

**Note Verbale dated 19 June 1995 from the Embassy of Malaysia,
together with Written Comments of the
Government of Malaysia**



BOE 31/95

The Embassy of Malaysia presents its compliments to the Registry of the International Court of Justice and with reference to Registry's letter ref. 91934 dated 5th October, 1994, has the honour to submit the faxed statement by the Government of Malaysia regarding the request by the World Health Organization for an advisory opinion by the International Court of Justice on the legality of the use of nuclear weapons in view of their effects on human health and the environment.

The Embassy has further the honour to inform that it will be submitting the original copy to the Registry in due course.

The Embassy of Malaysia avails itself of this opportunity to renew to the Registry of the International Court of Justice the assurances of its highest consideration.

The Hague,

19th June, 1995

Office of the Registrar
International Court of Justice
Peace Palace
2517 KJ THE HAGUE.



STATEMENT

by

THE GOVERNMENT OF MALAYSIA

in support of the

REQUEST BY THE WORLD HEALTH ORGANISATION

for an

ADVISORY OPINION BY THE INTERNATIONAL COURT OF JUSTICE

on

THE LEGALITY OF THE USE OF NUCLEAR WEAPONS

SUMMARY

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

Of these, nine States argued that the Court should not consider the case, stating that the WHO did not have the mandate to request such an opinion or that the Court should use its discretion not to respond. Five of these nine States argued that should the Court decide to consider the merits of the case, it should determine that the use of nuclear weapons is not illegal per se. Five States argued that the case was admissible and that the Court should give an opinion. Twenty-two States took the position that the use of nuclear weapons is illegal. (See Appendix 1 for a list of States making statements and a tabular analysis of their statements.)

Malaysia supports the argument that WHO is competent to request the opinion from the Court on the grounds that the use of nuclear weapons has direct and substantial implications for health, which are a legitimate and longstanding concern of the WHO.

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

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

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

Both biological and chemical weapons have been banned. Malaysia fails to comprehend how nuclear weapons, which are weapons of mass destruction par excellence, with the capacity to destroy civilisation itself, could be classified, for legal purposes, as "just another weapon", to be judged like any other bomb or artillery shell. Indeed, the awesome destructive power of a nuclear weapon, claimed by the nuclear weapon states to be an instrument of deterrence, is the reverse side of the coin of illegality.

1. ADMISSIBILITY

Substantial portions of the statements submitted to the Court by States, opposing the WHO request, address the question of admissibility, i.e. WHO's competence in the matter. Malaysia firmly believes that such competence exists in view of WHO's past concerns with the health and environmental effects of nuclear war and the fact that the potential health hazards arising from a nuclear war dwarf any other health hazard imaginable.

However, the question of WHO's competence to request such an opinion is now moot in the light of the request by the UN General Assembly for an advisory opinion on the question, "Is the threat or use of nuclear weapons in any circumstance permitted under international law?" This question subsumes the question requested by WHO. Article 96(1) of the UN Charter provides that the General Assembly may request an advisory opinion on "any legal question". Therefore, there is now no reason for the Court to turn down the request on grounds of admissibility.

Should the Court, however, wish to enter into the merits of the admissibility of WHO's request, additional support for the argument, that WHO has the competence to request such an opinion, is attached as Appendix II.

2. DISCRETION

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

2.1 This is a Political, not a Legal, Question

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

Australia stated that "The subject matter of the question is unsuitable for adjudication as it clearly goes beyond a definable field of judicial enquiry and enters into the wider realms of policy and security doctrines of states." (p. 3)

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

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

Response:

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

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

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

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

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

Indeed, it is precisely for the sake of propriety that the Court should not decline to answer WHO's question. If "the principal judicial organ of the United Nations" (Article 92, UN Charter) will not answer this most fundamental question

and safeguard the rule of law on behalf of "the peoples of the United Nations" (preamble, UN Charter), then which court can?

2.2 Nuclear Weapons are Political Weapons

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

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

Response:

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

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

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

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

It is a truism that deterrence does not work unless it is credible, i.e. unless the party to be deterred believes that the deterring party is prepared to proceed from threat to use as a last resort. The narrowness of the gap between 'political' use and actual use is illustrated by the following account by a former high official of the US Department of Defense:

In the thirty-six years since Hiroshima, every President from

Truman to Reagan, with the possible exception of Ford, has felt compelled to consider or direct serious preparations for possible imminent US initiation of tactical or strategic nuclear warfare, in the midst of an ongoing, intense, non-nuclear conflict or crisis.... Here briefly listed are more of the actual nuclear crises than can now be documented from memoirs or other public sources (in most cases after long periods of secrecy...):

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

- * Nixon's secret threats of massive escalation, including possible use of nuclear weapons, conveyed to the North Vietnamese by Henry Kissinger, 1969-72.
- * The Carter Doctrine on the Middle East (January 1980) as explained by Defense Secretary Harold Brown, Assistant Secretary of State William Dyess, and other spokesmen, reaffirmed, in essence, by President Reagan in 1981.

