

Letter dated 15 June 1995 from counsel appointed by Nauru, together with
Written Statement of the Government of Nauru

15 June 1995

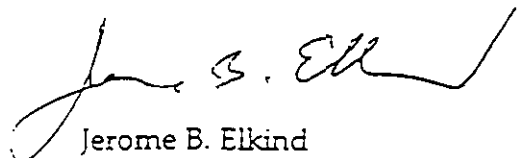
Registrar
International Court of Justice
Peace Palace
2517 KJ The Hague
The Netherlands

Dear Registrar,

Enclosed please find two Responses to Submissions of Other States by the Republic of Nauru in the case concerning *The Legality of the Use of Nuclear Weapons by States in Armed Conflict* and one Memorial in the case concerning the *Legality of the Use and Threat of Use of Nuclear Weapons*.

I understand that the Court has set the date of 30 October as the date for the beginning of oral hearings in the two cases. I would like permission to use a number of witnesses. In the case concerning *The Legality of the Use of Nuclear Weapons by a State in Armed Conflict* I would like to put on the stand a Dr. Frank Barnaby who is a nuclear physicist of repute. I would also like to put on the stand the Mayors of Hiroshima and Nagasaki. In the case concerning the *Legality of the Use and Threat of Use of Nuclear Weapons* I would like to place on the stand Ms. Hilda Lini, former Minister of Health of Vanuatu, Ms. Ligon Eknilang who has experienced the effects of U. S. nuclear tests during Operation Bravo or some other woman from the Pacific who has experienced those effects and Ms. Claudia Peterson who has experienced the effects of nuclear tests in the United States.

Sincerely,



Jerome B. Elkind

INTERNATIONAL COURT OF JUSTICE

LEGALITY OF THE USE OR THREAT OF USE OF NUCLEAR
WEAPONS (REQUEST FOR AN ADVISORY OPINION)

MEMORIAL OF THE GOVERNMENT OF THE REPUBLIC OF
NAURU

MEMORIAL OF THE GOVERNMENT OF THE REPUBLIC OF NAURU

Introduction

Nauru is a small island state in the Pacific Ocean. Nauru believes that peace and freedom from the threat of war is necessary for the social, cultural and economic development of people, both in the Pacific and world wide.

Nauru believes that the threat or use of force is contrary to international law and the development of positive international relations. Nauru has no armed forces, and as such threatens no state with the use of force.

The threat of nuclear weapons

Nauru believes that there is a continuing threat of use of nuclear weapons which must be addressed by the international community.

Despite the end of the cold war the nuclear states have yet to relinquish their policies of first use, use and threat of use of nuclear weapons. In addition, some of the nuclear states have not signed Protocols 1, 2 and 3 of the Treaty of Rarotonga under which they would refrain from using or threatening to use any nuclear devices and from testing or stationing any nuclear devices in the area defined by the Treaty.

The Pacific was the scene of the only hostile use of nuclear weapons and the scene of over 250 nuclear explosions for testing purposes. The nuclear

tests have significantly affected the health of Pacific people, wildlife and the environment, and will continue to do so for generations.

The testing of nuclear weapons in the Pacific from 1946 until 1992 has contaminated numerous islands and large areas of ocean with radiation that has severely affected health and the environment. The U.S. Atomic Energy Commission has called the Marshall Islands "by far one of the most contaminated areas in the world".¹ Miscarriages, still births, cancers, birth deformities and other radiogenic diseases have increased by up to 10 times pre-testing levels in areas closest to the testing.²

A description of some of these effects is given by Lijon Eknilang from the Marshall Islands:

I was seven years old at the time of the Bravo tests on Bikini. I remember that it was early in the morning that I woke up with a bright light in my eyes. I thought someone was burning the house. Soon after we heard a big loud noise, just like thunder and the earth started to move... Then came the fallout. It was white and to us kids we thought it was white soap powder. The kids were playing in the powder and having fun, but later on everyone was sick and we couldn't do anything... My cousin died of tumour cancer in 1960. In 1972 I had another cousin die of leukaemia. Two of my sisters have had thyroid surgery...

And I have had seven miscarriages and still births. Altogether there are eight other women on the island

¹ U.S. Atomic Energy Commission, 54th Meeting of the Advisory Committee on Biology and Medicine, New York, 1956.

² "Radioactive Heaven and Earth; The health and environmental effects of nuclear weapons testing in, on and above the earth." IPPNW, Apex Press, N.Y. 1991.

Independent Survey of Marshallese Women and reproduction, unpublished field report. Statement by Glenn Alcalay before the Presidential Advisory Committee on Human Radiation Experiments, March 15, 1995.

nothing. Other children are born who will never recognise this world or their own parents. They just lie there with crooked arms and legs and never speak. Already we have seven such children... .³

The leakage of radiation from nuclear testing sites and waste dumps, the continued human ingesting of radiation released into the environment and the radiation already ingested by Pacific peoples threatens them with radiation induced diseases and death for generations to come. In addition, the coral reefs damaged by nuclear testing has caused considerable ciguatera poisoning and will continue to threaten such poisoning.

There is also a very real threat that nuclear testing may resume in the Pacific.

The need for a Court opinion

Nauru shares the view which it believes to be generally accepted among nations that the threat or use of nuclear weapons is illegal. Nauru is concerned however that some nations, including some of the declared nuclear states, do not share this view.

Nauru places considerable importance on the role of international law and the role of the International Court of Justice in governing the practice of states and in the development of peace and security among states. In this light, Nauru accepts the compulsory jurisdiction of the I.C.J. for contentious cases, and has utilised the contentious case procedure in seeking peaceful resolution of one of its conflicts with a neighbouring state.

³ "Pacific Women Speak", Green Line, Oxford 1987, pp.15-17.

Nauru believes that an opinion from the Court would clarify the legal situation and would be of assistance to small states in their efforts to protect themselves from the threat or use of nuclear weapons. It believes that an advisory opinion from the Court would also be an important step towards a universally accepted and legally binding prohibition on the threat or use of nuclear weapons, and would be an important step towards the elimination of nuclear weapons.

Nauru does not believe that any pronouncement by the Court will harm the ongoing negotiations on nuclear disarmament. On the contrary, Nauru believes that a Court pronouncement confirming the illegality of the threat or use of nuclear weapons will be a stimulant to the conclusion of current negotiations on a Comprehensive Test Ban Treaty and a fissile material cut off, and will also be a stimulus to the commencement of negotiations on a convention prohibiting and eliminating nuclear weapons.

This opinion is supported by the fact that the question was introduced in and adopted by the first Committee of the United Nations General Assembly. This committee is responsible for recommending to the Conference on Disarmament measures which should be negotiated. The First Committee would not have requested such An advisory opinion if it believed that such a request would harm the negotiations on disarmament measures which the Committee has initiated in the Conference on Disarmament.

Nauru also believes that an opinion from the Court would assist in the implementation of Article VI of the Non Proliferation Treaty, according to which parties to the NPT pledged themselves " ...to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race

at an early date and to nuclear disarmament, and on a Treaty on general and complete disarmament under strict and effective international control."

The threat or use of nuclear weapons is illegal

On 20 September 1994, Nauru submitted to the Court that it believes that the use of nuclear weapons in armed conflict is illegal. This was in response to the question asked by the World Health Organisation on whether the use of nuclear weapons by a State in war or other armed conflict would be a breach of its obligations under international law.

Nauru would like the Court to consider this submission in connection with the present case as support for our belief that any use of nuclear weapons is a violation of international law. In addition, Nauru supports the submissions made in that case by Azerbaijan, Colombia, Costa Rica, Democratic Peoples' Republic of Korea, India, Iran, Kazakhstan, Lithuania, Malaysia, Mexico, Moldova, Papua New Guinea, Philippines, Rwanda, Samoa, Saudi Arabia, Solomon Islands, Sri Lanka, Sweden, Uganda, Ukraine, which argue that the use of nuclear weapons is a violation of international law.

In addition Nauru wishes to respectfully submit to the Court the following statement to support our belief that the threat or use of nuclear weapons is illegal.

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Question Presented

Is the threat or use of nuclear weapons in any circumstance permitted under international law?

Background

On 14 May 1993, the World Health Assembly adopted Resolution WHA 46.40, requesting the International Court of Justice to give an advisory opinion on the following question:

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

Following receipt of this request from the Director-General of WHO, the Court set a term of June 20, 1994, subsequently extended to September 20, 1994 for the submission of statements by member governments. Thirty five countries submitted statements, the majority arguing for an affirmative answer to the question presented. A number of states challenged the question's admissibility, arguing that WHO lacked the competence to submit it. Some states argued for the proposition that, while humanitarian law applies to nuclear weapons as it does to all other weapons, the legality *vel non* of their use must be determined by the specific facts of each case. A few states reserved their position on the merits, should the Court decide to give an opinion. In accordance with the Court's Rules, all submissions were transmitted to all states which made submissions. The Court has set a term of June 20, 1995 for states to comment on each other's submissions.

On December 15, 1994, the General Assembly of the United Nations, by Resolution 49/75/K, requested the Court to give an advisory opinion on the following question:

Is the threat or use of nuclear weapons in any circumstance permitted under international law?

The Court has set a term of June 20, 1995, for the submission of statements relative to the question posed by the General Assembly, and September 20, 1995, as the timeline for responses to these statements.

It is expected that the Court will eventually consolidate the two questions, but it has not yet done so.

Summary

This Statement endorses the arguments already before the Court supporting the thesis that any use of nuclear weapons is illegal under international law. Focusing on the question of threat, this Statement will argue that the threat of use of nuclear weapons is illegal because the law of peace and security, as it has evolved since the adoption of the United Nations Charter, treats "threat or use" as a single, indivisible concept and because it is a general principle of law that the illegality of a particularly serious offense entails as well the illegality of the threat to commit such an offense.

