

Written Statement of the Government of Nauru

INTERNATIONAL COURT OF JUSTICE

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

(Request for an Advisory Opinion)

MEMORIAL
OF THE GOVERNMENT OF
THE REPUBLIC OF NAURU
I

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**Memorial
in support of the
Application by the World Health Organization
for an
Advisory Opinion by the International Court of Justice
on the Legality of the Use of Nuclear Weapons
Under International Law, including the W.H.O. Constitution***

Question Presented

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

Summary

This Memorial will answer the question presented in the affirmative. It will argue that, because of the uniquely deadly nature of nuclear weapons, their use would violate fundamental principles of *jus in bello*, as embodied in both widely ratified treaties and customary international law, including the principles of discrimination, proportionality, necessity, humanity, neutrality, environmental security, and non-use of poison or analogous materials.

Introduction

Two clusters of issues dominate inquiry into the question presented to the Court for an Advisory Opinion: (1) Should the Court respond to such a question bearing so centrally on the security policy of nuclear weapon States, considering that its source is the World Health Organization (WHO)? In effect, does the WHO possess the legal authority to raise such a question, and is this authority well enough grounded that the Court should not rely on its discretion and decline to make a response? (2) Should, the Court, satisfied that it is appropriate—even mandatory—to respond to the question posed by the WHO, reach the conclusion that the use of nuclear weapons is inherently violative of international law, thereby making any and every use illegal? The alternative view is that in the absence of an explicit treaty of prohibition, the legality of nuclear weapons depends on the context of their use, and that their use cannot be categorically declared to be illegal.

These are complex and weighty concerns, but this Memorial will seek to convince the Court that existing international law requires a full response to the WHO question as posed and that the proper response is for the Court to advise that any and every use of nuclear weapons, certainly any known anticipated use of such weapons, would violate international law.

The arguments to support these two points are set forth in detail below. However, each can be briefly prefigured, in this Introduction, in their essential attributes at this stage.

By virtue of its Constitution, the World Health Organization is entrusted with the central task of promoting and protecting the health of humanity, including the avoidance of present and future health

*This Memorial is largely based upon a study conducted by an international group of lawyers lead by Peter Weiss (Esq.), Prof. Burns H. Weston, Prof. Richard A. Falk and Prof. Saul H. Mendlovitz.

¹I.C.J. Order, General List No. 93, 13 September 1993, citing request for advisory opinion in Resolution WHA 46.40, adopted by the Forty-Sixth World Health Assembly on 14 May 1993.

catastrophes. There is no doubt that most contemplated and characteristic uses of nuclear weapons pose catastrophic health problems, and on an unprecedented scale. Of course, it is possible to conceive of uses of nuclear weapons that might not pose such a challenge to health—for example, the detonation of an as yet uninvented "clean" nuclear device in an extremely limited traditional battlefield setting. But, as will be argued, the disposition of nuclear weapons to cause mass destruction and long-range life-destroying radiation is so overwhelming as to make the prospects for medical catastrophe virtually inevitable and consequently supportive of the *necessary* link between the WHO mandate to protect human health and *any* use of nuclear weapons. To insist that legal assessment must wait until after nuclear weapons have been physically used poses such a high risk of catastrophe as to be unacceptable. And to dwell on the possibility that some essentially isolated uses of nuclear weapons are permissible or that they may be permissible in certain narrowly defined circumstances is to trivialize arguably the greatest of all threats to human civilization and planet Earth itself, making the question of use a matter of multiple, separate governmental interpretations, with the consequent precedents being almost certainly understood in a variety of self-serving ways. Only an absolute ban on use provides any reasonable hope of protecting humanity against the eventuality of having health systems fundamentally—even irretrievably—disrupted and overwhelmed.

Yet, we realize that it is not enough to claim an absolute prohibition only on the basis of likely policy consequences. It is necessary to ground this claim in law as well, and notwithstanding that, at the outset, there is the difficulty of overcoming the resolve of several States, now stretching over half a century, to rely on nuclear weapons for their security. The nuclear weapon States, it is true, cannot be presumed to have given their consent to such a legal prohibition on use. But the issue for the Court is whether, despite this practice of "nuclear deterrence" by a minority of States and despite the absence of an explicit treaty ban, international law prohibits the use of nuclear weapons, either from the inception of the nuclear age or as a result of formation during its course.

This Memorial contends that such a rule antedated 1945, but in any event, that a specific rule of prohibition has emerged with respect to the use of nuclear weapons in the course of the last fifty years. It will be argued that the customary international law of war (*jus in bello*), embodying at its core a notion of moderateness in relation to the instruments of war, prohibits the use of *any* weapon or tactic that possesses the properties that nuclear weapons, in all their variety, characteristically possess—namely, indiscriminateness, failure of proportionality, inhumanity, environmental insecurity, and toxicity. Such features make any use of nuclear weaponry, certainly any known anticipated use, *per se* illegal under international law.

It will be argued also, both in reinforcement and in the alternative, that the organized international community has passed definitive legal judgment on nuclear weaponry in three main forms. First, in a lengthy series of General Assembly resolutions that have confirmed the illegality of any use of nuclear weapons. Second, in the weight of scholarly opinion from all parts of the world which has supported the existence as well as the emergence of such an absolute norm of prohibition. Third, in the "dictates of the public conscience" by way of diverse expressions of some of the most significant elements of civil society.

It is significant that this evidence of illegality has been accumulated largely during the Cold War when the doctrine of nuclear deterrence held sway, guiding the policies of both superpowers and based on an implied threat of use. It is our view that the distinction between possession and use is relevant to the current status of international law, making use inherently illegal, while the legal status of possession remains to be determined. The question presented here concerns use only.

Several linked developments strengthen the legal argument that any use of nuclear weapons would be illegal under international law:

- (a) the ending of superpower confrontation, eliminating the strategic rationale for mutual deterrence;
- (b) the mounting dangers of nuclear proliferation, adding complexity to efforts to prevent nuclear war and therefore giving renewed importance to confirming the existence of a clear prohibition on use as already embodied in international law;
- (c) the increasing realization of complexity and fragility arising from the growing interdependence and interpenetration of international life, making it prudent and beneficial, as in matters of environmental protection, to develop unconditional rules of prohibition (partly as a reflection of uncertainty of the effects associated with actual use, partly because of the difficulties of relying on interpretation in a highly decentralized and diverse community of sovereign States);
- (d) the accumulating evidence that the negative properties of nuclear weapons cannot be sufficiently controlled to escape legal condemnation, as reflected in the growing anti-nuclear consensus among the majority of States, in the "teachings of the most highly qualified publicists of the various nations" and in the "dictates of the public conscience" as expressed by the leading elements of civil society; and
- (e) the evident determination of the world community to abolish all weapons of mass destruction.

Jointly and severally, these developments help to establish a solid legal foundation for a finding that any use of nuclear weapons is and should now be prohibited in international law, although such a finding can be clarified and made more authoritative by a treaty or by a decision by this Court that reaches similar conclusions.

I. THE MEDICAL DIMENSION

No plague, no epidemic, no environmental health hazard in the history of the world has risen to the level of risk posed by a nuclear holocaust. The nuclear question, the question of how to prevent the holocaust, is, as Lord Russell said in 1955, "the most important question men have ever had to decide in the whole history of the human race."²

The first session of the United Nations General Assembly, held in London in January 1946, just four months after the only two nuclear bombs ever used in earnest were dropped on Hiroshima and Nagasaki, recognized this central fact of the current era by addressing its first substantive resolution to the danger of nuclear war.³ The World Health Organization, at whose request the question of the

² Quoted in E. P. Thompson, *OUT OF APATHY* (1960).

³ G.A. Res. 8(1), U.N. GAOR, 1st Sess. (1946).

legality of the use of nuclear weapons is pending before this Court, has repeatedly expressed its concern about the effects of nuclear war on the health and, indeed, the survival of the human race."

The introduction to WHO's classic study, *Effects of Nuclear War on Health and Health Services* (2d ed. 1987), summarizes the nature and effects of nuclear weapons in the following terms, at p. 7: Quantitatively, nuclear weapons are vastly more powerful than conventional weapons. Atom bombs of the type used at Hiroshima and Nagasaki represented an increase from tons of trinitrotoluene (TNT) to the equivalent weight of thousands of tons (kilotons, kt). Hydrogen bombs, developed about a decade later, represented an increase from thousands of tons to millions of tons (megatons, Mt). Nuclear weapons have now been amassed throughout the world to an estimated total of some 15,000 megatons and carry an explosive power 25-50 times as much as in the 1960s. The destructive power of these bombs is such that a single bomb may have an explosive power equal to that of all the conventional explosives used in all wars since gunpowder was invented. The explosive power of all the nuclear arsenals of the world is now about 5000 times greater than that of all the explosives used in the Second World War.

Qualitatively, the difference between nuclear and conventional weapons is of even greater significance than the quantitative difference. In conventional weapons the two most lethal agents are blast and heat. Blast and heat both cause injury and death when nuclear weapons are used, but to an extent thousands of times greater. Nuclear weapons, however, also produce additional lethal effects by radiation. Apart from the direct effects of radiation, the radioactive materials from a nuclear bomb can be transported to a great distance from the site of the explosion, as has recently been demonstrated on a very much smaller scale by the accident at the nuclear power plant at Chernobyl. Moreover, radiation from the fallout may be an obstacle to rescue operations and effective care of injured survivors and have harmful or lethal effects long after the explosion. Its deleterious effects may indeed continue to be felt in future generations, long after hostilities would have ended.

Less quantifiable effects of nuclear war include atmospheric changes detrimental to agriculture and the economy not only in the countries where the war takes place but also in others not engaged in hostilities. Moreover, since the world has never experienced a large-scale nuclear war, other unpredictable direct and indirect effects cannot be excluded. Any assessment of the effects of a nuclear war must therefore be attended by a high degree of uncertainty. However, on the basis of the information derived from the explosions at Hiroshima and Nagasaki, the tests of nuclear weapons and accidents at nuclear power plants, research in radiation physics and biology, and earthquakes, fires, floods, volcanic eruptions, and other natural disasters, it is possible to predict with reasonable accuracy the main effects on people and their environment. Those effects would not be limited to the people of the area where the bombs fell; some of them would be felt by people throughout most of the world.

⁴ See WHA Resolutions 34.38, 36.28 and 40.24, and World Health Organization, *Effects of Nuclear War on Health and Health Services* (2d ed. 1987).

Another authoritative study, by the International Physicians for the Prevention of Nuclear War, winner of the 1985 Nobel Prize, describes the medical effects of nuclear explosions as follows:⁵

Our understanding of the potential human devastation of a single nuclear explosion is rooted in the terrible experience of Japanese citizens in Hiroshima and Nagasaki. But the weapons used in 1945 were tiny in comparison to most of the tens of thousands of warheads that will remain in today's nuclear arsenals even if all of the START and 1991/1992 initiative to reduce the superpowers' nuclear arsenals are fulfilled. A single modern weapon, exploded either intentionally or accidentally over a large city, is capable of slaughtering more than one million people. If a larger number of weapons are exploded in warfare, the overall consequences will include not only short- and medium-term medical injuries but also severe environmental effects, disruption of transportation and the delivery of food, fuel, and basic medical supplies, and possible famine and mass starvation on a global level.

According to a summary of the 1986 Report on the Medical Implications of Nuclear War, published by the Institute of Medicine of the U.S. National Academy of Sciences, "Each successive study of the possible human destruction that would result from a nuclear war—either a limited exchange (were that possible) or a total exchange of existing stockpiles—draws a grimmer conclusion about what the human costs would be. Instead of speculating that the casualties might amount to only a few tens of millions, recent studies have indicated that the casualties are more likely to number a billion or more, and even the survival of human beings on earth has been questioned."

The following descriptions summarize only the immediate injuries resulting from a single explosion of a one-megaton warhead detonated on the ground—the equivalent of 1,000,000 tons of TNT, but less than 1/8000 of the destructive force that will remain after all current arms reduction plans are implemented. The immediate human casualties stem from three different sources of injury: the blast effects of the explosion itself; the burns resulting both from direct exposure to the intense heat generated by the explosion and from the resulting massive fires; and the radiation released by a nuclear detonation, delivered in the form of fallout of radioactive material down wind from the explosion itself. The most important factor in predicting most of these injuries is the distance of human beings from the explosion itself, although other factors including the weather may be critical (on a rainy day the moist atmosphere will absorb more of the heat energy released by the explosion, and burn injuries may be reduced).

To estimate the effects of a nuclear explosion in your own city or town, take any map, pick a location at which the nuclear detonation might take place, and draw four concentric circles, with a radius of 1.5 km, 5 km, 10 km, and 20 km respectively. The summary below describes the nature of the destruction and injuries that will take place within each of those circles. Total numbers of casualties will range from the tens of thousands to more than a million, depending on the population density within the circles.

⁵ International Physicians for the Prevention of Nuclear War, BRIEFING BOOK ON NUCLEAR WAR (1992).

DISTANCE	MEDICAL EFFECTS
Ground Zero:	At ground zero, the explosion creates a crater 92 meters deep and 367 meters in diameter. All life and structures are obliterated.
0 - 1.5 KM:	Within one second, the atmosphere itself in effect ignites into a fireball more than 1 km in diameter. The surface of the fireball (cooler than its center) radiates nearly three times the light and heat of a comparable area on the surface of the sun. The fireball rises to a height of six miles or more. All life below is extinguished in seconds.
1.5 - 5 KM:	The flash and heat from the explosion radiate outward at the speed of light, causing instantaneous severe burns. A blast wave of compressed air follows slightly more slowly, reaching a distance of 5 km in about 12 seconds. From the blast wave alone, most factories and commercial buildings collapse, and small frame and brick residences are destroyed. Debris carried by winds of 470 km/hour inflicts lethal injuries throughout this area. At least 50 percent of people die immediately, prior to any injuries from radiation or the developing firestorm.
5 - 10 KM:	The direct heat radiating from the explosion causes immediate third-degree burns to exposed skin, and the expanding blast wave destroys many small buildings. The combination of heat and blast causes fuel storage tanks to explode. A firestorm begins to develop, as winds and intense heat sweep individual fires together into a single raging conflagration. The firestorm consumes all nearby oxygen, sucking it out of any underground stations and asphyxiating the occupants. Shelters become ovens, and over the ensuing minutes to hours, fatalities are likely to approach 100 percent.
10 - 20 KM:	The shock wave reaches a distance of 15 km approximately 40 seconds after the initial explosion. People directly exposed to the electromagnetic radiation (in the form of intense light) generated by the exploding warhead suffer second-degree burns. Depending on the ability of protective structures to withstand blast and resist fire, total early casualties (killed and injured) may range from 5-50 percent.

Radiation Casualties

In the immediate proximity of the explosion (10 km or less), injuries resulting from radiation exposure have little significance, because most (perhaps all) susceptible individuals will have died from the more rapidly fatal burn and blast injuries. At greater distances, radioactive fallout becomes a major source of short-term and medium-term health problems. Accurate predictions about the location and extent of radiation injuries are much more difficult for burn and blast injuries. The effects of radioactive fallout will depend on such factors as where the nuclear explosion takes place (an explosion in the air above a city will create much less radioactive debris and resulting fallout than an explosion at ground level), whether the local wind patterns that day are carrying fallout over heavily populated areas, and local weather conditions (on a rainy day, radioactive debris will be washed out of the air more rapidly, resulting in more intense fallout over a more localized area). Other important factors are

whether individuals in the area of fallout are able to remain carefully sheltered, especially during the initial days of most intense radioactivity.

For those without effective shielding from fallout, a one-megaton nuclear explosion taking place near the ground will create a lethal radiation zone (450 rad doses in the first 48 hours) of approximately 1300 square kilometers. Serious radiation exposures, producing illness but not generally death, will occur over areas several times larger.

The most important medical problems resulting from acute radiation exposure include: central nervous system dysfunction (especially at very high doses); nausea, vomiting and diarrhea from damage to the gastrointestinal tract, leading to potentially fatal dehydration and nutritional problems; and destruction of the body's capacity to produce new blood cells, resulting in uncontrolled bleeding (because of the absence of platelets) and life-threatening infections (because of the absence of white blood cells). Many affected individuals will not be aware that they have received a potentially lethal radiation dose until days to weeks after the explosion, when the damage to their blood system becomes evident through bleeding from the gums or within their skin, or through uncontrolled infections or unhealing wounds.

Medical Care in the Aftermath of a Nuclear Explosion

Estimates of the ultimate casualties from a medical disaster often depend as much on the resources that are available to treat the victims as on the source of the original injuries themselves. In the case of nuclear explosions near human populations, the barriers to effective medical care will be enormous. The most important of these are the sheer numbers of casualties and the fact that the explosion itself will have destroyed hospitals and other medical facilities and killed or injured most medical personnel. The report of the U.S. Institute of Medicine estimated, for example, that in the United States burn injuries alone would require 142 times as many intensive care units as would be available.

Even for most of those with less severe injuries, however, effective medical care will likely be impossible. For example, many people in the aftermath of a nuclear explosion will have severe nausea and vomiting. Even if highly trained medical personnel are available, there will be no clear way for them to determine whether these symptoms are the result of lethal radiation exposure (in which case hospitalization with intravenous fluids and antibiotics is mandatory), or severe psychological stress with no significant radiation exposure at all (in which case emotional support alone is indicated). Effective use of the scarce medical resources that are available will simply not be realistic.

Conclusion

An understanding of the massive levels of death and irremediable suffering that would result from an explosion of even a single nuclear warhead near a populated area compels a simple conclusion: no such explosion must ever happen—whether by accident, through a terrorist act, or in war.

Prior to the Chernobyl nuclear disaster, expert nuclear scientists estimated that the probability of an accident at that facility was less than one chance in 10,000 years. Even if the odds of any single nuclear warhead exploding near a city were as low as that unrealistic estimate, the

continued existence of tens of thousands of such warheads would make the combined likelihood of such a disaster in the years ahead a near certainty.

The environmental effects of nuclear weapons, directly affecting the health and well-being of the world's populations, have come to be associated in the popular imagination with the theory of "nuclear winter," propounded some ten years ago by a group of distinguished scientists.⁶ This theory, based on mathematical models, assumes a major nuclear exchange on the order of 10,000 megatons between the United States and the then Soviet Union. It predicts that this would result in a mean reduction of 50 percent of the ozone layer in the northern hemisphere and 30 percent in the southern hemisphere. This, in turn, would result in an increase in ultraviolet radiation (UV-B) by a factor of five or more.⁷ A 1975 report, *Long-Term Worldwide Effects of Multiple Nuclear Weapons Detonations*, by the United States National Academy of Sciences, describes the biological effects of such an occurrence in the following terms:

If the upper limits of ozone depletion should be realized (70% reductions), irreversible injury to sensitive aquatic species might occur during the years of increase in UV-B following the detonations. . . .

UV-B exposure inhibits plant growth and development . . . reduces photosynthesis, and influences the pollination behavior of insect species.

Agricultural crops (peas, beans, tomatoes, sugar beets, lettuce and onions) are among the most sensitive plant species to UV radiation . . . [These] would be severely "scalded" and even killed by a 5-10 fold increase in UV-B.

An increase in UV-B would probably lead to an increased incidence of malignant skin tumors in white-coated or piebald animals. The incidence of "cancer-eye" in Hereford cattle is known to increase with both length and intensity of exposure.

For its part, the United Nations General Assembly, in 1958, adopted the Report of the United Nations Scientific Committee on the Effects of Atomic Radiation, which observed that

[r]adioactive contamination of the environment resulting from explosions of nuclear weapons constitutes a growing increment to worldwide radiation exposure. This involves new and largely unknown hazards for current and future populations; these hazards by their very nature are beyond the control of the exposed persons. The Committee concludes that all steps designed to prevent irradiation of human populations will act to the benefit of human health.⁸

⁶ P. Ehrlich *et al.*, NUCLEAR WINTER (1984).

⁷ International Physicians for the Prevention of Nuclear War, LAST AID 282 (1982).

⁸ *Resolution on the Effects of Atomic Radiation*, G.A. Res. 1147(XII), U.N. GAOR, 12th Sess., Supp. No. 18, at 3, (1958).

Later, in 1986, in its own words and referring to the possibility of a "nuclear winter" as a consequence of nuclear war, the General Assembly has observed that the "climatic effects of nuclear war pose an unprecedented peril to all nations, even those far removed from the nuclear explosions, which would add immeasurably to the previously known dangers of nuclear war, without excluding the possibility of all the Earth being transformed into a darkened, frozen planet, where conditions would be conducive to mass extinction."⁹

An exchange of the magnitude contemplated in the nuclear winter scenario is now extremely unlikely, the planet may no longer be reduced, in American essayist Jonathan Schell's memorable words, to "a republic of insects and grass."¹⁰ Nevertheless, the projections of the nuclear winter scientists convey some notion of the severity and duration of the effects of nuclear war on the human and natural environment and, as a consequence, on the health and well-being of humankind itself. Even in the absence of ozone layer depletion, radioactive fallout from a single small-to-medium sized nuclear detonation is bound to affect adversely, in severe ways, not only flora and fauna but the human environment as well.

Since the end of the cold war, a perception has arisen that the danger that nuclear weapons may again be used is past. Unfortunately, this perception partakes more of myth than reality. As of mid-1993, close to 27,000 nuclear warheads remained in the stockpiles of the declared nuclear weapon States (Belarus, China, France, Kazakhstan, Russia, Ukraine, the United Kingdom, and the United States) not counting those in the arsenals of such undeclared States as India, Israel, and Pakistan.¹¹ Public assurances by the leaders of the former Soviet republics are of course encouraging. But even after completion of the reductions contemplated by the arms control agreements currently in effect between the United States and the former Soviet Union there still will exist a stockpile of 10,000 to 20,000 nuclear warheads,¹² representing destructive power of an enormous magnitude (again not counting whatever weapons may be produced in the interim by other undeclared States). Add to this the collapse of central authority and discipline, military demoralization, harsh economic reforms, and ethnic unrest everywhere in the wake of the termination of the Soviet Union, and the potential for a "Yugoslavia with nukes," as former United States Secretary of State James Baker put it,¹³ is apparent.

⁹ *Resolution on the Climatic Effects of Nuclear War, Including Nuclear Winter*, G.A. Res. 41/86H, U.N. GAOR, 41st Sess., Supp. No. 53, at 93, (1989) (140 in favor, 1 against, 0 abstaining). See also *Resolution on the Climatic Effects of Nuclear War, Including Nuclear Winter* (noting the UN Secretary-General's Report on the Study on the Climatic and Other Effects of Nuclear War), 7 December 89, G.A. Res. 43/78D, U.N. GAOR, 43rd Sess., Supp. No. 49, at 95, U.N. Doc. A/43/49 (1989) (145 in favor, 0 against, 9 abstaining).

¹⁰ J. Schell, *THE FATE OF THE EARTH*, ch. I (1982).

¹¹ Natural Resources Defense Council, *NUCLEAR NOTEBOOK* (December 1993).

¹² Center for Defense Information, 12 *THE DEFENSE MONITOR* No. 1 (1983).

¹³ As quoted in T. Friedman, *Soviet Disarray: Noting Uncertainty in New Union, Washington Takes Cautious Path*, N. Y. TIMES, 10 December 1991, at p. A1, col. 4.

Thus, the danger posed by the existence of these omnicidal¹⁴ weapons remains as great if not greater than ever.¹⁵ It takes essentially three forms:

- An accidental launch, triggering a response in kind by the target State.¹⁶ The 1963 Hot Line Agreement¹⁷ and the 1973 Accidents Measures Agreement¹⁸ testify to the recognition of this risk by the United States and the Soviet Union (as it then was).

¹⁴ It is not known who coined the apt adjective "omnicidal" (i.e., "destroying everything") to describe nuclear weapons. The eminent British historian E. P. Thompson used the equally fitting word "exterminism." See E. P. Thompson, *Notes on Exterminism, The Last Stage of Civilization*, in EXTERMINISM AND COLD WAR (1982).

¹⁵ Write McGeorge Bundy, William J. Crowe, Jr., and Sidney D. Drell in REDUCING NUCLEAR DANGER (1993) at 2: "[It] would be dangerously wrong to suppose that the end of the Cold War means an end to nuclear danger Indeed, it is not all clear that the overall level of nuclear danger has gone down [T]here are new visible hazards both in the breakup of the old Soviet Union and in the demonstrated weakness of international efforts to limit nuclear spread." McGeorge Bundy is former National Security Adviser to U.S. President John F. Kennedy. William J. Crowe, Jr., is a former U.S. Chairman of the Joint Chiefs of Staff and currently Ambassador to the Court of St. James. Sidney D. Drell is a leading nuclear weapons scientist and adviser to the United States Government on national security issues.

A recent news account corroborates the foregoing concerns:

Organized crime in Russia has been systematically seeking control of 15,000 tactical nuclear warheads as a way to "hijack the state," an investigative report in *The Atlantic Monthly* says. * * * The report is written by Seymour M. Hersh, a Pulitzer Prize-winning reporter.

It says that 132 pounds of highly enriched uraniums, "enough to make three weapons of Hiroshima size," were seized in April by the Russian security ministry in Izhevsk, 600 miles east of Moscow.

"Of equally great concern are intelligence reports, yet to be confirmed, that weapons-grade plutonium was smuggled from a storage depot in Russia to North Korea," the report says.

Do Warheads Tempt Russia's Mobsters?, N.Y. TIMES, 16 May 1994, at A2, col. 4.

¹⁶ See Swedish Lawyers for Peace, NUCLEAR WAR BY MISTAKE: INEVITABLE OR PREVENTABLE? (Stockholm 1985).

¹⁷ Memorandum of Understanding Between the United States of America and the Union of Soviet Socialist Republics Regarding the Establishment of a Direct Communications Link. Concluded 20 June 1963. Entered into force 20 June 1963. 472 U.N.T.S. 163.

¹⁸ Agreement Between the United States of America and the Union of Soviet Socialist Republics on the Prevention of Nuclear War. Concluded 22 June 1973. Entered into force 22 June 73. 917 U.N.T.S. 85.

- Deliberate resort to nuclear weapons as a military tactic. While it is difficult to imagine any government taking such a fateful decision, it remains a fact that, of the five avowed nuclear powers, only China today adheres officially to a policy of no-first-use.¹⁹
- Use of nuclear weapons by a "terrorist" State or group of individuals, as a form of blackmail, *i.e.*, to achieve a political objective.²⁰ It should be noted, however, that any use of weapons of mass destruction is intended to terrorize the population against which they are used and that many States which do not possess nuclear weapons therefore regard those which do as actual or potential terrorists.

During the days of the cold war, as the two superpowers competed with each other in out-equipping themselves with nuclear weapons, the world lived literally on the brink of catastrophe.²¹ Fortunately, catastrophe never came to pass.

During that dreadful period, the reality of the nuclear standoff—of the MAD policy of "mutual assured destruction"—made it difficult for legal arguments concerning the use of nuclear weapons to find an audience. Today we live in a different world, one in which reliance on nuclear weapons as instruments of policy has been replaced by uncertainty as to their usefulness and, in many quarters, by a desire to eliminate them once and for all. In this climate of opinion, the teachings of international law, which at their best give voice to the common morality of humanity, can make an important contribution to the realization of the dream of a nuclear-weapons free world. They cannot replace disarmament negotiations; they can, however, provide the guidelines to be followed and set the parameters within which such negotiations can occur and bear fruit.

This Memorial recites and discusses the principles of international law relevant to nuclear weapons and warfare. It argues that, under the generally accepted laws of war, the use of nuclear weapons would be, under all circumstances, illegal and prohibited. However, before reviewing these principles of international law, it is necessary to address the competence of the World Health Organization to seek this honorable Court's advisory opinion on the use of nuclear weapons under international law.

¹⁹ See Official Doctrinal Positions of the Nuclear-Weapon States, in *NUCLEAR WEAPONS: A COMPREHENSIVE STUDY* Appendix I (U.N. Sales No. E.91.DX.10, 1991). Russia apparently abandoned its no-first-use doctrine last November 1993, as reported in *Moscow Outlines "Doctrine" for Its Future Military Use*, *N. Y. TIMES*, 3 November 1993, at A11. France, the United Kingdom, and the United States have modified but never abandoned their doctrine of first use under certain circumstances. Other nuclear weapons States have never renounced first use, since they have never admitted possessing such weapons.

²⁰ It is fashionable for the declared nuclear weapon States to refer to other States with nuclear ambitions (e.g., North Korea and Libya) as "terrorist" or "rogue" States. It must of course be recognized that any use of a weapon of mass destruction is an act of terror, and that the linguistic tables will likely be turned when the nuclear "have-nots" are seriously threatened by the nuclear "haves."

²¹ The perception of impending catastrophe was well voiced by United States President Jimmy Carter, in his farewell address to the American nation in 1981: "It is now only a matter of time before madness, desperation, greed or miscalculation let loose this terrible [nuclear] force." *Quoted in N. Humphrey, FOUR MINUTES TO MIDNIGHT* 4 (1982).

II. THE COMPETENCE OF THE WORLD HEALTH ORGANIZATION TO BRING THIS MATTER BEFORE THE INTERNATIONAL COURT OF JUSTICE

Under Article 96(2) of the United Nations Charter, specialized agencies of the United Nations may "request advisory opinions of the Court on legal questions arising within the scope of their activities." Article 76 of the Constitution of the World Health Organization²² and Article X of the Agreement between the United Nations and the WHO (approved by the General Assembly on 15 November 1947) confirms the right of WHO to make such a request, which, pursuant to Resolution 46.40 of the World Health Assembly, WHO's governing body, it has done.²³

That the question here presented is a legal one is evident from its formulation and from the ensuing discussion. It also clearly arises within the scope of WHO's activities. From its earliest days, WHO, the Constitution of which states, in its Preamble, that "[t]he 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," and, in its Article 1, that "[t]he objective of the World Health Organization . . . shall be the attainment by *all* peoples of the highest possible level of health,"²⁴ has been concerned with the relationship between health and peace in general, and the health danger posed by thermonuclear war in particular.

Thus Resolution WHA 34.38, adopted by the Thirty-Fourth World Health Assembly on 22 May 1981, is entitled "The Role of the Physician and Other Health Workers in the Preservation and Promotion of Peace as the Most Significant Factor for the Attainment of Health for All." This resolution, the full text of which is reproduced in Appendix A, requests the Director-General of WHO to establish "a broad and authoritative international committee of scientists and experts for comprehensive study and elucidation of the threat of thermonuclear war and its potentially baneful consequences for the life and health of peoples of the world." It refers, in its Preamble, to ten earlier WHA resolutions concerned with, *inter alia*, "the role of the physician in the preservation and promotion of peace" and "the protection of mankind against nuclear radiation," and it notes "the growing concern of physicians and other health workers in many countries at the mounting danger of thermonuclear war as *the most serious threat to the life and health of all populations*, which is an indication of their increased awareness of their moral, professional and social duty and responsibility to safeguard life, to improve human health, and to use all means and resources for attaining health for all."²⁵

²² Concluded 22 July 1946. Entered into force 7 April 1948. 14 U.N.T.S. 185.

²³ In adopting Resolution 46.40, the World Health Assembly may have been mindful of the words of the Secretary-General of the United Nations in his report to the 47th General Assembly: "I recommend that the Secretary-General be authorized . . . to take advantage of the advisory competence of the [International Court of Justice] and that other United Nations organs that already enjoy such authorization turn to the Court more frequently for advisory opinions."

²⁴ Emphasis added.

²⁵ Emphasis added. As stated by Dr. Egil Aarvik, Chairman of the Norwegian Nobel Committee, on the occasion of the award of the 1985 Nobel Peace Prize to the International Physicians for the Prevention of Nuclear War, "the ancient Hippocratic oath . . . demands a dedication without compromise to the protection of life and health . . . , [including protection against] the dangers to life and health which atomic weapons represent." As

Resolution WHA 34.38 led to the publication, in 1984, of the first edition of the *Report of the International Committee of Experts in Medical Sciences and Public Health on Effects of Nuclear War and Health and Health Services*. In accepting this report, the World Health Assembly, in Resolution WHA 36.28 of 16 May 1983, endorsed "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 the health and welfare of mankind*."²⁴ Additionally, the Assembly requested the Director-General of WHO to give wide publicity to the report and to transmit it to the Secretary-General of the United Nations "with a view to its consideration by the appropriate United Nations and other bodies." Further, it recommended that WHO continue the work initiated by WHA Resolution 34.38. This led to the publication, in 1987, of the second, updated edition of *Effects of Nuclear War on Health and Health Services*.

Thus WHA Resolution 46.40, which forms the basis of WHO's request for the advisory opinion pending before this Court, is not the result of some passing fancy, extraneous to WHO's principal concerns. It constitutes, rather, the culmination of a long line of previous resolutions based on the recognition, in the WHO Constitution, of the intrinsic link between peace and health. It expresses the conviction of the World Health Assembly that nuclear war is not only a health concern, but *the greatest threat to the health and welfare of humankind*. It implements the "moral, professional and social duty" of the world's health workers to "use all means and resources" to prevent thermonuclear disaster and the Assembly's desire to have the conclusions of the International Committee of Experts considered by "the appropriate United Nations bodies and other organizations," of which the International Court of Justice is one.

III. THE LAW OF WAR (*JUS IN BELLO*)

From the beginnings of recorded history, there is evidence of a desire common to many cultures and religions to place some limitations on the instruments of war. It matters little whether this desire emanates from an innate revulsion against excessive cruelty or from a military variant of the Golden Rule: do not do unto your enemy as you would not have your enemy do unto you. The fact is that, long before the codification of the laws of war in such instruments as the Hague and Geneva conventions and protocols, solemn prohibitions against the use of certain types of weapons and ammunition were enacted in many parts of the world.

