

**Written Comments of the Government of Egypt**

**LEGALITY OF THE THREAT OR USE  
OF NUCLEAR WEAPONS**

(REQUEST FOR ADVISORY OPINION)

ORDER OF 1 FEBRUARY 1995

WRITTEN COMMENTS OF EGYPT  
ON OTHER WRITTEN STATEMENTS  
(ARTICLE 66, PARAGRAPH 4, OF THE STATUTE)

September 1995

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## INTRODUCTION

1. The Government of the Arab Republic of Egypt has the honour to submit to the Court, in accordance with Article 66, paragraph 4 of the Statute, its written comments on other written statements relating to the request for an advisory opinion by the General Assembly in its resolution 49/75K of 15 December 1994.

2. The question contained in resolution 49/75K, for which Egypt has voted, reads as follows:

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

3. The World Health Assembly, in resolution WHA 46/40 of 14 May 1993, had also requested the Court to give an advisory opinion on the following:

*"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?"*

4. Egypt welcomes the decision of the Court to consolidate the oral hearings on both requests and addresses these comments to statements made in relation to both of them. While the two questions put to the Court are essentially similar, the question of the General Assembly is larger in scope, totally covering that of the World Health Assembly as well. This is the reason why the present comments are mainly addressed to the question of the General Assembly, while referring to the World Health Assembly's question whenever it is deemed necessary.

5. The written statement of Egypt of June 1995, together with the present comments constitute the position of Egypt on the two questions. Egypt believes that the question put to the Court by the General Assembly of the United Nations should be answered in the negative, whereas the answer to the question of the World Health Assembly should be in the affirmative.

6. Egypt notes that a large majority of States who have presented written statements relating to the two questions have adopted the same views as those she has put forward.

### I. Should the Court Render its Advisory Opinion on the Present Question?<sup>1</sup>

#### Arguments against the Court rendering an opinion:

7. Several States have maintained in their statements that the Court should decline to give the requested advisory opinion. It has thus been argued that "[t]he 'propriety' of judicial involvement with [the] question is more than doubtful",<sup>2</sup> and that the Court should not give the requested advisory opinion in the present case because there were several "compelling reasons" for it not to do so,<sup>3</sup> e.g. that "[t]he General Assembly's request ... leads to the question of Court's integrity ... since there is the danger of a pointless procedure."<sup>4</sup>

8. The reasons given for this negative attitude can be synthetically formulated as follows:

- That the question is abstract;
- That it is political;
- That the opinion can have no useful legal effect; or alternatively, and paradoxically
- That it will definitely have a nefarious effect on the ongoing disarmament and arms limitation negotiations.

These arguments are explained and refuted in turn.

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<sup>1</sup> The terms "present question", "present request" or "present case" refer to the request made by the General Assembly.

<sup>2</sup> Written statement of Germany, para. 2 at p. 3.

<sup>3</sup> Written statements of France, p. 5; and Germany, *loc. cit.*

<sup>4</sup> Written statement of Germany, para. 2 at p. 5.

1. The abstract character of the question:

9. It has been argued that the wording of the question of the General Assembly was broad, general and abstract, that it was hypothetical because it has not arisen within the context of a concrete legal or factual situation involving a specific use or threat to use nuclear weapons, that it required the Court to make speculative statements going beyond its judicial function, and that the question cannot be answered without reference to the numerous different combinations of circumstances in which the threat or use of nuclear weapons might be contemplated.<sup>5</sup> Therefore, the Court was invited to decline to answer the question posed by the General Assembly,<sup>6</sup> and not to engage in speculations about unknown future situations.<sup>7</sup>

10. That the abstract and general character of the question posed is a reason for the Court to decline to answer it in the exercise of its advisory rather than its contentious function, is a mere affirmation devoid of any justification and an inadmissible confusion between its two functions. The Court has declared that:

*"According to Article 96 of the Charter and Article 65 of the Statute, the Court may give an opinion on any legal question, abstract or otherwise."*<sup>8</sup>

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<sup>5</sup> Written statements of Russia, p. 5; Netherlands, para. 15, at p. 5; United States, pp. 1 and 4; France, para. 5 at pp. 13 f.; United Kingdom, para. 2.38, at p. 16; Germany, para. 2 at p. 5; and Finland, p. 1.

<sup>6</sup> Written statement of the United Kingdom, para. 1.3, at p. 1 and para. 2.23, at p. 9.

<sup>7</sup> Written statement of the United States, p. 4.

<sup>8</sup> Italics added. *Admission of a State to the United Nations (Charter, Art. 4), Advisory Opinion: I.C.J. Reports 1948, p. 57 at p. 61. See also Effect of awards of compensation made by the U.N. Administrative Tribunal, Advisory Opinion of July 13, 1954: I.C.J. Reports 1954, p. 47 at p. 51; and Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion of 21 June 1971, I.C.J. Reports 1971, p. 16, para. 40 at p. 27.*

In fact, in the exercise of its advisory function, the Court has more than once held that it is its "duty . . . to envisage the question submitted to it only in the abstract form which has been given to it . . ." <sup>9</sup> Moreover, as pointed out by Judge Azevedo, it is quite fitting for the advisory function of the Court to give an answer *in abstracto* which may eventually be applied to several *de facto* situations: *minima circumstantia facti magnam diversitatem juris*.<sup>10</sup>

11. Therefore, to argue that the question cannot be answered without reference to the numerous different combinations of circumstances in which the threat or use of nuclear weapons might be contemplated, and the factual matrix within which a specific use or threat to use nuclear weapons takes place, reveals a fundamental misunderstanding of the advisory function based on a confusion between it and the contentious function of the Court. The purpose of the advisory function is not to settle an actual dispute which cannot be understood without its factual and legal background, but to enlighten the requesting organ on certain legal issues which it has to deal with in discharging its functions.

## 2. The allegedly political nature of the question:

13. It has been suggested that the question posed by the General Assembly was not a legal question but a political one,<sup>11</sup> and that "an opinion by the Court offering advice on what is in many respects essentially a political matter could undermine its authority and effectiveness."<sup>12</sup> It has also been argued that the

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<sup>9</sup> *I.C.J. Reports 1948*, p. 57 at p. 61.

<sup>10</sup> *Cf.*, individual opinion of Judge Philadelpho Azevedo, *Admission of a State to the United Nations (Charter, Art. 4)*, *Advisory Opinion: I.C.J. Reports 1948*, p. 57 at p. 74.

<sup>11</sup> Written statements of France, pp. 12 f.; and Germany, para. 2 at p. 2.

