DISSENTING OPINION OF JUDGE WEERAMANTRY

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PRELIMINARY OBSERVATIONS ON THE OPINION OF THE COURT

(a) *Reasons for Dissent*

My considered opinion is that the use or threat of use of nuclear weapons is illegal *in any circumstances whatsoever*. It violates the fundamental principles of international law, and represents the very negation of the humanitarian concerns which underlie the structure of humanitarian law. It offends conventional law and, in particular, the Geneva Gas Protocol of 1925, and Article 23 *(a)* of the Hague Regulations of 1907. It contradicts the fundamental principle of the dignity and worth of the human person on which all law depends. It endangers the human environment in a manner which threatens the entirety of life on the planet.

I regret that the Court has not held directly and categorically that the use or threat of use of the weapon is unlawful *in all circumstances without exception*. The Court should have so stated in a vigorous and forthright manner which would have settled this legal question now and for ever.

Instead, the Court has moved in the direction of illegality with some far-reaching pronouncements that strongly point in that direction, while making other pronouncements that are both less than clear and clearly wrong.

I have therefore been obliged to title this a dissenting opinion, although there are some parts of the Court's Opinion with which I agree, and which may still afford a substantial basis for a conclusion of illegality. Those aspects of the Court's Opinion are discussed below. They do take the law far on the road towards total prohibition. In this sense, the Court's Opinion contains positive pronouncements of significant value.

There are two of the six operative sections of the second part of the Opinion with which I profoundly disagree. I believe those two paragraphs state the law wrongly and incompletely, and I have felt compelled to vote against them.

However, I have voted in favour of paragraph 1 of the *dispositif*, and in favour of four out of the six items in paragraph 2.

(b) *The Positive Aspects of the Court's Opinion*

This Opinion represents the first decision of this Court, and indeed of any international tribunal, that clearly formulates limitations on nuclear weapons in terms of the United Nations Charter. It is the first such decision which expressly addresses the contradiction between nuclear weapons and the laws of armed conflict and international humanitarian law. It is the first such decision which expresses the view that the use of

nuclear weapons is hemmed in and limited by a variety of treaty obligations.

In the environmental field, it is the first Opinion which expressly embodies, in the context of nuclear weapons, a principle of "prohibition of methods and means of warfare which are intended, or may be expected, to cause" widespread, long-term and severe environmental damage, and "the prohibition of attacks against the natural environment by way of reprisals" (para. 31).

In the field of nuclear disarmament, it also reminds all nations of their obligation to bring these negotiations to their conclusion in all their aspects, thereby ending the coninuance of this threat to the integrity of international law.

Once these propositions are established, one needs only to examine the effects of the use of nuclear weapons to conclude that there is no possibility whatsoever of a use or threat of use that does not offend these principles. This Opinion examines at some length the numerous unique qualities of the nuclear weapon which stand in flagrant contradiction of the basic values underlying the United Nations Charter, international law, and international humanitarian law. In the light of that information, it becomes demonstrably impossible for the weapon to comply with the basic postulates laid down by the Court, thus rendering them illegal in terms of the unanimous finding of the Court.

In particular, I would mention the requirement, in Article 2 (4) of the Charter, of compliance with the Purposes of the United Nations. Those Purposes involve respect for human rights, and the dignity and worth of the human person. They also involve friendly relations among nations, and good neighbourliness (see Article 1 (Purposes and Principles) read with the Preamble). The linkage of legality with compliance with these principles has now been judicially established. Weapons of warfare which can kill a million or a billion human beings (according to the estimates placed before the Court) show scant regard for the dignity and worth of the human person, or for the principle of good neighbourliness. They stand condemned upon the principles laid down by the Court.

Even though I do not agree with the entirety of the Court's Opinion, strong indicators of illegality necessarily flow from the unanimous parts of that Opinion. Further details of the total incompatibility of the weapons with the principles laid down by the Court appear in the body of this Opinion.

It may be that further clarification will be possible in the future.

I proceed now to make some comments on the individual paragraphs of part 2 of the *dispositif*. I shall deal first with the two paragraphs with which I disagree.

(c) *Particular Comments on the Final Paragraph*

(i) *Paragraph 2 B — (11 votes to 3)*

Regarding paragraph 2 B, I am of the view that there are comprehensive and universal limitations imposed by treaty upon the use of nuclear weapons. Environmental treaties and, in particular, the Geneva Gas Protocol and Article 23 *(a)* of the Hague Regulations, are among these. These are dealt with in my opinion. I do not think it is correct to say that there are no conventional prohibitions upon the use of the weapon.

(ii) *Paragraph 2 E — (7 votes to 7. Casting vote in favour by the President)*

I am in fundamental disagreement with both sentences contained within this paragraph.

I strongly oppose the presence of the word "generally" in the first sentence. The word is too uncertain in content for use in an Advisory Opinion, and I cannot assent to a proposition which, even by remotest implication, leaves open any possibility that the use of nuclear weapons would not be contrary to law in any circumstances whatsoever. I regret the presence of this word in a sentence which otherwise states the law correctly. It would also appear that the word "generally" introduces an element of internal contradiction into the Court's Opinion, for in paragraphs 2 C and 2 D of the Court's Opinion, the Court concludes that nuclear weapons must be consistent with the United Nations Charter, the principles of international law, and the principles of humanitarian law, and, such consistency being impossible, the weapon becomes illegal.

The word "generally" admits of many meanings, ranging through various gradations, from "as a general rule; commonly", to "universally; with respect to all or nearly all" [1]. Even with the latter meaning, the word opens a window of permissibility, however narrow, which does not truly reflect the law. There should be no niche in the legal principle, within which a nation may seek refuge, constituting itself the sole judge in its own cause on so important a matter.

The main purpose of this opinion is to show that, not *generally* but *always*, the threat or use of nuclear weapons would be contrary to the rules of international law and, in particular, to the principles and rules of humanitarian law. Paragraph 2 E should have been in those terms, and the Opinion need have stated no more.

The second paragraph of 2 E states that the current state of international law is such that the Court cannot conclude definitely whether the threat or use of the weapon would or would not be lawful in extreme

[1] *The Shorter Oxford English Dictionary*, 3rd ed., 1987, Vol. I, p. 840.

circumstances of self-defence. It seems self-evident to me that once nuclear weapons are resorted to, the laws of war (the *jus in bello*) take over, and that there are many principles of the laws of war, as recounted in this opinion, which totally forbid the use of such a weapon. The existing law is sufficiently clear on this matter to have enabled the Court to make a definite pronouncement without leaving this vital question, as though sufficient principles are not already in existence to determine it. All the more should this uncertainty have been eliminated in view of the Court's very definite findings as set out earlier.

(iii) *Paragraph 2 A — (Unanimous)*

Speaking for myself, I would have viewed this unquestionable proposition as a preliminary recital, rather than as part of the *dispositif*.

(iv) *Paragraph 2 C — (Unanimous)*

The positive features of this paragraph have already been noted. The Court, in this paragraph, has unanimously endorsed Charter-based preconditions to the legality of nuclear weapons, which are diametrically opposed to the results of the use of the weapon. I thus read paragraph 2C of the *dispositif* as rendering the use of the nuclear weapon illegal without regard to the circumstances in which the weapon is used — whether in aggression or in self-defence, whether internationally or internally, whether by individual decision or in concert with other nations. A unanimous endorsement of this principle by all the judges of this Court takes the principle of illegality of use of nuclear weapons a long way forward from the stage when there was no prior judicial consideration of legality of nuclear weapons by any international tribunal.

Those contending that the use of nuclear weapons was within the law argued strongly that what is not expressly prohibited to a State is permitted. On this basis, the use of the nuclear weapon was said to be a matter on which the State's freedom was not limited. I see the limitations laid down in paragraph 2C as laying that argument to rest.

(v) *Paragraph 2 D — (Unanimous)*

This paragraph, also unanimously endorsed by the Court, lays down the further limitation of compatibility with the requirements of international law applicable in armed conflict, and particularly with the rules of international humanitarian law and specific treaty obligations.

There is a large array of prohibitions laid down here.

My opinion will show what these rules and principles are, and how it is

impossible, in the light of the nature and effects of nuclear weapons, for these to be satisfied.

If the weapon is demonstrably contrary to these principles, it is unlawful in accordance with this paragraph of the Court's Opinion.

(vi) *Paragraph 2 F — (Unanimous)*

This paragraph is strictly outside the terms of reference of the question. Yet, in the overall context of the nuclear weapons problem, it is a useful reminder of State obligations, and I have accordingly voted in favour of it.

The ensuing opinion sets out my views on the question before the Court. Since the question posed to the Court relates only to use and threat of use, this opinion does not deal with the legality of other important aspects of nuclear weapons, such as possession, vertical or horizontal proliferation, assembling or testing.

I should also add that I have some reservations in regard to some of the reasoning in the body of the Court's Opinion. Those reservations will appear in the course of this opinion. In particular, while agreeing with the Court in the reasoning by which it rejects the various objections raised to admissibility and jurisdiction, I would register my disagreement with the statement in paragraph 14 of the Opinion that the refusal to give the World Health Organization the advisory opinion requested by it was justified by the Court's lack of jurisdiction in that case. My disagreement with that proposition is the subject of my dissenting opinion in that case.

I am of the view that in dealing with the question of reprisals (para. 46), the Court should have affirmatively pronounced on the question of the unlawfulness of belligerent reprisals. I do not agree also with its treatment of the question of intent towards a group as such in relation to genocide, and with its treatment of nuclear deterrence. These aspects are considered in this opinion.

(vii) *Paragraph 1 — (13 votes to 1)*

One other matter needs to be mentioned before I commence the substantive part of this dissenting opinion. I have voted in favour of the first finding of the Court, recorded in item 1 of the *dispositif*, which follows from the Court's rejection of the various objections to admissibility and jurisdiction which were taken by the States arguing in favour of the legality of nuclear weapons. I strongly support the views expressed by the Court in the course of its reasoning on these matters, but I have some further thoughts upon these objections, which I have set out in my dissenting opinion in relation to the WHO request, where also similar objections were taken. There is no need to repeat those observations in this opinion, in view of the Court's conclusions. However, what I have stated

on these matters in that dissenting opinion should be read as supplementary to this opinion as well.

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I. INTRODUCTION

1. Fundamental Importance of Issue before the Court

I now begin the substantive part of this opinion.

This case has from its commencement been the subject of a wave of global interest unparalleled in the annals of this Court. Thirty-five States have filed written statements before the Court and 24 have made oral submissions. A multitude of organizations, including several NGOs, have also sent communications to the Court and submitted materials to it; and nearly two million signatures have been actually received by the Court from various organizations and individuals from around 25 countries. In addition, there have been other shipments of signatures so voluminous that the Court could not physically receive them and they have been lodged in various other depositories. If these are also taken into account, the total number of signatures has been estimated by the Court's archivist at over three million[2]. The overall number of signatures, all of which could not be deposited in the Court, is well in excess of this figure. The largest number of signatures has been received from Japan, the only nation that has suffered a nuclear attack[3]. Though these organizations and individuals have not made formal submissions to the Court, they evidence a groundswell of global public opinion which is not without legal relevance, as indicated later in this opinion.

The notion that nuclear weapons are inherently illegal, and that a knowledge of such illegality is of great practical value in obtaining a nuclear-free world, is not new. Albert Schweitzer referred to it, in a letter to Pablo Casals, as early as 1958 in terms of:

> "the most elementary and most obvious argument: namely, that international law prohibits weapons with an unlimitable effect, which cause unlimited damage to people outside the battle zone. This is the

[2] In a memorandum responding to an enquiry regarding the number of signatures received, the archivist observes that: "To be precise in this matter is to count the stars in the sky."

[3] The sponsors of a Declaration of Public Conscience from Japan have stated, in a communication to the Registrar, that they have stored in a warehouse in The Hague, 1,757,757 signatures, which the Court had no space to accommodate, in addition to the 1,564,954 actually deposited with the Court. Another source, based in Europe, has reckoned the declarations it has received, in connection with the current applications to the Court, at 3,691,899, of which 3,338,408 have been received from Japan.

> case with atomic and nuclear weapons . . . The argument that these weapons are contrary to international law contains everything that we can reproach them with. It has the advantage of being a *legal argument* . . . No government can deny that these weapons violate international law . . . and international law cannot be swept aside!"[4]

Though lay opinion has thus long expressed itself on the need for attention to the legal aspects, the matter has not thus far been the subject of any authoritative judicial pronouncement by an international tribunal. It was considered by the courts in Japan in the *Shimoda* case[5] but, until the two current requests for advisory opinions from this Court, there has been no international judicial consideration of the question. The responsibility placed upon the Court is thus of an extraordinarily onerous nature, and its pronouncements must carry extraordinary significance.

This matter has been strenuously argued before the Court from opposing points of view. The Court has had the advantage of being addressed by a number of the most distinguished practitioners in the field of international law. In their submissions before the Court, they have referred to the historic nature of this request by the General Assembly and the request of the World Health Organization, which has been heard along with it. In the words of one of them, these requests:

> "will constitute milestones in the history of the Court, if not in history *per se*. It is probable that these requests concern the most important legal issue which has ever been submitted to the Court." (Salmon, Solomon Islands, CR 95/32, p. 38.)

In the words of another, "It is not every day that the opportunity of pleading for the survival of humanity in such an august forum is offered." (David, Solomon Islands, CR 95/32, p. 49.)

It is thus the gravest of possible issues which confronts the Court in this Advisory Opinion. It requires the Court to scrutinize every available source of international law, quarrying deep, if necessary, into its very bedrock. Seams of untold strength and richness lie therein, waiting to be quarried. Do these sources contain principles mightier than might alone, wherewith to govern the mightiest weapon of destruction yet devised?

It needs no emphasis that the function of the Court is to state the law as it now is, and not as it is envisaged in the future. Is the use or threat of

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[4] *Albert Schweitzer, Letters 1905-1965*, H. W. Bäher (ed.), J. Neugroschel (trans.), 1992, p. 280, letter to Pablo Casals dated 3 October 1958; emphasis added.

[5] *Shimoda* v. *The Japanese State, The Japanese Annual of International Law*, 1964, pp. 212-252.

use of nuclear weapons illegal under presently existing principles of law, rather than under aspirational expectations of what the law should be? The Court's concern in answering this request for an opinion is with *lex lata* not with *lex ferenda.*

At the most basic level, three alternative possibilities could offer themselves to the Court as it reaches its decision amidst the clash of opposing arguments. If indeed the principles of international law decree that the use of the nuclear weapon is legal, it must so pronounce. The anti-nuclear forces in the world are immensely influential, but that circumstance does not swerve the Court from its duty of pronouncing the use of the weapons legal if that indeed be the law. A second alternative conclusion is that the law gives no definite indication one way or the other. If so, that neutral fact needs to be declared, and a new stimulus may then emerge for the development of the law. Thirdly, if legal rules or principles dictate that the nuclear weapon is illegal, the Court will so pronounce, undeterred again by the immense forces ranged on the side of the legality of the weapon. As stated at the very commencement, this last represents my considered view. The forces ranged against the view of illegality are truly colossal. However, collisions with the colossal have not deterred the law on its upward course towards the concept of the rule of law. It has not flinched from the task of imposing constraints upon physical power when legal principle so demands. It has been by a determined stand against forces that seemed colossal or irresistible that the rule of law has been won. Once the Court determines what the law is, and ploughs its furrow in that direction, it cannot pause to look over its shoulder at the immense global forces ranged on either side of the debate.

2. Submissions to the Court

Apart from submissions relating to the competence of the General Assembly to request this opinion, a large number of submissions on the substantive law have been made on both sides by the numerous States who have appeared before the Court or tendered written submissions.

Though there is necessarily an element of overlap among some of these submissions, they constitute in their totality a vast mass of material, probing the laws of war to their conceptual foundations. Extensive factual material has also been placed before the Court in regard to the many ways in which the nuclear weapon stands alone, even among weapons of mass destruction, for its unique potential of damaging humanity and its environment for generations to come.

On the other hand, those opposing the submission of illegality have argued that, despite a large number of treaties dealing with nuclear weap-

ons, no single clause in any treaty declares nuclear weapons to be illegal in specific terms. They submit that, on the contrary, the various treaties on nuclear weapons entered into by the international community, including the Nuclear Non-Proliferation Treaty (NPT) in particular, carry a clear implication of the current legality of nuclear weapons in so far as concerns the nuclear powers. Their position is that the principle of the illegality of the use or threat of use of nuclear weapons still lies in the future, although considerable progress has been made along the road leading to that result. It is *lex ferenda* in their submission, and not yet of the status of *lex lata*. Much to be desired, but not yet achieved, it is a principle waiting to be born.

This opinion cannot possibly do justice to all of the formal submissions made to the Court, but will attempt to deal with some of the more important among them.

3. Some Preliminary Observations on the United Nations Charter

It was only a few weeks before the world was plunged into the age of the atom that the United Nations Charter was signed. The subscribing nations adopted this document at San Francisco on 26 June 1945. The bomb was dropped on Hiroshima on 6 August 1945. Only 40 days intervened between the two events, each so pregnant with meaning for the human future. The United Nations Charter opened a new vista of hope. The bomb opened new vistas of destruction.

Accustomed as it was to the destructiveness of traditional war, the world was shaken and awe-struck at the power of the nuclear bomb — a small bomb by modern standards. The horrors of war, such as were known to those who drafted the Charter, were thus only the comparatively milder horrors of World War II, as they had been experienced thus far. Yet these horrors, seared into the conscience of humanity by the most devastating conflict thus far in human history, were sufficient to galvanize the world community into action, for, in the words of the United Nations Charter, they had "brought untold sorrow to mankind". The potential to bring untold sorrow to mankind was within weeks to be multiplied several-fold by the bomb. Did that document, drafted in total unawareness of this escalation in the weaponry of war, have anything to say of relevance to the nuclear age which lay round the corner?

There are six keynote concepts in the opening words of the Charter which have intense relevance to the matter before the Court.

The Charter's very first words are "We, the peoples of the United Nations" — thereby showing that all that ensues is the will of the peoples of the world. Their collective will and desire is the very source of the United Nations Charter and that truth should never be permitted to recede from view. In the matter before the Court, the *peoples of the world* have a vital interest, and global public opinion has an important influ-

ence on the development of the principles of public international law. As will be observed later in this opinion, the law applicable depends heavily upon "the principles of humanity" and "the dictates of public conscience", in relation to the means and methods of warfare that are permissible.

The Charter's next words refer to the determination of those peoples to save succeeding generations from the scourge of war. The only war they knew was war with non-nuclear weapons. That resolve would presumably have been steeled even further had the destructiveness and the intergenerational effects of nuclear war been known.

The Charter immediately follows those two key concepts with a third — the dignity and worth of the human person. This is recognized as the cardinal unit of value in the global society of the future. A means was about to reveal itself of snuffing it out by the million with the use of a single nuclear weapon.

The fourth observation in the Charter, succeeding hard on the heels of the first three, is the equal rights of nations large and small. This is an ideal which is heavily eroded by the concept of nuclear power.

The next observation refers to the maintenance of obligations arising from treaties and *"other sources of international law"* (emphasis added). The argument against the legality of nuclear weapons rests principally not upon treaties, but upon such "other sources of international law" (mainly humanitarian law), whose principles are universally accepted.

The sixth relevant observation in the preamble to the Charter is its object of promoting social progress and better standards of life in larger freedom. Far from moving towards this Charter ideal, the weapon we are considering is one which has the potential to send humanity back to the stone age if it survives at all.

It is indeed as though, with remarkable prescience, the founding fathers had picked out the principal areas of relevance to human progress and welfare which could be shattered by the appearance only six weeks away of a weapon which for ever would alter the contours of war — a weapon which was to be described by one of its creators, in the words of ancient oriental wisdom, as a "shatterer of worlds"[6].

The Court is now faced with the duty of rendering an opinion in regard to the legality of this weapon. The six cardinal considerations set out at the very commencement of the Charter need to be kept in constant view, for each of them offers guidelines not to be lightly ignored.

[6] Robert Oppenheimer, quoting *The Bhagvadgita*. See Peter Goodchild, *Robert Oppenheimer: Shatterer of Worlds*, 1980.

4. The Law Relevant to Nuclear Weapons

As Oscar Schachter observes, the law relevant to nuclear weapons is "much more comprehensive than one might infer from the discussions of nuclear strategists and political scientists"[7], and the range of applicable law could be considered in the following five categories:

1. The international law applicable generally to armed conflicts — the *jus in bello*, sometimes referred to as the "humanitarian law of war".

2. The *jus ad bellum* — the law governing the right of States to go to war. This law is expressed in the United Nations Charter and related customary law.
3. The *lex specialis* — the international legal obligations that relate specifically to nuclear arms and weapons of mass destruction.

4. The whole corpus of international law that governs State obligations and rights generally, which may affect nuclear weapons policy in particular circumstances.

5. National law, constitutional and statutory, that may apply to decisions on nuclear weapons by national authorities.

All of these will be touched upon in the ensuing opinion, but the main focus of attention will be on the first category mentioned above.

This examination will also show that each one of the sources of international law, as set out in Article 38 (1) of the Court's Statute, supports the conclusion that the use of nuclear weapons in any circumstances is illegal.

5. Introductory Observations on Humanitarian Law

It is in the department of humanitarian law that the most specific and relevant rules relating to this problem can be found.

Humanitarian law and custom have a very ancient lineage. They reach back thousands of years. They were worked out in many civilizations — Chinese, Indian, Greek, Roman, Japanese, Islamic, modern European, among others. Through the ages many religious and philosophical ideas have been poured into the mould in which modern humanitarian law has been formed. They represented the effort of the human conscience to mitigate in some measure the brutalities and dreadful sufferings of war.

[7] Proceedings of the Canadian Conference on Nuclear Weapons and the Law, published as *Lawyers and the Nuclear Debate*, Maxwell Cohen and Margaret Gouin (eds.), 1988, p. 29.

In the language of a notable declaration in this regard (the St. Petersburg Declaration of 1868), international humanitarian law is designed to "conciliate the necessities of war with the laws of humanity". In recent times, with the increasing slaughter and devastation made possible by modern weaponry, the dictates of conscience have prompted ever more comprehensive formulations.

It is today a substantial body of law, consisting of general principles flexible enough to accommodate unprecedented developments in weaponry, and firm enough to command the allegiance of all members of the community of nations. This body of general principles exists in addition to over 600 special provisions in the Geneva Conventions and their Additional Protocols, apart from numerous other conventions on special matters such as chemical and bacteriological weapons. It is thus an important body of law in its own right, and this case in a sense puts it to the test.

Humanitarian law is ever in continuous development. It has a vitality of its own. As observed by the 1945 Nuremberg Tribunal, which dealt with undefined "crimes against humanity" and other crimes, "[the law of war] is not static, but by continual adaptation follows the needs of a changing world"[8]. Humanitarian law grows as the sufferings of war keep escalating. With the nuclear weapon, those sufferings reach a limit situation, beyond which all else is academic. Humanitarian law, as a living discipline, must respond sensitively, appropriately and meaningfully.

By their very nature, problems in humanitarian law are not abstract, intellectual enquiries which can be pursued in ivory-tower detachment from the sad realities which are their stuff and substance. Not being mere exercises in logic and black-letter law, they cannot be logically or intellectually disentangled from their terrible context. Distasteful though it be to contemplate the brutalities surrounding these legal questions, the legal questions can only be squarely addressed when those brutalities are brought into vivid focus.

The brutalities tend often to be hidden behind a veil of generalities and platitudes — such as that all war is brutal or that nuclear weapons are the most devastating weapons of mass destruction yet devised. It is necessary to examine more closely what this means in all its stark reality. A close and unvarnished picture is required of the actual human sufferings involved, and of the multifarious threats to the human condition posed by these weapons. Then only can humanitarian law respond appropriately. Indeed, it is by turning the spotlight on the agonies of the battle-

[8] *Trial of the Major War Criminals before the International Military Tribunal*, 1948, Vol. 22, p. 464.

field that modern humanitarian law began. This opinion will therefore examine the factual effects of nuclear weapons in that degree of minimum detail which is necessary to attract to these considerations the matching principles of humanitarian law.

6. Linkage between Humanitarian Law and the Realities of War

The nineteenth century tended to view war emotionally, as a glorious enterprise, and practically, as a natural extension of diplomacy. Legitimized by some philosophers, respected by nearly all statesmen, and glorified by many a poet and artist, its brutalities tended to be concealed behind screens of legitimacy, respectability and honour.

Henri Dunant's *Memory of Solferino*, written after a visit to the battlefield of Solferino in 1859, dragged the brutalities of war into public view in a manner which shook contemporary civilization out of its complacency and triggered off the development of modern humanitarian law. That spirit of realism needs to be constantly rekindled if the law is not to stray too far from its subject matter, and thus become sterile.

Dunant's historic account touched the conscience of his age to the extent that a legal response seemed imperative. Here is his description of the raw realities of war as practised in his time:

> "Here is a hand-to-hand struggle in all its horror and frightfulness: Austrians and Allies trampling each other under foot, killing one another on piles of bleeding corpses, felling their enemies with their rifle butts, crushing skulls, ripping bellies open with sabre and bayonet. No quarter is given. It is a sheer butchery . . .
>
> A little further on, it is the same picture, only made the more ghastly by the approach of a squadron of cavalry, which gallops by, crushing dead and dying beneath its horses' hoofs. One poor man has his jaw carried away; another his head shattered; a third, who could have been saved, has his chest beaten in.
>
> Here comes the artillery, following the cavalry and going at full gallop. The guns crash over the dead and wounded, strewn pell-mell on the ground. Brains spurt under the wheels, limbs are broken and torn, bodies mutilated past recognition — the soil is literally puddled with blood, and the plain littered with human remains."

His description of the aftermath is no less powerful:

> "The stillness of the night was broken by groans, by stifled sighs of anguish and suffering. Heart-rending voices kept calling for help. Who could ever describe the agonies of that fearful night?

> When the sun came up on the twenty-fifth, it disclosed the most dreadful sights imaginable. Bodies of men and horses covered the battlefield: corpses were strewn over roads, ditches, ravines, thickets and fields: the approaches of Solferino were literally thick with dead."

Such were the realities of war, to which humanitarian law was the response of the legal conscience of the time. The nuclear weapon has increased the savagery a thousandfold since Dunant wrote his famous words. The conscience of our time has accordingly responded in appropriate measure, as amply demonstrated by the global protests, the General Assembly resolutions, and the universal desire to eliminate nuclear weapons altogether. It does not sit back in a spirit of scholarly detachment, drawing its conclusions from refined exercises in legal logic.

Just as it is through close contact with the raw facts of artillery and cavalry warfare that modern humanitarian law emerged, it is through a consideration of the raw facts of nuclear war that an appropriate legal response can emerge.

While we have moved from the cruelties of cavalry and artillery to the exponentially greater cruelties of the atom, we now enjoy a dual advantage, not present in Dunant's time — the established discipline of humanitarian law and ample documentation of the human suffering involved. Realities infinitely more awful than those which confronted Dunant's age of simpler warfare cannot fail to touch the legal conscience of our age.

Here is an eyewitness description from the first use of the weapon in the nuclear age — one of hundreds of such scenes which no doubt occurred simultaneously, and many of which have been recorded in contemporary documentation. The victims were not combatants, as was the case at Solferino:

> "It was a horrible sight. Hundreds of injured people who were trying to escape to the hills passed our house. The sight of them was almost unbearable. Their faces and hands were burnt and swollen; and great sheets of skin had peeled away from their tissues to hang down like rags on a scarecrow. They moved like a line of ants. All through the night they went past our house, but this morning they had stopped. I found them lying on both sides of the road, so thick that it was impossible to pass without stepping on them.
>
> And they had no faces! Their eyes, noses and mouths had been burned away, and it looked like their ears had been melted off. It was hard to tell front from back. One soldier, whose features had been destroyed and was left with his white teeth sticking out, asked me for some water but I didn't have any. (I clasped my hands and

prayed for him. He didn't say anything more.) His plea for water must have been his last words."[9]

Multiply this a thousand-fold or even a million-fold and we have a picture of just one of the many possible effects of nuclear war.

Massive documentation details the sufferings caused by nuclear weapons — from the immediate charring and mutilation for miles from the site of the explosion, to the lingering after-effects — the cancers and the leukaemias which imperil human health, the genetic mutations which threaten human integrity, the environmental devastation which endangers the human habitat, the disruption of all organization, which undermines human society.

The Hiroshima and Nagasaki experience were two isolated incidents three days apart. They tell us very little of the effects of multiple explosions that would almost inevitably follow in quick succession in the event of a nuclear war today (see Section II.6 below). Moreover, 50 years of development have intervened, with bombs being available now which carry 70 or even 700 times the explosive power of the Hiroshima and Nagasaki bombs. The devastation of Hiroshima and Nagasaki could be magnified several-fold by just one bomb today, let alone a succession of bombs.

7. The Limit Situation Created by Nuclear Weapons

Apart from human suffering, nuclear weapons, as observed earlier, take us into a limit situation. They have the potential to destroy all civilization — all that thousands of years of effort in all cultures have produced. It is true "the dreary story of sickened survivors lapsing into stone-age brutality is not an assignment that any sensitive person undertakes willingly", but it is necessary to "contemplate the likely outcome of mankind's present course clearsightedly"[10]. Since nuclear weapons can destroy all life on the planet, they imperil all that humanity has ever stood for, and humanity itself.

[9] *Hiroshima Diary: The Journal of a Japanese Physician August 6-September 30, 1945*, by Michihiko Hachiya, M.D., translated and edited by Warner Wells, M.D., University of North Carolina Press, 1955, pp. 14-15.

[10] "The Medical and Ecological Effects of Nuclear War", by Don G. Bates, Professor of the History of Medicine, McGill University, in *McGill Law Journal*, 1983, Vol. 28, p. 717.

An analogy may here be drawn between the law relating to the environment and the law relating to war.