Thus, the Seventh Book of Manu, the legendary Hindu lawgiver, provides that "[w]hen the king fights with his foes in battle, let him not strike with weapons concealed in wood, nor with such as are barbed, poisoned, or the points of which are blazing with fire."²⁷ Similar prohibitions existed in ancient Greece and Rome²⁸ and are found also in the Koran.²⁹ The notion of chivalry, developed

quoted in *International Physicians for the Prevention of Nuclear War, NOBEL PRIZE SPEECHES AND LECTURES* 4 (Oslo: November 1985).

²⁴ Emphasis added.

²⁷ As quoted in Leon Friedman ed., *THE LAW OF WAR: A DOCUMENTARY HISTORY* 3 (1971) (hereinafter "FRIEDMAN").

²⁸ See Roman authors cited by Hugo Grotius in *DE JURE BELLI AC PACIS* (1925), at Bk. III, Ch. IV[XV], p. 652.

by the Catholic church during the Middle Ages,³⁰ is but another manifestation of the notion of moderation in armed conflict. The Lateran Council of 1139, for instance, prohibited the use of crossbows, calling such use "hateful to God and unfit for Christians."³¹

According to John Keegan, himself a distinguished military historian, the fascination to military historians of the Aztecs, who were formidable warriors, "resides in the extraordinary limitations on their capacity for warmaking that they imposed on themselves, through their religious beliefs, and the restraints those beliefs imposed on their warriors in battle."³² Aztec weapons were designed to wound but not to kill.³³

Grotius, in Chapter XI, Book III, of *De Jure Belli Ac Pacis*,³⁴ which is entitled "Moderation with Respect to the Right of Killing in a Lawful War", quotes with approval Cicero's view that "[t]here are certain duties which must be performed even toward those from whom you have received an injury" and lays down the following rules, among others: "[o]ne must take care, as far as is possible, to prevent the death of innocent persons, even by accident";³⁵ "[c]hildren should always be spared: women, unless they have been guilty of an extremely serious offense; and old men";³⁶ [a]ll useless fighting should be avoided.³⁷

The next significant development in the evolution of *jus in bello* was the promulgation by United States President Abraham Lincoln in Washington, D.C., on 24 April 1863, during the American Civil War, of *Instructions for the Government of Armies of the United States in the Field*, prepared by Francis Lieber and better known as "the Lieber Code."³⁸ This document, which subsequently became the

²⁹ See E. Meyrowitz, PROHIBITION OF NUCLEAR WEAPONS 2 (1990) (hereinafter "E. MEYROWITZ"). See also the bibliography on the history of the laws of war provided by the author at 209 n.2.

³⁰ "Los doctores eclesiásticos, desde Tomás de Aquino en 1266 hasta Francisco de Vitoria en 1557, enseñaron la necesidad de evitar toda *crueles inútil*, el respecto a las *mujeres y niños* y a los *habitantes pacíficos en general*" (The doctors of the church, from Thomas Aquinas in 1266 to Francisco de Vitoria in 1557, taught the need to avoid all *unnecessary cruelty* and to respect *women and children and peaceful inhabitants in general*). D. Antokoletz, DERECHO INTERNACIONAL PUBLICO 434 (4th ed. 1944).

³¹ *Id.*

³² J. Keegan, *A History of Warfare*, 1993, p. 108.

³³ *Ibid.*, p. 114

³⁴ *Supra* note 28, at 722 ff.

³⁵ *Id.*, XI[VIII].

³⁶ *Id.*, XI[IX].

³⁷ *Id.*, XI[XIX]. Grotius explains that, "as the Greeks say, 'an exhibition of strength rather than a combat against the enemy' [is] incompatible both with the duty of a Christian and with humanity itself."

³⁸ For text see FRIEDMAN 158.

basis for the adoption of military manuals by many States³⁹, constituted the first detailed codification of the laws of war. It declares that military necessity does not admit of cruelty, nor of the use of poison or "the wanton devastation of a district" (Article XVI); it insists on the distinction between private citizens and "men in arms" (Articles XXII and XXIII); and proclaims that, in modern wars, "protection of the inoffensive citizen of the hostile country is the rule" (Article XXV) and that "[u]nnecessary or revengeful destruction of life is not lawful" (Article LXVIII).⁴⁰

The Lieber Code was followed five years later by the first multilateral *jus in bello* instrument, the 1868 Declaration of St. Petersburg,⁴¹ signed by the representatives of sixteen European States⁴² plus Persia. This legal instrument, intended "to reconcile the necessities of war with the laws of humanity," forbade the use "of any projectile of less weight than four hundred grammes, which is explosive, or is charged with fulminating or inflammable substances." It declared that "the progress of civilization should have the effect of alleviating, as much as possible, the calamities of war," that "the only legitimate object which States should endeavor to accomplish during war is to weaken the military force of the enemy," and "that this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable."

The Hague Conventions of 1899 and 1907 went considerably beyond the Declaration of St. Petersburg in the specificity of their proscriptions as well as in the geographic diversity of their signatories. Of these conventions, the most important are the 1899 Convention Respecting the Laws and Customs of War on Land (1899 Hague II) and the similarly titled and virtually identical convention of 1907, commonly known as "Hague IV."⁴³

The 1899 Hague Peace Conference adopted three Declarations prohibiting: (1) for a period of five years, the launching of projectiles and explosives from balloons, or by other methods of a similar nature;⁴⁴ (2) the use of projectiles, the only object of which is the diffusion of asphyxiating and

³⁹ E. MEYROWITZ 4.

⁴⁰ For the text of the Lieber Code, see FRIEDMAN 192.

⁴¹ Declaration Renouncing the Use in Time of War of Explosive Projectiles Under 400 Grammes Weight. Adopted at St. Petersburg by the International Military Commission, 11 December 1868. 138 C.T.S. 297 (French), 1 AM. J. INT'L L. SUPP. 95 (1907).

⁴² Great Britain, Austria-Hungary, Bavaria, Belgium, Denmark, France, Greece, Italy, the Netherlands, Portugal, Prussia and the North German Federation, Russia, Sweden, Switzerland, Turkey, and Wurttemberg.

⁴³ Convention (No. IV) Respecting the Laws and Customs of War on Land, with Annexed Regulations ("the 1907 Hague Regulations"). Concluded 18 October 1907. Entered into force 26 January 1910. 205 C.T.S. 277 (French); 2 AM. J. INT'L L. SUPP. 90 (1908). For a side-by-side comparison of the two texts, see D. Schindler and J. Toman eds., THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 69 (3rd rev. and completed ed., 1988) (hereinafter "SCHINDLER-TOMAN").

⁴⁴ Declaration (IV, 1) to Prohibit, for the Term of Five Years, the Launching of Projectiles and Explosives from Balloons, and Other Methods of Similar Nature, adopted 29 July 1899, reprinted in 1 AM. J. INT'L L. SUPP. 153 (1907).

deleterious gases;⁴⁵ and (3) the use of bullets which expand or flatten easily in the human body (commonly known as "dum-dum bullets").⁴⁶

The Preamble to Hague IV states that, in revising and defining the general laws and customs of war, the High Contracting Parties are "animated by the desire to serve . . . the interests of humanity and the ever progressive needs of civilization" and that, although it has not been found possible "to concert Regulations covering all the circumstances which arise in practice . . . [they] clearly do not intend that unforeseen cases should, in the absence of a written undertaking, be left to the arbitrary judgment of military commanders." This is followed by the famous "de Martens Clause" (named after the then Foreign Minister of Russia, Fedor de Martens):

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

The de Martens Clause, it should be noted, was not an historical aberration. Numerous modern-day conventions on the laws of war have ensured its continuing vitality.⁴⁷

The salient features of the "Hague Regulations" annexed to 1907 Hague Convention No. IV are worthy of quotation:

⁴⁵ Declaration (IV, 2) Respecting the Prohibition of the Use of Projectile Diffusing Asphyxiating Gases, adopted 29 July 1899, reprinted in 187 C.T.S. 456, 1 AM. J. INT'L L. SUPP. 159 (1907).

⁴⁶ Declaration (IV, 3) Respecting the Prohibition of the Use of Expanding Bullets, adopted 29 July 1899, reprinted in 187 C.T.S. 459, 1 AM. J. INT'L L. SUPP. 155 (1907).

⁴⁷ For the 1949 versions of the de Martens Clause, see Article 63 of Geneva Convention (No. I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, concluded 12 August 1949, entered into force 21 October 1950, 75 U.N.T.S. 31; Article 62 of Geneva Convention (No. II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, concluded 12 August 1949, entered into force 21 October 1950, 75 U.N.T.S. 85; Article 142 of Geneva Convention (No. III) Relative to the Treatment of Prisoners of War, concluded 12 August 1949, entered into force 21 October 1950, 75 U.N.T.S. 135; and Article 158 of Geneva Convention (No. IV) Relative to the Protection of Civilian Persons in Time of War, concluded 12 August 1949, entered into force 21 October 1950, 75 U.N.T.S. 287. For the 1977 versions, see Article I of Protocol Additional (No. I) to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, concluded 8 June 1977, entered into force 7 December 1978, 1977 U.N.J.Y.B. 95, 16 INT'L LEG. MATS. 1391 (1977) (hereinafter "1977 Geneva Protocol Additional No. I"); Article I of Protocol Additional (No. II) to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, concluded 8 June 1977, entered into force 7 December 1978, 1977 U.N.J.Y.B. 135, 16 INT'L LEG. MATS. 1442 (1977) (hereinafter "1977 Geneva Protocol Additional No. II"). See also the Preamble of the 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, concluded 10 April 1972, entered into force 26 March 1975, 1015 U.N.T.S. 163, the penultimate sentences of which read: "Determined, for the sake of all mankind, to exclude completely the possibility of bacteriological (biological) agents and toxins being used as weapons" and "Convinced that such use would be repugnant to the conscience of mankind and that no effort should be spared to minimise this risk." *Id.* at 166.

Article 22. The right of belligerents to adopt means of injuring the enemy is not unlimited.

Article 23. In addition to the prohibitions provided by special Conventions, it is especially forbidden:

- (a) To employ poison or poisoned weapons;
- (b) To kill or wound treacherously individuals belonging to the hostile nation or army; * * *
- (d) To declare that no quarter will be given;
- (e) To employ arms, projectiles, or material calculated to cause unnecessary suffering; * * *
- (g) To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war . . .

Article 25. The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited.

Article 26. The officer in command of an attacking force must, before commencing a bombardment, except in cases of assault, do all in his power to warn the authorities.

Article 27. In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes.

Following World War I, in 1922, a Commission of Jurists to Consider Amendment of the Laws of War was established by the British Empire, France, Italy, Japan and the United States of America to consider whether "existing rules of international law adequately cover new methods of attack or defense resulting from the introduction or development, since the Hague Conference of 1907, of new agencies of warfare" and, "if not so, what changes in the existing rules ought to be adopted in consequence thereof as a part of the law of nations."⁴⁸

The Commission met in The Hague from December 1922 to February 1923 and adopted the Hague Rules of Air Warfare⁴⁹ which, though never formally adopted beyond the Commission, are generally regarded as having "strong persuasive authority."⁵⁰ Article 22 of the Hague Rules provides that "[a]erial bombardment for the purpose of terrorizing the civilian population, of destroying or damaging private property not of a military character, or of injuring non-combatants is prohibited." In addition, Articles 24 to 26 lay down detailed rules as to the limited circumstances under which aerial bombardment of military targets is permitted.

⁴⁸ FRIEDMAN 435.

⁴⁹ Reprinted in 17 AM. J. INT'L L. SUPP. 245 (1923).

⁵⁰ E. MEYROWITZ 11 (citing Oppenheim and Greenspan).

The next major event in the history of the Laws of War was the adoption in 1925 of the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, ratified or acceded to as of this writing by 131 States.⁵¹ The Geneva Gas Protocol, as it is popularly called, prohibits "the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices." It declares that such use "has been justly condemned by the general opinion of the civilized world" and that the purpose of the Protocol is that "this prohibition shall be universally accepted as a part of International Law, binding alike the conscience and the practice of nations."

In 1938, on the eve of World War II, the League of Nations adopted, without dissent, a Resolution on the Protection of Civilian Populations Against Bombing from the Air in Case of War, stating that "on numerous occasions public opinion has expressed through the most authoritative channels its horror of the bombing of civilian populations" and that "this practice . . . is condemned under the recognized principles of international law."⁵²

In the same year, the International Law Association adopted a Draft Convention for the Protection of Civilian Populations Against New Engines of War based on "the principles of humanity demanded by the conscience of civilization."⁵³ The Draft Convention would have prohibited the bombardment of undefended towns "in all circumstances" (Article 2) as well as "aerial bombardment for the purpose of terrorizing the civilian population (Article 4). In eerily prophetic language, it also would have prohibited "the use, by any method whatsoever . . . of any natural or synthetic substance (whether solid, liquid or gaseous) which is harmful to the human or animal organism by reason of its being a toxic, asphyxiating, irritant or vesicant substance" (Article 7) and of "projectiles specifically intended to cause fires except for use in defence against aircraft" (Article 8).

As is only too well known, in World War II, most of the foregoing general principles as well as specific prohibitions were honored more in the breach than in the observance. Nevertheless, the victorious Allies, in adopting the 1945 Nuremberg Charter⁵⁴, reaffirmed, *inter alia*, that "wanton destruction of cities, towns, or villages, or devastation not justified by military necessity" was a war crime and declared "inhumane acts committed against any civilian population" to be a crime against

⁵¹ Concluded 17 June 1925, entered into force 8 February 1928, 94 L.N.T.S. 65, reprinted in 14 INT'L LEG. MATS. 49 (1975), SCHINDLER-TOMAN 115 (hereinafter "the 1925 Geneva Gas Protocol").

⁵² Adopted 30 September 1938, 1938 LEAGUE OF NATIONS OFFICIAL JOURNAL, 19th Sess. (12-30 September 1938), Special Supp. 182, at 15.

⁵³ SCHINDLER-TOMAN 223.

⁵⁴ Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic, and the Government of the Union of Soviet Socialist Republics of the European Axis and Charter of the International Military Tribunal, concluded 8 August 1945, entered into force 8 August 1945, 82 U.N.T.S. 279. The principles of the Nuremberg Charter were unanimously endorsed by the United Nations General Assembly in Affirmation of the Principles of International Law Recognized by the Charter of Nuremberg Tribunal, adopted 11 December 1946, G.A. Res. 95, 1st Sess., at 1144, U.N. Doc. A/236 (1946), at 1144.

humanity⁵⁵. The Nuremberg principles were reaffirmed in their entirety by the International Law Commission of the United Nations in 1950⁵⁶, thus giving them the imprimatur of the international legal community and countering the occasional criticism of the Nuremberg Charter as "victors' justice."

The four Geneva Conventions of 1949⁵⁷ represent the most complete codification of humanitarian law up to the time of their adoption. They also contain, for the first time, a detailed Convention (No. IV) Relative to the Protection of Civilian Persons in Time of War.⁵⁸

Succeeding years saw the adoption of a number of legal instruments which greatly reinforced the notion of moderateness in the conventional and customary international laws of war. In 1956, the International Committee of the Red Cross adopted Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War.⁵⁹ The Preamble of this instrument speaks of "the limits placed by the requirements of humanity . . . on the use of armed force" and states that "the civilian population shall continue to enjoy the protection of the general rule set forth in Article 1, and of the principles of international law." Article 1 states:

Since the right of the Parties to the conflict to adopt means of injuring the enemy is not unlimited, they shall confine their operations to the destruction of his military resources, and leave the civilian population outside the sphere of armed attack.

In addition, Article 6 provides that "[a]ttacks directed against the civilian population, as such, whether with the object of terrorizing it or for any other reason, are prohibited," followed by a list of specific prohibitions designed to minimize the infliction of harm on non-combatants and including a chapter on "Weapons with Uncontrollable Effects." Article 14 of this chapter provides:

Without prejudice to the present or future prohibition of certain specific weapons, the use is prohibited of weapons whose harmful effects—resulting in particular from the dissemination of incendiary, chemical, bacteriological, radioactive or other agents - could spread to an

⁵⁵..The Nuremberg Charter was adopted two days after the nuclear bombing of Hiroshima, one day before the bombing of Nagasaki. This may explain why the Charter of the International Military Tribunal for the Far East, proclaimed by the Supreme Commander for the Allied Powers on 19 January 1946, defines war crimes merely as "violations of the laws or customs of war" and, unlike the Nuremberg Charter, does not mention "wanton destruction of cities . . . not justified by military necessity" as an example of war crimes. FRIEDMAN 894, 897.

⁵⁶ Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, adopted 2 August 1950: *Report of the International Law Commission Covering its Second Session*, 5 June-29 July 1950, U.N. Doc. A/1316, II Y.B.I.L.C. 374, reprinted in SCHINDLER-TOMAN 923.

⁵⁷ See note 47, *supra*.

⁵⁸ *Id.*

⁵⁹ DRAFT RULES FOR THE LIMITATION OF THE DANGERS INCURRED BY THE CIVILIAN POPULATION IN TIME OF WAR (International Committee of the Red Cross, 2d ed. 1958), reprinted in SCHINDLER-TOMAN 255.

unforeseen degree or escape, either in space or in time, from the control of those who employ them, thus endangering the civilian population.⁶⁰

In 1965, the International Conference of the Red Cross adopted a Resolution on Protection of Civilian Populations Against the Danger of Indiscriminate Warfare,⁶¹ reaffirming the following three principles:

- (1) the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited;
- (2) it is prohibited to launch attacks against the civilian population as such; and
- (3) 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.

Significantly, the resolution added a fourth principle: "The general principles of the Law of War apply to nuclear and similar weapons."

Three-years later, on 12 May 1968, the International Conference on Human Rights convened by the United Nations in Teheran, adopted, by a vote of 67 to none, with two abstentions, a Resolution on Human Rights in Armed Conflict⁶². Emphasizing the continuing importance of the Hague Conventions of 1899 and 1907,⁶³ the Geneva Gas Protocol of 1925⁶⁴ and the Geneva Conventions of 1949,⁶⁵ the resolution requested the Secretary-General to remind all States of their obligations to observe "the existing rules of international law" concerning armed conflicts and made a special point of quoting in full the operative portion of the text of the de Martens Clause.⁶⁶

The following year, the Institute of International Law, meeting in Edinburgh on September 9, 1969, adopted, by 60 votes to one, with two abstentions, a Resolution on the Distinction Between Military Objectives and Non-Military Objects in General and Particularly the Problems Associated with

⁶⁰ Emphasis added.

⁶¹ 20TH INTERNATIONAL CONFERENCE OF THE RED CROSS, RESOLUTIONS 21 (1965).

⁶² Resolution XXIII adopted by the International Conference on Human Rights 12 May 68, U.N. Doc. A/CONF. 32/41, Sales No. 68, XIV 2, reprinted in SCHINDLER-TOMAN 263.

⁶³ See text accompanying notes 43-47, *supra*.

⁶⁴ *Supra* note 51.

⁶⁵ *Supra* note 47.

⁶⁶ See text immediately preceding note 47, *supra*.

Weapons of Mass Destruction.⁴⁷ The attention of the Court is respectfully invited to the following excerpts from this important contribution to the customary law of war:

Considering that, if an armed conflict occurs . . . , the protection of the civilian population is one of the essential obligations of the parties,

Having in mind the general principles of international law, the customary rules and the conventions and agreements which clearly restrict the extent to which the parties engaged in a conflict may harm the adversary,

Having also in mind that these rules . . . have been formally confirmed on several occasions by a large number of international organizations and especially by the United Nations Organization,⁴⁸

Being of the opinion that these rules have kept their full validity notwithstanding the infringements suffered,

Having in mind that the consequences which the indiscriminate conduct of hostilities and particularly the use of nuclear, chemical and bacteriological weapons, may involve for civilian populations and for mankind as a whole,

Notes that the following rules form part of the principles to be observed in armed conflicts by any de jure or de facto government, or by any other authority responsible for the conduct of hostilities:

1. The obligation to respect the distinction between military objectives and non-military objects as well as between persons participating in the hostilities and members of the civilian population remains a fundamental principle of the international law in force. * * *
4. Existing international law prohibits all armed attacks on the civilian population as such * * *
6. Existing international law prohibits, irrespective of the type of weapon used, any action whatsoever designed to terrorize the civilian population.
7. Existing international law prohibits the use of all weapons which, by their nature, affect indiscriminately both military objectives and non-military objects, or both armed forces and civilian populations. In particular, it prohibits the use of weapons the destructive effect

⁴⁷ Adopted 9 September 1969, 53-II ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 358 (1969); SCHINDLER-TOMAN 265.

⁴⁸ See for example the list of pertinent General Assembly Resolutions in Article 1 of the *Final Act of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, 10 June 1977, U.N. Doc. A/32/144 (15 August 77), INTERNATIONAL REVIEW OF THE RED CROSS, No. 197-8, August-September 1977 at 1, reprinted in SCHINDLER-TOMAN 605.

of which is so great that it cannot be limited to specific military objectives or is otherwise uncontrollable . . .

The Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts,⁶⁹ adopted at Geneva on 8 June 1977, represents one of the most recent authoritative confirmations of the ethic of moderateness in *jus in bello*. Article 1.1 restates the de Martens Clause in its traditional form. Article 2(b) defines "rules of international law applicable in armed conflicts" as including, *inter alia*, "the generally recognized principles and rules of international law which are applicable in armed conflict." Article 35 reaffirms that the right of the Parties to a conflict to choose methods or means of warfare is not unlimited and that it is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering; it also adds a prohibition against the employment of methods or means of warfare causing widespread, long-term and severe damage to the natural environment. Article 36 imposes on the High Contracting Parties an obligation to determine whether the employment of new weapons, means or methods of warfare would violate "this Protocol or . . . any other rule of international law. . .". Article 40 provides that "[i]t is prohibited to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on that basis." And Part IV contains extremely detailed rules for the protection of the civilian population, including prohibitions of attacks against the civilian population and the natural environment by way of reprisals (Articles 51.6 and 55.2).

The 1977 Protocol Additional (No. II) to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts⁷⁰ extends the application of the humanitarian rules of warfare to certain non-international armed conflicts and again contains, in its Part IV, detailed rules for the protection of the civilian population.

A concise summary of the chief aspects of the law of war in its humanitarian aspects is contained in *Fundamental Rules of International Humanitarian Law Applicable in Armed Conflicts*, published by the International Committee of the Red Cross and the League of Red Cross Societies in 1978.⁷¹ Its Preamble states:

International humanitarian law is made up of all the international legal provisions, whether of written or customary law, ensuring respect for the individual in armed conflict. Taking its inspiration from the sentiment of humanity, it postulates the principle that belligerents must not inflict harm on their adversaries out of proportion with the object of warfare, which is to destroy or weaken the military strength of the enemy.

International humanitarian law comprises the "law of Geneva", which aims to safeguard military personnel *hors de combat* and persons who do not take part in the hostilities, and the "law of The Hague", which determines the rights of and duties of belligerents in the conduct of operations and limits the choice of the means of harming an enemy.

⁶⁹ *Supra* note 47. Reprinted in SCHINDLER-TOMAN 621.

⁷⁰ *Supra* note 47. Reprinted in SCHINDLER-TOMAN 689.

⁷¹ *International Review of the Red Cross* 248 (1978), reprinted in SCHINDLER-TOMAN 733.

It is doubtless with this perspective in mind that the Secretary-General of the United Nations, in a recent report to the Security Council, noted this honorable Court's recognition in the *Case Concerning Military and Paramilitary Activities in and against Nicaragua*⁷² that the prohibitions contained in common Article 3 of the 1949 Geneva Conventions,⁷³ is law that is "based on 'elementary considerations of humanity' and cannot be breached in armed conflict, regardless of whether it is international or internal in character."⁷⁴

One of the most recent reaffirmations of the basic principles of humanitarian law is contained in the Annex to the Report of the Secretary-General Pursuant to Security Council Resolution 808 (1993), being the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Committed in the Territory of the Former Yugoslavia since 1991⁷⁵ (which, in its Introduction, expresses the view of the Secretary-General that much of the conventional law of war "has beyond doubt become part of customary international law"). Article 3 of the Statute reads in part as follows:

The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

- (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
- (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
- (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings; . . .

THUS the principal instruments of *jus in bello* demonstrate beyond peradventure that, unlike certain other branches of international law, the core content of this branch of the law is unambiguous and unequivocal: moderateness in armed conflict, the community policy desired and accepted worldwide. The applicability of this community-wide policy to the use of nuclear weapons is discussed in the next ensuing section.

⁷² *Nicaragua v. United States*, 1986 I.C.J. 114.

⁷³ *Supra* note 47.

⁷⁴ Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808, S/25704, at 35 n.9.

⁷⁵ *Id.* at 13.

IV. THE LAW OF WAR (*JUS IN BELLO*) PROHIBITS THE USE OF NUCLEAR WEAPONS

The essential teaching of this Section IV, which argues that the physical use of nuclear weapons has violated and would violate in extreme ways the core humanitarian rules of armed conflict, is that *jus in bello*, though never fully complied with any more than any body of law is ever fully complied with, continues as a vital civilizing influence upon the world community's warring propensities and, further, that in this capacity it rules out the use of nuclear weapons.

A. *The Principle of Discrimination*: It is prohibited to use weapons that fail to discriminate between military and civilian personnel⁷⁶

Long before the power of the atom was turned to military use, John Bassett Moore, the first American judge on the Permanent Court of International Justice, referred to the primacy of the principle of discrimination in *jus in bello* as follows:

Among the elementary principles which the development of the modern rules of warfare, running through several centuries, has been designed to establish and to confirm, the principle most fundamental in character, the observance of which the detailed regulations have largely been designed to assure, is the distinction between combatants and non-combatants against injuries not incidental to military operations against combatants.⁷⁷

The *Comprehensive Study on Nuclear Weapons* submitted by the Secretary-General of the United Nations to the General Assembly on 12 July 1980⁷⁸ examines the likely effects of the use of a wide range of nuclear weapons, from 1 kiloton "tactical weapons"⁷⁹ to strategic weapons of moderate yield to "total nuclear war" employing the largest weapons, with yields of up to 20 megatons of destructive power.⁸⁰ It is impossible to read this report without being impressed at the great extent to which the use of nuclear weapons has violated and would violate the *jus in bello* principle of discrimination.

The fission bomb that exploded over Hiroshima on 6 August 1945 was small by today's standards. It had a yield of 12.5 kilotons and today would be considered a "tactical" nuclear weapon. Yet tens of

⁷⁶ The headings of subsections I to VII are borrowed from Bessie Dutton Murray Professor of Law Burns H. Weston's seminal study *Nuclear Weapons Versus International Law: A Contextual Reassessment*, 28 MCGILL L. J. 542 (1983) (hereinafter cited as "WESTON").

⁷⁷ J. B. Moore, INTERNATIONAL LAW AND SOME CURRENT ILLUSIONS AND OTHER ESSAYS 153 (1924).

⁷⁸ United Nations, COMPREHENSIVE STUDY ON NUCLEAR WEAPONS [:] REPORT OF THE SECRETARY-GENERAL, 35 U.N. GAOR, Annex (Provisional Agenda Item 48(b) ch. 4, U.N. Doc. A/35/392 (1980), reprinted as United Nations, DISARMAMENT STUDY SERIES NO. 1 ch. 4 (1981).

⁷⁹ "Tactical nuclear weapons are common terms for those nuclear weapons systems which, by virtue of their range and yield as well as the way they are incorporated in a military organization, have been designed or can be used for employment against military targets in a theater of war." *Id.* at 21.

⁸⁰ Throughout this memorial, the term "nuclear weapons" is used generally to refer to nuclear weapons as weapons of mass destruction. The relevance of the humanitarian rules of armed conflict to "mininukes," i.e., very small tactical weapons with yields of as little as 0.1 kilotons is dealt with in Section VII, *infra*.

thousands of innocent civilians were burned, blasted, and crushed to death at the moment of explosion. The number who died of their injuries within the next three months is estimated at 130,000.⁸¹ The official estimate by the City of Hiroshima of total deaths attributable to this single bomb is 200,000.⁸²

Today's nuclear arsenals contain weapons with yields of up to several megatons, i.e., several hundred times that of the Hiroshima bomb. It has been estimated that, if a ten megaton weapon were exploded over New York City, it would kill seven million people.⁸³

Needless to say, it is impossible to contemplate the use of any weapon in this range other than as a terror weapon, the purpose and effect of which is to kill and maim hundreds of thousands, if not millions, of civilians. It is important, in this connection, to recall the injunction of international law scholar Burns H. Weston to "be clear about the true nature of nuclear weapons, especially in contrast to so-called conventional weapons":⁸⁴

[M]ost nuclear weapons, certainly all in the "strategic" category, are not just "somewhat more destructive", but many thousands or millions of times more powerful than even the largest conventional high-explosive weapons. . . . Unlike conventional weapons, nuclear weapons risk putting an end to civilization as we know it. . . . [T]he majority of nuclear weapons, "tactical" as well as "strategic", differ from conventional weapons in the variety as well as the intensity and scale of their physical effects. The chief characteristic of conventional weapons is their potential for "blast" or "shock" damage, accompanied by some thermal effects (burns and fires). By contrast, nuclear weapons produce "blast" or "shock" damage and, in addition, extended "thermal radiation", "electromagnetic pulse" [EMP] effects, and invisible but highly-penetrating and harmful rays called "initial nuclear radiation" in the form of delayed radioactive fallout across potentially great distances and over extended periods of time. The radiation effects . . . are not unlike . . . the effects produced by chemical and biological weapons as opposed to conventional high-explosive weapons. Finally, in still further contrast to conventional weapons, nuclear weapons, even those with fairly low yields, are capable of harming noncombatants (including civilians and neutral parties) virtually inevitably.⁸⁵

Or as elder statesman George Kennan has written: "Conventional weapons can bring injury to noncombatants by accident or inadvertence or callous indifference; but they don't always have to do it. The nuclear weapon cannot help doing it, and doing it massively, even where the injury is unintended by those who unleash it."⁸⁶

⁸¹ See J. Scbell, *supra* note 10, at 37.

⁸² R. Lifton and R. Falk, *Indefensible Weapons* 40 (1982).

⁸³ T. Stonier, *NUCLEAR DISASTER* 24 (1964).

⁸⁴ WESTON 549.

⁸⁵ *Id.* at 550.

⁸⁶ G. Kennan, *THE NUCLEAR DELUSION* [:] *SOVIET-AMERICAN RELATIONS IN THE ATOMIC AGE* 203 (1982).

A forceful statement of the indiscriminately brutal nature of nuclear weapons is found in the Preamble of the 1967 Treaty for the Prohibition of Nuclear Weapons in Latin America,⁸⁷ popularly known as the Treaty of Tlatelolco, to which, as of this writing, 25 Western Hemispheric States are party. Proclaims the Preamble: "nuclear weapons, whose terrible effects are suffered, indiscriminately and inexorably, by military forces and civilian populations alike, constitute, through the persistence of the radioactivity they release, an attack on the integrity of the human species and ultimately may even render the whole earth uninhabitable."⁸⁸

B. *The Principle of Proportionality*: It is prohibited to effect reprisals which are disproportionate to their antecedent provocations or to legitimate military objectives, or disrespectful of persons, institutions and resources otherwise protected by the laws of war

It follows from the discussion in the preceding subsection that any use of nuclear weapons in response to conventional weapons violates the principle of proportionality. As a leading scholar on the law of nuclear weapons,⁸⁹ writes:

A partir d'un certain niveau, la notion de proportionnalité—et l'idée de licéité qui lui est associée—perd toute signification. Par définition, le principe de proportionnalité est totalement incompatible avec les destructions massives. Il devient inapplicable avant que l'échange des frappes nucléaires n'ait atteint le seuil de la massivité.⁹⁰

But this does not dispose of the more difficult question of the legitimacy *vel non* of a nuclear response to a nuclear attack. In this connection, the overriding norm is that reprisals "must conform

⁸⁷ Concluded 14 February 1967. Entered into force in accordance with Article 28. 634 U.N.T.S. 281.

⁸⁸ See also the Preamble to the South Pacific Nuclear Free Zone Treaty, concluded 6 August 1985, entered into force 11 December 1986, U.N. Doc. CD/633 (1985), U.N. Doc. CD/633/Corr. 2 (1985), and U.N. Doc. CD/633/Annex 4/Rev. 1 (1987), 24 INT'L LEG. MATS. 1442 (1985):

The Parties to this Treaty * * *

Gravely concerned that the continuing nuclear arms race presents the risk of nuclear war which would have devastating consequences for all people

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

⁸⁹ Cf. H. Meyrowitz, *Le Statut des Armes Nucléaires en Droit International*, 25 GERMAN Y. B. INT'L L. 219 (1982).

