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Cour internationale
de Justice

LA HAYE

International Court
of Justice

THE HAGUE

ANNEE 1995

Audience publique

tenue le mercredi 15 novembre 1995, à 10 heures, au Palais de la Paix,

sous la présidence de M. Bedjaoui, Président

sur la Licéité de l'utilisation des armes nucléaires
par un Etat dans un conflit armé
(Demande d'avis consultatif soumise par
l'Organisation mondiale de la Santé)

et

sur la Licéité de la menace ou de l'emploi d'armes nucléaires
(Demande d'avis consultatif soumise par
l'Assemblée générale des Nations Unies)

COMPTE RENDU

YEAR 1995

Public sitting

held on Wednesday 15 November 1995, at 10 a.m., at the Peace Palace,

President Bedjaoui presiding

in the case

in Legality of the Use by a State of Nuclear Weapons in Armed Conflict
(Request for Advisory Opinion Submitted by the World Health Organization)

and

in Legality of the Threat or Use of Nuclear Weapons
(Request for Advisory Opinion Submitted by
the General Assembly of the United Nations)

VERBATIM RECORD

Présents : M. Bedjaoui, Président
M. Schwebel, Vice-Président
MM. Oda
Guillaume
Shahabuddeen
Weeramantry
Ranjeva
Herczegh
Shi
Fleischhauer
Koroma
Vereshchetin
Ferrari Bravo
Mme Higgins, juges

M. Valencia-Ospina, Greffier

Present:	President	Bedjaoui
	Vice-President	Schwebel
	Judges	Oda
		Guillaume
		Shahabuddeen
		Weeramantry
		Ranjeva
		Herczegh
		Shi
		Fleischhauer
		Koroma
		Vereshchetin
		Ferrari Bravo
		Higgins
	Registrar	Valencia-Ospina

Licéité de l'utilisation des armes nucléaires par un Etat dans un conflit armé (Demande d'avis consultif soumise par l'Organisation mondiale de la Santé)

L'Organisation mondiale de la Santé est représentée par :

M. Claude-Henri Vignes, conseiller juridique;

M. Thomas Topping, conseiller juridique adjoint.

Licéité de l'utilisation des armes nucléaires par un Etat dans un conflit armé (Demande d'avis consultif soumise par l'Organisation mondiale de la Santé)

et/ou

Licéité de la menace ou de l'emploi d'armes nucléaires (Demande d'avis consultatif soumise par l'Assemblée générale des Nations Unies)

Le Gouvernement de l'Australie est représenté par :

M. Gavan Griffith, Q.C., *Solicitor-General* d'Australie, conseil;

L'Honorable Gareth Evans, Q.C., sénateur, ministre des affaires étrangères, conseil;

S. Exc. M. Michael Tate, ambassadeur d'Australie aux Pays-Bas, conseil;

M. Christopher Staker, conseiller auprès du *Solicitor-General* d'Australie, conseil;

Mme Jan Linehan, conseiller juridique adjoint du département des affaires étrangères et du commerce extérieur, conseil;

Mme Cathy Raper, troisième secrétaire à l'ambassade d'Australie, La Haye, conseiller.

Le Gouvernement de la République fédérale d'Allemagne est représenté par :

M. Hartmut Hillgenberg, directeur général des affaires juridiques du ministère des affaires étrangères;

Mme Julia Monar, direction des affaires juridiques, ministère des affaires étrangères.

Le Gouvernement du Costa Rica est représenté par :

S. Exc. M. J. Francisco Oreamuno, ambassadeur de la République du Costa Rica aux Pays-Bas;

M. Carlos Vargas-Pizarro, conseiller juridique et envoyé spécial du Gouvernement du Costa Rica;

M. Rafael Carrillo-Zürcher, ministre-conseiller à ambassade du Costa Rica, La Haye.

Le Gouvernement de la République arabe d'Egypte est représenté par :

S. Exc. M. Ibrahim Ali Badawi El-Sheikh, ambassadeur d'Egypte aux Pays-Bas;

M. Georges Abi-Saab, professeur de droit international à l´Institut universitaire de hautes études internationales de Genève, membre de l´Institut de droit international;

M. Ezzat Saad El-Sayed, ministre-conseiller à l'ambassade d'Egypte, La Haye.

Le Gouvernement des Etats-Unis d'Amérique est représenté par :

M. Conrad K. Harper, agent et conseiller juridique du département d'Etat;

M. Michael J. Matheson, conseiller juridique adjoint principal du département d'Etat;

M. John H. McNeill, conseil général adjoint principal au département de la défense;

M. John R. Crook, assistant du conseiller juridique pour les questions relatives à l'Organisation des Nations Unies, département d'Etat;

M. D. Stephen Mathias, conseiller pour les affaires juridiques à l'ambassade des Etats-Unis d'Amérique, La Haye;

M. Sean D. Murphy, attaché pour les questions juridiques à l'ambassade des Etats-Unis d'Amérique, La Haye;

M. Jack Chorowsky, assistant spécial du conseiller juridique, département d'Etat.

Le Gouvernement de la République française est représenté par :

M. Marc Perrin de Brichambaut, directeur des affaires juridiques au ministère des affaires étrangères;

M. Alain Pellet, professeur de droit international à l'Université de Paris X et à l'Institut d'études politiques de Paris;

Mme Marie-Reine d'Haussy, direction des affaires juridiques

du ministère des affaires étrangères;

M. Jean-Michel Favre, direction des affaires juridiques du ministère des affaires étrangères.

Le Gouvernement de la Fédération de Russie est représenté par :

M. A. G. Khodakov, directeur du département juridique du ministère des affaires étrangères;

M. S. M. Pounjine, premier secrétaire à l'ambassade de la Fédération de Russie, La Haye;

M. S. V. Shatounovski, expert au département juridique du ministère des affaires étrangères.

Le Gouvernement des Iles Marshall est représenté par :

L'Honorable Theordore G. Kronmiller, conseiller juridique, ambassade des Iles Marshall aux Etats-Unis;

Mme. Lijon Eknilang, membre du conseil, gouvernement local de l'atoll de Rongelap.

Le Gouvernement des Iles Salomon est représenté par :

L'Honorable Victor Ngele, ministre de la police et de la sécurité nationale;

S. Exc. M. Rex Horoi, ambassadeur, représentant permanent des Iles Salomon auprès de l'Organisation des Nations Unies, New York;

S. Exc. M. Levi Laka, ambassadeur, représentant permanent des Iles Salomon auprès de l'Union européenne, Bruxelles;

M. Primo Afeau, *Solicitor-General* des Iles Salomon;

M. Edward Nielsen, consul honoraire des Iles Salomon à Londres;

M. Jean Salmon, professeur de droit à l'Université libre de Bruxelles;

M. James Crawford, professeur de droit international, titulaire de la chaire Whewell à l'Université de Cambridge;

M. Eric David, professeur de droit à l'Université libre de Bruxelles;

Mme Laurence Boisson de Chazournes, professeur adjoint à l'Institut universitaire de hautes études internationales, Genève;

M. Philippe Sands, chargé de cours à la *School of Oriental and African Studies*, Université de Londres, et directeur juridique de la *Foundation for International Environmental Law and Development*;

M. Joseph Rotblat, professeur émérite de physique à l'Université de Londres;

M. Roger Clark, professeur à la faculté de droit de l'Université Rutgers, Camden, New Jersey;

M. Jacob Werksman, directeur de programme à la *Foundation for International Environmental Law and Development*;

Mme Ruth Khalastchi, *Solicitor* de la *Supreme Court of England and Wales;*

Mme Louise Rands, assistante administrative à la *Foundation for International Environmental Law and Development*, Université de Londres;

M. Edward Helgeson, chercheur associé à l'Université de Cambridge, *Research Center for International Law*.

Le Gouvernement de l'Indonésie est représenté par :

S. Exc. M. Johannes Berchmans Soedarmanto Kadarisman, ambassadeur d'Indonésie aux Pays-Bas;

M. Malikus Suamin, ministre et chef de mission adjoint à l'ambassade d'Indonésie, La Haye;

M. Mangasi Sihombing, ministre-conseiller à l'ambassade d'Indonésie, La Haye;

M. A. A. Gde Alit Santhika, premier secrétaire à l'ambassade d'Indonésie, La Haye;

M. Imron Cotan, premier secrétaire de la mission permanente d'Indonésie auprès de l'Organisation des Nations Unies, Genève;

M. Damos Dumoli Agusman, troisième secrétaire à l'ambassade d'Indonésie, La Haye.

Le Gouvernement de la République Islamique d'Iran est représenté par :

S. Exc. M. Mohammad J. Zarif, ministre adjoint aux affaires juridiques et internationales, ministère des affaires étrangères;

S. Exc. M. N. Kazemi Kamyab, ambassadeur de la République islamique d'Iran aux Pays-Bas;

M. Saeid Mirzaee, directeur, division des traités et du droit international public, ministère des affaires étrangères;

M. M. Jafar Ghaemieh, troisième secrétaire à l'ambassade de la République islamique d'Iran, La Haye;

M. Jamshid Momtaz, conseiller juridique, ministère des affaires étrangères.

Le Gouvernement italien est représenté par :

M. Umberto Leanza, professeur de droit international à la faculté de droit de l'Université de Rome «Tor Vergata», chef du service du contentieux diplomatique du ministère des affaires étrangères et agent du Gouvernement italien auprès des tribunaux internationaux, chef de délégation;

M. Luigi Sico, professeur de droit international à faculté de droit à l'Université de Naples «Frederico II»;

Mme Ida Caracciolo, chercheur auprès de l'Université de Rome «Tor Vergata».

Le Gouvernement du Japon est représenté par :

S. Exc. M. Takekazu Kawamura, ambassadeur, directeur général au contrôle des armements et aux affaires scientifiques, ministère des affaires étrangères;

M. Koji Tsuruoka, directeur de la division des affaires juridiques, bureau des traités, ministère des affaires étrangères;

M. Ken Fujishita, premier secrétaire à l'ambassade du Japon, La Haye;
M. Masaru Aniya, division du contrôle des armements et du désarmement, ministère des affaires étrangères;

M. Takashi Hiraoka, maire d'Hiroshima;

M. Iccho Itoh, maire de Nagasaki.

Le Gouvernement de la Malaisie :

Dato' Mohtar Abdullah, *Attorney-General*, chef de délégation;

S. Exc. M. Tan Sri Razali Ismail, ambassadeur, représentant permanent de la Malaisie auprès de l'Organisation des Nations Unies, chef de délégation ajoint;

Dato' Heliliah Mohd. Yusof, *Solicitor-General*;

S. Exc. Dato' Sallehuddin Abdullah, ambassadeur de Malaisie aux Pays-Bas;

Dato' Abdul Gani Patail, jurisconsulte et chef de la division du droit international, cabinet de l'*Attorney-General*;

Dato' R. S. McCoy, Expert;

M. Peter Weiss, Expert.

Le Gouvernement du Mexique est représenté par :

S. Exc. M. Sergio González Gálvez, ambassadeur, ministre adjoint des affaires étrangères;

S. Exc. M. José Carreño Carlón, ambassadeur du Mexique aux Pays-Bas;

M. Arturo Hernández Basave, ministre à l'ambassade du Mexique, La Haye;

M. Javier Abud Osuna, premier secrétaire à l'ambassade du Mexique, La Haye.

Le Gouvernement de la Nouvelle-Zélande est représenté par :

L'Honorable Paul East, Q.C., *Attorney-General* de Nouvelle-Zélande;

S. Exc. Madame Hilary A. Willberg, ambassadeur de Nouvelle-Zélande aux Pays-Bas;

M. Allan Bracegirdle, directeur adjoint de la division juridique du ministère des affaires étrangères et du commerce extérieur de Nouvelle-Zélande;

M. Murray Denyer, deuxième secrétaire à l'ambassade de Nouvelle-Zélande, La Haye.

Le Gouvernement des Philippines est représenté par :

M. Merlin M. Magallona, professeur, doyen de la faculté de droit de l´Université des Philippines, agent;

S. Exc. M. Rodolfo S. Sanchez, ambassadeur des Philippines aux Pays-Bas;

M. Raphael Perpetuo Lotilla, profsseur, directeur de l´*Institute of International Legal Studies, UP Law Centre*;

M. Carlos Sorreta, mission permanente des Philippines auprès de l´Organisation des Nations Unies;

M. Emmanuel C. Lallana, directeur adjoint, *Foreign Service Institute*.

Le Gouvernement de Qatar est représenté par :

S. Exc. M. Najeeb ibn Mohammed Al-Nauimi, ministre de la justice;

M. Sami Abushaikha, expert juridique du Diwan Amiri;

M. Richard Meese, cabinet Frere Cholmeley, Paris.

Le Gouvernement du Royaume-Uni de Grande-Bretagne et d'Irlande du Nord est représenté par :

Le Très Honorable sir Nicholas Lyell, Q.C., M.P., *Attorney-General*;

Sir Franklin Berman, K.C.M.G., Q.C., conseiller juridique du ministère des affaires étrangères et du Commonwealth;

M. Christopher Greenwood, conseil;

M. Daniel Bethlehem, conseil;

M. John Grainger, conseiller;

M. Christopher Whomersley, conseiller;

M. Andrew Barlow, conseiller.

Le Gouvernement de Saint-Marin est représenté par :

Mme Federica Bigi, conseiller d'ambassade, fonctionnaire en charge de la direction politique au ministère des affaires étrangères.

Le Gouvernement de Samoa est représenté par:

S. Exc. M. Neroni Slade, ambassadeur et représentant permanent du Samoa auprès de l'Organisation des Nations Unies, New York;

M. Jean Salmon, professeur de droit à l'Université libre de Bruxelles;

M. James Crawford, professeur de droit international, titulaire de la chaire Whewell à l'Université de Cambridge;

M. Roger Clark, professeur à la faculté de droit de l'Université Rutgers, Camden, New Jersey;

M. Eric David, professeur de droit à l'Université libre de Bruxelles;

Mme Laurence Boisson de Chazournes, professeur adjoint à l'Institut universitaire de hautes études internationales, Genève;

M. Philippe Sands, chargé de cours à la *School of Oriental and African Studies*, Université de Londres, et directeur juridique de la *Foundation for International Environmental Law and Development*;

M. Jacob Werksman, directeur de programme à la *Foundation for International Environmental Law and Development*;

Mme Ruth Khalastchi, *Solicitor* de la *Supreme Court of England and Wales;*

Mme Louise Rands, assistante administrative à la *Foundation for International Environmental Law and Development*, Université de Londres.

Le Gouvernement de la République du Zimbabwe est représenté par :

M. Jonathan Wutawunashe, chargé d'affaires a.i., ambassade de la République du Zimbabwe, Bruxelles.

Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Request for Advisory Opinion Submitted by the World Health Organization)

The World Health Organization is represented by:

Mr. Claude-Henri Vignes, Legal Counsel;

Mr. Thomas Topping, Deputy Legal Counsel.

Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Request for Advisory Opinion Submitted by the World Health Organization)

and/or

Legality of the Threat or Use of Nuclear Weapons (Request for Advisory Opinion Submitted by the General Assembly of the United Nations)

The Government of Australia is represented by:

Mr. Gavan Griffith, Q.C., Solicitor-General of Australia, Counsel;

The Honorable Gareth Evans, Q.C., Senator, Minister for Foreign Affairs, Counsel;

H.E. Michael Tate, Ambassador of Australia to the Netherlands, Counsel;

Mr. Christopher Staker, Counsel assisting the Solicitor-General of Australia, Counsel;

Ms Jan Linehan, Deputy Legal Adviser, Department of Foreign Affairs and Trade, Counsel;

Ms Cathy Raper, Third Secretary, Australian Embassy in the Netherlands, The Hague, Adviser.

The Government of Costa Rica is represented by:

H.E. Mr. J. Francisco Oreamuno, Ambassador of the Republic of Costa Rica to The Netherlands;

Mr. Carlos Vargas-Pizarro, Legal Counsel and Special Envoy of the Government of Costa Rica;

Mr. Rafael Carrillo-Zürcher, Minister Counsellor, Embassy of Costa Rica, The Hague.

The Government of the Arab Republic of Egypt is represented by:

H.E. Mr. Ibrahim Ali Badawi El-Sheikh, Ambassador of Egypt to the Netherlands;

Mr. Georges Abi-Saab, Professor of International Law, Graduate Institute of International Studies (Geneva), Member of the Institute of International Law;

Mr. Ezzat Saad El-Sayed, Minister Counsellor, Embassy of Egypt, The Hague.

The Government of the Republic of France is represented by:

Mr. Marc Perrin de Brichambaut, Director of Legal Affairs, Ministry of Foreign Affairs;

Mr. Alain Pellet, Professor of International Law, University of Paris X and Institute of Political Studies, Paris;

Mrs. Marie-Reine Haussy, Directorate of Legal Affairs, Ministry of Foreign Affairs;

Mr. Jean-Michel Favre, Directorate of Legal Affairs, Ministry of Foreign Affairs.

