Written Statement of the Government of the Solomon Islands

Government of Solomon Islands

HIGH COMMISSIONER FOR SOLOMON ISLANDS

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9 June 1994

His Excellency Eduardo Valencia Ospina
Registrar, International Court of Justice
Peace Palace, The Hague, The Netherlands

Sir,

WORLD HEALTH ORGANISATION - ADVISORY OPINION

By the direction of the Minister for Foreign Affairs, Solomon Islands, I have pleasure in sending you herewith, on behalf of the Government of Solomon Islands, Solomon Islands' Written Observations in respect of the request by the World Health Organisation for an Advisory Opinion from the International Court of Justice.

Solomon Islands avails itself of the right to submit these Written Observations as a member of the World Health Organisation and as a member of the United Nations according to which it is, *ipso facto*, a party to the Statute of the International Court of Justice.

In view of the importance of the request made by the World Health Organisation and the nature of the international legal questions arising thereunder, Solomon Islands considers that it would be appropriate for an oral hearing to be held in this matter.

Noting the recent establishment of a Chamber on Environmental Matters at the Court, which Solomon Islands welcomes, it may be appropriate for the Chamber to deal with this matter, given the special nature of the issue and its proximity to matters relating to the protection of human health and the environment.

I would be grateful if correspondence could be addressed to me at the above address, with copies to the Minister of Foreign Affairs at: PO Box 10, Honiara, Solomon Islands.

I remain, Sir,
Yours faithfully,

(Edward Nielsen)
Honorary Consul

REQUEST BY THE WORLD HEALTH ORGANIZATION FOR AN ADVISORY OPINION ON THE LEGALITY OF THE USE OF NUCLEAR WEAPONS IN VIEW OF THEIR EFFECTS ON HUMAN HEALTH AND THE ENVIRONMENT

WRITTEN OBSERVATIONS SUBMITTED BY THE GOVERNMENT OF SOLOMON ISLANDS TO THE INTERNATIONAL COURT OF JUSTICE

Government of Solomon Islands

10 JUNE 1994

and indicate the direction which the activities of the Organisation must take. The WHO's request for an Advisory Opinion must be understood in this context, and in the context of its work as a whole. The Advisory Opinion which the Court has been called upon to give, and which it should give, on the question relating to the legality of the use of nuclear weapons would allow the WHO to ensure that its activities were properly carried out in a manner which took full account of priority needs of the international community and were consistent with applicable norms of international law.

(D) The competence of the WHO to request this opinion does not derogate from the principle of speciality

2.35 It is well within the specialist and technical expertise and of the competence of the WHO to request an Opinion from the Court on the legality of the use of nuclear weapons.

2.36 These considerations are reflected in the debate which preceded the adoption by the World Health Assembly of Resolution WHA 46.40, which led to the request for an Opinion from the Court. In that context certain States challenged the request for the Opinion on the grounds that it fell outside the mandate of the WHO, taking account of the specificity of that mandate and the political nature of the question. Certain States emphasised the need to accord a greater priority to other types of activities in the field of human health.[31] During the course of the debate the Legal Advisor of the Organisation nevertheless reminded participants that it was for the World Health Assembly to decide its competence in the context of the Organisation's constitution.[32] Apart from the arguments relating to the special character of the Organisation and its mandate, those States opposing the request emphasised the burden, including the cost, which would be placed on the Organisation by the request.

2.37 The principle of speciality provides a basis for the division of tasks between the various organs and Specialized Agencies which participate in the United Nations system. Respect for this principle requires that each organisation should have sufficient competence necessary to allow it to carry out its functions and objectives, as the Court has recalled on numerous occasions.[33]

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[31] See the *proces-verbaux* of Commission B during the 46th World Health Assembly, A46/B/SR/8, A46/B/SR/9, A46/B/SR/10, as well as the "*compte rendu*" of 13th Plenary Session of the World Health Assembly, A46/BR/13.

[32] A46/VR/13, page 13.

[33] *Reparation for Injuries Suffered in the Service of the United Nations*, Adv. Op., 11 April 1949, *ICJ Rep.* 1949, p.174; *International Status of South West Africa*, Adv. Op., 11 July 1950, *ICJ Rep.* 1950, p.128; *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, Adv. Op., 13 July 1954, *ICJ Rep.* 1954, p.47; *Certain Expenses of the United Nations*, Adv. Op., 20 July 1962, *ICJ Rep.* 1962, p.151; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Adv. Op. 21 June 1971, *ICJ Rep.* 1971, p.16.

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INTRODUCTION

(A) Background

1.1 On 14 May 1993 the Assembly of the World Health Organization (WHO) adopted Resolution WHA 46.40, which requested an Advisory Opinion from the International Court of Justice ("the Court") on the following question:

> "In view of the health and environmental effects, would the use of nuclear weapons by a State in war or other armed conflict be a breach of its obligations under international law including the WHO Constitution?"

1.2 The request was made by the WHO under Article 96(2) of the United Nations Charter. Under Article 65(1) of its Statute

> "the Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request."

1.3 By an Order of 13 September 1993 the Court fixed 10 June 1994 as the time limit within which written statements relating to the question may be submitted to the Court. As a member of the WHO and a party to the Statute of the Court Solomon Islands is entitled to appear before the Court in this matter and to submit these Written Observations.

1.4 These Observations are divided into two Parts. Part I addresses the competence of the World Health Assembly to request the Advisory Opinion and the competence of the Court to render an Advisory Opinion. Part II, which is divided into three Sections, addresses: the legality of the use of nuclear weapons by reference to the rules of international law relating to armed conflicts (A); the rules of international law relating to the protection of human health and the environment and the protection of fundamental human rights (B): and the responsibility of States under international law for violation of these obligations (C). Part III summarises the Conclusions.

1.5 In summary, for the reasons set out in these Written Observations the Government of Solomon Islands submits that the Court should give an Advisory Opinion that:

(A) the World Health Organisation is competent to request an Advisory Opinion from the International Court of Justice on this question, and that the Court is competent to give an Advisory Opinion on the question submitted (paras. 2.1 to 2.58);

(B) any use of a nuclear weapon by a State would violate its obligations under international law as reflected in the rules of international law concerning methods and means of warfare (*jus in bello*) and neutrality, ALTERNATIVELY that the use of nuclear weapons must not violate applicable rules of international law concerning methods and means of warfare (*jus in bello*) and neutrality (paras. 3.1 to 3.95);

(C) any use of a nuclear weapon by a State would violate its obligations under

international law as reflected in the rules of international law for the protection of human health and the environment and fundamental human rights, ALTERNATIVELY the use of nuclear weapons must not violate applicable rules of international law for the protection of human health and the environment and fundamental human rights (paras. 4.1 to 4.46);

(D) any use of a nuclear weapon by a State would constitute a crime against humanity, ALTERNATIVELY the use of nuclear weapons in violation of international law constitutes a crime against humanity (para. 3.40); and

(E) any use by a State of a nuclear weapon gives rise to international responsibility ALTERNATIVELY the violation by a State of these obligations under international law gives rise to its international responsibility (paras. 5.1 to 5.4).

(B) Solomon Islands' interest in the question

1.6 Solomon Islands is a non-nuclear State which does not propose to engage in nuclear warfare or other nuclear activity. Nor does Solomon Islands anticipate being a primary target of such activity. It nevertheless has a great interest in the WHO's request for an Advisory Opinion from the Court, perceiving as an "innocent bystander" the serious danger to the safety and health of its people, its economy and its fragile environment from the effects of increases of radioactive material in the environment.

1.7 Solomon Islands is a widespread archipelago of mountainous islands and low-lying coral atolls in the south-west Pacific between latitudes 5 and 12 degrees South and longitudes 155 to 177 degrees East. The island chain is some 1,500 kilometres (900 miles) long, running in a northwesterly/southeasterly direction. The total land area is estimated at 27,556 square kilometres, comprising over 800 islands. They range from the largest (Guadalcanal on which the capital, Honiara, is located) to the very small. The population is about 325,000. The Solomon Islands became an independent Realm within the Commonwealth on 7 July 1978, It is a member of, *inter alia*, the United Nations, the World Health Organization, and the South Pacific Forum. The Head of State, Queen Elizabeth II, is represented in Solomon Islands by a Governor General. Solomon Islands is a parliamentary democracy.

1.8 Solomon Islands depends heavily on subsistence agriculture, forestry and fishing. The formal cash economy also depends largely on agriculture, forestry and marine primary production. The tourist industry is developing and makes a significant contribution to the cash economy. One of the major attractions of Solomon Islands and its produce is the relative freedom of its land and sea environment from pollution.

1.9 The impact of any increases in radioactive material in or around the territory of Solomon Islands would have grave consequences for the health of its citizens, for the environment, and for the economy. The fisheries, agricultural and tourism sectors which are the mainstay of the economy would be significantly damaged, if not wiped out. For these reasons, Solomon Islands takes an active interest in

the Advisory Opinion requested by the WHO from the International Court.

1.10 As a member of the United Nations Solomon Islands has consistently supported those General Assembly resolutions (*infra*. para. 3.25) which condemn the use of nuclear weapons in any circumstances and restate international law as prohibiting any use of such weapons. As a member of the WHO Solomon Islands supported the request for an Advisory Opinion by the World Health Assembly in 1993.

1.11 Solomon Islands' longstanding commitment towards minimising the risks posed by radioactive substances is reflected in its participation in numerous treaties, including the 1968 Treaty on Non-Proliferation of Nuclear Weapons. Its commitment towards international humanitarian law is reflected in the fact that it is a party to, *inter alia*, the 1925 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare; the four 1949 Geneva Conventions for the Protection of War Victims; the 1976 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques; and the 1966 International Covenant on Economic and Social Rights.

1.12 Solomon Islands' longstanding commitments towards the protection of human health and the environment is also reflected in its active participation in the UN Conference on Environment and Development and the fact that it is a party to treaties intended to protect human health and the environment. In particular, it is a party, *inter alia*, to the 1958 Convention on the High Seas and the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter.

1.13 Finally, by way of more general observation, Solomon Islands believes that the use of nuclear weapons, especially for hostile purposes, is a matter of global concern which affects all people and all States. This reason alone justifies the submission of these written observations.

PART I

THE WORLD HEALTH ORGANISATION IS COMPETENT TO REQUEST AN ADVISORY OPINION FROM THE INTERNATIONAL COURT OF JUSTICE ON THIS QUESTION, AND THE COURT IS COMPETENT TO GIVE AN ADVISORY OPINION ON THE QUESTION SUBMITTED

2.1 In accordance with Article 96(2) of the Charter of the United Nations, Article 76 of its Constitution, and Article X(2) of its Agreement with the United Nations, the WHO may request an Advisory Opinion from the Court on any legal questions within the scope of its activities. The WHO has previously exercised this right. In 1980, the Organisation requested from the Court an Advisory Opinion on certain questions relating to the transfer of a regional WHO office.[1] The WHO now requests an Advisory Opinion from the Court on another matter which similarly lies within the scope of its activities and in respect of which the Court's Opinion would assist it in the future conduct of its activities.

(A) The WHO's request for an Opinion fulfils the conditions of Article 96(2) of the UN Charter

2.2 The WHO's request for an opinion satisfies the conditions of Article 96(2) of the UN Charter both *ratione personae* and *ratione materiae*. Article X of the Agreement between the UN and the WHO, which entered into force on 10th July 1948, authorizes the WHO "to request advisory opinions of the International Court of Justice on legal questions arising within the scope of its activities other than questions concerning the mutual relationships of the Organisation and the United Nations or other specialised agencies".

2.3 The Opinion requested by the WHO clearly relates to a question arising within the scope of its activities. It is a "legal question"[2] concerning international legal aspects of the use of nuclear weapons, in view of the effects on human health and the environment. Any political character which the question might also have cannot prevent the Court from giving an Opinion:[3] the Court has consistently affirmed that "the Court, however, cannot attribute a political character to a request which invites it to undertake an

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1 *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Adv. Op., 20 December 1980, ICJ Rep 1980, p.73.

2 *Conditions of Admission of a State to Membership in the United Nations*, Adv. Op., 28th May 1948, *ICJ Rep.* 1947-1948, p.61.

3 D.W. Bowett, *The Law of International Institutions*, (4th ed., 1982), at p.278.

essentially judicial task, namely the interpretation of a treaty provision".[4] According to the Court's prior jurisprudence there is no reason for the Court not to respond positively to the WHO's request. The concrete legal question which has been asked falls within the normal exercise of the Court's jurisdiction, and the Court should not consider the motives which inspired a request. On the contrary: the Court has constantly affirmed that

> "in situations in which political considerations are prominent it may be particularly necessary for an international organization to obtain an advisory opinion from the Court as to the legal principles applicable with respect to the matter under debate, especially when these may include the interpretation of its constitution".[5]

2.4 The WHO request has been made to the Court as the principal judicial organ of the United Nations. The request invites the Court to contribute, through the exercise of its advisory role, to the effective functioning of the United Nations system and the activities of one of its Specialized Agencies. In fulfilling its judicial role, including the advisory function, the Court has always adopted an approach which is "*volontairement très libérale*",[6] taking the view that "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".[7]

2.5 According to the Court the objective of the WHO's request for an Advisory Opinion should be to "enlighten" the Organisation on the proper conduct of "its own activities".[8]

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[4] *Certain Expenses of the United Nations*, Adv. Op., 20th July 1962, *ICJ Rep.* 1962, p.155; *Conditions of Admission*, Adv. Op., 20th May 1948, *ICJ Rep.* 1947-1948, p.61; *Competence of the General Assembly for the Admission of a State to the United Nations*, *ICJ Rep.* 1950, Adv. Op., 3 March 1950, pp.6-7; *Interpretation of the Agreement of 25th March 1951 between the WHO and Egypt*, Adv. Op., 20th December 1980, *ICJ Rep.* 1980, p.87, paragraph 33.

[5] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Adv. Op., 20th December 1980, *ICJ Rep.* 1980, p.87, paragraph 33.

[6] Nguyen Quoc Dinh, Patrick Dailler, Alain Pellet, *Droit international public* (4th ed., 1992), p.837. See also L. Goodrich, E. Hambro, A. Simons, *Charter of the United Nations, Commentary and Documents* (3rd ed., rev., 1969), p.567.

[7] *Interpretation of Peace Treaties with Bulgaria, Hungary and Rumania*, interim phase, Adv. Op., 30th March 1950, *ICJ Rep.* 1950, p.71; *Reservations to the Convention for the Prevention and Punishment of the Crime of Genocide*, Adv. Op., 28th May 1951, *ICJ Rep.* 1951, p.19.

[8] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Adv. Op., 28th May 1951, *ICJ Rep.* 1951 p.19; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (1970), Adv. Op., 21st June 1971, *ICJ Rep.* 1971 p.24, para.32; *Western Sahara*, Adv. Op., 16th October 1975, *ICJ Rep.* 1975 p.24, para.31; *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, Adv. Op., 15th

The Opinion requested is of real importance for the WHO in the conduct of its activities relating to the effects of the use of nuclear materials and weapons on human health and the environment. The World Health Assembly has declared that the "primary prevention of the health hazards of nuclear weapons requires clarity about the status in international law of their use" since "over the last 48 years marked differences of opinion have been expressed by Member States about the lawfulness of the use of nuclear weapons".[9] The WHO's request seeks to clarify the international legal context in which its activities are conducted, and to provide a proper legal basis for the conduct of its future activities.

2.6 Further, in making this request the WHO is acting in conformity with the recommendation of the UN General Assembly addressed to its organs and Specialised Agencies. In Resolution 171A(11) of 14 November 1947 the General Assembly encouraged a greater use of the International Court, recommending that Specialized Agencies should submit to the Court requests for Advisory Opinions on points of law arising both within the competence of the Court and

> "in the course of their activities, ... if they concern questions of principle which it is desirable to have settled".[10]

It is in the spirit of the General Assembly's recommendation, and with a view to enhancing the focus and conduct of its activities, that the WHO has, as a Specialised Agency entitled to request an Opinion, asked the Court to provide assistance on a question of significant importance within the framework of its activities.

2.7 The fact that the question addressed to the International Court arises within the scope of the WHO's activities is clear from the Constitution of the WHO and its practice thereunder. Accordingly, the WHO is within its rights and entitled to request an Opinion on this particular question from the Court.

(B) The WHO is acting in accordance with its Constitution

2.8 The general question posed by the WHO, which addresses the health and environmental consequences of the use of nuclear weapons, falls within the objective and functions provided by its Constitution. The WHO Constitution embraces a broad scope of activities related to human health issues.

2.9 The Preamble sets forth a series of principles which are stated to be "basic to the

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December 1989, *ICJ Rep.* 1989, p.189, para.31.

[9] Resolution of the World Health Assembly (WHA) 46.40 of 14th May 1993.

[10] Res 171A (II), "Need for greater use by the United Nations and its organs of the International Court of Justice"; UN, *Repertory of the United Nations Organs*, Vol. V, Articles 92-111 of the Charter.

happiness, harmonious relations and security of all peoples". These indicate and recognise the fundamental importance of the protection and enhancement of human health. They also reflect the interdependence of human health with related matters, including international peace and security. Amongst the principles which are particularly relevant to the question of the effects on human health and the environment of the use of nuclear weapons, the following are especially noteworthy:

> "Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.
>
> The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition.
>
> The health of all peoples is fundamental to the attainment of peace and security and is dependent upon the fullest co-operation of individuals and States. (...)
>
> Governments have a responsibility for the health of their people which can be fulfilled only by the provision of adequate health and social measures."

2.10 The Organisation's objective is "the attainment by all peoples of the highest possible level of health" (Article 1). To that end, the Organisation has a number of specific functions set out in Article 2 of its Constitution. It is in the application of these functions that the WHO has undertaken its activities, for many years, on the health and environmental consequences of the use of nuclear energy and materials, including weapons.

2.11 The functions of the WHO include, *inter alia*:

- "to act as the directing and co-ordinating authority on international health work" (Article 2(a));
- to "propose conventions, agreements and regulations, and make recommendations in respect of international health matters and to perform such duties as may be assigned thereby to the Organisation and are consistent with its objective" (Article 2(k));
- to "study and report on, in co-operation with other specialised agencies where necessary, administrative and social techniques affecting public health and medical care and preventive and curative points of view, including hospital services and social security" (Article 2(p)); and
- "generally to take all necessary action to attain the objective of the Organisation" (Article 2(v)).

2.12 In directing and co-ordinating international action on human health, and in accordance with its right to "take all necessary action to attain the objective of the Organisation", the WHO has decided that it was essential to request an Opinion from the Court on the legality of the use of nuclear weapons, in view of their effects on human health and the environment. The WHO has formulated its request so as to assist it in adopting the best

possible path for its future activities in an area of crucial international importance which clearly falls within the scope of its activities.

2.13 The effects of the use of nuclear energy and material on human health and the environment, including those resulting from the use of nuclear weapons, is a subject that falls squarely within the scope of the WHO Constitution, even if that instrument does not include any express reference to nuclear energy. The WHO's legal mandate to promote and protect human health, characterised by a preventative approach, is directly threatened by the risks posed by the use of nuclear energy for civil and military purposes. In its practice the WHO has long addressed questions related to the consequences of the use of nuclear weapons on human health and the environment. This practice flows from related activities of the Organisation over many decades, including in particular the relationship between human health and the environment; the health consequences of ionising radiations irrespective of their source; and the effect on human health of the use of conventional and other weapons. A finding that the subject of the human health and environmental effects of the use of nuclear weapons fell outside the scope of the WHO's activities would be surprising and would contradict the evolution of the Organisation's practice. It is a subject thta no other Specialized Agency has the competence or the expertise to address. It follows that the question of the effects on human health and the environment resulting from the use of nuclear weapons occupies a central place in the activities of the WHO.

2.14 Further, interpretation of the Constitution of the WHO "in good faith in accordance with the ordinary meaning ... and in the light of its object and purpose"[11] (an approach to interpretation the importance of which has frequently been emphasised by the International Court of Justice)[12] leaves no room for doubt that the WHO Constitution encompasses questions relating to the health and environmental aspects of nuclear weapons use. The study of public health from a preventive point of view, with the goal of reaching the highest attainable standard of health for every human being without distinction of race, religion, political belief, economic or social condition, cannot be effectively undertaken without taking account of the legal status of the use of nuclear weapons in international law. The important reasons requiring the Court to give the Opinion requested are elaborated below (*infra*. para. 2.55).

2.15 Moreover, it is clear that the Assembly is the competent body to interpret the Constitution and determine the policy and activities of the Organization. The functions of the Assembly as set out in Article 18, include, *inter alia*,

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[11] 1969 Vienna Convention on the Law of Treaties (Article 31(1)).

[12] *Reparations for Injuries Suffered in the Service of the United Nations*, Adv. Op., 11th April 1949, *ICJ Rep.* 1949, p.184; *Case concerning Right of National of the United States of America in Morocco*, Judgment of 27th August 1952, *ICJ Rep.* 1952, pp.197-198; South West Africa cases, Preliminary Objections, Judgment of 21st December 1962, *ICJ Rep.* 1962, p.336.

"(a) to determine the policies of the Organization; [...]

(d) to review and approve reports and activities of the Board and of the Director General and to instruct the Board in regard to matters upon which action, study, investigations or report may be considered desirable; [...]

(m) to take any other appropriate action to further the objective of the Organization".

(C) The practice of the WHO confirms its competence over matters relating to the effects on human health and the environment of ionising radiation resulting from the use of nuclear weapons

2.16 Analysis of the practice of the Organisation since its establishment confirms that issues relating to the health and environmental effects of the use of nuclear weapons lie within the WHO's scope of activity and that the Organisation is competent to request an Opinion from the Court on the legality of the use of nuclear weapons, in view of their effects on human health and the environment.

(a) The WHO is competent to act in the field of environmental protection

2.17 The protection of the environment comprises an integral part of the activities of the WHO. Human health, development and environmental protection must be considered as inextricably linked (see *infra* paras. 4.3-4.5).[13] Maintaining a healthy environment for present and future generations has been recognised as essential to ensure the effective fulfilment of international legal and policy objectives relating to the promotion and protection of human health. This is clearly reflected in WHO consensus texts such as the Alma-Ata Declaration of the International Conference on Primary Health Care[14] and the WHO's Global Strategy for Health for all by the Year 2000.[15]

2.18 Agenda 21, which is the programme of action adopted by consensus of 176 participating States at the United Nations Conference on Environment and Development, held in Rio de Janeiro in June 1992, has further reinforced the important role of the WHO as the appropriate international organisation to co-ordinate the numerous activities in the field of health, sustainable development and the environment.[16] To address this task the World Health Assembly endorsed in 1993 a WHO global strategy for health and the

[13] See *Our Planet, Our Health: Report of the WHO Commission on Health of the Environment*, WHO, Geneva, 1992.

[14] Declaration of Alma-Ata 1978 on Primary Health Care, WHO, Geneva 1978. The declaration of the international conference states, *inter alia*, that the "promotion and protection of the health of the people is essential to sustained economic and social development and contributes to a better quality of life and to world peace" (para. iii).

[15] WHA 34.36 (1981).

[16] See especially Chapter 6 of Agenda 21, A/CONF. 151/26 (1992).

environment.[17] The strategy reinforces a long-standing commitment by the WHO to ensure that human health risks resulting from environmental degradation are properly addressed.

2.19 Nuclear material and weapons pose great risks to the environment and to human health. In the field of risk management WHO conducts activities which relate to nuclear weapons, including, *inter alia*:

> "- monitoring and surveillance of the biological, chemical and radio-active contamination of air, water and food, and periodic assessment of pollution from industrial development and energy use; (..)
>
> - periodic evaluation of trends and problems of environmental pollution and contamination of air, water and food, and of countries' programmes for the control of these problems; (..)
>
> - development of national and international capacity to respond to emergencies arising from industrial operations, from the use of chemicals or from the production of [nuclear] energy".[18]

(b) The WHO is competent to act in matters relating to ionising radiation

2.20 Since its creation, the WHO has consistently sought to reduce risks arising to human health from the use of ionising radiation. Its efforts to prevent risks arising from exposure to such radiation have been developed and applied irrespective of the source of the risk, and extend to those risks posed by nuclear weapons.

2.21 As a result of its activities in relation to ionising radiation the WHO has entered into association with the Nuclear Energy Agency of the Organisation for Economic Co-operation and Development, the International Atomic Energy Agency and the International Labour Organisation in adopting, in 1982, Basic Standards for Radiation of Protection.[19] The Basic Standards emphasise that the norms it sets forth are intended to ensure the security and protection of individuals, and "*exige encore une réduction du risque potentiel collectif qui subsiste*". The Basic Instrument also recommends the maintenance of "*toutes les expositions à des rayonnements ionisants au niveau le plus bas qu'on puisse raisonnablement atteindre, compte tenu des facteurs économiques et sociaux*".[20]

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[17] Resolution WHA 46.20, adopted 12 May 1993; the Strategy was prepared in response to resolution WHA 45.31 on Health and Environment.

[18] See *WHO's Contribution to the International Efforts toward Sustainable Development: Report of the Director-General*, WHA 42/1989/REC/1, Annex 4, p.96.

[19] *Normes fondamentales de radioprotection*, 1982 ed., Collection Security No. 9, IAEA 1983.

[20] *Id.*

2.22 Further, in the exercise of its competence in the field of nuclear energy, the WHO has entered into an Agreement with the International Atomic Energy Agency. These two organisations have agreed that "with a view to facilitating the effective attainment of objectives set forth in their respective constitutional instruments, within the general framework established by the Charter of the United Nations, they will act in close co-operation with each other and will consult each other regularly in regard to matters of common interest" (Article I(1)).

2.23 The Agreement emphasises the recognition "by the World Health Organisation that the International Atomic Energy Agency has the primary responsibility for encouraging, assisting and co-ordinating research on, and development and practical application of, atomic energy for peaceful uses throughout the world **without prejudice to the right of the World Health Organisation to concern itself with promoting, developing, assisting, and co-ordinating international health work, including research, in all its aspects.**" (Article I(2)) (emphasis added).

2.24 The competence of the WHO in the field of nuclear energy is clearly reflected in the terms of this Agreement. The WHO's field of competence is in no way limited by the Agreement, but illustrates the Organisation's right in law to address issues relating to the use of nuclear energy. Although this Agreement relates to the peaceful use of nuclear energy, the WHO's general mandate to protect human health from the release into the environment of ionizing radiation **must** be understood to entitle it to address the use of nuclear energy and materials for military purposes as well. The WHO's activities of promotion, development, assistance and co-ordination of international health action must be capable of being carried out in relation to the use of nuclear energy, irrespective of whether it relates to civil or military contexts.

2.25 In this regard, it is appropriate to recognise that the activities of the IAEA have evolved in such a way as to reflect the fact that activities relating to nuclear energy must necessarily encompass both civil and military aspects. In practice, activities relating to the application of nuclear safeguards, which were originally thought to be incidental to the activities of the IAEA, have become increasingly important in the context of the Agency's work as a whole. What initially began as an effort to control the peaceful use of nuclear material and installations with a view to avoiding their use for military purposes, has been progressively transformed into the control of the possession and proliferation of nuclear arms.[21] It is in this context that the Court should understand, recognise, and act upon the legitimate desire of the WHO to address the threat to human health which is posed by nuclear energy in a coherent and global manner. In this regard, it is difficult to see how the WHO might address the consequences of a human health and the environment of nuclear materials without taking into account radiation resulting from the use of nuclear weapons. For the Court to determine that the question posed by the WHO in its request for an Advisory Opinion falls outside the scope of its

[21] See *1980 Annual Report*, International Atomic Energy Agency, pp.44-45.

activities would have the effect of halting the WHO's efforts to protect human health from the use of nuclear weapons. Such an approach would also deny the legal basis of the extensive activities of the WHO in this field which have been carried out so far.