⁹⁰ *I.e.*: "Beyond a certain level, the principle of proportionality—and the idea of lawfulness associated with it—loses all significance. By definition, the principle of proportionality is totally incompatible with massive destruction. It becomes inapplicable even before the exchange of nuclear blows has reached the threshold of massiveness." H. Meyrowitz, *Le Régime des Armes Nucléaires Selon le Droit de la Guerre*, in *LAWYERS AND THE NUCLEAR DEBATE* 398 (M. Cohen & M. Gouin eds. 1988).

in all cases to the laws of humanity and morality"⁹¹—that is, the infliction of reprisals is subject to all the other principles of humanitarian law. Thus: "civilian populations . . . should not be the object of reprisals," per Article 7 of United Nations General Assembly Resolution 2675 (XXV) on Basic principles for the protection of Civilian Populations in Armed Conflicts;⁹² and "[r]eprisals against protected persons and their property are prohibited," per Article 33 of the 1949 Geneva Convention (No. IV) Relative to the Protection of Civilian Persons in Time of War. Similarly, 1977 Geneva Protocol Additional (I) to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts,⁹³ which several of the nuclear weapon States self-servingly claim does not apply to the use of nuclear weapons,⁹⁴ repeatedly stresses the prohibition of reprisals that fail to meet the test of proportionality: "[r]eprisals against the persons and objects protected by this Part are prohibited" (Article 20); "Attacks against the civilian population or civilians by way of reprisals are prohibited" (Article 51(6)); "[c]ivilian objects shall not be the object of attack or reprisals" (Article 52(1)); "it is prohibited to make [cultural objects and places of worship] the object of reprisals" (Article 53(c)); "these objects" [*i.e.* objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works] shall not be made the object of reprisals" (Article 54(2)(4)); "Attacks against the natural environment by way of reprisals are prohibited" (Article 55(2)); "It is prohibited to make any of the works, installations or military objectives mentioned in paragraph 1 [*i.e.*, works or installations containing dangerous forces, namely dams, dikes, and nuclear electrical generating stations] the object of reprisals" (Article 56(1)(4)). "In international armed conflicts," write British international law scholars Clive Parry and John Grant, "reprisals are now unconditionally prohibited against all categories of protected persons as enumerated in the four [1949] Geneva Conventions on the Laws of War."⁹⁵

In the *Naulilaa Incident Arbitration*⁹⁶, "generally considered to be the most authoritative statement of the customary law of reprisals,"⁹⁷ the Arbitral Tribunal held, *inter alia*, that reprisals are limited by considerations of humanity⁹⁸ and that the measures adopted must not be excessive, in the

⁹¹ Oxford Manual, Article 86. The Oxford Manual was adopted unanimously by the Institute of International Law on 9 September 1880. Its text is reprinted in SCHINDLER/TOMAN 35 ff.

⁹² Adopted 9 December 1970.

⁹³ *Supra* note 47.

⁹⁴ For a discussion of the "nuclear understandings" to the Protocol, see Section VI, *infra*.

⁹⁵ C. Parry and J. Grant, ENCYCLOPAEDIC DICTIONARY OF INTERNATIONAL LAW 337 (1988).

⁹⁶ 2 REPORTS OF INT'L ARB. AWARDS 1011, at 1026 and 1028 (1928).

⁹⁷ J. Briery, THE LAW OF NATIONS 401 (6th ed. 1963).

⁹⁸ "En efecto, las represalias no deben apartarse de los principios de *humanidad*. No es humano que en atención de que un beligerante haya masacrado barbaramente mujeres y niños, el otro responde con la misma bárbara" (transl: "In effect, reprisals cannot be separated from the principles of *humanity*. If a belligerent barbarously massacres women and children, it is not human for the other to respond with the same barbarity"). *Supra* note 30, at 440.

sense of being out of all proportion to the provocation received. Thus, as found in a RAND Corporation study, "[t]he concept of Assured Destruction, when deliberately applied to policies for the acquisition and use of nuclear weapons, appears to be directly opposed to the most fundamental principles found in the international law of armed conflict. . . . Even as reprisal, . . . the concept of Assured Destruction is prohibited if it includes deliberate attacks on the civilian population."⁹⁹

In any case, it is highly questionable whether the use of force as a means of reprisal—rather than as self-defense—is lawful under the regime of the United Nations Charter.¹⁰⁰ The classic notion of reprisal, which sanctions an illegal response to an illegal act, harks back to a Hobbesian condition of war or potential war of every State against every State.¹⁰¹ But Article 2(4) of the U.N. Charter, as is well known, commands all members to "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations." Furthermore, Charter Article 33(1) provides that "[t]he parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice." Hence renowned international law scholar Georg Schwarzenberger concludes: "The combined effect of the [1928] Kellogg Pact and the Charter of the United Nations . . . has been to resolve the dilemma arising from the co-existence of a limited right to apply forcible reprisals and an unlimited right to resort to war. Under this international quasi-order, forcible reprisals have become illegal."¹⁰²

The principal purpose of the United Nations, as stated in the Preamble to the Charter, is "to save succeeding generations from the scourge of war."¹⁰³ Clearly this purpose would be frustrated if a country subjected to a nuclear attack were to retaliate in kind, since the likely outcome of such an

⁹⁹ C. Builder and M. Graubard, *THE INTERNATIONAL LAW OF ARMED CONFLICT: IMPLICATIONS FOR THE CONCEPT OF MUTUAL ASSURED DESTRUCTION* (1982).

¹⁰⁰ Cf. I. Brownlie, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 281-82 (1963) and sources cited at 281 n.4.; also Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance With the Charter of the United Nations, adopted by the U.N. General Assembly, 24 October 1970, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1971), reprinted in 9 INT'L LEG. MATS. 1292 (1970) ("States have a duty to refrain from acts of reprisal involving the use of force"); and DIGEST OF U.S. PRACTICE IN INTERNATIONAL LAW 700 (1974), quoting the U.S. Department of State as supporting the Declaration and stating that it believes it to be "desirable to maintain the distinction between acts of lawful self-defense and unlawful reprisal."

¹⁰¹ "The condition of man . . . is a condition of war of everyone against everyone." LEVIATHAN, Pt. I, ch. 4.

¹⁰² A MANUAL OF INTERNATIONAL LAW 151 (1976). See also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 905 Reporters' Note 8 and sources cited there, including several Security Council resolutions.

¹⁰³ In the words of Judge Spender, in *Certain Expenses of the United Nations (Article 17, paragraph 2 of the Charter)* (Advisory Opinion), 1962 I.C.J. 151, at 186: "The principle pervading the whole of the Charter and dominating it is that of maintaining international peace and security . . ."

exchange would be the massive destruction of life in both countries, not to mention their neighbors and, depending on the size of the exchange, the rest of the planet. A second use of nuclear weapons, in other words, would be impermissible as reprisal and ineffective as well as impermissible as self-defense, since defensive military action is subject to the laws of war to the same extent as offensive military action.

It follows that the doctrine of deterrence, which is the current justification for the stockpiling and potential use of nuclear weapons, is devoid of any basis in the universally accepted norms of humanitarian law. None of the rules recited above make any exception for a second "defensive" use of nuclear weapons. The prohibition of their use is absolute; it is a rule of *jus cogens* analogous to the rule of human rights law that makes torture a *malum in se* and therefore does not allow for the use of torture in response to torture. As stated by Judge Jens Evensen, a former member of this Court, in an April 13, 1989 press conference at The Hague (commemorating the 90th anniversary of the Hague Conventions of 1899):

Reprisals are themselves violations . . . [and] the very nature of modern weapons are [sic] such that nuclear weapons should never be allowed to be used, never as first use, never as reprisals. . . . The use of nuclear weapons is the ultimate crime. . . . We can formulate all kinds of scenarios, but that doesn't change the basic approach that there are certain weapons of warfare that are illegal and criminal and the behavior of the other party doesn't make them legal. . . .

¹⁰⁴

Judge Evensen added: "One thing quite clear to me is that according to the U.N. Charter we have an obligation to get rid of all nuclear weapons."¹⁰⁵

C. *The Principle of Necessity*: It is prohibited to use weapons whose effect is greater than that required to achieve a legitimate military objective

The principle of necessity is sometimes cited to justify the only two occasions in which nuclear weapons have been used: the bombing of Hiroshima and Nagasaki. The killing of a few hundred thousand civilians, so the argument goes, saved the lives of millions of Americans and Japanese who would have been killed in a military assault on the Japanese mainland, if the nuclear attacks on the two Japanese cities had not ended World War II.¹⁰⁶ This theory of military necessity, sometimes referred to as the broad interpretation, holds that military necessity overrides all other principles and that whatever means are chosen to achieve the end of victory, are justified. But, as will be seen from the authorities cited below, necessity, like reprisal, is not an absolute. If necessity could be used to justify otherwise prohibited weapons or tactics, it would make a mockery of such prohibitions; military

¹⁰⁴ Press release, United Nations Press Association (UNCA), *Press Conference with Judge Jens Evensen*, 13 April 1989.

¹⁰⁵ *Id.*

¹⁰⁶ E. MEYROWITZ 29.

commanders would always invoke necessity to justify whatever weapons or tactics they chose to employ, no matter how brutal or inhumane.¹⁰⁷

As early as the 1863 Lieber Code,¹⁰⁸ the restrictions on the principle of necessity were clearly spelled out:

Article 14. Military necessity, as understood by modern civilized nations, consists of the necessity of those measures which are indispensable for securing the ends of war, *and which are lawful according to the modern law and usages of war.*¹⁰⁹

Article 15. Military necessity admits of all direct destruction of life or limb of *armed* enemies, and other persons whose destruction is incidentally *unavoidable.*¹¹⁰ . . .

Articles 16. Military necessity does not admit of cruelty—that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extract confessions.¹¹¹ It does not admit of the use of poison in any way¹¹², nor of the wanton devastation of a district . . . and, in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult.

Similarly, in the 1868 Declaration of St. Petersburg,¹¹³ it was laid down as a norm of humanitarian law that "the only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy." The use of a weapon of mass destruction against the civilian population may weaken the enemy's will to fight; it does not weaken the enemy's "military forces." And in the 1938 Resolution on Protection of Civilian Populations Against Bombing from the Air in Case of War, the League of Nations spelled out the necessity-humanity dichotomy in even greater detail, as follows:

Considering that on numerous occasions public opinion has expressed through the most authoritative channels its horror of the bombing of civilian populations;

¹⁰⁷ For a discussion of the broad versus the narrow interpretation of military necessity, arguing that the "weight of argument" and "the balance of legal opinion" clearly favor the narrow interpretation, see T. Nardin, *The Laws of War and Moral Judgment*, in R. Falk, F. Kratchowil and S. Mendlovitz, *INTERNATIONAL LAW: A CONTEMPORARY PERSPECTIVE* 441 ff. (1985).

¹⁰⁸ See text at note 38, *supra*.

¹⁰⁹ Emphasis added.

¹¹⁰ Emphases in original text.

¹¹¹ It is important to note the coupling of the prohibition of avoidable cruelty with the prohibition of torture, two prohibitions *per se*.

¹¹² Note the prohibition of "the use of poison in any way," derived from the general principle of humanity, long before such use was specifically prohibited by the 1925 Geneva Gas Protocol, *supra* note 50.

¹¹³ *Supra* note 41.

Considering that this practice, for which there is no military necessity, only causes needless suffering, is condemned under the recognized principles of international law¹¹⁴ . . .

To draw an analogy with international human rights law, which is well known to divide between derogable and non-derogable rights,¹¹⁵ the laws of war distinguish between norms that are subject to being overridden by military necessity and those that are not. Thus, Article 58 of the 1922-23 Hague Rules of Air Warfare¹¹⁶ provides that a neutral private aircraft must not be destroyed "except in the gravest military emergency"; Article 15 of the 1906 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field¹¹⁷ provides that buildings and material cannot be diverted from their use in caring for the sick and wounded, except "in case of important military necessity"; Article 54(5) of 1977 Geneva Protocol Additional No. I¹¹⁸ permits a Party to derogate from the prohibition against the destruction or removal of foodstuffs and other objects indispensable to the survival of the civilian population, but only within territory "under its own control where required by imperative military necessity"; Articles 62, 67, and 71 of the same instrument prohibit interference with civil defence organizations and relief personnel "except in case of imperative military necessity"; Article 17 of 1977 Geneva Protocol Additional No. II¹¹⁹ prohibits the displacement of the civilian population "unless the security of the civilians involved or imperative military reasons so demand"; and Article 11 of the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict,¹²⁰ provides that immunity may be withdrawn from cultural property "only in exceptional cases of unavoidable military necessity."

No such exceptions are written into the conventional or customary laws of war with respect to the principles applicable to the use of nuclear weapons as weapons of mass destruction. To the contrary, common Article 1 of the 1949 Geneva Conventions¹²¹ enjoins the Parties to respect their provisions "in all circumstances," while common Article 3 provides that persons taking no part in the hostilities

¹¹⁴ Emphasis added.

¹¹⁵ In the former category are those that may be temporarily suspended in times of emergency, such as liberty of movement as opposed to those in the latter category, which may not be suspended under any circumstances, such as those enumerated in, *inter alia*, Articles 6 and 7 of the International Covenant on Civil and Political Rights, concluded 16 December 1966, entered into force 23 March 1976, 999 U.N.T.S. 171: "the inherent right to life" and the right "[not to be] subjected to torture or to cruel, inhuman or degrading treatment or punishment."

¹¹⁶ *Supra* note 49.

¹¹⁷ Adopted 6 July 1906, entered into force 9 August 1907, 11 L.N.T.S. 440 (ultimately superseded by the 1929 convention of the same title, concluded 27 July 1929, entered into force 19 June 1931, 118 L.N.T.S. 303).

¹¹⁸ *Supra* note 47.

¹¹⁹ *Supra* note 47.

¹²⁰ Convention for the Protection of Cultural Property in the Event of Armed Conflict, and Regulations for the Execution of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, adopted 14 May 1954, entered into force 7 August 1956, 249 U.N.T.S. 214.

¹²¹ *Supra* note 47.

shall "in all circumstances" be treated humanely and protected from violence to life and person "at any time and in any place whatsoever." That the norms of humanitarian law are not subject to derogation by virtue of military necessity was succinctly stated by the Judge Advocate in the case of *In Re von Manstein*¹²²: "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 the eventuality In other words, the rules themselves have already made allowance for military necessity."¹²³

Furthermore, there is no authority in international law for the proposition that prohibited weapons or weapons whose use is prohibited can be used in self-defense. Thus, the famous rule in *The Caroline Case*¹²⁴ that the use of force in a foreign territory is justified only in case of "an instant and overwhelming necessity for self-defense leaving no choice of means, and no moment for deliberation" also speaks indirectly to the question of military necessity and prohibited weapons. Professor Georg Schwarzenberger, for instance, argues that if prohibited weapons cannot be used in self-defense, "a fortiori, they may not be used on the ground of necessity."¹²⁵

The notion of moderateness discussed in Section III, *supra*, also speaks to the principle of necessity, as exemplified by Article 220(a) of the United States Navy Manual, which states that "[t]he principle of military necessity permits a belligerent to apply only that degree and kind of regulated force¹²⁶, not otherwise prohibited by the laws of war¹²⁷, required for the partial or complete submission of the enemy with the least expenditure of time, life and physical resources.¹²⁸ The vast majority of commentators agree. Charles Rhyne, a former President of the American Bar Association and counsel to U.S. President Richard Nixon, uses the following formulation: "Military necessity means that only that destruction necessary, relevant and proportionate to the prompt achievement of lawful military objectives is legal. Not only must such destruction be necessary and relevant to the attainment of military objectives, but it must also be proportionately and reasonably related to the military importance of the object of attack."¹²⁹

From the foregoing, it is clear that "military necessity," while often invoked as a shibboleth by States or military commanders who have engaged in violations of the law of war, is powerless to justify the use of nuclear weapons when the entire body of that law is taken into consideration.

¹²² 16 ANN. DIGEST PUB. INT'L LAW CASES 509 (1949).

¹²³ Quoted in C. Parry and J. Grant, *supra* note 95, at 236.

¹²⁴ J. B. Moore, 2 DIGEST OF INTERNATIONAL LAW 409 (1906).

¹²⁵ G. Schwarzenberger, THE LEGALITY OF NUCLEAR WEAPONS 41 (1958).

¹²⁶ It is important to note that "regulated force" is a term totally at odds with the nature of nuclear weapons and warfare.

¹²⁷ Emphasis added.

¹²⁸ U.S. Department of the Navy, LAW OF NAVAL WARFARE ch. 2, at 4(1955).

¹²⁹ C. Rhyne, *International Law* 421 (1971).

D. *The Principle of Humanity*: It is prohibited to use weapons that cause unnecessary or aggravated suffering

This principle is the military counterpart of the rule against cruel, unusual and inhuman punishment in a civilian context.¹³⁰ While it is aimed particularly at reducing the suffering of combatants, it applies to the use of weapons against civilians as well.

As observed in Section III, *supra*, the ban on excessively cruel weapons dates back to the earliest recorded instances of humanitarian law and is a major theme running throughout the gradual evolution of the laws of war. Indeed, the first major international codification of the laws of war in modern times—the 1864 Declaration of St. Petersburg¹³¹—was prompted by the desire of the Russian government to ban the use of “dum-dum bullets,” *i.e.*, projectiles designed to explode upon contact with the human body. It is embodied in the two overarching principles that the right of the parties to an armed conflict to adopt means of injuring the enemy is not unlimited and that, in the words of the de Martens Clause,¹³² “the laws of humanity” and “the dictates of the public conscience” are to govern the conduct of war.

It hardly needs saying that the cruelty and inhumanity of nuclear weapons is of an order of magnitude astronomically greater than that of a dum-dum bullet.¹³³ Testimony concerning the effects of nuclear weapons on human beings by survivors of the Hiroshima and Nagasaki bombings has been collected in two bone-chilling volumes published by the Japan Confederation of A- & H-bomb Survivors. Herewith some examples:

[My sister] was caught in the A-bombing while she worked in the kitchen . . . [She] turned into pure white ashes.¹³⁴

¹³⁰ See, *e.g.*, Article 5 of the Universal Declaration of Human Rights, adopted 10 December 1948, G.A. Res. 217A, U.N. GAOR, 3rd Sess., Pt. I, Resolutions, at 71, U.N. Doc. A/810 (1948); Article 7 of the 1966 International Covenant on Civil and Political Rights, *supra* n. 115.

¹³¹ *Supra* note 41.

¹³² See text immediately preceding note 47, *supra*.

¹³³ On the nature and effect of nuclear weapons, see, *inter alia*, Report of the Secretary-General on Nuclear Weapons, *supra* note 78; WHO, EFFECTS OF NUCLEAR WAR ON HEALTH SERVICES, *supra* text following note 4, *supra*; International Physicians for the Prevention of Nuclear War, LAST AID (1982); R. Betes, APOCALYPSE: NUCLEAR CATASTROPHE IN WORLD POLITICS ch. 4 (1980); S. Glasstone & P. Dolan, THE EFFECTS OF NUCLEAR WEAPONS (3rd ed. 1977); R. Lifton & R. Falk, *supra* note 76, at ch.4; (1980); London Nuclear Warfare Tribunal, THE BOMB AND THE LAW ch. 3 (1989); J. Schell, *supra* note 75, at pt. 1; THE FINAL EPIDEMIC: PHYSICIANS AND SCIENTISTS ON NUCLEAR WAR pts. III & IV (R. Adams & S. Cullen eds. 1981); Ground Zero, NUCLEAR WAR: WHAT'S IN IT FOR YOU? pt. III (1982). See also notes 6-8 and accompanying texts.

¹³⁴ THE DEATHS OF HIBAKUSHA 6 (Japan Confederation of A- & H-bomb Survivors, 1991).

For 3 days after the A-bomb, my father and I searched for my brother, and at last we found him by the name on his clothes. His face swelled up with blisters so miserably that we could not have told him from others without the name.¹³⁵

The body of my father was found buried under the ground near a bomb-shelter. He was headless and terribly burnt. . . . [He] was identified only from a piece of his kimono jacket attached to a bone of his body.¹³⁶

The body of my mother was found headless in the kitchen, lying on her back with one of her legs raised and her arms stretched upward. It was burnt so badly that it looked almost like human-shaped charcoal. I remember noticing that it was somehow pulpy around the belly.¹³⁷

The victims were walking like sleepwalkers. . . . The skin from their fingernails was dangling down to the ground. Women had no hair. Men had some hair but only on the upper half of their heads that had been covered with hats.¹³⁸

The most important and unforgettable thing is atomic disease. I have already lost 6 relatives because of acute atomic disease. Those who were only slightly injured were covered with black spots, their hair falling out. They coughed up blood and finally died.¹³⁹

Since the only two nuclear weapons ever used in combat were exploded over primarily civilian targets, there are no accounts of their effect on combatants, but there is no reason to believe that these would be any less cruel or inhumane than those suffered by the people of Hiroshima and Nagasaki.¹⁴⁰

The burn and blast effects of nuclear weapons and their immediate and long-range consequences, including genetic consequences, all place them in the category of weapons that cause unnecessary and aggravated devastation and suffering. If it cannot be said of these weapons that they violate the laws of humanity and the dictates of the public conscience, then this cannot be said of any weapons in the arsenals of the world's armies, past or present.

¹³⁵ *Id.* at 7.

¹³⁶ *Id.* at 11.

¹³⁷ THE WITNESS OF THOSE TWO DAYS 89 (Japan Confederation of A- & H-bomb Survivors, 1991).

¹³⁸ *Id.*

¹³⁹ *Id.* at 147.

¹⁴⁰ For discussion of the legal aspects of the use of very small tactical nuclear weapons, see Subsection G(1), *infra*.

E. *The Principle of Neutrality*: It is forbidden to use weapons that violate the neutral jurisdiction of non-participating States

The principle of neutrality, in its classic sense, was aimed at preventing the incursion of belligerent forces into neutral territory, or attacks on the persons or ships of neutrals. Thus: "[t]he territory of neutral powers is inviolable";¹⁴¹ "[b]elligerents are bound to respect the sovereign rights of neutral powers. . .";¹⁴² "neutral states have equal interest in having their rights respected by belligerents . . .".¹⁴³ It is clear, however, that the principle of neutrality applies with equal force to transborder incursions of armed forces and to the transborder damage caused to a neutral state by the use of a weapon in a belligerent state. In this sense, nuclear weapons, given their uncontrollable effects, are neutrality-violating weapons *par excellence*.

In their classic study entitled *Consequences of Radioactive Fallout*, Lindop and Rotblat describe the effects of fallout from a nuclear explosion:¹⁴⁴

The radioactivity in the fallout can expose populations in several ways, and in different time sequences:

- external irradiation by the radioactive cloud as it passes overhead;
- internal radiation through the inhalation of radioactive particles in the air;
- external irradiation, mainly by the gamma-rays from the radioactive substances deposited on the ground;
- internal irradiation through eating meat or drinking milk from animals which had ingested radioactive substances, or by drinking contaminated water.

While conceding the speculative nature of projections of this sort, the authors estimate the accumulated dose from a 1-megaton explosion at 850 rads¹⁴⁵ at a distance of 100 km 3.3 hours after the explosion and 54 rads at a distance of 300 km after 11.7 hours; and the accumulated dose from a 10-megaton bomb at 4570 rads at 100 km after 2.8 hours and 100 rads at 800 km after 31.9 hours.¹⁴⁶ In another

¹⁴¹ Article I of Hague Convention (No. V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, concluded 18 October 1907, entered into force 26 January 1910, reprinted in 205 C.T.S. 299 (French), 2 AM J. INT'L L. SUPP. 117 (1908), SCHINDLER-TOMAN 942.

¹⁴² Article I of Hague Convention (No. XIII) Respecting the Rights and Duties of Neutral Powers in Naval War, concluded 18 October 1907, entered into force 26 January 1910, reprinted in 205 C.T.S. 395 (French), 2 AM J. INT'L L. SUPP. 202 (1908), Schindler-Toman 952.

¹⁴³ Preamble to Convention on Maritime Neutrality, concluded 20 February 1928, entered into force 12 January 1931, 135 L.N.T.S. 187, reprinted in SCHINDLER-TOMAN 962.

¹⁴⁴ In THE FINAL EPIDEMIC, *supra* note 133, at 117.

¹⁴⁵ Exposure to relatively small doses—40 rads or less—will cause radiation sickness (anorexia, nausea, vomiting, diarrhea) in a substantial portion of the population affected. "With increasing doses mortality increases, reaching 100 percent for a dose of about 500 rads to the marrow." *Id.* at 131.

¹⁴⁶ *Id.* at 125.

table, they estimate the area covered by an accumulated dose of 1000 rads at 1000 square kilometers from a 1-mt bomb and 12,000 square kilometers from a 10-mt bomb and the area covered by an accumulated dose of 50 rads a 18,600 square kilometers from a 1-mt bomb and 148,000 square kilometers from a 10-mt bomb.¹⁴⁷

Thus, as nuclear weapons are unable to discriminate between combatants and non-combatants, so also are they unable to discriminate between belligerent states and neutrals. The environmental effects of nuclear weapons, discussed in the next subsection, are equally uncontrollable.

F. *The Principle of Environmental Security*: It is forbidden to use weapons that cause widespread, long-term and severe damage to the environment

The right to a safe, clean and livable environment is sometimes referred to as a "third generation right." This may be so to the extent that it transcends the laws of war and concerns itself with protection against environmental degradation from whatever source. But as a branch of *jus in bello*, it has, like other aspects of that law, an ancient history.

In the Old Testament, we find this injunction: "When thou shalt besiege a city a long time ... thou shalt not destroy the trees thereof by forcing an ax against them."¹⁴⁸ And Grotius, citing the African-born Roman poet and historian Florus, relates that "[t]he poisoning of springs . . . is said . . . to be not only contrary to ancestral custom but also contrary to the law of the gods."¹⁴⁹

In more recent times, the protection of the environment from the ravages of war goes beyond trees and springs. The principle of environmental security is now recognized as part of international humanitarian law: "Respect for the environment is therefore one of the foremost obligations of the international community, which cannot and must not sit by and idly witness the destruction—all too often deliberate—of the collective heritage of mankind."¹⁵⁰

On the basis of the following legal instruments and other evidence of State practice, there clearly exists a rule of customary international law that prohibits the use of methods or means of warfare that are intended, or may be expected, to cause widespread, long-term, and severe damage to the environment.¹⁵¹ Besides that basic rule, the natural environment, as a "civilian object," is also protected by the customary rule of proportionality. According to this rule, an attack shall not be launched if it may be expected to cause damage to civilian objects which would be excessive in relation to the concrete and direct military advantage anticipated.¹⁵²

¹⁴⁷ *Id.* at 126.

¹⁴⁸ Deuteronomy 20.

¹⁴⁹ *Supra* note 28, at Bk. III, Ch. IV, XVI.2. To insure that his readers understood the principle to be a legal one, he thought it necessary to add "writers frequently ascribe the laws of nations to the gods."

¹⁵⁰ International Committee of the Red Cross, BULLETIN NO. 198 (July 1992).

¹⁵¹ *Cf.* Articles 35(3) and 55(1) of 1977 Geneva Protocol Additional No. I, *supra* note 47.

¹⁵² *Cf.* Article 57(2)(a)(iii) of 1977 Geneva Protocol Additional No. I, *supra* note 47.

1. *The principle of environmental security as an integral part of the international jus in bello: relevant treaties and other instruments*

- a. 1963 Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and Under Water¹⁵³

Preamble: "... desiring to put an end to the contamination of man's natural environment by radioactive substances ..."

- b. 1976 Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques¹⁵⁴

Article I(1): "Each State Party to this Convention undertakes not to engage in military or any other hostile use of environmental modification techniques having widespread, longlasting or severe effects as the means of destruction, damage or injury to any other State Party."

Article I(2): "Each State Party to this Convention undertakes not to assist, encourage or induce any State, group of States or international organization to engage in activities contrary to the provisions of paragraph 1 of this article."

Article II: "As used in Article I, the term 'environmental modification techniques' refers to any technique for changing, through the deliberate manipulation of natural processes, the dynamics, composition or structure of the earth, including its biota, lithosphere, hydrosphere and atmosphere, and of outer space."

According to the interpretative agreement of the ENMOD Convention, the term "widespread" should be understood as encompassing an area on the scale of several hundred square kilometers, the term "long-lasting" as referring to a period of months (or approximately a season), and the term "severe" as involving serious or significant disruption or harm to human life, natural economic resources or other assets.¹⁵⁵

- c. 1977 Geneva Protocol Additional No. I¹⁵⁶

Article 35(3) of the provisions listed as "Basic Rule" under "Methods and Means of Warfare," states that "[i]t is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the environment." The fact that this provision is included in an article on basic rules implies that the protection of the environment in time

¹⁵³ Concluded 5 August 1963. Entered into force, 10 October 1963. 480 U.N.T.S. 43. One Hundred Nineteen (119) States are party to this instrument as of this writing.

¹⁵⁴ Adopted 10 December 1976. Entered into force 5 October 1978. 1108 U.N.T.S. 151. Fifty-seven (57) States are party to this instrument as of this writing.

¹⁵⁵ See P. Antoine, *International Humanitarian Law and the Protection of the Environment in Time of Armed Conflict*, INTERNATIONAL REVIEW OF THE RED CROSS (No. 291), at 526 (November-December 1992).

¹⁵⁶ *Supra* note 47. Ninety-one (91) States are party to this instrument as of this writing.

of international armed conflict must be given high priority in the conduct of hostilities.¹⁵⁷ Its wording covers cases in which destruction of the natural environment is not necessarily the aim of the belligerent who uses methods or means of warfare that can cause widespread, long-term and severe damage to the environment.¹⁵⁸

The protection of the natural environment is also required by the provisions of the Protocol's Chapter III concerning "civilian objects":

Article 54 - Protection of objects indispensable to the survival of the civilian population

Article 54(2): "It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive."

Article 54(4): "These objects shall not be made the object of reprisals."

Article 55 - Protection of the natural environment

Article 55(1): "Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This 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."

Article 55(2): "Attacks against the natural environment by way of reprisal are prohibited."

Article 56 - Protection of works and installations containing dangerous forces

Article 56(1): "Works or installations containing dangerous forces, namely dams, dikes and nuclear electrical generating stations, shall not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population. . . ."

As a "civilian object," the natural environment is further protected by the precautionary measures laid down in Chapter IV of the Protocol, including the commands to take care to spare civilian objects (Article 57(1)) and to observe the rule of proportionality with respect to civilian objects (Article 57(2)(a) and (b)) in the conduct of military operations. Besides the principle of environmental security embodied in Article 35(3), therefore, as a "civilian object" the natural environment is protected under the

¹⁵⁷ P. Antoine, *supra* note 155, at 517, 526.

¹⁵⁸ Cf. Article 22(2)(d), commentary, para. 9 of Int'l L. Comm'n Draft Code of Crimes Against The Peace and Security of Mankind (as revised by the International Law Commission through 1991), first adopted by the U.N. International Law Commission on 4 December 1954. U.N. Doc. A/46/405 (1991), reprinted in 30 INT'L LEG. MATS. 1554 (1991).

proportionality rule codified in Article 57.¹⁵⁹ In view of the nature and effects of nuclear weapons, the collateral damage to the environment and other civilian objects that would be caused by the use of such weapons would inevitably outweigh the military advantage and so violate this rule of international law.

d. 1972 Stockholm Declaration of the United Nations Conference on the Human Environment¹⁶⁰

Principle 26: "Man and his environment must be spared the effects of nuclear weapons and all other means of mass destruction. States must strive to reach prompt agreement, in the relevant international organs, on the elimination and complete destruction of such weapons."

e. 1980 United Nations General Assembly Resolution on Historical Responsibility of States for the Preservation of Nature for Present and Future Generations¹⁶¹

Proclaims the historical responsibility of States for the preservation of nature for present and future generations;

Draws the attention of States to the fact that the continuing arms race has pernicious effects on the environment and reduces the prospects for the necessary international co-operation in preserving nature on our planet;

Calls upon States, in the interests of present and future generations, to demonstrate due concern and take measures . . . necessary for preserving nature, and also to promote international co-operation in this field;

Requests the Secretary-General, with the cooperation of the United Nations Environment Programme, to prepare a report on the pernicious effects of the arms race on nature and to seek the views of States on possible measures to be taken at the international level for the preservation of nature . . ."

¹⁵⁹ See J. Boyd, *Contemporary Practice of the United States Relating to International Law*, 72 AM. J. INT'L L. 375, 406 (1978): "We take satisfaction from the first codification of the customary rule of proportionality (Article 57) . . ."

¹⁶⁰ Adopted by the U.N. Conference on the Human Environment at Stockholm, 16 June 1972. *Report of the U.N. Conference on the Human Environment, Stockholm, 5-16 June 1972*, U.N. Doc. A/CONF.48/14/Rev.1 at 3 (1973), U.N. Doc. A/CONF.48/14 at 2-65, and Corr. 1 (1972), reprinted in 11 INT'L LEG. MATS. 1416 (1972).

¹⁶¹ Adopted 30 October 1980. G.A. Res 35/48, U.N. GAOR, 35th Sess., Supp. No. 48, at 15, U.N. Doc. A/35/48 (1981). On equity for future generations as a new and emerging legal principle of international environmental law, see E. Weiss, *IN FAIRNESS TO FUTURE GENERATIONS* (1989).

f. 1982 World Charter for Nature¹⁶²

Section I: General Principles

Article 5: "Nature shall be secured against degradation caused by warfare or other hostile activities."

Section III: Implementation

Article 14: "The principles set forth in the present Charter shall be reflected in the law and practice of each State, as well as at the international level."

Article 20: "Military activities damaging to nature shall be avoided."

Article 24: "Each person has a duty to act in accordance with the provisions of the present Charter, . . ."

g. 1991 Proceedings of the Sixth Committee of the U.N. General Assembly (remarks on behalf of the Member States of the European Community)

Speaking on behalf of the European Community and its twelve Member States in the Sixth Committee of the U.N. General Assembly on 24 October 1991 on the subject of the exploitation of the environment as a weapon in times of armed conflict, the representative of the Netherlands stated:¹⁶³

The twelve Member States of the European Community attach great importance to the protection of the environment both in times of peace and of armed conflict, and to the observance of international humanitarian law. Therefore they welcome the decision to place on the agenda of the Sixth Committee the subject "Exploitation of the environment as a weapon in times of armed conflict and the taking of practical measures to prevent such exploitation." When speaking about the use of the environment as a weapon in times of conflict we of course cannot ignore the unprecedented environmental damage caused by Iraq in Kuwait. In this context I would like to draw your attention to what was recently stated in a report to the Secretary-General of the United Nations based on a United Nations mission, namely that the deliberate torching of the oilfields represents Kuwait's most pressing environmental problem of today, besides which all else pales into insignificance. As this report rightly points out there has never been anything like it in history before.

There cannot be any doubt that these Iraqi activities were in flagrant violation of existing international law.

