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Cour internationale
de Justice

LA HAYE

International Court
of Justice

THE HAGUE

ANNEE 1995

Audience publique

tenue le jeudi 9 novembre 1995, à 10 heures, au Palais de la Paix,

sous la présidence de M. Bedjaoui, Président

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

et

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

COMPTE RENDU

YEAR 1995

Public sitting

held on Thursday 9 November 1995, at 10 a.m., at the Peace Palace,

President Bedjaoui presiding

in the case

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

and

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

VERBATIM RECORD

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

M. Valencia-Ospina, Greffier

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

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

L'Organisation mondiale de la Santé est représentée par :

M. Claude-Henri Vignes, conseiller juridique;

M. Thomas Topping, conseiller juridique adjoint.

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

et/ou

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

Le Gouvernement de l'Australie est représenté par :

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

L'Honorable Gareth Evans, Q.C., Sénateur, Ministre des affaires étrangères, conseil;

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

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

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

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

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

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

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

Le Gouvernement du Costa Rica est représenté par :

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

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

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

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

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

M. Georges Abi-Saab, professeur;

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

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

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

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

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

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

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

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

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

Le Gouvernement de la République française est représenté par :

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

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

Mme Marie-Reine d'Haussy, direction des affaires juridiques du ministère des affaires étrangères;

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

Le Gouvernement de la Fédération de Russie est représenté par :

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

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

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

Le Gouvernement des Iles Marshall est représenté par :

L'Honorable Johnsay Riklon, sénateur, atoll de Rongelap Special, envoyé du Gouvernement des Iles Marshall;

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

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

Le Gouvernement des Iles Salomon est représenté par :

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

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

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

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

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

Le Gouvernement de l'Indonésie est représenté par :

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

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

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

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

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

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

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

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

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

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

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

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

Le Gouvernement italien est représenté par :

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

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

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

Le Gouvernement japonais est représenté par :

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

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

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

M. Takashi Hiraoka, maire d'Hiroshima;

M. Iccho Itoh, maire de Nagasaki.

Le Gouvernement de la Malaisie :

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

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

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

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

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

Dato' R. S. McCoy, Expert;

M. Peter Weiss, Expert.

Le Gouvernement du Mexique est représenté par :

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

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

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

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

Le Gouvernement de la Nouvelle-Zélande est représenté par :

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

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

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

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

Le Gouvernement des Philippines est représenté par :

M. Merlin M. Magallona, agent;

M. Raphael Perpetuo Lotilla, conseil;

M. Carlos Sorreta, conseil;

M. Rodolfo S. Sanchez, avocat;

M. Emmanuel C. Llana, avocat.

Le Gouvernement de Qatar est représenté par :

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

M. Sami Abushaikha, expert juridique du Diwan Amiri;

M. Richard Meese, cabinet Frere Cholmeley, Paris.

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

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

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

M. Christopher Greenwood, conseil;

M. Daniel Bethlehem, conseil;

M. John Grainger, conseiller;

M. Christopher Whomersley, conseiller;

M. Andrew Barlow, conseiller.

Le Gouvernement de Saint-Marin est représenté par :

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

Le Gouvernement de Samoa est représenté par:

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

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

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

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

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

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

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

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

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

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

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

The World Health Organization is represented by:

Mr. Claude-Henri Vignes, Legal Counsel;

Mr. Thomas Topping, Deputy Legal Counsel.

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

and/or

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

The Government of Australia is represented by:

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

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

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

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

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

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

The Government of Costa Rica is represented by:

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

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

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

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

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

Mr. George Abi Saab, Professor;

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

The Government of the Republic of France is represented by:

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

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

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

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

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

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

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

The Government of Indonesia is represented by:

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

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

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

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

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

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

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

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

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

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

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

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

The Government of Italy is represented by:

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

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

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

The Japanese Government is represented by:

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

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

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

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

Mr. Takashi Hiraoka, Mayor of Hiroshima;

Mr. Iccho Itoh, Mayor of Nagasaki.

The Governement of Malaysia is represented by:

Dato' Mohtar Abdullah, Attorney-General - Leader;

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

Dato' Heliliah Mohd. Yusof, Solicitor-General;

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

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

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

Mr. Peter Weiss, Expert.

The Government of Marshall Islands is represented by:

The Honorable Johnsay Riklon, Senator, Rongelap Atoll, Special Envoy of the Government of the Marshall Islands;

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

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

The Government of Mexico is represented by:

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

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

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

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

The Government of New Zealand is represented by:

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

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

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

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

The Government of Philippines is represented by:

Mr. Merlin M. Magallona, Agent;

Mr. Raphael Perpetuo Lotilla, Counsel;

Mr. Carlos Sorreta, Counsel;

Mr. Rodolfo S. Sanchez, Advocate;

M. Emmanuel C. Llana, Advocate.

The Government of Qatar is represented by:

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

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

Mr. Richard Meese, Frere Cholmeley, Paris.

The Government of the Russian Federation is represented by:

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

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

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

The Government of Samoa is represented by:

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

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

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

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

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

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

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

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

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

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

The Government of San Marino is represented by:

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

The Government of Solomon Islands is represented by:

The Honorable 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. Joseph Rotblat, Emeritus Professor of Physics, University of London

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

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

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

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

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

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

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

Mr. Christopher Greenwood, Counsel;

Mr. Daniel Bethlehem, Counsel;

Mr. John Grainger, Adviser;

Mr. Christopher Whomersley, Adviser;

Mr. Andrew Barlow, Adviser.

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

Mr. Conrad K. Harper, Agent and Legal Adviser, 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 PRESIDENT: Please be seated. The Court resumes its hearings on the two advisory opinions asked for by the United Nations General Assembly and the World Health Organization. I give the floor first to The Honourable Paul East, Attorney-General of New Zealand.

The Honourable Paul EAST: May it please the Court, I appear with my colleague Mr. Bracegirdle, and may I say how privileged I am to represent the Government and people of New Zealand before this high tribunal on this vital matter. Members of the Court will appreciate that the questions brought before them by the World Health Assembly and the United Nations General Assembly are closely related to those matters which I addressed here just two months ago when New Zealand sought an examination of issues relating to French nuclear testing.

It will be our purpose on this occasion to supplement and develop the written submissions which the Government has already filed in response to the Court's orders relating to the two requests for advisory opinions.

At the outset I would like to acknowledge groups and individuals from New Zealand, some of them present here today, who worked so hard and played a major role in bringing this matter before Court.