The Governement of the Federal Republic of Germany is represented by :

Mr. Hartmut Hillgenberg, Director-General of Legal Affairs, Ministry of Foreign Affairs;

Ms Julia Monar, Directorate of Legal Affairs, Ministry of Foreign Affairs

The Government of Indonesia is represented by:

H.E. Mr. Johannes Berchmans Soedarmanto Kadarisman, Ambassador of Indonesia to the Netherlands;

Mr. Malikus Suamin, Minister, Deputy Chief of Mission, Embassy of the Republic of Indonesia, The Hague;

Mr. Mangasi Sihombing, Minister Counsellor, Embassy of the Republic of Indonesia, The Hague;

Mr. A. A. Gde Alit Santhika, First Secretary, Embassy of the Republic of Indonesia, The Hague;

Mr. Imron Cotan, First Secretary, Indonesian Permanent Mission of Indonesia to the United Nations, Geneva;

Mr. Damos Dumoli Agusman, Third Secretary, Embassy of the Republic of Indonesia, The Hague.

The Government of the Islamic Republic of Iran is represented by:

H.E. Mr. Mohammad J. Zarif, Deputy Minister, Legal and International Affairs, Ministry of Foreign Affairs;

H.E. Mr. N. Kazemi Kamyab, Ambassador of the Islamic Republic of Iran to the Netherlands;

Mr. Saeid Mirzaee, Director, Treaties and Public International Law Division, Ministry of Foreign Affairs;

Mr. M. Jafar Ghaemieh, Third Secretary, Embassy of the Islamic Republic of Iran, The Hague;

Mr. Jamshid Momtaz, Legal Advisor, Ministry of Foreign Affairs, Tehran, Iran.

The Government of Italy is represented by:

Mr. Umberto Leanza, Professor of International Law at the Faculty of Law of the University of Rome "Tor Vergata", Head of the Diplomatic Legal Service at the Ministry of Foreign Affairs and Agent of the Italian Government before the International Courts, Head of delegation;

Mr. Luigi Sico, Professor of International Law at the Faculty of Law of the University of Naples "Federico II";

Mrs. Ida Caracciolo, Researcher at the University of Rome "Tor Vergata".

The Japanese Government is represented by:

Mr. Takekazu Kawamura, Ambassador, Director General for Arms Control and Scientific Affairs, Ministry of Foreign Affairs;

Mr. Koji Tsuruoka, Director of Legal Affairs Division, Treaties Bureau, Ministry of Foreign Affairs;

Mr. Ken Fujishita, First Secretary, Embassy of Japan in the Netherlands

Mr. Masaru Aniya, Arms Control and Disarmament Division, Ministry of Foreign Affairs;

Mr. Takashi Hiraoka, Mayor of Hiroshima;

Mr. Iccho Itoh, Mayor of Nagasaki.

The Governement of Malaysia is represented by:

Dato' Mohtar Abdullah, Attorney-General - Leader;

Ambassador Tan Sri Razali Ismail, Permanent Representative of Malaysia to the United Nations in New York - Deputy Leader;

Dato' Heliliah Mohd. Yusof, Solicitor-General;

Dato' Sallehuddin Abdullah, Ambassador of Malaysia to the Netherlands;

Dato' Abdul Gani Patail, Head of Advisory and International Law Division, Attorney-General's Chambers;

Dato' Dr. R. S. McCoy, Expert;

Mr. Peter Weiss, Expert.

The Government of Marshall Islands is represented by:

The Honorable Theordore G. Kronmiller, Legal Counsel, Embassy of the Marshall Islands to the United States;

Mrs Lijon Eknilang, Council Member, Rongelap Atoll, Local Government.

The Government of Mexico is represented by:

H.E. Ambassador Sergio González Gálvez, Undersecretary of Foreign Relations;

H.E. Mr. José Carreño Carlón, Ambassador of Mexico to the Netherlands;

Mr. Arturo Hernández Basave, Minister, Embassy of Mexico, The Hague;

Mr. Javier Abud Osuna, First Secretary, Embassy of Mexico, The Hague.

The Government of New Zealand is represented by:

The Honorable Paul East, Q.C., Attorney-General of New Zealand;

H.E. Ms. Hilary A. Willberg, Ambassador of New Zeland to the Netherlands;

Mr. Allan Bracegirdle, Deputy Director of Legal Division of the New Zealand Ministry of Foreign Affairs and Trade;

Mr. Murray Denyer, Second Secretary New Zealand Embassy, The Hague;

The Government of Philippines is represented by:

Professor Merlin M. Magallona, Dean, College of Law, University of the Philippines, Agent;

H.E. Mr. Rodolfo S. Sanchez, Ambassador of the Philippines to the Netherlands;

Professor Raphael Perpetuo Lotilla, Director, Institute of International Legal Studies, UP Law Centre;

Mr. Carlos Sorreta, Philippine Mission to the United Nations, New York;

Dr. Emmanuel C. Lallana, Deputy Director, Foreign Service Institute.

The Government of Qatar is represented by:

H.E. Mr. Najeeb ibn Mohammed Al-Nauimi, Minister of Justice;

Mr. Sami Abushaikha, Legal Expert of the Diwan Amiri;

Mr. Richard Meese, Frere Cholmeley, Paris.

The Government of the Russian Federation is represented by:

Mr. A. G. Khodakov, Director, Legal Department, Ministry of Foreign Affairs;

Mr. S. M. Pounjine, First Secretary, Embassy of the Russian Federation in the Netherlands;

Mr. S. V. Shatounovski, Expert, Legal Department, Ministry of Foreign Affairs.

The Government of Samoa is represented by:

H.E. Mr. Neroni Slade, Ambassador and Permanent Representative of Samoa to the United Nations, New York;

Mr. Jean Salmon, Professor of Law, *Université libre de Bruxelles*;

Mr. James Crawford, Whewell Professor of International Law, University of Cambridge;

Mr. Roger Clark, Distinguished Professor of Law, Rutgers University School of Law, Camden, New Jersey;

Mr. Eric David, Professor of Law, *Université libre de Bruxelles*;

Mrs. Laurence Boisson de Chazournes, Assistant Professor, Graduate Institute of International Studies, Geneva;

Mr. Philippe Sands, Lecturer in Law, School of Oriental and African Studies, London University, and Legal Director, Foundation for International Environmental Law and Development;

Mr. Jacob Werksman, Programme Director, Foundation for International Environmental Law and Development;

Ms Ruth Khalastchi, Solicitor of the Supreme Court of England and Wales;

Ms Louise Rands, Administrative Assistant, Foundation for International Environmental Law and Development, London University.

The Government of San Marino is represented by:

Mrs. Federica Bigi, Official in charge of Political Directorate, Department of Foreign Affairs.

The Government of Solomon Islands is represented by:

The Honorable Victor Ngele, Minister for Police and National Security;

H.E. Ambassador Rex Horoi, Permanent Representative of Solomon Islands to the United Nations, New York;

H.E. Ambassador Levi Laka, Permanent Representative of Solomon Islands to the European Union, Brussels;

Mr. Primo Afeau, Solicitor-General for Solomon Islands;

Mr. Edward Nielsen, Honorary Consul, Solomon Islands, London;

Mr. Jean Salmon, Professor of Law, *Université libre de Bruxelles*;

Mr. James Crawford, Whewell Professor of International Law, University of Cambridge;

Mr. Eric David, Professor of Law, *Université libre de Bruxelles*;

Mrs. Laurence Boisson de Chazournes, Assistant Professor, Graduate Institute of International Studies, Geneva;

Mr. Philippe Sands, Lecturer in Law, School of Oriental and African Studies, London University, and Legal Director, Foundation for International Environmental Law and Development;

Mr. Joseph Rotblat, Emeritus Professor of Physics, University of London;

Mr. Roger Clark, Distinguished Professor of Law, Rutgers University School of Law, Camden, New Jersey;

Mr. Jacob Werksman, Programme Director, Foundation for International Environmental Law and Development;

Ms Ruth Khalastchi, Solicitor of the Supreme Court of England and Wales;

Ms Louise Rands, Administrative Assistant, Foundation for International Environmental Law and Development, London University;

Mr. Edward Helgeson, Research Associate, University of Cambridge, Research Center for International Law.

The Government of the United Kingdom of Great Britain and Northern Ireland is represented by:

The Right Honorable Sir Nicholas Lyell, Q.C., M.P., Her Majesty's Attorney-General;

Sir Franklin Berman, K.C.M.G., Q.C., Legal Adviser to the Foreign and Commonwealth Office;

Mr. Christopher Greenwood, Counsel;

Mr. Daniel Bethlehem, Counsel;

Mr. John Grainger, Adviser;

Mr. Christopher Whomersley, Adviser;

Mr. Andrew Barlow, Adviser.

The Government of the United States of America is represented by:

Mr. Conrad K. Harper, Agent and Legal Adviser, US Department of State;

Mr. Michael J. Matheson, Principal Deputy Legal Adviser, U.S. Department of State;

Mr. John H. McNeill, Senior Deputy General Counsel, US Department of Defense;

Mr. John R. Crook, Assistant Legal Adviser for United Nations Affairs, US Department of State;

Mr. D. Stephen Mathias, Legal Counsellor, Embassy of the United States, The Hague;

Mr. Sean D. Murphy, Legal Attaché, Embassy of the United States, The Hague;

Mr. Jack Chorowsky, Special Assistant to the Legal Adviser, US Department of State.

The Government of the Republic of Zimbabwe is represented by:

Mr. Jonathan Wutawunashe, Chargé d'Affaires a.i., Embassy of the Republic of Zimbabwe, Brussels.

The PRESIDENT: Please be seated. This morning the Court will resume its public hearings in the case of the two requests for advisory opinion submitted by the United Nations General Assembly and the World Health Organization. I will now call upon the distinguished representative of the delegation of the United Kingdom, the Right Honourable Sir Nicholas Lyell, Her Majesty's Attorney-General, to make his oral statement.

Sir Nicholas LYELL: Mr. President, Members of the Court, it is a great honour, Mr. President, to make this, my first appearance, before this Court on behalf of the United Kingdom. Few subjects in this unstable world could be more fundamental. But before I begin the substance of my speech, may I first, Mr. President, pay a sincere tribute to the late Judge Aguilar-Mawdsley. His sad death last month has deprived the Court of a most valued Member and one whose contribution to international law was of great significance.

Mr. President, the United Kingdom has a deep interest in this extremely important matter and addresses the Court in three capacities:

(a) as a State which itself possesses nuclear weapons for its national defence and has done so for over 40 years;

(b) as a permanent member of the Security Council which therefore has a special responsibility for the maintenance of international peace and security; and

(c) as a staunch supporter of this Court. The United Kingdom has accepted the compulsory jurisdiction of this Court since its foundation. I stress this, Mr. President, because the United Kingdom believes profoundly in the rule of law; and therefore in the importance of upholding the integrity of the Court's judicial process.

I shall concentrate in this address upon the three key issues raised by the two requests. For further detail, I respectfully refer the Court to the United Kingdom's two written statements.

The *first* issue is whether the World Health Organization is competent to request an opinion on the question it has put to the Court. Our submission is that it is not competent and the Court

should reject the WHO request on that ground.

The *second* issue concerns whether the Court should respond to the request from the General Assembly. This request is one which the General Assembly is competent to make, but it is a matter for the discretion of the Court whether or not to respond. And in our submission, Mr. President, there are compelling reasons why the Court should decline to respond to the request made by the General Assembly.

If accepted, our submissions on those two points would, of course, dispose of the matters before the Court. Nevertheless, if the Court is persuaded that it is right to consider the substantive law, a *third* issue then arises, namely what answers can properly be given to such over- simplified questions. These questions touch on what the Court will certainly recognize are immense and complex subjects and the nature of any answer could have most important ramifications.

However simple their terms, these questions do not admit of a simple answer. The United Kingdom's clear submission on this third issue will be that there is no specific rule of international law, express or implied, which outlaws the use of nuclear weapons *per se*. The legality of their use depends, and can only depend, upon the application of the general rules of international law, including those regulating the inherent right of self-defence and the conduct of hostilities. Those rules cannot be applied in isolation from any factual context to produce a prohibition of a general nature. Whether the use - or threatened use - of nuclear weapons in any particular case is lawful must depend upon *all* the circumstances.

Before proceeding to those matters, however, I must briefly mention one deep underlying aspect which these two requests ignore or certainly underplay. That is the sombre but vital role played by nuclear weapons in the system of international security over the past 50 years. For a State such as my own, the reason - the *sole* reason, Mr. President - for acquiring and possessing nuclear weapons is as a means of deterrence. I emphasize deterrence as something signalling both the will and the capacity to defend oneself, but there is a distinction between the concept of deterrence and that of self-defence. Self-defence is the right to resist and fight off an attacker. Deterrence warns a would-be aggressor not even to embark upon an attack.

Since the Second World War, the concept of deterrence has been fundamental to the maintenance of the peace and security of a substantial number of States. Not only the nuclear Powers themselves, but many non-nuclear States have sheltered under the umbrella of these weapons. We might wish nuclear weapons away, as we might wish away all weapons and, indeed, the whole concept of war and coercion. But nuclear weapons do exist and the Court - as a court of law - must operate not in some idealized world but in the real world. It has been suggested that all this is now in the past, but such a view, Mr. President, would be complacent. Some great changes have taken place in Europe and the former Soviet Union, and in the relaxation of tensions between East and West. Some start has been made in the reduction of those massive nuclear arsenals which are rightly feared. But huge numbers of nuclear weapons still exist. Our real world remains a fragmented and dangerous place and in this real world, to call in question now the legal basis of the system of deterrence on which so many States have relied for so long for the protection of their peoples could have a profoundly destabilizing effect.

The Competence of WHO

I turn now to the first of the three issues which I identified a few minutes ago, namely the competence of WHO to request the Court's opinion. Although the Court has decided - for very understandable reasons - that the present hearings should address both the WHO and General Assembly requests, those two requests must still be answered separately, as different considerations apply. In particular, the WHO request raises a prior and important question about the competence of a specialized agency to request an advisory opinion from the Court.

The United Kingdom does not agree[6] that the competence of WHO became moot once the General Assembly made a request of its own under its own powers. For the sake of the future, the Court is respectfully requested to rule on the point. In our submission, the Court should rule that the question posed by WHO does not fall within the scope of WHO's activities as required by Article 96

[6]Nauru and Malaysia, written comments on the written statements on the WHO request, June 1995, p. 3 in each statement.

of the United Nations Charter and that WHO has therefore acted outside its competence in making the present request. Furthermore, this lack of competence precludes the Court from considering the request. That is wholly unaffected by the separate request of the General Assembly. May I make this good.

Under Article 96 of the Charter, specialized agencies are authorized to request advisory opinions only on legal questions arising within the scope of their activities. This is the governing rule. This rule is faithfully reflected in both Article 76 of the WHO Constitution and Article X of the 1948 Relationship Agreement between the United Nations and WHO, each of which permits WHO to request opinions only on matters within the scope of its competence. Nothing of substance turns on the fact that one text refers to "competence", whereas the other refers to "activities". Similar language is used in corresponding legal provisions for other specialized agencies. The powers of each agency are limited and those limitations must be observed and enforced. Otherwise the way will be open to any specialized agency to approach the Court for advisory opinions on all manner of politically important general questions which lie not within their field of competence but that of the United Nations itself.

The question is not whether WHO complied with its own rules of procedure in adopting resolution 46/40 - that has not been challenged. It is whether that resolution falls within the substantive competence of WHO. So far as the advisory jurisdiction is concerned, WHO's competence is governed not only by its own Constitution but also by the *United Nations Charter*.

WHO's Constitution - its founding instrument - gives no hint that WHO might be competent to deal with the legality of using nuclear weapons. Article 1 sets out the *objectives* of the Organization and Article 2 its *powers*[7]. We do not agree[8] that competence to address the legality of using nuclear weapons can be inferred from the fact that one of the objectives of WHO is the attainment by all people of the highest possible level of health, or from the general power of WHO to take all

[7]On this aspect, see the United Kingdom's written statement on the WHO request, September 1994, pp. 30-40.

[8]Nauru, written statement on the WHO request, September 1994, Part II, pp. 3-6.

necessary action to achieve that objective. Nor can such a competence be derived from statements of extreme generality in the Preamble to the WHO Constitution.

To hold now, Mr. President, that these provisions enable WHO to challenge the lawfulness of the use of nuclear weapons, or any other weapon, would be at odds with any normal rules of treaty interpretation. On that form of reasoning, almost every specialized agency - the International Atomic Energy Agency (IAEA), International Labour Organisation (ILO), International Civil Aviation Organisation (ICAO) and many others - would suddenly become competent to refer questions regarding the use of nuclear or other weapons to the Court.

