CR 95/22

Cour internationale
de Justice

LA HAYE

International Court
of Justice

THE HAGUE

ANNEE 1995

Audience publique

tenue le lundi 30 octobre 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 Monday 30 October 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. Arnaldez, Greffier-adjoint

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

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;

Ms. 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 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 [TO BE TRANSLATED] of International Law, graduate Institute

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 Salomon est représenté par :

L'honorable Danny Philip, premier ministre adjoint et ministre des affaires étrangères;

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

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, 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 l'Université de Naples;

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

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 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 Royaum-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.

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

M. Roger S. Clark, professeur.

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 the Arab Republic of Egypt is represented by:

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

Mr. George 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 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, 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 University of Naples;

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

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

Mr. Roger S. Clark, Professor.

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 Danny Philip, Deputy Prime Minister and Minister for Foreign Affairs;

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

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

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

The Government of the United Kingdom 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;

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

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

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

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

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

The Government of Solomon Islands is represented by:

The Honorable Danny Philip, Deputy Prime Minister and Minister for Foreign Affairs;

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

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

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

Le PRESIDENT : Veuillez vous asseoir. La séance est ouverte.

Avant d'en venir aux affaires qui nous occupent aujourd'hui, j'ai le très pénible devoir de vous faire part du décès du juge Andrés Aguilar-Mawdsley, survenu à La Haye le 24 octobre 1995. La Cour rendra un hommage solennel à la mémoire de M. Aguilar, en séance publique, la semaine prochaine.

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La Cour est aujourd'hui réunie pour entendre des exposés oraux, conformément aux dispositions de l'article 66 de son Statut, sur deux demandes d'avis consultatif : la première, présentée par l'Organisation mondiale de la Santé, porte sur la *Licéité de l'utilisation des armes nucléaires par un Etat dans un conflit armé*; et la seconde, présentée par l'Assemblée générale des Nations Unies, porte sur la *Licéité de la menace ou de l'emploi d'armes nucléaires*. Bien que ces deux demandes fassent l'objet de procédures distinctes, elles soulèvent maintes questions connexes; et c'est la raison pour laquelle la Cour a décidé d'entendre au cours d'une seule et même série d'audiences publiques les exposés oraux relatifs à chacune desdites demandes.

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La Cour a été saisie de la demande d'avis consultatif de l'OMS comme suite à l'adoption, le 14 mai 1993, par l'Assemblée mondiale de la Santé, d'une résolution WHA 46.40, intitulée «Effets des armes nucléaires sur la santé et l'environnement», dont le texte lui a été transmis par une lettre du directeur général de l'OMS datée du 27 août 1993 et parvenue au Greffe le 3 septembre 1993. Je prierai le Greffier adjoint de donner lecture du paragraphe 1 du dispositif de cette résolution, qui indique la question sur laquelle l'avis de la Cour est demandé.

Le GREFFIER ADJOINT :

«La quarante-sixième Assemblée mondiale de la Santé,

...

1. *Décide*, conformément à l'article 96.2 de la Charte des Nations Unies, à l'article 76 de la Constitution de l'Organisation mondiale de la Santé et à l'article X de

l'accord entre l'Organisation des Nations Unies et l'Organisation mondiale de la Santé approuvé par l'Assemblée générale des Nations Unies le 15 novembre 1947 dans sa résolution 124 (II), de demander à la Cour internationale de Justice de donner un avis consultatif sur la question suivante :

«Compte tenu des effets des armes nucléaires sur la santé et l'environnement, leur utilisation par un Etat au cours d'une guerre ou d'un autre conflit armé constituerait-elle une violation de ses obligations au regard du droit international, y compris la Constitution de l'OMS ?»

Le PRESIDENT : Comme le prescrit le paragraphe 1 de l'article 66 du Statut, la requête pour avis consultatif a immédiatement été notifiée à tous les Etats admis à ester devant la Cour. En outre, l'Organisation mondiale de la Santé et les Etats membres de cette organisation admis à ester devant la Cour ont été avisés, en application du paragraphe 2 de l'article 66 du Statut, que, par une ordonnance en date du 13 septembre 1993, la Cour les avait jugés susceptibles de fournir des renseignements sur la question qui lui avait été soumise et qu'aux termes de ladite ordonnance, elle avait fixé au 10 juin 1994 la date d'expiration du délai dans lequel des exposés écrits pourraient lui être présentés. Suite aux demandes de plusieurs Etats, la date d'expiration de ce délai a été reportée au 20 septembre 1994, par une ordonnance du Président de la Cour en date du 20 juin 1994; par la même ordonnance, le

Président a fixé au 20 juin 1995 la date d'expiration du délai dans lequel les Etats ou organisations qui auraient présenté un exposé écrit pourraient présenter des observations écrites sur les autres exposés écrits conformément au paragraphe 4 de l'article 66 du Statut.

L'Organisation mondiale de la Santé a adressé à la Cour, en application du paragraphe 2 de l'article 65 du Statut, un dossier de documents pouvant servir à élucider la question; ce dossier est parvenu au Greffe en plusieurs envois.

Des exposés écrits ont été déposés par les Etats suivants : Allemagne, Arabie saoudite, Australie, Azerbaïdjan, Colombie, Costa Rica, Etats-Unis d'Amérique, Fédération de Russie, Finlande, France, Iles Salomon, Inde, République islamique d'Iran, Irlande, Italie, Japon, Kazakhstan, Lituanie, Malaisie, Mexique, Nauru, Norvège, Nouvelle-Zélande, Ouganda, Papouasie-Nouvelle-Guinée, Pays-Bas, Philippines, République de Moldova, République populaire démocratique de Corée, Royaume-Uni de Grande-Bretagne et d'Irlande du Nord, Rwanda, Samoa,

Sri Lanka, Suède et Ukraine. Par ailleurs, des observations écrites sur ces exposés écrits ont été reçues des Etats suivants : Costa Rica, Etats-Unis d'Amérique, Fédération de Russie, France, Iles Salomon, Inde, Malaisie, Nauru et Royaume-Uni de Grande-Bretagne et d'Irlande du Nord.

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La Cour a été saisie de la demande d'avis consultatif de l'Assemblée générale des Nations Unies comme suite à l'adoption par celle-ci, le 15 décembre 1994, d'une résolution 49/75 K, intitulée «Demande d'avis consultatif de la Cour internationale de Justice sur la légalité de la menace ou de l'emploi d'armes nucléaires»; le texte de la résolution a été transmis à la Cour sous le couvert d'une lettre du Secrétaire général de l'Organisation des Nations Unies datée du 19 décembre 1994 et reçue au Greffe par télécopie le 20 décembre 1994, dont l'original a été enregistré le 6 janvier 1995. Je prierai le Greffier adjoint de donner lecture du dispositif de cette résolution, qui indique la question sur laquelle l'avis de la Cour a été demandé.

Le GREFFIER ADJOINT :

«*L'Assemblée générale,*

...

Décide, conformément au paragraphe 1 de l'article 96 de la Charte, de demander à la Cour internationale de Justice de rendre dans les meilleurs délais un avis consultatif sur la question ci-après : «Est-il permis en droit international de recourir à la menace ou à l'emploi d'armes nucléaires en toute circonstance ?»

Le PRESIDENT : Comme le prescrit le paragraphe 1 de l'article 66 du Statut de la Cour, la requête pour avis consultatif a immédiatement été notifiée à tous les Etats admis à ester devant la Cour. En outre, les Etats admis à ester devant la Cour et l'Organisation des Nations Unies ont été avisés, en application du paragraphe 2 de l'article 66 du Statut, que, par une ordonnance en date du 1er février 1995, la Cour les avait jugés susceptibles de fournir des renseignements sur la question qui lui avait été soumise et qu'aux termes de ladite ordonnance, elle avait fixé, respectivement, au 20 juin 1995 la date d'expiration du délai dans lequel des exposés écrits pourraient lui être présentés, et au 20 septembre 1995 la date d'expiration du délai dans lequel les Etats ou organisations qui

auraient présenté un exposé écrit pourraient présenter des observations écrites sur les autres exposés écrits conformément au paragraphe 4 de l'article 66 du Statut de la Cour. Dans cette ordonnance, il était notamment rappelé que l'Assemblée générale avait demandé que l'avis consultatif de la Cour soit rendu «dans les meilleurs délais»; il y était par ailleurs fait référence à la demande d'avis consultatif qui avait été antérieurement soumise à la Cour par l'Assemblée mondiale de la Santé, ainsi qu'aux délais de procédure qui avaient été fixés aux fins de cette dernière demande.

Le Secrétaire général de l'Organisation des Nations Unies a adressé à la Cour, en application du paragraphe 2 de l'article 65 du Statut, un dossier de documents pouvant servir à élucider la question.

Les Etats suivants ont déposé des exposés écrits : Allemagne, Bosnie-Herzégovine, Burundi, Egypte, Equateur, Etats-Unis d'Amérique, Fédération de Russie, Finlande, France, Iles Marshall, Iles Salomon, Inde, République islamique d'Iran, Irlande, Italie, Japon, Lesotho, Malaisie, Mexique, Nauru, Nouvelle-Zélande, Pays-Bas, Qatar, République populaire démocratique de Corée, Royaume-Uni de Grande-Bretagne et d'Irlande du Nord, Saint-Marin, Samoa et Suède. Par ailleurs, des observations écrites sur ces exposés écrits ont été reçues des Etats suivants : Egypte, Iles Salomon et Nauru. Par lettre du 20 octobre 1995, la République de Nauru a demandé à la Cour l'autorisation de retirer les observations écrites qui avaient été présentées en son nom dans un document intitulé «Réponse aux conclusions des autres Etats»; la Cour a accédé à cette demande et ledit document ne fait en conséquence pas partie du dossier aujourd'hui devant elle.

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Comme je le rappelais il y a un instant, la Cour a décidé d'entendre les exposés oraux relatifs aux deux demandes d'avis consultatif au cours d'une seule série d'audiences. L'Organisation mondiale de la Santé et les Etats suivants ont fait connaître à la Cour leur souhait de prendre la parole lors de ces audiences : Allemagne, Australie, Colombie, Costa Rica, Egypte, Etats-Unis d'Amérique, Fédération de Russie, France, Guyana, Iles Marshall, Iles Salomon, Indonésie,

République islamique d'Iran, Italie, Japon, Malaisie, Mexique, Nouvelle-Zélande, Philippines, Qatar, Royaume-Uni de Grande-Bretagne et d'Irlande du Nord, Saint-Marin et Samoa. L'Organisation mondiale de la Santé n'est habilitée à s'exprimer qu'à propos de la demande d'avis qu'elle a elle-même soumise. Les modalités concrètes de déroulement des audiences ont été dûment communiquées par le Greffe à l'OMS et aux Etats que je viens de citer, par diverses correspondances. Je rappellerai en particulier que chacun d'eux ne disposera que d'un seul tour de parole, d'une durée totale d'une heure et demie au maximum. L'ordre dans lequel l'OMS et les Etats intéressés seront entendus par la Cour a été rendu public par un communiqué de presse de la Cour n° 95/31 en date du 27 septembre 1995, tel que complété par le communiqué n° 95/35 du 27 octobre 1995; dans ce second communiqué de presse figure le calendrier précis du déroulement des audiences. La Cour entendra aujourd'hui les exposés de l'Organisation mondiale de la Santé et du Commonwealth d'Australie. Avant d'appeler à la barre M. Claude-Henri Vignes, conseiller juridique de l'OMS, qui représente le directeur général de cette organisation, je voudrais encore indiquer que la Cour a décidé, conformément à l'article 106 de son Règlement, que les exposés écrits et les observations écrites produits dans les deux procédures consultatives seraient rendus accessibles au public à compter de l'ouverture des présentes audiences.