I Introduction

The possession of nuclear weapons by some states but not others, and the horrendous nature of these weapons, has created an unprecedented disparity of power between these two groups of states. So long as the nuclear "haves" do not take seriously their solemn obligation under Article VI of the Nuclear Non-Proliferation Treaty to move in good faith and with all deliberate speed toward the complete elimination of nuclear weapons, this disparity will continue to exist and will, in and of itself, constitute a threat to the survival of the "have nots" and of the "haves" as well.

This threat is further enhanced by the announced intention of the nuclear weapon states to reserve to themselves the right to use nuclear weapons in response to a perceived or actual threat of an attack or, more generally, in defense of their national interest or security. In a speech at l'Ecole Militaire on November 3, 1959, General Charles de Gaulle said, "...it is evidently necessary that we be able to provide ourselves in the coming years with a force that can act on our account, with what is customarily called a 'force de frappe,' able to be deployed anywhere at any time. It goes without saying that the basis for this force will be a nuclear armament--whether we make it or buy it--which must belong to us. And, since eventually France can be destroyed from any point in the world, our force must be designed to act anywhere on earth."¹

Nor is this threat diminished by the position of the nuclear weapon states that the only purpose of their nuclear arsenals is to deter the use of force by others. Indeed, the very concept of deterrence is meaningless without a credible willingness to use; hence "deterrence" equals "threat to use."

¹ Quoted in M. Bundy, DANGER AND SURVIVAL: CHOICES ABOUT THE BOMB IN THE FIRST FIFTY YEARS 480 (1988).

Thus, the question posed by the General Assembly goes beyond the *jus in bello* query of the World Health Assembly and ventures forth into the area of *jus ad bellum*. But the doctrine of *jus ad bellum*, as elaborated since the enactment of Article 2(4) of the United Nations Charter, leaves no room for the legality of the threat of force under international law. Article 2(4) categorically prohibits the threat or use of force by one state against another. The only exception to this prohibition is Article 51, which preserves "the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations." But nothing in Article 51 sanctions a standing threat - a threat *in futuro* - by one state against another, named or unnamed. It sanctions only the use of retaliatory force once an armed attack occurs. Its application is limited to the very brief time span following an attack; it cannot, therefore, sanction the threat of the use of force as a hypothetical matter inherent in the military doctrine of this or that state.

Furthermore, the use of force in self-defense is subject to the rules of *jus in bello*. Hence, if use of nuclear weapons is prohibited under the rubric of *jus in bello*, the threat to use nuclear weapons can never be sanctioned under the rubric of *jus ad bellum*.

II. The Law of Peace and Security (*Jus ad Bellum*)

All States must avoid the threat or use of force in their relations with one another.

A. United Nations Charter

The United Nations Charter specifically prohibits the threat or use of force. Under the U.N. Charter, Article 2(4):

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.²

The prohibition on the threat or use of force under Article 2(4) has the status of *jus*

² U.N. Charter art. 2, para. 4.

cogens, a peremptory rule of international law.³ Moreover, this prohibition extends to non-member States.⁴

The United Nations Charter permits the threat or use of force only in individual or collective self-defense, including Security Council enforcement measures. Under Article 51:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security....⁵

The Charter's prohibition on the threat or use of force, with the limited exception of self-defense, reflects a change in the development of international law. Historically, *Jus ad Bellum*, or the law of "just war", recognized the right of a state to resort to war for "just" reasons. In 1919, the Covenant of the League of Nations further limited a State's right to "resort to war".⁶

³ According to the International Law Commission, "the great majority of international lawyers today unhesitatingly holds that [Article 2(4)] together with other provisions of the U.N. Charter, authoritatively declares the modern customary law regarding the threat or use of force." ILC Yearbook, 1966, vol. 2, p.247. The International Court of Justice affirmed this position in Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States), Merits, 1986 ICJ Rep. 14, 98-101 (Judgment of June 27). In addition, the Restatement (Third) of Foreign Relations Law includes "the principles of the United Nations Charter prohibiting the use of force" among peremptory norms. § 102 comment k.

⁴ U.N. Charter art. 2, para. 6 provides:

The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.

See also Josef Mrazek, *Prohibition of the Use and Threat of Force: Self-Defence and Self-Help in International Law*, 1989 CANADIAN Y.B. OF INT'L L. 81, 85.

⁵ U.N. Charter art. 51. The Security Council, acting within the interests of collective security, has the authority to determine "the existence of any threat to the peace, breach of the peace, or act of aggression", U.N. Charter, art. 39. The Security Council is further authorized to determine and employ enforcement measures under Article 41 (not involving the use of armed force) and Article 42 (action involving the use of armed force).

⁶ League of Nations Covenant, art. 12, para. 1, states:

The Members of the League agree that if there should arise between them any dispute likely to lead to a rupture, they will submit the matter either to

In 1928, the General Treaty for the Renunciation of War (Kellogg-Briand Pact, also known as the Paris Peace Pact of 27 August 1928) prohibited aggressive war "as an instrument of national policy" and "for the solution of international controversies".⁷

The language of the Charter prohibits the "threat or use of force" rather than "resort to war", as the Covenant of the League of Nations did. The change in terminology reflects the recognition that a State might resort to the threat or use of force which does not rise to the level of war or resort to armed conflict without an open declaration of war.⁸

The League of Nations Covenant did, nevertheless, recognize the danger of threats in international relations. The Covenant declared "any war or threat of war" a matter of concern to the entire League and grounds for the League to take action to "safeguard the peace of nations."⁹

The principles behind the Kellogg-Briand Pact and the League of Nations Covenant provided a foundation for the United Nations Charter.¹⁰ The *travaux preparatoires* that preceded the adoption of the Charter further indicate a general understanding that a state of peace "could not be regarded merely as maintenance of the status quo but that it should imply active co-operation between Member States in order to promote the purposes of the Organization."¹¹ Thus, Article 2(3), which requires States to settle disputes peacefully, complements the prohibition on the threat or use of force.¹² Moreover, the Charter's preamble calls on States "to practice

arbitration or judicial settlement or to inquiry by the Council, and they agree in no case to resort to war until three months after the award by the arbitrators or the judicial decision or the report by the Council.

⁷ 46 Stat. 2343, T.S. No. 796, 2 Bevans 732, 99 L.N.T.S. 57

⁸ N. Bentwich and A. Martin, A COMMENTARY ON THE CHARTER OF THE UNITED NATIONS 13 (1950).

⁹ League of Nations Covenant art. 11, para. 1.

¹⁰ J. Keegan, A HISTORY OF WARFARE 383 (1993); G. Herczegh, *The Prohibition of the Threat and Use of Force in Contemporary International Law*, in QUESTIONS OF INTERNATIONAL LAW 70 (1964).

¹¹ Herczegh, *Id.* at 78.

¹² U.N. Charter, art. 2, para. 3, provides:

All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

tolerance and live together in peace with one another as good neighbours". These affirmative obligations to cooperate peacefully would clearly be inconsistent with a legal regime that tolerates threats between States.

The Opening Statement by Mr. Hans Corell, Under-Secretary-General for Legal Affairs at the United Nations, during the Congress on Public International Law in March, 1995, reaffirmed the principles that law should govern the relations between States and that disputes should be resolved peacefully:

[L]et this Congress also be a resounding appeal to those who ultimately make the decisions that affect our destiny. To them, our message should be:

-Yours is the responsibility to ensure that international law is applied and that legal advice is sought before important decisions are made in foreign policy matters. . . .

-And, if disputes occur, yours is the responsibility to refrain from the use of force and to make sure that these disputes are resolved by peaceful means.¹³

The preparatory work of the United States in anticipation of the creation of the United Nations reflects a concern with threats of force. A Memorandum containing "basic ideas which might be embodied in a constitution of an international organization for the maintenance of peace and security" listed as the first among the functions and purposes of the organization "to prevent the use of force or of threats to use force".¹⁴ As the first of the principal obligations of a member state, the Memorandum listed "To refrain from use of force or threat to use force. . . ."¹⁵

The proposals which emerged from the Dumbarton Oaks Conference, in preparation for the United Nations Conference in San Francisco, formed the basis of the U.N. Charter. At Dumbarton Oaks, the United States proposals were accepted as the basis for discussion and the structure they established was generally accepted.¹⁶ The Dumbarton Oaks draft of the principle

¹³ H. Corell, Opening Statement, United Nations Congress on Public International Law, New York, 13-17 March, 1995.

¹⁴ Memorandum for the President, Dec. 29, 1943, in U.S. Department of State, *Postwar Foreign Policy Preparation, 1939-1945*, Publication 3580 (February 195), Appendix 33, pp. 376-81 (reproduced in R. Russel, *A HISTORY OF THE UNITED NATIONS CHARTER*, App. F (1958)).

¹⁵ *Id.*

¹⁶ E. Luard, *A HISTORY OF THE UNITED NATIONS*, Vol. 1, 27 (1982). See also L. Goodrich & E. Hambro, *CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS* 6 (2nd ed. 1949).

which became Article 2(4) read:

All members of the Organization shall refrain in their international relations from the threat or use of force in any manner inconsistent with the purpose of the Organization.¹⁷

Australia's amendment added the prohibition on threats or use of force "against the territorial integrity or political independence of any member or State."¹⁸

B. United Nations Resolutions and Declarations

Numerous United Nations resolutions and declarations have confirmed the principle that States shall refrain from the threat or use of force in their international relations.

The Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations¹⁹ reiterates the language of Article 2(4) and adds:

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.²⁰

The Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty²¹ states: "No state has the right to intervene . . . in the internal or external affairs of any other state. Consequently, armed intervention and all other forms of interference or attempted threats . . . are condemned." The Declaration notes that intervention is not admissible "for any reason whatever."