Nor do any of the lengthy written submissions on the WHO request give any convincing explanation as to why WHO should be thought competent to address the *legality* of nuclear weapons. A supposed presumption that resolutions are validly adopted[9] simply begs the question. In this case, considerable doubts about the Organization's competence had been raised even before the voting. The Organization's legal counsel himself advised that the Organization was not competent. Lack of competence is an objective legal fact which can not be cured by a majority vote in the World Health Assembly. In answer to the question put by Judge Koroma, the United Kingdom's view is that resolution 46/40 was not validly adopted as WHO lacked the competence to ask this question. Many States rejected the validity of the resolution at the time it was adopted and thus have a right to continue to do so before this Court.

The undoubted competence of WHO to deal with health matters includes the effects on health of warfare and, therefore, the *effects* of using weapons. But it is an unwarranted jump to say that this brings the *legality* of war or the *legality* of using any particular weapon within the Organization's competence. The effects on health of the use of a weapon are the same whether that use is lawful or unlawful. In either case, WHO's concern is with the consequences, not with the legality.

Moreover, the practice of WHO since its foundation shows that it has no established pattern

[9]Nauru, written statement on the WHO request, September 1994, Part II, pp. 17-18.

of interest in the legality of nuclear weapons. Resolution 46/40 is the first resolution of WHO which claims any interest for the Organization in this matter. This was made perfectly clear in the oral statement of its own legal counsel. The previous resolutions cited in resolution 46/40 deal with various *health aspects* of the *effects* of nuclear weapons but none have any bearing on the issue of *legality*. There is no foundation at all for the argument that resolution 46/40 is simply the culmination of a long line of WHO activities[10]. On the contrary, that resolution was a radical new departure.

Nor, Mr. President, can any competence be inferred by analogy from the practice of WHO regarding biological and chemical weapons. It is true that on occasion WHO has called upon States to become parties to agreements dealing with these weapons. But it is one thing to say that WHO is entitled to exhort States to become parties to disarmament treaties which have already been negotiated elsewhere and the implementation of which would eliminate the possession of such weapons. It is an entirely different matter to claim for WHO an established interest in the legality of using a weapon which has not been banned by treaty and on which negotiations are in progress in another forum unconnected with WHO. For WHO, resolution 46/40 was wholly new territory.

Similarly, to maintain that the fact that the World Health Assembly decided to ask the question now before the Court after long debate cannot mean that it was competent to do so. That argument amounts to saying that an organisation creates competence for itself because it has asked a question of the Court, rather than that it is able to ask the question because it is competent to do so.

In summary, Mr. President, WHO is simply not competent to put this question to the Court - and this is why I have made these points to the court - and there are cogent reasons why the Court should so rule in order to protect the integrity of its advisory jurisdiction.

Nor does the General Assembly request affect this conclusion. The idea that the issue of the WHO's competence is now "moot" is unacceptable. A legal restriction on an organization's competence cannot be "cured" by parallel action by the General Assembly. Otherwise, Mr.

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[10]Nauru, written statement on the WHO request, September 1994, Part I, p. 13.

President, constitutional limitations on the specialized agencies would become meaningless. Only the competence of the General Assembly would then matter.

The Court's discretion not to respond to the requests

Mr. President, in contrast to the case of WHO, the competence of the United Nations General Assembly to pose its question is not, of course, in dispute. Whether or not the Court should answer is, however, very much a matter within the Court's discretion. Contrary to what was suggested by counsel for Egypt, the United Kingdom has never suggested that the Court had an "unfettered discretion" in this respect. What it does have - as counsel for Egypt himself recognized - is a right and a duty to safeguard the integrity of its judicial function. It is clear both from Article 65 of the Statute of the Court and from the Court's jurisprudence that even where the competence to make a request is not in dispute, the Court has an inherent discretion not to respond to that request[11].

The United Kingdom submits that the Court should exercise its discretion *not* to respond to the request from the General Assembly. Similarly, if, contrary to my earlier submission, the Court were to consider that WHO was competent to put its question to the Court, the United Kingdom submits that the Court should none the less decline to answer that question also. The reason is that both questions are too abstract and speculative for a meaningful response. A response would serve no useful purpose and may, in fact, actually do harm.

The United Kingdom's first submission is that in each case the question is simply too abstract. The circumstances in which it might arise are not merely unrelated to any particular set of facts. They are wholly undefined. As a matter of principle, the answering of questions of such a speculative nature has never been part of the judicial function. As Judge Hudson made clear, the judicial function lies in the application of the law to specific factual situations and circumstances[12].

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[11]*Interpretation of Peace Treaties, I.C.J. Reports* 1950, pp.71-72; *Certain Expenses of the United Nations, I.C.J. Reports 1962,* p.155.

[12]Hudson, 'The Advisory Opinions of the Permanent Court of International Justice', *International Conciliation* (November 1925), No. 214, p. 374; United Kingdom, written statement on the General Assembly request, June 1995, p. 17.

When this is the case - as it normally is - the Court should naturally seek to respond if it can. When this is not the case - as in the present instance - the Court should respectfully decline.

Here, as a number of the written statements recognize[13], the question is abstract, hypothetical, speculative. In the United Kingdom's submission, it is neither practicable nor consistent with the integrity of the judicial function for the Court to be invited to answer so speculative a question.

Suppose, Mr. President, the Court were minded to answer the question posed, and you must be agonizing over this. It is difficult to see what the Court could say, other than that the legality of any particular use of nuclear weapons would depend upon the facts. But an answer to that effect would clearly be of no practical benefit in clarifying the law, nor would it offer anything by way of usable guidance to the requesting organization.

Of course, the Court has decided in the past that it is not debarred from answering an abstract question. But it was using the term "abstract" in a quite different sense. In the *Admissions* case[14] the question was "abstract" simply in the sense that it did not mention particular States who were applying for membership of the United Nations. But the factual situation was crystal clear and had already been the subject of active discussion and dispute. So there is no comparison with this case.

The truth appears to be that those who drafted the questions posed by the General Assembly and WHO have proceeded throughout on the assumption that they admit of only one answer, regardless of the facts. The questions are not designed to allow the Court scope to weigh the several

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[13]In addition to the States submitting that the Court should not respond to the questions posed as they are too abstract or hypothetical - see, for example, United Kingdom, written statement on the General Assembly request, June 1995, pp. 16-17; Finland, written statement on the WHO request, September 1994, pp. 3-4, written statement on the General Assembly request, June 1995, p. 1; Netherlands, written statement on the WHO request, September 1994, paras. 22-23; Germany, written statement on the WHO request, September 1994, p. 5, written statement on the General Assembly request, June 1995, pp. 4-5 - a number of other States have also implicitly recognized that the questions posed are abstract, hypothetical, speculative - see, for example, Nauru, written comments on the written statements on the WHO request, June 1995, Part I, pp. 7-8, Part II, p. 1; Egypt, written comments on the written statements on the General Assembly request, September 1995, pp. 3-4; Malaysia, written comments on the written statements on the WHO request, June 1995, pp. 7-8. See also Australia, written statement on the WHO request, September 1994, para. 7.

[14]*Conditions of Admission of a State to the Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, I.C.J. Reports 1948*, p. 57.

factors that would come into play in a concrete case. Since, however, an answer devoid of a factual context would either be legally unsound or of no practical use, the Court is put in a dilemma which calls profoundly into question whether it is right to give an advisory opinion at all.

In summary, Mr. President, we agree with the Solicitor-General of Australia when he said that to give an opinion on a question so broad and abstract would go beyond the judicial function. We also agree with him - and this is our second submission - that to answer, or purport to answer, the question posed serves no purpose. This submission turns on the one inescapable fact, which none of the proponents of these requests has adequately addressed - namely that there is not one single question pending in either WHO or the United Nations itself which might be resolved, not a single purpose which might be advanced, by a response to these requests.

As our written statements have pointed out[15], the rationale behind the advisory jurisdiction is the contribution which the opinion makes to the current work of the Organization. Even though previous requests might have been controversial or political, they were answered because it was clear to the Court that the answer was needed. In several cases the legal question involved the interpretation of a constitutional provision which had been the subject of dispute in the Organization. In the *Admissions* case[16], for example, that contribution lay in breaking the impasse over the admission of new members to the United Nations, and in the *IMCO* case[17] in resolving differences regarding the composition of the maritime safety committee. In the *Reparations for Injuries* case[18] and the *Reservations* case[19] the Organization needed guidance about the exercise of its constitutional functions. In the only case previously emanating from WHO itself, that is the *WHO Regional Office*

[15]United Kingdom, written statement on the WHO Request, September 1994, pp. 43-51; written statement on the General Assembly request, June 1995, pp. 11-15.

[16]*Op.cit.*, note 9.

[17]*Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, Advisory Opinion, I.C.J. Reports 1960,* p. 150.

[18]*Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949,* p. 174.

[19]*Reservations to the Convention on Genocide, Advisory Opinion, I.C.J. Reports 1951,* p. 15.

case[20], the Organization was concerned about its agreement with one of its Member States and in the *Namibia* case[21] an issue had arisen as to Member States' obligations arising from decisions or resolutions of the Organization.

But by contrast in the present case, none of these factors is present. For the Court to give an opinion in such a case as this would be without precedent in the Court's jurisprudence.

Neither of the Resolutions which initiated these requests points to any specific purposes of either Organization which would be advanced by the giving of the Court's opinion. None of the written statements give any convincing explanation as to how an opinion would be of any practical value in determining the future work of either the United Nations General Assembly or WHO.

Equally, there is no evidence that an opinion would give any impetus to current disarmament negotiations, contrary to what is said by some States[22]. Both the United States and Russia, the two States which between them possess the great majority of the World's nuclear weapons and which are directly involved in the most important disarmament negotiations, have denied that an opinion in the present cases would assist those negotiations.

Contrary to what has been suggested by some States[23] the General Assembly request does not show that the United Nations regards an opinion as valuable for multilateral negotiations. No resolution requesting an opinion from the Court was even put forward in the Assembly until after WHO had made its request in May 1993. Then, as our written statement shows[24], the sponsors of

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[20]*Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980*, p. 73.

[21]*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16.

[22]See, for example, Samoa, written statement on the General Assembly request, June 1995, p. 5; Nauru, written statement on the General Assembly request, June 1995, Introduction, p. 4; Egypt, written comments on the written statements on the General Assembly request, September 1995, p. 10.

[23]Nauru and Malaysia, written comments on the written statements on the WHO request, June 1995, pp. 9-10 of each Statement; Samoa, written statement on the General Assembly request, June 1995, pp. 5-6.

[24]United Kingdom, written statement on the General Assembly request, June 1995, p. 4.

that resolution withdrew it expressly because they wished to maintain the momentum of progress being made in disarmament negotiations. But there is nothing in the debates of the 1994 General Assembly, when the request was adopted a year later, to indicate that there had been any material change in the meantime.

Nor is there any indication from the Conference on Disarmament, which is negotiating a Comprehensive Test Ban Treaty and is expected to negotiate a Fissile Material Cut-Off Treaty, that the progress of their work depends - or would benefit from - the giving of opinions in the present cases. In fact, the Test Ban negotiations are making sound progress and the conclusion of a treaty within a matter of months is highly probable. Many States involved are committed to this outcome. And while the negotiations for a Cut-Off Treaty have failed to start, the reasons for this have nothing to do with the absence of an advisory opinion or with the uncertainty over the question of legality.

Mr. President, it is for those who seek an opinion from the Court to show what positive purposes it would serve. That they have failed to do. On the contrary, there are numerous pieces of evidence which tend to show that nothing in the activities of the United Nations turns on receiving an answer to the present requests to the Court.

The Review and Extension Conference of the Non-Proliferation Treaty took place in April-May of this year, a few months after the adoption of General Assembly resolution 49/75 K. The Conference adopted without a vote the crucial decision to extend indefinitely the duration of the Non-Proliferation Treaty, as well as other important decisions on the non-proliferation of nuclear weapons. The fact that this advisory opinion had been requested was not an issue at the Conference. No one suggested that the Conference should put off its decisions until the Court's opinion had been received. No one even suggested it.

In relation to the proclamation by the five nuclear-weapon States of the Security Assurances on 6 April this year, no reference was made by any country to the requests for an advisory opinion. Those Assurances[25] are solemn and formal declarations on the part of the States concerned and

[25]The texts of which are set out in Annex C to the United Kingdom's written statement on the General Assembly request, June 1995.

respond to the urgent wishes of the non-nuclear-weapon States, which regard them as important for their own security.

The adoption of the Negative Security Assurances was followed by the passage of Security Council resolution 984[26]. In resolution 984, the Security Council unanimously welcomed the Assurances. The adoption of that resolution had been preceded by extensive discussion and debate. One non-member of the Council did indeed draw attention to the General Assembly's request. Yet, as the Court will find from the record, not one single member of the Security Council seems to have found that it had any relevance to the Council's decision or mentioned the value supposedly attached to "clarifying the legal issue" in this important context.

All the indications are, therefore, that a response to these two requests will serve no useful purpose. But it is necessary, Mr. President, to go beyond that proposition and consider whether a response would actually do harm to a disarmament process in which there is currently some remarkable progress. The submissions made to the Court in the present proceedings have confirmed what was already apparent - that the international community is divided over the issue of the legality of nuclear weapons. That division could have been the subject of argument, as endless as it would have been fruitless, in every disarmament forum. Instead, the international community has sensibly elected to draw a veil of constructive silence over that sterile debate and to concentrate instead on making progress in practical matters. The present requests ask the Court, in effect, to remove that prudence and set aside that veil. To do so would obviously carry a risk of undermining the whole basis on which disarmament negotiations have progressed and are progressing.

So, to recapitulate, Mr. President, the World Health Organization is manifestly without competence under the terms of the United Nations Charter, under the terms of its own Constitution, its Relationship Agreement with the United Nations and its own practice to put the question which stands in its name. The General Assembly has the necessary competence but there is no positive purpose, no activity of the United Nations - current or planned - which an opinion would serve, so as

[26]The text of which appears at Annex D of the United Kingdom's written statement on the General Assembly request, June 1995.

to bring the case within the established jurisprudence of the Court under its Statute. For these reasons, Mr. President, our primary submission is that the Court should not answer either of the requests for an advisory opinion.

The Substantive Law

Mr. President, I now turn to the substantive law, should the Court be minded to go into it. Our submission is that the substantive law does *not* prohibit the use, or threat of use, of nuclear weapons *per se*.

For that is the fundamental question raised by both these requests. Does international law *prohibit* the use, or threat of use, of nuclear weapons? We do not search for a permissive rule. International law is premised on the freedom of action of sovereign States, above all in matters affecting their security and their independence. The question is therefore whether there exists a prohibitive rule of law, conventional or customary, regarding nuclear weapons. To be lawful, the use of any weapon, nuclear or conventional, must comply with two requirements. The use of force must be lawful under the rules on resort to force, the *jus ad bellum*, and the use of a particular weapon must, in the circumstances, comply with the rules regulating the conduct of hostilities, the *jus in bello*. With your leave, Mr. President, I shall therefore look *first* at the law on the use of force and *second* at the law on the conduct of hostilities. Finally, because so much has been made of it in the oral statements to the Court, I shall examine the effect of general international law, including human rights and the law on the environment.

(1) The Law on the Use of Force

Is there, then, a clear rule regarding the use of force which prohibits the use of nuclear weapons? There is, of course, a rule which is highly pertinent, Mr. President. It lies, of course, in Article 2, paragraph 4, of the United Nations Charter, which encompasses both the use and the threat of force. The United Kingdom fully accepts that the prohibition in Article 2, paragraph 4, applies to the use of nuclear weapons: the rule is in no way weapon-specific.

But if the prohibition in Article 2, paragraph 4, extends to nuclear weapons, so too does the

right of self-defence enshrined in Article 51. That is the most fundamental right of all, Mr. President, and it is preserved in terms which are general, not restrictive. It is impossible to argue that this fundamental, inherent right has been limited or abandoned on the basis of mere inferences drawn from other rules, whether conventional or customary. Moreover, the practice of those States vitally affected by such a rule shows that they entirely reject any such inference.

How then can it be argued that there exists such a general prohibition, prohibiting even self-defence. If one carefully examines the submissions made to this Court, it appears that the arguments put forward are *threefold*.