M. Vignes, vous avez à présent la parole.

M. VIGNES : Monsieur le Président, Madame et Messieurs de la Cour,

C'est en qualité de représentant de l'Organisation mondiale de la Santé que je me présente aujourd'hui devant vous pour vous faire part des observations que l'Organisation désire formuler sur la demande d'avis consultatif qu'elle vous a adressée - et seulement sur cette demande - dont Monsieur le Greffier vous a rappelé les termes.

Le problème qui vous est posé est complexe au sens littéral du terme, complexe car il revêt plusieurs aspects différents : des aspects techniques, des aspects politiques, des aspects juridiques. On le verra, le moment venu, lorsque l'on décrira la série de modifications successives qu'a connu cette question au cours de l'évolution qu'elle a subie, durant laquelle ces divers éléments se sont superposés.

Dès à présent cependant, je voudrais dire que la tâche qui m'incombe est une tâche privilégiée.

C'est un honneur pour moi, en effet, de comparaître pour la seconde fois devant une Cour aussi prestigieuse que la vôtre.

Mais c'est aussi une tâche délicate, différente de celle des autres Parties.

En effet, chacun des Etats qui prendra part aux audiences en exposant les points de vue de son gouvernement, indiquera sans doute la position qu'il entend prendre au sujet de la question posée.

L'OMS quant à elle, ne peut pas agir de cette façon et cela en raison de l'absence de consensus qui s'est manifesté à l'Assemblée. Si tous les Etats membres de l'OMS avaient adopté une attitude identique et s'étaient déclarés d'accord d'en référer à la Cour, la situation aurait été différente et la tâche de l'organisation facilitée. Cette tâche aurait consisté à présenter à la Cour la position "unifiée" de l'Organisation telle qu'elle avait été définie par l'Assemblée. Ce n'est d'évidence pas le cas. L'Organisation est composée de cent quatre vingt dix Etats membres dont les points de vue sur cette question ont été parfois diamétralement opposés. L'on comprendra alors que l'OMS ne puisse faire sienne la thèse de l'une ou l'autre de ses composantes et ne puisse soutenir, ou à l'inverse combattre, la position prise par l'un ou l'autre de ses Etats membres.

C'est pourquoi l'OMS entend observer en la matière une position de stricte neutralité. Il doit donc être bien entendu qu'aucun des développements qui vont suivre ne saurait être interprété comme une indication en faveur ou à l'encontre des positions qui seront prises par chacun des autres intervenants.

Mais il faut être clair. Etre neutre, pour l'Organisation mondiale de la santé, ne signifie pas qu'elle se désintéresse des conséquences sur la santé de l'emploi des armes, quelles qu'elles soient. Neutralité ne veut pas dire indifférence. Cette neutralité c'est celle d'Henri Dunant au soir de la bataille de Solférino qui, sans s'interroger sur le bien-fondé de la cause des belligérants, était bouleversé par les souffrances et les dommages que les combats avaient causés. Les choses ont changé depuis le siècle dernier. Les armes se sont développées, les souffrances demeurent. La santé et l'environnement, qu'on le reconnaisse ou non, sont gravement affectés par l'utilisation des armes de quelque nature que ce soit, mais plus encore par l'utilisation des armes nucléaires.

Les données que l'on possède à ce sujet confirment ce qui vient d'être dit. Elles ont été

recueillies à la suite des bombardements de 1945 et proviennent également de l'analyse des essais et des modèles mathématiques et autres sources diverses auxquelles on a pu accéder, notamment les information obtenues à la suite des accidents nucléaires tels que ceux de Kyshtym, de Rocky Flats ou encore plus récemment de Chernobyl.

Ces divers éléments sont relatés en détail dans les documents que l'on a remis à la Cour. Ils ne sont rappelés ici que pour montrer dans quel contexte se situe la question posée.

Schématiquement, on peut dire qu'une explosion nucléaire entraîne des effets immédiats et des effets à plus long terme.

Les effets immédiats sont de trois sortes : mécaniques, thermiques et radioactifs.

L'effet mécanique, c'est celui qui résulte de l'onde de choc produite par l'explosion elle-même. Cet effet n'est pas différent dans son principe de celui résultant de l'explosion de bombes conventionnelles, mais il s'en distingue quantitativement en raison de la puissance de l'énergie dégagée.

L'effet thermique, quant à lui, résulte du très puissant dégagement de chaleur qu'entraîne l'explosion atomique qui, ici encore, se distingue quantitativement de celui dégagé par les armes conventionnelles.

L'effet radioactif, enfin, qui est propre à l'explosion nucléaire, entraîne un rayonnement instantané et aussi des retombées radioactives. A cela, s'ajoute une impulsion électromagnétique qui met hors de service les dispositifs électroniques, y compris ceux nécessaires aux services de santé.

Outre ces effets immédiats, se manifestent également des effets à plus long terme dus aux rayonnements ionisants sur l'homme et sur l'environnement.

L'OMS a montré dans les documents qui ont été déposés que la surexposition de l'organisme aux rayonnements entraîne l'effondrement des systèmes immunitaires et accroît la vulnérabilité des victimes aux infections et aux cancers. Elle a montré aussi qu'il y a une très grande probabilité d'augmentation des anomalies génétiques. Elle a souligné également les traumatismes psychiques que l'on continue d'observer chez les survivants d'Hiroshima et de Nagasaki.

L'Organisation a également mis en lumière les conséquences qui résulteraient pour

l'environnement de l'exposition prolongée aux radiations ionisantes, plus particulièrement en ce qui concerne les forêts de conifères, les cultures, la chaîne alimentaire, le bétail et l'écosystème marin.

L'OMS n'y reviendra pas et renvoie sur tous ces points aux documents qu'elle a soumis à la Cour et notamment aux divers rapports qu'elle a produits tout au long de ces dernières années. Car en effet, elle se préoccupe depuis fort longtemps des conséquences sur la santé et l'environnement des radiations nucléaires.

Une institution spécialisée dont le but, fixé par l'article 1er de sa Constitution, est d'«amener tous les peuples au niveau de santé le plus élevé possible» ne pouvait à l'évidence ignorer un tel sujet et cela bien avant que ne vous soit adressée, en 1993, la demande d'avis consultatif.

Ce n'est donc pas pour l'Organisation une question nouvelle, bien au contraire. Mais l'angle sous lequel cette question est abordée se modifie progressivement au cours des années, si bien que l'on peut distinguer trois phases dans cette évolution. Dans une première phase, l'OMS étudie «les effets des radiations ionisantes». Dans une seconde, elle examine «les effets de la guerre nucléaire». Dans une troisième, elle se préoccupe de «licéité de l'utilisation des armes nucléaires».

I

C'est à l'étude des «effets des radiations ionisantes» que s'attache l'Organisation dans une première phase qui s'ouvre quelques années après 1950 et qui va durer environ vingt-cinq ans.

Durant cette période, les discussions sur les problèmes nucléaires revêtent essentiellement des aspects d'ordre technique, c'est-à-dire qu'elles portent principalement sur des considérations de santé publique.

Dès 1954, le Conseil exécutif de l'Organisation s'intéresse aux aspects biomédicaux et environnementaux des rayonnements ionisants. Les années suivantes, en 1955 et en 1956, de nouvelles résolutions sont adoptées à la suite des rapports présentés par le directeur général sur cette question. Sans mentionner expressément les armes nucléaires, ces résolutions insistent cependant sur «la nécessité de mettre les générations présentes et futures à l'abri des effets nocifs des rayonnements ionisants de toute nature» et font référence aux «effets à court et à long terme des radiations ionisantes sur l'être humain et sur son milieu». Ce sont là les termes mêmes de la résolution WHA 11.50 de 1958 qui contient des dispositions détaillées sur cette question.

Un certain changement va cependant devenir perceptible. Alors que jusqu'en 1960 les questions nucléaires étaient discutées sous un point d'ordre général consacré à «l'utilisation de l'énergie atomique à des fins pacifiques», cette année-là, en 1960, est inscrit à l'ordre du jour de l'Assemblée un point beaucoup plus spécifique, le point 2.15, intitulé «Les radiations et la santé, y compris la protection de l'humanité contre les dangers des radiations ionisantes quelle que soit leur source». Sous ce point, l'Assemblée est saisie d'un rapport substantiel dont l'une des parties était consacrée aux effets des rayonnements dus aux retombées radioactives des explosions nucléaires expérimentales dans l'atmosphère. De longs débats se déroulèrent à l'Assemblée, à la suite desquels fut adoptée une résolution analogue à celle, plus détaillée, adoptée l'année suivante en 1961.

On notera cependant que si, dans les débats, à plusieurs reprises les armes nucléaires étaient mentionnées, les mots «armes nucléaires» ne figuraient dans aucune des résolutions dans leur forme finale. Ce n'est qu'en 1966, semble-t-il, que ces termes apparaissent pour la première fois dans une résolution adoptée par l'Assemblée qui y fait spécifiquement référence. Ces mots réapparaissent

en 1973 où, à nouveau, l'on mentionne les «armes nucléaires», et plus non seulement les «radiations ionisantes» dans une résolution de l'Assemblée. Mais exception faite de ces deux cas, on peut dire cependant que jusqu'à la fin des années soixante-dix, où s'achève cette première phase, les choses demeurent à peu près inchangées.

II

En 1979 la situation se modifie d'une façon significative. Pour la première fois l'Assemblée se préoccupe expressément de «la guerre nucléaire» et la mentionne dans une résolution, la résolution WHA 32.24. Cette résolution est à rapprocher de celle adoptée en 1981, deux ans plus tard, la résolution WHA 34.38, qui constitue véritablement l'amorce d'une seconde période dans l'évolution que l'on est en train de retracer.

A partir de cette date en effet, l'aspect purement technique qui jusqu'ici consistait à analyser d'une façon générale les «effets des radiations ionisantes» est associé au phénomène spécifique de «la guerre nucléaire», un des aspects de la lutte armée entre puissances, et c'est en ce sens que l'on peut dire qu'à l'aspect technique, qui demeure, s'ajoute un élément politique. Dès lors, dans toutes les résolutions qui vont se succéder, ces deux notions sont intimement liées. Durant cette période d'une dizaine d'années, l'Assemblée se préoccupe désormais des «effets de la guerre nucléaire» sur la santé et les services de santé".

La résolution de 1981 est donc, en un certain sens, à l'origine de la question aujourd'hui soumise à la Cour. C'est pour donner suite à cette résolution que fut constitué un comité international d'experts dont la tâche allait consister à préparer un rapport relatif aux «effets de la guerre nucléaire sur la santé et les services de santé». Ce rapport, dont la préparation allait demander deux ans, fut présenté à l'Assemblée en 1983 et ultérieurement publié sous ce titre en 1984.

Ce rapport est en possession de la Cour. Il suffit de rappeler ici qu'il envisageait trois situations possibles : l'utilisation d'une bombe unique, une guerre limitée, une guerre totale. Le chiffre des morts dans chacune de ces hypothèses variant de un million à un milliard auxquels devait s'ajouter le même nombre de blessés.

Lors des débats, des réserves furent émises quant à la compétence de l'Assemblée. Sans contester la véracité des conclusions du rapport, des délégations firent ressortir qu'à leur avis la prévention des conflits nucléaires relevait du domaine politique et qu'il n'appartenait pas à une institution spécialisée de jouer un rôle à cet égard. L'Assemblée décida néanmoins de demander à l'Organisation, et je cite ici les termes mêmes de la résolution, de «continuer ... à recueillir, analyser et régulièrement publier des ... études relatives aux effets de la guerre nucléaire sur la santé et les services de santé et d'en informer périodiquement l'Assemblée...».