The 1987 Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations affirms the principle of Article 2(4) and of the Declaration on Principles of International Law Concerning Friendly Relations, and adds:

¹⁷ Doc. 1 (English) G/1. UNCIO Documents, Vol. III, p. 3.

¹⁸ Doc. 2 (English) G/14 (1), May 5, 1945. UNCIO Documents, Vol. III, p. 543.

¹⁹ G.A. Res. 2625 (XXXV 1970).

²⁰ *Id.*, para.1.

²¹ G.A. Res. 2131 (XX) (1965).

The principle of refraining from the threat or use of force in international relations is universal in character and is binding, regardless of each State's political, economic, social or cultural system or relations of alliance.²²

This Declaration provides further that "States have the duty to abstain from armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements."²³ In addition, neither acquisition nor occupation of territory resulting from the threat or use of force will be recognized as legal,²⁴ and a treaty procured by the threat or use of force is void.²⁵

The Final Document of the First Special Session of the United Nations General Assembly on Disarmament stated that "[State members] stress the special importance of refraining from the threat or use of force against the sovereignty, territorial integrity or political independence of any State, or against peoples under colonial or foreign domination. . . ."²⁶

Additional Declarations, which reaffirm the principle of refraining from the threat or use of force include: Essentials of Peace,²⁷ Declaration on the Strengthening of International Security,²⁸ Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States,²⁹ and Declaration on the Prevention and Removal of Disputes and Situations

²² G.A. Res. 42/22 (XLII), para. 2.

²³ *Id.* para. 7.

²⁴ *Id.* para. 10.

²⁵ *Id.* para. 11.

²⁶ First Special Session of the General Assembly on Disarmament 1978, Final Document, para. 26.

²⁷ G.A. Res. 290 (IV). Paragraph 3 calls upon every nation "To refrain from any threats or acts, direct or indirect, aimed at impairing the freedom, independence or integrity of any State...."

²⁸ G.A. Res. 2734 (XXV). Paragraph 5 provides that the General Assembly:

Solemnly reaffirms that every State has the duty to refrain from the threat or use of force against the territorial integrity and political independence of any other State . . . and that every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State.

²⁹ G.A. Res. 36/103. Paragraph 2 provides that: "The principle of non-intervention and non-interference in the internal and external affairs of States comprehends the following rights and

Which May Threaten International Peace and Security and on the Role of the United Nations in This Field.³⁰

C. Collective Security Treaties

A number of collective security treaties confirm the symbolic nature of threat and use of force. The North Atlantic Treaty (the NATO Treaty)³¹ requires State Parties "to refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the United Nations." Similarly, the now-lapsed Treaty of Friendship, Cooperation and Mutual Assistance (the Warsaw Pact)³² requires Contracting Parties "to refrain in their international relations from the threat or use of force".

The Final Act of the Conference on Security and Co-operation in Europe³³ requires States participating to refrain from the threat or use of force, repeating the language of the Charter. Moreover, "[n]o consideration may be invoked to serve to warrant resort to the threat or use of force in contravention of this principle" and "[n]o such threat or use of force will be employed as a means of settling disputes, or questions likely to give rise to disputes. . . ."

The American Treaty on Pacific Settlement³⁴ requires the contracting parties to ". . . refrain

duties . . . [including, under II(a)] the duty of States to refrain in their international relations from the threat or use of force in any form whatsoever . . . to disrupt the political, social or economic order of other States. . . ."

³⁰ G.A. Res. 43/51, Preamble:

Reaffirming the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations . . . and the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations,

Recalling that it is the duty of States to refrain in their international relations from military, political, economic or any other form of coercion against the political independence or territorial integrity of any State

³¹ 63 Stat. 2241, T.I.A.S. No. 1964, 4 Bevans. 828, 34 V.A.T.S. 243 (1949) art. 1.

³² 219 U.N.T.S. 3 (1955) art. 1.

³³ 14 I.L.M. 1292 (1975), also known as "the Helsinki Final Act", Section II, Refraining from the Threat or Use of Force.

³⁴ Also known as the "Treaty of Bogota", 30 U.N.T.S. 55 (1948), chapter one, art. I.

from the threat or the use of force, or from any other means of coercion for the settlement of their controversies. . . ."

The Convention on the Rights and Duties of States³⁵ holds that "No state has the right to intervene in the internal or external affairs of another."

In addition, the Charter of the Organization of American States³⁶ provides:

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other States. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic and cultural elements.

D. The Nuremberg Principles

The General Assembly unanimously affirmed "the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal."³⁷ The principles "have since been universally considered to constitute an authoritative statement of the rules of customary international law."³⁸ The Nuremberg offenses "correspond largely to the obligations imposed by certain rules of jus cogens".³⁹

The principles as codified by the International Law Commission⁴⁰ define crimes against peace as:

- i. Planning, preparation, initiation or waging of a war of aggression or a

³⁵ Also known as the "Treaty of Montevideo", 49 Stat. 3097, T.S. No. 881, Bevans 145, 165 L.N.T.S. 19 (1933) art. 8.

³⁶ 2 U.S.T. 2394, T.I.A.S. 2361, 119 U.N.T.S. 3 (1948) art. 15.

³⁷ G.A. Res. 95(I), 188 U.N. Doc. A/64/Add.1 (1946).

³⁸ F. Boyle, *The Relevance of International Law to the "Paradox" of Nuclear Deterrence*, 80 Nw. U.L. Rev. 1407, 1416 (1986) (citing I. Brownlie, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 154-213 (1963)).

³⁹ *Report of the International Law Commission*, 28th Session, 31 U.N. GAOR Supp. (No. 10) at 246, (1976) 2 Y.B. Int'l L. Comm'n (Pt. 2) at 104.

⁴⁰ *Report of the International Law Commission*, 2d Session, 5 U.N. GAOR Supp. (No. 12) 11, U.N. Doc. A/1316 (1950), 2 Y.B. Int'l L. Comm'n 374, U.N. Doc. A/Cn.4/SERA/1950/Add.1

war in violation of international treaties, agreements or assurances

ii. Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).

A crime against peace is "a culpable violation of the *jus ad bellum*".⁴¹

Planning and preparing for aggression thus is clearly proscribed. In addition, while not so applied by the Nuremberg tribunals, the Nuremberg principles support the proscription of planning and preparation for war crimes and crimes against humanity. A war involving such crimes would be a "war in violation of international treaties, agreements or assurances". Also, the Charter of the International Military Tribunal⁴² and Control Council Law No. 10⁴³ provided for individual responsibility for participation in a "plan" to commit all three Nuremberg offenses (crimes against peace, war crimes, and crimes against humanity). Similarly, the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia provides for individual responsibility for the planning and preparation or execution of any crime referred to in the Statute.⁴⁴

The discussion regarding crimes against peace turns on the concept and definition of aggression. Section II.F *infra* examines threats of aggression.

E. *Opinio Juris*

The United Nations Charter and the treaties and resolutions cited above do not distinguish between the legal status of the threat to use force and that of the use of force itself. Both are equally prohibited. Indeed, "[i]f the promise is to resort to force in conditions in which no justification for the use of force exists, the threat itself is illegal."⁴⁵

⁴¹ H. McCoubrey and N. White, *INTERNATIONAL LAW AND ARMED CONFLICT* 334 (1992).

⁴² Art. 6, 59 U.S. Stat. 546 (1945).

⁴³ Art. I(2), 3 Official Gazette Control Council for Germany 50 (1946), (reprinted in 2 L. Friedman, *THE LAW OF WAR* 908 (1972)) Law No. 10 governed the 12 subsequent trials of major war criminals.

⁴⁴ Art 7(1), Annex to Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), S/25704, 2 May 1993.

⁴⁵ Brownlie, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* (1963), p. 364 (citing L. Oppenheim, *INTERNATIONAL LAW: A TREATISE*, Vol. II, 7th Ed. (Ed. H. Lauterpacht, 1952); U.K. *MANUAL OF MILITARY LAW*, part iii (1958), para. 11).

The significance of the prohibition on threats of force becomes apparent when one considers the implications for previously accepted legal norms. Oppenheim's discussion of threats of force in relation to the obligation to issue an ultimatum before resorting to war suggests that the prohibition on the threat of force overrides previously accepted and codified legal standards:

In so far as the *Charter of the United Nations* prohibits not only acts of force but also threats of force, the question arises as to the operation, as between the Members of the United Nations, of the provisions of the Hague Convention in the matter of ultimatum and, to some extent, of declaration of war. If it is unlawful for Members of the United Nations to threaten another State with the use of force, how can they properly be in a position to comply with the obligation to issue an ultimatum prior to resorting to war? The correct answer is probably that as between Members of the United Nations these provisions of the Hague Convention, although not directly conflicting with the Charter, are substantially obsolete.⁴⁶

The prohibition of the threat of force applies even where the threat is not carried out. As Professor Oscar Schachter notes,

The preponderance of military strength in some states and their political relations with potential target states may justifiably lead to an inference of a threat of force against the political independence of the target state. . . . [and] the applicability of article 2(4) in principle can hardly be denied.⁴⁷

However, even though relative military strength and political relations can create situations of threat, "[c]uriously [Article 2(4)] has not been invoked much as an explicit prohibition of such implied threats."⁴⁸ According to Schachter, this may be due to the "difficulty of demonstrating coercive intent" or to the widespread, though not unlimited, tolerance for disparities of power.⁴⁹

⁴⁶ L. Oppenheim, *INTERNATIONAL LAW: A TREATISE*, Vol. II, 297 (7th ed., H. Lauterpacht, ed. 1952).