At one time it was thought that the atmosphere, the seas and the land surface of the planet were vast enough to absorb any degree of pollution and yet rehabilitate themselves. The law was consequently very lax in its attitude towards pollution. However, with the realization that a limit situation would soon be reached, beyond which the environment could absorb no further pollution without danger of collapse, the law found itself compelled to reorientate its attitude towards the environment.

With the law of war, it is no different. Until the advent of nuclear war, it was thought that however massive the scale of a war, humanity could survive and reorder its affairs. With the nuclear weapon, a limit situation was reached, in that the grim prospect opened out that humanity may well fail to survive the next nuclear war, or that all civilization may be destroyed. That limit situation has compelled the law of war to reorientate its attitudes and face this new reality.

8. Possession and Use

Although it is the use of nuclear weapons, and not possession, that is the subject of this reference, many arguments have been addressed to the Court which deal with possession and which therefore are not pertinent to the issues before the Court.

For example, the Court was referred, in support of the position that nuclear weapons are a matter within the sovereign authority of each State, to the following passage in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*:

> "'in international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the *level of armaments* of a sovereign State can be limited' (*I.C.J. Reports 1986*, p. 135)" (CR 95/23, p. 79, France; emphasis added).

This passage clearly relates to possession, not use.

Much was made also of the Nuclear Non-Proliferation Treaty, as permitting nuclear weapons to the nuclear weapons States. Here again such permission, if any, as may be inferred from that treaty relates to *possession* and not *use*, for nowhere does the NPT contemplate or deal with the use or threat of use of nuclear weapons. On questions of use or threat of use, the NPT is irrelevant.

9. Differing Attitudes of States Supporting Legality

There are some significant differences between the positions adopted by States supporting the legality of the use of nuclear weapons. Indeed, in

relation to some very basic matters, there are divergent approaches among the nuclear States themselves.

Thus the French position is that

> "This criterion of proportionality does not itself rule out in principle the utilization, whether in response or as a matter of first use, of any particular weapon whatsoever, including a nuclear weapon, *provided that such use is intended to withstand an attack and appears to be the most appropriate means of doing so.*" (French Written Statement, p. 29, emphasis added.)

According to this view, the factors referred to could, in a given case, even outweigh the principle of proportionality. It suggests that the governing criterion determining the permissibility of the weapon is whether it is the most appropriate means of withstanding the attack. The United States position is that:

> "Whether an attack with nuclear weapons would be disproportionate depends entirely on the circumstances, including the nature of the enemy threat, the importance of destroying the objective, the character, size and likely effects of the device, and the magnitude of therisk to civilians." (United States Written Statement, p. 23.)

The United States position thus carefully takes into account such circumstances as the character, size and effects of the device and the magnitude of risk to civilians.

The position of the Russian Federation is that the "Martens Clause" (see Section III.4) is not working at all and that today the Martens Clause may formally be considered inapplicable (Written Statement, p. 13).

The United Kingdom, on the other hand, while accepting the applicability of the Martens Clause, submits that the clause does not on its own establish the illegality of nuclear weapons (United Kingdom Written Statement, p. 48, para. 3.58). The United Kingdom argues that the terms of the Martens Clause make it necessary to point to a rule of customary law outlawing the use of nuclear weapons.

These different perceptions of the scope, and indeed of the very basis of the claim of legality on the part of the nuclear powers themselves, call for careful examination in the context of the question addressed to the Court.

10. The Importance of a Clarification of the Law

The importance of a clarification of the law upon the legality of nuclear weapons cannot be overemphasized.

On 6 June 1899, Mr. Martens (presiding over the Second Subcommission of the Second Commission of the Hague Conference), after whom the Martens Clause has been named (which will be referred to at some

length in this opinion), made the following observations in reply to the contention that it was preferable to leave the laws of war in a vague state. He said:

> "But is this opinion quite just? Is this uncertainty advantageous to the weak? Do the weak become stronger because the *duties* of the strong are not determined? Do the strong become weaker because their *rights* are specifically defined and consequently limited? I do not think so. I am fully convinced that it is particularly in the interest of the weak that these rights and duties be defined. . . .
>
> Twice, in 1874 and 1899, two great international Conferences have gathered together the most competent and eminent men of the civilized world on the subject. They have not succeeded in determining the laws and customs of war. They have separated, leaving utter vagueness for all these questions. . . .
>
> To leave uncertainty hovering over these questions would necessarily be to allow the interests of force to triumph over those of humanity . . ."[11]

It is in this quest for clarity that the General Assembly has asked the Court to render an opinion on the use of nuclear weapons. The nations who control these weapons have opposed this application, and so have some others. It is in the interests of all nations that this matter be clarified which, for one reason or another, has not been specifically addressed for the past 50 years. It has remained unresolved and has hung over the future of humanity, like a great question mark, raising even issues so profound as the future of human life upon the planet.

The law needs to be clearly stated in the light of State rights and obligations under the new world dispensation brought about by the United Nations Charter which, for the first time in human history, outlawed war by the consensus of the community of nations. Fifty years have passed since that epoch-making document which yet lay in the distant future when Martens spoke. Those 50 years have been years of inaction, in so far as concerns the clarification of this most important of legal issues ever to face the global community.

II. Nature and Effects of Nuclear Weapons

1. The Nature of the Nuclear Weapon

The matter before the Court involves the application of humanitarian law to questions of fact, not the construction of humanitarian law as an abstract body of knowledge.

[11] J. B. Scott, "The Conference of 1899", *The Proceedings of the Hague Peace Conferences*, 1920, pp. 506-507; emphasis added.

The Court is enquiring into the question whether the use of nuclear weapons produces factual consequences of such an inhumane nature as to clash with the basic principles of humanitarian law. Both in regard to this Advisory Opinion and in regard to that sought by the World Health Organization, a vast mass of factual material has been placed before the Court as an aid to its appreciation of the many ways in which the effects of nuclear weapons attract the application of various principles of humanitarian law. It is necessary to examine these specific facts, at least in outline, for they illustrate, more than any generalities can, the unique features of the nuclear weapon.

Moreover, the contention that nuclear war is in some way containable renders essential a detailed consideration of the unique and irreversible nature of the effects of nuclear weapons.

2. Euphemisms Concealing the Realities of Nuclear War

It would be a paradox if international law, a system intended to promote world peace and order, should have a place within it for an entity that can cause total destruction of the world system, the millennia of civilization which have produced it, and humanity itself. A factor which powerfully conceals that contradiction, even to the extent of keeping humanitarian law at bay, is the use of euphemistic language — the disembodied language of military operations and the polite language of diplomacy. They conceal the horror of nuclear war, diverting attention to intellectual concepts such as self-defence, reprisals, and proportionate damage which can have little relevance to a situation of total destruction.

Horrendous damage to civilians and neutrals is described as collateral damage, because it was not directly intended; incineration of cities becomes "considerable thermal damage". One speaks of "acceptable levels of casualties", even if megadeaths are involved. Maintaining the balance of terror is described as "nuclear preparedness"; assured destruction as "deterrence", total devastation of the environment as "environmental damage". Clinically detached from their human context, such expressions bypass the world of human suffering, out of which humanitarian law has sprung.

As observed at the commencement of this opinion, humanitarian law needs to be brought into juxtaposition with the raw realities of war if it is to respond adequately. Such language is a hindrance to this process[12].

Both ancient philosophy and modern linguistics have clearly identified the problem of the obscuring of great issues through language which con-

[12] This aspect is addressed in a volume of contemporary philosophical explorations of the problem of war, *The Critique of War*, Robert Ginsberg (ed.), 1969. See, in particular, Chap. 6, "War and the Crisis of Language", by Thomas Merton.

ceals their key content. Confucius, when asked how he thought order and morality could be created in the State, answered, "By correcting names." By this he meant calling each thing by its correct name[13].

Modern semantics has likewise exposed the confusion caused by words of euphemism, which conceal the true meanings of concepts[14]. The language of nuclear war, rich in these euphemisms, tends to sidetrack the real issues of extermination by the million, incineration of the populations of cities, genetic deformities, inducement of cancers, destruction of the food chain, and the imperilling of civilization. The mass extinction of human lives is treated with the detachment of entries in a ledger which can somehow be reconciled. If humanitarian law is to address its tasks with clarity, it needs to strip away these verbal dressings and come to grips with its real subject-matter. Bland and disembodied language should not be permitted to conceal the basic contradictions between the nuclear weapon and the fundamentals of international law.

3. The Effects of the Nuclear Weapon

Before 1945 "the highest explosive effect of bombs was produced by TNT devices of about 20 tons"[15]. The nuclear weapons exploded in Hiroshima and Nagasaki were more or less of the explosive power of 15 and 12 kilotons respectively, that is, 15,000 and 12,000 tons of TNT (trinitrotoluene) respectively. Many of the weapons existing today and in process of being tested represent several multiples of the explosive power of these bombs. Bombs in the megaton (equivalent to a million tons of TNT) and multiple megaton range are in the world's nuclear arsenals, some being even in excess of 20 megatons (equivalent to 20 million tons of TNT). A one-megaton bomb, representing the explosive power of a million tons of TNT, would be around 70 times the explosive power of the bombs used on Japan, and a 20-megaton bomb well over a thousand times that explosive power.

Since the mind is numbed by such abstract figures and cannot comprehend them, they have been graphically concretized in various ways. One of them is to picture the quantity of TNT represented by a single one-megaton bomb, in terms of its transport by rail. It has been estimated that this would require a train 200 miles long[16]. When one is carrying death and destruction to an enemy in war through the use of a single one-megaton bomb, it assists the comprehension of this phenomenon to think

[13] Cited in Robert S. Hartman, "The Revolution against War", in *The Critique of War*, p. 324.

[14] "They serve to build these figments of hell into the system of power politics, and to dim the minds of the nuclear citizens." (*Ibid.*, p. 325.)

[15] N. Singh and E. McWhinney, *Nuclear Weapons and Contemporary International Law*, 1989, p. 29.

[16] Bates, *op. cit.*, p. 719.

in terms of a 200-mile train loaded with TNT being driven into enemy territory, to be exploded there. It cannot be said that international law would consider this legal. Nor does it make any difference if the train is not 200 miles long, but 100 miles, 50 miles, 10 miles, or only 1 mile. Nor, again, could it matter if the train is 1,000 miles long, as would be the case with a 5-megaton bomb, or 4,000 miles long, as would be the case with a 20-megaton bomb.

Such is the power of the weapon upon which the Court is deliberating — power which dwarfs all historical precedents, even if they are considered cumulatively. A 5-megaton weapon would represent more explosive power than all of the bombs used in World War II and a 20-megaton bomb "more than all of the explosives used in all of the wars in the history of mankind"[17].

The weapons used at Hiroshima and Nagasaki are "small" weapons compared with those available today and, as observed earlier, a one-megaton bomb would represent around 70 Hiroshimas and a 15-megaton bomb around 1,000 Hiroshimas. Yet the unprecedented magnitude of its destructive power is only one of the unique features of the bomb. It is unique in its uncontainability in both space and time. It is unique as a source of peril to the human future. It is unique as a source of continuing danger to human health, even long after its use. Its infringement of humanitarian law goes beyond its being a weapon of mass destruction[18]; to reasons which penetrate far deeper into the core of humanitarian law.

Atomic weapons have certain special characteristics distinguishing them from conventional weapons, which were summarized by the United States Atomic Energy Commission in terms that:

> "it differs from other bombs in three important respects: *first*, the amount of energy released by an atomic bomb is a thousand or more times as great as that produced by the most powerful TNT bombs; *secondly*, the explosion of the bomb is accompanied by highly penetrating and deleterious invisible rays, in addition to intense heat and light; and, *thirdly*, the substances which remain after the explosion are radio-active, emitting radiations capable of producing harmful consequences in living organisms"[19].

[17] Bates, *op. cit.*, p. 719.

[18] The Final Document of the First Special Session of the United Nations General Assembly devoted to Disarmament (1978) unanimously categorized nuclear weapons as weapons of mass destruction, a conclusion which was adopted by consensus (CR 95/25, p. 17).

[19] *Effects of Atomic Weapons*, prepared by the United States Atomic Energy Commission in co-operation the Department of Defense, 1950, cited in Singh and McWhinney, *op. cit.*, p. 30.

The following more detailed analysis is based on materials presented to the Court, which have not been contradicted at the hearings, even by the States contending that the use of nuclear weapons is not illegal. They constitute the essential factual foundation on which the legal arguments rest, and without which the legal argument is in danger of being reduced to mere academic disputation.

(a) *Damage to the environment and the ecosystem*[20]

The extent of damage to the environment, which no other weapon is capable of causing, has been summarized in 1987 by the World Commission on the Environment and Development in the following terms:

> "The likely consequences of nuclear war make other threats to the environment pale into insignificance. Nuclear weapons represent a qualitatively new step in the development of warfare. One thermonuclear bomb can have an explosive power greater than all the explosives used in wars since the invention of gunpowder. In addition to the destructive effects of blast and heat, immensely magnified by these weapons, they introduce a new lethal agent — ionising radiation — that extends lethal effects over both space and time."[21]

Nuclear weapons have the potential to destroy the entire ecosystem of the planet. Those already in the world's arsenals have the potential of destroying life on the planet several times over.

Another special feature of the nuclear weapon, referred to at the hearings, is the damage caused by ionizing radiation to coniferous forests, crops, the food chain, livestock and the marine ecosystem.

(b) *Damage to future generations*

The effects upon the ecosystem extend, for practical purposes, beyond the limits of all foreseeable historical time. The half-life of one of the by-products of a nuclear explosion — plutonium 239 — is over 20,000 years. With a major nuclear exchange it would require several of these "half-life" periods before the residuary radioactivity becomes minimal. Half-life is "the period in which the rate of radioactive emission by a pure

[20] On environmental law, see further Section III.10 *(f)* below.

[21] World Commission on Environment and Development ("the Brundtland Commission"), *Our Common Future*, 1987, p. 295, cited in CR 95/22, p. 55.

sample falls by a factor of two. Among known radioactive isotopes, half-lives range from about 10^{-7} seconds to 10^{16} years"[22].

The following table gives the half-lives of the principal radioactive elements that result from a nuclear test:

Nucleid	*Half-life*
Cesium 137	30.2 years
Strontium 90	28.6 years
Plutonium 239	24,100 years
Plutonium 240	6,570 years
Plutonium 241	14.4 years
Americium 241	432 years[23]

Theoretically, this could run to tens of thousands of years. At any level of discourse, it would be safe to pronounce that no one generation is entitled, for whatever purpose, to inflict such damage on succeeding generations.

This Court, as the principal judicial organ of the United Nations, empowered to state and apply international law with an authority matched by no other tribunal must, in its jurisprudence, pay due recognition to the rights of future generations. If there is any tribunal that can recognize and protect their interests under the law, it is this Court.

It is to be noted in this context that the rights of future generations have passed the stage when they were merely an embryonic right struggling for recognition. They have woven themselves into international law through major treaties, through juristic opinion and through general principles of law recognized by civilized nations.

Among treaties may be mentioned, the 1979 London Ocean Dumping Convention, the 1973 Convention on International Trade in Endangered Species, and the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage. All of these expressly incorporate the principle of protecting the natural environment for future generations, and elevate the concept to the level of binding State obligation.

Juristic opinion is now abundant, with several major treatises appearing upon the subject and with such concepts as intergenerational equity and the common heritage of mankind being academically well established[24]. Moreover, there is a growing awareness of the ways in which a multiplicity of traditional legal systems across the globe protect the environment for future generations. To these must be added a series of major

[22] *Encyclopaedia Britannica Micropaedia*, 1992 ed., Vol. 9, p. 893.

[23] Source: *Radioecology*, Holm ed., 1995, World Scientific Publishing Co.

[24] For further references, see Edith Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity*, 1989.

international declarations commencing with the 1972 Stockholm Declaration on the Human Environment.

When incontrovertible scientific evidence speaks of pollution of the environment on a scale that spans hundreds of generations, this Court would fail in its trust if it did not take serious note of the ways in which the distant future is protected by present law. The ideals of the United Nations Charter do not limit themselves to the present, for they look forward to the promotion of social progress and better standards of life, and they fix their vision, not only on the present, but on "succeeding generations". This one factor of impairment of the environment over such a seemingly infinite time span would by itself be sufficient to call into operation the protective principles of international law which the Court, as the pre-eminent authority empowered to state them, must necessarily apply.

(c) *Damage to civilian populations*

This needs no elaboration, for nuclear weapons surpass all other weapons of mass destruction in this respect. In the words of a well-known study of the development of international law:

> "A characteristic of the weapons of mass destruction — the ABC weapons — is that their destructive effect cannot be limited in space and time to military objectives. Consequently their use would imply the extinction of unforeseeable and indeterminable masses of the civilian population. This means also that their actual employment would be — even in the absence of explicit treaty provisions — contrary to international law, but it is also true that the problem of the weapons of mass destruction has grown out of the sphere of humanitarian law taken in the narrow sense and has become one of the fundamental issues of the peaceful coexistence of States with different social systems."[25]

(d) *The nuclear winter*

One of the possible after-effects of an exchange of nuclear weapons is the nuclear winter, a condition caused by the accumulation of hundreds of millions of tons of soot in the atmosphere, in consequence of fires in cities, in forests and the countryside, caused by nuclear weapons. The smoke cloud and the debris from multiple explosions blots out sunlight, resulting in crop failures throughout the world and global starvation. Starting with the paper by Turco, Toon, Ackerman, Pollack and Sagan (known as the TTAPS study after the names of its authors) on "Nuclear

[25] Géza Herczegh, *Development of International Humanitarian Law*, 1984, p. 93. "ABC weapons" refer to atomic, biological and chemical weapons.

Winter: Global Consequences of Multiple Nuclear Explosions"[26], an enormous volume of detailed scientific work has been done on the effect of the dust and smoke clouds generated in nuclear war. The TTAPS study showed that smoke clouds in one hemisphere could within weeks move into the other hemisphere[27]. TTAPS and other studies show that a small temperature drop of a few degrees during the ripening season, caused by the nuclear winter, can result in extensive crop failure even on a hemispherical scale. Such consequences are therefore ominous for non-combatant countries also.

"There is now a consensus that the climatic effects of a nuclear winter and the resulting lack of food aggravated by the destroyed

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[26] *Science*, 23 December 1983, Vol. 222, p. 1283.

[27] The movement of a cloud of dust particles from one hemisphere to another, with the resultant effects resembling those of a nuclear winter, are not futuristic scenarios unrelated to past experience. In 1815, the eruption of the Indonesian volcano, Tambora, injected dust and smoke into the atmosphere on a scale so great as to result in worldwide crop failure and darkness in 1816. The *Scientific American*, March 1984, p. 58, reproduced a poem, "Darkness", written by Lord Byron, thought to have been inspired by this year without a summer. At a hearing of the United States Senate on the effects of nuclear war, in December 1983, the Russian physicist, Kapitza, drew attention to this poem, in the context of the effects of nuclear war, referring to it as one well known to Russians through its translation by the novelist Ivan Turgenev. Here are some extracts, capturing with poetic vision the human despair and the environmental desolation of the post-nuclear scene:

"A fearful hope was all the world contain'd;
Forests were set on fire — but hour by hour
They fell and faded — and the crackling trunks
Extinguish'd with a crash — and all was black.
The brows of men by the despairing light
Wore an unearthly aspect, as by fits
The flashes fell upon them; some lay down
And hid their eyes and wept; . . .

. . . The world was void,
The populous and the powerful was a lump,
Seasonless, herbless, treeless, manless, lifeless —
A lump of death — a chaos of hard clay.
The rivers, lakes, and ocean all stood still,
And nothing stirr'd within their silent depths;
Ships sailorless lay rotting on the sea . . .".

> infrastructure could have a greater overall impact on the global population than the immediate effects of the nuclear explosions. The evidence is growing that in a post-war nuclear world Homo Sapiens will not have an ecological niche to which he could flee. It is apparent that life everywhere on this planet would be threatened."[28]

(e) *Loss of life*

The WHO estimate of the number of dead in the event of the use of a single bomb, a limited war and a total war varies from one million to one billion, with, in addition, a similar number of injured in each case.

Deaths resulting from the only two uses of nuclear weapons in war — Hiroshima and Nagasaki — were 140,000 and 74,000 respectively, according to the representative of Japan, out of total populations of 350,000 and 240,000 respectively. Had these same bombs been exploded in cities with densely packed populations of millions, such as Tokyo, New York, Paris, London or Moscow, the loss of life would have been incalculably more.

An interesting statistic given to the Court by the Mayor of Nagasaki is that the bombing of Dresden by 773 British aircraft followed by a shower of 650,000 incendiary bombs by 450 American aircraft caused 135,000 deaths — a similar result to a single nuclear bomb on Hiroshima — a "small" bomb by today's standards.

(f) *Medical effects of radiation*

Nuclear weapons produce instantaneous radiation, in addition to which there is also radioactive fallout.

> "It is well established that residual nuclear radiation is a feature of the fission or Atomic bomb as much as the thermo-nuclear weapon known as the 'fusion bomb' or H-bomb."[29]

Over and above the immediate effects just set out, there are longer term effects caused by ionizing radiation acting on human beings and on

[28] Wilfrid Bach, "Climatic Consequences of Nuclear War", in Proceedings of the Sixth World Congress of the International Physicians for the Prevention of Nuclear War (IPPNW), Cologne, 1986, published as *Maintain Life on Earth!*, 1987, p. 154.

[29] Singh and McWhinney, *op. cit.*, p. 123.

the environment. Such ionization causes cell damage and the changes that occur may destroy the cell or diminish its capacity to function[30].

After a nuclear attack the victim population suffers from heat, blast and radiation, and separate studies of the effects of radiation are complicated by injuries from blast and heat. Chernobyl has however given an opportunity for study of the effects of radiation alone, for:

> "Chernobyl represents the largest experience in recorded time of the effects of whole body radiation on human subjects, uncomplicated by blast and/or burn."[31]

Apart from the long-term effects such as keloids and cancers, these effects include in the short-term anorexia, diarrhoea, cessation of production of new blood cells, haemorrhage, bone marrow damage, damage to the central nervous system, convulsions, vascular damage, and cardiovascular collapse[32].

Chernobyl, involving radiation damage alone, in a comparatively lightly populated area, strained the medical resources of a powerful nation and necessitated the pouring in of medical personnel, supplies and equipment from across the Soviet Union — 5,000 trucks, 800 buses, 240 ambulances, helicopters and special trains[33]. Yet the Chernobyl explosion was thought to be approximately that of a half-kiloton bomb[34] — about one twenty-fifth of the comparatively "small" Hiroshima bomb, which was only one seventieth the size of a one-megaton bomb. As observed already, the nuclear arsenals contain multi-megaton bombs today.

The effects of radiation are not only agonizing, but are spread out over an entire lifetime. Deaths after a long life of suffering have occurred in Hiroshima and Nagasaki, decades after the nuclear weapon hit those cities. The Mayor of Hiroshima has given the Court some glimpses of the lingering agonies of the survivors — all of which is amply documented in a vast literature that has grown up around the subject. Indonesia made reference to Antonio Cassese's *Violence and Law in the Modern Age* (1988), which draws attention to the fact that "the quality of human suf-

[30] Herbert Abrams, "Chernobyl and the Short-Term Medical Effects of Nuclear War", in Proceedings of the IPPNW Congress, *op. cit.*, p. 122.
[31] *Ibid.*, p. 120.
[32] *Ibid.*, pp. 122-125.
[33] *Ibid.*, p. 121.
[34] *Ibid.*, p. 127.

fering . . . does not emerge from the figures and statistics only . . . but from the account of survivors". These records of harrowing suffering are numerous and well known[35].

Reference should also be made to the many documents received by the Registry in this regard, including materials from the *International Symposium: Fifty Years since the Atomic Bombing of Hiroshima and Nagasaki*. It is not possible in this opinion even to attempt the briefest summary of the details of these sufferings.

The death toll from lingering death by radiation is still adding to the numbers. Over 320,000 people who survived but were affected by radiation suffer from various malignant tumours caused by radiation, including leukaemia, thyroid cancer, breast cancer, lung cancer, gastric cancer, cataracts and a variety of other after-effects more than half a century later, according to statistics given to the Court by the representative of Japan. With nuclear weapons presently in the world's arsenals of several multiples of the power of those explosions, the scale of damage expands exponentially.

As stated by WHO (CR 95/22, pp. 23-24), overexposure to radiation suppresses the body's immune systems and increases victims' vulnerability to infection and cancers.

Apart from an increase in genetic effects and the disfiguring keloid tumours already referred to, radiation injuries have also given rise to psychological traumas which continue to be noted among the survivors of Hiroshima and Nagasaki. Radiation injuries result from direct exposure, from radiation emitted from the ground, from buildings charged with radioactivity, and from radioactive fallout back to the ground several months later from soot or dust which had been whirled up into the stratosphere by the force of the explosion[36].

In addition to these factors, there is an immense volume of specific material relating to the medical effects of nuclear war. A fuller account of this medical material appears in my dissenting opinion on the WHO request (*I.C.J. Reports 1996*, pp. 115-127). That medical material should also be considered as incorporated in this account of the unique effects of the nuclear weapon.

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[35] Among the internationally known contemporary accounts are John Hersey, *Hiroshima* (to which *The New Yorker* devoted its whole issue of 31 August 1946, and which has since appeared as a Penguin Classic, 1946); *Hiroshima Diary: The Journal of a Japanese Physician August 6-September 30, 1945*, by Michihiko Hachiya, M.D., University of North Carolina Press, 1955; and *The Day Man Lost: Hiroshima, 6 August 1945*, Kodansha, 1972. They are all part of a voluminous documentation.

[36] Over the effects of radiation, see, generally, *Nuclear Radiation in Warfare*, 1981, by Professor Joseph Rotblat, the Nobel Laureate.

(g) *Heat and blast*

Nuclear weapons cause damage in three ways — through heat, blast and radiation. As stated by the WHO representative, while the first two differ quantitatively from those resulting from the explosion of conventional bombs, the third is peculiar to nuclear weapons. In addition to instantaneous radiation, there is also radioactive fallout.

The distinctiveness of the nuclear weapon can also be seen from statistics of the magnitude of the heat and blast it produces. The representative of Japan drew our attention to estimates that the bomb blasts in Hiroshima and Nagasaki produced temperatures of several million degrees centigrade and pressures of several hundred thousand atmospheres. In the bright fireball of the nuclear explosion, the temperature and pressure are said indeed to be the same as those at the centre of the sun[37]. Whirlwinds and firestorms were created approximately 30 minutes after the explosion. From these causes 70,147 houses in Hiroshima and 18,400 in Nagasaki were destroyed. The blastwind set up by the initial shockwave had a speed of nearly 1,000 miles per hour, according to figures given to the Court by the Mayor of Hiroshima. The blast

> "turns people and debris into projectiles that hurl into stationary objects and into each other. Multiple fractures, puncture wounds and the smashing of skulls, limbs and internal organs makes the list of possible injuries endless."[38]

(h) *Congenital deformities*

The intergenerational effects of nuclear weapons mark them out from other classes of weapons. As the delegation of the Solomon Islands put it, the adverse effects of the bomb are

> "virtually permanent — reaching into the distant future of the human race — if it will have a future, which a nuclear conflict would put in doubt" (CR 95/32, p. 36).

Apart from damage to the environment which successive generations will inherit far into the future, radiation also causes genetic damage and will

[37] Bates, *op. cit.*, p. 722. Cf. the reference in *The Bhagvadgita*, "brighter than a thousand suns", which was widely used by nuclear scientists — as in Robert Jungk, *Brighter than a Thousand Suns: A Personal History of the Atomic Scientist*, Penguin, 1982, and Oppenheimer's famous quote from the same source.

[38] *Ibid.*, p. 723.

result in a crop of deformed and defective offspring, as proved in Hiroshima and Nagasaki (where those who were in the vicinity of the explosion — the *hibakusha* — have complained for years of social discrimination against them on this account), and in the Marshall Islands and elsewhere in the Pacific. According to the Mayor of Nagasaki:

> "the descendants of the atomic bomb survivors will have to be monitored for several generations to clarify the genetic impact, which means that the descendants will be forced to live in anxiety for generations to come" (CR 95/27, p. 43).

The Mayor of Hiroshima told the Court that children "exposed in their mothers' womb were often born with microcephalia, a syndrome involving mental retardation and incomplete growth" (*ibid.*, p. 29). In the Mayor's words:

> "For these children, no hope remains of becoming normal individuals. Nothing can be done for them medically. The atomic bomb stamped its indelible mark on the lives of these utterly innocent unborn babies." (*Ibid.*, p. 30.)

In Japan the social problem of *hibakusha* covers not only persons with hideous keloid growths, but also deformed children and those exposed to the nuclear explosions, who are thought to have defective genes which transmit deformities to their children. This is a considerable human rights problem, appearing long after the bomb and destined to span the generations.

Mrs. Lijon Eknilang, from the Marshall Islands, told the Court of genetic abnormalities never before seen on that island until the atmospheric testing of nuclear weapons. She gave the Court a moving description of the various birth abnormalities seen on that island after the exposure of its population to radiation. She said that Marshallese women

> "give birth, not to children as we like to think of them, but to things we could only describe as 'octopuses', 'apples', 'turtles', and other things in our experience. We do not have Marshallese words for these kinds of babies because they were never born before the radiation came.
>
> Women on Rongelap, Likiep, Ailuk and other atolls in the Marshall Islands have given birth to these 'monster babies'. . . . One woman on Likiep gave birth to a child with two heads. . . . There is

> a young girl on Ailuk today with no knees, three toes on each foot and a missing arm . . .
>
> The most common birth defects on Rongelap and nearby islands have been 'jellyfish' babies. These babies are born with no bones in their bodies and with transparent skin. We can see their brains and hearts beating. . . . Many women die from abnormal pregnancies and those who survive give birth to what looks like purple grapes which we quickly hide away and bury. . . .
>
> My purpose for travelling such a great distance to appear before the Court today, is to plead with you to do what you can not to allow the suffering that we Marshallese have experienced to be repeated in any other community in the world." (CR 95/32, pp. 30-31.)

