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Letter dated 16 June 1995 from the Legal Adviser to the Foreign and Commonwealth Office of the United Kingdom of Great Britain and Northern Ireland, together with Written Comments of the United Kingdom

Foreign &
Commonwealth
Office

London SW1A 2AH

From The Legal Adviser

16 June 1995

The Registrar
International Court of Justice
Peace Palace
The Hague
THE NETHERLANDS

Sir,

I have the honour to refer to my separate letter of today's date under cover of which was enclosed the written statement of the United Kingdom in response to the Court's Order of 1 February 1995 in connection with a request from the General Assembly of the United Nations for an Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons.

I have the honour to indicate that the said statement should also be taken, so far as relevant, as the response by the United Kingdom to the written statements submitted by other States in the separate proceedings on a request from the World Health Organisation for an Advisory Opinion on the Legality of the Use by a State of Nuclear Weapons in Armed Conflict. The United Kingdom is accordingly willing that the text of that statement be made available to all States which have submitted written statements in those proceedings.

I have the honour, however, to state that, having considered the written statements submitted by other States in those proceedings, the United Kingdom wishes to maintain in their entirety the conclusions in its own written statement, including (but not limited to) that the Request is not within the competence of the World Health Organisation.

Accept, Sir, the assurances of my highest consideration.

(Sir Franklin Berman)

International Court of Justice

Legality of the Threat or Use of Nuclear Weapons (Request for an Advisory Opinion by the United Nations General Assembly)

Statement of the Government of the United Kingdom

JUNE 1995

CONTENTS

I INTRODUCTION

1.1 The terms of the request made by the General Assembly of the United Nations in Resolution 49/75K, adopted on 15 December 1994, are as follows:

> *'The General Assembly ....*
>
> *Decides*, pursuant to Article 96, paragraph 1, of the Charter of the United Nations, to request the International Court of Justice urgently to render its advisory opinion on the following question:
>
> "Is the threat or use of nuclear weapons in any circumstance permitted under international law ?"'

1.2 This request, which overlaps to a large extent with one made in 1993 by the World Health Organization and still before the Court, is the result of a sustained campaign by a group of non-governmental organizations ('NGO's') which have long been active in promoting what they have termed 'The World Court Project', namely an attempt to obtain from the Court an advisory opinion to the effect that the use of nuclear weapons is unlawful in all circumstances.[1] To that end, these NGO's campaigned to obtain both the WHO and General Assembly requests and claim to have prepared the written statements submitted by a number of States in connection with the WHO request.

1.3 The United Kingdom submits that the present case is one in which the Court should exercise its discretion under Article 65, paragraph 1, of its Statute to decline to answer the question posed. That question is couched in vague, abstract terms and cannot be answered without reference to the numerous different combinations of circumstances in which the threat or use of nuclear weapons might be contemplated. The Court does not, and could not, have before it sufficient material to enable it to consider all the combinations of circumstances which might arise. Moreover, an answer to the question posed would not assist the General Assembly in the exercise of its functions under the Charter and might have a harmful effect on the work of the United Nations as a whole and on the different sets of negotiations which are taking place regarding disarmament and other aspects of the control of nuclear weapons. These issues are addressed in Part II of this Statement, which also examines the background to the present request and the progress of the disarmament negotiations.

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1 See *The World Court Project on Nuclear Weapons and International Law* (2nd edition, 1993).

1.4 If, however, the Court should decide to answer the question which has been put to it, the United Kingdom submits that that question does not admit of a simple answer in terms as abstract as those of the question itself. There is no treaty or other binding instrument which specifically prohibits the use of nuclear weapons in all circumstances. The legality of using nuclear weapons can therefore be determined only by reference to the circumstances in which that use occurs. In particular, it would be necessary to examine whether the State resorting to nuclear weapons was entitled to take action by way of individual or collective self-defence and whether the action thus taken met all the requirements of the right of self-defence. It would also be necessary to consider whether, in such circumstances, the use of a nuclear weapon was lawful under the laws of armed conflict. In Part III of this Statement the United Kingdom sets out the principles of law relevant to such an inquiry and again submits that the application of these principles is not an abstract matter but depends upon the factual circumstances of each case.

1.5 In view of the complexity of these questions, the United Kingdom reserves the right to make further submissions with regard to the request, should the Court decide to respond to it.

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II THE BACKGROUND TO THE REQUEST AND THE PROPRIETY OF RESPONSE

1 The Background to United Nations General Assembly Resolution 49/75K

2.1 The present section examines the background to the adoption by the General Assembly of Resolution 49/75K which contains the request for an advisory opinion from the Court.

2.2 In August 1987 an international conference of NGO's on nuclear weapons and international law was held in New York, sponsored by the Lawyers' Committee on Nuclear Policy (USA) and the Association of Soviet Lawyers. This conference decided to found a world-wide organization of lawyers opposed to nuclear weapons. This organization, the International Association of Lawyers against Nuclear Arms ('IALANA'), was founded in April 1988 at another meeting in Stockholm. In September 1989, at the Hague, the IALANA adopted its 'Hague Declaration on the Illegality of Nuclear Weapons'. It also appealed to all member States of the United Nations 'to take immediate steps towards obtaining a resolution by the United Nations General Assembly under Article 96 of the United Nations Charter, requesting the International Court of Justice to render an advisory opinion on the illegality of the use of nuclear weapons.' [2]

2.3 Subsequently, in January 1992, IALANA, with two other NGO's, the International Peace Bureau and International Physicians for the Prevention of Nuclear War, established the 'World Court Project'. In May 1992 the International Peace Bureau organized a meeting in Geneva to promulgate the project's ideas. The NGO's involved in the World Court Project lobbied States in order to persuade them to submit a draft resolution to the World Health Organization and the UN General Assembly requesting an advisory opinion on the illegality of the threat or use of nuclear weapons. On 14 May 1993, the World Health Assembly adopted resolution 46.40, which forms the subject of a separate request to the Court.

2.4 A meeting of the Non-Aligned Movement Co-ordinating Bureau in New York discussed in October 1993 tabling a draft resolution in the First Committee of the

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[2] *The World Court Project on Nuclear Weapons and International Law* (2nd edition, 1993), p. xiii and Appendix I.

General Assembly. The item had not been on the agenda of the Co-ordinating Bureau but was raised under 'Other Matters'.

2.5 At the 48th session of the United Nations General Assembly the representative of Indonesia introduced in the First Committee, at its 23rd meeting on 9 November, a draft resolution entitled 'Request for an Advisory Opinion from the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons.' [3] The draft resolution was stated to be introduced on behalf of the States members of the United Nations that are members of the movement of Non-Aligned Countries. The single operative paragraph of the draft resolution read:

> '*Decides*, pursuant to Article 96(1) of the Charter, to request the International Court of Justice to urgently render its advisory opinion on the following question, "Is the threat or use of nuclear weapons in any circumstance permitted under international law ?" '

2.6 However, at the 30th Meeting of the First Committee, on 19 November 1993, the sponsors announced that they had decided not to press for action on the draft resolution. The representative of Indonesia, speaking on behalf of the Non-Aligned Countries, said that the fact that the legal implications of nuclear weapons had yet to be addressed had prompted the Non-Aligned Countries to submit the draft resolution.

> 'However, they recognized that recent developments in the sphere of disarmament made the attainment of the complete elimination of nuclear weapons a more likely prospect. The progress achieved under the auspices of the Amendment Conference and the Conference on Disarmament had, moreover, facilitated the adoption by the Committee of consensus resolutions on a comprehensive test-ban and a ban on the production of fissionable materials which might lead to renunciation of the use of nuclear weapons. To preserve the momentum of the progress being made, the Non-Aligned Countries had therefore decided not to press for final action on draft resolution A/C.1/48/L.25 but would continue instead to monitor developments in different forums, with particular interest in the early conclusion of a comprehensive test ban treaty (CTBT).' [4]

2.7 From 31 May to 3 June 1994 the Eleventh Ministerial Conference of the Non-Aligned Countries was held in Cairo, at which the decision was taken to re-table the draft resolution and to put it to the vote at the next session of the UN General Assembly. On 9 November 1994 at the 15th Meeting of the First Committee at the 49th Session of the UN General Assembly, Resolution A/C.1/49/L.36 was introduced

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3 A/C.1/48/L.25.

4 A/C.1/48/SR.30, page 2.

by the delegation of Indonesia on behalf of the Non-Aligned Countries. The single operative paragraph of that draft resolution contained the request set out in the introduction to this Statement. No indication was given as to why the situation was thought to have changed since the previous year.

2.8 At the 24th Meeting of the First Committee on 18 November 1994, the delegation of Morocco proposed, in accordance with Rule 116 of the Rules of Procedure of the General Assembly, that no action be taken on the request contained in the draft resolution. The delegations of Germany and Hungary spoke in support of the Moroccan proposal. The delegations of Indonesia and Colombia opposed the motion. In addition, the delegation of Senegal deplored the submission of the resolution on behalf of the Movement of Non-Aligned Countries and stated that they could not in any way support the draft resolution.

2.9 The motion that no action be taken on the draft resolution was rejected by 67 votes to 45, with 15 abstentions. The First Committee then took a decision on the draft resolution, which was adopted by 77 votes to 33, with 21 abstentions.

2.10 The draft resolution was then submitted to the General Assembly as resolution K in paragraph 60 of the First Committee's Report.[5] At the 90th meeting of the General Assembly on 15 December 1994 the delegation of France moved that no action be taken on the draft resolution, in accordance with Rule 74 of the General Assembly's Rules of Procedure. The motion was supported by the delegations of Germany and Hungary and opposed by the delegations of Malaysia and Indonesia. The motion was then put to a vote and rejected by 68 votes to 58, with 26 abstentions.

2.11 The delegation of France then noted the profound division within the Assembly on the appropriateness of the draft resolution and emphasised their concern that the Court should not be in the situation of being pressurised by a specific group. The French delegation proposed an amendment to the draft resolution to delete the word 'urgently' in the operative paragraph, in order to ensure the freedom of a juridical body to make its own assessment. The representative of Indonesia moved, in accordance with Rule 74 of the Rules of Procedure, that no action be taken on the amendment. This motion was adopted by 61 votes to 56, with 30 abstentions. The draft resolution was then adopted by 78 votes to 43, with 38 abstentions, as Resolution 49/75K.

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5 A/49/699.

2 Nuclear Disarmament and Non-Proliferation

2.12 This section will deal with recent efforts by the international community in the field of nuclear disarmament and non-proliferation, which constitute an important part of the context within which the present Request must be seen.

2.13 The Treaty on the Non-Proliferation of Nuclear Weapons ('the NPT') was opened for signature at London, Moscow and Washington on 1 July 1968 and entered into force on 5 March 1970. The NPT sets out in detail the obligations of nuclear-weapon States (those which manufactured and exploded a nuclear weapon or other nuclear explosive device before 1 January 1967) and those of non-nuclear-weapon States, in particular in respect of: the transfer and manufacture of nuclear weapons; the application of safeguards, administered by the International Atomic Energy Agency, to nuclear materials; the use of nuclear energy for peaceful purposes; and general disarmament, including nuclear disarmament.

2.14 Article VIII(3) of the NPT provides for a conference to be held, five years after the entry into force of the Treaty, to review the operation of the Treaty, and for further such conferences to be held at five-yearly intervals thereafter. Such conferences have been held every five years since the Treaty's entry into force in 1970. Article X(2) of the NPT provides that twenty-five years after the entry into force of the Treaty, a conference shall be convened to decide whether the Treaty shall continue in force indefinitely, or shall be extended for an additional fixed period or periods, and that this decision shall be taken by a majority of parties to the Treaty.

2.15 From 17 April to 12 May 1995 the 1995 Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons was held at United Nations Headquarters in New York. The Conference was attended by 175 of the 178 States Parties. On 11 May the Conference decided without a vote that, as a majority existed among States Parties for the indefinite extension of the Treaty, in accordance with Article X(2), the Treaty should continue in force indefinitely.[6]

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6 A draft copy of that decision is attached at Annex A.

2.16 On 11 May the Conference also adopted without a vote a Decision on Principles and Objectives for Nuclear Non-Proliferation and Disarmament. [7] This decision contained the following paragraphs relating to nuclear disarmament:

> '3. Nuclear disarmament is substantially facilitated by the easing of international tension and the strengthening of trust between States which have prevailed following the end of the cold war. The undertakings with regard to nuclear disarmament as set out in the Treaty on the Non-Proliferation of Nuclear Weapons should thus be fulfilled with determination. In this regard, the nuclear-weapon States reaffirm their commitment, as stated in Article VI, to pursue in good faith negotiations on effective measures relating to nuclear disarmament.
>
> 4. The achievement of the following measures is important in the full realization and effective implementation of Article VI, including the programme of action as reflected below:
>
> (a) The completion by the Conference on Disarmament of the negotiations on a universal and internationally and effectively verifiable Comprehensive Nuclear-Test-Ban Treaty no later than 1996. Pending the entry into force of a Comprehensive Test-Ban Treaty, the nuclear-weapon States should exercise utmost restraint;
>
> (b) The immediate commencement and early conclusion of negotiations on a non-discriminatory and universally applicable convention banning the production of fissile material for nuclear weapons or other nuclear explosive devices, in accordance with the statement of the Special Coordinator of the Conference on Disarmament and the mandate contained therein;
>
> (c) The determined pursuit by the nuclear-weapon States of systematic and progressive efforts to reduce nuclear weapons globally, with the ultimate goal of eliminating those weapons, and by all States of general and complete disarmament under strict and effective international control.'

2.17 Sub-paragraphs 4 (a) to (c) reflect disarmament negotiations currently under way in other forums. The United Nations Conference on Disarmament in Geneva is currently engaged in the negotiation of a universal and internationally and effectively verifiable comprehensive test-ban treaty, and is due to begin negotiations on a non-discriminatory and universally applicable convention banning the production of fissile material for nuclear weapons or other nuclear explosive devices. Further efforts towards the reduction of nuclear weapons are also being made, particularly in the context of the United States-Russia Strategic Arms Reduction Treaty II ('START II'), of which those two States are committed to seek ratification in 1995. At their September 1994 meeting in Washington, the Presidents of the United States and Russia instructed their experts to intensify their dialogue on, *inter alia*, the possibility

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7 A draft copy of that decision is attached at Annex B.

after ratification of START II of further reductions on, and limitations of, remaining nuclear forces.

2.18 Paragraph 8 of the Decision on Principles and Objectives for Nuclear Non-Proliferation and Disarmament contained the following provisions on security assurances:-

> '8. Noting United Nations Security Council resolution 984 (1995), which was adopted unanimously on 11 April 1995, as well as the declarations by the nuclear-weapon States concerning both negative and positive security assurances, further steps should be considered to assure non-nuclear-weapon States party to the Treaty against the use or threat of use of nuclear weapons. These steps could take the form of an internationally legally binding instrument.'

2.19 This paragraph reflected the fact that on 5-6 April 1995 the five nuclear-weapon States had made statements containing both *positive security assurances* (statements of the steps they would take in the event of aggression with nuclear weapons, or the threat of such aggression) and negative security assurances (statements of the circumstances in which they undertook not to use nuclear weapons against non-nuclear-weapon States).[8] The negative security assurances given by the United Kingdom, France, Russia and the United States are in similar terms. The 1995 security assurances replaced earlier positive assurances given by the United Kingdom, the United States and the Soviet Union in 1968, and negative security assurances given by the nuclear-weapon States at various times since 1978.

2.20 On 11 April 1995 the United Nations Security Council unanimously adopted resolution 984, in which it welcomed the statements which had been made.[9]

2.21 The third decision adopted without a vote by the Conference of Parties to the NPT was a Decision on Strengthening the Review Process for the Treaty.[10] Paragraph 2 of that decision provides that Review Conferences of the NPT should continue to be held every five years, and that the next such conference should be held in the year 2000. Paragraph 3 provides for the holding of a Preparatory Committee in each of the three years prior to the Review Conference. Paragraph 4 provides that:

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8 Copies of these assurances are attached at Annex C.

9 The text of resolution 984 is attached at Annex D.

10 A copy of this decision is attached at Annex E.

'4. The purposes of the Preparatory Committee meetings would be to consider principles, objectives and ways in order to promote the full implementation of the Treaty, as well as its universality, and to make recommendations thereon to the Review Conference. These include those identified in the Decision on Principles and Objectives for Nuclear Non-Proliferation and Disarmament adopted on 11 May 1995. These meetings should also make the procedural preparations for the next Review Conference.'

2.22 None of the above decisions, statements and resolutions - which represent the most recent combined efforts of the international community to address nuclear disarmament and non-proliferation issues - refer to, or address the need for, an opinion on the legality or otherwise of the use or threat of use of nuclear weapons. Intensive negotiations were required by the States concerned to conclude those texts. In the course of those negotiations, and of the proceedings at the Conference, the issue of whether or not the use or threat of use of nuclear weapons would or would not be lawful was not a factor.

3 Whether the Court should Answer the Question Posed

2.23 In the view of the United Kingdom, the Court should decline to answer the question posed by the General Assembly.

2.24 It is clear that the Court has a discretion in deciding whether it should respond to a request for an advisory opinion. The language of Article 65 of the Statute is permissive, not mandatory. As the Court said, in the *Interpretation of Peace Treaties* case:

'Article 65 of the Statute is permissive. It gives the Court the power to examine whether the circumstances of the case are of such a character as should lead it to decline to answer the Request.... the Court possesses a large amount of discretion in the matter.' [11]

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[11] Advisory Opinion of 30 March 1950, ICJ Reports, 1950, pp. 71-2. See also the advisory opinions on *Reservations to the Genocide Convention*, ICJ Reports, 1951, at p. 19, and *Certain Expenses of the United Nations*, ICJ Reports, 1962, at p. 155.

Similarly, in the *Western Sahara* case, the Court said:

> 'In exercising this discretion, the International Court of Justice, like the Permanent Court of International Justice, has always been guided by the principle that, as a judicial body, it is bound to remain faithful to the requirements of its judicial character even in giving advisory opinions. If the question is a legal one which the Court is undoubtedly competent to answer, it may none the less decline to do so. As this Court has said in previous Opinions, the permissive character of Article 65, paragraph 1, gives it the power to examine whether the circumstances of the case are of such a character as should lead it to decline to answer the request.' [12]

2.25 It is within that margin of discretion that the question of propriety falls to be considered. The Court has repeatedly emphasised that there are inherent limitations on the judicial function [13] and these limitations apply particularly to issues raised with the Court which jeopardise its judicial propriety. Judgments which are 'devoid of object or purpose',[14] or 'remote from reality' [15] or incapable of effective application have been found to fall into this category. As the Court held in the *Northern Cameroons* case:

> 'If the Court were to proceed and were to hold that the Applicant's contentions were all sound on the merits, it would still be impossible for the Court to render a judgment capable of effective application...' [16]

And in the same judgment the Court stressed that all the considerations of judicial propriety apply equally to the exercise of its advisory jurisdiction.[17]

2.26 The Court has nevertheless indicated that, as the principal judicial organ of the United Nations, it should normally give its opinion on a legal question when requested to do so by a competent organ (or specialized agency) of the United Nations. As the Court said, in the *Peace Treaties* case,

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12 ICJ Reports, 1975, at p. 21.

13 See e.g. *Free Zones Case of Upper Savoy and Gex*, PCIJ, Ser. A/B, No. 46, 1932, p. 161; *Status of Eastern Carelia*, PCIJ, Ser. B, No. 5, 1923, p. 29; *Nuclear Tests Case*, ICJ Reports 1974, p. 271; *Northern Cameroons Case*, ICJ Reports 1963, p. 30.

14 *Western Sahara Case*, ICJ Reports 1975 at p. 37.

15 ICJ Reports 1963, p. 33.

16 *Ibid.*, p. 33.

17 *Ibid.*.., pp. 30-31. See also the passage from the *Western Sahara* case, above.

'the reply of the Court, itself an "organ of the United Nations", represents its participation in the activities of the Organization, and, in principle, should not be refused.' [18]

It is, of course, highly desirable that the Court should play a constructive role in assisting the other organs of the United Nations. The emphasis should, however, be on the constructive role which an opinion from the Court can play in a particular case. If a response by the Court to a request for an advisory opinion would, in fact, be unlikely to provide any constructive assistance to the other organs of the United Nations but, on the contrary, would be likely to have a detrimental effect on the activities of the United Nations family, the position would be very different. In such a case, both the duty of the Court to protect its own judicial function and the need for it to play its part as an organ of the United Nations call for it to exercise its discretion to decline to respond to the request.

2.27 It is the view of the United Kingdom that that is the case here and that the Court should accordingly decline to give an answer to the question posed by the General Assembly. First, an examination of the categories of cases in which the Court has held that an opinion should, as a matter of propriety, be given demonstrates that the present case falls outside those categories. Secondly, the nature of the case is such that the Court would be unable to give an advisory opinion which would be of positive assistance to the other organs of the United Nations. Thirdly, the rendering of an advisory opinion in this case could well have a harmful effect upon important and complex negotiations in the field of disarmament. Each of these considerations will be examined in turn.

(1) The Present request does not fall within any of the Categories of Cases in which, as a matter of propriety, an Opinion ought to be given

2.28 All the categories examined below show a common characteristic. They are all cases in which the opinion of the Court was likely to make a positive contribution to the work of the requesting organ and to the well-being of the United Nations as a whole. That is to say, whilst there were groups of States who might have had difficulties with the opinion (and the matter must be assumed to have generated some disagreement to merit reference to the Court), the likelihood that these difficulties would have had effects detrimental to the work of the United Nations was small; and, conversely, the benefits of settling a disputed legal question were considerable. In

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18 ICJ Reports, 1950, at p. 71.

short, the positive advantages to the United Nations clearly outweighed the possible negative consequences.