A la suite de cette résolution, le directeur général créa un «groupe de gestion» qui prépara un nouveau rapport sur le même sujet. En 1987 un point intitulé : «Effets de la guerre nucléaire sur la santé et les services de santé» fut inscrit à l'ordre du jour de l'Assemblée. Lors de la présentation du rapport préparé par le groupe de gestion, rapport ultérieurement publié, le président de ce groupe déclara : «Si les effets à long terme sont préoccupants, les effets directs sont proprement stupéfiants». Au cours des débats qui eurent lieu, des vues contradictoires furent exprimées. Certains soulignèrent que l'étude des aspects sanitaires de la guerre nucléaire entrait dans le champ des activités de l'Organisation. D'autres furent d'avis que cet aspect était étranger à son mandat.

Mais quelles que fussent les divergences d'opinion, l'essentiel des discussions portait alors sur les conséquences des ces phénomènes sur la santé et cela aussi bien pendant la première phase, où l'OMS s'occupait des effets des radiations ionisantes, que pendant la seconde, dont on termine l'examen, pendant laquelle l'OMS étudiait les effets de la guerre nucléaire.

III

Les choses vont changer en 1992 et surtout en 1993. A compter de ces années, aux aspects techniques et politiques s'ajoutent des considérations juridiques. J'aborde ainsi le troisième et dernier volet de cette présentation consacrée à la phase durant laquelle va apparaître la question de "la licéité".

En 1992, un certain nombre de délégations demandèrent l'inclusion d'un point supplémentaire à l'ordre du jour de l'Assemblée, point intitulé "Effets des armes nucléaires sur la santé et

l'environnement". Sur recommandation de son Bureau, l'Assemblée décida de ne pas inscrire cette question à l'ordre du jour. Nonobstant, un document avait été préparé contenant un projet de résolution dont l'Assemblée aurait eu à connaître si la question avait été discutée. Ce projet de résolution demandait au Conseil exécutif

> "qu'il étudie et formule une demande d'avis consultatif à la Cour internationale de Justice sur le statut, au regard du droit international, de l'utilisation des armes nucléaires, compte tenu de leurs graves répercussions sur la santé et l'environnement".

On reconnaît là, dans sa substance, la question qui allait être formulée l'année suivante. C'est en effet dans ce document de 1992 que se trouve énoncé pour la première fois l'ensemble des points contenus dans la requête de 1993.

Lors de la préparation de l'ordre du jour de l'Assemblée de 1993, certains Etats demandèrent que la question des "effets sur la santé et l'environnement des armes nucléaires" figure à l'ordre du jour de l'Assemblée. Bien que des oppositions se soient manifestées au sein du Conseil exécutif de janvier 1993, la question fut néanmoins inscrite. Pour faciliter la discussion, le Directeur général prépara un rapport, le document A46/30, qui a été soumis à la Cour, rapport qui mettait à jour et complétait les informations qui avaient été présentées dans les deux principaux rapports précédents, celui publié en 1984 et celui publié en 1987.

C'est à la suite des débats qui se déroulèrent d'abord en Commission puis en séance plénière, que la résolution WHA 46.40, qui contient la question soumise à la Cour, a été adoptée.

Par certains de ses aspects, cette question, qui constitue l'aboutissement d'un processus que l'on a mis en lumière, ne fait que reprendre des éléments bien connus, en ce sens qu'elle fait référence aux "effets sur la santé et sur l'environnement de l'utilisation des armes nucléaires" dont l'OMS, comme on l'a montré, se préoccupait déjà depuis des années.

Mais par d'autres de ses aspects, cette question est sans précédent. Elle est sans précédent en ce sens qu'elle soulève pour la première fois un point dont l'Organisation mondiale de la santé ne s'était jusqu'ici jamais préoccupée et qui n'apparaissait dans aucun des rapports présentés par le Directeur général. Il n'est plus seulement question maintenant des "effets de l'utilisation de l'arme nucléaire", il est désormais question de "la licéité de l'utilisation de l'arme nucléaire".

Pourquoi et comment cet aspect nouveau avait-il été soulevé ? Il est difficile de le dire. Mais il apparaît cependant, à la lecture des débats, qu'outre les gouvernements ayant demandé l'inclusion du point à l'ordre du jour et les co-auteurs du projet de résolution, deux organisations non-gouvernementales au moins aient été associées à la préparation de cette résolution. L'association internationale des médecins pour la prévention de la guerre nucléaire déclara au cours des débats que "l'OMS serait bien inspirée de solliciter un avis sur la question auprès de la Cour internationale de Justice". La Fédération mondiale des associations de santé publique, quant à elle, informa la Commission "qu'elle avait adopté à l'unanimité une résolution sur les armes nucléaires et la santé publique qui notamment invitait instamment la 46e Assemblée mondiale de la santé à demander un avis consultatif à la Cour internationale de Justice sur la licéité de l'utilisation des armes nucléaires". Il semble en outre, mais ce n'est évidemment plus le cas aujourd'hui, que le non-aboutissement à cette époque de tentatives faites à l'Assemblée générale des Nations Unies en vue d'obtenir d'elle qu'elle décide d'une demande d'avis consultatif, ait également joué un rôle.

L'inclusion de cet élément nouveau que constitue le problème de la "licéité" de l'utilisation des armes nucléaires entraîna des réactions de la part de diverses délégations. Certaines contestèrent formellement la compétence de l'Assemblée à adopter une telle résolution au cours de débats dont l'essentiel, tant en Commission qu'en séance plénière, fut consacré à cette controverse.

Les délégations en faveur de la compétence de l'Assemblée à s'occuper de la "licéité" rappelèrent l'article premier de la Constitution de l'OMS, déjà cité. Elles déclarèrent que cette résolution rentrait dans le cadre des fonctions constitutionnelles de l'Organisation telles que décrites dans l'article 2 de sa Constitution. Elles rappelèrent les principes contenus dans le préambule de la Constitution. C'est pourquoi ces délégations considéraient que, comme le disait un délégué : "l'Assemblée de la Santé a la compétence, la sagesse et le mandat pour examiner cette résolution".

A l'inverse, tout en reconnaissant que les études de l'OMS sur les effets sur la santé d'une guerre nucléaire "font partie de son mandat", on souligna qu'aux termes de l'article 76 de sa Constitution l'OMS pouvait seulement demander un avis consultatif sur des questions juridiques "du ressort de l'Organisation". On rappela l'article 96.2 de la Charte. L'article X.2 de l'accord entre les

Nations Unies et l'OMS fut également invoqué. En bref, diverses délégations estimaient que la question de la "licéité" de l'emploi des armes nucléaires qui constituait le coeur de la question posée à la Cour n'était pas du domaine de l'OMS mais du domaine de l'Assemblée générale des Nations Unies.

Une motion contestant la compétence de l'Assemblée fut déposée, conformément à l'article 65 de son Règlement intérieur. Cette motion, fut rejetée par 38 voix pour, 62 voix contre et 3 abstentions. La résolution elle-même fut adoptée par la Commission, avec 73 voix pour, 31 contre et 6 abstentions.

En séance plénière, les mêmes arguments pour ou contre la compétence de l'Assemblée furent avancés. Interrogé expressément, le conseiller juridique en fonction à cette époque estima qu'il n'entrait pas dans le mandat de l'OMS de soumettre la question de la «licéité» à la Cour mais qu'il appartenait à l'Assemblée d'en décider en dernier ressort. La résolution fut cependant adoptée avec les résultats suivants : pour 73, contre 40, abstentions 10.

Conformément aux responsabilités constitutionnelles qui lui incombent en vertu de l'article 77 de la Constitution, le directeur général de l'OMS transmit la résolution et la question qu'elle contenait à la Cour internationale de Justice.

Et c'est précisément cette question, Monsieur le Président, Madame et Messieurs de la Cour, qu'il vous appartient maintenant d'examiner.

Pour les raisons qui ont été indiquées au début de cet exposé, et sur lesquelles je ne reviendrai pas, l'OMS ne s'estime pas en mesure d'aller plus loin et de présenter des arguments de fond. Mais, ceci étant dit, il faut bien avoir conscience que cette attitude que s'impose l'Organisation ne l'a jamais empêché et ne l'empêchera jamais d'être profondément préoccupée par les souffrances des hommes et de faire tout ce qui lui est possible pour élever leur «niveau de santé».

C'est sur ces mots que l'Organisation voudrait conclure.

Elle espère que les documents qu'elle a fournis et les indications orales qu'elle vient de présenter sur les circonstances qui ont amené à cette demande d'avis consultatif, seront utiles aux délibérations de la Cour. Elle voudrait, en terminant, remercier la Cour de la patiente attention dont

elle a fait preuve à son égard.

Le PRESIDENT : Je vous remercie, Monsieur le conseiller juridique. Now I give the floor to His Excellency Mr. Griffith, Solicitor-General of the Commonwealth of Australia.

Mr. GRIFFITH: Mr. President, Members of the Court.

1. Over the last six years I have had the honour to act as Agent of Australia in proceedings in the Court's contentious jurisdiction. I appreciate the honour now to appear in these advisory proceedings.

2. The questions before the Court raise issues of profound significance both for the Court in its judicial role and for the whole world community at the level of substance. Australia welcomes the opportunity to be the first State to appear in these oral hearings.

3. It is Australia's initial submission that the Court should, in the exercise of its discretion, decline to give either of the advisory opinions that have been requested of it. This is for the reasons set out in our written statement filed on 9 June 1994 in relation to the request by the World Health Organization. Australia adopts what was said in that written statement also in relation to the advisory opinion requested by the United Nations General Assembly. In the course of the oral arguments today I will not detain the Court unnecessarily by repeating what we have already said in writing. On this procedural aspect our oral submissions will be confined to the making of a few additional points.

4. In anticipation of the possibility that the Court might, none the less, be inclined to address the substantive issues and give one or both of the requested advisory opinions, following my arguments on procedural issues, Australia's Minister for Foreign Affairs, Senator the Honourable Gareth Evans, Q.C., will present Australia's case on the substance of the questions before the Court. Put shortly, Australia's position on these questions is that customary international law has now developed to the stage where the threat or use of nuclear weapons would be contrary *per se* to international law.

5. With your permission, Mr. President, we will not read out our citations, but will provide

references to the Registry for inclusion in the verbatim record.

6. Mr. President, Members of the Court, I turn to the issue whether the Court should answer the two requests for advisory opinion. It is well established that the Court is not required by its Statute to give an advisory opinion in every case in which it is requested to do so[1]. It is entirely a matter for the Court whether or not to give an opinion[2]. In 1989 the Court said that, in principle, it will give an advisory opinion when requested by a competent body unless there are "compelling reasons to the contrary"[3]. It is Australia's submission that the present proceedings exemplify the exceptional case, admitted by the Court as a possibility, in which there are such "compelling reasons" for declining to answer the requests. We say so for three main reasons.

7. As we make clear in our written submissions, the first of these reasons is that the two questions are framed in such broad and abstract terms that to give the advisory opinions would be inconsistent with the judicial character of the Court.