<sup>12</sup> Written statement of the United States, p. 6.

use of nuclear weapons "cannot be assessed using the norms of international law without such an assessment turning from a judicial into a political one."<sup>13</sup>

13. The mere fact that the question may have been politically motivated cannot prevent the Court from rendering its advisory opinion. The Court has stated that:

"It is not concerned with the motives which may have inspired ... [the] request ..."<sup>14</sup>

The Court has also affirmed that:

"in institutions in which political considerations are prominent it may be particularly necessary for an international organization to obtain an advisory opinion from the Court as to the legal principles applicable with respect to the matter under debate ..."<sup>15</sup>

On another occasion, the Court said:

"It has been argued that the question put to the Court is intertwined with political questions, and that for this reason the Court should refuse to give an opinion. It is true that most interpretations of the Charter of the United Nations will have political significance, great or small. In the nature of things it could not be otherwise. The Court, however, cannot attribute a political character to a request which invites it to undertake an essentially judicial task ..."<sup>16</sup>

Thus, it is not for the Court to delve into the motivation which leads a duly authorized organ to request an advisory opinion on a legal question obviously falling within the jurisdiction of that organ even when that question relates to an issue which has other important political facets or is itself essentially political. In the two requests before the Court, the legal questions are clear

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<sup>13</sup> Written statement of Germany, para. 2 at p. 2.

<sup>14</sup> *I.C.J. Reports 1948*, p. 57 at p. 61.

<sup>15</sup> *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, I.C.J. Reports 1980*, p. 73, para. 33 at p. 87.

<sup>16</sup> *Certain Expenses of the UN, Advisory opinion of 20 July 1962, I.C.J. Reports 1962*, p. 151 at p. 155.



and the Court can answer them without enquiring into any apparent or hidden political motives or other political facets of the issue.

14. In the same vein, it was suggested, as a basis for the contention that the Court should decline to give the opinion, that there was very substantial disagreement within the international community as to whether such a request was appropriate.<sup>17</sup> On a previous occasion the Court had clearly indicated that the political controversy at the background of the question was not a reason for it to decline to give the advisory opinion requested.<sup>18</sup> "Differences of views among States on legal issues", explained the Court, "have existed in practically every advisory proceeding; if all were agreed, the need to resort to the Court for advice would not arise."<sup>19</sup>

15. It makes no difference that Resolution 49/75K was adopted amidst political controversy or whether it was adopted by a large majority or not. What matters is that it was properly adopted by the constitutionally required majority. It has thus to be considered as the expression of the legally valid will of the General Assembly.

3. Would an advisory opinion on the question put to the Court serve any useful legal purpose?:

16. It has been argued that an advisory opinion on the question put to the Court would serve no useful legal purpose, and would thus be a futile exercise of the judicial function, which dis-

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<sup>17</sup> Written statement of the United States, p. 6. Emphasis has been put on the circumstances of adopting resolution 49/75K and on its voting results. It was passed by 78 to 43 votes, with 38 abstentions.

<sup>18</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, I.C.J. Reports 1971, p. 16, para. 40 at p. 27.

<sup>19</sup> *Ibid.*, para. 34 at p. 24.

qualifies the request on grounds of "propriety". The argument goes on to explain that this is because the question does not fall in any of the categories of cases on which the Court has given advisory opinions up to the present.<sup>20</sup> Those categories were enumerated as follows:

*"(a) Cases where the legal question involved the interpretation of a constitutional provision which has become the subject of dispute in the organ making the request."*

*"(b) Cases where the legal question involves matters on which the requesting organ or agency seeks guidance in the exercise of its constitutional functions."*

*"(c) Cases where the legal question involves the interpretation of agreements between the Organization and a Member State."*

*"(d) Cases where the legal question concerns the obligations of Member States consequential upon decisions or resolutions of the competent organs of the organization."<sup>21</sup>*

17. This list is obviously a mere academic representation. It is one among many, and of course does not bind the Court nor can it limit the ambit of its advisory jurisdiction in any way. But even if, *arguendo*, it did, one can easily see that the present request falls under (b) as shall be apparent from the following point. But what is controlling here is not this list but the Statute. And the Statute is crystal clear when it provides that "[t]he Court may give an advisory opinion on any legal question".<sup>22</sup> The only condition is that the question be of a "legal nature" and falling within the jurisdiction of the requesting organ, which is for the General Assembly coextensive with the Charter.

18. Here again there is an impermissible confusion between the advisory and contentious functions of the Court. There is no need here, as in contentious proceedings, to prove a "legal interest" as a condition of admissibility of a case before the Court. In advisory proceedings, the Charter, including the Statute, leaves

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<sup>20</sup> Written statement of the United Kingdom, para. 2.27, at p. 11.

<sup>21</sup> *Ibid.*, pp. 12-15.

<sup>22</sup> Article 65 of the Statute of the Court.

it to the discretion of the requesting organ to evaluate the appropriateness and the eventual usefulness of the requested advisory opinion for its current and future work.

19. The Court has on numerous occasions affirmed its duty as "the principal judicial organ of the United Nations",<sup>23</sup> to respond to such requests:

"The reply of the Court, itself Organ of the United Nations, represents its participation in the activities of the Organization, and in principle should not be refused."<sup>24</sup>

Indeed, the Court considered that:

"no State, ... can prevent the giving of an Advisory Opinion which the United Nations considers to be desirable in order to obtain enlightenment as to the course of action it should take."<sup>25</sup>

It is not for the Court to decide in place of the General Assembly on the "desirability" or the "opportunity" of the request or to over rule it, when the Assembly had already considered it desirable.

20. It has been argued, nevertheless, that the nature of the case is such that the Court would be unable to give an advisory opinion which would be of positive assistance to the General Assembly and the other organs of United Nations, particularly in the field of disarmament and security.<sup>26</sup> It has also been argued that the Court "would be forced to overstep the bounds of its function as "the principal judicial organ of the United Na-

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<sup>23</sup> Article 92, Charter of the United Nations.

<sup>24</sup> *Interpretation of Peace Treaties (first phase), Advisory Opinion, I.C.J. Reports 1950*, p. 65 at p. 71; and *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, I.C.J. Reports 1951*, p. 15 at p. 19.

<sup>25</sup> *I.C.J. Reports 1950*, p. 65 at p. 71.