(a) Cases where the legal question involved the interpretation of a constitutional provision which had become the subject of dispute in the organ making the request

2.29 Many of the cases fall into this category. For example, in the *Conditions of Admission* [19] and *Competence* [20] cases the essential question raised was the proper interpretation of Article 4 of the Charter, specifically whether a member State in voting on an application for admission could take into account conditions not expressly provided for in Article 4(1) and, in the second opinion, whether the general Assembly might proceed to a vote on an application in the absence of a recommendation from the Security Council. The Court dealt with both questions in abstract terms and, although it was well aware of the highly political and acutely controversial nature of the disputes in the United Nations which had led to those requests,[21] its opinions proved most constructive. The impasse over the admission of new members was broken and the Organization moved rapidly towards the goal of universality. Similarly, in the *IMCO (Composition of the Maritime Safety Committee)* case, [22] the Court's opinion on the proper interpretation of Article 28 of the Constitution of IMCO made a highly positive contribution to the future well-being of IMCO.

2.30 The present case is entirely different. Although the question posed by the General Assembly would require the interpretation and application of certain provisions of the Charter, especially Articles 2(4) and 51, the case is not a constitutional one (in the sense in which the cases surveyed in the previous paragraph were constitutional), because the Charter provisions concerned deal not with the powers of the Organization or its internal workings but establish or codify rules of international law of general application. Moreover, to answer the question posed by

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19 Advisory Opinion of 28 May 1948: ICJ Reports, 1948, p. 57.

20 Advisory Opinion of 3 March 1950: ICJ Reports, 1950, p. 54.

21 See Higgins 'Policy Considerations and the International Judicial Process' 17 ICLQ (1968) 58, at p. 78, who supports the Court (*contra* Greig, 'The Advisory Jurisdiction of the ICJ and the Settlement of Disputes between States' 15 ICLQ (1966) 325) in the view that most issues raised in requests for opinions will have given rise to disputes within the UN but that this should not *per se* prevent the Court from responding.

22 Advisory Opinion of 8 June 1960: ICJ Reports, 1960, p. 150.

the Assembly would involve more than an examination of those provisions of the Charter, for the Court would be obliged also to consider the whole body of international law applicable to the use of weapons in armed conflicts.

(b) Cases where the legal question involves matters on which the requesting organ or agency seeks guidance in the exercise of its constitutional functions

2.31 There is a broad range of cases in which the question posed related not directly to the interpretation of a constitutional provision but rather to the manner in which an organ should carry out its functions, or to a question of law which needed to be clarified in order that an organ should be able to carry out its functions. Thus, in the *Reparations* case [23] the United Nations sought to know whether it might bring a claim against a State in respect of injuries suffered by an agent of the Organization. In the *Peace Treaties* case [24] the General Assembly asked whether disputes under the Peace Treaties existed and, if so, whether under the provisions of those treaties the Secretary-General was empowered to nominate the third member of the Treaty Commissions, notwithstanding that the government concerned had failed to appoint a representative. In effect, it was the Secretary-General who required legal guidance about the extent of his powers. The *Reservations* case [25] was similar, in that the Secretary-General needed to know how to deal with reservations to the Genocide Convention in order to carry out his duties as depositary under that Convention. In cases such as the *Effect of Awards of the UN Administrative Tribunal* [26] or the series of cases dealing with South-West Africa [27] it was the Assembly which sought guidance regarding the exercise of its functions.

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[23] *Reparations for Injuries suffered in the Service of the UN*, Advisory Opinion of 11 April 1949, ICJ Reports, 1949, p. 174.

[24] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion of 18 July 1950, ICJ Reports, 1950, p. 221.

[25] *Reservations to the Genocide Convention*, Advisory Opinion of 28 May 1951, ICJ Reports, 1951, p. 15.

[26] Advisory Opinion of 13 July 1954, ICJ Reports, 1954, p. 47.

[27] *International Status of South-West Africa*, Advisory Opinion of 11 July 1950, ICJ Reports, 1950, p. 128; *Voting Procedure on Questions relating to the Reports and Petitions concerning the Territory of SW Africa*, Advisory Opinion of 7 June 1955, ICJ Reports, 1955, p. 67; *Admissibility of Hearings of Petitioners by the Committee on SW Africa*, Advisory Opinion of 1 June 1956, ICJ Reports, 1956, p. 23.

2.32 It is certainly true that in the South-West Africa cases, or the *Western Sahara* case [28] the opinion sought by the Assembly also had a bearing on the legal obligations of Member States. Nevertheless, as the Court emphasised in *Western Sahara*, the primary motivation for the opinion was to give guidance to the Assembly.

> '...The opinion is sought for a practical and contemporary purpose, namely, in order that the General Assembly should be in a better position to decide at its thirtieth session on the policy to be followed for the decolonisation of Western Sahara.
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> ...
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> 'the object of the request is ... to obtain from the Court an opinion which the General Assembly deems of assistance to it for the proper exercise of its functions concerning the decolonisation of the territory.' [29]

2.33 In the present case, however, the General Assembly is not seeking guidance on the performance of its functions. As Part II.2 of this Written Statement has demonstrated, it is not in the Assembly but in other fora, notably the Security Council and the Conference on Disarmament, that the issue of nuclear disarmament is being addressed and action taken. The question on which the Court's opinion has been sought concerns not the powers of the Assembly but rather the rights and obligations of States and, in particular, the extent of their inherent right of self-defence. Moreover, there is nothing to suggest that some new problem has arisen in the recent period so that the General Assembly is now hampered in carrying out its functions by the lack of an answer to the question posed to the Court. Indeed, taking into account the progress made in the nuclear non-proliferation and disarmament fields (referred to in Part II.2, above), the remarks of the delegate of Indonesia at the United Nations First Committee (when announcing that no action would be taken on a previous draft request) are now even more pertinent than they were then.[30]

(c) Cases where the legal question involves the interpretation of agreements between the Organization and a Member State

2.34 Cases of this kind have long been regarded as appropriate for the use of the Court's advisory jurisdiction. As early as 1946, Section 30 of the UN Convention on Privileges and Immunities provided for reference of disputes to the Court by way of a

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28 Advisory Opinion of 16 October 1975, ICJ Reports, 1975, p. 12.

29 *Ibid.*, at pp. 20 and 27. So too in *Certain Expenses of the UN (Article 17(2) of the Charter)*, ICJ Reports, 1962, p. 151, although giving guidance to the Assembly on its budgetary functions, the Opinion carried necessary implications for the legal obligations of Member States.

30 See paragraph 2.6, above.

request for an advisory opinion. The *WHO Regional Office* case [31] and the *Applicability of the Obligation to Arbitrate arising under Section 21 of the United Nations Headquarters Agreement of 26 June 1947* case [32] both fell into this category. The present case, however, does not concern any agreement between the United Nations and a Member State. No such agreement concerning the use of nuclear weapons has ever been concluded.

(d) Cases where the legal question concerns the obligations of Member States consequential upon decisions or resolutions of the competent organs of the organization

2.35 In the *Namibia* case [33] the question put to the Court did involve the legal obligations of Member States but, of course, in the specific context of action by both the General Assembly and the Security Council with regard to the territory, in respect of which both organs had special responsibilities as a result of its mandated status. The Assembly, by Resolution 2145 (XXI), had terminated the Mandate under which South Africa held the territory, and the Security Council, by Resolution 276 (1970), had endorsed that decision, confirmed the illegality of further acts by South Africa in the territory and called upon Member States to refrain from dealing with South Africa contrary to paragraph 2 of the resolution. It was these decisions which created the legal obligations on which the Court was asked to advise.

2.36 In the present case the matter is entirely different. Although the General Assembly has adopted numerous resolutions regarding nuclear weapons since 1961, the Assembly has no power to create legal obligations for Member States with respect to the possession or use of nuclear weapons - or, indeed, with regard to any aspect of Member States' exercise of the right of self-defence - in the circumstances in which Resolution 49/75 K was adopted.

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31 Advisory Opinion of 20 December 1980, ICJ Reports, 1980, p. 73.

32 Advisory Opinion of 26 April 1988, ICJ Reports, 1988, p. 12.

33 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (SW Africa) notwithstanding Security Council resolution 276 (1970)*, Advisory Opinion of 21 June 1971, ICJ Reports, 1971, p. 16.

(2) An opinion from the Court in the present case would have no positive effect for the United Nations as a whole

2.37 The case law of the Court regarding the advisory jurisdiction emphasises the importance of this jurisdiction as a means by which the Court, as the principal judicial organ of the United Nations, can 'participate in the activities of the Organization'.[34] As the survey of the case law in the preceding paragraphs demonstrates, however, the Court has naturally been concerned that its participation should take the form of making a *positive* contribution to the activities of the United Nations. Moreover, the very fact that the Court is a principal organ of the United Nations means, it is submitted, that it must be concerned with the effect of an advisory opinion on the activities of the Organization as a whole and not just on the requesting organ. The United Kingdom considers that if the Court were to give an opinion in the present case, that opinion could not have a positive effect, either on the work of the General Assembly or in the context of the activities of the United Nations as a whole in the field of disarmament and security issues. First, the question posed by the General Assembly is a hypothetical one to which a proper judicial answer cannot be given, since the legality of the use, or threat of use, of nuclear weapons depends upon an analysis of the circumstances of the particular use or threat. Secondly, although it is the General Assembly which has sought the Court's opinion regarding the legality of the use of nuclear weapons, the dangers posed by such weapons are currently being addressed elsewhere in the United Nations in a manner which would not be helped (and, as will be demonstrated, may indeed be harmed) by a pronouncement on the legality of the use of such weapons.

(a) The question posed is hypothetical

2.38 As the preceding section has shown, the question put to the Court in the present case does not relate to the extent of the powers of the General Assembly or the exercise by the Assembly of its functions. Nor has it arisen in the context of a concrete factual situation involving a specific use or threat to use nuclear weapons. It is a purely hypothetical question which is removed from any factual or legal context which alone could provide the Court with a manageable framework within which it could set about answering the question. Although the Court has said, on a number of occasions, that the advisory jurisdiction may be used to answer an abstract question,[35]

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34 *Peace Treaties* case, ICJ Reports, 1950, at p. 71.

35 See, e.g., the *Admissions* case, ICJ Reports, 1948, at p. 61 and the discussion by Fitzmaurice in *The Law and Procedure of the International Court of Justice* (1986), vol. I at p. 117.

it must nevertheless be possible to analyse the question in some particular factual matrix and not merely in the context of purely speculative or hypothetical facts.

2.39 The essence of the judicial function is the application of principles of law to specific factual situations. As Judge Hudson said of the Permanent Court of International Justice,

> 'The Court has not been made the school-master of the Council [of the League]. It has not been asked to propound the law, but to apply it. It has not been confronted with legal problems of the future, but of the present. It is not asked to work in vacuo, but as part of a live, active and functioning international system.' [36]

In the present case, however, the Court is being asked to work 'in vacuo'. It is asked to pronounce on whether the threat or use of nuclear weapons is permitted 'in any circumstance'. As the United Kingdom will demonstrate in Part III of this Written Statement, there is no legally binding instrument which directly and specifically prohibits the threat or use of nuclear weapons. In the absence of such an instrument, the question posed by the General Assembly can be answered only by reference to rules and principles of international law of more general application. Yet the application of such rules and principles to a specific weapon will necessarily depend upon the precise circumstances in which that weapon is used, or its use is threatened. No indication of what those circumstances might be is given in the question and it is difficult to see how the Court could have before it sufficient material to enable it to consider all of the combinations of circumstances which might arise. The combinations of circumstances are virtually unlimited. The Court would be constrained to consider such variable factors as: the location, scale and nature of the attack, whether actual or imminent; the means of defence available to the State under attack or threat of attack; the presumed objectives of the attacker; the particular type of nuclear weapon used in response to the attack, and its effects in the particular locality in which it is employed, including its likely effects on non-military targets and long-term environmental effects. The factors, and their permutations, are endless.

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36 Hudson, 'The Advisory Opinions of the Permanent Court of International Justice', *International Conciliation* (November 1925), No. 214, p. 374.

(b) Nuclear weapons are being addressed in other contexts in the United Nations

2.40 Although the General Assembly has discussed nuclear weapons for over thirty years, it has not had sole, or even primary, responsibility for this matter within the United Nations. The possibility of a use of nuclear weapons is pre-eminently a question of international peace and security, primary responsibility for which is vested in the Security Council by virtue of Article 24(1) of the Charter. In addition, the Conference on Disarmament has long been the focus of efforts to achieve measures of nuclear disarmament. The Conference on Disarmament has consistently approached the question of reducing and eliminating the threat posed by nuclear weapons by means of negotiating specific measures, such as limitations on their proliferation and the achievement of limitations on nuclear testing, rather than by debating whether the use of a particular nuclear weapon would or would not be lawful in general or in some hypothetical combination of circumstances. This approach has recently been endorsed by the Security Council in resolution 984 (1995) [37] which expressly welcomes the assurances given by nuclear-weapon States to the non-nuclear-weapon States which are parties to the Non-Proliferation Treaty. [38] There is no indication that an opinion on the legality of the use of nuclear weapons would make any positive contribution to this process.

2.41 In Judge Hudson's words, the Court has to operate as part of a 'live, active and functioning international system'. In the present case, that international system must be seen as extending beyond the General Assembly to include the United Nations as a whole. It must also entail recognition of the fact that, so far as nuclear weapons are concerned, the most important parts of that system are to be found in the Conference on Disarmament and the Security Council, as well as in the recent Review and Extension Conference of the Non-Proliferation Treaty. If the Court's answer to the question posed by the General Assembly will make no positive contribution to the work of those parts of the international system then that is a good reason for the Court to decline to answer that question.

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37 See Annex D.

38 See paragraphs 2.19 to 2.22, above.

(3) An advisory opinion on this question could have a harmful effect on important disarmament negotiations

2.42 It has already been shown, in Part II.2 of this Statement, that the present case comes before the Court at a time when the parties have just decided, without the need for a vote, to extend indefinitely the Non-Proliferation Treaty, when new negative and positive security assurances have been unanimously welcomed by the Security Council, and when a number of other measures to reduce the threat posed by nuclear weapons are under the most active consideration. These negotiations form part of a disarmament process which it has taken many years to construct and which now offers the prospect of additional very considerable achievements. However, as paragraph 4(c) of the Decision on the Principles and Objectives for Nuclear Non-Proliferation and Disarmament makes clear, efforts to reduce nuclear weapons globally, with the ultimate goal of eliminating those weapons, are linked to the pursuit by all States of general and complete disarmament under strict and effective international control. That necessarily involves the consideration not only of nuclear weapons but also of conventional arms. Moreover, it would be unrealistic to imagine that that ultimate objective could be achieved within a short time-frame. In the meantime, therefore, the disarmament process has sought to achieve interim protection of international peace and security through a stable system of deterrence which includes both positive and negative security assurances from the nuclear-weapon States to the non-nuclear-weapon States.

2.43 The existing treaties and other texts which refer to nuclear weapons have been concluded after lengthy and complicated negotiations among States with widely differing views about the utility and even morality of possessing such weapons. The success achieved so far in these negotiations has been based on striking a balance between those views; and because States have, in fact, concentrated not upon the differences between them but on points where their interests coincide, with the result that specific steps towards goals of nuclear non-proliferation and disarmament have been achieved. These achievements have been welcomed within the United Nations. If, however, the Court were to give an opinion on the principles of law raised by this request (and in particular if in doing so it were to cast doubt on the basis for existing agreements) the continued participation of States concerned in these activities might be called into question. For example, an opinion of the Court that the possession of nuclear weapons, and their use in self-defence, could never be lawful might lead some States to conclude that they should no longer participate in existing regimes concerning nuclear weapons which did not amount to measures of complete disarmament. Alternatively, an opinion of the Court recognising that the use of

nuclear weapons could be lawful in appropriate circumstances might diminish the incentive for those States not parties to applicable treaty regimes to renounce the possession of nuclear weapons. In these circumstances, the viability of existing achievements in the field of nuclear disarmament and non-proliferation would be undermined.

2.44 Similar considerations apply as regards current disarmament negotiations. An advisory opinion by the Court on the principles of law raised by this request is not a necessary pre-condition for the successful conclusion of the disarmament negotiations referred to in paragraphs 2.16 to 2.21 above. Moreover, there is again a risk that such an opinion would actually play a divisive role. It might lead the States participating in those negotiations to become side-tracked into a debate on the implications of the Court's opinions, rather than concentrating on the complex and detailed matters before them. There would also be the risk, in the case of an opinion casting doubt on the legality of the use or threat of use of nuclear weapons in any circumstances, that some States might feel unable to continue their participation in nuclear disarmament and non-proliferation negotiations which build upon the existing position and which seek to bring about further reductions and controls, rather than total disarmament. Whatever the view the Court were to come to on the merits, it is in any case unlikely to have any significant effect in assisting progress in these negotiations.

2.45 The United Kingdom therefore submits that, in view of the considerations set out in this Part of the Statement, there are compelling reasons why the Court should exercise its discretion to decline to answer the question put to it.

3

III THE PRINCIPLES OF LAW RAISED BY THE QUESTION

1 The Meaning of the Question

3.1 The question posed by the General Assembly is wider than that posed by the World Health Assembly in that it refers to 'the threat or use of nuclear weapons' as compared with 'the use of' such weapons. This broader phase in the General Assembly's question is closer to the wording of Article 2, paragraph 4 of the U.N. Charter, which refers to 'the threat or use of force'. Neither question touches possession of nuclear weapons as such.

3.2 In so far as the General Assembly's question reflects the wording of Article 2, paragraph 4 of the U.N. Charter, this represents, in the view of the United Kingdom, the correct approach. For it essentially equates nuclear weapons with 'force'. They are one form, an extreme form, of 'force' and as such their use is subject to the same prohibitions - and the same exceptions - as the use of 'force' is in general under the U.N. Charter.

3.3 The question addressed to the Court is whether the threat or use of nuclear weapons is in any circumstance *permitted* under international law. It is, however, axiomatic that, in the absence of a prohibitive rule opposable to a particular State, the conduct of the State in question must be permissible.[39] Properly, therefore, the question should be whether the threat or use of nuclear weapons is *prohibited* by any rule of international law. In contrast, the question as formulated is implicitly cast in

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39 This principle was recently given specific application and endorsed by the Court in the *Nicaragua* case in the following terms:

> '... in international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited, and this principle is valid for all States without exception.' (*Military and Paramilitary Activities in and Against Nicaragua* (Merits), ICJ Reports, 1986, p. 14, at paragraph 269.)

The principle stated in the text flows in some measure from the often quoted statement of the Permanent Court in the *Lotus* case that international law leaves to States 'a wide measure of discretion which is only limited in certain cases by prohibitive rules' (PCIJ Reports, Series. A, No. 10, at p. 19). The principle does not, however, rely thereon but draws its support from the more general proposition that the basis of international law is 'the express or tacit consent of States to the body of rules comprising international law as a whole at any particular time' (Jennings and Watts, *Oppenheim's International Law* (9th ed., 1992), vol. I, paragraph 5).

terms of a presumption of illegality, rebuttable on proof that the conduct in question is permitted.

3.4 Flowing from this presumption of illegality is an almost imperceptible shifting in the burden of proof from those seeking to show that the conduct in qustion is prohibited to those seeking to show that it is permitted. In other words, contrary to accepted principles of international law, the formulation of the question places the burden on those seeking to show that the threat or use of nuclear weapons may in some circumstances be permissible to prove this to be the case. In the United Kingdom's view, it is for those contending for a prohibitive rule to prove that it exists and that it is opposable to other States. In the event that the Court decides to respond to the request for an advisory opinion, the correct interpretation of the question would therefore be whether the threat or use of nuclear weapons is in any circumstance *prohibited* by any rule of international law. In the absence of proof that this is so, it would follow that the conduct in question is lawful.

3.5 Whichever way the question is framed, it does not admit of a simple answer. There is no foundation for the view that the use of nuclear weapons would automatically contravene international law. The international community has never adopted in binding form any general prohibition on the use of nuclear weapons. On the contrary, those treaties which have been adopted regarding nuclear weapons presuppose that there are circumstances in which such weapons might lawfully be used. Moreover, an examination of the principles of international law regarding the threat and use of force and the conduct of hostilities reveals that, while nuclear weapons (like all methods and means of warfare) are subject to limitations on their use, those limitations are not such as to render the use of nuclear weapons unlawful *per se*.

3.6 This part of the United Kingdom's statement addresses these issues in the following way. Section 2 examines those treaties and other instruments which specifically refer to nuclear weapons. Section 3 considers the legality of the use of force in self-defence under the terms of the United Nations Charter. Section 4 looks at the application of the laws of armed conflict to the use of nuclear weapons. Section 5 considers the possible effect on the use of nuclear weapons of human rights treaties and treaties and customary law relating to the protection of the environment. Finally, Section 6 examines the legal issues raised by a threat to use nuclear weapons.

2 Provisions specifically referring to nuclear weapons

3.7 Since the middle of the nineteenth century, the international community has adopted a long list of treaties banning - or severely restricting - the use of specific weapons. Prominent on this list are:

(1) the St Petersburg Declaration, 1868, which prohibits the use of projectiles under 400 grammes in weight which are explosive or charged with fulminating or inflammable substances;[40]

(2) Hague Declaration No. 2, 1899, banning the use of projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases;[41]

(3) Hague Declaration No. 3, 1899, prohibiting the use of bullets which expand or flatten easily in the body;[42]

(4) the Hague Regulations on Land Warfare annexed to Hague Convention No. IV, 1907, Article 23 (a) of which prohibits the use of poison and poisoned weapons;[43]

(5) Hague Convention No. VIII, 1907, restricting the use of automatic submarine contact mines;[44]

(6) the Geneva Protocol, 1925, prohibiting the use of asphyxiating, poisonous or other gases, all analogous liquids, materials or devices, and bacteriological methods of warfare;[45]

(7) the Convention on the Prohibition of Development, Production and Stockpiling of Bacteriological and Toxin Weapons, 1972, which prohibits the

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40 138 CTS (1868-69) 297; LXIV UKPP (1869) 659.