(c) The WHO is competent to address the health and environmental consequences of the use of weapons

2.26 In the scope of its activities the WHO has for a long time addressed the production and use of certain categories of arms, as well as the destruction which such weapons can cause. Thus, the WHO has a long-standing concern over the production and use of chemical and biological weapons.[22]

2.27 The dramatic consequences which the use of nuclear weapons would have for human health and the environment has been, and continues to be, a matter for sustained consideration by the WHO. Reports addressing the effects of nuclear war on human health and on health services which have been prepared at the request of the World Health Assembly[23] have had a significant and widespread impact on the international community. Their conclusions and recommendations have never been challenged.[24] This fact proves that the Member States recognize the right of the WHO to deal with the question of the use of nuclear weapons.

(d) The question of the legality of the use of nuclear weapons within the framework of the WHO's activities

2.28 Since 1981 the World Health Assembly has adopted a number of important resolutions addressing the effects of nuclear weapons on human health and the environment. In this regard, it has been assisted by the provision of a series of expert specialised reports. These resolutions have formed the basis for the conduct of wide range of activities the WHO has undertaken in relation to the use of nuclear weapons and the legality of such use.

2.29 The long-standing practice of the World Health Assembly is reflected, in particular, in its Resolutions WHA 34.38, WHA 36.28 and WHA 40.24 on the effects of nuclear war

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[22] See *Santé publique et armes chimiques et biologiques*, WHO, Genève, 1970; *Effets des armes chimiques et biologiques sur la santé: Rapport du Directeur général*, EB81/27, 10 novembre 1987.

[23] *Effects of nuclear war on health and health services: Report of the International Community of experts in medical science and public health created by Resolution WHA 34.38*, WHO, Geneva, 1984; ("1983 WHO Report"); *Effects of nuclear war on health and health services, 2nd ed.: Report from the WHO management group on the applicability of resolution WHA 36.28*, WHO, Geneva, 1987; ("1987 WHO Report") *Effects of nuclear war on health and health services: Report of the WHO management group responsible on the application of Resolution WHA 36.28*, A44/INF.Doc./5, 25th April 1991 ("1991 WHO Report").

[24] *1991 WHO Report*, p.7 para.26.

on human health and health services. These were each adopted by large majorities.[25] The resolutions recalled that it had been established and recognized that no human health service in the world had the capacity to respond adequately to the consequences for human health resulting from the use of even a single nuclear weapon.

2.30 Moreover, the research towards sustainable development which the World Health Assembly has carried out (see e.g. Resolution WHA 42.26 on the contribution of the Organisation towards international efforts supporting sustainable development, as well as Resolution WHA 45.31 on the effects of the degradation of the environment on human health) has emphasised the serious adverse consequences for the environment (and for human health) over the short- and long-terms of the use of nuclear weapons. The impact on human health and the environment would be felt for generations to come.

2.31 The Report of the Director General on the effects of nuclear weapons on human health and the environment, presented to the World Health Assembly in 1993,[26] identifies many of the issues which the WHO must address in relation to nuclear weapons and their use. The Director General stated that many problems remain and new ones were arising:

> "First, a large number of nuclear weapons are still in existence and their production worldwide has not ceased altogether. Secondly nuclear weapons are now located on the territories of more countries than before. The possibility of clandestine production of nuclear weapons in certain countries has made proliferation of great concern to world security. Thirdly, there is the problem of the dismantling and disposal of nuclear weapons and their production facilities, both of which could pose risks to the health and safety of workers, the general population and the environment. The disposal of nuclear weapons and decommissioning of production plants undoubtedly increases the need for more radioactive waste disposal facilities and better management. Fourthly, problems are exacerbated by the fact that the number of unemployed nuclear weaponry experts is growing, which may lead to undesirable dissemination of this expertise."

2.32 These alarming findings have led the WHO, and in particular its Assembly, to consider the proper direction of its activities relating to the effects of nuclear weapons on human health and the environment. In the context of its consideration of this subject, it has become evident that it was necessary for the Organisation to identify the legal basis on which nuclear weapons might be used, under international law, in order to allow it to

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[25] Resolution WHA 34.38 (adopted by 68-23-17) (WHA 34/1981/RAC/2); Resolution WHA 36.28 (adopted by 102-12-8) (WHA 36/1983/REC/2); Resolution WHA 40.24 (adopted by 68-13-28) (WHA 40/1987/REC/2). It is useful to recall that a decision by an international organisation to establish its competence over a particular subject-matter need not be adopted unanimously: see Henry G. Schermers, *International Institutional Law*, p.203.

[26] See *The Effects of Nuclear Weapons on Health and the Environment: Report of the Director General*, A46/30, 26th April 1993, p.3 para.14.

assess its own activities in the most efficient manner possible.[27]

(e) The WHO is competent to act on matters concerning the development and application of international law relating to human health and the environment

2.33 Taking into account the existence of norms of international law, as well as their extent and the consequences of their application, are matters which are familiar to the WHO in its practice in other areas. In practice, the application of principles of international law is a subject which frequently preoccupies the WHO in the conduct of its activities. Respect for the rule of law has an important part to play in the choice and direction which the Organisation decides to take in the conduct of its activities. By way of example, respect for human rights law (and in particular the principle of non-discrimination) is recognised as being of essential importance in the framework of actions which the Organisation might take in addressing the international challenges posed by AIDS.[28] No one would suggest that the human rights aspects of AIDS prevention and treatment do not come within the scope of the WHO's activities. Similarly, in relation to the management of hazardous waste, which has significant consequences for human health and the environment, the WHO has in its activities taken account of the international legislative efforts which led to the adoption of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal. The WHO also participated in international efforts to develop an international Code of Practice on the transboundary movement of radioactive waste.[29] The World Health Assembly, in many other fields, has addressed actions undertaken outside the framework of the WHO which nevertheless have important implications for the protection and promotion of human health. Examples include actions relating to international peace and security and threats thereto. Thus, the WHO has rejected "any embargo on medical supplies for political reasons, on account of the effects on health care of such an embargo" and has appealed "in the spirit of paragraph 4 of Article 2 of the United Nations Charter, to all Member States of the United Nations to abstain from aggression and the use of threats in their international relations, including threats against medical centres and medical production plants."[30]

2.34 The practice of the WHO therefore demonstrates quite clearly that the actions of prevention and protection in the fields of human health and the environment cannot be decoupled from those efforts which seek to take into account, and apply, principles of international law which govern international relations. Such principles provide the basis

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[27] Resolution WHO 46.40 of the World Health Assembly of 14th May 1993. This Resolution was adopted by a large majority (73-31-6).

[28] See Resolutions WHO 41.24, WHO 42.33, WHO 43.10 and WHO 45.35 of the World Health Assembly.

[29] Resolution WHO 43.25 of the World Health Assembly.

[30] Resolution WHO 42.24 of the World Health Assembly.

and indicate the direction which the activities of the Organisation must take. The WHO's request for an Advisory Opinion must be understood in this context, and in the context of its work as a whole. The Advisory Opinion which the Court has been called upon to give, and which it should give, on the question relating to the legality of the use of nuclear weapons would allow the WHO to ensure that its activities were properly carried out in a manner which took full account of priority needs of the international community and were consistent with applicable norms of international law.

(D) The competence of the WHO to request this opinion does not derogate from the principle of speciality

2.35 It is well within the specialist and technical expertise and of the competence of the WHO to request an Opinion from the Court on the legality of the use of nuclear weapons.

2.36 These considerations are reflected in the debate which preceded the adoption by the World Health Assembly of Resolution WHA 46.40, which led to the request for an Opinion from the Court. In that context certain States challenged the request for the Opinion on the grounds that it fell outside the mandate of the WHO, taking account of the specificity of that mandate and the political nature of the question. Certain States emphasised the need to accord a greater priority to other types of activities in the field of human health.[31] During the course of the debate the Legal Advisor of the Organisation nevertheless reminded participants that it was for the World Health Assembly to decide its competence in the context of the Organisation's constitution.[32] Apart from the arguments relating to the special character of the Organisation and its mandate, those States opposing the request emphasised the burden, including the cost, which would be placed on the Organisation by the request.

2.37 The principle of speciality provides a basis for the division of tasks between the various organs and Specialized Agencies which participate in the United Nations system. Respect for this principle requires that each organisation should have sufficient competence necessary to allow it to carry out its functions and objectives, as the Court has recalled on numerous occasions.[33]

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[31] See the *proces-verbaux* of Commission B during the 46th World Health Assembly, A46/B/SR/8, A46/B/SR/9, A46/B/SR/10, as well as the "*compte rendu*" of 13th Plenary Session of the World Health Assembly, A46/BR/13.

[32] A46/VR/13, page 13.

[33] *Reparation for Injuries Suffered in the Service of the United Nations*, Adv. Op., 11 April 1949, *ICJ Rep.* 1949, p.174; *International Status of South West Africa*, Adv. Op., 11 July 1950, *ICJ Rep.* 1950, p.128; *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, Adv. Op., 13 July 1954, *ICJ Rep.* 1954, p.47; *Certain Expenses of the United Nations*, Adv. Op., 20 July 1962, *ICJ Rep.* 1962, p.151; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Adv. Op. 21 June 1971, *ICJ Rep.* 1971, p.16.

2.38 The application of the principle of speciality does not therefore mean that relations between the specialised agencies and the United Nations should be interpreted in a formalistic or rigid manner. Practice indicates that it is difficult to distinguish in a precise manner the competence of each Specialised Agency, particularly vis-a-vis those organisations which have general competence.[34] Moreover, the field of activities of each organisation has evolved as a consequence of the need to respond to the broad objectives which are established by the constituent instruments of each of these organisations. It is in this dynamic and constantly evolving context in the life of international organisations that it is appropriate to understand the basis upon which the WHO has made its request on the question of the legality of the use of nuclear weapons, in view of their effects on human health and the environment. Its Constitution requires it to act for the "happiness, harmonious relations and security of all peoples" and in the interests of "the highest attainable standard of health for every human being".

2.39 The question of the effects of the use of nuclear weapons on human health and the environment cannot be said to attach itself, *a priori*, to the competence of another international organisation any more than to the WHO's. It is true however, in conformity with the principle of speciality, that each organisation has a particular interest which is more or less specific in relation to a general question. It is only in relation to those aspects of the question which relate to its own activities and competence that it may conduct activities.

2.40 It is in this spirit that the WHO has requested an Advisory Opinion from the Court. The WHO is not addressing a question which touches upon the activities of any other organisation. The WHO has not asked for an opinion on the issue of nuclear disarmament, or the limitation of increases in armaments, or general disarmament issues, on the production or proliferation of nuclear weapons. These are issues over which the United Nations has a recognised and unchallenged competence. Rather, the WHO has asked a question which relates only to that aspect of the use of nuclear weapons which falls squarely within its competence: namely, the legality of the use of nuclear weapons taking into account their effects on human health and the environment. In focusing on the significant human health and environmental effects which would occur following the use of any nuclear weapon, the WHO is addressing a legal problem which arises squarely within the scope of its activities. Identifying the legal status of the use of nuclear weapons, notably by taking account of the consequences which would flow from the use of such weapons on human health and on the environment, is a fundamental issue for the WHO to address, and upon which it needs to be properly advised by the principal judicial organ of the United Nations, if it wishes to ensure that its future activities are properly oriented, and to ensure that such activities remain within its competence as provided by its Constitution.

2.41 Further, it is important to emphasise that the technical nature of many of the WHO's

[34] See in particular Schermers, *supra* note 25, p.33.

activities does not exclude the possibility that legal questions might be addressed by the WHO in relation to the preparation and conduct of those activities.[35] The significant point is that the Organisation must have recourse to the means necessary to resolve such issues, including legal issues. Clarification of the law in this area on the question requested of the Court falls squarely within the nature of such issues.

(E) The Court should give the Advisory Opinion requested by the WHO

2.42 As is clear from the preceding discussion the WHO is entitled to request an Advisory Opinion from the Court; however the Court is not required, in conformity with Article 65 of its Statute, to reply to the question asked. The Court has frequently in the past invoked the "permissive" formulation of Article 65 to conclude that "compelling reasons" could lead it to refuse to give an Advisory Opinion (see *infra* paras. 2.47, 2.50.) The Court has only relied on its right to refuse a request on one occasion. This was in 1923 in the *Eastern Carelia* case where the Council of the League of Nations had asked the Court if the Treaty between Finland and Russia of 1920 and its Annex relating to the recognition of the autonomy of Eastern Carelia, a Russian region, was binding on Russia. The Permanent Court of International Justice replied that the request encompassed a dispute between Finland and Russia, that Russia was not a member of the League of Nations, that it had not recognised the competence of the Court and that it refused to participate in the Court's procedure. According to the Court, these were "peremptory reasons" justifying its refusal to give an Advisory Opinion.[36]

2.43 That was the only occasion on which the Court relied upon the exception, despite the frequent requests by States, since 1949, that it should not on a particular matter give an Advisory Opinion. Subsequently, in accordance with a well-established jurisprudence, the Court has **never refused** to give an Advisory Opinion on the question posed. This has occurred (a) for reasons of principle, and (b) on the basis of certain criteria which have been fulfilled.

(a) The reasons of principle which have led the Court to decide to give an Advisory Opinion

2.44 The reasons of principle which have led the Court to agree to give an Advisory Opinion are the following:

— the Opinion is not binding (i);

— the Court has adopted a principle of not refusing to give an Advisory Opinion (ii).

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[35] See C.H. Vignes, *Questions juridiques intéressant l'Organisation Mondiale de la santé*, *AFDI*, 1963, p.627.

[36] PCIJ, opinion of 23 July 1928, *Series B No. 5*, pp. 27-28.

(i) The Opinion is not binding

2.45 In a case concerning the *Interpretation of Peace Treaties* (1950) the Court emphasised that given the non-binding character of the Opinion which it was giving — which flowed from "the scope attributed by the Charter and by the statute of the court to an Advisory Opinion"[37] — no State can oppose the giving of the Opinion:

> "The Court's reply is only of an advisory character: as such, it has no binding force. It follows that no State, whether a member of the United Nations or not, can prevent the giving of an Advisory Opinion which the United Nations considers to be desirable in order to obtain enlightenment as to the course of action it should take."[38]

2.46 The same principle governs the present affair; the Opinion requested of the Court will remain, as is indicated by its title, purely advisory and will not be binding upon States' members of the WHO. Accordingly, the giving of the Opinion does not depend on the consent of any particular State or group of States.[39]

(ii) In principle the Court does not refuse to give Advisory Opinions

2.47 If the "permissive" provisions in Article 65 ("**the Court may** give an advisory opinion") (emphasis added))[40] implies that the Court is entitled to refuse to give an Advisory Opinion, it has in practice adopted an approach of replying positively to all requests for Advisory Opinions which are addressed to it[41] where its response is intended to, and will, **enlighten** in legal terms the organ which has made the request. As the Court stated in the *Interpretation of Peace Treaties* case (1950):

> "The Court's Opinion is given not to the States, but to the organ which is entitled to request it; the reply of the Court, itself an 'organ of the United Nations', represents its participation

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[37] *Judgments of the Adm. Trib. of I.L.O. upon Complaints made against the UNESCO*, Adv. Op., 23 October 1956, *ICJ Rep.* 1956, p.84.

[38] *Interpretation of Peace Treaties*, Adv. Op., 30 March 1950, *ICJ Rep.* 1950, p.71; *Applicability of Art. VI, Sect. 22 of the Convention on the Privileges and Immunities of the UN (Mazilu Case)*, Adv. Op., 15 December 1989, *ICJ Rep.* 1989, pp.188-189.

[39] *Id.*

[40] *Interpretation of Peace Treaties*, Adv. Op., 30 March 1950, *ICJ Rep.* 1950, p.72; *Western Sahara*, Adv. Op., 16 October 1975, *ICJ Rep.* 1975, p.24.

[41] *Id.* See also *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, *ICJ Rep.* 1950, p.19; *Namibia Case*, Adv. Op., 21 June 1971, *ICJ Rep.* 1971, p.27.

in the activities of the Organization, and, in principle, should not be refused."[42]

2.48 *Mutatis mutandis*, this principle applies to the WHO case. The WHO has been addressing for more than ten years the inextricable problems relating to health and the environment which result from any use of nuclear weapons (*supra* paras. 2.28 *et seq.*). It is therefore indispensable for the conduct of its activities in this field that the WHO should be duly enlightened and informed of the legality of the use of nuclear weapons (*infra* paras. 2.56-2.57).

(b) Criteria which need to be satisfied in order for the Court to reply to a request for an Advisory Opinion

2.49 In order for the Court to give an Advisory Opinion, it is necessary that the Opinion requested must fulfil the following criteria:

(i) the Opinion should not relate to a dispute in which one of the parties is a total stranger to the Court;

(ii) the Court is acting within its judicial function.

(iii) the Opinion has a practical significance.

As will be seen, in the present case these criteria are fulfilled and the Court should not refuse to reply to WHO's request for an Advisory Opinion.

(i) The Opinion does not relate to a dispute in which one of the parties is a total stranger to the Court

2.50 In the *Eastern Carelia* case (1923), the Court had said that it could not, in the guise of an Advisory Opinion, deal with a dispute between two States where one had not recognised its competence, had refused to participate in the procedure and was not even a member of the organisation which had asked the Opinion.[43] Since then, the Court has on numerous occasions declared that only "compelling reasons" would lead it to refuse to reply to a request for an Opinion.[44] The "compelling reasons" envisaged by

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[42] *Interpretation of Peace Treaties*, Adv. Op., 30 March 1950, *ICJ Rep.* 1950, p.71; *Applicability of Art. VI, Sec.22 of the Convention on the Privileges and Immunities of the UN*, Adv. Op., 15 December 1989, *ICJ Rep.* 1989, pp.188-189; *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, *ICJ Rep.* 1950, p.19.

[43] PCIJ, Opinion of 23 July 1928, Series B, No. 5 pp. 27, 28.

[44] *Judgments of the Adm. Trib. of ILO upon Complaints made against the UNESCO*, Adv. Op., 23 October 1956, *ICJ Rep.* 1956, p.86; *Certain Expenses of the UN*, Adv. Op., 20 July 1962, *ICJ Rep.* 1962, p.155; *Namibia case*, Adv. Op., 21 June 1971, *ICJ Rep.* 1971, p.27.

the Court have always been limited to the situation that the Court has been called upon to address a dispute in respect of which one of the parties thereto had not accepted the competence of the Court. In the *Western Sahara* case (1975), the Court said:

> "In certain circumstances, therefore, the lack of consent of an interested State may render the giving of an advisory opinion incompatible with the Court's judicial character. An instance of this would be when the circumstances disclose that to give a reply would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent. If such a situation should arise, the powers of the Court under the discretion given to it by Art. 65, para. 1, of the Statute, would afford sufficient legal means to ensure respect for the fundamental principle of consent to jurisdiction."[45]

2.51 Admittedly, in the present case, the question which has been asked of the Court does relate to an important controversy between States. However, as the Court itself has recognised, underlying each request for an Advisory Opinion there will always be a controversy which has led the organisation to make the request to the Court:

> "Differences of view amongst States on legal issues have existed in practically every advisory proceeding; if all were agreed, the need to resort to the Court for advice would not arise."[46]

The mere existence of controversy does not mean that a contentious dispute exists between the parties. In giving an Opinion on the legality of the use of nuclear weapons, in view of their effect on human health and the environment, the Court would resolve a controversy but it would not address a dispute within the meaning of Article 36 of the Statute of the Court.

(ii) The Court, in giving its opinion, will remain within its judicial function

2.52 The Court has frequently emphasised that as the "principal judicial organ"[47] it should remain faithful to its character:

> "There are certain limits, however, to the Court's duty to reply to a Request for an Opinion. It is not merely an 'organ of the United Nations', it is essentially the 'principal judicial organ' of the Organization (Art.92 of the Charter and Art. 1 of the Statute)".[48]

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[45] *Western Sahara*, Adv. Op., 16 October 1975. *ICJ Rep.* 1975, p.25.

[46] *Namibia Case*, Adv. Op., 21 June 1971, *ICJ Rep.* 1971, p.24.

[47] *Interpretation of Peace Treaties*. Adv. Op., 30 March 1950, *ICJ Rep.* 1950, p.71.

[48] *Id.*, Judgments of the Adm.Trib. of ILO upon Complaints made against the UNESCO, Adv. Op., 23 October 1956, *ICJ Rep.* 1956, p.84.

As frequently recalled the Advisory Opinion requested of the Court must relate to a legal question.

> "[...] in accordance with Art. 65 of its Statute, the Court can give an advisory opinion only on a legal question. If a question is not a legal one, the Court has no discretion in the matter; it must decline to give the opinion requested."[49]

2.53 The fact that the question has political implications is not in itself an Obstacle to the giving of an Advisory Opinion: where the Court has been asked to characterise a particular form of behaviour with respect to the provisions of treaty and customary law, the Court is performing a task which is essentially legal:

> "It has been argued that the question put to the Court is intertwined with political questions, and that for this reason the Court should refuse to give an opinion. It is true that most interpretations of the Charter of the United Nations will have political significance, great or small. In the nature of things it could not be otherwise. The Court, however, cannot attribute a political character to a request which invites it to undertake an essentially judicial task, namely, the interpretation of a treaty provision."[50]

In the present case, the question asked at the Court relates to the compatibility of the use of nuclear weapons with the provisions of international law, including the Constitution of the WHO. In asking the Court to characterise the behaviour (the use of nuclear weapons) in the context of rules of positive law, the WHO is inviting the Court, in effect, to carry out a task which quite clearly relates to its judicial functions, namely "an interpretative function which falls within the normal exercise of its judicial powers".[51]

(iii) The Opinion will have a practical effect

2.54 The Court does not give Advisory Opinions as an end in themselves: its opinions must have practical consequences, for example by helping a requesting organisation to take decisions which will affect its activities on the basis of the answers given to the question posed to the Court. In the *Western Sahara* case (1975), the Court had said:

> "In general, an opinion given by the Court in the present proceedings will furnish the General Assembly with elements of a legal character relevant to its further treatment of the decolonization of Western Sahara.
> 73. In any event, to what extent or degree its opinion will have an impact on the action of the General Assembly is not for the Court to decide. The function of the Court is to give an opinion based on law, once it had come to the conclusion that the questions put to it are relevant and have a practical and contemporary effect and, consequently, are not devoid of

[49] *Certain Expenses of the UN*, Adv. Op., 20 July 1962, *ICJ Rep.* 1962, p.155.

[50] *Id.*

[51] *Condition of Admission of a State to Membership in the United Nations (Art. 4 of the Charter)*, Adv. Op., 20 July 1948, *ICJ Rep.* 1947-1948, p.61; *Certain Expenses of the UN*, Adv. Op., 20 July 1962, *ICJ Rep.* 1962, p.156.

object or purpose."[52]

2.55 In sum, the choices made and the acts taken by the WHO will depend directly on its knowing whether the use of nuclear weapons is legal or illegal. Therefore it is important that the Court should reply to the question posed. Even if this has considerable political implications, it is nevertheless fundamentally a legal matter, and the Court's reply would, in concrete terms, enlighten the WHO in the conduct of its activities. In the light of the Court's prior jurisprudence, there are no legal grounds for the Court to decline to give an Advisory Opinion on the question submitted by the WHO. Moreover, world public opinion would find it difficult to understand why the Court should refuse to answer an important legal question which has dominated international relations for more than half a century, particularly where the question has such profound implications for the future of humanity.

2.56 Assuming that the Court was of the Opinion that under certain conditions the use of nuclear weapons could be compatible with international law - *quod non* (see *infra*. paras. 3.34 *et seq.*) - the WHO would then be entitled to take specific *a priori* measures to prevent and reduce the adverse effects of a nuclear conflict, and specific *a posteriori* measures to attend to the needs of the victims of any such conflict. Even if, since 1961, a great majority of States have taken the view that any use of nuclear weapons would be illegal under international law (*infra*. paras. 3.25 *et seq.*), there remains a minority which takes the opposite view. It is clearly necessary for the WHO to know whether that minority is, as a matter of international law, correct in order for it to be able to adopt the preventative and curative procedures necessary to limit the number of victims and to limit the suffering of those who are injured as a result. Similarly, the WHO will need to redouble its efforts, together with other Specialized Agencies and international organisations, to determine what level of result radiation in foodstuffs, if any, would be safe for human consumption, and what level of radiation in a given environment, if any, could be safe enough to allow human access to such areas.

Specifically in regard to preventative measures, the WHO would, for example, be justified in developing a programme for the construction of shelters, including basic standards for their construction and the availability of foodstuffs for survivors and necessary survival equipment; the WHO would be entitled to develop special programmes of preparation and education for nuclear war which might be made available in schools and for the public at large. It would equally be required to assist in the training of appropriate health services and civil protection. With regard to assistance to the injured, the WHO would no doubt have to give serious study to the specific needs of hospitals, and to consider the means of making appropriate treatment available to large numbers of victims of burns or radiation. Either way, the WHO would need to take into account the particular conditions of each State, including its health and

[52] *Western Sahara*, Adv. Op., 16 October 1975, *ICJ Rep.* 1975, p.37.

economic conditions. Through the WHO new aid programmes might be studied or established with a view to providing developing countries with the necessary means of protecting itself against the consequences of a nuclear conflict. For a small island country with a limited territory and financial resources the active role of the WHO, in both a preventative and curative capacity, would be indispensable to its survival.

2.57 If, on the other hand, the Court decides that any use of nuclear weapons would be illegal under international law, as this Government argues, then the WHO would be entitled under its Constitution to limit its policy to actions taken to prevent not the effects of a nuclear war but the very use of nuclear weapons. Within the field of activities which is its own, the WHO could devote itself, in full knowledge of the applicable international law and its legal rights, to the work which it has already been carrying out to expose the horrifying consequences of a nuclear for human health and the environment. In particular, it could continue to focus the attention on States of the difficulty, if not the impossibility, of treating the victims of a nuclear accident or restoring damaged environments to a condition which are able to sustain human life. Whether legal or illegal, the Opinion of the Court, and the conclusions it reaches, will determine the direction which the WHO takes in action and in policy in the coming years in this area.

(F) Conclusion

2.58 For the reasons set out above it is submitted that the Court should give an Opinion on the basis that the WHO is competent to request an Advisory Opinion from the Court, and that the Court is competent to give, and should give, an Advisory Opinion on the question submitted.

PART II

THE LEGALITY OF THE USE OF NUCLEAR WEAPONS IN VIEW OF THEIR EFFECTS ON HUMAN HEALTH AND THE ENVIRONMENT

3.1 Part II of this Memorandum of Law is divided into three Sections. Section A addresses the legality of the use of nuclear weapons by reference to the applicable rules of international law of armed conflict (paras. 3.2-3.95). Section B addresses the legality of the use of nuclear weapons by reference to the rules of international law for the protection of human health and the environment (paras. 4.1-4.46). Section C briefly addresses the responsibility of a State for the consequences of a violation of its obligations as set forth in Sections A and B (paras. 5.1-5.3).

SECTION A

The use of nuclear weapons and the international law of armed conflict

3.2 The legality of the use of nuclear weapons raises three issues in relation to the rules governing the methods and means of warfare:

(a) what is the law applicable to the use of nuclear weapons?
(b) what are the applicable substantive rules of that law? and
(c) to whom do those rules apply?

The submissions made in this part of the Memorandum are that:

- the use of nuclear weapons is subject to international law, including the rules relating to armed conflicts (A);
- that any use of nuclear weapons is illegal under general international law and the WHO Constitution in particular (B); and
- that the relevant rules of international law apply to all States (C).

Specifically, Part A of Section II argues that the rules of law of armed conflict and law governing friendly relations prohibit the use of nuclear weapons in any circumstances, since any such use would violate:

- the limitation on the choice of means of attacking the enemy;

- the permanent obligation to distinguish between combatants and non combatants;

- the prohibition against attacking civilian targets;
- the prohibition against attacking health services;
- the prohibition against the use of chemical weapons or poisons or weapons which have indiscriminate effects;
- the prohibition against the use of weapons which render death inevitable or cause unnecessary suffering;
- the prohibition against violating the territorial integrity and neutrality of third States;
- the prohibition against causing widespread, long-term and severe damage to the environment;
- the obligation to respect the principles of proportionality and humanity; and
- the prohibition against genocide or crimes against humanity.