Mr. President, New Zealand voted for resolution 49/75 K on 15 December 1994, whereby the United Nations General Assembly decided to request the advisory opinion of the Court on an urgent basis. In New Zealand's view, the question is an entirely fit and proper one for the United Nations General Assembly to be putting to the Court. To our mind, the Court unquestionably has jurisdiction in this case and it would be unthinkable to us for it not to decide the matter or for it to give an answer that would harm the cause or the process of nuclear disarmament and arms control. We would draw attention to the obligation on the Court to give its opinion on legal questions put to it by the main political organ of the United Nations. On a question as clear and as fundamental to the international legal order as this, the Court is, we suggest, bound to exercise its jurisdiction to reach a decision on the substantive issue put to it. As I will go on to show, the answer to the question put to the Court should be no; the threat or use of nuclear weapons should no longer be permitted under international law.

In brief, the New Zealand position on the Court's competence is:

1. that the Court has jurisdiction to answer the questions put to it by the World Health Assembly and the United Nations General Assembly;

2. that the Court ought to answer the questions; there are no "compelling reasons" standing in the way of its general duty to co-operate with other organs of the United Nations system.

I would also like to make mention of nuclear testing at this early point. I will come back to this subject later in my submission, but I wanted to record at the outset New Zealand's outrage at the resumption of French nuclear testing in our region of the world. South Pacific countries have had to put up with nuclear testing for far too long. They have made it plain, at various meetings in the region and in international fora, that the latest series of French nuclear tests is unacceptable. These tests, and France's refusal to stop them forthwith, have only reinforced in our mind that the international community must turn up the pressure on nuclear weapons. Simply put, the world must now be rid of them.

Mr. President, the first of the two propositions that I have just mentioned is that the Court has jurisdiction to answer the questions. That proposition is easily established. Under Article 96 of the Charter and Article 65 of the Statute, the Court has jurisdiction to give advisory opinions on "legal questions" put to it by the United Nations General Assembly and by the World Health Assembly as an authorized body of a specialized agency. The questions put to the Court are without doubt "legal questions". The requests expressly refer to the obligations of States under international law and to what is permitted by international law. The fact that the question might be considered abstract does not affect that conclusion. The Court, in giving its very first opinion on the *Admission of Members*, rejected the argument that it was not competent to answer abstract questions as "a mere affirmation devoid of any justification" (*I.C.J. Reports 1947-1948*, p. 61). There is, of course, practice to show that the Court may have to interpret a question to facilitate the giving of an answer.

Any problem about the competence of the World Health Assembly to ask for an opinion has been made hypothetical by the request made by the United Nations General Assembly. Article 96 of the Charter of the United Nations and Article 65 of the Statute of the International Court place no

explicit limit on the power of the General Assembly to request an opinion on *any* legal question. In any event matters of nuclear disarmament and indeed of disarmament generally are preeminently within the competence of the General Assembly. If authority is needed for that proposition it is to be found in Article 11 of the Charter and in the very first resolution adopted by the General Assembly at its first session. The fact that the Security Council has relevant powers under Articles 24 and 26 of the Charter does not affect that broad responsibility of the principal organ comprised of representatives of all Members of the United Nations.

I turn secondly to the Court's discretion to answer the questions put to it. It is plain from the Statute of the Court, that the Court is not bound to answer a request for an advisory opinion. Article 65 (1) reads, in part "the Court *may* give an advisory opinion on any legal question at the request" of an authorized body.

The Court does not need to be reminded that it is both a judicial organ and an organ of the United Nations. The Court, in terms of Articles 7 and 92 of the Charter and Article 1 of the Statute, is the principal judicial organ of the United Nations. As a principal organ of the United Nations it is under a general duty to co-operate, whenever possible, with the other organs and with Member States in the attempted attainment of the objects of the Organization. The Court has clearly recognized that duty from the outset. For instance, in 1950 in the *Peace Treaties* case where its competence to answer the questions put to it had been challenged and where it was further argued that it should exercise its discretion against giving an opinion, the Court said in a very important passage:

> "the reply of the Court, itself 'an organ of the United Nations', represents its participation in the activities of the Organization, and, in principle, should not be refused" (*I.C.J. Reports 1950*, p. 71).

The Court has maintained that position without any deviation ever since. I will not weary the Court with all the references, but to refer to its recent Advisory Opinion on the *Applicability of the Convention on the Privileges and Immunities of the United Nations*, the Court declared:

> "It is well settled in the Court's jurisprudence that when a request is made under Article 96 of the Charter by an organ of the United Nations or a specialized agency for an advisory opinion by way of guidance or enlightenment on a question of law, the Court should entertain the request and give its opinion unless there are 'compelling reasons' to the contrary." (*I.C.J. Reports 1989*, p. 191.)

Any such compelling reasons would most likely relate to possible compromise of the Court's judicial character. It is not only a principal organ of the United Nations; it is also a *judicial* organ and must remain true to that character. So far the Court has not ever considered itself prevented from answering questions put to it by reference to such reasons. It has answered each and every question put to it, although in some cases it has had to interpret the question. The objection of an interested State to an opinion being given is not itself a reason for refusal. The Court has made that clear in several cases, from the *Peace Treaties* case to the *Western Sahara* case.

The statements and practice of the Court do however give some indication of the reasons relating to its judicial character which might compel it to refuse to answer. They could concern only one of three matters. The first is that interested States and parties should have full and equal opportunity to present their case in writing and orally and to reply to the arguments made by other participants in the process. The second requirement is that the Court must be provided with all the information necessary to enable it to answer the question put. Thirdly, the process must be a public one.

In the present proceedings, all of those requirements in our submission have been amply satisfied. The Court, through the orders it has made and the procedures it has followed, has given all interested States an ample opportunity to present their cases in writing and orally. The Court has been and is being provided with a wide range of information and argument. The Court and its Members can themselves, of course, seek further information from the organs which requested the opinions as well as from States participating in the process; as is indeed already happening. And the process itself is a public one.

In our submission it would be quite improper for the Court to question the motivations and reasons of the requesting organs. It would also be contrary to the separation of powers within the organized world community. The Court has plainly recognized these considerations. In the very first Opinion which it gave, on the *Admission of Members*, it stressed its legal and judicial function, as opposed to any political role:

> "The Court cannot attribute a political character to a request which, framed in abstract terms, invites it to undertake an essentially judicial task, ... It is not concerned

> with the motives which may have inspired this request ..." (*I.C.J. Reports 1947-1948*, p. 61.)

