

Letter dated 20 June 1995 from the Acting Legal Adviser to the
Department of State, together with Written Statement of the
Government of the United States of America



United States Department of State

Washington, D.C. 20520

June 20, 1995

Sir:

In accordance with the Court's order of February 1, 1995, and Article 66, paragraph 2, of the Statute of the Court, I have the honor to transmit to you the enclosed Written Statement of the Government of the United States of America concerning the Request of the United Nations General Assembly for an Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons.

Accept, sir, the assurances of my highest consideration.

Sincerely,

Michael J. Matheson

Michael J. Matheson
Acting Legal Adviser

Enclosure:

As stated.

Mr. Eduardo Valencia-Ospina,
Registrar,
International Court of Justice,
Peace Palace,
The Hague, The Netherlands

BEFORE THE
INTERNATIONAL COURT OF JUSTICE

The Hague
The Netherlands

Request by the United Nations General Assembly
for an Advisory Opinion on the Legality of the
Threat or Use of Nuclear Weapons

WRITTEN STATEMENT OF THE
GOVERNMENT OF THE UNITED STATES OF AMERICA

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I. INTRODUCTION AND SUMMARY

By resolution 49/75K of December 15, 1994, the United Nations General Assembly has requested an advisory opinion from the International Court of Justice on the following question:

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

Upon receiving this request, the Court fixed June 20, 1995 as the time limit within which written statements relating to the question might be submitted by States. The United States hereby submits its written statement.

This request is closely related to the request of the World Health Organization (WHO) for an advisory opinion on the legality of the use of nuclear weapons. The United States submitted an extensive written statement concerning that request on June 10, 1994, and is today submitting written comments on the submissions of other States in that case. In the present statement, the United States offers its views on important issues raised by the request of the General Assembly.

In particular, the United States believes that the Court, in the exercise of the discretion provided by Article 65, paragraph 1, of its Statute, should decline to provide an opinion. The question presented is vague and abstract, addressing complex issues which are the subject of consideration among interested States and within other bodies of the United Nations which have an express mandate to address these matters. An opinion by the Court in regard to the question presented would provide no practical assistance to the General Assembly in carrying out its functions under the Charter. Such an opinion has the potential

of undermining progress already made or being made on this sensitive subject and, therefore, is contrary to the interests of the United Nations Organization.

Nonetheless, in view of the possibility that the Court may decide to provide an opinion, we offer views on the substance of the legal question presented by the request of the General Assembly. In the view of the United States, there is no general prohibition in conventional or customary international law on the threat or use of nuclear weapons. On the contrary, numerous agreements regulating the possession or use of nuclear weapons and other state practice demonstrate that their threat or use is not deemed to be generally unlawful.

Moreover, nothing in the body of international humanitarian law of armed conflict indicates that nuclear weapons are prohibited per se. As in the case of other weapons, the legality of use depends on the conformity of the particular use with the rules applicable to such weapons. This would, in turn, depend on factors that can only be guessed at, including the characteristics of the particular weapon used and its effects, the military requirements for the destruction of the target in question and the magnitude of the risk to civilians. Judicial speculation about hypothetical future circumstances on a matter of such fundamental importance would, in our view, be inappropriate.

In view of the importance of the legal question presented, the United States requests the opportunity to provide further

comments or observations relating to the question should the Court determine to respond to the request.

II. IN THE EXERCISE OF ITS DISCRETION, THE COURT SHOULD DECLINE TO ISSUE AN OPINION

The United Nations General Assembly does, of course, have the authority under Article 96, paragraph 1, of the United Nations Charter to request the Court to give an advisory opinion on any legal question. It is nonetheless well established that, pursuant to Article 65 of its Statute, the Court has discretion whether to provide an advisory opinion even where it has jurisdiction to entertain the request.¹

Where the proposed opinion would serve to assist another organ of the United Nations in understanding and carrying out its responsibilities, the Court has ordinarily been reluctant to refuse such a request.² However, in no case (other than the WHO

¹ Interpretation of Peace Treaties With Bulgaria, Hungary and Romania, Advisory Opinion, I.C.J. Reports 1950, p. 65 at p. 72; Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 15 at p. 19; S. Rosenne, The Law and Practice of the International Court (2d ed. 1985), pp. 652, 658, 698.

² Interpretation of Peace Treaties With Bulgaria, Hungary and Romania, I.C.J. Reports 1950, p. 65 at pp. 71-72; Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, I.C.J. Reports 1951, p. 15 at p. 19; Rosenne, supra, p. 709. In other instances, the Court has indicated that only for compelling reasons should the Court decline to provide an opinion where it otherwise has jurisdiction. Judgments of the Administrative Tribunal of the International Labor Organization Upon Complaints Made Against the United Nations Educational, Scientific and Cultural Organization, Advisory Opinion, I.C.J. Reports 1956, p. 86. In that case, the Court concluded that:

(continued...)

request on nuclear weapons) has the Court been asked to provide an opinion on an abstract question, the answer to which could not reasonably be expected to provide practical guidance to the fulfillment of the functions of the requesting body. Unlike other requests for advisory opinions, the present request does not present a dispute or situation upon which specific legal advice can usefully be given. Rather, the request presents a very general and vague question that would of necessity involve complex legal, technical, political and practical considerations.

These matters cannot usefully be addressed in the abstract without reference to the specific circumstances under which any use of nuclear weapons would be contemplated. The Court should not, on a matter of such fundamental importance, engage in speculation about unknown future situations.

Where the issuance of an opinion will not provide any practical guidance to the requesting body, there is little reason for the Court to grant the request. This is particularly true where the requesting body is a specialized organ having limited

²(...continued)

Notwithstanding the permissive character of Article 65 of the Statute in the matter of advisory opinions, only compelling reasons could cause the Court to adopt in this matter a negative attitude which would imperil the working of the regime established by the Statute of the Administrative Tribunal for the judicial protection of officials.

Subsequently, the Court has reiterated the view that an opinion should be provided unless there are "compelling reasons to the contrary" without specifying the harm that a refusal to grant the request for the opinion would have to the United Nations system. Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, I.C.J. Reports 1989, p. 191.

functions (such as the World Health Organization). It is also true even where the requesting body is another principal organ of the Organization with more general responsibilities, such as the General Assembly. If the question posed is too vague and hypothetical to provide useful guidance to the requesting body, the Court should decline the request for an opinion.

Moreover, where providing an opinion might create difficulties for another part of the United Nations Organization in carrying out its responsibilities, or for States in conducting negotiations outside the United Nations, the Court may appropriately determine that the Organization is better served by the Court's declining a request.

An opinion on the complex and sensitive matter of the threat or use of nuclear weapons could complicate the work of States or other United Nations bodies, thereby undermining the progress already made in this area. Marked differences of opinion have been expressed by Member States about the lawfulness of the use of nuclear weapons.³ The substantial progress made to date in controlling the possession and use of nuclear weapons has been possible because States have set aside their differences and concentrated on agreeing upon practical measures to reduce the danger of nuclear conflict. Pronouncements by the Court on the abstract question of the legality of the threat or use of nuclear

³ This fact was expressly acknowledged in the resolution of the WHO Assembly ("WHA") that requested an advisory opinion on the lawfulness of the use of nuclear weapons. WHA Resolution 46.40 (1993), preamble.

weapons could well obstruct this progress and compel States to turn to a fruitless debate about the legal implications of the Court's pronouncements. To the extent that such pronouncements affected international instruments concerning environmental protection or human rights, there could be serious complications for international negotiation and cooperation in these fields as well.