These rules are well-established, finding their source in many of the classical instruments governing *jus in bello*, including the 1868 St Petersburg Declaration, the 1874 Brussels Declaration, 1899 Hague Declaration IV, Regulation annexed to 1907 Hague Convention IV, 1925 Geneva Protocol, 1948 Genocide Convention, 1949 Geneva Conventions

(A) The use of Nuclear Weapons is subject to International Law, including the rules relating to armed conflict

(a) The use of nuclear weapons is subject to general international law

3.3 It has been suggested that in the nuclear age the normal rules of international law have been suspended, or perhaps set aside altogether, for all matters relating to nuclear weapons.[53] There are no principled grounds in law or policy to support this view. The use of nuclear weapons like any other activity carried out or authorised by States, is subject to the general and the specific rules of international law, including those reflected in the WHO constitution.

3.4 The use of nuclear weapons is subject to the rule of law. The development of new forms of behaviour, including methods and means of armed conflict, does not bring into question the law applicable to it. The arrival of a new *modus operandi* does not modify

[53] See E. David, "A propos de certaines justifications théoriques à l'emploi des armes nucléaires," *Melange Pictet* (1984), p.349; Part IIA of the written observations is largely based on that study.

the application or effect of the rule of law. As the first Advocate General of the Belgium Military Court stated:

> "Ce n'est pas à des pénalistes qu'il faut rappeler que la découverte d'un nouveau modus operandi en vue de commettre und infraction ne pourrait avoir l'effet de rendre caduque la législation qui définit cette infraction, ni qu'aucune forme nouvelle de criminalité n'a d'effet abrogatoire du droit positif".[54]

Accordingly, the invention of the machine gun or the tank has not forced States to adopt specific rules to determine the legality or the illegality of their use.[55] The law of armed conflicts applies to **all** forms of weaponry. Any other view would undermine the international rule of law. It is the arms that man invents which ought to adapt to existing rules, not the other way round. Any other approach would permit the invention of new weapons to circumvent the operation of legal rules under international law.

3.5 As set out hereafter, the use of nuclear weapons is subject to the general international law of armed conflict and to the more specific rules, including those reflected in the 1977 Geneva I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict ("1977 Geneva Protocol I").

(b) The use of nuclear weapons is subject to international law of armed conflicts

3.6 The practice of States reflects the overwhelming view that nuclear weapons are subject to the international law of armed conflict. UN General Assembly resolution 1653 (XVI), which specifically addresses nuclear weapons, states in its preamble that:

> "the use of weapons of mass destruction, causing unnecessary human suffering, was in the past prohibited, as being contrary to the laws of humanity and to the principles of international law, by international declarations and binding agreements, such as the Declaration of St. Petersburg of 1868, the Declaration of the Brussels Conference of 1874, the Conventions of the Hague Peace Conferences of 1899 and 1907, and the Geneva Protocol of 1925, to which the majority of nations are still parties".

The paragraph was adopted by 63 votes in favour, one vote against, and 31 abstentions. Since then, the General Assembly has consistently endorsed the approach taken by the vast majority of States in resolution 1653(XVI).[56] Other organizations have taken the

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[54] Cited in A. Andries, "Pour une prise en considération de la compétence des juridictions pénales nationales a l'égard des emplois d'armes nucléaires," *RDPC* 1984, p.34 ("Andries").

[55] *Cf.* J. Fried, "International Law Prohibits the First Use of Nuclear Weapons", *RBDI* 1981-1982, p. 37.

[56] A/Res. 2936 (XXVII), 29 November 1972 (73-4-46), Preamble; 35/152 D, 12 December 1980 (112-19-14), Preamble; 36/92 I, 9 December 1981 (121-19-6), Preamble; 37/100, 13 December 1982 (117-17-8), Preamble; 38/73 G, 15 December 1983 (126-17-6), Preamble; 39/63 H, 12 December 1984 (128-17-5), Preamble; 40/151 F, 16 December 1985 (126-17-6), Preamble; 41/60 F, 3 December 1986 (132-17-4), Preamble; 42/39 C, 30

same approach. The Xxth International Conference of the Red Cross (Vienna, October 1965) adopted a resolution by 128 votes in favour and three abstentions (with no votes against) solemnly declaring that "the general principles of the law of armed conflict apply to nuclear weapons and other similar weapons" (translation). The resolution reflects State practice, as it was supported notably by non-governmental organisations (national organisations of the Red Cross, League of Red Cross Societies, International Committee of the Red Cross) but also by States (State Parties to the Geneva Conventions of 12 August 1949 ("1949 Geneva Conventions"), which participate in the International Conferences of the Red Cross in accordance with the Statute of the International Red Cross (Article 1(2)).

3.7 Military manuals addressing this issue also stipulate that the use of nuclear weapons is subject to the rules of international humanitarian law applicable to the methods and means of warfare.[57] For example, the military instructional manual of the United States of America state that the use of nuclear weapons is subject to "three basic principles of the law of war - military necessity, humanity and chivalry - that limit the discretion of belligerents in all circumstances".[58] At the signing of the final Act adopting the 1977 Geneva Protocols the US representative declared, moreover, that even if the 1977 Geneva Protocol I does not regulate or prohibit the use of nuclear weapons (on this point, see *infra*. para. 3.17) it is nevertheless the case that: "their use in time of hostilities is governed by existing principles of international law."[59] The British military manual adopts a similar approach:

> "[t]here is no rule of international law dealing specifically with the use of nuclear weapons. Their use, therefore, is governed by the general principles laid down in this Chapter".[60]

3.8 In Belgium, during the preparatory work for Parliamentary approval of the 1977 Geneva Protocol I the *Conseil d'Etat* (legislative section) implicitly recognised that if the new rules of the Protocol did not apply to nuclear weapons, these were nonetheless subject to the classical rules of international law of armed conflict:

November 1987 (135-17-4), Preamble; 43/76 E, 7 December 1988 (133-17-4), Preamble; 44/117 C, 15 December 1989, Preamble (134-17-4); 45/59 B, 4 December 1990 (125-17-10), Preamble; 47/53 C (126-21-21), Preamble; 48/76 B, 16 December 1993 (120-23-24), Preamble.

[57] See UN Doc. A/9215, Vol. 1, pp. 172-73 (French).

[58] Cited in R. Falk and E. Meyrowitz, *The Status of Nuclear Weapons under International Law* (roneo), p. 84, n.114.

[59] 9 June 1977, CDDH/SR.58, para. 82; in *Actes de la Conférence diplomatique sur la réaffirmation et le développement du droit international humanitaire applicables dans les conflits armés* (Genève, 1974-77) ("Actes"), Berne, 1978, I, 3e partie, p. 301.

[60] Manual of Military Law, 1958, Part III, sec.113 cited in *Commentaires des Protocoles additionels du 7 juin 1977 aux Conventions de Genève du 12 août 1949* ed. by Y. Sandoz, C. Swinarski, B. Zimmerman, ICRC - Martinus Nijhoff (1986) ("*Commentaires*"), p.604, n.33.

> "The consensus which was established on this point [the fact that the negotiations were not concerned with the regulation of the use or non-use of nuclear weapons] between the great nuclear powers and which has frequently been qualified as the placing 'between brackets' of nuclear weapons, must be interpreted as relating exclusively to the new rules in Protocol I. The rules contained in other international instruments, such as the Hague Conventions of 1899 and 1907 and the Geneva humanitarian conventions of 1949 are not affected and retain their value".[61] (authors' translation; emphasis added)

3.9 The jurisprudence of courts on the applicability of international law to nuclear weapon is limited. A noteworthy exception is the 1963 decision of the Tokyo District Court, which rejected the view that international law did not regulate the use of a nuclear weapon on Hiroshima because of its novelty:

> "the prohibition in this case is understood to include not only the case where there is an express provision of direct prohibition, but also the case where it is necessarily regarded that the use of a new weapon is prohibited from the interpretation and analogical application of existing international laws and regulations (international customary laws and treaties). Further, we must understand that the prohibition includes also the case where, in the light of principles of international law which are the basis of the above mentioned positive international laws and regulations, the case of a new weapon is admitted to be contrary to the principles [...] Therefore, we cannot regard a new weapon as legal only because it is a new weapon, and it is still right that a new weapon must be exposed to the examination of positive international law."[62]

At various points in the judgment the Tokyo District Court recognised the applicability of the classical rules of international law of armed conflict to the bombardment of Hiroshima and Nagasaki by nuclear weapons.[63]

3.10 For the great majority of international jurists there is no doubt that the use of nuclear weapon is subject to international law, and the examples cited below are merely illustrative.[64] The amount written on this subject reflects the strongly held views of

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[61] J. Salmon and R. Ergec, "La pratique du pouvoir exécutif et le contrôle des chambres législatives en matière de droit international" (1984-1986) *RBDI*, 1987, p.391, note E-D.

[62] Tokyo District Court, Judgment of 7 December 1963, *Jap.Ann.I.L.*, 1964, pp. 235-36.

[63] *Id.*, pp.234, 236, 241.

[64] See E. Castren, *The Present Law of War and Neutrality*, (1954), pp.206-07; Spaight, *Air Power and War Rights*, (1947), p.276; H. Lauterpacht, *Oppenheim's International Law*, 1952, 7th ed. p.347, s116; J. Greenspan, *The Modern Law of Land Warfare*, (1959), p.371 cited in M. Whiteman, *Digest of International Law*, Washington US GPO 1968, pp.482-83; R.E. Charlier, "Questions juridiques soulevées par l'évolution de la science atomique", *RCADI*, (1957), vol 91, p.354; G. Schwarzenberger, *The Legality of Nuclear Weapons*, (1958), pp.43-44; N. Singh; *Nuclear Weapons and International Law*, 1959 pp.147 *et seq*; H. Meyrowitz, "Les juristes devant l'arme nucléaire", *RGDIP* 1963 pp.844-848; Fried *loc.cit.* pp.34 *et seq*; A. Andries "L'emploie de l'arme nucléaire est un crime de guerre" *La Revue Nouvelle* (Brussels), March 1983, p.320, *id.*, Andries *loc.cit.*, pp.33 *et seq.*; J. Verhaegen, "Le problème pénal de la dissuasion nucléaire", *RDPC*, 1984, pp.20-21; *Statement on the Illegality of Nuclear Warfare*, The Lawyers Committee on Nuclear Policy, New York 1984; *Appel des juristes contre la guerre*

many jurists on the subject of the use of nuclear weapons and international law, including Judges of this International Court and other illustrious jurists.

Thus, the Institut de Droit International adopted at its 1969 Edinburgh session a resolution on "La distinction entre les objectifs militaires et non militaires en général et notamment les problèmes que pose l'existence des armes de destruction massive". The resolution recalled

> "les conséquences que la conduite indiscriminée des hostilités, et particulièrement l'emploi des armes nucléaires, [...] peut entraîner pour les populations civiles et pour l'humanité tout entière"

and noted the existence of rules "à observer lors de conflits armés par tout gouvernment", notably the prohibition against attacking civilians, the use of weapons having indiscriminate effects, and

> "notamment l'emploi des armes dont l'effet destructeur est trop grand pour avoir être limité à des objectifs militaires déterminés ou dont l'effet est incontrôlable (armes 'autogénératrices' ainsi que des armes aveugles".[65]

In other words, the Institut has implicitly recognised the applicability of the law of armed conflicts to the use of nuclear weapons.

(c) The use of nuclear weapons is subject to the 1977 Geneva Protocol I

3.11 The use of nuclear weapons is also subject to the relevant provisions of the 1977 Geneva Protocol I. It is important to expressly demonstrate this, since the Protocol does not expressly mention nuclear weapons, and further:

(i) during the presentation of the draft text to serve as a base for the discussions of the diplomatic conference the ICRC had declared its unwillingness to broach the question of nuclear weapons;[66] and

(ii) declarations made by the United Kingdom, the United States and France, (at the beginning and/or at the end of the Conference), stated that all or part of the 1977

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nucléaire, petition by the Bureau International de la Paix (1987).

[65] *Ann.I.D.I.*, 1969, Vol.53, II, p.360.

[66] "Problems relating to atomic, bacteriological and chemical warfare as subjects of international arguments or negotiations by governments, and in submitting these draft Additional Protocols the ICRC does not intend to broach those problems" (translation), in ICRC, *Projets de Protocoles additionels aux Convention de Genève du 12 août 1949*, Geneva, 1973, p.2, in *Actes*.

Geneva Protocol I did not apply to nuclear weapons.[67]

(i) No consensus exists on whether nuclear weapons are covered by Protocol I

3.12 When the law prohibits certain conduct without specifying all the ways in which such conduct might occur, such silence does not imply that the conduct is authorised under another guise. The silence of Protocol I does not therefore signify that it is permissible to use nuclear weapons to carry out activities prohibited by the Protocol. It may be possible to go further in adopting the view that the Protocol does prohibit the use of nuclear weapons in a *quasi*-explicit way, since it prohibits attacks on nuclear power plants (Art. 56). As A. Andries has written:

> "Il y'aurait en effet contradiction dans les termes à interdire la destruction des centrales nucléaires à cause des forces dangereuses qu'elles peuvent libérer (art. 56.1) tout en n'interdisant pas la libération directe de ces forces par l'explosion d'une arme nucléaire."[68]

3.13 Some writers have concluded that a consensus existed at the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva, 1974-1977), that Protocol I did not apply to the use of nuclear weapons.[69] This view cannot be confirmed. Many States put forward the opposite view, both during the Conference and afterwards. Indeed, the proliferation of view is so contradictory that it is impossible to identify a consensus existed on the inapplicability of Protocol I to the use of nuclear weapons.

3.14 During the early sessions of the Conference, the UK, relying on the ICRC Declaration, declared that the Protocols

> "must not 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."[70]

Similarly, Sweden wanted to address certain conventional weapons, but emphasised that "[t]he proposals did not cover atomic, bacteriological and chemical weapons [and] that

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[67] UK, 6th March 1974, CDDH/SR 13 para. 36, *Actes* V, p.130; 9th June 1977, CDDH, SR.58 para.119, *Actes* VII p.310; US, 9th June 1977, CDDH/SR.58, para. 82, *Actes* VII, p.301; France 8th June 1977, *CDDH/SR* 56, para. 3, *Actes* VII p.199.

[68] A. Andries, *loc. cit.* pp. 35-6.

[69] H. Meyrowitz: "La stratégie nucléaire et le Protocole additionnel I aux Conventions de Genève de 1949", ***RGDIP***, 1979 pp.915-17, 928-29, Andries *loc.cit.*, pp.35-36.

[70] 6th March 1974, CDDH/SR. 13 para. 36, *Actes* V, p.130.

discussion should be confined to conventional types of warfare [...]."[71]

3.15 During the same session, however, many other States took an alternative view. The following are illustrative examples. Ghana stated that

> "The use of new types of weapons appeared on the agenda of two important conferences currently meeting in Geneva and in Vienna. The main purpose of at least one of them was to limit the use of strategic arms which could result in the destruction of all mankind. Consistently with the contemporary trend of political thought, the Conference should declare the complete prohibition of the use of new weapons in all conflicts. Experience had shown that the use of such weapons could affect innocent civilians some distance from the area directly attached. Surely, prevention was better than cure".[72]

According to Rumania:

> "Nuclear, bacteriological, chemical and biological weapons as well as all weapons of mass destruction should be banned".[73]

A similar view was proposed by the People's Republic of China:

> "The new Protocols should unequivocally provide for the prohibition and destruction of nuclear weapon; [...]".[74]

According to Iraq:

> "The principles that had to be stressed were the protection of the civilian population in armed conflicts; the prohibition of nuclear, biological and chemical weapons and of certain conventional weapons of mass destruction; [...]".[75]

For Zaire, the Conference should

> "Give particular attention to the following points [...] prohibition of the use of weapons liable to inflict unnecessary suffering on civilians, especially bacteriological, chemical and nuclear weapons; [...]".[76]

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[71] 7th March 1974, CDDH/SR. 14 para. 21. *Actes* V, p.141.

[72] 5th March 1974, CDDH/SR.10 para. 36. *Actes* V, p.92.

[73] 5th March 1974, CDDH/SR.11 para. 13. *Actes* V, p.99.

[74] 6th March 1974, CDDH/SR.12 para. 18. *Actes* V, p.116.

[75] 6th March 1974, CDDH/SR.12 para. 32. *Actes* V, p.119.

[76] 11th March 1974, CDDH/SR.19 para. 5. *Actes* V, p.189.

For Albania,

> "Methods of warfare indiscriminately affecting the civilian population, such as atomic weapons, bombardment of civilian population and deportation, must be specifically prohibited".[77]

It is therefore clear that during the early stages of the Conference no consensus existed.

3.16 The nuclear weapons issue was hardly debated again during the Conference, although in 1975, the People's Democratic Republic of Korea complained about the installation of nuclear weapons in South Korea and stated that:

> "the production, testing and use of such weapons should be prohibited [...]".[78]

In response, the US made it clear that it did not wish to address nuclear weapons, recalling the ICRC draft had not included any rules on nuclear weapons.[79]

3.17 The question of nuclear weapons reappeared at the end of the Conference, during the final declarations. France, the US, and the UK declared that 1977 Geneva Protocol I did not apply to nuclear weapons. The declarations differ in tone and content. France, which proposed a most extreme approach:

> "wishes to make it quite clear that its Government could not under any circumstances permit the provisions of Protocol I to [...] prohibit the use of any specific weapon which it considers necessary for its defence. [...] It accordingly wishes to stress that in its view the rules of the Protocols do not apply to the use of nuclear weapons".[80]

The US representative, whilst admitting that the use of nuclear weapons "is regulated by existing principles of international law", stated

> "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."[81]

The UK took the view that only "the new rules" established by Protocol I would not apply to nuclear weapons. For the UK representative

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77 19th March 1974, CDDH/III.SR.8, para. 87, *Actes* XIV, p.76.

78 27th February 1975, CDDH/III/SR.26 para. 31, *Actes* XIV, p.260.

79 14th April 1975, CDDH/III/SR.40, para. 123, *Actes*, XIV, p.466.

80 8th June 1977, CDDH/SR.56 para. 3, *Actes* VII, p.199.

81 8 June 1977, CDDH/SR.58, para. 82, *Actes* VII, p.301.

> "the new rules introduced by the Protocols 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".[82]

In other words, as commentators have emphasized,

> "The British declaration refers expressly to *new* rules and therefore implicitly confirms that the rules *reaffirmed* in the Protocol apply to all arms;"[83] (translation - emphasis added)

Accordingly, the only consensus between the three States is confined to the inapplicability of the new rules of the Protocol to the use of nuclear weapons. As between the US and France, one could identify a consensus on the inapplicability of the whole of Protocol I to nuclear weapons (despite the face that the US recognises that their use is subject to general rules of the law of armed conflicts: *supra* para. 3.7). But this view is taken only by these two States and not by the other Parties to Protocol I.

3.18 It is significant that other States have affirmed that Protocol I applies to nuclear weapons, and except for the three above-mentioned States, they have not been contradicted on this point. Accordingly, in referring to Article 33 of the draft text (Article 35 in the final text) which stipulates that Parties do not have an unlimited right as to the choice of weapons and that they cannot use weapons causing excessive harm or widespread, long lasting and serious damage to the natural environment, India declared:

> "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".[84] (emphasis added)

In more general terms, according to Rumania,

> "Humanitarian law must also prohibit the use of weapons of massive destruction and methods of warfare which struck indiscriminately at combatants and civilians alike [...] ***Many of those aims were covered by the provisions of Protocol I***, including... the prohibition or restriction of the use of certain conventional weapons and weapons of massive destruction".[85] (emphasis added)

3.19 Other States do not specifically refer to nuclear weapons, although certain declarations suggest that Protocol I is applicable to their use. According to Yugoslavia, for example,

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[82] 9 June 1977, CDDH/SR.58, para. 119, *Actes*, p. 310.

[83] *Commentaires*, p.604, para. 1853.

[84] 25th May 1977, CDDH/SR.39. *Actes* VI, p.114.

[85] 9th June 1977, CDDH/SR.58, para. 61, *Actes* VII, p.296.

it would be dangerous to permit, as certain States have suggested, that:

> "certain methods and means of combat permissable in "exceptional" circumstances. In Protocol I, as also in other texts codifying the laws of armed conflict, and in accordance with the principle confirmed by the Nürnberg Tribunal, there had been due regard for military necessity, but the new rules were also based on humanitarian requirements [...] If the use of weapons that might cause superfluous injury or have indiscriminate effects was not renounced, or restricted in practice, the rules that the Conference had so carefully drafted would in fact be impossible to apply."[86]

According to the German Democratic Republic,

> "The unambiguous rule prohibiting the civilian population being made the object of attack, the prohibition of indiscriminate attacks, the protection of civilian objects and of the natural environment form [...] the core of the Protocol. In view of the terrible experience the civilian population had to endure during the Second World War and afterwards, each rule in this field - even if it only reaffirms existing law - is a real progress."[87]

According to Mozambique,

> "The destructive power of present-day weapons strikes mainly at the civilian population, so we congratulate the Conference on its adoption of the articles relating to the protection of the unarmed population."[88]

3.20 It is therefore clear that no consensus existed in Geneva as to the applicability of Protocol I to nuclear weapons. The various declarations identified above are inconclusive. As against the unchallenged declarations, of differing content and value, of the UK, US and France (*supra*. paras. 3.14 and 3.17) one can rely on the express declarations of India and Rumania, which were also uncontested as well as the implicit rejection of weapons of mass destruction reflected in declarations of other States.

3.21 Practice following the adoption of Protocol I confirms the lack of a consensus to exclude the use of nuclear weapons from its field of application. Such practice is reflected in the following:

(i) One of the States the most adamantly opposed to the application of Protocol I to nuclear weapons - France - itself recognised in 1984 that there was no consensus that the Protocol was inapplicable to nuclear weapons. At the time of depositing its instrument of ratification to Protocol II, France justified her refusal to adhere to Protocol I by referring to

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[86] 8th June 1977, CDDH/SR.56, para. 70-71, *Actes* VII, p.214.

[87] 8th June 1977, CDDH/SR.56, Acts. VII, p.247.

[88] 9th June 1977, CDDH/SR.58, Acts, VII, p.332.

> "the absence of consensus between the signatory States of the first Protocol in what concerns the exact obligations assumed by them in respect to dissuasion" "(authors' translation - emphasis added).

(ii) If there had usually been a consensus on the "setting aside" of nuclear weapons, it would not have been necessary for certain States, in accepting Protocol I, to adopt reservations on its applicability to nuclear weapons. However, various member States of NATO declared in a broadly uniform manner upon ratification of Protocol I that it applied "exclusively to classical weapons" and that it did not

> "préjudice à aucune autre règle de droit international applicable à d'autres types d'armes."[90]

Significantly, no other State, including some member States of NATO such as Greece, Portugal and Iceland,[91] made this kind of declaration upon ratifying Protocol I. It is thus clear that there is no consensus on the matter.

3.22 The jurists at the ICRC also take the view that there has never been a consensus to exclude the use of nuclear weapons from the field of application of Protocol I "puisqu'aucune décision n'a été prise".[92] Only "une entente s'est réalisée pour ne pas discuter des armes nucléaires".[93] This does not mean that the rules of the Protocol do not apply to such weapons. The jurists at the ICRC have concluded, on the contrary, that if

> "les principes raffirmés dans le Protocole n'interdisent pas l'usage des armes nucléaires lors d'un conflit armé, ils restreignent donc très sérieusement cet usage."[94]

We will see that the characteristically prudential approach of the ICRC on the legality of the use of nuclear weapons is unsupported by the positive law. It is submitted that the "principles reaffirmed in the Protocol" do prohibit the use of nuclear weapons, in view

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[89] *RICR*, 1984 p.239.

[90] Italy in *RICR*, 1986 p.114; for the same idea and similar wording, see Belgium, the Netherlands, Spain, Federal German Republic in *RICR* 1986 p.178; 1987 p.444; 1989 p.389; 1991, pp.250-51. With regard to Canada: "the rules introduced by Protocol I are adopted in order to apply exclusively to conventional weapons" and "have no effect whatsoever on nuclear weapons, which they neither apply to nor prohibit", *RICR*, 1991, p.82: (this statement is ambiguous: by referring to "rules introduced" is Canada referring to all the provisions of the Protocol or only those which establish new rules?)

[91] *RICR*, 1989, p.267; 1992, p.416.

[92] *Commentaires*, p.603, para. 1851; *RICR* , 1987 p.352; 1989, p.267; 1992, p.416.

[93] *Id.*, para. 1852.

[94] *Id.*, p.605, para. 1859.

of their nature and the extent of their destructive effects.

3.23 In conclusion, the lack of any consensus on the express exclusion of nuclear weapons from the field of application of Protocol I suggests that the Protocol, and in particular the principles of general international law reaffirmed therein, are applicable to nuclear weapons together with all other types of weapons.

3.24 It remains necessary to determine whether the declarations "setting aside nuclear weapons" which have been made by certain States to prevent or limit the applicability of Protocol I to the use of nuclear weapons in treaty relations (as opposed to customary law relations) of these States, as between themselves or as between themselves and the other Parties to the Protocol. This is considered at paragraphs 3.90 and 3.91.

(d) The use of nuclear weapons is subject to the rules of international law specifically prohibiting the use of nuclear weapons

3.25 Certain rules of international law specifically expressly prohibit the use of nuclear weapons. These are reflected in UN General Assembly resolutions, which have been consistently supported by the vast majority of the members of the UN. The practice of that body began in 1961 with the Declaration on the Prohibition of the Use of Nuclear and Thermo-Nuclear Weapons,[95] which declares that any use of nuclear weapons would:

- be contrary to the spirit, letter and aims of the UN and, as such, "a direct violation of the Charter of the United Nations";[96]
- be contrary to the "rules of international law and to the laws of humanity", since it would exceed the scope of war and cause indiscriminate destruction to mankind and civilization;[97] and
- constitute the commission of a "crime against mankind and civilisation".[98]

Resolution 1653 was recalled by the General Assembly in 1972 and has subsequently been recalled at each Session of the General Assembly since 1980.[99] In 1972, the

[95] A.Res.1653 (XVI), 24 November 1961 (55-20-26).

[96] *Id.*, para. 1(a) and (d).

[97] *Id.*, para. 1(b).

[98] *Id.*, para. 1(d).

[99] *Supra*, note 95.

General Assembly "solemnly declared, on behalf of the States Members of the Organization, [...] the permanent prohibition on the use of nuclear weapons."[100] In 1978, the special Commission of the 10th Extraordinary Session of the UN General Assembly declared in its final document that

> "Les armes nucléaires sont celles qui menacent le plus gravement l'humanité et la survie de la civilisation"[101]

The General Assembly has frequently invoked this provision or the idea contained in it.[102] Also in 1978, the General Assembly

> "declared that the use of nuclear weapons will be a violation of the UN Charter and a crime against humanity".[103]

From 1980 (35th Session)[104] to the present day (48th Session), the General Assembly has repeated, year after year, its condemnation of the use of nuclear weapons by characterising such use as a "violation of the Charter" and "a crime against humanity".[105]

Furthermore, in 1981 the General Assembly solemnly declared that

> "States and statesmen that resort first to the use of nuclear weapons will be committing the gravest crime against humanity"[106]

In 1983, the General Assembly

> "Resolutely, unconditionally and for all time condemns nuclear war as being contrary to human conscience and reason, as the most monstrous crime against peoples and as a

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[100] A/Res. 2936 (XXVII), 29 Nov.1972 (73-4-46), para.1.

[101] A/Res. 5. 10/2, 30th June 1978 (adopted without a vote), para.47.

[102] See e.g. A/Res. 38/183M, 20th Dec.1983 (133-1-14), preamble: 39/148 P, 17th Dec.1984 (128-6-12), preamble; 40/152 P, 16th Dec.1985 (131-16-6), preamble; 41/60 I, 3rd Dec.1986 (139-12-4), preamble; 42/42 D., 30th Nov.1987 (140-3-14) preamble; 43/78 F, 7th Dec.1988 (136-3-14), preamble.

[103] A/Res. 33/71 B, 14th Dec. 1978 (103-18-18), para.1.

[104] A/Res. 35/152, 12th Dec.1980 (112-19-14) para.1.

