pointing toward injury on a scale so vast as to foreclose any possibility of striking a balance with the requirements of humanity and necessity.

As for the "striking a balance" arguments advanced by the United Kingdom and the United States, they ignore the fact that necessity, like reprisal, is not an absolute. If necessity could be used to justify otherwise prohibited weapons or tactics, it would make a mockery of such prohibitions; military commanders would always invoke necessity to justify whatever weapons or tactics they chose to employ, no matter how brutal or inhumane.

The laws of war distinguish between norms that may be overridden by military necessity and those which may not. The principles applicable to the use of nuclear weapons as weapons of mass destruction contain no exceptions for the sake of military necessity.

Moreover, self-defense, a particular case of military necessity, is not a justification for use of prohibited weapons. No "balance" is possible between the "military advantage" which may be derived and the suffering which would be caused by the use of nuclear weapons. A military objective that can only be achieved by the use of nuclear weapons is beyond justifiable self-defense. To suggest that a situation might arise where nuclear weapons would be essential for self-defense is to imply that, under the current NPT-regime, the majority of States are denied potentially necessary means of self-defense. Since most States have chosen not to acquire nuclear weapons, nor have aligned themselves with nuclear weapon States for purposes of self-defense, it appears that most States have implicitly rejected the notion that nuclear weapons might become militarily necessary for self-defense. Thus, to claim a right to use nuclear weapons to "concentrate sufficient military force to achieve a particular objective" is to place one's own military objectives and perceived security needs above those of other, especially non-nuclear weapon, States, and thus to claim a right not available to others. One wonders what legitimate military objective could only be achieved by weapons of mass destruction of the type found in today's arsenals.

In an action against the Japanese government by victims of the bombs dropped on Hiroshima and Nagasaki, the court, relying on the St. Petersburg Declaration and the Hague Regulations prohibiting unnecessary suffering, stated:

[W]e can safely see that besides poison, poison-gas and bacterium the use of the means of injuring the enemy which causes at least the same or more injury is prohibited by international law. . . . [I]t is not too much to say that the pain brought by the atomic bombs is severer than that from poison and poison-gas, and we can say that the act of dropping such a cruel bomb is contrary to the fundamental principle of the laws of war that unnecessary pain must not be given. (The Shimoda Case, Judgment of the Tokyo District Court, 7 Dec. 1963, reprinted in 8 Japanese Ann.Int'l L. 212, 241-42 (1964).)

### 5.6 The Principle of Neutrality

Art. 1 of the Hague Convention V, Respecting the Rights and Duties of Neutral Powers and Persons in case of War on Land, 1907, provides that 'the territory of neutral powers is inviolable.'

"Whether the use of nuclear weapons would deposit radioactive fallout on the territory of States not party to the conflict would. . . depend upon the type of weapon used and the location at which it was used. The assumption that any use of nuclear weapons would inevitably have such an effect is unfounded. Moreover, Hague Convention No. V was designed to protect the territory of neutral states against incursions by belligerent forces or the deliberate bombardment of targets located in that territory, not to guarantee such states against the incidental effects of hostilities" (UK, p. 92)

Response:

As demonstrated by the experience of Chernobyl, where the radiation released contaminated at least twenty countries (D. Maples, "Chernobyl's Lengthening Shadow", Bulletin of Atomic Scientists, Sept. 1993), radioactive fallout from a nuclear explosion would spread far beyond the target. Nuclear fallout is no respecter of borders.

Radiation in quantities sufficient to cause extensive sickness would spread from a 1-megaton explosion, which is relatively small, to a distance of 300 km in less than 12 hours. Even greater doses of radiation from a 10- megaton bomb would reach a distance of 100 km in less than three hours and 800 km in less than 32 hours. (Lindop and Rotblat, Consequences of Radioactive

Fallout, in *The Final Epidemic: Physicians and Scientists on Nuclear War* (R. Adams & S. Cullen eds., 1981) at 131, 125.)

There is no basis for the United Kingdom's claim that Hague Convention V, which provides that "the territory of neutral powers is inviolable", was designed only to guarantee the territory of neutral powers against incursions or bombardments. Only the most tortured interpretation can lead to the conclusion that radioactive fallout causing devastation of humans, flora and fauna does not constitute a violation of neutral territory.

### 5.7 The Principle of Environmental Security

"Article I [of the EnMod Convention] prohibits 'military or other hostile use of environmental modification techniques having widespread, long- lasting or severe effects, as the means of destruction, damage or injury' to another State. . . . Article II of the Convention defines the term 'environmental modification technique' as 'any technique for changing-- through the deliberate manipulation of natural processes--the dynamics, composition or structure of the Earth. . . .' The effects on the environment of the use of nuclear weapons, however, would normally be a side-effect of these weapons." (UK, pp. 90-91; cf. USA, p. 30)

"Article 35(3) of Additional Protocol I is broader in scope, in that it is applicable to the incidental effects on the environment of the use of weapons. It was, however, an innovative provision. It is therefore subject to the understanding, which was discussed above, that the new provisions created by Protocol I would not be applicable to the use of nuclear weapons." (UK, at p. 91-92; cf. USA, p. 30)

Response:

The above statements refer to the EnMod Convention and Protocol I of the 1977 Geneva Convention regarding destruction of the environment but overlook the numerous other international legal instruments relating to destruction of the environment. These include, among others:

- 1972 Stockholm Declaration of the United Nations Conference on the Human Environment (Adopted by the U.N. conference on the Human Environment at Stockholm, 16 June 1972, U.N. Doc. A/CONF.48/14/Rev.1 at 3 (1973), 11 I.L.M. 1416 (1972));

- 1980 United Nations General Assembly Resolution on Historical Responsibility of States for the Preservation of Nature for Present and Future Generations (Adopted 30

October 1980, G.A. Res. 35/48 (1981));

-1982 World Charter for Nature (G.A. Res. 37/7 (Annex) (1982));

-Draft Code of Crimes Against the Peace and Security of Mankind (U.N. Doc. A/46/405 (1991), 30 I.L.M. 1554 (1991) Articles 19(3), 22(2), 26);

-1982 United Nations Convention on the Law of the Sea (U.N. Doc. A/CONF.62/122, 21 I.L.M. 1261, (1982) Article 192)

-1985 Vienna Convention for the Protection of the Ozone Layer (26 I.L.M. 1516 (1987) Article 2(1));

-1992 Framework Convention on Climate Change (31 I.L.M. 849 (1992) Article 3);

-1992 Convention on Biological Diversity (31 I.L.M. 818 (1992) Article 3, Principles 7, 25).

It is a general principle of law that the foreseeable consequences of an act are interpreted as an intention to bring them about. It is disingenuous, therefore, in view of what scientists have described as the enormously damaging environmental and climatic consequences of a nuclear exchange, to assert that these would be mere "unintended side effects":

[S]urprisingly harsh and lasting effects could be generated even by relatively modest exchanges. The baseline scenario (5,000 megatons) could drop average continental temperatures in the Northern Hemisphere to about minus 23 degrees centigrade. Shockingly, even 100 megatons detonated on cities alone could produce sufficient smoke to blacken skies and chill continental areas to below minus 20 degrees centigrade, with recovery taking over three months. (Anne Ehrlich, "Nuclear Winter", The Bulletin of the Atomic Scientists, April 1984, p. 3S, at p. 5S.)

Concerning the relevance of Arts. 35(3) and 55 of Additional Protocol I of 1977, see Section 4.1.1, supra.

## 6. The Right to Life and Health

Apparently no statement submitted to the Court has challenged the relevance to the question before the Court of the right to life and health, as embodied in the International Covenant on Civil and Political Rights and other international law instruments.

## 7. Customary Law and *Opinio Juris*

### 7.1 General Comments on Custom

Custom is to be looked for primarily in the actual practice and *opinio juris* of States. Although nuclear weapons have not been used since WWII, "[o]ne cannot. . . conclude from that fact that there has come into being any practice of 'non-use' based upon a prohibition of use 'accepted as having the force of law' and see this as constituting an established or incipient custom." (France, p. 18)

"[F]or a custom to have been established, there would have to have been situations in which the States concerned could envisage the use of those weapons. This has not been the case. . . ." (France, p. 18)

Response:

Actual practice and *opinio juris* of States confirm the prohibition on the use of nuclear weapons.

i) For a custom to be established, there need not be absolute conformity with the rule. The International Court of Justice has stated:

"It is not to be expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency, from the use of force or from intervention

in each other's internal affairs. The court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule." (Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*) Merits, Judgment, I.C.J. Reports 1986, p. 135 at paragraph 186.)

Thus the declarations of a small minority of States that use of nuclear weapons would not necessarily be unlawful have not prevented the development of a customary rule of international law prohibiting such use.

Indeed, "a customary rule may arise notwithstanding the opposition of one State, or even perhaps a few States, provided that otherwise the necessary degree of generality is reached." (Henkin, Pugh, et al., *International Law: Cases and Materials* (3rd ed., 1993) (citing Waldock, *General Course on Public International Law*) p. 87.) The necessary degree of generality in the case of nuclear weapons is reflected in the non-use since 1945 and the repeated declarations of a majority of States that their use is illegal. (See Section 7.2, *infra*.)

Admittedly, a newly emergent customary rule does not generally bind a State which has consistently objected to that rule. However, it has been noted that "[n]o case is cited in which the objector effectively maintained its status after the rule became well accepted in international law." (Henkin, Pugh, et al., *op. cit.* (citing Charney) p. 89) Moreover, the United Kingdom has, on at least one occasion, questioned the right of a consistently objecting State to an exemption from a rule of law of fundamental importance. (See 1951 I.C.J. *Fisheries Case*, II Pleadings, Oral Arguments 428-430.) An example of a non-consenting State not being exempted from a customary rule is South Africa, which persistently dissented from the rule prohibiting racial discrimination while that rule was developing. (See Henkin, Pugh, et al., *op. cit.*, p. 89.)

ii) Despite the claim to the contrary, there have been numerous situations in which the "States concerned could envisage the use of [nuclear] weapons" (France, p. 18). (See Section 2.2, *supra*.)