Finally, an opinion by the Court offering advice on what is in many respects essentially a political matter could undermine its authority and effectiveness.

In exercising its discretion, the Court should, in the view of the United States, take into account the significant number of States that did not support this request. The proposal for this request was introduced in the First Committee of the General Assembly. While 77 States voted for the request, 33 States opposed it and 21 abstained.⁴ The number of States that did not support the request was even greater when the matter subsequently came before the General Assembly. While 78 States voted for the resolution, 43 States opposed it and 38 abstained.⁵ In short, there was very substantial disagreement within the international community as to whether such a request was appropriate.

⁴ UN GAOR First Comm., 49th Sess., 24th Mtg., pp. 12-13; UN Doc. A/C.1/49/PV.24 (1994).

⁵ UN GAOR, 49th Sess., 90th Plen. Mtg., pp. 35-36; UN Doc. A/49/PV.90 (1994).

For these various reasons, the United States believes the Court should, in the exercise of its discretion under Article 65 of its Statute, decline to provide a response to the request.

III. THE SUBSTANCE OF THE QUESTION POSED

A. Introduction.

Some States have by agreement undertaken not to possess or use nuclear weapons under any circumstances and others have undertaken not to use such weapons in certain defined geographical areas. Apart from this, there is no prohibition in conventional or customary international law on the threat or use of nuclear weapons. On the contrary, international law is replete with agreements that regulate the possession or use of nuclear weapons, providing compelling evidence that their use is not deemed to be generally unlawful. The practice of States, including the Permanent Members of the Security Council, all of which maintain stocks of nuclear weapons, further proves this point.

In addition, nothing in the body of the international humanitarian law of armed conflict indicates that nuclear weapons are prohibited per se. As in the case of other weapons, the legality of use depends on the conformity of the particular use with the rules applicable to such weapons. This would, in turn, depend on factors that can only be guessed at, including the characteristics of the particular weapon used and its effects, the military requirement for the destruction of the target in

question and the magnitude of the risk to civilians. Judicial speculation on a matter of such fundamental importance would be inappropriate.

B. There is No General Prohibition on the Use of Nuclear Weapons.

It is a fundamental principle of international law that restrictions on States cannot be presumed but must be found in conventional law specifically accepted by them or in customary law generally accepted by the community of nations. There is no general prohibition on the use of nuclear weapons in any international agreement. There is likewise no such prohibition in customary international law. Such a customary prohibition could only result from a general and consistent practice of States followed by them from a sense of legal obligation. We submit, based on the following analysis of the agreements, conduct and expressed views of States, that there is no such practice.

1. Customary Law. Customary international law is created by a general and consistent practice of States followed by them from a sense of legal obligation.⁶ Evidence of a customary norm requires indication of "extensive and virtually uniform" State practice, including States whose interests are

⁶ See Restatement (Third) of the Foreign Relations Law of the United States § 102 (1987); Case Concerning the Continental Shelf (Libyan Arab Jamahariya v. Malta), I.C.J. Reports 1985, p. 13 at pp. 29-30.

"specially affected."⁷ Among the actions of States that contribute to the development of customary international law are international agreements concluded by them, governmental acts, and official statements of what the law is considered to be. (However, mere hortatory declarations or acts not based on a perception of legal obligation would not suffice.)⁸

With respect to the use of nuclear weapons, customary law could not be created over the objection of the nuclear-weapon States, which are the States whose interests are most specially affected. Nor could customary law be created by abstaining from the use of nuclear weapons for humanitarian, political or military reasons, rather than from a belief that such abstention is required by law. Among the more important indicators of State practice in this area are the international agreements that regulate but do not prohibit nuclear weapons, the fact of the acquisition and deployment of nuclear weapons by the major military powers, and the official views expressed by States on this question.

2. International Agreements. We are aware of no international agreement -- and certainly none to which the United States is a Party -- that contains a general prohibition on the use of nuclear weapons. On the contrary, it is evident that

⁷ North Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands), I.C.J. Reports 1969, p. 3 at p. 43.

⁸ See 7 R. Bernhardt, ed., Encyclopedia of Public International Law (1984), pp. 62-63.

existing agreements proceed from the assumption that there is no such general prohibition.

a. Use of Other Weapons. There are a number of prohibitions in international agreements on the use of other specific categories of weapons. These include: biological and chemical weapons (the 1925 Geneva Protocol);⁹ the use of environmental modification techniques as weapons (the 1977 Environmental Modification Convention);¹⁰ the use of exploding bullets (the 1868 Declaration of St. Petersburg);¹¹ and the use of weapons with non-detectable fragments (the 1981 Convention on Specific Conventional Weapons).¹² This pattern implies that there is no such general prohibition on the use of nuclear weapons, which would otherwise have found expression in a similar international agreement.

b. Agreements on Use of Nuclear Weapons. A few international agreements regulate the use of nuclear weapons, doing so in a way that indicates there is no general prohibition

⁹ Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 17 June 1925, 94 L.N.T.S. 65.

¹⁰ Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques, 18 May 1977, 1125 U.N.T.S. 3.

¹¹ Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, 11 December 1868, reprinted in A. Roberts & R. Guelff, Documents on the Laws of War (2nd ed. 1989), p. 63.

¹² Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, 10 April 1981, reprinted in Roberts & Guelff, supra note 11, p. 471.

on the use of such weapons. For example, there are agreements that prohibit the use of nuclear weapons in particular regions: Antarctica (the Antarctic Treaty);¹³ Latin America (the 1967 Treaty of Tlatelolco);¹⁴ and the South Pacific (the South Pacific Nuclear Free Zone Treaty).¹⁵

The Antarctic Treaty prohibits all nuclear explosions on the Antarctic continent. The Treaty of Tlatelolco prohibits the Latin American parties from using nuclear weapons under any circumstances; at the same time, two separate Additional Protocols, to which nuclear-weapon States are invited to adhere, obligate them to observe the same prohibition within a defined area in the Western Hemisphere. Similarly, Protocol 2 to the South Pacific Nuclear Free Zone Treaty (to which nuclear-weapon States are invited to adhere) prohibits Protocol Parties from using nuclear weapons against any Treaty Party. These provisions would make no sense if there were already a general prohibition on the use of nuclear weapons.

c. Agreements on Manufacture, Testing or Possession. A number of international arms control agreements prohibit or regulate the manufacture, testing or possession of nuclear weapons or systems for their delivery. These include the

¹³ Antarctic Treaty, 1 December 1959, 402 U.N.T.S. 71.

¹⁴ Treaty for the Prohibition of Nuclear Weapons in Latin America ("Tlatelolco Treaty"), 14 February 1967, 634 U.N.T.S. 281.

¹⁵ South Pacific Nuclear Free Zone Treaty, 6 August 1985.

1963 Limited Test Ban Treaty,¹⁶ the 1967 Outer Space Treaty,¹⁷ the 1968 Non-Proliferation Treaty,¹⁸ the 1971 Seabed Arms Control Treaty,¹⁹ the 1972 Anti-Ballistic Missile (ABM) Treaty,²⁰ the 1974 Threshold Test Ban Treaty,²¹ the 1987 Intermediate-Range Nuclear Forces (INF) Treaty²² and the 1991 Treaty on the Reduction and Limitation of Strategic Offensive Arms (START).²³ These treaties would be unnecessary if there were already a generally-accepted prohibition on the use of nuclear weapons.