<sup>26</sup> Written statements of the United Kingdom, para. 2.27, at p. 11 and para. 2.37, at p. 16; United States, pp. 1 f.; and France, para. 7 at p. 16.

tions".<sup>27</sup> In this context, it has been stated that "[i]f a response by the Court to a request for an advisory opinion would, in fact, be unlikely to provide any constructive assistance to the other organs of the United Nations but, on the contrary, would be likely to have a detrimental effect on the activities of the United Nations family", it was "both the duty of the Court to protect its own judicial function and the need for it to play its part as an organ of the United Nations call for it to exercise its discretion to decline to respond to the request."<sup>28</sup>

21. It is submitted, however, that the advisory opinion of the Court can be of great practical value. The Court has abundantly reiterated that its advisory activity constitutes its main form of participation in the activities of the United Nations of which it is the principal judicial organ and that a request in principle should not be refused.<sup>29</sup> The present request relates to an issue that lies within the hard core of the first purpose and principal function of the United Nations, namely the maintenance of international peace and security, including disarmament and arms control. The question falls squarely within the ambit of the Assembly's large mandate under Article 10 covering "all matters falling within the Charter". In fact, the General Assembly has been dealing with the legality of nuclear weapons since its first session.<sup>30</sup> The request raises both the *jus ad bellum* question of the threat or use of force (Articles 2(4) and 51 of the Charter), as well as that of the *jus in bello* relating to certain weapons of mass destruction. Answering the request by the Court would enlighten the General Assembly on the legal context in which its activities are carried out. A statement by the Court on the legality of the threat or use of nuclear weapons under international law cannot fail to have a positive effect on the long-standing negotiations in the United Nations and elsewhere,

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<sup>27</sup> Written statement of Germany, para. 2 at p. 4.

<sup>28</sup> Written statement of the United Kingdom, para. 2.26, at p. 11.

<sup>29</sup> *I.C.J. Reports 1950*, p. 65 at p. 71; and *I.C.J. Reports 1951*, p. 15 at p. 19.

<sup>30</sup> Resolution no. 1(I) of 24 January, 1946.

at least by reducing the scope of a legal controversy.

4. Would an advisory opinion on the question put to the Court have a nefarious effect on the ongoing disarmament efforts?:

22. It has been argued that a judgment on the legality of nuclear weapons might jeopardize the operation of the Non-Proliferation Treaty in particular,<sup>31</sup> and the ongoing negotiations on nuclear disarmament in general.<sup>32</sup> This, it is submitted, is pure conjecture. A pronouncement by the Court on the subject is in no way incompatible with the pursuit of negotiations, especially if they were to be conducted in the light of an authoritative declaration on the issues involved. Confirming the illegality of the threat or use of nuclear weapons by an authoritative statement of the Court would play a major role in clarifying the law and thus, bringing a prolonged debate to a close. Therefore, such a pronouncement cannot harm the ongoing negotiations on nuclear disarmament in general.

23. On the contrary, most probably, a pronouncement by the Court would facilitate the implementation of Article VI of the Non-Proliferation Treaty which provides that the parties should "pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race ... and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control."

## II. Is there a General Prohibition on the Threat or Use of Nuclear Weapons in General International Law?

24. Moving to the substance of the question, it has been argued

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<sup>31</sup> Written statement of the Netherlands, para. 11, at p. 4.

<sup>32</sup> Written statements of the United Kingdom, para. 2.27, at p. 11 and paras. 2.41 f., at pp. 18 f.; United States, pp. 5 f; Germany, para. 2 at p. 5 and Finland, p. 1.

that international law does not contain a general prohibition on the use of nuclear weapons *per se*, that no treaty or other binding instrument specifically prohibits the use of nuclear weapons in all circumstances,<sup>33</sup> and that State practice demonstrates that their threat or use is not deemed to be generally unlawful.<sup>34</sup> It was suggested that the existence of several treaties on the prohibition of use in certain geographic regions, non-proliferation, manufacturing or testing of nuclear weapons proves that there is no global prohibition on the acquisition or use of nuclear weapons *per se*, as these treaties are premised on the lawful existence of nuclear weapons and their possession by States in general.<sup>35</sup>

25. This understanding of the role and the cumulative legal significance of the instruments which prohibit nuclear weapons, each in a certain domain or a certain area, is erroneous for two reasons. In the first place, the existence of numerous treaties each prohibiting a specific aspect or use of nuclear weapons bears witness to the emergence of a comprehensive legal prohibition rather than the reverse.<sup>36</sup>

26. Secondly, the fact that there is no general prohibition on the acquisition or detention of nuclear weapons is a separate

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<sup>33</sup> Written statements of Russia, p. 5, United Kingdom, para. 1.4, at p. 2 and para. 3.5, at p. 22; United States, pp. 2, 8 and 20; France, paras. 13 at p. 24, 31 at p. 45 and 33 at p. 53; and Italy, p. 1.

<sup>34</sup> Written statement of the United States, pp. 2 and 9.

<sup>35</sup> Written statements of Russia, pp. 6 f.; and United States, pp. 10-14.

<sup>36</sup> They are the Antarctic Treaty of 1959, United Nations, *Treaty Series*, Vol. 402, p. 71; Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and under Water of 1963, *op. cit.*, Vol. 480; Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies of 1967, *op. cit.*, Vol. 601, p. 205; Treaty for the Prohibition of Nuclear Weapons in Latin America of 1967 (Treaty of Tlatelolco), *op. cit.*, Vol. 634, p. 326; Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and Ocean Floor and the Subsoil Thereof of 1971, *op. cit.*, Vol. 895, p. 115; South Pacific Nuclear Free Zone Treaty of 1985 (Treaty of Rarotonga), 24 *I.L.M.*, 1440 (1985); and the African Nuclear-Weapon-Free Zone Treaty of 1995.

question from, and without prejudice to, the question of their use or threat thereof.

27. The general significance of these partial efforts to ban or outlaw different aspects of nuclear weapons has to be assessed in the light of the relevant resolutions of the General Assembly of the United Nations which are the clearest indications of the *opinio juris* of the international community on the subject.

28. General Assembly resolution no. 1653 (XVI) of 24 November, 1961 entitled "Declaration on the Prohibition of the Use of Nuclear and Thermo-nuclear Weapons" reads as a prohibition *de lege lata* of nuclear weapons.<sup>37</sup> It states that "[t]he use of nuclear ... weapons is contrary to the spirit, letter and aims of the United Nations and, as such, a direct violation of the Charter of the United Nations".<sup>38</sup> The resolution goes on to add that "[a]ny State using nuclear ... weapons is to be considered as ... acting contrary to the laws of humanity and as committing a crime against mankind and civilization."<sup>39</sup>

29. Equally, resolution 2936 (XXVII) of 29 November, 1972 on the Non-Use of Force in International Relations and Permanent Prohibition of the Use of Nuclear Weapons, enunciates "the permanent prohibition of the use of nuclear weapons".<sup>40</sup>

30. These two resolutions have been followed, almost annually,

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<sup>37</sup> Its preamble states that:

"the use of weapons of mass destruction, causing unnecessary human suffering, was in the past prohibited, as being contrary to the laws of humanity and to the principles of international law, by international declarations and binding agreements, such as the Declaration of St. Petersburg of 1868, the Declaration of the Brussels Conference of 1874, the Conventions of the Hague Peace Conferences of 1899 and 1907, and the Geneva Protocol of 1925, to which the majority of nations are still parties".