It is clear that existing international law limits the rights of belligerents to cause suffering and injury to people and wreak destruction on objects. Massive ecological damage

¹⁶² Adopted by the U.N. General Assembly, 28 October 1982. G.A. Res. 37/7 (Annex), U.N. GAOR, 37th Sess., Supp. No. 51, at 17, U.N. Doc. A/37/51, reprinted in 22 INT'L LEG. MATS. 455 (1983). Member States voting: 111 in favor, 1 against (the United States), 18 abstaining.

¹⁶³ U.N. Doc. A/C.6/46/SP.20, at 2-3, reprinted in 62 BRIT. Y. B. INT'L L. 653-64 (1991).

*as a consequence of armed conflict—be it of international or non-international character—can endanger the very basis of life on this planet for a long period of time.*¹⁶⁴

h. Draft Code of Crimes Against the Peace and Security of Mankind¹⁶⁵

Article 19(3): "[O]n the basis of the rules of international law in force, an international crime may result, inter alia, from: " " "

- (d) 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"

Article 22(2): "[A]n exceptionally serious war crime is an exceptionally serious violation of principles and rules of international law applicable in armed conflict consisting of any of the following acts: " " "

- (d) employing methods or means of warfare which are intended or may be expected to cause widespread, long-term and severe damage to the natural environment;¹⁶⁶

Article 26: "An individual who wilfully causes or orders the causing of widespread, long-term and severe damage to the natural environment shall, on conviction thereof, be sentenced"

i. 1992 Security Council Resolution 687 (concerning the restoration of peace and security in Iraq and Kuwait)¹⁶⁷

"The Security Council . . .

¹⁶⁴ Emphasis added.

¹⁶⁵ *Supra* note 158.

¹⁶⁶ It is enlightening to note the International Law Commission's commentary on draft Article 22(2)(d): "The wording . . . is taken, word for word, from Article 35, paragraph 3, of Protocol I Additional to the Geneva Conventions [I]t should be pointed out that, under the sub-paragraph, it is a crime not only to employ methods or means of warfare intended to cause the damage mentioned above but also those which may be expected to cause such damage. This latter expression covers cases in which destruction of the natural environment was not the essential aim of the user of such methods or means of warfare, but, aware of their potentially disastrous consequences for the environment, he none the less decided to employ them." U.N. Doc. A/CN.4/L.464/Add. 4 (15 July 1991), at 33.

¹⁶⁷ Adopted 3 April 1991. U.N. Doc. S/RES/687 (1991), reprinted in 30 INT'L LEG. MATS. 846 (1991). See also Security Council Resolution 692 (concerning the liability of Iraq for direct loss, damage including environmental damage, as a result of Iraq's unlawful invasion and occupation of Kuwait), 20 May 1991, U.N. Doc. S/RES/692 (1991).

16. *Reaffirms* that Iraq . . . is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources . . . as a result of Iraq's unlawful invasion and occupation of Kuwait . . .¹⁶⁶

With its specific reference to environmental damage and the depletion of natural resources, Resolution 687 is clear evidence of the international community's determination to ensure respect for the environment in time of armed conflict.

j. 1992 Rio Declaration on Environment and Development¹⁶⁹

Principle 24: "Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and co-operate in its further development, as necessary."

2. *The principle of environmental security as part of conventional international environmental law*

a. United Nations Charter

Article 55: "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

- (a) higher standards of living . . . and conditions of economic and social progress and development;
- (b) solutions of international economic, social, health *and related problems* . . .¹⁷⁰

Article 56: "All Members pledge themselves to take joint and separate action in co-operation with the Organization for the purposes set forth in Article 55."

Since the well-being of peoples, their economic and social progress and development, and the resolution of international problems all presuppose a healthy environment, these Articles of the United Nations Charter must be interpreted as including an obligation upon the Member States to respect and protect the human environment in war as well as in peace.

b. 1966 International Covenant on Economic, Social and Cultural Rights¹⁷¹

Article 12(1): "The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."

¹⁶⁶ Emphasis added.

¹⁶⁹ Adopted by the U.N. Conference on Environment and Development at Rio de Janeiro, 13 June 1992. U.N. Doc. A/CONF.151/26 (Vol. I) (1992), reprinted in 31 INT'L LEG. MATS. 874 (1992).

¹⁷⁰ Emphasis added.

¹⁷¹ Concluded 16 December 1966. Entered into force, 3 January 1976. 993 U.N.T.S. 3. One hundred twenty (120) States are party to this instrument as of this writing.

Article 12(2): "The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: * * *

(b) The improvement of *all aspects* of environmental . . . hygiene; . . ."¹⁷²

c. 1981 African Charter on Human and Peoples' Rights¹⁷³

Article 24: "All peoples shall have the right to a general satisfactory environment favorable to their development."

d. 1982 United Nations Convention on the Law of the Sea¹⁷⁴

Article 192: "States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention."

e. 1985 Vienna Convention for the Protection of the Ozone Layer¹⁷⁵

Article 2(1): "The Parties shall take appropriate measures . . . to protect human health and the environment against adverse effects resulting or likely to result from human activities which modify or are likely to modify the ozone layer."

f. 1992 Framework Convention on Climate Change¹⁷⁶

Article 3: "In their actions to achieve the objective of the Convention and to implement its provisions, the Parties shall be guided, *inter alia*, by the following:

1. "The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof."

¹⁷² Emphasis added.

¹⁷³ Concluded 26 June 1981. Entered into force, 21 October 1986. OAU Doc. CAB/LEG/67/3 Rev. 5, reprinted in 21 INT'L LEG. MATS. 59 (1982). Forty-four (44) States are party to this instrument as of this writing.

¹⁷⁴ Concluded 10 December 1982. Enters into force 16 November 1994. U.N. Doc. A/CONF.62/122, reprinted in 21 INT'L LEG. MATS. 1261 (1982). Sixty-one (61) States are party to this instrument as of this writing.

¹⁷⁵ Concluded 22 March 1985. Entered into force 22 September 1988. 26 INT'L LEG. MATS. 1516 (1987). One hundred two (102) States are party to this instrument as of this writing.

¹⁷⁶ Concluded 29 May 92. Entered into force 21 March 1994. Reprinted in 31 INT'L LEG. MATS. 849 (1992).

g. 1992 Convention on Biological Diversity.¹⁷⁷

Article 3: "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction" (the same wording as Principle 21 of the 1972 Stockholm Declaration, *infra*).

Principle 7: "States shall co-operate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. . . ."

Principle 25: "Peace, development and environmental protection are interdependent and indivisible."

3. *The principle of environmental security as part of customary international environmental law*

The customary status of the principle of environmental security is evinced by the above treaties, many of which have emerged into customary international law,¹⁷⁸ and confirmed by the practice of States and international governmental organizations in United Nations resolutions and other diplomatic communications. For a small sampling:

a. 1972 Stockholm Declaration of the United Nations Conference on the Human Environment¹⁷⁹

Principle 21: "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."

b. 1982 World Charter for Nature¹⁸⁰

Principle 1: "Nature shall be respected and its essential processes shall not be impaired."

Principle 2: "The genetic viability on the earth shall not be compromised"

¹⁷⁷ Concluded 5 June 1992. Entered into force 29 December 1993. Reprinted in 31 INT'L LEG. MATS. 818 (1992).

¹⁷⁸ See, e.g., C. G. Weeramantry, NUCLEAR WEAPONS AND SCIENTIFIC RESPONSIBILITY 93 (1987).

¹⁷⁹ *Supra* note 160.

¹⁸⁰ *Supra* note 162.

c. 1987 Legal Principles for Environmental Protection and Sustainable Development of the Experts Group on Environmental Law of the 1986 World Commission on Environment and Development^{181/}

Article 1: "All human beings have the fundamental right to an environment adequate for their health and well-being."

Article 2: "States shall ensure that the environment and natural resources are conserved and used for the benefit of present and future generations."

d. 1990 European Council Declaration on The Environmental Imperative^{182/}

"As Heads of State or Government of the European Community, we recognize our special responsibility both to our own citizens for their environment and in a wider context. We undertake to intensify our efforts to protect and enhance the natural environment of the community itself and the world of which it is part. . . .

The objective of such action must be to guarantee citizens the right to a clean and healthy environment, particularly with regard to - (*inter alia*)

- the quality of air
- rivers, lakes and coastal and marine waters
- the quality of food and drinking water
- protection against contamination of soil . . . and deforestation
- preservation of habitats, flora and fauna, landscape and other elements of the natural heritage".

e. 1992 Rio Declaration on Environment and Development^{183/}

Principle 1: "Human beings are at the center of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature."

Principle 2: "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction" (the same wording as Principle 21 of the Stockholm Declaration, *supra*).

In sum, it is beyond peradventure that the uncontrollable environmental effects of the use of nuclear weapons, even on a relatively small scale, are incompatible with the many and growing prohibitions on environmentally damaging weapons and tactics.

¹⁸¹ Adopted by the WCED Experts Group on Environmental Law, 4 August 1987. U.N. Doc. WCERD/86/23/Add.1 (1986).

¹⁸² Adopted 25-26 June 1991. EUROPE DOCUMENTS NO. 1630/1651, 27 June 1990, at 11-13.

¹⁸³ Adopted by the U.N. Conference on Environment and Development at Rio de Janeiro, 13 June 1992. U.N. Doc. A/CONF.151/26 (Vol. I) (1992), reprinted in 31 INT'L LEG. MATS. 874 (1992).

G. *The Principle of Non-Toxicity*: It is prohibited to use asphyxiating, poisonous, or other gases, and all analogous liquids, materials, or substances

It is useful to recall once more the command of Manu, the first man and the first king in the mythology of India, and certainly its first law-giver:¹⁸⁴

When the king fights with his foes in battle, let him not strike with weapons concealed in wood, nor with such as are barbed, poisoned, or the points of which are blazing with fire.

Presumably because of the slow, painful and treacherous way in which they act on the human body, poisons and other chemical substances have always been regarded with peculiar horror as instruments of combat, compared with such clean, if not exactly pleasant tools for dispatching an enemy as swords, lances and bullets. Thus Grotius devotes an entire section to the proposition that "[b]y the law of nations it is forbidden to kill any one by means of poison"¹⁸⁵, stating, *inter alia*:

[F]rom old times the law of nations—if not of all nations, certainly of those of the better sort—has been that it is not permissible to kill an enemy by poison. . . . In speaking of Perseus[,] Livy calls the poisoning of enemies secret crimes. Claudian, in discussing the plot against Pyrrhus which was rejected by Fabricius, characterizes it as impious, and Cicero, touching on the same story, refers to it as an atrocity. . . . In Valerius Maximus is the saying, "Wars ought to be waged with weapons, not poisons."

Like Grotius, Lieber went out of his way to emphasize the abhorrent nature of poison as a weapon: "[m]ilitary necessity does not admit of . . . the use of poison in any way . . .",¹⁸⁶ "[t]he use of poison in any manner, be it to poison wells, or food, or arms, is wholly excluded from modern warfare. He that uses it puts himself out of the pale of the law and usages of war."¹⁸⁷

Similar prohibitions are found in, among other provisions, Article 8(a) of the 1880 Oxford Manual,¹⁸⁸ the 1899 Hague Declaration (IV,2) Concerning Asphyxiating Gases,¹⁸⁹ Article 23(a) of the 1907 Hague Regulations,¹⁹⁰ Article 5 of the 1922 Treaty Relating to the Use of Submarines and Noxious Gases in Warfare,¹⁹¹ and the premier treaty in this field, the 1925 Geneva Gas

¹⁸⁴ *Supra* note 27.

¹⁸⁵ *Supra* note 28, at Bk III, Ch. IV, S. XV.

¹⁸⁶ *Supra* note 38, Article 16.

¹⁸⁷ *Id.*, Article 70.

¹⁸⁸ *Supra* note 91.

¹⁸⁹ *Supra* note 45.

¹⁹⁰ *Supra* note 43.

¹⁹¹ Concluded 6 February 1922, not in force for other reasons, 25 L.N.T.S. 202.

Protocol,¹⁹² which prohibits "the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices"¹⁹³ and states that "such use has been justly condemned by the general opinion of the civilized world," thus constituting a good example of a treaty confirmatory rather than declaratory in nature.

Article 14 of the 1956 Draft Rules [of the International Committee of the Red Cross] for the Limitation of the Dangers Incurred by the Civilian Population in Time of War¹⁹⁴ expanded on the Geneva Gas Protocol in the following terms:

[T]he use is prohibited of weapons whose harmful effects—resulting in particular from the dissemination of incendiary, chemical, bacteriological, radioactive or other agents—could spread to an unforeseen degree or escape, either in space or time, from the control of those who employ them.¹⁹⁵

It requires no great powers of analysis to read the ICRC language as an Aesopian reference to the radioactive and other emissions from nuclear weapons as constituting "analogous materials or devices" within the meaning of the Protocol. As stated in *Nuclear War: What's in it for You?*¹⁹⁶

Radioactive fallout is in effect a kind of poison that can be absorbed through the skin, breathed in, or eaten. It is accumulative, which means that it collects in the body. When the accumulated dose rises above a certain level, the result is "radiation sickness", a disease that attacks the bone marrow and other parts of the body. The first symptoms are vomiting and diarrhea, followed by anemia, loss of hair, possible skin sores, increased susceptibility to infection, and finally—in the worst cases—death.

Because the prohibition in the Gas Protocol is so unequivocal, and its application by analogy to nuclear weapons so clear, it is little wonder that many highly qualified publicists have relied on the Protocol's prohibition of the use of poisonous and asphyxiating gases and "all analogous liquids, materials and devices" to reach the conclusion that nuclear weapons are illegal.¹⁹⁷

¹⁹² *Supra* note 51.

¹⁹³ Emphasis added.

¹⁹⁴ *Supra* note 59.

¹⁹⁵ Emphasis added.

¹⁹⁶ *Supra* note 133, at 140.

¹⁹⁷ E. MEYROWITZ 67, referring to the study by E. Castrén, *The Illegality of Nuclear Weapons*, 1971 *TOLEDO L. REV.* 89, at 94.

V. THE USE OF NUCLEAR WEAPONS VIOLATES THE INTERNATIONALLY GUARANTEED RIGHT TO LIFE AND HEALTH

It has often been observed that human rights are interdependent; that one right, or set of rights, cannot fulfill its promise if the implementation of other rights is wanting.¹⁹⁸ It is not easy, therefore, to arrive at a consensus on a hierarchy of rights. On the other hand, it is not difficult to agree that the one right transcending all others, the one source from which all others flow, is the right to life.¹⁹⁹

The simplest and strongest formulation of this right is found in *Article 3 of the 1948 Universal Declaration of Human Rights*²⁰⁰ (widely recognized as expressive of customary international law, especially in relation to such "basic decencies" as respect for the physical integrity of the individual person): "Everyone has the right to life, liberty and security of person." Other international law instruments display variations on the theme, including:

*Article 2(1) of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms:*²⁰¹ "Everyone's rights to life shall be protected by law."

*Article 6(1) of the 1966 International Covenant on Civil and Political Rights:*²⁰² "Every human being has the inherent right to life."

¹⁹⁸ See, e.g., Article 28 of the Universal Declaration of Human Rights, *supra* note 129: "Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized." See also the Preamble to the International Covenant on Economic, Social and Cultural Rights, *supra* note 171: "Recognizing that . . . the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights." A virtual identical clause appears in the Preamble to the International Covenant on Civil and Political Rights, *supra* note 129. The most recent known expression is found in United Nations General Assembly Resolution Res. 48/1941 establishing the office of High Commissioner for the Promotion and Protection of All Human Rights, adopted without a vote on 20 December 1993 and stating in its Preamble: "Aware that all human rights are universal, indivisible, interdependent and interrelated and that as such they should be given the same emphasis."

¹⁹⁹ "In its general comment 6(16) adopted at its 378th meeting on 27 July 1982, the Human Rights Committee [of the United Nations] observed that the right to life . . . is the supreme right from which no derogation is permitted. . . . It is basic to all human rights." U.N. Document A/39/644; CCPR/c/21/Add.4. See also the comment of Theo C. Van Boven, then Director of the United Nations Division of Human Rights, in his address at the opening of the 38th Session of the United Nations Human Rights Commission (1982): "The right to life," he stated, "is, without doubt, the most fundamental of all human rights. Without legal and social protection of human life, the very fabric of our societies would be destroyed."

²⁰⁰ *Supra* note 130.

²⁰¹ Concluded 4 November 1950. Entered into force 3 September 1953. 213 U.N.T.S. 221.

²⁰² Concluded 16 December 1966. Entered into force 23 March 1976. 999 U.N.T.S. 717.

*Article 4(1) of the 1969 American Convention on Human Rights:*²⁰³ "Every person has the right to have his life respected."

*Article 4 of the 1981 African Charter on Human and People's Rights:*²⁰⁴ "Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person."

*Article 1(a) of the 1981 Universal Islamic Declaration of Human Rights:*²⁰⁵ "Human life is sacred and inviolable and every effort shall be made to protect it."

*Article 6(1) of the 1989 Convention on the Rights of the Child:*²⁰⁶ "States Parties recognize that every child has the inherent right to life."

As demonstrated above, the use of nuclear weapons would in most if not all circumstances result in the taking of many thousands, if not millions, of innocent civilian lives, in violation of several principles of humanitarian law.²⁰⁷ Such an event would violate also the right to life.

The point has been recognized by the Human Rights Committee of the United Nations in its 1984 general comment under Article 40(4) of the International Covenant on Civil and Political Rights:²⁰⁸

3. While remaining deeply concerned by the toll of human life taken by conventional weapons in armed conflicts, the Committee has noted that, during successive sessions of the General Assembly, representatives from all geographical regions have expressed their growing concern at the development and proliferation of increasingly awesome weapons of mass destruction, which not only threaten human life but also absorb resources that could otherwise be used for vital economic and social purposes, particularly for the benefit of developing countries, and thereby for promoting and securing the enjoyment of human rights for all.

²⁰³ Concluded 22 November 1969. Entered into force 18 July 1978. O.A.S.T.S. No. 36, O.A.S. Off Rec. OEA/Ser. L/V/II.23 doc. 21 rev. 6 (1979), reprinted in 9 INT'L LEG. MATS. 673 (1970).

²⁰⁴ *Supra* note 173.

²⁰⁵ Adopted 19 September 1981. 4 EUR. HUMAN RTS. REP. 433 (1982).

²⁰⁶ Concluded 20 November 1989. Entered into force 2 September 1990. G.A. Res. 44/25 (Annex), U.N. GAOR, 44th Sess., Supp. No. 49, at 166, U.N. Doc. A/RES/44/49 (1990), reprinted in 30 INT'L LEG. MATS. 1448 (1989).

²⁰⁷ See Sections I and IV, *supra*.

²⁰⁸ *Supra* note 130.

4. The committee associates itself with this concern. *It is evident that the designing, testing, manufacture, possession and deployment of nuclear weapons are among the greatest threats to the right to life which confront mankind today. This threat is compounded by the danger that the actual use of such weapons may be brought about, not only in the event of war, but even through human or mechanical error or failure.*²⁰⁹

5. Furthermore, the very existence and gravity of this threat generates a climate of suspicion and fear between States, which is in itself antagonistic to the promotion of universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter of the United Nations and the International Covenants on Human Rights.

Closely allied with, indeed an integral part of, the right to life is the right to health. A number of treaties and other international instruments use the language of rights in referring to health, and therefore it is important they be noted as well. Just as the use of nuclear weapons would in most if not all circumstances result in the taking of many thousands, if not millions, of innocent civilian lives, so also would the use of nuclear weapons, particularly in connection with their radioactive effects, cause widespread epidemics and other conditions of ill-health, fundamentally antithetical to the enjoyment of the right to life, again violating several of the principles of humanitarian law.²¹⁰ Pertinent provisions include:

*Preamble to the 1946 Constitution of the World Health Organization:*²¹¹ "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."

*Article 25 of the 1948 Universal Declaration of Human Rights:*²¹² "Everyone has the right to a standard of living adequate for health and well-being of himself and his family, including food, clothing, housing and medical care and the right to security in the event of . . . sickness, disability. . . ."

²⁰⁹ Emphasis added.

²¹⁰ See Sections I and IV, *supra*. As observed by Dr. Egil Aarvik, Chairman of the Norwegian Nobel Committee on the occasion of the award of the 1985 Nobel Peace Prize to the International Physicians for the Prevention of Nuclear War (IPPNW): "There is no feasible protection available against such an atomic catastrophe [the use of nuclear weapons]. Home defense and medical services would inevitably collapse. It would be impossible to help the injured and the dying, and survivors would be subjected to the murderous long term consequences." *Supra* note 5.

²¹¹ *Supra* note 22.

²¹² *Supra* note 130.

*Article 12(1) of the 1966 International Covenant on Economic, Social and Cultural Rights:*²¹³ "The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."

*Article 24(1) of the 1989 Convention on the Rights of the Child:*²¹⁴ "States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health."

*Article 16 of the 1981 African Charter on Human and Peoples' Rights:*²¹⁵ "Every individual shall have the right to enjoy the best available state of physical and mental health."

VI. THE "NUCLEAR UNDERSTANDINGS" ISSUE

Questions have been raised as to whether 1977 Geneva Protocol Additional No. I²¹⁶ applies to the use of nuclear weapons. At the time of signature, the United Kingdom and the United States stipulated formal "understandings" that the rules established or newly introduced by the Protocol would not regulate or prohibit the use of nuclear weapons, only so-called conventional ones. The United States, which has not yet ratified the Protocol, signed it on 12 December 1977 subject to the following understanding:

It is the understanding of the United States of America that the rules established by this Protocol were not intended to have any effect on and do not regulate or prohibit the use of nuclear weapons.²¹⁷

Similar understandings were voiced by the United Kingdom, which appears to be on the point of ratifying, and by France, which has neither signed nor ratified the Protocol as of this writing.

It is submitted that these understandings cannot have the effect of exempting nuclear weapons from the regime of humanitarian law. An understanding, while constituting a lesser derogation from the binding effect of a treaty than a reservation, is still subject to the rule that a signing or ratifying State may not formulate a reservation incompatible with the purpose or object of a treaty. It is clear beyond peradventure that in most circumstances, the use of nuclear weapons would be totally incompatible with the purpose and object of the Protocol, as well as with the Geneva Conventions that it is intended to reaffirm and supplement.

²¹³ *Supra* note 171.

²¹⁴ *Supra* note 206.

²¹⁵ *Supra* note 173.

²¹⁶ *Supra* note 47.

²¹⁷ See DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 920 (J. Boyd ed. 1977).

Hence, the "nuclear understanding" can only be interpreted in one of two ways: either it is meant to limit the application of the Protocol to nuclear weapons "as such" (as in the formulation used in the United States Army Field Manual²¹⁶), or it is intended to refer to the non-applicability to nuclear weapons of that part of Protocol I that goes beyond the restatement of humanitarian law as it existed prior to the Protocol's adoption.

Arguably, the only truly "new" provision in the Protocol relevant to nuclear weapons is Article 55 on the protection of the natural environment. This view is borne out, to some extent, by the following statement by George H. Aldrich, United States Representative to the Fourth Session of the Diplomatic Conference on the *Reaffirmation*²¹⁷ and Development of International Humanitarian Law Applicable in Armed Conflicts (1977), in his report to the Department of State:²¹⁸

During the course of the Conference there was no consideration of the issues raised by the use of nuclear weapons. Although there are several articles that could seem to raise questions with respect to the use of nuclear weapons, *most clearly, article 55 on the protection of the natural environment*, it was the understanding of the United States Delegation throughout the Conference that the rules to be developed were designed with a view to conventional weapons and their effects and that the rules established by the Protocol were not intended to have any effects on, and do not regulate or prohibit the use of nuclear weapons.²¹⁹

French international law scholar Henri Meyrowitz, in discussing the relationship between the "nuclear understandings" and preexisting customary law, states: "Les puissances nucléaires et leurs alliés et protégés pourront discuter le contenu exact des règles coutumières; mais aucun gouvernement ne pourra—et aucun n'osera—contester le principe même de l'assujettissement de l'emploi des armes atomiques au droit coutumier préexistant" (The nuclear powers and their allies and protégés can discuss the exact content of the customary rules; but no government can—and none will dare to—contest the very principle of the subjection of nuclear weapons to preexisting customary law).²²⁰

To exempt nuclear weapons from humanitarian law on the basis of the Protocol-related understandings would be to ignore pre-Protocol and post-Protocol conventional and customary law, as well as to give far greater weight to the understandings than that to which they are entitled under normal rules of interpretation.

²¹⁶ See Paragraph 35 of United States Department of the Army, Field Manual 27-10, THE LAW OF LAND WARFARE (1956): "The use of explosive 'atomic weapons'. . . cannot as such be regarded as violative of international law in the absence of any customary rule of international law or international convention restricting their employment" (emphasis added). For a discussion of the illegality of nuclear weapons under all circumstances, rather than "as such", see Section VII, *infra*.

²¹⁷ Emphasis added.

²¹⁸ DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1977, at 919 (J. Boyd ed. 1979).

²¹⁹ Emphasis added.

²²⁰ *Supra* note 89, at 385.

VII. THE PROHIBITION OF THE USE OF NUCLEAR WEAPONS APPLIES TO NUCLEAR WEAPONS OF ALL SIZES IN ALL CIRCUMSTANCES

A. "Micro-nukes," "mini-nukes," and "tiny-nukes" are not exempt

This Memorial, as stated above, has been concerned principally with the use of nuclear weapons as weapons of mass destruction. It is useful, however, to examine briefly the applicability of the seven principles of *jus in bello* discussed above in relation to the size and nature of certain nuclear weapons.

In one sense, the question is academic, particularly in view of the fact that, as of November 1993, it has been the Congressionally mandated policy of the United States *not* to conduct "research and development which could lead to the production by the United States of a low-yield nuclear weapon."²²³ Furthermore, as far as can be ascertained, the smallest nuclear weapons currently in the arsenals of the five declared nuclear weapon States have a yield of 5 kilotons, e.g., a little less than half of the Hiroshima bomb and one-third of the Nagasaki bomb.²²⁴ Everything said heretofore applies to weapons of this size.

On the other hand, speculation surfaces from time to time about the design and possible production of much smaller weapons. Thus, two highly qualified researchers, William Arkin and Robert Norris, have reported that the Los Alamos National Laboratory recommends a nuclear arsenal for the United States that would contain several hundreds of the following "low yield" weapons: (1) 10-ton earth penetrator warheads ("micro-nukes"), (2) 100-ton anti-tactical ballistic missile warheads ("mini-nukes"), and (3) 1-kt counter-projection force warheads ("tiny nukes").²²⁵

This honorable Court may simply choose to disregard these data as the musings of a group of scientists in search of a post-Cold War mission and therefore not presenting a question ripe for consideration. However, should the court undertake to enter into a debate of the micro/mini/tiny nuke question, the following points are respectfully submitted for consideration:

1. The proposed micro-nuke, the smallest of the potential future arsenal, is ten times the size of the largest conventional bomb used in the 1991-92 Persian Gulf War.
2. No matter how small the nuclear weapon, it is still one exhibiting primarily radioactive properties. Hence its effects, while of a lower order of magnitude than weapons in the 5-kt and up category, are still uncontrollable, quasi-poisonous, and unnecessarily cruel.

²²³ See, e.g., National Defense Authorization Act for Fiscal Year (FY) 1994, Public Law 103-160, 30 November 1993, 107 Stat. 1547. Section 3136(d) (42 U.S.C. 2121) of Act the defines a low-yield nuclear weapon as one having a yield of less than five kilotons.

²²⁴ While it is possible to reconfigure some warheads in existing arsenals for a yield lower than 5 kilotons, it is doubtful that reconfiguration would successfully limit actual yield to much less than one kiloton.

²²⁵ W. Arkin and R. Norris, *Tiny Nukes for Mini Minds*, THE BULLETIN OF THE ATOMIC SCIENTISTS 24 (April 1992).

3. The use of any low-yield nuclear weapon against a military facility would necessitate a ground (surface or sub-surface) burst which would generate, proportionately, greatly more radiation than an atmospheric burst since, at ground level, more material is available to become radioactive than in the atmosphere.
4. Therefore, the use of the proposed micro-nukes and, *a fortiori*, the mini-nukes and tiny-nukes, would still be absolutely forbidden by the principles of humanity and non-toxicity and, depending on the circumstances of their use would also be prohibited by the principles of discrimination, proportionality, necessity, neutrality, and environmental security.
5. Any use of even the tiniest nuclear weapon is likely to escalate into a nuclear exchange of increasing magnitude, and thus the country initiating such use would bear the gravest responsibility for its consequences and would, at the very least, be in violation of the principle of proportionality. "[N]otwithstanding vogueish theories of 'intra-war bargaining,' 'intra-war deterrence,' and controlled escalation,' it is highly improbable that the opposing sides would or could restrict themselves to fighting a 'limited' rather than 'total' nuclear war, as if somehow governed by the rules of the Marquess of Queensbury."²²⁶

Finally, consideration must always be given to the fundamental difference between nuclear weapons and all previous weapons in the history of warfare. Thus Henri Meyrowitz, speaking of the "special status" of nuclear weapons in international law, states:

La raison en est la différence absolue qui sépare les armes nucléaires et les armes classiques, malgré la miniarisation progressive des charges atomiques et la précision croissante des vecteurs (The reason for this is the absolute difference that separates nuclear weapons from classic weapons, despite the progressive miniaturization of the atomic charges and the growing precision of the delivery vehicles).²²⁷

B. Deterrence is not a defense to the illegality of the use of nuclear weapons

The current policy of the declared nuclear weapon States is to retain their capacity to retaliate against either a nuclear or a conventional attack with a nuclear counter-strike.²²⁸ Patently, such a response to a conventional attack would violate, at a minimum, the principle of proportionality, no matter how devastating so-called conventional weapons have become.

²²⁶ WESTON 581. Weston writes further: [A]s conservatively projected in the 1980 *Report of the Secretary-General on nuclear weapons* [*supra* note 78], tactical nuclear warfare . . . would result in hundreds and thousands of nuclear explosions and, consequently, untold immediate and long-range, long-term collateral harms. In addition, once unleashed, the probability that tactical nuclear warfare could be kept at theater or battlefield level would be small. A crisis escalating to the first use of even relatively small nuclear weapons would bring us dangerously close to the ultimate stage, a 'strategic exchange', particularly if one of the two sides was itself at a disadvantage in a drawn out 'tactical exchange.'" *Id.* at 583-84.

²²⁷ *Supra* note 89, at 388.

²²⁸ Only China has an official no-first-use policy. See note 19 and accompanying text *supra*.

However, as discussed in Section III above, not only a nuclear response to a *conventional* attack, but also a nuclear response to a *nuclear* attack would violate at least the principles of discrimination, humanity, and environmental security, and quite possibly also the principle of neutrality, since there is no purpose in incinerating entire urban populations, ravaging the natural environment for generations to come, and quite possibly defiling the territory of neighboring and distant neutral countries other than to satisfy one's desire for vengeance. An oft-cited study by the United States Office of Technology Assessment, published in 1979, quotes United States government studies indicating that between 2 million and 20 million Americans would be killed within thirty days after a *counter* silo-attack on United States ICBM sites, due in large part to early radiation fallout from likely surface bursts.²²⁹ In such circumstances, the very meaning of proportionality becomes lost and we come dangerously close to condoning the Nazi German theory of *Kriegsraison* rejected at Nuremberg and to repudiating the *jus cogens* prohibition of genocide.

John Kegan, for many years a senior lecturer in military history at the British Royal Military Academy, Sandhurst, comments pertinently on the conscience-shocking character of nuclear deterrence:

Nuclear deterrence was and is abhorrent to humane sentiment . . . since it implies that a state, if required to defend its own existence, will act with pitiless disregard for the consequences to its own and its adversary's peoples. Little wonder that . . . deterrence theory evokes the deepest repugnance, often from patriots devoted to the national defence, even from professional warriors who have shed their own blood for their countries.²³⁰

And so, additionally, the inherent illogic of nuclear deterrence is exposed: paradoxically, salvation from extinction by nuclear weapons is to be found in the weapons of extinction themselves.

The so-called paradox of nuclear deterrence was long ago noted by Sir Winston Churchill, speaking on nuclear deterrence in the House of Commons in 1955: "Safety will be the sturdy child of terror," Churchill said, "and survival the twin brother of annihilation."²³¹ More recently, in his famous 1982 essay on *The Fate of the Earth*, Jonathan Schell addressed the inconsistency succinctly:

This doctrine [of nuclear deterrence], in its detailed as well as its more general formulations, is diagrammatic of the world's failure to come to terms with the nuclear predicament. In it, two irreconcilable purposes clash. The first purpose is to permit the survival of the species, and this is expressed in the doctrine's aim of frightening everybody into holding back from using nuclear weapons at all; the second purpose is to serve *national* ends, and this is expressed in the doctrine's permitting the defense of one's nation and its interests by threatening to use nuclear weapons. The strategists are pleased to call this clash of two opposing purposes in one doctrine a paradox, but in actuality it is a contradiction. We cannot both threaten ourselves with something and hope to avoid that same thing by making the threat—both intend to do something and not to do it . . . And since the deterrence doctrine

²²⁹ Congress of the United States, Office of Technology Assessment, *THE EFFECTS OF NUCLEAR WAR* 87 (1979).

²³⁰ J. Kegan, *A HISTORY OF WARFARE* 48 (1993).

²³¹ As quoted in J. Schell, *supra* note 10, at 197.

pairs the safety and the terror, and makes the former depend on the latter, the world is never quite sure from day to day which one is ascendant—if, indeed, the distinction can be maintained in the first place. All that the world can know for certain is that at any moment the fireballs may arrive. I have said that we do not have two earths, one to blow up experimentally and the other to live on; nor do we have two souls, one for reacting to daily life and the other for reacting to the peril to all life. But neither do we have two wills, one with which we can intend to destroy our species and the other with which we can intend to save ourselves. Ultimately, we must all live together with one soul and one will on one earth.²²⁷

Schell's assessment has of course an obvious legal implication: if the intent to use nuclear weapons is inseparable from the doctrine of deterrence, and such use is illegal, then the doctrine itself must sink under the weight of illegality.