## 7.2 Evidence of *Opinio Juris* in U.N. Voting Records

Various UN Resolutions declaring the use of nuclear weapons to be illegal are not legally binding instruments. (UK pp. 73-75, USA pp. 24-25)

By calling for a convention prohibiting such weapons, States implicitly recognize their present legitimacy. (UK pp. 75-76, France p. 21)

Declarations of illegality in the preambles of the UN Resolutions are mere "political stances" devoid of legal import. (France p. 21)

The negative votes of the nuclear weapon States deprive the UN

Resolutions of their status as sources of *opinio juris* (France p. 21) or customary law (USA pp. 24-25).

Response:

The General Assembly resolutions declaring the use of nuclear weapons unlawful represent State practice in the interpretation of the laws of war. Although they are not binding in the sense that a treaty is, they provide proof of international community standards, and the frequent reaffirmation of these standards underscores their importance.

As to the argument that a call for a convention banning a weapon "legitimizes" the weapon to be banned, see Section 3.2, *supra*, with respect to the distinction between confirmatory and constitutive, or law-creating, conventions. In any case, a series of resolutions both calling the use of nuclear weapons illegal and/or a crime against humanity, while at the same time urging the enactment of a convention banning their use, can hardly be interpreted as an expression of confidence in the present legality of such use.

France's somewhat cynical "political stance" argument is difficult to follow. A declaration is a declaration is a declaration. Will future declarations be accompanied by lie detector tests to establish whether the declarants mean what they say?

### 7.3 Evidence of *Opinio Juris* in Public Comments of Statesmen

No uniform view has emerged as yet on the legal aspects of the possession of nuclear weapons and their use as a means of warfare (France, pp. 18- 19, USA pp. 22-24).

Response:

True; but, as already pointed out, the great majority of States are unanimous in their condemnation of resort to nuclear weapons and their view that such resort is illegal. The lack of total unanimity is the principal reason for requesting the Court's opinion, an opinion to be based not merely on customary law and *opinio juris*, such as they are, but on the solid foundations of humanitarian law and other applicable rules of international law.

### 7.4 Evidence of *Opinio Juris* Through State Practice

"Evidence of a customary norm requires indication of 'extensive and virtually uniform' State practice, including States whose interests are 'specially affected.'" (USA, p. 17, citing North



Continental Shelf Cases, 1969 ICJ Reports, p. 43).

"With respect to the use of nuclear weapons, customary law could not be created over the objection of the nuclear-weapon States, which are the States whose interests are most specially affected. Nor could customary law be created by abstaining from the use of nuclear weapons for humanitarian, political or military reasons, rather than from a belief that such abstention is required by law." (USA, p. 17)

Response:

With respect to State practice, uniformity is complete in the sense that no state has used nuclear weapons since 1945. The United States would have the Court believe that this has merely been a general practice based on humanitarian, political and military reasons, rather than a "general practice accepted as law", within the meaning of Art. 38(1)(b) of the ICJ Statute. But the suggestion that "humanitarian, political or military reasons" for abstaining from the use of nuclear weapons are distinct from "a belief that such abstention is required by law" overlooks the essence and origins of humanitarian law. A recognition that use of nuclear weapons would violate humanitarian standards is essentially an acknowledgement of the applicability of humanitarian law.

Furthermore, all the nuclear weapon States which have made submissions to the Court so far have admitted that the laws of war apply, "in principle", to nuclear weapons, while failing to produce any convincing examples of situations in which nuclear weapons could be used without violating the laws of war. This is another reason for holding that the non-use of nuclear weapons for the past half century satisfies the classic definition of *opinio juris sive necessitatis*.

It should also be noted that the non-nuclear weapon States, which must surely be counted as "States affected" in their capacity as potential victims of nuclear attack, have not consented to the nuclear weapon States' policy of deterrence. They have repeatedly affirmed their positions in numerous resolutions, discussed above, stating that the use of nuclear weapons would constitute a violation of the U.N. Charter and a crime against humanity. These unequivocal statements indicated that the "States concerned . . . feel that they are conforming to what amounts to a legal obligation", as required under international law. (North Sea Continental Shelf Cases, 1969 ICJ Reports, p. 44)

7.5 *Opinio Juris* in the Dictates of Public Conscience: The Martens Clause

The famous Martens Clause, a cornerstone of humanitarian law, recites as follows:

In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience. (Preamble to the Hague Convention IV and restated in Art. 1(2) Protocol 1, 1977)

The United Kingdom argues that "[w]hile the Martens Clause makes clear that the absence of a specific treaty provision on the use of nuclear weapons is not, in itself, sufficient to establish that such weapons are capable of lawful use, the Clause does not, on its own, establish their illegality. The terms of the Martens Clause themselves make it necessary to point to a rule of customary international law which might outlaw the use of nuclear weapons." (p. 84)

Response:

The Martens Clause makes it indisputably clear that the customary rules of armed conflict as well as the dictates of public conscience are relevant to the question before the Court.

Elliot Meyrowitz has commented:

[R]estraints on the conduct of war have historically never been limited to treaty law alone. The Martens Clause of the 1907 Hague Conventions offers a legal yardstick intended specifically for those situations in which no international convention exists to prohibit a particular weapons or tactic. When the Nuremberg tribunal was confronted with the lack of a prior treaty defining crimes against humanity and crimes against peace, it concluded:

The law of war is to be found not only in treaties but in the customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practised by military courts.

This law is not static, but by continual adaptation follows the needs of a changing world...

(Elliott L. Meyrowitz, "Nuclear Weapons Are Illegal Threat", *The Bulletin of the Atomic Scientists*, May 1985, p. 35 at 37.)

The United Kingdom's interpretation of the Martens Clause reduces it to a non-entity by requiring "a rule of customary international law" for its application. What if some horrible new weapon were invented, eagerly adopted by most of the world's generals and roundly condemned as inhumane by most of the world's people? The United Kingdom's position would, in effect, make the legal advisors to the world's Ministries of Defense and Foreign Affairs the guardians of the public conscience. That is not what Frederic de Martens had in mind.

## 8. Issues of Self-Defense and Reprisals

### 8.1 Nuclear weapons can be used in self-defense and for reprisals

Several States have argued that the right of self-defense and reprisal affects the legal position of nuclear weapons under international law. (France p.14, UK pp. 81, 93).

#### Response:

It is not subject to dispute that the right of self-defense does not include the right to use prohibited weapons or tactics. Hence the right of self-defense does not affect the legal regime of nuclear weapons positively or negatively. Cf. Section 5.5, *supra*.

As for the right of reprisal, see Section 5.3, *supra*.

#### Conclusion

By far the most serious weakness of the submissions of States which argue that the use of nuclear weapons is not necessarily unlawful is their failure to acknowledge the uniquely terrifying nature and effects of nuclear weapons. To argue that the legality of the use of nuclear weapons depends entirely upon the particular circumstances of use is to pretend that nuclear weapons are no different from and no more dangerous than conventional weapons, when in fact their capacity for health and environmental damage is of a totally different order of magnitude and quality, and their nature is such that, unlike conventional weapons, no use of nuclear weapons can be imagined that would not violate one or more dictates of international law.

The way to avoid the incomparable devastation that any use of nuclear weapons would cause is to affirm the rule of law. As Albert Einstein noted, in 1946, "Henceforth, every nation's foreign policy must be judged at every point by one consideration:

Does it lead us to a world of law and order or does it lead us back toward anarchy and death?" (Excerpt from interview of Albert Einstein with Michael Amrine, published in The New York Times, 23 June, 1946, reprinted in Nathan & Nordern, eds., Einstein on Peace, 1955)

More recently, Hans Corell, Legal Counsel of the United Nations, declared: "Arms must cede to the law and, ultimately, to the judge's robe." (Opening Statement, U.N. Congress on Public International Law, New York, 13-17 March, 1995) In response to the World Health Organization's request for an advisory opinion, the International Court of Justice is respectfully urged to endorse Mr. Corell's words and to affirm the illegality of the use of nuclear weapons in armed conflict.

June B. Ell

Appendix

A

United Nations General Assembly Resolutions which conclude that the use of nuclear weapons is a crime against humanity and a violation of the U.N Charter.

Resolution 1653 (XVI), Declaration on the Prohibition of the Use of Nuclear and Thermonuclear Weapons, U.N. GAOR 16th Sess, Supp. No. 17, at 4 U.N. Doc. A/5100 (1961).