From another country which has had experience of deformed births, Vanuatu, there was a similar moving reference before the World Health Assembly, when that body was debating a reference to this Court on nuclear weapons. The Vanuatu delegate spoke of the birth, after nine months, of "a substance that breathes but does not have a face, legs or arms"[39].

(i) *Transnational damage*

Once a nuclear explosion takes place, the fallout from even a single local detonation cannot be confined within national boundaries[40]. According to WHO studies, it would extend hundreds of kilometres downwind and the gamma ray exposure from the fallout could reach the human body, even outside national boundaries, through radioactivity deposited in the ground, through inhalation from the air, through consumption of contaminated food, and through inhalation of suspended radioactivity. The diagram appended to this opinion, extracted from the WHO Study, comparing the areas affected by conventional bombs and nuclear weapons, demonstrates this convincingly. Such is the danger to which neutral populations would be exposed.

All nations, including those carrying out underground tests, are in agreement that extremely elaborate protections are necessary in the case of underground nuclear explosions in order to prevent contamination of the environment. Such precautions are manifestly quite impossible in the

[39] Record of the 13th Plenary Meeting, Forty-Sixth World Health Assembly, 14 May 1993, doc. A46/VR/13, p. 11, furnished to the Court by WHO.

[40] See diagram appended from *Effects of Nuclear War on Health and Health Services*, World Health Organization, 2nd ed., 1987, p. 16.

case of the use of nuclear weapons in war — when they will necessarily be exploded in the atmosphere or on the ground. The explosion of nuclear weapons in the atmosphere creates such acknowledgedly deleterious effects that it has already been banned by the Partial Nuclear Test Ban Treaty, and considerable progress has already been made towards a Total Test Ban Treaty. If the nuclear powers now accept that explosions below ground, in the carefully controlled conditions of a test, are so deleterious to health and the environment that they should be banned, this ill accords with the position that above ground explosions in uncontrolled conditions are acceptable.

The transboundary effects of radiation are illustrated by the nuclear meltdown in Chernobyl which had devastating effects over a vast area, as the by-products of that nuclear reaction could not be contained. Human health, agricultural and dairy produce and the demography of thousands of square miles were affected in a manner never known before. On 30 November 1995, the United Nation's Under-Secretary-General for Humanitarian Affairs announced that thyroid cancers, many of them being diagnosed in children, are 285 times more prevalent in Belarus than before the accident, that about 375,000 people in Belarus, Russia and Ukraine remain displaced and often homeless — equivalent to numbers displaced in Rwanda by the fighting there — and that about 9 million people have been affected in some way[41]. Ten years after Chernobyl, the tragedy still reverberates over large areas of territory, not merely in Russia alone, but also in other countries such as Sweden. Such results, stemming from a mere accident rather than a deliberate attempt to cause damage by nuclear weapons, followed without the heat or the blast injuries attendant on a nuclear weapon. They represented radiation damage alone — only one of the three lethal aspects of nuclear weapons. They stemmed from an event considerably smaller in size than the explosions of Hiroshima and Nagasaki.

(j) *Potential to destroy all civilization*

Nuclear war has the potential to destroy all civilization. Such a result could be achieved through the use of a minute fraction of the weapons already in existence in the arsenals of the nuclear powers.

As Former Secretary of State, Dr. Henry Kissinger, once observed, in relation to strategic assurances in Europe:

[41] *New York Times Service*, reported in *International Herald Tribune*, 30 November 1995.

> "The European allies should not keep asking us to multiply strategic assurances that we cannot possibly mean, or if we do mean, we should not want to execute because if we execute, *we risk the destruction of civilization.*"[42]

So, also, Robert McNamara, United States Secretary of Defense from 1961 to 1968, has written:

> "Is it realistic to expect that a nuclear war could be limited to the detonation of tens or even hundreds of nuclear weapons, even though each side would have tens of thousands of weapons remaining available for use? The answer is clearly no."[43]

Stocks of weapons may be on the decline, but one scarcely needs to think in terms of thousands or even hundreds of weapons. Tens of weapons are enough to wreak all the destructions that have been outlined at the commencement of this opinion.

Such is the risk attendant on the use of nuclear weapons — a risk which no single nation is entitled to take, whatever the dangers to itself. An individual's right to defend his own interests is a right he enjoys against his opponents. In exercising that right, he cannot be considered entitled to destroy the village in which he lives.

(i) *Social institutions*

All the institutions of ordered society — judiciaries, legislatures, police, medical services, education, transport, communications, postal and telephone services, and newspapers — would disappear together in the immediate aftermath of a nuclear attack. The country's command centres and higher echelons of administrative services would be paralysed. There would be "social chaos on a scale unprecedented in human history"[44].

(ii) *Economic structures*

Economically, society would need to regress even beyond that of the Middle Ages to the levels of man's most primitive past. One of the best known studies examining this scenario summarizes the situation in this way:

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[42] Henry A. Kissinger, "NATO Defense and the Soviet Threat", *Survival*, November-December 1979, p. 266 (address in Brussels), cited by Robert S. McNamara in "The Military Role of Nuclear Weapons: Perceptions and Misperceptions", *Foreign Affairs*, 1983-1984, No. 62, Vol. 1, p. 59; emphasis added.

[43] Robert S. McNamara, *op. cit.*, p. 71.

[44] Bates, *op. cit.*, p. 726.

> "The task . . . would be not to restore the old economy but to invent a new one, on a far more primitive level. . . . The economy of the Middle Ages, for example, was far less productive than our own, but it was exceedingly complex, and it would not be within the capacity of people in our time suddenly to establish a medieval economic system in the ruins of their twentieth-century one. . . . Sitting among the debris of the Space Age, they would find that the pieces of a shattered modern economy around them — here an automobile, there a washing machine — were mismatched to their elemental needs. . . . [T]hey would not be worrying about rebuilding the automobile industry or the electronics industry: they would be worrying about how to find nonradioactive berries in the woods, or how to tell which trees had edible bark."[45]

(iii) *Cultural treasures*

Another casualty to be mentioned in this regard is the destruction of the cultural treasures representing the progress of civilization through the ages. The importance of the protection of this aspect of civilization was recognized by the Hague Convention of 14 May 1954, for the protection of cultural property in the case of armed conflict, which decreed that cultural property is entitled to special protection. Historical monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples must not be the objects of any acts of hostility.

Additional Protocol II provides that cultural property and places of worship which constitute the cultural and spiritual heritage of peoples must not be attacked. Such attacks are grave breaches of humanitarian law under the Conventions and the Protocol. The protection of culture in wartime is considered so important by the world community that Unesco has devised a special Programme for the Protection of Culture in Wartime. Whenever any cultural monuments were destroyed, there has been a public outcry and an accusation that the laws of war had been violated.

Yet it is manifest that the nuclear bomb is no respecter of such cultural treasures[46]. It will incinerate and flatten every object within its radius of destruction, cultural monument or otherwise.

Despite the blitz on many great cities during World War II, many a cultural monument in those cities stood through the war. That will not be the case after nuclear war.

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[45] Jonathan Schell, *The Fate of the Earth*, 1982, pp. 69-70, cited in Bates, *op. cit.*, p. 727.

[46] On State responsibility to protect the cultural heritage, see Article 5 of the World Heritage Convention, 1972 (The Convention for the Protection of the World Cultural and Natural Heritage).

That this is a feature of considerable importance in all countries can be illustrated from the statistics in regard to one. The number of listed monuments in the Federal Republic of Germany alone, in 1986, was around 1 million, of which Cologne alone had around 9,000 listed buildings[47]. A nuclear attack on a city such as Cologne would thus deprive Germany, in particular, and the world community in general, of a considerable segment of their cultural inheritance, for a single bomb would easily dispose of all 9,000 monuments, leaving none standing — a result which no wartime bombing in World War II could achieve.

Together with all other structures, they will be part of the desert of radioactive rubble left in the aftermath of the nuclear bomb. If the preservation of humanity's cultural inheritance is of any value to civilization, it is important to note that it will be an inevitable casualty of the nuclear weapon.

(k) *The electromagnetic pulse*

Another feature distinctive to nuclear weapons is the electromagnetic pulse. The literature indicates that this has the effect of displacing electrons out of air molecules in the upper atmosphere and these electrons are then displaced by the earth's magnetic field. As they spin down and around the lines of magnetic force, they transmit a very sudden and intensive burst of energy — the electromagnetic pulse — which throws all electronic devices out of action. As these systems go haywire, all communication lines are cut, health services (among other essential services) disrupted and organized modern life collapses. Even the command and control systems geared for responses to nuclear attack can be thrown out of gear, thus creating a fresh danger of unintended release of nuclear weapons.

A standard scientific dictionary, *Dictionnaire encyclopédique d'électronique*, describes the effects of the electromagnetic pulse in the following terms:

> "Electromagnetic pulse, nuclear pulse; strong pulse of electromagnetic energy radiated by a nuclear explosion in the atmosphere; caused by collisions between the gamma rays emitted during the first nanoseconds of the explosion and the electrons in the molecules in the atmosphere; the electromagnetic pulse produced by a nuclear explosion of an average force at around 400 km altitude can instantly put out of service the greater part of semiconductor electronic equipment in a large country, such as the United States, as well as a large

[47] See Hiltrud Kier, "UNESCO Programme for the Protection of Culture in Wartime", in Documents of the Sixth World Congress of IPPNW, *op. cit.*, p. 199.

> part of its energy distribution networks, without other effects being felt on the ground, with military consequences easy to imagine."[48]

An important aspect of the electromagnetic pulse is that it travels at immense speeds, so that the disruption of communication systems caused by the radioactive contamination immediately can spread beyond national boundaries and disrupt communication lines and essential services in neutral countries as well. Having regard to the dominance of electronic communication in the functioning of modern society at every level, this would be an unwarranted interference with such neutral States.

Another important effect of the electromagnetic pulse is the damage to electrical power and control systems from nuclear weapons — indeed electromagnetic pulse could lead to a core melt accident in the event of nuclear power facilities being in the affected area[49].

(l) *Damage to nuclear reactors*

The enormous area of devastation and the enormous heat released would endanger all nuclear power stations within the area, releasing dangerous levels of radioactivity apart from that released by the bomb itself. Europe alone has over 200 atomic power stations dotted across the continent, some of them close to populated areas. In addition, there are 150 devices for uranium enrichment[50]. A damaged nuclear reactor could give rise to:

> "lethal doses of radiation to exposed persons 150 miles downwind and would produce significant levels of radioactive contamination of the environment more than 600 miles away"[51].

The nuclear weapon used upon any country in which the world's current total of 450 nuclear reactors is situated could leave in its wake a series of Chernobyls.

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[48] Michel Fleutry, *Dictionnaire encyclopédique d'électronique (anglais-français)*, 1995, p. 250. *[Translation by the Registry.]*

[49] Gordon Thompson, "Nuclear Power and the Threat of Nuclear War", in Documents of the Sixth World Congress of IPPNW, *op. cit.*, p. 240.

[50] William E. Butler (ed.), *Control over Compliance with International Law*, 1991, p. 24.

[51] Bates, *op. cit.*, p. 720.

The effects of such radiation could include anorexia, cessation of production of new blood cells, diarrhoea, haemorrhage, damage to the bone marrow, convulsions, vascular damage and cardiovascular collapse[52].

(m) *Damage to food productivity*

Unlike other weapons, whose direct impact is the most devastating part of the damage they cause, nuclear weapons can cause far greater damage by their delayed after-effects than by their direct effects. The detailed technical study, *Environmental Consequences of Nuclear War*, while referring to some uncertainties regarding the indirect effects of nuclear war, states:

> "What can be said with assurance, however, is that the Earth's human population has a much greater vulnerability to the indirect effects of nuclear war, especially mediated through impacts on food productivity and food availability, than to the direct effects of nuclear war itself."[53]

The nuclear winter, should it occur in consequence of multiple nuclear exchanges, could disrupt all global food supplies.

After the United States tests in the Pacific in 1954, fish caught in various parts of the Pacific, as long as eight months after the explosions, were contaminated and unfit for human consumption, while crops in various parts of Japan were affected by radioactive rain. These were among the findings of an international Commission of medical specialists appointed by the Japanese Association of Doctors against A- and H-bombs[54]. Further:

> "The use of nuclear weapons contaminates water and food, as well as the soil and the plants that may grow on it. This is not only in the area covered by immediate nuclear radiation, but also a much larger unpredictable zone which is affected by the radio-active fall-out."[55]

(n) *Multiple nuclear explosions resulting from self-defence*

If the weapon is used in self-defence after an initial nuclear attack, the ecosystem, which had already sustained the impact of the first nuclear attack, would have to absorb on top of this the effect of the retaliatory

[52] See Herbert Abrams, *op. cit.*, pp. 122-125.
[53] SCOPE publication 28, released at the Royal Society, London, on 6 January 1986, Vol. I, p. 481.
[54] As referred to in Singh and McWhinney, *op. cit.*, p. 124.
[55] *Ibid.*, p. 122.

attack, which may or may not consist of a single weapon, for the stricken nation will be so ravaged that it will not be able to make fine evaluations of the exact amount of retaliatory force required. In such event, the tendency to release as strong a retaliation as is available must enter into any realistic evaluation of the situation. The ecosystem would in that event be placed under the pressure of multiple nuclear explosions, which it would not be able to absorb without permanent and irreversible damage. Capital cities with densely packed populations could be targeted. The fabric of civilization could be destroyed.

It is said of some of the most ruthless conquerors of the past that, after they dealt with a rebellious town, they ensured that it was razed to the ground with no sound or sign of life left in it — not even the bark of a dog or the purr of a kitten. If any student of international law were asked whether such conduct was contrary to the laws of war, the answer would surely be "Of course!" There would indeed be some surprise that the question even needed to be asked. In this age of higher development, the nuclear weapon goes much further, leaving behind it nothing but a total devastation, wrapped in eerie silence.

(o) *"The shadow of the mushroom cloud"*

As pointed out in the Australian submissions (CR 95/22, p. 49), the entire post-war generation lies under a cloud of fear — sometimes described as the "shadow of the mushroom cloud", which pervades all thoughts about the human future. This fear, which has hung like a blanket of doom over the thoughts of children in particular, is an evil in itself and will last so long as nuclear weapons remain. The younger generation needs to grow up in a climate of hope, not one of despair that at some point in their life, there is a possibility of their life being snuffed out in an instant, or their health destroyed, along with all they cherish, in a war to which their nation may not even be a party.

* * *

This body of information shows that, even among weapons of mass destruction, many of which are already banned under international law, the nuclear weapon stands alone, unmatched for its potential to damage all that humanity has built over the centuries and all that humanity relies upon for its continued existence.

I close this section by citing the statement placed before the Court by Professor Joseph Rotblat, a member of the British team on the Manhattan Project in Los Alamos, a Rapporteur for the 1983 WHO investigation into the Effects of Nuclear War on Health and Health Services, and a Nobel Laureate. Professor Rotblat was a member of one of the delegations, but was prevented by ill health from attending the Court.

Here is a passage from his statement to the Court:

> "I have read the written pleadings prepared by the United Kingdom and the United States. Their view of the legality of the use of nuclear weapons is premised on three assumptions: *(a)* that they would not necessarily cause unnecessary suffering; *(b)* that they would not necessarily have indiscriminate effects on civilians; *(c)* that they would not necessarily have effects on territories of third States. It is my professional opinion — set out above and in the WHO reports referred to — that on any reasonable set of assumptions their argument is unsustainable on all three points." (CR 95/32, Annex, p. 2.)

4. The Uniqueness of Nuclear Weapons

After this factual review, legal argument becomes almost superfluous, for it can scarcely be contended that any legal system can contain within itself a principle which permits the entire society which it serves to be thus decimated and destroyed — along with the natural environment which has sustained it from time immemorial[56]. The dangers are so compelling that a range of legal principles surges through to meet them.

It suffices at the present stage of this opinion to outline the reasons for considering the nuclear weapon unique, even among weapons of mass destruction. Nuclear weapons

(1) cause death and destruction;
(2) induce cancers, leukaemia, keloids and related afflictions;

(3) cause gastro-intestinal, cardiovascular and related afflictions;

(4) continue for decades after their use to induce the health-related problems mentioned above;
(5) damage the environmental rights of future generations;

(6) cause congenital deformities, mental retardation and genetic damage;
(7) carry the potential to cause a nuclear winter;
(8) contaminate and destroy the food chain;
(9) imperil the ecosystem;
(10) produce lethal levels of heat and blast;
(11) produce radiation and radioactive fallout;
(12) produce a disruptive electromagnetic pulse;

(13) produce social disintegration;
(14) imperil all civilization;

[56] See further, on this aspect, Section V.1 below.

(15) threaten human survival;
(16) wreak cultural devastation;
(17) span a time range of thousands of years;
(18) threaten all life on the planet;
(19) irreversibly damage the rights of future generations;

(20) exterminate civilian populations;
(21) damage neighbouring States;
(22) produce psychological stress and fear syndromes

as no other weapons do.

Any one of these would cause concern serious enough to place these weapons in a category of their own, attracting with special intensity the principles of humanitarian law. In combination they make the case for their application irrefutable. This list is by no means complete. However, to quote the words of a recent study:

> "Once it becomes clear that all hope for twentieth century man is lost if a nuclear war is started, it hardly adds any meaningful knowledge to learn of additional effects."[57]

The words of the General Assembly, in its "Declaration on the Prevention of Nuclear Catastrophe" (1981), aptly summarize the entirety of the foregoing facts:

> "all the horrors of past wars and other calamities that have befallen people would pale in comparison with what is inherent in the use of nuclear weapons, capable of destroying civilization on earth"[58].

Here then is the background to the consideration of the legal question with which the Court is faced. Apart from this background of hard and sordid fact, the legal question cannot be meaningfully addressed. Juxtapose against these consequences — so massively destructive of all the principles of humanity — the accepted principles of humanitarian law, and the result can scarcely be in doubt. As the ensuing discussion will point out, humanitarian principles are grotesquely violated by the consequences of nuclear weapons. This discussion will show that these effects of the nuclear weapon and the humanitarian principles of the laws of war are a contradiction in terms.

5. *The Differences in Scientific Knowledge between the Present Time and 1945*

On 17 July 1945, United States Secretary of War, Stimson, informed Prime Minister Churchill of the successful detonation of the experimental

[57] Bates, *op. cit.*, p. 721.
[58] Resolution 36/100 of 9 December 1981.

nuclear bomb in the New Mexican desert, with the cryptic message "Babies satisfactorily born."[59] A universe of knowledge has grown up regarding the effects of the bomb since that fateful day when the advent of this unknown weapon could, even cryptically, be so described.

True, much knowledge regarding the power of the bomb was available then, but the volume of knowledge now available on the effects of nuclear weapons is exponentially greater. In addition to numerous military studies, there have been detailed studies by WHO and other concerned organizations such as International Physicians for the Prevention of Nuclear War (IPPNW); the TTAPS studies on the nuclear winter; the studies of the Scientific Committee on Problems of the Environment (SCOPE); the International Council of Scientific Unions (ICSU); the United Nations Institute of Disarmament Research (UNIDIR); and literally hundreds of others. Much of this material has been placed before the Court or deposited in the library by WHO and various States that have appeared before the Court in this matter.

Questions of knowledge, morality and legality in the use of nuclear weapons, considered in the context of 1995, are thus vastly different from those questions considered in the context of 1945, and need a totally fresh approach in the light of this immense quantity of information. This additional information has a deep impact upon the question of the legality now before the Court.

Action with full knowledge of the consequences of one's act is totally different in law from the same action taken in ignorance of its consequences. Any nation using the nuclear weapon today cannot be heard to say that it does not know its consequences. It is only in the context of this knowledge that the question of legality of the use of nuclear weapons can be considered in 1996.

6. Do Hiroshima and Nagasaki Show that Nuclear War Is Survivable?

Over and above all these specific aspects of the rules of humanitarian law, and in a sense welding them together in one overall consideration, is the question of survivability of the target population — indeed, of the human race. Survivability is the limit situation of each individual danger underlying each particular principle of humanitarian law. The extreme situation that is reached if each danger is pressed to the limit of its potential is the situation of non-survivability. We reach that situation with nuclear war. In the fact that nuclear war could spell

[59] Winston Churchill, *The Second World War*, Vol. 6, "Triumph and Tragedy", 1953, p. 63.

the end of the human race and of all civilization, all these principles thus coalesce.

A fact that obscures perception of the danger that nuclear war may well be unsurvivable is the experience of Hiroshima and Nagasaki. The fact that nuclear weapons were used in Japan and that that nation emerged from the war resilient and resurgent may lull the observer into a sense of false security that nuclear war is indeed survivable. International law itself has registered this complacency, for there is what may be described as an underlying subliminal assumption that nuclear war has been proved to be survivable.

It is necessary therefore to examine briefly some clear differences between that elementary scenario of a nuclear attack half a century ago and the likely characteristics of a nuclear war today. The following differences may be noted:

1. The bombs used in Hiroshima and Nagasaki were of not more than 15 kilotons explosive power. The bombs available for a future nuclear war will be many multiples of this explosive power.

2. Hiroshima and Nagasaki ended the war. The limit of that nuclear war was the use of two "small" nuclear weapons. The next nuclear war, should it come, cannot be assumed to be so restricted, for multiple exchanges must be visualized.
3. The target country in Hiroshima and Nagasaki was not a nuclear power. Nor were there any other nuclear powers to come to its assistance. A future nuclear war, if it occurs, will be in a world bristling with nuclear weapons which exist, not for display, but for a purpose. The possibility of even a minute fraction of those weapons being called into service is therefore an ever present danger to be reckoned with in a future nuclear war.

4. Hiroshima and Nagasaki, important though they were, were not the nerve centres of Japanese government and administration. Major cities and capitals of the warring States are likely to be targeted in a future nuclear war.

5. Major environmental consequences such as the nuclear winter — which could result from a multiple exchange of nuclear weapons — could not result from the "small" bombs used in Hiroshima and Nagasaki.

Hiroshima and Nagasaki thus do not prove the survivability of nuclear war. They are, rather, a forewarning on a minuscule scale of the dangers to be expected in a future nuclear war. They remove any doubt that might have existed, had the question of the legality of nuclear weapons been argued on the basis of scientific data alone, without a practical demonstration of their effect on human populations.

Every one of the evils which the rules of humanitarian law are designed to prevent thus comes together in the questions of survival attendant on the future use of nuclear weapons in war.

7. A Perspective from the Past

This section of the present opinion has surveyed in the broadest outline the effects of the bomb in the light of the known results of its use and in the light of scientific information available today. The non-conformity of the bomb with the norms of humanitarian law and, indeed, with the basic principles of international law seems upon this evidence to be self-evident, as more fully discussed later in this opinion.

It adds a sense of perspective to this discussion to note that even before the evidence of actual use, and even before the wealth of scientific material now available, a percipient observer was able, while the invention of the nuclear bomb still lay far in the distance, to detect the antithesis between the nuclear bomb and every form of social order — which would of course include international law. H. G. Wells, in *The World Set Free*, visualized the creation of the bomb on the basis of information already known in 1913 resulting from the work of Einstein and others on the correlation of matter and energy. Projecting his mind into the future with remarkable prescience, he wrote in 1913:

> "The atomic bombs had dwarfed the international issues to complete insignificance . . . we speculated upon the possibility of stopping the use of these frightful explosives before the world was utterly destroyed. For to us it seemed quite plain these bombs, and the still greater power of destruction of which they were the precursors, might quite easily shatter every relationship and institution of mankind."[60]

The power that would be unleashed by the atom was known theoretically in 1913. That theoretical knowledge was enough, even without practical confirmation, to foresee that the bomb could shatter every human relationship and institution. International law is one of the most delicate of those relationships and institutions.

It seems remarkable that the permissibility of the weapon under international law is still the subject of serious discussion, considering that the power of the bomb was awesomely demonstrated 40 years after its consequences were thus seen as "quite plain", and that the world has had a further 50 years of time for reflection after that event.

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[60] H. G. Wells, *The First Men in the Moon* and *The World Set Free*, Literary Press, London, undated reprint of 1913 ed., p. 237. See, also, the reference to Wells in R. J. Lifton and Richard Falk, *Indefensible Weapons*, 1982, p. 59.

III. Humanitarian Law

It could indeed be said that the principal question before the Court is whether the nuclear weapon can in any way be reconciled with the basic principles of humanitarian law.

The governance of nuclear weapons by the principles of humanitarian law has not been in doubt at any stage of these proceedings, and has now been endorsed by the unanimous opinion of the Court (para. 105 (2) D). Indeed, most of the States contending that the use of nuclear weapons is lawful have acknowledged that their use is subject to international humanitarian law.

Thus the Russian Federation has stated:

> "Naturally, all that has been said above does not mean that the use of nuclear weapons is not limited at all. Even if the use of nuclear weapons is in principle justifiable — in individual or collective self-defence — that use shall be made within the framework of limitations imposed by humanitarian law with respect to means and methods of conducting military activities. It is important to note that with respect to nuclear weapons those limitations are limitations under customary rather than treaty law." (Written Statement, p. 18.)

The United States states:

> "The United States has long taken the position that various principles of the international law of armed conflict would apply to the use of nuclear weapons as well as to other means and methods of warfare. This in no way means, however, that the use of nuclear weapons is precluded by the law of war. As the following will demonstrate, the issue of the legality depends on the precise circumstances involved in any particular use of a nuclear weapon." (Written Statement, p. 21.)

So, also, the United Kingdom:

> "It follows that the law of armed conflict by which the legality of any given use of nuclear weapons falls to be judged includes all the provisions of customary international law (including those which have been codified in Additional Protocol I) and, where appropriate, of conventional law but excludes those provisions of Protocol I which introduced new rules into the law." (Written Statement, p. 46, para. 3.55.)

The subordination of nuclear weapons to the rules of humanitarian law has thus been universally recognized, and now stands judicially confirmed as an incontrovertible principle of international law.

It remains then to juxtapose the leading principles of humanitarian law against the known results of nuclear weapons, as already outlined. When

the principles and the facts are lined up alongside each other, the total incompatibility of the principles with the facts leads inescapably to but one conclusion — that nuclear weapons are inconsistent with humanitarian law. Since they are unquestionably governed by humanitarian law, they are unquestionably illegal.

Among the prohibitions of international humanitarian law relevant to this case are the prohibitions against weapons which cause superfluous injury, weapons which do not differentiate between combatants and civilians, and weapons which do not respect the rights of neutral States.

A more detailed consideration follows.

1. "Elementary Considerations of Humanity"

This phrase gives expression to a core concept of humanitarian law. Is the conduct of a State in any given situation contrary to the elementary considerations of humanity? One need go no further than to formulate this phrase, and then recount the known results of the bomb as outlined above. The resulting contrast between light and darkness is so dramatic as to occasion a measure of surprise that their total incompatibility has even been in doubt.

One wonders whether, in the light of common sense, it can be doubted that to exterminate vast numbers of the enemy population, to poison their atmosphere, to induce in them cancers, keloids and leukaemias, to cause congenital defects and mental retardation in large numbers of unborn children, to devastate their territory and render their food supply unfit for human consumption — whether acts such these can conceivably be compatible with "elementary considerations of humanity". Unless one can in all conscience answer such questions in the affirmative, the argument is at an end as to whether nuclear weapons violate humanitarian law, and therefore violate international law.

President Woodrow Wilson, in an address delivered to a joint session of Congress on 2 April 1917, gave elegant expression to this concept when he observed:

> "By painful stage after stage has that law been built up, with meager enough results, indeed, . . . but always with a clear view, at least, of what the heart and conscience of mankind demanded."[61]

In relation to nuclear weapons, there can be no doubt as to "what the heart and conscience of mankind" demand. As was observed by another

[61] Address of the President of the United States at a Joint Session of the Two Houses of Congress, 2 April 1917, reprinted in *American Journal of International Law*, 1917, Vol. 11, Supp., p. 144. The President was speaking in the context of the indiscriminate German submarine attacks on shipping which he described as "a warfare against mankind".

American President, President Reagan, "I pray for the day when nuclear weapons will no longer exist anywhere on earth."[62] That sentiment, shared by citizens across the world — as set out elsewhere in this opinion — provides the background to modern humanitarian law, which has progressed from the time when President Wilson described its results as "meager . . . indeed".

The ensuing portions of this opinion are devoted to an examination of the present state of development of the principles of humanitarian law.

2. Multicultural Background to the Humanitarian Laws of War

It greatly strengthens the concept of humanitarian laws of war to note that this is not a recent invention, nor the product of any one culture. The concept is of ancient origin, with a lineage stretching back at least three millennia. As already observed, it is deep-rooted in many cultures — Hindu, Buddhist, Chinese, Christian, Islamic and traditional African. These cultures have all given expression to a variety of limitations on the extent to which any means can be used for the purposes of fighting one's enemy. The problem under consideration is a universal problem, and this Court is a universal Court, whose composition is required by its Statute to reflect the world's principal cultural traditions[63]. The multicultural traditions that exist on this important matter cannot be ignored in the Court's consideration of this question, for to do so would be to deprive its conclusions of that plenitude of universal authority which is available to give it added strength — the strength resulting from the depth of the tradition's historical roots and the width of its geographical spread[64].

Of special relevance in connection with nuclear weapons is the ancient South Asian tradition regarding the prohibition on the use of hyper-destructive weapons. This is referred to in the two celebrated Indian epics, the *Ramayana* and the *Mahabharatha*, which are known and regularly re-enacted through the length and breadth of South and South-East Asia, as part of the living cultural tradition of the region. The references in these two epics are as specific as can be on this principle, and they relate to a historical period around three thousand years ago.

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[62] Speech of 16 June 1983, referred to by Robert S. McNamara, *op. cit.*, p. 60.

[63] I note in this context the sad demise of our deeply respected Latin American colleague, Judge Andrés Aguilar-Mawdsley, six days before the hearings of the case commenced, thus reducing the Court to fourteen, and depriving its composition of a Latin American component.