First, it is argued that any use of nuclear weapons would be by way of reprisals, not self-defence[27]. That is pure speculation. To assess whether a particular use of force is a case of self-defence or a reprisal requires a careful scrutiny of the facts of the particular case to reveal whether the real purpose is protective or punitive. It cannot be right to assert or assume that, *irrespective* of the facts, the use of a particular weapon must inevitably be qualified as a reprisal. A special form of this argument is to say that a "second use" of nuclear weapons would necessarily be a reprisal, on the assumption that the time for defence would have passed, the damage already having been suffered[28]. But who is to say that an aggressor will launch only one attack? And to argue that self-defence disappears once damage has been suffered would be tantamount to saying that a victim of aggression loses the right in self-defence to expel the invader once its territory is occupied.

Second, it is argued that because the weapon is illegal it cannot be used in self-defence[29]. Well, Mr. President, the Court will instantly recognize such an argument is entirely circular: the use of nuclear weapons cannot be lawful because it is unlawful. It assumes the very conclusion - the

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[27]Nauru, written statement on the WHO request, September 1994, pp. 26-29; India, written statement on the General Assembly request, June 1995, p. 2.

[28]See, for example, Nauru, written statement on the General Assembly request, June 1995, pp. 25-26; Mexico, written statement on the General Assembly request, June 1995, p. 11; Malaysia, written statement on the General Assembly request, June 1995, p. 18.

[29]See, for example, Malaysia, written comments on the written statements on the WHO request, June 1995, p. 34; Solomon Islands, written statement on the General Assembly request, June 1995, p. 65.

illegality of use - which has to be proved. It adds nothing to the legal analysis. As I shall show later, when States *have* wanted to outlaw particular weapons, as they have, they have been careful to agree precise, conventional rules - such as the Biological Weapons Convention or the Chemical Weapons Convention.

Third, it is argued that to use nuclear weapons must fall outside the right of self-defence, since it could never constitute a "proportionate" response[30]. Here again, this is assertion, not argument. If one is to speak of "disproportionality", the question arises: disproportionate to what? The answer must be "to the threat posed to the victim State". It is by reference to that threat that proportionality must be measured. So one has to look at all the circumstances, in particular the scale, kind and location of the threat. To assume that any defensive use of nuclear weapons must be disproportionate, no matter how serious the threat to the safety and the very survival of the State resorting to such use, is wholly unfounded. Moreover, it suggests an overbearing assumption by the critics of nuclear weapons that they can determine in advance that no threat, including a nuclear, chemical or biological threat, is ever worth the use of any nuclear weapon. It cannot be right to say that if an aggressor hits hard enough, his victim loses the right to take the only measures by which he can defend himself and reverse the aggression. That would not be the rule of law. It would be an aggressors' charter.

In reality, Mr. President, any government faced with such a threat will have to decide, what reliance on deterrence or degree of action is necessary for self-defence. A decision to use nuclear weapons would only be taken in extreme cases and on the basis of the ultimate duty of a State to defend its people and their homeland. That duty cannot be replaced by some supposed axiom that the use of a nuclear weapon will always be "disproportionate".

Nor can it be argued that such an axiom is necessary because governments will always take the wrong decision. For all the dangers, for all the hideous anxiety, we have behind us 50 years of

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[30]See, for example, Malaysia, written statement on the General Assembly request, June 1995, p. 17; Egypt, written statement on the General Assembly request, June 1995, p. 10; Mexico, written statement on the General Assembly request, June 1995, p. 10.

non-use of nuclear weapons. Despite all the conflicts of the past 50 years, the holding of nuclear weapons in exercise of the policy of deterrence has been responsible.

(2) The Law of War

It is next necessary to consider whether the use of nuclear weapons is unlawful *per se* under the *jus in bello*, the law on the conduct of hostilities. Time and again in the submissions which have been made to this Court, we find the assumption, the bare assertion, that the use of nuclear weapons *must* be unlawful. But if that proposition is to be advanced before a court of law, Mr. President, it must be tested by means of a careful examination of the law - both conventional and customary - to determine whether it does contain a rule which clearly does prohibit the use of nuclear weapons.

Our submission is that the law of war contains no such rule. *First*, among all the numerous treaties which deal with weaponry, there is not one which addresses the legality of using nuclear weapons. *Second*, the more general treaties on the law of war, and, in particular, the First Additional Protocol to the Geneva Conventions, cannot be read - as others have sought to read them - as impliedly outlawing the use of nuclear weapons. *Third*, the customary law of war, while it contains principles which are applicable to nuclear weapons does not preclude the use of such weapons in appropriate circumstances.

Treaties on the Law of War

No rule outlawing nuclear weapons *per se* is to be found in any of the treaties on the law of war. Although most of those treaties have been concluded since 1945, it is significant that no reference to nuclear weapons is to be found in the 1949 Geneva Conventions, the 1977 Additional Protocols or the various weaponry treaties adopted during this period. Indeed, the negotiating history of those treaties *reveals* a deliberate decision on the part of the international community not to discuss, let alone adopt, a prohibition on the use of nuclear weapons.

The point is worth stressing, because the international community has certainly not shied away from adopting agreements on the use of specific weapons during this period, and indeed specific weapons of mass destruction. The Biological and Toxin Weapons Convention (1972), the

Environmental Modification Treaty (1977), the United Nations Conventional Weapons Convention and its Protocols (1980) and the Chemical Weapons Convention (1993) all bear witness to the fact that the international community has been prepared to ban, or restrict, the use of specific weapons and that it has chosen to do so directly and explicitly, by treaty. But it has done nothing of the kind in the case of nuclear weapons, outside certain specified geographical areas. This is not an accident but a matter of conscious choice. Nuclear weapons have consistently been treated as a subject for disarmament negotiations, rather than prohibition.

Just such a choice was made, Mr. President, by the Diplomatic Conference which adopted the two Additional Protocols to the Geneva Conventions. The Conference proceeded throughout on the basis of an express understanding that it would not - that it would not - attempt to change the law applicable to the use of nuclear weapons. The nature of that understanding and the conclusions which the United Kingdom seeks to draw from it have been misrepresented in a number of the statements made to this Court. We do not suggest, contrary to what was said by counsel yesterday, that the Additional Protocols legitimized any use of nuclear weapons which was previously illegal.

The real nature and effects of the nuclear understanding on the basis of which the Additional Protocols were adopted are set out in our Written Statement[31]. The understanding was that the Diplomatic Conference would not attempt to deal with the question of nuclear weapons. That meant, first, that there would be no attempt to make specific provisions for nuclear weapons in the text, and no provisions were made. Secondly, it meant that any new provisions introduced into the law of armed conflict by the Additional Protocols would apply only to conventional weapons.

We fully accept, however, that the use of nuclear weapons is subject to the principles of customary international law, and it is plain that some of the provisions of Additional Protocol I did no more than reaffirm and codify principles of the customary law of armed conflict which already existed and which apply to the use of all weapons, including nuclear weapons. But it is equally plain that other provisions of the Protocol, such as those on the environment and those on reprisals, were

[31]United Kingdom, written statement on the General Assembly request, June 1995, pp. 25-27 and 40-46.

understood to be new rules.

All this is clearly reflected in formal statements made by several States, including my own, on signature or, indeed, on ratification of Protocol I. None of those statements has been questioned or objected to by any other party; no contrary declaration has been deposited with the Swiss Government at any stage.

Speaking yesterday, counsel asked why the international community could not "innovate" in the law in order to meet innovation in weaponry. The answer of course is that it could. But to say that it *could* do so does not mean that is *has* done so. The most recent of the nuclear statements was made when Canada ratified Protocol I in 1990. It too went, rightly, unchallenged.

It has also been suggested in these proceedings before this Court that the use of nuclear weapons has indirectly been prohibited by treaty provisions which do not mention such weapons by name. In particular, several of the written statements submitted to the Court maintain that the prohibition on the use of chemical weapons - which is clearly established in the treaties - is broad enough to extend to nuclear weapons also[32].

Mr. President, that argument is patently unsound. The ban on "asphyxiating, poisonous or other gases and of all analogous liquids materials or devices", recognized in the 1925 Geneva Protocol on Chemical and Bacteriological Weapons was, of course, adopted long before nuclear weapons, or indeed, any nuclear technology, existed. It was intended to apply to weapons the *primary* effects of which were poisonous - obviously, it had the gas used in the first world war very much in mind - whereas the primary effects of nuclear weapons are devastating heat and blast.

Moreover, those who addressed the Court on this subject yesterday ignored the subsequent practice of the parties to the 1925 Protocol. That practice shows that the provisions of the Protocol have not been treated by the parties as applicable to nuclear weapons. Four of the five

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[32]See, for example, India, written statement on the General Assembly request, June 1995, p. 5; Mexico, written statement on the General Assembly request, June 1995, p. 13; Malaysia, written statement on the WHO request, September 1994, pp. 11-12; Solomon Islands, written statement on the WHO request, September 1994, p. 56; Nauru, written statement on the WHO request, September 1994, Part I, p. 47.

nuclear-weapon States were already parties to the 1925 Protocol when they acquired nuclear weapons. Many other parties relied upon the "nuclear umbrella" provided by one or more of the nuclear-weapon States. None of them considered it necessary to denounce the Protocol or to make any interpretative statement or declaration regarding nuclear weapons. Nor did the United States make any such statement or reservation when it ratified the Protocol in 1975. It was treated as axiomatic that the Protocol simply had nothing to do with nuclear weapons[33]. You cannot have a contemporary interpretation of the Protocol wholly inconsistent with the practice of the parties.

Moreover, the 1925 Protocol does not stand alone. Since 1945, chemical and bacteriological weapons - both weapons of mass destruction - have been the subject of very detailed and lengthy negotiations. A painstaking process which has lasted more than 25 years produced, first, the 1972 Biological and Toxin Weapons Convention and, most recently, the 1993 Chemical Weapons Convention. Neither treaty makes any reference whatever to nuclear weapons and such weapons were scarcely mentioned in the 30 years of negotiations which led to those agreements. It is nonsense, Mr. President, to suggest that States which have for 50 years based their strategy for national self-defence on nuclear weapons - whether their own or those of others - have inadvertently agreed to a complete ban on the use of those weapons.

The Customary Law of War

So far as the customary law of war is concerned, the United Kingdom has always accepted that the use of nuclear weapons is subject to the general principles of the *jus in bello*. But to say that a weapon is *subject* to the law does not mean that it must be *prohibited* by that law. There is no doubt that the customary law of war does prohibit *some* uses of nuclear weapons, just as it prohibits some uses of *all* types of weapon. But again, it is assumption, not argument, to say that it prohibits *all* uses of nuclear weapons, without regard to the circumstances.

Detailed replies to many of these points are set out at length in our written statement on the

[33]United Kingdom, written statement on the General Assembly request, June 1995, pp. 48-49; Netherlands, written statement on the WHO request, September 1994, para. 25; United States, written statement on the General Assembly request, June 1995, pp. 23-25.

General Assembly request: so it is simply not accurate for counsel for Solomon Islands to claim that their arguments have not been properly answered. I will not repeat all those points before the Court, Mr. President, but I do wish to draw your attention to certain issues.

For example, the Court has been told that "it goes without saying" that nuclear weapons violate a long-established customary law principle against causing unnecessary suffering[34]. But is that really so? The principle that a belligerent must not use methods or means of warfare which cause unnecessary suffering or superfluous injury[35] does not prohibit the use of a weapon which causes extensive suffering unless that suffering is truly *unnecessary*. What is required, therefore, is a balancing of military necessity and humanity. Contrary to what is suggested in some of the observations before the Court[36], this is not to say that military necessity overrides the law of war. It does not. Consideration of military necessity is an integral part of the *unnecessary* suffering principle. It is not a case of necessity being invoked to justify the use of an unlawful weapon; the use of that weapon is not unlawful if the injury it causes is necessary to the achievement of a legitimate military goal.

It was also said that no balance is possible between the suffering which would be caused by a use - any use - of a nuclear weapon and the military advantage which would be derived from that use[37]. But such an abstract statement does not stand up to analysis. Let me take an example. A State or group of States is faced with invasion by overwhelming enemy forces. That State or that group of States is certainly entitled to defend itself. If all the other means at their disposal are insufficient, then how can it be said that the use of a nuclear weapon must be disproportionate? Unless it is being suggested that there comes a point when the victim of aggression is no longer

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[34]Egypt, written statement on the General Assembly request, June 1995, p. 13.

[35]Hague Regulations on Land Warfare, 1907, Article 23 (e); Additional Protocol I, 1977, Article 35 (2).

[36]See, for example, Malaysia, written comments on the written statements on the WHO request, June 1995, p. 25.

[37]Malaysia, written comments on the written statements on the WHO request, June 1995, p. 25.

permitted to defend itself because of the degree of suffering which defensive measures will inflict. Such a suggestion is insupportable in logic and unsupported in practice.

Many of the submissions made to the Court have displayed a similar tendency to assume that, as a matter of course, any use of a nuclear weapon will inevitably violate the principles of the law of war designed to protect the civilian population. Let me itemize those principles which are well known and then dissect the argument.

The principles can be summarized as follows:

(i) *first*, it is unlawful to direct an attack against the civilian population or civilian objects as such; only military objectives are legitimate targets of attack; and

(ii) *second*, even a military target must not be attacked if to do so would cause collateral civilian casualties or damage to civilian property which is excessive in relation to the concrete and direct military advantage anticipated from the attack - an aspect of the wider principle of proportionality to which I have already referred.

These principles were the heart of the resolution adopted by the *Institut* at its 1969 Edinburgh session, of which so much was made yesterday. The distinguished roll-call of the members of the *Institut* means that its resolutions, though not binding, are entitled to great respect. The 1969 resolution played an important part in the intergovernmental negotiations which led to Additional Protocol I to the Geneva Conventions, in particular through its statement of the two principles which I have just cited.

We fully accept that these principles operate as a constraint on the use of nuclear weapons - and all other weapons. But it is a fallacy to argue that *every* use of a nuclear weapon *must* contravene those principles. While the resolution sets out the criteria by which the use of nuclear weapons must be assessed, it does not prejudge the results of that assessment. If the members of the *Institut* had believed that those criteria prohibited all use of nuclear weapons, they could have said so. They did not.

Furthermore, nuclear weapons are today capable of precise targeting. It is possible to direct them quite precisely against military objectives and thus to comply with the first principle. Whether

that is done in a particular case is not simply a matter of the size of the weapon itself, contrary to what is suggested by Malaysia[38]. It depends upon *all* the circumstances in which the use of the weapon is rendered necessary and therefore takes place. Once again, broad abstract statements about the use of nuclear weapons give the Court no help in answering the questions posed to it.

Nor is it to be assumed that the use of a nuclear weapon against a military objective will inevitably cause disproportionate civilian casualties. Like the unnecessary suffering principle, this rule requires a balance to be struck between the concrete and direct military advantage anticipated and the level of collateral civilian casualties and damage foreseen. It is an inescapable feature of the legal principle itself that the greater the military advantage which can reasonably be expected to result from the use of a weapon in a particular case, the greater the risk of collateral civilian casualties which may have to be regarded as within the law. Where what is at stake is the difference between national survival and subjection to conquest which may be of the most brutal and enslaving character, it is dangerously wrong to say that the use of a nuclear weapon could never meet the criterion of proportionality.

The argument that the use of a nuclear weapon is *per se* unlawful because it would inevitably violate the territory of neutral States is equally unsound, Mr. President. The principle that neutral territory is inviolable means that a belligerent may not, save in rare and clearly defined circumstances, actually conduct military operations on the territory of a neutral State. It has never meant that neutral States can expect to be subject to none of the effects of war. The whole purpose of the law of neutrality has always been to achieve a balance between the interests of the neutral State and the needs of the belligerents. The needs of a State forced to fight for survival in the face of massive aggression must weigh very heavily in that balance. Moreover, whether any use of a nuclear weapon anywhere in the world would inevitably produce material effects on the territory of a neutral State is not a matter which can be approached by way of generalizations. Each case, once again, has to be judged in the light of all the relevant circumstances.

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[38]Malaysia, written comments on the written statements on the WHO request, June 1995, pp. 20-21.

In spite of all the assertions and all the assumptions put before the Court, Mr. President, no rule prohibiting nuclear weapons *per se* can be derived from any treaty or customary rule on the law of war.

(3) General International Law

Treaties

The Court has also been told that, irrespective of the *jus ad bellum* and the *jus in bello*, every use of nuclear weapons would be contrary to general principles of international law. Yesterday the case was that the general provisions in environmental treaties have the effect of outlawing the use of nuclear weapons[39]. This argument cannot, however, be sustained and must, in the United Kingdom's view, be decisively rejected. These treaties - often prayed in aid collectively, rather than by reference to any of their particular terms - make no mention of nuclear weapons. Their principal purpose is the protection of the environment in times of peace. Warfare in general, and nuclear warfare in particular, are not mentioned in their texts and were scarcely alluded to in the negotiations which led to their adoption. It would be not merely startling but destabilizing to the rule of law to see these treaties now interpreted in such a way as to prohibit the use of nuclear weapons.