Resolution on the Non-use of Force in International Relations and Permanent Prohibition of the Use of Nuclear Weapons, G.A. Res 2936, U.N. GAOR, 20th Sess., Supp. No. 31, at 5, U.N. Doc. A/8730 (1972) (72 in favor, 4 opposed, 41 abstentions);

Resolution on Non-use of Nuclear Weapons and Prevention of Nuclear Weapons, G.A. Res. 33/71B, 33 U.N. GAOR, Supp. No. 45, at 48, U.N. Doc. A/33/45 (1978) (103 in favor, 18 opposed, 18 abstentions);

Resolution on Non-use of Nuclear Weapons and Prevention of Nuclear War, G.A. Res. 34/83G, 34 U.N. GAOR, Supp. No. 46, at 56, U.N. Doc. A/34/46 (1979) (112 in favor, 16 opposed, 14 abstentions);

Resolution on Non-use of Nuclear Weapons and Prevention of Nuclear War, G.A. Res. 35/152D, 35 U.N. GAOR, Supp. No. 48, at 69, U.N. Doc. A/35/48 (1980) (113 in favor, 19 opposed, 14 abstentions);

Resolution on Non-use of Nuclear Weapons and Prevention of Nuclear War, G.A. Res. 36/92I, 36 U.N. GAOR, Supp. No. 51, at 64, U.N. Doc. A/36/51 (1981) (121 in favor, 19 opposed, 6 abstentions);

Resolution 37/100C Convention on the Prohibition of the Use of Nuclear Weapons, U.N. GAOR Supp. No 51 at 83, (1982)

Resolution 38/75, Condemnation of Nuclear War, U.N. GAOR, Supp. No. 47 at 69 (1983).

Resolution 39/63H, Convention on the prohibition of the use of nuclear weapons U.N. GAOR, Supp 57 at 70, (1984).

Resolution 40/151F, Convention on the prohibition of the use of nuclear weapons, U.N. GAOR, 40th Sess., Supp. 53 at 90 (1985).

Resolution 41/60F, Convention on the prohibition of the use of nuclear weapons, U.N. GAOR, 41st Sess. Supp. 53 at 85, (1986)

Resolution 42/39C, Convention on the prohibition of the use of nuclear weapons, U.N. GAOR, 42nd Sess., Supp. no. 49 at 81, (1987).

Resolution 43/76E, Convention on the Prohibition of the Use of Nuclear Weapons, U.N. GAOR, 43rd Sess., Supp. No. 49 at 90, (1988).

Resolution 44/117C, Convention on the Prohibition of the Use of Nuclear Weapons, U.N. GAOR 44TH Sess., Supp No. 49 at 80, (1989).

Resolution 45/59B, Convention on the prohibition of the use of nuclear weapons, U.N. GAOR 45th Sess. Supp. No. 49 at 71 (1990);

Resolution 46/37D, Convention on the prohibition of the use of nuclear weapons (1991). U.N. Doc. GA/8307 at 127,

Resolution 47/53C, Convention on the prohibition of the use of nuclear weapons (1992), U.N. Doc. GA/8470 at 112 (1993);

Resolution 48/76B, Convention on the prohibition of the use of nuclear weapons (1993), U.N. Doc. GA/8637 at 124 (1994);

## Appendix B

### RESOLUTIONS STATING NUCLEAR DISARMAMENT OR THE ELIMINATION OF NUCLEAR WEAPONS AS A GOAL

(Listed in chronological order)

Establishment of a commission to deal with the problems raised by the discovery of atomic energy, G.A. Res. 1, 1(1) U.N. GAOR at 9, U.N. Doc. A/64 (1946) (unanimous).

Principles governing the general regulation and reduction of armaments, G.A. Res. 41, 1(2) U.N. GAOR at 65, U.N. Doc A/64/Add.1 (1946) (unanimous).

Reports of the Atomic Energy Commission, G.A. Res. 191, 3(1) U.N. GAOR at 16, U.N. Doc. A/810 (1948) (40 in favor - 6 opposed - 4 abstention).

Prohibition of the atomic weapon and reduction by one-third of the armaments and armed forces of the permanent members of the Security Council, G.A. Res. 192, 3(1) U.N. GAOR at 17, U.N. Doc. A/810 (1948) (43 in favor - 6 opposed - 1 abstention).

Essentials of peace, G.A. Res. 290, 4 U.N. GAOR at 13, U.N. Doc. A/1251 (1949) (53 in favor - 5 opposed - 1 abstention).

Peace through deeds, G.A. Res. 380, 5 U.N. GAOR at 13, U.N. Doc. A/1775 (1950) (50 in favor - 5 opposed - 1 abstention).

International control of atomic energy, G.A. Res. 496, 5 U.N. GAOR Supp. (No. 20) at 80, U.N. Doc. A/1775 (1950) (47 in favor - 5 opposed - 3 abstentions).

Regulation, limitation and balanced reduction of all armed forces and all armaments; international control of atomic energy, G.A. Res. 502, 6 U.N. GAOR Supp. (No. 20) at 1, U.N. Doc. A/2119 (1952) (42 in favor - 5 opposed - 7 abstentions).

Regulation, limitation and balanced reduction of all armed forces and all armaments: report of the Disarmament Commission, G.A. Res. 704, 7 U.N. GAOR Supp. (No. 20A) at 3, U.N. Doc. A/2361/Add. 1 (1953) (52 in favor - 5 opposed - 3 abstentions).

Regulation, limitation and balanced reduction of all armed forces and all armaments: report of the Disarmament Commission, G.A. Res. 715, 8 U.N. GAOR Supp. (No. 17) at 3, U.N. Doc. A/2630 (1953) (54 in favor - none opposed - 5 abstentions).

Regulation, limitation and balanced reduction of all armed forces and all armaments: report of the Disarmament Commission; Conclusion of an international convention (treaty) on the reduction of armaments and the prohibition of atomic, hydrogen and other weapons of mass destruction, G.A. Res. 808, 9 U.N. GAOR Supp. (No. 21) at 119, U.N. Doc. A/2890 (1954) (unanimous).

Declaration on the prohibition of the use of nuclear and thermo-nuclear weapons, G.A. Res. 1653, 16 U.N. GAOR Supp. (No. 17) at 4, U.N. Doc. A/5100 (1961) (55 in favor - 20 opposed - 26 abstentions).

Non-proliferation of nuclear weapons, G.A. Res. 2028, 20 U.N. GAOR Supp. (No. 14) at 7, U.N. Doc. A/6014 (1965) (93 in favor - none opposed - 5 abstentions).

Question of convening a conference for the purpose of signing a convention on the prohibition of the use of nuclear and thermonuclear weapons, G.A. Res. 2164, 21 U.N. GAOR Supp. (No. 16) at 12, U.N. Doc A/6316 (1966) (180 in favor - none opposed - 23 abstentions).

Conclusion of a convention on the prohibition of the use of nuclear weapons, G.A. Res. 2289, 22(1) U.N. GAOR Supp. (No. 16) at 14, U.N. Doc. A/6716 (1967) (77 in favor - none opposed - 29 abstentions).

Question of general and complete disarmament, G.A. Res. 2342, 22(1) U.N. GAOR Supp. (No. 16) at 15, U.N. Doc. A/6716 (1967) (113 in favor - none opposed - 1 abstention).

Treaty on the Non-Proliferation of Nuclear Weapons, G.A. Res. 2373, 22(2) U.N. GAOR Supp. (No. 16A) at 5, U.N. Doc. A/6716/Add. 1 (1968) (94 in favor - 4 opposed - 21 abstentions).

Question of general and complete disarmament, G.A. Res. 2454(B), 23 U.N. GAOR Supp. (No. 18) at 12, U.N. Doc. A/7218 (1968) (109 in favor - none opposed - 4 abstentions).

Conference of Non-Nuclear-Weapon States, G.A. Res. 2456(A), 23 U.N. GAOR Supp. (No. 18) at 13, U.N. Doc. A/7218 (1968) (103 in favor - 7 opposed - 5 abstentions).

Conference of Non-Nuclear-Weapon States, G.A. Res. 2456(B), 23 U.N. GAOR Supp. (No. 18) at 13, U.N. Doc. A/7218 (1968) (98 in favor - none opposed - 16 abstentions).

Question of general and complete disarmament, G.A. Res. 2602(E), 24 U.N. GAOR Supp. (No. 30) at 14, U.N. Doc. A/7630 (1969) (104 in favor - none opposed - 13 abstentions).

Declaration on the Strengthening of International Security, G.A. Res. 2734, 25 U.N. GAOR Supp. (No. 28) at 22, U.N. Doc. A/8028 (1970) (120 in favor - 1 opposed - 1 abstention).

Economic and social consequences of the armaments race and its extremely harmful effects on world peace and security, G.A. Res. 2831, 26 U.N. GAOR Supp. (No. 29) at 35, U.N. Doc. A/8429 (1971) (111 in favor - 1 opposed - 3 abstentions).

World Disarmament Conference, G.A. Res. 2833, 26 U.N. GAOR Supp. (No. 29) at 4, U.N. Doc. A/8429 (1971) (adopted by acclamation).



World Disarmament Conference, G.A. Res. 2930, 27 U.N. GAOR Supp. (No. 30) at 15, U.N. Doc. A/8730 (1972) (105 in favor - none opposed - 1 abstention).

Non-use of force in international relations and permanent prohibition of the use of nuclear weapons, G.A. Res. 2936, 27 U.N. GAOR Supp. (No. 30) at 5, U.N. Doc. A/8730 (1972) (73 in favor - 4 opposed - 46 abstentions).

Declaration and establishment of a nuclear-free zone in South Asia, G.A. Res. 3265(A), 29 U.N. GAOR Supp. (No. 31) at 29, U.N. Doc. A/9631 (1974) (104 in favor - 1 opposed - 27 abstentions).

Declaration and establishment of a nuclear-free zone in South Asia, G.A. Res. 3265(B), 29 U.N. GAOR Supp. (No. 31) at 30, U.N. Doc. A/9631 (1974) (96 in favor - 2 opposed - 36 abstentions).

Economic and social consequences of the armaments race and its extremely harmful effects on world peace and security, G.A. Res. 3462, 30 U.N. GAOR Supp. (No. 34) at 17, U.N. Doc. A/10034 (1975) (adopted without a vote).

General and complete disarmament, G.A. Res. 31/189 C, 31 U.N. GAOR Supp. (No. 39), Vol. I, at 45, U.N. Doc. A/31/39 (1976) (95 in favor - none opposed - 33 abstentions).