That is to say whether the requesting organ should or should not make the request is a matter for it and its members and for it and them alone. If the requesting organ considers it no longer requires the opinion it can vote to withdraw the request, as has happened just once, in 1925 in the case of *Expulsion of the Oecumenical Patriarch* (*P.C.I.J., Series E, No. 3, Third Annual Report*, p. 184). Neither body has taken that action. These requests remain before the Court. In New Zealand's opinion the wisdom of making the request is not a matter that can be the subject of legal evaluation by the Court to which the request comes.

To repeat, New Zealand does not see any "compelling reason" standing in the way of the Court answering the questions put to it. On the contrary, the Court should respond to the clear indication given by the requesting organs both in the decisions to seek the opinions and in the terms of the resolutions seeking them, of their need for the opinions and of their real interest in having the opinions. For instance, in its resolution, the World Health Assembly recalled earlier studies by the World Health Organization on the health and environmental effects of nuclear weapons, and affirmed "that primary prevention is the only appropriate means to deal with the health and environmental effects of the use of nuclear weapons".

The Assembly expressed its realization that primarily prevention of health hazards - a matter plainly within the competence of the World Health Organization - required clarity about the status in international law of the use of nuclear weapons.

The General Assembly, in its resolution requesting the opinion, recalled earlier resolutions declaring that the use of nuclear weapons would be a violation of the Charter and a crime against humanity and expressed its conviction that the complete elimination of nuclear weapons is the only guarantee against the threat of nuclear war.

Accordingly New Zealand submits, first, that the Court has jurisdiction to answer the questions asked by the two bodies and, second, that it ought to answer them.

I now turn, Mr. President and Members of the Court, to the substance of New Zealand's submissions.

The Court already has available to it New Zealand's written statements. It is also hearing from many other States, a record number I understand, attesting to the vital importance of the issues placed before the Court. We will endeavour in our submissions to focus as succinctly as possible on the principal issues.

I will begin with the fundamental principles of international humanitarian law. I will contend that, in the context of the developments which we have outlined, these principles forbid the use, in any circumstances, of nuclear weapons and likewise any threat of their use.

I will then emphasize the great importance of the obligations undertaken by the parties to the Nuclear Non-Proliferation Treaty, obligations which look forward to a ban on the very existence of nuclear weapons, let alone their use.

My colleague, Mr. Bracegirdle, will then address the development of the practice limiting and prohibiting the development, deployment, testing and use of nuclear weapons and will refer to the law prohibiting the use of force.

I will then, with leave of the Court, Mr. President, return to the rostrum to deal with the testing of nuclear weapons in more detail and to conclude New Zealand's submission.

Mr. President and Members of the Court, in this part of New Zealand's submissions, I will seek to persuade you that international humanitarian law forbids the use of nuclear weapons. We have long ago passed from the situation described by Cicero in 52 B.C.:

"Silent enim leges inter arma"

"Laws are silent in time of war".

This is clearly no longer the case, and the first point I wish to make about this body of international humanitarian law is that in significant part it takes the form of principles. The Court recently recognized the existence of "fundamental general principles of humanitarian law" in the *Military and Paramilitary Activities* case *I.C.J. Reports 1986,* p. 113. That characteristic is important for at least four reasons:

1. The first is that these humanitarian principles endure and provide a continuing standard, even as the activities, weapons and methods and means of warfare to which the principles

are to apply change, and as a consequence the detailed law also changes. The continuing relevance of humanitarian principles is evidenced by the new tribunals established in respect of international crimes in Former Yugoslavia and Rwanda.

2. It follows that the principles apply to new weapons and methods and means of warfare; the principles are not bounded by the circumstances and weapons at the time they were first stated; the point is reflected in Article 36 of the First Additional Protocol to the Geneva Conventions concluded in 1977 and now accepted by 140 States; that provision requires a State in the study, development, acquisition or adoption of a new weapon, means or method of warfare, to determine whether the use of the weapon would in some or all circumstances breach international law.

3. The principles are not however immutable, nor do they comprise a closed list; developing circumstances and especially major threats presented by new weapons of mass destruction may well require the development of further principles.

4. The principles continue to give life to the law, even although specific provisions regulating an area in a particular way have not yet been made; the world community has long recognized that proposition in the De Martens clause included in relevant treaties since last century. In its latest form, in Article 1(2) of the First Additional Protocol of 1977, the principle is stated as follows:

> "In cases not covered by this protocol or by other 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."

Members of the Court will recall, of course, the similar reference to "elementary considerations of humanity" in the *Corfu Channel* case, the Judgment in which was given nearly 50 years ago (*I.C.J. Reports 1949*, p. 22).

It follows from these characteristics of the body of international humanitarian law, that it is no answer at all to the present questions to say that the use of nuclear weapons is not prohibited by international law since there is no specific treaty to that effect. Rather the question must be determined by reference to broader principle in the context, among other things, of the developments,

especially relating to the Nuclear Non-Proliferation Treaty. The Court is being asked to state the law as it now is.

I turn now to the particular principles of international humanitarian law, conscious of course that you will already have heard a great deal about them in the last week or two, and also about the effects of the use of nuclear weapons in armed conflict.

I begin with the most general principle, one that takes a somewhat negative form. According to this basic principle, the right of the parties to an armed conflict to choose methods or means of warfare is not unlimited. That is to say the world community rejected any doctrine of unlimited warfare or of total war. Rather, both in principle and in treaty obligations since the St. Petersburg Declaration in 1868, the world community has accepted that limit. It is a limit, of course, which flatly rejects in this area any general proposition that under international law States are free to act unless they are specifically prohibited.

The second principle requires parties to a conflict to distinguish at all times between the civilian population and combatants and between civilian objects and military objectives in order to spare the civilian population and property. Neither the civilian population as such nor civilian persons are to be the objects of attack. Attacks must be directed solely against military objectives. There can of course be collateral civilian damage consequential to an attack on a legitimate military target. That realisation of the harsh facts of war is however tempered by the requirement that the loss of civilian life, injury to civilians, damage to civilian objects or any combination of those losses must not be excessive in relation to the concrete and military advantage anticipated. One member of this Court, citing an earlier President of the Court, has referred to an Indian classic, *The Ramayana*. That text tells us that the use of a weapon of war which would destroy the entire race of the enemy was forbidden by the virtuous Prince Rama. The reason given is that the weapon would destroy even those who did not bear arms; such destruction en masse was forbidden by the ancient laws of war even though Rama's adversary was fighting an unjust war (Weeramantry, *Nuclear Weapons and Scientific Responsibility* (1987), p. 84, citing Nagendra Singh, *Human Rights and the Future of Mankind* (1981), p. 93).