Further, the terms of these treaties implicitly acknowledge in many ways that the continued possession and use of such weapons (within the confines of treaty limitations) are not

¹⁶ Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, 5 August 1963, 480 U.N.T.S. 43.

¹⁷ Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies, 27 January 1967, 610 U.N.T.S. 205.

¹⁸ Treaty on the Non-proliferation of Nuclear Weapons, 1 July 1968, 729 U.N.T.S. 161.

¹⁹ Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof, 11 February 1971, 955 U.N.T.S. 115.

²⁰ Treaty on the Limitation of Anti-Ballistic Missile Systems, 26 May 1972, 944 U.N.T.S. 13.

²¹ Treaty on the Limitation of Underground Nuclear Weapon Tests, 3 July 1974, 13 International Legal Materials ("ILM") (1974), p. 906.

²² Treaty on the Elimination of Intermediate-range and Shorter-range Missiles, 8 December 1987, 27 ILM (1988), p. 84.

²³ Treaty on the Reduction and Limitation of Strategic Arms, 3 January 1993, 16 UN Disarmament Yearbook (1991), App. II, p. 450.

prohibited. For example, the Limited Test Ban Treaty (to which there are well over one hundred parties) permits underground nuclear weapons testing, while prohibiting testing elsewhere. This is a clear acknowledgment that the possession of such weapons by the nuclear-weapon States is lawful and implies that use in at least some circumstances would also be lawful, since possession and testing of such weapons would otherwise be purposeless. Likewise, the Non-Proliferation Treaty accepts the lawfulness of the development and possession of nuclear weapons by the nuclear-weapon States designated in the Treaty, which would be senseless if all uses of such weapons were unlawful.

The ABM and START Treaties go even further in that they sanction the need for deterrent nuclear-weapon forces, prohibit the creation of destabilizing defenses against them, and prohibit or restrict offensive forces that could destroy them. Furthermore, the START Treaty accepts the legality and propriety of limited deployments of nuclear-weapon systems that are deemed to contribute to a stable nuclear deterrent posture. This entire structure of obligations would be meaningless if the use of nuclear weapons were considered to be unlawful under all circumstances.

d. Agreements on Accidental or Unauthorized Use.

International arms control agreements have been concluded which attempt in various ways to minimize the chance of accidental or unauthorized use of nuclear weapons. They include the 1963 "Hot

Line" Agreement,²⁴ the 1971 Accidents Measures Agreement,²⁵ the 1973 Prevention of Nuclear War Agreement²⁶ and the 1987 Nuclear Risk Reduction Agreement.²⁷ In addressing the need for arrangements to minimize the risk of unintended use of nuclear weapons, these agreements are additional evidence of the acceptance by States that the possession and use of such weapons are not generally prohibited.

3. Conduct of States. It is well known that the Permanent Members of the Security Council possess nuclear weapons and have developed and deployed systems for their use in armed conflict.²⁸ These States would not have borne the expense and effort of acquiring and maintaining these weapons and delivery systems if they believed that the use of nuclear weapons was generally prohibited. On the contrary, the possible use of these weapons is an important factor in the structure of their military establishments, the development of their security doctrines and strategy, and their efforts to prevent aggression and provide an essential element of the exercise of their right of self-defense.

²⁴ Memorandum of Understanding Regarding the Establishment of a Direct Communications ("Hot-Line") Link, 20 June 1963, 472 U.N.T.S. 163.

²⁵ Agreement on Measures to Reduce the Risk of Outbreak of Nuclear War, 30 September 1971, 807 U.N.T.S. 57.

²⁶ Agreement on the Prevention of Nuclear War, 22 June 1973, 24 U.N.T.S. 1478.

²⁷ Agreement on the Establishment of Nuclear Risk Reduction Centers, 15 September 1987.

²⁸ See Report of the U.N. Secretary-General on Nuclear Weapons, A/45/373, 18 September 1990, pp. 19-24.

(These deployments and doctrines are discussed in the 1990 Report of the Secretary-General on nuclear weapons.)²⁹ This pattern of conduct is inconsistent with the existence of any general legal prohibition on the use of nuclear weapons.

The fact that such weapons have actually been used in only one armed conflict does not suggest the contrary. Certainly nuclear-weapon States have preserved the option to use nuclear weapons if necessary, and (as is explained below) have not refrained from further use of these weapons because they believed such use to be unlawful -- which is an essential element in the development of customary international law.

4. Expressed Views of States. Various States have taken differing views on the legality of the use of nuclear weapons. As the United Nations Secretary-General has recently concluded, "no uniform view has emerged as yet on the legal aspects of the possession of nuclear weapons and their use as a means of warfare."³⁰ This is confirmed by the WHO resolution that requested an advisory opinion, which refers to the fact that "marked differences of opinion have been expressed by Member States about the lawfulness of the use of nuclear weapons."³¹ The variety and disparity of views expressed by States demonstrates that there is no generally-accepted prohibition on the use of nuclear weapons. Under these circumstances, customary

²⁹ Id., pp. 61-71.

³⁰ Id., p. 130.

³¹ WHA Resolution 46.40 (1993), preambular para. 9.

international law cannot be said to include such a general prohibition.

The position of the nuclear-weapon States is best illustrated by their official statements on nuclear-weapons use in the context of the Non-Proliferation Treaty and the Treaty of Tlatelolco. On April 5, 1995, Secretary of State Christopher announced that President Clinton had declared the following in the context of the Conference on the extension of the Non-Proliferation Treaty:

The United States reaffirms that it will not use nuclear weapons against non-nuclear-weapon States Parties to the Treaty on the Non-Proliferation of Nuclear Weapons except in the case of an invasion or any other attack on the United States, its territories, its armed forces or other troops, its allies, or on a State towards which it has a security commitment, carried out or sustained by such a non-nuclear-weapon State in association or alliance with a nuclear-weapon State.³²

Statements identical in substance were made at the same time by France,³³ Russia³⁴ and the United Kingdom.³⁵ The Security Council unanimously took note of these statements "with appreciation",³⁶ and no exception was taken to the reservation by these States of the right to use nuclear weapons in certain circumstances.

Likewise, at the time of its ratification of Additional Protocols I and II to the Tlatelolco Treaty, the United States

³² U.N. Doc. A/50/153 (1995).

³³ U.N. Doc. A/50/154 (1995).

³⁴ U.N. Doc. A/50/151 (1995).

³⁵ U.N. Doc. A/50/152 (1995).

³⁶ UN Security Council Resolution 984 (1995), para. 1.

made a formal statement of understandings and declarations, including a statement that effectively reserved its right to use nuclear weapons against one of the Contracting Parties in the event of "an armed attack by a Contracting Party, in which it was assisted by a nuclear-weapon State" ³⁷ Similar statements were made by the United Kingdom and the Soviet Union. ³⁸ France stated that nothing in the Protocol could present an obstacle to "the full exercise of the right of self-defense confirmed by Article 51 of the United Nations Charter." ³⁹

Although these statements differ in some respects, they have certain important common features. In particular, none acknowledges any general prohibition on the use of nuclear weapons; on the contrary, each clearly reserves the right to use nuclear weapons in some circumstances. Further, limits are offered only with respect to certain States, thus indicating that there are no comparable constraints on the use of nuclear weapons against States generally.

Additional statements of nuclear-weapon States on the use of nuclear weapons are contained in Appendix I to the Secretary-General's 1990 Report. ⁴⁰ In each case, the government

³⁷ 28 ILM 1423.

³⁸ Id. at 1418, 1422.

³⁹ Id. at 1415.