Review of the implementation of the recommendations and decisions adopted by the General Assembly at its tenth special session, G.A. Res. 33/71 B, 33 U.N. GAOR Supp. (No. 45) at 48, U.N. Doc. A/33/45 (1978) (103 in favor - 18 opposed - 18 abstentions).

General and complete disarmament, G.A. Res. 32/87 G, 32 U.N. GAOR Supp. (No. 45) at 55, U.N. Doc. A/32/45 (1977) (134 in favor - 2 opposed - no abstentions).

General and complete disarmament, G.A. Res. 33/91 C, 33 U.N. GAOR Supp. (No. 45) at 60, U.N. Doc. A/33/45 (1978) (127 in favor - 1 opposed - 10 abstentions).

General and complete disarmament, G.A. Res. 33/91 H, 33 U.N. GAOR Supp. (No. 45) at 62, U.N. Doc. A/33/45 (1978) (108 in favor - 10 opposed - 16 abstentions).

Review of the implementation of the recommendations and decisions adopted by the General Assembly at its tenth special session, G.A. Res. 34/83 J, 34 U.N. GAOR Supp. (No. 46) at 57, U.N. Doc. A/34/46 (1979) (120 in favor - 2 opposed - 19 abstentions).

Conclusion of an international convention to assure the non-nuclear-weapon States against the use or threat of use of nuclear weapons, G.A. Res. 34/85, 34 U.N. GAOR Supp. (No. 46) at 59, U.N. Doc. A/34/46 (1979) (120 in favor - none opposed - 22 abstentions).  
G.A. Res. 35/152(D), 35 U.N. GAOR Supp. (No. 48) at 69, U.N. Doc. A/35/48 (1980) (112 in favor - 19 opposed - 14 abstentions).

Conclusion of an international convention to assure non-nuclear-weapon States against the use or threat of use of nuclear weapons, G.A. Res. 35/155, 35 U.N. GAOR Supp. (No. 48) at 74, U.N. Doc. A/35/48 (1980) (121 in favor - none opposed - 24 abstentions).

Review of the implementation of the recommendations and decisions adopted by the General Assembly at its tenth special session (NUCLEAR WEAPONS IN ALL ASPECTS), G.A. Res. 36/92 E, 36 U.N. GAOR Supp. (No. 51) at 62, U.N. Doc. A/36/51 (1981) (118 in favor - 18 opposed - 5 abstentions).

Review of the implementation of the recommendations and decisions adopted by the General Assembly at its tenth special session (NON-USE OF NUCLEAR WEAPONS AND PREVENTION OF NUCLEAR WEAPONS), G.A. Res. 36/92 I, 36 U.N. GAOR Supp. (No. 51) at 64, U.N. Doc. A/36/51 (1981) (121 in favor - 19 opposed - 6 abstentions).

Conclusion of effective international arrangements to assure non-nuclear-weapon States against the use or threat of use of nuclear weapons, G.A. Res. 36/95, 36 U.N. GAOR Supp. (No. 51) at 68, U.N. Doc. A/36/51 (1981) (145 in favor - none opposed - 3 abstentions).

Review of the implementation of the recommendations and decisions adopted by the General Assembly at its tenth special session (NUCLEAR WEAPONS IN ALL ASPECTS), G.A. Res. 37/78 C, 37 U.N. GAOR Supp. (No. 51) at 60, U.N. Doc. A/37/51 (1982) (118 in favor - 19 opposed - 9 abstentions).

Review of the implementation of the recommendations and decisions adopted by the General Assembly at its tenth special session (PROHIBITION OF THE NUCLEAR NEUTRON WEAPON), G.A. Res. 37/78 E, 37 U.N. GAOR Supp. (No. 51) at 61, U.N. Doc. A/37/51 (1982) (81 in favor - 14 opposed - 52 abstentions).

Review of the implementation of the recommendations and decisions adopted by the General Assembly at its tenth special session (IMPLEMENTATION OF THE RECOMMENDATIONS AND DECISIONS OF THE TENTH SPECIAL SESSION), G.A. Res. 37/78 F, 37 U.N. GAOR Supp. (No. 51) at 61, U.N. Doc. A/37/51 (1982) (134 in favor - none opposed - 12 abstentions).

Review of the implementation of the recommendations and decisions adopted by the General Assembly at its tenth special session (NON-USE OF NUCLEAR WEAPONS AND PREVENTION OF NUCLEAR WAR), G.A. Res. 37/78 J, 37 U.N. GAOR Supp. (No. 51) at 64, U.N. Doc. A/37/51 (1982) (112 in favor - 19 opposed - 15 abstentions).

Conclusion of effective international arrangements to assure non-nuclear-weapon States against the use or threat of use of nuclear weapons, G.A. Res. 37/81, 37 U.N. GAOR Supp. (No. 51) at 66, U.N. Doc. A/37/51 (1982) (144 in favor - none opposed - 3 abstentions).

General and complete disarmament (PROHIBITION OF THE DEVELOPMENT,

PRODUCTION, STOCKPILING AND USE OF RADIOLOGICAL WEAPONS), G.A. Res. 37/99 C, 37 U.N. GAOR Supp. (No. 51) at 77, U.N. Doc. A/37/51 (1982) (adopted without a vote).

General and complete disarmament (REVIEW OF AND SUPPLEMENT TO THE COMPREHENSIVE STUDY OF THE QUESTION OF NUCLEAR-WEAPON-FREE ZONES IN ALL ITS ASPECTS), G.A. Res. 37/99 F, 37 U.N. GAOR Supp. (No. 51) at 79, U.N. Doc. A/37/51 (1982) (141 in favor - 1 opposed - 2 abstentions).

Review and implementation of the Concluding Document of the Twelfth Special Session of the General Assembly (FREEZE ON NUCLEAR WEAPONS), G.A. Res. 37/100 A, 37 U.N. GAOR Supp. (No. 51) at 82, U.N. Doc. A/37/51 (1982) (122 in favor - 16 opposed - 6 abstentions).

Review and implementation of the Concluding Document of the Twelfth Special Session of the General Assembly (NUCLEAR-ARMS FREEZE), G.A. Res. 37/100 B, 37 U.N. GAOR Supp. (No. 51) at 83, U.N. Doc. A/37/51 (1982) (119 in favor - 17 opposed - 5 abstentions).

Review and implementation of the Concluding Document of the Twelfth Special Session of the General Assembly (CONVENTION ON THE PROHIBITION OF THE USE OF NUCLEAR WEAPONS), G.A. Res. 37/100 C, 37 U.N. GAOR Supp. (No. 51) at 83, U.N. Doc. A/37/51 (1982) (117 in favor - 17 opposed - 8 abstentions).

Conclusion of effective international arrangements to assure non-nuclear-weapon States against the use or threat of use of nuclear weapons, G.A. Res. 38/68, 38 U.N. GAOR Supp. (No. 47) at 59, U.N. Doc. A/38/47 (1983) (141 in favor - none opposed - 6 abstentions).

Review and implementation of the Concluding Document at the Twelfth Special Session of the General Assembly (FREEZE ON NUCLEAR WEAPONS), G.A. Res. 38/73 B, 38 U.N. GAOR Supp. (No. 47) at 64, U.N. Doc. A/38/47 (1983) (124 in favor - 15 opposed - 7 abstentions).

Review and implementation of the Concluding Document at the Twelfth Special Session of the General Assembly (CONVENTION ON THE PROHIBITION OF THE USE OF NUCLEAR WEAPONS), G.A. Res. 38/73 G, 38 U.N. GAOR Supp. (No. 47) at 67, U.N. Doc. A/38/47 (1983) (126 in favor - 17 opposed - 6 abstentions).

Condemnation of nuclear war, G.A. Res. 38/75, 38 U.N. GAOR Supp. (No. 47) at 69, U.N. Doc. A/38/47 (1983) (95 in favor - 19 opposed - 30 abstentions).

Review of the implementation of the recommendations and decisions adopted by the General Assembly at its tenth special session (NON-USE OF NUCLEAR WEAPONS AND PREVENTION OF NUCLEAR WAR), G.A. Res. 38/183 B, 38 U.N. GAOR Supp. (No. 47) at 73, U.N. Doc. A/38/47 (1983) (110 in favor - 19 opposed - 15 abstentions).

Review of the implementation of the recommendations and decisions adopted by the General Assembly at its tenth special session (NUCLEAR WEAPONS IN ALL ASPECTS), G.A. Res. 38/183 D, 38 U.N. GAOR Supp. (No. 47) at 73, U.N. Doc. A/38/47 (1983) (108 in favor - 19 opposed - 16 abstentions).

Review of the implementation of the recommendations and decisions adopted by the General Assembly at its tenth special session (IMPLEMENTATION OF THE RECOMMENDATIONS AND DECISIONS OF THE TENTH SPECIAL SESSION), G.A. Res. 38/183 M, 38 U.N. GAOR Supp. (No. 47) at 79, U.N. Doc. A/38/47 (1983) (133 in favor - 1 opposed - 14 abstentions).

Review and implementation of the Concluding Document of the Twelfth Special Session of the General Assembly (FREEZE ON NUCLEAR WEAPONS), G.A. Res. 39/63 G, 39 U.N. GAOR Supp. (No. 51) at 70, U.N. Doc. A/39/51 (1984) (127 in favor - 11 opposed - 11 abstentions).

Review and implementation of the Concluding Document of the Twelfth Special Session of the General Assembly (CONVENTION ON THE PROHIBITION OF THE USE OF NUCLEAR WEAPONS), G.A. Res. 39/63 H, 39 U.N. GAOR Supp. (No. 51) at 70, U.N. Doc. A/39/51 (1984) (128 in favor - 17 opposed - 5 abstentions).