8. The Court has affirmed that it may give advisory opinions on "abstract" questions. However, to date the Court has never given an advisory opinion on a question of law which is *both* wholly abstract *and* wholly hypothetical, in the sense that it is completely unrelated to any fact situation, past, present or future. In the words of the Court in its 1980 Advisory Opinion on the *Interpretation of the Agreement of 25 March 1951*[4]:

> "a rule of international law, whether customary or conventional, does not operate in a vacuum; it operates in relation to facts and in the context of a wider framework of legal rules of which it forms only a part. Accordingly, if a question put in the hypothetical way in which it is posed in the request is to receive a pertinent and effectual reply, the Court must first ascertain the meaning and full implications of the question in the light of the actual framework of fact and law in which it falls for consideration. Otherwise its reply to the question may be incomplete and, in consequence, ineffectual and even misleading as to the pertinent legal rules actually governing the matter under consideration by the requesting Organization."

9. It must not be forgotten that even when exercising its advisory jurisdiction, the Court functions as a court of law[5], and must remain faithful to the requirements of its judicial character[6]. These requirements must impose limitations on the types of questions on which the Court can appropriately give advisory opinions. The point here made may be illustrated by a hypothetical example. What if the General Assembly requested the Court to give an advisory opinion on the

question: "What are the rules of customary international law?" Such a question would be a *legal* question. And no doubt, an answer to the question would be of assistance to the General Assembly in the conduct of its activities. Yet, we submit, to give an advisory opinion on a question as broad and abstract as this would clearly be an act beyond the bounds of the judicial function. A court attempting to answer such a question would rather be assuming the role of a body such as the International Law Commission engaged in the codification of international law.

10. Mr. President, Members of the Court, the second reason why Australia submits that the Court should decline to give the opinions relates to the question of the practical effect of such a decision so far as the bodies requesting it are concerned.

11. In 1950 the Court noted that when exercising its advisory jurisdiction, "the Court's Opinion is given not to the States, but to the organ which is entitled to request it"[7]. The resolutions of the World Health Assembly and the United Nations General Assembly deciding to request the advisory opinions give no indication of any particular activity or course of action proposed to be taken by those bodies or any related body in which they would be influenced or guided by the requested advisory opinion. The apparent intention is for the advisory opinion to clarify the rules of international law with respect to the threat or use of nuclear weapons[8], and thereby to influence and affect the conduct, not of the General Assembly, but of States. This conclusion is supported by other resolutions concerning nuclear disarmament and non-proliferation adopted by the General Assembly on 15 December 1994 which stress that "it is the responsibility of all States to adopt and implement measures towards the attainment of general and complete disarmament under effective international control"[9], and call on States to take specific actions with respect to nuclear disarmament[10].

12. Similarly, while the World Health Organization may have an interest in the health effects of the use of nuclear weapons, it is not evident that there is any particular course of action that this Organization may be proposing to take in which it would be influenced or guided by the requested advisory opinion.

13. Mr. President, Members of the Court, the third reason why Australia submits that the

Court should exercise its discretion not to give an advisory opinion relates to the possible adverse impact of such a decision on the larger interests of the whole international community. The proponents of these two requests no doubt consider that the giving of an advisory opinion on the legality of the threat or use of nuclear weapons would contribute positively to the process of nuclear disarmament. But were the Court to advise - contrary to Australia's submission on the merits - that the threat or use of nuclear weapons is not illegal in all circumstances, it is Australia's *gravest* concern that such an opinion may well have exactly the opposite effect.

14. The international community is now engaged in an intensive process of strengthening existing security norms and frameworks and developing new ones. This is being done through the United Nations, regional dialogues and bilateral frameworks. Progress towards nuclear disarmament has been achieved of a kind, and on a scale, which would have seemed impossible even five years ago. In May this year almost all the world community, including all five nuclear-weapon States, committed themselves to a programme of action on nuclear disarmament. Fundamental changes in the global balance of power and intense and sustained diplomatic dialogue and negotiation between all members of the international community have made this advance possible.

15. An opinion from the Court that the use of nuclear weapons was not illegal in some circumstances could have very negative implications for global nuclear non-proliferation norms. For example, a conclusion that nuclear weapons could be used in some circumstances in self-defence could be relied upon by the handful of "threshold" States outside the Non-Proliferation Treaty as doctrinal support for their acquisition of nuclear weapons. This would have serious and adverse consequences for efforts to counter the proliferation of nuclear weapons and to achieve the elimination of existing nuclear weapons.

16. As another example, an opinion that nuclear weapons could be used in response to a non-nuclear attack, or even a strong dissenting opinion to that effect, could jeopardize further progress on strengthening negative security assurances, and the potential contribution that they can make to non-proliferation. It must be the case that any finding of legality, even in limited circumstances, has the real potential to undermine the present pressure and imperatives on the

nuclear weapon States to engage in negotiations for the banning of testing and the elimination of nuclear weapons.

17. A further problem associated with a finding of legality of use or threat, even one relatively limited in scope, is that it would be perceived by some States as a definitive pronouncement on the issue by the principal judicial organ of the United Nations. This may have the effect of impeding future and beneficial developments of international law. The rules of customary international law can change in a very short period of time[11]. The issue of the legality of use or threat of nuclear weapons is one area where rapid changes in customary international law are occurring. With the end of the Cold War, many countries are in the process of reviewing their security policies, including, in the case of some nuclear weapon States, their nuclear strategies and doctrines. Any finding of legality may hold back the development of principles of international law directed against nuclear weapons.

18. Mr. President, Members of the Court, for these reasons, Australia submits that as a matter of discretion, the Court should decline to give the advisory opinions requested by the World Health Organization and the United Nations General Assembly. In Australia's respectful submission, the fact that the giving of an advisory opinion might actually have a detrimental effect on nuclear disarmament and non-proliferation negotiations being constructively carried out elsewhere in the relevant forums and through bilateral arrangements makes this conclusion inevitable.

19. Mr. President, I now invite you to call on Senator Evans to present Australia's observations on the substance of the questions.

REFERENCES

1. *Interpretation of certain Peace Treaties, Advisory Opinion, I.C.J. Reports 1950,* pp. 71-72; *Reservations to the Genocide Convention, Advisory Opinion, I.C.J. Reports 1951,* p. 19; *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco, Advisory Opinion, I.C.J. Reports 1956,* pp. 86, 111-112 (separate opinion of Judge Klaestad); *Certain Expenses of the United Nations, Advisory Opinion, I.C.J. Reports 1962,* p. 155; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion* (hereafter *"Namibia Advisory Opinion", I.C.J. Reports 1971,* p. 21; *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, I.C.J. Reports 1973,* p. 175; *Western Sahara Advisory Opinion, I.C.J. Reports 1975, p. 21; Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1987,* p. 31. See also *Status of Eastern Carelia, Advisory Opinion, 1923, P.C.I.J. Series B, No. 5,* pp. 28-29.

2. *Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1987,* pp. 31, 78.

3. *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, I.C.J. Reports 1989,* p. 191; *Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1987,* pp. 31, 78. See also *Interpretation of certain Peace Treaties, Advisory Opinion, I.C.J. Reports 1950,* pp. 71-72; *Reservations to the Genocide Convention, Advisory Opinion, I.C.J. Reports 1951,* p. 19; *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco, Advisory Opinion, I.C.J. Reports 1956,* p. 86; *Certain Expenses of the United Nations, Advisory Opinion, I.C.J. Reports 1962,* p. 155; *Namibia Advisory Opinion, I.C.J. Reports 1971,* p. 27; *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, I.C.J. Reports 1973,* p. 183.

4. *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980,* p. 76.

5. *Namibia Advisory Opinion, I.C.J. Reports 1971,* p. 23.

6. *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco, Advisory Opinion, I.C.J. Reports 1956,* p. 84; *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, Advisory Opinion, I.C.J. Reports 1960,* p. 153; *Certain Expenses of the United Nations, Advisory Opinion, I.C.J. Reports 1962,* p. 155; *Northern Cameroons* case, *I.C.J. Reports 1963,* p. 30; *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973,* p. 175; *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, I.C.J. Reports 1982,* p. 334. Also *Status of Eastern Carelia, Advisory Opinion, 1923, P.C.I.J. Series B, No. 5,* p.29.

7. *Interpretation of certain Peace Treaties, Advisory Opinion, I.C.J. Reports 1950,* p. 71.

8. Cf. preambular paragraph 7 of resolution 49/75K, which refers to "the need to strengthen the rule of law in international relations".

9. Resolution 49/75L, preambular paragraph 6; 49/75P, preambular paragraph 6.

10. See especially resolutions 49/75 E ("Step-by-step reduction of the nuclear threat"); 49/75H ("Nuclear disarmament with a view to the ultimate elimination of nuclear weapons"); 49/75L ("Bilateral nuclear-arms negotiations and nuclear disarmament"); 49/75P ("Bilateral nuclear-arms negotiations and nuclear disarmament").

11. *North Sea Continental Shelf* cases, *I.C.J. Reports 1969*, p. 43.

Le PRESIDENT : Je vous remercie, M. Griffith, mais avant de donner la parole à Son Excellence M. Gareth Evans, ministre des affaires étrangères du Commonwealth d'Australie, la Cour fera une pause de quinze minutes maintenant pour ne pas avoir à interrompre l'exposé de M. Evans en son milieu.

La séance est suspendue de 11 h 15 à 11 h 45.

Le PRESIDENT : Veuillez vous asseoir. La séance est reprise et je donne la parole à Son Excellence M. Gareth Evans, ministre des affaires étrangères d'Australie.

Mr. EVANS: Merci, Monsieur le Président, Madame, Messieurs les Juges.

1. Mr. President, Members of the Court, as Minister for Foreign Affairs of Australia, former Attorney-General and counsel, it is an honour and a pleasure for me to appear today before this Court. Given Australia's long-standing support of the Court, and given the importance which Australia has long attached to nuclear non-proliferation and disarmament as part of its foreign policy, I take particular personal satisfaction in speaking on behalf of my country in these proceedings.

2. My observations today are directed to both questions before the Court, but I will focus particularly on the broader question asked by the United Nations General Assembly. I will seek to establish the following three propositions:

First, nuclear weapons are by their nature illegal under customary international law, by virtue of fundamental general principles of humanity. It is illegal not only to use or threaten use of nuclear weapons, but to acquire, develop, test, or possess them. The right of States to self-defence cannot be invoked to justify such actions.

Second, it follows that all States are under an obligation to take positive action to eliminate completely nuclear weapons from the world. To implement this obligation, States which do not possess such weapons cannot lawfully acquire them, and States which do possess nuclear weapons cannot add to, improve or test them. States which possess nuclear weapons must, within a reasonable time-frame, take systematic action to eliminate completely all nuclear weapons in a

manner which is safe and does not damage the environment.

Third, while requiring elimination, international law must none the less deal with the reality of the present existence of large stocks of nuclear weapons. It is accordingly necessary and appropriate that during the course of the elimination process the principle of stable deterrence be maintained: this will enable for that period the possession or threat of use of nuclear weapons for the sole purpose of ensuring that nuclear weapons are never used by others. Given the inherently illegal nature of nuclear weapons, such deterrence can only be a temporary necessity, and can never make lawful the indefinite possession or threat of use of nuclear weapons.

Customary International Law and Fundamental Principles of Humanity

3. Mr. President, Members of the Court, as to the basic issue of the legality or illegality of nuclear weapons, there is manifestly a vast range of international law rules which might be violated by a threat or use of nuclear weapons in particular circumstances. The use of nuclear weapons in an armed attack on another State may constitute a violation of Article 2, paragraph 4, of the Charter of the United Nations. Equally, it might violate the customary international law rule to the same effect, recognized by this Court[1]. Such an act directed against or affecting a neutral State might contravene the law of neutrality[2]. The use by a State of a nuclear weapon against a particular group may constitute the crime of genocide. The conduct of nuclear weapons tests might be contrary to international law on the ground that it causes radioactive contamination of the environment of a third State or of the global commons.