41 187 CTS (1898-99) 453; UKTS 32 (1907), Cd. 3751.

42 187 CTS (1898-99) 459; UKTS 32 (1907), Cd.3751.

43 205 CTS (1907) 227; UKTS 9 (1910), Cd. 5030.

44 205 CTS (1907) 331; UKTS 12 (1910), Cd. 5116.

45 XCIV LNTS (1929) 65; UKTS 24 (1930), Cmd. 3604.

possession of bacteriological and toxin weapons and reinforces the prohibition on their use;[46]

(8) the United Nations Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques, 1977, prohibiting the use of weapons intended to change the environment through the deliberate manipulation of natural processes;[47]

(9) the United Nations Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, 1981, the Protocols to which prohibit the use of weapons the primary effect of which is to injure by non-detectable fragments, and impose certain restrictions on the use of mines, booby-traps and incendiary weapons;[48]

(10) the Chemical Weapons Convention, 1993, which prohibits all use of chemical weapons and requires the destruction of existing stocks.[49]

3.8 In marked contrast, no treaty has been adopted specifically prohibiting the use of nuclear weapons. Nor is the use of nuclear weapons outlawed by a provision in a treaty of more general application. The Charter of the United Nations makes no reference to nuclear weapons. Nor do the Principles of the Charter elaborated in the Declaration of Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (UNGA Resolution 2625 (XXV)), the Resolution on the Definition of Aggression (UNGA Resolution 3314 (XXIX)) or the Declaration on the Enhancement of the Effectiveness of the Principle of refraining from the Threat or Use of Force in International Relations (UNGA Resolution 42/22) expressly prohibit or regulate the use of nuclear weapons.[50]

3.9 On the contrary, the international community has consistently declined to address the question of the lawfulness or unlawfulness of nuclear weapons *per se*.

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46 1015 UNTS 164.

47 1108 UNTS 151.

48 19 ILM (1980) 1523; 1342 UNTS 7.

49 32 ILM (1993) 800.

50 Resolution 42/22 refers to nuclear weapons only in the context of statements about the importance of avoiding armed conflict and contains no statement about whether the use of such weapons would be lawful.

Although in 1961 and in subsequent years the United Nations General Assembly proposed the conclusion of a treaty prohibiting the use of nuclear weapons,[51] that proposal has not been followed up and no conference to consider such a treaty has been convened. In another context, the Diplomatic Conference which adopted the four Geneva Conventions of 1949 rejected a proposal that it adopt a resolution on the illegality of using nuclear weapons as being outside the terms of reference of the Conference.[52]

3.10 The Diplomatic Conference on the Development of Humanitarian Law, 1974 to 1977, which adopted the two Additional Protocols to the Geneva Conventions of 1949 and which had broader terms of reference than the 1949 Conference, also did not discuss the legality of nuclear weapons. In submitting draft protocols to the Diplomatic Conference, the International Committee of the Red Cross stated:

> 'Problems relating to atomic, bacteriological and chemical warfare are subjects of international agreements or negotiations by governments, and in submitting these draft Additional Protocols the ICRC does not intend to broach those problems. It should be borne in mind that the Red Cross as a whole, at several International Red Cross Conferences, has clearly made known its condemnation of weapons of mass destruction and has urged governments to reach agreements for the banning of their use.'[53]

During the four sessions of the Conference, the United Kingdom and a number of other States made statements to the effect that the subject of nuclear weapons should not be discussed by the Conference.[54] A number of other States, while not expressly referring to nuclear weapons, made clear that they shared the view of the ICRC that this question was better dealt with in the context of disarmament negotiations and that the Conference should do nothing to prejudice such talks. For example, the Representative of Brazil said that:

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51 Resolution 1653 (XVI). This resolution and subsequent resolutions on the same subject are discussed below, paragraphs 3.25 to 3.32.

52 *Final Record of the Diplomatic Conference of Geneva*, vol. IIA, pp. 802-5.

53 ICRC, *Draft Additional Protocols to the Geneva Conventions of August 12, 1949* (Geneva June 1973), p. 2.

54 *Official Records*, vol. V, pp. 134 (UK), 121 (USSR), 145-6 (Sweden), 179 (Argentina), vol VII, pp. 192 (France), 295 (USA).

'...other international bodies which were trying to bring about the reduction of armaments and to achieve general and complete disarmament were in a better position than the Conference to deal with certain weapons.'[55]

3.11 Although some States maintained that the Conference should consider a ban on some or all uses of nuclear weapons,[56] it is clear from the records of the Conference that this was not done. No formal proposal to deal with nuclear weapons was put before the Conference and discussion of specific weapons was confined to certain conventional weapons considered by the Conference's *Ad Hoc* Committee, the terms of reference of which were expressly confined to conventional weapons.[57] In its Report to the Conference, the *Ad Hoc* Committee stated that:

'There was general agreement that a consideration of certain modern *conventional* weapons in the light of such factors as the degree of suffering caused or their indiscriminateness had by now become an urgent necessity. Tremendous technological developments had led to ever more sophisticated weapons, in many cases with increasingly destructive power. Nuclear weapons and other weapons of mass destruction were, of course, the most destructive. In that connexion, some delegations rejected the view that the debate on those weapons and their possible prohibition should be left to the disarmament discussions, and they urged that the Conference include them in its programme of work. Another delegation expressed its regret at the decision not to consider these weapons. Many other delegations, however, accepted the limitation of the work of this Conference to conventional weapons. As it was pointed out by some, nuclear weapons in particular had a special function in that they act as deterrents preventing the outbreak of a major armed conflict between certain nuclear powers.'[58]

The Conference formally recorded the Report without a vote.[59] The Conference also adopted a resolution recommending that a Conference of Governments be convened with a view to reaching 'agreements on prohibitions or restrictions on the use of specific *conventional* weapons including those which may be deemed to be

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55 *Official Records*, vol. V, p. 98. See also the statements by Ukraine (p. 113), Byelorussia (p. 150) and Mongolia (p. 192).

56 *Official Records*, vol. V, pp. 97 (Ghana), 103 (Romania),105 (Yugoslavia), 120 (China), 123 (Iraq) and 195 (Zaire); vol. XIV p. 70 (Albania) and p. 241 (North Korea).

57 Pilloud et al, *Commentary on the Additional Protocols of 8 June 1977* (ICRC, 1987), p. 591 (the 'ICRC Commentary'). A proposal to remove the word 'conventional' from the title of the *Ad Hoc* Committee was rejected. For the debate on the establishment and terms of reference of this committee, see *Official Records*, vol. V, pp. 82-90.

58 *Official Records*, vol XVI, p. 454 (emphasis added).

59 *Official Records*, vol. V, pp. 219-221.

excessively injurious or have indiscriminate effects'. [60] Subsequently, a number of States made declarations, on signature or ratification, to the effect that the new rules contained in Protocol I did not apply to nuclear weapons. [61]

3.12 It is not surprising, therefore, that the Commentary on the Protocols published under the auspices of the ICRC (the 'ICRC Commentary') concludes that 'there is no doubt that during the four sessions of the Conference agreement was reached not to discuss nuclear weapons,' [62] or that the Protocols contain no references to nuclear weapons. [63]

3.13 Those treaties which have dealt expressly with the subject of nuclear weapons have not addressed the question whether such weapons are unlawful *per se* but have concentrated, for the most part, upon issues regarding possession, deployment and testing. The effect of these treaties may be summarised as follows:-

Possession

3.14 By becoming parties to the Non-Proliferation Treaty, 1968,[64] or to a regional treaty, such as the Treaty of Tlatelolco,[65] most non-nuclear-weapon States have now undertaken not to manufacture or acquire nuclear weapons. The Peace Treaties concluded at the end of the Second World War also bind a number of States not to possess nuclear weapons. [66] In the case of Germany, this obligation was reaffirmed in the Treaty on the Final Settlement with Respect to Germany, 1990. [67] The disarmament treaties concluded between some of the nuclear powers limit by

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60 Resolution 22: *Official Records*, vol. I, p. 215 (emphasis added).

61 See below, paras. 3.45 to 3.55.

62 *ICRC Commentary*, p. 593.

63 The possible effect on the use of nuclear weapons of the more general provisions of Additional Protocol I is considered below, paragraphs 3.45 to 3.55.

64 729 UNTS 161.

65 634 UNTS 281.

66 Treaties of Peace with Bulgaria, Finland, Hungary, Italy and Romania.

67 29 ILM (1990) 1186, Article 3.

agreement the number and types of nuclear weapons delivery-systems which those States may possess.[68]

Deployment

3.15 The deployment of nuclear weapons is prohibited in Antarctica.[69] in outer space or on celestial bodies [70] and on the deep seabed.[71] For those States which have become parties to the Treaty of Tlatelolco or its Ist Protocol, the deployment of nuclear weapons is prohibited within the areas covered by that agreement.[72] Similarly, those States which are parties to the Treaty of Rarotonga or its Ist Protocol have undertaken not to deploy nuclear weapons within the areas covered by that agreement.[73]

Testing

3.16 Those States parties to the Partial Test Ban Treaty, 1963, [74] have agreed not to carry out atmospheric nuclear tests. Bilateral agreements also restrict underground nuclear testing by some of the nuclear powers. In addition, testing in certain parts of the world is restricted by agreements such as the Antarctic Treaty. Negotiations currently taking place with a view to the adoption of a comprehensive test ban treaty are described in Part II.2, above.

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68 See, e.g., the Anti-Ballistic Missiles Systems Treaty, 1972 (944 UNTS 13), and the Intermediate-Range Nuclear Forces Treaty, 1987 (27 ILM (1988) 84), between the Soviet Union and the United States.

69 Antarctic Treaty, 1959, Article I (402 UNTS 71).

70 Outer Space Treaty, 1967, Article IV (610 UNTS 205).

71 Sea-Bed Treaty, 1971, Article I (955 UNTS 115).

72 The areas covered by the Treaty of Tlatelolco comprise most of Latin America and certain adjacent waters and islands. The United Kingdom is a party to Protocols I and II to the Treaty.

73 The Treaty of Rarotonga applies to parts of the South Pacific. The United Kingdom has not become a party to the protocols to that treaty but the United Kingdom Government have stated that they are ready, as a matter of policy, to respect the intentions of the regional States and that they have no intention of testing nuclear weapons in the South Pacific or of basing nuclear weapons on British territories in the South Pacific (statement by the Minister of State, Foreign and Commonwealth Office in the House of Commons, 20 March 1987; HC Debs, vol. 112, Written Answers, col. 639; 58 BYIL (1987) 635).

74 480 UNTS 43.

3.17 The treaties, however, say little about the possible use of nuclear weapons by those States which have no obligation not to possess them. The Partial Test Ban Treaty, for example, while prohibiting the parties from conducting atmospheric nuclear tests, does not purport to restrict their use of nuclear weapons in the course of hostilities.[75] Similarly, the Sea Bed Treaty prohibits the emplacement of nuclear weapons on the sea bed but does not restrict the use of nuclear weapons fired from other locations.

3.18 The Treaty of Tlatelolco is an exception. Article 3 of Protocol II to the Treaty contains an undertaking by those nuclear States which are parties to the Protocol not to use or threaten to use nuclear weapons against the States party to the Treaty of Tlatelolco. All five permanent members of the Security Council are now parties to this Protocol and have thus accepted this obligation, although each made a declaration on becoming party in which it indicated the circumstances in which it would regard itself as free to take military action involving the use of nuclear weapons. Thus, the United Kingdom declared that:

> 'the Government of the United Kingdom would, in the event of any act of aggression by a Contracting Party to the Treaty in which that Party was supported by a nuclear-weapon State, be free to reconsider the extent to which they could be regarded as committed by the provisions of Additional Protocol II.'[76]

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75 That the Partial Test Ban Treaty was not intended to apply to the use of nuclear weapons in an armed conflict was made clear by the United States Secretary of State in his report of 8 August 1963 to the President, in which he said:

> 'The article [Article I] does not prohibit the use of nuclear weapons in the event of war nor restrict the exercise of the right of self-defense recognized in Article 51 of the Charter of the United Nations.' (*Documents on Disarmament*, 1963, p. 297.)

See also the advice of the State Department Legal Adviser, *op. cit.* pp. 343-4. The Government of the Soviet Union took a similar approach in a statement on 21 August 1963, in which it said:

> 'the treaty also does not prohibit the Soviet Union, if need be, from holding underground nuclear tests, from increasing the stockpiles of nuclear arms, and even from using these weapons against the imperialist aggressors if they unleash a war in a fit of insanity.' (*Op. cit.*, p. 456.)

76 28 ILM (1989) p. 1400 at 1422. The United States made a similar statement on ratification (*loc. cit.* p. 1423). On signature of the Protocol, China repeated its general undertaking that it would not be the first State to resort to the use of nuclear weapons (p. 1414); France stated that:

> 'The French Government interprets the undertakings set forth in Article 3 of the Protocol as not presenting an obstacle to the full exercise of the right of self-defence confirmed by Article 51 of the United Nations Charter.' (p. 1415)

The Soviet Union stated that:

3.19 Although the Non-Proliferation Treaty contains no comparable provision,[77] China, France, Russia, the United Kingdom and the United States have each given security assurances to non-nuclear-weapon States in connection with the Treaty. These assurances are described in Part II. above.[78] In resolution 984 [79] the Security Council has welcomed the fact that these assurances had been given.

3.20 In addition, some of the treaties discussed in Part II prohibit any use of force (whether with nuclear or conventional weapons) within a defined area.[80]

3.21 The treaties reviewed here, together with the absence of a general treaty prohibition on the use of nuclear weapons, show that the international community has addressed the question of nuclear weapons through the medium of practical measures of disarmament and non-proliferation by agreement, rather than through an attempt to outlaw nuclear weapons or their use. The preambles, substantive provisions and drafting histories of the various treaties which have dealt with the question of nuclear weapons clearly place those treaties in the context of disarmament, as steps on the road to the goal of a more general disarmament by agreement between the States specially concerned, or between all States. Neither expressly nor impliedly do they attempt to outlaw all uses of nuclear weapons in any circumstances.

3.22 Nor do these treaties support the inference that the use of nuclear weapons is regarded as unlawful under existing international law.[81] On the contrary, many of

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'Any action carried out by a State or States party to the Tlatelolco Treaty that are incompatible with its statute of denuclearization as well as the perpetration by one or several States party to the Treaty of an act of aggression with the support of a State possessing nuclear weapons or together with such State, shall be considered by the Soviet Union to be incompatible with the *obligations of those countries* under the Treaty. In such cases the Soviet Union reserves the right to review its obligations under Additional Protocol II.' (p. 1418)

77 The Preamble to the Treaty makes clear that the Treaty was designed to contribute to the prevention of nuclear war by preventing the dissemination of nuclear weapons, that in doing so it was a response to the calls from the United Nations General Assembly for the adoption of an agreement on the spread of nuclear weapons and that it was a critical step in the process of concluding disarmament agreements.

78 See paragraph 2.19 and Annex C.

79 Annex D.

80 Eg the Antarctic Treaty, 1959, and the Moon Treaty (1363 UNTS 3).

81 Attempts to draw such an inference are made by, for example, Sri Lanka in its statement to the Court regarding the request by the WHO for an advisory opinion (Written Statement of the Government of Sri Lanka, p. 2).

the provisions of those treaties are only explicable on the assumption that the use of nuclear weapons was not regarded by the negotiating States as unlawful *per se*. The commitment made by the nuclear-weapon States in Protocol II to the Treaty of Tlatelolco would be entirely unnecessary if the use of nuclear weapons was in all circumstances prohibited by general international law. Moreover, 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, indicate that those States consider that there are circumstances in which resort to nuclear weapons would be lawful.

3.23 The Non-Proliferation Treaty and the security assurances offered by the nuclear-weapon States rest on the same assumption. Although the Non-Proliferation Treaty is concerned with possession, rather than use, of nuclear weapons, it is based upon a balance of responsibilities between nuclear-weapon and non-nuclear-weapon States, which the agreement treats as two distinct categories. Thus, nuclear-weapon States parties are subject to clearly differentiated obligations under the Treaty from those parties which do not possess such weapons and undertake not to acquire them. To treat the nuclear-weapon States in this way is incompatible with any assumption that the possible use of nuclear weapons is totally prohibited. The entire structure of the Non-Proliferation Treaty (which on 11 May 1995 was extended indefinitely by the Conference of States Parties without the need for a vote) presupposes that the parties did not regard the use of nuclear weapons as being proscribed in all circumstances. Moreover, the security assurances given by the nuclear-weapon States can only be regarded as possessing any significance on the assumption that there are conditions in which nuclear weapons could and might lawfully be used. Similarly, Security Council resolution 984 (which was unanimously adopted on 11 April 1995) is based upon the assumption that there are circumstances in which the use of nuclear weapons in response to aggression might be a lawful measure of individual or collective self-defence.

3.24 The absence of any challenge to the declarations made in connection with the Treaty of Tlatelolco, together with the response to the security assurances made in connection with the Non-Proliferation Treaty, is highly pertinent to the matter under consideration. Since it is clear that there is no treaty provision which imposes a general prohibition on the threat or use of nuclear weapons, any such prohibition must be derived from customary law. For the Court to find, however, that a rule of customary international law embodying such a prohibition exists, it would need to be provided with clear evidence that that rule enjoys the support of the generality of States. The existence of the nuclear-weapon States already weakens the argument

that there is a sufficient 'generality' in support of a prohibitive rule. To this number must be added the number of States failing to make any challenge to the declarations and assurances considered in the preceding paragraphs. The attitude of those States can only be consistent with the view that no prohibitive rule exists. It is clear, therefore, that the 'generality' of States needed to support a prohibitive rule can be shown categorically *not* to exist. That this is the position becomes even clearer when one considers other evidence of State attitudes towards the question.

3.25 The only documents which claim to treat nuclear weapons as unlawful *per se* are certain resolutions of the United Nations General Assembly, starting with Resolution 1653 (XVI) in 1961, paragraph 1 of which declared that:

> '(a) The use of nuclear and thermonuclear weapons is contrary to the spirit, letter and aims of the United Nations and, as such, a direct violation of the Charter of the United Nations;
> (b) The use of nuclear and thermonuclear weapons would exceed even the scope of war and cause indiscriminate suffering and destruction to mankind and civilization and, as such, is contrary to the rules of international law and to the laws of humanity;
> (c) The use of nuclear and thermonuclear weapons is a war directed not against an enemy or enemies alone but also against mankind in general, since the peoples of the world not involved in such a war will be subjected to all the evils generated by the use of such weapons;
> (d) Any State using nuclear and thermonuclear weapons is to be considered as violating the Charter of the United Nations, as acting contrary to the laws of humanity and as committing a crime against mankind and civilization.'

However, the resolution went on to request the Secretary-General to consult States about the possibility of convening a conference to discuss *the adoption of a convention* in order to prohibit the use of nuclear weapons.

3.26 This resolution was followed in 1972 by Resolution 2936 (XXVII), paragraph 1 of which solemnly declared

> 'on behalf of the States members of the Organization, their renunciation of the use or threat of force in all its forms and manifestations in international relations in accordance with the Charter of the United Nations, and the permanent prohibition of the use of nuclear weapons.'

A series of subsequent resolutions [82] declared that the use of nuclear weapons would be unlawful and called upon States *to adopt a convention* prohibiting their use and the threat of their use.

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[82] Resolutions 33/71 B, 35/152 D, 36/92 I, 45/59 B, 46/37 D, 47/53 C and 48/76 B.

3.27 These resolutions are not, of course, legally binding instruments.[83] Moreover, there are several reasons for rejecting the suggestion that they are declaratory of a rule of customary international law forbidding all use of nuclear weapons. First, an analysis of the voting figures reveals that the resolutions were controversial. Resolution 1653 (XVI) was adopted by 55 votes to 20, with 26 abstentions. Of the nuclear powers, France, the United Kingdom and the United States voted against the resolution, while the Soviet Union voted in favour. It is evident, therefore, that, as an authoritative United Nations Report stated, this resolution demonstrated not a consensus but rather the sharp conflict of views on this issue.[84] Resolution 2936 (XXVII) was adopted by 73 votes to 4, with 46 abstentions. The Soviet Union was one of the sponsors of the resolution and voted in its favour; France, the United Kingdom and the United States abstained. The later resolutions [85] also failed to command the general support which has characterised those resolutions which have been widely regarded as declaratory of customary international law. [86]

3.28 Secondly, it is evident that many of those States which voted for the resolutions concerned did not regard them as stating such a customary law principle. In the case of Resolution 1653, the link between the assertion of the illegality of

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83 The General Assembly has no power under the Charter to impose binding obligations upon Member States except in respect of certain internal matters. This is in contrast to the position of the Security Council, the resolutions of which are, in certain circumstances, binding by virtue of Article 25 of the Charter. The criteria identified by the Court in the *Namibia* Opinion (ICJ Reports, 1971, p. 15 at p. 53) for determining whether or not such a resolution is a binding one concerned only resolutions of the Security Council and did not, contrary to what is suggested by the Solomon Islands in its submissions regarding the WHO request for an Advisory Opinion (Written Statement of the Government of the Solomon Islands, p. 38, paragraph 3.26), suggest that resolutions of the General Assembly possess a binding character merely because they are couched in language similar to that of a Security Council resolution. The Court in the *Namibia* Opinion considered General Assembly resolutions to have a determinative effect only in certain exceptional matters, none of which are relevant in the present case.

84 UN Secretary-General's Report on *Existing Rules of International Law concerning the Prohibition or Restriction of Use of Specific Weapons* (UN Doc. A/9215), vol. I, p. 147.