[105] *Supra*, note 103.

[106] See e.g. A/Res. 36/100, 9th Dec.1981 (82-19-41), para.1; 37/78 J, 9th Dec. 1982 (112-19-15), preamble, and para. 1; 38/183 B, 20th Dec.1983 (110-19-15), preamble, and para.1.

violation of the foremost human right - the right to life".[107]

These resolutions raise two questions: do they constitute rules, and if so, do they bind all States?

3.26 Resolutions of the UN General Assembly can be a source of law to the extent that they relate to questions which are within the competence of the General Assembly and are elaborated in a normative mode. The power of the General Assembly to adopt resolutions on nuclear weapons is based on Article 11(1) of the Charter which states that:

> "The General Assembly may consider the general principles of co-operation in the maintenance of international peace and security, including the principles governing disarmament and the regulation of armaments, and may make recommendations with regard to such principles to the Members or to the Security Council or to both."

Although this provision gives the General Assembly only a power of "recommendation", this does not preclude the Assembly from exercising other powers of a normative character. Practice confirms[108] this and the ICJ had affirmed this in the *Namibia Case* (1971):

> "For it would not be correct to assume that, because the General Assembly is in principle vested with recommendatory powers, it is debarred from adopting, in specific cases within the framework of its compliance, resolutions which make determinations or have operative design."[109]

The normative character of resolutions flows from their formulation. As the International Court has stated with respect to the Security Council resolutions:

> "The language of a resolution of the Security Council should be carefully analyzed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussion leading to it, the Charter provisions invoked and in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council"[110] (emphasis added)

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[107] A/Res. 38/75 B, 15th Dec.1983 (95-19-30), para.1.

[108] For examples of the legal effect of UN General Assembly resolutions see *Texaco-Calasiatic v. Libya*, Arbitral award of 19 January 1988, *JDI* 1977, pp.378-79; *Military and Paramilitary Activities in and against Nicaragua*, *ICJ Rep.* 1986, pp.100 and 103, paras. 188 and 195.

[109] Adv. Op. 21st June 1971, *ICJ Rep.* 1971, p.50, para. 105.

[110] *Namibia Case*, *loc.cit.* p.53 para. 114.

Similarly, the 13th Commission of the Institut de Droit International, during the 1987 session in Cairo, proposed with regards to resolutions of the UN General Assembly that

> "Le libellé et le texte d'une résolution aident à déterminer la portée normative. La présence de références au droit international ou de formules équivalentes, ou l'omission délibérée de telles références ou formules sont des indices utiles mais non décisifs en soi" (Conclusion 10)

In casu, the General Assembly resolutions identified above are drafted in the present tense and utilise verbs in an affirmative manner according to which the Assembly, "declares" or "imposes" principles enunciated in legal terms which are based upon sources of positive law: nuclear weapons are "weapons of massive destruction causing unnecessary harm and human suffering"; in this context their use is "prohibited" by reason of the Declaration of St Petersburg, Brussels, etc. (*infra*. paras. 3.38 and 3.42); moreover, their usage is a "violation of the Charter" and a "crime against humanity".

In **referring** to the existence of an obligation of customary and treaty law imposed on States not to use nuclear weapons, an obligation the violation of which would constitute an **international crime**, these resolutions of the General Assembly are of a normative character.

3.27 Advocates for the legality of the use of nuclear weapons would perhaps take the view that these resolutions are contradictory, since they declare that the use of nuclear weapons is illegal but also demand the conclusion of a treaty prohibiting the use of nuclear weapons.[111] Alternatively, they argue that if the use of those nuclear weapons was already illegal it would be pointless to conclude another treaty on the subject. Other resolutions condemn the first use of nuclear weapons,[112] which seems to suggest that a second, or retaliatory, use would be lawful, etc.[113] These arguments might be invoked in support of the view that the use of nuclear weapons is not yet contrary to international law.

3.28 The inclusion of an international legal obligation in a treaty does not imply that the obligation did not pre-date the treaty, perhaps as a rule of customary law or alternatively in another treaty. Many treaty rules (for example those relating to the law of diplomatic relations, law of treaties, law of the sea, etc) codify pre-existing customary rules. It is quite normal in international law for the most common and the most fundamental rules

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[111] See A/Res. 33/71 B, 14th Dec. 1978, para. 2 and resolutions cited in note 56.

[112] A/Res. 36/100, 9th Dec. 1981 (82-19-41), para.1. *Ann.I.D.I.* 1987, Vol.62, T.II. p.73.

[113] For a more detailed analysis see E. David *Examen de certaines justifications théoriques a l'emploi des armes nucléaires* (Part II), in *Les conséquences juridiques de l'installation éventuelle de missiles cruise et pershing en Europe, Brussels*, ed. of the University of Brussels and Bruylant. 1984 pp.15 *et seq* ("Examen") are largely inspired by this study.

to be reaffirmed and repeatedly incorporated into treaties; examples include the prohibition on the use of force, the obligation to settle disputes peacefully. The formal re-affirmation of these rules in a treaty clearly does not imply their prior non-existence as binding obligations. To read into the fact that certain States call for the elaboration of a treaty to expressly prohibit the use of nuclear weapons a proof that their use is not yet prohibited illustrates the dangers of an *a contrario* approach to treaty interpretation. Used in a way which is too general, this approach to interpretation introduces in effect a character of reversibility, that is to say that it could just as easily result in one conclusion as another. As has been written:

> "Seules les règles dont la vocation est d'être particulière, ainsi les exceptions, les énumérations limitives, les dispositions onéreuses se prêtent-elles à une interprétation a contrario"[114]

In these circumstances the will of the United Nations, as expressed in General Assembly resolutions, to adopt a convention prohibiting the use of nuclear weapons is an objective far too general to lend itself to an *a contrario* form of interpretation. The United Nation's desire to adopt such a convention could either be because the use of nuclear weapons has not yet been prohibited in international law or because it is only prohibited in a generic manner - *quod est*: a treaty would emphasise or reinforce an existing prohibition.

The context of these resolutions proves that only the second conclusion is compatible with the text of the preambular paragraphs and the substantive commitments set forth in the resolutions, which proclaim categorically and in a peremptory manner the illegality of any use of nuclear weapons.

3.29 As for the fact that the General Assembly has generally focused on the first use of nuclear weapons, this again might simply provide evidence of a narrow, juridical approach, than one which justifies the conclusion that anything other than first use might be permitted. It is noteworthy that when the General Assembly commends those States which have undertaken never to make a first use of a nuclear weapon, it stipulates that this constitutes an important first step towards a reduction of the threat of a nuclear war.[115] In other words, the Assembly welcomes all actions which can diminish the risk of a nuclear war, but evidently this does not imply that it accepts *a contrario* anything which might increase such risks. It would therefore be incorrect to find in these resolutions implicit acceptance of the right of recourse to nuclear weapons in any circumstances.

3.30 If the UN General Assembly resolutions reflect a source of international law applicable

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[114] F. Ost, "L'intépretation logique et systématique et le postulat de rationnalité du légilateur," in *L'intépretation en droit* (1978), p.124.

[115] See e.g. A/Res. 37/78 J, 9th Dec.1982 (112-19-15), para. 1; 38/183 B, 20th Dec.1983 (110-19-15), para. 1.

to the use of nuclear weapons, as an expression of the *opinio juris* of States it is of little importance that they have only been supported by a majority of States. Insofar as they reflect customary international law applicable to the entire international community they reflect obligations imposed on all States. As was said by the 13th Commission of the Institut de Droit International in its conclusion 17 *in fine*:

> "Si une résolution énonce le droit existant, un état ne peut se libérer de la force obligatoire de ce droit en émettant une réserve".[116]

Whether any State has entered such a reservation is considered at paragraphs 3.90 and 3.91.

3.31 In conclusion, there therefore exists in the law of the UN a corpus of rules specifically prohibiting - and characterising as a "crime against humanity" - the use of nuclear weapons. These rules, which are reflected in the Declaration adopted by resolution 1653,[117] do not, however, create new law since the texts which endorse them are based upon the classical prohibitions embodied in the law of armed conflicts.

The UN General Assembly resolutions are therefore an expression and application of a pre-existing and positive law to nuclear weapons, rather than a source of new rules. Even if they did constitute new rules — *quod non* — the Court is still entitled to take account of the resolutions as the GA had already invited it to do so:

> "the development of international law may be affected by declarations and resolutions of the General Assembly, which may to that extent be taken into consideration by the International Court of Justice"[118]

(e) The use of nuclear weapons is subject to the WHO Constitution

3.32 The use of nuclear weapons also falls under the obligations set forth in the WHO Constitution. This provides, *inter alia*, in terms of some generality:

- the right to health (Preambular paragraph 2);
- health as "fundamental condition of war peace and security" (Preambular paragraph 3);
- the right and obligation of Government to ensure "the health of their people" and to take appropriate social measures" (Preambular paragraph 9);

[116] Ann.I.D.I., 1987 Vol.62 II, p.75.

[117] 24 November 1961 (55-20-26).

[118] *Examen du rôle de la C.I.J.*, A/Res. 3232 (XXIX), 12th Nov.1974 (consensus) preamble.

— the objective of the WHO which is "to raise health of all nations as to the highest possible level" (Art. 1); and

— the functions of the WHO which include, *inter alia*, "helping Governments at their request to reinforce their health service (WHO Constitution, Art. 2), to "furnish [...] in an emergency the necessary aid at the request of Governments and with their consent (Art. 2(d)).

In fact, when the WHO launched its research programme on the affects of a war on human health the World Health Assembly invoked[119] UN General Assembly resolution 34/58, in which the General Assembly considered

> "que la paix et la securité sont des conditions importantes pour préserver et améliorer la santé de tous les peuples et que la coopération entre les nations sur les problèmes essentiels de la santé peut être une contribution importante à la paix."[120]

For its part, the World Health Assembly has observed that a nuclear conflict

> "qu'elles qu'en puisse être la forme et l'ampleur, provoquera inévitablement une destruction irréversible de l'environnement et la mort de centaines de million de personnes, et entrainers également de graves conséquences pour la vie et la santé de la population de tous les pays du monde sans exception ainsi que pour la les générations à venir, sapant ainsi les efforts que déploient les Etats et l'OMS pour instaurer la santé pour tous d'ici l'an 2000."[121]

The World Health Assembly has also noted that doctors see the risk of such a conflict as "la pire des menaces pour la vie et la santé de toutes les populations".[122] It is in the context of these views that the Assembly requested a study on the consequences of nuclear war on life and the health of peoples of the world. Following this study, the Assembly adopted another resolution in which it:

> "3. Endorses the Committee's conclusion that it is impossible to prepare health services to deal in any systematic way with a catastrophe resulting from nuclear warfare and that nuclear weapons constitute the greatest immediate threat to health and welfare of mankind."[123]

The concern is reflected in resolution WHA 40.24 of 15 May 1987, in which the World Health Assembly recalled "the close links between health and the safeguarding of peace",

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[119] Res.WHA 34.38, May 1981, preamble.

[120] A/Res.34/58, 29th Nov.1979 (without vote), preamble.

[121] Res. WHA 34.38, May 1981, preamble.

[122] *Id.*, 6th al.

[123] Res. WHA 36.28, May 1983.

and its concerns about the effects of nuclear war on health.

3.33 As this survey illustrates, there can be little doubt that the practice of the WHO can only lead to the conclusion that the human health and environmental effects resulting from the use of nuclear weapons are subject to the rules of the WHO, including its constitution.

(B) The use of nuclear weapon is contrary to international law of armed conflicts

3.34 Just as the use of certain conventional weapons is specifically prohibited by international law because of their inherent characteristics (such as "dum-dum" bullets,[124] chemical weapons,[125] etc.), it is the very characteristics of the consequences of nuclear weapons which provides the basis for the inherent illegality of their use. These inherent characteristics relate to their effect on human health and the environment, namely their quantitative effects (a) and their qualitative effects (b). It is by reason of both these effects that the use of nuclear weapons, in any context, violates the most fundamental rules of international law in relation to both international and non-international armed conflict (c). Under international law there are no circumstances justifying the use of a nuclear weapon (d).

Nuclear weapons are characterised by their effects on human health and the environment, which are both quantitative and qualitative.

(a) The use of nuclear weapons violates international law by reason of the quantitative effects of such weapons

3.35 There are three types of nuclear weapons: atom bombs, hydrogen bombs and neutron bombs. Without descending into the specific details of how each of these weapons works, it is worth noting that the power of each of these bombs varies between:

— 1 to 75 kilotonnes (1 kilotonne = 1.000 tonnes of dynamite) for atomic bombs; the minimum level of one kilotonne corresponds to the minimum critical mass of fissile material necessary to unleash a nuclear reaction (the bombardment of uranium-235 atoms or plutonium-239 atoms by neutrons — when bursting (fission) these atoms free other neutrons and a great amount of energy). It is now possible to go below the level of 1 kilotonne through the use of certain "compression" techniques of fissile material, and it has been suggested that nuclear weapons with a power equivalent to 10 or 100 tonnes of TNT might be

[124] Declaration IV of the Hague, 28 July 1899.

[125] *Id.*, IV, 2; Geneva Protocol of 17th June 1925; Paris Convention of 13th January 1993, Art I.

constructed;

— between several kilotonnes and several megatonnes (1 megatonne = 1,000 kilotonnes) for hydrogen bombs (thermonuclear weapons) which comprise two bombs: a thermonuclear bomb with virtually unlimited power and an atomic explosive which allows the necessary temperature of several million degrees to be reached to unleash a nuclear reaction where isotopes of heavy hydrogen (tritium and deuterium) unite (fusion) to create a helium core, thereby unleashing a vast quantity of energy; the atomic explosive which triggers the fusion is approximately 1 kilotonne, the amount of fissile material necessary for a nuclear reaction; these materials are generally then encased in a mass of uranium-238 which is more stable than uranium-235, but which as a result of the fusion and the intense bombardment of neutrons itself enters the reaction (fission). The whole process thereby comprises one of fission-fusion-fission. The maximum power of such a weapon is limited only by limitations relating to packaging and transportation, and certain attempts have been made to create larger weapons, although it seems that at present the majority of nuclear weapons arsenals comprise bombs of between ½ and 1 megatonne (some 38 to 76 times more powerful than the bomb used at Hiroshima);

— neutron bombs from 1 to several kilotonnes: these are actually thermonuclear bombs of limited power which are not surrounded by a belt of uranium-238; the effect of the shockwaves is less significant than other nuclear weapons. Although neutron bombs have less of an effect on solid objects (buildings, vehicles) they produce proportionately more radiation and hence create greater damage to victims and the environment in relation to their actual size.[126]

3.36 The destructive effect of these weapons results from the following phenomena:

— shock waves or air blasts;
— thermic waves or radiation;
— fires;
— initial nuclear radiation (emitting neutron or gamma rays);
— residual nuclear radiation or radioactive fallout; and

[126] *L'Encyclopaedia Universalis*, v° "Nucléaire (armement)"; *Etude d'ensemble des armes nucléaires*, Rapport du Secrétaire général, doc. ONU A/35/392, 12 septembre 1980 ("*1980 UN Report*"), Appendix 1, p. 180, para. 23; *Etude d'ensemble des armes nucléaires*, Rapport du Secrétaire général, doc. ONU A/45/373, 18 septembre 1990 ("*1990 UN Report*"); A. Resibois and A. Joffroy, *Armes nucléaires : les médecins désarmés*, Bruxelles, Assoc. Méd pour la Prév. de la Guerre Nucl., 1981, pp.12-13 ("Resibois and Joffroy"); H. Firket, "Effets biologiques et médicaux des explosions nucléaires", in *Vivre ensemble ou mourir : le dilemme nucléaire*, Bruxelles, Assoc. Méd. pour la Prév. de la Guerre Nucl., 1986, pp.17-18.

— electro-magnetic impulses.[127]

These effects vary according to a range of factors, including the nature and power of the bomb used, the population density of the bombarded area, the topography of that area, the availability of protection for the population, the foreseeability or otherwise of the attack, local weather conditions, and the height at which the explosion occurs. Forecasts have been prepared as to the damage which would result from the use of a nuclear weapon under different scenarios, and the precise effect will obviously vary from one situation to the next.

3.37 Without identifying all possible situations, it is worth recalling that at Hiroshima a small bomb of only 13 kilotonnes was used. This exposed some 320,000 people to the effects of the explosion, of whom 70,000 thousand civilians died within one month. In 1950 it was estimated that 200,000 people had died as a direct result of the use of the bombing.[128] In Nagasaki, out of some 280,000 people exposed to the effects of the 22 kilotonnes bomb, 100,000 people had died by 1950.[129] The difference in the figures results from the different topographies of the two cities: Hiroshima is a town situated on flat land close to the sea, whereas different parts of Nagasaki are separated by several small hills, diminishing the shock wave and blowing effects of the explosion.[130]

Other than the effects on civilians, virtually all health services were affected or destroyed. In Hiroshima only three out of 45 hospitals and dispensaries remained intact; out of 1,780 nurses, 1,654 were killed or too seriously injured to allow them to work; 65 of the 150 doctors were killed and most of the others injured.[131]

3.38 Under international law it is clear beyond any doubt that the use of a nuclear weapon against civilians, whatever the nature or size and destructive power of the weapon, will be rendered illegal by virtue of the application of the customary rule which states that belligerants must always distinguish between combatants and non-combatants and limit their attack only to the former. This is an old and well-established rule which has achieved universal acceptance. The first multilateral instrument to state it was the St. Petersburg Declaration of 1868, the second paragraph of which declares that:

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[127] *1980 UN Report*, Appendix 1, paras. 1-35; *1983 WHO Report*, p. 8; *1987 WHO Report*, p. 9.

[128] *1980 UN Report*, paras. 162-63.

[129] *Id.*, para. 163.

[130] *Id.*, para. 162; *1983 WHO Report*, p.88: British Medical Association, *The Medical Effects of Nuclear War*, Chichester, J. Wiley, 1983, pp.3-4.

[131] Resibois and Joffroy, *loc.cit.*, p.9; for slightly different figures see also T. Okihita, in *1983 WHO Report*, p.95 (French). For estimates of damage to medical and hospital staff following an attack on London or Boston see A. Leaf, in *1987 WHO Report*., Annex 6, pp. 169-70 (French).

> "the only legitimate object which States should endeavour to accomplish during war is to weakening the military forces of the enemy".

This obligation is repeated and further elaborated in different forms in many instruments, including :

— Article 25 of the Regulation annexed to the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land, and Article 1 of the 1907 Hague Convention IX Concerning Bombardment by Naval Forces in Times of War, to the extent that these provisions prohibit attacks on undefended areas and undefended buildings;

— the resolution of 30 September 1928, whereby the Assembly of the League of Nations forbade the civilian population from being considered a military objective;

— the 1949 Geneva Conventions prohibiting attacks on military establishments and health transports (Art 19 *et seq.* of Convention I; Article 22 *et seq.* of Convention II; Articles 14, 15, 18, 21, 22 of Convention IV);

— UN General Assembly resolutions 2444 (XXIII) of 19 December 1968 and 2675 (XXV) of 9 December 1970;[132]

— the 1977 Geneva Protocol I, Articles 12 and 21 (which prohibit attacks against sanitary units and health transports), Article 48 (which restates the St. Petersburg rule), and Article 51 (which states and develops the prohibition against attacking the civilian population).

The illegality of the Hiroshima bombings, on these grounds, was recognized by the Tokyo District Court in the Shimoda case in 1963.[133] It is therefore unnecessary to dwell on the use of nuclear weapons against civilians and health units: the use of a nuclear weapon against civilian targets, or of a weapon having incidental effects on civilians in any circumstance is rendered illegal by virtue of the most elementary rules of the international law of armed conflict.

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[132] Resolution 2444 provides, *inter alia*:

> "b) Qu'il est interdit de lancer des attaques contre les populations civiles en tant que telles;
> "c) Qu'il faut en tous temps faire la distinction entre les personnes qui prennent part aux hostilités et les membres de la population civile afin que ces derniers soient épargnés dans toute la mesure possible;"

Resolution 2675 further develops those principles.

[133] 32 *ILR* 627-634.

3.39 Further, it is clear that the use of a nuclear weapon against civilians would not only constitute a "simple" violation of international humanitarian law; it would also constitute a war crime under Article 85 of 1977 Geneva Protocol I, since it would constitute an intentional attack on sanitary units and transportation (Art. 85(2)), on the civilian population or individual civilians (Art. 85(3a)), or the launching of an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such an attack would cause excessive loss of life or injury to civilians (Art. 85(3b)).

3.40 Moreover, the use of a nuclear weapon against a civilian target would constitute a crime against humanity, as defined by Article 6(c) of the Statute of the Nuremberg Military International Tribunal (which defines crimes against humanity as all "acte inhumain commis contre toute population civile avant ou pendant la guerre [...]" and Article 2 of the 1948 Convention for the Prevention and Punishment of the Crime of Genocide (78 *U.N.T.S.* 277). The UN General Assembly has characterised as "crimes against humanity and civilisation" any use by a State of a nuclear or thermo-nuclear weapons (*supra.* para. 3.25), irrespective of whether they are even used against civilians. This view is shared by many distinguished jurists (a non-exhaustive is set out *supra.* para. 3.10 at note 64).

3.41 Further use of a nuclear weapon against a military target will also be illegal. This arises from the following considerations:-

— even the use of a limited nuclear weapon with reduced power (such as a battlefield nuclear weapon) renders death inevitable for those within the range of its effects (i);

— the use of a limited nuclear weapon with reduced power could lead to total nuclear war (ii);

— the use of nuclear weapon with enhanced power increases the effects identified above and adds indiscriminate effects which cannot be limited to any "permitted" military objectives (iii).

(i) Nuclear weapons render death inevitable

3.42 Even if the power of a nuclear weapon could be reduced to a fraction of one kilotonne[134] (equivalent perhaps to the size of the *blockbusters* used during the Second World War, which contained approximately 10 tonnes of TNT)[135] it would nevertheless be the case that such a bomb would not leave those within the immediate vicinity of the

[134] *1990 UN Report*, paras. 39 *et seq.* (French).

[135] *1983 WHO Report*, p. 9, para. 9 (French); *1987 WHO Report*, p. 10, para. 10.

explosion with any reasonable chance of survival.[136] In addition to the shock waves or blowing effect, there would also be thermic waves which, for those in the vicinity, would leave no chance of survival; with a power of 10 to 20 kilotonnes (the size of the Hiroshima and Nagasaki bombs) the fireball alone would be felt in a radius of some 200 metres:[137]

> "Dans la boule de feu et a proximité immédiate, tout se volatiserait ou fonderait".[138]

> "A Hiroshima et a Nagasaki, la température a atteint 3000-4000 OC a proximité du point zéro; elle a dépassé 570° OC meme a une distance de 1100-1600 m.".[139]

The "eclair thermique" of a one kilotonne bomb will cause 3rd degree burns to a person at 600 metres distant from the explosion,[140] and can also ignite secondary fires which, if occurring simultaneously, could lead to fireballs of the type which occurred at Hiroshima,[141] or occurred as a result of the Allied bombings of Hamburg, Dresden and Tokyo.[142] Many survivors of the shock waves would be killed by these incendiaries. Such a consequence violates the prohibition on the use of weapons which render death inevitable. According to the 1868 Declaration of St Petersburg, the "legitimate objective" of war

> "would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or **render their death inevitable**".[143] (emphasis added)

3.43 The obligation reflected in the preamble to the St. Petersburg Declaration remains in force and applicable today. It has been neither abolished nor superseded. Nuclear weapons are far more lethal than any other weapon, including chemical weapons (which

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[136] *1990 UN Report*, para. 295 (French).

[137] *1990 UN Report*, para. 293, n. 2 (French).

[138] *1990 UN Report*, para. 294.

[139] T. Okhita, in *1983 WHO Report*, p. 88 (French); A. Leaf, *1987 WHO Report*, p. 163 and notes (French).

[140] Resibois and Joffroy, *op. cit.*, p. 20.

[141] *1990 UN Report*, para. 294 (French).

[142] Resibois and Joffrey, *op. cit.*, p. 24; A. Leaf, in *1987 WHO Report* Annex VI, pp. 163-64 (French); T. A. Postol, "Possible Fatalities from Superfires Following Nuclear Attacks in or Near Urban Areas," in F. Solomon and R.Q. Marston (eds.), *The Medical Implications of Nuclear War*, Institute of Medicine and National Academy of Sciences, Washington DC, National Academy Press (1986), pp. 15 *et seq*.

[143] On this text see E. David, *Principes de droit des conflits armés* (1994), pp. 266 *et seq* ("Principes").

do not necessarily render death inevitable since appropriate shelter would provide protection) and which have been universally condemned. According to a group of UN experts,

> "There is therefore no target strong enough to resist the intense effects of nuclear weapons [...]"[144]

Death is inevitable for all those in the vicinity of a nuclear explosion.

3.44 The prohibition on the use of weapons which render death inevitable reflects an even more fundamental principle of the law of armed conflict: the obligation to minimise harm to combatants. Accordingly in its use of force a State must not injure its enemy when it can capture him, or not to cause serious injury when one cause slight injury, and not to kill the enemy if he can be injured.[145]

The principle is reflected in a number of rules: the limitation on the choice of methods or means of warfare (Regulation annexed to the 1907 Hague Convention IV Art. 22; 1977 Geneva Protocol I, Art. 35(1)); the prohibition on declaring that no quarter will be given (1907 Hague Convention IV, Art. 23; 1977 Geneva Protocol I, Art. 40); the prohibition of the use of weapons which cause unnecessary suffering (*infra* para. 3.65); the obligation to take necessary precautions during attacks to avoid the civilians and their property (1977 Geneva Protocol I, Art. 57; 1907 Hague Convention IV, Art. 26). This list is merely illustrative, and many more examples could be given.

As a result of the scale of the devastation which the use of a nuclear weapon will cause, and the unavoidable lethal effects within a certain perimeter, the use of a nuclear weapon would certainly violate these widely accepted principles and rules of international law.

(ii) The use of even a single nuclear weapon could result in total nuclear war

3.45 Proponents of the use of nuclear weapons probably consider it inappropriate to contemplate catastrophic scenarios and maintain that a limited nuclear conflict is possible. This view is only realistic, if it could ever be called realistic, in the context of the use of a nuclear weapon against a State which did not possess nuclear weapons, or which did not have allies which both possessed nuclear weapons and were willing to use them. In a conflict between two or more States possessing nuclear weapons the likelihood of an escalation is great, and would probably lead to total nuclear war and the devastation of a substantial part of the international community.This view has been endorsed by UN experts,[146] by independent academics,[147] and by political

[144] 1980 UN Report, para. 142.

[145] Examen, *supra*. note 113, pp. 206-07, 279, 332 and 336.

[146] 1980 UN Report, para. 199.

figures.[148]

3.46 In other words, there is a good chance that a State which made first-use of a nuclear weapon, even in a limited manner, would provoke a global nuclear conflagration. It is difficult to see how such behaviour, with the mere possibility of such consequences, can be compatible with international law. It would violate the obligation "to respect and make others respect" international humanitarian law,[149] further enhancing the inherent illegality of the use of nuclear weapons. Even if a State could not have known that its act would result in such consequences, it would be regarded as "an encouragement [...] to commit acts contrary to general principles of international humanitarian law reflected in treaties" the view taken by the Court in the ***Case concerning certain military and paramilitary activities against Nicaragua.***[150]

3.47 The first use of a nuclear weapon, even of limited power and targeted only against military objectives, would therefore be illegal independently of any of its unavoidable lethal effects. This arises simply by reason of the possibility that it might lead to the massive use of nuclear weapons and the violation of most of the rules of the law of armed conflict.

It is no doubt for this reason that the UN General Assembly has solemnly proclaimed that

> "1. States and Statesmen that resort *first* to the use of nuclear weapons will be committing the *gravest* crime against humanity;
>
> 2. There will never be any justification or pardon for Statesmen who take the decision to be the first to use nuclear weapons";[151] (emphasis added).

(iii) Nuclear weapons have indiscriminate effects

3.48 In the case of a strategic nuclear war it is conceivable that nuclear weapons might be used against combatants with limited side effects against civilians: for example, an attack against enemy forces in the desert or on the high seas or outside an inhabited zone. The

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147 1987 WHO Report, Annex 4(c), p. 127.