(Daniel Ellsberg, "How We Use Our Nuclear Arsenal". Protest and Survive, E.P.Thompson and Dan Smith, eds., reprinted in The Nuclear Predicament: A Sourcebook, edited by Donna Uthus Gregory, A Bedford Book, St Martin's Press, NY (1982).

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

2.3 The Question is Too Abstract for Judicial Consideration

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

Response:

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

The arguments supporting the illegality of the use of nuclear weapons are not based on the circumstances in which they are used, but on the fact that the very nature of the weapons is such that any use would violate principles of international law. The Court is therefore not being asked to consider different abstract scenarios, but rather to consider the

concrete scientific evidence concerning the health and environmental effects of any use of nuclear weapons, and from that determine whether any use would be illegal.

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

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

Response:

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

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

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

should respect it."

The precedent of the Nuclear Tests Case is instructive in this respect. In 1973, Australia and New Zealand sought this Court's protection against France's atmospheric nuclear testing in the South Pacific. France challenged the legality of the case on grounds of standing and of its non-adherence to the Test Ban Treaty of 1963, and declared that it would not abide by the decision of the Court. Nevertheless, France abandoned its programme of atmospheric testing during the pendency of the case, rendering it moot. (Nuclear Tests Case, 1973 ICJ Reports, p.99. 1974 ICJ Reports, p. 253).

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

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

Response:

- i) The opinion requested is an advisory one. Coming from this tribunal, it would carry great weight but would not be binding or self executing per se.
- ii) So long as no State used nuclear weapons in armed conflict, no State would be in violation of an opinion that such use was in violation of international law.
- iii) Since 73 member states of the World Health Assembly have requested this opinion, it would, on the contrary, undermine the authority of the Court if it refused the request.

2.6 The Court's Opinion Would Damage Disarmament Negotiations

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

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

Response:

- i) The claim that disarmament negotiations are in progress is not borne out by the facts. The United States and the Russian Federation have agreed to cut their nuclear arsenals by the year 2003 to a total of 19,580 warheads, the equivalent of approximately 200,000 Hiroshima-sized bombs (Center for Defense Information, Nuclear Weapons Facts, 1995). Despite the demands of most non-nuclear States, the recent Nuclear Non-Proliferation Treaty Review and Extension Conference concluded without any firm commitment by the nuclear weapon States for further cut-backs, much less the ultimate elimination of nuclear weapons. There is no evidence that any negotiations to increase cut-backs are currently under way or contemplated.

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

- ii) It is not the role of the Court to encourage or discourage disarmament negotiations. Its role is to provide an advisory opinion on the question referred to it by the World Health Assembly.
- iii) It is difficult to see how an opinion holding the use of nuclear weapons to be in violation of international law would impede disarmament negotiations. It is reasonable to assume that, quite on the contrary, such an opinion would provide an impetus to such negotiations.
- iv) The question asked by WHO on the legality of the use of nuclear weapons has now been supported by the United Nations General Assembly. (UNGA Resolution A/49/699K, 1994)

2.7 An Affirmative Opinion by the World Court
Would Undermine Deterrence

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

Response:

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

3. THE APPLICATION OF TREATY LAW TO NUCLEAR WEAPONS

3.1 Nuclear Weapons Are Legal Because They Are Not Prohibited By Any Treaty

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

Conventions prohibiting or restricting chemical, biological, inhumane or environment-modifying weapons have been created to deal with specific types of weaponry. "The exacting nature of those specific conventions clearly confirms that one cannot deduce a precise restriction on the use of specific weaponry from general principles which, by their nature, apply to all weapons without discrimination, and to any of them in particular...Conventions thus established are only binding upon the parties to them..." (France, p.22)

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

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

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

"There are no treaties prohibiting nuclear weapons as such." (Germany. p.3)

Response:

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

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

As amply demonstrated in several submissions before the Court, many treaties and principles of customary law already prohibit the practices and consequences which any use of nuclear weapons would inevitably entail. It is disingenuous, therefore, to claim that the absence of a specific treaty relating to nuclear weapons somehow "legalises" such weapons. It is also noteworthy that none of the statements made by countries defending the legality of nuclear weapons recite, hypothetically, any instances in which nuclear weapons could be used without violating any of the general principles which are the basis of their illegality.