4. Many States have submitted written statements to the Court on one or both of the questions asked by the World Health Organization and the General Assembly. A number of these have dealt in detail with the substance of the questions. The Court already has before it a considerable body of argument on issues such as the effect of Article 2, paragraph 4, of the Charter; the law of armed conflict and international humanitarian conventions such as the 1977 Additional Protocol I to the Geneva Conventions[3]; international conventions restricting the manufacture, acquisition, deployment and use of nuclear weapons; international conventions prohibiting biological and chemical weapons; international law relating to human rights and the environment; and General Assembly resolutions

declaring the use of nuclear weapons to be illegal. These arguments are powerfully put, for instance in the submission of the Solomon Islands, but clearly the application of these individual provisions and resolutions to nuclear weapons issues will be contested equally vigorously, as is evidenced by the written submissions of States such as the United States and the United Kingdom.

5. We certainly consider that all these specific arguments are pertinent to the question. But the difficulty confronted by the Court in these proceedings is the impossibility in practice of it considering every conceivable situation in which a nuclear weapon might be threatened or used, and every conceivable permutation of surrounding circumstances, in order to determine each of the specific rules of international law which might be violated by such conduct.

6. So, rather than focusing on these matters as separate and discrete issues, we submit that a more direct route to the same conclusion is to address the question whether there is some general principle today which would render the use or threat of nuclear weapons illegal *per se*. If so, *any* threat or use in *any* circumstances, irrespective of context, would be contrary to international law, on the basis that it is inconsistent with that principle. If such a general principle can be identified, the Court need not consider all of the different situations in which nuclear weapons might be threatened or used.

7. We submit that the principles of international law of most direct and obvious relevance to the legality of nuclear weapons are the general principles of humanitarian law. The existence of "fundamental general principles of humanitarian law", against which the conduct of States can be judged under customary international law, was recognized by this Court in the *Military and Paramilitary Activities* case[4]. These "principles of humanitarian law"[5] were also recognized in the *Corfu Channel* case, in which the Court referred to "certain general and well-recognized principles, namely: elementary considerations of humanity"[6].

8. The major conventions on humanitarian law in armed conflicts, such as the 1899 and 1907 Hague Conventions, and the 1949 Geneva Conventions and 1977 Additional Protocols, are in some respects a reflection of these fundamental principles. However, the general principles of humanity recognized under customary international law, and the specific treaty obligations under humanitarian

conventions, are not identical. Some conduct which is prohibited by a provision of one of these treaties may not be prohibited by customary international law[7]. But equally, the fact that particular conduct is not proscribed by any international treaty does not of itself enable the conclusion to be drawn that such conduct is consistent with general principles of humanitarian law. The general principles may in some respects be broader than any existing treaty provision, and may apply in situations where there is no applicable treaty provision at all.

9. This is specifically recognized in the so-called "Martens clauses" in some of the humanitarian conventions. These provide that even in cases not covered by international agreements, civilians and combatants remain under the protection and authority of "the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience"[8]. Furthermore, while the conventions are directed to conduct in times of armed conflict, the Court made clear in the *Corfu Channel* case that the general humanitarian principles apply also in times of peace. Indeed, the Court said that they are "even more exacting in peace than in war"[9]. General principles of humanity pervade the whole of international law, not just the law of armed conflict.

10. Of course, neither the concept of "humanity", nor the "dictates of public conscience" are static. Conduct which might have been considered acceptable by the international community earlier this century might be condemned as inhumane by the international community today.

11. Furthermore, even where the content of a particular principle of humanitarian law has been established, the practical application of that principle at any given time will depend on the circumstances of the time. For instance, one of the most fundamental and longest-standing humanitarian principles is the prohibition on employing weapons or methods of warfare of a nature to cause unnecessary losses or suffering[10]. Yet while this principle has remained constant, its practical application has not and will not. The suffering inflicted by a particular type of weapon may be accepted as "necessary" in one age, but condemned as unnecessary in another. Such changes in the dictates of public conscience may have a number of causes. Advances in technology or changes in methods of warfare may provide alternatives to the use of weapons of that type. Or it

may be that in a later age the level of suffering in warfare which the international community is prepared to tolerate is lower than the level which it tolerated previously.

12. In line with such changes in the attitude of the world community, over time the permissible uses of one particular type of weapon may be progressively restricted, until finally prohibited altogether. In the case of chemical weapons, for instance, the 1899 Hague Declaration 2[11] only prohibited the use of projectiles the *sole* object of which was the diffusion of asphyxiating or deleterious gases. A general prohibition on the use of asphyxiating and poisonous gases, as well as on the use of bacteriological methods of warfare, was later embodied in the 1925 Geneva Protocol[12], which stated that the use in war of asphyxiating or poisonous gases "has been justly condemned by the general opinion of the civilized world". Subsequently, the mere possession of such weapons was made illegal under the terms of the 1972 Biological Weapons Convention[13] and the 1992 Chemical Weapons Convention[14].

13. Such an evolution would also be possible in the case of nuclear weapons, under general principles of humanitarian law. It is not part of our argument that the use or threat of nuclear weapons was *per se* contrary to international law at the end of the Second World War, or for some period thereafter. The practice of the 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 non-nuclear-weapon States, makes it difficult to argue that there was any rule of *per se* illegality dating back to the time of the construction of the world's first nuclear weapon. But the question 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. Even if the use or threat of nuclear weapons was not *per se* inconsistent with elementary considerations of humanity and the dictates of public conscience in the past, this does not determine whether it is *per se* inconsistent with those principles today.

14. The issue before the Court is thus whether the point has now been reached at which it is possible to conclude that, whatever the position may have been in the past, the use or threat of nuclear weapons would now be contrary to fundamental principles of humanity, and hence, contrary

to customary international law. If the answer to that question is yes, Australia considers that it is not necessary for the Court to attempt to fix the precise time at which customary international law reached this point, and this would probably not be possible in any event. Both questions on which advisory opinions have been requested are framed in the present tense. They are forward looking, and are not concerned with any conduct which has occurred in the past. They are concerned only with what the law is today, and what consequences it will have for States today and tomorrow.

Developments Establishing the *Per Se* Illegality of Nuclear Weapons

15. Mr. President, Members of the Court, in order to answer the question whether nuclear weapons are now contrary to fundamental principles of humanity, it is necessary to look at a variety of developments which have occurred since 1945, including political, technological and social developments, as well as developments in the law.

Evolving nuclear technology

16. First, so far as evolving nuclear technology is concerned, there have been continuous and profound developments since 1945. The immense suffering caused by nuclear weapons was apparent already from their use that year in Hiroshima and Nagasaki. However, at that time, the single nuclear power had a limited nuclear arsenal, and its delivery systems by today's standards were primitive. In subsequent years and decades, things changed quite rapidly. Vastly more powerful nuclear weapons were developed. New technologies also emerged to make weapons and their delivery systems ever more efficient, ever more deadly. Huge arsenals of awesome destructive power were amassed in a seemingly never-ending search for security based on the threat of mass devastation. At the peak of the Cold War, there were almost 80,000 nuclear warheads in existence and the point was reached early in the Cold War where all the nuclear weapons in the world had sufficient destructive power to destroy all life on this planet many times over.

17. There was also a progressive proliferation of nuclear technology. Within twenty years of the first atom bomb, the number of nuclear-weapon States grew from one to five. Since then, nuclear science and technology has spread to the point at which the acquisition of nuclear weapons

would be a practical possibility for not only a large number of other States, but possibly in the future also for non-State entities and even criminal organizations.

18. The international community has been intensely concerned by these developments. Numerous General Assembly resolutions have expressed alarm at "the threat to the survival of mankind and to the life sustaining-system posed by nuclear weapons"[15]. In 1981, the General Assembly recognized that

> "all the horrors of past wars and all other calamities that have befallen people would pale in comparison with what is inherent in the use of nuclear weapons capable of destroying civilisation on earth".[16]

19. In terms of general principles of humanity, it was thus the collective existence of all such weapons, and the possibility of a global nuclear conflagration which they engendered, which became of foremost concern. It is not to the point that it may be possible to conceive of theoretical situations in which a nuclear weapon may cause no more damage than certain conventional weapons. The fact remains that the existence of nuclear weapons as a class of weapons threatens the whole of civilisation. This is not the case with respect to any class or classes of conventional weapons. It cannot be consistent with humanity to permit the existence of a weapon which threatens the very survival of humanity. The threat of global annihilation engendered by the existence of such weapons, and the fear that this has engendered amongst the entire post-war generation, is itself an evil, as much as nuclear war itself. If not always at the forefront of our everyday thinking, the shadow of the mushroom cloud remains in all our minds. It has pervaded our thoughts about the future, about our children, about human nature. And it has pervaded the thoughts of our children themselves, who are deeply anxious about their future in a world where nuclear weapons remain.

20. It is in any event today unlikely in practice that one nuclear weapon would be used in isolation: it would be academic and unreal for any analysis to seek to demonstrate that the use of a single nuclear weapon in particular circumstances could be consistent with principles of humanity. The reality is that if nuclear weapons were ever used, this would be overwhelmingly likely to trigger a nuclear war.

21. Evolving restrictions on nuclear activity. Mr President, Members of the Court, in

response to these realities, and to the dangers posed by nuclear weapons, there has been in fact intense international activity. In 1945, nuclear weapons were under no specific international controls at all, other than those applying to weapons generally. Since then, progressive restrictions on the manufacture, acquisition, deployment, testing and military use of nuclear weapons have now been imposed by a series of universal conventions. Major milestones have been the establishment in 1957 of the International Atomic Energy Agency and the beginnings of international safeguards; the 1959 Antarctic Treaty[17]; the 1963 Partial Test Ban Treaty[18]; the 1967 Outer Space Treaty[19], the 1968 Nuclear Non-Proliferation Treaty (NPT)[20]; the 1971 Treaty on the Prohibition of the Emplacement of Nuclear Weapons and other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof[21]; and the 1967 Treaty of Tlatelolco[22] and the 1985 Treaty of Rarotonga[23] establishing nuclear-free zones in Latin America and the South Pacific respectively.

22. However, it is the eventual complete elimination of nuclear weapons that has become established as the primary goal of the international community in response to the technological developments I have described. Article VI of the Nuclear Non-Proliferation Treaty made unequivocally clear the obligation of the nuclear weapons States to disarm:

> "Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control."

Commitment to this goal of elimination was reaffirmed, for instance, by the General Assembly in 1978 at its tenth special session on disarmament, in a resolution adopted without a vote which declared that:

> "Nuclear weapons pose the greatest danger to mankind and to the survival of civilisation. It is essential to halt and reverse the nuclear arms race in all its aspects in order to avert the danger of war involving nuclear weapons. The ultimate goal in this context is the complete elimination of nuclear weapons."[24]

And that commitment was reaffirmed again, to take a more recent example, by the 1995 Non-Proliferation Treaty Review Conference just a few months ago, at which the States Parties reiterated their belief in the "ultimate goal of complete elimination of nuclear weapons".

23. To date, international efforts have not culminated in an international convention banning

the threat or use of nuclear weapons in all circumstances. However, this does not mean that the international community does not regard nuclear weapons as fundamentally inhumane or inconsistent with the dictates of public conscience. On the contrary, all the international efforts taken so far with the aim of ultimately eliminating nuclear weapons altogether suggest exactly the opposite. If nuclear weapons were perfectly compatible with general principles of humanity, there would seem little justification for such intense

international effort aimed at their elimination.