<sup>38</sup> Paragraph 1 (a).

<sup>39</sup> Paragraph 1 (d).

<sup>40</sup> Paragraph 1.

by others reiterating the illegality of nuclear weapons, e.g. resolutions 33/71 B, 35/152 D, 36/92 I, 45/59 B, 46/37 D, 47/56 C and 48/76 B.

31. It has been argued, however, that the link between the assertion of the illegality of nuclear weapons in paragraph 1 of resolution 1653 (XVI), and the request in the same resolution addressed to the Secretary-General of the United Nations to consult with Member States about the conclusion of a convention to prohibit the use of nuclear weapons, raises the question whether those States which voted in favour of the resolution regarded the use of nuclear weapons as unlawful in the absence of such a convention. This, it was suggested, casted doubts on the extent to which those States, which voted in favour of the resolutions, saw them as containing statements *de lege lata* about the legality of the use of nuclear weapons.<sup>41</sup>

32. The vote on a resolution calling, *inter alia*, for the conclusion of a convention prohibiting the use of nuclear weapons cannot be construed as a negation of the existence of such a prohibition under general international law. Otherwise, the conclusion of any codification convention would bear the negation of the prior existence of the rules it codifies. Such a convention is useful in spite of the prior existence of the rules, because it purports to eliminate or reduce the controversies over their existence and exact interpretation as rules of general international law.

33. In addition, the States which have voted in favour of resolution 1653 (XVI) calling, *inter alia*, for the conclusion of the convention are largely those who have voted for resolutions declaring that nuclear war "[r]esolutely, unconditionally and for all time condemn[ed] ... as being contrary to human conscience and reason, as the most monstrous crime against peoples and as a violation of the foremost human right - the right to life",<sup>42</sup>

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<sup>41</sup> Written statement of the United Kingdom, para. 3.28, p. 34.

<sup>42</sup> General Assembly resolution no. 38/75 B of 15 December, 1983.



that the use of nuclear weapons would be a violation of the Charter of the United Nations and a crime against humanity,<sup>43</sup> and that nuclear weapons pose the greatest danger to mankind and to the survival of civilization.<sup>44</sup>

34. It has been argued that General Assembly resolutions on nuclear weapons were not binding in themselves<sup>45</sup> and did not offer binding interpretations of the United Nations Charter.<sup>46</sup> It was held that the resolutions were not accepted by a majority of the nuclear weapon States. It was also claimed that such resolutions would only be declaratory 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".<sup>47</sup> The question of the voting results is raised in order to prove that the resolutions were not binding and to minimize their value.<sup>48</sup>

35. The resolutions of the General Assembly are an important component in the thickening legal network on the prohibition of nuclear weapons *per se*. It is important, therefore, to address the issue of their legal significance. Though formally most General Assembly resolutions addressed to Member States are mere recommendations, depending on their contents and the circumstances of their adoption, they can bear greater legal significance. Thus, the Court in its advisory opinion on *Namibia* declared that:

"it would not be correct to assume that, because the General Assembly is

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<sup>43</sup> Resolutions nos. 1653 (XVI), 33/71 B, 34/83 G, 35/152 D and 36/92 I 45/59 B, 46/37 D, 47/56 C and 48/76 B.

<sup>44</sup> Paragraph 47 of the Final Document of the First Special Session on Disarmament of the General Assembly of 1978.

<sup>45</sup> Written statements of the United Kingdom, para. 3.27, at p. 33; United States, pp. 18 f.; and France, para. 22 at p. 34.

<sup>46</sup> Written statement of Russia, p. 8.

<sup>47</sup> Written statement of the United States, pp. 18 f. See also written statement of the United Kingdom, para. 3.27, at p. 33.

<sup>48</sup> Written statement of Italy, pp. 1 f.

in principle vested with recommendatory powers, it is debarred from adopting, in specific cases within the framework of its competence, resolutions which make determinations or have operative design.<sup>49</sup>

They can also interact with the rules of general international law by having a declaratory, crystallizing or generating effect on them.<sup>50</sup>

36. As for General Assembly resolutions on nuclear weapons, they should be considered as declaratory of norms of general international law because they reveal the illegality of nuclear weapons in the light of the Charter and other rules of general international law. There are a number of factors which enhance their legal significance. The resolutions are drafted in precise legal language, and mostly make determinations of fact and law.<sup>51</sup> The voting patterns of those resolutions demonstrate a high and consistent support from the membership of the United Nations. Such an accumulation of resolutions can generate and result in the formation of a rule of customary international law.<sup>52</sup> It demonstrates continuity and distinguishes those resolutions as having stable support. It equally impresses the importance which States attach to them.<sup>53</sup> Repetition of the resolutions also answers the objection that a resolution may have only been

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<sup>49</sup> *I.C.J. Reports 1971*, p. 16, para. 105 at p. 50.

<sup>50</sup> See ABI-SAAB, Georges: La coutume dans tous ses états ou le dilemme du développement du droit international général dans un monde éclaté, in *Essays in Honour of Roberto Ago*, Dott. A. Giuffrè Editore, Milano, 1987, p. 56:

"il est possible de dire qu'à l'heure actuelle la très grande majorité de la doctrine est d'avis que les résolutions normatives de l'Assemblée générale peuvent susciter les mêmes modes d'interaction avec la coutume que ceux que la Cour a identifiés par rapport aux traités de codification, c'est-à-dire qu'elles peuvent produire les mêmes effets potentiels que ceux-ci, déclaratoires, cristallisants ou générateurs de règles coutumières."

<sup>51</sup> For example see the language of General Assembly resolution no. 38/75 B of 15 December, 1983 quoted above, *supra*, para. 33 at p. 13.

<sup>52</sup> Judge Tanaka, dissenting opinion, *South West Africa, Second Phase, Judgment*, *I.C.J. Reports 1966*, p. 6 at p. 291.

<sup>53</sup> *Cf.*, SLOAN, Blaine: General Assembly Resolutions Revisited (Forty Years Later), 58 *B.Y.I.L.*, p. 132 (1987).

adopted to please a temporary majority in a certain situation.<sup>54</sup> There is also a strong moral element in the resolutions which renders contrary practice increasingly of doubtful legality.

37. As for the claim that General Assembly resolutions on nuclear weapons were not declaratory of an existing custom because the nuclear-powers, being "the most directly affected States" have voted against them, it is obviously an argument worthy of consideration, based on some truth, but not the whole truth. For not only nuclear powers but all States of the world are "most directly affected", as potential recipients of nuclear wrath, by the issue of threat or use of nuclear weapons under international law.