The specificity of recent treaties prohibiting biological and

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

3.2 The Existence of Treaties Recognising and Regulating Nuclear Weapons Suggests That These Weapons are Legal

"Those treaties which may...relate to the use of nuclear weapons neither lay down nor imply any generalised prohibition of their use. Most of the relevant instruments have to do with the installation, emplacement, possession, transfer, manufacture and testing, or even the destruction of such weapons." (France, p.15)

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

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

Positive international law in force accepts the fact of existence of nuclear weapons. There is a wide range of international norms aimed at non-proliferation, non-deployment, limitation, reduction of nuclear weapons, prevention of their testing and other forms of control of nuclear weapons. There is a large number of effectively functioning international instruments, both multilateral and bilateral, dealing with this subject, including well-known bilateral agreements on the prevention of nuclear war." (Russian Federation, p.2)

Response:

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

International law and custom include mechanisms for addressing breaches of legal norms and dealing with the

effects of these breaches, without sanctioning them. This is no more than a recognition of the gap between the real and the ideal which exists in many areas of life, and which law seeks to close.

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

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

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

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

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

The United Kingdom states, on page 72, that "the declarations made by the nuclear weapon States at the time of signing or ratifying the Protocol, which were not challenged by the parties to the Treaty of Tlatelolco (Done at Mexico, 14 February 1967, 634 U.N.T.S. 281), indicate that those States consider that there are circumstances in which resort to nuclear arms would be lawful." But, except for Argentina, which abstained, and which did not ratify the Treaty until

18 January 1994, all the States Parties to the Treaty of Tlatelolco have voted for UN resolutions declaring the use of nuclear weapons to be a crime against humanity and a violation of the UN Charter. (Examples include GA Res. A/48/76B (1993) and A/49/700E (1994), both titled, "Convention on the Prohibition of the Use of Nuclear Weapons"). Some States Parties (Mexico, Costa Rica and Colombia) have stated in these proceedings that they consider the use of nuclear weapons to be illegal; none has stated the contrary.

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

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

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 inhabitable.

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

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

The Preamble states, in part:

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

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

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

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

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

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

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

The NPT was negotiated in connection with and was annexed to United Nations General Assembly Resolution 2373 (XXII), which concludes that "...an agreement to prevent the further proliferation of nuclear weapons must be followed as soon as possible by effective measures on the cessation of the nuclear arms race and on nuclear disarmament." This explains the context of the NPT which was not only to halt the proliferation of nuclear weapons, but also to lead towards their elimination. A Treaty which is part of a declared

process for the elimination of nuclear weapons cannot be said to legitimise a so-called right, that of possession of nuclear weapons, which is in direct opposition to the declared goal.

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

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

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

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

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

Azerbaijan
Colombia
Costa Rica
Democratic People's Republic of Korea
Iran
Kazakhstan
Lithuania
Malaysia

Mexico
Nauru
Papua New Guinea
Philippines
Rwanda
Samoa
Saudi Arabia
Solomon Islands
Sri Lanka
Sweden
Uganda
Ukraine

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

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

While the NPT reflects the reality that five nuclear weapon states existed in 1968, it does not legitimise the permanent possession of nuclear weapons. Far from it. Rather the NPT regime creates a system of shared obligations among its parties: while non-nuclear weapon states promise not to acquire nuclear weapons, nuclear weapon states promise to undertake measures to reduce and eliminate their nuclear arsenals. (Ambassador Thomas Graham, *supra*, p.16).

4. PROTOCOL I OF 1977 ADDITIONAL TO THE 1949 GENEVA CONVENTIONS AND THE "NUCLEAR UNDERSTANDINGS" ISSUE

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

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

4.1 Response:

4.1.1 Protocol I is Largely Confirmatory of Preexisting Humanitarian Law

It is not true, as claimed by France (p.19), that those States upholding the thesis of illegality rely "particularly"

on Articles 35 and 51 of Protocol I, which deal respectively with the prohibition of weapons causing superfluous injury and with the protection of the civilian population. The illegality thesis is solidly anchored in the entire body of humanitarian law, both pre- and post-Protocol I, and would therefore remain valid even if the "Nuclear Understandings" thesis were accepted.

Protocol I did not start with a clean slate. The Diplomatic Conference which led to its adoption was called "The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts". There is general agreement that, while there was some "development", e.g. Art 55 relating to the protection of the natural environment, by far the bulk of the Protocol, including Articles 35(1) and (2) and (51), consisted in "reaffirmation." To apply the "nuclear understandings" made with respect to the Protocol to the body of preexisting conventional and customary law would be a new departure indeed in the theory and practice of international law.