Review of the implementation of the recommendations and decisions adopted by the General Assembly at its tenth special session (NUCLEAR WEAPONS IN ALL ASPECTS), G.A. Res. 39/148 C, 39 U.N. GAOR Supp. (No. 51) at 77, U.N. Doc. A/39/51 (1984) (102 in favor - 19 opposed - 13 abstentions).

Review of the implementation of the recommendations and decisions adopted by the General Assembly at its tenth special session (NON-USE OF NUCLEAR WEAPONS AND PREVENTION OF NUCLEAR WAR), G.A. Res. 39/148 D, 39 U.N. GAOR Supp. (No. 51) at 78, U.N. Doc. A/39/51 (1984) (101 in favor - 19 opposed - 17 abstentions).

Review of the implementation of the recommendations and decisions adopted by the General Assembly at its tenth special session (CESSATION OF THE NUCLEAR-ARMS RACE AND NUCLEAR DISARMAMENT), G.A. Res. 39/148 K, 39 U.N. GAOR Supp. (No. 51) at 83, U.N. Doc. A/39/51 (1984) (124 in favor - 13 opposed - 9 abstentions).

General and complete disarmament (NUCLEAR-WEAPON FREEZE), G.A. Res. 39/151 D, 39 U.N. GAOR Supp. (No. 51) at 91, U.N. Doc. A/39/51 (1984) (104 in favor - 18 opposed - 8 abstentions).

Conclusion of effective international arrangements to assure non-nuclear-weapon States against the use or threat of use of nuclear weapons, G.A. Res. 40/86, 40 U.N. GAOR Supp. (No. 53) at 71, U.N. Doc. A/40/53 (1985) (142 in favor - none opposed - 6 abstentions).

Bilateral nuclear-arms negotiations, G.A. Res. 40/18, 40 U.N. GAOR

Supp. (No. 53) at 65, U.N. Doc. A/40/53 (1985) (76 in favor - none opposed - 12 abstentions).

Review of the implementation of the recommendations and decisions adopted by the General Assembly at its tenth special session (NON-USE OF NUCLEAR WEAPONS AND PREVENTION OF NUCLEAR WAR), G.A. Res. 40/152 A, 40 U.N. GAOR Supp. (No. 53) at 92, U.N. Doc. A/40/53 (1985) (123 in favor - 19 opposed - 7 abstentions).

Review of the implementation of the recommendations and decisions adopted by the General Assembly at its tenth special session (BILATERAL NUCLEAR-ARMS AND SPACE-ARMS NEGOTIATIONS), G.A. Res. 40/152 B, 40 U.N. GAOR Supp. (No. 53) at 93, U.N. Doc. A/40/53 (1985) (107 in favor - none opposed - 40 abstentions).

Review of the implementation of the recommendations and decisions adopted by the General Assembly at its tenth special session (NUCLEAR WEAPONS IN ALL ASPECTS), G.A. Res. 40/152 C, 40 U.N. GAOR Supp. (No. 53) at 93, U.N. Doc. A/40/53 (1985) (117 in favor - 19 opposed - 11 abstentions).

Review of the implementation of the recommendations and decisions adopted by the General Assembly at its tenth special session (CESSATION OF THE NUCLEAR ARMS RACE AND NUCLEAR DISARMAMENT), G.A. Res. 40/152 P, 40 U.N. GAOR Supp. (No. 53) at 102, U.N. Doc. A/40/53 (1985) (131 in favor - 16 opposed - 6 abstentions).

Conclusion of effective international arrangements to assure non-nuclear-weapon States against the use or threat of use of nuclear weapons, G.A. Res. 41/52, 41 U.N. GAOR Supp. (No. 53) at 67, U.N. Doc. A/41/53 (1986) (149 in favor - none opposed - 4 abstentions).

General and complete disarmament (NUCLEAR DISARMAMENT), G.A. Res. 41/59 F, 41 U.N. GAOR Supp. (No. 53) at --, U.N. Doc. A/41/53 (1986) (Adopted without a vote).

G.A. Res. 41/86 F, 41 U.N. GAOR Supp. (No. 53) at --, U.N. Doc. A/41/53 (1986) (130 in favor - 15 opposed - 5 abstentions).

Conclusion of effective international arrangements to assure non-nuclear-weapon States against the use or threat of use of nuclear weapons, G.A. Res. 42/32, 42 U.N. GAOR Supp. (No. 49) at 66, U.N. Doc. A/42/49 (1987) (151 in favor - none opposed - 3 abstentions).

General and complete disarmament (NUCLEAR DISARMAMENT), G.A. Res. 42/38 H, 42 U.N. GAOR Supp. (No. 49) at 77, U.N. Doc. A/42/49 (1987) (Adopted without a vote).

Conclusion of effective international arrangements on the strengthening of the security of non-nuclear-weapon States against the use or threat of use of nuclear weapons, G.A. Res. 43/68, 43 U.N. GAOR Supp. (No. 49) at 69, U.N. Doc. A/43/49 (1988) (117 in

15 June 1995

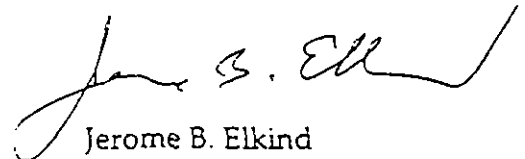
Registrar  
International Court of Justice  
Peace Palace  
2517 KJ The Hague  
The Netherlands

Dear Registrar,

Enclosed please find two Responses to Submissions of Other States by the Republic of Nauru in the case concerning *The Legality of the Use of Nuclear Weapons by States in Armed Conflict* and one Memorial in the case concerning the *Legality of the Use and Threat of Use of Nuclear Weapons*.

I understand that the Court has set the date of 30 October as the date for the beginning of oral hearings in the two cases. I would like permission to use a number of witnesses. In the case concerning *The Legality of the Use of Nuclear Weapons by a State in Armed Conflict* I would like to put on the stand a Dr. Frank Barnaby who is a nuclear physicist of repute. I would also like to put on the stand the Mayors of Hiroshima and Nagasaki. In the case concerning the *Legality of the Use and Threat of Use of Nuclear Weapons* I would like to place on the stand Ms. Hilda Lini, former Minister of Health of Vanuatu, Ms. Ligon Ekrilang who has experienced the effects of U. S. nuclear tests during Operation Bravo or some other woman from the Pacific who has experienced those effects and Ms. Claudia Peterson who has experienced the effects of nuclear tests in the United States.

Sincerely,



Jerome B. Elkind

# REPUBLIC OF NAURU RESPONSE TO SUBMISSIONS OF OTHER STATES

Very few of the submissions presented by States in the case concerning the *Use of Nuclear Weapons by a State in Armed Conflict* address the legal arguments that we have offered to show that the use of nuclear weapons is unlawful but the submissions make other points. One point made about the legality of the use of nuclear weapons is that the issue is abstract and theoretical. It is difficult to see how the question can be considered abstract. It is really quite simple. The General Assembly has asked the question "is the use or threat of use of nuclear weapons in any circumstances unlawful"? The World Health Assembly has asked "is the use of nuclear weapons by a State in armed conflict unlawful"? Even assuming that the question is abstract, in the Reply of the Court to the Request for an Advisory Opinion in the *Status of Eastern Carelia* Case,<sup>1</sup> the Permanent Court of International Justice said:

The question put to the Court is not one of abstract law, but concerns directly the main point of the controversy between Finland and Russia,....

As a result the Court refused to give an advisory opinion in that case. Clearly if the Court refused to give an advisory opinion because the question was not sufficiently abstract, then it is appropriate to give advisory opinions when an abstract question of law is asked. Perhaps one reason for feeling that the question is abstract is the difficulty of determining who has standing to request the opinion. But this is a request for an advisory opinion and questions of standing are irrelevant. Perhaps the argument can best be

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<sup>1</sup> [[1923] P.C.I.J. Rep. Ser. B, No.5, p.7 at pp. 28-29.

understood by looking at the written statement of the Government of Finland:<sup>2</sup>

...the legality of the use of nuclear weapons can only be determined in respect of the circumstances of the case,...it follows that in the absence of a concrete factual situation, the court would itself be required to entertain various hypotheses about situations in which nuclear arms might conceivably be used. That is to say, the Court would be required to speculate with a very large number of potential situations, including, for example, situations of first use and counter-use, various types of limited use and practices of targeting, the Court would be required to analyze different types of nuclear weapons and entertain hypotheses about the factual consequences of their use. All this would require analyzing extremely complex and controversial pieces of technical, strategic and scientific information.

It should be pointed out that the difficulty foreseen by the Government of Finland can arise only if the Court decides that not all uses of nuclear weapons are unlawful. We submit that *all* uses and threats of use are unlawful and that the Court is not required to distinguish among them.

Secondly, the nuclear weapons owning States imagine that the majority of States have consented to the legality of the use of nuclear weapons because of their participation in such treaties as the Non-Proliferation Treaty<sup>3</sup>. It should be pointed out that the Non-Proliferation Treaty is not really relevant to this case. The Non-Proliferation Treaty appears to validate the possession of nuclear weapons. Even though we believe that the possession of nuclear weapons is a relevant issue, it is not a relevant issue in this case. This case is about the legality of the *use* of such weapons. Secondly it is wrong to imagine that the majority of states support the legality of the use and threat of use of

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<sup>2</sup> Page 4.