⁴⁷ O. Schachter, *The Right of States to Use Armed Force*, 82 *MICH. L. REV.* 1620, 1625 (1984).

⁴⁸ *Id.*

⁴⁹ *Id.* Schachter notes further that:

A blatant and direct threat of force, used to compel another state to yield territory or make substantial political concessions (not required by law), would have to be seen as illegal under article 2(4) if the words "threat of force" are to have any meaning.

An alternative explanation for the underuse of the prohibition on threat in Article 2(4) is the difficulty of invoking it effectively. Since the authority to do so lies with the Security Council, the failure of the non-permanent members to exercise that authority does not so much indicate their tolerance of implied or actual threats by the permanent members - who are also the declared nuclear weapon states - but rather their recognition of power disparities and the veto power of the permanent members.

International legal scholars differ somewhat in their analyses of what constitutes a threat of force and what the role of threats in international law is. According to Ian Brownlie, a threat "consists in an express or implied promise by a government of a resort to force conditional on non-acceptance of certain demands of that government."⁵⁰ Romana Sadurska regards a threat in the international arena as "a message, explicit or implicit, formulated by a decision maker and directed to the target audience, indicating that force will be used if a rule or demand is not complied with."⁵¹ Both experts suggest that use of force is conditional on the target's response to the threat and that the threat might be "implicit" or "implied", as well as "explicit" or "express".

In the *Corfu Channel Case*⁵² the International Court of Justice concluded that the passage of British warships through the North Corfu Strait did not violate Albanian sovereignty. In that case, Albania had earlier fired on British ships, and the British "'mission' was designed to affirm a right which had been unjustly denied,"⁵³ i.e., the right of passage. The Court also held that Albania's obligation to notify international shipping of the mining of her waters stemmed from "certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; and every state's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other states."⁵⁴ A concurring opinion by Judge Alvarez drew "special attention" to "acts contrary to international law, which are related to the present dispute: *intervention, pressure or threat of force, demonstration of force, with a view to intimidation, violation of sovereignty, and misuse of right.* . . ."⁵⁵

⁵⁰ Brownlie, *supra* note 45, at 364.

⁵¹ R. Sadurska, *Threats of Force*, 82 AM. J. INT'L L. 239, 242 (1988). Sadurska argues that threats "may not be detrimental, indeed may even be beneficial, to the preservation of international order" but admits that "this is a precarious game" and that "an environment in which threats of force are regularly used is likely to be very unstable." *Id.*, at 239-240, 247, 250, n. 54.

⁵² United Kingdom v. Albania, 1949 ICJ Rep. 4 (Merits), (Judgment of April 9).

⁵³ *Id.* at 30.

⁵⁴ *Id.* at 22.

⁵⁵ *Id.* 39 (Individual Opinion by Judge Alvarez) at 46 (emphasis in the original).

In the *Fisheries Jurisdiction Case*,⁵⁶ a dissenting opinion by Judge Padilla Nervo notes the following regarding threats:

A big power can use force and pressure against a small nation in many ways, even by the very fact of diplomatically insisting in having its view recognized and accepted. The Royal Navy did not need to use armed force, its mere presence on the seas inside the fishery limits of the coastal State could be enough pressure. It is well known by professors, jurists and diplomats acquainted with international relations and foreign policies, that certain "Notes" delivered by the government of a strong power to the government of a small nations, may have the same purpose and the same effect as the use or threat of force.⁵⁷

F. Threats of Aggression

A threat of force alone does not constitute an "act of aggression" under the U.N. "Definition of Aggression" Resolution.⁵⁸ In fact, the Definition suggests that not all uses of force constitute acts of aggression, noting in the Preamble that "aggression is the most serious and dangerous form of the illegal use of force."⁵⁹

The International Law Commission incorporated the General Assembly's definition of aggression in the Draft Code of Crimes Against Peace and Security of Mankind.⁶⁰ Significantly, the Draft Code includes a separate article for the crime of the Threat of Aggression.⁶¹

1. An individual who as leader or organizer commits or orders the commission of a threat of aggression shall, on conviction thereof, be sentenced

⁵⁶ *United Kingdom v. Iceland*, 1973 ICJ Rep. 3 (Judgment of February 2).

⁵⁷ *Id.* at 47.

⁵⁸ G.A. Res. 3314 (XXIX 1974). Article 1 of the Definition states that:

Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. . . .

⁵⁹ *Id.*

⁶⁰ *Draft Code of Crimes Against the Peace and Security of Mankind, Report of the Commission to the General Assembly on the work of its forty-third session*, 1991 Y.B. Int'l L. Comm'n vol. II, part two, art. 15, U.N. Doc. A/CN.4/SER.A/1991/Add.1 (part 2).

⁶¹ *Id.* art. 16.

2. Threat of aggression consists of declarations, communications, demonstrations of force or any other measures which would give good reason to the Government of a State to believe that aggression is being seriously contemplated against that State.

The International Law Commission Report on the Draft Code to the General Assembly notes that in the context of this article, "the word 'threat' denotes acts undertaken with a view to making a State believe that force will be used against it if certain demands are not met by that State."⁶² A threat might take the form of declarations ("expressions made public in writing or orally"), communications ("messages sent by the authorities of one Government to the authorities of another Government, by no matter what means of transmission") and demonstrations of force (eg., "concentrations of troops near the frontier").⁶³ Moreover, the Commission emphasized that the threat of aggression does not justify a threatened State resorting to force in self-defence.⁶⁴

The Commission was careful to link the acts of an individual who commits a crime against peace and security with the State. Only individuals "vested with the authority of the State" have the potential to commit this offense.⁶⁵ However, the State is not exempted from its responsibility for the crime. Thus, although the Draft Code places the liability directly on the individual⁶⁶, it also provides that:

Prosecution of an individual for a crime against the peace and security of mankind does not relieve a State of any responsibility under international law for an act or omission attributable to it.⁶⁷

The Commission also noted the importance of defining a crime of threat of aggression, particularly since powerful states have the potential to achieve improper objectives without committing an actual act of aggression.⁶⁸ Indeed, the Sixth Committee of the General Assembly, in its review of the Commission Report, noted that "there had been many cases of States that had

⁶² 1989 Y.B. Int'l L. Comm'n, vol. 2, part 2, U.N. Doc. A/CN.4/SER.A/1989/Add.1 (part 2), p.68.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ 1989 Y.B. Int'l L. Comm'n, vol. 1, U.N. Doc. A/CN.4/SER.A/1989, p. 296.

⁶⁶ Article 3, Responsibility and punishment.

⁶⁷ Article 5.

⁶⁸ 1989 Y.B. Int'l L. Comm'n vol. 1, *supra* note 60, at 294, para. 11 (statement of Mr. Beesley).

lost their independence through threats and ultimatums.⁶⁹ The record went on to note:

Contemporary international law prohibited not only the use of force, but also the threat of the use of force, and thus its inclusion in the code would reaffirm the position of the international community in that regard.⁷⁰

The Draft Code of Crimes Against the Peace and Security of Mankind reflects the recent development of the concept of crimes against peace.

III. Specific Law Regarding the Threat of Use of Nuclear Weapons

The Charter of the United Nations was adopted in San Francisco on June 26, 1945, six weeks before the first use of the atom bomb on August 6, 1945.⁷¹ Had this time sequence been reversed, the Charter might well have contained a specific prohibition on the threat and use of nuclear weapons and other weapons of mass destruction. "The fact, however, that the existence of atomic weapons means an unprecedented source of danger for mankind, and that it may be one of the gravest forms of the threat of force, was immediately recognized by the United Nations, which then tried to solve this problem."⁷² The concern of the world community with this new, startling development was evidenced by the fact that the first resolution adopted by the United Nations dealt with the subject of atomic energy and called, *inter alia*, "for the elimination from national armaments of atomic weapons and of all other major weapons adaptable to mass destruction. . . ."⁷³

⁶⁹ U.N. GAOR Sixth Committee (31st mtg.) at 15, U.N. Doc. A/C.6/44/SR.31 (1989) (statement of Mr. Gondra).

⁷⁰ *Id.*

⁷¹ Herczegh, *supra* note 10, at 88.

⁷² *Id.* Former United States Secretary of State John Foster Dulles also stressed that if the drafters of the Charter had known of the role nuclear weapons were to play, they would have adopted more "emphatic and realistic" provisions to deal with disarmament and regulation. *U.S. Constitution and U.N. Charter: An Appraisal*, Address by the Secretary of State John Foster Dulles before the American Bar Association at Boston on Aug. 26, 1953, Dept. of State Publication 5194.

⁷³ G.A. Res. 0101, Establishment of a Commission to Deal with the Problems Raised by the Discovery of Atomic Energy, adopted unanimously, para. 5(c) (1946).

A. Treaties

The preamble of the Treaty on the Non-Proliferation of Nuclear Weapons⁷⁴ calls for "the cessation of the manufacture of nuclear weapons, the liquidation of all their existing stockpiles, and the elimination from national arsenals of nuclear weapons and their means of delivery...." Specifically, the Treaty prohibits the manufacture or acquisition of nuclear weapons by non-nuclear weapon States,⁷⁵ and it requires nuclear weapon States to "pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament."⁷⁶ The threat of use of nuclear weapons is inconsistent with the general purpose and goal of the treaty as well as the specific requirements of State parties.