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

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

5. HUMANITARIAN LAW

5.1 Humanitarian Law Does Not Prohibit the Use of Nuclear Weapons

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

Response:

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

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

5.2 The Principle of Discrimination

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

Response:

In the absence of further particulars, it is difficult to comment on the United Kingdom's hypothetical reference to the precise targeting of nuclear weapons against "quite small" military objectives. (On the impossibility of "precise targeting" of nuclear weapons, see E.L. Meyrowitz, "Nuclear Weapons Are Illegal Threats", Bulletin of the Atomic Scientists, May 1985, 35 at 37). No one has ever seen such an operation carried out. US law currently forbids "research and development which could lead to the production...of a low-yield nuclear weapon", which is defined as having a yield of less than five kilotons. (National Defense Authorisation Act for Fiscal Year (FY) 1944, Public Law 103-160, 30 November 1993). No information is available on the existence of nuclear weapons with a yield of less than five kilotons in the arsenals of any other state. This is only a little less than half the size of the Hiroshima bomb (12.5 kilotons), which caused the death of some 200,000 civilians. If a truly small nuclear weapon - say, the size of a large conventional bomb or artillery shell - were ever developed,

it would still have lasting, uncontrollable radioactive effects, leading to the conclusion that the use of such a weapon, instead of a conventional one of equal size and impact, would be prohibited as one causing "superfluous injury or unnecessary suffering." At any rate, speculation as to "micro-nukes" or "mini-nukes" is of a de minimis character, as long as deterrence is the primary rationale advanced by the nuclear weapon states for their continued possession of nuclear weapons. It is clear that such "tiny nukes" are useless as weapons of deterrence.

As for "collateral civilian damage", it may readily be conceded that, under generally accepted principles of humanitarian law, one cannot require a belligerent carrying out an attack on a legitimate military target to ensure that civilians will not be hurt or killed in the attack. It should be equally readily conceded by those on the other side of the argument that applying the collateral damage principle to the use of nuclear weapons results in an absurdity, which necessarily wipes out the entire body of humanitarian law. As stated above, the relatively small Hiroshima bomb produced 200,000 victims. Casualty projections relating to current-day nuclear weapons are in the millions. Surely the principle of permissible collateral damage cannot be stretched that far - common sense forbids it.

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

5.3 The Principle of Proportionality

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

Response:

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

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

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

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

It is only logical to consider the illegality of nuclear weapons in the light of the scientific evidence confirming that massive civilian casualties are unavoidable in a nuclear exchange directed only against military targets. One recent private analysis of civilian deaths, that might be expected to result from the use of small battlefield nuclear weapons, estimated that, in a nuclear exchange between US and Soviet forces in both Germanys, using approximately 90 200-kiloton weapons, 10 to 20 million civilian casualties would result. The same study, using a different scenario involving approximately 90 two-kiloton weapons, estimated that one to ten million civilian casualties would result. The conclusions of numerous governmental and private studies on the consequences of the use of nuclear weapons make it outrageous to claim that minimum collateral damage to the civilian populations will occur if nuclear weapons are restricted to military targets. ("Nuclear Weapons Are Illegal Threats" by Elliott L. Meyrowitz, Bulletin of the Atomic Scientists, May 1985, 35 at p.37.)

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

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

In the Naulilaa Incident Arbitration, (2 Reports of Int'l Arb. Awards 1011, at 1026 and 1028 (1928) "generally considered to be the most authoritative statement of the customary law of reprisals," (J.Brierly, The Law of Nations (6th ed. 1963) p.401), the Arbitral Tribunal held, *inter alia*, that reprisals are limited by considerations of humanity and that the measures adopted must not be excessive, in the sense of being out of all proportion to the provocation received. Thus, as found in the RAND Corporation study, "the concept of Assured Destruction, when deliberately applied to policies for the acquisition and use of nuclear weapons, appears to be directly opposed to the most fundamental principles found in the international law of armed conflict...Even as reprisal,...the concept of Assured Destruction is prohibited if it includes deliberate attacks on the civilian population." (C.Builder and M.Graubard, The International Law of Armed Conflict: Implications for the Concept of Mutual Assured Destruction (1982).

5.4 The Principle of Non-Toxicity

According to the United States, the 1925 Geneva Protocol "was intended to apply to weapons that are designed to kill or injure by the inhalation or other absorption into the body of poisonous gases or analogous substances. It was not intended to apply, and has not been applied, to weapons that are designed to kill or injure by other means, even though they may create asphyxiating or poisonous byproducts." (USA, p.28).

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

Response:

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

A strong case can be made for the assimilation of radiation and radioactive fallout to poison. If introduced into the

body in sufficiently large doses, they produce symptoms which are indistinguishable from those of poisoning and inflict death or serious damage to health in...a manner more befitting demons than civilised human beings." (Georg Schwarzenberger, *International Law and Order*, Praeger Publishers, New York, 1971, p.199)

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

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.