The doctrine sinks, too, from the essential inutility of nuclear weapons. As noted by the Center for Defense Information, a non-governmental organization headquartered in Washington, D.C. and led by retired Rear Admiral Eugene J. Carroll and other high-ranking former officers of the United States armed forces:

Nuclear weapons are simultaneously the most destructive and most useless weapons ever invented. . . . The monstrous devastation and radioactive pollution created by nuclear weapons renders them useless to achieve any rational military objective.

Nuclear weapons failed to prevent wars, including the Korean conflict, Vietnam war, and Iraq's invasion of Kuwait. Nor have nuclear weapons been used in warfare since 1945. Any use of nuclear weapons in a scenario like the war against Iraq would be self-defeating. Nuclear weapons would have poisoned the very land, Kuwait and Saudi Arabia, that the U.S.-led coalition was trying to protect. Fallout could also kill one's own soldiers as well as countless numbers of innocent civilians.

In addition to being militarily impractical, nuclear weapons are self-inhibiting. Any use of nuclear weapons would undoubtedly incur widespread public outcry at home and abroad.²²⁸

The negative implications that these highly practical considerations bear for the principle of military necessity is or should be self-evident.

Indeed, these and related practical considerations, as well as the moral and legal dilemmas posed by the doctrine of nuclear deterrence, are responsible for a palpable growing resistance to the necessity of nuclear weapons altogether. Thus, in a recent publication of the United Nations Institute for Disarmament Research (UNIDIR), *Nuclear Deterrence: Problems and Perspectives in the 1990's*, Juan Marin-Bosch, Mexico's Ambassador to the United Nations Office, Geneva, is quoted as saying: "The

²²⁷ *Id.* at 197-98 (emphasis added).

²²⁸ THE DEFENSE MONITOR, No. XXII, at 3 (1993).

whole question of deterrence is passé. The whole question of trying to justify the possession of nuclear weapons in terms of deterrence, if it ever was valid, is certainly no longer valid now."²⁴

In fact, from a practical point of view, the myth of nuclear deterrence poses the greatest risk of nuclear war, for the simple reason that, so long as the declared nuclear weapon States insist on retaining their weapons for deterrence purposes, an ever increasing number of other presently non-nuclear-weapon States will believe themselves compelled to acquire such weapons themselves; and given the porous nature of proliferation controls, they will be able to do so. Deterrence is the enemy of non-proliferation and proliferation is the way to nuclear war. It may be said, therefore, that the adherence of the nuclear weapon States to their "right of deterrence" makes them not only openly potential violators of the laws of war (since the effectiveness of deterrence must be based on the willingness to use nuclear weapons), but actual violators of the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (NPT).²⁵ Article VI of the NPT places an obligation on the States Parties to "pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control."²⁶ While negotiations between the United States and former republics of the Soviet Union have led to a considerable diminution of their respective nuclear arsenals, there is currently no indication of any future movement toward nuclear disarmament, much less general and complete disarmament. To the contrary, the adherence to deterrence, by both sides, makes any such movement impossible.

The point was well put by the representative of the Holy See, H. E. Archbishop Renato Martino, speaking before the First Committee of the United Nations on 25 October 1993:

²⁴ UNIDIR/93/26, at 89 (1993). As should be expected of a conference comprised mainly of national security rather than legal experts, not every participant in the conference that produced this volume shared Ambassador Marin-Bosch's view. Nevertheless, it is noteworthy that such references to law as are to be found in the proceedings of the conference (168 pages long) are the following:

Professor Serge Sur, Deputy Director of UNIDIR: "De jure, nuclear weapons remain the only weapons of mass destruction which are not [expressly] prohibited, at least to a certain extent, after the conclusion of the Chemical Weapons Convention. . . . However, the eradication of chemical weapons cannot be equated with a contrario recognition of the legitimacy of nuclear weapons." Id. at 8 and 9.

*Raimundo Gonzalez, Counsellor, Permanent Mission of Chile to the United Nations Office, Geneva, speaking of deterrence in the context of Article 2(4) of the United Nations Charter: "We have to be very careful in trying to define the threat of the use of force which, by the way is also prohibited by the UNGA Resolution 2625/XXV which identifies the seven more important principles of the United Nations Charter, and which has from the legal point of view the character of principles of *ius cogens*. It cannot be derogated." Id. at 137.*

²⁵ Concluded 1 July 1968. Entered into force, 5 March 1970. 729 U.N.T.S. 161. One hundred fifty (150) States are party to this instrument as of this writing.

²⁶ For statements on the importance of "good faith" clauses in international agreements, see, *Conditions of Admission of a State to Membership in the United Nations (Article 4 of Charter)* (Advisory Opinion), 1948 I.C.J. 57; *Temple of Preah Vihear (Cambodia v. Thailand)*, 1961 I.C.J. 6; *North Sea Continental Shelf (Federal Republic of Germany/Denmark and Federal Republic of Germany/Netherlands)*, 1969 I.C.J. 3, 46.

The new period of history the world has entered enables fresh insights into the fundamental policies of nuclear deterrence that have for so long held sway. Today, there is no logical reason for the retention and further development of such cataclysmic fire-power. Nuclear reductions are not enough. Security lies in the abolition of nuclear weapons and the strengthening of international law.²³⁷

The viewpoint, however, is increasingly embraced in the secular as well as the sacred order. Mr. Les Aspin, United States President Bill Clinton's first Secretary of Defense and former Chairman of the House Armed Services Committee of the United States House of Representatives, addressed a graduation commencement audience at the Massachusetts Institute of Technology in June 1992 as follows:

Nuclear weapons were the big equalizer—the means by which the United States equalized the military advantage of its adversaries. But now the Soviet Union has collapsed. The United States is the biggest conventional power in the world. There is no longer any need for the United States to have nuclear weapons as an equalizer against other powers.

If we were to get another crack at that magic wand, we'd wave it in a nanosecond. In fact, a world without nuclear weapons would actually be better. Nuclear weapons are still the big equalizer but now the United States is not the equalizer but the equalizee.²³⁸

VIII. *OPINIO JURIS* SUPPORTS THE PROHIBITION OF THE USE OF NUCLEAR WEAPONS

This Memorial has attempted to show that, despite much flouting of the legal restraints on the conduct as well as the initiation of war over the years, there remains today, as lately demonstrated by the world community's horror at the ongoing carnage in Bosnia-Herzegovina, an inherited commitment to standards of humane conduct within which belligerents can and must operate. It has attempted to show also that these legal standards of humane conduct in time of war (the *jus in bello*) must be read, by any rational or reasonable interpretation, to prohibit the use—arguably even the threat of use—of nuclear weapons.

It remains now to confirm, in the absence of any treaty applying these standards to the use of nuclear weapons *per se*, that these international humanitarian rules of armed conflict are understood and widely accepted, as a matter of law as well as of morality, to prohibit the use of nuclear weapons (as has been argued above); and, further, that the physical use of these weapons at Hiroshima and Nagasaki, together with their psychological use by the nuclear weapon States in the exercise of their deterrence policies, does not erode this *opinio juris*—nor, therefore, the consequent legal judgment that the use of nuclear weapons is prohibited under international law.²³⁹

²³⁷ Press Release, Permanent Observer Mission of the Holy See to the United Nations, 2 December 1993.

²³⁸ As reported in *THE DEFENSE MONITOR*, No. XXII, at 4 (1993).

²³⁹ It may be that an extremely small, totally "clean" weapon used in a totally controllable fashion in a purely military context posing no danger to civilians or the environment would be able to escape the manifold *jus in bello* prohibitions discussed above. No such weapon has yet been invented and no such scenario has ever been encountered in a real-life military context. *De minimis non curat lex*, not even as an exception to a general rule.

A. The international humanitarian rules of armed conflict are widely understood and accepted to prohibit the use of nuclear weapons as a matter of law

Arguably the single most persuasive point to be made in this connection is the fact that in the nearly fifty years since Hiroshima-Nagasaki, there is little in the authoritative literature to indicate, either explicitly or implicitly, that nuclear weapons and warfare are not or should not be prohibited by the humanitarian rules of armed conflict. Which should come as no surprise. It is, for example, exceedingly difficult to imagine the United States not decriing as a heinous violation of *jus in bello* an atomic attack by Japan against the United States or other Allied territory during World War II, and notwithstanding the "saturation bombings" visited by American forces at other times during that terrible conflict. Write Falk, Meyrowitz and Sanderson in a seminal essay: "A perspective of role reversal is helpful in orienting our understanding of the present status of nuclear weaponry and strategic doctrine"²⁴⁰—and, it may be added, of international law.

In fact, there is much to indicate that the use of nuclear weapons, certainly any known anticipated use, is and should be prohibited by the humanitarian rules of armed conflict—although sometimes, as befits a legal community lacking in centralized command and enforcement structures, one must rely for evidence more on inference than its opposite. For example, one cannot overlook that United Nations General Assembly Resolution 95(I) of 11 December 1946, which recognized the principles of international law formalized in the Nuremberg Charter (including the definition of a "war crime" as embracing the "wanton destruction of cities, towns or villages, or devastation not justified by military necessity"; and of a "crime against humanity" as involving "inhumane acts committed against any civilian population"), was adopted by unanimous vote about a year and a half *after* the advent of the nuclear age in July-August 1945.²⁴¹ Nor can one overlook, for further example, that the four 1949 Geneva conventions on the humane conduct of war²⁴² have been the subjects of widespread and essentially unqualified adoption from four to five years after the advent of the nuclear age to the present day. Except for the few self-interested nuclear powers that, as earlier discussed, have sought—imperfectly and arguably in violation of the law of treaties—to exempt nuclear weapons from the 1977 Protocol Additional No. I to the 1949 Geneva conventions,²⁴³ there is no known evidence that any State, least of all any non-nuclear weapons State, ever has contested that these 1949 conventions prohibit implicitly, even if they do not prohibit explicitly, the use of nuclear weapons. Not even all the declared nuclear weapon States (including now Belarus, Kazakhstan, and Ukraine) appear to have done so. As one international law scholar observed in 1983, referring to the understandings adopted by the United Kingdom and the United States purporting to exempt nuclear weapons from the 1977 Protocol Additional No. I to the 1949 Geneva conventions, "[n]ot one non-nuclear weapon State has followed suit and none appears inclined to do so. The non-nuclear weapon States, it seems, are variously committed to the wholesale prohibition of nuclear weapons or, in the alternative, to their regulation

²⁴⁰ R. Falk, E. Meyrowitz and J. Sanderson, *Nuclear Weapons and International Law*, 20 INDIAN J. INT'L L. 541, 590 (1980).

²⁴¹ U.N. Doc. A/236 (1946).

²⁴² *Supra* note 47.

²⁴³ *Id.*

according to the laws of war most recently articulated."²⁴¹ Validating this observation are, for example, numerous pronouncements of the member States of the Non-Aligned Countries asserting, *inter alia*, their perception of the costs and dangers of the nuclear arms race, their concern to achieve general and complete disarmament, and "their rejection of all theories and concepts purporting to justify the possession of nuclear weapons and their use under any circumstances"²⁴² which, they have repeatedly maintained, "would also be a crime against humanity."²⁴³

Fortunately, one need not rely exclusively on inference to prove the point being made here. There are ample explicit signals to substantiate a far-flung consensus or *opinio juris* that the use of nuclear weapons would, except possibly in the case of the detonation of an as yet uninvented "clean" nuclear device in an extremely limited traditional battlefield setting, violate the humanitarian rules of armed conflict. It is, indeed, for this very reason that one sometimes hears the spurious argument that these legal rules do not interdict the use of nuclear weapons because they predate the invention of such

²⁴¹ WESTON at 571.

²⁴² Paragraph 8 of the *Final communiqué of the Meeting of Ministers for Foreign Affairs and Heads of Delegations of the Movement of Non-Aligned Countries to the forty-second session of the United Nations general Assembly*, held in New York from 5 to 7 October 1987, reprinted in 11 *THE THIRD WORLD WITHOUT SUPERPOWERS: THE COLLECTED DOCUMENTS OF THE NON-ALIGNED COUNTRIES* 549 (O. Jankowitsch, K. Sauvart & J. Weber eds. 1993).

²⁴³ Paragraph 47 of the *Report of the Chairman of the Eighth Conference of Heads of State or Government of Non-Aligned Countries*, held at Harare, 1-6 September 1986, reprinted in 11 *THE THIRD WORLD WITHOUT SUPERPOWERS: THE COLLECTED DOCUMENTS OF THE NON-ALIGNED COUNTRIES* 168 ((O. Jankowitsch, K. Sauvart & J. Weber eds. 1993); Paragraph 32 of the *Final communiqué of the Ministerial Meeting of the Co-ordinating Bureau of the Movement of Non-Aligned Countries*, held at Nicosia, 5-10 September 1988, reprinted in 12 *THE THIRD WORLD WITHOUT SUPERPOWERS: THE COLLECTED DOCUMENTS OF THE NON-ALIGNED COUNTRIES* 549 ((O. Jankowitsch, K. Sauvart & J. Weber 1993); Paragraph 8 of the *Final communiqué of the Ministerial Meeting of the Co-ordinating Bureau of the Movement of Non-Aligned Countries*, held at Harare, 17-19 May 1989, reprinted in 12 *THE THIRD WORLD WITHOUT SUPERPOWERS: THE COLLECTED DOCUMENTS OF THE NON-ALIGNED COUNTRIES* 549 ((O. Jankowitsch, K. Sauvart & J. Weber eds. 1993).

weapons or otherwise fail to mention them by name.²⁴⁷ To avoid the authoritative nature of the consensus, the very relevance of the humanitarian rules of armed conflict to nuclear weaponry is denied.

1. *Opinio juris as expressed in United Nations General Assembly resolutions and similar expressions of public policy*

An early example is 1961 United Nations General Assembly Resolution 1653 (XVI) declaring "the use of nuclear and thermonuclear weapons" to be (a) "contrary to the spirit, letter and aims of the United Nations and, as such, a direct violation of the Charter of the United Nations," (b) "contrary to the rules of international law and to the laws of humanity," and (c) "a crime against mankind and civilization."²⁴⁸ It is true that resolutions of the U.N. General Assembly are not presumptively binding on the U.N. membership because they do not "legislate" in the commonly understood domestic law sense of that term. But this fact does not deny their probity as expressions of juridical opinion²⁴⁹ or, as Professor Rosalyn Higgins of the London School of Economics has put it, as "declarations of consciously legal content"²⁵⁰ (for example— and cited by Professor Higgins—the General Assembly's 1946 Affirmation of the Principles of International Law Recognized by the Charter of Nuremberg Tribunal;²⁵¹ for another, the Assembly's 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance With the Charter of the

²⁴⁷ The spurious nature of this argument has been noted by Professor Weston as follows:

The argument [that the humanitarian rules of armed conflict do not apply because they predate the invention of nuclear weapons or otherwise fail to mention them by name] is easily dismissed. As a variant of the spurious thesis that nuclear weapons uses are without legal constraint in the absence of an explicit treaty ban, it fails to heed the multifaceted nature of the international law-creating system, taking a view of legal process that no one would dare accept in the domestic sphere. Moreover, legal rules typically are interpreted to encompass matters not specifically mentioned—often not even contemplated—by their formulators As stated by the 1945 Nuremberg Tribunal when called to adjudicate complaints about previously undefined "crimes against humanity" and other crimes, "[the law of war] is not static, but by continual adaptation follows the needs of a changing world." Finally, confirming the first point, the well known [de] Martens Clause . . . was formulated exactly to cover such lacunae Weapons and tactics not dealt with specifically in the various texts articulating the laws of war thus remain nonetheless constrained by the principles of international law, including the counterbalancing principles of humanity and military necessity, and—not to be forgotten—"the dictates of the public conscience."

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²⁴⁸ G.A. Res. 1653, U.N. GAOR 16th Sess., Supp. No. 17, at 4, U.N. Doc. A/5100 (1962).

²⁴⁹ Observes John Norton Moore: "General Assembly resolutions taken alone . . . can be evidence of international law; they can, in areas of popular consensus, perhaps reflect that consensus or even aid in creating it J. N. Moore, *Nuclear Weapons and the Law: Enhancing Strategic Stability* in NUCLEAR WEAPONS AND LAW 51, 53 (A. Miller & M. Feinreider eds. 1984).

²⁵⁰ R. Higgins, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* 4 (1963).

²⁵¹ G.A. Res. 95, 1st Sess., at 1144, U.N. Doc. A/236 (1946).

United Nations²⁵²). And the more is this true when the General Assembly resolution is adopted by a substantial worldwide consensus, as happened with Resolution 1653 (XVI),²⁵³ and when the essential substance of the resolution is repeated over and over again, as also happened with Resolution 1653 (XVI), and not just once but at least eighteen times since 1961,²⁵⁴ each time by increasingly larger majorities.²⁵⁵

International law recognizes that the interpretation of a treaty may be affected by the subsequent practice of the parties to it, including voting in the General Assembly in favor of one interpretation or

²⁵² *Supra* note 100.

²⁵³ Resolution 1653 (XVI) was passed by a vote of 55 to 20 with 26 abstentions, which suggests a much smaller consensus than in fact was the case. As Chichele Professor of Public International Law at Oxford University Ian Brownlie points out,

[t]he only vote cast against the resolution from Africa and Asia was that of Nationalist China. The Latin-American States largely abstained, as also did the Scandinavian States, Austria, and certain political associates of the West in Asia. What is interesting about the voting pattern is, however, the fact that States representing a variety of political associations are to be found in the majority vote. This was drawn from the 'non-aligned' African and Asian States, some African and Asian States with Western leanings such as Nigeria, Lebanon and Japan, Mexico . . . and the Communist States. Members of NATO (apart from Denmark and Norway), together with Australia, Ireland, New Zealand, Spain [under Franco], South Africa, three Central American republics and Nationalist China, voted against the resolution.

I. Brownlie, *Some Legal Aspects of the Use of Nuclear Weapons*, 14 INT'L & COMP. L. Q. 437, 438-39 (1965). In other words, except for the United States and other self-interested nuclear weapons States and States significantly dependent upon the United States, most of the world voted for the resolution.

²⁵⁴ See, e.g., Resolution on the Non-use of Force in International Relations and Permanent Prohibition of the Use of Nuclear Weapons, G.A. Res. 2936, U.N. GAOR, 20th Sess., Supp. No. 31, at 5, U.N. Doc. A/8730 (1972) (72 in favor, 4 opposed, 41 abstentions); Resolution on Non-use of Nuclear Weapons and Prevention of Nuclear Weapons, G.A. Res. 33/71B, 33 U.N. GAOR, Supp. No. 45, at 48, U.N. Doc. A/33/45 (1978) (103 in favor, 18 opposed, 18 abstentions); Resolution on Non-use of Nuclear Weapons and Prevention of Nuclear War, G.A. Res. 34/83G, 34 U.N. GAOR, Supp. No. 46, at 56, U.N. Doc. A/34/46 (1979) (112 in favor, 16 opposed, 14 abstentions); Resolution on Non-use of Nuclear Weapons and Prevention of Nuclear War, G.A. Res. 35/152D, 35 U.N. GAOR, Supp. No. 48, at 69, U.N. Doc. A/35/48 (1980) (113 in favor, 19 opposed, 14 abstentions); Resolution on Non-use of Nuclear Weapons and Prevention of Nuclear War, G.A. Res. 36/92I, 36 U.N. GAOR, Supp. No. 51, at 64, U.N. Doc. A/36/51 (1981) (121 in favor, 19 opposed, 6 abstentions); Resolution on the Convention on the Prohibition of the Use of Nuclear Weapons (with annexed Draft Convention on the Prohibition of the Use of Nuclear Weapons), G.A. Res. 45/59B, 45 U.N. GAOR, at 117, U.N. Doc. A/45/779 (1990) (125 in favor, 17 opposed, 10 abstentions); Resolution on the Convention on the Prohibition of the Use of Nuclear Weapons (with annexed Draft Convention on the Prohibition of the Use of Nuclear Weapons), G.A. Res. 46/37D, 46 U.N. GAOR, at 127, U.N. Doc. A/46/674 (1991) (122 in favor, 16 opposed, 22 abstentions). See also the full list see Appendix B.

²⁵⁵ It is helpful to note that the votes cast in respect of these many post-1961 resolutions increasingly included votes by States that had either voted against or abstained in the vote on Resolution 1653 (XVI), including Bolivia, Brazil, Chile, China, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Iran, Malaysia, Nicaragua, Pakistan, Panama, Paraguay, Peru, Philippines, Thailand, Uruguay, and Venezuela (many of them countries proximate to, and dependent on, the United States).

another. It thus is fair to conclude that General Assembly and similar resolutions interpreting the conventional and customary laws of war also amount to a practice that may clarify and settle legal issues. As Judge Jessup pointed out in his dissenting opinion in the *South West Africa Cases* (1966),²⁵⁶ the judicial task of the Court, as in that case, is to interpret the instruments presented to it (e.g., the U.N. Charter) by applying contemporary international community standards for which statements in General Assembly resolutions provide proof.²⁵⁷

In any event, lest there be any doubt about the validity of the *opinio juris* expressed in the aforementioned General Assembly resolutions, it is instructive to note the pleas of the member States of the Non-Aligned Movement, many of them sponsors of the General Assembly resolutions, repeatedly appealing for nuclear disarmament on the grounds, *inter alia*, that "the use of nuclear weapons would . . . be a crime against humanity."²⁵⁸ Particularly noteworthy in this connection is an especially forceful statement to the United Nations made by Indonesia on behalf of the Non-Aligned Movement in November 1993. Stated Ambassador Nugroho Wisnumurti:

The advent of nuclear weapons has added a new and frightening dimension to the potentialities for world catastrophe. Their possession constitutes an unprecedented threat to human society and civilization. For what is at stake is the most fundamental right of humans and nations, which is the right to their very survival. Despite these self evident and principal concerns, the major powers have shown a callous disregard for the global calamitous consequences that would surely ensue the use of nuclear weapons. . . . [T]heir use as a deliberate political decision remains a frightening possibility for the great majority of nations. . . . Hence the immorality and illegality inherent in the present situation can no longer be perpetuated.²⁵⁹

²⁵⁶ *South West Africa* (Eth. v. S. Afr.) (Liber. v. S. Afr.) (Second Phase), 1966 I.C.J. 6.

²⁵⁷ Similarly, the sole arbitrator, Professor René-Jean Dupuy, in the 1977 arbitration between Texaco Overseas Petroleum and the Libyan Arab Republic looked to the votes of States on United Nations General Assembly resolutions to help determine the customary international law applicable to nationalizations of foreign property. See *Texaco Overseas Petroleum Co. v. Libyan Arab Republic*, Award on the Merits of 19 January 1977, 17 INT'L LEGAL MATS. 1, 30 (1978). A notable and noteworthy domestic law instance in which General Assembly resolutions have provided proof of contemporary international community standards may be found in the case of *Filártiga v. Peña-Irala*, 630 F. 2d 876 (1980) wherein the United States Court of Appeals for the Second Circuit held that torture was prohibited under international law, as evidenced in part by "U.N. declarations [which] are significant because they specify with great precision the obligations of member nations under the Charter." *Id.* at 883.

²⁵⁸ See notes 246-247 and accompanying text, *supra*.

²⁵⁹ Statement before the First Committee of the Forty-Eight Session of the General Assembly on Behalf of Non-Aligned Countries on Draft Resolution A/C.1/48/L.25, 19 November 1993. Press Release of the Permanent Mission of the Republic of Indonesia to the United Nations.

It is instructive to note, too, the history surrounding General Assembly Resolution 2444 of 19 December 1968 on Respect for Human Rights in Armed Conflicts²⁶⁰. Adoption of the resolution involved a request by the Soviet delegation for the deletion of a provision "that the general principles of war apply to nuclear and similar weapons." The deletion was allowed, but only over the objections of the United States representative who maintained that the laws and principles of war "apply as well to the use of nuclear and similar weapons," and only on the understanding that the remaining provisions would apply regardless of the nature of the armed conflict "or the kinds of weapons used."²⁶¹ To this may be added the spirit and substance, if not the precise letter, of the Final Document of the United Nations General Assembly Special Session on Disarmament, adopted 30 June 1978.²⁶²

2. *Opinio juris as expressed in judicial decisions*

Another important expression of *opinio juris* that confirms that the humanitarian rules of armed conflict work to prohibit nuclear weapons and warfare is found in the widely acclaimed *Shimoda Case*, a suit brought by five individuals against the Japanese government in 1955 to recover damages for injuries allegedly sustained from the atomic bombings of Hiroshima and Nagasaki and decided by the District Court of Tokyo on December 7, 1963, the twenty-second anniversary of the Japanese surprise attack on Pearl Harbor.²⁶³ The case is important both for its third-party decision-making genre, a well-known scarcity in the international legal order, and for the fact that, so far as is known, it is the only attempt by any court of law anywhere to wrestle with the legal implications of nuclear warfare. Ultimately holding that the claimants had no legal basis for recovering damages from the Japanese government (because of Japan's waiver of war-injury claims in its 1951 Peace Treaty with the Allied Powers), the court also reached the principal substantive conclusion that the United States' bombings of Hiroshima and Nagasaki were contrary to international law in general and the laws of war (*ius in bello*) in particular. The decision was never appealed by the five plaintiffs, apparently because they were sufficiently satisfied by the finding of illegality to let the litigation lapse. But neither was it appealed by the Japanese government even though Tokyo had contended that the atomic bombs were new inventions and for this reason not expressly covered by the conventional or customary rules of the international law of war, since their use was not expressly forbidden, they argued (even in the face of Japan's diplomatic protest at the time of the bombings), there was no legal basis upon which to premise a claim for compensation.

The Japanese government's argument was vigorously rejected by the court. In an opinion that accords with the best traditions of judicial conservatism, namely, narrowing the dispositive issue to the greatest extent possible, it dealt not with the legality of atomic weapons as such, only with the

²⁶⁰ 23 U.N. GAOR, Supp. No. 18, at 50, U.N. Doc. A/7218 (1968). See also U.N. General Assembly Resolution on Basic principles for the Protection of Civilian Populations in Armed Conflicts, G.A. Res. 2675, 25 U.N. GAOR, Supp. No. 28, at 76, U.N. Doc. A/8028 (1970).

²⁶¹ As recounted in United States Dep't of the Air Force, INTERNATIONAL LAW—THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS 5-17 n.18 (AFP.110-31, 1976).

²⁶² G.A. Res. S-10/2, U.N. GAOR, 10th Special Sess., Supp. No. 4, at 3, U.N. Doc. A/S-10/4 (1978), reprinted in 17 INT'L LEG. MATS. 1016 (1978) and 2 INTERNATIONAL LAW AND WORLD ORDER: BASIC DOCUMENTS (B. Weston ed. 1994) as Document II.C.6.

²⁶³ Reprinted in [1964] JAP. ANN. INT'L L. 212 (English transl.), 32 INT'L L. REPS. 626 (1964).

legality of their use against Hiroshima and Nagasaki. The court's principal findings are conveniently summarized by Richard A. Falk, the Albert G. Milbank Professor of International Law and Practice at Princeton University as follows:²⁴⁴

- (1) International law forbids an indiscriminate or blind attack upon an undefended city; Hiroshima and Nagasaki were undefended; therefore, the attacks were illegal.
- (2) International law only permits, if at all, indiscriminate bombing of a defended city if it is justified by military necessity; no military necessity of sufficient magnitude could be demonstrated here; therefore the attacks were illegal.
- (3) International law as it has specifically developed to govern aerial bombardment might be stretched to permit zone or area bombing of an enemy city in which military objectives were concentrated; there was no concentration of military objectives in either Hiroshima or Nagasaki; therefore, no legal basis exists for contending that the atomic attacks might be allowable by analogy to zone bombing, because even the latter is legal, if at all, if directed against an area containing a concentration of military targets.
- (4) International law prohibits the use of weapons and belligerent means that produce unnecessary and cruel forms of suffering as illustrated by the prohibition of lethal poisons and bacteria; the atomic bomb causes suffering far more severe and extensive than the prohibited weapons; therefore, it is illegal to use the atomic bomb to realize belligerent objectives:
 - (a) that is, the duty to refrain from causing unnecessary suffering is a principle of international law by which all belligerent activity is tested, whether specifically regulated or not;
 - (b) that is, specific prohibitions embody a wider principle and this principle extends to new weapons developments not foreseen at the time when the specific prohibition was agreed upon.

Importantly, the *Shimoda* court was advised by three distinguished Japanese professors of international law, appointed by the court because of their competence to analyze the legal problems at issue. Accordingly, though contemporary knowledge about the devastating effects of nuclear weaponry probably would have caused the court and its distinguished advisors to be yet more circumspect about the boundaries of military necessity, this sole judicial attempt to assess the humanitarian rules of armed conflict in relation to the use of nuclear weapons in warfare takes on added *opinio juris* significance.

3. *Opinio juris as expressed in the writings of "highly qualified publicists"*

Complementing the foregoing is the *opinio juris* that is to be found in "the teachings of the most highly qualified publicists" which, together with judicial decisions such as the *Shimoda* decision just described,²⁴⁵ this Court is authorized by Article 38 of its governing statute to apply "as subsidiary

²⁴⁴ R. Falk, *The Shimoda Case: A Legal Appraisal of the Atomic Attacks upon Hiroshima and Nagasaki*, 59 AM. J. INT'L L. 759, 776 (1965).

²⁴⁵ See text accompanying notes 246 and 247, *supra*.

mean for the determination of rules of law." While these teachings differ in emphasis and nuance, and while a few dissent from the thesis of this Memorial altogether,²⁶⁶ in part on the transparently dubious grounds that, though widely understood to be globally destabilizing, nuclear weapons are necessary for global stability,²⁶⁷ the vast majority of the scholars who have addressed the topic clearly favor the view that the use of nuclear weapons generally would violate the humanitarian rules of armed conflict. A partial listing is all that is possible here:

C. Builder & M. Graubard, *THE INTERNATIONAL LAW OF ARMED CONFLICT: IMPLICATIONS FOR THE CONCEPT OF ASSURED DESTRUCTION* (Rand Publication Series R-28044-FF, 1982); F. Kalshoven, *CONSTRAINTS ON THE WAGING OF WAR* (1987); R. Lifton & R. Falk, *INDEFENSIBLE WEAPONS* (1982); E. Meyrowitz, *PROHIBITION OF NUCLEAR WEAPONS: THE RELEVANCE OF INTERNATIONAL LAW* (1990); B. Röling, *THE IMPACT OF NUCLEAR WEAPONS ON INTERNATIONAL RELATIONS AND INTERNATIONAL LAW* (1982); G. Schwarzenberger, *THE LEGALITY OF NUCLEAR WEAPONS* (1958); N. Singh, *NUCLEAR WEAPONS AND INTERNATIONAL LAW* (1959); N. Singh & E. McWhinney, *NUCLEAR WEAPONS AND INTERNATIONAL LAW* (2d ed. 1989); J. Spaight, *THE ATOMIC PROBLEM* (1948); C. Weeramantry, *NUCLEAR WEAPONS AND SCIENTIFIC RESPONSIBILITY* (1987); D. Arbes, *The International Law of Armed Conflict in Light of Contemporary Deterrence Strategies: Empty Promises or Meaningful Restraint?*, 30 MCGILL L. J. 89 (1984); J. Bleimaier, *Nuclear Weapons and Crimes Against Humanity under International Law*, 33 CATH. LAW. 161 (1990); F. Boyle, *The Relevance of International Law to the "Paradox" of Nuclear Deterrence*, 80 NW. U. L. REV. 1407 (1986); I. Brownlie, *Some Legal Aspects of the Use of Nuclear Weapons*, 14 INT'L & COMP. L. Q. 437 (1965); E. Castrén, *The Illegality of Nuclear Weapons*, 3 U. TOL. L. REV. 89 (1971); B. Chimni, *Nuclear Weapons and International Law: Some Reflections*, in *INTERNATIONAL LAW IN TRANSITION: ESSAYS IN MEMORY OF JUDGE NAGENDRA SINGH* 137 (R. Pathak & R. Dhokalia eds. 1992); Corwin, *The Legality of Nuclear Arms Under International Law*, 5 DICKINSON J. INT'L L. 271 (1987); R. Falk, E. Meyrowitz & J. Sanderson, *Nuclear Weapons and International Law*, 20 INDIAN J. INT'L L. 541 (1980); J. Fried, *International Law Prohibiting the First Use of Nuclear Weapons: Existing Prohibitions in International Law*, 12 BULL. PEACE PROPOSALS 21 (1981); _____, *The Nuclear Collision Course: Can International Law be of Help?*, 14 DEN. J. INT'L L. & POL'Y 97 (1985); H. Fujita, *First Use of Nuclear Weapons: Nuclear Strategy vs. International Law*, 3 KANSAI U. REV. L. & POL. 57 (1982); _____, *The Pre-Atomic Law of War and its Applicability to Nuclear Warfare*, 6 KANSAI U. REV. L. & POL. 7 (1985); _____, *Status of Nuclear Weapons in International Law*, 7 KANSAI U. REV. L. & POL. 1 (1986); N. Grief, *Legal Challenges to the United Kingdom's Nuclear Defence Policy*, 1989 PUB. L. 541 (Winter 1989); Kennedy, *A Critique of United States Nuclear Deterrence Theory*, 9 BROOKLYN J. INT'L L. 35 (1983); M. Lippman, *Nuclear Weapons and International Law: Towards a Declaration on the*

²⁶⁶ See, e.g., H. Almond, *Deterrence and A Policy-Oriented Perspective on the Legality of Nuclear Weapons*, in *NUCLEAR WEAPONS AND LAW* 75 (A. Miller & M. Feinreider eds. 1984); J.N. Moore, *supra* note 249, at 51; W. Reisman, *Deterrence and International Law*, in *NUCLEAR WEAPONS AND LAW* 129 (A. Miller & M. Feinreider eds. 1984). See also R. Lisle, *Remarks: Nuclear Weapons - A Conservative Approach to Treaty Interpretation*, 9 BROOKLYN J. INT'L L. 275 (1983); E. Rostow, *Is There a Legal Basis for Nuclear Deterrence Theory and Policy?*, in *LAWYERS AND THE NUCLEAR DEBATE - PROCEEDINGS OF THE CANADIAN CONFERENCE ON NUCLEAR WEAPONS AND THE LAW* 175 (M. Cohen & M. Gouin eds. 1988).