[64] As observed in a contemporary study of the development of international humanitarian law, there is evidence "of efforts made by every people in every age to reduce the devastation of war" (Herczegh, *op. cit.*, p. 14).

The *Ramayana*[65] tells the epic story of a war between Rama, prince of Ayodhya in India, and Ravana, ruler of Sri Lanka. In the course of this epic struggle, described in this classic in the minutest detail, a weapon of war became available to Rama's half-brother, Lakshmana, which could "destroy the entire race of the enemy, including those who could not bear arms".

Rama advised Lakshmana that the weapon could not be used in the war

> "because such destruction *en masse* was forbidden by the ancient laws of war, even though Ravana was fighting an unjust war with an unrighteous objective"[66].

These laws of war which Rama followed were themselves ancient in his time. The laws of Manu forbade stratagems of deceit, all attacks on unarmed adversaries and non-combatants, irrespective of whether the war being fought was a just war or not[67]. The Greek historian Megasthenes[68] makes reference to the practice in India that warring armies left farmers tilling the land unmolested, even though the battle raged close to them. He likewise records that the land of the enemy was not destroyed with fire nor his trees cut down[69].

The *Mahabharatha* relates the story of an epic struggle between the Kauravas and the Pandavas. It refers likewise to the principle forbidding hyperdestructive weapons when it records that:

> "Arjuna, observing the laws of war, refrained from using the *'pasupathastra'*, a hyper-destructive weapon, because when the fight was restricted to ordinary conventional weapons, the use of extra-ordinary or unconventional types was not even moral, let alone in conformity with religion or the recognized laws of warfare."[70]

Weapons causing unnecessary suffering were also banned by the Laws of Manu as, for example, arrows with hooked spikes which, after enter-

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[65] *The Ramayana*, Romesh Chunder Dutt (trans.).

[66] See Nagendra Singh, "The Distinguishable Characteristics of the Concept of the Law as It Developed in Ancient India", in *Liber Amicorum for the Right Honourable Lord Wilberforce*, 1987, p. 93. The relevant passage of *The Ramayana* is *Yuddha Kanda (Sloka)*, VIII.39.

[67] *Manusmrti*, vii, 91, 92.

[68] c. 350 BC-c. 290 BC — ancient Greek historian and diplomat sent on embassies by Seleucus I to Chandragupta Maurya, who wrote the most complete account of India then known to the Greek world.

[69] Megasthenes, *Fragments*, cited in N. Singh, *Juristic Concepts of Ancient Indian Polity*, 1980, pp. 162-163.

[70] *Mahabharatha, Udyog Parva*, 194.12, cited in Nagendra Singh, "The Distinguishable Characteristics of the Concept of Law as It Developed in Ancient India", *op. cit.*, p. 93.

ing the body would be difficult to take out, or arrows with heated or poisoned tips[71].

The environmental wisdom of ancient Judaic tradition is also reflected in the following passage from Deuteronomy (20:19):

> "When you are trying to capture a city, do not cut down its fruit trees, even though the siege lasts a long time. Eat the fruit but do not destroy the trees. *The trees are not your enemies.*" (Emphasis added.)

Recent studies of warfare among African peoples likewise reveal the existence of humanitarian traditions during armed conflicts, with moderation and clemency shown to enemies[72]. For example, in some cases of traditional African warfare, there were rules forbidding the use of particular weapons and certain areas had highly developed systems of etiquette, conventions, and rules, both before hostilities commenced, during hostilities, and after the cessation of hostilities — including a system of compensation[73].

In the Christian tradition, the Second Lateran Council of 1139 offers an interesting illustration of the prohibition of weapons which were too cruel to be used in warfare — the crossbow and the siege machine, which were condemned as "deadly and odious to God"[74]. Nussbaum, in citing this provision, observes that, it "certainly appears curious in the era of the atomic bomb". There was a very early recognition here of the dangers that new techniques were introducing into the field of battle. Likewise, in other fields of the law of war, there were endeavours to bring it within some forms of control as, for example, by the proclamation of "Truces of God" — days during which feuds were not permitted which were expanded in some church jurisdictions to periods from sunset on Wednesday to sunrise on Monday[75].

Gratian's *Decretum* in the twelfth century was one of the first Christian works dealing with these principles, and the ban imposed by the Second Lateran Council was an indication of the growing interest in the subject. However, in Christian philosophy, while early writers such as St. Augustine examined the concept of the just war *(jus ad bellum)* in great detail, the *jus in bello* was not the subject of detailed study for some centuries.

Vitoria gathered together various traditions upon the subject, including traditions of knightly warfare from the age of chivalry; Aquinas

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[71] *Manusmrti*, VII.90, cited in N. Singh, *India and International Law*, 1973, p. 72.

[72] See Y. Diallo, *Traditions africaines et droit humanitaire*, 1978, p. 16; E. Bello, *African Customary Humanitarian Law*, ICRC, 1980, both referred to in Herczegh, *op. cit.*, p. 14.

[73] Bello, *op. cit.*, pp. 20-21.

[74] Resolutions of the Second Lateran Council, Canon XXIX, cited by Nussbaum, *A Concise History of the Law of Nations*, 1947, p. 25.

[75] *Ibid.*, p. 26.

worked out a well-developed doctrine relating to the protection of non-combatants; and other writers fed the growing stream of thought upon the subject.

In the Islamic tradition, the laws of war forbade the use of poisoned arrows or the application of poison on weapons such as swords or spears[76]. Unnecessarily cruel ways of killing and mutilation were expressly forbidden. Non-combatants, women and children, monks and places of worship were expressly protected. Crops and livestock were not to be destroyed[77] by anyone holding authority over territory. Prisoners were to be treated mercifully in accordance with such Qur'anic passages as "Feed for the love of Allah, the indigent, the orphan *and the captive.*"[78] So well developed was Islamic law in regard to conduct during hostilities that it ordained not merely that prisoners were to be well treated, but that if they made a last will during captivity, the will was to be transmitted to the enemy through some appropriate channel[79].

The Buddhist tradition went further still, for it was totally pacifist, and would not countenance the taking of life, the infliction of pain, the taking of captives or the appropriation of another's property or territory in any circumstances whatsoever. Since it outlaws war altogether, it could under no circumstances lend its sanction to weapons of destruction — least of all to a weapon such as the nuclear bomb.

> "According to Buddhism there is nothing that can be called a 'just war' — which is only a false term coined and put into circulation to justify and excuse hatred, cruelty, violence and massacre. Who decides what is just and unjust? The mighty and the victorious are 'just', and the weak and the defeated are 'unjust'. Our war is always 'just' and your war is always 'unjust'. Buddhism does not accept this position."[80]

In rendering an advisory opinion on a matter of humanitarian law concerning the permissibility of the use of force to a degree capable of destroying all of humanity, it would be a grave omission indeed to neglect the humanitarian perspectives available from this major segment of the world's cultural traditions[81].

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[76] See N. Singh, *India and International Law, op. cit.*, p. 216.

[77] *Qur'an*, II.205.

[78] *Ibid.*, LXXVII.8; emphasis added.

[79] S. R. Hassan, *The Reconstruction of Legal Thought in Islam*, 1974, p. 177. See, generally, Majid Khadduri, *War and Peace in the Law of Islam*, 1955. For a brief summary of the Islamic law relating to war, see C. G. Weeramantry, *Islamic Jurisprudence: Some International Perspectives*, 1988, pp. 134-138.

[80] Walpola Rahula, *What the Buddha Taught*, 1959, p. 84.

[81] On Buddhism and international law, see, generally, K. N. Jayetilleke, "The Principles of International Law in Buddhist Doctrine", *Recueil des cours de l'Académie de droit international de La Haye*, Vol. 120 (1967-I), pp. 441-567.

Examples of the adoption of humanitarian principles in more recent history are numerous. For example, in the Crimean War in 1855, the use of sulphur was proposed at the Siege of Sebastopol, but would not be permitted by the British Government, just as during the American Civil War the use of chlorine in artillery shells by the Union forces was proposed in 1862, but rejected by the Government[82].

It is against such a varied cultural background that these questions must be considered and not merely as though they are a new sentiment invented in the nineteenth century and so slenderly rooted in universal tradition that they may be lightly overridden.

Grotius' concern with the cruelties of war is reflected in his lament that:

> "when arms were once taken up, all reverence for divine and human law was thrown away, just as if men were thenceforth authorized to commit all crimes without restraint"[83].

The foundations laid by Grotius were broad-based and emphasized the absolute binding nature of the restrictions on conduct in war. In building that foundation, Grotius drew upon the collective experience of humanity in a vast range of civilizations and cultures.

Grotius' encyclopedic study of literature, from which he drew his principles, did not of course cover the vast mass of Hindu, Buddhist and Islamic literature having a bearing on these matters, and he did not have the benefit of this considerable supplementary source, demonstrating the universality and the extreme antiquity of the branch of law we call the *jus in bello*.

3. Outline of Humanitarian Law

Humanitarian principles have long been part of the basic stock of concepts embedded in the corpus of international law. Modern international law is the inheritor of a more than hundred-year heritage of active humanitarian concern with the sufferings of war. This concern has aimed at placing checks upon the tendency, so often prevalent in war, to break every precept of human compassion. It has succeeded in doing so in several specific areas, but animating and underlying all those specific instances are general principles of prevention of human suffering that goes beyond the purposes and needs of war.

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[82] See L. S. Wolfe, "Chemical and Biological Warfare: Effects and Consequences", *McGill Law Journal*, 1983, Vol. 28, p. 735. See, also, "Chemical Warfare" in *Encyclopaedia Britannica*, 1959, Vol. 5, pp. 353-358.

[83] Grotius, *Prolegomena*, para. 28, trans. Whewell.

The credit goes to the United States of America for one of the earliest initiatives in reducing humanitarian law to written form for the guidance of its armies. During the War of Secession, President Lincoln directed Professor Lieber to prepare instructions for the armies of General Grant — regulations which Mr. Martens, the delegate of Czar Nicholas II, referred to at the 1899 Peace Conference as having resulted in great benefit, not only to the United States troops but also to those of the Southern Confederacy. Paying tribute to this initiative, Martens described it as an example, of which the Brussels Conference of 1874 convoked by Emperor Alexander II, was "the logical and natural development". This conference in turn led to the Peace Conference of 1899, and in its turn to the Hague Conventions which assume so much importance in this case[84].

The St. Petersburg Declaration of 1868 provided that "the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy" — and many subsequent declarations have adopted and reinforced this principle[85]. It gives expression to a very ancient rule of war accepted by many civilizations[86].

The Martens Clause, deriving its name from Mr. Martens, was, by unanimous vote, inserted into the preamble to the Hague Convention II of 1899, and Convention IV of 1907, with respect to the Laws and Customs of War on Land. It provided that:

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

Although the Martens Clause was devised to cope with disagreements among the parties to the Hague Peace Conferences regarding the status of resistance movements in occupied territory, it is today considered applicable to the whole of humanitarian law[87]. It appears in one form or

[84] For Martens's speech, see *The Proceedings of the Hague Peace Conferences, op. cit.*, pp. 505-506.

[85] The Hague Regulations of 1899 and 1907, Art. 25; the Hague Convention (IX) of 1907, Art. 1; League of Nations Assembly resolution of 30 September 1928; United Nations General Assembly resolutions 2444 (XXIII) of 19 December 1968 and 2675 (XXV) of 9 December 1970; Additional Protocol I to the 1949 Geneva Conventions, Arts. 48 and 51.

[86] See Section V.2. below on "The Aims of War".

[87] See D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, 1995, p. 29.

another in several major treaties on humanitarian law[88]. The Martens Clause clearly indicates that, behind such specific rules as had already been formulated, there lay a body of general principles sufficient to be applied to such situations as had not already been dealt with by a specific rule[89].

To be read in association with this is Article 22 of the 1907 Hague Regulations which provides that, "The right of belligerents to adopt means of injuring the enemy is not unlimited."

These were indications also that international law, far from being insensitive to such far-reaching issues of human welfare, has long recognized the pre-eminent importance of considerations of humanity in fashioning its attitudes and responses to situations involving their violation, however they may occur. These declarations were made, it is to be noted, at a time when the development of modern weaponry was fast accelerating under the impact of technology. It was visualized that more sophisticated and deadly weaponry was on the drawing boards of military establishments throughout the world and would continue to be so for the foreseeable future. These principles were thus meant to apply to weapons existing then as well as to weapons to be created in the future, weapons already known and weapons as yet unvisualized. They were general principles meant to be applied to new weapons as well as old.

The parties to the Geneva Conventions of 1949 expressly recognized the Martens Clause as a living part of international law — a proposition which no international jurist could seriously deny.

As McDougal and Feliciano have observed:

> "To accept as lawful the deliberate terrorization of the enemy community by the infliction of large-scale destruction comes too close to rendering pointless all legal limitations on the exercise of violence."[90]

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[88] First Geneva Convention 1949, Art. 63, para. 4; Second Geneva Convention, Art. 62, para. 4; Third Geneva Convention, Art. 142, para. 4; Fourth Geneva Convention, Art. 158, para. 4; Inhumane Weapons Convention, 1980, Preamble, para. 5.

[89] At the last meeting of the Fourth Commission of the Peace Conference, on 26 September 1907, Mr. Martens summarized its achievements in terms that,

> "If from the days of antiquity to our own time people have been repeating the Roman adage '*Inter arma silent leges*', we have loudly proclaimed, '*Inter arma vivant leges*'. This is the greatest triumph of law and justice over brute force and the necessities of war." (J. B. Scott, "The Conference of 1907", *The Proceedings of the Hague Peace Conferences*, 1921, Vol. III, p. 914.)

[90] M. S. McDougal and F. P. Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion*, 1961, p. 657.

International law has long distinguished between conventional weapons and those which are unnecessarily cruel. It has also shown a continuing interest in this problem. For example, the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, 1980, dealt in three separate Protocols with such weapons as those which injure by fragments, which in the human body escape detection (Protocol I); Mines, Booby Traps and Other Devices (Protocol II); and Incendiary Weapons (Protocol III).

If international law had principles within it strong enough in 1899 to recognize the extraordinary cruelty of the "dum dum" or exploding bullet as going beyond the purposes of war[91], and projectiles diffusing asphyxiating or deleterious gases as also being extraordinarily cruel[92], it would cause some bewilderment to the objective observer to learn that in 1996 it is so weak in principles that, with over a century of humanitarian law behind it, it is still unable to fashion a response to the cruelties of nuclear weapons as going beyond the purposes of war. At the least, it would seem passing strange that the expansion within the body of a single soldier of a single bullet is an excessive cruelty which international law has been unable to tolerate since 1899, and that the incineration in one second of a hundred thousand civilians is not. This astonishment would be compounded when that weapon has the capability, through multiple use, of endangering the entire human species and all civilization with it.

Every branch of knowledge benefits from a process of occasionally stepping back from itself and scrutinizing itself objectively for anomalies and absurdities. If a glaring anomaly or absurdity becomes apparent and remains unquestioned, that discipline is in danger of being seen as floundering in the midst of its own technicalities. International law is happily not in this position, but if the conclusion that nuclear weapons are illegal is wrong, it would indeed be.

As will appear from the ensuing discussion, international law is not so lacking in resources as to be unable to meet this unprecedented challenge. Humanitarian law is not a monument to uselessness in the face of the nuclear danger. It contains a plethora of principles wide enough, deep enough and powerful enough to handle this problem.

Humanitarian law has of course received recognition from the juris-

[91] International Declaration Respecting Expanding Bullets, signed at The Hague, 29 July 1899.

[92] International Declaration Respecting Asphyxiating Gases, signed at The Hague, 29 July 1899.

prudence of this Court (for example, *Corfu Channel, I.C.J. Reports 1949*, p. 22; *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), I.C.J. Reports 1988*, p. 114), but this Court has not so far had occasion to examine it in any depth. This case offers it the opportunity *par excellence* for so doing.

4. Acceptance by States of the Martens Clause

The Martens Clause has commanded general international acceptance. It has been incorporated into a series of treaties, as mentioned elsewhere in this opinion, has been applied by international judicial tribunals, has been incorporated into military manuals[93], and has been generally accepted in international legal literature as indeed encapsulating in its short phraseology the entire philosophy of the law of war.

At the Krupp Trial (1948), it was described as:

> "a general clause, making the usages established among civilised nations, the laws of humanity and the dictates of the public conscience into the legal yardstick to be applied if and when the specific provisions of the Convention and the Regulations annexed to it do not cover specific cases occurring in warfare, or concomitant to warfare"[94].

The Clause has been described by Lord Wright as furnishing the keynote to the Hague Regulations which particularize a great many war crimes,

> "leaving the remainder to the governing effect of that sovereign clause which does really in a few words state the whole animating and motivating principle of the law of war, and indeed of all law, because the object of all law is to secure as far as possible in the mutual relations of the human beings concerned the rule of law and of justice and of humanity"[95].

The Martens Clause has thus become an established and integral part of the corpus of current customary international law. International law has long passed the stage when it could be debated whether such principles had crystallized into customary international law. No State would today repudiate any one of these principles.

A generally accepted test of recognition of rules of customary international law is that the rule should be "so widely and generally accepted,

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[93] See Section III.10 *(a)* below.

[94] *Law Reports of Trials of War Criminals*, Vol. 10, p. 133.

[95] Foreword by Lord Wright to the last volume of the *Law Reports of Trials of War Criminals*, Vol. 15, p. xiii. See, further, the discussion of the Martens Clause in Singh and McWhinney, *op. cit.*, pp. 46 *et seq.*, referring, *inter alia*, to the two passages cited above.

that it can hardly be supposed that any civilized State would repudiate it"[96]. While no State today would repudiate any one of these principles, what seems to be in dispute is the application of those principles to the specific case of nuclear weapons which, for some unarticulated reason, seem to be placed above and beyond the rules applicable to other weapons. If humanitarian law regulates the lesser weapons for fear that they may cause the excessive harm which those principles seek to prevent, it must *a fortiori* regulate the greater. The attempt to place nuclear weapons beyond the reach of these principles lacks the support not only of the considerations of humanity, but also of the considerations of logic.

These considerations are also pertinent to the argument that customary law cannot be created over the objection of the nuclear weapon States (United States Written Statement, p. 9)[97]. The general principles of customary law applicable to the matter commanded the allegiance of the nuclear-weapon States long before nuclear weapons were invented. It is on those general principles that the illegality of nuclear weapons rests.

It seems clear that if the principles are accepted and remain undisputed, the applicability of those principles to the specific case of nuclear weapons cannot reasonably be in doubt.

5. "The Dictates of Public Conscience"

This phraseology, stemming from the Martens Clause, lies at the heart of humanitarian law. The Martens Clause and many subsequent formulations of humanitarian principles recognize the need that strongly held public sentiments in relation to humanitarian conduct be reflected in the law.

The phrase is, of course, sufficiently general to pose difficulties in certain cases in determining whether a particular sentiment is shared widely enough to come within this formulation.

However, in regard to the use or threat of use of nuclear weapons, there is no such uncertainty, for on this issue the conscience of the global community has spoken, and spoken often, in the most unmistakable terms. Resolutions of the General Assembly over the years are not the only evidence of this. Vast numbers of the general public in practically every country, organized professional bodies of a multinational character[98], and many other groupings across the world have proclaimed time and again their conviction that the public conscience dictates the non-use of nuclear weapons. Across the world, presidents and prime ministers,

[96] *West Rand Central Gold Mining Co., Ltd.* v. *R* (1905), 2 KB, p. 407.
[97] On this aspect, see further Section VI.6 below.
[98] See, on these organizations, Section VI.3 below.

priests and prelates, workers and students, and women and children have continued to express themselves strongly against the bomb and its dangers. Indeed, this conviction underlies the conduct of the entire world community of nations when, for example, in the NPT, it accepts that all nuclear weapons must eventually be got rid of. The recent Non-Proliferation Review Conference of 1995 reconfirmed this objective. The work currently in progress towards a total test ban treaty reconfirms this again.

Reference is made in the next section (Section VI.6) to the heightening of public sensitivity towards humanitarian issues, resulting from the vast strides made by human rights law ever since the United Nations Charter in 1945.

General Assembly resolutions on the matter are numerous[99]. To cite just one of them, resolution 1653 (XVI) of 1961 declared that:

> "The use of nuclear and thermo-nuclear weapons is contrary to the spirit, letter and aims of the United Nations and, as such, a direct violation of the Charter of the United Nations"

and asserted, with more specific reference to international law, that such use was "contrary to the rules of international law and to the laws of humanity". In addition, the "threat" to use nuclear weapons, and not merely their actual use, has been referred to by the General Assembly as prohibited[100].

Nuclear weapons have been outlawed by treaty in numerous areas of planetary space — the sea-bed, Antarctica, Latin America and the Caribbean, the Pacific, and Africa, not to speak of outer space. Such universal activity and commitment would be altogether inconsistent

[99] Resolution 1653 (XVI) of 24 November 1961 ("Declaration on the Prohibition of the Use of Nuclear and Thermo-nuclear Weapons"); resolution 2936 (XXVII) of 29 November 1972 ("Non-Use of Force in International Relations and Permanent Prohibition of the Use of Nuclear Weapons"); resolution 33/71 B of 14 December 1978 ("Non-Use of Nuclear Weapons and Prevention of Nuclear War"); resolution 34/83 G of 11 December 1979 ("Non-Use of Nuclear Weapons and Prevention of Nuclear War"); resolution 36/92 I of 9 December 1981 ("Non-Use of Nuclear Weapons and Prevention of Nuclear War"); resolution 44/117 C of 15 December 1989 ("Convention on the Prohibition of the Use of Nuclear Weapons"); resolution 45/59 B of 4 December 1990 ("Convention on the Prohibition of the Use of Nuclear Weapons"); resolution 46/37 D of 6 December 1991 ("Convention on the Prohibition of the Use of Nuclear Weapons"). See, also, e.g., resolution 36/100 of 9 December 1981 ("Declaration on the Prevention of Nuclear Catastrophe"), para. 1 "States and statesmen that resort first to the use of nuclear weapons will be committing the gravest crime against humanity".

[100] Resolution 2936 (XXVII) of 29 November 1972 ("Non-Use of Force in International Relations and Permanent Prohibition of the Use of Nuclear Weapons"), preambular paragraph 10.

with a global acceptance of the compatibility of these weapons with the general principles of humanity. They point rather to a universal realization that there is in them an element which deeply disturbs the public conscience of this age.

As has been well observed in this regard:

> "in this burgeoning human rights era especially, respecting an issue that involves potentially the fate of human civilization itself, it is not only appropriate but mandated that the legal expectations of all members of human society, official and non-official, be duly taken into account" [101].

It is a truism that there is no such thing as a unanimous opinion held by the entire world community on any principle, however lofty. Yet it would be hard to find a proposition so widely and universally accepted as that nuclear weapons should not be used. The various expressions of opinion on this matter "are expressive of a far-flung community consensus that nuclear weapons and warfare do not escape the judgment of the humanitarian rules of armed conflict" [102].

The incompatibility between "the dictates of public conscience" and the weapon appears starkly, if one formulates the issues in the form of questions that may be addressed to the public conscience of the world, as typified by the average citizen in any country.

Here are a few questions, from an extensive list that could be compiled:

Is it lawful for the purposes of war to induce cancers, keloid growths or leukaemias in large numbers of the enemy population?

Is it lawful for the purposes of war to inflict congenital deformities and mental retardation on unborn children of the enemy population?

Is it lawful for the purposes of war to poison the food supplies of the enemy population?

Is it lawful for the purposes of war to inflict any of the above types of damage on the population of countries that have nothing to do with the quarrel leading to the nuclear war?

Many more such questions could be asked.

If it is conceivable that any of these questions can be answered in the affirmative by the public conscience of the world, there may be a case for

[101] Burns H. Weston, "Nuclear Weapons and International Law: Prolegomenon to General Illegality", *New York Law School Journal of International and Comparative Law*, 1982-1983, Vol. 4, p. 252, and authorities therein cited.

[102] *Ibid.*, p. 242.

the legality of nuclear weapons. If it is not, the case against nuclear weapons seems unanswerable.

6. Impact of the United Nations Charter and Human Rights on "Considerations of Humanity" and "Dictates of Public Conscience"[103]

The enormous developments in the field of human rights in the post-war years, commencing with the Universal Declaration of Human Rights in 1948, must necessarily make their impact on assessments of such concepts as "considerations of humanity" and "dictates of public conscience". This development in human rights concepts, both in their formulation and in their universal acceptance, is more substantial than the developments in this field for centuries before. The public conscience of the global community has thus been greatly strengthened and sensitized to "considerations of humanity" and "dictates of public conscience". Since the vast structure of internationally accepted human rights norms and standards has become part of common global consciousness today in a manner unknown before World War II, its principles tend to be invoked immediately and automatically whenever a question arises of humanitarian standards.

This progressive development must shape contemporary conceptions of humanity and humanitarian standards, thus elevating the level of basic expectation well above what it was when the Martens Clause was formulated.

In assessing the magnitude of this change, it is helpful to recall that the first movement towards modern humanitarian law was achieved in a century (the nineteenth century) which is often described as the "Clausewitzean century" for the reason that, in that century, war was widely regarded as a natural means for the resolution of disputes, and a natural extension of diplomacy. Global sentiment has moved an infinite distance from that stance, for today the United Nations Charter outlaws all resort to force by States (Art. 2 (4)), except in the case of self-defence (Art. 51). The Court's Opinion highlights the importance of these articles, with far-reaching implications which this opinion has addressed at the every outset (see "Preliminary Observations"). There is a firm commitment in Article 2 (3) that all members shall settle their international disputes by peaceful means, in such manner that international peace and security, *and justice*, are not endangered. This totally altered stance regarding the normalcy and legitimacy of war has undoubtedly heightened the "dictates of public conscience" in our time.

[103] See, also, Section III.10 *(g)* below.

Charter provisions bearing on human rights, such as Articles 1, 55, 62 and 76, coupled with the Universal Declaration of 1948, the twin Covenants on Civil and Political Rights and Economic, Social and Cultural Rights of 1966, and the numerous specific conventions formulating human rights standards, such as the Convention against Torture — all of these, now part of the public conscience of the global community, make the violation of humanitarian standards a far more developed and definite concept than in the days when the Martens Clause emerged. Indeed, so well are human rights norms and standards ingrained today in global consciousness, that they flood through into every corner of humanitarian law.

Submissions on these lines were made to the Court (for example, by Australia, CR 95/22, p. 25) in presentations which drew attention further to the fact that the General Assembly has noted the linkage between human rights and nuclear weapons when it condemned nuclear war "as a violation of the foremost human right — the right to life" [104].

Parallel to the developments in human rights, there has been another vast area of development — environmental law, which has likewise heightened the sensitivity of the public conscience to environmentally related matters which affect human rights. As observed by the International Law Commission in its consideration of State responsibility, conduct gravely endangering the preservation of the human environment violates principles "which are now so deeply rooted in the conscience of mankind that they have become particularly essential rules of general international law" [105].

7. The Argument that "Collateral Damage" Is Unintended

It is not to the point that such results are not directly intended, but are "by-products" or "collateral damage" caused by nuclear weapons. Such results are known to be the necessary consequences of the use of the weapon. The author of the act causing these consequences cannot in any coherent legal system avoid legal responsibility for causing them, any less than a man careering in a motor vehicle at 150 kilometres per hour through a crowded market street can avoid responsibility for the resulting deaths on the ground that he did not intend to kill the particular persons who died.

[104] General Assembly resolution 38/75 of 15 December 1983 ("Condemnation of Nuclear War"), operative paragraph 1.

[105] Report of the International Law Commission on the work of its twenty-eighth session, *Yearbook of the International Law Commission*, 1976, Vol. II, Part II, p. 109, para. 33.

The plethora of literature on the consequences of the nuclear weapon is so much part of common universal knowledge today that no disclaimer of such knowledge would be credible.

8. Illegality Exists Independently of Specific Prohibitions

Much of the argument of States opposing illegality was based on the proposition that what is not expressly prohibited to a State is permitted. Some practical illustrations would be of assistance in testing this proposition:

(a) If tomorrow a ray were invented which would immediately incinerate all living things within a radius of 100 miles, does one need to wait for an international treaty specifically banning it to declare that it offends the basic principles of the *jus in bello* and cannot therefore be legitimately used in war? It would seem rather ridiculous to have to await the convening of an international conference, the drafting of a treaty, and all the delays associated with the process of ratification, before the law can treat such a weapon as illegal.

(b) The fallacy of the argument that what is not expressly prohibited is permitted appears further from an illustration used earlier in this opinion. The argument advanced would presuppose that, immediately prior to the treaties outlawing bacteriological weapons, it was legal to use warheads packed with the most deadly germs wherewith to cause lethal epidemics among the enemy population. This conclusion strains credibility and is tenable only if one totally discounts the pre-existing principles of humanitarian law.

The fact that no treaty or declaration expressly condemns the weapon as illegal does not meet the point that illegality is based upon principles of customary international law which run far deeper than any particular weapon or any particular declaration. Every weapon proscribed by international law for its cruelty or brutality does not need to be specified any more than every implement of torture needs to be specified in a general prohibition against torture. It is the *principle* that is the subject of customary international law. The *particular* weapon or implement of torture becomes relevant only as an application of undisputed *principles* — principles which have been more than once described as being such that no civilized nation would deny them.

It will always be the case that weapons technologists will from time to time invent weapons based on new applications of technology, which are different from any weapons known before. One does not need to wait until some treaty specifically condemns that weapon before declaring that its use is contrary to the principles of international law.

If, as is indisputably the case, the Martens Clause represents a universally accepted principle of international law, it means that beyond the domain of express prohibitions there lies the domain of the general principles of humanitarian law. It follows that "If an act of war is not expressly prohibited by international agreements or customary law, this does not necessarily mean that it is actually permissible."[106]

It is self-evident that no system of law can depend for its operation or development on specific prohibitions *ipsissimis verbis*. Any developed system of law has, in addition to its specific commands and prohibitions, an array of general principles which from time to time are applied to specific items of conduct or events which have not been the subject of an express ruling before. The general principle is then applied to the specific situation and out of that particular application a rule of greater specificity emerges.