24. Further evidence of the attitude of the international community can be found in a series of General Assembly resolutions dating back to 1961. In the first of these, resolution 1653, the Assembly declared that:

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

The resolution declared further, in quite express terms, that:

> "The use of nuclear and thermo-nuclear weapons would exceed even the scope of war and cause indiscriminate suffering and destruction to mankind and civilization and, as such, is contrary to international law and to the laws of humanity."

This conclusion, that the use of nuclear weapons would be contrary to international law, has been expressed in a string of subsequent General Assembly resolutions, the last of which was resolution 49/75K requesting one of the present advisory opinions[25]. In 1983, in a resolution entitled "Condemnation of nuclear war", the General Assembly "*Resolutely, unconditionally and for all time*" condemned nuclear war "as being contrary to human conscience and reason, as the most monstrous crime against peoples"[26]. Some of the General Assembly resolutions refer specifically to the prohibition of the "threat" of nuclear weapons, in addition to their "use"[27].

25. The view has been expressed by at least one eminent scholar that resolution 1653, from which I have been quoting, is an example of a "law-making" resolution of the General Assembly[28]. It may well be that at the time it was adopted in 1961 it did not reflect then established customary international law. Nevertheless, in view of the considerations to which I have referred - in particular the threat to the whole of civilization posed by nuclear weapons, the international commitment to the

elimination of nuclear weapons and the practical steps taken towards that end, and the General Assembly resolutions declaring the illegality of such weapons - it must be the case that at the very least, the illegality of nuclear weapons has been emerging as a principle *de lege ferenda* for some time. The question is whether it has yet finally established itself as *lex lata*. Australia submits that there have been a number of recent developments which justify the conclusion that this stage has now been reached.

26. International law of war and human rights. Mr President, Members of the Court, a further development which merits attention in this respect is the significant change in the international community's attitude to war generally and to human rights. This of itself may have little direct bearing on the question of the legality or illegality of specific types of weapons, but is nonetheless important. A society which abhors war and condemns the use of force will have higher standards in assessing the humanity of weapons of warfare than a society which considers the use of force to be a permissible means of international dispute settlement. The preamble to the United Nations Charter expresses the determination "to save succeeding generations from the scourge of war". The prohibition on the use of force, enshrined in Article 2, paragraph 4, of the Charter, has since been continuously reaffirmed, and progressively more clearly articulated and defined in a series of authoritative General Assembly Declarations[29].

27. International standards of human rights must shape conceptions of humanity and have an impact on the dictates of public conscience. International concern for human rights has been one of the most characteristic features of this era of international law. The commitment to human rights in Charter provisions such as Articles 1, 55, 62 and 76, has been developed and reinforced by instruments such as the 1948 Universal Declaration of Human Rights and the 1966 Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights, as well as specific conventions on acts such as torture. It is now accepted that the most fundamental human rights are now part of customary international law. The General Assembly in a resolution adopted in 1983, drew the connection between international human rights and nuclear weapons, when it condemned nuclear war "as a violation of the foremost human right - the right to life"[30].

28. International civilian protection law. Another area of the law in which there have been significant recent developments is that of the protection of the civilian population in times of armed conflict. A significant step further was taken as recently as 1977, with the adoption of the Additional Protocol I to the Geneva Conventions[31]. Australia, together with the bulk of the international community, believes that the essential terms of the Protocol should be regarded as reflecting customary international law. Article 51, paragraph 4, of this Protocol prohibits "indiscriminate attacks", defined to include

> "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated"[32].

Article 54, paragraph 2, provides that a Party may not

> "attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party".

Again, Article 57, paragraph 2 (b), prohibits attacks where it is apparent

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

29. International environmental law. Mr President, Members of the Court, yet another development relates to the growing appreciation since 1945 of the health and environmental effects of nuclear weapons, and of the development of international law in these areas. Not only have scientific and medical advances increased our understanding of the effects of such weapons, but since 1945 the gravity of potential damage to the world environment and the health of its population has grown with the growth of the world's nuclear arsenals. In 1987, the World Commission on the Environment and Development reported that

> "The likely consequences of nuclear war make other threats to the environment pale into insignificance. Nuclear weapons represent a qualitatively new step in the development of warfare. One thermonuclear bomb can have an explosive power greater than all the explosives used in wars since the invention of gunpowder. In addition to the destructive effects of blast and heat, immensely magnified by these weapons, they introduce a new lethal agent - ionising radiation - that extends lethal effects over both space and time."[33]

30. The development of environmental protection as a discrete field of international law has

been quite recent, dating back only so far as the United Nations Conference on the Human Environment in Stockholm in 1972. The United Nations Environment Programme, UNEP, was established only in 1973. It was only a few years later, in 1976, that the International Law Commission, in its consideration of State responsibility, expressed the view that conduct gravely endangering the preservation of the human environment violated principles

> "which are now so deeply rooted in the conscience of mankind that they have become particularly essential rules of international law"[34].

Its draft Article 19(3)(d) on State Responsibility, adopted the same year, classifies massive pollution of the atmosphere or of the seas as an international crime[35]. The significance of the developments in environmental law since then has been such that in 1993 this Court decided to establish a Chamber for Environmental Matters pursuant to Article 26, paragraph 1, of the Statute[36].

31. More specifically, in recent times the issue of the protection of the environment in armed conflict has been a particular international concern. In 1976, the General Assembly adopted[37] the Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques[38]. This Convention prohibits

> "military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State party"[39].

The 1977 Additional Protocol I to the Geneva Convention prohibits, in Article 35, paragraph 3,

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

Article 55 prohibits more specifically

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

The preamble to the 1981 Conventional Weapons Convention recalls

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

International concern for the protection of the environment against damage from warfare was expressed also in the General Assembly's 1982 "World Charter for Nature[40]", and the 1992 Rio Declaration on Environment and Development[41].

32. Indeed, consideration of lethal effects of radiation over time provides a link between the

principle which provides for the protection of civilian populations and the principle which provides for protection of the environment. The development of the principle of intergenerational equity has been gathering pace over the last several decades, but as long ago as 1972 found expression in the Stockholm Declaration on Human Environment. The first principle of that Declaration speaks of a "solemn responsibility to protect and improve the environment for present and future generations". Future generations of humanity, innocent in the conflict which may give rise to the use of nuclear weapons, must be afforded protection on the basis of this principle of intergenerational equity. There is opportunity for this Court, as guardian of the legal interests of succeeding generations, to recognize and apply this newly emerging principle.

33. All these recent developments in the law point to an international rejection of the use of nuclear weapons. It is not to the point whether or not any of these specific conventions or instruments specifically applies to nuclear weapons, or purports to make the threat or use of nuclear weapons *per se* illegal. The question is not whether the threat or use of nuclear weapons is inconsistent with any of these instruments, but whether the threat or use of nuclear weapons is *per se* inconsistent with general principles of humanity. All these instruments, whether they themselves apply to nuclear weapons or not, provide cumulative evidence that weapons having such potentially disastrous effects on the environment, and on civilians and on civilian targets, are no longer compatible with the dictates of public conscience.

34. The illegality of nuclear weapon possession. However, Mr. President, Members of the Court, developments since 1945 also point to much more than this: the illegality not merely of the use or threat of use of nuclear weapons, but the illegality of their possession. The mere existence of such weapons, and their possession by States as part of their military arsenals, gives rise to the ever present threat of the outbreak of nuclear war.

35. The proponents of theories of limited nuclear war, and deterrence based on such theories, ask all of us to make assumptions about control over the use of weapons and human reliability in crisis management that cannot, in fact, be supported. Mistakes, accidents, loss of control are commonplace in human experience. Such events have occurred often enough in the past when

conventional weapons were being used. The costs have been high in terms of human lives, both armed and civilian. Such costs if nuclear weapons were involved would be vastly higher.

36. Critically, it has been utterly fundamental in debate about nuclear war fighting that proponents have insisted that they could maintain escalation control. This is without credibility. An attempt to stop preponderant conventional force by use of tactical or battlefield nuclear weapons - so called "flexible response" - would, it is now widely recognized, involve crossing a nuclear threshold and thus attract a response with nuclear weapons, almost certainly more powerful. General Colin Powell, recording his reaction in 1986 to the question of a possible Soviet attack upon Germany with conventional weapons, wrote in his recently published autobiography about his scepticism that major civilian casualties, and subsequent escalation, could be avoided. He said this:

> "No matter how small these nuclear payloads were, we would be crossing a threshold. Using nukes at this point would mark one of the most significant political and military decisions since Hiroshima. The Russians would certainly retaliate, maybe escalate. At that moment, the world's heart was going to skip a beat. From that day on, I began rethinking the practicality of these small nuclear weapons."[42]

37. Mr. President, Members of the Court, if "small" nuclear weapons lack "practicality", what can be said of the others? In 1979, Lord Louis Mountbatten, former United Kingdom Chief of Staff said: "As a military man I can see no use for any nuclear weapons"[43]. In 1982, another UK Chief of Staff, Field Marshall Lord Carver, wrote that he was totally opposed to NATO ever initiating the use of nuclear weapons[44]. In 1979, Dr. Henry Kissinger said in Brussels:

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

In 1987, Helmut Schmidt said: "Flexible response is nonsense. Not out of date, but nonsense." In 1982, Melvin Laird said: "These weapons ... are useless for military purposes." With nuclear weapons, the avoidance of "the destruction of civilization" rests upon an assumption of escalation control which cannot be made, not least because on at least one side it would involve - as again Dr. Kissinger put it - what "we cannot possibly mean, or if we do mean, we should not execute"[46].

38. Given this ever-present threat of destruction that is inherently associated with nuclear weapons, and the way in which that threat is now so universally understood, Australia submits that

the attitude of the international community is that there are some weapons the very existence of which is inconsistent with fundamental general principles of humanity. In the case of weapons of this type, international law does not merely prohibit their threat or use. It prohibits even their acquisition or manufacture, and by extension their possession.

39. Such an attitude has been manifested in the case of other types of weapons of mass destruction. Both the 1972 Biological Weapons Convention and the 1992 Chemical Weapons Convention do not merely prohibit the use of biological and chemical weapons of mass destruction, but prevent their very existence. Under these conventions, States Parties are obliged never in any circumstances to acquire, retain, transfer or use such weapons[47], and are required to destroy all such weapons that they already possess. They are further prohibited from assisting other States from acquiring such weapons[48]. Both conventions have widespread adherence. The Biological Weapons Convention has 131 States Parties. The very recent Chemical Weapons Convention has already 159 signatories and 40 ratifications or acceptances[49].

40. The final preambular paragraph to the Biological Weapons Convention expresses the conviction of the States Parties that the use of biological weapons "would be repugnant to the conscience of mankind and that no effort should be spared to minimize this risk". Clearly, this is a strong international statement that the use of such weapons would be contrary to fundamental general principles of humanity. The approach of both conventions indicates a further conviction that the threats posed by certain types of weapons are so grave that they should be eliminated altogether, with their mere possession by a State made unlawful.

41. Although neither of these two conventions applies to nuclear weapons, they are indicative. Nuclear weapons are the last of the trilogy of weapons of mass destruction, and overwhelmingly the most destructive of the three. They can be no more consistent with fundamental principles of humanity than the other two.

42. The international community has already clearly begun to go down the path of elimination of nuclear weapons in formal treaty law. The centrepiece of international efforts to combat the proliferation of nuclear weapons and to advance the cause of nuclear disarmament is of course the

1968 Nuclear Non-Proliferation Treaty, Article VI of which, as we have seen, commits every State to general and complete nuclear disarmament. This treaty is of enormous practical significance in a number of respects, including the international safeguards mechanisms it provides to prevent diversion of nuclear material from peaceful uses to nuclear weapons or other nuclear explosive devices.