85 Adopted by votes of 103-18-18; 112-19-14; 121-19-6; 125-17-10; 122-16-22; 126-21-21 and 120-23-24 respectively.

86 For example Resolution 2625 (XXV) (Declaration on Principles of International Law) and Resolution 3314 (XXIX) (Definition of Aggression), which were treated by the Court in the *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, ICJ Reports, 1986, p. 3 at paragraphs 188 and 195, as reflecting the content of customary international law, were both adopted without a vote, as was Resolution 3452 (XXX) (Declaration on Torture), which was regarded as declaratory of customary international law by a United States court in *Filartiga* v. *Pena-Irala* 630 F 2d 876 (1980); 77 ILR 169. The requirement that a General Assembly resolution must command wide support, including support from all the various groups of States most closely affected, if it is to be treated as declaratory of customary international law was also emphasised by Professor Dupuy as Sole Arbitrator in *Texaco/Calasiatic* v. *Libya* 53 ILR 389.

nuclear weapons in paragraph 1 and the request that the Secretary-General consult States about the conclusion of a convention to prohibit the use of nuclear weapons raises the question whether those States which voted for the resolution regarded the use of nuclear weapons as unlawful in the absence of such a convention.[87] Statements by a number of States, including some of the sponsors of the resolution, suggest that they did not take such a position. [88] The later resolutions also refer to the adoption of a convention prohibiting the use of nuclear weapons, again casting doubt on the extent to which those States which voted for them saw the resolutions as containing statements *de lege lata* about the legality of the use of nuclear weapons.

3.29 Thirdly, in Resolution 2936 the prohibition of nuclear weapons was expressly linked to the renunciation of the use of force 'in accordance with the Charter of the United Nations'. The resolution thus leaves open the possibility of the lawful use of nuclear weapons, since the renunciation of the use of force was evidently not intended to preclude the exercise of that right.[89] That was made clear by the Soviet Union, one of the sponsors of the resolution, [90] whose subsequent security assurances given to the Conference on Disarmament also showed that it regarded the use of nuclear weapons as lawful where that was a necessary measure of self-defence.

3.30 Finally, the significance of the General Assembly resolutions has to be seen in the light of State practice as a whole, including the conclusion of the agreements discussed above, the failure to adopt a convention of the kind called for in the resolutions themselves, the decision not to discuss nuclear weapons at the Diplomatic Conference on the Development of Humanitarian Law and the statements and security assurances made by the nuclear powers in the context of the Non-Proliferation Treaty and the Treaty of Tlatelolco, all of which indicate that there is no consistent State practice from which a customary law prohibition of nuclear weapons might have developed. Thus, there is no real evidence of an *opinio juris* shared by the generality of States.

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87 See Kalshoven, 'Arms, Armaments and International Law' 191 *Recueil des cours* (1985-II) 183 at pp. 276-7.

88 See, e.g., the statement by Ceylon GAOR, 17th Sess., Ist Ctee., 1288th Mtg, para. 8. See also the discussion in UN Doc A/9215, vol. I, pp. 147-54.

89 See Part III.3, below.

90 See the statement by the Soviet Union at A/PV. 2040, pp. 26-33.

3.31 Indeed, the practice of the General Assembly itself reinforces this conclusion. The resolutions on the use of nuclear weapons are by no means the only resolutions adopted by the General Assembly with regard to the question of nuclear arms. The Assembly has supported (or in some cases launched) the various initiatives which led to the adoption of the treaties considered above. In particular, it has expressed its support for the principle of 'an acceptable balance of mutual responsibilities and obligations between nuclear-weapon States and those which do not possess nuclear weapons', [91] and for the notion of embodying the security assurances given by the nuclear-weapon States in connection with the Non-Proliferation Treaty [92] in an international agreement.[93] For the reasons already given, such an approach cannot be reconciled with the view that international law already prohibits all use of nuclear weapons.

3.32 The position is, therefore, as recently summarized by the Federal Republic of Germany, that:

> '...international law in force...does not contain any explicit provisions definitely prohibiting the use of nuclear weapons, nor can any such prohibition be derived from current contractual and customary law.'[94]

In the absence of a rule of international law specifically prohibiting the use of nuclear weapons, the legality of their use has to be assessed by reference to the principles of law which are applicable to any use of armed force. According to these principles, the use of force is lawful only if it is in circumstances in which resort to force is permissible under the principles enshrined in the United Nations Charter and if it meets the requirements of the law of armed conflict regarding the conduct of hostilities.

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91 Resolution 2028 (XX). See also Resolution 49/83.

92 See Part II.2. above, and Annex C.

93 Resolution 49/73.

94 Federal Ministry of Defence, *Humanitarian Law in Armed Conflicts Manual* (1992), paragraph 428. Other military and naval manuals have taken the same position. See Switzerland, *Gesetze und Gebrauche des Krieges* (1987), Section 3, Art. 24; United States, *Naval Commander's Handbook*, NWP-9 (1989), paragraph 10.2.1; Canada, *Draft Manual of the Law of Armed Conflict* , para. 511; United Kingdom, *Manual of Military Law, Part III* (1958), paragraph 113; Australian Defence Force, *Law of Armed Conflict; Commander's Guide* (1994) paragraph 313. Although the New Zealand Defence Force manual contains no express statement about the legality of nuclear weapons, they are not included in the list of prohibited weapons at paragraph 511.

3 The United Nations Charter and the Right of Self-Defence

3.33 The use of force is not prohibited by Article 2(4) of the United Nations Charter if it is duly authorized by the competent organ of the United Nations, or if it is in the exercise of the right of self-defence. Although for Member States of the United Nations Article 51 of the Charter recognizes their right to self-defence, Article 51 is not the source of that right. Indeed, the use of the word 'inherent' in Article 51 was intended to mark the pre-existence of this right, based on customary international law.[95] There had been no reference to self-defence in the Dumbarton Oaks Proposals and the view of Committee I at the San Francisco Conference was that the prohibition of the use of force, contemplated as a core provision of the new UN Charter, would leave the use of arms in self-defence unimpaired.[96] The same view had been taken earlier in relation to the Covenant of the League and the 1928 Pact of Paris. The decision to make express reference to the right of individual or collective self-defence came largely as a response to the demand of regional organizations, such as the Organization of American States and the Arab League, that the legitimacy of their arrangements for collective self-defence should be expressly recognized.

(1) The Terms and Effects of Article 51

3.34 The terms of Article 51 are well known:

> 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs...'

On its face, therefore, the effect of this provision is to safeguard the right of Member States to take such action as would be permissible in self-defence independently of the United Nations Charter. In other words, if action by a State meets all the requirements of legitimate self-defence under traditional, customary international law, such action is not impaired or prohibited by anything contained in the Charter. Such measures must, however, be reported to the Security Council.

3.35 The elaboration of this provision at San Francisco in 1945 did not in fact turn on a discussion of different types of weapons, and certainly there is nothing in the *travaux préparatoires* to suggest that any particular type of weapon was, *per se*,

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95 See *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, Judgment of 27 June 1986, ICJ Reports 1986, paragraph 176.

96 See Bowett, *Self-defence in International Law* (1958), pp. 182-184.

incapable of use in self-defence. It follows, therefore, that discussion of the legality of the use or threat of use of nuclear weapons in the exercise of the right of self-defence must centre on whether such use of nuclear weapons would meet the traditional criteria for lawful self-defence.

(2) The Conditions of Lawful Self-defence

3.36 As an inherent, customary law right of States, recognized by Article 51 of the Charter, self-defence is permitted under certain conditions. These conditions are, in particular, that it is necessary to act in self-defence and that the steps taken by way of self-defence are proportionate. These principles are equally applicable to the use of nuclear weapons in self-defence as to the use of any other type of weapon in self-defence. Moreover, it would be entirely arbitrary to exclude *ex hypothesi* the right of a State to rely on nuclear weapons as a means of defence against a conventional attack.

(a) The necessity to react in self-defence

3.37 The notion has long been accepted that States should only use force in self-defence as a matter of last resort. This is inherent in the concept of self-defence. The burden of showing necessity would exist whether the weapons used are nuclear or conventional.

3.38 In this context the theory of nuclear 'deterrence' falls to be considered. For the past forty or so years States have relied upon their possession of nuclear weapons, or on alliance with nuclear-weapon States, and even their targeting of another nuclear-weapon State, as a necessary means of deterring an attack by the latter. Whatever the theoretical criticisms voiced of the idea of deterrence, the fact is, first, that it has worked and, second, that for many years a number of States have based their self-defence upon that idea, in the belief that the possession of nuclear weapons, and the threat to use them in self-defence, is legitimate.

(b) The Proportionality of the Reaction

3.39 It has always been accepted that self-defence must be proportionate. The controversy has been over the question of what the measures of self-defence have to be proportionate to: to the scale of the attack or to the extent to which the target State is jeopardised ?

3.40 The former view has its adherents,[97] but, as Ago wrote as Rapporteur of the I.L.C. on State responsibility:

> 'It would be mistaken ... to think that there must be proportionality between the conduct constituting the armed attack and the opposing conduct. The action needed to halt and repulse the attack may well have to assume dimensions disproportionate to those of the attack suffered. What matters in this respect is the result to be achieved by the "defensive" action, and not the forms, substance and strength of the action itself.' [98]

Thus, on this argument, there can be no easy assumption that the use of nuclear weapons can never be justified in response to a conventional attack, because there is 'disproportion' between the two. The question to be posed is whether, in the actual circumstances of the attack, the use of the particular nuclear weapon was necessary in order to defend the victim State.[99]

3.41 The answer to that question may depend upon a host of factors: the nature, scale and location of the attack, the means of defence available to the victim State; the extent to which the defensive means chosen (nuclear or non-nuclear) will minimise the danger to non-military targets; whether the damage is caused on the territory of the aggressor or the victim State, and so on.

(3) Conclusion

3.42 The notion that the use of nuclear weapons in response to an armed attack should not be regarded as necessarily unlawful but is capable of falling within the scope of the right of self-defence finds confirmation in Security Council resolution 984 (1995).[100] The preamble of that resolution contains the following statement:

> *'The Security Council,*
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> ...
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> *Considering further* that, in accordance with the relevant provisions of the Charter of the United Nations, any aggression with the use of nuclear weapons would endanger international peace and security...'

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97 See, for example, Singh, 'The right of self-defence in relation to the use of nuclear weapons' 5 *Indian Yearbook of International Affairs* (1956), vol. 3, pp. 32-34.

98 Ago, 'Addendum to Eighth Report on State Responsibility' 1980 II (i) I.L.C.Y.B., 13 at p. 69.

99 For a discussion of this question, see Dinstein, *War, Aggression and Self-Defence* (2nd ed., 1994) pp. 230-236.

100 See Annex D.

The Council did not, therefore, characterise every use of nuclear weapons as incompatible with the Charter but only acts of *aggression* with the use of such weapons. Indeed, the resolution clearly envisages that such aggression might give rise to a lawful use of nuclear weapons against the aggressor.

3.43 It follows, therefore, that not only have States not accepted the view that nuclear weapons are *per se* incompatible with self-defence but, equally, that no absolute, all-embracing postulate, either directed to their legality or illegality, can be made. In short, the question posed to the Court by the General Assembly is impossible to answer properly in the abstract. Any court, facing that same question in a concrete case, would be bound to take account of all the factors of place, type of threat, type of nuclear weapon used, immediacy of the threat and so on. It would be incompatible with the judicial function to apply broad sweeping generalisations, as opposed to close and careful scrutiny of all the relevant facts.

4 The Laws of Armed Conflict

3.44 Assuming that a State's use of nuclear weapons meets the requirements of self-defence, it must then be considered whether it conforms to the fundamental principles of the law of armed conflict regulating the conduct of hostilities.

(1) The Additional Protocols to the Geneva Conventions

3.45 It has already been shown that the Diplomatic Conference on the Development of Humanitarian Law which adopted Protocol I proceeded from the outset on the basis that it would not discuss the use of nuclear weapons as such.[101] It was on that basis that the ICRC submitted the draft protocols to the Conference.[102] The implications of this decision not to broach the subject of nuclear weapons were made clear by the Representative of the United Kingdom speaking in the plenary session shortly after the opening of the Conference, when he stated that:

> 'His delegation also endorsed the ICRC's view, expressed in the Introduction to the draft Protocols, that they were not intended to broach problems concerned with atomic, bacteriological or chemical warfare, which were the subject of existing international agreements and current delicate negotiations by Governments elsewhere. It was on the assumption that the draft Protocols would not affect those problems that the United Kingdom Government had worked and would continue to work towards final agreement on the Protocols.'[103]

The result of this understanding about the work of the Conference was that any new rules introduced by Protocol I were applicable only to the use of conventional weapons, without prejudice to those rules of customary international law which were codified in the Protocol and which were already applicable to the use of nuclear weapons.

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101 See above, paragraphs 3.9 to 3.11

102 Professor Kalshoven, who attended the Conference as a member of the Netherlands delegation, has described the ICRC's position in these terms: '...the ICRC had consciously discarded not only the question of a categorical prohibition on use of nuclear weapons but all questions *specifically relating* to possible restrictions on such use.' ('Arms, Armaments and International Law' 191 *Recueil des cours* (1985-II) 183 at pp. 281-2.)

103 *Official Records*, vol. V, p. 134.

3.46 The United Kingdom, United States and France again put on record this understanding about the scope of the Protocol at the final session of the Conference. On that occasion, the United Kingdom Representative stated that:

> 'At the first session of the Diplomatic Conference, his delegation had expressed in plenary its concurrence in the view that the draft Protocols were not intended to broach problems concerned with atomic, bacteriological or chemical warfare. Nothing in the four years' work of the Conference or in the texts themselves had caused it to depart from that view. It therefore continued to be his government's understanding that the new rules were not intended to have any effect on and did not regulate or prohibit the use of nuclear or other non-conventional weapons. Such questions were rightly the subject of agreements and negotiations elsewhere.'[104]

Similarly, the United States Representative stated that:

> 'From the outset of the Conference it had been his understanding that the rules to be developed had been designed with a view to conventional weapons. During the course of the Conference, there had been no discussion of the use of nuclear weapons in warfare. He recognized that nuclear weapons were the subject of separate negotiations and agreements and, further, that their use in warfare was governed by the present principles of international law. It was his government's understanding that the rules established by the Protocol were not intended to have any effect on, and did not regulate or prohibit the use of, nuclear weapons. It further believed that the problem of the regulation of nuclear weapons remained an urgent challenge to all nations which would have to be dealt with in other forums and by other agreements.'[105]

The Representative of France commented that:

> 'Already in 1973, the French Government noted that the ICRC did not include any regulations on nuclear weapons in its drafts. In participating in the preparation of the Additional Protocols, therefore, the French Government has taken into consideration only conflicts using conventional weapons. It accordingly wishes to stress that in its view the rules of the Protocols do not apply to the use of nuclear weapons. On numerous occasions the French Government has indicated its willingness to study the problems of nuclear weapons with the Powers directly concerned, in an attempt to achieve general disarmament with suitable controls.'[106]

3.47 It has occasionally been suggested that these statements do not reflect a common understanding about the scope of the Protocol, on the grounds that they are not consistent with one another and that contrary statements were made by other

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104 *Official Records*, vol. VII, p. 303.

105 *Official Records*, vol. VII, p. 295.

106 *Official Records*, vol. VII, p. 193.

States.[107] This suggestion is without foundation. The statements by the United Kingdom and the United States, though couched in different terms, were identical in substance. Both States maintained that the new rules laid down in the Protocol were not applicable to nuclear weapons, while recognizing that the use of such weapons was subject to the rules of customary international law, including those codified in the Protocol. That the term 'rules established by the Protocol' was intended to refer only to new rules is shown by the report of the United States Delegation to the Secretary of State, which stated that:

> '...it was the understanding of the United States Delegation throughout the Conference that the rules to be developed were designed with a view to conventional weapons and their effects and that the new rules established by the Protocol were not intended to have any effects on, and do not regulate or prohibit the use of nuclear weapons.'[108]

The French statement is also clear in rejecting the application to nuclear weapons of the new rules contained in the Protocol, although its language is broad enough to suggest that it might go further than the statements by the United Kingdom and the United States. The three States were therefore in complete agreement about the inapplicability to nuclear weapons of the new rules contained in the Protocol.

3.48 It is true that, as explained above,[109] a number of States made statements at the first session of the Conference urging that the Conference discuss the question of nuclear weapons. Closer examination of those statements, however, shows that the States concerned sought the adoption of a specific prohibition on the use of nuclear weapons and, in some cases, their goals could have been met only by the conclusion of a full disarmament treaty. Thus, the representative of Romania stated that:

> 'Nuclear, chemical and biological weapons as well as all weapons of mass destruction should be banned. A universal agreement on general disarmament and, in particular, nuclear disarmament, was an urgent necessity.'[110]

Similarly, the Representative of the People's Republic of China said that:

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107 See paras. 3.11 to 3.24 of the Written Statement of the Government of the Solomon Islands submitted in connection with the WHO's request for an Advisory Opinion.

108 *Digest of United States Practice in International Law*, 1977, p. 917 at 919.

109 See paragraphs 3.9 to 3.11.

110 *Official Records*, vol. V, p. 103.

'The new Protocols should unequivocally provide for the prohibition and destruction of nuclear weapons ...'[111]

and the Representative of the Democratic People's Republic of Korea maintained that:

'...the production, testing and use of such weapons should be prohibited and existing stocks should be destroyed.' [112]

3.49 These statements urged (though without any formal proposal to that effect) that the Conference should expressly proscribe the use of nuclear weapons, which the Conference not only did not do but did not even discuss doing. They have no bearing on the entirely different question of whether general rules introduced by the Protocol are applicable to nuclear weapons.

3.50 Of the States which had initially wanted to discuss nuclear weapons, only Romania repeated its views at the final session of the Conference and its statement is seen, on closer examination, to be ambiguous:

'The delegation of Romania was convinced that humanitarian law must develop within the framework of modern international law, which prohibited aggression and interference in the internal affairs of States and supported the right of peoples to self-determination and to self-defence by every possible means against aggression.

'In present conditions, humanitarian law must make a clear distinction between the victim of aggression and the aggressor, unreservedly protecting the former. Humanitarian law must also prohibit the use of weapons of massive destruction and methods of warfare which struck indiscriminately at combatants and civilians alike. The latter must be protected against the dangers of military operations. Many of those aims were covered by the provisions of Protocol I, including the case of peoples struggling for their independence, the status of prisoners of war, and the prohibition or restriction of the use of certain conventional weapons and weapons of massive destruction.'[113]

It is unclear to which provisions of the Protocol the delegate of Romania was referring or in what respect he considered that nuclear weapons were regulated *de lege lata*, as opposed to expressing a view that they should be prohibited. The only other statement which appears to contradict those of the nuclear powers is one made

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111 *Official Records*, vol. V, p. 120

112 *Official Records*, vol. XIV, pp. 241-2.

113 *Official Records*, vol. VII, pp. 289-90.

by India following the adoption by consensus of Article 33 of the draft protocol (Article 35 of the final text), in which India said that it had joined the consensus,

> 'with the understanding that the basic rules contained in this article will apply to all categories of weapons, namely nuclear, bacteriological, chemical or conventional weapons or any other category of weapons.'[114]

This statement has also been described as ambiguous, since it may have referred only to paragraphs 1 and 2 of Article 35, which both state rules which have long been part of customary international law.[115]

3.51 However, no State challenged then, or has challenged since, the statements made by the United Kingdom, United States and France. Moreover, several non-nuclear States made similar statements regarding the applicability of the new rules contained in the Protocol when depositing their instruments of ratification. Italy, for example, stated that:

> 'It is the understanding of the Government of Italy that the rules relating to the use of weapons introduced by Additional Protocol I were intended to apply exclusively to conventional weapons. They do not prejudice any other rule of international law applicable to other types of weapons.'

Similar statements of understanding were made on ratification by Belgium, Canada, the Federal Republic of Germany, the Netherlands and Spain and on signature by the United Kingdom and the United States.[116] No other signatory or contracting party to Protocol I challenged these statements then, or has done so since. In addition, the bills submitted to the Parliaments of Norway, Sweden and Switzerland to provide for ratification of the Protocols by those States made reference to the non-applicability of parts of Protocol I to nuclear weapons.[117]

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114 *Official Records*, vol. VI, p. 115.

115 Bothe, Partsch and Solf, *New Rules for Victims of Armed Conflicts* (1982), p. 192.

116 The United Kingdom statement recorded its understanding that 'the new rules introduced by the Protocol are not intended to have any effect on and do not regulate or prohibit the use of nuclear weapons' (UK Misc. 19 (1977), Cmnd. 6927).

117 Bring and Reimann, 'Redressing a Wrong Question: the 1977 Protocols Additional to the 1949 Geneva Conventions and the Issue of Nuclear Weapons', 33 Netherlands International Law Review (1986), p. 99 at p. 103. The authors were respectively members of the Swedish and Swiss delegations to the Diplomatic Conference. See also the statement of the *Conseil d'Etat* to the Belgian Parliament cited at pages 27-8 of the Written Statement of the Government of the Solomon Islands in the WHO case.

3.52 This history has led two commentators, who were members of the delegations of neutral States at the Conference, to conclude that:

> 'A study of the context of the Additional Protocol accordingly shows that the intentions of the parties were, during the negotiations and at the time of signature, that the rules in the Protocol should not specifically appertain to the question of weapons of mass destruction.'[118]

Similarly, Professor Kalshoven, who was also present at the Conference, has commented that:

> 'Additional Protocol I does not purport to prohibit the use of nuclear weapons, and neither does it lay down any further restrictions on such use than already result from pre-existent rules and principles of the law of armed conflict (and which were reaffirmed in the Protocol). Without any attempt at completeness, the following items may be listed among the "new law" which on account of its novelty remains inapplicable to the use of nuclear weapons: the "ecological principle" ... which protects the natural environment from "widespread, long-term and severe damage"; the sophisticated rules in Article 57 of the Protocol, elaborating the customary principle of proportionality in the protection of the civilian population; and last but not least, the prohibition of reprisals against the civilian population and civilian objects, as now laid down in various paragraphs of Articles 51 to 56 of the Protocol.
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> To those who, like the Romanian delegate, would have wished to see the question of use of nuclear weapons dealt with in Additional Protocol I, it should be pointed out that the choice has been clear throughout the proceedings of the Diplomatic Conference: it was either a Protocol not bearing on the use of nuclear weapons, or no Protocol at all.'[119]

3.53 The treatment of this question in the military manuals of a number of States confirms that the new rules in Additional Protocol I do not apply to the use of nuclear weapons. Thus, the Manual published by the Federal Republic of Germany states that:

> 'The new rules introduced by Additional Protocol I have been established with the intention of being applied to conventional weapons irrespective of other rules of international law applicable to other types of weapons. They do not influence, regulate or prohibit the use of nuclear weapons.' [120]

Similarly, a manual published by the Swedish Ministry of Defence states that:

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118 Bring and Reimann, *loc cit.*.