⁴⁰ Report of the U.N. Secretary-General on Nuclear Weapons, 18 September 1990, UN Doc. A/45/373 (1990), pp. 61-75; see also Statement of U.S. Defense Secretary Schlesinger of 1 July 1975, reprinted in 1975 Digest of U.S. Practice in International Law, pp. 800-01.

in question stated its resolve to act in such a manner as to avoid the necessity for the use of nuclear weapons, but in no case is there a recognition of any general prohibition on the use of nuclear weapons.

Beginning with Resolution 16/1653 in 1961, the U.N. General Assembly has adopted a series of resolutions declaring that the use of nuclear weapons is contrary to the U.N. Charter and international law generally.⁴¹ It is well established, however, that aside from certain administrative matters, the General Assembly does not have the authority to "legislate" or create legally binding obligations on its members.⁴² Further, such General Assembly resolutions could only be declarative of the existence of principles of customary international law to the extent that such principles had been recognized by the international community, including the States most directly affected.⁴³ In fact, there were a significant number of U.N.

⁴¹ E.g., UN General Assembly Resolution 33/71 B (1978); UN General Assembly Resolution 35/152 D (1980); UN General Assembly Resolution 36/92 I (1981); UN General Assembly Resolution 46/37 D (1991); UN General Assembly Resolution 47/53 C (1992).

⁴² See Charter of the United Nations, Article 11(1) ("The General Assembly may consider the general principles of cooperation in the maintenance of international peace and security, . . . and may make recommendations with regard to such principles"); Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South West Africa, Advisory Opinion, I.C.J. Reports 1955, pp. 90, 116 (separate opinion of Judge Lauterpacht) (" . . . the General Assembly has no legal power to legislate or bind its Members by way of recommendations").

⁴³ See, e.g., S. Schwebel, 7 *Forum Internationale* (1985), pp. 11-12; Letter of U.S. State Department Deputy Legal Adviser
(continued...)

Member States that did not accept these resolutions: in particular, these resolutions were not accepted by a majority of the nuclear-weapon States.

For example, Resolution 1653 was adopted by a vote of 55 to 20, with 26 abstentions, and each of the subsequent resolutions attracted at least 16 negative votes and a number of abstentions. In each case, the United States, the United Kingdom and France voted against the resolution. The representative of the United Kingdom, in explaining his Government's vote on Resolution 1653, stated that "so long as States possess nuclear weapons, they will use them in self-defense."⁴⁴ The representative of the United States stated that:

. . . it is simply untrue to say that the use of nuclear weapons is contrary to the Charter and to international law . . . Indeed, the very provisions of the Charter approve, and demand, the exercise of self-defense against armed attack. It is very clear that the Charter says nothing whatever about any particular weapon or method which may be used for self-defense.⁴⁵

During the 1980s, the General Assembly adopted a series of resolutions urging the nuclear-weapon States to adopt a policy of refraining from the first use of nuclear weapons and to begin negotiations on a legally binding regime including the obligation

⁴³(...continued)

Stephen Schwebel of 25 April 1975, 1975 Digest of U.S. Practice in International Law, p. 85; S. Schwebel, "Lawmaking in the United Nations," 4 Federal Law Review (1970), pp. 115, 118.

⁴⁴ 16 UN GAOR, 13th Sess., 1063rd Mtg., p. 803; UN Doc. A/13/PV.1063 (1961).

⁴⁵ Id. at 798.

not to be the first to use nuclear weapons.⁴⁶ Like the resolutions cited above, these resolutions on first use were not accepted by a significant number of U.N. Member States and in particular were not accepted by most nuclear-weapon States.⁴⁷ Further, the adoption of these resolutions implicitly indicates a general understanding that there is no existing prohibition on all uses of nuclear weapons, since there would be no need for first-use resolutions and agreements if all uses were already prohibited.

Taken together, these various expressions of the views of States demonstrate that there is no consensus on the question of the legality of the use of nuclear weapons. In particular, there is nothing approaching the degree of acceptance by States, and of acceptance by the States most specifically affected, that would be required to create obligations under customary international law.

Finally, there is nothing in the United Nations Charter, or in rules of customary international law embodied in it, that per se precludes the use of nuclear weapons. For example, States may use force when authorized by the Security Council under Chapter

⁴⁶ UN General Assembly Resolution 36/100 (1981); UN General Assembly Resolution 37/78 J (1982); UN General Assembly Resolution 38/183 B (1983); UN General Assembly Resolution 39/148 D (1984); UN General Assembly Resolution 40/152 A (1985); UN General Assembly Resolution 41/86 B (1986); UN General Assembly Resolution 42/42 A (1987); UN General Assembly Resolution 43/78 B (1988); UN General Assembly Resolution 44/119 B (1989).

⁴⁷ In each case, the United States, the United Kingdom and France voted against and each resolution attracted at least 17 negative votes and a number of abstentions.

VII or in the exercise of individual or collective self-defense. The exercise of self-defense is subject to the rules of necessity and proportionality, but the application of those rules to any use of nuclear weapons depends on the precise circumstances involved and cannot be judged in the abstract.

C. The Law of Armed Conflict Does Not Prohibit the Use of Nuclear Weapons.

The United States has long taken the position that various principles of the international law of armed conflict would apply to the use of nuclear weapons as well as to other means and methods of warfare.⁴⁸ This in no way means, however, that the use of nuclear weapons is precluded by the law of war. As the following will demonstrate, the issue of the legality depends on the precise circumstances involved in any particular use of a nuclear weapon.

It has been argued that the use of nuclear weapons is inherently precluded by the principles of international humanitarian law, regardless of the circumstances of their use. It seems to be assumed that any use of nuclear weapons would inevitably escalate into a massive strategic nuclear exchange, with the deliberate destruction of the population centers of the opposing sides.

Such assumptions are speculative in the extreme, and cannot be the basis for judgments by the Court on the legality of hypothetical uses of nuclear weapons that otherwise comply with

⁴⁸ See International Red Cross Conference Resolution XXVIII, 20th International Red Cross Conference (1965).

the principles of international humanitarian law. In fact, any serious analysis of the legality of a hypothetical use of nuclear weapons would of necessity have to consider the precise circumstances of that use. Such circumstances cannot be evaluated in the abstract, and any attempt by the Court to do so would, in our view, be inappropriate.

Various arguments have been advanced in support of the conclusion that the use of nuclear weapons is precluded by the law of armed conflict. In the following, we shall consider these arguments in turn and indicate why we believe each to be incorrect.

1. Attacking the Civilian Population. It has been argued that the use of nuclear weapons is unlawful in that it would constitute an attack on the civilian population. The law of armed conflict precludes making civilians the object of attack as such.⁴⁹ This, of course, does not mean that attacks on military objectives are prohibited simply because they may cause collateral civilian injury or damage -- as is often the case in armed conflict. This rule would not be violated by the use of nuclear weapons to attack targets that constitute legitimate military objectives, and in any event is subject to the right of reprisal (see below).

⁴⁹ See, e.g., U.S. Army Field Manual 27-10, Change No. 1, The Law of Land Warfare (1976) 4, para. 40(a) ("U.S. Army Field Manual").

2. Indiscriminate Weapons. It has been argued that nuclear weapons are unlawful because they cannot be directed at a military objective⁵⁰. This argument ignores the ability of modern delivery systems to target specific military objectives with nuclear weapons, and the ability of modern weapon designers to tailor the effects of a nuclear weapon to deal with various types of military objectives. Since nuclear weapons can be directed at a military objective, they can be used in a discriminate manner and are not inherently indiscriminate.