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

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

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

"It is unlawful to use weapons that are of such a nature as to cause superfluous injury or unnecessary suffering. This prohibition was intended to preclude weapons designed to

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

Response:

The argument of the Netherlands comes down to this: Let us determine the "exact implications" of the use of one or more nuclear weapons. Then we can decide whether such use has violated international law or the principles of humanity. But the exact implications will not be apparent until after the use has occurred and not for decades after the event, as demonstrated by the experience of Hiroshima and Nagasaki. Humanitarian law, however, is intended to act as a preventive restraint, not an ex post facto criterion. On the other hand, there is a vast scientific literature enabling military decision makers to forecast the probable implications of the use of nuclear weapons, all of it pointing toward injury on a scale so vast as to foreclose any possibility of striking a balance with the requirements of humanity and necessity.

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

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

Moreover, self-defence, a particular case of military necessity, is not a justification for use of prohibited weapons. No "balance" is possible between the "military advantage", which may be derived, and the suffering which would be caused by the use of nuclear weapons. A military

objective that can only be achieved by the use of nuclear weapons is beyond justifiable self-defence. To suggest that a situation might arise where nuclear weapons would be essential for self-defence is to imply that, under the current NPT regime, the majority of States are denied potentially necessary means of self-defence. Since most States have chosen not to acquire nuclear weapons, nor have aligned themselves with nuclear weapon states for purposes of self-defence, it would appear that most States have implicitly rejected the notion that nuclear weapons might become militarily necessary for self-defence. Thus, to claim a right to use nuclear weapons to "concentrate sufficient military force to achieve a particular objective" is to place one's own military objectives and perceived security needs above those of others, especially the non-nuclear weapon states, and thus to claim a right not available to others. One wonders what legitimate military objectives could only be achieved by weapons of mass destruction of the type found in today's arsenals.

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

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

5.6 The Principle of Neutrality

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

"Whether the use of nuclear weapons would deposit radioactive fallout on the territory of States not party to the conflict would...depend upon the type of weapon used and the location at which it was used. The assumption that any use of nuclear weapons would inevitably have such an effect is unfounded. Moreover, Hague Convention No. V was designed to protect the territory of neutral states against incursions by belligerent

forces or the deliberate bombardment of targets located in that territory, not to guarantee such states against the incidental effects of hostilities". (UK, p.92)

Response:

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

Radiation in quantities sufficient to cause extensive sickness would spread from a relatively small one-megaton explosion to a distance of 300 km in less than 12 hours. Even greater doses of radiation from a ten-megaton bomb would reach a distance of 100 km in less than 3 hours and 800 km in less than 32 hours. (Lindop and Rotblat, Consequences of Radioactive Fallout, in The Final Epidemic: Physicians and Scientists on Nuclear War (R.Adams and S.Cullen, Eds., 1981) at 131,125.

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

5.7 The Principle of Environmental Security

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

"Article 35(3) of Additional Protocol I is broader in scope, in that it is applicable to the incidental effects on the environment of the use of weapons. It was, however, an

innovative provision. It is therefore subject to the understanding, which was discussed above, that the new provisions created by Protocol I would not be applicable to the use of nuclear weapons." (UK, p.91-92; cf. USA, p.30).

Response:

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

- * 1972 Stockholm Declaration of the United Nations Conference on the Human Environment, 16 June 1972, UN Doc. A/CONF.48/14/Rev.1 at 3 (1973), 11 I.L.M. 1416 (1972)
- * 1980 United Nations General Assembly Resolution on Historical Responsibility of States for the Preservation of Nature for Present and Future Generations (Adopted 30 October 1980, G.A. Res. 35/48 (1981)
- * 1982 World Charter for Nature (G.A. Res. 37/7 (Annex) (1982)
- * Draft Code of Crimes Against the Peace and Security of Mankind (UN Doc. A/46/405 (1991), 30 I.L.M. 1554(1991) Articles 19(3), 22(2), 26)
- * 1982 United Nations Convention on Law of the Sea (UN Doc. A/CONF.62/122,21 I.L.M. 1261, (1982) Article 192)
- * 1985 Vienna Convention for the Protection of the Ozone Layer (26 I.L.M. 1516 (1987) Article 2(1)
- * 1992 Framework Convention on Climate Change (31 I.L.M. 849 (1992) Article 3)
- * 1992 Convention on Biological Diversity (31 I.L.M. 818 (1992) Article 3, Principles 7, 25)

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

Surprisingly harsh and lasting effects could be generated even by relatively modest exchanges. The baseline scenario

(5,000 megatons) could drop average continental temperatures in the Northern Hemisphere to about minus 23 degrees centigrade. Shockingly, even 100 megatons detonated on cities alone could produce sufficient smoke to blacken skies and chill continental areas to below minus 20 degrees centigrade, with recovery taking over three months. (Anne Ehrlich, "Nuclear Winter", The Bulletin of the Atomic Scientist, April 1984, p. 3S, at 5S).