The South Pacific Nuclear Free Zone Treaty prohibits the manufacture, acquisition, possession or control of nuclear weapons.⁷⁷ The Treaty for the Prohibition of Nuclear Weapons in Latin America prohibits the testing, use manufacture, production or acquisition of nuclear weapons, directly or indirectly, by parties to the treaty or within the region defined by the treaty.⁷⁸

The pattern in international law regarding weapons of mass destruction is to prohibit not only the use but also the manufacture and acquisition of these weapons. The treaties discussed above seek to eliminate both the use and the threat to use nuclear weapons; in no instance do they prohibit use but tolerate possession. Similarly, treaties regarding other weapons of mass destruction, namely biological weapons⁷⁹ and chemical weapons⁸⁰, link threat and use. The

⁷⁴ 21 U.S.T. 483, T.I.A.S. No. 6839, 729 U.N.T.S. 161, 7 I.L.M. 811 (1968).

⁷⁵ *Id.* art. II.

⁷⁶ *Id.* art. VI.

⁷⁷ Also known as the Treaty of Rarotonga, 24 I.L.M. 1440, (1985), art. 3.

⁷⁸ Also known as the Treaty of Tlatelolco, 22 U.S.T. 762, T.I.A.S. No. 7137, 6 I.L.M. 521 (1967), art. 1.

⁷⁹ Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, U.N. Res. 2826 (XXVI 1972), 26 U.S.T. 583, T.I.A.S. No. 8062, 11 I.L.M. 309 (1972). Article I provides: "Each State Party to this Convention undertakes never in any circumstances to develop, produce, stockpile or otherwise acquire or retain" biological weapons.

⁸⁰ Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, opened for signature in Paris on 13 January 1993. A United Nations *Treaty Series* registration number will be assigned once it enters into force. Article I.1 provides: "Each State Party to this Convention undertakes never under any

illegality of the threat to use these weapons is underscored by provisions calling for their destruction.⁸¹

B. Security Council Resolutions

Resolution 984 (April 11, 1995) gives non-nuclear States assurances from the nuclear States that nuclear weapons will not be threatened or used against them. All of the declared nuclear States supported this resolution.

Resolution 255 of the Security Council provides that aggression or the threat of aggression with nuclear weapons against a non-nuclear weapon State would require the Security Council to act immediately.⁸²

Resolutions 984 and 255 therefore implicitly recognize the illegality of the threat and use of nuclear weapons against a non-nuclear weapon state. A legal act would not require assurances against use nor require Security Council response.⁸³

C. United Nations General Assembly, Conference on Disarmament and Disarmament Commission

As discussed above, the framers of the Charter could not be aware of the threat of nuclear weapons, but the first United Nations resolution addressed elimination of these weapons.⁸⁴

circumstances (a) To develop, produce, otherwise acquire, stockpile or retain chemical weapons . . . (b) To use chemical weapons. . . ."

⁸¹ Article II of the Biological Weapons Convention and Article 12 of the Chemical Weapons Convention.

⁸² S.C. Res. 255 (1968). The relevant text reads as follows:

The Security Council . . . [r]ecognizes that aggression with nuclear weapons of the threat of such aggression against a non-nuclear weapon State would create a situation in which the Security Council, and above all its nuclear-weapon State permanent members, would have to act immediately in accordance with their obligations under the United Nations Charter.

⁸³ *Supra* note 5.

⁸⁴ *See supra* notes 71-73 and accompanying text.

Another early resolution of the General Assembly⁸⁵ reaffirms the prohibition on the threat or use of force and, in this context, calls on the Disarmament Commission to develop comprehensive plans providing for the "elimination and prohibition of all major weapons . . . adaptable to mass destruction"⁸⁶ and, specifically, the "effective international control of atomic energy to ensure the prohibition of atomic weapons"⁸⁷

The issue of assurances for non-nuclear weapon States against the use or threat of use of nuclear weapons has received overwhelming support from the international community. The General Assembly has passed numerous resolutions affirming the urgency of reaching an early agreement on effective international arrangements to assure non-nuclear weapon States against the use or threat of use of nuclear weapons.⁸⁸ Significantly, no state has opposed the conclusion of these assurances. Most recently, for example, 168 States voted in favor of this resolution and only three countries abstained (France, the United Kingdom, and the United States). Even the three States generally considered to have secret nuclear weapons arsenals (India, Israel and Pakistan) voted in favor of these assurances.

The conclusion of effective international arrangements to assure non-nuclear-weapons States against the use or threat of use of nuclear weapons has been a key agenda item of the U.N. Conference on Disarmament, and the Ad Hoc Committee established to review this item has consistently been re-established at the start of each annual session. Most recently, the Committee's report, adopted by the Conference on Disarmament, noted as follows:

All delegations reiterated that they attach particular importance to the question of international arrangements to assure non-nuclear-weapon States against the use or threat of use of nuclear weapons and expressed their readiness to engage in a search for a mutually acceptable solution of the issue.⁸⁹

Additionally, the report of the Conference "stressed the necessity to recognize the right

⁸⁵ G.A. Res. 704 (VII) (1953).

⁸⁶ *Id.* para. 2(a).

⁸⁷ *Id.* para. 2(c).

⁸⁸ E.g. G.A. Res. 49/73 (1994), G.A. Res. 48/73 (1993), G.A. Res. 47/50 (1992), G.A. Res. 46/32 (1991), G.A. Res. 45/54 (1990), G.A. Res. 44/111 (1989), G.A. Res. 43/69 (1988), G.A. Res. 42/32 (1987), G.A. Res. 41/52 (1986), G.A. Res. 40/86 (1985), G.A. Res. 39/58, G.A. Res. 38/68 (1983) et al. All of these resolutions bear the name "Conclusion of effective international arrangements to assure non-nuclear-weapon States against the use or threat of use of nuclear weapons."

⁸⁹ Report of the Conference on Disarmament, 49 U.N. GAOR Supp. (No. 27) (Agenda Item 33) at 130-131, U.N. Doc. A/49/27 (1994).

of non-nuclear-weapon States not to be attacked nor threatened with these weapons."⁹⁰ It is significant that, in referring to this right, the Report called for its recognition rather than its creation.

The complete elimination of nuclear weapons has been a constant and recurring objective of the Disarmament Commission and the Conference on Disarmament.⁹¹

In addition, the General Assembly has passed over 100 resolutions stating nuclear disarmament or the elimination of nuclear weapons as a goal.⁹² Thus, the majority of states do not accept the necessity argument for deterrence. A growing number of states have specifically prohibited nuclear weapons in their territory and have established, or are in the process of establishing, nuclear weapons free zones.

D. The Non-Derogable Right to Life

The United Nations Human Rights Committee, which supervises the implementation of the International Covenant on Civil and Political Rights⁹³ [ICCPR], has determined that nuclear weapons threaten the non-derogable right to life:

[T]he designing, testing, manufacture, possession and deployment of nuclear weapons are among the greatest threats to the right to life which confront mankind today. This threat is compounded by the danger that the actual use of nuclear weapons may be brought about, not only in the event of war, but even through human or mechanical error or failure. Furthermore, the very existence and gravity of this threat generates a climate of suspicion and fear between States, which is in itself antagonistic to the promotion of universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter of the

⁹⁰ *Id.*

⁹¹ *E.g.* Report of the Disarmament Commission, 49 U.N. GAOR Supp. (No. 42) (Agenda Item 4) at 4, U.N. Doc. A/49/42; Report of the Disarmament Commission, 48 U.N. GAOR Supp. (No. 42) (Agenda Item 4) at 4, U.N. Doc. A/48/42; Report of the Conference on Disarmament, *supra* note 41, (Agenda Item 2) at 1; Report of the Conference on Disarmament, 48 U.N. GAOR Supp. (No. 27) (Agenda Item 2) at 1, U.N. Doc. A/48/27; Report of the Conference on Disarmament, 47 U.N. GAOR Supp. (No. 27) (Agenda Item 2) at 2, U.N. Doc. A/47/27.

⁹² *See* Appendix B.

⁹³ 999 U.N.T.S. 171, 6 I.L.M. 368 (1967). Entered into force on March 23, 1976. Article 6, para. 1 reads: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

United Nations and the International Covenants on Human Rights.⁹⁴

In other words, nuclear weapons both threaten the right to life and contribute to the spirit of mistrust among States which compounds the likelihood of threats being carried out. In addition, the threat to use nuclear weapons conflicts with the commitment to provide children with the protection of society and the State⁹⁵ and to protect families.⁹⁶

The right to life is confirmed as well in the European Convention for the Protection of Human Rights and Fundamental Freedoms⁹⁷ [ECHR], and the American Convention on Human Rights⁹⁸ [ACHR]. Under the ICCPR, the ECHR, and the ACHR, a derogation clause may be invoked in exceptional situations that threaten the life of the nation. However, the right to life is one of the four non-derogable rights which constitute the "irreducible core"⁹⁹ of human rights. A non-derogable right is one which cannot be suspended by the State even in times of public emergency.

Moreover, according to Judge Schwebel of the International Court of Justice, matters affecting international human rights obligations cannot be regarded as exclusively within domestic jurisdiction of a particular State:

Once a state has undertaken obligations toward another state, or toward the international community, in a specified sphere of human rights, it may no longer maintain, vis-a-vis the other state or the international community, that matters in that sphere are exclusively or essentially within its domestic jurisdiction and

⁹⁴ Report of the Human Rights Committee, General Comment 14(23) on Article 6 of the Covenant, 2 November 1984: U.N. GAOR (40th Session) Supp. (No.40), Annex VI, 162, U.N. Doc. A/40/40.

⁹⁵ ICCPR, art. 24.

⁹⁶ ICCPR, art. 23.

⁹⁷ 213 U.N.T.S. 221, E.T.S. 5 (1950), art. 2.

⁹⁸ O.A.S. Official Records OEA/SER. K/XVI/1.1 Doc. 65, Rev. 1, Corr. 1, 9 ILM 101 (1970), 65 A.J.I.L. 679 (1971), art. 4.