A third basic principle is that parties to a conflict must not use weapons and methods and means of warfare of a nature to cause superfluous injury or unnecessary suffering. Again there is a recognition in this proposition that armed conflict does cause suffering. There is, however, a limit on weapons by reference to superfluity and lack of necessity.

A fourth principle is unlike the preceding three in that it cannot be traced back to the last century or even earlier. It has been recognized more recently as the destructive effect of weapons has massively increased. Under this principle parties to a conflict must not use methods or means of warfare which are intended or may be expected to cause widespread, long term and severe damage to the natural environment. Closely related to this principle is the concern for intergenerational damage, a matter touched on by Judge Weeramantry in his dissenting opinion given in this Court two months ago when New Zealand sought to resume the case which it had brought in 1973 relating to French Nuclear Testing. That idea of a continuing obligation owed to future generations is increasingly recognized in environmental law.

Indeed, it is noteworthy that over 200 years ago, an American President, James Madison, espoused a not dissimilar principle when writing in the National Gazette on 2nd February 1792: "Each generation should bear the burden of its own wars, instead of carrying them on, at the expense of other generations."

A fifth relevant principle of international humanitarian law is that methods and means of warfare must not violate the neutrality of States which are not participating in the conflict. Belligerents have no right to carry on hostilities within the territory of such a State. Neutral States have the right to freedom from harm and injury arising from an armed conflict with which they are not involved.

Finally is the set of rules prohibiting the use of asphyxiating, poisonous or other gases and all analogous materials. This principle is generally acknowledged as forming part of customary international law and is codified in part in the 1925 Geneva Protocol on the use in war of gases and bacteriological weapons. Given the radiation effects of nuclear weapons many contend that this body of law also applies to nuclear weapons.

The most recent authoritative statement supporting the propositions I have stated is the First Additional Protocol of 1977 relating to the protection of the victims of armed conflict. In the course of the preparation of that agreement, nuclear powers made it clear that they did not consider that text governed the use of nuclear weapons. I do not intend to take up the particular legal effect of those various statements and declarations. Rather it is enough for present purposes to make the point that in the present context that text is simply a convenient statement of well-established principle existing under customary international law independently of the formal status of the 1977 Protocol and its exact interpretation. This Court did of course, in 1986 in its Judgment in the case concerning *Military and Paramilitary Activities*, recognize the customary force of the Geneva Conventions. The force, it said, does not derive only from the conventions themselves but from the general principles of humanitarian law to which the conventions merely give specific expression.

I might note, Mr. President and Members of the Court, that such fundamental principles which have the character of *jus cogens* do not fall within the scope of the primacy provisions in Article 103 of the Charter; the obligations arising from those principles are not to be found simply in "any other international agreement". They have a much more basic character.

Mr. President, I would now like to consider the fundamental legal obligations that exist concerning nuclear weapons, particularly in the context of the Treaty on the Non-Proliferation of Nuclear Weapons. In 1968 many countries around the world entered into a compact. Non-nuclear-weapon States agreed not to develop nuclear weapons. Nuclear-weapon States, for their part, agreed to negotiate in good faith on bringing the nuclear arms race to an end at an early date and on nuclear disarmament.

These were commitments of the most solemn kind. Security is a fundamental concern of nation States and the United Nations. Countries do not lightly renounce whole categories of weapons that they have come to see as being, or as holding out the promise of being, essential to their security. But in 1968, the paradoxical nature of nuclear weapons was already well understood. If ever used, they would most likely ensure the destruction, not the maintenance of the security, of the user. It is trite today to observe that these weapons were wholly different from anything that

humanity had previously had to deal with. The threat and fear of such weapons and of their proliferation was very real. They posed a unique challenge to the international legal order.

That concern remains with us today, even if the worst fears of the 1960s have not been realized. It was widely recognized that nuclear weapons posed an overwhelming danger to humanity. Their further proliferation, whether "horizontally", involving the acquisition of nuclear weapons by additional countries, or "vertically", through the development of greater numbers of nuclear weapons and of new types which might appear to make nuclear weapons more "usable" and thereby supposedly enhance their deterrent value, would not be in anyone's interests. The overriding security imperative that underpins the Nuclear Non-Proliferation Treaty adopted in 1968 is that nuclear weapons are too dangerous for humanity and must be eliminated. That is the central and fundamental point of the treaty, as its preamble makes clear. This security imperative remains as valid today as in 1968. The willingness of the parties, at their Review and Extension Conference in May 1995, to make the treaty permanent, is the strongest evidence that that is so. That decision also emphasizes that the international community's rejection of nuclear weapons that is the very basis of the treaty is a permanent rejection.

In New Zealand's view, it is very significant that this treaty has broad international support. It is not yet universally accepted, but only a handful of countries have not yet committed themselves to its terms. Some 180 countries are party to it. What is especially significant is that all five nuclear-weapon States are now party to it. They are bound to work to eliminate their nuclear weapons, and the non-nuclear-weapon States parties are bound not to acquire such weapons. The principle of non-proliferation, of the unacceptability, of nuclear weapons, is so widely accepted that it can now be said that it has attained the status of a norm at international law which binds all countries, even though the terms of the treaty itself do not yet bind all.

The agreed premise of the treaty is that a world free of nuclear weapons would be a better and more secure place. The treaty held out the promise of that goal being reached without undue delay. Even those States that are not party to the treaty would be hardly likely to disagree with the elimination of nuclear weapons. That has not happened. For most of the life of the treaty, the

nuclear arms race accelerated rather than going into decline. Only in recent years has the nuclear arms race been reversed. It is due to the fact that that promise has not been fulfilled that this opinion is now being sought. The requests to the Court reflect the impatience and concern of the international community at the failure to live up to this promise.

The challenge to the Court that this case presents is a very large one. Nuclear arms control and disarmament has long been one of the highest objectives of the international community. The Court is bound to ensure that its opinions support and assist the achievement of that objective and do not jeopardize it in any way. The Nuclear Non-Proliferation Treaty, as reinforced by the recent decision of the parties to make it permanent, has "delegitimized" nuclear weapons. The international community is committed to their complete elimination. That this is so is clear beyond doubt as a matter of international law. There can be no turning back now from the treaty commitments. The Court must seize the opportunity to help in building on that process and achieving the objective of the treaty as rapidly as possible. It cannot do otherwise, and in particular must avoid any weakening of that process. Mr. President, New Zealand is confident that the Court's findings in this matter will be consonant with other developments in nuclear arms control and nuclear disarmament, including the rededication of commitment to the Nuclear Non-Proliferation Treaty, the imminent conclusion of a comprehensive nuclear test ban treaty, and further rapid progress in bilateral nuclear arms control talks.