6. THE RIGHT TO LIFE AND HEALTH

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

7. CUSTOMARY LAW AND OPINIO JURIS

7.1 General Comments on Custom

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

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

Response:

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

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

"It is not to be expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency, from the use of force or from intervention in each other's internal affairs. The Court

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

Thus the declarations of a small minority of States that use of nuclear weapons would not necessarily be unlawful have not prevented the development of a customary rule of international law prohibiting such use. Indeed, "a customary rule may arise notwithstanding the opposition of one State or even perhaps a few States, provided that otherwise the necessary degree of generality is reached." (Henkin, Pugh, et al, International Law: Cases and Materials (3rd ed. 1993) (citing Waldock, General Course on Public International Law) p.87. The necessary degree of generality in the case of nuclear weapons is reflected in the non-use since 1945 and the repeated declarations of a majority of States that their use is illegal. (See Section 7.2, *infra*.)

Admittedly, a newly emergent customary rule does not generally bind a State which has consistently objected to that rule. However, it has been noted that "no case is cited in which the objector effectively maintained its status after the rule became well accepted in international law." (Henkin, Pugh et al, *op. cit.* (citing Charney) p.89). Moreover, the United Kingdom has, on at least one occasion, questioned the right of a consistently objecting State to an exemption from a rule of law of fundamental importance. (See 1951 I.C.J. Fisheries Case, II Pleadings, Oral Arguments 428-430). An example of a non-consenting State not being exempted from a customary rule is South Africa, which persistently dissented from the rule prohibiting racial discrimination while that rule was developing. (See Henkin, Pugh et al., *op. cit.* p.89)

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

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

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

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

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

The negative votes of the nuclear weapon States deprive the UN Resolutions of their status as sources of opinio juris (France, p.21) or customary law (USA, pp.24-25).

Response:

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

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

France's somewhat cynical "political stance" argument is difficult to follow. A declaration is a declaration. Does it mean that future declarations will have to be strengthened by lie detector tests to establish the honesty and sincerity of the declarants?

7.3 Evidence of Opinio Juris in Public Comments of Statesmen

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

Response:

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

7.4 Evidence of Opinio Juris Through State Practice

"Evidence of a customary norm requires indication of 'extensive and virtually uniform' State practice, including States whose interests are 'specially affected.'" (USA, p.17, citing North Continental Shelf Cases, 1969 ICJ Reports, p.43).

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

Response:

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

Furthermore, all the nuclear weapon States, which have made submissions to the Court so far, have admitted that the laws of war apply, "in principle", to nuclear weapons, while failing to produce any convincing examples of situations in which nuclear weapons could be used without violating the

laws of war. This is another reason for holding that the non-use of nuclear weapons for the past half century satisfies the classic definition of *opinio juris sive necessitatis*.

It should also be noted that the non-nuclear weapon States, the unprotected, potential victims of nuclear attack from the nuclear weapon States, have not consented to the policy of deterrence. They have repeatedly affirmed their positions in numerous resolutions, indicating their firm belief that the use of nuclear weapons would constitute a violation of the UN Charter and a crime against humanity. These unequivocal resolutions have indicated that the "States concerned...feel that they are conforming to what amounts to a legal obligation", as required under international law. (North Sea Continental Shelf Cases, 1969 ICJ Reports, p.44.)

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

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

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

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

Response:

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

Elliot Meyrowitz has commented:

Restraints on the conduct of war have historically never been

limited to treaty law alone. The Martens Clause of the 1907 Hague Conventions offer a legal yardstick intended specifically for those situations in which no international convention exists to prohibit particular weapons or tactic. When the Nuremberg tribunal was confronted with the lack of a prior treaty defining crimes against humanity and crimes against peace, it concluded:

The law of war is to be found not only in treaties but in the customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practised by military courts. This law is not static, but by continual adaptation follows the needs of the changing world... (Elliot Meyrowitz, "Nuclear Weapons are Illegal Threat", The Bulletin of the Atomic Scientists, May 1985, p.35 at 37.)

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

8 ISSUES OF SELF-DEFENCE AND REPRISALS

8.1 Nuclear Weapons can be Used in Self-defence and for Reprisals

Several States have argued that the right of self-defence and reprisal affects the legal position of nuclear weapons under international law. (France, p.14, UK, pp.8i,93).

Response:

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

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

CONCLUSION

The submissions of States which argue that the use of nuclear weapons is not necessarily unlawful suffer from several weaknesses and flaws.