Counsel for Solomon Islands asked why the United Kingdom and other nuclear-weapon States have not sought - as he put it - to protect their position in connection with these treaties by insisting on express understandings similar to that concluded with regard to Additional Protocol I. But, the answer is obvious, Mr. President. Additional Protocol I is all about war. The environmental treaties are not. They are directed at the conduct of States in normal peacetime conditions, and it needs to be established that they apply to the conduct of armed hostilities. It is nonsense to suggest that the insistence on an express understanding about nuclear weapons in a treaty on war means that the absence of such an understanding in treaties which are not about war means that those treaties outlaw the use of nuclear weapons. And it is dangerous nonsense to suggest that States which have

[39]See also Mexico, written statement on the WHO request, September 1994, pp. 9-11; Malaysia, written statement on the WHO request, September 1994, p. 11; Solomon Islands, written statement on the WHO request, September 1994, p. 78.

dealt so carefully with nuclear weapons in the context of the laws of war and disarmament would, almost casually, have accepted that such weapons be prohibited by recourse to general conventions on the environment - dangerous nonsense.

Mr. President, the contrary argument, with respect to those who have advanced it, does pose real dangers. If treaties, such as those on the environment, are to be construed in a manner which is quite outside all normal expectation, States are bound to think twice before subscribing to them, and that is in nobody's interest. As I noted at the outset, the United Kingdom believes profoundly in the rule of law. It would be a source of the greatest concern were we to be informed that obligations to which we have put our name now mean something entirely different from that which they were understood to mean when negotiated.

Counsel for Solomon Islands also referred to the 1991 hostilities in the Gulf. As one who was in government at the time, I can assure him that the legality of acts of warfare in that conflict were assessed by reference to the laws of armed conflict, not by reference to environmental treaties applicable in times of peace. Since Iraq's invasion and occupation of Kuwait was fundamentally illegal, Iraq was internationally responsible for all the damage, including environmental damage that resulted. This is what the Security Council decided in resolution 687 of 1991 as the wording itself shows.

The similar argument, Mr. President, that any use of nuclear weapons would violate the right to life provisions in human rights treaties must also be rejected[40]. These treaties were never intended to regulate the conduct of hostilities in wartime. The practice of States who are parties to human rights conventions is, unambiguously, to test the legality of acts of warfare by reference to the laws of war, not by reference to treaties safeguarding human rights in time of peace.

Moreover, the right to life is not absolute. The prohibition - to draw on the International

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[40]See, for example, Malaysia, written statement on the WHO request, September 1994, p. 12; Nauru, written statement on the WHO request, September 1994, Part I, pp. 48-51; Solomon Islands, written statement on the WHO request, September 1994, pp. 76-91; Egypt, written statement on the General Assembly request, June 1995, pp. 15-16.

Covenant on Civil and Political Rights[41] - is in respect of the *arbitrary* deprivation of life. In so far as this applies in armed conflict at all, it can only mean deprivation of life which is contrary to the laws of war. The reference to human rights treaties thus adds nothing, for the legality of a use of nuclear weapons continues to turn on the laws of war.

Mr. President, it is entirely contrary to the law of treaties to interpret an instrument, whether on the environment, human rights, or any other subject, in a way which was never intended or even contemplated by the parties and which has never been endorsed in their practice. To venture down that road would gravely endanger the certainty and stability of treaty relations.

Custom

Mr. President, for the United Kingdom that is the end of the matter. I would in normal circumstances have wished to bring my remarks to a close there, having dealt - I hope sufficiently - with questions of jurisdiction, admissibility and propriety, and, on the substantive law, and with both the relevant treaty and customary law. I must however detain the Court a little longer, if I may, to deal with some very far-reaching, not to say novel, arguments advanced before the Court at the opening of these oral hearings by the distinguished Foreign Minister of Australia.

The entire argument put to the Court turns upon an axiom of "inherent illegality". It is said that not only all use or threat of use of nuclear weapons is unlawful, but a whole series of other activities - testing, possession, improvement of existing weapons, and so on, not covered in either of the questions submitted to the Court, must be considered unlawful because of some inherent quality of nuclear weapons.

Apart from the fact that this argument simply fails to grapple at all with the realities of nuclear deterrence (which I discussed earlier), the argument also contradicts itself by admitting that the legal position has not always been as it is now argued inherently to be. It admits that nuclear weapons were not illegal at the time they were first developed, manufactured and deployed, and, apparently, for most of the period since then. We were told that it would be fruitless to speculate as

[41]Art. 6.

to when precisely the crucial change occurred. But, Mr. President, the question cannot simply be brushed aside. If for a long period of time the weapon was recognized to be lawful but is now said to be completely unlawful, the change does have to be identified and demonstrated by reference to some evidence. Yet in this particular case the argument sought to be made is that the weapon is inherently *illegal*, in other words that there is some quality of the weapon itself which prevents it from being lawful. But the essential nature of nuclear weapons has not changed, and it certainly has not changed since the 1980s. So it cannot be anything in the weapon itself which has produced the supposed illegality but some change in the surrounding circumstances. Hence it is simply not sustainable to brush aside the need to show the Court what this change was and why it had the effects alleged.

That leads me, Mr. President, to reflect a little on whether that elusive ingredient of customary law, the *opinio juris*, is reliably to be gathered from the speeches in the United Nations General Assembly or even from speeches before this Court. Sometimes there may be better evidence of what States actually believe the law to be. One valuable source, I do not know whether it is inherently valuable, is their military manuals, the instructions they actually issue to their armed forces for time of war. May I quote briefly from one such manual which we referred to in our written submissions. It is very short. Under the heading "nuclear weapons", it says:

> "Although the United Nations General Assembly has purported to condemn all nuclear weapons as illegal, the consensus of the international community is that such weapons are not prohibited *per se*."

That extract, Mr. President, is from the "Commanders' Guide" issued to its Defence Forces by the Government of Australia. And the date is March 1994.

Mr. President, moving on from this point, I feel obliged to make some comment on the other wholly imprecise suggestions which have been made to the Court to the effect that there is a rule of customary international law, which is somehow emerging from some other source, that outlaws the use of nuclear weapons. I must emphasize that there is no State practice, there is no *opinio juris*, which could begin to support such an assertion.

A new rule of customary law cannot, contrary to what has been claimed, be derived simply

from general humanitarian principles. Nor can "general principles of humanity" be turned into rules of law by saying that they have been recognized by this Court in its previous decisions. General principles of humanity have indeed been referred to in two decisions by this Court, in the *Corfu Channel* case[42] and in the *Military and Paramilitary Activities* case[43]. But one cannot stop there, at the threshold, and refrain from looking at what the Court actually decided, and what it said. In both cases what the Court decided was that there was a legal obligation to notify, for the benefit of shipping, the existence of known minefields. In each case, an obligation to warn of a known danger. This is a far cry indeed from the proposed outlawing *per se* of a lawful weapon, still less a weapon of such importance in the strategic balance. In the *Corfu Channel* case the Court did not conjure up this obligation solely out of humanitarian considerations; it said explicitly that it was basing itself on several general and well- recognized principles, which included considerations of humanity, but also such principles of law as the freedom of maritime communication and the obligation of every State not knowingly to allow its territory to be used for acts contrary to the rights of other States. Similarly, in the *Military and Paramilitary Activities* case, the Court did not derive its conclusion solely from free-standing "principles of humanity", but analyzed them against the background of specific treaty provisions. Moreover, when the Court went on to consider broader obligations under international humanitarian law, it did so clearly and specifically in the context of treaties in force. Therefore, while the approach now suggested seeks to borrow a handful of words and phrases previously employed by the Court, it uses them in a way which bears not the slightest relationship to how the Court has previously handled humanitarian considerations.

This Court has on many occasions set out the real requirements of custom. There must be a coherent body of State practice. That practice must be of sufficient generality to show widespread support among States. The practice must embody a positive belief that it is required by law. Support for the existence of the rule must be evident, in particular, from States whose interests are

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[42] *Corfu Channel, I.C.J. Reports 1949,* p. 22.

[43] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14.

specially affected.

In the present case none - *none* - of those criteria are satisfied. Although some States contend for the existence of a prohibitive rule[44], there is no widespread and uniform body of practice in support of such a contention. Moreover, whatever practice there may be does not include the practice of States whose interests are specially affected. Specifically, nuclear-weapon States and those States on whose territory such weapons are situated have, by word and deed, disavowed the existence of such a rule. The evident disagreement on this matter before the Court is itself adequate testimony to the absence of a sufficient consistency of practice on this point.

Equally, Mr. President, there is no evidence of any belief on the part of States that any such practice is required by customary international law. Although some have argued that the non-use of nuclear weapons since 1945 implies a belief that such use would be illegal[45] this contention has no merit. I have already explained that the purpose of nuclear weapons is to deter by their very existence. The fact that a weapon has not been used is not evidence of a prohibition unless the States which refrain from such use do so because they consider themselves under an obligation not to use that weapon. That is not the case here. That States with nuclear weapons have not used them and that some *other* States consider their use would be unlawful cannot be said to create a prohibitive rule.

Mr. President, much of the oral argument before the Court has revolved around the Non-Proliferation Treaty. It was the basis on which the Attorney-General of New Zealand asked the Court to give its impetus to an emerging rule of customary law. The Non-Proliferation Treaty is certainly extremely important in itself and in the present context. But it is essential to avoid generalized propositions about the NPT and its effects which do not take into account what the Treaty actually says and what the parties undertook in subscribing to it.

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[44]See, for example, Samoa, written statement on the General Assembly request, June 1995, p. 3; Mexico, written statement on the General Assembly request, June 1995, para. 4; Solomon Islands, written statement on the General Assembly request, June 1995, paras. 4.3 *et seq.*

[45]See, for example, Nauru, written comments on the written statements on the WHO request, June 1995, Part I, p. 32.

First, there can be no doubt that the Treaty recognizes the possession of nuclear weapons by the nuclear-weapon States defined in its Article IX, paragraph 3. I say "recognizes" advisedly because there is not the slightest hint in the Treaty of an intention to stigmatize their holding of nuclear weapons as unlawful. What the Treaty does is something quite different. In the Preamble and in Article VI the parties pledge themselves to pursue effective measures "relating to nuclear disarmament *and*" (I stress this because the Court has been treated to selective quotation) "and on a Treaty on general and complete disarmament under strict and effective international control". This is to be done by *negotiation* "in good faith". And there is no time limit. Article VI says that the nuclear *arms race* should be ended by negotiation, "at an early date" but there is no time-clause attached to nuclear disarmament any more than to "general and complete disarmament". Mr. President, it is extremely hard to read into the actual terms of the Treaty any intention to legitimize nuclear weapons only for a temporary period, as the Australian Foreign Minister suggested. No doubt there were different views about nuclear disarmament among the negotiators. But the text suggests strongly the conviction that it might not be possible to achieve *nuclear* disarmament without *general and complete* disarmament, and then only if it was bolstered by strict and effective international control. And that will come as no surprise to anyone who has studied this subject over many years.

Second, there is not a shred of evidence in the Treaty for the proposition advanced yesterday on behalf of Solomon Islands, that those who deny the universal binding force of the NPT are encouraging non-parties to acquire nuclear weapons. That cannot stand in the face of repeated calls for universal adherence to the Treaty by the United Nations General Assembly and by the parties themselves in the Principles they adopted at the Review and Extension Conference. The only nuclear-weapon States *recognized* by the Treaty are those which, under Article IX, had nuclear weapons before 1 January 1967. How can this be said to legitimize proliferation by others?

Finally, Mr. President, a word about the *use* of nuclear weapons. We heard it eloquently advanced that the NPT only recognizes possession of nuclear weapons but not their possible use. There is an air of unreality about that proposition. Of course the Treaty says nothing about use; it

was not a laws of war agreement. But why were the negotiators so concerned about the threat of proliferation? Because, as the Preamble says, they believe that proliferation would seriously enhance the danger of nuclear war. It is not credible to assume that the negotiating States recognized lawful possession of nuclear weapons by a limited class of States but denied any possibility of lawful use, and thus any purpose for their possession.

This question is directly linked to the question of the Security Assurances which I mentioned earlier. Security Council resolution 984 which welcomed those assurances does not, as claimed by the representative of Iran, recognize that the use of nuclear weapons is unlawful. Rather, the Council faced up to the possibility that there could be unlawful *aggression* with nuclear weapons, which would require a collective response. The Council also welcomed the assurances given by the nuclear-weapon States as to the circumstances in which their weapons would not be used. Its welcoming of the specific terms of those assurances is simply not compatible with the view that use of nuclear weapons in general is unlawful in any circumstances, is unlawful *per se*.

None of these items of international practice - resolution 984 of the Security Council, the Negative Security Assurances and the Decision of the Non-Proliferation Treaty Conference - is remotely reconcilable with a customary rule prohibiting the use of nuclear weapons. On the contrary, they demonstrate a widespread acceptance by a considerable number of States that the use of such weapons is not at present prohibited *per se*. There can be no other explanation for the repeated emphasis on the importance of pursuing nuclear disarmament by negotiation.

That conclusion is reinforced by State practice in the conclusion of treaties establishing nuclear-weapon-free zones, which is specifically foreseen by Article VII of the NPT. These now include the Treaty of Tlatelolco in respect of South America, the Treaty of Rarotonga in respect of the South Pacific, and the recently concluded treaty on the African Nuclear-Weapon Free Zone. The United Kingdom is a party to the Protocols to the Treaty of Tlatelolco and has recently announced, along with the United States and France, its intention to sign the Protocols to the Treaty of Rarotonga in the first half of 1996. These Treaties and their Protocols, the declarations made by the nuclear-weapon States in respect of the Treaty of Tlatelolco, and the appeals by the parties to these

agreements that the nuclear-weapon States participate in these régimes, imply, quite clearly, an acceptance that there is no over-arching rule prohibiting such weapons *per se*. They also indicate a general acceptance that the way in which to proceed on these matters is, as I have said several times, by negotiation.

In the absence of State practice and *opinio juris* sufficient for the formation of a rule of custom, there can be no rule prohibiting the use of nuclear weapons. Custom is not something which can be conjured from the air or even in the tempest from the vasty deep. It requires evidence, particularly if it is to be relied upon to overturn a body of practice that has gone to the very heart of the defence of many States over the past 50 years. It is not something which can be assumed, or deduced from appeals to general principles of humanity.

Nor can a customary prohibition on nuclear weapons be derived from the resolutions of the General Assembly of which so much has again been made in these proceedings[46]. In some cases, it has not been a specific instrument that has been prayed in aid but the allegedly "cumulative effect" or "combined weight" of a number of instruments[47].

Mr. President, such an approach lacks any solid foundation in international law. Resolutions of the General Assembly on matters such as these do not create binding obligations for United Nations Members. While they may, in certain circumstances, be evidence of custom, a rule of custom cannot lightly be presumed. As the Court itself said[48], resolutions of the General Assembly may only be relied upon as evidence of custom (i) if they command widespread and representative support, (ii) if they are regarded by States voting for them as articulating a principle of customary law, and (iii) if they are capable of normative application. Provisions which are merely

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[46]See, for example, Samoa, written statement on the WHO request, September 1994, p. 3, written statement on the General Assembly request, June 1995, pp. 3-6; Egypt, written statement on the General Assembly request, June 1995, pp. 7-8; Mexico, written statement on the WHO request, September 1994, pp. 4-5; Solomon Islands, written statement on the WHO request, September 1994, pp. 36-41.

[47]See, for example, Samoa, written statement on the General Assembly request, June 1995, pp. 3-5.

[48]*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14.

hortatory and which received only partial support among States cannot be relied upon to generate a new rule or to change an existing rule of custom[49].

Mr. President, without exception the General Assembly resolutions cited in support of the existence of a prohibitive rule of custom do not meet the standards required by this Court. The voting figures in each case indicate controversy among States on the matters in issue (the figures are given in our written submissions[50]). In each case, nuclear-weapon States and other States whose interests were specially affected either voted against or abstained from voting for the resolution. This fact fatally undermines any notion that the resolutions express an *opinio juris* in favour of a prohibitive rule. Moreover, the very language of the resolutions in most cases demonstrates their hortatory nature and indicates that they are unsuitable for normative application. The resolutions cannot, therefore, be evidence of a prohibitive rule of customary law.

The approach of deducing a rule of custom from various multilateral treaties is equally flawed. The treaties relied upon for this purpose are invariably treaties for the protection of the environment. As I noted a moment ago, these treaties make no mention of nuclear weapons, let alone contain a prohibition on their use. Just as these treaties cannot be read as prohibiting the use of nuclear weapons as a matter of treaty law, so we cannot extract from them a rule of customary law to that effect. If a rule of custom is to be deduced from a treaty, it is surely a prerequisite that the rule in question is identifiable, first, — and this was not done — in the treaty itself.