A legal system based on the theory that what is not expressly prohibited is permitted would be a primitive system indeed, and international law has progressed far beyond this stage. Even if domestic systems could function on that basis, — which indeed is doubtful — international law, born of generations of philosophical thinking, cannot. Modern legal philosophy in many jurisdictions has exposed the untenability of this view in regard to domestic systems and, *a fortiori*, the same applies to international law. As a well-known text on jurisprudence observes:

> "The rules of every legal order have an enveloping blanket of principles and doctrines as the earth is surrounded by air, and these not only influence the operation of rules but sometimes condition their very existence."[107]

More to the point than the question whether any treaty speaks of the *illegality* of nuclear weapons is whether any single provision of any treaty or declaration speaks of the *legality* of nuclear weapons. The fact is that, though there is a profusion of international documents dealing with many aspects of nuclear weapons, not one of these contains the shred of a suggestion that the *use* or *threat of use* of nuclear weapons is legal. By way of contrast, the number of international declarations which expressly pronounce against the legality or the use of nuclear weapons is legion. These are referred to elsewhere in this opinion.

The general principles provide both nourishment for the development of the law and an anchorage to the mores of the community. If they are to be discarded in the manner contended for, international law would be cast adrift from its conceptual moorings. "The general principles of law

[106] D. Fleck, *op. cit.*, p. 28, basing this principle on the Martens Clause.
[107] Dias, *Jurisprudence*, 4th ed., 1976, p. 287.

recognized by civilized nations" remains law, even though indiscriminate mass slaughter *through the nuclear weapon*, irreversible damage to future generations *through the nuclear weapon*, environmental devastation *through the nuclear weapon*, and irreparable damage to neutral States *through the nuclear weapon* are not expressly prohibited in international treaties. If the italicized words are deleted from the previous sentence, no one could deny that the acts mentioned therein are prohibited by international law. It seems specious to argue that the principle of prohibition is defeated by the absence of particularization of the weapon.

The doctrine that the sovereign is free to do whatever statute does not expressly prohibit is a long-exploded doctrine. Such extreme positivism in legal doctrine has led humanity to some of its worst excesses. History has demonstrated that power, unrestrained by principle, becomes power abused. Black-letter formulations have their value, but by no stretch of the imagination can they represent the totality of the law.

With specific reference to the laws of war, it would also set at nought the words of the Martens Clause, whose express terms are that, "Until a more complete code of the laws of war has been issued, the High Contracting Parties . . . declare that, *in cases not included in the Regulations adopted by them* . . ." (emphasis added), the humanitarian principles it sets out would apply.

Thus, by express agreement, if that indeed were necessary, the wide range of principles of humanitarian law contained within customary international law would be applicable to govern this matter, for which no specific provision has yet been made by treaty.

9. *The* "Lotus" *Decision*

Much of the argument based on the absence of specific illegality was anchored to the *"Lotus"* decision. In that case, the Permanent Court addressed its enquiry to the question:

> "whether or not under international law there is a principle which would have prohibited Turkey, in the circumstances of the case before the Court, from prosecuting Lieutenant Demons" (*P.C.I.J., Series A, No. 10*, p. 21).

In the absence of such a principle or of a specific rule to which it had expressly consented, it was held that the authority of a State could not be limited.

Indeed, even within the terms of the *"Lotus"* case, these principles become applicable, for, in relation to the laws of war, there is the express

acceptance by the nuclear powers that the humanitarian principles of the laws of war should apply. Apart from the nuclear powers, some other powers who have opposed a finding of illegality before this Court (or not adopted a clear-cut position in regard to the present request), were also parties to the Hague Convention, for example, Germany, Netherlands, Italy and Japan.

The *"Lotus"* case was decided in the context of a collision on the high seas, in time of peace, between the *Lotus*, flying the French flag and a vessel flying the Turkish flag. Eight Turkish sailors and passengers died and the French officer responsible was sought to be tried for manslaughter in the Turkish courts. This was a situation far removed from that to which the humanitarian laws of war apply. Such humanitarian law was already a well-established concept at the time of the *"Lotus"* decision, but was not relevant to it. It would have been furthest from the mind of the Court deciding that case that its dictum, given in such entirely different circumstances, would be used in an attempt to negative all that the humanitarian laws of war had built up until that time — for the interpretation now sought to be given to the *"Lotus"* case is nothing less than that it overrides even such well-entrenched principles as the Martens Clause, which expressly provides that its humanitarian principles would apply "in cases not included in the Regulations adopted by them".

Moreover, at that time, international law was generally treated in two separate categories — the laws of peace and the laws of war — a distinction well recognized in the structure of the legal texts of that time. The principle the *"Lotus"* court was enunciating was formulated entirely within the context of the laws of peace.

It is implicit in *"Lotus"* that the sovereignty of other States should be respected. One of the characteristics of nuclear weapons is that they violate the sovereignty of other countries who have in no way consented to the intrusion upon their fundamental sovereign rights, which is implicit in the use of the nuclear weapon. It would be an interpretation totally out of context that the *"Lotus"* decision formulated a theory, equally applicable in peace and war, to the effect that a State could do whatever it pleased so long as it had not bound itself to the contrary. Such an interpretation of *"Lotus"* would cast a baneful spell on the progressive development of international law.

It is to be noted also that just four years earlier, the Permanent Court, in dealing with the question of State sovereignty, had observed in *Nationality Decrees Issued in Tunis and Morocco* that the sovereignty of States would be proportionately diminished and restricted as international law developed (*Advisory Opinion, 1923, P.C.I.J., Series B, No. 4,* pp. 121-125, 127, 130). In the half century that has elapsed since the *"Lotus"* case, it is quite evident that international law — and the law relating to

humanitarian conduct in war — have developed considerably, imposing additional restrictions on State sovereignty over and above those that existed at the time of the *"Lotus"* case. This Court's own jurisprudence in the *Corfu Channel* case sees customary international law as imposing a duty on all States so to conduct their affairs as not to injure others, even though there was no prohibition *ipsissimis verbis* of the particular act which constituted a violation of the complaining nation's rights. This Court cannot in 1996 construe *"Lotus"* so narrowly as to take the law backward in time even beyond the Martens Clause.

10. Specific Rules of the Humanitarian Law of War

There are several interlacing principles which together constitute the fabric of international humanitarian law. Humanitarian law reveals not a paucity, but rather an abundance of rules which both individually and cumulatively render the use or threat of use of nuclear weapons illegal.

The rules of the humanitarian law of war have clearly acquired the status of *jus cogens*, for they are fundamental rules of a humanitarian character, from which no derogation is possible without negating the basic considerations of humanity which they are intended to protect. In the words of Roberto Ago, the rules of *jus cogens* include:

> "the fundamental rules concerning the safeguarding of peace, and notably those which forbid recourse to force or threat of force; *fundamental rules of a humanitarian nature* (prohibition of genocide, slavery and racial discrimination, *protection of essential rights of the human person in time of peace and war*); the rules prohibiting any infringement of the independence and sovereign equality of States; the rules which ensure to all members of the international community the enjoyment of certain common resources (high seas, outer space, etc.)" [108].

The question under consideration is not whether there is a prohibition in peremptory terms of nuclear weapons specifically so mentioned, but whether there are basic principles of a *jus cogens* nature which are violated by nuclear weapons. If there are such principles which are of a *jus cogens* nature, then it would follow that the weapon itself would be prohibited under the *jus cogens* concept.

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[108] *Recueil des cours de l'Académie de droit international de La Haye*, Vol. 134 (1971), p. 324, footnote 37; emphasis added. See, also, the detailed study of various peremptory norms in the international law of armed conflict, in Lauri Hannikainen, *Peremptory Norms (Jus Cogens) in International Law*, 1988, pp. 596-715, where the author finds that many of the principles of the humanitarian law of war are *jus cogens*.

As noted at the commencement of Part III, most of the States which support the view that the use of nuclear weapons is lawful acknowledge that international humanitarian law applies to their use, and that such use must conform to its principles. Among the more important of the relevant principles of international law are:

(a) the prohibition against causing unnecessary suffering;
(b) the principle of proportionality;
(c) the principle of discrimination between combatants and non-combatants;
(d) the obligation to respect the territorial sovereignty of non-belligerent States;
(e) the prohibition against genocide and crimes against humanity;
(f) the prohibition against causing lasting and severe damage to the environment;
(g) human rights law.

(a) *The prohibition against causing unnecessary suffering*

The Martens Clause, to which reference has already been made, gave classic formulation to this principle in modern law, when it spelt out the impermissibility of weapons incompatible with "the laws of humanity and the dictates of public conscience".

The prohibition against cruel and unnecessary suffering, long a part of the general principles of humanitarian law, has been embodied in such a large number of codes, declarations, and treaties as to constitute a firm and substantial body of law, each document applying the general principles to a specific situation or situations[109]. They illustrate the existence of overarching general principles transcending the specific instances dealt with.

The principle against unnecessary suffering has moreover been incorporated into standard military manuals. Thus the British *Manual of Military Law*, issued by the War Office in 1916, and used in World War I, reads:

> "*IV. The Means of Carrying on War*
>
> 39. The first principle of war is that the enemy's powers of resistance must be weakened and destroyed. The means that may be employed to inflict injury on him are not however unlimited [footnote cites Hague Rules 22, 'Belligerents have not an unlimited right

[109] Examples are the Lieber Code of 1863 (adopted by the United States for the Government of Armies in the Field); the Declaration of St. Petersburg of 1868; the Hague Conventions of 1899 and 1907; the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare of 1925; the Hague Rules of Air Warfare of 1923; the Nuremberg Charter of 1945; and the four Geneva Conventions of 1949.

as to the choice of means of injuring the enemy']. They are in practice definitely restricted by international conventions and declarations, and also by the customary rules of warfare. And, moreover, there are the dictates of morality, civilization and chivalry, which ought to be obeyed.

. . . . . .

42. It is expressly forbidden to employ arms, projectiles or material calculated to cause unnecessary suffering [Hague Rules 23 *(e)*]. Under this heading might be included such weapons as lances with a barbed head, irregularly shaped bullets, projectiles filled with broken glass and the like; also the scoring of the surface of bullets, the filing off the end of their hard case, and smearing on them any substance likely to inflame or wound. The prohibition is not, however, intended to apply to the use of explosives contained in mines, aerial torpedoes, or hand-grenades." (Pp. 242-243.)

Such was the Manual the British forces used in World War I, long before the principles of humanitarian warfare were as well entrenched as they now are[110].

As early as 1862, Franz Lieber accepted the position that even military necessity is subject to the law and usages of war, and this was incorporated in the instructions for the army[111]. Modern United States War Department Field Manuals are in strict conformity with the Hague Regulations and expressly subject military necessity to "the customary and conventional laws of war"[112].

The facts set out in Part II of this opinion are more than sufficient to establish that the nuclear weapon causes unnecessary suffering going far beyond the purposes of war.

An argument that has been advanced in regard to the principle regarding "unnecessary suffering" is that, under Article 23 *(e)* of the 1907 Hague Regulations, it is forbidden, "To employ arms, projectiles, or material *calculated* to cause unnecessary suffering" (emphasis added). The nuclear weapon, it is said, is not *calculated* to cause suffering, but suffering is rather a part of the "incidental side effects" of nuclear weapons explosions. This argument is met by the well-known legal principle that the doer of an act must be taken to have *intended* its natural and foreseeable consequences (see Section III.7 above). It is, moreover, a lit-

[110] On the importance of validity of military manuals, see Singh and McWhinney, *op. cit.*, pp. 52-53.

[111] General Orders 100, *Instructions for the Government of the Armies of the United States in the Field*, s. 14.

[112] Singh and McWhinney, *op. cit.*, p. 59.

eral interpretation which does not take into account the spirit and underlying rationale of the provision — a method of interpretation particularly inappropriate to the construction of a humanitarian instrument. It may also be said that nuclear weapons are indeed deployed "in part with a view to utilising the destructive effects of radiation and fall-out"[113].

(b) *The principle of proportionality*

See discussion in Part IV below, pages 514-516.

(c) *The principle of discrimination*

The principle of discrimination originated in the concern that weapons of war should not be used indiscriminately against military targets and civilians alike. Non-combatants needed the protection of the laws of war. However, the nuclear weapon is such that non-discrimination is built into its very nature. A weapon that can flatten a city and achieve by itself the destruction caused by thousands of individual bombs is not a weapon that discriminates. The radiation it releases over immense areas does not discriminate between combatant and non-combatant, or indeed between combatant and neutral States.

Article 48 of the Additional Protocol I to the Geneva Conventions of 1949 repeats as a "Basic Rule" the well-accepted rule of humanitarian law:

> "In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall *at all times* distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives." (Emphasis added.)

The rule of discrimination between civilian populations and military personnel is, like some of the other rules of *jus in bello*, of ancient vintage and shared by many cultures. We have referred already to the ancient Indian practice that Indian peasants would pursue their work in the fields, in the face of invading armies, confident of the protection afforded them by the tradition that war was a matter for the combatants[114]. This scenario, idyllic though it may seem, and so out of tune with the brutalities of war, is a useful reminder that basic humanitarian principles such as discrimination do not aim at fresh standards unknown before.

[113] Ian Brownlie, "Some Legal Aspects of the Use of Nuclear Weapons", *International and Comparative Law Quarterly*, 1965, Vol. 14, p. 445.
[114] Nagendra Singh, *op. cit.*, footnote 69 above.

The protection of the civilian population in times of armed conflict has for long been a well-established rule of international humanitarian law. Additional Protocol I to the Geneva Conventions (1949) provides by Article 51 (5) *(b)*) that the "indiscriminate attacks" which it prohibits include:

> "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated".

So, also, Article 57 (2) *(b)* prohibits attacks when:

> "the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated".

The many facets of this rule were addressed in the resolution of the International Law Institute, passed at its Edinburgh Conference in 1969[115], which referred to them as prohibited by *existing* law as at that date. The acts described as prohibited by *existing law* included the following:

> "all attacks for whatsoever motive or by whatsoever means for the annihilation of any group, region or urban centre with no possible distinction between armed forces and civilian populations or between military objectives and non-military objects"[116];

> "any action whatsoever designed to terrorize the civilian population"[117];

> "the use of all weapons which, by their nature, affect indiscriminately both military objectives and non-military objects, or both armed forces and civilian populations. In particular, it prohibits the use of weapons the destructive effect of which is so great that it cannot be limited to specific military objectives or is otherwise uncontrollable . . ., as well as of 'blind' weapons."[118]

[115] On the eminent juristic support for this proposition, see Section III.11 below.

[116] *Annuaire de l'Institut de droit international*, 1969, No. 53, Vol. II, p. 377, para. 8; Iran, CR 95/26, p. 47, footnote 45.

[117] *Annuaire de l'Institut de droit international*, 1969, No. 53, Vol. II, p. 377, para. 6.

[118] *Ibid.*, para. 7.

(d) *Respect for non-belligerent States*

When nuclear weapons are used their natural and foreseeable consequence of irreparable damage to non-belligerent third parties is a necessary consideration to be taken into reckoning in deciding the permissibility of the weapon. It is not merely a single non-belligerent State that might be irretrievably damaged, but the entire global community of States. The uncontainability of radiation extends it globally. The enormous area of damage caused by nuclear weapons, as compared with the most powerful conventional weapons, appears from the diagram appended to this opinion, which is taken from WHO studies. When wind currents scatter these effects further, it is well established by the TTAPS and other studies that explosions in one hemisphere can spread their deleterious effects even to the other hemisphere. No portion of the globe — and therefore no country — could be free of these effects.

The argument of lack of intention has been addressed in this context as well. In terms of this argument, an action directed at an enemy State is not intended to cause damage to a third party, and if such damage in fact ensues, it is not culpable. This argument has already been dealt with in an earlier section of this opinion, when it was pointed out that such an argument is untenable (see Section III.7). The launching of a nuclear weapon is a deliberate act. Damage to neutrals is a natural, foreseeable and, indeed, inevitable consequence. International law cannot contain a rule of non-responsibility which is so opposed to the basic principles of universal jurisprudence.

(e) *The prohibition against genocide*[119]

The Court's treatment of the relevance of genocide to the nuclear weapon is, in my view, inadequate (paragraph 26 of the Opinion).

Nuclear weapons used in response to a nuclear attack, especially in the event of an all-out nuclear response, would be likely to cause genocide by triggering off an all-out nuclear exchange, as visualized in Section IV below. Even a single "small" nuclear weapon, such as those used in Japan, could be instruments of genocide, judging from the number of deaths they are known to have caused. If cities are targeted, a single bomb could cause a death toll exceeding a million. If the retaliatory weapons are more numerous, on WHO's estimates of the effects of nuclear war, even a billion people, both of the attacking State and of others, could be killed. This is plainly genocide and, whatever the circumstances, cannot be within the law.

[119] See, further, Section III.10 *(g)* below on human rights law.

When a nuclear weapon is used, those using it must know that it will have the effect of causing deaths on a scale so massive as to wipe out entire populations. Genocide, as defined in the Genocide Convention (Art. II), means any act committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. Acts included in the definition are killing members of the group, causing serious bodily or mental harm to members of the group, and deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.

In discussions on the definition of genocide in the Genocide Convention, much play is made upon the words "as such". The argument offered is that there must be an intention to target a particular national, ethnical, racial or religious group qua such group, and not incidentally to some other act. However, having regard to the ability of nuclear weapons to wipe out blocks of population ranging from hundreds of thousands to millions, there can be no doubt that the weapon targets, in whole or in part, the national group of the State at which it is directed.

Nuremberg held that the extermination of the civilian population in whole or in part is a crime against humanity. This is precisely what a nuclear weapon achieves.

(f) *The prohibition against environmental damage*

The environment, the common habitat of all Member States of the United Nations, cannot be damaged by any one or more members to the detriment of all others. Reference has already been made, in the context of dictates of public conscience (Section III.6 above), to the fact that the principles of environmental protection have become "so deeply rooted in the conscience of mankind that they have become particularly essential rules of general international law"[120]. The International Law Commission has indeed classified massive pollution of the atmosphere or of the seas as an international crime[121]. These aspects have been referred to earlier.

Environmental law incorporates a number of principles which are violated by nuclear weapons. The principle of intergenerational equity and the common heritage principle have already been discussed. Other principles of environmental law, which this request enables the Court to recognize and use in reaching its conclusions, are the precautionary principle, the principle of trusteeship of earth resources, the principle that the

[120] Report of the International Law Commission on the work of its twenty-eighth session, *Yearbook of the International Law Commission*, 1976, Vol. II, Part II, p. 109, para. 33.

[121] Draft Article 19 (3) *(d)* on "State Responsibility" of the International Law Commission, *ibid.*, p. 96.

burden of proving safety lies upon the author of the act complained of, and the "polluter pays principle", placing on the author of environmental damage the burden of making adequate reparation to those affected[122]. There have been juristic efforts in recent times to formulate what have been described as "principles of ecological security" — a process of norm creation and codification of environmental law which has developed under the stress of the need to protect human civilization from the threat of self-destruction.

One writer[123], in listing eleven such principles, includes among them the "Prohibition of Ecological Aggression", deriving this principle *inter alia* from such documents as the 1977 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques which entered into force on 5 October 1978 (1108 *UNTS*, p. 151), and the United Nations General Assembly resolution "Historical responsibility of States for the preservation of nature for present and future generations" (General Assembly resolution 35/8 of 30 October 1980).

The same writer points out that,

> "Under Soviet [now Russian] legal doctrine, the deliberate and hostile modification of the environment — ecocide — is unlawful and considered an international crime."[124]

Another writer, drawing attention to the need for a co-ordinated, collective response to the global environmental crisis and the difficulty of envisioning such a response, observes:

> "But circumstances are forcing just such a response; if we cannot embrace the preservation of the earth as our new organizing principle, the very survival of our civilization will be in doubt."[125]

Here, forcefully stated, is the driving force behind today's environmental law — the "new organizing principle" of preservation of the earth, without which all civilization is in jeopardy.

A means already at work for achieving such a co-ordinated collective response is international environmental law, and it is not to be wondered

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[122] See the references to these principles in my dissenting opinion in *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the* Nuclear Tests (New Zealand *v.* France) *Case, I.C.J. Reports 1995*, pp. 339-347.

[123] A. Timoshenko, "Ecological Security: Global Change Paradigm", *Columbia Journal of International Environmental Law and Policy*, 1990, Vol. 1, p. 127.

[124] Timoshenko, *op. cit.*

[125] A. Gore, *Earth in the Balance: Ecology and the Human Spirit*, 1992, p. 295, cited in Guruswamy, Palmer and Weston, *International Environmental Law and World Order*, 1994, p. 264.

at that these basic principles ensuring the survival of civilization, and indeed of the human species, are already an integral part of that law.

The same matter is put in another perspective in an outstanding study, already referred to:

> "The self-extinction of our species is not an act that anyone describes as sane or sensible; nevertheless, it is an act that, without quite admitting it to ourselves, we plan in certain circumstances to commit. Being impossible as a fully intentional act, unless the perpetrator has lost his mind, it can come about only through a kind of inadvertence — as a 'side effect' of some action that we do intend, such as the defense of our nation, or the defense of liberty, or the defense of socialism, or the defense of whatever else we happen to believe in. To that extent, our failure to acknowledge the magnitude and significance of the peril is a necessary condition for doing the deed. We can do it only if we don't quite know what we're doing. If we did acknowledge the full dimensions of the peril, admitting clearly and without reservation that any use of nuclear arms is likely to touch off a holocaust in which the continuance of all human life would be put at risk, extinction would at that moment become not only 'unthinkable' but also undoable."[126]

These principles of environmental law thus do not depend for their validity on treaty provisions. They are part of customary international law. They are part of the *sine qua non* for human survival.

Practical recognitions of the principle that they are an integral part of customary international law are not difficult to find in the international arena. Thus, for example, the Security Council, in resolution 687 of 1991, referred to Iraq's liability "under international law . . . for environmental damage" resulting from the unlawful invasion of Kuwait. This was not a liability arising under treaty, for Iraq was not a party to either the 1977 ENMOD Convention, nor the 1977 Protocols, nor any other specific treaty dealing expressly with the matter. Iraq's liability to which the Security Council referred in such unequivocal terms was clearly a liability arising under customary international law[127].

Nor are these principles confined to either peace or war, but cover both situations, for they proceed from general duties, applicable alike in peace and war[128].

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[126] Jonathan Schell, *The Fate of the Earth*, 1982, p. 186.

[127] A submission to this effect was made by the Solomon Islands in the hearings before the Court (CR 95/32, Sands, p. 71).

[128] See, for example, the phraseology of Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration, referring to the duties of States to prevent damage to the environment of other States.

The basic principle in this regard is spelt out by Article 35 (3) of the 1977 Additional Protocol I to the Geneva Convention in terms prohibiting

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

Article 55 prohibits

> "the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population".

The question is not whether nuclear weapons were or were not intended to be covered by these formulations. It is sufficient to read them as stating undisputed principles of customary international law. To consider that these general principles are not explicit enough to cover nuclear weapons, or that nuclear weapons were designedly left unmentioned and are therefore not covered, or even that there was a clear understanding that these provisions were not intended to cover nuclear weapons, is to emphasize the incongruity of prohibiting lesser weapons of environmental damage, while leaving intact the infinitely greater agency of causing the very damage which it was the rationale of the treaty to prevent.

If there are general duties arising under customary international law, it clearly matters not that the various environmental agreements do not specifically refer to damage by nuclear weapons. The same principles apply whether we deal with belching furnaces, leaking reactors or explosive weapons. The mere circumstance that coal furnaces or reactors are not specifically mentioned in environmental treaties cannot lead to the conclusion that they are exempt from the incontrovertible and well-established standards and principles laid down therein.

Another approach to the applicability of environmental law to the matter before the Court is through the principle of good neighbourliness, which is both impliedly and expressly written into the United Nations Charter. This principle is one of the bases of modern international law, which has seen the demise of the principle that sovereign States could pursue their own interests in splendid isolation from each other. A world order in which every sovereign State depends on the same global environment generates a mutual interdependence which can only be implemented by co-operation and good neighbourliness.

The United Nations Charter spells this out as "the general principle of good-neighbourliness, due account being taken of the interests and well-being of the rest of the world, in social, economic, and commercial matters" (Art. 74). A course of action that can destroy the global environment will take to its destruction not only the environment, but the social,

economic and commercial interests that cannot exist apart from that environment. The Charter's express recognition of such a general duty of good neighbourliness makes this an essential part of international law.

This Court, from the very commencement of its jurisprudence, has supported this principle by spelling out the duty of every State not to "allow knowingly its territory to be used for acts contrary to the rights of other States" (*Corfu Channel, I.C.J. Reports 1949*, p. 22).

The question of State responsibility in regard to the environment is dealt with more specifically in my dissenting opinion on the WHO request (*I.C.J. Reports 1996*, pp. 139-143), and that discussion must be regarded as supplementary to the discussion of environmental considerations in this opinion. As therein pointed out, damage to the environment caused by nuclear weapons is a breach of State obligation, and this adds another dimension to the illegality of the use or threat of use of nuclear weapons.

(g) *Human rights law*[129]

This opinion has dealt in Section III.3 with the ways in which the development of human rights in the post-war years has made an impact on "considerations of humanity" and "dictates of public conscience".

Concentrating attention more specifically on the rights spelt out in the Universal Declaration of Human Rights, it is possible to identify the right to dignity (Preamble and Art. 1), the right to life, the right to bodily security (Art. 3), the right to medical care (Art. 25 (1)), the right to marriage and procreation (Art. 16 (1)), the protection of motherhood and childhood (Art. 25 (2)), and the right to cultural life (Art. 27 (1)), as basic human rights which are endangered by nuclear weapons.

It is part of established human rights law doctrine that certain rights are non-derogable in any circumstances. The right to life is one of them. It is one of the rights which constitute the irreducible core of human rights.

The preamble to the Declaration speaks of recognition of the inherent dignity of all members of the human family as the foundation of freedom, justice and peace in the world. Article 1 follows this up with the specific averment that "All human beings are born free and equal in dignity and rights." Article 6 states that everyone has the right to recognition everywhere as a person before the law. The International Covenant on Civil and Political Rights made this right more explicit and imposed on States the affirmative obligation of protecting it by law. Article 6 (1)

[129] See, also, Section III.6 below.

states, "Every human being has the inherent right to life. This right shall be protected by law." States parties to the Covenant expressly assumed the responsibility to implement the provisions of the Covenant.

The European Convention for the Protection of Human Rights and Fundamental Freedoms (1950, Art. 2) and the American Convention of Human Rights (1969, Art. 4) likewise confirm the right to life. It is one of the non-derogable rights and an integral part of the irreducible core of human rights.

It has been argued that the right to life is not an absolute right and that the taking of life in armed hostilities is a necessary exception to this principle. However, when a weapon has the potential to kill between one million and one billion people, as WHO has told the Court, human life becomes reduced to a level of worthlessness that totally belies human dignity as understood in any culture. Such a deliberate action by an State is, in any circumstances whatsoever, incompatible with a recognition by it of that respect for basic human dignity on which world peace depends, and respect for which is assumed on the part of all Member States of the United Nations.

This is not merely a provision of the Universal Declaration on Human Rights and other human rights instruments, but is fundamental Charter law as enshrined in the very preamble to the United Nations Charter, for one of the ends to which the United Nations is dedicated is "to reaffirm faith in fundamental human rights, in the *dignity and worth* of the human person" (emphasis added). No weapon ever invented in the long history of man's inhumanity to man has so negatived the dignity and worth of the human person as has the nuclear bomb.

Reference should also be made to the General Comment of the United Nations Human Rights Committee entitled "The Right to Life and Nuclear Weapons"[130] which endorsed the view of the General Assembly that the right to life is especially pertinent to nuclear weapons[131]. Stating that nuclear weapons are among the greatest threats to life and the right to life, it carried its view of the conflict between nuclear weapons and international law so far as to propose that their use should be recognized as crimes against humanity.

All of these human rights follow from one central right — a right described by René Cassin as "the right of human beings to exist" (CR 95/32, p. 64, including footnote 20). This is the foundation of the elaborate structure of human rights that has been painstakingly built by the world community in the post-war years.

Any endorsement of the legality of the use, in any circumstances what

[130] Gen. C 14/23, reproduced in M. Nowak, *United Nations Covenant on Civil and Political Rights*, 1983, p. 861.

[131] General Assembly resolution 38/75, "Condemnation of Nuclear War", first operative paragraph.

soever, of a weapon which can snuff out life by the million would tear out the foundations beneath this elaborate structure which represents one of the greatest juristic achievements of this century. That structure, built upon one of the noblest and most essential concepts known to the law, cannot theoretically be maintained if international law allows this right to any State. It could well be written off the books.

11. Juristic Opinion

It would be correct to say that the bulk of juristic opinion is of the view that nuclear weapons offend existing principles of humanitarian law. Juristic opinion is an important source of international law and there is no room in this opinion for a citation of all the authorities. It will suffice, for present purposes, to refer to a resolution already noted in an earlier part of this discussion — the resolution adopted by the Institute of International Law in 1969, at its Edinburgh Session, at a time when juristic writing on nuclear arms had not reached its present level of intensity and was in fact quite scarce.

The finding of the Institute, already cited (see Section III.10 *(b)* above), that *existing* international law prohibits, in particular, the use of weapons whose destructive effect "is so great that it cannot be limited to specific military objectives or is otherwise uncontrollable . . ., as well as of 'blind' weapons"[132], was adopted by 60 votes, with one against and two abstentions. Those voting in favour included Charles De Visscher, Lord McNair, Roberto Ago, Suzanne Bastid, Erik Castrén, Sir Gerald Fitzmaurice, Wilfred Jenks, Sir Robert Jennings, Charles Rousseau, Grigory Tunkin, Sir Humphrey Waldock, José Maria Ruda, Oscar Schachter and Kotaro Tanaka, to select a few from an illustrious list of the most eminent international lawyers of the time.