In the first place, the use of nuclear weapons violates the established and universally recognised principles enshrined in the laws of war. These principles of moderation, discrimination, proportionality, necessity, humanity, neutrality, environmental safety and non-toxicity clearly prohibit the use of nuclear weapons in warfare.

The use of nuclear weapons violates the right to life which is enshrined in the Universal Declaration of Human Rights, which states in Article 3 that "every one has the right to life, liberty and security of person".

The use of nuclear weapons is a direct violation of the Charter of the United Nations and is contrary to the rules of international law and the laws of humanity and morality.

The governments of those States, which argue that the legality of the use of nuclear weapons depends entirely upon the particular circumstances of use, refuse to recognise that nuclear weapons are totally different from conventional weapons in their awesome power and capacity to inflict death and destruction of a totally different order of magnitude and gravity that threatens human survival.

When human survival is threatened by the use of nuclear weapons, it becomes vital that mankind has an authoritative legal opinion by the highest international authority on the legality of nuclear weapons under international law.

As Albert Einstein noted in 1946: "Henceforth, every nation's foreign policy must be judged at every point by one consideration. Does it lead us to a world of law and order or does it lead us back toward anarchy and death?"

More recently, Hans Corell, Legal Counsel of the United Nations, declared: "Arms must cede to the law and, ultimately, to the judge's robe."

In response to the World Health Assembly's request for an advisory opinion, the International Court of Justice is respectfully urged to affirm the illegality of the use of nuclear weapons in armed conflict.

Appendix I

ANALYSIS OF STATEMENTS SUBMITTED TO ICJ IN WHO CASE

COUNTRY	ICJ SHOULD REJECT IN EXERCISE OF DISCRETION	USE NOT ILLEGAL PER SE	NUCLEAR WEAPONS LEGIT- IMIZED BY TREATIES	DETAILED REPLY	ADMISS- IBLE	ICJ SHOULD CAREFULLY STUDY ADMIS- SIBILITY	USE ILLEGAL PER SE	DETAILED ARGUMENTS	STATE SUBMITTED NO TOTAL NUCLEAR DISARMAMENT	POSITION ON RESULTS RESERVED
Australia	x	x								x
Azerbaijan							x			
Colombia							x			
Costa Rica							x			
Finland	x	x								
France	x	x	x	x	x					
Germany	x	x	x	x						
India							x			
Iran							x	(x)		
Ireland									x	
Italy	x									x
Japan							x (x)		x	
Kazakhstan							x			
Lithuania							x			
Malay							x	x		
Mexico							x	x		
Moldova							x			
Mauru					x		x	x		
Netherlands	x	x	x	x						
New Zealand						x				x
N. Korea							x			
Norway						x				
Papua New Guinea							x			
Philippines							x			
Russia	x									
Rwanda							x			
Samoa							x			
Saudi Arabia							x			
Solomon Islands							x	x		
Sri Lanka							x			
Sweden							x	x		
Uganda							x			
Ukraine							x			
United Kingdom	x	x	x	x						
United States	x	x	x	x						

* While Japan did not say that use of nuclear weapons is illegal *per se*, they did submit that "the use of nuclear weapons is clearly contrary to the spirit of humanity that gives international law its philosophical foundation."

Appendix II: Admissibility

The WHO has the mandate to request an opinion from the ICJ. on this topic given the facts that:

1. WHO is granted permission to request advisory opinions according to Article 96 paragraph 2 of the UN Charter, Article 76 of the WHO Constitution and Article X of the Agreement between the United Nations and the WHO.
2. The request concerns a question which relates to the powers and functions of the WHO in the advancement and promotion of health, as defined by the WHO Constitution.
3. The request concerns an area of health which has been of longstanding concern the WHO.

There follow specific responses to arguments that the WHO does not have the mandate to request an opinion on this topic from the ICJ.:

1. Legality of use of nuclear weapons is not a genuine concern of WHO

1.1 WHO has not been previously concerned about the legality of nuclear weapons.

The U.K. submission stated that none of the WHA resolutions prior to WHA 46.40 "expresses concerns over the legality of the legality of their use..." (p18) and that "WHA 46.40 is the first instance in which the legality of the use of nuclear weapons has been the subject of WHA action, and is thus an entirely new development." (p19)

Response: The fact that WHO has not previously considered the legality of nuclear weapons is no reason not to consider it now. Consideration is a natural progression from earlier consideration by WHO of the health and environmental effects of nuclear weapons. (Effects of Nuclear War on Health and Health Services, Geneva, World Health Organization, 1984. Second edition 1987.) It is appropriate to consider first the nature and extent of the health risk and then to consider measures for minimizing the risk, including legal measures. It might have been presumptuous for WHO to consider the legality of the use of nuclear weapons before it had completed studies on the nature and extent of the risk, but this was not the case.