Mr. President, it is sometimes claimed that the Nuclear Non-Proliferation Treaty created two classes of countries, the nuclear-weapon States and the non-nuclear-weapon States, the "haves" and the "have-nots". Certainly, it recognized the reality of the world at the time, where some countries had nuclear weapons and others did not. But more important, it set out the conditions by which equality could be restored between both sets of countries, that is, a world in which nuclear weapons would be eliminated as quickly as possible. In providing for the elimination of nuclear weapons, it was plainly not aiming to maintain the status quo or encourage renewed development of nuclear weapons by the nuclear-weapon States. No distortion of that kind stands up to scrutiny.

Nor can an argument that the nuclear-weapon States were being given a legal basis for the

maintenance of their nuclear weapons be sustained. That is simply not what the treaty provides. It does not provide a basis for nuclear-weapon States to argue that nuclear arms control and nuclear disarmament can be deferred. Article VI does not make that process conditional on a treaty on general and complete disarmament under strict and effective international control. Such an argument ignores the very *raison d'être* of the Treaty, which is based on a recognition that nuclear weapons are different. The judgment made was that, in view of the uniquely destructive potential of such weapons, and human nature being what it is, the only option for humanity was to rid itself of these weapons entirely. The threat that the weapons represent hangs over the security of the whole international community. They also constitute a threat, and a challenge, to the very international legal order. The Nuclear Non-Proliferation Treaty is the most important response to date to that challenge.

The closest parallels to nuclear weapons are biological weapons and chemical weapons, which are commonly referred to as weapons of mass destruction. Both these latter two categories of weapons, and in effect their use, are of course subject to comprehensive prohibitions which are now incorporated in a single treaty in each case. Despite their even more threatening nature, the abolition of nuclear weapons has proceeded down a more complicated track. The general terms of Article VI of the Nuclear Non-Proliferation Treaty to negotiate in good faith towards the elimination of such weapons stands by itself as a powerful, if only partly met, obligation to that end. It is reinforced by a large amount of additional international law, both treaty law and customary law, that bears on nuclear weapons and their use. This law, some of which long predates the Nuclear Non-Proliferation Treaty and even the advent of nuclear weapons, and some being of more recent origin, contains a whole series of sometimes overlapping obligations and prohibitions which circumscribes, *inter alia*, the threat or use of nuclear weapons in many ways. The comprehensiveness of that law is, in New Zealand's view, now beyond debate. In no realistic scenario of nuclear war can it today be said that the use of nuclear weapons would be taking place in conformity with international law. For many years, the direction of international law has been overwhelmingly clear; it has now reached a point where a conclusive answer can be given to the question that has been put before the

Court.

Mr. President, I would now like to ask my colleague, Mr. Bracegirdle, to address the Court on State practice in the area of disarmament and arms control, and then I will make some concluding comments when he has finished.

The PRESIDENT: I thank the Honourable Paul East, Attorney-General of New Zealand, for his statement and I now give the floor to His Excellency Mr. Allan Bracegirdle, Deputy Director of the Legal Department of New Zealand's Foreign Ministry.

Mr. BRACEGIRDLE: Thank you, Mr. President and Members of the Court. Could I first add my own comments, that it is an honour and a privilege to appear before this august body. I trust that you will bear with me, even where I repeat comments on legal matters that you will have already had from other States earlier in these hearings.

I need hardly note at the outset that the process whereby new rules of customary international law emerge is a large and complex topic on its own, well beyond the scope of these submissions. New Zealand is aware that a rule, in order to constitute customary international law, must be based on more than evidence of State practice alone; it is also necessary to show that States consider themselves to be legally bound by the practice.

Evidence for the existence of such a legal obligation can, of course, be expressed in various ways, and there is no need to show that every State accepts the practice. It is pertinent to note that the Court, in its Judgment in the *North Sea Continental Shelf* case, indicated that rules of customary international law may be crystallized or generated by treaties and bind States that never become party to them, and that such a process could in certain circumstances take place over only a short period of time. It has also reiterated, in its Judgment in the *Military and Paramilitary Activities* case, that rules of customary international law embodied in treaties have an independent existence, and it noted that instances of inconsistent State conduct do not affect the existence of a rule of customary international law where State practice has, in general, been consistent with it.

So far as the actual use of nuclear weapons is concerned, State practice is of course virtually non-existent. There has been no case of a nuclear weapon being used by one State against another State in 50 years. The nuclear-weapon States have shown great restraint with these weapons. The restraint might appear remarkable, but it reflects a recognition on their part of the enormity of the question of the use in war of such weapons and that such use would be a very different proposition from anything that had gone before.

On the other hand, in the area of nuclear disarmament and arms control, a large body of law, particularly treaty law, has continued to evolve and imposes prohibitions of various kinds on, *inter alia*, the threat or use of nuclear weapons. It is appropriate to look at State practice accordingly, and I would like to begin with the New Zealand approach.

Mr. President, New Zealand is a longstanding advocate of nuclear disarmament and non-proliferation. We believe in the benefits of a nuclear-free and more secure world. We are a diligent party to the Nuclear Non-Proliferation Treaty, and have sought to match our belief in the objective of that Treaty with further actions. We have made every endeavour to make our part of the world nuclear free. In his recent address to the Special Commemorative Meeting of the United Nations, the New Zealand Prime Minister said that the time has come for a new commitment to a world free of nuclear weapons and he called for a strategy to achieve this goal.

In New Zealand, the nuclear-free foundations are laid down in a statute, the New Zealand Nuclear Free Zone, Disarmament and Arms Control Act of 1987. That Act embodies New Zealand's commitment to the nuclear disarmament and arms control process. It does this in two main ways.

First, the Act creates a nuclear-free zone within New Zealand. The Act makes it an offence for New Zealand citizens or persons ordinarily resident in New Zealand to manufacture, acquire, or possess or have control over any nuclear explosive device within the New Zealand Nuclear Free Zone. Offences are also created for aiding, abetting or procuring any person to do any of those things. In the case of servants or agents of the Crown, the prohibition against committing such acts extends beyond the Zone. There are further prohibitions in the Act on the

stationing or testing of nuclear explosive devices in the New Zealand Nuclear Free Zone, and on the entry into New Zealand internal waters of nuclear weapons.