²⁶⁷ See, e.g., J. N. Moore, *supra* note 250, at 53. The dubious quality of the argument is made manifest by the inherent instability of a nuclear armed and proliferating world, briefly considered in Section VII(B), *supra*.

Prevention and Punishment of the Crime of Nuclear Humanicide, 8 LOY. L. A. INT'L & COMP. L. ANN. 183 (1986); _____, *First Strike Nuclear Weapons and the Justifiability of Civil Resistance under International Law*, 2 TEMPLE INT'L & COMP. L. J. 155 (1988); E. McGrath, *Nuclear Weapons: The Crisis of Conscience*, 107 MEL. L. REV. 191 (1985); P. Menon, *Elimination of Nuclear Weapons: An Imperative Need to Preserve the Human Race from Extinction*, 30 REV. DR. MILITAIRE 253 (1991); E. Meyrowitz, *The Opinions of Legal Scholars on the Legal Status of Nuclear Weapons*, 24 STAN. J. INT'L L. 111 (1987); H. Meyrowitz, *Les juristes devant l'arme nucléaire*, 67 REV. GEN. INT'L PUB. 820 (1963); _____, *Le Statut des Armes Nucléaires en Droit International*, 25 GERMAN Y. B. INT'L L. 219 (1982); _____, *Le Régime des Armes Nucléaires Selon le Droit de la Guerre*, in LAWYERS AND THE NUCLEAR DEBATE – PROCEEDINGS OF THE CANADIAN CONFERENCE ON NUCLEAR WEAPONS AND THE LAW 398 (M. Cohen & M. Gouin eds. 1988); V. Nanda, *Nuclear Weapons and the Right to Peace Under International Law: A Fundamental Challenge*, 9 BROOKLYN J. INT'L L. 283 (1982); I. Pogany, *Nuclear Weapons and Self-Defense in International Law: An Emerging Standard for a Nuclear Age*, 59 N.Y.U. L. REV. 187 (1984); B. Polebaum, *National Self-Defense in International Law: An Emerging Standard for a Nuclear Age*, 59 N.Y.U.L. REV. 187 (1984); P. Ragone, *The Applicability of Military Necessity in the Nuclear Age*, 16 N.Y.U.J. INT'L L. & POL. 701 (1984); A. Rosas, *Negative Security and Non-Use of Nuclear Weapons*, 25 GERMAN Y. B. INT'L L. 199 (1982); A. Rubin, *Nuclear Weapons and International Law*, 8 FLETCHER FORUM 45 (1984); B. Weston, *Answering the Nuclear Question: The Modern Lawyer's Role*, 9 BROOKLYN J. INT'L L. 203 (1983); _____, *2, Nuclear Weapons Versus International Law: A Contextual Reassessment*, 28 MCGILL L. J. 542 (1983); _____, *Nuclear Weapons and International Law: Prolegomenon to General Illegality*, 4 N.Y.L.S. J. INT'L & COMP. L. 227 (1983); _____, *Nuclear Weapons and International Law: Illegality in Context*, 13 DENVER J. INT'L L. & POL'Y 1 (1983); _____, *Nuclear Weapons and the Responsibility of the Legal Profession*, in LAWYERS AND THE NUCLEAR DEBATE – PROCEEDINGS OF THE CANADIAN CONFERENCE ON NUCLEAR WEAPONS AND THE LAW 291 (M. Cohen & M. Gouin eds. 1988).

To these learned teachings may be added the following: (a) the opinions of international law scholars Alfred P. Rubin (Professor of International Law, Fletcher School of Law and Diplomacy, Tufts University) Francis A. Boyle (Professor of Law, University of Illinois), and Burns H. Weston (Bessie Dutton Murray Professor of Law and Associate Dean for International and Comparative Legal Studies, The University of Iowa) in their capacity as judges in an "unofficial" trial before the Provisional District World Court of the Federation of Earth in *re More than 50,000 Nuclear Weapons*²⁶⁴ (each holding that the humanitarian rules of armed conflict either prohibit or severely curtail the use of nuclear weapons); and (b) the opinions of international law scholars Sean MacBride (co-founder of Amnesty International and 1974 Nobel Peace Prize Recipient) and Richard A. Falk (Albert G. Milbank Professor of International Law and Practice at Princeton University), together with Dorothy Hodgkin (Professor Emeritus and Fellow of Wolfson College, Oxford University and 1964 Nobel Prize recipient for Chemistry) and Maurice Wilkins (Professor Emeritus of Biophysics and Fellow of King's College, Cambridge University and 1962 Nobel Prize recipient for Medicine), as members of the "unofficial" London Nuclear Warfare Tribunal (holding essentially the same thing).²⁶⁹ We call the Court's

²⁶⁴ See IN RE: MORE THAN 50,000 NUCLEAR WEAPONS—ANALYSES OF THE ILLEGALITY OF NUCLEAR WEAPONS UNDER INTERNATIONAL LAW 21-70 (1991).

²⁶⁹ London Nuclear Warfare Tribunal: Judgment, Report published as *'The Bomb on Trial'*; Swedish Lawyers Against Nuclear Arms, Stockholm (1989)

attention as well to the 1989 Hague Declaration on the Illegality of Nuclear Weapons of the International Association of Lawyers Against Nuclear Arms (IALANA), "affirming that the use or threat of use of nuclear weapons is a war crime and a crime against humanity, as well as a gross violation of other norms of international customary and treaty law"²⁷⁰

4. *Opinio juris as expressed in the "dictates of the public conscience"*

As certified in the famous "de Martens Clause"²⁷¹ in the 1907 Hague Convention (No. IV) Respecting the Laws and Customs of War on Land and reaffirmed in the four 1949 Geneva Conventions on the laws of war and the two 1977 Geneva Protocols Additional thereto, the laws of war are in part a function of "the dictates of the public conscience."²⁷² Accordingly, when attempting to determine and define the *jus in bello*, including the humanitarian rules of armed conflict, this Court is expressly authorized by conventional international law to look beyond the sources of law enumerated in Article 38 of its Statute to legal communications expressed by, or in the name of, "the dictates of the public conscience." And to this end, the Court's attention is called to a host of draft rules, declarations, resolutions, and other communications expressed by persons and institutions highly qualified to assess the laws of war although having no governmental affiliations—for necessarily limited example: resolutions of the International Committee of the Red Cross, e.g., *Resolution XXVIII on the Protection of Civilian Populations Against the Dangers of Indiscriminate Warfare*, declaring that "[t]he general principles of the Law of War apply to nuclear and similar weapons";²⁷³ Chapter 5 of Vatican II's 1966 *Pastoral Constitution on the Church in the Modern World* and the 1983 *Pastoral Letter on War, Armaments and Peace* of the National Conference of Catholic Bishops of the United States;²⁷⁴ and, again, the 1989 Hague Declaration on the Illegality of Nuclear Weapons of the International Association of Lawyers Against Nuclear Arms (IALANA).²⁷⁵ Overwhelmingly, each of these communications, emanating from among arguably the most significant elements of civil society—the healers, the clergy, and the lawyers—manifests not only the desire to curtail the menace of military nuclearism but also the intention to reinforce the humanitarian rules of armed conflict in the nuclear warfare context. Arguably persuasive is the 1989 Hague Declaration inasmuch as it was adopted unanimously not only by lawyers

²⁷⁰ Reprinted in 2 INTERNATIONAL LAW AND WORLD ORDER: BASIC DOCUMENTS (B. Weston ed. 1994) as Document II.F.1.

²⁷¹ For text, see text immediately preceding note 47, *supra*.

²⁷² It bears repeating the "de Martens Clause" in the Preamble of the 1907 Hague Convention (No. IV), *supra* note 41, is variously repeated in subsequent modern-day law of war conventions. See note 45, *supra*.

²⁷³ Reprinted in INTERNATIONAL CONFERENCE OF THE RED CROSS, RESOLUTIONS, at 22 (1965). See also International Committee of the Red Cross, SOME INTERNATIONAL RED CROSS CONFERENCE RESOLUTIONS ON THE PROTECTION OF CIVILIAN POPULATIONS AND ON WEAPONS OF MASS DESTRUCTION (1981); _____, REPORT ON THE WORK OF EXPERTS THAT MAY CAUSE UNNECESSARY SUFFERING OR HAVE INDISCRIMINATE EFFECTS (1973).

²⁷⁴ See *Pastoral Constitution on the Church in the Modern World*, ch. 5, reprinted and translated in THE DOCUMENTS OF VATICAN II (W. Abbott ed. 1966); National Conference of Catholic Bishops, *The Challenge of Peace: God's Promise and Our Response (Pastoral Letter on War, Armaments and Peace)*, 13 ORIGENS—NC DOCUMENTARY SERVICE NO. 1 (19 May 1983).

²⁷⁵ Reprinted as Document II.F.1 in 2 INTERNATIONAL LAW AND WORLD ORDER: BASIC DOCUMENTS (B. Weston ed. 1994).

but by lawyers from both sides of the then disintegrating Iron Curtain, "affirming that the use and threat of use of nuclear weapons is a war crime and a crime against humanity, as well as a gross violation of other norms of international customary and treaty law . . ." However, perhaps the most persuasive of all these and other "dictates of the public conscience" are the resolutions of the International Committee of the Red Cross inasmuch as the I.C.R.C. has come to play an important and respected quasi-official role in the development and clarification as well as the implementation of the humanitarian laws of war.²⁷⁶ Its *opinio juris* counts for a great deal.

- B. The physical use of nuclear weapons at Hiroshima and Nagasaki, together with their psychological use in the exercise of major power deterrence policy, has not eroded the *opinio juris* that the use of nuclear weapons would violate the humanitarian rules of armed conflict

Despite abundant rhetoric to the contrary, and with the notable exception of their intense concern to curb the proliferation of nuclear weapons beyond their monopoly control, the nuclear weapon States have appeared determined to fight delaying actions against a general legal control of nuclear weapons and warfare. In the name of self-defense and deterrence, they have built and continue to build, despite the ending of the Cold War, enormous nuclear arsenals which presumably they would use if sufficiently provoked, if not between themselves then against others. Mutually fearful of evasion, they have shown themselves unable to agree on a comprehensive instrument of prohibition and reluctant to accept otherwise severe restrictions. Except for the People's Republic of China, they have declined publicly to renounce the option of "first use."²⁷⁷ And, as noted above, some of them have sought to exempt nuclear weapons from important provisions of the most recent formal statement on the protection of victims of international conflicts, the 1977 Geneva Protocol Additional No. I to the 1949 Geneva Conventions on the laws of war.²⁷⁸

In the light of such State practice, there can be some controversy as to whether or not the *opinio juris* that finds nuclear warfare contrary to the core precepts of *jus in bello* has been eroded or transformed. As Oxford University Professor Mark W. Janis has correctly observed, "[t]he lines that separate state practice that violates customary international law, state practice that dissents from customary international law, and state practice that replaces old with new customary international law are often hard to discern."²⁷⁹

²⁷⁶ The I.C.R.C. played a major role, as is well known, in the drafting and negotiation of the four 1949 Geneva conventions on the laws of war, *supra* note 46, and the two 1997 Geneva Protocols Additional to those conventions, *supra* note 46—all of them unofficially referred to, in fact, as "the Red Cross conventions." For further indication of the I.C.R.C.'s extensive involvement, see, e.g., G. Draper, *THE RED CROSS CONVENTIONS* (1958); D. Forsythe, *HUMANITARIAN POLITICS: THE INTERNATIONAL COMMITTEE OF THE RED CROSS* (1978); J. Picot, *HUMANITARIAN LAW AND THE PROTECTION OF WAR VICTIMS* (1975); _____, *THE PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW* (n.d., available from the ICRC).

²⁷⁷ See n. 19, *supra*.

²⁷⁸ See Section VI, *supra*.

²⁷⁹ M. Janis, *AN INTRODUCTION TO INTERNATIONAL LAW* 43 (2d ed. 1993).

In the instant case, however, the diacritical line is not difficult to discern. This is so for essentially two reasons: first, because certain of the practices of the nuclear weapon States themselves belies the conclusion that their behavior has somehow negated or transformed the worldwide community consensus that the use of nuclear weapons would violate the humanitarian rules of armed conflict; second, because the rest of the international community has not acquiesced in, or in any way consented to, a negation or transformation of this consensus.

1. The practice of the nuclear weapon States reconfirms the *opinio juris* that the use of nuclear weapons would violate the humanitarian rules of armed conflict

Even while escalating nuclear capabilities and tensions during the 1980s to the point where responsible observers were predicting a nuclear holocaust before the year 2000, the nuclear powers appeared to have taken for granted that the use of nuclear weapons would not escape the negative judgment of the humanitarian rules of armed conflict. The evidence of this *opinio juris* is plentiful.

Perhaps most unmistakably, it is implicit in the military manuals of the major powers, manuals whose purpose it is, *inter alia*, to advise military personnel (particularly those in command positions) on how to comport themselves in time of war. While denying the illegality of nuclear weapons *per se*, the military manuals of the United States and the United Kingdom, for example, consistently instruct that nuclear weapons are to be judged according to the same standards that apply to other weapons in armed conflict; and by any rational application of these standards in any of the real world contexts in which nuclear weapons would likely be used, the use of nuclear weapons, as this Memorial has argued, would be prohibited.

Also, "a certain responsiveness to the importance of not transgressing [the humanitarian rules of armed conflict] appears to have been at work, however perversely, in the bombings of Hiroshima and Nagasaki. Each was justified officially on [the] grounds of military necessity."²⁸⁰ Similarly, the responsiveness has seemed present, to some at least minimal extent, in the complete non-use of nuclear weapons in a number of the violent conflicts that have arisen since World War II, conflicts into which, manifestly, superior forces could have been unleashed, including three major wars with inconclusive outcomes but in which nuclear weapon States might have "won" had they been willing to use nuclear weapons—the United States in the case of Korea and Vietnam and the Soviet Union in the case of Afghanistan. Surely it is in this spirit that one must receive former U.S. President Ronald Reagan's now famous pronouncement that "[n]uclear wars cannot be won and must never be fought."²⁸¹ President Reagan was speaking less as Commander-in-Chief of the armed forces of the United States than as President of the United States and moral world citizen. It would be hyperbole to say that he was uttering a clearly defined legal precept, but he certainly was in the gray area where moral perceptions meet legal rules and where "the dictates of the public conscience" serve critically and fundamentally to underpin the laws of war.

²⁸⁰ WESTON 571.

²⁸¹ As quoted in N. Y. Times, 6 November 1986, at A35, col. 1.

Finally, along similar lines, one must be alert to the responsiveness that surely has been present (a) among the American and Soviet strategists who, during the height of the Cold War especially, have been concerned with counterforce doctrine and with capabilities for damage limitation²⁴² and (b) among the diplomats, particularly from the two nuclear superpowers, who, to the present day, have negotiated the various nuclear arms control and arms reduction treaties that have multiplied over the years.²⁴³ In each case, even while failing to meet their own obligations under Article VI of the

²⁴² *Id.*, citing J. Rose, *THE EVOLUTION OF U.S. ARMY NUCLEAR DOCTRINE 1945-1980* (1980) (including a discussion of Soviet as well as American doctrinal thinking).

²⁴³ See, e.g., the Antarctic Treaty, 1 December 1959, 402 U.N.T.S. 71; the Memorandum of Understanding Between the United States and the Union of Soviet Socialist Republics Regarding the Establishment of a Direct Communication Link ("the Hot Line Agreement"), 20 June 1963, 472 U.N.T.S. 163; the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water ("the Partial Test Ban Treaty"), *supra* note 154; the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies ("the Outer Space Treaty"), 27 January 1967, 610 U.N.T.S. 205, reprinted in 6 INT'L LEG. MATS. 386 (1967); the Treaty for the Prohibition of Nuclear Weapons in Latin America ("the Treaty of Tlatelolco"), *supra* note 87; the Treaty on the Non-Proliferation of Nuclear Weapons ("the NPT"), *supra* note 237; the Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof ("the Seabed Arms Control Treaty"), 11 February 1971, 955 U.N.T.S. 115, reprinted in 10 INT'L LEG. MATS. 146 (1971); the Agreement on Measures to Reduce the Risk of Outbreak of Nuclear War Between the United States and the Union of Soviet Socialist Republics ("the Accident Measures Agreement"), 30 September 1971, 807 U.N.T.S. 57, reprinted in 10 INT'L LEG. MATS. 1173 (1971); the Agreement Between the United States of America and the Union of Soviet Socialist Republics on Measures to Improve the USA-USSR Direct Communications Link ("the Hot Line Modernization Agreement"), 30 September 1971, 806 U.N.T.S. 402, reprinted in 10 INT'L LEG. MATS. 1174 (1971); the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, 10 April 1972, 1015 U.N.T.S. 163, reprinted in 11 INT'L LEG. MATS. 310 (1972); the Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems ("the ABM Treaty"), 26 May 1972, 23 U.S.T. 3435, T.I.A.S. No. 7503, reprinted in 11 INT'L LEG. MATS. 784 (1972); the Interim Agreement Between the United States of America and the Union of Soviet Socialist Republics on Certain Measures with Respect to the Limitation of Strategic Offensive Arms, 26 May 1972, 94 U.N.T.S. 3, reprinted in 11 INT'L LEG. MATS. 791 (1972); the Declaration of Basic Principles of Relations Between the United States of America and the Union of Soviet Socialist Republics, 29 May 1972, 66 DEP'T STATE BULL. 898 (1972); the Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Underground Nuclear Weapon Tests, 12 July 1974, 71 DEP'T STATE BULL. 217 (1974); the Limitations on Anti-Ballistic Missile Systems Treaty Protocol, 3 July 1974, 27 U.S.T. 1645, T.I.A.S. No. 8276; the Joint Statement on the Limitation of Strategic Offensive Arms ("the Vladivostok Agreement"), 29 April 1974, 70 DEP'T STATE BULL. 677 (1974); the Final Act of the Conference on Security and Cooperation in Europe ("the Helsinki Accords"), reprinted in 14 INT'L LEG. MATS. 1292 (1975); the Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Strategic Offensive Arms and Protocol Thereto ("the SALT II Treaty"), 18 June 1979, reprinted in 18 INT'L LEG. MATS. 1138 (1979); Agreement Governing the Activities of States on the Moon and Other Celestial Bodies ("the Moon Treaty"), 5 December 1979, U.N.G.A. Res. 34/68 (XXXIV), 34 U.N. GAOR, Supp. (No. 46) 77, U.N. Doc. A/34/664 Annexes (1979), reprinted in 18 INT'L LEG. MATS. 1434 (1979); Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Elimination of Their Intermediate-Range and Shorter-Range Missiles ("INF Treaty"), 7 December 1987, reprinted in 27 INT'L LEG. MATS. 90 (1988); Agreement Among the United States of America and the Kingdom of Belgium, The Federal Republic of Germany, the Republic of Italy, the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland Regarding Inspection Relating to the Treaty Between the United States of America

Treaty on the Non-Proliferation of Nuclear Weapons (NPT) "to pursue negotiations in good faith on effective measures relating to . . . nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control,"²⁴⁴ the nuclear powers appear to have acknowledged the unacceptability of the use of nuclear weapons—and not only because of the unprecedented devastation that would result, but also, one may assume, because of the correct perception that nuclear warfare—that is, the *actual use* of nuclear weapons—would collide both normatively and systemically with everything for which the humanitarian *jus in bello* is supposed to stand. Otherwise, it is difficult to understand why, for example, in the 1967 Treaty of Tlatelolco²⁴⁵—banishing the "testing," "use," "manufacture," "production," "acquisition," "receipt," "storage," "installation," "deployment," and "any form of possession" of nuclear weapons anywhere in Latin America—the Contracting Parties (including, via associated Protocols I and II,²⁴⁶ such nuclear powers as China, France, the United Kingdom, the United States, and the former U.S.S.R.) would have expressed, in the Preamble, their conviction "[t]hat the incalculably destructive power of nuclear weapons has made it imperative that the legal prohibition of war should be strictly observed in practice if the survival of civilization and of mankind itself is to be assured" and "[t]hat nuclear weapons, whose terrible effects are suffered indiscriminately and inexorably, by military forces and civilian populations alike, constitute, through the persistence of the radioactivity they release, an attack on the integrity of the human species and ultimately may even render the whole earth uninhabitable."

In sum, the laws of war (*jus in bello*) are not superseded by the contrary practice of the nuclear weapon States; certain of the practices of the nuclear powers themselves confirms the *opinio juris* that the use of nuclear weapons is prohibited by the humanitarian rules of armed conflict. Counterarguments to this conclusion represent not a challenge to its validity, but, rather, an acknowledgment of its authoritativeness and a consequent attempt to escape it—and for the simple reason that the conclusion leads ineluctably to the further conclusion that the nuclear powers are poised to be in violation of those humanitarian rules if, in fact, they are not in violation of them already. But failure or refusal to obey the law cannot be allowed to negate the law. Just as in domestic legal systems those who violate the law are not permitted to argue that their own illegal conduct destroys the very laws they have violated, so the maxim *ex injuria non oritur jus*, a general principle of law recognized by all civilized nations, is a rule of international law that begs to be taken seriously in the present case.²⁴⁷ As pointed out by the 1985 London Nuclear Warfare Tribunal, it is, simply, "startling" historic irony that, China and

and the Union of Soviet Socialist Republics on the Elimination of Their Intermediate-Range and Shorter-Range Missiles, 1 June 1988, reprinted in 27 INT'L LEG. MATS. 60 (1988); and Treaty Between the United States of America and the Union of Soviet Socialist Republics on Reduction and Limitation of Strategic Offensive Arms ("the START Treaty"), 31 July 1991, S. Treaty Doc. No. 102-20, 102d Cong., 1st Sess. (1991). All of the foregoing agreements are reprinted in whole or in part in 1-2 INTERNATIONAL LAW AND WORLD ORDER: BASIC DOCUMENTS (B. Weston ed. 1994).

²⁴⁴ Treaty on the Non-Proliferation of Nuclear Weapons, *supra* n. 235.

²⁴⁵ *Supra* note 87.

²⁴⁶ For Additional Protocol I, see 637 U.N.T.S. 360, reprinted in 6 INT'L LEG. MATS. 533 (1967). For Additional Protocol II, see 634 U.N.T.S. 364, reprinted in 6 INT'L LEG. MATS. 534 (1967).

²⁴⁷ See, e.g., I. Brownlie, *Some Legal Aspects of the Use of Nuclear Weapons*, 14 INT'L & COMP. L. Q. 437, 451 (1965).

India aside, "the other states that acknowledge possession of nuclear weapons constituted the four prosecuting states at Nuremberg after World War II. In particular the two superpowers, the United States and the Soviet Union, were most insistent that German leaders at all levels of society be held criminally liable for their refusal to uphold international law in the context of war and peace."²⁸⁸

2. *The non-nuclear weapon States have not acquiesced in, or consented to, the practice of the nuclear weapon States*

It is sometimes asserted that, by virtue of a certain silence or lack of protest relative to the massive commitment to nuclear deterrence and the consequent possibility of nuclear warfare by the major powers, the non-nuclear weapon States have acquiesced in or consented to the practice of the nuclear weapon States and therefore to the negation or transformation of the worldwide community consensus that the use of nuclear weapons would violate the humanitarian rules of armed conflict. This contention fails for essentially three reasons.

First, it is not empirically valid. As observed above, the United Nations General Assembly, the largest and most representative global forum anywhere, has manifested its concern about the status of nuclear weapons in a long series of widely endorsed resolutions (going back to General Assembly Resolution 1653 (XVI) of 1961²⁸⁹) which clearly support the view that the use of nuclear weapons constitutes violations of the United Nations Charter and crimes against humanity.²⁹⁰ And these expressions of *opinio juris* are in turn underscored, directly and indirectly, by other major expressions of community consensus such as the 1967 Treaty of Tlatelolco,²⁹¹ the repeated pleas and protests of the member States of the Non-Aligned Movement,²⁹² the 1978 Final Document of the United Nations General Assembly Special Session on Disarmament,²⁹³ and the contemporary "dictates of the public conscience."²⁹⁴

Second, whatever the silence or lack of protest that may be attributed to the non-nuclear weapon States in the face of the nuclear build-ups and deployments of the major powers over the years, it has little if anything to do with any conscious or unconscious concession to the negation or revision of the humanitarian laws of war. It has to do, rather, with perceptions of futility and dependency and to the brute reality of Cold War ideological-psychological gridlock. The non-nuclear weapon States have correctly perceived that any serious legal challenge they might have mounted or wish to mount against the policies of the nuclear powers, most of them permanent members of the United Nations Security

²⁸⁸ Excerpts from the Ruling of the London Nuclear Warfare Tribunal, in re: More than 50,000 Nuclear Weapons 71, 73 (1991).

²⁸⁹ See note 248 and accompanying text, *supra*.

²⁹⁰ See text accompanying notes 248-262, *supra*. See also Appendix B.

²⁹¹ See text at notes 88 and 285, *supra*.

²⁹² See notes 245-246, 259 and accompanying texts, *supra*.

²⁹³ *Supra* note 262.

²⁹⁴ See text accompanying notes 271-276, *supra*.

Council, is destined to be summarily vetoed. Also, they have understood very well that such a challenge would not sit well with the nuclear weapon States upon whom they are, by and large, economically and/or politically dependent. And there is no escaping that the larger imprint of Great Power exhortation and cajolery, at least during the ideological height of the Cold War, indelibly marked a paranoid disposition on the part of many to think the Faustian bargain that it was better to risk societal—possibly civilizational—death than to live in communist slavery or capitalist servitude, characterized by the Non-Aligned Countries as “a perpetual community of fear that contradicts the United Nations Charter and the approach and principles of the Final Document of the [U.N. General Assembly’s] first special session on disarmament and those contained in the declarations of the non-aligned Summit Conferences.”²⁷⁵ Factors such as these, not any acquiescence or consent to normative change, explain the occasions when there may have been silence or lack of protest, just as they explain the world’s frequent inability to resist the abuse of United Nations Charter Article 2(4), similarly a target of predictions of demise.²⁷⁶ But as proven by the 1990-91 Persian Gulf War alone, such predictions have proven erroneous.²⁷⁷ In the case of the humanitarian *jus in bello*, these claims likewise fail for being as simplistic as they are self-serving.

Finally, because there are serious non-normative explanations for the silence or lack of protest that some would attribute to the non-nuclear weapon States and therefore at least ambiguity about the force and effect that such silence or lack of protest may have, it is not in any event theoretically possible that the non-nuclear weapon States can have acquiesced in, or consented to, the dismissal of the *opinio juris* that use of nuclear weapons, certainly in all known anticipated settings at least, would violate the humanitarian rules of armed conflict. Armed aggression, crimes against peace, crimes against humanity, war crimes, and genocide are now agreed to violate *jus cogens*; so, therefore, it may be presumed that the use of weapons that are capable of exterminating all or part of the human race would violate *jus cogens*. Therefore, to argue that such silence or lack of protest as may be attributed to the non-nuclear weapon States legitimates a *jus cogens* violation is, at bottom, to deny the very existence of peremptory norms in international law. It taxes simple credulity to insist that such a result or conclusion would have been intended or that it can be inferred, especially via silence or lack of protest.

In sum, the world community has in no way consented to the abolition of the humanitarian rules of armed conflict in order to legitimize nuclear war. As the late Professor John Fried stated emphatically: “It is scurrilous to argue that it is still *forbidden* to kill a *single* innocent enemy civilian with a *bayonet*, or wantonly to destroy a *single* building or enemy territory by *machine-gun* fire—but that it is *legitimate* to kill *millions* of enemy non-combatants and wantonly to destroy entire enemy

²⁷⁵ Paragraph 33 of the *Final Political Declaration adopted by the Conference of Foreign Ministers of the Non-Aligned Countries*, held at Luanda, 4-7 September 1985, reprinted in 11 *THE THIRD WORLD WITHOUT SUPERPOWERS: THE COLLECTED DOCUMENTS OF THE NON-ALIGNED COUNTRIES* 44 (O. Jankowitsch, K. Sauvart & J. Weber eds. 1993).

²⁷⁶ See, e.g., T. Franck, *Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force by States*, 64 *AM. J. INT’L L.* 809 (1970).

²⁷⁷ See, e.g., L. Henkin, *The Reports of the Death of Article 2(4) Are Greatly Exaggerated*, 65 *AM. J. INT’L L.* 544 (1971). In this connection, see Tlatelolco preamble “imperative that the legal prohibition of war should be strictly observed . . .”

cities, regions and perhaps countries (including cities, areas or the entire surface of *neutral States*) by nuclear weapons."²⁹⁸

Conclusion

In conclusion, we call this honorable Court's attention to the importance of precaution as a principle to guide decision—a principle now accepted as fundamental in international environmental law, it is important to note, in respect of all activities that are likely to pose a significant risk to nature²⁹⁹ and to the rights of present and future generations, especially in transboundary settings.³⁰⁰ Professor Weston has put it this way:³⁰¹

[I]n view of the horrifying and potentially irreversible devastation of which nuclear weapons are capable, not to mention the very little time their delivery systems allow for rational thought, it seems only sensible that any doubts about whether they are subject to the humanitarian rules of armed conflict as a matter of law should be answered, as a matter of policy, unequivocally in the affirmative. Such a response seems required, in any event, by a world public order of human dignity in which values are shaped and shared more by persuasion than by coercion. It is in keeping, too, with the major trends of an evolving planetary civilization: for example, the persistent, if uncertain, quest for nuclear arms control and disarmament, and the accelerating struggle for the realization of fundamental human rights, including the emerging right to peace recognized implicitly in Article 28 of the Universal Declaration of Human Rights. Also, it is consistent with the spirit, if not always the letter, of the judgment at Nuremberg, the Genocide Convention, and, not least, the United Nations Charter. The burden of proof, in other words, should be upon those who would contend that the humanitarian norms do not control the use of nuclear weapons.

²⁹⁸ J. Fried, *First Use of Nuclear Weapons—Existing Prohibitions in International Law*, 12 BULL. PEACE PROPOSALS 21, 28 (1981).

²⁹⁹ See, e.g., Principle 11(a)-(b) of the 1982 World Charter for Nature, *supra* note 162; Article 16 of the 1987 Legal Principles for Environmental Protection and Sustainable Development adopted by the 1986 Experts Group on Environmental Law of the World Conference on Environment and Development, *supra* note 181; Principle 15 of the 1992 Rio Declaration on Environment and Development, *supra* note 183.

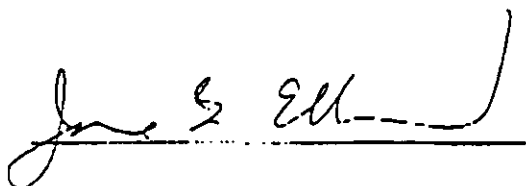
³⁰⁰ See, e.g., Principles 1 and 2 of the 1972 Stockholm Declaration of the United Nations Conference on the Human Environment, *supra* note 160; Preamble, World Charter for Nature, *supra* note 162; Article 2 of the 1987 Legal Principles for Environmental Protection and Sustainable Development adopted by the 1986 Experts Group on Environmental Law of the World Conference on Environment and Development, *supra* note 181.

³⁰¹ WESTON 574.

For this and the other reasons explained herein, the Court is requested to advise the World Health Organization that the use of nuclear weapons by a State in war or other armed conflict is a breach of its obligations under international law, including the W.H.O. Constitution. We ask this honorable Court to do so, mindful of the epitaph that may be found at Hiroshima where the first atomic bomb fell almost fifty years ago:

We know 100 times more than we need to know. What we lack is the ability to experience and to be moved by what we know, what we understand, and what we see and believe.

Auckland, New Zealand
19 September 1994

A handwritten signature in cursive script, appearing to read "Jerome B. Elkind", written over a horizontal line.

Prof. Jerome B. Elkind
Counsel of the Government of
the Republic of Nauru

RESOLUTION ADOPTED BY THE THIRTY-FOURTH WORLD HEALTH ASSEMBLY,
22 MAY 1981

Resolution WHA34.38

The role of physicians and other health workers in the preservation and promotion of peace
as the most significant factor for the attainment of health for all

The Thirty-fourth World Health Assembly,

Having considered the reports of the Executive Board and of the Director-General on the Global Strategy for the attainment of health for all by the year 2000 and the contribution of health to the socioeconomic development of countries, particularly developing countries, as well as to the preservation and promotion of peace as the most significant factor for the protection of people's life and health;

Bearing in mind the provisions of the WHO Constitution stating that the attainment of the highest possible standard of health of peoples, on the basis of the fullest cooperation of individuals and States, is one of the fundamental factors for peace and security, and also resolution 34/58 of the United Nations General Assembly stating that peace and security, in their turn, are important for the preservation and improvement of the health of all people, and that cooperation among nations on vital health issues can contribute importantly to peace;

Recalling the provision of the Alma-Ata Declaration emphasizing that an "acceptable level of health for all the people of the world by the year 2000 can be attained through a fuller and better use of the world's resources, a considerable part of which is now spent on armaments and military conflicts";

Recalling resolutions WHA13.56, WHA13.67, WHA15.51, WHA17.45, WHA20.54, WHA22.58, WHA23.53, WHA32.24, WHA32.30, WHA33.24 and others on the role of the physician in the preservation and promotion of peace, the protection of mankind against nuclear radiation, the reduction of military expenditures and the allocation of the resources thus released to socioeconomic development and also to public health, especially in developing countries;

Considering the present aggravation of the international situation and the growing danger of thermonuclear conflict, whose unleashing in any form and on any scale will inevitably lead to irreversible destruction of the environment and the death of hundreds of millions of people, and also to grave consequences for the life and health of the population of all countries of the world without exception and of future generations, thus undermining the efforts of the States and WHO to achieve health for all by the year 2000;

Noting further the growing concern of physicians and other health workers in many countries at the mounting danger of thermonuclear war as the most serious threat to the life and health of all populations and their desire to prevent thermonuclear disaster, which is an indication of their increased awareness of their moral, professional and social duty and responsibility to safeguard life, to improve human health, and to use all means and resources for attaining health for all;

1. REITERATES most strongly its appeal to Member States to multiply their efforts to consolidate peace in the world, reinforce détente and achieve disarmament so as to create conditions for the release of resources for the development of public health in the world;

2. REQUESTS the Director-General:

(1) to expedite and intensify the study of the contribution that WHO, as a United Nations specialized agency, could and should make to economic and social development and to facilitate the implementation of the United Nations resolutions on strengthening peace, détente and disarmament and preventing thermonuclear conflict, creating for this purpose an international committee composed of eminent experts in medical science and public health;

(2) to continue collaboration with the Secretary-General of the United Nations and with other governmental and nongovernmental organizations, to the extent required, in establishing a broad and authoritative international committee of scientists and experts for comprehensive study and elucidation of the threat of thermonuclear war and its potentially baneful consequences for the life and health of peoples of the world.