So, Mr. President, there remains only the "cumulative effect" argument. With due respect to its authors, this is an argument for the Court to make law, not to state the law as it finds it. If ever there was a case in which it would be inappropriate for the Court to make the law, this is it. There is no evidence to sustain a rule of custom. There is a consensus that nuclear disarmament must proceed by negotiation. As the differing views expressed in these very proceedings attest, there is no

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[49]See further on this point the United Kingdom's written statement on the WHO request, September 1994, pp. 73-77 and its written statement on the General Assembly request, June 1995, pp. 32-35.

[50]United Kingdom, written statement on the General Assembly request, June 1995, pp. 32-35.

uniformity of view to which the Court can simply add its voice. Nuclear weapons - and the concept of deterrence based upon them - go, as I have said before, to the very heart of the defence of many States and thus to the maintenance of international peace and security and have done so for some 50 years. In the United Kingdom's submission, it is wholly improper in this case, of all cases, to suggest that the Court should take on a legislative function.

Conclusion

Mr. President, I must now conclude. These are not contentious proceedings and there is no call for formal closing submissions, but it may be of assistance if I briefly summarize what we believe to be the main issues and state the conclusions which we reach on each of them.

First, there is an issue of *jurisdiction*. In our submission, the World Health Organization is manifestly not competent, under its Constitution or by reference to any established pattern of activity pursuant to its Constitution, to raise the present subject with the Court. We believe that the Court should give a clear ruling to that effect in its reply to WHO. This is necessary for the protection of the system laid down in the United Nations Charter and in the Statute and for the benefit of WHO itself and for the benefit of the other specialized agencies.

Second, there is an issue about the discretion of the Court and the integrity of the judicial function - an important issue. While there is no doubting the Court's competence to entertain the question from the General Assembly, there remains an important question whether the Court should exercise its *discretion* to refuse an answer to that question. There are three strands to this issue:

(a) the abstract and speculative nature of the question, which raises serious doubts about whether it is indeed a *legal* question amenable to objective judicial determination by a court of law in isolation from any factual situation;

(b) the fact that there is no current activity or purpose of the United Nations which is waiting on the giving of an opinion on this question or which needs guidance of this kind, so that it is only in the most fictitious sense that an opinion could be argued to be a contribution to the work of the Organization;

(c) the fact that the community of States in their diplomatic activities in the nuclear field and by their eloquent silences have shown that an opinion would fulfil no positive need but might, indeed, have negative consequences for continued progress towards negotiated agreements.

Taken together, these considerations point to the conclusion that, in order to protect the integrity of its judicial function, the Court should decline to answer the question put by the General Assembly.

Third, there is an issue - or issues - regarding the substantive law. This is a vast subject but I shall seek to sum up the position in six propositions:

1. There is no legal basis for rewriting the inherent right of self-defence, recognized in Article 51 of the Charter, so as not to apply to nuclear weapons. Whether a particular use of nuclear weapons would be a lawful exercise of the right of self-defence can be determined only by reference to the actual circumstances of that case.

2. It is a consistent and uniform contemporary practice that the prohibition of the use of specific weapons is accomplished by express agreement amongst States; there is no treaty of that kind relating to nuclear weapons other than those establishing particular nuclear-weapon-free zones.

3. The Non-Proliferation Treaty, the decisions and recommendations adopted at its Review and Extension Conference earlier this year, the Positive and Negative Security Assurances and the practice of the Security Council, all provide cogent evidence that the possession and - in appropriate circumstances - the use of nuclear weapons is not regarded as in principle unlawful.

4. Those principles and rules of the laws of war which apply to the use of nuclear weapons do not preclude the possibility that such weapons may lawfully be used.

5. It is against both the tenets of treaty interpretation and the underlying principle of good faith to read an indirect prohibition of nuclear weapons into general treaties which deal neither with weapons nor with warfare.

6. Against this background, it is impossible to construct any customary law prohibition on the use of nuclear weapons and it is not for the Court to speculate on how customary law might develop in the future.

Mr. President, the United Kingdom is in no doubt as to the difficulties in which the present requests have placed the Court. Recognition of those difficulties is widespread. It is apparent in many of the written and oral submissions made to the Court and helps to explain the unprecedented controversy surrounding the resolutions of the World Health Assembly and the General Assembly. The present requests ask the Court to answer questions which are over-simplified and divorced from any factual setting. They deal with a subject of the most fundamental importance, but it is one in which the line between lawful and unlawful conduct cannot be separated from the facts of each particular case.

In effect, the requests ask the Court to do something which is contrary to its judicial calling. Despite what was suggested yesterday, it is not States but the Court itself which has always been concerned to protect the integrity of its judicial function and which has expressed that concern on many occasions. The Court should not feel - because I recognize, Mr. President, the pressures you must be under - that if it declines that invitation, as we believe that it should do, it would be failing in its duty, that to decline would be a ground for legitimate criticism. On the contrary, that decision would be understood and on reflection respected by all supporters of the Court and of its important work. It would not be in any way detrimental to the Court's ability to exercise its judicial function in proper cases where, even though there are high political interests involved, there is nevertheless a genuine legal dispute or legal question. That is the proper function of the Court. But this is not such a case.

Mr. President, Members of the Court, you have been very patient and I am very grateful. That concludes the oral submissions by the United Kingdom. Thank you.

The PRESIDENT: I thank very much Sir Nicholas Lyell, the Right Honourable Attorney-General of the United Kingdom, for his statement. That concludes, as you say, the oral arguments of the United Kingdom. The hearings are suspended for a break of 15 minutes.

The Court adjourned from 11.45 a.m. to 12 noon.

The PRESIDENT: The Court resumes its hearings and I give the floor to His Excellency, Mr. Conrad Harper, the Legal Adviser of the United States Department of State.

Mr. HARPER: Mr. President, distinguished Members of the Court, may it please the Court: it is a great honour and a rare privilege to appear before you today to present the views of the United States of America regarding the requests for advisory opinions which have been submitted to the Court by the World Health Organization and the United Nations General Assembly.

Before I begin, allow me to express my condolences to the family of Judge Aguilar and to the Court. The United States mourns Judge Aguilar's untimely death and remembers with admiration his contribution to this Court, to the law, and to the international community.

Underlying the requests for advisory opinions before the Court are understandable concerns regarding the proliferation and potential use of nuclear weapons. Certainly the United States shares these concerns. For many years my country has devoted close attention and considerable resources to arms control and disarmament efforts, and we have taken the lead in many of the most successful efforts of the last half-century. The commitment of the United States and the international community as a whole to address these issues has been advanced recently in the very important consensus decision to extend unconditionally the Treaty on the Non-Proliferation of Nuclear Weapons.

At the same time, I note that many States rely for their security in large part on the nuclear capabilities of nuclear-weapon States, which have entered into mutual defence arrangements consistent with the collective self-defence principle recognized in Article 51 of the United Nations Charter. In the view of the United States, nuclear deterrence has contributed substantially during the past 50 years to the enhancement of strategic stability, the avoidance of global conflict and the maintenance of international peace and security.

That said, the United States strongly believes that there is more work to be done both in bilateral settings, and in multilateral settings such as the United Nations Conference on Disarmament, further to reduce the risk of the outbreak of nuclear war. But such work is

fundamentally the burden, and within the political discretion, of States and the political organs of the international community. The requests before the Court are not an appropriate vehicle for accomplishing such ends. No amount of impassioned argument by lawyers and no predictions of the tragic human costs of possible conflicts can obscure the fact that international law simply does not prohibit *per se* the use of nuclear weapons.

Let me go further: yesterday, counsel for Samoa, the Marshall Islands, and Solomon Islands told the Court that these requests for advisory opinions do not implicate the possession of nuclear weapons by the nuclear-weapon States. He went on to argue that the use or threat of use of such weapons was prohibited by international law. We take the common-sense view, however, that the legal possession of weapons means they can, under certain circumstances, be legally employed.

This case involves vital measures and vital matters affecting global security and strategic stability. It is therefore crucial that the Court discharge its duty prudently and in a manner compatible with its judicial functions and responsibilities. The Court should not attempt to determine in advance whether hypothetical uses of nuclear weapons would violate international law. In our view, any attempt to do so would be inconsistent with this Court's responsibilities, for it would require the Court to engage in unrestrained speculation - to make assumptions of a distinctly non-judicial character regarding the facts and circumstances of possible future events.

With the Court's permission, I shall now provide a summary of the views the United States will present orally in these proceedings.

In our view, the Court lacks jurisdiction to grant the WHO request for an advisory opinion because WHO is not empowered to request an opinion on the legal question presented. With respect to the General Assembly's request, the United States is strongly of the belief that, while the Court possesses authority to issue an advisory opinion, it would be inappropriate and unwise for the Court to exercise that authority. The nature of the question presented by the General Assembly is so hypothetical - so dependent upon facts not now ascertainable - that the Court could not, consistent with its judicial function, reasonably provide an answer that would afford guidance to the General Assembly.

On the supposition that the Court might none the less elect to address the substance of the question posed by the two requests, my colleagues, Michael Matheson and John McNeill, will detail the views of the United States.

Mr. Matheson will begin by establishing what the United States believes should be the Court's starting point in examining the merits: the fundamental principle of international law that restrictions on States cannot be presumed, but must be established by conventional law specifically accepted by them, or in customary law established by the conduct of the community of nations. He will argue that there is no general prohibition on the use of nuclear weapons in either conventional or customary law.

Mr. Matheson will also address the claims made by some States that human rights law and certain international environmental instruments can be construed as prohibiting categorically the use of nuclear weapons. Such claims try to enlist these important bodies of law to serve ends they should not and cannot be asked to serve. None of the referenced human rights or environmental instruments prohibits, either expressly or by implication, the use of nuclear weapons.

Thereafter, Mr. McNeill will consider the law of armed conflict and its application to the question presented. While not embodying a general prohibition on the use of nuclear weapons, the law of armed conflict regulates the use of such weapons in the same manner that it regulates the use of conventional weapons in armed conflict. As Mr. McNeill will discuss, the legality of the use of any weapon under the law of armed conflict depends upon the precise circumstances involved in such use, except when an express prohibition bans such use altogether. Therefore, this Court should not attempt to determine in advance whether hypothetical uses of nuclear weapons might violate the law of armed conflict.

Finally, in my concluding remarks I shall argue that the absence of a general prohibition on the use of nuclear weapons means it cannot be maintained that a threat to use such weapons is prohibited *per se*.

With the Court's permission, let me now address why the Court should not exercise its discretion to issue the opinion requested by the General Assembly. I should note at the outset that

the United States concurs fully in the comprehensive presentation of the United Kingdom on this point.

This case does not present the ordinary request for an advisory opinion. It involves a fundamental question of international peace and security. It presents circumstances which the Court previously has identified as inappropriate for treatment in an advisory opinion.

This Court has recognized time and again - particularly in the *ILO Administrative Tribunal* case - that in the exercise of its advisory function, "it is bound to remain faithful to the requirements of its judicial character" (*I.C.J Reports 1956*, p. 77 at p. 84). In the *South West Africa* case, the Court touched on one such requirement vital to its judicial role. It said:

> "[T]o enable a court to pronounce on legal questions, it must also be acquainted with, take into account and, if necessary, make findings as to the relevant factual issues." (*I.C.J. Reports 1971*, p. 16, at p. 27.)

Where the Court cannot establish the necessary facts to support a judicial conclusion, it has rightly declined to issue an advisory opinion. Thus, the justifiable prudence of the Permanent Court of International Justice in the *Eastern Carelia* case, where that Court concluded,

> "It appears now to be very doubtful whether there would be available to the Court materials sufficient to enable it to arrive at any judicial conclusion upon the question of fact [presented]." (*P.C.I.J., Series B, No. 5*, p. 28.)

Other States have correctly noted the Court's expressed willingness on occasion to address abstract legal questions in advisory proceedings. What most characterizes - and distinguishes - the requests for advisory opinions now before the Court is *not* that they are divorced from any particular set of circumstances in dispute and hence are abstract and general, but rather that they require the Court to go so far as to make a series of hypothetical, speculative factual assumptions in order to reach a purportedly legal conclusion. Thus, the Court is prevented from responding to the requests in a manner consistent with its judicial character.

The Court recognized a score of years ago in the *Western Sahara* case

that its role in advisory cases is

> "to give an opinion based on law, once it has come to the conclusion that the questions put to it are relevant and have a practical and contemporary effect and, consequently,

are not devoid of object or purpose" (*Western Sahara, I.C.J. Reports 1975,* p. 37).

An opinion rendered by the Court, which is based on, and qualified by a series of essentially random factual assumptions about a particular episode of armed conflict - picked as it were out of the air - would not have such practical effect. To render an advisory opinion under such circumstances threatens the authority and effectiveness of the Court.

Moreover, the consequences of the Court's electing to issue an opinion on the merits in this case are likely to be quite unfortunate. The issuance of such an opinion risks undermining the concrete efforts of States and United Nations political bodies to address the concern reflected in the General Assembly's request to the Court. To date, member States have set aside their differences regarding the lawfulness of the use of nuclear weapons in favour of concentrating on more constructive measures to regulate the possession and use of nuclear weapons such as the Non-Proliferation Treaty and the bilateral Treaties on the Reduction and Limitation of Strategic Offensive Arms.

An hypothetical pronouncement by the Court regarding the legality of the use of nuclear weapons could very well obstruct and sidetrack such efforts by turning the debate away from practical accommodation and the search for strategic consensus, and into the domain of arid legal debate. Moreover, depending on its reasoning, if the Court reached such a decision it might well adversely affect the development of legal norms in other areas.

For instance, if the Court were to rely on norms developed in the fields of human rights and environmental law - which, as my colleagues will demonstrate, were never intended to address the legality of the use of nuclear weapons or any other aspect of armed conflict - the way in which States view these fields and contribute to their future development will be forever altered. States would be *forced* to devote considerable effort to define the precise application to military activities of legal norms that were not intended to regulate armed conflict. This would burden, complicate, and obstruct negotiations aimed at improving the protection of human rights and the environment.

To summarize, and to return more directly to the question of the Court's discretion to consider the requests before the Court: There are, as the Court in the *Northern Cameroons* case noted,

"inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore" (*I.C.J. Reports 1963*, p. 29). The United States believes that in light of the entirely hypothetical nature of the question posed and the factual vacuum in which the Court is operating, these limitations should lead the Court to protect and preserve its judicial character by declining the exercise of its discretion to render an advisory opinion in this case.

Thank you, Mr. President and Members of the Court. With your permission, my colleague, Mr. Matheson, will now address the Court.

The PRESIDENT: I thank you very much Your Excellency for your statement and I give the floor to His Excellency Mr. Michael Matheson, Principal Deputy Legal Adviser of the United States Department of State.

Mr. MATHESON: Mr. President, distinguished Members of the Court. It is an honour to appear before you today on behalf of the United States. Mr. Harper has explained our position that this Court lacks jurisdiction to respond to the request of WHO for an advisory opinion, and should not exercise its discretion to issue the opinion requested by the General Assembly. If, however, the Court chooses to address the substance of the question posed, it should, in our view, confirm that neither conventional nor customary international law contains a general prohibition on the use of nuclear weapons.

It is a fundamental principle of international law that restrictions on States - particularly those affecting the conduct of armed conflict - cannot be presumed; they must, rather, be found in conventional law specifically accepted by States, or in customary law generally accepted as such by the community of nations. The Court made this vital point in the case of *Nicaragua* v. *United States* (*I.C.J. Reports 1986*, p. 135), recalling that

> "in international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited".

An even higher standard applies in establishing the existence of peremptory norms of international law, which must be accepted and recognized by the international community as norms from which no

derogation is permitted.

In 1990, the Secretary-General of the United Nations issued a report concerning nuclear weapons in which he concluded - correctly, in our judgment - that "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" (Report of the United Nations Secretary-General on Nuclear Weapons, UN doc. A/45/373 (1990)). This is still the case today. WHO itself, in its request for an advisory opinion, conceded that "marked differences of opinion have been expressed by Member States about the lawfulness of the use of nuclear weapons".

It is clear that no general prohibition on the use of nuclear weapons can be found in current conventional law. On the contrary, as we have shown in our submissions, international agreements governing the possession, testing and use of nuclear weapons seem clearly to proceed on the assumption that there is no such general prohibition. When the international community has decided to accept a prohibition on the use of a specific category of weapons, it has done so directly and expressly in the form of an international agreement. For example, international agreements expressly prohibit the use of chemical and biological weapons, as well as weapons with non-detectable fragments. Given the overriding significance of nuclear weapons, any general prohibition on their use would surely have found expression in such an international agreement, which would undoubtedly have included provisions for verification and other essential elements. The fact that such a prohibition has not been so expressed indicates that, in fact, it does not exist.