⁹⁹ J. Oraa, HUMAN RIGHTS IN STATES OF EMERGENCY IN INTERNATIONAL LAW 96 (1992). The other non-derogable rights are: the right to be free from torture and other inhuman or degrading treatment or punishment (ICCPR, art. 7; ECHR, art.3; ACHR, art. 5), the right to be free from slavery or servitude (ICCPR, art. 8; ECHR, art. 4, ACHR, art. 6), and the principle of non-retroactivity of penal laws (ICCPR, art. 15, ECHR, art. 7, ACHR, art. 9).

outside the range of international concern.¹⁰⁰

Thus the manufacture and possession of nuclear weapons, which violate the right to life, cannot be defended by nuclear weapon States either as essential for defense in times of public emergency or as matters of domestic jurisdiction.

IV. The Threat of Use of Nuclear Weapons is Prohibited in Any Circumstance

A. The Correlation Between Threat and Use of Force: Threat Is Use

For purposes of the following analysis, it will be useful to examine briefly the meanings of the terms "threat" and "force", both generically and within the context of the legal instruments relevant to this discussion.

The common meaning of "force" is "strength, energy, power". The normal meaning of "the use of force", within the context of Article 2(4) of the Charter, is the application of physical force of a military nature by one member state against another, as in the invasion of Kuwait by Iraq.

Upon closer examination, however, it becomes apparent that more is involved here than a transborder launch of tanks, troops or missiles. Art. 2(4) forbids not only the use of force against the territorial integrity of a state, but also against its political independence, or "in any other manner inconsistent with the purposes of the United Nations." If Art. 2(4) had been aimed only at cross-border military action, it would not have been necessary to add this further language.

What kind of force, then, other than military force in action, can be used by one state against the political independence of another, without affecting its territorial integrity? Non-military force, to be sure, as for instance the erection of tariff barriers or other economic measures, but also the open or veiled promise of the use of force, including armed force, if certain demands are not met. This interpretation is consistent with the definitions of "force" as "power to influence, affect or control", "persuasive power, power to convince."¹⁰¹

"Threat", on the other hand, is defined as "a declaration of an intention or determination to inflict punishment, injury, death, or loss on someone **in retaliation for, or conditionally upon,** some action or course; an indication of probable evil, loss or violence to come; ...

¹⁰⁰ S. Schwebel, *Human Rights in the World Court*, 24 VAND. J. TRANSNAT'L L. 945 (1991).

¹⁰¹ Random House Dictionary of the English Language, Third Unabridged Edition.

warning."¹⁰²

Even more relevant, for present purposes, is the definition of "threat" in Black's Law Dictionary: "In criminal law, ... any menace of such a nature as to unsettle the mind of the person on whom it operates, and to take away from his acts that free and voluntary action which alone constitutes consent."

The United Nations Secretary General, in considering what constitutes a threat to use force, noted that, "[t]he person who utters the threat may not intend to carry it out, and the threat is then only a form of intimidation and 'blackmail'."¹⁰³

As one philosopher has noted:

Nuclear weapons are being used today and can be expected to be used in the future. Not that they are being detonated . . . [b]ut that is not a requirement of their being used. A man uses a gun when he sticks it in your ribs and demands your money. He does not need to fire the gun. And a country uses nuclear weapons when it makes it known that it may launch them unless certain conditions are met, as the United States did against the Soviets in the Cuban Missile Crisis, against China during the Korean War, and against North Vietnam during the Vietnam War. And the very threat of retaliation that is at the heart of nuclear deterrence is a use of nuclear weapons, even if it is not the actual exploding of them.¹⁰⁴

Thus, the concepts of "threat" and "use" in Article 2(4) merge into each other in most circumstances: The threat of use is itself a kind of use.

B. The Conditional Threat of Force is Prohibited in Any Circumstance

As has been shown in Section II, *supra*, the prohibition on the threat of force for the purpose of affecting another state's political independence, or in any manner inconsistent with the purposes of the United Nations, - what we may call a conditional threat - runs like a mantra through the entire post-World War II law of peace and security. Whether stated in terms of threat, attempted threat, planning or preparation, coercion, interference in the internal or external

¹⁰² *Id.*, emphasis added.

¹⁰³ Secretary General of the United Nations, *Report on the Question of Defining Aggression*, U.N. Doc. A/2211 at 51 (Oct. 3, 1952) para. 368. (Reprinted in Henkin, Pugh et al., *INTERNATIONAL LAW: CASES AND MATERIALS* 894-896 (Third ed., 1993).

¹⁰⁴ R.L. Holmes, *ON WAR AND MORALITY* 8 (1989).

affairs of states or "all other forms of interference"¹⁰⁵, it is clear that all "threats" of this kind are unequivocally outlawed by the United Nations Charter, many other international instruments and, indeed, the customary law of peace and security.

This being so, and considering that nuclear weapons represent the greatest conceivable instrument of threat available to any nation, the conditional threat to use nuclear weapons is, a fortiori, a gross violation of the law of peace and security.

C. A Retaliatory Threat to Use Nuclear Weapons is Illegal in Any Circumstance

What of threat in the retaliatory sense, i.e. "if you do such and such to me, I will do such and such to you"? Surely no person, nor any state, can be deprived of the right to threaten harm as a means of self-defense. But this right is not unlimited: There is no right to threaten to commit a crime or other illegal act. Hence, if, as has been argued elsewhere,¹⁰⁶ the use of nuclear weapons is illegal in any circumstance, i.e. even by way of self-defense or reprisal, the threat to use nuclear weapons must also be illegal in any circumstance.¹⁰⁷

Although this general proposition is dispositive of the question of the legality of retaliatory threats of nuclear weapons, it may be useful to examine somewhat more closely the forms which such threats may take.

1. The Threat of First Use

A threat of first use could include a threatened preemptive nuclear strike against a perceived nuclear or conventional attack or a threatened nuclear response to an actual conventional attack. Moreover, a threat of first use could be directed against developments falling short of the perception of an immediate attack: The essence of the current doctrine of "counterproliferation" is that the nuclear weapon states reserve to themselves the right to use nuclear weapons to discourage "rogue states" from developing—not necessarily using—weapons of mass destruction, whether nuclear, chemical, biological or other. Of the declared nuclear

¹⁰⁵ See *supra* Sections II.B and II.C.

¹⁰⁶ P. Weiss, B. Weston, R. Falk, S. Mendlovitz, *Draft Memorial in Support of the Application by the World Health Organization for an Advisory Opinion by the International Court of Justice on the Legality of the Use of Nuclear Weapons Under International Law, Including the W.H.O. Constitution*, 4 *TRANSNAT'L L. & CONTEMP. PROBS.* 721, 753-757 (1994). See also Statements submitted by Malaysia, Mexico, Nauru, Solomon Islands, and Sweden in support of the request by the World Health Organization for an advisory opinion on the legality of use of nuclear weapons in armed conflict.

¹⁰⁷ Brownlie, *supra* note 45; Oppenheim, *supra* note 46.

powers, only China has an official no-first-use policy.¹⁰⁸ The nuclear weapon States, specifically the United States and the United Kingdom, have repeatedly used threats of first use of nuclear weapons against both nuclear and non-nuclear weapon States.¹⁰⁹

A threat of first use of nuclear weapons is a direct violation of *jus ad bellum*. The prohibition on the threat of force under the United Nations Charter¹¹⁰ covers threats of both conventional and nuclear weapons. The threat of first use is inherently a threat against the political independence and territorial integrity of another State. This is true not only when the threat is imminent and aimed at exacting specific changes but also, because of the unique nature of the weapons, when it is a longstanding posture not directly linked to specific demands. Any State in actual or potential conflict with a nuclear State that has a first-use policy, recognizes that the nuclear State has the weapons and the will to use these weapons should it be deemed necessary by the nuclear State. This inevitably influences the decision making of that State.

The unique nature of nuclear weapons, as weapons of mass destruction, makes the threat of their use a tool of unequalled intimidation, undermining the political independence of the threatened State.

Any nuclear threat or use and especially first use and its threat is contrary to the purposes of the United Nations, which include the maintenance of international peace and security and prevention of "threat to the peace" and suppression of "breaches of the peace" (Art. 1(1)) and the achievement of cooperation in promoting and respecting human rights (Art. 1(3)).

Furthermore, the threat of first use of nuclear weapons can never satisfy the principle of proportionality, one of the foundation stones of the laws of war, since the magnitude of the event to which a preemptive response is being made is necessarily a matter of speculation.

2. The Threat of Second Use

The second use of nuclear weapons, and therefore the threat of such use, are not permitted under the law of reprisals. Reprisals "must conform in all cases to the laws of humanity and morality."¹¹¹ "Civilian populations ... should not be the object of reprisals"¹¹² "Attacks against

¹⁰⁸ NUCLEAR WEAPONS: A COMPREHENSIVE STUDY Appendix I, U.N. Sales No. E.91.IX.10 (1990).

¹⁰⁹ See Appendix C.

¹¹⁰ See *supra* notes 2-5 and accompanying text.

¹¹¹ Art. 86, Manual Published by the Institute of International Law (Oxford Manual), 1880. Schindler and Toman, *The Laws of Armed Conflict*, p.48 (hereafter Schindler).

the civilian population or civilians by way of reprisals are prohibited."¹¹³ "Reprisals may be justified, but they too must be in accordance with customary law."¹¹⁴

It is common ground that the laws of war apply equally to all weapons and tactics, including those used in self-defense.¹¹⁵ The use of genocide, torture or terrorist attacks by one state against another does not justify the use of genocide, torture or terrorist attacks in response. Hence self-defense cannot justify the threat of use of nuclear weapons in self-defense.