3. Proportionality. It has been argued that the use of nuclear weapons would be unlawful because it would cause collateral injury or damage to civilians or civilian objects that would be excessive in relation to the military advantage anticipated from the attack⁵¹. Whether an attack with nuclear weapons would be disproportionate depends entirely on the circumstances, including the nature of the enemy threat, the importance of destroying the objective, the character, size and likely effects of the device, and the magnitude of the risk to civilians. Nuclear weapons are not inherently disproportionate.

4. Poison Weapons. It has been argued that the use of nuclear weapons would violate the prohibition in the 1907 Hague

⁵⁰ For a restatement of the general rule in this context, see, e.g., U.S. Army Field Manual, supra note 49, at 5, para. 40(b)(3) and (c).

⁵¹ For a restatement of the general rule in this context, see, e.g., U.S. Army Field Manual, supra note 49, at 5, para. 41.

Convention on the use of poison weapons⁵². This prohibition was established with particular reference to projectiles that carry poison into the body of the victim. It was not intended to apply, and has not been applied, to weapons that are designed to injure or cause destruction by other means, even though they also may create toxic byproducts.

For example, the prohibition on poison weapons does not prohibit conventional explosives or incendiaries, even though they may produce dangerous fumes. By the same token, it does not prohibit nuclear weapons, which are designed to injure or cause destruction by means other than poisoning the victim, even though nuclear explosions may also create toxic radioactive byproducts.

5. 1925 Geneva Protocol. It has been argued that the use of nuclear weapons would violate the prohibition in the 1925 Geneva Protocol on the first use in war of asphyxiating, poisonous or other gases and analogous liquids, materials and devices⁵³. This prohibition was intended to apply to weapons that are designed to kill or injure by the inhalation or other absorption into the body of poisonous gases or analogous substances.⁵⁴

⁵² Hague Convention (IV) Respecting the Laws and Customs of War on Land, Annex, Art. 23(a) reprinted in Roberts & Guelff, supra note 11, p. 53.

⁵³ Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 17 June 1925, 94 L.N.T.S. 65.

⁵⁴ See F. Kalshoven, "Arms, Armaments and International Law", 191 Hague Academy of International Law (Recueil de Cours) (1985-II), pp. 283-84.

This prohibition was not intended to apply, and has not been applied, to weapons that are designed to kill or injure by other means, even though they may create asphyxiating or poisonous byproducts. Once again, the Protocol does not prohibit conventional explosives or incendiary weapons, even though they may produce asphyxiating or poisonous byproducts, and it likewise does not prohibit nuclear weapons.

6. 1977 Additional Protocol I. Additional Protocol I to the 1949 Geneva Conventions⁵⁵ contains a number of new rules on means and methods of warfare, which of course apply only to States that ratify Protocol I. (For example, the provisions on reprisals and the protection of the environment are new rules that have not been incorporated into customary law.)⁵⁶ It is, however, clear from the negotiating and ratification record of Protocol I that the new rules contained in the Protocol were not intended to apply to nuclear weapons.

At the outset of the negotiations that led to Protocol I, the International Committee of the Red Cross (ICRC) stated that:

Prohibitions relating to atomic, bacteriological and chemical warfare are subjects of international agreements or negotiations by governments, and in submitting these draft

⁵⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts ("Protocol I"), 12 December 1977, 1125 U.N.T.S. 3.

⁵⁶ See M. Bothe, K. Partsch & W. Solf, New Rules for Victims of Armed Conflicts (1982), pp. 312, 317; International Committee of the Red Cross, Commentary on the Additional Protocols of 8 June 1977 (1987), p. 662.

Additional Protocols the ICRC does not intend to broach these problems.⁵⁷

Explicit statements to the same effect were made during the negotiations by various delegations, including France, the Soviet Union, the United Kingdom and the United States.⁵⁸

Furthermore, in creating an ad hoc committee to consider specific restrictions on the use of conventional weapons thought to present special dangers to the civilian population, the Conference rejected a proposal to expand the scope of this study to nuclear weapons. The Committee concluded that the predominant view was acceptance of "the limitation of the work of this Conference to conventional weapons", noting in particular the important function of nuclear weapons in deterring the outbreak of armed conflict.⁵⁹

Nevertheless, in light of the importance of this point, a number of States made clear formal statements upon signature or ratification emphasizing that the new rules adopted in the Protocol would not apply to nuclear weapons. For example, the signature of the United Kingdom was based on the formal understanding that:

⁵⁷ International Committee of the Red Cross, Commentary on the Additional Protocols of 8 June 1977 (1987), p. xxxii.

⁵⁸ E.g., Official Records of the Diplomatic Conference of Geneva, Vol. V, p. 134; Vol. VII, p. 193, 295; Vol. XVI, p. 188.

⁵⁹ Id., Vol. XVI, p. 454.

. . . the new rules introduced by the Protocol are not intended to have any effect on and do not regulate or prohibit the use of nuclear weapons.⁶⁰

Similar express formal statements have been made on signature or ratification by Belgium, Canada, Italy, Germany, the Netherlands, Spain and the United States.⁶¹

To our knowledge, no State made any comment or objection to any of these formal and clear statements and declarations, nor did any State express a contrary view in connection with its own signature or ratification of Protocol I. In short, the record of signature and ratification of the Protocol reflect a manifest understanding that nuclear weapons were not prohibited or restricted by the new rules established by the Protocol.

This conclusion is consistent with the analysis of those experts on international humanitarian law who are best informed on the Conference's work. For example, the Commentary of the ICRC concluded: that "there is no doubt that during the four sessions of the Conference agreement was reached not to discuss nuclear weapons"; that the principles reaffirmed in the Protocol "do not allow the conclusion that nuclear weapons are prohibited as such by international humanitarian law"; and that "the

⁶⁰ International Committee of the Red Cross, Public Information Division, CD-ROM on International Humanitarian Law (September 1993) (containing up-to-date list of signatures, ratifications, accessions and successions relating to international humanitarian law treaties, as well as the full text of reservations, declarations and objections thereto) (United Kingdom).

⁶¹ Id. (Belgium, Canada, Italy, Germany, Netherlands, Spain, United States).

hypothesis that States acceding to the Protocol bind themselves without wishing to -- or even without knowing -- with regard to such an important question as the use of nuclear weapons, is not acceptable."⁶² Likewise, the extensive commentary of Bothe, Partsch and Solf on the Protocols concludes that the negotiating record "shows a realization by the Conference that the scope of its work excluded the special problems of the use of nuclear weapons."⁶³

7. Unnecessary Suffering. It has been argued that the use of nuclear weapons would violate the prohibition on the use of weapons that are of such a nature as to cause superfluous injury or unnecessary suffering.⁶⁴ This prohibition was intended to preclude weapons designed to increase the injury or suffering of the persons attacked beyond that necessary to accomplish the military objective.⁶⁵ It does not prohibit weapons that may cause great injury or suffering if the use of the weapon is necessary to accomplish the military mission. For example, it does not prohibit the use of anti-tank munitions which must penetrate armor by kinetic-energy or incendiary effects, even

⁶² International Committee of the Red Cross, Commentary on the Additional Protocols of 8 June 1977 (1987), pp. 593-94.

⁶³ Bothe, Partsch & Solf, supra note 56, p. 191.

⁶⁴ See Convention (IV) Respecting the Laws and Customs of War on Land, 18 October 1907, 1 Bevans 631, Annex, Art. 23(e).