<sup>3</sup> 729 U.N.T.S. 161 (1968).



nuclear weapons. States are aware that the existence of nuclear weapons is a fact of life. Given that they are a fact of life, whether they are lawful or not, it is essential that their use, manufacture, possession and testing be regulated and controlled. Therefore States have participated in negotiations and agreements to regulate and control their use, manufacture, possession and testing. But the position of most States can be gleaned by the fact that a majority of States have voted in the United Nations General Assembly and the World Health Assembly to request these advisory opinions and a review of the submissions made to this Court in this case will show that the majority of States oppose the legality of the use of nuclear weapons.

A number of States have expressed a fear that a decision in this case will somehow hinder negotiations on the extension of the Non-Proliferation Treaty, on disarmament and on a test ban treaty. It is difficult to see how negotiations will be hindered if this Court decides that the use and threat of use of nuclear weapons is unlawful. Negotiations can only be enhanced if they are carried out in the knowledge that the use and threat of use of these weapons is unlawful. It is a short logical step from a finding that the use and threat of use of these weapons is unlawful to a belief that possession, manufacture and testing of these weapons is therefore pointless.

The only argument that we made that has been addressed is the argument that the use of nuclear weapons contravenes customary and treaty prohibitions against the use of poisonous weapons. The argument seems to be that nuclear weapons are not specifically poisonous weapons. They kill by other means as well. In the view of the United States: <sup>4</sup>

This prohibition was established with specific reference to projectiles that carry poison into the body of the victim. It was

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<sup>4</sup> Written Statement of the Government of the United States of America, p. 27.

not intended to apply, and has not been applied, to weapons that are designed to injure or cause destruction by other means, even though they may also create toxic byproducts. For example, the prohibition on poison weapons does not prohibit conventional explosives or incendiaries, even though they may produce dangerous fumes. By the same token, it does not prohibit nuclear weapons, which are designed to injure or cause destruction by means other than poisoning of the victim, even though nuclear explosions may also create toxic radioactive byproducts.

The fundamental flaw in this reasoning is that it equates radiation with the purely incidental toxic fumes of incendiaries and explosives. Nuclear weapons kill in three ways, blast, heat and radiation<sup>5</sup>. Of these three ways, radiation is the most persistent killer. Victims of blast and heat are usually killed in the first seconds of the explosion. Victims of radiation may take days, months, years, even decades to die. The radiation effects of nuclear weapons which consist of the transmission of gamma rays, neutrons, beta particles and some alpha particles, are very similar to the effects produced by chemical weapons as opposed to conventional high explosive weapons. In 1979-80, thirty-five years after the bombing, 2,279 names were added to the list of deaths *officially* attributed to the delayed radiation effects on victims of the "little boy" bomb that was dropped on Hiroshima. In 1983 the list of deaths from radiation in Hiroshima totalled 97,964.

A study prepared by the United States Department of Defense and the United States Department of Energy had this to say about nuclear weapons:

...there are several basic differences between nuclear and high explosive weapons. ... Fourth, the nuclear explosion is accompanied by highly penetrating and

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<sup>5</sup> Rumble, *The Politics of Nuclear Defence* (1985) pp. 130-7; *Effects of Nuclear Weapons on Health and Health Services* (World Health Organisation 2d ed. 1987) pp. 9, 15; Tone (ed.), *The Effects of Nuclear Weapons* (3d ed. Prepared and published by the United States Defence Department 1977).

harmful invisible rays called the "initial nuclear radiation." Finally, the substances remaining after a nuclear explosion are radioactive, emitting similar radiation over an extended period of time. This is known as the "residual nuclear radiation" or "residual radioactivity".

Figure 1.02 is labelled "Effects of a nuclear explosion". The effects listed are "blast and shock", "thermal radiation", "initial nuclear radiation" and "residual nuclear radiation".<sup>6</sup>

Concerning the harmful effects of radiation, the book says :<sup>7</sup>

The harmful effects of nuclear radiation appear to be caused by the ionization (and excitation) produced in the cells composing living tissue. As a result of ionization, some of the constituents, which are essential to the normal functioning of the cells, are altered or destroyed. In addition, the products formed *may act as poisons*.. Among the observed consequences of the action of ionizing radiations on cells are breaking of the chromosomes, swelling of the nucleus and of the entire cell, increase in viscosity of the cell fluid, increased permeability of the cell membrane, and destruction of cells. (Emphasis added)

In total the book devotes 136 pages to "initial nuclear radiation" and "residual radiation and fallout", evidence that at least two Departments of the United States Government consider the radiation effects of nuclear explosions to be more than incidental effects.

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<sup>6</sup> Glasstone and Dolan (eds.), *The Effects of Nuclear Weapons* (3d ed. United States Department of Defense and the United States Department of Energy 1977) pp.1-3.

<sup>7</sup> Ibid. at p. 575.

The fact is that most nuclear weapons are deployed in part to utilise the destructive effects of radiation and fallout.<sup>8</sup> The neutron bomb is a weapon specifically designed to kill by radiation so that human beings are killed while buildings and other structures are left standing.

There are five main arguments supporting the legality of the use of nuclear weapons. The submissions do not make all those arguments. But they may be made subsequently. The arguments are:

(a) There is no specific treaty making the use of nuclear weapons unlawful.

(b) Nuclear weapons are justified by military necessity.

(c) Nuclear weapons may lawfully be used in retaliation.

(d) Nuclear weapons may lawfully be used in self-defence.

(e) It is possible to invent a scenario where the use of nuclear weapons would be lawful.

We will consider these arguments one at a time.

**(a) There is no treaty specifically banning the use of nuclear weapons**

The answer to the argument that there is no specific treaty banning the use of nuclear weapons and that therefore they must be legal is found in the

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<sup>8</sup> Brownlie, "Some Legal Aspects of the Use of Nuclear Weapons" (1965) 14 ICLQ 437, 445.

Martens clause of the Preamble to the IVth Hague Convention of 1907 Concerning the Laws and Customs of War on Land. Martens was a leading member of the Russian delegation to the Hague Peace conference. The clause says:

Until a more suitable code of the laws of war can be drawn up, the high contracting parties deem it expedient to declare that, in cases not covered by the rules adopted by them, the inhabitants and the belligerents remain under the protection and governance of the general principles of the law of nations, derived from the usages established among civilised peoples, from the laws of humanity, and from the dictates of the public conscience.

This tells us that a complete answer to the legality of nuclear weapons cannot be had by a study of treaty law alone. A specific treaty rule is not required. If a weapon or its use violates the dictates of the public conscience and the laws of humanity, then it is certainly a violation of the Hague Convention.

We might say that the United Nations General Assembly Resolution is redundant when it asks the Court to consider whether the use and threat to use nuclear weapons is unlawful. Threatening is an active and destructive use of nuclear weapons. If I hold a gun to someone's head and say "if you don't give me all your money I will blow your brains out", is there any doubt that I am using that gun even if I do not actually pull the trigger?

There is a more sophisticated version of the argument that there is no specific treaty banning nuclear weapons and that version is that there is neither a specific treaty nor a specific rule of customary international law. International law recognises that legal effect stems from more than treaties. Article 38 (1) of the Statute of the International Court of Justice is frequently

recognised as an authoritative statement of the sources of international law. It says:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it shall apply:

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

The Article contains three specific sources of law as outlined in (a)-(c). It also mentions in (d) two "subsidiary" law determining agencies. The three prime sources of law are treaty, custom and general principles of law. Therefore if we can say that there are rules emanating from any of those sources which outlaw nuclear weapons, then we can say that the use of nuclear weapons is unlawful.

Let us look at the first source, treaties. In the first place we do not need a specific treaty outlawing nuclear weapons to make these weapons unlawful. If we find that they violate the terms of any existing treaty, then we may say that they are unlawful under that treaty. At the outset I think it is necessary to reject the notion that nuclear weapons are banned by implication. If these weapons are the type of weapons that do what the treaties do not allow weapons to do, then we must say that the weapons are outlawed by the treaty. If the use of such weapons amounts to conduct that is prohibited by a

treaty then we must say that the use of those weapons directly contravenes the treaty. In the course of our argument we have cited many existing international treaties that outlaw the use of certain weapons in warfare. If nuclear weapons are the sort of weapon that offends the terms of the treaty then we may say that nuclear weapons are outlawed by that treaty. In the first place the use of nuclear weapons violates the United Nations Charter. It violates the International Covenant on Civil and Political Rights and it violates the International Covenant on Economic, Social and Cultural Rights. Nuclear weapons are also offensive to the Declaration of St. Petersburg of 1868, The Hague Declaration on Asphyxiating Gases of July 29, 1899, the Geneva Gas Protocol of 1925,<sup>9</sup> the Hague Regulations on Land Warfare of 1907,<sup>10</sup> the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949 (the First Geneva convention), the Geneva Convention for the Amelioration of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea of August 12, 1940 (the second Geneva Convention), the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (the third Geneva Convention), the Geneva Convention Relative to the Protection of Civilian Persons in Times of War of August 12, 1949 (the fourth Geneva Convention) and Geneva Protocol I (1977).<sup>11</sup> Arguably the use of nuclear weapons is criminal. Article 6 of the Agreement for the Prosecution and

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<sup>9</sup> Cmnd. 3604 (1930); 94 LNTS 65 (1927),

<sup>10</sup> *Supra* note 11.

<sup>11</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the protection of Victims of International Armed Conflicts adopted at Geneva, June 8, 1977, U.N. Doc. A/32/144 August 12, 1977; 16 ILM 1391 (1977); Misc. No. 19;(Cmnd. 6927) p.23.