148 See e.g. the views of Lord Mountbatten: "in warfare without triggering an all-out nuclear exchange leading to the final holocaust . . . is more and incredible . . . In all sincerity, as a military man I can see no use for any nuclear weapons which would not end in escalation with consequences that no one can conceive"; cited in British Medical Association, *op.cit.* pp. 26-27.

149 Art. 1 common to the four 1949 Geneva Conventions, and Art. 1(1) of the 1977 Geneva Protocol I.

150 *ICJ Rep.* 1986, p. 130, para. 256.

151 A/RES 36/100, 9 December 1981 (82 in favour, 19 against, 41 abstentions).

surgical precision of a nuclear attack of this kind is entirely theoretical, notwithstanding that even in such a circumstance, violations of general international law for the protection of human health and the environment would occur (*infra*. paras. 3.52, 3.53, 4.21-4.29). As reflected in the reports of the UN and WHO referred to frequently in these Written Observations (cited *supra*. at note 126), such a scenario is, historically, speculative and beyond the realms of possibility. Experience with the use of nuclear weapons (Nagasaki, Hiroshima) and major nuclear accidents (Chernobyl) indicates clearly that the effects of radiation, once released, are uncontrollable.

3.49 The limited use of nuclear weapons would, however, most likely lead to an escalation into all out nuclear war. According to the SIPRI figures adopted by the 1990 UN Report, the majority of Russian and American arsenals comprise nuclear weapons with a power of 100 kilotonnes or more.[152] Accordingly a first use or an escalation involving either or both of these States would probably result in the use of nuclear weapons having eight times the power of that used in Hiroshima. The greater the power of the weapon, the greater the collateral damage caused to civilians, their property and the environment.

It has been estimated that to halt a classical attack led by four divisions (80,000 troops) supported by 100 planes operating out of ten airbases, it will be necessary to have:

> "some tens of weapons of 1 to 10 kt. yield against important elements of the ground forces and up to 10 weapons of 20 to 100 kt. yield to reduce the opponent's air force."[153]

The number of civilian victims resulting from a limited action of this type, even if it had only military objectives, would undoubtedly vary considerably according to the density of the population in the regions attacked. On the basis of median figures it is not inconceivable that the total number killed or seriously injured could be 180,000 civilians (150,000 as a result of direct effect of the explosions and 30,000 as a result of radioactive fallout) and 35,000 military personnel (30,000 and 5,000 respectively).[154] These figures could be reduced if certain protective measures were taken (alerts, evacuation, shelter),

> "[h]owever, this does not invalidate the most conspicuous conclusion that can be drawn from the table: even when only military targets are selected, and even if protection is provided, the civilian casualties may far outnumber the military ones."[155]

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[152] *1990 UN Report*, Appendix II (French).

[153] *1980 UN Report*, § 186.

[154] *Id.*, para. 189.

[155] *Id.*, para. 190.

Other simulations confirm this prognosis. It has been calculated that in the case of a nuclear conflict in Western and Eastern Europe in which less than 1% of the total available nuclear weaponry were used[156] against 470 exclusively military targets (in which 379 targets were the subject of a single attack of 150 kilotonnes each, and the other 91 targets were the subject of three attacks of 150 kilotonnes each), the total number of dead and injured resulting from the shock waves, blowing effect and heat alone would exceed 15.6 million. If you add to this figure the foreseeable victims resulting in the short term from radioactive fallout, a figure of more than 100 million dead and injured would be reached.[157] According to other studies which concern limited nuclear attacks, targeting only military objectives in the United States or in the former USSR, figures suggest that the number of victims, depending upon geographical circumstances, winds and the theoretical models used, would vary between 23 million and 45 million in the United States, and 54 million in the former USSR.[158]

3.50 In the context of the likelihood of escalation the use of small nuclear weapons become incrementally more significant (see *supra* paras. 3.45-3.47). Where the use of nuclear weapons in the above-mentioned cases affects a large number of non-combatants, it will be seen that their use necessarily has indiscriminate effects even where belligerants have sought to limit their actions to military targets. Legally, any such use would violate the obligation to distinguish between combatants and non-combatants by limiting any attacks to the former (*supra* para. 3.38) and not using weapons with indiscriminate effects (see 1977 Geneva Protocol I, Art. 51(4)-(5)).[159] With a large number of victims it is impossible to argue that the collateral damage was not "excessive in relation to the concrete and direct military advantage anticipated" within the meaning of Art. 51(5)(b) *in fine* of the 1977 Geneva Protocol 1. Losses of the scale indicated above would not only be "excessive", they would constitute a war crime, a crime against humanity, and possibly even genocide if it could be shown the person using the nuclear weapon had the requisite element of intent (see 1948 Convention on the Prevention of the Crime of Genocide, Art. 2).The element of intent for genocide could be inferred from the mere failure of the person using the nuclear weapons to take account of its full effects: in such conditions it is impossible to say that they were ignorant as to the consequences of use and that therefore they did not intend to exterminate the victim population.

These observations become all the more pertinent when one considers the possibility of **any** use of **any** nuclear weapon against a small island state, which would have the effect of wiping out the entire population and rendering its environment uninhabitable.

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[156] A. Ottolenghi, in *1987 WHO Report*, Annex 4.C, p.130 (French).

[157] *Id.*

[158] B. Levi and F. von Hippel, in *id.*, Annex 4.B, pp. 105 *et seq.* (French).

[159] *Cfr. Principes, op. cit.*, pp.281 et 331 (French).

3.51 Another consequence of a "limited" nuclear attack would be the impossibility for health services, assuming they remained intact, to assure the care required for those victims who had not been killed. The burden placed on medical facilities and staff would be overwhelming. According to one expert:

> "Le nombre de victimes que provoquerait ne serait-ce que l'utilisation d'une petite partie des arsenaux nucléaires d'aujourd'hui montre bien qu'il est vain d'envisager qu'un quelconque système de santé puisse offrir des soins médicaux adaptés à la situation."[160]

> "Dégager les blessés des décombres, leur prodiguer les premiers soins, puis les transporter hors de la zone de destruction dans des établissements médicaux appropriés serait une tâche extrêmement difficile, même en l'absence de retombées radioactives, d'incendies violents et d'obstruction des rues par les décombres des bâtiments effondrés. [...] Il s'agit là d'une situation exigeant une contribution maximale de la part des services médicaux dans de nombreux domaines: sang, plasma, autre liquides administrables par voie parentérale, actes chirurgicaux, antibiotiques, soins infirmiers, soins médicaux, chambres stériles, de même que toutes les autres ressources sophistiquées de la médecine moderne. Il s'agit en outre de blessures dont chacune exige des journées entières de soins intensifs et des semaines ou des mois de soins hospitaliers. En fait, il n'existe aucun moyen de soigner un aussi grand nombre de victimes."[161]

These conclusions, which address the consequences of the use of nuclear weapons in industrialised countries, are *a fortiori* valid in respect of any developing country which might be subject to a nuclear attack.

3.52 The use of a nuclear weapon which affects a large number of non-combatants will necessarily have indiscriminate effects, even if the action was intended to be limited to military targets. Such use violates the obligation to distinguish between combatants and non-combatants, to limit attacks to combatants (*supra* para.3.38), and not to use weapons with indiscriminate effects (1977 Geneva Protocol I, Art 51(4-5)). The large number of victims resulting from the use of any nuclear weapon, as evidenced by the Reports cited above, would be indiscriminate in causing incidental loss to civilian life or objects and would be excessive in relation to any military advantage anticipated (see 1977 Geneva Protocol I, Art. 51(5)(b)). Such damage to human health and the environment would constitute a war crime and a crime against humanity and, to the extent that the necessary intentional element could be proved (whether such intention is express or could be implied), genocide (*supra*. para. 3.40, 1948 Genocide Convention, Art. II).

3.53 Another consequence of a "strategic" nuclear attack would be the overwhelming burden imposed upon a country's health services to respond to the needs of victims. In countries with less highly developed health services the burden would be even greater. The use of a weapon which prevents health services from functioning or which renders any

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[160] A. Leaf, in *id.*, Annex 6, p. 167 (French).

[161] *Id.*, p. 168 (French).

possibility of helping the injured illusory violates international humanitarian law. Thus, the 1949 Geneva Convention IV provides that "the wounded and sick shall be cared for" (Art. 3(2), emphasis added). As the International Court has recognised, this provision applies *a fortiori* in an international armed conflict.[162] The obligation is further developed in various provisions of the Geneva Conventions (1949 Geneva Convention I, Art. 12 *et seq.*; 1949 Geneva Convention II, Art. 12; 1949 Geneva Convention IV, Arts. 16 *et seq.* and 55 *et seq.*), as well as the 1977 Geneva Protocols (Protocol I, Arts. 8, 61, 68; Protocol II, Art. 7 *et seq.*). Article 10 of the 1977 Geneva Protocol I provides:

> "1. All the wounded, sick and shipwrecked, to whichever Party they belong, shall be respected and protected.
>
> 2. In all the circumstances they shall be treated humanely and shall receive, to the fullest extent practicable and with least possible delay, the medical care and attention required by their condition."

This obligation will be violated even where it is impossible to save the victims of a "limited" nuclear conflict.[163]

3.54 In conclusion, the extraordinary power of nuclear weapons and the enormity of their effects on human health and the environment necessarily means that their use violates, directly or indirectly, those rules of the international law of armed conflict which prohibits:

- the use of weapons that render death unavoidable;
- the use of weapons which have indiscriminate effects;
- any behaviour which might violate this law.

(b) The use of nuclear weapons violates international law by reason of their qualitative effects of such weapons

3.55 The qualitative effects of nuclear weapons which distinguish them from conventional weapons are those which result (i) from the disintegration of the atom and (ii) from radioactive fallout. The disintegration of the atom has two consequences: the emission of electromagnetic impulses and initial nuclear radiation.

(i) The specific consequences of the disintegration of the atom

3.56 The disintegration of the atom has two effects:

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[162] *Military and Paramilitary Activities in and Against Nicaragua, ICJ Rep.* 1986, p. 114, para. 218.

[163] Singh, *op. cit.*, pp. 200-01.

- electromagnetic impulses (a); and
- initial nuclear radiation (b).

(a) Electromagnetic impulses and their consequences

3.57 The explosion of a nuclear weapon produces high energy gamma rays which remove electrons from surrounding matter and leave electrically charged atoms (ions). It is the removal of electrons which produces an extremely short and high intensity electromagnetic impulse.[164] Without going into the technical details of the phenomenon,[165] it should be remembered that if the electro-magnetic impulse does not seem to cause direct physical damage to the human body, it has serious indirect consequences insofar as it can damage all the electrical and electronic equipment of an area affected by an explosion. The electro-magnetic impulse might destroy computers, transistors, and integrated circuits to which it is transmitted through electromagnetic energy captors such as antennae, telephone wires, railway lines, the aluminium fuselage of planes etc. Many systems which are essential for the life and health of civilian populations, as well as civil society in general, would be rendered unworkable, including electronic devices for medical purposes, telecommunications for civil use, and water, gas and electricity supplies.[166] The effect of cutting communications links between military personnel might also precipitate a further escalation in the use of nuclear weapons.[167]

It should nevertheless be noted that the effects of electromagnetic impulses are relatively negligible in contrast to the other effects of nuclear weapons described above, so long as the explosion takes place at an altitude of less than 10 or 15 kilometres. On the other hand, if the explosion takes place at a higher altitude, the blowing, thermic and radioactive effects have more limited consequences for the population on the ground, but the electromagnetic impulse effects are greater since they will reach "une vaste zone dont les limites coincident avec la ligne d'horizon par rapport au point d'explosion".[168] It has been calculated that:

> "L'explosion d'une bombe à une altitude de 100 km., par exemple, produirait un effet *électromagnétique sensible dans un rayon* de 1100 km. Une explosion unique à 350 km. d'altitude produirait une impulsion qui toucherait pratqiuement la totalité de l'Europe ou des E.-U., ainsi qu'une partie du Canada et du Mexique."[169]

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[164] *1980 UN Report*, Appendix I, p. 179, para. 18 (French).

[165] *Id.*

[166] *1987 WHO Report*, p. 11, para. 12, *et seq.* (French).

[167] *Id.* p. 12, para. 14.

[168] *1980 UN Report*, Appendix I, p. 179, para. 20 (French).

[169] *1987 WHO Report*, p. 11, para. 13 (French).

3.58 Electromagnetic impulses have effects which cannot be directed or limited, and they affect indiscriminately:

- combatants and civilians;
- medical safety, health and assistance units; and
- third States and areas beyond national jurisdiction.

It follows that the use of the nuclear weapons will violate those rules of the law of armed conflicts which prohibit the use of weapons of indiscriminate effects (*supra*. paras. 3.48-3.54). It also violates the rules of international law governing friendly relations between States which prohibit effects of a conflict being felt by third Party States, namely:

- the rule prohibiting States from damaging human health or the environment in the territory of other States (*infra*, paras. 4.9-4.20);

- the laws of neutrality — to the extent that they apply -according to which "[t]he territory of neutral Powers is inviolable" (1907 Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Article 1)

- the rules prohibiting aggression, to the extent that the UN General Assembly has defined aggression as "the use of all weapons by a State" acting first "against the territory of another State",[170] which amounts to a violation of Art. 2(4) of the UN Charter.

(b) The initial nuclear radiation

3.59 "Initial nuclear radiation" lasts just one or two seconds, during which time it has very grave consequences for those who are exposed to it, involving both short and medium term consequences. The effect on living organisms is similar to that of a genotoxic poison (as opposed to the neurotoxic poison unleashed by a chemical weapon).[171] The effects are even more extensive in the case of neutron bombs. Initial nuclear radiation only affects living matter; acts as a poison; complicates or precludes the possibility of treating the sick or wounded; causes unnecessary suffering and superfluous injury; and poses long-term genetic risks for those who are not directly involved in the conflict, including the children of those who are directly exposed. Moreover, it is an inherent characteristic of the use of nuclear weapons and would occur in any use.

3.60 In the short term, the principal effects of radiation on the human body have been

[170] A/RES 3314 (XXIX), 14 December 1974, Art. 3(b) and 2 (adopted by consensus).

[171] See reference in Andries, *supra*. note 54, at 21.

commonly referred to as radiation sickness and have been described as follows:

> "The severity of these syndromes depends on the radiation dose received. In the lethal range of doses three degrees of severity can be recognized: (1) the central nervous system syndrome, characterized by alternating states of stupor and hyperexcitability, with unavoidable death within a few days (this is the effect aimed at by the use of neutron bombs); (2) the gastrointestinal syndrome, characterised by nausea, persistent vomiting, and haemorrhagic diarrhoea, with death occurring within a week or two; and (3) the haematopoietic syndrome, characterized by nausea, vomiting, cytopenia, anaemia, and immunity disturbances. When the whole body is exposed over a short period to doses less than 6 Gy (600 rad) the prognosis is directly related to the doses received by the bone marrow. It the same dose is received over a longer period of time the chances of survival increases. The risk of death is greatly reduced if some bone marrow, even as little as a tenth, is shielded from the radiation. In the range of whole-body irradiation of 2-6Gy (200-600 rad) survival depends largely on the therapeutic measures taken."[172]

According to their proximity to the place of the explosion and the power of the weapon, victims can either die in hours, days or weeks following their exposure to radiation:

> "For an explosion similar to those over Hiroshima or Nagasaki, the radiation is strong enough to render human beings in the open unconscious within minutes at distances up to 700 or 800 m from ground-zero. The exposed persons, if they survive the blast and heat, would die in less than one or two days from the radiation injury. The radiation received at a distance of 1,300-1,400 m from such an explosion would also be fatal but death may be delayed up to about a month. At 1,800 m or more from ground-zero few if any acute radiation injuries would be expected to occur. However, late radiation injuries may be induced by lower radiation levels."[173]

Shelters specifically constructed to deal with nuclear conflict might provide certain protection against initial nuclear radiation:

> "En demeurant dans un local ou dans un abri spécialement conçu, on réduirait considérablement la dose d'irradiation. Un bon abri diviserait cette dose par 1000 ou davantage [...]. La protection assurée par une maison ordinaire dépendrait de son type de construction et d'autres caractéristiques."[174]

This type of protection is going to have a limited efficacy with regard to neutron bombs:

> "qui sont précisément conçues pour tuer sous l'effet des rayonnements sans infliger par ailleurs trop de dégâts d'origine mécanique ou thermique."[175]

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[172] *1983 WHO Report*, p. 12, para. 28.

[173] *1990 UN Report*, p.81, para. 297; Leaf, *1987 WHO Report*, p.165 (French).

[174] *1983 WHO Report*, p.12, para. 25 (French).

[175] Rotblat, J., *ibid.*, p.36, para. 48 (French).

If these reduced doses of radiation are not themselves lethal, combined with other traumatic effects felt by victims, they become fatal. Radiation reduces the defence system of the human organism by attacking the immune system and consequently increasing the risk of exposure to diseases and illnesses which might not otherwise prove to be fatal:

> "En raison de l'effet combiné des blessures et de l'immunosuppression, beaucoup de victimes succomberaient immédiatement après une explosion nucléaire à des blessures ou à des infections qui auraient été bénignes dans des circonstances normales."[176]

The health needs of victims who have been exposed to nuclear radiation require a high level of technical, medical and hospital infrastructure. The 200 who were injured by the accident at the Chernobyl nuclear power plant, and the 135,000 people who had to be evacuated from a 30km exclusion zone, mobilised "le personnel et the matériel des services de santé de l'ensemble du pays".[177] In the case of a nuclear war, even if it was limited, (see the figures cited *supra*. at paras. 337 and 3.49) "les services de santé, même à l'échelle mondiale, ne pourraient en aucun cas faire face à cette situation". Developing countries would be more adversely affected than developed countries.

3.61 In the medium and long term, epidemiological studies carried out on large numbers of people exposed to the bombings of Hiroshima and Nagasaki, as well as experiments carried out on animals, have shown a relationship between exposure to radiation (and/or to radioactive fallout) and the accrued subsequent consequences: malignant tumours (leukaemias, thyroid cancers and tumours of the breast, the lung and stomach, and multiple myelomas), cataracts, chromosomal abnormalities, including for those who are exposed *in utero*.[178] Moreover, it is likely the use of nuclear weapons would lead to a significant increase in genetic consequences resulting from any children born from people exposed to radiation.[179]

3.62 Experts are in agreement in recognising that nuclear radiation acts on organisms in the same way as a poison. According to Professor M. Errera of the laboratory of biophysics and radiology at the Université libre de Bruxelles,

> "Il y a deux sortes de poisons: les neurotoxiques et les génotoxiques. Les premiers sont

[176] *1987 WHO Report*, p.32, para. 76; Leaf, *ibid.*, p.180 (French).

[177] *Ibid.*, p.30 (French).

[178] Kato, H and Shigematsu, I.; Land, Ch., Oftedal, P. *1983 WHO Report*, pp. 103-48.

[179] Oftedal, P., *id.*, p.154.

particulièrement le fait des armes chimiques, les seconds celui des armes nucléaires."[180]

According to Professor M.F. Lechat, of the epidemiology unit of the Catholic University of Louvain, and adviser to the Comité internationale d'experts en sciences médicales et santé publique created by the WHO pursuant to Assembly resolution WHA 34.38.[181]

> "On peut considérer l'arme nucléaire comme un 'poison' surtout du fait des effects écologiques: passage dans la chaîne alimentaire avec concentration et dépôt d'isotopes radioactifs dont l'élimination est lente, pouvant s'étager pour certains des isotopes les plus communs sur des années."[182]

Finally, according to annex II of Protocol III of the Paris Accords of 23 October 1954 relating to the control of armaments:

> "L'arme nucléaire est définie comme toute arme qui contient ou est conçue pour contenir ou utiliser un combustible nucléaire ou des isotopes radioactifs et qui, par explosion ou autre transformation nucléaire non contrôlée ou par radioactivité du combustible nucléaire ou des isotopes radioactifs, est capable de destruction massive, dommages généralisés ou **empoisonnements** massifs." (emphasis added)[183]

3.63 It should be noted that the lethal synergy of effects (blowing and heat combined with radiation) do not occur in the explosion of nuclear devices with a power of more than 100 kilotonnes

> "car la zone mortelle créée par l'effet de souffle et l'effet thermique est bien supérieure à celle qui résulte du rayonnement."[184]

On the other hand, in the case of a neutron bomb

> "la zone mortelle où s'exercent les effets des neutrons et des rayons gamma est beaucoup plus étendue que celle de l'onde de choc et de l'onde thermique."[185]

3.64 These qualitative consequences bring nuclear weapons within the scope of those

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[180] Cited in Andries, *supra*. note 54, at 21.

[181] *1983 WHO Report*, p. 5.

[182] *Supra*. note 178.

[183] Cited id.: text in *RGDIP*, 1963, p. 825 (French); OTAN Documents fondamentaux Bruxelles, 1981, p. 59.

[184] *1987 WHO Report*, p. 16 (French).

[185] *Id*. (French).

international rules prohibiting the use of weapons which have analogous consequences. Nuclear weapons can thereby be characterised as, or have consequences analogous to, chemical weapons, the use of which is prohibited by international law, notably by:

- 1899 Hague Declaration 2 Concerning Asphyxiating Gases;
- 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare;
- 1993 Convention on the Prohibition of the Production, Storage and use of Chemical Weapons and their Destruction.

The 1925 Geneva Protocol is noteworthy because it addresses "asphyxiating, poisonous or other gases, and [..] **all analogous liquids materials** or devices" (emphasis added), reflects the Parties' intention not to limit the category of weapons in a restrictive manner. Moreover, a restrictive approach to interpretation is not the rule in international humanitarian law, which should always be interpreted to give the benefit of any doubt in favour of the protection of the victim. This is particularly reflected in the Martens clause, which provides that:

> "Until a more complete code of the laws of war has been issued, the high contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerants remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience."[186]

3.65 Nuclear weapons have other characteristics which render their use unlawful. They have poisonous consequences and their use is therefore prohibited by the 1899 Hague Convention 2 (Article 23) and the Regulations annexed to the 1907 Hague Convention (IV). They "uselessly aggravate the sufferings of disabled men" in violation of the principle enunciated by the 1868 St Petersburg Declaration, and they cause "superfluous injury" in violation of, *inter alia*, 1907 Hague Convention IV Regulations (Art. 23(e)), 1977 Geneva Protocol I (Art. 35(2)). Moreover, their use would violate the principles of proportionality which regulate the law of armed conflict.

(ii) The effects of radioactive fallout

3.66 Apart from the energy generated by the initial nuclear radiation, nuclear fission produces radioactive substances which attach themselves to particles of the debris of the nuclear weapon as well as to matter dispersed by the explosion (if it takes place at ground level

[186] See e.g. 1907 Hague Convention IV, preamble; 1977 Geneva Protocol I, Art. 1(2); 1981 UN Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, preamble.

or at a low altitude). These particles produce a "residual" radiation with a life ranging from a fraction of a second to several years. Thus,

> "Two important elements, strontium 90 and caesium 137, for instance, will retain half of their radioactivity after about 30 years, and hence cause long term health hazards. Carbon 14, which is formed from nitrogen in the atmosphere when irradiated with neutron, has a half life of about 5,800 years and will thus continue to give small radiation doses to many generations."[187]

The fallout of radioactive particles will vary according to their weight, the altitude at which the explosion occurred, the prevailing atmospheric conditions, the nature and size of the weapon used, etc. The heavier and denser particles may be subject to fallout within a few minutes, although lighter particles may remain in the stratosphere for months or years before falling to earth.[188]

3.67 The biological effects of radioactive fallout are analogous to those of the initial nuclear radiation, except that they can cover infinitely greater areas and consequently affect far more people. It has been estimated that for a ground-level explosion of a one megatonne bomb

> "les personnes restant à découvert pendant une longue période recevront des doses mortelles sur une supeficie de près de 2000km^2 et des doses engendrant des lésions sur une superficie d'environ 10000 km^2."[189]

It should also be noted that radioactive particles affect persons both "par irradiation externe de l'ensemble ou d'une partie du corps" and by "irradiation interne (Inhalation ou ingestion d'éléments radioactifs)".[190]

3.68 Given the analogous effects of the initial nuclear radiation and the residual nuclear radiation resulting from radioactive fallout, the rules of international law applicable to the former (*supra*. paras. 3.64-3.65) are evidently applicable also to the latter. Accordingly, the use of nuclear weapons doubly violates six capital rules of the international law of armed conflicts as a result of their qualitative effects. International law prohibits the use of weapons which:

- are chemical;
- are poisonous;
- render death inevitable;

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[187] *1980 UN Report*, p. 169, Appendix 1, para. 31 (English).

[188] *Id.*; see also *1980 UN Report*, pp. 81-83 (French); J. Rotblat, in *1983 WHO Report*, pp. 36-39.

[189] *1983 WHO Report*, p. 12, para. 23 (French).

[190] *Id.*

— cause unnecessary suffering;
— have indiscriminate effects; and
— violate the principles of proportionality and humanity.

To these six prohibitions there must be added a seventh. As radioactive fallout does not respect national frontiers, third States will certainly be affected by fallout and by the residual nuclear radiation.[191] This fallout would violate the rules of international law governing friendly relations between States and prohibiting any interference with third States (*infra*. paras. 4.9-4.20).

3.69 Additionally, international law now also regulates the methods and means of warfare with the aim of ensuring appropriate protection for the environment. It establishes, in particular, absolutely prohibits the use of weapons which will cause "widespread, long-term and severe damage to the environment". Article 35(3) of the 1977 Geneva Protocol provides that:

> "It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment."

Article 55 of Protocol I, which relates to the protection of the civilian population, provides, *inter alia*, that:

> "1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. Thus protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population."

There can be little doubt that any use of nuclear weapons would cause "widespread, long-term and severe damage" to the environment, engendering a violation of Articles 35(3) and 55 of Protocol I and the customary obligation reflected therein. As described in the following Section (*infra*. para. 4.3), the Chernobyl accident illustrated the gravity for the environment of a release into the atmosphere of significant quantities of radioactive material, with potential damage to the natural environment lasting several decades.

3.70 The approach in the 1977 Protocol I follows, in general terms, the language used in the 1977 Convention on the Prohibition of Military or other Hostile Use of Environmental Techniques (ENMOD). The basic obligation of Parties, under Article I(i) is:

> "not to engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or

[191] See e.g. the radioactive fallout anticipated in a hypothetical attack against strategic Soviet targets in February, 1987 *WHO Report*, Annex 4.B, p. 122, fig. 3. (French).

injury to any other State party".

In the context of the definition of "environmental modification technique", (Art. II) this obligation leaves open the question of whether the use of a nuclear weapon could constitute the "deliberate manipulation of natural processes" and lead to the violation of the obligation under ENMOD. Nevertheless, the Convention signals widespread recognition of the need to limit the use of the environment as a weapon of war, without diminishing in any way the customary and treaty obligations establishing clear norms for the protection of the environment which must be followed in times of war and armed conflict (*infra* paras. 4.21-4.29). As supplemented by the more detailed and emphatic obligations of the 1977 Geneva Protocol I, it is submitted that ENMOD now reflects the customary obligation not to cause "widespread, long-lasting or severe" harm to the environment.

(C) The use of nuclear weapons violates international law irrespective of the circumstances in which they are used

3.71 The majority of the rules cited in the preceding discussion apply essentially to international armed conflicts. Although the possibility remains remote, the use of nuclear weapons would also be unlawful in the case of a non-international armed conflict. The fundamental rules which invalidate the use of nuclear weapons — notably the limitation on the methods and means to threaten the enemy and the obligation not to attack civilians — are applicable to all armed conflicts. This is reflected in UN General Assembly resolution 2444 (XXIII) which provides:

> "Recognizing the necessity of applying basic humanitarian principles **in all armed conflicts**,
>
> — Affirms resolution XXVIII of the Xxth International Conference of the Red Cross held at Vienna in 1965, which laid down, *inter alia*, the following principles for observance by **all governmental and other authorities** responsible for action in armed conflicts:
>
> (a) that the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited;
>
> (b) that it is prohibited to launch attacks against the civilian populations as such;
>
> (c) that distinction must be made **at all times** between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible"[192] (emphasis added)

The 1977 Geneva Protocol II confirms and extends the principles reflected in resolution 2444, notably by prohibiting attacks against non-combatants, the commission of acts of terrorism, and orders against giving quarter (Arts. 4(1) and (2)(d), 7, 9, 11, and 13).