Second, the Act enshrines in national legislation five international agreements in the disarmament and arms control field, four of which are directly applicable to nuclear weapons. These are:

- the South Pacific Nuclear Free Zone Treaty of 6 August 1985, also known as the Treaty of Rarotonga;
- the Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and Under Water of 5 August 1963, also known as the Partial Test Ban Treaty;
- the Treaty on the Non-Proliferation of Nuclear Weapons itself of 1 July 1968 (the NPT); and
- the 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 of 11 February 1971 (also known as the Sea-bed Arms Control Treaty).

By giving special status to these treaties and creating a New Zealand Nuclear-Free Zone, the Act robustly expresses New Zealand's support for a nuclear-free world. It is the national basis for stronger action in disarmament and arms control at the regional and global levels.

New Zealand's commitment to effective nuclear disarmament and arms control measures at the *regional* level is reflected in our support for the Antarctic Treaty and the South Pacific Nuclear-Free Zone, both of which are important examples of prohibitions on nuclear weapons and their use applying to particular geographic regions.

New Zealand is an original contracting party to the Antarctic Treaty of 1959. Article 1 of that agreement provides that Antarctica shall be used for peaceful purposes only. Any measures of a military nature, including the establishment of military bases, the carrying out of military manoeuvres, and the testing of any type of weapons, are prohibited. The Treaty also prohibits any nuclear explosions in Antarctica and the disposal of radioactive waste there. Through its active participation in the continuing operation of the Antarctic Treaty, New Zealand contributes to the demilitarization of a whole continent.

Mr. President, New Zealand was pleased to play a major role in the establishment of the South Pacific Nuclear Free Zone. The Treaty of Rarotonga, which creates that zone and entered into force in 1986, reflects the collective will of South Pacific nations to renounce the possession of nuclear weapons, to ensure that nuclear weapons are neither tested in the zone nor stationed on national territory in the region, and to gain assurances of non-use of nuclear weapons from the nuclear-weapon States.

The last of these objectives of course requires the support of the nuclear-weapon States. To date, only China and the former Soviet Union of the nuclear powers have become party to the relevant protocols to the treaty. New Zealand, however, greatly welcomes the very recent joint announcement of the other three nuclear-weapon States of their intention to sign the protocols in the first half of 1996. In doing so, they will be strengthening the nuclear non-proliferation régime in our region of the world. Nuclear weapon-free zones can only be fully effective if they gain the support of the nuclear-weapon States. We hope that the success of the Treaty of Rarotonga and the Treaty of Tlatelolco establishing the Latin American nuclear-weapon-free zone will encourage other regions of the world to make similar arrangements, where appropriate, for their security as indeed envisaged in Article VII of the Nuclear Non-Proliferation Treaty.

The significance, Mr. President, of such regional initiatives can be seen in the fact that together with the areas covered by the adjacent Antarctic Treaty and the Treaty of Tlatelolco, the South Pacific Nuclear Free Zone contributes to an overall nuclear weapon-free area which covers approximately 200 million square kilometres of the earth's surface. Almost all of the southern hemisphere will be included within such zones upon the entry into force of the Treaty establishing the African nuclear weapon-free zone. New Zealand has followed the recent developments concerning that treaty with considerable interest, in particular the adoption of the Pelindaba text of the treaty in June 1995 by the Heads of State of the Organization of African Unity. New Zealand is also very interested in the negotiations under way among South East Asian countries who are members of ASEAN on a treaty to establish a nuclear-weapon-free zone in their region. Such a zone would complete, in effect, a southern hemisphere zone, and further

reinforce State practice in respect of the non-proliferation of nuclear weapons.

Beyond this contribution at the regional level, Mr. President, New Zealand is also committed to progress in global efforts in the disarmament and arms control field. New Zealand recognizes that no part of the globe may be insulated in the event of the use of nuclear weapons. The security of *all* States is dependent upon the effectiveness of international agreements directed at the control in various respects, and the elimination, of nuclear weapons.

To that end, New Zealand is a party to significant global disarmament and arms control treaties that bear on the threat or use of nuclear weapons. These treaties include the Partial Test Ban Treaty, the Outer Space Treaty, the Sea-bed Arms Control Treaty and, most importantly in our view, the Nuclear Non-Proliferation Treaty itself.

As has already been noted, New Zealand has been, and continues to be, a strong supporter of the Nuclear Non-Proliferation Treaty. We see it as the fundamental underpinning for further progress in nuclear disarmament and arms control. It is in recognition of this fact that New Zealand supported the unanimous decision taken at the Review and Extension Conference in May 1995 to extend the treaty indefinitely. That decision was a vote of confidence in the contribution that that treaty has to make to a nuclear-free world and in the commitment of the nuclear-weapon States to work, without further deflection, towards that goal.

As mentioned in our written statement, Mr. President, since 1972 New Zealand has taken a lead, with other States, in tabling a resolution each year at the United Nations General Assembly calling for a comprehensive nuclear test ban treaty to be negotiated. In 1993, for the first time, and again in 1994, the resolution was adopted by consensus. A comprehensive nuclear test ban treaty is now being negotiated in the Conference on Disarmament, with the active participation of the nuclear-weapon States. Three of the nuclear-weapon States have already indicated that a treaty with a zero testing threshold would be acceptable to them. Such a treaty will make a significant contribution to halting the proliferation of nuclear weapons in all its forms, and hence have a major impact on the threat or use of nuclear weapons.

New Zealand strongly supports other recent multilateral steps towards nuclear

disarmament that would further back up a comprehensive nuclear test ban. Such steps include the recent agreement by the Conference on Disarmament on a mandate for an *ad hoc* committee to begin negotiations on a treaty banning the production of fissile material for nuclear weapons purposes. New Zealand has also called for a negotiated and verifiable agreement to ban the future production of nuclear weapons.

Mr. President, New Zealand also welcomes the progress made in the bilateral nuclear arms reduction negotiations between the United States and the Russian Federation. We urge an acceleration of their work, which is further evidence that State practice is now turning strongly against nuclear weapons.

The New Zealand approach, then, Mr. President, is a comprehensive one. We are committed to the goals of nuclear disarmament and arms control through our national legislation, through our participation in regional initiatives, and through our active support of international agreements that might ultimately help to bring about general and complete disarmament. The New Zealand practice, then, is both clear and strong.