Punishment of the Major War Criminals of the European Axis <sup>12</sup> (The Nuremberg Charter) provides:

...The following acts, or any of them, are crimes coming within the jurisdiction of the [Nuremberg] Tribunal for which there shall be individual responsibility:

(b) War crimes. Namely, violation of the laws and customs of war. Such violations shall include, but not be limited to, murder, ill treatment...wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

(c) Crimes against humanity. Namely murder, extermination...and other inhumane acts committed against any civilian population...whether or not in violation of the domestic law of the country where perpetrated.

On May 25, 1993, the United Nations Security Council established an international tribunal to punish persons responsible for violation of international law in the former Yugoslavia. Article 3 establishes jurisdiction over the violation of the "laws and customs of war" which the article describes as including "but not limited to":

(a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;

(b) wanton destruction of cities, towns or villages or devastation not justified by military necessity;

(c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings or buildings;

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Nuclear weapons are poisonous and they are capable of causing unnecessary suffering. They are capable of destroying cities, towns and

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<sup>12</sup> Signed August 8, 1945. 39 A.J.I.L. Supp. 259 (1945).



villages including undefended towns, villages, dwellings or buildings. So we can see that the use of nuclear weapons violates many principles of treaty law and may be not only a war crime but also a crime against humanity.

As to customary international law, again we may say that there is no specific rule of customary law banning nuclear weapons as such. But this does not mean that nuclear weapons do not offend principles of customary international law. We have already demonstrated the inconsistency of the use of nuclear weapons with the Universal Declaration of Human Rights. If we accept the idea that the Universal Declaration has found its way into the corpus of customary international law then here is one important set of customs that the use of nuclear weapons violates. But we have shown that there are other rules of customary law which the use of nuclear weapons offends. Clearly it is a violation of customary international law to use poisons or other analogous substances. Thus even where a State is not a party to the Geneva Gas Protocol it is nonetheless bound under customary international law to refrain from using poisonous weapons and this would seem to include weapons that emit radiation. It is also a violation of customary international law to use weapons that cause unnecessary suffering and to use weapons that cause severe damage to the environment. Furthermore it is probably a violation of customary international law to use weapons that cause injury to neutral territory.

Secondly, although Resolutions of the United Nations General Assembly are not binding, as such, upon the Members of the United Nations, some Resolutions, if they are passed with substantial majorities may be taken to reflect the views of States as to what the law is; in other words they may be taken as reflections of the *opinio juris* of States. Hence they can assist us in ascertaining the nature of customary international law. There are quite a few

Resolutions of the General Assembly which hold that the use of nuclear weapons is unlawful. One example is G.A. Res. 2936 XXVIII, Nov. 29, 1970; G.A. Res. 1653 (XVI), 16 GAOR Supp. (No. 17) (1961) which is also called the Declaration on the Prohibition of the Use of Nuclear and Thermonuclear Weapons of November 24, 1961. See also Resolution on the Non-use of Force in International Relations and Permanent Prohibition of the Use of Nuclear Weapons, G.A. Res. 2936, U.N. GAOR 20th Sess., Supp. No. 31, at 5, U.N. Doc. A/8730 (1972); Resolution on the Non-use of Nuclear Weapons and the Prevention of Nuclear Weapons, G.A. Res. 33/71B, 33 U.N. GAOR, Supp. No. 45, at 48, U.N. Doc. A/33/45 (1978); Resolution on the Non-use of Nuclear Weapons and Prevention of Nuclear War, G.A. Res. 34/83G, 34 U.N. GAOR, Supp. No. 46, at 56, U.N. Doc. A/34/46 (1979); Resolution on the Non-use of Nuclear Weapons and Prevention of Nuclear War, G.A. Res. 35/152D, 35 U.N. GAOR, Supp. No. 48, at 69, U.N. Doc. A/35/48 (1980); Resolution on the Non-use of Nuclear Weapons and Prevention of Nuclear War, G.A. Res. 36/921, 36 U.N. GAOR, Supp. No. 51, at 64, U.N. Doc. A/36/51 (1981); Resolution 37/100C Convention on the Prohibition of the Use of Nuclear Weapons, U.N. GAOR Supp. No. 51 at 83 (1982); Resolution 38/75, Condemnation of Nuclear War, U.N. GAOR, Supp. No. 47 at 69 (1983); Resolution 39/63H, Convention on the Prohibition of the Use of Nuclear Weapons, U.N. GAOR, Supp. 57 at 70 (1984); Resolution 40/51F, Convention on the Prohibition of the Use of Nuclear Weapons, U.N. GAOR, 40th Sess., Supp. 53 at 90 (1985); Resolution 41/60F, Convention on the Prohibition of the Use of Nuclear Weapons, U.N. GAOR, 41st Sess., Supp. 53 at 85 (1986); Resolution 42/39C, Convention on the Prohibition of the Use of Nuclear Weapons, U.N. GAOR, 42nd Sess., Supp. No. 49 at 81 (1987); Resolution 43/76E, Convention on the Prohibition of the Use of Nuclear Weapons, U.N. GAOR, 43rd Sess., Supp. No. 49 at 90 (1988); Resolution 44/117C, Convention of the Prohibition of the Use of Nuclear Weapons, U.N. GAOR 44th Sess., Supp. No. 49 at 80 (1989); Resolution

45/59B, Convention on the Prohibition of the Use of Nuclear Weapons, U.N. GAOR 45th Sess., Supp. No. 49 at 71 (1990); Resolution 46/37D, Convention on the Prohibition of the Use of Nuclear Weapons (1991), U.N. Doc. GA/8307 at 217; Resolution 47/53C, Convention on the Prohibition of the Use of Nuclear Weapons (1992) U.N. Doc. GA/8470 at 112 (1993); Resolution 48/76B, Convention on the prohibition of the Use of Nuclear Weapons (1993), U.N. Doc. GA/8637 at 124 (1994). See Appendix B of Memorial 1.

The Martens clause seems to require the application of general principles of law. It speaks of the laws of humanity and the dictates of public conscience. General principles of law recognised by civilised nations would therefore seem to embody the principles of humanity and the public conscience. Inhumane weapons and weapons which offend the public conscience are therefore prohibited.

Now we come to the two law-determining agencies. As for judicial decisions, there are certainly no international decisions yet that are relevant to our discussion. There is one important municipal case that requires discussion. That case is the *Shimoda* case. The case was begun in May of 1955 when five individuals instituted legal action against the Japanese Government to recover damages for injuries allegedly sustained as a consequence of the atomic bombings of Hiroshima and Nagasaki. On December 7, 1963 the District Court of Tokyo delivered a lengthy decision.<sup>13</sup> The case is important both for its third party decision-making genre, and for the fact that it appears to be the only attempt by any court of law anywhere to wrestle with the legal implications of nuclear warfare. The Court accepted the plaintiffs' argument that the dropping of atomic bombs on Hiroshima and Nagasaki constituted a

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<sup>13</sup> The decision has been translated into English and printed in the Japanese annual; of International Law for 1964. It is digested in 58 A.J.I.L. 1016 (1964).

violation of international law on the ground that the dropping of said bombs not only constituted an indiscriminate bombardment of undefended cities far beyond the requirements of destroying military objectives within those cities, but also violated the general principle of international law (which it derived from the specific treaty limitations on the use of poisonous gas) that weapons which give rise to "unnecessary ailments" to enemy personnel must not be used. However the Court recognised that individuals have no standing under international law. Consequently, there was no liability to the plaintiffs on the part of the Government of Japan.

With regard to publicists-There are many publicists who would argue that the use of nuclear weapons is unlawful for the reasons cited above and in Nauru's Memorials nos. 1 and 3. The attitude of publicists is summarised by Meyrowitz in his article "The Opinions of Legal Scholars on the Legal Status of Nuclear Weapons" <sup>14</sup> Many legal scholars take the view that the use of nuclear weapons is unlawful. A fairly complete list of them appears in Memorial 1 at p. 66. Others are seduced by the argument that nuclear weapons must be lawful in the absence of any treaty banning them specifically. We have already demonstrated why we believe this argument to be fallacious.

**(b) Nuclear weapons are justified by military necessity**

When we speak of military necessity we must ask two questions. The first question is what is military necessity? The second question is, what is justified by it? The object of war is to hurt the enemy, to kill as many enemy soldiers as possible and to convince the enemy that it is not worthwhile to continue their campaign. But international humanitarian law tells us that the

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<sup>14</sup> 24 Stanford J.I.L. 111 (1987-88).

means of hurting the enemy are not unrestricted. Article 22 of the Hague Rules says:

The right of belligerents to adopt means of injuring the enemy is not unlimited.

In a trial before a United States Military Tribunal called the *Hostages Trial*, the Tribunal said:

Military necessity or expediency do not justify a violation of positive rules. International Law is prohibitive law. <sup>15</sup>

The right to adopt measures to injure the enemy is subject to very definite limitations and these limitations are spelled out by the principles of international humanitarian law. Said a former President of the International Court of Justice:

...it is submitted that if the mere fact of defeat were accepted as a legal justification for ignoring the rules of warfare, the entire *raison d'être* of the laws of war would disappear, since the object of every war is the achievement of victory or success. Thus, if, for the attainment of that objective, no rules whether customary or conventional can be accepted, all wars would degenerate into wild savagery and cruelty and the society of nations would revert to the law of the jungle. Such a concept of the doctrine of success would wipe out the achievements of humanity as enshrined in the Hague and Geneva Conventions and usher in the worst experiences of the Middle Ages. <sup>16</sup>

One thing which the military is not permitted to do is to attempt to convince the enemy to surrender by terrorising the civilian population. Article 22 of the Hague rules provides that:

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<sup>15</sup> *Law Reports of Trials of War Criminals*, vol. 8, p. 34 at p. 66.

<sup>16</sup> Singh, N., *Nuclear Weapons and International Law* (1959) p. 82.