119 *Loc cit.*, p. 283.

120 Federal Ministry of Defence, *Humanitarian Law in Armed Conflicts Manual* (1992), paragraph 430.

> '...it was assumed that the rules of Additional Protocol I concerning the protection of civil populations and property during military operations had been negotiated with the tacit reservation that they should only apply during conventional warfare.' [121]

The Swiss Manual also refers to the nuclear understanding and concludes that the use of nuclear weapons is not prohibited by, for example, the prohibition on the use of indiscriminate weapons in Protocol I.[122] Manuals published by the United States and Canada contain similar statements.[123]

3.54 The ICRC Commentary comes to the same conclusion:

> 'Clearly the hypothesis that States acceding to the Protocol bind themselves without wishing to - or even without knowing - with regard to such an important question as the use of nuclear weapons is not acceptable. The desire not to broach it during the [Diplomatic Conference] is a determining factor in this respect.' [124]

Other authoritative commentaries take the same view.[125]

3.55 It follows that the law of armed conflict by which the legality of any given use of nuclear weapons falls to be judged includes all the provisions of customary international law (including those which have been codified in Additional Protocol I) and, where appropriate, of conventional law but excludes those provisions of Protocol I which introduced new rules into the law. It has sometimes been argued that the use (or, at least, some uses) of nuclear weapons would violate various principles of the law of armed conflict. These arguments will now be considered in turn.

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121 *International Humanitarian Law in Armed Conflict, with reference to the Swedish Total Defence System* (1991), pp. 25-6.

122 *Gesetze und Gebrauche des Krieges* (1987), Section 3, Art. 24.

123 See footnote 94, above.

124 Pilloud, et al, *Commentary on the Additional Protocols of 1977* (1987), paragraph 1858 .

125 Bothe, Partsch and Solf, *New Rules for Victims of Armed Conflicts* (1982), p. 191, Rauschning, 'Nuclear Warfare and Weapons, in Bernhardt (ed), *Encyclopaedia of Public International Law* , vol. IV, (1982), p. 49.

(2) The Principle that the parties to a conflict do not have an unlimited choice of the methods and means of warfare

3.56 It has been suggested [126] that the use of nuclear weapons would violate the principle that the parties to an armed conflict do not have an unlimited choice of the methods and means of warfare, a principle stated in Article 22 of the Hague Regulations, 1907,[127] and reaffirmed in Article 35(1) of Additional Protocol I. While that principle is undoubtedly well established as part of customary international law, however, it cannot stand alone as a prohibition of a particular category of weapons. In any event, there is no incompatibility between the two propositions (i) that States do not have an unlimited choice of the methods and means of warfare and (ii) that States may use nuclear weapons where this is consistent with their right of self-defence. There is no suggestion that self-defence is "unlimited". On the contrary, self-defence is always limited to the necessities of the case.[128]

3.57 It is necessary, therefore, to look outside the principle in Article 22 of the Hague Regulations in order to determine what limitations are imposed by customary or conventional law upon the choice of methods and means of warfare. The argument thus begs the question whether there exists some other principle of international law which limits the right to choose nuclear weapons as a means of warfare.

3.58 The same is true of the argument based upon the 'Martens Clause' which appeared in the preamble to Hague Convention No. IV respecting the Laws and Customs of War on Land, 1907. The most recent version of this clause appears in Article 1(2) of Additional Protocol I, 1977, which provides that:

> '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.'

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126 Singh and McWhinney, *Nuclear Weapons and Contemporary International Law* (1989), p. 115.

127 Regulations annexed to Hague Convention No. IV, Respecting the Laws and Customs of War on Land, 1907, UKTS 9 (1910), Cd. 5030.

128 See Part III.3, above.

While 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. Since it is the existence of such a rule which is in question, reference to the Martens Clause adds little.

(3) The Prohibition of Poison, Chemical Weapons and Analogous Liquids and Materials

3.59 The use of nuclear weapons has been said to violate the long established prohibition on the use of poison and poisoned weapons, [129] because the effects of radiation are described as a form of poisoning. [130] In addition, some commentators have invoked the provisions of the Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases and of Bacteriological Methods of Warfare, 1925, which applies to 'the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices,' on the ground that the effects of radiation are said to make nuclear weapons analogous to asphyxiating or poisonous gases.

3.60 The prohibitions in both Article 23(a) of the Hague Regulations and the 1925 Protocol were, however, intended to apply to weapons whose primary effect was poisonous and not to those where poison was a secondary or incidental effect. As one leading commentator says of the 1925 Protocol, its drafting history makes clear that 'the scope *ratione materiae* of the Protocol is restricted to weapons the primary effect of which is to asphyxiate or poison the adversary.' [131] In the case of almost all nuclear weapons, the primary effects are blast and heat and it is these which give the weapon its main military advantages.

3.61 In addition, State practice does not support the argument that nuclear weapons fall within the prohibition in the 1925 Protocol. That argument has never been seriously advanced by any of the States party to the 1925 Protocol. Moreover, when

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129 Article 23(a) Hague Regulations, 1907.

130 Singh and McWhinney, *op. cit.*, p. 127. Schwarzenberger, *The Legality of Nuclear Weapons* (1958).

131 Kalshoven, *loc. cit.*, p. 284.

the United States became party to the 1925 Protocol in 1975, thirty years after becoming the world's leading nuclear power, it made no reservation of its right to use nuclear weapons. It is inconceivable that a major nuclear power would inadvertently assume a treaty obligation which prohibited it from using one of the most important weapons in its armoury. None of the other parties to the 1925 Protocol suggested, at the time of United States ratification, that the United States had assumed new obligations regarding the use of its nuclear weapons. It would appear, therefore, that the subsequent practice of the parties to the 1925 Protocol does not sustain the interpretation placed upon its terms by those who argue that it applies to the use of nuclear weapons.

3.62 Although a number of commentators have argued that nuclear weapons fall within the scope of the 1925 Protocol, there is a considerable division of opinion on this point. Thus, Bailey maintains that,

> '...it might be thought by the non-expert that nuclear weapons were encompassed by the Geneva Protocol's ban on using liquids, materials and devices analogous to chemical weapons but this has never been seriously advanced.'[132]

Kalshoven,[133] Hearn, [134] McDougal and Feliciano, [135] and Rauschning [136] also reject the argument that the use of nuclear weapons would necessarily violate the ban on poisoned weapons or the provisions of the 1925 Protocol.

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132 *War and Conscience in the Nuclear Age* (1988), p. 117.

133 *Loc. cit.*

134 'Nuclear Deterrence and Warfare' 61 British Year Book of International Law (1990), p. 199 at pp 230-2.

135 *The International Law of War* (1994), pp 664-5.

136 'Nuclear Warfare and Weapons', in Bernhardt (ed) *Encyclopaedia of Public International Law*, vol. IV, p. 44 at p. 47.

(4) The unnecessary suffering principle

3.63 It has also been argued that the use of nuclear weapons would violate the prohibition on weapons which cause unnecessary suffering. [137] The most recent statement of this principle is contained in Article 35(2) of Additional Protocol I, 1977, which provides:

> 'It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.'

The principle is, however, a long established one. [138]

3.64 The principle prohibits only the use of weapons which cause *unnecessary* suffering or *superfluous* injury. It thus 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. [139] The more effective the weapon is from the military point of view, the less likely that the suffering which its use causes will be characterized as unnecessary. [140] 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 legitimate military objective, such as the defeat of an invader. 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. [141]

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137 See, e.g., Brownlie, 'Some Legal Aspects of the Use of Nuclear Weapons' 14 ICLQ (1965) p. 437 at 450 and paras. 3.42 to 3.44 of the Written Statement of the Government of the Solomon Islands in the WHO case.

138 See, e.g., Article 23(e) Hague Regulations, 1907.

139 ICRC, *Weapons that may Cause Unnecessary Suffering or have Indiscriminate Effects* (1973); Report of a Conference of Experts, p. 13.

140 This point is conceded even in the decision of the Tokyo District Court which held that the bombings of Hiroshima and Nagasaki were unlawful, *Shimoda* v. *The State* 32 ILR 626 (1963), at p.634: 'the use of a certain weapon, great as its inhuman result may be, need not be prohibited by international law if it has a great military effect.'

141 Kalshoven, *loc. cit.*, p. 284; Hearn, *loc. cit.* p. 235. Even Singh and McWhinney, who maintain that the use of nuclear weapons would violate this principle, concede that State practice suggests otherwise, *op. cit.*, p. 117.

3.65 A variation on the unnecessary suffering argument is the contention that the use of nuclear weapons would be unlawful because any use of such a weapon would render death inevitable for those in the immediate area of the explosion. [142] The basis for this argument is the preamble to the St Petersburg Declaration. 1868, which stated:

> 'That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy;
>
> 'That for this purpose it is sufficient to disable the greatest possible number of men;
>
> 'That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable.
>
> 'That the employment of such arms would, therefore, be contrary to the laws of humanity.'

The reference to weapons which render death inevitable must, however, be seen in context. The declaration prohibited only the use of projectiles of a weight below 400 grammes which were explosive or were charged with fulminating or inflammable substances. The use of such a weapon against personnel was considered to be gratuitously cruel, because it caused horrific and almost invariably fatal injuries, while offering little or no military advantage over the use of ordinary ammunition, since a soldier hit by either type of bullet would normally be disabled and rendered incapable of further participation in the battle. The Declaration did not prohibit the use of explosive artillery shells, even though they can cause horrific injuries and are usually fatal to those in the immediate area of the explosion, because the military utility of explosive artillery shells was so great that it was considered to justify the human costs.

3.66 The Declaration was, therefore, no more than a specific application of the unnecessary suffering principle, the suffering caused by the exploding bullet being seen as unnecessary, while that caused by the exploding shell was not so characterized, because of the effectiveness of that weapon. Although the preamble to the Declaration is widely regarded as having played an influential role in the development of customary international law, subsequent statements of the customary principle have referred only to weapons causing unnecessary suffering or superfluous

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142 Written Statement of the Government of the Solomon Islands in the WHO case, paras 3.42 to 3.44.

injury and have omitted references to rendering death inevitable.[143] Since all weapons are capable of being used in a way which renders death inevitable, this is not surprising.[144] The use of a nuclear weapon must, therefore, be judged by reference to whether the suffering which it causes should be regarded as unnecessary when balanced against the military effectiveness of the weapon in the circumstances in which it is used, rather than by concentrating on whether it will inevitably cause death. This is not a judgement which can be made in the abstract. It can be made only on the basis of a careful appraisal of the circumstances of a particular case.

(5) The principle that the civilian population as such must not be made the object of attack

3.67 A further argument which has been raised is that the use of any nuclear weapon would necessarily have such terrible effects upon civilians that it would violate those rules of the law of armed conflict which exist for their protection. There are two principles of particular relevance in this respect. First, it is a well established principle of customary international law that the civilian population and individual civilians are not a legitimate target in their own right. The parties to an armed conflict are required to discriminate between civilians and civilian objects on the one hand and combatants and military objectives on the other and to direct their attacks only against the latter. Secondly, the principle of proportionality requires that even a military objective should not be attacked if to do so would cause collateral civilian casualties or damage to civilian objects which would be excessive in relation to the concrete and direct military advantage anticipated from the attack.

3.68 Those who argue that nuclear weapons are inherently indiscriminate and cannot be used without causing excessive civilian casualties frequently fail to differentiate between these two rules.[145] That reflects the fact that much of the writing on nuclear weapons on which these arguments rely dates from the 1950's and early 1960's. Modern nuclear weapons are capable of far more precise targeting and can therefore be directed against specific military objectives without the indiscriminate effect on the civilian population which the older literature assumed to be inevitable. Moreover, the United Kingdom's and NATO's current doctrine

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143 See, e.g., Article 23(e) Hague Regulations, 1907, and Article 35(2) of Additional Protocol I.

144 McDougal and Feliciano, *op. cit.*, p. 661.

145 See, e.g., the argument at paragraph 3.48 *et seq.* of the Written Statement of the Government of the Solomon Islands in the WHO case.

emphasizes that nuclear weapons would only ever be used in a defensive role and that the threat posed by an aggressor which would invite a nuclear response would be of a scale which would make that nuclear response proportionate.

3.69 All weapons, nuclear weapons included, are capable of being used against centres of civilian population or in an indiscriminate way. Subject to what is said below about reprisals, such use would be illegal. What is not true is that nuclear weapons cannot be used in any other way. The use of nuclear weapons against specific military objectives would undoubtedly not be contrary to the first of the two principles set out in paragraph 3.67, above.

3.70 So far as the principle of proportionality is concerned, it is often assumed both that any use of nuclear weapons would cause extensive civilian losses and that such losses would necessarily be excessive in relation to any military advantage which might result. [146] These assumptions tend to be based on assessments of the likely effects of a nuclear attack on or near a city. The reality, however, is that nuclear weapons might be used in a wide variety of circumstances with very different results in terms of likely civilian casualties. In some cases, such as the use of a low yield nuclear weapon against warships on the High Seas or troops in sparsely populated areas, it is possible to envisage a nuclear attack which caused comparatively few civilian casualties. It is by no means the case that every use of nuclear weapons against a military objective would inevitably cause very great collateral civilian casualties.

3.71 Moreover, the principle of proportionality prohibits an attack upon a military objective only if the likely civilian casualties and damage to civilian objects would be excessive in relation to the expected military advantage. Like the unnecessary suffering principle, this principle requires a balance to be struck between the military advantage resulting from an attack and the effect on the civilian population. Only if the latter is wholly disproportionate to the former will the attack violate the principle. Since no nuclear-weapon State is likely lightly to resort to the use of nuclear weapons, [147] it is unlikely that a nuclear weapon would be used unless its use was expected to produce a very substantial military advantage. That expected advantage

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[146] See, e.g., paragraph 3.50 of the Written Statement of the Government of the Solomon Islands in the WHO case. Proportionality as a requirement of the law of self-defence is considered in Part III.3, above.

[147] See, e.g., the security assurances given in connection with the Non-Proliferation Treaty and the statements made in connection with the Treaty of Tlatelolco; paragraphs 2.19 and 3.18 to 3.19, above.

would have to be weighed against the likely civilian losses to determine whether the use of the weapon would violate the principle of proportionality. It cannot, however, be right to assume, as an abstract proposition, that those losses would always outweigh that advantage especially where the destruction of a particular military objective was essential to the survival of a State which was under attack (and, perhaps, to the lives of millions of members of that State's civilian population) and the use of a nuclear weapon offered the only means of destroying that objective.[148] As with the unnecessary suffering principle, the question whether the use of a nuclear weapon would be contrary to the principle of proportionality is not one which can be answered in the abstract but only by reference to the circumstances of each individual case.[149]

3.72 A similar answer has to be made to two related arguments. First, it has sometimes been said that the use of nuclear weapons would be unlawful because it would make it impossible for a State to discharge its obligations towards persons and objects protected under the Geneva Conventions, 1949, such as the sick, wounded and prisoners of war or hospitals, as such persons and objects would inevitably be amongst the casualties of any nuclear exchange. The deliberate targeting of protected persons and objects would be unlawful, irrespective of the weapons used, but the Geneva Conventions do not require the suspension of large scale hostilities merely because of the proximity of protected persons or objects. Moreover, the argument overlooks the drafting history of the Conventions and, in particular, the rejection of proposals to discuss the legality of nuclear weapons at the 1949 Conference. As one commentator has put it, 'to argue like this is to lay a heavier burden on the Geneva Conventions than they were ever meant to sustain.'[150]

3.73 Secondly, it has been argued that the use of nuclear weapons would inevitably cause so many civilian casualties that it would amount to the commission of

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148 Kalshoven, *loc. cit.*, pp. 286-7; Hearn, p. 236; McDougal and Feliciano, *op. cit.*, p. 666; Green, in Cohen and Gouin (eds) *Lawyers and the Nuclear Debate* (1988), p. 102; Dinstein, *ibid.*, p. 61.

149 The same approach has to be taken with regard to the argument that the use of nuclear weapons would cause wanton or unnecessary destruction of property. While the wanton destruction of property has long been recognized as contrary to the laws of armed conflict, destruction of property is legitimate where it is required by military necessity. The question would therefore be whether the destruction caused by a particular instance of the use of a nuclear weapon could be regarded as necessary. That question can be answered only by reference to the military goal which the use of the weapon was designed to achieve and the efficacy of other methods which might have achieved that goal at a lower cost.

150 Kalshoven, *loc. cit.*, p. 285.

genocide.[151] The Court has stressed that genocide is a crime which 'shocks the conscience of mankind, results in losses to humanity...and is contrary to moral law and to the spirit and aims of the United Nations.' [152] It has been demonstrated above, however, that it is by no means the case that the use of a nuclear weapon, targeted upon a military objective, would necessarily entail massive civilian casualties. Moreover, genocide is a crime of intent. Article II of the Genocide Convention, 1948, requires 'intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.' The prohibition of genocide is clearly not directed at collateral casualties resulting from an attack upon a military objective.[153]

(6) The Laws of Armed Conflict and the Protection of the Environment [154]

3.74 A more recent argument is that the use of nuclear weapons is prohibited because of the effect that it would have upon the natural environment. [155] This argument rests on two sets of treaty provisions. Article I of the United Nations Convention on the Prohibition of Military or any other Hostile Environmental Modification Techniques, 1977, 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 35(3) of Additional Protocol I prohibits the employment of 'methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.' [156]

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151 Paragraph 3.50 of the Written Statement of the Government of the Solomon Islands in the WHO case.

152 *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Order of 13 September 1993, paragraph 51; ICJ Reports, 1993, p. 348.

153 Kalshoven, *loc. cit*, p. 285, comments as follows on the argument that the use of nuclear weapons would necessarily contravene the Genocide Convention:

'It follows, moreover, from the *travaux préparatoires* of the Convention that the notion of genocide was expressly defined in such a manner as to prevent a mixing up with the law of war....the argument based on the Genocide Convention must be rejected as disingenuous and manifestly ill-founded.'

154 This section deals only with those parts of the law of armed conflict which concern the protection of the environment. The general environmental agreements are considered in Part III.5, below.

155 See, e.g., Written Statement of the Government of the Solomon Islands, Section IIB and Written Statement of the Government of Nauru, pp. 36–47, in the WHO case.

156 See also Article 55.

3.75 The Environmental Modification Convention, however, is not really applicable to most cases in which nuclear weapons might be used. That Convention was designed to deal with the deliberate manipulation of the environment as a method of war. Thus, 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, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space' (emphasis added).

While the use of a nuclear weapon may have considerable effects on the environment,[157] it is unlikely that it would be used for the deliberate manipulation of natural processes. The effect on the environment would normally be a side-effect of the use of a nuclear weapon, just as it would in the case of use of other weapons.

3.76 Moreover, the *travaux préparatoires* of the Environmental Modification Convention indicate that the intention of the parties was to 'limit the potential danger to mankind from possible *new* means of warfare'.[158] The environmental modification techniques in contemplation were techniques which had not yet been developed. As the United States Secretary of State said at the ceremony to mark the signature of the Convention:

> 'While the intentional modification of the environment at present can be done only on a local and small scale at best, we scarcely need remind ourselves that in our era technology can advance to make possible actions which would cause hitherto inconceivable environmental consequences. So we believe it would be wise to outlaw what is commonly called "environmental warfare" before it has a real chance to develop significantly for military purposes, with potentially disastrous consequences.'[159]

This emphasis on new methods of warfare and the anticipatory nature of the Convention are further evidence that the parties did not intend that it should apply to the collateral environmental effects of nuclear (or, indeed, other battlefield) weapons, which were far from new in 1977.

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157 Though, once again, how substantial those effects would be is likely to vary depending on the type of weapon and the circumstances in which it is used.

158 Joint statement by the United States and the Soviet Union, 3 July 1974; 1974 *Digest of United States Practice in International Law* 744.

159 1977 *Digest of United States Practice in International Law* 966-7.

3.77 Articles 35(3) and 55 of Additional Protocol I are broader in scope than the Environmental Modification Convention, in that they are applicable to the incidental effects on the environment of the use of weapons. They were, however, innovative provisions when included in Additional Protocol I, as was made clear in a statement by the Federal Republic of Germany on the adoption of what became Article 35 of the Protocol:

> 'The delegation of the Federal Republic of Germany joined in the consensus on Article 33 [subsequently renumbered Article 35] with the understanding that paragraphs 1 and 2 reaffirm customary international law, while paragraph 3 of this article is an important new contribution to the protection of the natural environment in times of international armed conflict.'[160]

As new rules, the provisions of Articles 35(3) and 55 are subject to the understanding, which was discussed above, that the new provisions created by Additional Protocol I do not apply to the use of nuclear weapons. [161] The view that the environmental provisions of Protocol I are new rules and thus inapplicable to the use of nuclear weapons is confirmed by a number of commentators. [162]

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160 *Official Records*, vol. VI, p. 115.

161 See above, paragraphs 3.9 to 3.11 and 3.45 to 3.55.

162 Kalshoven, *loc. cit.*, p. 283, quoted in paragraph 3.52, above; Hearn, *loc. cit.*, pp. 244-6. The ICRC Commentary does not include Articles 35(3) and 55 in the list of provisions which it regards as declaratory of custom and hence as applicable to nuclear weapons; ICRC Commentary, paras. 1857-59. It is interesting to note that the Government of Nauru, in its written submissions in the WHO case, notwithstanding its strongly expressed view that the use of nuclear weapons would be unlawful, concedes that Article 35(3) lays down new rules (Written Statement of the Government of Nauru, p. 22.)