3. Implicit Threats of Use

Threats need not be expressly communicated to be effective.¹¹⁶ While it is true that the bully on the block threatens the safety of his peaceful neighbors by his very presence and his past behavior, it is also true that not every disparity of power between persons or economic or political units constitutes a threat actionable at law. Nevertheless, most systems of law recognize that mere size can and frequently does lead to abuses of power.

¹¹² Par. 7, GA Res. 2675 (XXV), 1970, Basic Principles for the Protection of Civilian Populations in Armed Conflicts, adopted by 109 votes to none, with 18 states abstaining or absent.

¹¹³ Art. 51(6), Protocol I Additional to the Geneva Conventions, 1977. The Protocol also prohibits reprisals against civilian objects (Art. 52[1]), cultural objects and places of worship (Art. 53[c]), objects indispensable to the survival of the civilian population (Art. 54[4]), the natural environment (Art. 55[2]) and works and installations containing dangerous forces, namely dams, dykes and nuclear generating stations (Art. 56[4]).

¹¹⁴ N. Singh & E. McWhinney, *NUCLEAR WEAPONS AND CONTEMPORARY LAW* 167 (2d ed., 1989).

¹¹⁵ "Whatever may be the cause of a war that has broken out, and whether or no the cause may be a so-called just cause, the same rules of international law are valid as to what must not be done, may be done, and must be done by the belligerents themselves in making war against each other." U.S. v. Wilhelm List et al. (Hostage Case), 11 Trials of War Criminals 1247 (1950). The quoted statement was made by international lawyer L. Oppenheim and adopted by the tribunal.

¹¹⁶ For example, Farrands, *The Regional Use of Force*, in *THE USE OF FORCE IN INTERNATIONAL RELATIONS* 70, 84-85 (F. Northedge, ed., 1974) notes:

The best example of . . . "concealed threat" was the first Sputnik of October 1957; this great scientific achievement would have been nothing more if the implication that for the first time the USSR could destroy American cities had not been evident.

The field of competition law, for instance, is replete with examples of statutes and treaties intended to compensate for inequalities of size and power in the market place in order to create that "level playing field" which alone can guarantee the functioning of the free market. Many countries and regional groupings have laws forbidding the abuse of a dominant position.¹¹⁷ However, as the European Court of Justice observed:

The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, *as a result of the very presence of the undertaking in question*, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition . . ., has the effect of hindering the maintenance of the degree of competition still existing in the market.¹¹⁸

Substitute "country possessing nuclear weapons" for "undertaking in a dominant position" and you have a description of the distortion of "normal" international relations resulting from the "very presence" of such weapons.

Similarly, the rationale of antitrust laws providing for state control of mergers and acquisitions is to prevent mere size from distorting normal market relations, which is another way of saying that mere size poses a threat to their operation. Countries and regional arrangements having such laws include the European Union, Austria, Belgium, Brazil, Colombia, the Czech Republic, Finland, France, Germany, Hungary, Ireland, Italy, Norway, Poland, Portugal, Russia, Spain, Sweden, the United Kingdom, Australia, India, Israel, Japan, Kenya, Korea, New Zealand, South Africa, Taiwan, Canada, the United States, and Venezuela.¹¹⁹

The possession of nuclear weapons, i.e., weapons capable of wreaking complete destruction on an enemy, represents a unique case of power disparity. By its very existence, a nuclear arsenal in the hands of one State constitutes a threat of the greatest magnitude to the safety, indeed the survival, of every other state.¹²⁰

¹¹⁷ E.g., Art. 86, Treaty of Rome (EEC), Art. 22, German Competition Law.

¹¹⁸ Hoffmann-La Roche v. Commission, 1979 E.C.R. 461, par. 6 (emphasis added).

¹¹⁹ B.E. Hawk, UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST, 1031, n.1, (2d ed., 1994 supplement).

¹²⁰ Herczegh, *supra* note 10, observes:

In our days the major form of the threat of force is concomitant with the armament race, the manufacture of thermonuclear and other weapons of mass destruction and with the tests conducted with them.

It may be argued, in rebuttal, that the actual policy of the nuclear weapon states is to maintain their arsenals for the sole purpose of insuring their own security, i.e., for deterrence. But nations are not famous for observing their solemn promises when they perceive their vital interest to be at risk. If they were, the world would not have seen numerous cross-border wars¹²¹ break out since the enactment of the U.N. Charter.

What is known in current political science parlance as "vital interest" or "national interest" or "national security" used to be referred to as "reasons of state" and was then, as now, understood to take priority over law or morality. One might say, in a variant on Pascal's well-known aphorism, "the state has its reasons which reason knows nothing of."

A recent example of this attitude is the statement by Gen. Vladimir Semyonov, commander of Russian ground forces, that the violation of the Conventional Armed Forces Treaty in Europe¹²² by the deployment of a new Russian army in Chechnya is justified because "the interests of Russia's security and integrity must come above the provisions set in this treaty."¹²³ An earlier example is the statement by Jeane Kirkpatrick, U.S. Ambassador to the United Nations, that the Charter "is not a suicide pact."¹²⁴

The point here is not to chastise this or that nation for placing its perceived vital interest above the commands of the law, since all nations are guilty of this offense, but to submit that, in assessing the threat posed by overwhelming power, one must look at what nations do, not what they say.

Starting from Lord Acton's famous aphorism that "power tends to corrupt and absolute

As early as 1939, before serious work had started anywhere on developing a nuclear weapons plant, Lord Cherwell, Winston Churchill's advisor on science, is said to have held the view that "[w]hoever possessed such a plant would be able to dictate terms to the rest of the world." Bundy, *supra* note 1, at 27.

¹²¹ See generally BORDER AND TERRITORIAL DISPUTES (A.J. Day, ed., 2nd ed., 1987). Examples include Iran-Iraq (pp. 238-241), Iraq-Kuwait (pp.244-247), Argentina-United Kingdom (Falklands) (pp. 391-92), Ecuador-Peru (pp. 424-425). See also Comment, *International Intervention: The United States' Invasion of Panama*, 31 HARV. INT'L L.J. 633 (1990); R. Beck, *International Law and the Decision to Invade Grenada: A Ten Year Retrospective*, 33 VA. J. INT'L L. 765 (1993).

¹²² Treaty on Conventional Armed Forces in Europe, 30 I.L.M. 1 (1990)

¹²³ New York Times, April 27, 1995, p. A6.

¹²⁴ J. Kirkpatrick *The Limits of International Law*, address before the American Society of International Law, New York, NY April 12, 1984. (Reprinted in LEGITIMACY AND FORCE, vol. II (1988) pp. 241-252, at 251.)

power corrupts absolutely", Norman Cousins, adjunct professor of Medical Humanities at the University of California, gives the following summary of "the tendencies that emerge from the pages of historians":

- The tendency of power to drive intelligence underground;
- The tendency of power to become a theology, admitting no gods before it;
- The tendency of power to distort and damage the traditions and institutions it was designed to protect;
- The tendency of power to create a language of its own, making other forms of communication incoherent and irrelevant;
- The tendency of power to spawn imitators, leading to volatile competition;
- The tendency of power to set the stage for its own use.¹²⁵

It is not difficult to see how all of these "tendencies" apply to the enormous power flowing from the possession of nuclear weapons, nor how this power is bound to be used as an instrument of national policy by those who possess it.

4. Deterrence

Deterrence cuts across the three categories of threat discussed above. Because it is generally claimed to be the principal purpose of nuclear weapons, it merits special consideration.

According to the U.S. Joint Chiefs of Staff:

"[T]he fundamental purpose of US nuclear forces is to deter the use of weapons of mass destruction, particularly nuclear weapons, and to serve as a hedge against the emergence of an overwhelming conventional threat."¹²⁶

Note the use of the adjective "fundamental" rather than "sole", suggesting that U.S. nuclear forces may have purposes other than deterrence. The Joint Chiefs go on to say that:

Deterrence is founded in real force capabilities and the national determination to

¹²⁵ N. Cousins, *THE PATHOLOGY OF POWER* 23 (1987).

¹²⁶ Joint Chiefs of Staff, *DOCTRINE FOR JOINT NUCLEAR OPERATIONS*, Joint Pub 3-12, 29 April 1993, p. I-1.

use those forces if necessary¹²⁷

and that deterrence is:

a defense posture that makes possible war outcomes so uncertain and dangerous, as calculated by potential enemies, as to remove all incentive for initiating attack under any circumstance.¹²⁸

The Joint Chiefs of Staff state further that:

U.S. forces and command and control systems [must] be viewed by enemy leadership as capable of inflicting such damage upon their military forces and means of support, or upon their country, as to deny them the military option.¹²⁹

Thus, the doctrine of deterrence implies a readiness and willingness (1) to use nuclear weapons, (2) to inflict great damage on the enemy, and (3) if necessary, to inflict such damage on the enemy's country, not simply his military forces and means of support.

Nor should deterrence be seen as a purely defensive doctrine. As one analyst has noted:

The development of modern nuclear weapons and the systems needed to deliver them cannot be explained if one insists on defining deterrence in an essentially defensive and reactive form. Instead, the modern concept of deterrence has evolved into something much closer to the traditional understanding of the role of military force in the pursuit of national objectives. Deterrence is now seen as "flexible" or "extended", and a "second-strike counterforce" capability is defended as part of a deterrent on the grounds that a credible (i.e., non-suicidal) response must be available if deterrence fails.¹³⁰

Another makes the following comment:

[T]he theory of nuclear deterrence, far from being one of the great advances of our time . . . is so little understood in its conceptual foundations and so thoroughly confused in its implementation as to be practically useless from the standpoint of the rational, not to mention moral, guidance of policy. It may, in

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* (emphasis supplied).