43. But insofar as the question of the present legality of nuclear weapons is concerned, it is Articles I and II of the Non-Proliferation Treaty which are of particular importance. Article II prohibits non-nuclear-weapon States from receiving the transfer of nuclear weapons or of control over such weapons, directly or indirectly, from any transferor whatsoever. It further prohibits non-nuclear-weapon States from manufacturing or otherwise acquiring nuclear weapons, or from seeking or receiving any assistance in the manufacture of nuclear weapons. The Article applies not only to nuclear weapons, but also to any other nuclear explosive devices. Article I of the Treaty imposes a corresponding obligation on the nuclear-weapon States not to transfer nuclear weapons to non-nuclear-weapon States, or to assist non-nuclearweapon States to manufacture or acquire them.

44. Obligations under the Nuclear Non-Proliferation Treaty may have been no more than treaty obligations at the time it was concluded. However, over the years, the number of States Parties to the Treaty has steadily risen. By 1992, when China and France acceded to it, all five acknowledged nuclear-weapon States were Parties to it. It now has 180 States Parties, the vast majority of all States in the world. At the Nuclear Non-Proliferation Treaty Review and Extension Conference held in May this year, the Treaty was extended indefinitely by the unanimous decision of the Conference of States Parties. In view of this widespread, indeed near universal, adherence to the Treaty; in view of the indefinite duration now of its provisions; and in view of all the other international activities and evidence (not least in the context of the hostile reaction world-wide to the continued weapons testing by France and China) manifesting the clearest conviction that nuclear weapons must ultimately be eradicated, Australia submits that Articles I and II of the Nuclear Non-Proliferation Treaty must now be regarded as reflective of customary international law.

45. Those two provisions, to adopt the terminology used by this Court, are provisions which

have

> "constituted the foundation of, or [have] generated a rule which, while only conventional or contractual in its origin, has since passed into the general *corpus* of international law, and is now accepted as such by the *opinio juris*, so as to have become binding even for countries which have never, and do not, become parties to the Convention."[50]

For those States who are parties to the Non-Proliferation Treaty the conventional obligations and the corresponding obligations under customary international law, exist side by side[51].

46. If non-nuclear-weapons States cannot legally acquire such weapons, they cannot legally possess them. The possession of such weapons following their illegal manufacture or acquisition would be a continuing illegality. And if such States cannot lawfully manufacture or acquire such weapons, they cannot test them. Testing is in any event a step in the manufacture or acquisition of such weapons, or a use of them, both of which we have argued to be illegal. It is therefore illegal, in our submission, to acquire, develop, test, possess, or otherwise use or threaten to use nuclear weapons.

47. The right of States to self-defence cannot be invoked to justify such actions. The right to self-defence is not unlimited. It is subject to fundamental principles of humanity. Self-defence is not a justification for genocide, for ordering that there shall be no enemy survivors in combat or for indiscriminate attacks on the civilian population. Nor is it a justification for the use of nuclear weapons.

48. This prohibition under customary international law must apply equally to nuclear-weapon States and non-nuclear-weapon States. It is in the nature of rules of customary international law that they apply to all States alike. If humanity and the dictates of conscience demand the prohibition of such weapons for some States, it must demand the same prohibition for all States. And following the end of the Cold War, there can no longer be, if there ever was, any practical imperative for treating nuclear-weapon States and non-nuclear-weapon States differently. True, the Nuclear Non-Proliferation Treaty does not state that it is illegal for the nuclear-weapon States to continue to acquire, possess, test, threaten or use nuclear weapons. Indeed, it seems to assume that they will do some or all of these things, at least for a period. However, it is also true that the Non-Proliferation

Treaty confers no positive right on the nuclear-weapon States to continue to possess such weapons. Furthermore, the Treaty does point to the ultimate aim of the complete elimination of nuclear weapons through general and complete nuclear disarmament. That Treaty cannot be seen as a bar to the emergence of a rule of customary international law which would fill the gap, making the threat or use of nuclear weapons illegal for nuclear-weapon States in the same way as for non-nuclear-weapon States.

The Obligation to Eliminate and the Principle of Stable Deterrence

49. Mr. President, Members of the Court, having reached this conclusion that the acquisition, development, testing, possession, use or threat of use of nuclear weapons is contrary to international law, it follows that all States are under an obligation to take positive action to eliminate completely nuclear weapons from the world. To implement this obligation, States which do not possess such weapons cannot lawfully acquire them, and States which do possess nuclear weapons cannot add to, improve or test them. States which possess nuclear weapons must be subject to an obligation to eliminate their existing weapons. They must within a reasonable timeframe take systematic action to eliminate completely all nuclear weapons in a manner which is safe, and does not damage the environment.

50. International law must nonetheless deal with the reality of the present existence of large stocks of nuclear weapons. It is accordingly necessary and appropriate that during the course of the elimination process the principle of stable deterrence be maintained: this would enable for that period the possession or threat of use of nuclear weapons for the sole purpose of ensuring that nuclear weapons are never used by others. Given the inherently illegal nature of nuclear weapons, such deterrence can only be a temporary necessity, and can never make lawful the indefinite possession or threat of use of nuclear weapons.

51. At the time that the nuclear-weapon States acquired nuclear weapons, their possession and deployment, their threat, or even their use, may not yet have been illegal *per se*. But, having acquired them, international law, in our submission, then changed. It must be accepted that this gives rise to practical difficulties. The nuclear-weapon States have structured their defence policies

on the basis of the existence of their own nuclear arsenals, and those of the other nuclear-weapon States. The defence policies of the nuclear-weapon States are based on the principle of stable deterrence. That is, the simultaneous possession of nuclear weapons by the nuclear-weapons States, and the mutually assured destruction which would result from any use of such weapons, deters their use at all. In these circumstances, one nuclear-weapon State cannot be expected unilaterally to undertake a complete nuclear disarmament. This would undermine the basis of the policy of deterrence, and if anything would make the actual use of nuclear weapons more, rather than less likely. We cannot foresee the future, and should never assume the projection into the indefinite future of present conditions. If the prospect of any nuclear-weapon State initiating a nuclear attack on a nuclear disarmed State looks far-fetched now, it might not be so at some time in the future.

52. Consistently with this conclusion, Australia, together with many other governments, supports the principle of stable nuclear deterrence pending complete nuclear disarmament. However, we state again that stable deterrence can only be accepted as an interim or transitional condition, that is to say, until the complete elimination of nuclear weapons accompanied by substantial verification provisions is achieved.

53. On the question of verification, it is perhaps worth making the point that, on the evidence of the now successfully concluded Chemical Weapons Convention, a comprehensive and effective verification régime is both practical and achievable. The nature of the technology and the associated commercial industry involved makes the detection of chemical weapons manufacture and possession very much harder than would be the case for nuclear weapons. If verification is possible for chemical weapons, making it possible in due course to rid the world of this whole class of weapons of mass destruction, then there is no reason why it should not be possible for nuclear weapons[52].

54. During this transitional phase of negotiated nuclear disarmament, the nuclear-weapon States remain under a legal obligation to continue to negotiate in good faith with other States, and otherwise to make every possible effort to achieve complete nuclear disarmament within a reasonable time-frame. Such a "duty to negotiate" under customary international law is not unprecedented. An analogous duty exists in customary international law relating to continental shelf delimitations

between neighbouring or opposite coastal States. In that context, this Court has referred to the existence of a "duty to negotiate with a view to reaching agreement, and to do so in good faith, with a genuine intention to achieve a positive result"[53].

55. State practice is consistent with, and confirms these conclusions. As has been seen, Article VI of the Nuclear Non-Proliferation Treaty imposes an obligation on the nuclear weapon States, and on all other Parties to the Treaty, to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control. At this year's Non-Proliferation Treaty Review and Extension Conference, the nuclear weapon States reaffirmed "their commitment, as stated in Article VI, to pursue in good faith negotiations on effective measures relating to nuclear disarmament"[54], and the ultimate goal of eliminating those weapons was also reaffirmed[55].

56. Mr President, Members of the Court, during this transitional phase, all States, including the nuclear weapon States are prohibited by customary international law from engaging in any action inconsistent with this commitment. They cannot introduce new nuclear weapons. They cannot refine their existing stockpiles. They cannot engage in action intended to ensure maintenance of their nuclear arsenals indefinitely into the future.

57. In particular, the testing of nuclear weapons under any circumstances must now be prohibited. Not only is testing a "use" of nuclear weapons, and therefore subject to the primary obligation I have identified, but testing for the purpose of developing new nuclear weapons or for refining existing weapons would clearly be illegal, as they are directed to enhancing nuclear armaments, rather than eliminating them. However, even testing for the purpose of maintaining existing stockpiles would be inconsistent with the obligation, since such conduct is aimed at extending the period in which the status quo can be maintained. The argument that some testing of existing stocks may continue to be necessary during the transition period in order to ensure the basic physical safety of these weapons legitimately retained for balanced deterrence purposes, is belied by the acceptance in principle by all nuclear weapon States of the conclusion, as early as next year, of a

genuinely comprehensive Comprehensive Test Ban Treaty (CTBT) which would allow no such tests. France has argued that it needs to conduct tests now to ensure the safety of its stockpile after the CTBT is concluded. But this argument has manifestly failed to win wider international acceptance - no doubt because it is well-known that safety can be maintained these days through computer simulation, and widely believed that France has, or could have if it chose, access to all relevant data.

58. It follows that continued nuclear testing by France and China runs directly counter to the obligations that I am talking about. It also runs counter to the express undertakings of France and China, and the other nuclear weapon States, at the recent NPT Review and Extension Conference, when they undertook to exercise "utmost restraint" in nuclear testing pending the entry into force of a comprehensive test ban treaty. The actions of France and China have been regarded by the overwhelming majority of the international community as a clear betrayal of this undertaking - an undertaking accepted in good faith by the international community.

59. Yet testing goes on. Only three days ago, France exploded a third nuclear device in the South Pacific. The device tested was over four times the size of the Hiroshima bomb. France's testing is an affront to the peoples of the South Pacific, whose desire, clearly established in the Treaty of Rarotonga, is to live in a nuclear-free region. It is also an affront to the commitment of the South Pacific to nuclear non-proliferation and nuclear disarmament, and a betrayal of their strong support for the indefinite extension of the NPT. And it is an affront to the entire international community, as Australia has consistently and forcefully maintained since the test series was announced.

60. As I indicated at the outset, specific uses of nuclear weapons in particular cases may also violate rules of international law other than those to which I have referred in this part of our argument. For instance, the Court will recall that earlier this year Australia and four other States applied for permission to intervene in proceedings brought by New Zealand against France. Had we been permitted to intervene, Australia proposed to argue that the current French nuclear tests in the Pacific are a violation by France of *erga omnes* obligations relating to the protection of the marine environment. That case was concerned with the environmental aspects of the French nuclear tests,

and Australia, as an applicant for permission to intervene, did not seek to broaden the scope of the proceedings because we could not in the context of that particular case. However, for the reasons I have given, irrespective of the environmental effects, Australia's position is that the testing of nuclear weapons is now, as I hope I have made clear, *per se* illegal under customary international law[56].

Achieving Elimination in Practice

61. Mr President, Members of the Court, consistently with the obligation to negotiate to which I have referred, substantial political efforts to further the process of nuclear disarmament are now under way, which Australia fully supports. The main challenge for the international community over the coming years will be to ensure that the recent achievements in nuclear disarmament are locked in and that the downward trend in nuclear arsenals, reversing the forty years of the nuclear arms race, is continued and broadened, until complete elimination of nuclear weapons has been achieved.