12. The 1925 Geneva Gas Protocol

Quite independently of the various general principles that have been invoked in the discussion thus far, there is a conventional basis on which it has been argued that nuclear weapons are illegal. It is for this reason that I have voted against paragraph 2 B of the *dispositif* which holds that there is not, in conventional international law, a comprehensive and universal prohibition of the threat or use of nuclear weapons as such. I refer, in particular, to the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases and of Bacteriological Methods of Warfare, 17 June 1925 (commonly referred to as the Geneva Gas Protocol). It is so comprehensive in its prohibition that, in my view, it clearly covers nuclear weapons, which thus become the subject of conventional prohibition. There is considerable scholarly opinion favouring

[132] *Annuaire de l'Institut de droit international*, 1969, No. 53, Vol. II, p. 377, para. 7.

this view[133]. Moreover, if radiation is a poison, it is caught up also by the prohibition on poison weapons contained in Article 23 *(a)* of the Hague Regulations. The rule against poisonous weapons has indeed been described as "The most time-honoured special prohibition on the subject of weapons and instruments of war."[134] It is a rule recognized from the remotest historical periods and in a wide spread of cultures.

The Geneva Gas Protocol was drafted in very wide terms. It prohibits "the use in war of asphyxiating, *poisonous*, or other gases and of all analogous liquids, *materials* or *devices*" (emphasis added).

If this Protocol is to be applicable to nuclear weapons, it must be shown:

(1) that radiation is *poisonous*; and
(2) that it involves the contact of *materials* with the human body.

If both these questions are answered in the affirmative, the damage to the human body caused by radiation would be covered by the terms of the Protocol.

(i) *Is radiation poisonous?*

Poison is generally defined as a substance which, of its own force, damages health on contact with or absorption by the body[135]. The discussion of the effects of radiation in Section II.3 *(f)* above can leave one in no doubt that the effects of radiation are that it destroys life or damages the functions of the organs and tissues.

Schwarzenberger points out that if introduced into the body in suffi-

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[133] See Burns H. Weston, *op. cit.*, p. 241; E. Castrén, *The Present Law of War and Neutrality*, 1954, p. 207; G. Schwarzenberger, *The Legality of Nuclear Weapons*, 1958, pp. 37-38; N. Singh, *Nuclear Weapons and International Law*, 1959, pp. 162-166; Falk, Meyrowitz and Sanderson, "Nuclear Weapons and International Law", *Indian Journal of International Law*, 1980, Vol. 20, p. 563; Julius Stone, *Legal Controls of International Conflict*, 1954, p. 556; Spaight, *Air Power and War Rights*, 3rd ed., 1947, pp. 275-276; H. Lauterpacht (ed.), in *Oppenheim's International Law*, Vol. 2, 7th ed., 1952, p. 348.

[134] Singh and McWhinney, *op. cit.*, p. 120.

[135] The *McGraw-Hill Dictionary of Scientific and Technical Terms* defines poison as

> "A substance that in relatively small doses has an action that either destroys life or impairs seriously the functions of organs and tissues" (2nd ed., 1978, p. 1237).

The definition of poison in the *Oxford English Dictionary* is that poison is:

> "Any substance which, when introduced to or absorbed by a living organism, destroys life or injures health, irrespective of mechanical means or direct thermal changes. Particularly applied to a substance capable of destroying life by rapid action, and when taken in a small quantity. Fig. phr. to hate like poison.
>
> But the more scientific use is recognized in the phrase *slow poison*, indicating the accumulative effect of a deleterious drug or agent taken for a length of time." (Vol. XII, p. 2, 1989 ed.)

ciently large doses, radiation produces symptoms indistinguishable from poisoning[136].

Once it is established that radioactive radiation is a poison, it is also covered by the prohibition on poison weapons contained in the Hague Regulations already referred to. It poisons, indeed in a more insidious way than poison gas, for its effects include the transmission of genetic disorders for generations.

The NATO countries have themselves accepted that poisoning is an effect of nuclear weapons, for Annex II to the Protocol on Arms Control of the Paris Agreements of 23 October 1954, on the accession of the Republic of Germany to the North Atlantic Treaty, defines a nuclear weapon as any weapon:

> "designed to contain or utilise, nuclear fuel or radioactive isotopes and which, by explosion or other uncontrolled nuclear transformation . . . is capable of mass destruction, mass injury or *mass poisoning*" (emphasis added).

(ii) *Does radiation involve contact of the body with "materials"?*

The definitions of poison speak of it in terms of its being a "substance". The Geneva Gas Protocol speaks of "materials" which are poisonous. It is necessary therefore to know whether radiation is a "substance" or a "material", or merely a ray such as a light ray which, when it impinges on any object, does not necessarily bring a substance or material in contact with that object. If it is the former, it would satisfy the requirements of the Geneva Gas Protocol.

The definition of "radioactive" in the *Shorter Oxford Dictionary* is as follows: "Capable (as radium) of emitting spontaneously rays consisting of *material particles* travelling at high velocities."[137]

Scientific discussions[138] draw a distinction between the spectrum of electromagnetic radiations that have zero mass when (theoretically) at rest, such as radio waves, microwaves, infrared rays, visible light, ultraviolet rays, x-rays, and gamma rays, and the type of radiation that includes such particles as electrons, protons and neutrons which have

[136] *The Legality of Nuclear Weapons*, 1958, p. 35. He remarks very severely that they "inflict death or serious damage to health in, as Gentili would have put it, a manner more befitting demons than civilised human beings". The reference is to Gentili's observation that, though war is struggle between men, the use of such means as poison makes it "a struggle of demons" (*De Jure Belli Libri Tres* (1612), Book II, Chap. VI, p. 161, trans. J. C. Rolfe).

[137] 3rd ed., 1987, Vol. II, p. 1738; emphasis added.

[138] See *Encyclopaedia Britannica Macropaedia*, Vol. 26, pp. 471 *et seq.* on "Radiation".

mass. When such forms of particulate matter travel at high velocities, they are regarded as radiation.

The ionizing radiation caused by nuclear weapons is of the latter kind. It consists *inter alia* of a stream of particles[139] coming into contact with the human body and causing damage to tissues. In other words, it is a material substance that causes damage to the body and cannot fall outside the prohibition of poisonous weapons laid down by the Geneva Gas Protocol.

The question whether radiation is a "material" seems thus beyond doubt. In the words of Schwarzenberger:

> "the words 'all analogous liquids, materials or devices' are so comprehensively phrased as to include any weapons of an analogous character, irrespective of whether they were known or in use at the time of the signature of the Protocol. If the radiation and fall-out effects of nuclear weapons can be likened to poison, all the more can they be likened to poison gas . . ."[140]

There has been some discussion in the literature of the question whether the material transmitted should be in gaseous form as the provision in question deals with materials "analogous" to gases. It is to be noted in the first place that the wording of the provision itself takes the poisons out of the category of *gases* because it speaks also of analogous *liquids*, *materials*, and even devices. However, even in terms of *gases*, it is clear that the distinction between solids, liquids and gases has never been strictly applied in military terminology to the words "gas". As Singh and McWhinney point out, in strict scientific language, mustard gas is really a liquid and chlorine is really a gas, but in military terminology both are categorized as gas[141].

The case that nuclear weapons are covered by the Geneva Gas Protocol seems therefore to be irrefutable. Further, if indeed radioactive radiation constitutes a poison, the prohibition against it would be declaratory of a universal customary law prohibition which would apply in any event whether a State is party or not to the Geneva Protocol of 1925[142].

Yet another indication, available in terms of the Geneva Gas Protocol, is that the word "devices" would presumably cover a nuclear bomb, irrespective of the question whether radiation falls within the description of "analogous materials".

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[139] The definitions of radiation in the *McGraw-Hill Dictionary of Physics and Mathematics* (1978, p. 800) is "a stream of particles, . . . or high energy photons, or a mixture of these".

[140] *Op. cit.*, p. 38.

[141] *Op. cit.*, p. 126.

[142] See, to this effect, Schwarzenberger, *op. cit.*, pp. 37-38, in relation to chemical and bacteriological weapons.

Nuclear weapons, being unknown at the time of the documents under consideration, could not be more specifically described, but are covered by the description and intent of the Protocol and the Hague Regulations.

It has been submitted by the United States that:

> "This prohibition 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." (Written Statement, p. 25.)

If, in fact, radiation is a major by-product of a nuclear weapon — as indeed it is — it is not clear on what jurisprudential principle an exemption can thus be claimed from the natural and foreseeable effects of the use of the weapon. Such "by-products" are sometimes described as collateral damage but, collateral or otherwise, they are a major consequence of the bomb and cannot in law be taken to be unintended, well known as they are.

Besides, such an argument involves the legally unacceptable contention that if an act involves both legal and illegal consequences, the former justify or excuse the latter.

13. Article 23 (a) *of the Hague Regulations*

The foregoing discussion demonstrates that radiation is a poison. Using the same line of reasoning, it follows that there is also a clear contravention of Article 23 *(a)* of the Hague Regulations which frames its prohibition in unequivocal terms[143]. No extended discussion is called for in this context, and it is well accepted that the categorical prohibition against poisoning therein contained is one of the oldest and most widely recognized laws of war. Since "the universally accepted practice of civilised nations has regarded poison as banned", the prohibition contained in Article 23 *(a)* has been considered as binding even on States not parties to this conventional provision.

> "Thus, apart from purely conventional law, the customary position based on the general principles of law would also bar the use in warfare of poisonous substances as not only barbarous, inhuman and uncivilised, but also treacherous."[144]

[143] See Singh and McWhinney, *op. cit.*, pp. 127 and 121.
[144] *Ibid.*, p. 121.

IV. SELF-DEFENCE

Self-defence raises probably the most serious problems in this case. The second sentence in paragraph 2 E of the *dispositif* states that, in the current state of international law and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake. I have voted against this clause as I am of the view that the threat or use of nuclear weapons would not be lawful in any circumstances whatsoever, as it offends the fundamental principles of the *jus in bello*. This conclusion is clear and follows inexorably from well-established principles of international law.

If a nation is attacked, it is clearly entitled under the United Nations Charter to the right of self-defence. Once a nation thus enters into the domain of the *jus in bello*, the principles of humanitarian law apply to the conduct of self-defence, just as they apply to the conduct of any other aspect of military operations. We must hence examine what principles of the *jus in bello* apply to the use of nuclear weapons in self-defence.

The first point to be noted is that the use of *force* in self-defence (which is an undoubted right) is one thing and the use of *nuclear weapons* in self-defence is another. The permission granted by international law for the first does not embrace the second, which is subject to other governing principles as well.

All of the seven principles of humanitarian law discussed in this opinion apply to the use of nuclear weapons in self-defence, just as they apply to their use in any aspect of war. Principles relating to unnecessary suffering, proportionality, discrimination, non-belligerent States, genocide, environmental damage and human rights would all be violated, no less in self-defence than in an open act of aggression. The *jus in bello* covers all use of force, whatever the reasons for resort to force. There can be no exceptions, without violating the essence of its principles.

The State subjected to the first attack could be expected to respond in kind. After the devastation caused by a first attack, especially if it be a nuclear attack, there will be a tendency to respond with any nuclear firepower that is available.

Robert McNamara, in dealing with the response to initial strikes, states:

> "But under such circumstances, leaders on both sides would be under unimaginable pressure to avenge their losses and secure the interests being challenged. And each would fear that the opponent might launch a larger attack at any moment. Moreover, they would both be operating with only partial information because of the dis-

> ruption to communications caused by the chaos on the battlefield (to say nothing of possible strikes against communication facilities). Under such conditions, it is highly likely that rather than surrender, each side would launch a larger attack, hoping that this step would bring the action to a halt by causing the opponent to capitulate."[145]

With such a response, the clock would accelerate towards global catastrophe, for a counter-response would be invited and, indeed, could be automatically triggered off.

It is necessary to reiterate here the undoubted right of the State that is attacked to use all the weaponry available to it for the purpose of repulsing the aggressor. Yet this principle holds only *so long as such weapons do not violate the fundamental rules of warfare embodied in those rules.* Within these constraints, and for the purpose of repulsing the enemy, the full military power of the State that is attacked can be unleashed upon the aggressor. While this is incontrovertible, one has yet to hear an argument in any forum, or a contention in any academic literature, that a nation attacked, for example, with chemical or biological weapons is entitled to use chemical or biological weapons in self-defence, or to annihilate the aggressor's population. It is strange that the most devastating of all the weapons of mass destruction can be conceived of as offering a singular exception to this most obvious conclusion following from the bedrock principles of humanitarian law.

That said, a short examination follows of the various principles of humanitarian law which could be violated by self-defence.

1. Unnecessary Suffering

The harrowing suffering caused by nuclear weapons, as outlined earlier in this opinion, is not confined to the aggressive use of such weapons. The lingering sufferings caused by radiation do not lose their intensity merely because the weapon is used in self-defence.

2. Proportionality/Error

The principle of proportionality may on first impressions appear to be satisfied by a nuclear response to a nuclear attack. Yet, viewed more carefully, this principle is violated in many ways. As France observed:

> "The assessment of the necessity and proportionality of a response to attack depends on the nature of the attack, its scope, the danger it poses and the adjustment of the measures of response to the desired defensive purpose." (CR 95/23, pp. 82-83.)

[145] McNamara, *op. cit.*, pp. 71-72.

For these very reasons, precise assessment of the nature of the appropriate and proportionate response by a nation stricken by a nuclear attack becomes impossible[146]. If one speaks in terms of a nuclear response to a nuclear attack, that nuclear response will tend, as already noted, to be an all-out nuclear response which opens up all the scenarios of global armageddon which are so vividly depicted in the literature relating to an all-out nuclear exchange.

Moreover, one is here speaking in terms of measurement — measurement of the intensity of the attack and the proportionality of the response. But one can measure only the measurable. With nuclear war, the quality of measurability ceases. Total devastation admits of no scales of measurement. We are in territory where the principle of proportionality becomes devoid of meaning.

It is relevant also, in the context of nuclear weapons, not to lose sight of the possibility of human error. However carefully planned, a nuclear response to a nuclear attack cannot, in the confusion of the moment, be finely graded so as to assess the strength of the weapons of attack, and to respond in like measure. Even in the comparatively tranquil and leisured atmosphere of peace, error is possible, even to the extent of unleashing an unintentional nuclear attack. This has emerged from studies of unintentional nuclear war[147]. The response, under the stress of nuclear attack, would be far more prone to accident.

According to the *Bulletin of the Atomic Scientists*:

> "Top decision-makers as well as their subordinate information suppliers rely on computers and other equipment which have become even more complex and therefore more vulnerable to malfunction. Machine failures or human failures or a combination of the two could, had they not been discovered within minutes, have caused unintended nuclear war in a number of reported cases."[148]

The result would be all-out nuclear war.

Here again there is confirmation from statesmen, who have had much experience in matters of foreign and military policy, that all-out nuclear war is likely to ensue. Robert McNamara observes:

> "It is inconceivable to me, as it has been to others who have studied the matter, that 'limited' nuclear wars would remain limited — any decision to use nuclear weapons would imply a high proba-

[146] On this, see further Section II.3 *(n)* above and Section VII.6 below.

[147] For example, *Risks of Unintentional Nuclear War*, United Nations Institute of Disarmament Research (UNIDIR), 1982.

[148] June 1982, Vol. 38, p. 68.

bility of the same cataclysmic consequences as a total nuclear exchange."[149]

Former Secretary of State, Dr. Kissinger, has also written to the same effect:

> "Limited war is not simply a matter of appropriate military forces and doctrines. It also places heavy demands on the discipline and subtlety of the political leadership and on the confidence of the society in it. For limited war is psychologically a much more complex problem than all-out war. . . . An all-out war will in all likelihood be decided so rapidly — if it is possible to speak of decision in such a war — and the suffering it entails will be so vast as to obscure disputes over the nuances of policy."[150]

He proceeds to observe:

> "Limited nuclear war is not only impossible, according to this line of reasoning, but also undesirable. For one thing, it would cause devastation in the combat zone approaching that of thermonuclear war in severity. We would, therefore, be destroying the very people we were seeking to protect."[151]

It is thus no fanciful speculation that the use of nuclear weapons in self-defence would result in a cataclysmic nuclear exchange. That is a risk which humanitarian law would consider to be totally unacceptable. It is a risk which no legal system can sanction.

3. Discrimination

As already observed earlier in this opinion, nuclear weapons violate the principle of discrimination between armed forces and civilians. True, other weapons also do, but the intensity of heat and blast, not to speak of radiation, are factors which place the nuclear weapon in a class apart from the others. When one speaks of weapons that count their victims by hundreds of thousands, if not millions, principles of discrimination cease to have any legal relevance.

4. Non-belligerent States

One of the principal objections to the use of nuclear weapons in self-defence occurs under this head.

Self-defence is a matter of purely internal jurisdiction only if such

[149] *Op. cit.*, p. 72.
[150] Henry Kissinger, *Nuclear Weapons and Foreign Policy*, 1957, p. 167.
[151] *Ibid.*, p. 175.

defence can be undertaken without clearly causing damage to the rights of non-belligerent States. The moment a strategy of self-defence implies damage to a non-belligerent third party, such a matter ceases to be one of purely internal jurisdiction. It may be that the act of self-defence inadvertently and unintentionally causes damage to a third State. Such a situation is understandable and sometimes does occur, but that is not the case here.

5. Genocide

The topic of genocide has already been covered[152]. Self-defence, which will, as shown in the discussion on proportionality, result in all probability in all-out nuclear war, is even more likely to cause genocide than the act of launching an initial strike. If the killing of human beings, in numbers ranging from a million to a billion, does not fall within the definition of genocide, one may well ask what will.

No nation can be seen as entitled to risk the destruction of civilization for its own national benefit.

6. Environmental Damage

Similar considerations exist here, as in regard to genocide. The widespread contamination of the environment may even lead to a nuclear winter and to the destruction of the ecosystem. These results will ensue equally, whether the nuclear weapons causing them are used in aggression or in self-defence.

International law relating to the environment, in so far as it concerns nuclear weapons, is dealt with at greater length in my dissenting opinion on the World Health Organization request (*I.C.J. Reports 1996,* pp. 139-143), and the discussion in that opinion should be considered as supplementary to the above discussion.

7. Human Rights

All the items of danger to human rights as recounted earlier in this opinion would be equally operative whether the weapons are used in aggression or in self-defence.

* * *

The humanitarian principles discussed above have long passed the stage of being merely philosophical aspirations. They are the living law and represent the highwatermark of legal achievement in the difficult task

[152] See Section III.10 *(e)* above.

of imposing some restraints on the brutalities of unbridled war. They provide the ground-rules for military action today and have been forged by the community of nations under the impact of the sufferings of untold millions in two global cataclysms and many smaller wars. As with all legal principles, they govern without distinction all nations great and small.

It seems difficult, with any due regard to the consistency that must underlie any credible legal system, to contemplate that all these hard-won principles should bend aside in their course and pass the nuclear weapon by, leaving that unparalleled agency of destruction free to achieve on a magnified scale the very evils which these principles were designed to prevent.

* * *

Three other aspects of the argument before the Court call for brief mention in the context of self-defence.

The United Kingdom relied (Written Statement, para. 3.40) on a view expressed by Judge Ago in his addendum to the Eighth Report on State Responsibility, to the effect that:

> "The action needed to halt and repulse the attack may well have to assume dimensions disproportionate to those of the attack suffered. What matters in this respect is the result to be achieved by the 'defensive' action, and not the forms, substance and strength of the action itself."[153]

Ago is here stressing that the defensive action must always be related to its purpose, that of halting and repelling the attack. As he observes, in the same paragraph:

> "The requirement of the *proportionality* of the action taken in self-defence . . . concerns the relationship between that action and its purpose, namely . . . that of halting and repelling the attack."

That purpose is to halt and repulse the attack, not to exterminate the aggressor, or to commit genocide of its population. His reference to forms, substance and strength is expressly set out by him, within the context of this purpose, and cannot be read as setting at nought all the other requirements of humanitarian law such as those relating to damage to neutral States, unnecessary suffering, or the principle of discrimination. The statement of so eminent a jurist cannot be read in the sense of neutralizing the classic and irreducible requirements of the *jus in bello* — requirements which, moreover, had received massive endorsement from

[153] *Yearbook of the International Law Commission*, 1980, Vol. II, Part I, p. 69, para. 121.

the Institute of International Law over which he was later to preside with such distinction. The Edinburgh Session of 1969 adopted by a majority of 60 to 1, with 2 abstentions, the resolution[154] prohibiting weapons affecting indiscriminately both military and non-military objects, both armed forces and civilian populations, and weapons designed to terrorize the civilian population. Ago himself was a member of that majority.

The second submission calling for attention is the suggestion that Security Council resolution 984 (1995) (United Kingdom Written Statement, para. 3.42 and Annex D) in some way endorses the view that the use of nuclear weapons, in response to an armed attack, should not be regarded as necessarily unlawful.

A careful perusal of the resolution shows that it reassures the non-nuclear-weapon States that the Security Council and the nuclear-weapon States will act immediately in the event that such States are victims of nuclear aggression. It *avoids any mention whatsoever* of the measures to be adopted to protect the victim. Had such been the intention, and had such use of nuclear weapons been legal, this was the occasion *par excellence* for the Security Council to have said so.

For the sake of completeness, it should here be pointed out that, even if the Security Council had expressly endorsed the use of such weapons, it is this Court which is the ultimate authority on questions of legality, and that such an observation, even if made, would not prevent the Court from making its independent pronouncement on this matter.

The third factor calling for mention is that much of the argument of those opposing illegality seems to blur the distinction between the *jus ad bellum* and the *jus in bello*. Whatever be the merits or otherwise of resorting to the use of force (the province of the *jus ad bellum*), when once the domain of force is entered, the governing law in that domain is the *jus in bello*. The humanitarian laws of war take over and govern all who participate, assailant and victim alike. The argument before the Court has proceeded as though, once the self-defence exception to the prohibition of the use of force comes into operation, the applicability of the *jus in bello* falls away. This supposition is juristically wrong and logically untenable. The reality is, of course, that while the *jus ad bellum* only opens the door to the use of force (in self-defence or by the Security Council), whoever enters that door must function subject to the *jus in bello*. The contention that the legality of the use of force justifies a breach of humanitarian law is thus a total non-sequitur.

* * *

[154] Already noted in Section III.11 above.

Upon a review therefore, no exception can be made to the illegality of the use of nuclear weapons merely because the weapons are used in self-defence.

Collective self-defence, where another country has been attacked, raises the same issues as are discussed above.

Anticipatory self-defence — the pre-emptive strike before the enemy has actually attacked — cannot legally be effected by a nuclear strike, for a first strike with nuclear weapons would axiomatically be prohibited by the basic principles already referred to. In the context of non-nuclear weaponry, all the sophistication of modern technology and the precise targeting systems now developed would presumably be available for this purpose.

V. Some General Considerations

1. Two Philosophical Perspectives

This opinion has set out a multitude of reasons for the conclusion that the resort to nuclear weapons for any purpose entails the risk of the destruction of human society, if not of humanity itself. It has also pointed out that any rule permitting such use is inconsistent with international law itself.

Two philosophical insights will be referred to in this section — one based on rationality, and the other on fairness.

In relation to the first, all the postulates of law presuppose that they contribute to and function within the premise of the continued existence of the community served by that law. Without the assumption of that continued existence, no rule of law and no legal system can have any claim to validity, however attractive the juristic reasoning on which it is based. That taint of invalidity affects not merely the particular rule. The legal system, which accommodates that rule, itself collapses upon its foundations, for legal systems are postulated upon the continued existence of society. Being part of society, they must themselves collapse with the greater entity of which they are a part. This assumption, lying at the very heart of the concept of law, often recedes from view in the midst of the nuclear discussion.

Without delving in any depth into philosophical discussions of the nature of law, it will suffice for present purposes to refer briefly to two tests proposed by two pre-eminent thinkers about justice of the present era — H. L. A. Hart and John Rawls.

Hart, a leading jurist of the positivistic school, has, in a celebrated exposition of the minimum content of natural law, formulated this principle pithily in the following sentence:

> "We are committed to it as something presupposed by the terms

> of the discussion; for our concern is with social arrangements for continued existence, not with those *of a suicide club*."[155]

His reasoning is that:

> "there are certain rules of conduct which any social organization must contain if it is to be viable. Such rules do in fact constitute a common element in the law and conventional morality of all societies which have progressed to the point where these are distinguished as different forms of social control."[156]

International law is surely such a social form of control devised and accepted by the constituent members of that international society — the nation States.

Hart goes on to note that:

> "Such universally recognized principles of conduct which have a basis in elementary truths concerning human beings, their natural environment, and aims, may be considered the *minimum content* of Natural Law, in contrast with the more grandiose and more challengeable constructions which have often been proffered under that name."[157]

Here is a recognized minimum accepted by positivistic jurisprudence which questions some of the more literal assumptions of other schools. We are down to the common denominator to which all legal systems must conform.

To approach the matter from another standpoint, the members of the international community have for the past three centuries been engaged in the task of formulating a set of rules and principles for the conduct of that society — the rules and principles we call international law. In so doing, they must ask themselves whether there is a place in that set of rules for a rule under which it would be legal, for whatever reason, to eliminate members of that community or, indeed, the entire community itself. Can the international community, which is governed by that rule, be considered to have given its acceptance to that rule, whatever be the approach of that community — positivist, natural law, or any other? Is the community of nations, to use Hart's expression a "suicide club"?

This aspect has likewise been stressed by perceptive jurists from the non-nuclear countries who are alive to the possibilities facing their countries in conflicts between other States in which, though they are not parties, they can be at the receiving end of the resulting nuclear devastation. Can international law, which purports to be a legal system for the

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[155] H. L. A. Hart, *The Concept of Law*, 1961, p. 188; emphasis added.
[156] *Ibid.*
[157] *Ibid.*, p. 189; emphasis added.

entire global community, accommodate any principles which make possible the destruction of their communities?

> "No legal system can confer on any of its members the right to annihilate the community which engenders it and whose activities it seeks to regulate. In other words, there cannot be a *legal* rule, which *permits* the threat or use of nuclear weapons. In sum, nuclear weapons are an unprecedented event which calls for rethinking the self-understanding of traditional international law. Such rethinking would reveal that the question is not whether one interpretation of existing laws of war prohibits the threat or use of nuclear weapons and another permits it. Rather, the issue is whether the debate can take place at all in the world of law. The question is in fact one which cannot be legitimately addressed by law at all since it cannot tolerate an interpretation which negates its very essence. The end of law is a rational order of things, with survival as its core, whereas nuclear weapons eliminate all hopes of realising it. In this sense, nuclear weapons are unlawful by definition."[158]

The aspect stressed by Hart that the proper end of human activity is survival is reflected also in the words of Nagendra Singh, a former President of this Court, who stated, in his pioneering study of nuclear weapons, that:

> "It would indeed be arrogant for any single nation to argue that to save humanity from bondage it was thought necessary to destroy humanity itself . . . No nation acting on its own has a right to destroy its kind, or even to destroy thousands of miles of land and its inhabitants in the vain hope that a crippled and suffering humanity — a certain result of nuclear warfare — was a more laudable objective than the loss of human dignity — an uncertain result which may or may not follow from the non-use of nuclear weapons."[159]

Nagendra Singh expressed the view, in the same work, that "resort to such weapons is not only incompatible with the laws of war, but irreconcilable with international law itself"[160].

Another philosophical approach to the matter is along the lines of the "veil of ignorance" posited by John Rawls in his celebrated study of justice as fairness[161].

If one is to devise a legal system under which one is prepared to live, this exposition posits as a test of fairness of that system that its members

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[158] B. S. Chimni, "Nuclear Weapons and International Law: Some Reflections", in *International Law in Transition: Essays in Memory of Judge Nagendra Singh*, 1992, p. 142; emphasis added.

[159] Nagendra Singh, *Nuclear Weapons and International Law*, 1959, pp. 242-243.

[160] *Ibid.*, p. 17.

[161] John Rawls, *A Theory of Justice*, 1972.

would be prepared to accept it if the decision had to be taken behind a veil of ignorance as to the future place of each constituent member within that legal system.

A nation considering its allegiance to such a system of international law, and not knowing whether it would fall within the group of nuclear nations or not, could scarcely be expected to subscribe to it if it contained a rule by which legality would be accorded to the use of a weapon by others which could annihilate it. Even less would it consent if it is denied even the right to possess such a weapon and, least of all if it could be annihilated or irreparably damaged in the quarrels of others to which it is not in any way a party.

One would indeed be in a desirable position in the event that it was one's lot to become a member of the nuclear group but, if there was a chance of being cast into the non-nuclear group, would one accept such a legal system behind a veil of ignorance as to one's position? Would it make any difference if the members of the nuclear group gave an assurance, which no one could police, that they would use the weapon only in extreme emergencies? The answers to such questions cannot be in doubt. By this test of fairness and legitimacy, such a legal system would surely fail.

Such philosophical insights are of cardinal value in deciding upon the question whether the illegality of use would constitute a minimum component of a system of international law based on rationality or fairness. By either test, widely accepted in the literature of modern jurisprudence, the rule of international law applicable to nuclear weapons would be that their use would be impermissible.

Fundamental considerations such as these tend to be overlooked in discussions relating to the legality of nuclear weapons. On matter so intrinsic to the validity of the entire system of international law, such perspectives cannot be ignored.

2. The Aims of War

War is never an end in itself. It is only a means to an end. This was recognized in the St. Petersburg Declaration of 1868, already noted (in Section III.3 on humanitarian law), which stipulated that the weakening of the military forces of the enemy was the only legitimate object of war. Consistently with this principle, humanitarian law has worked out the rule, already referred to, that "The right of belligerents to adopt means of injuring the enemy is not unlimited" (Article 22 of the Hague Rules, 1907).