¹³⁰ A. Krass, *Deterrence and Its Contradictions*, in *TOWARD NUCLEAR DISARMAMENT AND GLOBAL SECURITY* 219 (B. Weston, ed., 1984).

fact, ultimately prove disastrous.¹³¹

A recent United States Congressional study on the proliferation of weapons of mass destruction discussed the "potentially conflicting objectives" of nuclear non-proliferation and the nuclear powers' reliance on nuclear deterrence.¹³² The study admits that:

One way to reduce the appeal of nuclear weapons is to deemphasize the role that play in international relations. But to do so would mean that the nuclear powers must rely on them less, weakening the credibility and utility of U.S. nuclear deterrent threats. . . .¹³³

V. The Illegality of the Threat to Commit an Illegal Act

Support for the principle that the threat to commit an illegal act is also illegal can be found in international legal instruments and *opinio juris*¹³⁴ as well as the general principles of law recognized by civilized nations.

A. International Legal Instruments

We have already seen that treaties regarding weapons of mass destruction prohibit possession and manufacture of these weapons in addition to their use.¹³⁵ Similarly, the Nuremberg Principles define as Crimes Against Peace the "planning" and "preparation" of war in addition to the "initiation" or "waging" of war.¹³⁶

¹³¹ Holmes, *supra* note 104, at 259.

¹³² U.S. Congress, Office of Technology Assessment, *Proliferation of Weapons of Mass Destruction: Assessing the Risks*, OTA-ISC-559 (Washington, DC: U.S. Government Printing Office, August 1993) pp. 25-29.

¹³³ *Id.* at 28.

¹³⁴ *Supra* notes 45-46 and accompanying text.

¹³⁵ *Supra* Section III.A.

¹³⁶ *Supra* Section II.D.

Additional examples include Protocol I of the Geneva Convention¹³⁷, which lists, in Article 75, paragraph 2, a number of prohibited acts, namely, murder, torture, corporal punishment, mutilation, outrages upon personal dignity, taking of hostages, collective punishments, and "*threats to commit any of the foregoing acts*" (emphasis added).

In addition, the Convention on the Prevention and Punishment of the Crime of Genocide¹³⁸ renders punishable not only genocide,¹³⁹ but also conspiracy to commit genocide,¹⁴⁰ direct and public incitement to commit genocide,¹⁴¹ attempt to commit genocide,¹⁴² and complicity in genocide,¹⁴³ all of which might be perceived by the target as the threat of genocide.

B. General Principles of Law Recognized by Civilized Nations

Given the paucity of discussions in the legal literature concerning the meaning of "threat" in Article 2(4) of the Charter, it may be useful to consider the treatment of "threat" in ordinary civil and criminal law.

The principle of criminalizing threat, either in itself or for the purpose of achieving some unlawful end, is well established in the legal systems of many countries, as will be shown by the following examples:

Argentina:

Article 211, Penal Code:

Anybody who, in order to spread general fear or to produce a riot or disorder, makes any sign, voices any alarm, **threatens the commission of any crime of common danger**, or uses any other physical means which would normally produce any such result, shall be punished by jailing from one month to

¹³⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 16 I.L.M. 1391 (1977).

¹³⁸ 78 U.N.T.S. 277 (1948).

¹³⁹ *Id.*, art. III(a).

¹⁴⁰ *Id.*, art. III(b).

¹⁴¹ *Id.*, art. III(c).

¹⁴² *Id.*, art. III(d).

¹⁴³ *Id.*, art. III(e).

three years. . . .

Brazil:

Article 147 of the Criminal Code provides for a penalty of imprisonment of one to six months, or a fine, for "threatening anyone through words, writing or gesture, or any other symbolic means of causing any unjust or serious harm."

Chile:

Article 494 (16) of the Penal Code penalizes anyone who threatens a violent act of physical force as a form of intimidation to cause fear among the general public.

Article 296 penalizes anyone who threatens another with a harm that constitutes a criminal offense, regardless of whether the harm occurs.

France:

Article 305 of the Penal Code renders punishable by imprisonment from two to five years and by a fine of 50,000 to 450,000 francs any person, who by anonymous or signed writing, picture, symbol or emblem, threatens the assassination, poisoning or any other attempt against the life of a person which is punishable by a death sentence, hard labor for life or deportation whenever the threat is accompanied by an order to deposit an amount of money in cash at a designated place, or to fulfill any other requirement.

Article 306 of the Penal Code provides for imprisonment of no less than one nor more than three years and a fine of 50,000 to 450,000 francs, when the threat is not accompanied by any order or condition.

Germany:

Section 126, Penal Code:

Anybody who endangers the public peace by threatening to commit felonies entailing common danger, shall be punished by imprisonment for a term not to exceed one year.

India:

Section 503, Penal Code:

Whoever threatens another with any injury to his person, reputation or property, or to the person or reputation of anyone in whom that person is interested, with intent to cause alarm to that person, or to cause that person to do

any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation.

Italy:

Article 421, Penal Code:

Whoever threatens to commit crimes against public safety, or acts of devastation or pillage, in a manner which arouses public fear, shall be punished by imprisonment for up to one year.

Article 612, Penal Code:

Whoever threatens another with any wrongful harm shall be punished, on complaint of the victim, by a fine of up to 20,000 lire.

Korea:

Article 283, Penal Code penalizes a person who intimidates another.

Article 284 penalizes "a person who commits a crime under . . . the preceding Article by the threat of collective force or while carrying a dangerous weapon".

Nigeria:

Section 252, Penal Code:

A person who . . . attempts or threatens to apply force of any kind to the person of another without his consent . . . is said to assault that person.

Philippines:

Art. 282, Penal Code, defines as "Acts punishable as grave threats":

1. By threatening another with the infliction upon his person, honor or property or that of his family of any wrong amounting to a crime and demanding money or imposing any other condition

3. By threatening another with the infliction upon his person, honor or property or that of his family of any wrong amounting to a crime which is not subject to a condition.

Spain:

Article 263, Penal Code, penalizes anyone who threatens to commit certain terrorist acts with the intent of disrupting the security of the State or of altering the public order, even though the threat is not dependent on the fulfillment of some condition.

Article 493, Penal Code, penalizes anyone who threatens another with harm to his person or honor or that of his family or to harm the property of either with an injury that constitutes a criminal offense.

Thailand:

Title XI, Section 309, penalizes "[w]hoever compels any person to do, or not to do, or to suffer any act by putting him in fear of injury to life, body, liberty or reputation or property of him or of another person"

Uganda:

Section 76, Penal Code, penalizes anyone who "with intent to intimidate or annoy any person . . . threatens to injure, assault, shoot or kill any person, or to burn, break or injure any property."

United States of America:

The distinction between assault and battery, in the crime of "assault and battery", lies in the fact that the threat of unlawful force suffices to constitute the crime of assault, while battery requires physical contact.¹⁴⁴

Robbery is frequently defined as the commission of theft by means of the use or threat of physical force or intimidation, whether property is actually taken from the victim or not.¹⁴⁵

"Threatening" or "Menacing" is defined as a separate crime in some criminal codes.¹⁴⁶

¹⁴⁴ U.S. Model Penal Code § 211.1 (1)(c), Official Draft and Revised Comments 1982. The code prohibits an attempt "by physical menace to put another in fear of imminent serious bodily injury."

¹⁴⁵ Model Penal Code § 222.1

¹⁴⁶ Examples include: N.Y. Penal Law §§ 120.13, 120.14, and 120.15 (Menacing in the first, second, and third degrees, respectively); N.Y. Penal Law § 240.20 (Disorderly Conduct by Threatening Behavior); Cal. Penal Code § 519 (Threats); Ohio Rev. Code Ann. § 2903.21 (Aggravated Menacing), § 2903.211 (Menacing by Stalking), § 2903.22 (Menacing).

Extortion and blackmail are normally defined as "the extraction of money or other value by means of an unlawful threat".¹⁴⁷

"Terroristic threat" statutes are entering the vocabulary of criminal statutes.¹⁴⁸

Zambia:

Section 77, Penal Code, penalizes a person who "threatens another with any injury to his person or property. . . ."

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¹⁴⁷ Model Penal Code § 212.5; N.Y. Penal Law § 155.05(e) (Larceny by Extortion, defined as obtaining property by instilling in another a "fear that, if the property is not delivered, the actor . . . will cause physical injury . . . or cause damage to property.)

¹⁴⁸ See, e.g., Model Penal Code, § 211.3. "A person is guilty of a felony of the third degree if he threatens to commit any crime of violence with purpose to terrorize another. . . ."

Conclusion

The 1995 Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons has ended with two results significant for the consideration of the question before the Court:

The nuclear arsenals of both declared and undeclared nuclear weapon states remain intact, at a level variously estimated at 41,000 to 45,000 warheads.¹⁴⁹

There is no unambiguous, binding commitment by the declared nuclear weapon states, much less the undeclared ones, to the ultimate abolition of all nuclear weapons, even in the distant future.

Thus, the subjective threat of use of nuclear weapons remains as an objective threat to the survival of all or part of the world's present population and of generations to come. If this threat were regarded as an epidemic of potentially incalculable proportions, like polio in bygone days and AIDS in the present, the medical and scientific resources of humanity would be mobilized to combat it. The only weapons available to combat the potential of a nuclear epidemic are common sense, and the rule of law.

In light of the arguments presented here and in other Statements filed with the Court in support of both the World Health Organization and General Assembly Advisory Opinion cases, this Court is respectfully requested to advise that the threat and use of nuclear weapons is not permitted under international law in any circumstance.

¹⁴⁹ The Center for Defense Information, *Nuclear Weapon Facts*, 1995. If the Treaty on the Reduction and Limitation of Strategic Offensive Arms II (START II) is fully carried out, the estimated number of warheads in the year 2003 would be 20,000 to 22,000.