(7) The effect on neutral States

3.78 It has been suggested [163] that the use of nuclear weapons would inevitably have such catastrophic effects on the territory of neutral States and States not party to a conflict that it would violate the principle laid down in Article 1 of Hague Convention No V, Respecting the Rights and Duties of Neutral Powers and Persons in case of War on Land, 1907, which provides that 'the territory of neutral Powers is inviolable.' Whether the use of nuclear weapons would deposit radioactive fall-out on the territory of neutral States would, however, 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 neutral States against the incidental effects of hostilities.

(8) Belligerent Reprisals

3.79 Even if a particular use of nuclear weapons might be contrary to the laws of armed conflict, it remains necessary to consider whether that use might nevertheless be justified as a belligerent reprisal. A belligerent reprisal is an action, taken by a party to an armed conflict, which would normally constitute a violation of the laws of armed conflict but which is lawful because it is taken in response to a prior violation of that law by an adversary. Since such a reprisal takes place in the context of a continuing armed conflict, it raises legal questions entirely distinct from those concerning the taking of armed reprisals in a normal peacetime environment (a matter which is not considered in these submissions). To be lawful, a belligerent reprisal must meet two conditions. First, it must not be directed against persons or objects against which the taking of reprisals is specifically prohibited. Secondly, it must meet the criteria for the regulation of reprisals, namely that it is taken in response to a prior wrong, is proportionate, is undertaken for the purpose of putting an end to the enemy's unlawful conduct and for preventing future illegalities, and is a means of last resort.

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163 Written Statement of the Government of Nauru, p. 35.

3.80 The Geneva Conventions of 1949 prohibit the taking of reprisals against persons or objects protected by the Conventions. [164] That, however, would have little relevance here, since it is difficult to conceive of the use of nuclear weapons against such persons or objects. [165] The Conventions do not preclude the taking of reprisals against the enemy's civilian population or civilian objects in enemy territory.

3.81 Additional Protocol I prohibits the taking of reprisals against the civilian population (Article 51(6)), civilian objects (Article 52(1)), historic monuments (Article 53(c)), objects indispensable to the survival of the civilian population (Article 54(4)), the natural environment (Article 55(2)) and works and installations containing natural forces (Article 56(4)). The application of these provisions would have a greater effect on the retaliatory use of nuclear weapons. Again, however, these provisions are correctly regarded as innovative and thus as inapplicable to the use of nuclear weapons. [166]

3.82 So far as the second condition for the conduct of lawful reprisals is concerned, it has been argued that the use of nuclear weapons could never satisfy the requirements of proportionality and preventiveness. [167] This argument, however, suffers from the same flaws as the argument that the use of nuclear weapons could never satisfy the requirements of self-defence. Whether the use of nuclear weapons would meet the requirements of proportionality cannot be answered in the abstract: it would depend upon the nature and circumstances of the wrong which prompted the

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[164] Convention No. I, Article 46, prohibits reprisals against the wounded, sick and those medical personnel, buildings and equipment covered by the Convention.

Convention No. II, Article 47, prohibits reprisals against the wounded, sick, shipwrecked and those medical personnel, vessels and equipment protected by the Convention.

Convention No. III, Article 13, prohibits reprisals against prisoners of war.

Convention No. IV, Article 33, prohibits reprisals against those civilians protected by the Convention (principally civilians detained in the territory of an adverse party and the civilian population of occupied territory) and their property.

[165] See paragraph 3.72, above.

[166] Sir Hersch Lauterpacht, *Oppenheim's International Law*, (7th ed 1952), vol. II, p. 351; Kalshoven, *loc. cit.*, p. 283; Heam, *loc. cit.*, p. 217. The ICRC Commentary, does not include the reprisals provisions in the list of provisions which it expressly regards as applicable to nuclear weapons, paragraphs 1857-9.

[167] Brownlie, *loc. cit.*, p. 445 goes further and contends that:

> 'it is hardly legitimate to extend a doctrine related to the minutiae of the conventional theatre of war to an exchange of power which, in the case of the strategic and deterrent uses of nuclear weapons, is equivalent to the total war effort and is the essence of the war aims.'

But the same reasoning would lead to the conclusion that it is hardly legitimate to extend any of the doctrines of the laws of war designed for the non-nuclear age to the use of nuclear weapons.

taking of reprisal action. Nor can it be ruled out that the retaliatory use of a nuclear weapons might have the effect of putting a stop to a series of violations of the law by an adversary. Indeed, military doctrine for fifty years has been based on the belief that it is the threat of retaliation in kind which is the principal factor deterring the use of nuclear weapons.

(9) Conclusion

3.83 It follows that, while some uses of nuclear weapons would violate the laws of armed conflict, the argument that their use would invariably be contrary to this part of international law is unfounded. Whether the use of a nuclear weapon in a particular case is lawful will depend upon the circumstances of that case. Moreover, the scope for variation in those circumstances is so great and the effect of those variations so important that any abstract statement about the legality of using nuclear weapons would be either unhelpful in its generality or misleading.

5 International Law on Human Rights and the Environment

3.84 This section will address the question of whether the use, or threat of use, of nuclear weapons is prohibited *per se* by the law of human rights or any rule of international law requiring the protection of the environment.

3.85 Although the scope of the enquiry is broad, the conclusion which results from a review of these issues is essentially clear. As the law stands, the threat or use of nuclear weapons is not prohibited *per se* by provisions of international law on human rights or the protection of the environment. *De lege lata*, the threat or use of nuclear weapons is lawful, subject to such rules of the *jus ad bellum* or *jus in bello* as may be applicable. Those rules have been considered in the preceding sections of this Written Statement. Given that States actively disagree on the development of a rule of law regulating the threat or use of nuclear weapons as such, and in view also of the sensitivity of the disarmament process, this matter is one in which, in the view of the United Kingdom, an opinion *de lege ferenda* would be fundamentally inappropriate.

3.86 There are also cogent reasons, relative to a consideration of the matter from the perspective of human rights and environmental protection why the Court should, on grounds of propriety, exercise its discretion and decline to respond to the request for an advisory opinion.

3.87 International law on human rights and the protection of the environment is largely treaty-based. It is therefore important that the interpretation and application of such agreements is properly located within the law of treaties. Some preliminary observations are thus warranted.

(1) General Considerations

3.88 First, it is a fundamental principle of the law of treaties that a prohibitive rule, purporting to exclude a particular activity from the scope of permissible State practice, must be clearly stated. Referring to 'the need of express terms to alter an existing rule of law', Lord McNair quotes, 'in spite of its antiquity' the principle stated by Sir Leoline Jenkins that

'...Treaties ... are not to be understood as altering or restraining the Practice generally received, unless the Words do fully and necessarily infer an Alteration or Restriction.' [168]

3.89 As a basic proposition, one cannot, therefore, infer from general words, or a treaty of general application, a prohibitive rule of specific content that would have the effect of limiting the scope of otherwise permissible State conduct. It would be neither sound practice nor sufficient to rely upon general provisions of international law on human rights or the environment for the purpose of conjuring up a rule prohibiting the threat or use of nuclear weapons by way of legitimate self-defence. Indeed, such an approach would pose considerable dangers for the wider integrity and effectiveness of the provisions of law in question.

3.90 Secondly, both the performance and interpretation of treaties are subject to the overriding obligation of good faith. One aspect of this is that:

'... it would be a breach of this obligation for a party to make use of an ambiguity in order to put forward an interpretation which it was known to the negotiators of the treaty not to be the intention of the parties.' [169]

3.91 In the words of the Permanent Court of International Justice, the text of a treaty cannot

'... be enlarged by reading into it stipulations which are said to result from the proclaimed intentions of the authors of the Treaty, but for which no provision is made in the text itself.' [170]

3.92 Considering this obligation in the light of the principle of effectiveness, Sir Hersch Lauterpacht noted that:

'... good faith requires no more than that effect be given, in a fair and reasonable manner, to the intention of the parties. This means that on occasions, if such was the intention of the parties, good faith may require that the effectiveness of the instrument should fall short of its apparent and desirable scope. The principle of effectiveness cannot transform a mere declaration of lofty purpose - such as the Universal Declaration of Human Rights - into a source of legal rights and obligations. ... Equally, although a recommendation, which is not binding, by an organ of the League of Nations or the United Nations is of less potency than a binding decision, this does not

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168 McNair, *The Law of Treaties* (1961), p. 463.

169 *Ibid.*, p. 465.

170 *Polish War Vessels in Danzig*, PCIJ Reports, Series A/B, No. 43, p. 142.

mean that it is open to a judicial tribunal to endow with binding character an expression, however politically or morally weighty, of collective opinion.' [171]

3.93 Thus, the fact that a treaty *could* be construed to achieve a particular result does not mean that it *should* be so construed. Particularly in the context of a case such as that presently in issue, the construction of a treaty to achieve a purpose not within the contemplation of its authors would be inappropriate. In the context of treaties having as their express object the protection of specific aspects of the eco-system, there is also a danger that such an approach could undermine the integrity of these conventions and impugn their normative quality more generally. It would also do great disservice to the cause of environmental protection if the prospect of judicial creativity in the interpretation and application of such treaties translated into caution on the part of States when it came to participating in such agreements in the future.

3.94 Thirdly, 'treaties must be applied and interpreted against the background of general principles of international law.' [172] This rule now finds partial expression in Article 31(3)(c) of the Vienna Convention on the Law of Treaties, 1969, which permits 'any relevant rules of international law applicable in the relations between the parties' to be taken into account for the purposes of the interpretation of treaties. On this principle, one commentator has noted that 'every treaty provision must be read not only in its own context, but also in the wider context of general international law, whether conventional or customary'. [173] A treaty cannot, therefore, be construed in a vacuum, or in the abstract, without reference to other rules of international law with which it may interact.

3.95 One aspect of this rule which is of particular importance in the present context is that, save to the extent expressly provided, a treaty must be construed against the background of the inherent right of self-defence. In other words, save to the extent expressly provided, a treaty cannot be construed so as to restrict the inherent right of States to act by way of legitimate self-defence.

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171 *The Development of International Law by the International Court of Justice* (1958), pp. 292-3.

172 McNair, *op. cit.*, p. 466.

173 Sinclair, *The Vienna Convention on the Law of Treaties* (2nd ed., 1984), p. 139.

3.96 As stated, this proposition merely reflects the fundamental and overriding character of self-defence in general international law. In the words of Judges Anzilotti and Huber in the *Wimbledon* case:

> 'The right of a State to adopt the course which it considers best suited to the exigencies of its security and to the maintenance of its integrity, is so essential a right that, in case of doubt, treaty stipulations *cannot be interpreted* as limiting it, even though those stipulations do not conflict with such an interpretation.' [174]

3.97 Although these comments were made in the context of a joint dissenting opinion, the text of Article 380 of the Treaty of Versailles in issue in the proceedings, and the judgment of the Court, implied that Germany would have been entitled, in the event of a war in which it was involved, to restrict access to the Kiel Canal, notwithstanding the terms of the Treaty. The dissent was therefore on the issue of Germany's rights in the case of a war in which it was not involved. In so far as is material to the present case, therefore, the proposition stated by Judges Anzilotti and Huber is not at variance with the judgment of the Court and may be regarded as of general application.

3.98 In the light of these observations, the issue before the Court in respect of the law of human rights and the law on protection of the environment is not whether the use or threat of use of nuclear weapons is, in the abstract, compatible with those laws. Rather, it is whether any of the rules of the law of human rights or the law on environmental protection can be construed, in accordance with the general principles stated above, as prohibiting the use or threat of use of nuclear weapons *when carried out by way of legitimate self-defence.*

(2) The Law of Human Rights

3.99 In the written statements submitted to the Court in the WHO case, it was argued by two States that the use of nuclear weapons would be contrary to the law of human rights and, in particular, to the right to life. [175] This right is protected by all

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174 *Case of the SS Wimbledon*, PCIJ Reports, Series A, No. 1, p. 37.

175 Written Statement of the Government of the Solomon Islands, Part IIB; Written Statement of the Government of Nauru, vol. I, pp. 48-51.

the international agreements for the protection of human rights. Thus, Article 6(1) of the International Covenant on Civil and Political Rights, 1966, provides that:

> 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.'

The right to life is also expressly guaranteed by Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 4 of the American Convention on Human Rights and Article 4 of the African Charter on Human and People's Rights.

3.100 Although the right to life is the most fundamental of all human rights, it is not unqualified, otherwise its application in time of armed conflict would invariably render the use of any weapon unlawful. This issue is expressly addressed in the European Convention on Human Rights, Article 15 of which provides for parties to derogate from their obligations under the Convention in times of 'war or other public emergency threatening the life of the nation'. Article 15(2) stipulates that no derogation is permitted from Article 2, which guarantees the right to life, 'except in respect of deaths resulting from lawful acts of war.' The European Convention thus expressly refers to the law of armed conflict to determine whether deaths resulting from the conduct of hostilities involve a violation of the right to life. Deaths caused by the use of nuclear (or conventional) weapons would violate the right to life only if the particular use of the weapons was contrary to the laws of armed conflict. As the United Kingdom has sought to demonstrate (in Part III.4, above), there are circumstances in which the use of nuclear weapons is not prohibited *per se* by the laws of armed conflict.

3.101 Although the International Covenant on Civil and Political Rights contains no provision equivalent to Article 15(2) of the European Convention, Article 6(1) prohibits only the 'arbitrary' deprivation of life. [176] If the Covenant is applicable at all to the taking of life in the context of an armed conflict, it is necessary to determine what the term 'arbitrary' means in that context. Since the taking of life is an inescapable feature of the conduct of armed conflict and since it has never seriously been suggested that the Covenant outlaws the use of force by way of national self-defence, the reference to 'arbitrary' deprivation of life must contain the means for distinguishing between those acts of taking life in armed conflict which are compatible with Article 6 of the Covenant and those which are not. The only sensible

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176 The same is true of Article 4 of the American Convention on Human Rights and Article 4 of the African Charter on Human and People's Rights.

construction which can be placed on the term 'arbitrary' in this context is that it refers to whether or not the deliberate taking of life is unlawful under that part of international law which was specifically designed to regulate the conduct of hostilities, that is the laws of armed conflict. On that basis, the use of a weapon to take life in armed conflict could only amount to an arbitrary deprivation of life, for the purposes of Article 6 of the Covenant, if it was contrary to the laws of armed conflict but not otherwise.

3.102 This interpretation is confirmed by the *travaux préparatoires* of the Covenant. In drafting Article 6, it was decided not to attempt to list those circumstances in which the deprivation of life might be lawful but, instead, to rely upon the concept of arbitrariness to exclude such cases from the scope of the prohibition. One of the examples given of a taking of life that would not be arbitrary was killing in the course of a 'lawful act of war'.

3.103 Whether the use of nuclear weapons in an armed conflict entails a violation of the right to life under Article 6 of the Covenant would thus depend on whether that use was contrary to the laws of armed conflict discussed in Part III.4 of this Statement.

3.104 It is in this context that the references to nuclear weapons by the United Nations Human Rights Committee, in their two General Comments on Article 6, must be seen. The Committee is empowered, under Article 40(4) of the Covenant, as part of the procedure for considering the reports submitted by the States parties, to transmit to them such general comments as it may consider appropriate. [177]

3.105 The first such Comment, adopted in 1982, contains the following passage:

> 'The Committee observes that war and other acts of mass violence continue to be a scourge of humanity and to take the lives of thousands of human beings every year. Under the Charter of the United Nations the threat or use of force by any State against another State, except in the case of the inherent right of self-defence, is already prohibited. The Committee considers that States have the supreme duty to prevent wars, acts of genocide and other acts of mass violence causing arbitrary loss of life. Every effort they make to avert the danger of war, especially thermo-nuclear war, and to strengthen international peace and security would constitute the most important condition and guarantee for the safeguarding of the right to life.' [178]

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[177] These general comments are, by definition, *not binding*.

[178] General Comment 6(16): UN Doc. A/37/40, p. 93, paragraph 2.

This comment does not suggest that all acts of war or all uses of nuclear weapons are a violation of the right to life. On the contrary, it expressly recognizes that the use of force in self-defence is lawful under international law.

3.106 The General Comment adopted by the Committee in 1984 goes further. After recalling the 1982 General Comment, the Committee noted the expressions of concern in the General Assembly at the proliferation of weapons of mass destruction and continued:

> '4. ... It is evident that the designing, testing, manufacture, possession and deployment of nuclear weapons are amongst the greatest threats to the right to life which confront mankind today. This threat is compounded by 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.
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> ...
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> '6. The production, testing, possession, deployment and use of nuclear weapons should be prohibited and recognized as crimes against humanity.' [179]

3.107 This General Comment was highly controversial, not least because the Committee had made very little of the threat to the right to life created by nuclear weapons in the questions which it had posed to States in connection with their reports to the Committee. Moreover, the Committee did not consider whether any particular use of a nuclear weapon would or would not violate the laws of armed conflict. The General Comment does not, however, assert that the use (let alone the testing, possession or deployment) of nuclear weapons would inevitably contravene Article 6 of the Covenant. The statement in paragraph 6 of the Comment is clearly framed as a proposal for the adoption of a new prohibition and not as a statement *de lege lata*. In the words of one leading commentary:

> 'It is difficult to accept that the term "should" suggests anything other than a desirable goal to be achieved rather than a statement of immediate legal obligation derived from Article 6 of the [Covenant].' [180]

3.108 The protection given by the law of human rights does not, therefore, lead to a different conclusion regarding the legality of the use of nuclear weapons from that

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179 General Comment 14 (23). UN Doc. A/40/40, p. 162, paragraphs 4 and 6.

180 McGoldrick, *The Human Rights Committee* (1994), p. 336.

provided by the law of armed conflict. Since the law of human rights is concerned primarily with the protection of human rights in peacetime, whereas the law of armed conflict is a *lex specialis* designed to regulate the conduct of hostilities, it is entirely appropriate that the human rights agreements should, in effect, refer to the law of armed conflict in order to determine whether or not any particular instance of the deprivation of life in wartime is arbitrary. The same principle applies, *a fortiori*, in respect of the protection of other human rights.

(3) International Law requiring the Protection of the Environment

3.109 The very considerable number of treaties concluded over the past century providing for the protection of some or other aspect of the eco-system - by one count over 300 multilateral treaties, 900 bilateral treaties and 200 other instruments [181] - have addressed matters ranging from pollution of one sort or another to the protection of the cultural and national heritage, wetlands, tropical forests and endangered and migratory species. Amongst these agreements are a number which, it has sometimes been argued, should be construed as prohibiting the threat or use of nuclear weapons. There are also various resolutions, declarations and statements, which are not legally binding, but which have sometimes been relied upon as evidence of a general rule of international law prohibiting the threat or use of nuclear weapons *per se*.

3.110 Scarcely any of these texts, however, make any reference to the use of nuclear weapons. There was, for example, virtually no discussion of the environmental consequences of nuclear weapons during the Stockholm Conference on the Human Environment in 1972 or the Rio Conference on Environment and Development in 1992. Nor do the resolutions of the United Nations General Assembly dealing with the environment refer to nuclear weapons. [182] Conversely, the General Assembly resolutions on the use of nuclear weapons do not refer to the environment.

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[181] See Prieur, 'Protection of the Environment' in Bedjaoui (ed.), *International Law: Achievements and Prospects* (1991), p. 1017, at p. 1018.

[182] See, e.g., resolution 47/37, which addresses the protection of the environment in times of armed conflict but makes no mention of nuclear weapons.

(a) Environmental Agreements and the Threat or Use of Nuclear Weapons

3.111 With the exception of certain treaties, discussed in Part III.2 of this Statement,[183] which prohibit any use of force within a defined area, international treaties having as their object the protection of the environment have not in terms addressed the use or threat of use of nuclear weapons. The question is, therefore, whether agreements of a general nature[184] are to be construed as prohibiting the threat or use of nuclear weapons as a matter of necessary implication. Examples of such treaties might be said to include the Convention for the Protection of the World Cultural and Natural Heritage, 1972, [185] and the Vienna Convention for the Protection of the Ozone Layer, 1985. [186]

3.112 However, the nature and scope of these agreements is such that they cannot be construed as containing an implied prohibition on the threat or use of nuclear weapons. Such an approach would run contrary to the principles discussed in paragraphs 3.88 to 3.98, above, that a prohibitive rule must be clearly stated, that the interpretation and performance of treaties are subject to the obligation of good faith and that treaties must be construed against the background of the inherent right of individual and collective self-defence. To read into environmental agreements of a general nature a prohibition on the use or threat of use of nuclear weapons could have absurd effects. If the Convention for the Protection of the World Cultural and Natural Heritage may be construed, in the absence of an express clause to this effect, as prohibiting the threat or use of nuclear weapons, so could the European Convention for the Protection of Pet Animals, 1987.[187] Article 3(1) of which provides that

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183 See, e.g., the Antarctic Treaty, 1959, and the other treaties considered in paragraphs 3.13 to 3.23, above.

184 Treaties dealing specifically with the protection of the environment in time of armed conflict are discussed in paragraphs 3.74 to 3.77, above.

185 11 ILM (1972) 1358; UKTS 2 (1985). Article 6(3) of this Convention provides that:

> 'Each State Party to this Convention undertakes not to take any deliberate measures which might damage directly or indirectly the cultural or natural heritage referred to in Articles 1 and 2 situated on the territory of other States Parties to this Convention.'

186 26 ILM (1987) 1529; UKTS 1 (1990). Article 2(1) of this Convention provides that:

> 'The Parties shall take appropriate measures in accordance with the provisions of the Convention and of those protocols in force to which they are party to protect human health and the environment against adverse effects resulting from or likely to result from human activities which modify or are likely to modify the ozone layer.'