Aerial bombardment for the purpose of terrorising the civilian population, of destroying or damaging private property not of a military character, or of injuring non-combatants is prohibited.

Strategic nuclear weapons are instruments of terror against the civilian population. So we can say that military necessity does not permit this use of nuclear weapons.

The 1863 Lieber Code <sup>17</sup> spells out the restrictions on the principle of military necessity:

Article 14. Military necessity, as understood by modern civilized nations, consists of the necessity of those measures which are indispensable for securing the ends of war, and which are lawful according to the modern law and usages of war.

Article 15. Military necessity admits of all direct destruction of life or limb of armed enemies, and other persons whose destruction is incidentally unavoidable.

Article 16. Military necessity does not admit of cruelty—that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to exact confessions. It does not admit of the use of poison in any way, <sup>18</sup> nor of the wanton devastation of a district...and, in general military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult.

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<sup>17</sup> For the text see Friedman, L., THE LAW OF WAR: A DOCUMENTARY HISTORY (1971) p.158.

<sup>18</sup> Note that this prohibition predates the 1925 Geneva Gas Protocol.

Military necessity consists in all measures immediately indispensable and proportionate to military objectives when taken on the decision of a responsible commander.

A weapon, any weapon must be justified according to four basic limitations regarding the purpose, nature and scope of permissible violence. The first limitation concerns the *purpose* of permissible violence. Inflicting injury on the enemy as an end in itself is not permitted. Violence must have a legitimate purpose if it is to be described as violence having "military necessity". The second limitation is concerned with the *nature* of permissible violence, and is particularly though not exclusively addressed to the weapons of warfare. Use of weapons which cause cruel suffering or unavoidable death may or may not be helpful to the party who would use them for the achievement of an otherwise legitimate military end. Their use is, however, forbidden under any circumstances. The third limitation relates to the scope of permissible violence. The rule here is that of proportionality. Only such amount of violence is permissible as is reasonably proportionate to the legitimate military objective sought to be achieved in the given military operation. The fourth limitation concerns the *objectives* of permissible violence. This limitation is particularly though not exclusively concerned with the protection of civilian lives and property.

The measures taken must not be contrary to the laws of war. There are certain weapons and conduct which are prohibited even though they may lead to military advantage. Among the weapons which are prohibited are those which cause unnecessary or aggravated suffering, those which are poisonous and those which are harmful to the environment. Resort to such weapons is not permitted by military necessity. Prohibited conduct includes the use of such weapons. It has been the thrust of our argument that nuclear

weapons cause unnecessary and aggravated suffering, create radiation which can be seen to have poisonous effects and are devastating to the environment. Therefore the use of such weapons cannot be justified by military necessity.

**(c) Nuclear weapons may lawfully be used in retaliation**

There is a heavy emotional content to this argument. It is the argument that was most strongly used to justify the use of atomic weapons against Japan. Because the Japanese military was contemptuous of the laws of war, the argument goes, the use of the atomic bomb was a justified punishment. A string of Japanese atrocities, including the rape of Nanking, the treatment of allied prisoners of war and even the treachery of the attack on Pearl Harbour are cited as justification for the use of the atomic bomb. But the fact is that hundreds of thousands of people; men, women and children were killed by the atomic bomb and most of the victims had nothing to do with the treacherous and brutal actions of their government. Why did they deserve to die because of the actions of someone else? The fact is that the Emperor Hirohito and the Prime Minister Tojo were not even in Hiroshima and Nagasaki when the Atomic bomb was dropped. They survived. Perhaps their punishment was the defeat of Japan. But they did not suffer the gruesome injuries and deaths that thousands of ordinary, innocent people suffered.

Secondly, it is a fundamental principle of international humanitarian law that a violation does not justify a counterviolation. Article 46 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949 ( the First Geneva convention) says:

**Reprisals against the wounded, sick, personnel, buildings**



or equipment protected by the Convention are prohibited.

The same prohibition of reprisals appears in Article 47 of the Geneva Convention for the Amelioration of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea of August 12, 1949 (the second Geneva Convention), Article 13 and Article 33 of the Geneva Convention Relative to the Protection of Civilian Persons in Times of War of August 12, 1949 (the fourth Geneva Convention). The prohibition against reprisals also appears in Article 20 of Protocol I to the Geneva Conventions. Articles 51-56 of that Protocol also have provisions prohibiting reprisals. So it is clear that retaliation or reprisal with nuclear weapons is prohibited by the laws of war.

**(d) Nuclear weapons may lawfully be used in self-defence**

Article 51 of the United Nations Charter says:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations...

Given this approval of self-defence expressed in the Charter many States will attempt to claim that the use of nuclear weapons is lawful if they are used in self-defence. But a slightly more careful reading is required. It says "nothing in the present Charter". This means that the Charter prohibitions against the use of force do not apply where the Member is exercising the right of self-defence. It does not and cannot mean that no rules of international law shall apply. Defensive military action is subject to the laws of war to the same extent as offensive military action. None of the rules which we have cited in our submission make any exception for a 'defensive' use of nuclear weapons. Therefore where we have rules of international law that prohibit (a) the use of poisonous weapons or (b) weapons that cause unnecessary or aggravated

suffering or (c) harm the environment or (d) destroy medical facilities or (e) damage or pollute neutral territory or (f) cannot distinguish between civilian objects and military objectives, then their use is unlawful.

In fact it is hard to see how one might use nuclear weapons in self-defence. If one has been attacked with nuclear weapons, then the use of nuclear weapons against the attacker will do nothing to defend the attacked State. It has already been hit. Its cities have been devastated. There is no way for it to defend itself against a result which has already occurred. So its use of nuclear weapons in that situation will, of necessity, be retaliation and we have already shown why it is not lawful to use nuclear weapons in retaliation. One might argue that a State may threaten to use nuclear weapons in self-defence. But this is acceptable only if one accepts the validity of the deterrence theory of international affairs. There are serious flaws in deterrence theory.

**(e) It is possible to invent a scenario where the use of Nuclear Weapons would be Lawful**

Some state representatives will attempt to argue that nuclear weapons are lawful in certain circumstances. In attempting to so argue they will present scenarios in which the use of nuclear weapons are free of the legal defects which the use of nuclear weapons possess. On the general question of scenarios Ian Brownlie has commented <sup>19</sup> :

It is rather ridiculous to allow refined examples of putatively lawful use to dominate the legal regime [thus ignoring] the general context of conflict and the risk of escalation.

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<sup>19</sup> Brownlie, *supra* note 2 at 450.

Certainly, the risk of escalation must not be ignored, but as we will show, it is doubtful that any scenarios invented can meet the test of lawfulness.

It is submitted that, in any scenario designed to meet the criterion of lawfulness, six conditions would have to be met:

1. The nuclear weapons would have to be radiation free. We submit that there is no such thing as a nuclear weapon which is entirely radiation free. We venture to predict that all scenarios will talk about "substantially" radiation free nuclear weapons. But just a little probing will reveal that none of the so-called "clean" weapons are entirely free of radiation.

2. The nuclear weapons for which the status of legality is claimed should not cause unnecessary or aggravated suffering.

3. The nuclear weapons for which the status of legality is claimed should not be harmful to the environment.

4. The nuclear weapons for which the status of legality is claimed should not be likely to destroy medical facilities.

5. Nuclear weapons for which the status of legality is claimed should not damage or pollute neutral territory. (This was not dealt with in Nauru's submissions. But the point was made quite effectively in other submissions.)

5. The nuclear weapons for which the status of legality is claimed should be capable of distinguishing between military objectives and civilian objects.

6. At any rate it must be unlikely that conventional weapons could accomplish the desired military result.

The scenario most commonly invented is the use of low yield tactical nuclear weapons on a military base isolated in the desert. The scenario attempts to eliminate some of the illegal consequences of the use of nuclear weapons. By calling the weapons low-yield the argument theoretically eliminates the poison argument because the weapons would not contain as much radiation. It is my intention to call to the stand a nuclear scientist who will testify that there is no such thing as a completely clean nuclear weapon. So we can see that it is not possible to completely do away with radiation and the harmful effects of radiation.

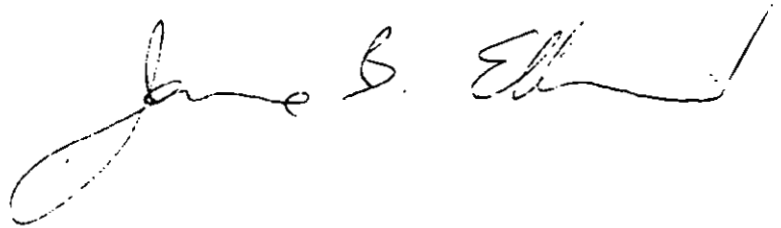
Another matter which this scenario is intended to deal with is the desirability of eliminating the failure to distinguish between civilian and military targets. This may be true. But even in this case.

1. A nuclear weapon would still cause unnecessary and aggravated suffering.
2. As I have shown it would still be poisonous.
3. It would still damage the environment, and
4. It would still destroy any medical facility that might exist on the base. So it would still be unlawful.

### **Conclusion**

We have shown that the use of nuclear weapons violates a number of important rules of international law. There may be no specific treaty barring the use of nuclear weapons but we have shown that these are weapons which

do things which many rules of treaty and customary law prohibit weapons from doing. We have also shown that international humanitarian law does not cease to have effect just to satisfy claims of military necessity. Furthermore the rules of international humanitarian law apply whatever the nature of the conflict. They apply when a State is acting in self-defence and when a State is acting in retaliation.

A handwritten signature in black ink, appearing to read "James B. Egan". The signature is written in a cursive style with a large, looping initial "J" and a long horizontal stroke extending to the right.