Those agreements which do restrict the use of nuclear weapons only do so in specific geographical areas, which would make no sense if the use of such weapons were already prohibited everywhere. Those agreements which restrict the deployment or limit the number of nuclear delivery vehicles clearly proceed on the assumption that nuclear weapons are not generally prohibited. Certain of these agreements recognize the need for deterrent nuclear forces, and even prohibit or restrict the creation of defences against them or offensive nuclear forces that could destroy them.

One important treaty that clearly proceeds on this assumption is the Nuclear Non-Proliferation Treaty, which was recently affirmed by the parties without change. During the first day of these

proceedings, the distinguished representative of Australia argued that the Treaty is evidence of a general prohibition on the acquisition, testing, possession and use of nuclear weapons by all States. With respect, this turns the Treaty squarely on its head. An international agreement can hardly be the basis for a prohibition that goes well beyond its terms and is, in fact, inconsistent with them.

Far from prohibiting the possession and use of nuclear weapons by all States, the Non-Proliferation Treaty effectively confirms that the five acknowledged nuclear-weapon States are in lawful possession of such weapons, and calls for negotiations on effective measures to end the nuclear arms race and bring about nuclear disarmament at a future date. This, it seems to us, is clear acknowledgment by the international community that nuclear weapons are not currently prohibited by law, but rather are to be dealt with in future political negotiations among the States parties. This conclusion is further confirmed by Security Council resolution 984, which expressed approval for security assurances given in the context of the Non-Proliferation Treaty that expressly preserve the right to use nuclear weapons in the exercise of self-defence in specified circumstances.

It is also our view that there is no general prohibition in customary international law on the use of nuclear weapons. As the Court has clearly established, customary international law is created by a general and consistent practice of States, followed out of a sense of legal obligation. The Court has noted in the *North Sea Continental Shelf* case that the incorporation of a norm into customary international law requires "extensive and virtually uniform" State practice. No evidence of such practice exists with respect to nuclear weapons, and it cannot be implied from the decision of States possessing such weapons to abstain from using them for humanitarian, political, or military reasons, rather than from a belief, that such abstention was required by law.

In fact, the conduct and publicly-stated views of many States reflect that they do not recognize a general legal obligation to refrain from using nuclear weapons. For example, each of the Permanent Members of the Security Council has made an immense commitment of human and material resources to acquire and maintain stocks of nuclear weapons and their delivery systems, and many other States have decided to rely for their security on these nuclear capabilities. If these weapons could not lawfully be used in individual or collective self-defence under any circumstances,

there would be no credible threat of such use in response to aggression and deterrent policies would be futile and meaningless. In this sense, it is impossible to separate the policy of deterrence from the legality of the use of the means of deterrence. Accordingly, any affirmation of a general prohibition on the use of nuclear weapons would be directly contrary to one of the fundamental premises of the national security policy of each of these many States.

The *North Sea Continental Shelf* case further affirms that States whose interests are "specially affected" by application of a putative norm must also subscribe to its legitimacy for it to attain customary status (*I.C.J. Reports 1969*, p. 3 at p. 43). Consequently, customary law prohibiting the use of nuclear weapons could not be created over the objection of States possessing such weapons or those relying upon them for their security, since these States would clearly be "specially affected" by such a prohibition. In our submissions to the Court, we have documented the oft-expressed views of these States that no such prohibition exists.

Neither, in our view, should the Court give undue weight to the United Nations General Assembly resolutions that have declared the use of nuclear weapons to be contrary to the United Nations Charter and international law generally. These resolutions, which attracted a significant number of negative votes and abstentions in the General Assembly, do not and cannot of their own force create legal obligations.

As a matter of law, the General Assembly's resolutions could only be declarative of principles of customary international law to the extent that such principles have, in fact, been recognized already by the international community. The United States and many other States have demonstrated in their submissions to this Court that a prohibition on the use of nuclear weapons has not been embraced as consistent, widely accepted State practice; to the contrary, numerous States have rejected such a proposition, reserving in particular the right to use nuclear weapons consistent with the right of self-defence.

During his oral presentation, the distinguished representative of Australia acknowledged that:

> "the practice of nuclear-weapon States during the decades following the end of the Second World War, in acquiring, testing and deploying large numbers of nuclear weapons, and the acquiescence in this by their allies and other nuclear-weapon States, makes it difficult to argue that there was any rule of *per se* illegality ..."

He went on the argue, however, that:

> "the question of whether the use or threat of nuclear weapons was illegal in the 1940s, or even in the 1980s, is not of particular significance for present purposes".

Rather, he maintained, more recent developments, particularly growth in the number and sophistication of nuclear weapons, the development of such weapons by other States, and the increasing sensitivity of the international community to the danger of nuclear war, have created such a prohibition.

With respect, we do not understand how this could be so. The build-up of nuclear arsenals or the acquisition of nuclear weapons by additional States could hardly be evidence of the general acceptance of a customary norm prohibiting such weapons. In fact, there has in recent years been a very great reduction in the size of nuclear arsenals as a result of agreements among the nuclear powers. In our view, this too does not constitute evidence of the creation of a customary law norm, but rather illustrates clearly that this serious problem can only be solved by negotiations among States, rather than by the pronouncement of new customary law.

In support of their arguments for the existence of a general prohibition on the use of nuclear weapons, some States have also attempted to invoke a number of international instruments which do not address arms control and disarmament issues and do not form part of the law of war. These agreements were not intended to deal with the matters of global peace and security that are before the Court. Rather, they address such diverse subjects as the protection of the environment and human rights. In our view, it is both implausible and illogical to conclude that in becoming party to these agreements, States adopted by implication or inadvertence, a prohibition on the use of nuclear weapons that these same States have pointedly declined to establish in agreements dealing directly with arms control and armed conflict.

In the field of environmental protection, it is important to distinguish between those provisions that were negotiated in the context of the regulation of the use of weapons in armed conflict and those which were not. In the first category are the Environmental Modification Convention and certain provisions of Additional Protocol I to the 1949 Geneva Conventions. My colleague, Mr.

McNeill, will address the relevance of these provisions to the use of nuclear weapons.

In the second category - environmental provisions that were not negotiated in the context of the use of weapons in armed conflict - are such agreements as the Vienna Convention for the Protection of the Ozone Layer, the Framework Convention on Climate Change, and the Convention on Biological Diversity. It has been argued that these agreements collectively embody a "principle of environmental security" which supposedly forms part of the law of war and prohibits the use of nuclear weapons.

The United States has played a major role in helping to establish and promote recognition of international environmental norms, and was intimately involved in the negotiation of these same treaties. But the fact is that none of these treaties limits the use of nuclear weapons or any other means of armed conflict, either expressly or by implication. Nor, as we have shown in our submissions, is there any textual basis for reading these treaties as reflecting a broader principle of environmental security in wartime. Indeed, none of these treaties was negotiated with the intention that it would limit the use of nuclear weapons. No State has presented credible evidence from the relevant negotiating records to suggest otherwise. In the absence of such support in the text or negotiating record of these treaties, it would be inappropriate and contrary to normal treaty principles for the Court to interpret these instruments in a manner contrary to the good-faith intentions of the parties.

In fact, even if these treaties were meant to apply in armed conflict, we have shown in our submissions that the language of none of them prohibits or limits the actions of States in any manner that would reasonably apply to the use of weapons. For example, the Convention for the Protection of the Ozone Layer simply directs parties to take "appropriate measures" to protect the ozone layer. The Convention on Climate Change simply calls on parties to "minimize" the causes of adverse climate change. The Biodiversity Convention contains similar general admonitions. In short, there is nothing in these treaties that can fairly be seen as prohibiting the use of nuclear weapons, even if they were applicable.

Some States have also contended that a number of international environmental declarations

provide a basis for a nuclear weapons prohibition. These declarations, for example the 1972 Stockholm Declaration on the Human Environment, are not legally binding. Even if they were, a prohibition on the use of a category of weapons could not legitimately be inferred from general statements in such declarations that do not articulate prohibitions of any sort on armed conflict or on the use of such weapons. Nor, as we have shown in our submissions, was there any intent to do so.

Similarly, it is important in the field of humanitarian protection to distinguish between treaties which were negotiated in the context of the regulation of the use of weapons in armed conflict and those which were not. In the first category are the 1949 Geneva Conventions and the 1977 Additional Protocols. Again Mr. McNeill will address the relevance of these provisions to the use of nuclear weapons.

In the second category are human rights instruments that were not negotiated in the context of the regulation of the use of weapons in armed conflict. It has been suggested that the use of nuclear weapons would violate the right to life that is recognized in international instruments such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the European Convention on Human Rights. These instruments do not, by their terms, prohibit the use of nuclear weapons, or any other weapons for that matter. Nor, more broadly, do they prohibit the taking of life for otherwise lawful purposes, either directly or by implication. One such lawful purpose is, of course, the right of self-defence, which has long been understood to encompass the right to use lethal force.

These human rights instruments cannot and should not be construed as undermining fundamental provisions of the law of war. In fact, the European Convention on Human Rights specifically recognizes that persons may lose their lives through lawful acts of war. As discussed in our submission, a similar understanding guided the negotiation of the International Covenant on Civil and Political Rights. Were this not the case - were the Court to give the right to life unwarrantedly broad effect - international humanitarian law would, as a consequence, be rendered meaningless and irrelevant, as the right to life would then be construed to prohibit the loss of life in all forms of armed conflict, without reference to self-defence, necessity, proportionality, or any of the other relevant

legal standards.

In addition, an opinion by the Court that the environmental and human rights instruments in question somehow prohibit or restrict the use of nuclear weapons could seriously impair international co-operation and the development of legal norms in these fields in the future. Efforts to negotiate new instruments would be complicated and potentially paralysed as States would focus not on the substance of the real environmental and human rights issues under negotiation, but rather on the possible implications for nuclear weapons or other forms of armed conflict, whether intended or not. Yesterday, for example, it was suggested that only language expressly excluding nuclear weapons could prevent the application of such treaties to these weapons; but in fact it is probable that none of these treaties could have been adopted if there were such a requirement to deal expressly in their texts with the volatile question of nuclear weapons.

In summary, those States which argue that international law already embodies a prohibition on the use of nuclear weapons do so in the face of the clear reliance on such weapons as an essential element of national defence by many States, including but not at all limited to the five Permanent Members of the Security Council. It is inconceivable, under these circumstances, that a prohibition could have emerged in customary or conventional law on such weapons. In fact, as we have argued, this has not happened. If this Court were to hold otherwise, it would, in our view, amount to the imposition of a new and fundamental restriction in the area of national defence on the many States that have not accepted such a restriction. This, we suggest, is a step the Court should not take.

Mr. President, this concludes my presentation. With the permission of the Court, my colleague, Mr. McNeill, will now address the Court concerning the rules of international humanitarian law of armed conflict. Thank you, Sir.

The PRESIDENT: I thank you very much, Your Excellency, for your statement, and I give the floor to Mr. John McNeill, Senior Deputy General Counsel of the United States Department of Defence.

Mr. McNEILL: Mr. President, distinguished Members of the Court. It is indeed an honour to

appear before you today.

In their submissions to the Court a number of States have suggested that the law of armed conflict (sometimes referred to as the law of war or international humanitarian law) precludes the use of nuclear weapons. The United States has long shared the view that the law of armed conflict governs the use of nuclear weapons - just as it governs the use of conventional weapons. But it is contrary to the very nature and structure of the law of armed conflict to claim that it prohibits *per se* the use of nuclear weapons. Under the law of armed conflict, in the absence of an express prohibition, the legality of the use of any weapon, including nuclear weapons, is fundamentally dependent on the facts and circumstances of the use in question.

DETERRENCE/STRATEGIC DOCTRINE The argument that international law prohibits, in all cases, the use of nuclear weapons appears to be premised on the incorrect assumption that every use of every type of nuclear weapon will necessarily share certain characteristics which contravene the law of armed conflict. Specifically, it appears to be assumed that any use of nuclear weapons would inevitably escalate into a massive strategic nuclear exchange, resulting automatically in the deliberate destruction of the population centres of opposing sides.

This assumption is entirely unwarranted; it is based on myth, not fact. As explained in many of my country's statements on the subject over the past three decades, US deterrence strategy is designed to provide a range of options in response to armed aggression that will control escalation and terminate armed conflict as soon as possible.

Before proceeding further with our discussion of the law of armed conflict, I would like to address briefly the argument made to the Court during these proceedings that certain passages in a US document, the US Doctrine for Joint Nuclear Operations (Chairman of the Joint Chiefs of Staff, *Joint Publication 3-12*, 1993), suggest that deterrence is not a purely defensive doctrine. It is unfortunate that these important passages have been misconstrued and mischaracterized. The fact is that the document in question unambiguously characterizes deterrence as a "defence posture," and identifies the fundamental purpose of US nuclear forces as that of deterring the use of weapons of

mass destruction, particularly nuclear weapons (para. 1.a). The doctrine for Joint Nuclear Operations is by no means the only statement of US policy on nuclear weapons. Indeed, there are many presidential and cabinet level documents that speak even more authoritatively, given our tradition of civilian control of the military. A perusal of these presidential and cabinet level documents makes clear that US policy reflects a willingness to use nuclear weapons only in self-defence: the US stands ready to impose a sufficiently high price on States engaging in acts of aggression so as to deter such acts from occurring in the first instance. Mr. President, Members of the Court: we too have lived with the spectre of nuclear war for generations. Ours is in every sense a defensive strategy; and very frankly we believe the policy of nuclear deterrence has saved many millions of lives from the scourge of war during the past 50 years. In this special sense, nuclear weapons have been "used", defensively, every day for over half a century - to preserve the peace.

With the Court's indulgence, I will now return to the law of armed conflict. It is the view of the United States that it is not possible in the abstract, without knowledge of the precise circumstances of particular uses of nuclear weapons, to determine that such uses would be violative of that body of law. Nuclear weapons, as is true of conventional weapons, can be used in a variety of ways: they can be deployed to achieve a wide range of military objectives of varying degrees of significance; they can be targeted in ways that either increase or decrease resulting incidental civilian injury or collateral damage; and their use may be lawful or not depending upon whether and to what extent such use was prompted by another belligerent's conduct and the nature of such conduct. The Secretary-General's 1990 Report on nuclear weapons, referred to previously by my colleague, Mr. Matheson, likewise noted that the effects of nuclear weapons depend, *inter alia*, on the explosive yield and height of the burst of individual weapons, on the character of their targets, as well as on climatic and weather conditions (Report of the United Nations Secretary-General on Nuclear Weapons, p. 75, para. 290.) These differences, distinctions and variables cannot be ignored; they are critical to the appropriate legal analysis.

A number of different principles of the law of armed conflict have been invoked more specifically and particularly in support of the erroneous argument that the use of nuclear weapons is

categorically prohibited. With the Court's permission, I would like to review briefly these principles and demonstrate that they cannot be construed to prohibit generally the use of nuclear weapons.

INDISCRIMINATE EFFECTS/COLLATERAL DAMAGE

It has been said, for example, that the use of nuclear weapons would violate the law of armed conflict because it would amount to an impermissible attack on civilian populations. While it is of course true that civilians, as such, may not be made the object of attack under the law of armed conflict, an attack upon a legitimate military objective - irrespective of the type of weapon used - that occasions incidental civilian casualties or collateral damage, is clearly not prohibited by the proscription against the deliberate targeting of civilian populations.

It has also been doubted that nuclear weapons can, in any circumstance, be targeted at specific military objectives. As a consequence, it has been argued that nuclear weapons are inherently indiscriminate in their effect, and that their use must therefore be prohibited by the law of armed conflict. This argument is simply contrary to fact. Modern nuclear weapon delivery systems are, indeed, capable of precisely engaging discrete military objectives.

It has also been argued that the use of nuclear weapons is unlawful because in all cases it would result in incidental injury to civilians or collateral destruction that is excessive in relation to the military advantage to be gained from such use. This assertion, too, is entirely speculative, and unwarrantedly so. Whether the use of nuclear weapons in any given instance would result in the infliction of disproportionate collateral destruction or incidental injury to civilians cannot be judged in the abstract. Such a judgment depends entirely on the circumstances of the contemplated use, including the military necessity of destroying a particular objective.

The World Health Organization and some States have submitted to the Court materials discussing the destructive effects of nuclear weapons, including the effect of their use on human health and the environment. It is true that the use of nuclear weapons would have an adverse collateral effect on human health and both the natural and physical environment. But so too can the use of conventional weapons. Obviously, World Wars I and II, as well as the 1990-1991 conflict

resulting from Iraq's invasion of Kuwait, dramatically demonstrated that conventional war can inflict terrible collateral damage to the environment. The fact is that armed conflict of any kind can cause widespread, sustained destruction; the Court need not examine scientific evidence to take judicial notice of this evident truth.