187 ETS 125.

'nobody shall cause a pet animal unnecessary suffering or distress.' In the United Kingdom's view, the relevant principle of law is that stated by the Permanent Court of International Justice in the *Polish War Vessels in Danzig* case - the text of a treaty cannot be enlarged by reading into it stipulations for which no provision is made in the text itself. [188]

(b) Customary International Law on the Environment and the Threat or Use of Nuclear Weapons

3.113 It has also been suggested that customary international law on the environment has developed a prohibition on the use of nuclear weapons. This prohibition is said to be derived from international agreements and other texts, such as resolutions of the General Assembly and other bodies. The Court has, however, made it clear that the existence of a rule of customary law will not lightly be presumed:

> 'It is, of course, axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them. [189]

3.114 In the present case, the practice of States in environmental matters gives no hint of a rule regarding the use, or threat of use, of nuclear weapons. Treaties on the environment which contain no reference to such weapons and in which no prohibition on their use can reasonably be implied clearly cannot be relied upon as evidence of a customary rule prohibiting the threat or use of nuclear weapons. Resolutions of the General Assembly and other bodies may be relied upon as evidence of customary international law only if they command widespread and representative support, are regarded by the States voting for them as articulating a principle of customary law and are capable of normative application. Hortatory provisions with only partial support among States cannot give rise to, or change the content of, a rule of customary law.

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188 See paragraph 3.91, above.

189 *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, ICJ Reports, 1985, p. 13, at paragraph 27.

3.115 Two instruments are sometimes said to be particularly relevant to the use or threat of use of nuclear weapons. Principle 26 of the Stockholm Declaration on the Human Environment, 1972, provides that:

> 'Man and his environment must be spared the effects of nuclear weapons and all other means of mass destruction. States must strive to reach prompt agreement, in the relevant international organs, on the elimination and complete destruction of such weapons.'

Principle 24 of the Rio Declaration on Environment and Development, 1992, provides that:

> 'Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary.'

Quite apart from the non-binding character of these declarations as a matter of form, an examination of the detail leaves no room for doubt that they cannot be considered a basis for a rule of customary international law prohibiting the threat or use of nuclear weapons. For example, the language of Principle 26 of the Stockholm Declaration is clearly hortatory in nature. Equally, while Principle 24 of the Rio Declaration provides that States shall respect international law providing protection for the environment in times of armed conflict, it gives no indication of what that law entails. An authoritative proscription of the threat or use of nuclear weapons cannot be inferred from such a statement.

3.116 The fact that there is no evidence of 'widespread and representative' support for the existence of a rule of custom prohibiting *per se* the threat or use of nuclear weapons, as well as the absence of *opinio juris* on the part of States concerning the existence of such a rule, has effectively precluded the emergence of a rule of customary international law to this effect.[190]

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[190] See, in this regard, the comment by Birnie and Boyle that the rule of customary international law that has now developed prohibiting atmospheric nuclear testing

> 'does not extend beyond deliberate nuclear tests or peaceful explosions ... nor does it imply that the actual use of nuclear weapons is forbidden by international law. ... Explicit treaty limitations on the conduct of military operations place some constraints on methods of warfare which cause widespread, long-lasting and severe damage to the natural environment, but the use of nuclear weapons is prohibited entirely only in Latin America and the Pacific.' (Birnie and Boyle, *International Law and the Environment* (1992), pp. 360-61; footnotes omitted).

6 Threats to Use Nuclear Weapons

3.117 Unlike the earlier request from the World Health Organization, the question submitted to the Court by the United Nations General Assembly asks the Court whether the threat to use nuclear weapons is in any circumstances permitted by international law. Whereas the use of force is regulated by a large body of detailed rules under both the *jus ad bellum* and the *jus in bello*, the only express regulation of the threat of force is contained in Article 2(4) of the United Nations Charter, which provides that:

> 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.'

3.118 The question what constitutes a threat of force within the meaning of Article 2(4) has received very little attention. A widely accepted definition, however, appears to be that of Professor Brownlie, who states that:

> 'A threat of force consists in an express or implied promise by a government of a resort to force conditional on non-acceptance of certain demands of that government. If the promise is to resort to force in conditions in which no justification for the use of force exists, the threat itself is illegal.' [191]

A threat to use nuclear weapons thus involves much more than merely the possession of such weapons. In the absence of a specific commitment by a State not to possess such weapons, [192] their possession cannot, in itself, be contrary to international law. As the Court held in the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*,

> 'in international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited, and this principle is valid for all State without exception.' [193]

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191 Brownlie, *International Law and the Use of Force by States* (1963), p. 364. See also the similar approach adopted by Sadurska 'Threat of Force', 82 AJIL (1988) 239 at p. 242, Schachter, *International Law in Theory and Practice* (1991) at p. 111 and Randelzhofer in Simma (ed), *The Charter of the United Nations - A Commentary* (1994) at p. 118.

192 Such commitments are considered in Part III.2

193 ICJ Reports, 1986, p. 3 at p. 135.

Nor does the deployment of nuclear weapons amount to a threat of their use unless the surrounding circumstances make clear that such a threat is implicit in the fact of their deployment, something which is not lightly to be presumed, since all States have a right to possess and deploy weapons for their own self-defence unless they have agreed to forego or curtail this right.

3.119 In circumstances where the actual use of force would be lawful, it follows that the threat to use force would also be lawful. Thus, for one State to make clear (whether by words or deeds) to another State that, if attacked, it will use force to defend itself is not an unlawful threat of force, if, indeed, it can be described as a threat at all. In the *Corfu Channel* case, the Court held that the action of the United Kingdom in sending four warships through the Corfu Channel with their crews at action stations after a previous occasion on which coastal artillery had fired on British warships was not an unlawful action. Having held that United Kingdom warships had a right of passage through the Corfu Channel, the Court accepted that even though

> 'the intention must have been, not only to test Albania's attitude, but at the same time to demonstrate such force that she would abstain from firing on passing ships' [194]

there was no violation of Albania's sovereignty. Similarly, for a State to make clear that, if attacked, it will resort to nuclear weapons would involve no threat of force in violation of Article 2(4) of the Charter or of any other rule of international law, since the first State is not attempting to coerce the second into complying with a demand which it has no right to make and there is no danger that it will use nuclear weapons unless it is itself the victim of an unlawful armed attack.

3.120 Moreover, in assessing this aspect of the question posed by the General Assembly, it is important to bear in mind that the deterrent effect of nuclear weapons has played an essential part in maintaining the self-defence of a number of States without recourse to force proving necessary.[195] In that respect, it cannot be regarded as contrary to the policy underlying Article 2(4) and Article 51 of the Charter.

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194 ICJ Reports, 1949, p. 3 at p. 31.

195 See paragraphs 2.18 to 2.21 and 3.11, above.

4

IV CONCLUSION

4.1 On the basis of the arguments set out above, the United Kingdom submits that the Court should, in the exercise of its discretion, decline to give an answer to the question posed by the General Assembly because:-

(1) the case is not one in which the opinion of the Court would be capable of providing any constructive assistance to the General Assembly in the exercise of its functions under the United Nations Charter;

(2) the request for an opinion should be considered in the context of the effects which such an opinion might have upon the United Nations as a whole and, in particular, upon the disarmament process where an opinion on the legality of nuclear weapons would be unlikely to have any beneficial effects and would be likely to be detrimental to further progress at a time when the prospects for such progress are otherwise promising;

(3) the question put to the Court is in vague and abstract terms, whereas an answer would require detailed examination of the circumstances of any possible use of nuclear weapons, or the threat thereof, and the necessary material regarding such circumstances could not be brought before the Court.

4.2 As regards the principles of law raised by the question, the United Kingdom submits that:

(1) there is no rule contained in either treaty or customary international law which expressly prohibits the use of nuclear weapons *per se*, nor can such a rule be inferred from more general treaty provisions;

(2) State practice regarding the possession of nuclear weapons necessarily implies that the use of nuclear weapons would be lawful in proper circumstances. This practice has received recent confirmation in the unanimous adoption of Security Council resolution 984 and the decision of the Conference on the renewal of the Non-Proliferation Treaty to extend the Treaty indefinitely;

(3) the legality of the use of nuclear weapons must therefore be assessed in the light of the applicable principles of international law regarding the use of force and the conduct of hostilities, as is the case with other methods and means of warfare;

(4) the threat or use of nuclear weapons will not be contrary to the Charter of the United Nations if it meets the criteria for the exercise of the right of self-defence. Whether the use of nuclear weapons meets those criteria will depend upon the circumstances of each individual case;

(5) nuclear weapons are not prohibited *per se* by the law of armed conflict. Their use will be lawful provided that it complies with the applicable rules of that law. Their use in circumstances which would otherwise be illegal may, moreover, be lawful if it constitutes a legitimate belligerent reprisal;

(6) the threat or use of nuclear weapons is not prohibited *per se* by any rule of international law for the protection of human rights or the environment.

1995 Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons

NPT/CONF.1995/L.6
9 May 1995

ORIGINAL: ENGLISH

New York, 17 April-12 May 1995

EXTENSION OF THE TREATY ON THE NON-PROLIFERATION OF NUCLEAR WEAPONS

Draft decision proposed by the President

The Conference of the States Party to the Treaty on the Non-Proliferation of Nuclear Weapons (hereinafter referred to as "the Treaty") convened in New York from 17 April to 12 May 1995, in accordance with articles VIII,3 and X,2 of the Treaty,

Having reviewed the operation of the Treaty and affirming that there is a need for full compliance with the Treaty, its extension and its universal adherence, which are essential to international peace and security and the attainment of the ultimate goals of the complete elimination of nuclear weapons and a treaty on general and complete disarmament under strict and effective international control,

Having reaffirmed article VIII,3 of the Treaty and the need for its continued implementation in a strengthened manner and, to this end, emphasizing the Decision on Strengthening the Review Process for the Treaty and the Decision on Principles and Objectives for nuclear non-proliferation and disarmament also adopted by the Conference,

Having established that the Conference is quorate in accordance with article X,2 of the Treaty,

Decides that, as a majority exists among States party to the Treaty for its indefinite extension, in accordance with its article X,2, the Treaty shall continue in force indefinitely.

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role to play in preventing the proliferation of nuclear weapons. Every effort should be made to implement the Treaty in all its aspects to prevent the proliferation of nuclear weapons and other nuclear explosive devices, without hampering the peaceful uses of nuclear energy by States parties to the Treaty.

Nuclear disarmament

3. Nuclear disarmament is substantially facilitated by the easing of international tension and the strengthening of trust between States which have prevailed following the end of the cold war. The undertakings with regard to nuclear disarmament as set out in the Treaty on the Non-Proliferation of Nuclear Weapons should thus be fulfilled with determination. In this regard, the nuclear-weapon States reaffirm their commitment, as stated in article VI, to pursue in good faith negotiations on effective measures relating to nuclear disarmament.

4. The achievement of the following measures is important in the full realization and effective implementation of article VI, including the programme of action as reflected below:

(a) The completion by the Conference on Disarmament of the negotiations on a universal and internationally and effectively verifiable Comprehensive Nuclear-Test-Ban Treaty no later than 1996. Pending the entry into force of a Comprehensive Test-Ban Treaty, the nuclear-weapon States should exercise utmost restraint;

(b) The immediate commencement and early conclusion of negotiations on a non-discriminatory and universally applicable convention banning the production of fissile material for nuclear weapons or other nuclear explosive devices, in accordance with the statement of the Special Coordinator of the Conference on Disarmament and the mandate contained therein;

(c) The determined pursuit by the nuclear-weapon States of systematic and progressive efforts to reduce nuclear weapons globally, with the ultimate goal of eliminating those weapons, and by all States of general and complete disarmament under strict and effective international control.

Nuclear-weapon-free zones

5. The conviction that the establishment of internationally recognized nuclear-weapon-free zones, on the basis of arrangements freely arrived at among the States of the region concerned, enhances global and regional peace and security is reaffirmed.

6. The development of nuclear-weapon-free zones, especially in regions of tension, such as in the Middle East, as well as the establishment of zones free of all weapons of mass destruction should be encouraged as a matter of priority, taking into account the specific characteristics of each region. The establishment of additional nuclear-weapon-free zones by the time of the Review Conference in the year 2000 would be welcome.

1995 Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons

NPT/CONF.1995/L.5
9 May 1995

ORIGINAL: ENGLISH

New York, 17 April-12 May 1995

PRINCIPLES AND OBJECTIVES FOR NUCLEAR NON-PROLIFERATION AND DISARMAMENT

Draft decision proposed by the President

Reaffirming the preamble and articles of the Treaty on the Non-Proliferation of Nuclear Weapons,

Welcoming the end of the cold war, the ensuing easing of international tension and the strengthening of trust between States,

Desiring a set of principles and objectives in accordance with which nuclear non-proliferation, nuclear disarmament and international cooperation in the peaceful uses of nuclear energy should be vigorously pursued and progress, achievements and shortcomings evaluated periodically within the review process provided for in article VIII (3) of the Treaty, the enhancement and strengthening of which is welcomed,

Reiterating the ultimate goals of the complete elimination of nuclear weapons and a treaty on general and complete disarmament under strict and effective international control,

The Conference affirms the need to continue to move with determination towards the full realization and effective implementation of the provisions of the Treaty, and accordingly adopts the following principles and objectives:

Universality

1. Universal adherence to the Treaty on the Non-Proliferation of Nuclear Weapons is an urgent priority. All States not yet party to the Treaty are called upon to accede to the Treaty at the earliest date, particularly those States that operate unsafeguarded nuclear facilities. Every effort should be made by all States parties to achieve this objective.

Non-proliferation

2. The proliferation of nuclear weapons would seriously increase the danger of nuclear war. The Treaty on the Non-Proliferation of Nuclear Weapons has a vital

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7. The cooperation of all the nuclear-weapon States and their respect and support for the relevant protocols is necessary for the maximum effectiveness of such nuclear-weapon-free zones and the relevant protocols.

Security assurances

8. Noting United Nations Security Council resolution 984 (1995), which was adopted unanimously on 11 April 1995, as well as the declarations by the nuclear-weapon States concerning both negative and positive security assurances, further steps should be considered to assure non-nuclear-weapon States party to the Treaty against the use or threat of use of nuclear weapons. These steps could take the form of an internationally legally binding instrument.

Safeguards

9. The International Atomic Energy Agency (IAEA) is the competent authority responsible to verify and assure, in accordance with the statute of the IAEA and the Agency's safeguards system, compliance with its safeguards agreements with States parties undertaken in fulfilment of their obligations under article III (1) of the Treaty, with a view to preventing diversion of nuclear energy from peaceful uses to nuclear weapons or other nuclear explosive devices. Nothing should be done to undermine the authority of the IAEA in this regard. States parties that have concerns regarding non-compliance with the safeguards agreements of the Treaty by the States parties should direct such concerns, along with supporting evidence and information, to the IAEA to consider, investigate, draw conclusions and decide on necessary actions in accordance with its mandate.

10. All States parties required by article III of the Treaty to sign and bring into force comprehensive safeguards agreements and which have not yet done so should do so without delay.

11. IAEA safeguards should be regularly assessed and evaluated. Decisions adopted by its Board of Governors aimed at further strengthening the effectiveness of IAEA safeguards should be supported and implemented and the IAEA's capability to detect undeclared nuclear activities should be increased. Also States not party to the Treaty on the Non-Proliferation of Nuclear Weapons should be urged to enter into comprehensive safeguards agreements with the IAEA.

12. New supply arrangements for the transfer of source or special fissionable material or equipment or material especially designed or prepared for the processing, use or production of special fissionable material to non-nuclear-weapon States should require, as a necessary precondition, acceptance of IAEA full-scope safeguards and internationally legally binding commitments not to acquire nuclear weapons or other nuclear explosive devices.

13. Nuclear fissile material transferred from military use to peaceful nuclear activities should, as soon as practicable, be placed under IAEA safeguards in the framework of the voluntary safeguards agreements in place with the nuclear-weapon States. Safeguards should be universally applied once the complete elimination of nuclear weapons has been achieved.

Peaceful uses of nuclear energy

14. Particular importance should be attached to ensuring the exercise of the inalienable right of all the parties to the Treaty to develop research, production and use of nuclear energy for peaceful purposes without discrimination and in conformity with articles I, II as well as III of the Treaty.

15. Undertakings to facilitate participation in the fullest possible exchange of equipment, materials and scientific and technological information for the peaceful uses of nuclear energy should be fully implemented.

16. In all activities designed to promote the peaceful uses of nuclear energy, preferential treatment should be given to the non-nuclear-weapon States party to the Treaty, taking the needs of developing countries particularly into account.

17. Transparency in nuclear-related export controls should be promoted within the framework of dialogue and cooperation among all interested States party to the Treaty.

18. All States should, through rigorous national measures and international cooperation, maintain the highest practicable levels of nuclear safety, including in waste management, and observe standards and guidelines in nuclear materials accounting, physical protection and transport of nuclear materials.

19. Every effort should be made to ensure that the IAEA has the financial and human resources necessary in order to meet effectively its responsibilities in the areas of technical cooperation, safeguards and nuclear safety. The IAEA should also be encouraged to intensify its efforts aimed at finding ways and means for funding technical assistance through predictable and assured resources.

20. Attacks or threats of attack on nuclear facilities devoted to peaceful purposes jeopardize nuclear safety and raise serious concerns regarding the application of international law on the use of force in such cases, which could warrant appropriate action in accordance with the provisions of the Charter of the United Nations.

The Conference requests that the President of the Conference bring this decision, the Decision on Strengthening the Review Process of the Treaty, the Decision on the Extension of the Treaty and the Final Declaration of the Conference to the attention of the heads of State or Government of all States and seek their full cooperation on these documents and in the furtherance of the goals of the Treaty.

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ANNEX I

Statement dated 5 April 1995 by the representative of the Ministry of Foreign Affairs of the Russian Federation

Recognizing the fundamental importance of the Treaty on the Non-Proliferation of Nuclear Weapons, respecting the legitimate desire of non-nuclear-weapon States parties to that Treaty to receive assurances that nuclear weapons will not be used against them, based on the provisions of the military doctrine of the Russian Federation, the Ministry of Foreign Affairs of the Russian Federation is authorized to make the following statement (see annex).

It should be pointed out, furthermore, that as the President of the Russian Federation proposed at the forty-ninth session of the General Assembly, work on a further United Nations Security Council resolution on security assurances for non-nuclear-weapon States has been harmonized. The draft resolution, prepared with the participation of Russian representatives, is being submitted to the Security Council for its consideration. The main provisions of the draft resolution are as follows:

In the event of aggression involving the use of nuclear weapons or the threat of such aggression against a non-nuclear-weapon State party to the Treaty on the Non-Proliferation of Nuclear Weapons, the nuclear Powers which are permanent members of the Security Council will immediately bring the matter to the attention of the Council and will seek to ensure that they provide, in accordance with the Charter, necessary assistance to the State that is a victim of such an act of aggression or that is threatened by such aggression.

The draft resolution provides, further on, for the possibility of taking appropriate measures in response to a request from the victim of such an act of aggression for technical, medical, scientific or humanitarian assistance and for payment of compensation by the aggressor for loss, damage or injury sustained as a result of the aggression.

We believe that the adoption by the Security Council of this draft resolution would be welcomed by the non-nuclear-weapon States parties to the Treaty on the Non-Proliferation of Nuclear Weapons and would help strengthen the non-proliferation regime, international solidarity and world stability.

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Fiftieth session
Item 68 of the preliminary list*
CONCLUSION OF EFFECTIVE INTERNATIONAL ARRANGEMENTS TO ASSURE NON-NUCLEAR-WEAPON STATES AGAINST THE USE OR THREAT OF USE OF NUCLEAR WEAPONS

SECURITY COUNCIL
Fiftieth year

Letter dated 6 April 1995 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General

I have the honour to transmit to you herewith the text of a statement dated 5 April 1995 by the representative of the Ministry of Foreign Affairs of the Russian Federation regarding the presentation of security assurances to non-nuclear-weapon States (see annex I) and a statement dated 5 April 1995 by the Ministry of Foreign Affairs of the Russian Federation consisting of a national statement on negative security assurances for non-nuclear-weapon States (see annex II).

I should be grateful if you could have the text of this letter and its annexes circulated as a document of the General Assembly, under item 68 of the preliminary list of items to be included in the provisional agenda of the fiftieth session, entitled "Conclusion of effective international arrangements to assure non-nuclear-weapon States against the use or threat of use of nuclear weapons", and of the Security Council.

(Signed) S. LAVROV

* A/50/50.

ANNEX II

Statement of the Ministry of Foreign Affairs of the Russian Federation

5 April 1995

Russian Federation will not use nuclear weapons against non-nuclear-weapon States parties to the Treaty on the Non-Proliferation of Nuclear Weapons, except in the case of an invasion or any other attack on the Russian Federation, its territory, its armed forces or other troops, its allies or on a State towards which it has a security commitment, carried out or sustained by such a non-nuclear-weapon State in association or alliance with a nuclear-weapon State.

I should be grateful if you would have the text of the present letter and its annex circulated as a document of the General Assembly, under item 68 of the preliminary list, and of the Security Council.

(Signed) David H. A. HANNAY

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SECURITY COUNCIL
Fiftieth year

Letter dated 6 April 1995 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the Secretary-General

I have the honour to transmit herewith the text of a declaration by the United Kingdom of Great Britain and Northern Ireland on security assurances, issued by my Government on 6 April 1995 at the Conference on Disarmament in Geneva (see annex).

In issuing this declaration, my Government recognises that those States which have renounced nuclear weapons are entitled to look for assurances that such weapons will not be used against them. The revised negative security assurance now given in the Conference on Disarmament by the United Kingdom is a solemn and formal undertaking by my Government which meets these concerns. The positive security assurance also contained in the declaration reiterates and expands on the assurance which my Government gave in 1968 by recognising the desire of non-nuclear-weapon States to be reassured that the nuclear-weapon States would take appropriate measures in the event of the former being attacked or threatened with nuclear weapons.