62. We should be under no illusions about the size of the task of nuclear disarmament which confronts the international community. More than 40,000 nuclear warheads exist in the world today, with a total destructive power around a million times greater than that of the bomb that flattened Hiroshima. Under START I, the United States and Russia have agreed to nuclear reductions which are seeing each country dismantle some 2,000 warheads annually. But Russia's stockpile is much greater: around 25,000 warheads, compared with some 15,000 for the United States. A further 1,000 are possessed by the other three nuclear weapon States, the United Kingdom, France and China. If the reductions envisaged under START I are achieved, this will still leave in place some 20,000 nuclear warheads. At the present rate, the United States and Russia will have reached their START I targets in about ten years. Under START II, both parties have agreed to further deep cuts. But even if the dismantlement schedules can be maintained, the five nuclear-weapon States by 2003 would still have around 12,000 warheads. As agreed by Presidents Bush and Yeltsin, the United States and Russia would then have a maximum of 3,500 strategic warheads each: the balance would be made up of the approximately 1,000 strategic warheads I have just mentioned held by the United Kingdom, France and China, and the tactical warheads held by all nuclear-weapon States.

63. The task of these reductions requires then a major commitment from the nuclear weapon

States. The task does not end with the dismantlement of weapons. There are further processes that will also have to be pursued. The components need to be destroyed. The weapons grade nuclear material needs to be burnt in reactors, or diluted for peaceful nuclear use. At the stage of dismantlement, the nuclear-weapon States have a special responsibility for accounting for and protecting the components and weapons grade material.

64. The START agreements undoubtedly represent a major leap forward in reducing the threat of nuclear conflagration. But they clearly do not remove that threat. The world still needs, if we are to achieve the complete elimination of nuclear weapons within a reasonable time-frame, a practical programme of nuclear reductions to which all five nuclear- weapon States are committed, and which they will pursue in good faith and with renewed vigour.

65. Much work clearly needs to be done to identify what that reasonable time-frame would in practice be. We do not ask the Court itself to tackle that task: it is enough that the basic principle be articulated. But I can advise the Court that Australia is prepared to do everything it can to advance knowledge of what is both desirable and possible in this respect. Prime Minister Paul Keating announced last week that we would establish a group of knowledgeable, imaginative and distinguished individuals from around the world to produce a report on how to achieve a nuclear weapons free world as soon as possible, outlining the practical steps that would need to be taken to achieve that goal.

66. The first multilateral step towards the elimination of nuclear weapons will clearly be the Comprehensive Test Ban Treaty, which we hope and expect will be concluded next year. The CTBT will be a major impediment to the development of new generations of nuclear weapons by the nuclear weapon States. Without nuclear testing, the nuclear weapon States' ability to modernize their arsenals - by developing new weapons designs, and modifying existing designs - will be seriously constrained. A CTBT will thus break the spiral of qualitative competition between the nuclear-weapon States and open the way for further nuclear-weapons reductions. Cessation of nuclear testing will furthermore mean that the nuclear weapon States will find it difficult to maintain the expertise and facilities to develop more sophisticated nuclear warheads.

67. The next multilateral step after a CTBT will be persuading those countries which have produced fissile material for weapons to cease doing so permanently and accept international supervision of their sensitive nuclear material production facilities so that there is no future increase in the supply of such material for use in nuclear arsenals.

68. This will be achieved by the negotiation of a "cut-off" convention banning the production of fissile material for weapons. The enrichment and reprocessing facilities in nuclear-weapon and nuclear threshold States would be either placed under international inspection or dismantled. This would be a major step forward towards the application of international safeguards to all nuclear activities in these States.

69. Further nuclear arms reductions treaties will need to be progressively negotiated by the United States and Russia, with moves made as early as possible to involve the five nuclear-weapon States. This process of negotiation and implementation of nuclear arms reduction treaties adds an essential element of confidence between the States concerned and prepares the ground for further reductions. Through transparency and mutual, as well as international, inspection will come confidence, will come experience and the development of control measures which will provide the essential framework for the safe, secure total elimination of nuclear weapons. Added transparency would also come from the development of a regime requiring all States to declare and account for their present stocks of fissile material. The universal acceptance of non-proliferation obligations through membership of the Nuclear Non-Proliferation Treaty will also be essential for this purpose.

70. When the world is approaching a total elimination of nuclear weapons, there will be a need to address the legal obligations of nuclear weapon States under the NPT and the nature of the application of international safeguards on their peaceful nuclear activities. Clearly, safeguards measures will have to take into account the fact that the States concerned have detailed knowledge about the design and production of nuclear weapons.

Conclusion

71. Mr. President, Members of the Court, may I say just these few words in conclusion. So long as nuclear weapons exist, humanity faces the risk they may be used. The prevailing military

doctrines justifying the acquisition of nuclear weapons have rested upon the notion of their utility as deterrents - that the possibility that they might be used will ensure that an attack with nuclear or, in some cases conventional, weapons, will not occur. This notion itself rests absolutely upon recognition of the unique destructive power of nuclear weapons, on the profound difference between them and conventional weapons.

72. As was hideously demonstrated at Hiroshima, where a relatively minuscule atomic bomb was detonated, and as the release of radiation by the Chernobyl disaster showed to our horror, any use of nuclear weapons, anywhere at any time, would be devastating and in no way comparable to any use, in whatever magnitude, of conventional weapons. The 12,000 warheads that will be left in 2003, assuming START II has been implemented by then, will be enough, it has been credibly estimated[57], to destroy still more than ten times over human society and the planetary environment as we have known it - through a combination of blasts, shock-waves, ionising radiation and impact upon the ionosphere and climate.

73. Australia submits that the answer to these concerns that is demanded by law, by rationality, by morality and by humanity is verifiable and effective nuclear disarmament, pursued without delay and under conditions of stable deterrence. This Court's unique ability to advise on the law in this context is of the deepest historic importance because, Mr. President, Members of the Court, if you are minded to address the substantive issues raised in the questions before you, your advice can and will materially affect the achievement of that nuclear disarmament.

I thank you, Mr. President and Members of the Court, for your kind attention.

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paragraph 1 ("States and statesmen that resort first to the use of nuclear weapons will be committing the gravest crime against humanity").

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

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

28. Brownlie, *Principles of Public International Law* (4th ed. 1990), p. 14.

29. E.g., Resolution 290 (IV) of 1 December 1949 ("Essentials of Peace"); resolution 2131 (XX) of 21 December 1965 ("Declaration on Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty"); resolution 2625 (XXV) of 24 October 1970 ("Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Amongst States in Accordance with the Charter of the United Nations 1970"); resolution 2734 (XXV) of 16 December 1970 ("Declaration of the Strengthening of International Security"); resolution 36/103 of 9 December 1981 ("Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States"); resolution 42/22 of 18 November 1987 ("Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations").

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

31. Articles 50-51.

32. Article 51(5)(b).

33. World Commission on Environment and Development ("the Brundtland Commission"), *Our Common Future* (1987), p. 295.

34. Report of the International Law Commission on the work of its twenty-eighth session, *Yearbook of the International Law Commission 1976*, Vol. II (part ii), p. 109, para. (33).

35. *Ibid.*, p. 75.

36. *International Court of Justice Yearbook 1992-1993*, No. 47 (The Hague 1993), p. 17.

37. Resolution 31/72 of 10 December 1976 ("Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques") (adopted by a vote of 96 in favour, 8 against and with 30 abstentions).

38. Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques, Geneva, 18 May 1977, *UNTS* Vol. 1108, p. 151. The Convention entered into force on 5 October 1978.

39. Article 1.

40. General Assembly resolution 37/7 of 9 November 1982 ("World Charter for Nature"), Annex, paragraphs 5 ("Nature shall be secured against degradation caused by warfare or other hostile activities") and 20 ("Military activities damaging to nature shall be avoided"). (The resolution was adopted by a vote of 111 in favour to 1 against, with 18 abstentions).

41. United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992

(A/CONF.151/5/Rev.1), Principle 24 stated that: "Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and co-operate in its future development, as necessary."

Also, in a consensus resolution adopted in 1992, the General Assembly stated that "the destruction of the environment, not justified by military necessity and carried out wantonly, is clearly contrary to existing international law" (resolution 47/37 of 25 November 1992 ("Protection of the Environment in Times of Armed Conflict"), preambular paragraph 5).

42. Powell, *A Soldier's Way* (1995), p. 324.

43. Quoted in McNamara, *In Retrospect, The Tragedy and Lessons of Vietnam* (1995), Appendix, pp. 344-345.

44. Quoted *ibid.*

45. Quoted *ibid.*

46. All quoted *ibid.*

47. Article I of each Convention.

48. Chemical Weapons Convention, Article 1 (1)(d); Biological Weapons Convention, Article III.

49. The Convention will enter into force 180 days after the 65th ratification, accession, acceptance or succession.

50. *North Sea Continental Shelf* cases, *I.C.J. Reports 1969*, p. 41, para. 71.

51. *Military and Paramilitary Activities* case, *I.C.J. Reports 1986*, pp. 93-95.

52. See generally Taylor, "Technological Problems of Verification", in Rotblat *et al.*, *A Nuclear-weapon-Free World: Desirable? Feasible?* (1993), pp. 63-82.

53. *Gulf of Maine* case, *I.C.J. Reports 1984*, p. 292, para. 87. See also *North Sea Continental Shelf* cases, *I.C.J. Reports 1969*, p. 47, para. 85.

54. 1995 Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Decision 2, "Principles and objectives for nuclear non-proliferation and disarmament", NPT/CONF.1995/32/DEC.2, 11 May 1995, operative paragraph 3.

55. *Ibid.*, operative paragraph 4(c).

56. In the event, the Court by its Order of 22 September 1995 dismissed New Zealand's Request for an Examination of the Situation in accordance with paragraph 63 of the Judgment of the Court of 20 December 1974 in the *Nuclear Tests Case (New Zealand* v. *France)*, so that it was unnecessary for the Court to determine the merits either of the New Zealand request or of the applications for permission to intervene filed by Australia and four other States. In that Order, the Court stated that its decision was without prejudice to the obligations of States to respect and protect the natural environment, obligations to which France has reaffirmed its commitment (at paragraph 64).

57. Turco, Toon, Ackerman, Pollack & Sagan, *Nuclear Winter: Global Consequences of Multiple Nuclear Explosions*, 222 Sci, 23 Dec. 1983, at 1283.

The PRESIDENT: Thank you very much, Your Excellency, for your statement. Au cours des audiences de plaidoiries qui viennent de débuter ce matin et qui dureront au moins deux semaines, la Cour entendra les représentants d'un nombre considérable d'Etats. Mais la Cour ignore si ces représentants comptent ou non rester ici quelques jours une fois qu'ils ont prononcé leurs plaidoiries. Je prie chaque représentant de signaler au Greffe ses intentions à ce sujet. Je vous le demande aux fins d'organiser nos audiences, bien sûr, car il peut arriver que des membres de la Cour souhaitent poser une ou plusieurs questions à un représentant. L'indication au Greffe de la durée de séjour d'une délégation serait donc utile pour les membres de la Cour qui sauront alors jusqu'à quelle date ils pourraient poser des questions à un représentant. J'ajoute aussi que si une question est posée à un représentant, celui-ci a bien sûr la faculté d'y répondre oralement à un moment approprié, à convenir avec le Greffe, ou alors par écrit, également dans un délai qui sera approprié. Je remercie chaque délégation de sa compréhension à ce sujet. La Cour n'a pas d'orateur inscrit pour l'audience de demain matin, mardi 31 octobre. Elle reprendra en conséquence ses audiences le mercredi 1er novembre à 10 heures.

La séance est levée à 13 h 10.

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