Appendix B

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

Resolution 1653 (XVI), Declaration on the Prohibition of the Use of Nuclear and Thermonuclear Weapons, U.N. GAOR 16th Sess, Supp. No. 17, at 4 U.N. Doc. A/5100 (1962).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

INTERNATIONAL COURT OF JUSTICE

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

(Request for an Advisory Opinion)

MEMORIAL
OF THE GOVERNMENT OF
THE REPUBLIC OF NAURU
II

September 1994

Memorial
in support of the
Application by the World Health Organization
for an
Advisory Opinion by the International Court of Justice
on the Legality of the Use of Nuclear Weapons
Under International Law, including the W.H.O. Constitution

Issues of Competence and Admissibility¹

A.

By Resolution 46.40 of May 14, 1993, the World Health Assembly requested the International Court of Justice to give an advisory opinion on the following question:

"In the 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?"

Objections have been raised¹ against this request to the effect that this resolution exceeds the bounds of the powers of the World Health Assembly (WHA) and, therefore, does not constitute a legally valid exercise of the power granted to the WHA to request an advisory opinion and that, as a result, the International Court of Justice is not entitled to give that opinion. This memorial will show that the resolution containing the request is indeed a valid exercise of the powers conferred upon the WHA.

Objections have also been raised which may be understood in the sense that it would be improper for the ICJ to give the opinion and that the Court, given these objections, should use the discretion it possesses not to accede to the request². This memorial will show that giving an answer to the request constitutes a proper exercise of the judicial function of the Court and that, thus, no reason exists for the Court to use its discretion in the sense of not giving the requested opinion.

¹This Memorial is largely based upon a study conducted by Prof. Dr. Michael Bothe (University of Frankfurt/Main).

¹See in particular the objections raised by certain delegates in the debates of WHA, WHO Doc. A 46/B/SR/8 p. 7 *et seq.*, SR/9 p. 2 *et seq.* and A 46/VR/13 p. 8 *et seq.* and in particular some of the views formulated by the WHO Legal Council, A 46/VR/13 p. 13 *et seq.*

²It is in this sense that objections could be interpreted which state that the course followed by WHA was "not appropriate" (see e.g. Austria, WHO Doc. A 46/B/SR/8, p. 11).

B.

Resolution 46.40 lies within the competences of the WHA.

I.

The legal source of the power granted to the WHA to request an advisory opinion of the ICJ is found in Art. 96 para. 2 of the United Nations Charter, Art. 76 of the WHO Constitution and in Art. 10 of the Agreement between the United Nations and WHO approved by both the WHA and the United Nations General Assembly. The relevant parts of these three provisions read as follows:

Art. 96 para. 2 of the UN Charter:

"Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on *legal questions arising within the scope of their activities*."³

Art. 76 of the WHO Constitution:

"Upon authorization by the General Assembly of the United Nations or upon authorization in accordance with any agreement between the Organization and the United Nations, the Organization may request the International Court of Justice for an advisory opinion on *any legal question arising within the competence of the Organization*."⁴

³ Emphasis added.

⁴ Emphasis added.

Art. X of the Agreement between the United Nations and the World Health Organization:

1. ...
2. The General Assembly authorizes the World Health Organization to request advisory opinions of the International Court of Justice on *legal questions arising within the scope of its competence other than questions concerning the mutual relationship of the Organization and the United Nations or other specialized agencies.*
3. Such requests may be addressed to the Court by the Health Assembly or by the Executive Board acting in pursuance of an authorization by the Health Assembly.
4. ...⁵

The two essential legal requirements for the admissibility of the request are, thus, that the request concerns a "legal question" and relates to matters which are within the scope of the activities or of the competence of the World Health Organization. This memorial will first address the latter question.

II.

The resolution concerns a question which is within the scope of the powers and functions of the WHO.

1. The powers of the WHO concerning nuclear weapons are based upon, and related to, some obvious and undisputed facts: In the two instances where nuclear weapons were used they caused unspeakable human suffering not only killing immediately, but also inflicting wounds and illness in many different ways upon thousands of "survivors". Should nuclear weapons ever be used again, the effects of their use will again ruin the health of countless

⁵ Emphasis added.

human beings and constitute a challenge of unsurmountable dimension to the health services and the medical profession⁶ in the affected areas. Furthermore, the health effects of the testing of nuclear weapons are becoming more and more apparent as the veil of government secrecy lifts. Nuclear weapons represent, among other things, a health problem, and are, thus, of relevance to the tasks of WHO.

The resolution containing the request can, thus, be based upon a number of items contained in the list of WHO functions enumerated in Art. 2 of the WHO Constitution. These are in particular:

"(a) to act as the directing and co-ordinating authority on international health work;

...

(c) to assist Governments, upon request, in strengthening health services;

(d) to furnish appropriate technical assistance and, in emergencies, necessary aid upon the request or acceptance of Governments;"

As far as nuclear weapons are concerned, these provisions give WHO, in particular, the mandate to help states in preparing their health services to meet the challenge of assisting the injured, but still surviving victims of a nuclear attack.

"(j) to promote co-operation among scientific and professional groups which contribute to the advancement of health;"

The provision is especially concerned with attitudes of the medical profession, which represent a crucial issue with regard to nuclear weapons. This provision can be seen as fundamental to WHO activities relating to medical ethics, which may also be based upon the following:

⁶ WHO, *Effects of Nuclear War on Health and Health Services*, 2nd ed. 1987.

"(k) to propose conventions, agreements and regulations, and make recommendations with respect to international health matters ..."

Awareness of health related problems (including those created by nuclear weapons) is another important aspect of WHO activities, based on the following provisions:

"(q) to provide information, counsel and assistance in the field of health;
 (r) to assist in developing an informed public opinion among all peoples on matters of health;"

The request for an advisory opinion is, among other things, a means to develop a more convincing information policy regarding nuclear weapons and the challenge they constitute for health services and the medical profession.

Finally, the list of WHO functions ends with a general clause:

"(v) generally to take all necessary action to attain the objective of the Organization."

This provision creates the necessary link between the powers and the aims organization. It constitutes an unusually broad enabling clause that allows the Organization to do everything necessary to attain its goals. It does not only refer to Art. 1 which states that the objective of the Organization is

"the attainment by all peoples of the highest possible level of health,"

but also the Preamble which formulates some basic principles relating to this objective. The Preamble states, in particular, the close link between health, on the one hand, and peace and security, on the other:

"The health of all peoples is fundamental to the attainment of peace and

security..."

With regard to nuclear weapons, this provides the WHO with additional authority.

The power of WHO to deal with the question of nuclear weapons having been established in general terms, it is possible to develop some more specific arguments in favour of the power to request the advisory opinion and to dispel some arguments put forward against this power.

2. The interpretation of the WHO Constitution to the effect that the Organization may deal with health effect of nuclear weapons is confirmed by the undisputed practice of the Organization. This subsequent practice constitutes a decisive element regarding the interpretation of a treaty, in particular, where no dispute exists between the parties and the parties to the treaty agree on this practice⁷.

With respect to the health effects of nuclear weapons, doubts were not voiced in the otherwise controversial debate leading to the adoption of resolution 46.40⁸ that these effects constitute questions coming within the scope of competence of the WHO. Dealing with the health effects of nuclear weapons has indeed constituted an unchallenged practice of the WHO over many years. Based on resolution WHA 34.38, an international committee of experts was formed by the Director General of the WHO which in 1983, submitted a first report on the effects of nuclear war on health and health services. The WHA endorsed the committee's conclusions in resolution WHA 36.28 and recommended that the work should continue. This recommendation was the basis for the well-known second edition of the report published in 1987⁹. This report was accepted and commended by the Fourtieth World Health Assembly¹⁰.

⁷ Art. 31 para. 2 (b) of the Vienna Convention on the Law of Treaties; see R. Bernhardt, Interpretation in International Law, in: R. Bernhardt (ed.), EPIL, Instalment 7 (1984), p. 323.

⁸ Statement by the Legal Council of WHO, A 46/VR/13 p. 13; Delegate of France, *ibidem* p. 12.

⁹ Effects of Nuclear War on Health and Health Services, Second Edition, Geneva 1986.

A similar practice exists relating to other weapons of mass destruction. In the 1960s, the WHO cooperated with the United Nations in the field of the prohibition of chemical and biological weapons. It submitted a report on health aspects of chemical and biological weapons¹¹ and several WHO resolutions dealt with this problem¹². It, therefore, remains beyond doubt that the health aspects of weapons of mass destruction represent a genuine question of health and, thus, fall within the scope or purpose of the World Health Organization as defined in Art. 1 of its Constitution. According to Art. 2 (q) and (r), quoted above, it is the function of WHO to provide information regarding these questions and to contribute to the formation of a better informed public opinion. This represents a basis for the publicizing of activities and views of the WHO on such questions.

3. The objections raised in the current proceedings do not relate to the legality of the WHA dealing with questions of health effects of nuclear weapons, they only relate to the power of the WHA to express a view regarding, or to request an advisory opinion on, the legality of the use of such weapons. For the purposes of the powers of the WHA, a distinction is thus made between the health effects of such weapons and the legality of their use. Those objecting apparently assume that the powers of WHO relate to these effects only, while the causes of these effects, namely the actual use of those weapons, remain outside the sphere of the competences of the Organization and its Assembly. This distinction establishes a narrow construction of WHO powers which is unacceptable and contrary to the established practice of the organization.

The undisputed practice constitutes a subsequent practice within the meaning of Art. 31 para. 3 (b) of the Vienna Convention on the Law of Treaties and thus a decisive element of the interpretation of the WHO Constitution¹³. WHO has never understood its mandate to deal

¹⁰ Resolution WHA 40.24, 15 May 1987.

¹¹ WHO, Health aspects of chemical and biological weapons, 1970.

¹² Resolutions WHA 20.54 of May 1967; WHA 22.58 July 1969 and WHA 23.53 of May 1970.

¹³ See above note 7.

with health questions as excluding from its purview the social and political causes of health problems. This broad stance has always lead the organization to deal with the political aspects of certain conflicts¹⁴. As a result, the WHA has also expressed views concerning the application of the laws of armed conflict, in particular the Geneva Conventions for the protection of victims of armed conflicts¹⁵. The authority of the WHO to deal with political issues is, in particular, well established in relation to the question of health and peace. The Preamble of the WHO Constitution clearly states that health is a prerequisite of peace¹⁶. Thus, health is not seen as a merely technical or scientific issue. It is a political matter, a question of war and peace. It thus being accepted that health is a prerequisite of peace, can the question of peace as a prerequisite of health be excluded from the scope of activities of the Organization? Both as a matter of legal logic and of the practice of the Organization, the answer is clearly no. This concept of "health through peace" and "peace through health" is clearly reflected in relevant resolutions of the WHA. WHA 15.51 of May 1962 on the "Role of the Physician in the Preservation and Promotion of Peace" reads as follows:

"The Fifteenth World Assembly,

Considering the international responsibilities which rest upon the World Health Organization, and being aware of the *close relationship which exists between health and the preservation of peace*; Bearing in mind the stipulations of the Preamble to the Constitution of the World Health Organization which states, inter alia: "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"; Desiring to emphasize the close relationship which exists between health - defined as a state of complete physical, mental and social well-being - and happiness, harmony

¹⁴ See, as a recent example, the resolution dealing with health conditions of the Arab populations in the occupied Arab territories, including Palestine, WHO Doc. A 46/B/SR/8, p. 2.

¹⁵ *Cfr.* resolution WHA 11:31 of June 1958 (concerning the Geneva Conventions in general).

¹⁶ See above.

and security of all peoples; Considering that continuing progress in the improvement of world health will contribute importantly to peace, as well as that peace is a basic condition for the preservation and improvement of health of people in the whole world,

1. DECLARES that physicians and all other medical workers have - in the exercise of their profession and through the relief and help they give to their patients - an important role to play in the preservation and promotion of peace, by contributing to the elimination or at least the attenuation of the causes of distress and dissatisfaction;
2. CALLS upon all Members to promote the cause of peace by intensifying their efforts to implement the principles and purposes embodied in the Constitution of the World Health Organization."¹⁷

The same broad approach to WHO powers was adopted in relation to chemical and biological weapons. In its resolution of 25 May 1967, the 20th World Health Assembly welcomed the resolutions of the United Nations General Assembly concerning the prohibition of the use of chemical and biological weapons and called upon its Member States to exert every effort to implement these resolutions¹⁸. The question of the use of such weapons is thus considered to constitute a common concern and a common function of both the United Nations and WHO. Along the same lines, resolution WHA 22.58 of 25 July 1969 expresses the view that rapid international agreements for the complete prohibition and the disposal of all types of chemical and bacteriological weapons are necessary. Again, the pronouncement of WHA is well in the field of disarmament.

The most telling example of this broad concept of WHO powers, which include the question of the legality of possession and use of weapons of mass destruction, is WHA 23.53 of May 1970. Due to its importance, it deserves to be quoted in full text:

¹⁷ Emphasis added.

¹⁸ WHA 20.54.

"The Twenty-third World Health Assembly,
Guided by the principles of the Constitution of the World Health Organization; Recalling the danger hanging over mankind as a result of the ever-continuing work to develop new forms of chemical and bacteriological (biological) weapons, and also as a result of their stockpiling; Expressing its profound anxiety in regard to the cases that are recurring of the use of chemical means of waging warfare; Bearing in mind resolution WHA 20.54 in which the World Health Assembly has already expressed its deep conviction that scientific achievements, particularly in the field of biology and medicine - that most humane science - should be used only for mankind's benefit, but never to do it any harm; Taking into account the terms of resolution 2603 (XXIV) adopted by the General Assembly of the United Nations at its twenty-fourth session, which stated that the prospects for general and complete disarmament under strict and effective international control and hence for peace throughout the world would brighten significantly if the development, production and stockpiling of chemical and bacteriological (biological) agents intended for purposes of war were to end and if they were eliminated from all military arsenals; Noting with approval the report of the Director-General of WHO and a group of consultants on the disastrous consequences for human health to which the use of chemical and bacteriological (biological) weapons could lead, a report which was transmitted to the Secretary-General of the United Nations in accordance with paragraph 2 of the operative part of resolution WHA 22.58, adopted by the Twenty-second World Health Assembly; Drawing attention to the fact that the *question of prohibiting the development, production and stockpiling of all forms of chemical and bacteriological (biological) weapons is very closely linked with the problem of the protection of the human environment against pollution*; and Declaring that the use not only of chemical and bacteriological (biological) weapons but also of any chemical and bacteriological (biological) agents for the purpose of war might lead to a disturbance of ecological processes which in

its turn would menace the existence of modern civilization,

1. PROPOSES that the Director-General should continue to co-operate with the Secretary-General of the United Nations with a view to promoting the rapid prohibition of the development, production and stockpiling of chemical and bacteriological (biological) weapons and ensuring their destruction;
2. APPEALS *once more to the governments of countries which have not yet ratified the Geneva Protocol of 17 June 1925 to accede to that important and highly humane international agreement in the nearest possible future;*
3. EMPHASIZES *the need for the rapid prohibition of the development, production and stockpiling of chemical and bacteriological (biological) weapons and the destruction of stocks of such weapons as a necessary measure in the fight for human health;*
4. CALLS UPON all medical associations and all medical workers to consider it their moral and professional duty to give every possible assistance to the international movement directed towards the complete prohibition of chemical and bacteriological (biological) means of waging war; and
5. REQUESTS the Director-General to transmit this resolution to the Secretary-General of the United Nations and also to distribute it among Member States and a wide medical public."¹⁹

The concept of this resolution is that the powers of the WHA are not limited to the health effects of the use of weapons of mass destruction, but that these health effects legitimize WHO dealing with the (il)legality of use and possession of such weapons, and that it is included in a specific medical professional responsibility to work toward their prohibition. It is precisely this concept which underlies resolution 46.40.

¹⁹ Emphasis added.

4. Another source of the power of WHA to request the advisory opinion of the ICJ lies in the fact that, in the view of the WHA, it required such an opinion as guidance for future action. The Court has always accepted a perceived need for authoritative guidance as a basis for its acceding to a request to give an advisory opinion²⁰. The interpretation of the constitution of the Organization to which the requesting organ belongs, represents, without doubt, such a matter where the guidance of the Court can be sought. Thus, the request to clarify the meaning of the WHO Constitution lies within the powers of the WHA. This is an explicit aspect of the request for the advisory opinion. Although it is true that the main reasons for the illegality of the use of nuclear weapons are found in other rules of international law, the WHO Constitution is also relevant for the question. The use of nuclear weapons would be both a clear-cut denial of the very essence of the objective of the WHO as formulated in Art. 1 of the Constitution and of the basic principles formulated in the Preamble. The use of weapons causing incurable trauma and illness for thousands or even millions of victims is incompatible with the basic human right contained in the Preamble of the WHO Constitution:

"The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being ..."

It is clearly within the powers of the WHA to express this idea in a solemn declaration. In the debate preceding the adoption of resolution 46.40, the Legal Council of the WHO expressly mentioned the possibility that WHA could adopt a resolution concerning the interpretation of the Constitution²¹. It follows (a logical conclusion which, however, the Legal Council fails to draw) that WHA may seek the advise of the ICJ before making such a declaration²².

Another field of activity where the legal guidance of the ICJ concerning the (il)legality of the

²⁰ See *Certain Expenses of the United Nations*, ICJ Reports 1962, p. 8 et seq.

²¹ WHO Doc. A 46/B/SR/10 p. 2.

²² See in this sense the statement by the Delegate of Mexico, WHO Doc. A 46/B/SR/8 p. 9.

use of nuclear weapons may become relevant is the function to provide advice pertaining to medical services. Assistance in the field of public health and the development of medical services is one of the major activities of WHO²³. This assistance is of particular importance for the developing countries. Preparing health services, in particular those of developing countries, to cope with emergencies and disasters is a very important element of this assistance²⁴. Medical services of developing countries are in a position which is still worse than that of industrial countries when having to cope with these problems. The problem of nuclear weapons has become more relevant for developing countries in recent time as the proliferation of those weapons to smaller states has come to present a realistic scenario²⁵. For the purposes of giving advice on disaster medicine relating to a nuclear attack, it is certainly relevant whether such attacks are to be considered as a fact of life which must be accepted under the law or are to be avoided where the law is obeyed. In addition, the report on the effects of nuclear war on health and health services convincingly concluded that, in the case of a nuclear attack, the health services of the world could not alleviate the resulting situation in any significant way. Therefore, the only approach of treatment of health effects of nuclear warfare is primary prevention, that is, prevention of nuclear war²⁶. It would be awkward, to say the least, to conclude that the WHA must keep silent regarding something which is recognized as being the only effective prevention of the health problems created by nuclear war.

Another field where the guidance to be given by the International Court of Justice would be important for the activities of the WHO is medical ethics. Medical ethics represents another

²³ See Art. 2 (c) and (d), quoted above.

²⁴ See, *inter alia*, The Work of WHO 1990 - 1991, Biennial Report of the Director-General to the World Health Assembly and to the United Nations, 1992, pp. 7 *et seq.*

²⁵ See the report by the Director General, Health and Environmental Effects of Nuclear Weapons, WHO Doc. A 46/30, para. 14.

²⁶ Effects of Nuclear War on Health and Health Services, Second Edition, p. 5.

important activity of WHO²⁷. It is also relevant for the question of nuclear weapons. The role of physicians in the preservation and promotion of peace and, in particular, in relation to the removal of the threat of nuclear weapons is a major ethical issue. This is, for instance, reflected in WHO resolution WHA 34.38²⁸:

"Noting further the growing concern of physicians and other health workers in many countries at the mounting danger of thermonuclear war as the most serious threat to the life and health of all populations and their desire to prevent thermonuclear disaster, which is an indication of their increased awareness of their moral, professional and social duty and responsibility to safeguard life, to improve human health, and to use all means and resources for attaining health for all;"

Finally, the question of the legal prohibition of nuclear weapons is also relevant for WHO activities in another aspect. Under the rules of the law of armed conflict which are relevant for the prohibition of nuclear weapons, the effect on human health and the environment constitutes the essential basis of this prohibition. Thus, it is not possible to clearly establish the very existence of that prohibition without expert medical knowledge. It is one of the tasks of WHO to collect and disseminate such knowledge or at least to instigate concerted efforts to this effect. Thus, the work of WHO should represent an essential basis for the opinion of the Court regarding the illegality of the use of nuclear weapons. The WHO must, as a result, also be interested in the legal yardstick by which such health effects are evaluated. Health effects and the legal yardstick applicable to the use of these weapons are thus inseparable; they are the two sides of the same coin. If the health effects of nuclear weapons fall within the powers of the WHO (and there is no doubt that they do), WHO must also be competent for the question of the legal prohibition of the weapons causing these effects. It is this very concept which determined the role of the WHO in its co-operation with the United Nations

²⁷ See, *inter alia*, resolutions EB4.R24 of July 1949, EB5.R75 of Feb. 1950; EB55.R64 of Jan. 1975; EB57.R47 of Jan. 1976.

²⁸ See already Resolution WHA 23.53 of May 1970, quoted above.

regarding the prohibition of chemical and biological weapons²⁹.

5. Those objecting to the competence of the WHO to deal with the question of the (il)legality of nuclear weapons claim that this question lies within the exclusive competence of the United Nations which the WHO would have to respect. Although this was not expressed in very clear terms, this idea seems to underly the misgivings the Legal Council of the WHO and of many delegates expressing doubts about the legality of the request³⁰. This thesis seems to rest on the assumption that a kind of *domaine réservé* exists for the United Nations in the field of the application and interpretation of the laws of armed conflict. If this is the assumption, it is an erroneous one. There are no exclusive powers of the United Nations in this field. Quite to the contrary, a tradition of cooperation of the United Nations with other bodies exists. The United Nations has, in particular, recognized the powers and functions of the International Committee of the Red Cross in this field. The questions of the application, implementation and development of the laws of armed conflict are dealt with both by the United Nations and by the Red Cross³¹.

Questions regarding peace and security and the laws of armed conflict have never been considered as a matter to be exclusively treated by the United Nations, but rather a common concern and a common function of the United Nations and of certain specialized agencies, in particular the WHO and UNESCO. The United Nations have always welcomed the contribution of the specialized agencies in this field. This co-operation or common action on the part of both the United Nations and the specialized agencies was not always uncontroversial. It was argued that the basic principle of the specialized agencies was "functionalism" and, as a result, "political" questions had to remain outside the scope of their

²⁹ See above notes 11 and 12.

³⁰ WHO Doc. A 46/B/SR/8 p. 8 (Legal Council); Delegate of Senegal, *ibidem* p. 12; United States, SR/10 p. 3; New Zealand, *ibidem* p. 6.

³¹ M. Bothe, in: M. Bothe/K. J. Partsch/W. A. Solf, *New Rules of Victims of Armed Conflicts*, 1982, p. 3.

activities³². Although there was considerable legal debate concerning the treatment of such political issues as South Africa and the relations between Israel and the Arab States, it has never been accepted that the specialized agencies were "unpolitical"³³. Indeed, the United Nations reminded certain specialized agencies that they had their role to play in order to promote certain policy objectives of the United Nations, for instance the Bretton Wood institutions in relation to South Africa³⁴. The co-operation between the United Nations and WHO concerning chemical and biological weapons, already mentioned above³⁵, represents another example of this concept of the responsibility for peace and security shared by the United Nations and a specialized agency.

It may, however, be argued that WHO must respect the primary role of the United Nations and, in particular, of the Security Council in the field of peace and security. The relevant sections of the Agreement between the United Nations and the WHO, however, provide only for limited duties of the WHO. In relation to recommendations of the General Assembly and of ECOSOC, a duty exist, to consider them and to consult with the U. N. (Art. IV). In addition, a duty of the WHO exists to render "such assistance for the maintenance of international peace and security" as the Security Council may request. This could mean a duty of the WHO not to create obstacles for United Nations activities³⁶. However, the

³² On this question of "politicisation", see D. Williams, *The Specialized Agencies and the United Nations*, 1987, pp. 55 *et seq.*; 4. - V. Ghebali, *The Politicisation of UN Specialized Agencies: A Preliminary Analysis*, in: R. N. Wells (ed.), *Peace by Pieces - United Nations Agencies and Their Roles*, 1991, pp. 12 *et seq.*

³³ Williams, *op. cit.* p. 55; R. v. Hanstein, *Der Einfluß der Vereinten Nationen auf die Sonderorganisationen - Anspruch und Wirklichkeit*, 1989, p. 171 *et seq.*; W. Meng, Art. 57, notes 37 *et seq.* in: B. Simma (ed.), *Charta der Vereinten Nationen*, 1991; E. Klein, *United Nations Specialized Agencies*, in: R. Bernhardt (ed.), *EPIL Instalment 5*, 1983, pp. 349 *et seq.*, at 366.

³⁴ v. Hanstein, *op. cit.*, p. 19 *et seq.*; Meng, *loc. cit.* note 42; see also I. Seidl-Hohenveldern, *Sonderorganisationen*, in: R. Wolfrum (ed.), *Handbuch Vereinte Nationen*, 2nd ed. 1991, pp. 782 *et seq.*, note 9.

³⁵ See above notes 11 and 12; on other "political" matters in the work of WHO, see C. O. Tannenberg, *A New International Health Order*, 1979, pp. 305 *et seq.*

³⁶ *Cfr.* Meng, *loc. cit.* note 42 *et seq.*

pronouncement of the United Nations General Assembly to the effect that the use of such weapons is indeed illegal³⁷ by no means constitutes the final disposition of the matter. Room still exists for an authoritative statement by the International Court of Justice on the same matter. Even if the World Health Assembly is required to respect the responsibilities and functions of the Security Council, this would not and could not constitute an obligation on the part of WHO had to keep silent regarding matters not actually before the Security Council.

6. A final point to be considered is the fact that the WHA has already made an explicit determination of its own competence. A motion not to consider the draft resolution requesting the advisory opinion was put before the Assembly which argued that the resolution were beyond the powers of the Organization. The motion was rejected³⁸. This formal determination of the Organization's powers must be respected by the ICJ. This raises the question of the judicial review of decisions taken by international organizations. Certain authors argue that there is no judicial review of such resolutions³⁹. For these authors, it should be clear that the determination made by the WHA concerning its own competence to request an advisory opinion was binding for the Court and could not be questioned by it. This, however, is a somewhat extreme view. The Court rather adopts a compromise view on the matter by using the legal construct of a presumption. In its advisory opinion concerning *Namibia*, the Court states:

"A resolution of a properly constituted organ of the United Nations which is passed in accordance with that organ's rules of procedure, and is declared by its President to have been so passed, must be presumed to have been validly adopted⁴⁰."

³⁷ Resolution 33/71 B (1978).

³⁸ WHO Doc. A 46/B/SR/9 p. 3.

³⁹ Caflisch, *Is the International Court entitled to review Security Council Resolutions adopted under Chapter VII of the United Nations Charter?*, Paper submitted to the Qatar International Law Conference 1994, in particular p. 4.

⁴⁰ ICJ Reports 1971, p. 22.

In its advisory opinion on *Certain Expenses of the United Nations*, the Court states:

"As anticipated in 1945, ... each organ must, in the first place at least, determine its own jurisdiction⁴¹."

This, too, is a kind of presumption. The question is thus whether, in a particular case, any reason exists to rebut this presumption. It is submitted that no such reason exists. It is true that in the *Namibia Case*, the Court examined objections raised concerning the procedure of the organ which had requested the advisory opinion because those objections finally concerned the jurisdiction of the Court. The Court, however, did not hold that this conveyed a right of unlimited scrutiny regarding the requesting organ's judgement concerning its own competence. In the present case, the essential question is really whether the WHA needs the guidance of the Court for its future activities. In this respect, a margin of appreciation must at least be granted to the requesting body. The Court will have to accept and may not question the wisdom of the judgement made by the WHA that it feels a need for the Court's guidance, at least where the matter in question does not manifestly lie outside the jurisdiction of the requesting organ. The Court, indeed, has never refused to give an opinion on the basis of a lack of competence of the requesting organ, although objections to this effect have been raised before the Court⁴².

III.

The next requirement for the admissibility of a request is that it relates to a *legal* question. As the question is submitted to the Court, it concerns the existence of a prohibition under international law. This is certainly a legal question. It is true that this legal question contains important political implications. This does, however, not exclude the legal character of the

⁴¹ ICJ Reports 1962, p. 168.

⁴² D. Pratap, *The Advisory Jurisdiction of the International Court*, 1972, pp. 122 *et seq.*

question. A legal question put to the Court, in particular a question of treaty interpretation, remains a legal question even if it has far-reaching political consequences. The Court, as it held in the *Certain Expenses case*,

"cannot attribute a political character to a request which invites it to undertake an essentially judicial task, namely, the interpretation of a treaty provision⁴³."

This is the constant jurisprudence of the Court⁴⁴. If such political consequences nevertheless lead the Court to refuse to give an opinion, the reason is not a lack of jurisdiction, but the fact that it might not be appropriate for the Court to give an opinion. This is a matter of the discretionary power of the Court to decline a request.

C.

Even if the request for an advisory opinion constitutes a legally valid exercise of a power conferred upon WHA, it still remains within the discretionary power of the ICJ not to give that opinion⁴⁵. Under Art. 65 of the Statute, the Court *may* give an advisory opinion. It is, however, not obliged to do so.

As the Court stated it in the *Certain Expenses Case*:

"The power granted is of a discretionary character ... Even if the question

⁴³ ICJ Reports 1962, p. 155; see already in this sense H. Kelsen, *The Law of the United Nations*, 1964, p. 548; on the broad definition of a "legal question", see also H. W. A. Thirlway, *Advisory Opinions of International Courts*, in: Bernhardt (ed.), *EPIL* vol. I, 1992, p. 39.

⁴⁴ Pratap, *op. cit.* p. 130; L. M. Goodrich/E. Hambro/A. P. Simons, *Charter of the United Nations*, 3rd ed. 1969, p. 567 *et seq.*; P. Daillier, Art. 96, in: J.-P. Cot/A. Pellet (eds.), *La Charte des Nations Unies*, 1985, p. 1287.

⁴⁵ *Certain Expenses of the United Nations*, ICJ Reports 1962, p. 155.

is a legal one, which the Court is undoubtedly competent to answer, it may nonetheless decline to do so."

The Court will, however, in principle not refuse to accede to such a request. Only "compelling reasons" should lead the Court to refuse to give a requested advisory opinion⁴⁶. This is related to the function of the Court as the principal judicial organ of the United Nations. As a matter of principle, the Court is bound to give an opinion. As the decisive factor in exercising its discretion, the Court is inspired by considerations of judicial propriety⁴⁷. The fact that a question is "intertwined with political questions"⁴⁸ does not constitute a compelling reason to refuse to give an opinion in the sense discussed above; it does not make it improper for the Court to accede to the request. In contentious proceedings, it has also been argued that the political nature of a dispute should exclude the jurisdiction of the Court. The Court clearly rejected this argument in the *Nicaragua* case⁴⁹. It found that there was no "inability of the judicial function to deal with situations involving ongoing conflict"⁵⁰. In international law, no political question doctrine exists that suggests that courts should refrain from giving a pronouncement on a particular question because that question is too political. Thus, the political and security implications pertaining to the (il)legality of the use of nuclear weapons do not render it improper, in view of the judicial function of the Court, to give a legal opinion thereon.

⁴⁶ *Judgement of the Administrative Tribunal of the ILO upon complaints made against UNESCO*, ICJ Reports 1953, p. 86; *Certain Expenses of the United Nations*, ICJ Reports 1962, p. 155.

⁴⁷ H. Mosler, Art. 96 note 22, in: B. Simma (ed.), *Charta der Vereinten Nationen*, 1991; M. Schröder, IGH-Internationaler Gerichtshof, in: R. Wolfrum (ed.), *Handbuch der Vereinten Nationen*, 2nd ed. 1991, pp. 321 et seq., note 14; Pratap, *op. cit.* pp. 149 et seq.; *Western Sahara* case. ICJ Reports 1975, p. 21.

⁴⁸ ICJ Reports 1962, p. 155.

⁴⁹ *Case concerning military and paramilitary activities in and against Nicaragua*, Jurisdiction and admissibility, ICJ Reports 1984, p. 437.

⁵⁰ *Ibidem* p. 436.