All study of the laws of war becomes meaningless unless it is anchored to the ends of war, for thus alone can the limitations of war be seen in their proper context. This necessitates a brief excursus into the philosophy of the aims of war. Literature upon the subject has existed for upwards of twenty centuries.

Reference has already been made, in the context of hyperdestructive weapons, to the classical Indian tradition reflected in India's greatest epics, the *Ramayana* and the *Mahabharatha*. The reason behind the prohibition was that the weapon went beyond the purposes of war.

This was precisely what Aristotle taught when, in Book VII of *Politics*, he wrote that, "War must be looked upon simply as a means to peace."[162] It will be remembered that Aristotle was drawing a distinction between actions that are no more than necessary or useful, and actions which are good in themselves. Peace was good in itself, and war only a means to this end. Without the desired end, namely peace, war would therefore be meaningless and useless. Applying this to the nuclear scenario, a war which destroys the other party is totally lacking in meaning and utility, and hence totally lacks justification. Aristotle's view of war was that it is a temporary interruption of normalcy, with a new equilibrium resulting from it when that war inevitably comes to an end.

The philosophy of the balance of power which dominated European diplomacy since the Peace of Utrecht in 1713 presupposed not the elimination of one's adversary, but the achievement of a workable balance of power in which the vanquished had a distinct place. Even the extreme philosophy that war is a continuation of the processes of diplomacy, which Clausewitz espoused, presupposed the continuing existence, as a viable unit, of the vanquished nation.

The United Nations Charter itself is framed on the basic principle that the use of force is outlawed (except for the strictly limited exception of self-defence), and that the purpose of the Charter is to free humanity from the scourge of war. Peace between the parties is the outcome the Charter envisages and not the total devastation of any party to the conflict.

Nuclear weapons render these philosophies unworkable. The nuclear exchanges of the future, should they ever take place, will occur in a world in which there is no monopoly of nuclear weapons. A nuclear war will not end with the use of a nuclear weapon by a single power, as happened in the case of Japan. There will inevitably be a nuclear exchange, especially in a world in which nuclear weapons are triggered for instant and automatic reprisal in the event of a nuclear attack.

Such a war is not one in which a nation, as we know it, can survive as a viable entity. The spirit that walks the nuclear wasteland will be a spirit of total despair, haunting victors (if there are any) and vanquished alike. We have a case here of methodology of warfare which goes beyond the purposes of war.

[162] Aristotle, *Politics*, trans. John Warrington, Heron Books, 1934, p. 212.

3. The Concept of a "Threat of Force" under the United Nations Charter

The question asked by the General Assembly relates to the use of force and the threat of force. Theoretically, the use of force, even with the simplest weapon, is unlawful under the United Nations Charter. There is no purpose therefore in examining whether the use of force with a nuclear weapon is contrary to international law. When even the use of a single rifle is banned, it makes little sense to enquire whether a nuclear weapon is banned.

The question of a threat of force, within the meaning of the Charter, needs some attention. To determine this question, an examination of the concept of threat of force in the Charter becomes necessary.

Article 2 (4) of the United Nations Charter outlaws threats against the territorial integrity or political independence of any State. As reaffirmed in the Declaration on Principles of International Law Concerning Friendly Relations 1970:

> "Such a threat or use of force constitutes a violation of international law and the Charter of the United Nations and shall never be employed as a means of settling international issues." (General Assembly resolution 2625 (XXV).)

Other documents confirming the international community's understanding that threats are outside the pale of international law include the 1965 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty (General Assembly resolution 2131 (XX)), and the 1987 Declaration on the Enhancement of the Principle of Non-Use of Force (General Assembly resolution 42/22, para. 2).

It is to be observed that the United Nations Charter draws no distinction between the use of force and the threat of force. Both equally lie outside the pale of action within the law.

Numerous international documents confirm the prohibition on the threat of force without qualification. Among these are the 1949 Declaration on Essentials of Peace (General Assembly resolution 290 (IV)); the 1970 Declaration on the Strengthening of International Security (General Assembly resolution 2734 (XXV)); and the 1988 Declaration on the Prevention and Removal of Disputes and Situations Which May Threaten International Peace and Security and on the Role of the United Nations in This Field (General Assembly resolution 43/51). The Helsinki Final Act (1975) requires participating States to refrain from the threat or use of force. The Pact of Bogotá (the American Treaty on Pacific Settlement) is even more specific, requiring the contracting parties to "refrain from the threat or the use of force, or from any other means of coercion for the settlement of their controversies . . .".

The principle of non-use of threats is thus as firmly grounded as the principle of non-use of force and, in its many formulations, it has not been made subject to any exceptions. If therefore deterrence is a form of threat, it must come within the prohibitions of the use of threats.

A more detailed discussion follows in Section VII.2 of the concept of deterrence.

4. Equality in the Texture of the Laws of War

There are some structural inequalities built into the current international legal system, but the substance of international law — its corpus of norms and principles — applies equally to all. Such equality of all those who are subject to a legal system is central to its integrity and legitimacy. So it is with the body of principles constituting the corpus of international law. Least of all can there be one law for the powerful and another law for the rest. No domestic system would accept such a principle, nor can any international system which is premised on a concept of equality.

In the celebrated words of the United States Chief Justice John Marshall in 1825,

> "No principle of general law is more universally acknowledged than the perfect equality of nations. Russia and Geneva have equal rights."[163]

As with all sections of the international legal system, the concept of equality is built into the texture of the laws of war.

Another anomaly is that if, under customary international law, the *use* of the weapon is legal, this is inconsistent with the denial, to 180 of the 185 Members of the United Nations, of even the right to *possession* of this weapon. Customary international law cannot operate so unequally, especially if, as is contended by the nuclear powers, the use of the weapon is essential to their self-defence. Self-defence is one of the most treasured rights of States and is recognized by Article 51 of the United Nations Charter as the inherent right of every Member State of the United Nations. It is a wholly unacceptable proposition that this right is granted in different degrees to different Members of the United Nations family of nations.

[163] *The Antelope* case, [1825] 10 *Wheaton*, p. 122. Cf. Vattel, "A dwarf is as much a man as a giant is; a small republic is no less a sovereign state than the most powerful Kingdom." (*Droit des gens*, Fenwick trans. in *Classics of International Law*, S. 18.)

De facto inequalities always exist and will continue to exist so long as the world community is made up of sovereign States, which are necessarily unequal in size, strength, wealth and influence. But a great conceptual leap is involved in translating *de facto* inequality into inequality *de jure*. It is precisely such a leap that is made by those arguing, for example, that when the Protocols to the Geneva Conventions did not pronounce on the prohibition of the use of nuclear weapons, there was an implicit recognition of the legality of their use by the nuclear powers. Such silence meant an agreement not to deal with the question, not a consent to legality of use. The "understandings" stipulated by the United States and the United Kingdom that the rules established or newly introduced by the 1977 Additional Protocol to the four 1949 Geneva Conventions would not regulate or prohibit the use of nuclear weapons do not undermine the basic principles which antedated these formal agreements and received expression in them. They rest upon no conceptual or juristic reason that can make inroads upon those principles. It is conceptually impossible to treat the silence of these treaty provisions as overruling or overriding these principles.

Similar considerations apply to the argument that treaties imposing partial bans on nuclear weapons must be interpreted as a current acceptance, by implication, of their legality.

This argument is not well founded. Making working arrangements within the context of a situation one is powerless to avoid is neither a consent to that situation, nor a recognition of its legality. It cannot confer upon that situation a status of recognition of its validity. Malaysia offered in this context the analogy of needle exchange programmes to minimize the spread of disease among drug users. Such programmes cannot be interpreted as rendering drug abuse legal (Written Comments, p. 14). What is important is that, amidst the plethora of resolutions and declarations dealing with nuclear weapons, there is not one which sanctions the use of such weapons for any purpose whatsoever.

A legal rule would be inconceivable that some nations alone have the right to use chemical or bacteriological weapons in self-defence, and others do not. The principle involved, in the claim of some nations to be able to use nuclear weapons in self-defence, rests on no different juristic basis.

Another feature to be considered in this context is that the community of nations is by very definition a voluntarist community. No element in it imposes constraints upon any other element from above. Such a structure is altogether impossible except on the basic premise of equality. Else "the

danger is very real that the law will become little more than the expression of the will of the strongest"[164].

If the corpus of international law is to retain the authority it needs to discharge its manifold and beneficent functions in the international community, every element in its composition should be capable of being tested at the anvil of equality. Some structural inequalities have indeed been built into the international constitutional system, but that is a very different proposition from introducing inequalities into the corpus of substantive law by which all nations alike are governed.

It scarcely needs mention that whatever is stated in this section is stated in the context of the total illegality of the use of nuclear weapons by any powers whatsoever, in any circumstances whatsoever. That is the only sense in which the principle of equality which underlies international law can be applied to the important international problem of nuclear weapons.

5. The Logical Contradiction of a Dual Régime in the Laws of War

If humanitarian law is inapplicable to nuclear weapons, we face the logical contradiction that the laws of war are applicable to some kinds of weapons and not others, while both sets of weapons can be simultaneously used. One set of principles would apply to all other weapons and another set to nuclear weapons. When both classes of weapons are used in the same war, the laws of armed conflict would be in confusion and disarray.

Japan is a nation against which both sets of weapons were used, and it is not a matter for surprise that this aspect seems first to have caught the attention of Japanese scholars. Professor Fajita, in an article to which we were referred, observed:

> "this separation of fields of regulation between conventional and nuclear warfare will produce an odd result not easily imaginable, because conventional weapons and nuclear weapons will be eventually used at the same time, and in the same circumstances in a future armed conflict"[165].

Such a dual régime is inconsistent with all legal principle, and no reasons of principle have ever been suggested for the exemption of nuclear weapons from the usual régime of law applicable to all weapons. The reasons that have been suggested are only reasons of politics or of expediency, and neither a court of law nor any body of consistent juristic science can accept such a dichotomy.

It is of interest to note in this context that even nations denying the

[164] Weston, *op. cit.*, p. 254.

[165] *Kansai University Review of Law and Political Science*, 1982, Vol. 3, p. 77.

illegality of nuclear weapons *per se* instruct their armed forces in their military manuals that nuclear weapons are to be judged according to the same standards that apply to other weapons in armed conflict[166].

6. *Nuclear Decision-Making*

A factor to be taken into account in determining the legality of the use of nuclear weapons, having regard to their enormous potential for global devastation, is the process of decision-making in regard to the use of nuclear weapons.

A decision to use nuclear weapons would tend to be taken, if taken at all, in circumstances which do not admit of fine legal evaluations. It will in all probability be taken at a time when passions run high, time is short and the facts are unclear. It will not be a carefully measured decision, taken after a detailed and detached evaluation of all relevant circumstances of fact. It would be taken under extreme pressure and stress. Legal matters requiring considered evaluation may have to be determined within minutes, perhaps even by military rather than legally trained personnel, when they are in fact so complex as to have engaged this Court's attention for months. The fate of humanity cannot fairly be made to depend on such a decision.

Studies have indeed been made of the process of nuclear decision-making and they identify four characteristics of a nuclear crisis[167]. These characteristics are:

(1) the shortage of time for making crucial decisions. This is the fundamental aspect of all crises;
(2) the high stakes involved and, in particular, the expectation of severe loss to the national interest;
(3) the high uncertainty resulting from the inadequacy of clear information, for example, what is going on?, what is the intent of the enemy?; and
(4) the leaders are often constrained by political considerations, restricting their options.

If such is the atmosphere in which leaders are constrained to act, and if they must weigh the difficult question whether it is legal or not in the absence of guidelines, the risk of illegality in the use of the weapon is great.

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[166] See Burns H. Weston, *op. cit.*, p. 252, footnote 105.

[167] See Conn Nugent, "How a Nuclear War Might Begin", in Proceedings of the Sixth World Congress of the International Physicians for the Prevention of Nuclear War, *op. cit.*, p. 117.

The weapon should in my view be declared illegal in *all* circumstances. If it is legal in some circumstances, however improbable, those circumstances need to be specified (or else a confused situation is made more confused still).

VI. The Attitude of the International Community towards Nuclear Weapons

Quite apart from the importance of such considerations as the conscience of humanity and the general principles of law recognized by civilized nations, this section becomes relevant also because the law of the United Nations proceeds from the will of the peoples of the United Nations; and ever since the commencement of the United Nations, there has not been an issue which has attracted such sustained and widespread attention from its community of members. *Apartheid* was one of the great international issues which attracted concentrated attention until recently, but there has probably been a deeper current of continuous concern with nuclear weapons, and a universally shared revulsion at their possible consequences. The floodtide of global disapproval attending the nuclear weapon has never receded and no doubt will remain unabated so long as those weapons remain in the world's arsenals.

1. The Universality of the Ultimate Goal of Complete Elimination

The international community's attitude towards nuclear weapons has been unequivocal — they are a danger to civilization and must be eliminated. The need for their complete elimination has been the subject of several categorical resolutions of the General Assembly, which are referred to elsewhere in this opinion.

The most recent declaration of the international community on this matter was at the 1995 Non-Proliferation Treaty Review Conference which, in its "Principles and Objectives for Nuclear Non-Proliferation and Disarmament", stressed "the ultimate goals of the complete elimination of nuclear weapons and a treaty on general and complete disarmament". This was a unanimous sentiment expressed by the global community and a clear commitment by every nation to do all that it could to achieve the complete elimination of these weapons.

The NPT, far from legitimizing the possession of nuclear weapons, was a treaty for their liquidation and eventual elimination. Its preamble unequivocally called for the liquidation of all existing stockpiles and their elimination from national arsenals. Such continued possession as it envis-

aged was not absolute but subject to an overriding condition — the pursuit in good faith of negotiations on effective measures relating to the cessation of the nuclear arms race at an early date. Inherent in this condition and in the entire treaty was not the acceptance of nuclear weapons, but their condemnation and repudiation. So it was when the NPT entered into force on 5 March 1970 and so it was when the NPT Review and Extension Conference took place in 1995[168].

The NPT Review Conference of 1995 was not new in the universality it embodied or in the strength of the commitment it expressed, but merely a reiteration of the views expressed in the very first resolution of the United Nations in 1945. From the formation of the United Nations to the present day, it would thus be correct to say that there has been a universal commitment to the elimination of nuclear weapons — a commitment which was only a natural consequence of the universal abhorrence of these weapons and their devastating consequences.

2. Overwhelming Majorities in Support of Total Abolition

This view, which cannot be more clearly expressed than it has been in numerous pronouncements of the General Assembly, provides a backdrop to the consideration of the applicable law, which follows.

It is beyond dispute that the preponderant majority of States oppose nuclear weapons and seek their total abandonment.

The very first resolution of the General Assembly, adopted at its Seventeenth Plenary Meeting on 24 January 1946, appointed a Commission whose terms of reference were, *inter alia*, to make specific proposals "for the elimination from national armaments of atomic weapons and of all other major weapons adaptable to mass destruction".

In 1961, at Belgrade, the Non-aligned Heads of State made a clear pronouncement on the need for a global agreement prohibiting all nuclear tests. The non-aligned movement, covering 113 countries from Asia,

[168] Article 4 of Decision No. 2 on the Principles and Objectives for Nuclear Non-Proliferation and Disarmament, adopted by that Conference, stipulated as an obligation of States parties, which was inextricably linked to the extension of the treaty, the following goal, *inter alia*:

> "The determined pursuit by the nuclear-weapon States of systematic and progressive efforts to reduce nuclear weapons globally, with the ultimate goals of eliminating those weapons." (Para. 4 *(c)*.)

Also the Conference on Disarmament was to complete the negotiations for a Comprehensive Nuclear-Test-Ban Treaty no later than 1996 (para. 4 *(a)*).

Africa, Latin America and Europe, comprises within its territories not only the vast bulk of the world's population, but also the bulk of the planet's natural resources and the bulk of its bio-diversity. It has pursued the aim of the abolition of nuclear weapons and consistently supported a stream of resolutions[169] in the General Assembly and other international forums pursuing this objective. The massive majorities of States calling for the Non-Use of Nuclear Weapons can leave little doubt of the overall sentiment of the world community in this regard.

States appearing before the Court have provided the Court with a list of United Nations resolutions and declarations indicating the attitude towards these weapons of the overwhelming majority of that membership. Several of those resolutions do not merely describe the use of nuclear weapons as a violation of international law, but also assert that they are a crime against humanity.

Among these latter are the resolutions on Non-Use of Nuclear Weapons and Prevention of Nuclear War, passed by the General Assembly to this effect in 1978, 1979, 1980 and 1981, were passed with 103, 112, 113 and 121 votes respectively in favour, with 18, 16, 19 and 19 respectively opposing them, and 18, 14, 14 and 6 abstentions respectively. These can fairly be described as massive majorities (see Appendix IV of Malaysian Written Comments).

Resolutions setting the elimination of nuclear weapons as a goal are legion. One State (Malaysia) has, in its Written Comments, listed no less than 49 such resolutions, several of them passed with similar majorities and some with no votes in opposition and only 3 or 4 abstentions. For example, the resolutions on conclusion of effective international arrangements to assure non-nuclear weapon States against the use or threat of use of nuclear weapons of 1986 and 1987 were passed with 149 and 151 votes in favour, none opposed and 4 and 3 abstentions respectively. Such resolutions, adopting a goal of complete elimination, are indicative of a global sentiment that nuclear weapons are inimical to the general interests of the community of nations.

The declarations of the world community's principal representative organ, the General Assembly, may not themselves make law, but when repeated in a stream of resolutions, as often and as definitely as they have been, provide important reinforcement to the view of the impermissibility of the threat or use of such weapons under customary international law. Taken in combination with all the other manifestations of global disapproval of threat or use, the confirmation of the position is strengthened even further. Whether or not some of the General Assembly resolutions are themselves "law making" resolutions is a matter for serious

[169] See footnote 99, above.

consideration, with not inconsiderable scholarly support for such a view[170].

Although the prime thrust for these resolutions came from the non-aligned group, there has been supportive opinion for the view of illegality from States outside this group. Among such States contending for illegality before this Court are Sweden, San Marino, Australia and New Zealand. Moreover, even in countries not asserting the illegality of nuclear weapons, opinion is strongly divided. For example, we were referred to a resolution passed by the Italian Senate, on 13 July 1995, recommending to the Italian Government that they assume a position favouring a judgment by this Court condemning the use of nuclear weapons.

It is to be remembered also that, of the 185 Member States of the United Nations, only five have nuclear weapons and have announced policies based upon them. From the standpoint of the creation of international custom, the practice and policies of five States out of 185 seem to be an insufficient basis on which to assert the creation of custom, whatever be the global influence of those five. As was stated by Malaysia:

> "If the laws of humanity and the dictates of the public conscience demand the prohibition of such weapons, the five nuclear-weapon States, however powerful, cannot stand against them." (CR 95/27, p. 56.)

In the face of such a preponderant majority of States' opinions, it is difficult to say there is no *opinio juris* against the use or threat of use of nuclear weapons. Certainly it is impossible to contend that there is an *opinio juris* in favour of the legality of such use or threat.

3. World Public Opinion

Added to all these official views, there is also a vast preponderance of public opinion across the globe. Strong protests against nuclear weapons have come from learned societies, professional groups, religious denominations, women's organizations, political parties, student federations, trade unions, NGOs and practically every group in which public opinion is expressed. Hundreds of such groups exist across the world. The names that follow are merely illustrative of the broad spread of such organizations: International Physicians for the Prevention of Nuclear War (IPPNW); Medical Campaign Against Nuclear Weapons; Scientists Against Nuclear Arms; People for Nuclear Disarmament; International Association of Lawyers against Nuclear Arms (IALANA); Performers

[170] For example, Brownlie, *Principles of Public International Law*, 4th ed., 1990, p. 14, *re* resolution 1653 (XVI) of 1961, which described the use of nuclear and thermonuclear weapons as such a "law-making resolution".

and Artists for Nuclear Disarmament International; Social Scientists Against Nuclear War; Society for a Nuclear Free Future; European Federation against Nuclear Arms; The Nuclear Age Peace Foundation; Campaign for Nuclear Disarmament; Children's Campaign for Nuclear Disarmament. They come from all countries, cover all walks of life, and straddle the globe.

The millions of signatures received in this Court have been referred to at the very commencement of this opinion.

4. Current Prohibitions

A major area of space on the surface of the planet and the totality of the space above that surface, and of the space below the ocean surface, has been brought into the domain of legal prohibition of the very presence of nuclear weapons. Among treaties accomplishing this result are the 1959 Antarctic Treaty, the 1967 Treaty of Tlatelolco in respect of Latin America and the Caribbean, the 1985 Treaty of Rarotonga in regard to the South Pacific, and the 1996 Treaty of Cairo in regard to Africa. In addition, there is the Treaty prohibiting nuclear weapons in the atmosphere and outer space, and the 1971 Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof (see CR 95/22, p. 50). The major portion of the total area of the space afforded for human activity by the planet is thus declared free of nuclear weapons — a result which would not have been achieved but for universal agreement on the uncontrollable danger of these weapons and the need to eliminate them totally.

5. Partial Bans

The notion of partial bans and reductions in the levels of nuclear arms could not, likewise, have achieved their current results but for the existence of such a globally shared sentiment. Important among these measures are the Partial Test Ban Treaty of 1963 prohibiting the testing of nuclear weapons in the atmosphere, and the Nuclear Non-Proliferation Treaty of 1968. These treaties not only prohibited even the testing of nuclear weapons in certain circumstances, but also provided against the horizontal proliferation of nuclear weapons by imposing certain legal duties upon both nuclear and non-nuclear States. The Comprehensive Test Ban Treaty, now in the course of negotiation, aims at the elimina-

tion of all testing. The START agreements (START I and START II) aim at considerable reductions in the nuclear arsenals of the United States and the Russian Federation reducing their individual stockpiles by around 2,000 weapons annually.

6. Who Are the States Most Specially Concerned?

If the nuclear States are the States most affected, their contrary view is an important factor to be taken into account, even though numerically they constitute a small proportion (around 2.7 per cent) of the United Nations membership of 185 States.

This aspect of their being the States most particularly affected has been stressed by the nuclear powers.

One should not however rush to the assumption that in regard to nuclear weapons the nuclear States are necessarily the States most concerned. The nuclear States possess the weapons, but it would be unrealistic to omit a consideration of those who would be affected once nuclear weapons are used. They would also be among the States most concerned, for their territories and populations would be exposed to the risk of harm from nuclear weapons no less than those of the nuclear powers, if ever nuclear weapons were used. This point was indeed made by Egypt in its presentation (CR 95/23, p. 40).

For probing the validity of the proposition that the nuclear States are the States most particularly affected, it would be useful to take the case of nuclear testing. Suppose a metropolitan power were to conduct a nuclear test in a distant colony, but with controls so unsatisfactory that there was admittedly a leakage of radioactive material. If the countries affected were to protest, on the basis of the illegality of such testing, it would be strange indeed if the metropolitan power attempted to argue that because it was the owner of the weapon, it was the State most affected. Manifestly, the States at the receiving end were those most affected. The position can scarcely be different in actual warfare, seeing that the radiation from a weapon exploding above ground cannot be contained within the target State. It would be quite legitimate for the neighbouring States to argue that they, rather than the owner of the bomb, are the States most affected.

This contention would stand, quite independently of the protests of the State upon whose territory the weapon is actually exploded. The relevance of this latter point is manifest when one considers that of the dozens of wars that have occurred since 1945, scarcely any have been fought on the soil of any of the nuclear powers. This is a relevant circumstance to be considered when the question of States most concerned is examined.

A balanced view of the matter is that no one group of nations — nuclear or non-nuclear — can say that its interests are most specially

affected. Every nation in the world is specially affected by nuclear weapons, for when matters of survival are involved, this is a matter of universal concern.

7. Have States, by Participating in Regional Treaties, Recognized Nuclear Weapons as Lawful?

The United States, the United Kingdom and France have in their written statements taken up the position that by signing a regional treaty such as the Treaty of Tlatelolco prohibiting the use of nuclear weapons in Latin America and the Caribbean, the signatories indicated by implication that there is no general prohibition on the use of nuclear weapons.

The signatories to such treaties are attempting to establish and strengthen a non-proliferation régime in their regions, not because they themselves do not accept the general illegality of nuclear weapons, but because the pro-nuclear States do not.

The position of the regional States is made quite clear by the stance they have adopted in the numerous General Assembly resolutions wherein several of them, for example, Costa Rica, have voted on the basis that the use of nuclear weapons is a crime against humanity, a violation of the United Nations Charter and/or a violation of international law.

Indeed, the language of the Treaty itself gives a clear indication of the attitude of its subscribing parties to the weapon, for it describes it as constituting "an attack on the integrity of the human species", and states that it "ultimately may even render the whole earth uninhabitable".

VII. Some Special Aspects

1. The Non-Proliferation Treaty

An argument has been made that the NPT, by implication, recognizes the legality of nuclear weapons, for all participating States accept without objection the possession of nuclear weapons by the nuclear powers. This argument raises numerous questions, among which are the following:

(i) As already observed, the NPT has no bearing on the question of *use* or *threat of use* of nuclear weapons. Nowhere is the power given to use weapons, or to threaten their use.

(ii) The Treaty was dealing with what may be described as a "winding-down situation". The reality was being faced by the world community that a vast number of nuclear weapons were in existence and that they might proliferate. The immediate object of the world community was to wind down this stockpile of weapons.

As was stressed to the Court by some States in their submissions, the Treaty was worked out against the background of the reality that, whether or not the world community approved of this situation, there were a small number of nuclear States and a vast number of non-nuclear States. The realities were that the nuclear States would not give up their weapons, that proliferation was a grave danger and that everything possible should be done to prevent proliferation, recognizing at the same time the common ultimate goal of the elimination of nuclear weapons.

(iii) As already observed, an acceptance of the inevitability of a situation is not a consent to that situation, for accepting the existence of an undesirable situation one is powerless to prevent is very different to consenting to that situation.

(iv) In this winding-down situation, there can be no hint that the right to possess meant also the right of use or threat of use. If there was a right of possession, it was a temporary and qualified right until such time as the stockpile could be wound down.

(v) The preamble to the Treaty makes it patently clear that its object is:

> "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".

That Preamble, which, it should be noted, represents the unanimous view of all parties, nuclear as well as non-nuclear, describes the use of nuclear weapons in war as a "the devastation that would be visited upon all mankind".

These are clear indications that, far from acknowledging the legitimacy of nuclear weapons, the Treaty was in fact a concentrated attempt by the world community to whittle down such possessions as there already were, with a view to their complete elimination. Such a unanimous recognition of and concerted action towards the elimination of a weapon is quite inconsistent with a belief on the part of the world community of the legitimacy of the continued presence of the weapon in the arsenals of the nuclear powers.

(vi) Even if possession be legitimized by the Treaty, that legitimation is temporary and goes no further than possession. The scope and the language of the Treaty make it plain that it was a temporary state of possession *simpliciter* and nothing more to which they, the signatories, gave their assent — an assent given in exchange for the promise that the nuclear powers would make their utmost efforts to eliminate those weapons which *all* signatories considered so objection-

able that they must be eliminated. There was here no recognition of a *right*, but only of a *fact*. The legality of that fact was not conceded, for else there was no need to demand a *quid pro quo* for it — the *bona fide* attempt by all nuclear powers to make every effort to eliminate these weapons, whose objectionability was the basic premise on which the entire Treaty proceeded.

2. Deterrence

Deterrence has been touched upon in this opinion in the context of the NPT. Yet, other aspects also merit attention, as deterrence bears upon the threat of use, which is one of the matters on which the Court's opinion is sought.

(i) *Meaning of deterrence*

Deterrence means in essence that the party resorting to deterrence is intimating to the rest of the world that it means to *use* nuclear power against any State in the event of the first State being attacked. The concept calls for some further examination.

(ii) *Deterrence — from what?*

Deterrence as used in the context of nuclear weapons is deterrence from an act of *war* — not deterrence from *actions which one opposes*[171].

One of the dangers of the possession of nuclear weapons for purposes of deterrence is the blurring of this distinction and the use of the power the nuclear weapon gives for purposes of deterring unwelcome actions on the part of another State. The argument of course applies to all kinds of armaments, but *a fortiori* to nuclear weapons. As Polanyi observes, the aspect of deterrence that is most feared is the temptation to extend it beyond the restricted aim of deterring war to deterring unwelcome actions[172].

It has been suggested, for example, that deterrence can be used for the protection of a nation's "vital interests". What are vital interests, and who defines them? Could they be merely commercial interests? Could they be commercial interests situated in another country, or a different area of the globe?

Another phrase used in this context is the defence of "strategic interests". Some submissions adverted to the so-called "sub-strategic deterrence", effected through the use of a low-yield "warning shot" when a nation's vital interests are threatened (see, for example, Malaysia's sub-

[171] John Polanyi, *Lawyers and the Nuclear Debate, op. cit.*, p. 19.
[172] *Ibid.*

mission in CR 95/27, p. 53). This opinion will not deal with such types of deterrence, but rather with deterrence in the sense of self-defence against an act of war.

(iii) *The degrees of deterrence*

Deterrence can be of various degrees, ranging from the concept of maximum deterrence, to what is described as a minimum or near-minimum deterrent strategy[173]. Minimum nuclear deterrence has been described as:

> "nuclear strategy in which a nation (or nations) maintains the minimum number of nuclear weapons necessary to inflict unacceptable damage on its adversary even after it has suffered a nuclear attack"[174].

The deterrence principle rests on the threat of *massive* retaliation, and as Professor Brownlie has observed:

> "If put into practice this principle would lead to a lack of proportion between the actual threat and the reaction to it. Such disproportionate reaction does not constitute self-defence as permitted by Article 51 of the United Nations Charter."[175]

In the words of the same author, "the prime object of deterrent nuclear weapons is ruthless and unpleasant retaliation — they are instruments of terror rather than weapons of war"[176].