38. The nuclear States can perhaps delay, but cannot definitely set obstacle to the emergence and consolidation of an *opinio juris* underlying a general rule of international law to the effect of the illegality of the threat or use of nuclear weapons *per se*, in any circumstance.

But even if the Court comes to the conclusion that such a rule has not yet reached the ultimate stage of consolidation, and that the threat or use of nuclear weapons is not prohibited *per se*; their use would still be prohibited in any circumstance, by *their effects*, under the general rules of the law of armed conflict.

### III. The Threat or Use of Nuclear Weapons in any Circumstance is Contrary to the Laws of Armed Conflict

39. All threat or use of force, including by nuclear weapons, is prohibited under Article 2(4) of the Charter, which provides only two exceptions to this general prohibition of the threat or use of force, namely self-defence in accordance with Article 51 of

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<sup>54</sup> *Cf.*, *loc. cit.*

the Charter and enforcement actions under Article 42 of the Charter.

40. As for enforcement action, in such cases where it deems it necessary to apply military force to "maintain or restore international peace and security", it is unimaginable that the Security Council would resort to or authorize the use of nuclear weapons with their wide ranging disastrous effects; that which would surely immensely aggravate any threat to or breach of peace, rather than restore international peace and security.

41. As to the other and more important exception to the prohibition of the use of force, as it is not subject to a prior decision by the Security Council, it has been argued that the questions put to the Court by the General Assembly and the World Health Assembly do not "draw a distinction between the use of nuclear weapons by the aggressor and the use of such weapons in self-defence",<sup>55</sup> and that general international law does not specifically prohibit the threat or use of nuclear weapons in self-defence.<sup>56</sup> It was also claimed that it would be entirely arbitrary to exclude *ex hypothesi* the right of a State to rely on nuclear weapons as a means of defence against a conventional attack, and that there can be no easy assumption that the use of nuclear weapons can never be justified in response to a conventional attack on the basis of the "disproportion" between the two, because what mattered was the result to be achieved by the "defensive" action and not the forms, substance and strength of the action itself. It was, thus, suggested that the question to be posed was whether, in the actual circumstances of an attack, the use of a particular nuclear weapon was necessary in order to defend the victim State?<sup>57</sup> It was finally claimed that the possibility of using nuclear weapons in self-defence found

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<sup>55</sup> Written statement of Russia, p. 5.

<sup>56</sup> Written statement of France, para. 18 at p. 30.

<sup>57</sup> Written statement of the United Kingdom, para. 3.36, at p. 37 and para. 3.40, at p. 38; see also written statement of France, para. 17 at pp. 28 f.

confirmation in Security Council resolution no. 984 (1995), and particularly in its preamble which refers *only* to "any aggression" with the use of nuclear weapons as "endangering international peace and security" "in accordance with the relevant provisions of the Charter of the United Nations".

42. By contesting the legality of the threat or use of nuclear weapons, even in self-defence, it is not suggested that the nuclear powers cannot use force in self-defence. It is simply submitted that the use of force, even in self-defence, has to conform with the rules of the *jus in bello*, and that nuclear weapons by their very nature and inevitable effects fall fowl with these rules, which are of absolute nature and do not permit their setting aside even in retaliation in the form of belligerent reprisals. Thus, even if the State or States exercising self-defence were attacked by nuclear weapons this does not mean that they may respond by nuclear weapons.

43. Reprisals are prohibited against protected persons and objects according to the Geneva Conventions of 1949 and their additional Protocols. This prohibition of reprisal is absolute and applies to the use of all weapons. In consequence, the protected persons and objects can never become targets of any attack, including nuclear attacks. The provisions of the Conventions and the Protocols carrying this prohibition of reprisals against protected persons and objects are considered declaratory of customary law.<sup>58</sup>

44. Moreover, paragraph 5 of Article 60 of the Vienna Conventions on the Law of Treaties of 1969<sup>59</sup> and 1986<sup>60</sup> provides

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<sup>58</sup> Cf., RONZITTI, Natalino: *The Law of Naval Warfare*, ed. by N. Ronzitti, Martinus Nijhoff Publishers, 1988, p. 47.

<sup>59</sup> Vienna Convention on the Law of Treaties. Concluded at Vienna on 23 May 1969. Entered into force on 27 January 1980. United Nations, *Treaty Series*, Vol. 1155, p. 331.

<sup>60</sup> Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations. Concluded at Vienna on 21 March 1986. Not yet in force. A/CONF.129/15.

that the rights open to an injured party, in terms of suspension or termination of a treaty in cases of material breach, shall not apply to treaties of "humanitarian character"; thus, excluding the application of the maxim *inadimplenti non est adimplendum*.<sup>81</sup> Hence, if a treaty of such a character was violated by another party, the injured party or parties may not proceed toward terminating the treaty or suspending its operation in whole or in part, or retaliate in kind against the breaching party. Consequently, even on the hypothesis that the use of nuclear weapons is at all permitted, they cannot be used in reprisals because breached treaties of "humanitarian character" applicable in this case, notably the Geneva Conventions and their Protocols, will still apply between the parties *durante bello* according to their own terms and by the application of the rules of the law of treaties. And in any case regardless of the treaties, the relevant principles and rules of humanitarian law expressed in these treaties are part of general international law. They are of a *jus cogens* character and thus cannot be waived.

45. It has been argued, however, that nothing in international humanitarian law indicates that nuclear weapons were prohibited *per se*.<sup>82</sup> More particularly, it was claimed that nuclear weapons were not prohibited by the Protocols of 1977<sup>83</sup> as the Diplomatic Conference which adopted the Protocols<sup>84</sup> had decided not to treat that issue.

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<sup>81</sup> Article 60, paragraph 5 provides that:

"Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties."

<sup>82</sup> Written statement of the United States, pp. 2, 7 and 21.

<sup>83</sup> Protocols Additional to the Geneva Conventions of 12 August 1949, and Relating to the protection of Victims of International Armed Conflicts of 1977.

<sup>84</sup> The Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 1974-77.