1.2 Legality of Nuclear Weapons is not Relevant to WHO

The U.K. submission asks "...why the lawfulness or otherwise of the use of nuclear weapons has any relevance to their effects on health if they are used; and WHA offers no such

1.3 The Request is a Non Governmental Initiative Which Does not Concern WHO

The U.K. noted that the non-governmental organizations, under the banner of the World Court Project, had tried to pursue the option of persuading Australia and New Zealand to initiate an advisory opinion in the mid 1980's without success and then turned to the WHO subsequently (pp. 10-11). The implication is that this is therefore not an initiative arising from within WHO but is rather an initiative from the outside which is irrelevant to WHO's concerns. The U.K. noted that "...the genesis of this request lies in the so-called 'World Court Project', a project in which the International Physicians for the Prevention of Nuclear War have joined." (p. 56)

Response: WHO, like the United Nations itself and its specialized agencies, exists to serve the people of the world and be responsive to their concerns. Many initiatives pursued by these bodies originate with non-governmental organizations, and quite properly so. One may be permitted to doubt that, with its unfortunate reference to the International Physicians for the Prevention of Nuclear War, which, incidentally, received the Nobel Peace Prize for its work on the medical effects of nuclear war, the United Kingdom intended to suggest to the Court that the concern expressed by a non-governmental organization for the subject matter of an advisory opinion request disqualifies such a request from consideration by the Court.

2. The Request is Beyond the Scope of the WHO Constitution

The United States submitted that "Nothing in the objective or described functions of the WHO suggests that the Organization has responsibility or authority in regard to the use of nuclear weapons." (p6).

The United States also noted that the Legal Counsel of the WHO stated in 1992 that "Whether the use of nuclear weapons is legal or illegal is a question which does not so readily fit the 22 constitutional functions of WHO..." (p6).

Response: The Court is respectfully referred to the memorial submitted by Nauru on the admissibility of the request of WHO, which identifies powers and functions of the WHO which relate to the question of the use of nuclear weapons. Particular note should be made of Article I of the WHO Constitution which describes the objective of WHO as "... the attainment by all peoples of the highest possible level of health", and Article 2 of the Constitution which defines the functions of WHO as including "...all necessary action to obtain the objective of the organization."

In addition, the question of the relationship between legality of nuclear weapons and their health risk is a proper concern of WHO in that WHO as a specialized agency of the UN, has along with other UN organs and specialized agencies, a legitimate concern for and interest in ensuring respect for the law. This is reflected in the preamble of the UN Charter which notes the determination of the peoples of the UN "...to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained."

APPENDIX III

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

(Listed in chronological order)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion of effective international arrangements to assure non-nuclear-weapon States against the use or threat of use of nuclear weapons, G.A. Res. 47/50, 47 U.N. GAOR Supp. (No. 49, Vol. I) at 60, U.N. Doc. A/47/49 (1992) (162 in favor - none opposed - 2 abstentions).

Review and implementation of the Concluding Document of the Twelfth Special Session of the General Assembly (CONVENTION ON THE PROHIBITION OF THE USE OF NUCLEAR WEAPONS), G.A. Res. 47/53 C, 47 U.N. GAOR Supp. (No. 49, Vol. I) at 70, U.N. Doc. A/47/49 (1992) (Adopted without a vote).

Review and implementation of the Concluding Document of the Twelfth Special Session of the General Assembly (NUCLEAR ARMS FREEZE) G.A. Res. 47/53 E, 47 U.N. GAOR Supp. (No. 49, Vol. I) at 70, U.N. Doc. A/47/49 (1992) (Adopted without a vote).

Conclusion of effective international arrangements to assure non-nuclear-weapon States against the use or threat of use of nuclear weapons, G.A. Res. 48/73, 48 U.N. GAOR Supp. (No. --) at --, U.N. Doc. A/48/-- (1993) (166 in favor - none opposed - 4 abstentions).

(BILATERAL NUCLEAR-ARMS NEGOTIATIONS AND NUCLEAR DISARMAMENT), G.A. Res. 48/75 B, 48 U.N. GAOR Supp. (No. --) at --, U.N. Doc. A/48/-- (1993) (Adopted without a vote).

Review of the implementation of the recommendations and decisions adopted by the General Assembly at its tenth special session (REPORT OF THE DISARMAMENT COMMISSION), G.A. Res. 48/77 A, 48 U.N. GAOR Supp. (No. --) at --, U.N. Doc. A/48/-- (1993) (Adopted without a vote).

Appendix IV

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

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

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

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

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

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

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

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

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

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

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

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

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