These assurances have been given by my Government after consultation with the other nuclear-weapon States. They are extended to non-nuclear-weapon States Parties to the Treaty on the Non-Proliferation of Nuclear Weapons and demonstrate the continuing determination of the nuclear-weapon States to strengthen and make permanent that Treaty.

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ANNEX

United Kingdom of Great Britain and Northern Ireland declaration on security assurances made in the plenary session of the Conference on Disarmament on 6 April 1995 by Sir Michael Weston, United Kingdom Permanent Representative to the Conference on Disarmament in Geneva

The Government of the United Kingdom believes that universal adherence to and compliance with international agreements seeking to prevent the proliferation of weapons of mass destruction are vital to the maintenance of world security. We note with appreciation that 175 States have become parties to the Treaty on the Non-Proliferation of Nuclear Weapons.

We believe that the Treaty on the Non-Proliferation of Nuclear Weapons is the cornerstone of the international non-proliferation regime which has made an invaluable contribution to international peace and security. We are convinced that the Treaty should be extended indefinitely and without conditions.

We will continue to urge all States that have not done so to become parties to the Treaty.

The Government of the United Kingdom recognises that States which have renounced nuclear weapons are entitled to look for assurances that nuclear weapons will not be used against them. In 1978 we gave such an assurance. Assurances have also been given by the other nuclear-weapon States Parties to the Treaty on the Non-Proliferation of Nuclear Weapons.

Recognising the continued concern of non-nuclear-weapon States Parties to the Treaty on the Non-Proliferation of Nuclear Weapons that the assurances given by nuclear-weapon States should be in similar terms, and following consultation with the other nuclear-weapon States, I accordingly give the following undertaking on behalf of my Government:

The United Kingdom will not use nuclear weapons against non-nuclear-weapon States Parties to the Treaty on the Non-Proliferation of Nuclear Weapons except in the case of an invasion or any other attack on the United Kingdom, its dependent territories, its armed forces or other troops, its allies or on a State towards which it has a security commitment, carried out or sustained by such a non-nuclear-weapon State in association or alliance with a nuclear-weapon State.

In giving this assurance the United Kingdom emphasises the need not only for universal adherence to, but also for compliance with, the Treaty on the Non-Proliferation of Nuclear Weapons. In this context I wish to make clear that Her Majesty's Government does not regard its assurance as applicable if any beneficiary is in material breach of its own non-proliferation obligations under the Treaty on the Non-Proliferation of Nuclear Weapons.

In 1968 the United Kingdom declared that aggression with nuclear weapons, or the threat of such aggression, against a non-nuclear-weapon State would

create a qualitatively new situation in which the nuclear-weapon States which are Permanent Members of the United Nations Security Council would have to act immediately through the Security Council to take the measures necessary to counter such aggression or to remove the threat of aggression in accordance with the United Nations Charter, which calls for taking "effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace". Therefore, any State which commits aggression accompanied by the use of nuclear weapons or which threatens such aggression must be aware that its actions are to be countered effectively by measures to be taken in accordance with the United Nations Charter to suppress the aggression or remove the threat of aggression.

I, therefore, recall and reaffirm the intention of the United Kingdom, as a Permanent Member of the United Nations Security Council, to seek immediate Security Council action to provide assistance, in accordance with the Charter, to any non-nuclear-weapon State, party to the Treaty on the Non-Proliferation of Nuclear Weapons, that is a victim of an act of aggression or an object of a threat of aggression in which nuclear weapons are used.

This Security Council assistance could include measures to settle the dispute and restore international peace and security, and appropriate procedures, in response to any request from the victim of such an act of aggression, regarding compensation under international law from the aggressor for loss, damage or injury sustained as a result of the aggression.

If a non-nuclear-weapon State Party to the Treaty on the Non-Proliferation of Nuclear Weapons is a victim of an act of aggression with nuclear weapons, the United Kingdom would also be prepared to take appropriate measures in response to a request from the victim for technical, medical, scientific or humanitarian assistance.

The United Kingdom reaffirms in particular the inherent right, recognised under Article 51 of the Charter, of individual and collective self-defence if an armed attack, including a nuclear attack, occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.

ANNEX

Statement issued on 5 April 1995 by the Honourable Warren Christopher, Secretary of State, regarding a declaration by the President on security assurances for non-nuclear-weapon States Parties to the Treaty on the Non-Proliferation of Nuclear Weapons

The United States of America believes that universal adherence to and compliance with international conventions and treaties seeking to prevent the proliferation of weapons of mass destruction is a cornerstone of global security. The Treaty on the Non-Proliferation of Nuclear Weapons is a central element of this regime. 5 March 1995 was the twenty-fifth anniversary of its entry into force, an event commemorated by President Clinton in a speech in Washington, D.C., on 1 March 1995. A conference to decide on the extension of the Treaty will begin in New York on 17 April 1995. The United States considers the indefinite extension of the Treaty on the Non-Proliferation of Nuclear Weapons without conditions as a matter of the highest national priority and will continue to pursue all appropriate efforts to achieve that outcome.

It is important that all parties to the Treaty on the Non-Proliferation of Nuclear Weapons fulfil their obligations under the Treaty. In that regard, consistent with generally recognized principles of international law, parties to the Treaty on the Non-Proliferation of Nuclear Weapons must be in compliance with these undertakings in order to be eligible for any benefits of adherence to the Treaty.

The United States reaffirms that it will not use nuclear weapons against non-nuclear-weapon States Parties to the Treaty on the Non-Proliferation of Nuclear Weapons except in the case of an invasion or any other attack on the United States, its territories, its armed forces or other troops, its allies, or on a State towards which it has a security commitment, carried out or sustained by such a non-nuclear-weapon State in association or alliance with a nuclear-weapon State.

Aggression with nuclear weapons, or the threat of such aggression, against a non-nuclear-weapon State Party to the Treaty on the Non-Proliferation of Nuclear Weapons would create a qualitatively new situation in which the nuclear-weapon-State permanent members of the United Nations Security Council would have to act immediately through the Security Council, in accordance with the Charter of the United Nations, to take the measures necessary to counter such aggression or to remove the threat of aggression. Any State which commits aggression accompanied by the use of nuclear weapons or which threatens such aggression must be aware that its actions are to be countered effectively by measures to be taken in accordance with the Charter to suppress the aggression or remove the threat of aggression.

Non-nuclear-weapon States Parties to the Treaty on the Non-Proliferation of Nuclear Weapons have a legitimate desire for assurances that the United Nations Security Council, and above all its nuclear-weapon-State permanent members, would act immediately in accordance with the Charter, in the event such

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CONCLUSION OF EFFECTIVE INTERNATIONAL ARRANGEMENTS TO ASSURE NON-NUCLEAR-WEAPON STATES AGAINST THE USE OR THREAT OF USE OF NUCLEAR WEAPONS

SECURITY COUNCIL
Fiftieth year

Letter dated 6 April 1995 from the Chargé d'affaires a.i. of the Permanent Mission of the United States of America to the United Nations addressed to the Secretary-General

I have the honour to forward herewith a statement by the Secretary of State of the United States of America, issued yesterday, announcing a declaration by President Clinton on security assurances for non-nuclear-weapon States parties to the Treaty on the Non-Proliferation of Nuclear Weapons (see annex).

I would be grateful if you would arrange to have the present letter and its annex circulated as a document of the General Assembly, under item 68 of the preliminary list, and of the Security Council.

(Signed) Edward W. GNEHM

* A/50/50.

non-nuclear-weapon States are the victim of an act of, or object of a threat of, aggression in which nuclear weapons are used.

The United States affirms its intention to provide or support immediate assistance, in accordance with the Charter, to any non-nuclear-weapon State Party to the Treaty on the Non-Proliferation of Nuclear Weapons that is a victim of an act of, or an object of a threat of, aggression in which nuclear weapons are used.

Among the means available to the Security Council for assisting such a non-nuclear-weapon State Party to the Treaty on the Non-Proliferation of Nuclear Weapons would be an investigation into the situation and appropriate measures to settle the dispute and to restore international peace and security.

United Nations Member States should take appropriate measures in response to a request for technical, medical, scientific or humanitarian assistance from a non-nuclear-weapon State Party to the Treaty on the Non-Proliferation of Nuclear Weapons that is a victim of an act of aggression with nuclear weapons, and the Security Council should consider what measures are needed in this regard in the event of such an act of aggression.

The Security Council should recommend appropriate procedures, in response to any request from a non-nuclear-weapon State Party to the Treaty on the Non-Proliferation of Nuclear Weapons that is the victim of such an act of aggression, regarding compensation under international law from the aggressor for loss, damage or injury sustained as a result of the aggression.

The United States reaffirms the inherent right, recognized under Article 51 of the Charter, of individual and collective self-defence if an armed attack, including a nuclear attack, occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.

ANNEX

Statement concerning security assurances to non-nuclear-weapon States made by the Permanent Representative of France to the Conference on Disarmament on 6 April 1995

The issue of security assurances given by the nuclear Powers to the non-nuclear-weapon States is, for my delegation, an important one:

Firstly, because it corresponds to a real expectation on the part of the non-nuclear-weapon States, particularly those which, have renounced atomic weapons by signing the Treaty on the Non-Proliferation of Nuclear Weapons;

Secondly, because it involves our particular responsibilities as a nuclear Power;

Finally, because it has acquired new meaning since the end of the cold war, with the growing awareness of the threat which the proliferation of nuclear weapons represents for everyone.

It is in order to meet that expectation, to assume its responsibilities and to make its contribution to efforts to combat the proliferation of nuclear weapons that France has decided to take the following steps:

Firstly, it reaffirms, and clarifies, the negative security assurances which it gave in 1982, specifically:

France reaffirms that it will not use nuclear weapons against non-nuclear-weapon States Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, except in the case of an invasion or any other attack on France, its territory, its armed forces or other troops, or against its allies or a State towards which it has a security commitment, carried out or sustained by such a State in alliance or association with a nuclear-weapon State.

It seems to us natural that it is the signatory countries to the Treaty on the Non-Proliferation of Nuclear Weapons - that is to say, the overwhelming majority of countries in the world - who should benefit from these assurances, since they have made a formal non-proliferation commitment. Furthermore, in order to respond to the request of a great many countries, France has sought as much as possible to harmonize the content of its negative assurances with those of the other nuclear Powers. We are pleased that this effort has been successful. The content of the declarations concerning the negative security assurances of France, the United States of America, the Russian Federation and the United Kingdom of Great Britain and Northern Ireland are henceforth practically identical.

Secondly, and for the first time, France has decided to give positive security assurances to all non-nuclear-weapon States Parties to the Treaty on the Non-Proliferation of Nuclear Weapons. Its accession to the Treaty made this decision both possible and desirable. Accordingly:

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SECURITY COUNCIL
Fiftieth year

Letter dated 6 April 1995 from the Permanent Representative of France to the United Nations addressed to the Secretary-General

Acting upon instructions from my Government, I have the honour to draw your attention to the contents of the declaration on security assurances made on behalf of France by the Permanent Representative of France to the Conference on Disarmament on 6 April 1995 (see annex).

I should be grateful if you would have this document and its annex circulated as a document of the General Assembly, under item 68 of the preliminary list, and of the Security Council.

(Signed) Jean-Bernard MERIMEE

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The decisions which I have just announced correspond to our intention to consolidate the non-proliferation regime and particularly the Treaty on the Non-Proliferation of Nuclear Weapons, which is the cornerstone of that regime. It is our hope and firm conviction that the initiatives we have just taken will contribute thereto.

"France considers that any aggression which is accompanied by the use of nuclear weapons would threaten international peace and security. France recognizes that the non-nuclear-weapon States Parties to the Treaty on the Non-Proliferation of Nuclear Weapons are entitled to an assurance that, should they be attacked with nuclear weapons or threatened with such an attack, the international community and, first and foremost, the United Nations Security Council, would react immediately in accordance with the obligations set forth in the Charter.

"Having regard to these considerations, France makes the following declaration:

"France, as a Permanent Member of the Security Council, pledges that, in the event of attack with nuclear weapons or the threat of such attack against a non-nuclear-weapon State party to the Treaty on the Non-Proliferation of Nuclear Weapons, France will immediately inform the Security Council and act within the Council to ensure that the latter takes immediate steps to provide, in accordance with the Charter, necessary assistance to any State which is the victim of such an act or threat of aggression.

"France reaffirms in particular the inherent right, recognized in Article 51 of the Charter, of individual or collective self-defence if an armed attack, including an attack with use of nuclear weapons, occurs against a Member of the United Nations until the Security Council has taken measures necessary to maintain international peace and security."

In this area also, we are pleased that the content of these positive assurances has been the subject of close consultations with the other nuclear Powers.

Thirdly, France, with the four other nuclear Powers, has decided to submit to the United Nations Security Council a draft resolution which constitutes a first in many respects, and which reflects our intention to meet the expectations of the international community globally, collectively and specifically;

Globally: for the first time, a draft resolution deals with both negative and positive assurances;

Collectively: for the first time, a resolution of the Security Council specifies the measures which the Security Council could take in the event of aggression, in the areas of the settlement of disputes, humanitarian assistance and compensation to the victims.

The draft resolution solemnly reaffirms the need for all States parties to the Treaty on the Non-Proliferation of Nuclear Weapons to fully respect their obligations. That is not a petitio principii, but a reminder of a fundamental rule. The draft resolution also emphasizes the desirable nature of universal accession to the Treaty.

ANNEX

Statement on security assurances issued on 5 April 1995 by the People's Republic of China

For the purpose of enhancing international peace, security and stability and facilitating the realization of the goal of complete prohibition and thorough destruction of nuclear weapons, China hereby declares its position on security assurances as follows:

1. China undertakes not to be the first to use nuclear weapons at any time or under any circumstances.

2. China undertakes not to use or threaten to use nuclear weapons against non-nuclear-weapon States or nuclear-weapon-free zones at any time or under any circumstances. This commitment naturally applies to non-nuclear-weapon States parties to the Treaty on the Non-Proliferation of Nuclear Weapons or non-nuclear-weapon States that have entered into any comparable internationally-binding commitment not to manufacture or acquire nuclear explosive devices.

3. China has always held that, pending the complete prohibition and thorough destruction of nuclear weapons, all nuclear-weapon States should undertake not to be the first to use nuclear weapons and not to use or threaten to use such weapons against non-nuclear-weapon States and nuclear-weapon-free zones at any time or under any circumstances. China strongly calls for the early conclusion of an international convention on no-first-use of nuclear weapons as well as an international legal instrument assuring the non-nuclear-weapon States and nuclear-weapon-free zones against the use or threat of use of nuclear weapons.

4. China, as a permanent member of the Security Council of the United Nations, undertakes to take action within the Council to ensure that the Council takes appropriate measures to provide, in accordance with the Charter of the United Nations, necessary assistance to any non-nuclear-weapon State that comes under attack with nuclear weapons, and imposes strict and effective sanctions on the attacking State. This commitment naturally applies to any non-nuclear-weapon State party to the Treaty on the Non-Proliferation of Nuclear Weapons or any non-nuclear weapon State that has entered into any comparable internationally-binding commitment not to manufacture or acquire nuclear explosive devices, in the event of an aggression with nuclear weapons or the threat of such aggression against such State.

5. The positive security assurance provided by China, as contained in paragraph 4, does not in any way compromise China's position as contained in paragraph 3 and shall not in any way be construed as endorsing the use of nuclear weapons.

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SECURITY COUNCIL
Fiftieth year

Letter dated 6 April 1995 from the Permanent Representative of China to the United Nations addressed to the Secretary-General

I have the honour to transmit to you herewith China's national statement on security assurances (see annex).

I would be grateful if you could make arrangements to have the present letter and its annex circulated as a document of the General Assembly, under item 68 of the preliminary list, and of the Security Council.

(Signed) LI Zhaoxing
Ambassador Extraordinary and Plenipotentiary
Permanent Representative of
the People's Republic of China
to the United Nations

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1. Takes note with appreciation of the statements made by each of the nuclear-weapon States (S/1995/261, S/1995/262, S/1995/263, S/1995/264, S/1995/265), in which they give security assurances against the use of nuclear weapons to non-nuclear-weapon States that are Parties to the Treaty on the Non-Proliferation of Nuclear Weapons;

2. Recognizes the legitimate interest of non-nuclear-weapon States Parties to the Treaty on the Non-Proliferation of Nuclear Weapons to receive assurances that the Security Council, and above all its nuclear-weapon State permanent members, will act immediately in accordance with the relevant provisions of the Charter of the United Nations, in the event that such States are the victim of an act of, or object of a threat of, aggression in which nuclear weapons are used;

3. Recognizes further that, in case of aggression with nuclear weapons or the threat of such aggression against a non-nuclear-weapon State Party to the Treaty on the Non-Proliferation of Nuclear Weapons, any State may bring the matter immediately to the attention of the Security Council to enable the Council to take urgent action to provide assistance, in accordance with the Charter, to the State victim of an act of, or object of a threat of, such aggression; and recognizes also that the nuclear-weapon State permanent members of the Security Council will bring the matter immediately to the attention of the Council and seek Council action to provide, in accordance with the Charter, the necessary assistance to the State victim;

4. Notes the means available to it for assisting such a non-nuclear-weapon State Party to the Treaty on the Non-Proliferation of Nuclear Weapons, including an investigation into the situation and appropriate measures to settle the dispute and restore international peace and security;

5. Invites Member States, individually or collectively, if any non-nuclear-weapon State Party to the Treaty on the Non-Proliferation of Nuclear Weapons is a victim of an act of aggression with nuclear weapons, to take appropriate measures in response to a request from the victim for technical, medical, scientific or humanitarian assistance, and affirms its readiness to consider what measures are needed in this regard in the event of such an act of aggression;

6. Expresses its intention to recommend appropriate procedures, in response to any request from a non-nuclear-weapon State Party to the Treaty on the Non-Proliferation of Nuclear Weapons that is the victim of such an act of aggression, regarding compensation under international law from the aggressor for loss, damage or injury sustained as a result of the aggression;

7. Welcomes the intention expressed by certain States that they will provide or support immediate assistance, in accordance with the Charter, to any non-nuclear-weapon State Party to the Treaty on the Non-Proliferation of Nuclear Weapons that is a victim of an act of, or an object of a threat of, aggression in which nuclear weapons are used;

8. Urges all States, as provided for in Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons, to pursue negotiations in good faith on

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11 April 1995

RESOLUTION 984 (1995)

Adopted by the Security Council at its 3514th meeting, on 11 April 1995

The Security Council,

Convinced that every effort must be made to avoid and avert the danger of nuclear war, to prevent the spread of nuclear weapons, to facilitate international cooperation in the peaceful uses of nuclear energy with particular emphasis on the needs of developing countries, and reaffirming the crucial importance of the Treaty on the Non-Proliferation of Nuclear Weapons to these efforts,

Recognizing the legitimate interest of non-nuclear-weapon States Parties to the Treaty on the Non-Proliferation of Nuclear Weapons to receive security assurances,

Welcoming the fact that more than 170 States have become Parties to the Treaty on the Non-Proliferation of Nuclear Weapons and stressing the desirability of universal adherence to it,

Reaffirming the need for all States Parties to the Treaty on the Non-Proliferation of Nuclear Weapons to comply fully with all their obligations,

Taking into consideration the legitimate concern of non-nuclear-weapon States that, in conjunction with their adherence to the Treaty on the Non-Proliferation of Nuclear Weapons, further appropriate measures be undertaken to safeguard their security,

Considering that the present resolution constitutes a step in this direction,

Considering further that, in accordance with the relevant provisions of the Charter of the United Nations, any aggression with the use of nuclear weapons would endanger international peace and security,

effective measures relating to nuclear disarmament and on a treaty on general and complete disarmament under strict and effective international control which remains a universal goal;

9. Reaffirms the inherent right, recognized under Article 51 of the Charter, of individual and collective self-defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security;

10. Underlines that the issues raised in this resolution remain of continuing concern to the Council.

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7. The Conference agreed further that Review Conferences should look forward as well as back. They should evaluate the results of the period they are reviewing, including the implementation of undertakings of the States parties under the Treaty, and identify the areas in which, and the means through which, further progress should be sought in the future. Review Conferences should also address specifically what might be done to strengthen the implementation of the Treaty and to achieve its universality.

1995 Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons

NPT/CONF.1995/L.4
10 May 1995

ORIGINAL: ENGLISH

New York, 17 April-12 May 1995

STRENGTHENING THE REVIEW PROCESS FOR THE TREATY

Draft decision proposed by the President

1. The Conference examined the implementation of article VIII, 3, of the Treaty and agreed to strengthen the review process for the operation of the Treaty with a view to assuring that the purposes of the Preamble and the provisions of the Treaty are being realized.

2. The States party to the Treaty participating in the Conference decided, in accordance with article VIII, 3, of the Treaty, that Review Conferences should continue to be held every five years and that, accordingly, the next Review Conference should be held in the year 2000.

3. The Conference decided that, beginning in 1997, the Preparatory Committee should hold, normally for a duration of 10 working days, a meeting in each of the three years prior to the Review Conference. If necessary, a fourth preparatory meeting may be held in the year of the Conference.

4. The purpose of the Preparatory Committee meetings would be to consider principles, objectives and ways in order to promote the full implementation of the Treaty, as well as its universality, and to make recommendations thereon to the Review Conference. These include those identified in the Decision on Principles and Objectives for Nuclear Non-Proliferation and Disarmament adopted on __ May 1995. These meetings should also make the procedural preparations for the next Review Conference.

5. The Conference also concluded that the present structure of three Main Committees should continue and the question of an overlap of issues being discussed in more than one Committee should be resolved in the General Committee, which would coordinate the work of the Committees so that the substantive responsibility for the preparation of the report with respect to each specific issue is undertaken in only one Committee.

6. It was also agreed that subsidiary bodies could be established within the respective Main Committees for specific issues relevant to the Treaty, so as to provide for a focused consideration of such issues. The establishment of such subsidiary bodies would be recommended by the Preparatory Committee for each Review Conference in relation to the specific objectives of the Review Conference.