46. Indeed the United States, the United Kingdom and France made declarations at the time of signature and ratification (by those among them who ratified) to the effect that their understanding, which was generally accepted by the Conference according to them, was to consider the negotiations as well as the ensuing instruments as not covering nuclear weapons. This was made in the form of an interpretative declaration (revealing their own understanding of what happened) and not as a reservation subject to objections by other parties to the instruments; though several of the latter did append differing interpretative declarations on this point to their own signature or ratification. In fact, the American, British and French declarations have unreasonably stretched the significance of the decision of the Conference not to deal specifically with weapons and particularly with weapons of mass destruction and more particularly nuclear arms, leaving it to other fora where negotiations on their prohibition *per se* were in process or about to start. The general understanding was that these weapons will not be addressed specifically. But this was without prejudice to the applicability to such weapons of the general rules of humanitarian law which were in process of reaffirmation and development in the Conference. What was excluded from the ambit of the Conference and the ensuing Protocols was specific treatment of the nuclear weapons, and not the applicability of general rules to them as to all other weapons whether existing or non-existing yet. This comes clearly from the Commentary of the International Committee of the Red Cross on the Protocols which reads:

"delegations agreed not to discuss nuclear weapons. But it cannot be inferred from that that the rules of Protocol I do not apply to nuclear weapons. On the contrary, if the rules of Protocol I do not prohibit the use of nuclear weapons, they nevertheless seriously restrict such use<sup>55</sup>

47. Thus, whether the Conference did or did not specifically discuss nuclear weapons is a matter that has no bearing on the applicability of the provisions of Protocol I to nuclear weapons, as long as the effects of these weapons violate the rules and

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<sup>55</sup> Para. 1851 at p. 603.

principles expressed therein. The mere fact that the Protocol, or any other instrument, does not *specifically* prohibit the use of nuclear weapons, does not imply that their use is permissible if such use falls within the patterns of conduct prohibited by the provisions of these instruments.

48. Indeed the use of nuclear weapons violates several fundamental principles and rules of the international law of armed conflicts, prominent among them are the following:

49. 1. *The obligation to distinguish in all circumstances between civilian populations and objects and military personnel and objectives:* One of the most fundamental rules of humanitarian international law is that "[t]he civilian population ... as well as individual civilians, shall not be the object of attack."<sup>86</sup>

50. It is especially forbidden "[t]o destroy ... the enemy's property, unless such destruction ... be imperatively demanded by the necessities of war".<sup>87</sup> The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited.<sup>88</sup> Equally, in "bombardments" all necessary precautions must be taken to spare buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected.<sup>89</sup> Furthermore, it is also prohibited to attack civilian hospitals, convoys of vehicles, hospital trains, hospital ships, aircraft exclusively employed for the removal of wounded and sick civilians, or the transport of medical personnel and

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<sup>86</sup> Article 52(2) of the First Protocol.

<sup>87</sup> Article 23 (g) of the Hague Regulations Respecting the Laws of and Customs of War on Land annexed to Convention No. IV of 1907.

<sup>88</sup> *Ibid.*, Article 25.

<sup>89</sup> Article 27 of the First Protocol of 1977.



equipment.<sup>70</sup>

51. In order to ensure compliance with this prohibition the parties to the conflict are required *at all times* to "distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly ... direct their operations only against military objectives."<sup>71</sup> In other words, indiscriminate attacks are absolutely prohibited.<sup>72</sup>

52. This fundamental principle of the laws of armed conflict, most recently reiterated in the First Protocol of 1977, is a well established and uncontested rule of general international law. It applies to the use of any weapon old or new, existing or to come, conventional or non-conventional. It is not the nature of the weapon as such but the effect of its use which makes it fall under the prohibition. Thus, the most precise weapons can be used in an indiscriminate manner. But some weapons, by their massive and uncontrollable effects in terms of destruction, killing and

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<sup>70</sup> Articles 18, 21 and 22 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, of 12 August 1949. United Nations, *Treaty Series*, Vol. 75, p. 386. Also, Articles 12, 22 and 23 of the First Protocol of 1977.

<sup>71</sup> *Ibid.*, Articles 48 and 51(2).

<sup>72</sup> *Ibid.*, Article 51. According to this article indiscriminate attacks are:

"4. ...

c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently ... are of a nature to strike military objectives and civilians or civilian objects without distinction.

5. Among others, the following types of attacks are to be considered as indiscriminate:

a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and

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

pollution, are not amenable to discriminate use, directed only against military personnel and objectives; they are constitutionally (i.e. by their physical nature) "indiscriminate" in their effects.

53. This is the case of nuclear weapons. By their inherent qualitative and quantitative characteristics, the effects of nuclear weapons are necessarily and inescapably cataclysmic and indiscriminate. They cannot distinguish, it is submitted, between combatants and non-combatants and between protected and unprotected objects. They are expected to cause immense incidental loss of civilian life, injury to civilians, damage to civilian objects and to the environment, or a combination thereof, excessive in relation to any concrete and direct military advantage.

54. It has been contended, without being proven, that like any other weapons, nuclear ones can target military objectives, particularly when they are situated in isolated areas away from civilian concentrations, and that incidental damage to civilian population and objects, is collateral damage which is tolerated in humanitarian law as long as the military advantage outweighs the risks.<sup>73</sup> Thus, it cannot be said before hand and in general that the use of nuclear weapons is prohibited in all cases, as it will depend on the circumstances of each case.

55. It has been argued, furthermore, that modern nuclear weapons were capable of precise targeting and can be, therefore, directed against specific military objectives without indiscriminate effect on the civilian population,<sup>74</sup> and that modern weapon-designers were able to tailor the effects of a nuclear weapon to deal with various types of military objectives.<sup>75</sup> However, these arguments ignore, *inter alia*, the surrounding natural environment of the objective, and the risk-factor of error which can be extremely costly in cases of use of nuclear weapons, as

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<sup>73</sup> Written statement of the United States, p. 22.

<sup>74</sup> Written statement of the United Kingdom, para. 3.68, at p. 52.

<sup>75</sup> Written statement of the United States, p. 23.

well as the incalculable effects as to the general environment and the future generations, as certain effects cannot be locally contained and can be vehicled by the natural elements such as water and air.

56. One should thus not be misled by the concept of the so-called "low yield nuclear weapon", which remains a nuclear weapon with all the inherent effects and dangers of such weapons.<sup>76</sup>

57. Apart from the fundamental principle of discrimination at all times between military personnel and objectives and civilian populations and objects, several other principles and rules of the law of armed conflict also render the use of nuclear weapons illegal in any circumstance.

Prominent among them is the general principle enunciated in the Preamble of the Declaration of St. Petersburg of 1868<sup>77</sup> that:

*"the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy"*<sup>78</sup>

Similarly, the principle expressed in Article 22 of the Hague Regulations of 1907 states that:

*"the right of the belligerent to adopt means of injuring the enemy is not unlimited."*

These are, however, general injunctions, specified further *inter alia* in the following principles.

58. 2. *The prohibition against the use of weapons which cause unnecessary suffering:* It has been argued that the use of nuclear

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<sup>76</sup> For more details see the thorough examination of the question of "micro-nukes", "mini-nukes" and "tiny-nukes" in *Memorial of the Government of the Republic of Nauru*, September 1994, made in connection with the request for and advisory opinion made by the World Health Assembly, at pp. 53-8.