Mr. President, turning to the practice of other States, we know that we share our own aspirations in respect of nuclear disarmament and arms control with countries all round the world. The support given to the Nuclear Non-Proliferation Treaty is perhaps the clearest evidence of that. We believe that the tide of State practice today is stronger than ever in favour of nuclear non-proliferation and the complete elimination of nuclear weapons.

Although nuclear weapons are a comparatively recent invention, international law has not been slow to respond to their uniquely destructive qualities and progressively develop a range of prohibitions and restrictions. There is now a considerable body of international law which bears specifically on the threat or use of nuclear weapons. Further, more recent, development of this law is evidence of the strength of State practice on the matter.

A substantial body of treaty law already exists regulating nuclear weapons. In various respects, possession, testing, deployment, threats or use of nuclear weapons are expressly prohibited. Several of the treaties, which are widely if not universally accepted, are of major

importance:

- first, to recall commitments made under the Nuclear Non-Proliferation Treaty and other regional treaties, such as the South Pacific Nuclear Free Zone Treaty and the Treaty of Tlatelolco in respect of Latin America. These commitments mean that nearly all States other than the five declared nuclear-weapon States have undertaken not to manufacture or otherwise acquire nuclear weapons or to receive the transfer of or control over such weapons whether directly or indirectly. The decision of the parties to the Nuclear Non-Proliferation Treaty at their Review and Extension Conference in May 1995, to make the treaty permanent, is - as has already been mentioned - of special significance;
- secondly, under the Partial Test Ban Treaty of 1963, undertakings have been secured not to carry out any nuclear-weapon test explosion, or any other nuclear explosion, in the atmosphere, under water, or in outer space. Moreover, the treaty prohibits nuclear-weapon tests in any other environment if the explosion would cause radioactive debris to be present outside the borders of the State under whose jurisdiction or control the explosion is conducted;
- thirdly, the Outer Space Treaty of 1967, is restrictive of nuclear weapons in two important respects. It prohibits placing nuclear weapons in orbit around Earth, or installing them on the moon or any other celestial body, or otherwise stationing nuclear weapons in outer space. It also limits the use of the moon and other celestial bodies exclusively for peaceful purposes and expressly prohibits their use for, *inter alia*, testing weapons of any kind. Like prohibitions are contained in the Moon Treaty of 1979;
- finally, the Sea-bed Arms Control Treaty of 1971 prohibits emplanting or emplacement on the sea-bed and the ocean floor and in the subsoil thereof of any nuclear weapons, or other weapons of mass destruction. Structures, launching installations or any other facilities specifically designed for storing, testing or using such weapons, are prohibited beyond the outer limit of a twelve-mile "sea-bed zone". The same prohibition applies to the area *within* a sea-bed zone, except in relation to the coastal State concerned.

The first point to note, then, Mr. President, is that significant regulation of nuclear

weapons already exists in important multilateral treaties.

State practice against nuclear weapons is continuing to evolve and to strengthen. I have already mentioned the developments concerning the African nuclear-weapon-free zone and the proposed South East Asian nuclear-weapon-free zone. These efforts are further evidence of the desire of a significant number of States to buttress other prohibitions on nuclear weapons and to express in formal treaty terms their rejection of these weapons as far as possible in their own backyards.

A significant outcome of the Review and Extension Conference of the parties to the Nuclear Non-Proliferation Treaty in May 1995 was the commitment agreed by all parties to complete negotiations on a universal and internationally and effectively verifiable Comprehensive Nuclear Test Ban Treaty no later than 1996. Negotiations are well advanced - as already mentioned - in the Conference on Disarmament in Geneva. Such a treaty will be the most important development since the adoption of the Nuclear Non-Proliferation Treaty itself in strengthening the non-proliferation régime and as a signal of the intention to eliminate nuclear weapons. The commencement of negotiations on a treaty on the cut-off of production of fissile material for nuclear weapons, as has also been proposed in the Conference on Disarmament, will further reinforce these goals.

Mr. President, so far as the practice of the nuclear-weapon States is concerned, Article VI of the Nuclear Non-Proliferation Treaty is the starting point. If I may just read that Article in full - it is relatively brief. It provides as follows:

> "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."

In the Principles and Objectives for Nuclear Non-Proliferation and Disarmament, adopted unanimously by decision of the parties to the treaty at their Review and Extension Conference, the parties agreed that the undertakings with regard to nuclear disarmament, as set out in the treaty, should be fulfilled with determination. In this regard, 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".

Recent welcome progress - as has already been mentioned - has been made by the nuclear-weapon States in nuclear disarmament and arms control. Bilateral agreements in more recent years between the two major nuclear powers, the United States on the one hand and the former Soviet Union and the Russian Federation on the other hand, have provided for significant reductions in their respective nuclear arsenals and the elimination of one whole category of nuclear weapons, intermediate-range nuclear missiles.

Initially, in the early 1970s, the Strategic Arms Limitation Talks, or SALT, focused exclusively on limiting the size of the respective side's strategic nuclear arsenals. Overall, nuclear arsenals increased as the nuclear arms race continued almost unabated. It was not until 1987, with the conclusion of the Intermediate Nuclear Forces Treaty, followed by the Strategic Arms Reduction Treaties (START) in the 1990s, that real reductions in nuclear stockpiles finally got under way. Present stockpiles, however, still far exceed the number of nuclear weapons in existence when the Nuclear Non-Proliferation Treaty entered into force, and are a measure of the intensity of the nuclear arms race in the 1970s and 1980s.

The willingness of the major nuclear powers to enter into negotiations on a comprehensive nuclear test-ban treaty and on a treaty banning the production of fissile material for nuclear weapons, is a further indication of changing attitudes on the part of the nuclear-weapon States.

As already noted, Mr. President, the practice of the nuclear-weapon States supports the non-use of nuclear weapons. In various respects, non-use has been accepted by them as a legal obligation. A further significant part of their practice in this regard concerns the negative security assurances given by all five nuclear-weapon States about the circumstances in which they would *not* use nuclear weapons. The United States, the United Kingdom, France and Russia have this year reaffirmed that they will not use nuclear weapons against non-nuclear-weapon States parties to the Nuclear Non-Proliferation Treaty. While there is an exception in certain cases of armed attack by a non-nuclear-weapon State in association or alliance with a nuclear-weapon State, it does not constitute evidence, of course, that nuclear weapons will be used in the

circumstances concerned. China's assurance is unconditional in that it is not limited to parties to the Nuclear Non-Proliferation Treaty but extends to all non-nuclear-weapon States. Its guarantee to non-nuclear-weapon States also applies "in all circumstances", and it has reaffirmed its undertaking not to be the first to use nuclear weapons at any time and under any circumstances.