[192] 19 December 1968, adopted unanimously (111 votes).

Like Protocol I, Protocol II prohibits attacks against nuclear plants (Art. 15) thus confirming the applicability *a fortiori* of the prohibition on the use of nuclear weapons (*supra* para. 3.12).

It is significant that the General Assembly generally condemns the use of nuclear weapons without distinguishing between international and non-international armed conflicts and qualifies any use as "a crime against humanity" (*supra* para. 3.25). Thus the field of application of crimes against humanity is not limited to international armed conflicts. This is further reflected in the Statute of the International War Tribunal for Crimes committed in the territory of the former Yugoslavia, which recognises the competence of the Tribunal to judge the crimes "committed during an armed conflict, whether international or internal" (Art 5).[193]

(d) The use of nuclear weapons cannot be justified by international law in any circumstances

3.72 Proponents of the legality of the use of nuclear weapons might attempt to justify their use under the principles of (i) legitimate defence; (ii) reprisal; and (iii) necessity. None of these justifications survive a careful scrutiny of the applicable rules of international law.[194]

(i) Self-defence does not justify the use of nuclear weapons

3.73 Self-defence is an exception to the prohibition against the use of force when a State is subject to an armed attack (UN Charter, Art. 51). Accordingly, the self-defence rule is subject to the rules governing *jus ad* (or *contra) bellum*, whereas the rules relating to the use of nuclear weapons arise in relation to *jus in bello*. Moreover, the application of *jus in bello* does not depend on the legality of the defended causes; whether aggressor or victim, each party is equally subject to the law of armed conflict in conformity with the customary principle of the equality of belligerents in the law of war, a principle reflected in the fifth preambular paragraph of the 1977 Geneva Protocol I. Recourse to nuclear weapons, prohibited by the rules of the law of armed conflicts, cannot be justified according to the inherent right of self-defence.

(ii) Reprisals do not justify the use of nuclear weapons

3.74 Recourse to nuclear weapons by way of reprisal must be considered with regard to targets:

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[193] Text in Doc. UN S/25704, 3rd May 1993, p.40 on the field of application *ratione contexti* of the crime against humanity; E. David, *Principes*, *op.cit.* p.604.

[194] The following paragraphs are again largely inspired by *Examen* (2 ed.) *loc.cit.*, pp. 23 *et seq.*

(a) which cannot be the object of reprisals: non-combatants and non-military targets;

(b) against which recourse to reprisals is not categorically prohibited: the combatants and military targets.

(a) Reprisals with regard to non-combatants and non-military targets

3.75 During hostilities it is forbidden to resort to reprisals against medical installations, transportation and units; the injured; the infirm; civilian populations, property and various categories of civilian property which are subject to special protection (1977 Geneva Protocol I, Arts. 20, 51(6), 52(1), 53, 54(4), 55(2), 56(4)). The prohibition applies in respect of all weapons, including nuclear weapons. This rule had previously been established in a general manner by Art. 60(5) of the 1969 Vienna Convention on the Law of Treaties (1969 Vienna Convention) which provides that the right to suspend, or denounce a treaty for substantial violation of the latter does not apply

> "to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties."

A similar provision is set forth in paragraph 7 of UN General Assembly resolution 2675 (XXV) of 9 December 1977 on "the fundamental principles [...] concerning the protection of the civilian population during an armed conflict", which declares that

> "Civilian populations, or individual members thereof, **should not be the object of reprisals**, forcible transfers or other assaults on their integrity" (emphasis added)

The prohibition on reprisals in these situations appears also in Principle 1, paragraph 6 of UN General Assembly resolution 2625 (XXV) on friendly relations. Even if, in that case, it relates to *jus ad* (or *contra*) *bellum* rather than *jus in bello*, it is nonetheless applicable to the second. It follows from the above that reprisals can, in no circumstances, be lawful against this category of targets.

(b) Reprisals with regard to combatants and military targets

3.76 The prohibition of reprisals against combatants and military targets is not expressly provided for in legal instruments, but the prohibition of the use of nuclear weapons against the former or the latter is nonetheless certain. Combatants fall under the same title as non-combatants as "protected people" by virtue of the law of armed conflicts and benefit from specific protection against the use of certain forms of weaponry. Thus Art 60(5) of the 1969 Vienna Convention on the law of treaties prohibits the use of *exceptio non adimpleti contractus* in the case of "provisions relative to the protection of human beings". In the case of treaties of a humanitarian character this takes into account combatants as well as non-combatants, with all "human beings" entitled to the minimum

standards of humanitarian protection guaranteed by international law. The fact that Art. 60(5) refers "**in particular** to provisions prohibiting any form of reprisals" (emphasis added) *does not imply* that the other humanitarian provisions — those in which the prohibition of reprisals is not expressly mentioned — fall outside its field of application, since the adverb "notably" shows that the reference to those provisions prohibiting reprisals is not intended to be exhaustive. In this perspective, the use nuclear weapons by way of reprisal, even if exclusively directed against combatants and military targets, would violate Art. 60(5) and the general provisions of the law of armed conflicts prohibiting this use.

3.77 In a similar manner, the International Law Commission, in its Draft Articles on the Responsibility of States, stresses about Art. 30, on counter-measures, that:

> "even where the internationally wrongful act in question would justify a reaction involving the use of force [...], action taken in this guise certainly cannot include, for instance, a breach of obligations of international humanitarian law. Such a step could never be 'legitimate' and such conduct would remain wrongful."[195]

3.78 Art. 1 common to the four 1949 Geneva Conventions and Art. 1(1) of 1977 Geneva Protocol I states that:

> "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances."

Moreover, as set out in the *Commentaire* to the Geneva Conventions:

> "Les mots 'en toutes circonstances' signifient qu' [. . .] une Partie contractante ne peut se donner aucun prétexte valable, d'ordre juridique ou autre, à ne pas respecter la Convention dans son ensemble [. . .] L'art. 1er, loin d'être une clause de style, a été volontairement revêtu d'un caractère impératif. Il doit être pris à la lettre."[196]

In other words, the absence of an expressed prohibition on reprisals in the rules of Protocol I relating to methods and means of combat does not imply any right to use them: independently of this *a contrario* approach to interpretation,[197] the obligation to respect the Protocol in "all circumstances" necessarily excludes the right of recourse to reprisals.

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[195] *Ybk ILC*, 1979, Vol. II, Part 2, p. 116[§5].

[196] *Les Conventions de Genève du 12 août 1949, Commentaire*, Genève, CICR, 1956 vol IV, pp. 21-22. ("Commentaire des Conventions").

[197] The *a contrario* argument would only be acceptable if a text could be found in humanitarian law which said "reprisals are only prohibited against the following objectives ... ". It would only be in that case that the *a contrario* argument could be upheld with respect to the legality of reprisals against all objectives not appearing in this list.

Moreover, the rule elaborated in Art. 1 also indicates that reciprocity has no place in the law of armed conflicts. As indicated in the *Commentaire* to the Geneva Conventions:

> "En prenant d'emblée cet engagement, les Parties contractantes soulignent que la Convention n'est pas seulement un contrat de réciprocité liant un Etat avec son ou ses co-contractants dans la seule mesure où ceux-ci respectent leurs propres engagements, mais plutôt une série d'obligations unilatérales, solennellement assumées à la face du monde représenté par les autres Parties contractantes. Chaque Etat s'engage aussi bien vis-à-vis de lui-même que vis-à-vis des autres."[198]

The principle of non-reciprocity excludes *a fortiori* recourse to reprisals in relation to the use of nuclear weapons, even against combatants.

3.79 The draft article of the ICRC on the regulation of reservations to 1977 Geneva Protocol I prohibited, *inter alia*, any reservation relating to the prohibition of the use of weapons causing superfluous injury.[199] It was dropped by the Conference because of opposition from Western and socialist States who wanted the question of reservations to remain subject to the general rules on the Law of Treaties. The draft text nevertheless reflects the importance of the prohibition in the eyes of the ICRC, and it is possible to conclude that a humanitarian prohibition which cannot be subject to a reservation also cannot be overridden in the name of a reprisal. In any case, to the extent that the general rules relating to reservations prohibit reservations incompatible with the object and purpose of the treaty (where the treaty is silent, 1969 Vienna Convention, Art 19(c)), reservations relating to use of nuclear weapons are evidently incompatible with the object and purpose of rules to protect victims of war from the exceptionally harmful effects of these weapons, as well as the fact that their use violates many fundamental rules of humanitarian law.

In practice, the very nature of nuclear weapons (excluding virtually any possibility of limiting their effects to military targets and avoiding a total war) means that recourse to nuclear reprisals would necessarily violate prohibitions for which these reprisals are explicitly prohibited — for example the prohibition on attacking civilian populations or their property (*supra* para. 3.38). This is why such reprisals must necessarily be illegal.[200]

(iii) Necessity does not justify the use of nuclear weapons

3.80 Compromised between military necessities and humanitarian requirements, the law of

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[198] *Commentaire des Conventions*, III, p. 24; see also *Commentaires*, pp. 37-38; *Principes loc. cit.* pp. 473-74.

[199] ICRC, Draft Additional Protocol to the Geneva Conventions of 12th August 1949, commentary, Geneva, 1973 pp.106-08.

[200] *Cf.* von der Heydte and Andrassy, in *Ann.I.D.I.*, Session of Nice, 1967, Vol. 52, Pt. II, p. 45; I. Brownlie, "Some Legal Aspects of the Use of Nuclear Weapons" *ICLQ* 1965, p. 445.

armed conflicts does not accept the state of necessity except in those circumstances where it is expressly provided for. As stated by the International Law Commission about its Draft Article 33 on the state of necessity as a situation precluding illegality as a result of a violation of international law, this exception does not authorise a State to ignore the prescriptions of humanitarian law:

> "It would be absurd to invoke the idea of military necessity or necessity of war in order to evade the duty to comply with obligations designed, precisely, to prevent the necessities of war from causing suffering which it was desired to prescribe once and for all."[201]

If humanitarian law takes account of military necessities:

> "these are provisions which apply only to the cases expressly provided for. Apart from these cases, it follows implicitly from the text of the conventions that they do not admit the possibility of invoking military necessity as a justification for State conduct not in conformity with the obligations they impose."[202]

The jurisprudence of course takes the same approach. Thus, in *Van Lewinski* (*alias Von Manstein*) case:

> "Once the usages of war have assumed the status of laws, they cannot be overridden by necessity, except in those special cases where the law itself makes provision for that eventuality."[203]

The rule is absolute:

> "[...] the rules of international law must be followed even if it results in the loss of a battle or even a war. Expediency or necessity cannot warrant their violation [...]"[204]

The rule applies equally in relation to nuclear weapons.[205] In the *Shimoda* case the Tokyo District Court, in response to the argument that all means to force the enemy to surrender are good, said:

> "[...] it is wrong to say that the distinction between military objective and non-military

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[201] *Ybk.ILC*, 1980, II, Part 2, p.46 [§28].

[202] *Id.*

[203] Hamburg, 19 December 1949, 16 *ILR* 512; see also *Examen* (Part 2), *loc.cit.* p.38 n.97.

[204] US.Mil.Trib., Nuremberg, 19th February 1948, List, *et al.*, *Trials of War Criminals Before the Nuremberg Military Tribunals*, ed. by Sprecher and Fried, Washington, US G.P.O. 1951-1953, IX, p.1272; also, *id.*; Nuremberg, 30th June 1948, *Krupp*, *ILR* 15 p.628.

[205] A. Andries, *loc.cit.* p.64.

objective has gone out of existence because of total war".[206]

(C) The relevant rules of international law prohibiting the use of nuclear weapons apply to all States

3.81 The rules of law of armed conflict and law governing friendly relations which prohibit the use of nuclear weapons are, notably, those which establish:

- the limitation on the choice of means of attacking the enemy (*supra*. paras. 3.38, 3.71);
- the permanent obligation to distinguish between combatants and non combatants (*supra*. paras. 3.38, 3.50, 3.71);
- the prohibition against attacking civilian targets (*supra*. para. 3.38-3.39, 3.71);
- the prohibition against attacking health services (*supra*. para. 3.53);
- the prohibition against the use of chemical weapons or poisons or weapons which have indiscriminate effects (*supra*. para. 3.52, 3.64, 3.65);
- the prohibition against the use of weapons which render death inevitable or cause unnecessary suffering (*supra*. paras. 3.44, 3.65);
- the prohibition against violating the territorial integrity of third States (*supra*. para. 3.58, 3.68);
- the prohibition against causing widespread, long-term and severe damage to the environment (*supra*, paras. 3.69-3.70);
- the obligation to respect the principles of proportionality and humanity (*supra*. para. 3.71); and
- the prohibition against genocide or crimes against humanity (*supra*. para. 3.40).

Most of these rules are set out in the classical instruments governing *jus in bello* - the 1868 St Petersburg Declaration, the 1874 Brussels Declaration, 1899 Hague Declaration IV, Regulation annexed to 1907 Hague Convention IV, 1925 Geneva Protocol, 1948 Genocide Convention, 1949 Geneva Conventions - which are generally considered to reflect customary law in practise,[207] jurisprudence,[208] and the writings of jurists.[209]

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[206] *Jap.Ann.I.L.*, 1964, p.240.

[207] See res.827 of 25th May 1993, para. 2., where the Security Council approves the Secretary General's report on the Statute of the International War Tribunal for crimes committed in the former Yugoslavia, where the Secretary General lists the conventions which, according to him, form part of international customary law: the 1907 Hague, Statute of the Nuremberg International Military Tribunal, 1948, Genocide Convention, 1945, 1949 G.C.; in doc. UN S/25704, 3rd May 1993 p.11 para.35.

[208] For the customary character of the Hague Regulation, see Judgment of 30th September - 1st October 1946, *Procès des grands criminels de guerre devant le T.M.I.*, Doc.Off., Nuremberg, 1947, vol.1 p.267; see also the Intern. Mil. Trib. for the Orient, Tokyo, 12th November 1948 in *Ann.Dig.* 1948 Vol.15, pp.365-66; C. Rousseau, *Le droit des conflits armés*, Paris. Pédone, 1983, p.24 and the references; Germany Reichsgericht in criminal matters, 4th April 1922, *Ann.Dig.* 1 p.433, Nur., US.Mil.Trib., 28th October 1948, *Von Leeb et al.*, (German High Command Trial), *A.D.* 1948, 384 etc.

Some of the applicable rules are found in the UN Charter and the law arising thereunder. Almost all of those which arise under the law of armed conflict come within the "general principles of humanitarian law" invoked by the International Court in the case concerning *Military and Paramilitary Activities in and against Nicaragua*.[210]

3.82 Now, whether in relation to customary law, or to the 1948 and 1949 Conventions, or to United Nations law on general principles of humanitarian law, these rules bind all States or virtually all States - as custom, general principles, or ratified treaties. The question is, do they bind, as between themselves or between themselves and third States, those States which believe that the use of nuclear weapons is legal?

3.83 The opposition of certain States to a formal expression of the illegality of the use of nuclear weapons first occurred during the negotiation and adoption of the UNGA resolutions condemning their use, and continued during the negotiations of Geneva Protocol I. It is accordingly by reference to their activities in those contexts that one must judge whether these States have been able to establish, for themselves, special rules relating to the use of nuclear weapons, i.e. rules excluding the application of the general obligations of the law of armed conflict.

During the adoption of the UN General Assembly resolutions condemning the use of nuclear weapons (*supra* para. 3.25), a certain number of States had voted against these resolutions or they abstained. To the extent that these resolutions represent positive law, abstentions are not to be considered as a negative vote. Since international law prohibits the use of nuclear weapons, this law certainly applies to States who always abstain during the affirmation of this rule of law. To prevent the application of this rule by creating another, its expression must be clearly stated; an abstention does not provide a clear expression in these terms, and is insufficient to allow a new rule to emerge for the abstaining States. Moreover, even if an abstention were to be considered as equivalent to a negative vote the act of abstention would not, as set out below, create a new rule.

3.84 To justify the modification of the law prohibiting the use of nuclear weapons, States favouring a modification of a pre-existing rule prohibiting their use are likely to invoke the fact that dissuasion through nuclear power has been around for fifty years without it being roundly condemned by the entire international community. The question referred to the Court relates to the legality of the use of nuclear weapons: it does not touch upon the legality of the threatened use of nuclear power. In this context it is important to note that the threatened use of nuclear power is only a matter for a small number of countries; even if their practice reflected their belief in the legality of the use of nuclear weapons, they would not be entitled to impose it upon non-nuclear States.

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[209] See, for example, A. Roberts and R. Guelff. Documents on the Laws of War, Oxford, Clarendon Press, 1989, pp.30, 35, 44, 138-39.

[210] *ICJ Rep.* 1986 p.114 para. 220; see also p.112 para. 215 and p.113 para. 218.

Non-nuclear States do not practise this kind of dissuasion, and they have consistently supported expressions of the illegality under international law including the UN Charter of any use of nuclear weapons.

3.85 This practice of dissuasion cannot therefore modify the pre-existing rules of international law which prohibit the use of nuclear weapons. Even as between the proponents of this practice and other States, the use of nuclear weapons remains illegal. This reasoning applies also in respect of States which vote against UN General Assembly resolutions condemning their use: opponents of these resolutions cannot impose their will on States who support them, since these States are re-stating existing law. All States therefore remain linked by common legal obligations: if not by the resolutions themselves, then through the law they enunciate according to the principle *prior in tempore potior in jus*. To recall, Art. 41 the 1969 Vienna Convention on the Law of Treaties states that:

> "1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:
>
> (a) the possibility of such a modification is provided for by the treaty; or
>
> (b) the modification in question is not prohibited by the treaty and:
>
> (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
>
> (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole [...]" (emphasis added)

In this case, States to which this rule applies, and who would like to modify it, can do so under certain circumstances, but this new agreement — supposing it applies, *quod non* to nuclear weapons (see below) — applies only to these States and not to others (see Art. 34 of the 1969 Vienna Convention). The principle of the relative effect of treaties applies equally to other forms of international legal obligation, including customary obligations and those arising by operation of general principles.

3.86 If the States which argue in favour of the legality of the use of nuclear weapons can thus take advantage of a rule which would link them **only** in their relations as between themselves, it is still necessary that such an agreement should satisfy the obligation reflected in Art. 41 of the 1969 Vienna Convention, and notably to those conditions providing that the modification, by these States, of treaties normally applicable to nuclear weapons does not compromise:

(i) either the object or purpose of these treaties taken as a whole (Vienna Convention, Art 41(1)(b)(ii);
(ii) or the particular rights and obligations that other States parties to these treaties may rely upon or are subject to (1969 Vienna Convention, Art 41(1)(b)(i)).

3.87 It is doubtful whether the use of nuclear weapons could be compatible with the effective realisation of the object and purpose of treaties with humanitarian objectives, since their object and purpose is:

- in general, to reduce the suffering of people exposed to the direct or indirect effects of wars and to protect the victims of such conflicts;

- more specifically, to fulfil the particular objectives identified above (*supra*. para. 3.81).

It has been seen that the use of nuclear weapons not only increases the suffering of victims, but necessarily contravenes the provisions of numerous treaties. Consequently, any agreement which they might have made would necessarily be contrary to the object and purpose of the above-mentioned instruments even as concerns relations between States advocating the legality of the use of nuclear weapons.

A fortiori, this is the only proper conclusion which can be drawn for legal obligations which are based upon the protection of victims and not the interests of States, and are beyond the scope of the application of the principle of reciprocity.

3.88 In the event that applicable treaties — those whose provisions have the effect of rendering illegal the use of nuclear weapons — establish laws which all State parties must respect, it is inconceivable that contracting parties should be able to conclude an agreement on the legality of the use of nuclear weapons without *ipso facto* violating the rights which other contracting parties have under those treaties (1969 Vienna Convention, Art 41(1)(b)(i)). In the event of a large-scale use of nuclear weapons all States would, directly or indirectly, be subject to the damaging consequences (by uncontrollable radiation, contamination and pollution). Accordingly, their enjoyment of their conventional rights would be affected and violated.

3.89 Finally, given that the applicable treaties establish humanitarian rules which by virtue of their importance are part of *jus cogens*,[211] any agreement contrary to these rules are necessarily null and void by virtue of Art. 53 of the 1969 Vienna Convention.

3.90 The question remains whether the efforts by certain States during the elaboration and adoption of 1977 Geneva Protocol I to "set apart" nuclear weapons" by adopting declarations (*supra*, paras. 3.17 *et seq.*) precludes the application of that instrument to nuclear weapons in respect of treaty relations as between those States, and as between themselves and third States Parties to the Protocol). Several reasons lead to the conclusion that Protocol I does govern the use by those States of nuclear weapons.

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[211] *Id.*, 1980, Vol. 2, 2nd part, pp. 45 & 49: see also *Barcelona Traction*, 5th February 1970, *ICJ Rep.* 1970, p.32; *Principes*, *op cit.*, pp. 85-93.

(1) According to the way in which they have been characterised by their drafters, they are only "declarations"; *stricto sensu* they are not reservations within the meaning of Article 2 of the 1969 Vienna Convention on the Law of Treaties,[212] and accordingly other Parties do not have to enter objections to them since according to Article 2(d) only reservations can have the effect of modifying obligations under a treaty. These "declarations" therefore have no legal effects as against third States.

(2) Supposing, however, that these "declarations" did amount to reservations, they would still only be effective and admissible if they were compatible with the object and purpose of the Protocol (1969 Vienna Convention, Art. 19(c)). Moreover, as previously noted, nuclear weapons have effects on human health and the environment which are contrary to the classical rules of international humanitarian law. Their use would negate the entire Protocol since any use of nuclear weapons would allow a Party to circumvent its obligations under the Protocol with respect to conflict. In other words, it would not just be "certain provisions" of the Protocol which would cease to apply, but the totality of that instrument. It is doubtful whether such an approach could be compatible with the object and purpose of the Protocol.

(3) Having regard to the extraordinary effects of nuclear weapons, saying that it is possible to be a Party to Protocol I while reserving to oneself the right to use nuclear weapons nullifies the objective of the Protocol. It essentially allows a State to unilaterally decide whether it will apply the Protocol. Such a conditional application is entirely without validity in international law since it would allow a State to disengage itself from a treaty obligation whenever it wished, and avoid its obligation to carry out its treaty obligations in good faith (see 1969 Vienna Convention, Art. 26).

(4) If the "declarations" do amount to reservations, the fact that other Parties to the Protocol have not objected to them could imply that they have accepted these reservations (1969 Vienna Convention, Art. 20(5)) and their compatibility with the object and purpose of the Protocol. The silence of the Parties to the Protocol does not imply acceptance of these reservations, however, in the context of the annual support given by these States to the General Assembly resolution declaring the illegality of nuclear weapons (*supra*. para. 3.25).

(5) Maintaining the hypothesis that these "declarations" were reservations, they would permit their authors to use nuclear weapons without violating the Protocol. However, the use of these weapons necessarily violates the rules of international

[212] Art.2(d): "'reservations' means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State".

humanitarian law, which have been recognised by the whole of the international community as imperative. The reservations would, in effect, be void of content or effect (Vienna Convention, Art. 53).

3.91 Some may suggest that the relevant rules of international law are not *jus cogens* because some States claim that certain uses of nuclear weapons might be lawful and that consequently any illegality *per se* of the use of nuclear weapons under these rules is not accepted by the whole of the international community of States. This seems to be an inverted form of reasoning: if all States have accepted the imperative character of a rule, it is not possible for a handful of States, acting subsequently, to say that the rule is not imperative because the required quasi-unanimity is no longer evident as a result of their lack of support. It is at the moment of adoption and of the characterisation of the rule that it is necessary to determine whether the requisite quasi-unanimity of views is apparent.

(D) Conclusions

3.92 In summary, it has been shown in this Section that the use of nuclear weapons is subject to international law. It does not follow that just because nuclear weapons have different characteristics from other types of weapons that international law does not apply to them: practice (including that of the nuclear power States), jurisprudence and the writings of jurists are clear on this point (*infra*. paras. 3.3-3.10).

3.93 The 1977 Geneva Protocol I applies to the use of nuclear weapons even if it does not expressly say so. The silence of the Protocol about nuclear weapons proves nothing, since the Protocol is silent about other forms of weapons. Their use is no less subject to the general rules of behaviour which are required by the Protocol. *A fortiori*, the specific prohibition in the 1977 Protocols against attacking nuclear power plants reflects the great concern of States about the release into the environment of radioactive material and supports the view that Protocol I does apply to nuclear weapons. As to the expressed desire of certain States not to apply Protocol I to nuclear weapons, it comes up against the strongly opposing views of the great majority of other States; practice consecutive to the adoption of the Protocol confirms that there was no agreement that the Protocol did not apply to nuclear weapons (*infra*. paras. 3.11-3.24).

If the classical instruments governing the law of armed conflict do not expressly address nuclear weapons, the General Assembly of the United Nations has adopted a large number of resolutions solemnly condemning the use of nuclear weapons in any circumstances. These resolutions do not create new law, seeking only to recall that the use of nuclear weapons is governed by pre-existing rules (paras. 3.25-3.31).

In view of the objective and functions of the WHO, certain of its rules are also applicable to and condemn the use of nuclear weapons (*infra*. paras. 3.32-3.33).

3.94 It is the devastating effects of nuclear weapons which condemns their use: their power leads ineluctably to the death of many people within a certain radius; with strategic weapons the effect persists although it diminishes in scale. In any event, the use of even the smallest nuclear weapon has the potential to unleash a full-scale nuclear war with incalculable consequences; even the use of a strategic nuclear weapon would lead to greater losses amongst civilians than military personnel. By reason of these quantitative effects alone, the use of nuclear weapons violates the rules prohibiting the infliction of necessary death for adversaries, of causing indiscriminate effects, and encouraging the general rules of international humanitarian law (*infra*. paras. 3.34-3.54).

The qualitative effects of nuclear weapons, characterised by the initial nuclear radiation and nuclear fallout and the consequences of these effects, brings nuclear weapons within the scope of rules prohibiting the use of poisonous and chemical weapons. Since these effects become cumulatively greater with the power of nuclear weapons, they lead to a greater certainty of killing their victims, thereby violating the prohibition against the use of weapons which render death inevitable. Health and rescue services having been destroyed or badly damaged, the use of nuclear weapons violates the immunity of medical corps and the rights of victims to have access to medical assistance. Moreover, since these effects may affect people outside the scope of the conflict, both in time and geographically, the use of nuclear weapons violates the prohibition on the use of weapons which cause unnecessary suffering, cause harm to civilians, and have indiscriminate effects. The principles of proportionality and humanity are obviously violated. And nuclear weapons are incapable of respecting the obligation not to cause widespread, severe and long-term damage to the natural environment, or violating the rights of third States under the laws of neutrality or general international law (*infra*. paras. 3.55-3.70).

These violations are independent of the context in which they occur - international or non-international armed conflict - and they cannot be justified by reason of arguments relating to legitimate defence, reprisals or state of necessity since the law of armed conflict is independent of the *jus contra bellum*, which prohibits reprisals, excludes any possibility of reciprocity, and already takes account of the state of necessity (*infra*. paras. 3.71-3.80).

3.95 The rules identified above are reflected in customary law and treaties binding all States, including those proponents of the legality of the use of nuclear weapons. These States have not even managed to create *inter se* different norms than those which they are bound to respect in their relations with third States. Such norms would be incompatible with the object and purpose of the general rules applicable to nuclear weapons and would violate the rights of third States and of victims. In any event, since these rules may be considered to be *jus cogens*, any agreement in violation of them would be *ipso facto* without effect (*infra*. paras. 3.81-3.91)

Section B

The use of nuclear weapons violates applicable rules of international law for the protection of human health and the environment

(A) The use of nuclear weapons is subject to international law for the protection of human health and the environment and fundamental rights

4.1 The use of nuclear weapons must also be considered by reference to those rules of international law which do not relate directly to armed conflict. As set out in Section A, the use of nuclear weapons can cause damage to human health and the environment in the territory of the State which uses a nuclear weapon, the target State or territory, third countries, and other areas beyond national jurisdiction. It can also violate fundamental human rights, including the right to life.