<sup>77</sup> Signed at St. Petersburg 29 November - 11 December 1868.

<sup>78</sup> Italics added.

weapons would not necessarily lead to a violation of the rule laid down in Article 23(e) of the Hague Regulations of 1907 which forbids belligerents "to employ arms, projectiles, or materials calculated to cause unnecessary suffering". It was suggested that suffering may be called "unnecessary" only when its infliction is not necessary to attain a lawful military advantage or greatly exceeds what could reasonably have been considered necessary to attain that military advantage,<sup>79</sup> that the question of whether a specific use is in contravention of the said obligation cannot, therefore, be answered until the exact implications, both as to the military advantage gained and to the injury caused, are known.<sup>80</sup>

59. It was argued, furthermore, that the prohibition was intended for weapons designed to increase the injury or suffering of the persons attacked beyond what is necessary to put them "*hors combat*";<sup>81</sup> for example weapons which would unnecessarily inflame wounds.<sup>82</sup>

60. Since the nineteenth century, this principle has been embodied in two rules: one forbids the use of poisons, while the other prohibits the use of weapons capable of causing superfluous injuries. Nuclear weapons fall in the latter category by reason, of their enormous blast waves, air blasts, fires, residual nuclear radiation or radioactive fallout, electromagnetic impulses and thermal radiation which cause extensive "unnecessary suffering".<sup>83</sup> By their poisonous effect, the use of nuclear weapons also violates the other rules as well as the 1925 Geneva Protocol.

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<sup>79</sup> Written statement of the Netherlands, para. 20. at p. 7. On a similar opinion see written statement of the United Kingdom, paras. 3.64 and 3.66, at pp. 50-52.

<sup>80</sup> Written statement of the Netherlands, para. 22, at p. 8.

<sup>81</sup> Written statement of the United States, p. 28.

<sup>82</sup> Written statement of the United States, f.n. 65 at p. 28.

<sup>83</sup> Cf. General Assembly resolution no. 1653 (XVI) of 24 November, 1961.

61. 3. *The prohibition against causing widespread, long-term and severe damage to the environment, and the obligation not to prejudice the health or survival of the population:* It has been argued that the prohibition to use "methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment" in the First Protocol of 1977<sup>84</sup> did not apply to nuclear weapons on the basis that the Protocol did not apply to such weapons.<sup>85</sup>

62. However, as it has been demonstrated, the Protocol governs the use and the effects of nuclear weapons. Thus, these prohibitions apply to them.<sup>86</sup> Even, if it were not used with the intent to attack the environment, the use of nuclear weapons becomes unlawful because its use will inevitably and on a wider scale harm the environment,<sup>87</sup> and would thereby prejudice the health or the survival of the population.<sup>88</sup>

#### IV. The Threat or Use of Nuclear Weapons is Contrary to Numerous other Principles and Rules of Contemporary International Law

The following are but a sample of some important principles of contemporary international law which would be violated by the threat or use of nuclear weapons in any circumstance.

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<sup>84</sup> Articles 35 (3) and 55 (2).

<sup>85</sup> Written statement of the United States, pp. 29 f.

<sup>86</sup> It is equally prohibited to carry out "[a]ttacks against the natural environment by way of reprisals". Article 55 (2) of the First Protocol of 1977.

<sup>87</sup> The violation by nuclear weapons of rules regulating the environment will be dealt with later, *infra*, paras. 70-73 at pp. ...

<sup>88</sup> Article 55 of the First Protocol of 1977.

A. The International Law of Human Rights:

63. 1. *The right to life:* It has been argued that the right to life did not mean that it was not possible to deprive a person of his life through legitimate use of force.<sup>88</sup> Attention was drawn to Articles 2, paragraph 2, and 15, paragraph 2, of the European Convention on the Protection of Human Rights and Fundamental Freedoms of 1950 which respectively provide that:

"Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which ... is absolutely necessary ... in defence of any person from unlawful violence ..."

and that:

"No derogation from Article 2, except in respect of deaths resulting from lawful acts of war ... shall be made under this provision."

Moreover, it has been argued that according to the International Covenant on Civil and Political Rights,<sup>89</sup> the "deliberate taking of life" is prohibited only if it is done "arbitrarily".<sup>91</sup> It was also argued that death resulting from the use of nuclear weapons in self-defence would thus not fall under these prohibitions.

64. Article 6(1) of the International Covenant on Civil and Political Rights<sup>92</sup> provides that "Every human being has the inherent right to life."<sup>93</sup> Although it is expected that in

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<sup>88</sup> Written statements of Russia, p. 9; and the Netherlands, para. 27, at p. 10.

<sup>89</sup> Article 6(1). United Nations, *Treaty Series*, Vol. 999, p. 171.

<sup>91</sup> Written statements of the United Kingdom, para. 3.101, at pp. 65 f.; and United States, p. 43.

<sup>92</sup> United Nations, *Treaty Series*, Vol. 999, p. 171.

<sup>93</sup> See also article 3 of the Universal Declaration of Human Rights of 1948.

times of war human beings, whether military or civilians, might perish, the killing of human beings should not exceed the limits of lawful acts of war. It should be recalled, however, that Article 40 of the Fourth Geneva Convention stipulates that "[i]t is prohibited to order that there shall be no survivors". Although an order to use nuclear weapons may not intend that "there shall be no survivors", it is an indirect order to do so by virtue of the immense lethal capabilities of such weapons. The use of nuclear weapons necessarily causes wide-scale deaths, thus "arbitrarily" depriving human beings of the right to life.

65. 2. *The right to enjoy the highest attainable standard of physical and mental health:* Everyone has a right to "the enjoyment of the highest attainable standard of physical and mental health."<sup>84</sup> It is needless to say that the adverse effects of nuclear explosions on the human health are immeasurable and irreparable. Two generations continue to suffer from the Hiroshima and Nagasaki bombs. It is noteworthy that existing modern nuclear weapons may be hundreds of times more powerful and damaging than those thrown over Japan in 1945. The use of nuclear weapons is an absolute impediment to the "enjoyment of the highest attainable standard of physical and mental health" by human beings.

#### B. The prohibition of genocide and crimes against humanity:

66. It has been argued that the mere use of nuclear weapons does not constitute genocide if it was not "committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group" on the grounds that genocide was a crime of intent.<sup>85</sup> It was, further, claimed that the prohibition of genocide was clearly not directed at collateral casualties resulting from attack on military objectives.

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<sup>84</sup> Article 12 of the International Covenant on Economic, Social and Cultural Rights. United Nations, *Treaty Series*, Vol. 999, p. 3.