⁶⁵ The prohibition has been applied, for example, to lances with barbed tips and bullets that are irregularly shaped, scored or coated with a substance that would unnecessarily inflame a wound. U.S. Army Field Manual, supra note 49, p. 18, para. 34.

though this may well cause severe and painful burn injuries to the tank crew. By the same token, it does not prohibit the use of nuclear weapons, even though such weapons can produce severe and painful injuries.

8. Environmental Effects. Article I of the 1977 Environmental Modification Convention⁶⁶ prohibits "military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party." Article II defines the term "environmental modification techniques" as "any techniques for changing -- through the deliberate manipulation of natural processes -- the dynamics, composition or structure of the Earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space."

Although one might imagine a hypothetical use of nuclear weapons to create an environmental modification technique (for example, to cause an earthquake or tidal wave), the Convention does not prohibit other uses of nuclear weapons (or any other weapon), even if they cause serious damage to the environment. Only the "deliberate manipulation" of environmental forces to cause destruction is covered.

Articles 35(3) and 55 of Additional Protocol I to the 1949 Geneva Conventions prohibit the use of "methods or means or warfare which are intended, or may be expected, to cause

⁶⁶ Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques, 18 May 1977, 1125 U.N.T.S. 3.

widespread, long-term and severe damage to the natural environment." This is one of the new rules established by the Protocol that, as explained above, do not apply to nuclear weapons.

9. Reprisals. It has been argued that the use of nuclear weapons would not be consistent with the law of reprisals. For the purpose of the law of armed conflict, reprisals are lawful acts of retaliation in the form of conduct that would otherwise be unlawful, resorted to by one belligerent in response to violations of the law of war by another belligerent. Such reprisals would be lawful if conducted in accordance with the applicable principles governing belligerent reprisals. Specifically, the reprisals must be taken with the intent to cause the enemy to cease violations of the law of armed conflict, other means of securing compliance should be exhausted, and the reprisals must be proportionate to the violations.⁶⁷ As in the case of other requirements of the law of armed conflict, a judgment about compliance of any use of nuclear weapons with these requirements would have to be made on the basis of the actual circumstances in each case, and could not be made in advance or in the abstract. (Of course, as shown elsewhere in this submission, possible lawful use of nuclear weapons is not limited to reprisals.)

⁶⁷ U.S. Army Field Manual, supra note 49, p. 177, para. 497.

Various provisions of Additional Protocol I contain prohibitions on reprisals against specific types of persons or objects, including the civilian population or individual civilians (Article 51(6)), civilian objects (Article 52(1)), cultural objects and places of worship (Article 53(c)), objects indispensable to the survival of the civilian population (Article 54(4)), the natural environment (Article 55(2)), and works and installations containing dangerous forces (Article 56(4)). These are among the new rules established by the Protocol that, as explained above, do not apply to nuclear weapons.

10. Neutrality. It has been asserted that the rules of neutrality in the law of armed conflict apply to and prohibit the use of nuclear weapons. However, the principle of neutrality⁶⁸ is not a broad guarantee to neutral States of immunity from the effects of war, whether economic or environmental. Its purpose was to preclude military invasion or bombardment of neutral territory, and otherwise to define complementary rights and obligations of neutrals and belligerents.⁶⁹ We are aware of no case in which a belligerent has been held responsible for

⁶⁸ See Hague Convention V Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, 18 October 1907, reprinted in Roberts & Guelff, supra note 11, p. 63.

⁶⁹ See, e.g., Greenspan, The Modern Law of Land Warfare, p. 356 (1959); W. Bishop, Jr., International Law: Cases and Materials, pp. 1019-20 (1971).

collateral damage to neutral territory for lawful acts of war committed outside that territory.⁷⁰

Further, the argument that the principle of neutrality prohibits the use of nuclear weapons is evidently based on the assertion that the use of such weapons would inevitably cause severe damage in the territory of neutral States. This assumption is incorrect and in any event highly speculative. The Court could not find that such damage would occur without knowing the precise circumstances of a particular use. Like any other weapon, nuclear weapons could be used to violate neutrality, but this in no way means that nuclear weapons are prohibited per se by neutrality principles.

11. Rendering death inevitable. It has been argued that the use of nuclear weapons would violate the principle expressed in the 1868 St. Petersburg Declaration concerning weapons that "render death inevitable".⁷¹ This assertion is evidently based on the argument that no nuclear weapon would leave those within the immediate vicinity of the explosion with any reasonable chance of survival.

This argument is based on a misconception of the St. Petersburg principle, which was directed at anti-personnel weapons that were deliberately designed to kill when that design

⁷⁰ See G. Schwarzenberger, International Law as Applied by International Courts and Tribunals, Vol. II, pp. 582-591 (1968).

⁷¹ Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, 11 December 1868, reprinted in Roberts & Guelff, supra note 11, p. 29.

feature was not needed to disable enemy combatants.⁷² This does not mean that it is unlawful to use a weapon that has a high probability of killing persons in its immediate vicinity if that design feature is required to fulfill a legitimate military mission.

For example, any large high-explosive or fragmentation weapon has a high probability of killing exposed persons within a certain distance of the detonation. An effective anti-submarine, anti-aircraft or anti-tank weapon has a high probability of killing the crews of these vehicles. This fact does not make these weapons unlawful, since these lethal effects are necessary for the effective accomplishment of their legitimate mission.

By the same token, a nuclear weapon is not prohibited per se by the St. Petersburg principle if its effects are required for a legitimate military mission. For example, the use of a nuclear weapon to destroy a naval vessel or an armored formation does not violate this principle, even though there would likely be a very high casualty rate among targeted combatants.

12. Genocide. It has been argued that any use of nuclear weapons which affects a large number of non-combatants could constitute genocide, and that the element of intent for genocide could be inferred from the mere failure of the person using the nuclear weapons to take account of its full effects. This is a

⁷² The only specific weapons prohibited by the St. Petersburg Declaration are projectiles weighing less than 400 grams that are explosive or "charged with fulminating or inflammable substances." *Id.*

serious misstatement of the elements of the offense of genocide, which is only committed if violent acts are done "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such."⁷³ The deliberate killing of large numbers of people is not sufficient to establish this offense unless this genocidal intent is demonstrated (although such killing might, depending on the circumstances, constitute a violation of other rules of international humanitarian law). Like any other weapon from firearms to poison gas, nuclear weapons could be used to commit genocide, but this fact in no way renders their use illegal per se.

D. International Environmental Instruments Do Not Prohibit the Use of Nuclear Weapons.

No international environmental instrument is expressly applicable in armed conflict. No such instrument expressly prohibits or regulates the use of nuclear weapons. Consequently, such an international environmental instrument could be applicable only by inference. Such an inference is not warranted because none of these instruments was negotiated with the intention that it would be applicable in armed conflict or to any use of nuclear weapons. Further, such an implication is not warranted by the textual interpretation of these instruments.

1. International Environmental Treaties. It has been suggested that there is a "Principle of Environmental Security"

⁷³ Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, UN General Assembly Resolution 260 A(III), 78 UNTS 277, Art. II.

which supposedly forms part of the law of war. This principle is said to be evidenced by the provisions of a number of international environmental law treaties, including the 1985 Vienna Convention for the Protection of the Ozone Layer, the 1992 Framework Convention on Climate Change, and the 1992 Convention on Biological Diversity. However, none of the cited environmental treaties defines any "environmental security" principle, nor does any of them state or even suggest that there is such a principle.