Some States have adverted to studies of the effects of nuclear weapons in an attempt to demonstrate that every use of every type of nuclear weapon would necessarily violate principles of proportionality and discriminate use. But the material that has been presented for the Court's consideration cannot support such a sweeping proposition. Any given study rests on static assumptions: assumptions regarding the yield of a weapon, the technology that occasions how much radiation the weapon may release, where, in relation to the earth's surface it will be detonated, and the military objective at which it would be targeted.

The assumptions made by the World Health Organization in the materials submitted to the Court are in fact highly selective (*Effects of Nuclear War on Health and Health Service*, 2nd ed., 1987). The four scenarios on which the World Health Organization Report focuses address civilian casualties expected to result from nuclear attacks involving significant numbers of large urban area targets or a substantial number of military targets. But no reference is made in the report to the effects to be expected from other plausible scenarios, such as a small number of accurate attacks by low-yield weapons against an equally small number of military targets in non-urban areas. The plausibility of such scenarios follows from a fact noted in the WHO Report by Professor Rotblat: namely, that "remarkable improvements" in the performance of nuclear weapons in recent years have resulted in their "much greater accuracy" (J. Rotblat, p. 95). Clearly, such possible scenarios would not necessarily raise issues of proportionality or discrimination.

To summarize, scientific evidence could only justify a total prohibition on the use of nuclear weapons if such evidence covers the full range of variables and circumstances that might be involved in such uses. The material presented does not even approach such a level of completeness, and is overly selective in its assumptions. Thus, it does not support the conclusion that the use of every type of nuclear weapon would violate the principles of proportionality and discriminate use in all

cases.

UNNECESSARY SUFFERING/SUPERFLUOUS INJURY

Returning to the claims that have been made regarding specific principles of the law of armed conflict, it has also been argued that nuclear weapons categorically cause unnecessary suffering or superfluous injury and therefore violate the law of armed conflict. This line of argument cannot be sustained. The unnecessary suffering principle prohibits the use of weapons designed specifically to increase the suffering of persons attacked beyond that necessary to accomplish a particular military objective. As a general matter, however, it does not prohibit the use of weapons that cause great injury and pain, as such. Under this principle, whether use of a particular weapon causes unnecessary suffering depends, therefore, on whether its use and resultant effects are required to accomplish a legitimate military objective, a question which again cannot be answered in the abstract.

ENVIRONMENTAL CONCERNS

Neither can it be said that the use of nuclear weapons categorically runs afoul of arms control and law of armed conflict principles that are designed to protect the environment. Article I of the 1977 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (the EnMod Convention) prohibits the military use of "environmental modification techniques" that have the effect of causing widespread, long-lasting or severe damage to a State party. More particularly, the Convention prohibits the deliberate manipulation of the environment - for example, causing an earthquake or a tidal wave - as a means of inflicting damage. Means of warfare - whether nuclear or conventional - that damage the environment are not prohibited by the EnMod Convention unless they involve the deliberate manipulation of environmental forces. Conceivably, nuclear weapons could be deliberately utilized to manipulate the environment, as could conventional weapons; but it certainly cannot be maintained that every use of nuclear weapons would be so designed and as a result prohibited by the Environmental Modification Convention.

There is an additional point to be made with respect to the environment. Reference was made yesterday by counsel for Solomon Islands to United Nations Security Council resolution 687 (1991), as an example of a customary rule of international law assigning liability for damage to the environment during armed conflict. This is incorrect. Resolution 687 recognized environmental and other forms of injury caused by Iraq to be compensable simply because Iraq was an aggressor. In this regard, resolution 687 only stands for the proposition that an aggressor is liable, and does not confirm or indicate the existence of any generic rule relating to environmental damage during armed conflict. In this area, as in others, however, the requirements of military necessity and proportionality always apply.

ADDITIONAL PROTOCOL I - APPLICABILITY

Submissions to the Court have also made copious reference to standards concerning wartime damage to the environment which are set forth in another 1977 agreement, the Protocol Additional to the 1949 Geneva Conventions, and relating to the Protection of Victims of International Armed Conflicts, known as Additional Protocol I. Articles 35 and 55 of this Protocol prohibit methods and means of warfare that are intended, or may be expected to cause, widespread, long-term and severe damage to the natural environment. As a threshold matter, it is important to note that the new rules contained in Additional Protocol I only apply to those States that ratify it; the United States is not a party. Moreover, the provisions of this Protocol, relating to the protection of the environment and reprisals, which I shall discuss next, have not been incorporated into customary law.

In any event, and most importantly, it is clear from the negotiating record that the new rules of Additional Protocol I were not intended to apply to nuclear weapons. This point was made evident at the very start of the negotiations in a statement submitted by the International Committee of the Red Cross accompanying the text of the draft Additional Protocol. In this statement, quoted in the Memorial of the United States, the ICRC asserted forthrightly and without qualification that the draft Additional Protocol was *not* intended to address "problems relating to atomic, bacteriological and chemical warfare" which are the subjects of international agreements or negotiations by

governments.

Explicit statements to the very same effect, affirming the ICRC's view, were made during the negotiation of Additional Protocol I by representatives of the United States, France, the United Kingdom, and the former Soviet Union. This view was also reflected in a decision of the Conference to reject a proposal that an *ad hoc* committee, asked to study the effects of conventional weapons, also consider the effects of nuclear weapons. Commenting on the proposal, the committee noted "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.

The United States is not aware of any convincing evidence to the contrary in the negotiation record. A few statements of negotiating objectives by several delegations to the effect that nuclear weapons should be prohibited by the Protocol are not of probative value. These statements were made at the outset of what was an extended conference, and were not repeated after it had become clear that no such prohibition had, in fact, been accepted as an objective. As a result, these few, isolated, introductory statements prove nothing.

By contrast, the conduct of States in signing and ratifying the Protocol provides further evidence of its non-applicability to nuclear weapons. Formal statements articulating understandings that the rules adopted in the Protocol would not apply to nuclear weapons were made by a number of States upon signature or ratification. These include Belgium, Canada, Germany, Italy, the Netherlands, and Spain. To our knowledge, no State objected to, or otherwise commented upon these statements.

In sum, both the negotiating record, and the record of signature and ratification of Additional Protocol I, reflect a manifest understanding that the agreement's new rules do not apply to the use of nuclear weapons. Under the Vienna Convention on the Law of Treaties it is our view that this record should be taken as reflecting the correct interpretation of the Protocol on this point. And as we have indicated in our submission to the Court, this view is shared by highly qualified publicists such as Bothe, Partsch and Solf (*New Rules for Victims of Armed Conflict*, 1982). Consequently, the new rules governing protection of the environment during wartime that were provided for in Additional

Protocol I are not applicable to nuclear weapons.

REPRISAL

For the same reason, the new rules on reprisals embodied in Additional Protocol I are not relevant to the question before the Court. Some Member States have argued that the use of nuclear weapons would be inconsistent with these rules, but as just noted, the new rules added by Additional Protocol I - including those on reprisal - cannot be construed as applying to nuclear weapons. It has been alternatively suggested that the principles of the law of reprisal found in the law of armed conflict similarly prohibit the use of nuclear weapons. Even if it were to be concluded - as we clearly have not - that the use of nuclear weapons would necessarily be unlawful, the customary law of reprisal permits a belligerent to respond to another party's violation of the law of armed conflict by itself resorting to what otherwise would be unlawful conduct. Whether a use of force would or would not be lawful, and whether or not it would be justified as a reprisal, depends, obviously and necessarily, upon the circumstances surrounding the act in question. The law of reprisal does not and cannot, therefore, be construed as prohibiting categorically the use of nuclear weapons; indeed, if it were to be so construed, the negative implications for strategic deterrence would be obvious and dire.

NEUTRALITY

Along rather different lines, it has been suggested that rules of neutrality which form part of the law of armed conflict also prohibit the use of nuclear weapons. This argument is based on the faulty assumption that the use of nuclear weapons would necessarily and unlawfully damage the territory of a neutral State. As an initial matter, we note that the principle of neutrality has never been understood to guarantee neutral States absolute immunity from the effects of armed conflict. The purpose of this principle was to preclude military invasion or bombardment of neutral territory, and otherwise to define complementary rights and obligations of neutrals and belligerents. However, even assuming *arguendo* that a belligerent's liability to a neutral could somehow be established in a particular case, the argument that unlawful damage would necessarily occur to neutral States whenever nuclear weapons are used cannot be maintained. Whether or not the principles of neutrality might be violated once again clearly depends on the precise circumstances of a particular use of nuclear weapons.

GENOCIDE

Some States in their submissions to the Court have gone so far as to suggest that any use of nuclear weapons which results in the death of a large number of civilians would constitute genocide. It has been claimed that the intent to engage in genocidal acts could be inferred from the failure of the party using nuclear weapons to appreciate fully the destructive consequences of such use. In light of the atrocities and malevolence that the history of this century associates with genocide, the United States regrets that assertions of genocidal conduct have been so imprecisely made in this context. In any event, the claim here is evidently based on a misunderstanding of the concept of genocidal intent. Under international law, the crime of genocide is characterized by an intent to "destroy, in whole or in part, a national, ethnical, racial, or religious group, as such" (Convention on the Prevention and Punishment of the Crime of Genocide, 1948 , Article 2). Thus, even a deliberate and illegal killing of civilians - deplorable as that would be - would not necessarily constitute genocide. It is, of course, the case that nuclear weapons could be an instrument of genocide in the hands of a party harbouring the requisite *animus*, just as other weapons could be put to such unconscionable uses; but the fact of this potential would not, without more, render the use of nuclear weapons violative of the law against genocide.

Finally, the United States notes that its written statements to the Court address a number of other law of armed conflict claims regarding the use of nuclear weapons - for example, incorrect claims that the use of nuclear weapons would violate international conventions prohibiting the use of poison gases and poison weapons. As we have explained in some detail in our submissions, nuclear weapons are not, and have never been treated as, poison weapons for purposes of the 1907 fourth Hague Convention or gas weapons for purposes of the 1925 Geneva Protocol. The 1954 definition of "atomic weapons" that was referred to yesterday by counsel for Solomon Islands does not imply anything to the contrary. That definition includes both nuclear weapons and the separate category of what are known today as radiological weapons, which are designed to cause poisoning, for example, through the deliberate spreading of radiological substances over an area. These and other claims addressed in our submissions are no more persuasive than those I have discussed here and are

addressed in detail in our Memorial to the Court.

THE MARTENS CLAUSE

In view of the evidence that conventional law does not express, or even imply, a general prohibition on the use of nuclear weapons, some States have suggested, apparently alternatively, that the Martens Clause embodies such a prohibition. The Martens Clause, which has found expression in the 1907 fourth Hague Convention and the 1949 Geneva Conventions, among other instruments, cannot be so construed. The clause states that in cases not covered by the express terms of the cited conventions and regulations,

> "the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience" (Preamble, 1907 Hague IV).

The Martens Clause clarifies that the absence of a specific treaty provision prohibiting the use of nuclear weapons does not, standing alone, compel the conclusion that such use is or is not lawful. At the same time, however, the clause does not independently establish the illegality of nuclear weapons, nor does it transform public opinion into rules of customary international law. Rather, it simply makes clear the important protective role of the law of nations and clarifies that customary international law may independently govern cases not explicitly addressed by the Conventions. This is what gives content and meaning to the Martens Clause. Therefore, when as here, customary international law does not categorically prohibit the use of nuclear weapons, the Martens Clause does not independently give rise to such a prohibition.

Thank you, Mr. President. With your permission, Mr. Harper will now conclude the presentation of the United States. It has been a privilege for me to address you and I am grateful for your generous attention to my remarks.

The PRESIDENT: Thank you very much, Mr. McNeill, for your statement. I now give the floor to His Excellency Mr. Harper, for his final statement.

Mr. HARPER: Mr. President, Members of the Court. The presentation of the United States

regarding the merits of the questions presented has, to this point, been limited to the legality of the use of nuclear weapons and has not addressed the legality of threats to use such weapons. The most important explicit textual reference to the threat of force in an international instrument can be found in the famous fourth paragraph of Article 2 of the United Nations Charter, which directs Members to refrain from the threat of force "against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations".

It is unlawful for a State to threaten resort to force where no justification for the actual use of force exists. However, where the use of force would be lawful - where it would be consistent, for example, with the right of self-defence - it follows that a threat to use force under the same circumstances would also be lawful. Thus, as a matter of both logic and law, if there is no general prohibition on the use of nuclear weapons, as my colleagues and I have argued, then neither can the threat of using such weapons be prohibited *per se*. With respect to a threat to use nuclear weapons in a particular case, such a threat may or may not be lawful - just as a threat to use conventional weapons may or may not be lawful - depending on the circumstances in question. As we have emphasized throughout our presentation, the Court could not hypothetically conceive of such circumstances *ex ante*, without engaging in unfounded and inappropriate speculation.

Allow me to conclude the presentation of the United States with a few brief points. To be sure, principles of humanity circumscribe the conduct of armed conflict. But those principles only assume the force of customary international law when they satisfy criteria this Court has recognized as governing the establishment of legal norms. In this case, customary international law does not prohibit categorically the use of nuclear weapons. The record before the Court does not reflect "extensive and virtually uniform" State recognition of a general legal prohibition against the use of nuclear weapons. General Assembly resolutions proclaiming illegality are no substitute for ascertaining custom.

Conventional law, as we have demonstrated, is no more probative of a *per se* prohibition. It is true that the Non-Proliferation Treaty affirms the commitment of nuclear-weapon States toward reducing the number of nuclear weapons and toward achieving the goal of disarmament.

The United States is committed to this process. We and the Russian Federation are pursuing a dynamic programme of substantial and wholly unprecedented reductions in numbers and types of nuclear weapons. In just the last few years, the United States and Russia have entered into a dozen new agreements that reflect our record of mutual and responsible stewardship of nuclear weapons. Further, all nuclear-weapon States are pledged to conclude a comprehensive test ban treaty in the near future.

From these general political commitments to engage in future negotiations, however, cannot reasonably be implied a rule of law prohibiting the use of nuclear weapons. The text of the NPT, which explicitly recognizes the status and responsibilities of certain States in possession of nuclear weapons, certainly belies such an interpretation. Nothing in the text or negotiating record of the NPT indicates that the parties to this treaty intended to prohibit nuclear-weapon States from using nuclear weapons. No State has brought to the Court's attention persuasive evidence to the contrary.

Nor has any State managed to argue persuasively for such a prohibition from the text or negotiating record of any other international instruments. Loosely to impute to the parties of such instruments an intent to prohibit the use of nuclear weapons would undermine the *corpus* of conventional law and future international negotiations. States must be able to rely on the fact that treaties mean what they say and what the parties thereto intend, and nothing more.

As my colleagues have noted, the Secretary-General, in a 1990 report, concluded that no uniform view has emerged regarding the legality of the use of nuclear weapons. Nothing has changed in the last five years to warrant the conclusion that such use is now prohibited.

The Court plays a role in promoting peace and security only when it decides issues that are appropriate for, and amenable to, judicial decision-making. It would be of no benefit to the peace and security we all wish to achieve, to the Court's credibility, or to the development of the international legal order, for the Court to accept the invitation presented by advocates of a legal prohibition to recognize phantom legal norms.

Accordingly, we respectfully urge this honourable Court to decline the requests before it to issue an advisory opinion.

Thank you, Mr. President, thank you, Members of the Court.

The PRESIDENT: Thank you very much, Mr. Harper, for your last statement that concludes the oral arguments by the United States of America. I now give the floor to Judge Ranjeva who would like to ask a question.

M. RANJEVA : Je vous remercie, Monsieur le Président. Ma question s'adresse à toutes les délégations intéressées et plus particulièrement à la délégation du Royaume-Uni et des Etats-Unis d'Amérique. Ce matin le Royaume-Uni et les Etats-Unis d'Amérique ont dit qu'un avis de la Cour sur le fond des questions posées aurait des effets négatifs qui affecteraient l'évolution des négociations sur le désarmement nucléaire. Ma question est : «Sur quels *faits concrets* ces délégations se fondent-elles pour justifier cette affirmation ?» Je vous remercie, Monsieur le Président.

Le PRESIDENT : Merci. Il est à noter que le texte de cette question posée par M. Ranjeva sera immédiatement distribué, et qu'il est loisible à la délégation du Royaume-Uni et à celle des Etats-Unis d'Amérique, comme du reste à toute autre délégation concernée, de donner une réponse écrite dans un délai de quinze jours. Je n'ai plus d'orateur dans ma liste. Je déclare donc levée cette séance jusqu'à 15 heures cet après-midi.

L'audience est levée à 13 h 13.