4.2 The pernicious effects of radiation on human health and the environment were graphically illustrated by the accident which occurred at the Chernobyl nuclear power plant on 26 April 1986. The accident made clear that radiation does not respect national boundaries, that it can be carried for thousands of kilometres, and that wherever it is deposited it will cause harm to human health and the environment, with consequential adverse effects on agriculture, tourism and other industrial activities. For a small island state, the consequences of any such exposure would be catastrophic.

On 27 April 1986, Sweden, and then Denmark, Finland and Poland, detected significant increases in radioactivity levels.[213] Increased radiation levels were subsequently observed, *inter alia*, in Austria, German Democratic Republic, Hungary, Italy, Norway, Yugoslavia (29 April); Federal Republic of Germany, Switzerland, Turkey (30 April); France (1 May); Belgium, Greece, Netherlands, United Kingdom (2 May); and Iceland (7 May). Low-level increases were also detected in Japan and the United States. Significant increases of particular danger to human health were observed in the levels of Iodine-131, Caesium-134 and Caesium-137 immediately after the accident.[214] The scale of the disaster became clearer when the world learnt that in the 36 hours after the accident more than 100,000 people had been evacuated from a radius of some 20 miles around the reactor. The full effects of the accident on people, property and the environment are still difficult to assess. In the USSR thirty-one people died as a direct

[213] See Salo, "Information Exchange After Chernobyl", 28 *IAEA Bulletin*, No. 3, p.18 (1986); see generally P. Sands, *Chernobyl: Law and Communication: Transboundary Nuclear Air Pollution — The Legal Materials* (1988).

[214] See Summary Report of 22 July 1986 of the Working Group on Assessment of Radiation Dose Commitment in Europe due to the Chernobyl Accident, noted in 28 *IAEA Bulletin*, No. 3, at p.27 (1986).

result within a few weeks and a further three during 1987 as a result of on-site exposure.[215] The United Kingdom National Radiation Protection Board has estimated that in the EEC countries 1,000 people will die and 3,000 will contract non-fatal cancers because of the accident.[216] Many States, as well as the EEC, situated thousands of kilometres from the accident, took measures to minimize the effects, measures sometimes costly in themselves (as, for example, the protective medication undertaken in Poland) but which also caused losses to dairy and agricultural farmers, fish and meat producers and the tourist industries.[217] The effects in the Federal Republic of Germany were described as follows:

> "The widespread radioactive contamination of the air, water and soil entailed direct damage to spring vegetables; milk-producing cattle had to be kept from grazing; the consumption of milk and other foodstuffs had to be supervised; import restrictions became necessary; the fixing of state intervention levels led to a change in consumers' eating and buying habits; travel agencies and transport undertakings specialising in Eastern Europe business lost their clientele; and finally, seasonal workers in agriculture lost their jobs."[218]

4.3 The legality of the use of any nuclear weapon is subject to those rules of international law arising by operation of treaty, custom or act of international organisation which are intended to protect human health and the environment from pollution and to protect fundamental human rights. That body of rules is now extensive. Moreover, these rules are of "essential importance for the safeguarding and preservation of the human environment" within the meaning of Article 19(1)(d) of the ILC's draft Articles on State Responsibility, the serious breach of which may give rise to the commission of an international crime.[219] Just as the laws of armed conflicts prohibit "widespread, long-term and severe damage" to the natural environment (*supra*, paras. ...), so general international law now seeks to protect the environment and prevent damage to human health. The fundamental importance of rules protecting human health and the environment, and their interdependence with the maintenance of peace and security, has been recognised by all States participating at the UN Conference on Environment and Development in June 1992. The Security Council, meeting at the level of head of government or head of State, has declared that "non-military sources of instability in the

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[215] *The Financial Times*, 5 December 1987.

[216] See NRPB, *A Preliminary Assessment of the Chernobyl Reactor Accident on the Population of the European Community* (1987).

[217] See *The Financial Times*, 11 July 1986, at p.36; 22 May 1987, at p.3; 15 May 1986, at p.2; *The Economist*, 16 August 1986, at p.28.

[218] 38 *NLB* 21 (1986).

[219] 1980 *Ybk ILC*, Vol. II (Part 2), p. 30.

ecological field have become threats to international peace and security".[220] Earlier, in April 1991, the Security Council had reaffirmed in resolution 687/1991 that Iraq was "liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign [...] nationals" which occurred as a result of its unlawful invasion and occupation of Kuwait.[221] The protection of human health and the environment from damage, including that resulting from the use of nuclear weapons, is a fundamental objective of the international legal order as reflected in these recent developments. They serve to emphasise the context in which the legality of the use of nuclear weapons must be judged.

4.4 The practice of States reflects that the dual objectives of human health protection and environmental protection are interdependent and are treated in an integrated manner. Interdependence is evident from the discussion concerning the competence of the WHO over health and environmental issues (*supra*. paras. 2.17-2.19), from Agenda 21 (which recognises the "interdependence among the factors of health, environment and development"),[222] and from the Rio Declaration on Environment and Development (Principle 21 of which declares that human beings "are entitled to a healthy and productive life in harmony with nature").[223] The interdependence of human health and environmental protection objectives is also evident from the provisions of treaties expressly intended to prevent damage and adverse effects to human health and the environment from pollution,[224] other treaties having more general objectives,[225] and from decisions of relevant international bodies.[226]

4.5 Accordingly, the Court should not distinguish between human health protection and environmental protection. The fundamental rules of international law which are

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[220] Note by President of the Security Council. 31 January 1992. UN Doc. S/23500. p.2 (1992).

[221] 3 April 1991.

[222] *Agenda 21*, Chapter 6, para. 6.39. (A/CONF. 151/26 (1992)) citing recent analysis by the World Health Organisation.

[223] A/CONF. 151/26 (1992), Vol. I.

[224] Convention on Long-Range Transboundary Air Pollution, 13 November 1979, 18 *ILM* 1442 (1979) (1979 LRTAP Convention) Art. 1(a); UN Convention on the Law of the Sea, 10 December 1982, 21 *ILM* 1261 (1982); Art. 1(4) (1982 UNCLOS); 1992 UN Framework Convention Climate Change Convention, 9 May 1992, 31 *ILM* 849 (1992) Art. 1(1) (1992 Climate Change Convention).

[225] See e.g. EC Treaty, requiring Community environment policy to pursue the objectives of "Preserving, protecting and improving the quality of the environment" and "protecting human health": EC Treaty, as amended by the Treaty on European Union, Art. 130r1, OJ No C 191, 29.7.92, pp. 27-8.

[226] See e.g. UN Human Rights Commission declaration that the movement and dumping of toxic and dangerous products endanger basic human rights such as 'the right to the highest standard of health, including its environmental aspects, 'Resolution 1990/43, U.N. Doc. E/CN.4/1990/94 at 104, 6 March 1990.

primarily intended to protect human health also bring environmental benefits and impose environmental obligations; rules primarily intended to protect the environment (often defined as including human health, as well as flora, fauna, soil, air, water, climate, landscape and historical monuments or physical structures, and the interrelationship among these elements).[227]

4.6 The international community has long recognised the inherent dangers posed by radioactive material for human health and the environment, as reflected in the large body of treaties which seek to minimize the risks. Regional and global instruments have been adopted to, *inter alia*:

- ban nuclear testing in the atmosphere, ocean or other space;[228]
- protect workers and the public from exposure;[229]
- limit the proliferation of nuclear weapons;[230]
- regulate transport in nuclear material;[231]
- regulate or ban transport of nuclear waste;[232]
- prohibit the emplacement of nuclear weapons in certain areas;[233] and
- create nuclear-free zones (and prohibit the use of nuclear weapons).[234]

4.7 It is clear from these international legislative efforts, as well as those cited in the preceding sections, that the international community has acted to limit releases of radioactive substances and to use all available methods to prevent any massive increases which would cause damage to human health and the environment. Accordingly, there can be no doubt that the use of nuclear weapons is subject to these relevant rules of international law, which aim to prevent any increase in the level of ionising radiation

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227 See e.g. Convention on Environmental Impact Assessment in a Transboundary Context, Espoo, 25 February 1991, 30 *ILM* 802 (1991), Art. 1(vii); Convention on the Transboundary Effects of Industrial Accidents, Helsinki, 17 March 1992, 31 *ILM* 1330 (1992), Art. 1(2).

228 Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and Under Water, 5 August 1963, 480 *UNTS* 43.

229 ILO Convention (No. 115) Concerning the Protection of Workers against Ionizing Radiation, 22 June 1960, 431 *UNTS* 41.

230 Treaty on the Non-Proliferation of Nuclear Weapons, 1 July 1968, 729 *UNTS* 161.

231 Convention on the Ban of Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa, 29 January 1991, 30 *ILM* 775 (1991).

232 Treaty for the Prohibition of Nuclear Weapons in Latin America, and Additional Protocols I and II, 14 February 1967, 634 *UNTS* 326.

233 South Pacific Nuclear Free Zone Treaty, 6 August 1985, 24 *ILM* 1142 (1985).

234 Convention on the Physical Protection of Nuclear Material, 3 March 1980, 18 *ILM* 1419 (1980).

in the environment.

(B) **The use of nuclear weapons violates international law for the protection of human health and the environment, and violates fundamental human rights**

4.8 This rule arises from: (a) the obligation under general international law for every State to respect the sovereignty and territorial integrity of other States; (b) the obligation under general international law of every State not to cause damage to human health or the environment outside its own territory; and (c) obligations imposed under international law (particularly treaties, acts of international organisations, and custom) requiring States not to cause damage to human health and the environment in its own territory, in the territory of other States, and in areas beyond national jurisdiction.

(a) *Sovereignty and territorial integrity*

4.9 It is a well-established principle of international law that every State must respect the territorial sovereignty and inviolability of every other State. This is reflected in numerous judicial decisions and arbitral awards, as well as treaties and other international acts. An early example is the Award of Max Huber in the *Island of Palmas Case*, which holds that:

> "Territorial sovereignty ... involves the exclusive right to display the activities of a State. This right has as corollary a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war, together with the rights which each State may claim for its nationals in foreign territory."[235]

4.10 The International Court itself has recognised the principle of "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States".[236] This principle applies to any activity carried out or authorised by a State, including *a fortiori* the use of a nuclear weapon, and is applicable equally in times of war or other armed conflict.

4.11 The obligation to respect the sovereignty and territory of other States is a fundamental principle of international law. It is embodied in the principle of good-neighbourliness as set forth in Article 74 of the United Nations Charter. This provision reflects the agreement of the members of the international community that their policy and activities in their own metropolitan areas must take account of "the interests and well-being of the rest of the world, in social, economic and commercial matters."

4.12 The obligation to respect sovereignty and territory is clearly applicable to radioactive

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[235] Permanent Court of Arbitration (*Netherlands v. US*), 2 *R.I.A.A.* 829, 839.

[236] *Corfu Channel* case (*UK v. Albania*), Judgement of 9 April 1949, *ICJ Rep.* 1949 pp. 4, 22.

contamination. Any increase of levels of radiation in the territory of a State or of an area beyond national jurisdiction resulting from any activity of a State violates this principle of international law. The principle was cited by Australia and New Zealand in the Nuclear Tests Cases brought by them against France.[237] Australia claimed that the carrying out of atmospheric nuclear tests by France was in violation of Australia's rights on three counts: Australia's sovereignty over its territory; the right of Australia that *nuclear tests should not be conducted in the atmosphere* and, in particular, not in such a way as to lead to radioactive fall-out upon Australian territory; and the rights of Australia to the unrestricted use, at all times, of the high seas and superjacent air-space for navigation, fishery and other purposes, free of physical interference and risk of radiation pollution.[238] When asked by the President of the International Court of Justice, Sir Humphrey Waldock, whether it took the view that 'every transmission by natural causes of chemical or other matter from one state into another state's territory, air space or territorial sea automatically created a legal cause of action in international law without the need to establish anything more?', Australia responded, *inter alia*, that:

> "where, as a result of a normal and natural use by one state of its territory, a deposit occurs in the territory of another, the latter has no cause of complaint unless it suffers more than merely nominal harm or damage. The use by a state of its territory for the conduct of atmospheric nuclear tests is not a formal or natural use of its territory. The Australian Government also contends that the radioactive deposit from the French tests gives rise to more than merely nominal harm or damage to Australia.
>
> ...
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> By way of elaborating .... the basic principle is that intrusion of any sort into foreign territory is an infringement of sovereignty. Needless to say, the Government of Australia does not deny that the practice of states has modified the application of this principle in respect of the interdependence of territories. It has already referred to the instance of smoke drifting across national boundaries. It concedes that there may be no illegality in respect of certain types of chemical fumes in the absence of special types of harm. What it does emphasise is that the legality thus sanctioned by the practice of states is the outcome of the toleration extended to certain activities which produce these emissions, which activities are generally regarded as natural uses of territory in modern industrial society and are tolerated because, while perhaps producing some inconvenience, they have a community benefit."[239]

4.13 Increased levels of radiation in the environment from any source, including the use of nuclear weapons, is not and cannot be tolerated by State practice. The preamble to the 1963 Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water affirms the desire "to put an end to the contamination of man's

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[237] See *Nuclear Tests* (Australia v. France), Interim Protection, Order 22 June 1973, *ICJ Rep.* 1973, p.99; *Nuclear Tests* (New Zealand v. France), Interim Protection, Order, 22 June 1973, *ICJ Rep.* 1973, p.135.

[238] *Nuclear Tests* Case, (Australia v. France) Pleadings, Vol. I. p.522.

[239] *Id.*, 525-26.

environment by radioactive substances", and the Treaty requires each party

> "to prohibit, to prevent, and not to carry out any nuclear weapon test explosion, or any other nuclear explosion, at any place under its jurisdiction or control:
>
> (a) in the atmosphere; beyond its limits, including outer space; or underwater, including territorial waters or high seas; or
>
> (b) in any other environment if such explosion causes radioactive debris to be present outside the territorial limits of the State under whose jurisdiction or control such explosion is conducted."[240]

The use of nuclear weapons cannot in any circumstances be considered a "natural use of territory in modern industrial society". And the use of nuclear weapons cannot in any circumstances be considered to provide a community benefit at "some inconvenience". In this regard, the community must include any third State not involved in a conflict which may suffer in human health or environmental terms, directly or indirectly, the consequences of radioactive contamination.

4.14 Moreover, every State is further restrained in the activities which it may carry out or permit by virtue of the prohibition on the abuse by a State of a right it enjoys under international law. Such an abuse will occur when a State avails itself of its rights in an arbitrary manner in such a way as to inflict upon another State an injury which cannot be justified by a legitimate consideration of its own advantage.[241] Any use of a nuclear weapon, whether or not it had consequences in a third State or in areas beyond national jurisdiction, would constitute an abuse of right.

4.15 The use of nuclear weapons by a State in war or other armed conflict is subject to the general obligation under international law to respect territorial sovereignty. Accordingly, any use of a nuclear weapon, alternatively any use which had consequences in a third State or in areas beyond national jurisdiction, would violate the general obligation.

(b) The general obligation of each State not to cause damage to human health or the environment outside its territory or other areas subject to its jurisdiction or control

4.16 Flowing directly from the fundamental primary obligation described in paragraphs 4.9-4.12 is the obligation of every State not to cause damage to human health or the environment outside its national territory. The general obligation under international law to avoid transboundary injury to human health and the environment is reflected in the award of the Arbitral Tribunal in the *Trail Smelter* arbitration, which held that:

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[240] Art. I(1).

[241] R. Jennings and A. Watts (eds.), *Oppenheim's International Law* (9th ed., 1992), Vol. I, p. 407; see also 1982 UNCLOS, Art. 300.

> "Under the principles of international law ... no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another of the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence".[242]

4.17 The formulation of this obligation is now codified in Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration, both of which provide, in relevant part, that:

> "States have, in accordance with the Charter of the United Nations and the principles of international law, the ... responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction".[243]

In this regard, the use of the word "control" indicates that the obligation extends to activities carried out by States through, for example, submarines, vessels or aircraft which might launch a nuclear weapon from an area beyond its national jurisdiction.

4.18 This formulation has been accepted by all States and reflects a rule of customary law. The rule set forth in Principle 21 has been described by the UN General Assembly as one of the 'basic rules' governing the international responsibility of states in regard to protection of human health and the environment.[244] It has been endorsed or incorporated in its entirety into the Preamble of many treaties;[245] described as having the status of a "generally accepted principle of international law";[246] reaffirmed on numerous occasions in international soft law.[247] Most recently, Principle 21 was fully

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[242] *United States v. Canada*, 3 *RIAA* p. 1907 (1941); citing Eagleton, *Responsibility of States*, 1928, p.80.

[243] 11 *ILM* 1416 (1972); 31 *ILM* 851 (1992).

[244] UN General Assembly resolution 2996 (1972), 27 *UN GAOR* (Supp. No. 30) 42.

[245] See e.g. Convention for the Prevention of Marine Pollution by Dumping of Wastes and other Matter, 29 December 1972, 1046 *UNTS* 120; 1979 LRTAP Convention; 1985 Convention for the Protection of the Ozone Layer, 26 *ILM* 1529 (1987); 1992 Climate Change Convention.

[246] 1985 Association for South East Asian Nations Agreement on the Conservation of Nature and Natural Resources, Art. 20.

[247] See e.g. Charter of Economic Rights and Duties of States, Art. 30, UN General Assembly resolution 3281 (XXIX), 12 December 1974, *Ybk UN* 1974 at 402; Final Act, Conference on Security and Cooperation in Europe, Helsinki, 1 August 1975 ('each of the participating States, in accordance with the principles of international law, ought to ensure, in a spirit of co-operation, that activities carried out on its territory do not cause degradation of the environment in another State or in areas lying beyond the limits of national jurisdiction' in I. Brownlie, *Basic Documents on Human Rights* (3rd. ed, 1992), p.417).

incorporated as Article 3 of the 1992 Biodiversity Convention.[248] The substantive rule set forth in Principle 21 has been endorsed in a number of other treaties applicable to particular regions.[249] Article 194(2) of the 1982 UNCLOS, which enters into force later this year, and in any case reflects customary law, establishes a similar obligation specifically to protect the marine environment.

4.19 Principle 21 has been cited with apparent approval by at least one judge of the International Court[250] and is considered by many jurists to reflect a customary obligation.[251] Specifically in relation to ionizing radiation, UN General Assembly resolution 1629 (XVI), adopted in 1961, declares that:

> The fundamental principles of international law impose a responsibility on all states concerning actions which might have harmful biological consequences for the existing and future generation of peoples of other states, by increasing the levels of radioactive fallout.[252]

4.20 In using a nuclear weapon in war or other armed conflict, a State is subject to the specific obligation under international law to ensure that no damage is caused to human health or the environment of other States, or to human health and the environment in areas beyond the limits of national jurisdiction. Accordingly, any use of a nuclear weapon, alternatively any use which has consequences in a third State or in areas beyond national jurisdiction, would violate this general and fundamental obligation of

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[248] 5 June 1992, 31 *ILM* 822 (1992); the Convention was signed by more than 150 States at UNCED, and entered into force on 29 December 1993. It now has more than fifty Parties.

[249] See e.g. Treaty for Amazonian Co-Operation, 3 July 1978, 17 *ILM* 1045 (1978), Art. IV ('the exclusive use and utilization of natural resources within their respective territories is a right inherent in the sovereignty of each state and that the exercise of this right shall not be subject to any restrictions other than those arising from International Law'); 1981 Convention for the Protection of the Marine Environment and Coastal Area of the South-East Pacific, 12 November 1981, *IELMT* 981:85; Art. 3(5) (activities must be conducted so that 'they do not cause damage by pollution to others or to their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not, as far as possible, spread beyond the areas where [they] exercise sovereignty and jurisdiction'); 1982 UNCLOS, Art. 193 ('States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment').

[250] See Judge de Castro, dissenting, in the *Nuclear Tests* case, (*Australia v. France*), 1974 *ICJ Rep.* pp. 253, 389: 'If it is admitted as a general rule that there is a right to demand prohibition of the emission by neighbouring properties of noxious fumes, the consequences must be drawn, by an obvious analogy, that the Applicant is entitled to ask the Court to uphold its claim that France should put an end to the deposit of radio-active fall-out on its territory'.

[251] See ILA, Report of the Committee on Legal Aspects of the Environment, *60th Conference Report*, p. 157 at 163; L. Goldie, "A General View of International Environmental Law - A Survey of Capabilities, Trends and Limits", in *Colloque La Haye*, pp. 66-9 (1973); A.C. Kiss, "La lutte contre la pollution de l'air sur le plan international", *Colloque La Haye*, pp. 169-174 (1973).

[252] United Nations General Assembly resolution 1629 (XVI) (1961), 16 *UN GAOR* (1043 Plenary Meeting) at 505-07, UN Doc. A/PV.1043 (1961).

international law.

(c) The specific obligations not to cause damage to human health and the environment

4.21 The primary and general obligations described in paragraphs 4.9 and 4.17 have been further elaborated into specific and detailed norms. These too would be violated by any use of nuclear weapons. They are developed by States through the adoption of a large number of treaties and other acts establishing more specific objectives for the protection of human health and the environment, including in particular the protection of air quality, freshwater resources, oceans and seas, biodiversity, and historical monuments or physical structures of significant cultural value.

4.22 A great number of treaties and multilateral acts at the global and regional level have been adopted to protect human health and the environment. They have received widespread support from States, and many now also reflect rules of customary law establishing specific obligations to protect human health and the environment, and to prevent significant damage thereto. In many instances these rules establish international obligations which are undoubtedly of "essential importance for the safeguarding and preservation of the human environment".[253]

4.23 Human exposure to ionizing radiation always causes some damage to **human health**, the protection of which is envisaged by many international agreements, including in particular the WHO Constitution and those treaty and customary obligations which establish specific obligations. The Preamble to the WHO Constitution provides that "the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition". The WHO Constitution commits all members to achieving the objectives of the Organization, including "the attainment by all peoples of the highest possible level of health" (Article 1) and the improvement of "environmental hygiene" (Article 2(i)). To that end, the World Health Assembly adopted International Health Regulations in 1969. The Organization has also endorsed the 1990 Recommendations establishing specific levels of protection from ionizing radiation adopted by the International Commission on Radiological Protection (ICRP), which establish annual effective dose equivalent limits for members of the public of 5 MsV (0.5 rem).[254] Any increase above that limit is deemed "unacceptable" on health grounds. The 1990 Recommendations replace earlier ICRP Recommendations[255] which provided the basis for the 1982 Basic Safety Standards for Radiation Protection adopted and published

[253] *Supra*. note 219.

[254] ICRP Publication 60 (1991); Table S-4.

[255] ICRP Publication No. 26.

jointly by the IAEA, WHO, ILO and the Nuclear Energy Agency of the OECD.[256] The Standards, whose objectives include the provision of "guidance for the protection of man from undue risks of the harmful effects of ionizing radiation", set a limit for the annual effective dose equivalent for members of the public of 5 MsV (0.5 rem).[257] The same level of protection, reflecting the earlier ICRP recommendations, is applied in mandatory form under the law of the European Union.[258]

4.24 Human exposure to ionizing radiation will also violate basic human rights and fundamental freedoms. Any use of nuclear weapons is also subject to, and must comply with, relevant norms established under general and specific international human rights law. Aside from the right to health recognised by the WHO Constitution itself (*supra.* para. 2.9) international law has long recognised that the quality of the human environment must be maintained to ensure the full enjoyment of basic human rights.[259] This approach is reflected in Principle 1 of the 1972 Stockholm Declaration,[260] Principle 1 of the Rio Declaration on Environment and Development,[261] and has been endorsed by the UN General Assembly, which has resolved that 'all individuals are entitled to live in an environment adequate for their health and well-being'.[262] Pollution by radiation which damages human health and the environment violates international human rights standards, as reflected in treaty and customary law, including the right to a standard of living adequate for health and well-being[263] and the right to the highest attainable standard of health (including improvement of all aspects of environmental and

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256 Basic Standards for Radiation Protection, 1982 Edition, IAEA, Vienna.

257 *Id.*, paras. 10 and 418.

258 Directive 84/467/Euratom, OJ No L 265, 5.10.1984.

259 UN GA res. 2398(XXII) (3 December 1968); UN Commission on Human Rights, Resolution 1990/41, 6 March 1990.

260 "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations."

261 "Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature."

262 Resolution 45/94, 14 December 1990; see also the Declaration of the Hague on the Environment, recognizing 'the fundamental duty to preserve the ecosystem' and 'the right to live in dignity in a viable and global environment, and the consequent duty of the community of nations vis-à-vis present and future generations to do all that can be done to preserve the quality of the environment': 11 March 1989, 28 *ILM* 1308 (1989).

263 Universal Declaration of Human Rights, UN GA resolution 217 (III) of 10 December 1948, Art. 25; International Covenant on Economic, Social and Cultural Rights (1966 ICESCR), Annex to GA Res. 2200 (XXI) of 16 December 1966, 6 *ILM* 360 (1967), Art. 11(1).

industrial hygiene).[264] Similar rights are reflected in the 1981 African Charter ('all peoples shall have the right to a general satisfactory environment favourable to their development'),[265] the 1989 San Salvador Protocol to the 1969 American Convention on Human Rights,[266] and the 1989 Convention Concerning Indigenous and Tribal Peoples in Independent Countries.[267]

4.25 International law requires States to prevent damage to **air quality** from pollution, including that resulting from the use of nuclear weapons. Relevant international obligations are set forth in, *inter alia*, the 1979 LRTAP Convention[268] the 1982 UNCLOS,[269] and various regional marine environment protection treaties, including UNEP Regional Seas Conventions.[270] To the extent that the use of a nuclear weapon causes damage to the ozone layer and the climate system violations would also occur of the 1985 Convention for the Protection of the Ozone Layer (and related Protocol)[271] and the 1992 UN Climate Change Convention which commits all Parties to "protect the climate system for the benefit of present and future generations".[272]

4.26 International law requires States to prevent damage to **biodiversity** (*flora and fauna*)

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[264] 1966 ICESCR, Art. 12(1) and (2)(b); European Social Charter, 18 October 1961, 529 UNTS 89, Art. 11; African Charter on Human and People's Rights (1981 ACHPR), 28 June 1981, 21 *ILM* 59 (1982) Art. 16(1).

[265] 1981 ACHPR Art. 24.

[266] See Art. 11:

"1. Everyone shall have the right to live in a healthy environment and to have access to basic public services.

2. The State Parties shall promote the protection, preservation and improvement of the environment".

[267] Geneva, 27 June 1989, 28 *ILM* 1382 (1989), Arts. 2, 3, 4(1), 7(4) and 15(1).

[268] *Supra*, note 224; see Article 2, reflecting the determination of the Parties "to protect man and his environment against air pollution" and to "endeavour to limit and, as far as possible, gradually reduce and prevent air pollution including long-range transboundary air pollution".

[269] *Supra*, note 224; Article 212, requiring all States to 'prevent, reduce and control pollution of the marine environment, from or through the atmosphere, applicable to the air space under their sovereignty and to vessels flying their flag or vessels or aircraft of their registry'.

[270] 1974 Convention for the Prevention of Marine Pollution from Land-Based Sources, 4 June 1974, 13 *ILM* 352 (1974), Art. 3(c)(iv) (as amended); 1974 Convention on the Protection of the Marine Environment of the Baltic Sea Area, 22 March 1974, 13 *ILM* 546 (1974), Art. 2(2); 1983 Protocol for the Protection of the South-East Pacific Against Pollution from Land-Based Sources, 22 July 1983, *IELMT*, 983:54, Art. II(c).