None of these treaties was negotiated with any idea that it was to be applicable in armed conflict, much less to prohibit the use of nuclear weapons. None of them makes specific or veiled reference to armed conflict, and none of them relates in any concrete way to the use of nuclear weapons. The application of these treaties to nuclear weapons would be for a purpose wholly different from that which was contemplated by the negotiating States.

a. 1985 Convention for the Protection of the Ozone Layer. A review of the text of the Vienna Convention for the Protection of the Ozone Layer⁷⁴ reveals no intent, whether express or implied, to address the legality of the use of nuclear weapons or any other form of armed conflict. The only provision of the Convention that even purports to regulate the conduct of the Parties is a general statement in Article 2(1):

⁷⁴ Convention for the Protection of the Ozone Layer, 22 March 1985, 26 ILM (1987), p. 1529.

The Parties shall take appropriate measures in accordance with the provisions of this Convention . . . to protect human health and the environment against adverse effects resulting or likely to result from human activities which modify or are likely to modify the ozone layer.

Article 2(1) does not contain any language which suggests that the Parties intended to prohibit any specific activities, and certainly none which suggests an intent to prohibit the use of any category of weapons.

Further, Annex I to the Convention sets forth an agenda for future research concerning substances and processes that may adversely affect the ozone layer. No reference is made, however, to research regarding the effects of the use of nuclear weapons, or to the effects of the use of any other weapons or means of warfare. The absence of any such reference further indicates that the Parties did not contemplate that the Convention would apply to such matters.

b. 1992 Convention on Climate Change. Nothing in the UN Framework Convention on Climate Change⁷⁵ addresses, expressly or by implication, the use of nuclear weapons or any other aspect of armed conflict. The objective of the Convention, as stated in Article 2, is to achieve "stabilization of greenhouse gas concentrations in the atmosphere" Similarly, the operative provisions of the Convention call on Parties to take various measures related to emissions of greenhouse gases. The Convention does not identify the use of

⁷⁵ United Nations Framework Convention on Climate Change, 9 May 1992, 31 ILM (1992), p. 849.

nuclear weapons as a source of greenhouse gases (although it identifies other such sources).

The record of the preparatory work for the Convention further establishes that the negotiating States did not intend to address the use of nuclear weapons. During preparatory work conducted by the United Nations Environment Programme (UNEP)/WHO Intergovernmental Panel on Climate Change that was tasked to develop possible elements of a convention, three proposals relating to armed conflict were suggested: one to refer to the 1977 Environmental Modification Convention,⁷⁶ a second suggesting a requirement that the climate be used only for "peaceful purposes", and a third suggesting that a linkage be established between nuclear stockpiles and climate change.⁷⁷ It appears, however, that none of these proposals (or anything similar) was put forward or discussed during the negotiations on the Convention that followed, nor were any such proposals included in the Convention text. The inescapable conclusion is that the States that negotiated the Convention did not intend to deal with such matters in that instrument.

⁷⁶ Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques, 18 May 1977, 1125 U.N.T.S. 3.

⁷⁷ "Report on Legal Measures by the Topic Coordinators", Response Strategies Working Group, Intergovernmental Panel on Climate Change (1990).

c. 1992 Biodiversity Convention. Nothing in the text of the Convention on Biological Diversity⁷⁶ states or implies that it applies to the use of nuclear weapons or any other aspect of armed conflict. The only provision of even arguable relevance is Article 14, which requires that, in cases where an activity within a Party's jurisdiction poses an "imminent or grave danger" to biological diversity outside its jurisdiction, that Party shall "as far as possible and as appropriate" notify the States potentially affected and initiate action to "prevent or minimize" the danger. This provision is not designed to deal with armed conflict and in any event recognizes that there may be circumstances in which it is not possible or appropriate to prevent or minimize danger to biological diversity. Nothing in the negotiating record of which we are aware suggests that this general admonition was intended to regulate armed conflict, much less to prohibit nuclear weapons.

2. International Environmental Declarations. It has also been argued that the use of nuclear weapons would be contrary to a series of non-legally binding environmental instruments. As will be seen from an examination of those instruments, this conclusion is wholly unwarranted.

a. 1972 Stockholm Declaration on the Human Environment. The 1972 Stockholm Declaration of the United

⁷⁶ Convention on Biological Diversity, 5 June 1992, 31 ILM (1992), p. 822.

Nations Conference on the Human Environment⁷⁹ is not a legally binding instrument, but rather a political statement of aspirations. Nothing in the Declaration purports to ban the use of nuclear weapons in armed conflict. Indeed, the one principle (Principle 26) expressly addressing nuclear weapons merely states that:

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

At most, this is only a statement of a policy objective and is certainly not a statement of a legal prohibition on the use of nuclear weapons. All efforts at the Conference to prohibit the use of such weapons in armed conflict were rejected.⁸⁰

Principle 21 of the Declaration provides:

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

It is clear, from a reading of the whole text of Principle 21, that it was designed to balance a statement of sovereign rights to exploit a State's own natural resources with a statement of the responsibility to ensure that the exercise of those rights

⁷⁹ Stockholm Declaration on the Human Environment (16 June 1972), section I of the Report of the United Nations Conference on the Human Environment, UN Doc. A/CONF.48/14 & Corr.1 (1972).

⁸⁰ See L. Sohn, "The Stockholm Declaration on the Human Environment", 14 Harvard Int'l L.J. (1973), p. 423 at pp. 508-11.

does not result in damage to others. It was obviously not drafted to apply to the conduct of armed conflict, much less to the use of nuclear weapons in foreign territory.

b. 1992 Rio Declaration on Environment and Development. The Rio Declaration on Environment and Development,⁸¹ like the Stockholm Declaration, is a non-legally binding political statement of principles and goals, adopted by consensus at the 1992 United Nations Conference on Environment and Development (UNCED). It does not address, even by inference, the legality of the use of nuclear weapons in armed conflict.

Only one of the principles of the Rio Declaration addresses armed conflict. Principle 24 provides:

Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary.

Thus Principle 24 calls on States to respect the existing international law providing protection for the environment in times of armed conflict, but does not in any way identify the content of that law, or express an opinion on the adequacy of its content. Although some States at the Rio Conference sought a general principle condemning weapons of mass destruction, they failed in this effort.⁸²

⁸¹ Rio Declaration on Environment and Development (14 June 1992), United Nations Conference on Environment and Development, UN Doc. A/CONF.151/5/Rev.1 (1992).

⁸² See J. Kovar, "A Short Guide to the Rio Declaration", 4 Colorado J. of Int'l Environmental Law & Policy (1993), p. 119 at p. 138.

Principles 1, 2 and 25 of the Rio Declaration have been cited for the proposition that the threat or use of nuclear weapons in an armed conflict would constitute a breach of generally accepted principles of international environmental law. However, none of these principles addresses armed conflict or the use of nuclear weapons.

Principle 1 provides:

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

Principle 2 is a restatement of Principle 21 of the Stockholm Declaration. Principle 2 provides:

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

This text simply adds to Stockholm Principle 21 the words "and developmental" after the word "environmental" in the phrase "pursuant to their own environmental and developmental policies." It thus no more today supports the position that international law prohibits the use in armed conflict of nuclear weapons than it did twenty years ago.

Principle 25 provides that:

Peace, development and environmental protection are interdependent and indivisible.

While this principle identifies peace as an essential prerequisite to sustainable development, it does not purport to

outlaw war, or to make the use of nuclear weapons in armed conflict unlawful.