<sup>85</sup> Written statements of Russia, p. 9; the Netherlands, para. 26, at p. 10; United Kingdom, para. 3.73, p. 54; and United States, pp. 33 f.

67. According to Article II of the Convention on the Prevention and Punishment of the Crime of Genocide of 1948<sup>66</sup> any acts "committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group" is considered genocide. It has already been demonstrated that by the inherent qualitative and quantitative characteristics of their effects, collateral damage of the use of nuclear weapons necessarily results in cataclysmic and indiscriminate effects, and is expected to cause immense incidental loss of civilian life inevitably excessive in relation to any concrete and direct military advantage anticipated. Therefore, their use cannot at all be justified by stating that extensive losses in life are simply collateral damage.

68. This is of special relevance to the argument that genocide is a crime of intent. For as long as it was unambiguously clear and known before hand to the user of nuclear weapons that their use would result in immense incidental loss of life, how can it still be argued that nuclear weapons can be lawfully used on the basis that there was no intention to cause such wide killing, or that the primary objective was something else? The question of intent applies to cases where the result was unexpected and the user could not have predicted its occurrence. Hence, the use of nuclear weapons necessarily implies an intent to destroy, or at least not to mind destroying, in whole or in part, the groups within which the target is situated.

#### C. The International Law of Environment:

69. It has been argued that no international environmental instrument is expressly applicable in armed conflict, or expressly prohibits or regulates the use of nuclear weapons.<sup>67</sup> It was mentioned that out of the some 300 multilateral treaties, 900

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<sup>66</sup> United Nations, *Treaty Series*, Vol. 78, p. 278.

<sup>67</sup> Written statements of the United States, p. 34; and France, para. 26 at p. 38.



bilateral treaties and 200 other instruments on the protection of the environment scarcely any of them makes any references to the use of nuclear weapons.<sup>98</sup>

70. Every State has, in accordance with the Charter of the United Nations and the principles of international law, the responsibility to ensure that activities within its jurisdiction or under its control do not cause damage to the environment of other States or areas beyond the limits of national jurisdiction.<sup>99</sup> This general rule, which figures in Principle 21 of the Stockholm Declaration, is further specified in numerous other instruments. For example the Convention for the Protection of the World Cultural and Natural Heritage of 1972,<sup>100</sup> and the Vienna Convention for the Protection of the Ozone Layer of 1985<sup>101</sup> provide that States Parties shall not take deliberate measures which might damage the cultural or natural heritage and that they shall take appropriate measures to protect the environment against adverse effects resulting from human activities which modify or are likely to modify the ozone layer.<sup>102</sup> More emphatically, Principle 26 of the Stockholm Declaration of 1972 states, *inter alia*, that:

"Man and his environment must be spared the effects of nuclear weapons and all other means of mass destruction."

It has been argued that this text as well as the Rio Declaration have no binding legal effect.<sup>103</sup> It is submitted, however, that those Declarations must be seen as declaratory of the

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<sup>98</sup> United Kingdom, paras. 3.109 f.

<sup>99</sup> Principle 21 of the Stockholm Declaration of the United Nations Conference on the Human Environment of 1972. 11 *I.L.M.*, 1416 (1972); and Principle 2 of the Rio Declaration. 31 *I.L.M.*, 851 (1992).

<sup>100</sup> 11 *I.L.M.*, 1358 (1972).

<sup>101</sup> 12 *I.L.M.*, 1529 (1987).

<sup>102</sup> Articles 6(3) and 2(1) of the Convention on Cultural and Natural Heritage, and the Ozone Layer Vienna Convention respectively.

<sup>103</sup> Written statement of France, para. 26 at p. 39.

evolving normative regulation for the protection of the environment, including from the effects of the use of nuclear weapons.

71. It has been argued, more concretely, that the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD) of 1977<sup>104</sup> was not applicable to most cases in which nuclear weapons might be used. It was argued that the Convention was designed to deal with the "deliberate manipulation" of the environment as a method of war.<sup>105</sup>

72. Article I of the ENMOD Convention provides that it is prohibited "to engage in 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." It also prohibits States from assisting, encouraging or inducing any State, group of States or international organization to engage in activities contrary to the provisions of paragraph 1 of Article I. Obviously, the use of nuclear weapons has such "widespread, long-lasting or severe effects" on the environment, as to fall under the prohibition of the Convention.

D. Use of nuclear weapons violates the neutrality and the territorial sovereignty of other States:

73. It has been argued that the principle of neutrality was not a broad guarantee to neutral States of immunity from the effects of war. It was equally maintained that no belligerent was held responsible for collateral damage to such States for acts of war committed outside their territories.<sup>106</sup> In addition, it has

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<sup>104</sup> United Nations, *Treaty Series*, Vol. 1108, p. 151.

<sup>105</sup> Written statements of the United Kingdom, para. 3.75, at p. 56; and United States, p. 29.

<sup>106</sup> Written statement of the United States, pp. 31 f.

been argued that the Court could not find that such damage would occur without knowing the precise circumstances of a particular use.<sup>107</sup>

74. Such arguments would render the principle of neutrality devoid of all meaning and legal value. But in international law, on the contrary, if a belligerent carries out a policy which infringes the rights of neutrals, the latter can not only protest but also take measures aimed at ending the illegal policy of the belligerent.<sup>108</sup>

75. Moreover, as was just mentioned in relation to environmental law, States have, in accordance with the Charter of the United Nations and the principles of international law, the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of the *other States or of areas beyond the limits of national jurisdiction*.<sup>109</sup> However, electromagnetic impulses resulting from a nuclear explosion at an altitude of 100 k.m. may travel to up to 1100 k.m.<sup>110</sup> Radioactive contamination may also reach the neighbouring countries of the State in which the explosion occurred.

76. In consequence, the use of nuclear weapons would necessarily violate the territorial sovereignty of other States, where the impact is bound to be felt, which is a fundamental principle of international law, and the principle of good neighbourliness provided for in Article 74 of the Charter of the United Nations.

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<sup>107</sup> Written statement of the United States, p. 32.

<sup>108</sup> RONZITTI, Natalino: *The Law of Naval Warfare*, ed. by N. Ronzitti, Martinus Nijhoff Publishers, 1988, p. 50.

<sup>109</sup> Principle 21 of the Stockholm Declaration of 1972 and Principle 2 of the Rio Declaration of 1992.

<sup>110</sup> 1987 WHO Report, para. 13 at p. 11 (French).

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77. In the light of the foregoing, Egypt maintains its submissions concluding its statement of 20 June, 1995.

78. As some States have reserved the right to make further submissions with regard to the request of the General Assembly should the Court decide to respond to it, Egypt reserves the right to respond to such submissions should the Court decide to receive them and in the manner which the Court will prescribe.