Another argument raised to suggest that the Court should refuse to give that opinion may be called a futility argument. It is said that a decision holding that nuclear weapons are indeed prohibited would be of no practical consequence. This argument can be understood in various ways. First, it is often said that it is improper for the Court to answer hypothetical or "academic" questions. The Court, however, has never accepted this argument⁵¹. In the *Western Sahara* case, the Court expressly stated that its advisory jurisdiction was not limited to giving an opinion

"on existing rights and obligations, or on their coming into existence, modification or termination, or on the powers of international organs ... (T)he court may also be requested to give its opinion on questions of law which do not call for any pronouncement of this kind, though they may have their place within a wider problem the solution of which could involve such matters⁵²."

Thus, the fact that the request does not relate to a particular case of use or intended use and/or does not concern the behaviour of any particular state does not affect the judicial propriety of rendering the opinion.

The futility argument may also be interpreted to mean that it would be improper for the Court to deliver an opinion which has no chance of being executed in practice. In this respect, the views expressed by the Court in the *Nicaragua* case are also applicable. Quoting the *Chorzów* decision of the PCIJ, the Court⁵³ observes that it

"neither can or should contemplate the contingency of the judgement not being complied with."

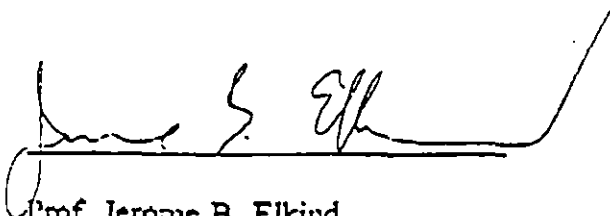
⁵¹ Prataap, *op. cit.* p. 130, 169 *et seq.*

⁵² ICJ Reports 1975, p. 20; see also Mosler, *loc. cit.* note 2b.

⁵³ ICJ Reports 1984, p. 437.

This applies, it is submitted, *a fortiori* to advisory opinions. It must be recognized that indeed the request for an advisory opinion, in this case as in many others, is part of a political process designed to achieve a certain solution to a problem. This was so in particular in relation to the requests for advisory opinions concerning the status of Namibia and the powers of administration possessed, or not possessed, by South Africa and the consequences of the presence of South Africa in Namibia which was found to be illegal. When the Court was asked for a legal opinion, it was by no means certain that the holding of the Court would be honoured by South Africa. This, however, did not prevent the Court from delivering an opinion. It is the role of law and thus also the role of the judges to contribute to the solution, in a political process, of a political problem by clarifying the applicable rules of the game. If this contribution of the law is asked for at the beginning of a process, that is to say at a point in time where the solution of the problem still seems to be far away, this does not mean that the law has no role to play. The political difficulty of implementing an opinion given by the Court is not a compelling reason to deny a request.

Auckland, New Zealand
19 September 1994



Prof. Jerome B. Elkind
Counsel of the Government of
the Republic of Nauru

**INTERNATIONAL COURT OF
JUSTICE**

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

(Request for an Advisory Opinion)

MEMORIAL
OF THE GOVERNMENT OF
THE REPUBLIC OF NAURU

MEMORIAL OF THE GOVERNMENT OF THE REPUBLIC OF NAURU

Authority of Ask for Advisory Opinions

Article 96 of the United Nations Charter says:

1, The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.

2. Other organs of the United Nations and the specialised agencies, which may at any time be so authorised by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.

Article 65(1) of the Statute of the International Court of Justice says:

The court may give advisory opinions on any legal question at the request of whatever body may be authorised by or in accordance with the Charter of the United Nations to make such a request.

The World Health Organisation is authorised to request advisory opinions under Article X of its Relationship Agreement with the United Nations which says:

(2) The General Assembly authorises the World Health

Organisation to request advisory opinions of the International Court of Justice on legal questions arising within the scope of its competence other than questions concerning the mutual relationships of the Organisation and the United Nations or other specialised agencies.

(3) Such requests may be addressed to the Court by the Health Assembly or by the Executive Board acting in pursuance of an authorisation by the Health Assembly.

General Assembly Resolution 124(II), 15 November 1947 approved that agreement. Article 76 of the Constitution of the World Health Organisation says:

Upon authorisation by the General Assembly of the United Nations or upon authorisation in accordance with any agreement between the Organisation and the United Nations, the organisation may request the International Court of Justice for an advisory opinion on any legal question arising within the competence of the organisation.

So we must ask ourselves whether the use of nuclear weapons is a legal question arising within the competence of the W.H.O. The first question to be answered is does it fall within the competence of W.H.O. Let us look at the Preamble. The Preamble says:

The States Parties to this constitution declare, in conformity with the Charter of the United Nations, that the following principles are basic to the happiness harmonious relations and security of all peoples:

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 achievement of any State in the promotion and protection of health is of value to all.

* * *

Healthy development of the child is of basic importance: the ability to live harmoniously in a changing total environment is essential to such development.

* * *

Governments have a responsibility for the health of their peoples which can be fulfilled only by the provision of adequate health and social measures.

Accepting these principles and for the purpose of co-operation among themselves and with others to promote and protect the health of all peoples, the

Contracting Parties agree to the present Constitution and hereby establish the World Health Organisation as a specialised agency within the terms of art. 57 of the Charter of the United Nations.

Article 1 says:

The objective of the World Health Organisation (hereinafter called the Organisation) shall be the attainment by all peoples of the highest possible level of health.

The victims of a nuclear attack could not possibly sustain the level of health referred to in the Preamble and in Article 1? Clearly this makes the use of nuclear weapons a health issue. It is my intention to call a doctor to the stand to testify that the use of nuclear weapons is a health matter.

The next question to be asked is "is this a legal question?" We can regard this as a question of justiciability. Justiciability has been defined as the "fitness of a dispute for settlement on the basis of legal principle". It has been

very common for States to assert that a question before the Court is of a political nature and not a proper one for judicial settlement. But a distinction must be made between genuine "legal" non-justiciability and spurious claims of non-justiciability based on the alleged "political" nature of the subject matter (political non-justiciability). Issues of the political nature of a matter date back to the P.C.I.J. *Austro-German Customs Union Case*.¹ In essence the Permanent Court was asked whether the proposed regime threatened the independence of Austria. This question clearly invited the court to indulge in some political forecasting and was of the greatest political importance. Notwithstanding this all fifteen judges subscribed to opinions which dealt with the merits of the dispute and only Judge Anzelotti even mentioned the propriety of doing so. Advisory cases before the I.C.J. where the political question was raised include *Conditions of Admission of a State to Membership in the United Nations*,² *Competence of the General Assembly for the Admission of a States to the United Nations*³, and *Certain Expenses of the United Nations case*.⁴ In all three cases the argument was summarily rejected. The argument was a legal one. Nor, said the Court was there any reason why it should refrain from giving an opinion. In the *Certain Expenses Case*, the Court said that only compelling reasons could lead it to refuse to give an opinion:

The Court finds no "compelling reason" why it should not give the advisory opinion...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

¹ [1931] P.C.I.J. Rep., Ser. A/B, No. 41.

² [1948] I.C.J. Rep. 57.

³ [1950] I.C.J. Rep. 4

⁴ [1962] I.C.J. Rep. 151.

judicial task... .⁵

In that case the judicial task was specifically the interpretation of a treaty. Despite the involved political aspects of that case and its considerable political importance only one of the fourteen judges argued that the Court should refuse to proceed on that ground.

In this case the task is the interpretation of a number of treaties including the United Nations Charter and the elaboration and application of principles of customary international law.

Perhaps the strongest attacks on justiciability appeared in cases where the Respondent did not even bother to come to the Court. In the *Fisheries Jurisdiction* Cases, the Icelandic government argued that this was a matter involving "the vital interests of the people of Iceland."⁶ In the *Nuclear Test* Cases, the French Government protested that the matter was too closely connected with national security and defence of France⁷ and in the *Hostages* Case, the Iranian government complained that the hostage problem was only a part of a larger problem inherent in the relationship between the United States and Iran of over twenty years' duration.⁸ In the *Military and Paramilitary Activities* Case, the United States attempted to argue that the use of force was a political matter which should more properly have been dealt

⁵ Ibid. at 155.

⁶ Correspondence from the Minister of Foreign Affairs of Iceland to the Registrar of the Court [1975] I.C.J. Pleadings, Vol. II, pp. 375-6.

⁷ [1974] I.C.J. Pleadings, Vol. II, pp. 347-8.

⁸ [1975] I.C.J. 7, 10-11. See Gross, "The Case concerning United States Diplomatic and Consular Staff in Tehran Phase of Provisional Measures," 74 A.J.I.L. 395, 396-7 (1980).

with by the United Nations Security Council.⁹ When, despite this argument the Court found that it did possess jurisdiction, the United States withdrew from participation in the case. In all of these cases the parties attempted to argue that the Court did not possess jurisdiction.

The non-appearing respondents argued that the Court did not possess jurisdiction with varying degrees of authority and conviction. In the *Hostages Case* the Court did not even deem it necessary to waste time with a jurisdictional phase. In all of these cases, it would seem that, while lack of jurisdiction was a professed motive for abstention from the judicial process, the primary motive, in each case was a claim that the action was non-justiciable.

Any discussion of non-justiciability inevitably involves a dialogue with Sir Hersch Lauterpacht, the most articulate critic of the doctrine of non-justiciability. In his book *The Function of Law in the International Community*, written before he received his knighthood and well before his elevation to the bench of the International Court of Justice, he identified "four clear-although not mutually exclusive-conceptions of legal or justiciable disputes". These are:

(a) Legal disputes are such differences between States as are capable of judicial settlement by the application of existing and ascertainable rules of international law.

(b) Legal disputes are those in which the subject-matter of the claim relates to questions of minor and secondary importance not affecting the vital interests of States, or their external independence, or internal sovereignty, or territorial integrity, or honour, or any of the other important interests usually referred to in the so-called "restrictive clauses" in arbitration conventions.

(c) Legal disputes are those in which the application of

⁹ [1984] I.C.J. 392.

existing rules of international law is sufficient to ensure a result which is not incompatible with the demands of justice between States and with a progressive development of international relations.

(d) *Legal disputes* are those in which the controversy concerns existing legal rights as distinguished from claims aiming at a change of existing law.¹⁰

Of these, the second conception is the oldest and probably more accurately reflects the thinking of Government leaders than the others.

Traditionally, treaties involving international arbitration exempted disputes which might affect the vital interests, independence and international honour of the contracting parties. Later treaties limited the obligation to arbitrate "legal disputes" or disputes "with regard to which the parties are in conflict as to their respective rights". Such clauses were inserted into declarations of acceptance of the compulsory jurisdiction of the Permanent Court of International Justice as a means of excluding "political" disputes or disputes related to interests and not to rights.¹¹ De Visscher expressed the view that, when a state takes a political position, it is expressing the priority that its Government assigns to the interests involved:

The specifically political quality is to be seen in the particularly close relation that the rulers assert from time to time between the State and certain goods or values that they hold indispensable to its security or greatness.¹²

Iceland, for example regarded the conservation of its fisheries resources as non-justiciable because, as a nation dependant upon its fisheries, it

¹⁰ Lauterpacht, *The Function of Law in the International Community* (1933), pp. 19-20.

¹¹ Ibid.

¹² De Visscher, *Theory and Reality in Public International Law* (Transl. Corbett 1959) p. 73.

regarded the matter as vital. The United States and other nuclear nations do not want a legal decision which will limit their free hand with nuclear weapons.

Thomas Franck points out that "the test is nearly useless from the point of view of good order".¹³ Hence:

...the only useful guide from the legal point of view,
is the external behavior of interested States.

This underlines the difficulty of developing legal norms which can help us to determine what is a political dispute and what is a legal one. Political questions, according to De Visscher, are the expression of "vital and moving forces". They can be subject to constant change. They cannot be locked up in a definition.¹⁴ He did however acknowledge that certain matters generally have a political character while others are political only in exceptional circumstances.¹⁵ But his book demonstrates throughout, the operation of political factors in all areas of international law and the fact that there is no clear demarcation between political and other issues. With regard to domestic matters he notes that there is hardly any matter which "looked at from a certain angle or a certain level of generalisation or specialisation"¹⁶ may not now be legal, now political.

Some writers are of the opinion that the distinction between legal and political questions has no real validity. Lauterpacht argues that all questions which can be resolved by the application of legal rules are legal whether or

¹³ Franck, *The Structure of Impartiality* (1968), p. 178.

¹⁴ *Supra* note 5 at p. 73.

¹⁵ *Ibid.*

¹⁶ *Ibid.* at p. 22.

not they affect the vital interests of States.¹⁷ Thus all conflicts in the sphere of international politics can be reduced to conflicts of a legal nature.¹⁸ One writer points out that there have been quite a few situations in which cases involving political tension have been brought before the Court.¹⁹ He cites as examples the *Anglo-Iranian Oil Co. Case*²⁰, the *Corfu Channel Case*²¹, the *Cases of Treatment in Hungary of Aircraft of the United States of America*,²² the *Asylum Case*²³, the *Aerial Incidents Cases*²⁴ and the *Antarctic Territory Cases*.

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¹⁷ *Supra* note 3 at p. 139. See also Doecker, "International Politics and the International Court of Justice", 35 *Tulane L.R.* 767, 770 (1961); Brown, "Reserved International Rights", 38 *AJIL* 281 (1944); Schwarzenberger, *Power Politics* (2d Rev. ed. 1951) p. 450, although Schwarzenberger argues that "an organised society based upon a community spirit and founded upon the rule of law seems to be an illusion".

¹⁸ Lauterpacht, *ibid.* at p. 164.

¹⁹ Doecker, *supra* note 10 at 782.

²⁰ [1952] *I.C.J. Rep.* 93.

²¹ [1949] *I.C.J. Rep.* 4.

²² [1952] *I.C.J. Rep.* 99, 103.

²³ [1950] *I.C.J. Rep.* 266.

²⁴ [1956] *I.C.J.* 6; [1959] *I.C.J. Rep.* 276.

²⁵ [1956] *I.C.J. Rep.* 12.

Lauterpacht points to the historical paradox that many disputes of political importance were settled by the judicial process while many disputes which were obviously capable of decision along strictly legal lines were withheld from adjudication or arbitration on the ground that they were essentially political.²⁶

In fact, all international disputes including legal controversies are political because the State is a political institution and all questions which affect it, particularly those which deal with its relationship with other States are political.²⁷ The nature of the judicial task is isolation of the legal problems from the political situation and solution of legal problems on the basis of objective rules of international law to the exclusion of extra-legal considerations.²⁸ In the words of Judge Hardy C. Dillard:

Just as men are neither a pack of wolves
nor a choir of angels and marriages are
sometimes happy and sometimes sad, so
with disputes. Most of them, as we all know,

²⁵ [1956]I.C.J. 12.

²⁶ *Supra* note 3 at p. 163.

²⁷ *Ibid.* at p. 153.

²⁸ Rosenne, *The International Court of Justice* (1957), p. 66.

have both a political and a legal component. And surely, the legal component can usually be syphoned off for analysis.²⁹

As De Visscher points out, lawyers and politicians look at these matters through different lenses. A lawyer is likely to ask whether there are rules of international law which can be brought to bear on the issue. To a politician the question is the extent to which State interests, or even Government policy (which is often identified with State interests) are affected by the dispute. A Government may refuse to submit a dispute to legal settlement without disputing the existence of legal rules which can be applied by the judge or arbitrator.³⁰ Thus the attempt to measure justiciability in terms of political importance is illusory.

In Lauterpacht's view, it is not the nature of a matter which makes it unfit for judicial settlement, but the unwillingness of States to have it settled by application of law.³¹ Arthur Larsen made the following point:

...the real obstacle to adjudication is not inherent in the nature of things, but it is largely a matter of deliberate choice. As of today nations stay away from the Court... simply because they prefer to retain their freedom of action, and in many cases because they apparently prefer to live with continuing controversy than take a chance on an unfavorable decision. In short, the problem isn't "can't-its" "won't".³²

²⁹ Address to the American Society of International Law, "The World Court - An Inside View" 67 Proc. ASIL 296, 299 (1972-73).

³⁰ Supra note 5 at p. 331.

³¹ Supra note 3 at p. 369. But see Rosenne, "Sir Hersch Lauterpacht's Concept of the Task of an International Judge", 55 AJIL 825, 832, note 34 (1961). Rosenne believes that there are other extra-judicial factors which may establish the non-justiciability of a particular matter.

³² Larsen, "Peace Through Law: The Role and Limits of Adjudication-Some Contemporary Problems", 54 Proc. ASIL 8 (1960).

In the *Fisheries Jurisdiction* Cases, the *Hostages* Case and the *Military and Paramilitary Activities* Case the Court was not sympathetic to the claim that the matters were political and thus not fit for judicial settlement. In all three cases the Court went on to decide the merits of the case despite the pleas by Iceland, Iran and the United States that the matters were political and therefore not suitable for settlement by the Court.

There are strong legal arguments that can be made about the legality of the use of nuclear weapons, particularly strong are the arguments relating to *jus in bello*. But before proceeding to the *jus in bello* arguments, it would seem necessary to canvass some of the reasons why the use of nuclear weapons is unlawful according to the *jus ad bellum*.

The United Nations Charter

Article 2(4) of the United Nations Charter says:

All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, *or in any other manner inconsistent with the Purposes of the United Nations*, (emphasis added).

Therefore, the use of nuclear weapons is unlawful because the use of force is unlawful. This automatically excludes any aggressive "first strike" uses.

The italicised portion of this rule is frequently ignored by scholars. But let us look closely at it. The purposes of the United

Nations are set out in Article 1 of the Charter. There are three relevant paragraphs.

Article 1(1) says that one of the chief purposes of the United Nations is:

To maintain international peace and security...

The remainder of the paragraph speaks of collective measures for the removal of threats to the peace, breaches of the peace and acts of aggression and peaceful settlement of disputes.

Certainly the use of nuclear weapons is inconsistent with the maintenance of international peace and security.

Paragraph 2 says:

To develop friendly relations among nations based on respect for the principles of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.

Again the use of nuclear weapons can be seen to be fundamentally inconsistent with the idea of developing friendly relations among nations.

Paragraph 3 says:

To achieve international co-operation in solving international problems of

an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.

Nuclear war is not international co-operation. It does not help to solve problems of an economic, social, cultural or humanitarian character, rather it creates and aggravates such problems and, it can be seen to violate basic human rights and fundamental freedoms.

The use of nuclear weapons violates other provisions of the United Nations Charter. Article 33(1) directs the parties to a dispute to seek a solution using peaceful means for the settlement of such disputes. The use of nuclear weapons does not amount to peaceful settlement.

Article 55 says:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

a. higher standards of living, full employment, and conditions of economic and social progress and development.

b. solutions of international, social, health, and related problems; and international cultural and educational co-operation.

c. universal respect for, and observance of, human rights and

fundamental freedoms for all without distinction as to race, sex, language, or religion (emphasis added).

We can see the fundamental inconsistency of the use of nuclear weapons with those objectives.

Article 56 says:

All members pledge themselves to take joint and separate action in co-operation with the organisation for the achievement of the purposes set forth in Article 55.

Human Rights Law

Before proceeding to a *jus in bello* argument we might also want to look at basic human rights law. For instance one can argue that the use of nuclear weapons violates the following principles in the Universal Declaration of Human Rights.³³

Article 1 says:

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act toward one another in a spirit of brotherhood.

Obviously to use such a horrible weapon on someone does not recognise that person's dignity and rights. It cannot be regarded as acting toward the victim in a spirit of brotherhood.

³³ U.N. Doc. A/811 (10 December 1948).

Article 3 deals with the right to life, liberty and security of person. The use of nuclear weapons against people may well deprive them of their right to life. The current threat of nuclear weapons has a negative impact on everyone's sense of security.

Article 5 prohibits torture or cruel, inhuman or degrading treatment or punishment. I think we can say that the victims of nuclear weapons in Hiroshima and Nagasaki and future victims have experienced and will experience cruel, inhuman and degrading treatment.

Article 8 says:

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

In a nuclear war there is no remedy and there is no tribunal capable of administering such a remedy.

Article 12 protects against arbitrary interference with privacy, family, home and correspondence. A nuclear war will arbitrarily destroy families and homes.

Article 25 talks of the right to an adequate standard of living. Assuming that one survived a nuclear war, one would be reduced to the process of living at a bare subsistence level. A nuclear war would in fact render superfluous most of the rights in the Universal Declaration, freedom of expression, freedom of assembly, freedom of religion, the right to take part in the

government of one's country, the right to rest and leisure. So we can say that it would violate Articles 18, 19, 20, 21 and 24.

Article 28 is also relevant. It says:

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this declaration can be fully realised.

The status of the Universal Declaration is questionable. On one view it is merely declaratory and has no legal force.³⁴ On another view it has found its way into the corpus of customary international law and is therefore binding on all states, regardless of whether they are parties to any human rights treaties.³⁵ But we can find references to similar rights in the human rights treaties particularly the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

Poison

³⁴ Watson, "Legal Theory, Efficacy and Validity of Human Rights Norms<" (1979) U. Ill L.F. 609; See also Schachter, *International Law in Theory and Practice* (1985) pp. 334-38. For a reply to Watson see J. Elkind, "Normative Surrender" 9 Michigan Journal of International Legal Studies 263, 266-273 (1988).

³⁵ Schwebel, "The International Court of Justice and the Human Rights Clause of the Charter," 66 AJIL 337(1972); Sohn, "Protection of Human Rights Through International Legislation" in 1 Rene Cassin, *Amicorum Discipulorumque Liber* 325 (1969); Lauterpacht, *International Law and Human Rights* (1950, 1973) pp. 145-60.

Turning to the *jus in bello* arguments; the position in customary international law is that the use of poison in warfare is prohibited.³⁶

The most positive and clear enactment on the subject is found in Article 23(a) of the Hague Regulations,³⁷ which is in unequivocal terms and is regarded as a fundamental principle regarding the law of weapons in war. The term poison means "any substance that, when introduced into, or absorbed by a living organism destroys life or injures health".³⁸ The use of nuclear weapons contaminates water and food, as well as the soil and the plants that may grow on it. This is so not only in areas covered by immediate nuclear radiation, but also in a much larger unpredictable zone which is affected by radioactive fall-out. In regard to immediate nuclear radiation which consists of neutrons and gamma rays said to be released instantaneously with the explosion, it is now well established that a certain dosage is destructive of human life. It gives rise to disease, aggravates suffering and frequently proves lethal. Exposure to radiation brings about chemical changes both in plant and animal life including human beings. Accepting the normal definition of poison, nuclear radiation appears to be something which can be described as poisonous in its effects.³⁹

It is my intention to call a doctor to the stand to testify that nuclear radiation destroys life and injures health.

³⁶ Schwarzenberger, *The Legality of Nuclear Weapons* (1968) p. 30-4.

³⁷ Signed at the Hague 18 October 1907. entered into force 26 January 1910; TS 9 (1910), Cd. 5030; P (1910) CXII 59; 100 B.S.P. 338; 25 H.C.T. 596; 3 Martens (V) 461; Supra note 11 at p. 43.

³⁸ Supra note 36 at p. 27, citing *The Shorter Oxford Dictionary*.

³⁹ Singh, *Nuclear Weapons and International Law* (1959) p. 157.

Other international anti-poison instruments which are violated by nuclear weapons are the Declaration of St. Petersburg of 1868 which is the first major international codification of the laws of war in modern times, , the Hague Declaration on Asphyxiating Gases of July 29, 1899 and the Geneva Gas Protocol of 1925. ⁴⁰ That Protocol prohibits "the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices" and states that "such use has been justly condemned by the general opinion of the civilised world". The United States is the most prominent of the non-Parties. But we have shown that the prohibition of poison is a rule of customary international law and is therefore binding on States which are not Parties to the Geneva Gas Protocol.

Article 14 of the ICRC Draft Rules (1956) expanded on the Geneva Gas Protocol. It said:

...the use is prohibited of weapons whose harmful effects - resulting in particular from the dissemination of incendiary, chemical, bacteriological, radioactive or other agents - could spread to an unforeseen degree or escape, either in space or time, from the control of those who employ them.

Unnecessary Suffering

It is forbidden to use weapons which cause unnecessary or aggravated suffering. This is the military counterpart of the rule found in the Universal Declaration of Human Rights and in other human rights documents prohibiting cruel and inhuman treatment or punishment. It is aimed at reducing the suffering of combatants, although it applies to the use of

⁴⁰ Cmnd. 3604 (1930); 94 LNTS 65 (1927),

weapons against civilians as well. The ban on excessively cruel weapons dates back to the earliest recorded instances of humanitarian law. Thus, the right of parties to an armed conflict to adopt means of injuring the enemy is not unlimited.

The Declaration of St. Petersburg was prompted by the desire of the Russian Government to ban the use of dum dum bullets, i.e. projectiles designed to explode upon contact with the human body. It hardly needs saying that the cruelty and inhumanity of nuclear weapons is astronomically greater than that of dum dum bullets. The blast and burn effects of such weapons and all their other consequences including the radiation consequences and the genetic consequences demonstrate that they cause unnecessary and aggravated suffering. The rule against causing unnecessary or aggravated suffering is enshrined in the Declaration of Petersburg. Article 23(e) of the Hague Regulations on Land Warfare of 1907 ⁴¹ says that "the use of arms, projectiles or material calculated to cause unnecessary suffering is prohibited".

Environmental Safety

Everyone has a right to a safe, clean, livable environment. The Stockholm Declaration of the United Nations Conference on the Human Environment (1972) adopted principle 26 which said:

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

⁴¹ Supra note 11.

Principle 21 says:

States have, in accordance with the United Nations Charter 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.

Article 35(3) of Geneva Protocol I (1977) ⁴² declares that "it is prohibited to employ methods of warfare that are intended, or may be expected to cause widespread, long-term and severe damage to the environment". Article 55 provides:

1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition on 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 and survival of the population.

2. attacks against the natural environment by way of reprisals are prohibited.

The United States of America and the United Kingdom but not China, France or the U.S.S.R. declared, upon signing Protocol I, that it was their understanding that its rules were "not intended to have any effect on and do not regulate or prohibit the use of nuclear weapons". But we must understand that this is not a reservation. It is an understanding of the interpretation that

⁴² Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the protection of Victims of International Armed Conflicts adopted at Geneva, June 8, 1977, U.N. Doc. A/32/144 August 12, 1977; 16 ILM 1391 (1977); Misc. No. 19;(Cmnd. 6927) p.23.

these two nations wish to have placed on the Treaty. But, as an understanding, it must be regarded as purely self-serving and neither the international community nor the International Court of Justice is bound by it. Even if it could be considered a reservation, Article 19(c) of the Vienna Convention on the Law of Treaties ⁴³ provides that a signing state may not formulate a reservation which is "incompatible with the object and purpose of the treaty".

The United Kingdom has not ratified Protocol I ⁴⁴ and the United States has ratified Protocol II ⁴⁵ but not Protocol I. Protocol I has however been ratified by over 70 States and we can say that it must now be regarded as customary international law which is binding on all States.

The World Charter for Nature adopted by the United Nations General Assembly on 28 October 1982 proclaims in Principle 5 that nature "shall be secured against degradation caused by warfare or other hostile activities".

The theory of "nuclear winter" was propounded by a group of distinguished scientists. ⁴⁶ It is based on mathematical models and assumes that a major nuclear exchange of about 10,000 megatons would result in a mean reduction of 50% of the ozone layer in the Northern Hemisphere and 30% in the Southern Hemisphere. This would result in an increase in

⁴³ Cmnd. 7964; 1155 UNTS 331; 8 ILM 679 (1969); 63 AJIL 875 (1969).

⁴⁴ *Supra* note 17.

⁴⁵ 16 ILM 1442 (1977).

⁴⁶ Ehrlich, Sagan, Kennedy and Roberts, *Nuclear Winter* (1984).

ultraviolet radiation (UV-B) by a factor of five or more. ⁴⁷ It would also make the earth much colder. It would make warm places cool and cold places unlivable.

The nuclear winter theory gives us some idea of the severity that the effects of nuclear war would have on the environment. Even a single small tactical nuclear detonation ⁴⁸ is likely to affect the environment adversely since it would damage not only humans but plant and other animal life. Nuclear weapons are weapons which clearly damage the environment and as such are banned.

The Destruction of Medical Facilities

Nuclear weapons are indiscriminate. They would result in the destruction of medical facilities. This is forbidden by the Geneva Conventions. Article 19 of the Geneva Convention of 1949, for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field says:

Fixed establishments and mobile medical units of the Medical Service may in no circumstances be attacked but shall at all times be respected and protected by the Parties to the conflict. ...

Article 21 says:

⁴⁷ International Physicians for the Prevention of Nuclear War, *Last Aid* (1982) p. 282.

⁴⁸ Tactical nuclear weapons are common terms for those nuclear weapons systems which, by virtue of their range and yield as well as the way they are incorporated in a military organisation, have been designed or can be used for employment against military targets in a theatre of war.

The protection to which fixed establishments and mobile medical units of the medical Service are entitled shall not cease unless they are used to commit, outside their humanitarian duties, acts harmful to the enemy. Protection may, however cease only after a due warning has been given, naming, in all appropriate cases, a reasonable time limit and after such warning has remained unheeded.

Article 18 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War says:

Civilian hospitals organised to give care to the wounded and sick, the infirm and maternity cases, may in no circumstances be the object of attack but shall at all times be respected and protected by the Parties to the conflict.

States which are Parties to a conflict shall provide all civilian hospitals with certificates showing that they are civilian hospitals and that the buildings which they occupy are not used for any purposes which would deprive these hospitals of protection in accordance with Article 19.

Civilian hospitals shall be marked by means of the emblem provided for in Article 38 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, (the red cross or red crescent) but only if so authorised by the state

The Parties to the conflict shall, insofar as military consideration permit, take the necessary steps to make the distinctive emblems indicating civilian hospitals clearly visible to the enemy land, air and naval forces in order to obviate the possibility of any hostile action.

In view of the dangers to which hospitals may be exposed by being close to military objectives, it is recommended that such hospitals be situated as far as possible from such objectives.

Clearly, there is no way in which a strategic nuclear attack by ICBMs or other long range missiles can pick out civilian hospitals from military targets and ensure their protection.

Article 12 of Protocol I says:

1. Medical units shall be respected and protected at all times and shall not be the object of attack.

2. Paragraph 1 shall apply to civilian medical units provided that they:

(a) belong to one of the Parties to the conflict;

(b) are recognised and authorised by the competent authority of one of the Parties to the conflict; or

(c) are authorised in conformity with Article 9, paragraph 2, of this Protocol or Article 27 of the First Convention.

3. the Parties to the conflict are invited to notify each other of the location of their fixed medical units. The absence of such notification shall not exempt any of the Parties from the obligation to comply with the provisions of paragraph 1.

4. Under no circumstances shall medical units be used in an attempt to shield military objectives from attack. Whenever possible, the Parties to the conflict shall ensure that medical units are so sited that attacks against military objectives shall not imperil their safety.

A nuclear armed conflict, in that it would destroy civilian and military hospitals and thereby place a great strain on the medical facilities of the attacked party would violate the Geneva conventions.

Discrimination Between Military and Civilian Targets

It is forbidden to use weapons that fail to discriminate between military and civilian targets. ⁴⁹ A Comprehensive Study on Nuclear Weapons was submitted by the Secretary General of the United Nations to the General Assembly pursuant to a General Assembly Resolution. ⁵⁰ That study examines the likely effects of the use of nuclear weapons ranging from a 1 kiloton tactical nuclear weapon, to strategic weapons of moderate yield to total nuclear war employing the largest weapons with yields of up to 20 megatons.

The small atomic fission weapon exploded over Hiroshima on August 6, 1945 was small by today's standards. It had a yield of 12.5 kilotons and today it would be considered a tactical nuclear weapon. Yet tens of thousands of civilians were burned, blasted and crushed to death by the explosion. Within three months of the explosion an estimated 130,000 people died of their injuries. ⁵¹ The official estimate of the total number of civilian deaths attributable to the bomb by the city of Hiroshima is 200,000. ⁵²

Today's nuclear arsenals contain weapons with yield of up to 800 times that of the Hiroshima bomb. A weapon exploded over New York City could kill up to 7 million civilians. ⁵³

⁴⁹ Weston, "Nuclear Weapons Versus International Law: A Contextual Reassessment", 28 McGill Law Journal 542 (1983).

⁵⁰ Resolution 33/91 D, 16 December 1980. Also published by Autumn Press, 1980.

⁵¹ J. Schell. *The Fate of Earth* (1982) p. 37.

⁵² R.J. Lifton and R. Falk, *Indefensible Weapons* (1982) p. 40.

⁵³ T. Storier, *Nuclear Disaster* (1964) p. 24.

Protocol I of the Geneva Convention requires discrimination between civilian and military targets. Article 48 contains the basic rule. It says:

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.⁵⁴

Article 51 says:

1. The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances.

2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

3. Civilians shall enjoy the protection afforded by this section, unless and for such time as they take part in hostilities.

4. Indiscriminate attacks are prohibited. Indiscriminate attacks are:

(a) those which are not directed at a specific military objective;

(b) those which employ a method or means of combat which cannot be directed at a specific military objective; or

(c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol;

⁵⁴ Supra note 17 at 1412.

and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

5. Among others, the following types of attacks are to be considered as indiscriminate:

(a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and

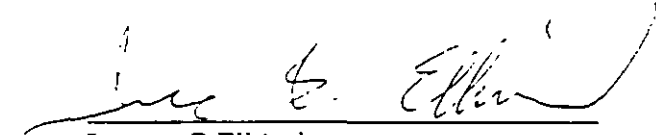
(b) An attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

6. Attacks against the civilian population or civilians by way of reprisals are prohibited.⁵⁵

* * *

Nuclear weapons are a means of combat which cannot be limited as required by these sections. A strategic nuclear weapon is incapable of discriminating between civilian and military targets. For that reason it must be regarded as "indiscriminate" and therefore prohibited by Articles 48 and 51 of Protocol I.

Memorial 3



Jerome B. Elkind

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⁵⁵ Ibid. at 1413.