Neither the nuclear-weapon States nor those States that rely for their security on the nuclear-weapon capabilities of others would ever have accepted a prohibition on the use of nuclear weapons in the context of such an instrument. The attempt ex post facto to interpret these instruments as if such a prohibition had been accepted would be to stand these instruments on their collective head and reverse the clear intent of the States that negotiated them.

Further, to the extent that the Court were to decide that the use of nuclear weapons is prohibited or restricted by international environmental agreements or principles, very serious damage could be caused to international cooperation and the development of legal norms in this area. Any determination by the Court that these instruments prohibit or restrict the use of nuclear weapons would introduce a new and highly divisive element into international cooperation in this field.

E. Human Rights Instruments Do Not Prohibit the Use of Nuclear Weapons.

The argument has been made that the use of nuclear weapons violates the internationally guaranteed right to life, based on such international instruments as the Universal Declaration of Human Rights, the International Covenant of Civil and Political Rights, the American Convention on Human Rights and the European Convention on Human Rights. However, in the view of the United

States, the use of nuclear weapons in the exercise of legitimate self-defense would not be in any way inconsistent with such a right to life.

The human rights instruments which recognize a right to life do not by their terms prohibit the use of nuclear or any other weapons. For example, the Universal Declaration provides in Article 3 that "[e]veryone has the right to life, liberty and security of person."⁸³ Nowhere in the Universal Declaration is there any mention of a limitation or prohibition on the use of any form of weaponry. The formulation contained in the International Covenant on Civil and Political Rights differs only slightly, primarily by adding to this basic assertion that no one shall be "arbitrarily deprived" of life.⁸⁴

None of these instruments prohibits, directly or indirectly, the taking of life for legitimate purposes, including in the exercise of the right to self-defense. That inherent right has long been understood and intended to comprehend the right to use lethal force, and it is inconceivable that the various human

⁸³ Universal Declaration of Human Rights, UNGA Res. 217A (III), UN Doc. A/811, adopted Dec. 10, 1948.

⁸⁴ Art. 6(1) of the 1966 International Covenant on Civil and Political Rights provides: "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." See also the 1969 American Convention on Human Rights, Art. 4(1): "Every person has the right to have his life respected. This right shall be protected by law, and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life." Article 4 of the 1981 African Charter on Human and Peoples' Rights states: "Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right."

rights instruments cited could have been intended to abridge that right so long as the rules of armed conflict and the limitations of the U.N. Charter are observed.

Thus, the prohibition in the International Covenant on Civil and Political Rights against arbitrarily depriving someone of his or her life was clearly understood by its drafters to exclude the lawful taking of human life. During the negotiation of the text which became Article 6, various delegations indicated a preference for including an explicit statement of the circumstances under which the taking of life would not be deemed a violation of the general obligation to protect life, including inter alia killings resulting from the use of force which is no more than absolutely necessary, or which occur in case of self-defense, or which are lawfully committed by the military in time of war.⁸⁵ Rather than attempt to identify all the possible circumstances under which the taking of life might be justified, the drafters agreed to a simple prohibition on the "arbitrary" deprivation of life. In any event, we know of no significant opposition to the proposition that the deprivation of life as a "lawful act of war" would not be violative of the protected right to life. The European Convention, which also guarantees the

⁸⁵ See, e.g., Bossuyt and Humphrey, Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights (1987), pp. 115-125.

right to life, specifically recognizes the right of States to deprive persons of their lives through lawful acts of war.⁸⁶

It has been suggested that the Human Rights Committee, in General Comments issued in 1982 and 1984, has construed the Covenant on Civil and Political Rights as prohibiting the possession and use of nuclear weapons. That is not, however, what the Committee actually said, and those Comments are not in fact inconsistent with the view that the Covenant does not prohibit the taking of life for legitimate purposes, including the proper exercise of the right of self-defense.

The 1982 Comment, for example, notes that the U.N. Charter prohibits the threat or use of force by one State against another, but expressly recognizes the inherent right of self-defense.⁸⁷ The 1984 Comment, while recognizing that nuclear weapons are among the greatest threats to the right to life, does not purport to declare that possession or use of such weapons is

⁸⁶ Article 2 of the European Convention on Human Rights prohibits the intentional taking of life, save in the case of capital punishment, or following the use of force which is no more than absolutely necessary in quelling riots or insurrections, preventing the escape of a lawfully-held prisoner, effecting a lawful arrest or in self-defense. Article 15 prohibits derogations from Article 2 "except in respect of deaths resulting from lawful acts of war."

⁸⁷ See General Comment 6/16, July 27, 1982, at paragraph 2: "The Committee observes that war and other acts of mass violence continue to be a scourge of humanity and take the lives of thousands of innocent human beings every year. Under the Charter of the United Nations the threat or use of force by any State against another State, except in exercise of the inherent right of self-defence, is already prohibited. The Committee considers that States have the supreme duty to prevent wars, acts of genocide and other acts of mass violence causing arbitrary loss of life." HRI/GEN/1/Rev. 1 at p. 6 (1994).

prohibited per se by international law. Rather, it simply proclaims that the production, testing, possession, deployment and use of such weapons "should" be prohibited, thereby expressing an aspirational goal to be achieved and not a binding rule of international law.⁸⁸

Accordingly, the citation of human rights instruments adds nothing to the analysis of the question whether the use of nuclear weapons is consistent with existing international law. The answer to that question is determined, as it must be, not by reference to human rights instruments but by application of the principles of international law governing the use of force and the conduct of armed conflict.

F. The Same Conclusions Apply to the Threat of Use of Nuclear Weapons.

The request of the General Assembly is somewhat broader than the request of the World Health Organization. Specifically, while the WHO request refers to "the use of nuclear weapons by a State in war or other armed conflict", the General Assembly request refers to "the threat or use of nuclear weapons in any circumstance". But even if this difference in the scope of the

⁸⁸ See General Comment 14/23, Nov. 2, 1984, paras. 4 and 6: "[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 such weapons may be brought about, not only in the event of war, but even through human or mechanical error or failure....The production, testing, possession, deployment and use of nuclear weapons should be prohibited and recognized as crimes against humanity." HRI/GEN/1/Rev. 1 at p. 6 (1994).

request was purposive, it does not lead to any different conclusion in substance.

In particular, if there is no prohibition per se on the use of a class of weapons, the "threat" to use such weapons is likewise not prohibited per se. States which maintain stocks of nuclear weapons for possible use in self-defense if the unfortunate necessity for such use should ever arise, and for the purpose of deterring aggression and hostile use of nuclear weapons by others, do not thereby violate international law if there is not an applicable prohibition on the possession or use of such weapons. (This is, of course, without prejudice to any specific obligation not to acquire, possess, deploy or use nuclear weapons that States may accept through such international agreements as the Non-Proliferation Treaty, the Tlatelolco Treaty, and the Outer Space Treaty.)

Indeed, many States rely for their security in large part on the nuclear capabilities of nuclear-weapon States, which have entered into mutual defense arrangements consistent with the collective self-defense principle recognized in Article 51 of the Charter. Nuclear deterrence has contributed significantly during the past 50 years to the enhancement of strategic stability, the avoidance of global conflict and the maintenance of international peace and security.

IV. CONCLUSION

The United States believes that the Court should, in the exercise of the discretion provided by Article 65, paragraph 1, of its Statute, decline to provide the opinion requested. In any event, there is no general prohibition in conventional or customary international law on the use of nuclear weapons, and there is no basis for speculation by the Court as to the manner in which the law of armed conflict might apply to the use of nuclear weapons in hypothetical future situations.