[271] 22 March 1985, 26 *ILM* 1529 (1987); Montreal Protocol on Substances that Deplete the Ozone Layer, 16 September 1987, 26 *ILM* 1540 (1987).

[272] *Supra* note 224; Art. 3(1).

from pollution, including that resulting from the use of nuclear weapons. International law for the protection of biodiversity is particularly well-established at the regional and global level. The Biodiversity Convention, which commits Parties to "promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings",[273] supplements other global agreements which have received widespread support. Of particular note is the 1971 Convention on Wetlands of International Importance, Especially as Waterfowl Habitat. Regional conservation agreements have been adopted for Africa;[274] the Americas;[275] East Africa;[276] South East Asia,[277] Europe, including the EC;[278] the South Pacific;[279] and the Caribbean.[280] Special protection is provided for many endangered species who would be destroyed by increases in radiation, including migratory species.[281]

4.27 International law requires States to prevent damage to **freshwater resources** (including vital groundwater resources) from pollution, including that resulting from the use of nuclear weapons. Increased levels of ionizing radiation in freshwater resources (rivers, lakes, groundwaters *etc.*) is prohibited by general international law, treaties and other international acts. Apart from the special regimes intended to protect individual rivers and river systems (e.g. the Rhine, Zambezi, River Plate), regional and global rules also exist. The International Law Commission's Draft Articles on the Non-navigational Uses of International Watercourse, which draws upon resolutions of the International Law

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[273] 1992 Biodiversity Convention, *supra* note 224, Article 8(d)

[274] African Convention on the Conservation of Nature and Natural Resources, Algiers, 15 September 1968, 1001 *UNTS* 4.

[275] Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, 12 October 1940, 161 *UNTS* 193.

[276] 1985 Nairobi Protocol concerning Protected Areas and Wild Fauna and Flora in the Eastern African Region, 21 June 1985, *IELMT* 985:47.

[277] 1985 ASEAN Agreement, *supra* note 246.

[278] Institut de Droit International, Resolution on International Regulations regarding the use of International Watercourses for Purposes other than Navigation, Madrid, 19 April 1911, 11 *IPE* 5702. Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, *OJ* L 103, 25.4.1979, p.1; Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild flora and fauna, *OJ* L 206, 22.7.1992, p.7 (French).

[279] Convention for the Protection of the Natural Resources and Environment of the South Pacific Region, Noumea, 24 November 1986, 26 *ILM* 38 (1987).

[280] Protocol Concerning Specially Protected Areas and Wildlife in the Wider Caribbean Region, Kingston, 18 January 1990, 1 *YIEL* 441 (1990).

[281] Convention on the Conservation of Migratory Species of Wild Animals, 23 June 1979, 19 *ILM* 15 (1980).

Association and the Institut de Droit International,[282] provides that watercourse States "shall, individually or jointly, protect and preserve the ecosystems of international watercourses" and prevent "any detrimental alteration in the composition or quality of the waters of an international watercourse which results directly or indirectly from human conduct ... that may cause appreciable harm to other watercourses".[283] This general rule, which reflects customary law, is also reflected in regional treaties.[284]

4.28 International law requires States to prevent damage to the **marine environment** from pollution, including that resulting from the use of nuclear weapons. These norms are particularly well-developed, and are closely related to the obligation of all States to respect the high seas freedoms of all other States, which would be violated by radioactive pollution on the high seas. Specific global treaty obligations, many of which now reflect customary law, are set forth in, *inter alia*, the 1958 Geneva Convention on the High Seas[285] and the 1982 UNCLOS.[286] Equivalent treaty obligations are set forth in the various UNEP Regional Seas conventions, which have attracted such extensive support that they must, in their relevant parts, be considered to reflect customary law.[287]

4.29 International law requires States to prevent damage to **cultural and natural heritage** from pollution, including that resulting from the use of nuclear weapons. Under the 1972 World Heritage Convention, which has received widespread support across the globe, each Party undertakes "not to take any deliberate measures which might damage directly or indirectly the cultural or natural heritage ... situated on the territory" of other

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282 See e.g. Institut de Droit International, Resolution on International Regulations Regarding the Use of International Watercourses for Purposes Other than Navigation, Madrid, 19 April 1911, 11 *IPE* 5702; ILA, Helsinki Rules on the Uses of the Waters of International Rivers, 52 *ILA* 484 (1967); ILA Rules on Water Pollution in an International Drainage Basin, 60 *ILA* 535 (1983); ILA Rules on International Groundwaters, 62 *ILA* 251 (187).

283 2 *YIEL* 764 (1991), Arts. 20 and 21(1).

284 See e.g. Convention on the Protection and Use of Transboundary Watercourses and International Lakes, 17 March 1992, 31 *ILM* 1312 (1992) Art. 1(2) and 2(1).

285 450 *UNTS* 82; Art. 25(2), providing that all States must "co-operate with competent international organizations in taking measures for the prevention of pollution of the seas or air space above, resulting from any activities with radio-active materials".

286 *Supra* note [INSERT], especially Arts. 192 and 194(2).

287 See also the Convention for the Protection of the Marine Environment of the North-East Atlantic, 22 September 1992, LDC 15/INF.11, recognising the 'vital importance to all nations' of the marine environment and the flora and fauna it supports and the 'inherent worth' of the marine environment of the North-East Atlantic, and recalling the relevant provisions of customary law reflected in Part XII of 1982 UNCLOS, and in particular Article 197.

Parties."[288]

(d) The obligation not to cause massive damage to human health or the environment anywhere

4.30 The specific obligations described in paragraphs 4.24-4.29 are applicable to prohibit damage from an activity carried out or authorised by a State having consequences anywhere: in a State's own territory; in the territory of another State; or in areas beyond national jurisdiction.

4.31 In addition to the obligations to protect human health and particular environmental resources, international law requires States to prevent damage from radiation to certain geographic areas which are subject to special rules of protection. By general international law reflected in treaties and custom, States are specifically prohibited from causing damage to human health and the environment in areas outside the territory and exclusive jurisdiction of any State, including the high seas and its seabed and subsoil,[289] the moon and outer space,[290] and the Antarctic.[291] Regional agreements prohibiting any nuclear explosion whatsoever have been adopted in Latin America[292] and the South Pacific.[293]

(e) Conclusion

4.32 By way of summary, general international law prohibits a State from carrying out or authorising activities which damage human health and the environment or violate human rights. In using a nuclear weapon in war or other armed conflict a State is subject to the specific obligations established by the rules of general international law reflected in treaty and custom. Any use of a nuclear weapon, alternatively any use which has consequences in a third State or in areas beyond national jurisdiction, would violate these rules of general international law. The use of a nuclear weapon which caused massive environmental pollution or damage to human health and so violates these essential rules

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[288] Convention for the Protection of the World Cultural and Natural Heritage, 16 November 1972, 11 *ILM* 1358 (1972) Art. 6(3).

[289] 1982 UNCLOS, Art. 194.

[290] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, 27 January 1967, 610 UNTS 205 (especially Art. IV); Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, 5 December 1979, 18 *ILM* 1434 (1979) (especially Art.7).

[291] Antarctic Treaty, 1 December 1959, 402 *UNTS* 71 (especially Art. V, prohibiting nuclear explosions).

[292] *Supra* note 232.

[293] *Supra* note 233.

would constitute an international crime (*supra*. para. 4.3).

(C) International obligations for the protection of human health and the environment apply during armed conflict

4.33 Since the use of nuclear weapons must, *prima facie*, occur during a war or other armed conflict, it is necessary to consider whether, and if so to what extent, the customary and treaty obligations identified above apply during war or armed conflict. In this regard it is necessary to determine whether such obligations apply as between belligerents, and as between a belligerent State and third States not involved in the conflict.

(a) The operation of treaties during armed conflict

4.34 Notwithstanding Article 73 of the 1969 Vienna Convention on the Law of Treaties, which provides that 'the present Convention shall not prejudge any question that may arise in regard to a treaty from ... the outbreak of hostilities between States, it is now generally accepted that the outbreak of an armed conflict "does not *ipso facto* terminate or suspend the operation of treaties in force between the parties to the armed conflict".[294] Moreover, a state of armed conflict "does not entitle a party unilaterally to terminate or to suspend the operation of treaty provisions relating to the protection of the human person, unless the treaty provides otherwise,"[295] and, as regards the outbreak of an armed conflict between some of the parties to a multilateral treaty, "does not *ipso facto* terminate or suspend the operation of that treaty between other contracting States or between them and the States parties to the armed conflict."[296] Treaties establishing international organizations, such as the Constitution of the WHO, are considered not to be affected by the existence of an armed conflict between any of its parties.[297] Accordingly, Principle 24 of the 1992 Rio Declaration, which provides that

> "Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in time of armed conflict and cooperate in its further development, as necessary"[298],

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[294] Institut de Droit International, Resolution of the Helsinki Session (1985), "The effects of armed conflicts on treaties", Art. 2, in *Tableau des Resolutions adoptées (1957-1991)*, (1992), pp. 174-75.

[295] *Id.*, Art. 4.

[296] *Id.*, Art. 5.

[297] *Id.*, Art. 6.

[298] See also Principle 26 of the 1972 Stockholm Declaration ("Man and his environment must be spared the effects of nuclear weapons and all other means of mass destruction"); 1982 World Charter for Nature ("Nature shall be secured against degradation caused by warfare or other hostile activities", and "military activities damaging to nature shall be avoided").

must be interpreted as requiring States to respect those rules of international law which provide protection for the environment in times of armed conflict (as well as in times of peace). This approach is consistent with the rules of environmental protection provided by Articles 35 and 55 of 1977 Geneva Protocol I. The support for the view that international obligations for the protection of human health and the environment survive the outbreak of hostilities is further reflected by the relevant provisions of Agenda 21, which called on the international community to consider measures in accordance with international law "to address, in times of armed conflict, large-scale destruction of the environment that cannot be justified under international law."[299] Both the UNCED texts imply that treaties protecting the environment should, as a general principle, continue to apply in times of war and other armed conflict. This conclusion can also be drawn from UN General Assembly resolution 47/37, which stressed that the destruction of the environment, not justified by military necessity and carried out wantonly, was "clearly contrary to international law".[300] The General Assembly further urged States to "take all measures to ensure compliance with the existing international law applicable to the protection of the environment in times of armed conflict."

4.35 In the absence of a clear general rule it is nevertheless appropriate to consider the provisions of individual treaties. A review indicates that the vast majority of treaties which aim to protect human health and the environment are silent on the question of their effect during war and other armed conflict. A small minority of such treaties provide exceptions to the general rule of silence on the point, and even in respect of these treaties practice is not uniform.

4.36 Some treaties (such as those establishing rules on civil liability for damage) include provisions excluding the operation of their provisions to damage occurring as a result of war and armed conflict.[301] Other treaties include provisions permitting their total or partial suspension at the instigation of one of the Parties.[302] Still other treaties would

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[299] *Agenda 21*, Chapter 39, para. 39.6(a), A/CONF.151/ L.3.add.39, 11 June 1992.

[300] GA Res. 47/37 on Protection of the Environment in Times of Armed Conflict, 25 November 1992.

[301] Convention on Third Party Liability in the Field of Nuclear Energy, 29 July 1960, 956 *UNTS* 251; Art. 9; Convention on Civil Liability for Nuclear Damage, 29 May 1963, 1063 *UNTS* 265; Art. IV(3)(a); International Convention on Civil Liability for Oil Pollution Damage, 29 November 1969, 973 *UNTS* 3; Art. III(2)(a); International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 18 December 1971, 11 *ILM* 284 (1972); Art. 4(2)(a) (which also does not apply to oil from warships used on non-commercial service); 1977 Civil Liability Convention Art. 3(3); Convention on the Regulation of Antarctic Mineral Resource Activities, 2 June 1988, 27 *ILM* 868 (1988); Art. 8(4)(b) (if no reasonable precautionary measures could have been taken); and ILC Draft Articles on International Liability for Injurious Consequences Arising Out of Acts not Prohibited by International Law Art. 26(1)(a).

[302] International Convention for the Prevention of Pollution of the Sea by Oil, 12 May 1954, 327 *UNTS* 3. Art. XIX(1), allowing parties to suspend operation of whole or part of Convention in case of war or other hostilities if they consider themselves affected as a belligerent or as a neutral, upon notification to the Convention's Bureau.

appear not to apply during military hostilities since their provisions do not apply to certain military operations in peacetime operations.[303] In the other direction, however, are treaties which are specifically applicable to certain activities which may be associated with hostilities,[304] or which implicitly apply during hostilities.[305] These limited examples (which cover nuclear accidents, oil pollution, etc) may be considered to create exceptional rules which expressly deviate from the general rule identified above, according to which treaty (and customary) obligations to protect human health and the environment apply in peace and in war.

4.37 The silence of the great majority of treaties intended to protect human health and the environment allows the conclusion that they are designed to ensure environmental protection at all times, in peace and in war, unless expressly excluded.[306] This conclusion is justified also by the fact that these treaties, by their terms and overall purpose, establish international obligations which are of "essential importance" for the safeguarding and preservation of human health and the environment (*supra*. para. 4.3).

4.38 In considering the legal effect of human health and environmental protection treaties when an armed conflict occurs, it is also appropriate to distinguish between two types of conflict: those of an international character, and those of a non-international character. In the case of the former, it is further necessary to distinguish between the legal situation as between belligerents, and the legal situation between belligerents and States which are not involved in the international armed conflict.

(i) Non-international armed conflict

4.39 A State may not invoke a non-international armed conflict to terminate or suspend the application of a treaty. War or armed conflict are not identified by the 1969 Vienna Convention on the Law of Treaties as grounds for suspending or terminating a treaty. Accordingly, the use of a nuclear weapon in a civil war which had adverse consequences on human health and the environment would continue to be subject to the obligations of

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303 1972 London Convention, *supra* note 245. Art. VII(4) (non-applicability of Convention to vessels and aircraft entitled to sovereign immunity under international law).

304 Protocol for the Prevention of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft, 16 February 1976, which generally prohibits dumping of materials produced for biological and chemical warfare (Annex 1, Section A, para. 9); and Protocol for the Prevention of Pollution of the South Pacific Region by Dumping, 25 November 1986, *IELMT* 986:87A; which prohibits special dumping permits from being granted in respect of materials produced for biological and chemical warfare (Art. 10(1) and (2) and Annex I, Section A, para. 6).

305 International Convention for the High Seas Fisheries of the North Pacific Ocean, 9 May 1952, 205 *UNTS* 65, which provides that Commission decisions should make allowance for, *inter alia*, wars which may introduce temporary declines in fish stocks (Art. IV(2)).

306 1959 Antarctic Treaty *supra* note 291, (Art. I(1)); 1988 CRAMRA, (Art. 2).

relevant treaties, including those indicated above which specifically address the protection of human health and the environment.

4.40 Moreover, international practice has tended to adopt a restrictive approach in applying the principle of *rebus sic stantibus* (see Article 62 of the 1969 Vienna Convention), which should not be invoked in the case of a civil war involving the use of weapons which violate treaties for the protection of human health and the environment. This is appropriate given the nature of the international obligation in question (the protection of human health and the environment), which establishes rules of protection for the benefit of individual states as well as the international community as a whole. It is difficult to justify the invoking of the clause in the case of a non-international armed conflict, other than in the exceptional circumstances provided by Article 62 of the 1969 Vienna Convention.

(ii) International armed conflict

4.41 The 1969 Vienna Convention is also silent about the status and legal effect of treaties when an international armed conflict occurs. Traditionally, the view had been taken that as regards legal relations between belligerent parties their respective obligations under bilateral and multilateral treaties in force at the outbreak of hostilities were suspended, unless they had been adopted in consideration of that conflict. Recently, however, there has been growing support for the view that certain categories of treaty obligations, even as between belligerents, are not suspended during war or armed conflict.[307] This rule is confirmed by the writings of jurists.[308] The Institut de Droit International adopted a Resolution expressing the view that a treaty will continue to apply unless it limits military objectives:

> "Les traités restés en vigueur et dont l'exécution demeure, malgré les hostilités, pratiquement possible, doivent être observés comme par le passé. Les Etats belligérants ne peuvent s'en dispenser que dans la mesure et pour le temps commandés par les nécessités de la guerres"[309]

4.42 As regards treaty obligations between parties to a conflict and third States, the obligations arising from bilateral treaties are not affected by the state of war or armed conflict, unless performance of the obligations thereunder is rendered impossible. This general rule is subject to the exceptions expressly provided by a particular treaty,

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[307] *Supra*. para. 4.34.

[308] L. Oppenhein, *International Law*, Vol. II, 7th ed. H. Lauterpacht, ed., (1952), 304; A.D. McNair, *Law of Treaties* (1961), 705; C.B. Hurst, 'The Effect of War on Treaties', 2 *BYIL* (1924), 37 at 41.

[309] Art 4, 6 *Ann.I.D.I.* 587; see also Arts. 7-11; cited in R. Tarasofsky, "Legal Protection of the Environment During International Armed Conflict", XXIV *NYIL* 17 (1993), at 63.

including those allowing for a right of unilateral denunciation and the application of clauses relating to *rebus sic stantibus* or *non adimpleti contractus*. Moreover, it is submitted the validity of treaties for the protection of human health and the environment governing relations between belligerent States and third States which are not parties to an armed conflict will not be affected by the conflict.

4.43 This approach is not affected by application of the law of neutrality (*supra*. para. 3.58), which does not preclude the possibility that other obligations of the international law of peace continue to apply. Damage to human health or the environment of a neutral State, even if it results from an act of war committed by a belligerent State, is regulated by obligations of international law for the protection of human health and the environment. As confirmed by the general rules of international law governing State responsibility which do not allow exonerations for armed conflict (*infra*. paras. 5.1-5.3), no exceptions apply to military activities of belligerent States.

4.44 As a general matter, therefore, the outbreak of war or other armed conflict should not be considered to automatically suspend or terminate those treaties between the parties to a conflict which are intended to protect human health and the environment and which do not exclude their application in time of war. Such treaties continue to apply where they are in force between one or more parties to a conflict and third States.

(b) Customary law

4.45 There are no reasons to justify a different conclusion in respect of obligations arising under customary law or by acts of international organisations (*supra*. paras. 4.17-4.20 and 4.23-4.29) Certainly as regards relations between belligerent States and third States the existence of a war or armed conflict will not limit or otherwise affect the obligations imposed by customary norms protecting human health and the environment. Accordingly, the customary obligation reflected in Principle 21/Principle 2 would be violated should the adverse consequences for human health and the environment resulting from the use of a nuclear weapon be felt in a third state or in an area beyond national jurisdiction would be in violation.

(c) Conclusion

4.46 It therefore follows that, as a general matter, the use of a nuclear weapon by a State in war or other armed conflict must comply with treaty and other obligations under international law, including the WHO Constitution, which are intended to protect human health and the environment. Where an obligation is of "essential importance" for the safeguarding and preservation of human health and the environment the application of this rule becomes even more strict.

SECTION C

Any violation by a State of these obligations under international law gives rise to its international responsibility and liability

5.1 The use of a nuclear weapon by a State in violation of an international legal obligation for the protection of human health or the environment gives rise to the international responsibility of that State.[310] The principle that a breach of an international legal obligation under treaty or customary law, or perhaps even general principles of law, creates a further obligation, or a liability,[311] to make reparation is also well established. As the PCIJ stated in the *Chorzow Factory* case:

> it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation. In judgment no. 8 (1927) (PCIJ, Ser. A,, No. 9, p.21) ... the Court had already said that reparation was the indispensable complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself.[312]

5.2 A State which uses a nuclear weapon in violation of its international legal obligation to protect human health and the environment will be under an obligation to make reparation for the consequences of the violation. This arises from a principle of general application, and there is no reason why violations relating to human health and environmental obligations should be subject to a different approach. The general principle is clearly expressed in the judgment of the *Chorzow Factory (Indemnity)* case, where the PCIJ stated that

> The essential principle contained in the actual notion of an illegal act - a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals - is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible payment of a sum corresponding to the value which a restitution in kind would bear; the award if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it - such are the principles which should serve to determine the amount of

[310] ILC Draft Articles on State Responsibility, Art. 1, [1977] II *Ybk ILC* (UN Doc. A/CN.4/302).

[311] See also UNCLOS Article 139, and UNCLOS Article 235 which provides that States are "responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law."

[312] 1928 PCIJ, *Series A*, No. 17, at p. 47.

compensation due for an act contrary to international law.[313]

5.3 In the event that the use of a nuclear weapon should cause damage to human health and the environment, especially in a third State not involved in the conflict, financial reparation should cover the costs associated with material damage to environmental resources (pure environmental damage) and consequential damage to people and property (consequential environmental damage), including restoration or reinstatement. This approach has been confirmed by Security Council resolution 687/1991, which reaffirmed that Iraq was liable under international law for, *inter alia*, 'environmental damage and the depletion of natural resources' resulting from the unlawful invasion and occupation of Kuwait.[314] Violations of international law arising from the use of a nuclear weapon would also give rise to the responsibility of the concerned State, together with the obligation to make reparation. In the case of an armed conflict resulting from the use of one or more nuclear weapons it will be virtually impossible to provide adequate financial reparation, providing a further compelling reason for concluding that any use of a nuclear weapon must, by virtue of its effects on human health and the environment, be illegal under international law.

5.4 International responsibility may also trigger the criminal liability of a State (and any person associated with a decision to use a nuclear weapon should be on notice that he or she will also be subject to criminal liability). According to the ILC "a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas" should be categorized as an international crime, or delict.[315] The use of a nuclear weapon causing massive damage to human health or the environment *anywhere* would, it is submitted, constitute an international crime, and any member of the international community would have standing to challenge the act, since it would injure the rights of all States and members of the international community irrespective of where the damage to human health or the environment was actually felt.[316]

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313 1927 (PCIJ) *Series A*, No. 17, p. 47.

314 Security Council Res. 687/1991 of 3 April 1991, 30 *ILM* 847 (1991).

315 *Supra*, note 219.

316 See also ILC Draft Code of Crimes Against the Peace and Security of Mankind, Report of the ILC on its 43rd session, 30 *ILM* 1584 (1991), especially Draft Article 26 (stated to apply in times of peace as well as during armed conflict) provides that an individual who 'wilfully causes or orders the causing of widespread, long term and severe damage to the natural environment' would be guilty of a crime. Draft Article 22 provides that an individual who employs methods or means of warfare 'which are intended or may be expected to cause widespread, long-term and severe damage to the natural environment' would be guilty of an exceptionally serious war crime.

PART III

SUMMARY OF CONCLUSIONS

6.1 For the reasons sets out in these Written Observations, it is submitted that:

(I) **The WHO is competent to request an Advisory Opinion from the Court on the question and the Court is competent to and should give its Opinion on the question.**

(A) The WHO's request for an Opinion fulfils the conditions of Article 96(2) of the UN Charter.

(B) The WHO is acting in accordance with its Constitution.

(C) The practice of the WHO under its Constitution confirms its competence over matters relating to the effects on human health and the environment of ionising radiation resulting from the use of nuclear weapons, since:

(a) the WHO is competent to act in the field of environmental protection;

(b) the WHO is competent to act in matters relating to ionising radiation;

(c) the WHO is competent to address the health and environmental consequences of the use of weapons;

(d) the question of the legality of the use of nuclear weapons is within the framework of the WHO's activities;

(e) the WHO is competent to act on matters concerning the development and application of international law relating to human health and the environment;

(D) The competence of the WHO to request this Opinion does not derogate from the principle of speciality.

(E) The Court should give the Advisory Opinion requested by the WHO.

(II) **Any use of a nuclear weapon violates international law of armed conflicts.**

(A) Any use of a nuclear weapon is subject to international law, including the rules relating to armed conflicts:

(a) any use of a nuclear weapons is subject to general international law;

(b) any use of a nuclear weapons is subject to the international law of armed conflicts;

(c) any use of a nuclear weapon is subject to the 1977 Geneva Protocol I;

(d) nuclear weapons are subject to rules of international law specifically prohibiting their use; and

(e) any use of a nuclear weapon is subject to and would violate the WHO Constitution.

(B) Any use of a nuclear weapon violates the international law of armed conflicts:

(a) any use of a nuclear weapon violates international law by reason of its quantitative and qualitative effects, which violate the relevant rules of international law that:

(i) limit the means of attacking the enemy;

(ii) prohibit direct or indirect attacks on civilian targets;

(iii) establish a permanent obligation to distinguish between combatants and non-combatants;

(iv) prohibit direct or direct attacks against health services;

(v) prohibit the use of chemical or poisonous weapons or weapons which have indiscriminate effects;

(vi) prohibit the use of weapons which render death inevitable or cause unnecessary suffering;

(vii) prohibit violations of the territorial sovereignty of third States;

(viii) prohibit causing "widespread, long-term and severe damage to the environment";

(ix) require respect for the principles of proportionality and humanity; and

(x) prohibit crimes against humanity or genocide.

(c) The use of nuclear weapons violates international law irrespective of the circumstances in which they are used.

(d) The use of nuclear weapons cannot be justified by international law in any

circumstances, in particular by reason of self-defence, reprisal, or state of necessity.

(C) The relevant rules of international law prohibiting the use of nuclear weapons apply to all States.

(III) Any use of nuclear weapons violates international law for the protection of human health and the environment and the protection of human rights.

(A) The use of nuclear weapons is subject to international law for the protection of human health and the environment, and protection of fundamental human rights.

(B) The use of nuclear weapons violates international law for the protection of human health and the environment, and fundamental human rights, by increasing levels of radiation in the environment which:

(a) do not respect national boundaries and violate the sovereignty and territorial integrity of third States;

(b)) violate the general obligation not to cause damage to human health and the environment outside its territory or other areas subject to its jurisdiction or control;

(c) violate specific obligations not to cause significant damage to human health and the environment anywhere, including in particular air quality, biodiversity, freshwater resources; the marine environment, and cultural and natural heritage; and

(d) violate fundamental human rights.

(C) International law for the protection of human health and the environment and for the protection of human rights is applicable during armed conflict.

(IV) Any use of nuclear weapons by a State entails its responsibility under international law and its liability to make reparation.

6.2 Accordingly, and for the reasons set out in these Written Observations it is submitted that the International Court of Justice should give an Advisory Opinion which states:

(A) **that the World Health Organisation is competent to request an Advisory Opinion from the International Court of Justice on this question, and that the Court is competent to and should give an Advisory Opinion on the question submitted;**

(B) **that any use of a nuclear weapon by a State would violate its obligations under international law as reflected in the rules of international law concerning methods and mean of warfare (*jus in bello*) and neutrality, ALTERNATIVELY that the use of nuclear weapons must not violate applicable rules of international law concerning methods and mean of warfare (*jus in bello*) and neutrality;**

(C) **that any use of a nuclear weapon by a State would violate its obligations under international law as reflected in the rules of international law for the protection of human health and the environment and fundamental human rights, ALTERNATIVELY that the use of nuclear weapons must not violate applicable rules of international law for the protection of human health and the environment and fundamental human rights;**

(D) **that any use of a nuclear weapon by a State would constitute a crime against humanity, ALTERNATIVELY that the use of nuclear weapons in violation of international constitutes a crime against humanity; and**

(E) **that any use by a State of a nuclear weapon gives rise to its international responsibility, ALTERNATIVELY that the violation by a State of its obligations under international law relating to the use of nuclear weapons gives rise to its international responsibility.**

Table of Annexes

Written Observations Submitted by the
Government of Solomon Islands

ERRATA

1. p. 77, par. 4.3, line 6: For "Article 19 (1) (d) of the ILC's draft Articles" read "Article 19 (3) (d) of the ILC's draft Articles".

2. p. 77, par. 4.3, line 9: Insert "3.69 and 3.70" after "paras. ".

3. p. 86, note 257: For "paras. 10 and 418" read "paras. 101 and 418".

4. p. 86, note 259: For "res. 2398 (XXII)" read "res 2398 (XXIII)".

5. p. 86, note 262: Last line of the note, for "environment" read "atmosphere".

6. p. 87, note 269: Add the words "adopt laws and regulations to" before "prevent".

7. p. 88, note 273: for "note 224" read "note 248".

8. p. 89, note 286: For "note [INSERT]" read "note 224".

25 August 1994