Since the question posed is whether the use of nuclear weapons is legitimate in *any* circumstances, minimum deterrence must be considered.

(iv) *Minimum deterrence*

One of the problems with deterrence, even of a minimal character, is that actions perceived by one side as defensive can all too easily be perceived by the other side as threatening. Such a situation is the classic backdrop to the traditional arms race, whatever be the type of weapons involved. With nuclear arms it triggers off a nuclear arms race, thus raising a variety of legal concerns. Even minimum deterrence thus leads to counter-deterrence, and to an ever ascending spiral of nuclear armament testing and tension. If, therefore, there are legal objections to deterrence, those objections are not removed by that deterrence being minimal.

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[173] R. C. Karp (ed.), *Security Without Nuclear Weapons? Different Perspectives on Non-Nuclear Security*, 1992, p. 251.

[174] *Ibid.*, p. 250, citing Hollins, Powers and Sommer, *The Conquest of War: Alternative Strategies for Global Security*, 1989, pp. 54-55.

[175] "Some Legal Aspects of the Use of Nuclear Weapons", *op. cit.*, pp. 446-447.

[176] *Ibid.*, p. 445.

(v) *The problem of credibility*

Deterrence needs to carry the conviction to other parties that there is a real intention to use those weapons in the event of an attack by that other party. A game of bluff does not convey that intention, for it is difficult to persuade another of one's intention unless one really has that intention. Deterrence thus consists in a real intention[177] to use such weapons. If deterrence is to operate, it leaves the world of make-believe and enters the field of seriously intended military threats.

Deterrence therefore raises the question not merely whether the threat of use of such weapons is legal, but also whether *use* is legal. Since what is necessary for deterrence is assured destruction of the enemy, deterrence thus comes within the ambit of that which goes beyond the purposes of war. Moreover, in the split second response to an armed attack, the finely graded use of appropriate strategic nuclear missiles or "clean" weapons which cause minimal damage does not seem a credible possibility.

(vi) *Deterrence distinguished from possession*

The concept of deterrence goes a step further than mere possession. Deterrence is more than the mere accumulation of weapons in a storehouse. It means the possession of weapons in a state of readiness for actual use. This means the linkage of weapons ready for immediate take-off, with a command and control system geared for immediate action. It means that weapons are attached to delivery vehicles. It means that personnel are ready night and day to render them operational at a moment's notice. There is clearly a vast difference between weapons stocked in a warehouse and weapons so readied for immediate action. Mere possession and deterrence are thus concepts which are clearly distinguishable from each other.

(vii) *The legal problem of intention*

For reasons already outlined, deterrence becomes not the storage of weapons with intent to terrify, but a stockpiling with *intent to use*. If one intends to use them, all the consequences arise which attach to *intention* in law, whether domestic or international. One *intends* to cause the damage or devastation that will result. The intention to cause damage or devastation which results in total destruction of one's enemy or which might indeed wipe it out completely clearly goes beyond the purposes of

[177] For further discussion of the concept of intention in this context, see *Just War, Non-violence and Nuclear Deterrence*, D. L. Cady and R. Werner (eds.), 1991, pp. 193-205.

war[178]. Such intention provides the mental element implicit in the concept of a threat.

However, a secretly harboured intention to commit a wrongful or criminal act does not attract legal consequences, unless and until that intention is followed through by corresponding conduct. Hence such a secretly harboured intention may not be an offence. If, however, the intention is announced, whether directly or by implication, it then becomes the criminal act of threatening to commit the illegal act in question.

Deterrence is by definition the very opposite of a secretly harboured intention to use nuclear weapons. Deterrence is not deterrence if there is no communication, whether by words or implication, of the serious intention to *use* nuclear weapons. It is therefore nothing short of a *threat* to use. If an act is wrongful, the threat to commit it and, more particularly, a publicly announced threat, must also be wrongful.

(viii) *The temptation to use the weapons maintained for deterrence*

Another aspect of deterrence is the temptation to use the weapons maintained for this purpose. The Court has been referred to numerous instances of the possible use of nuclear weapons of which the Cuban Missile Crisis is probably the best known. A study based on Pentagon documents, to which we were referred, lists numerous such instances involving the possibility of nuclear use from 1946 to 1980[179].

(ix) *Deterrence and sovereign equality*

This has already been dealt with. Either all nations have the right to self-defence with any particular weapon or none of them can have it — if the principle of equality in the right of self-defence is to be recognized. The first alternative is clearly impossible and the second alternative must then become, necessarily, the only option available.

The comparison already made with chemical or bacteriological weapons highlights this anomaly, for the rules of international law must

[178] For the philosophical implications of deterrence, considered from the point of view of natural law, see Cady and Werner, *op. cit.*, pp. 207-219. See, also, John Finnis, Joseph Boyle and Germain Grisez, *Nuclear Deterrence, Morality and Realism*, 1987. Other works which present substantially the same argument are Anthony Kenny, *The Logic of Deterrence*, 1985, and *The Ivory Tower*, 1985; Roger Ruston, *Nuclear Deterrence — Right or Wrong?*, 1981, and "Nuclear Deterrence and the Use of the Just War Doctrine", in Blake and Pole (eds.), *Objections to Nuclear Defense*, 1984.

[179] Michio Kaku and Daniel Axelrod, *To Win a Nuclear War*, 1987, p. 5; CR 95/27, p. 48.

operate uniformly across the entire spectrum of the international community. No explanation has been offered as to why nuclear weapons should be subject to a different régime.

(x) *Conflict with the St. Petersburg principle*

As already observed, the Declaration of St. Petersburg, followed and endorsed by numerous other documents (see Section III.3 above) declared that weakening the military forces of the enemy is the only legitimate object which States should endeavour to accomplish during war (on this aspect, see Section V.2 above). Deterrence doctrine aims at far more — it aims at the destruction of major urban areas and centres of population and even goes so far as "mutually assured destruction". Especially during the Cold War, missiles were, under this doctrine, kept at the ready, targeting many of the major cities of the contending powers. Such policies are a far cry from the principles solemnly accepted at St. Petersburg and repeatedly endorsed by the world community.

3. Reprisals

The Court has not in its Opinion expressed a view in regard to the acceptance of the principle of reprisals in the corpus of modern international law. I regret that the Court did not avail itself of this opportunity to confirm the unavailability of reprisals under international law at the present time, whether in time of peace or in war.

I wish to make it clear that I do not accept the lawfulness of the right to reprisals as a doctrine recognized by contemporary international law.

Does the concept of reprisals open up a possible exception to the rule that action in response to an attack is, like all other military action, subject to the laws of war?

The Declaration concerning Principles of Friendly Relations and Co-operation among States (resolution 2625 (XXV) of 1970) categorically asserted that "States have a duty to refrain from acts of reprisal involving the use of force".

Professor Bowett puts the proposition very strongly in the following passage:

> "Few propositions about international law have enjoyed more support than the proposition that, under the Charter of the United Nations, the use of force by way of reprisals is illegal. Although, indeed, the words 'reprisals' and 'retaliation' are not to be found in the Charter, this proposition was generally regarded by writers and by the Security Council as the logical and necessary consequence of

> the prohibition of force in Article 2 (4), the injunction to settle disputes peacefully in Article 2 (3) and the limiting of permissible force by states to self-defense." [180]

While this is an unexceptionable view, it is to be borne in mind, further, that nuclear weapons raise special problems owing to the magnitude of the destruction that is certain to accompany them. In any event, a doctrine evolved for an altogether different scenario of warfare can scarcely be applied to nuclear weapons without some re-examination.

Professor Brownlie addresses this aspect in the following terms:

> "In the first place, it is hardly legitimate to extend a doctrine related to the minutiae of the conventional theatre of war to an exchange of power which, in the case of the strategic and deterrent uses of nuclear weapons, is equivalent to the total of war effort and is the essence of the war aims." [181]

These strong legal objections to the existence of a right of reprisal are reinforced also by two other factors — the conduct of the party indulging in the reprisals and the conduct of the party against whom the reprisals are directed.

The action of the party indulging in the reprisals needs to be a measured one, for its only legitimate object is as stated above. Whatever tendency there may be to unleash all its nuclear power in anger or revenge needs to be held strictly in check. It is useful to note in this connection the observation of Oppenheim who, after reviewing a variety of historical examples, concludes that:

> "reprisals instead of being a means of securing legitimate warfare may become an effective instrument of its wholesale and cynical violation in matters constituting the very basis of the law of war" [182].

The historical examples referred to relate, *inter alia*, to the extreme atrocities sought to be justified under the principle of retaliation in the Franco-German War, the Boer War, World War I and World War II [183]. They all attest to the brutality, cynicism and lack of restraint in the use of power which it is the object of the laws of war to prevent. Such shreds of

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[180] D. Bowett, "Reprisals Involving Recourse to Armed Force", *American Journal of International Law*, 1972, Vol. 66, p. 1, quoted in Weston, Falk and D'Amato, *International Law and World Order*, 1980, p. 910.

[181] "Some Legal Aspects of the Use of Nuclear Weapons", *op. cit.*, p. 445.

[182] *Op. cit.*, Vol. II, p. 565.

[183] *Ibid*, pp. 563-565.

the right to retaliation as might have survived the development of the laws of war are all rooted out by the nature of the nuclear weapon, as discussed in this opinion.

If history is any guide, the party indulging in reprisals will in practice use such "right of reprisal" — if indeed there is such a right — in total disregard of the purpose and limits of retaliation — namely, the limited purpose of ensuring compliance with the laws of war.

Turning next to the conduct of the party against whom the right is exercised — a party who already has disregarded the laws of war — that party would only be stimulated to release all the nuclear power at its disposal in response to that retaliation — unless, of course, it has been totally destroyed.

In these circumstances, any invitation to this Court to enthrone the legitimacy of nuclear reprisal for a nuclear attack is an invitation to enthrone a principle that opens the door to arbitrariness and lack of restraint in the use of nuclear weapons.

The sole justification, if any, for the doctrine of reprisals is that it is a means of securing legitimate warfare. With the manifest impossibility of that objective in relation to nuclear weapons, the sole reason for this alleged exception vanishes. *Cessante ratione legis, cessat ipsa lex.*

4. Internal Wars

The question asked of the Court relates to the use of nuclear weapons in *any* circumstance. The Court has observed that it is making no observation on this point. It is my view that the use of the weapon is prohibited in *all* circumstances.

The rules of humanity which prohibit the use of the weapon in external wars do not begin to take effect only when national boundaries are crossed. They must apply internally as well.

Article 3 which is common to the four Geneva Conventions applies to all armed conflicts of a non-international character and occurring in the territory of one of the Powers parties to the Convention. Protocol II of 1977 concerning internal wars is couched in terms similar to the Martens Clause, and refers to "the principles of humanity and to the dictates of public conscience".

Thus international law makes no difference in principle between internal and external populations.

Moreover, if nuclear weapons are used internally by a State, it is clear from the foregoing analysis of the effects of nuclear weapons that the effects of such internal use cannot be confined internally. It will produce widespread external effects, as Chernobyl has demonstrated.

5. *The Doctrine of Necessity*

Does the doctrine of necessity offer a principle under which the use of nuclear weapons might be permissible in retaliation for an illegitimate act of warfare?

There is some support for the principle of necessity among the older writers, especially those of the German school[184], who expressed this doctrine in terms of the German proverb *"Kriegsraeson geht vor Kriegsmanier"* ("necessity in war overrules the manner of warfare"). However, some German writers did not support this view and in general it did not have the support of English, French, Italian and American publicists[185].

According to this doctrine, the laws of war lose their binding force when no other means, short of the violation of the laws of war, will offer an escape from the extreme danger caused by the original unlawful act.

However, the origins of this principle, such as it is, go back to the days when there were no *laws* of war, but rather *usages* of war, which had not yet firmed into laws accepted by the international community as binding.

The advance achieved in recognition of these principles as binding laws, ever since the Geneva Convention of 1864, renders untenable the position that they can be ignored at the will, and in the sole unilateral judgment, of one party. Even well before World War I, authoritative writers such as Westlake strenuously denied such a doctrine[186] and, with the new and extensive means of destruction — particularly submarine and aerial — which emerged in World War I, the doctrine became increasingly dangerous and inapplicable. With the massive means of destruction available in World War II, the desuetude of the doctrine was even further established.

Decisions of war crimes tribunals of that era attest to the collapse of that doctrine, if indeed it had ever existed. The case of the *Peleus*[187] relating to submarine warfare, decided by a British military court; the *Milch* case[188], decided by the United States Military Tribunal at Nuremberg; and the *Krupp* case[189], where the tribunal addressed the question of grave economic necessity, are all instances of a judicial rejection of that doctrine in no uncertain terms[190].

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[184] See the list of German authors cited by Oppenheim, *op. cit.*, Vol. II, p. 231, footnote 6.

[185] *Ibid.*, p. 232.

[186] Westlake, *International Law*, 2nd ed., 1910-1913, pp. 126-128; *The Collected Papers of John Westlake on Public International Law*, ed. L. Oppenheim, 1914, p. 243.

[187] *War Crimes Reports*, 1946, i, pp. 1-16.

[188] *War Crimes Trials*, 1948, 7, pp. 44, 65.

[189] *Ibid.*, 1949, 10, p. 138.

[190] See, on these cases, Oppenheim, *op. cit.*, pp. 232-233.

The doctrine of necessity opens the door to revenge, massive devastation and, in the context of nuclear weapons, even to genocide. To the extent that it seeks to override the principles of the laws of war, it has no place in modern international law.

In the words of a United States scholar:

> "where is the military necessity in incinerating entire urban populations, defiling the territory of neighboring and distant neutral countries, and ravaging the natural environment for generations to come . . .? . . . If so, then we are witness to the demise of Nuremberg, the triumph of *Kriegsraison*, the virtual repudiation of the humanitarian rules of armed conflict . . . The very meaning of 'proportionality' becomes lost, and we come dangerously close to condoning the crime of genocide, that is, a military campaign directed more towards the extinction of the enemy than towards the winning of a battle or conflict."[191]

6. Limited or Tactical or Battlefield Nuclear Weapons

Reference has already been made to the contention, by those asserting legality of use, that the inherent dangers of nuclear weapons can be minimized by resort to "small" or "clean" or "low yield" or "tactical" nuclear weapons. This factor has an important bearing upon the legal question before the Court, and it is necessary therefore to examine in some detail the acceptability of the contention that limited weapons remove the objections based upon the destructiveness of nuclear weapons.

The following are some factors to be taken into account in considering this question:

(i) No material has been placed before the Court demonstrating that there is in existence a nuclear weapon which does not emit radiation, does not have a deleterious effect upon the environment, and does not have adverse health effects upon this and succeeding generations. If there were indeed a weapon which does not have any of the singular qualities outlined earlier in this opinion, it has not been explained why a conventional weapon would not be adequate for the purpose for which such a weapon is used. We can only deal with nuclear weapons as we know them.

[191] Burns H. Weston, "Nuclear Weapons versus International Law: A Contextual Reassessment", *McGill Law Journal*, 1983, Vol. 28, p. 578.

(ii) The practicality of small nuclear weapons has been contested by high military[192] and scientific[193] authority.

(iii) Reference has been made (see Section IV above), in the context of self-defence, to the political difficulties, stated by former American Secretaries of State, Robert McNamara and Dr. Kissinger, of keeping a response within the ambit of what has been described as a limited or minimal response. The assumption of escalation control seems unrealistic in the context of nuclear attack.

(iv) With the use of even "small" or "tactical" or "battlefield" nuclear weapons, one crosses the nuclear threshold. The State at the receiving end of such a nuclear response would not know that the response is a limited or tactical one involving a small weapon and it is not credible to posit that it will also be careful to respond in kind, that is, with a small weapon. The door would be opened and the threshold crossed for an all-out nuclear war.

The scenario here under consideration is that of a limited nuclear response to a nuclear attack. Since, as stated above,

(a) the "controlled response" is unrealistic; and
(b) a "controlled response" by the nuclear power making the first attack to the "controlled response" to its first strike is even more unrealistic,

the scenario we are considering is one of all-out nuclear war, thus rendering the use of the controlled weapon illegitimate.

The assumption of a voluntary "brake" on the recipient's full-scale use of nuclear weapons is, as observed earlier in this opinion, highly fanciful and speculative. Such fanciful speculations provide a very unsafe assumption on which to base the future of humanity.

(v) As was pointed out by one of the States appearing before the Court:

"it would be academic and unreal for any analysis to seek to demonstrate that the use of a single nuclear weapon in particular

[192] General Colin Powell, *A Soldier's Way*, 1995, p. 324:

"No matter how small these nuclear payloads were, we would be crossing a threshold. Using nukes at this point would mark one of the most significant military decisions since Hiroshima. . . . I began rethinking the practicality of those small nuclear weapons."

[193] See *Bulletin of the Atomic Scientists*, May 1985, p. 35, at p. 37, referred to in Malaysian Written Comments, p. 20.

circumstances could be consistent with principles of humanity. The reality is that if nuclear weapons ever were used, this would be overwhelmingly likely to trigger a nuclear war." (Australia, Gareth Evans, CR 95/22, pp. 49-50.)

(vi) In the event of some power readying a nuclear weapon for a strike, it may be argued that a pre-emptive strike is necessary for self-defence. However, if such a pre-emptive strike is to be made with a "small" nuclear weapon which by definition has no greater blast, heat or radiation than a conventional weapon, the question would again arise why a nuclear weapon should be used when a conventional weapon would serve the same purpose.

(vii) The factor of accident must always be considered. Nuclear weapons have never been tried out on the battlefield. Their potential for limiting damage is untested and is as yet the subject of theoretical assurances of limitation. Having regard to the possibility of human error in highly scientific operations — even to the extent of the accidental explosion of a space rocket with all its passengers aboard — one can never be sure that some error or accident in construction may deprive the weapon of its so-called "limited" quality. Indeed, apart from fine gradations regarding the size of the weapon to be used, the very use of any nuclear weapons under the stress of urgency is an area fraught with much potential for accident[194]. The UNIDIR study, just mentioned, emphasizes the "very high risks of escalation once a confrontation starts"[195].

(viii) There is some doubt regarding the "smallness" of tactical nuclear weapons, and no precise details regarding these have been placed before the Court by any of the nuclear powers. Malaysia, on the other hand, has referred the Court to a United States law forbidding "research and development which could lead to the production . . . of a low-yield nuclear weapon" (Written Comments, p. 20), which is defined as having a yield of less than 5 kilotons (Hiroshima and Nagasaki were 15 and 12 kilotons, respectively)[196]. Weapons of this firepower may, in the absence of evidence to the contrary, be presumed to be fraught with all the dangers attendant on nuclear weapons, as outlined earlier in this opinion.

(ix) It is claimed a weapon could be used which could be precisely aimed at a specific target. However, recent experience in the Gulf War has shown that even the most sophisticated or "small" weapons do not always strike their intended target with precision.

[194] See the UNIDIR Study, *Risks of Unintentional Nuclear War, supra.*

[195] *Ibid.*, p. 11.

[196] National Defense Authorization Act for Fiscal Year (FY) 1944, *Public Law*, 103-160, 30 November 1993.

If there should be such error in the case of nuclear weaponry, the consequence would be of the gravest order.

(x) Having regard to WHO estimates of deaths ranging from one million to one billion in the event of a nuclear war which could well be triggered off by the use of the smallest nuclear weapon, one can only endorse the sentiment which Egypt placed before us when it observed that, having regard to such a level of casualties: "even with the greatest miniaturization, such speculative margins of risk are totally abhorrent to the general principles of humanitarian law" (CR 95/23, p. 43).

(xi) Taking the analogy of chemical or bacteriological weapons, no one would argue that because a small amount of such weapons will cause a comparatively small amount of harm, therefore chemical or bacteriological weapons are not illegal, seeing that they can be used in controllable quantities. If, likewise, nuclear weapons are generally illegal, there could not be an exception for "small weapons".

If nuclear weapons are intrinsically unlawful, they cannot be rendered lawful by being used in small quantities or in smaller versions. Likewise, if a State should be attacked with chemical or bacteriological weapons, it seems absurd to argue that it has the right to respond with small quantities of such weapons. The fundamental reason that all such weapons are not permissible, even in self-defence, for the simple reason that their effects go beyond the needs of war, is common to all these weapons.

(xii) Even if — and it has not been so submitted by any State appearing before the Court — there is a nuclear weapon which *totally* eliminates the dissemination of radiation, and which is not a weapon of mass destruction, it would be quite impossible for the Court to define those nuclear weapons which are lawful and those which are unlawful, as this involves technical data well beyond the competence of the Court. The Court must therefore speak of legality in general terms.

The Court's authoritative pronouncement that *all* nuclear weapons are not illegal (i.e., that *every* nuclear weapon is not illegal) would then open the door to those desiring to use, or threaten to use, nuclear weapons to argue that any particular weapon they use or propose to use is within the rationale of the Court's decision. No one could police this. The door would be open to the use of whatever nuclear weapon a State may choose to use.

It is totally unrealistic to assume, however clearly the Court stated its reasons, that a power desiring to use the weapon

would carefully choose those which are within the Court's stated reasoning.

VIII. Some Arguments against the Grant of an Advisory Opinion

1. The Advisory Opinion Would be Devoid of Practical Effects

It has been argued that, whatever may be the law, the question of the use of nuclear weapons is a political question, politically loaded, and politically determined. This may be, but it must be observed that, however political be the question, there is always value in the clarification of the law. It is not ineffective, pointless and inconsequential.

It is important that the Court should assert the law as it is. A decision soundly based on law will carry respect with it by virtue of its own inherent authority. It will assist in building up a climate of opinion in which law is respected. It will enhance the authority of the Court in that it will be seen to be discharging its duty of clarifying and developing the law, regardless of political considerations.

The Court's decision on the illegality of the *apartheid* régime had little prospect of compliance by the offending Government, but helped to create the climate of opinion which dismantled the structure of *apartheid.* Had the Court thought in terms of the futility of its decree, the end of *apartheid* may well have been long delayed, if it could have been achieved at all. The clarification of the law is an end in itself, and not merely a means to an end. When the law is clear, there is a greater chance of compliance than when it is shrouded in obscurity.

The view has indeed been expressed that, in matters involving "high policy", the influence of international law is minimal. However, as Professor Brownlie has observed in dealing with this argument, it would be "better to uphold a prohibition which *may* be avoided in a crisis than to do away with standards altogether"[197].

I would also refer, in this context, to the perceptive observations of Albert Schweitzer, cited at the very commencement of this opinion, on the value of a greater public awareness of the illegality of nuclear weapons.

The Court needs to discharge its judicial role, declaring and clarifying the law as it is empowered and charged to do, undeterred by considerations that pertain to the political realm, which are not its concern.

[197] "Some Legal Aspects of the Use of Nuclear Weapons", *op. cit.*, p. 438, emphasis added.

2. Nuclear Weapons Have Preserved World Peace

It was argued by some States contending for legality that such weapons have played a vital role in support of international security over the last fifty years, and have helped to preserve global peace.

Even if this contention were correct, it makes little impact upon the legal considerations before the Court. The threat of use of a weapon which contravenes the humanitarian laws of war does not cease to contravene those laws of war merely because the overwhelming terror it inspires has the psychological effect of deterring opponents. This Court cannot endorse a pattern of security that rests upon terror. In the dramatic language of Winston Churchill, speaking to the House of Commons in 1955, we would then have a situation where, "Safety will be the sturdy child of terror and survival the twin brother of annihilation." A global régime which makes safety the result of terror and can speak of survival and annihilation as twin alternatives makes peace and the human future dependent on terror. This is not a basis for world order which this Court can endorse. This Court is committed to uphold the rule of law, not the rule of force or terror, and the humanitarian principles of the laws of war are a vital part of the international rule of law which this Court is charged to administer.

A world order dependent upon terror would take us back to the state of nature described by Hobbes in *The Leviathan*, with sovereigns "in the posture of Gladiators; having their weapons pointing and their eyes fixed on one another . . . which is a posture of Warre" [198].

As international law stands at the threshold of another century, with over three centuries of development behind it, including over one century of development of humanitarian law, it has the ability to do better than merely re-endorse the dependence of international law on terror, thus setting the clock back to the state of nature as described by Hobbes, rather than the international rule of law as visualized by Grotius. As between the widely divergent world views of those near contemporaries, international law has clearly a commitment to the Grotian vision; and this case has provided the Court with what future historians may well describe as a "Grotian moment" in the history of international law. I regret that the Court has not availed itself of this opportunity. The failure to note the contradictions between deterrence and international law may also help to prolong the "posture of Warre" described by Hobbes, which is implicit in the doctrine of deterrence.

However, conclusive though these considerations be, the weakness of the argument that deterrence is valuable in that it has preserved world

[198] Thomas Hobbes, *The Leviathan*, ed. James B. Randall, Washington Square Press, 1970, p. 86.

peace does not end here. It is belied by the facts of history. It is well documented that the use of nuclear weapons has been contemplated more than once during the past 50 years. Two of the best-known examples are the Cuban Missile Crisis (1962) and the Berlin Crisis (1961). To these, many more could be added from well-researched studies upon the subject[199]. The world has on such occasions been hovering on the brink of nuclear catastrophe and has, so to speak, held its breath. In these confrontations, often a test of nerves between those who control the nuclear button, anything could have happened, and it is humanity's good fortune that a nuclear exchange has not resulted. Moreover, it is incorrect to speak of the nuclear weapon as having saved the world from wars, when well over 100 wars, resulting in 20 million deaths, have occurred since 1945[200]. Some studies have shown that since the termination of World War II, there have been armed conflicts around the globe every year, with the possible exception of 1968[201], while more detailed estimates show that in the 2,340 weeks between 1945 and 1990, the world enjoyed a grand total of only three that were truly war-free[202].

It is true there has been no global conflagration, but the nuclear weapon has not saved humanity from a war-torn world, in which there exist a multitude of flashpoints with the potential of triggering the use of nuclear weapons if the conflict escalates and the weapons are available. Should that happen, it would bring "untold sorrow to mankind" which it was the primary objective of the United Nations Charter to prevent.

IX. Conclusion

1. The Task before the Court

Reference has been made (in Section VI.3 of this opinion) to the wide variety of groups that have exerted themselves in the anti-nuclear cause — environmentalists, professional groups of doctors, lawyers, scientists, performers and artists, parliamentarians, women's organizations, peace groups, students' federations. They are too numerous to mention. They come from every region and every country.

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[199] For example, *The Nuclear Predicament: A Sourcebook*, D. U Gregory (ed.), 1982.

[200] Ruth Sivard, in *World Military and Social Expenditures, World Priorities*, 1993, p. 20, counts 149 wars and 23 million deaths during this period.

[201] See Charles Allen, *The Savage Wars of Peace: Soldiers' Voices 1945-1989*, 1989.

[202] Alvin and Heidi Toffler, *War and Anti-War: Survival at the Dawn of the 21st Century*, 1993, p. 14.

There are others who have maintained the contrary for a variety of reasons.

Since no authoritative statement of the law has been available on the matter thus far, an appeal has now been made to this Court for an opinion. That appeal comes from the world's highest representative organization on the basis that a statement by the world's highest judicial organization would be of assistance to all the world in this all-important matter.

This request thus gives the International Court of Justice a unique opportunity to make a unique contribution to this unique question. The Opinion rendered by the Court has judicially established certain important principles governing the matter for the first time. Yet it does not go to the full extent which I think it should have.

In this opinion I have set down my conclusions as to the law. While conscious of the magnitude of the issues, I have focused my attention on the law as it *is* — on the numerous principles worked out by customary international law, and humanitarian law in particular, which cover the particular instances of the damage caused by nuclear weapons. As stated at the outset, my considered opinion on this matter is that the use or threat of use of nuclear weapons is incompatible with international law and with the very foundations on which that system rests. I have sought in this opinion to set out my reasons in some detail and to state why the use or threat of use of nuclear weapons is absolutely prohibited by *existing* law — *in all circumstances and without reservation.*

It comforts me that these legal conclusions accord also with what I perceive to be the moralities of the matter and the interests of humanity.

2. The Alternatives before Humanity

To conclude this opinion, I refer briefly to the Russell-Einstein Manifesto, issued on 9 July 1955. Two of the most outstanding intellects of this century, Bertrand Russell and Albert Einstein, each of them specially qualified to speak with authority of the power locked in the atom, joined a number of the world's most distinguished scientists in issuing a poignant appeal to all of humanity in connection with nuclear weapons. That appeal was based on considerations of rationality, humanity and concern for the human future. Rationality, humanity and concern for the human future are built into the structure of international law.

International law contains within itself a section which particularly concerns itself with the humanitarian laws of war. It is in the context of that particular section of that particular discipline that this case is set. It is an area in which the concerns voiced in the Russell-Einstein Manifesto resonate with exceptional clarity.

Here are extracts from that appeal:

> "No one knows how widely such lethal radioactive particles may be diffused, but the best authorities are unanimous in saying that a war with H-bombs might possibly put an end to the human race . . .
>
> . . . We appeal, as human beings, to human beings: Remember your humanity, and forget the rest. If you can do so, the way lies open to a new Paradise; if you cannot, there lies before you the risk of universal death."

Equipped with the necessary array of principles with which to respond, international law could contribute significantly towards rolling back the shadow of the mushroom cloud, and heralding the sunshine of the nuclear-free age.

No issue could be fraught with deeper implications for the human future, and the pulse of the future beats strong in the body of international law. This issue has not thus far entered the precincts of international tribunals. Now that it has done so for the first time, it should be answered — convincingly, clearly and categorically.

(Signed) Christopher Gregory WEERAMANTRY.

Appendix
(Demonstrating danger to neutral States)

COMPARISON OF THE EFFECTS OF BOMBS

A — Lethal area from the blast wave of the blockbusters used in the Second World War.
B — Lethal area from the blast wave of the Hiroshima bomb.
C — Lethal area from the blast wave of a 1-Mt bomb.
D — Lethal area for fallout radiation from a 1-Mt bomb.