Now, Mr. President, while discussions in the international community on the incorporation of these unilateral security assurances into an international instrument have continued in recent years, it is New Zealand's view that such a move would simply serve to codify the customary law force that such assurances already enjoy. Negative security assurances, made in good faith, give rise to a legitimate expectation on the part of non-nuclear-weapon States that they will be complied with. This is by virtue of the Judgment of the Court in the *Nuclear Tests* case *(New Zealand* v. *France)* in 1974, when the Court stated that, based on the principle of good faith, unilateral declarations by States may be binding at international law. The quotation from the relevant parts of the Judgment in that case is set out in paragraph 50 of our written statement, so I will not repeat it here.

It is also relevant to the practice of the nuclear-weapon States to draw attention to the parallels with other categories of weapons. Since the adoption of the Nuclear Non-Proliferation Treaty in 1968, the nuclear-weapon States have also agreed to the adoption of treaties to eliminate other weapons of mass destruction, that is the Biological Weapons Convention in 1972 and the Chemical Weapons Convention in 1993. Moreover, they have agreed to the elimination of certain conventional weapons which are excessively injurious or have indiscriminate effects, that is certain booby traps and weapons based on non-detectable fragments, in the Inhumane Weapons Convention adopted in 1981.

Mr. President, I would like to turn now briefly to international law regarding resort to force, which is broadly related to treaties in the disarmament and arms control field. Article 2, paragraph 4, of the United Nations Charter of course proscribes the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations. The Court has recognized, in its Judgment in the

Military and Paramilitary Activities case, that the principle of the prohibition of the use of force is a rule of customary international law and referred to suggestions that it may be a fundamental principle having the character of *jus cogens*.

The Charter recognizes only tightly prescribed exceptions to the general rule against the threat or use of force. First, the threat or use of force is lawful if made as part of enforcement action taken by the Security Council under Chapter VII of the Charter in the event of a threat to the peace, breach of the peace or act of aggression.

Secondly, countries have a right of self-defence as recognized in Article 51 of the Charter. Nothing in the Charter impairs the inherent right of individual or collective self-defence in the event of an armed attack against a member "until the Security Council has taken measures necessary to maintain international peace and security". A member State exercising its right of self-defence is required to immediately report such action to the Security Council. The Council's authority and responsibility to take whatever action it deems necessary to maintain or restore international peace and security is not affected by the measures taken by a State.

Mr. President, there is of course nothing in these exceptions which specifically authorizes the use of nuclear weapons. Moreover, the right of self-defence cannot be exercised in isolation from other applicable rules and principles of international law. In particular, the humanitarian laws of armed conflict apply to measures taken in self-defence. Such measures must, for example, be necessary and proportionate to the danger faced, as recognized by the Court in its Judgment in the *Military and Paramilitary Activities* case.

Mr. President, I thank the Court for its attention, and I would like at this point to return to the Attorney-General to complete the New Zealand submissions.

The PRESIDENT: I thank you, Mr. Allan Bracegirdle, and I give the floor to the Honourable Paul East.

The Honourable Paul EAST: Mr. President, as earlier indicated, I should like to begin this final part of New Zealand's presentation by referring to one particular aspect of nuclear weapons

where there have recently been some reprehensible developments, and I refer to the nuclear tests conducted by China and France.

As this Court will be well aware from New Zealand's recent request concerning the case filed against France in 1973, New Zealand has been especially concerned about French nuclear testing, which takes place in our region of the world, far from metropolitan France, and in a fragile and vulnerable marine environment. New Zealand recognizes that all countries have the right to ensure their security. That is a fundamental right at international law. But the right does not operate in a vacuum. It is not wholly a matter for the subjective determination of each individual State. It must be exercised within the bounds of the international legal framework.

New Zealand's attitude to nuclear weapons testing has been abundantly clear. As my predecessor, the then Attorney-General, told this Court in 1973, from the earliest days of the development of nuclear weapons, New Zealanders, along with the world community, have viewed them with the deepest apprehension. In the United Nations, New Zealand was, in 1958, associated with a number of countries in sponsoring a resolution in the General Assembly designed to promote conditions in which a comprehensive nuclear test ban could be realized. In 1959 we joined our voice to the appeal of African countries to France not to carry out its announced intention of nuclear weapons testing in the Sahara. In 1961 we deplored the Soviet Union's breach of the moratorium observed since 1958 by three nuclear powers, a breach which led to the resumption of testing by the United States and the United Kingdom. In 1962 New Zealand voted along with an overwhelming majority of Governments to condemn all nuclear weapon tests and to demand their cessation. That record has continued to this day.

Indeed, it has already been noted that New Zealand has taken a lead for over 20 years in tabling an annual resolution at the United Nations General Assembly, which was adopted by consensus in the last two years, calling for a comprehensive nuclear test ban treaty to be negotiated. The negotiations on a comprehensive nuclear test ban treaty under way in the Conference on Disarmament have been very much welcomed by New Zealand. The potential impact of resumed nuclear testing in the South Pacific on the progress towards that ban has of

course heightened alarm over the French decision. There is considerable concern that renewed French nuclear testing may jeopardize these negotiations.

Mr. President, New Zealand's opposition to nuclear testing, and nuclear weapons, has been strongly shared by other countries of the South Pacific. I referred to this two months ago when I appeared before this honourable Court.

The region's 15 leaders, speaking through the South Pacific Forum, and bilaterally, have consistently opposed nuclear testing in the South Pacific, and the region's use for nuclear purposes generally. This stance has been expressed in a great number of resolutions adopted in the Forum's annual meetings. Forum communiqués and resolutions over the years show strong political and environmental opposition to nuclear testing in the South Pacific region.

This opposition, and the fears that go with it, are solidly grounded. Traditionally, this region has been vitally dependent on the marine environment for sustenance and survival. Many Pacific peoples live on small islands and atolls where land resources are very, very limited. This has led to a strong dependence on the oceans. This region cannot afford to have this environment damaged.

The region's strong opposition to nuclear testing was reflected in the application by four Pacific Island States, and Australia, to intervene in the recent proceedings which New Zealand brought before this Court. Needless to say, this support was very much welcomed by New Zealand. And New Zealand also very much welcomes the participation of other States from our South Pacific region in these present proceedings.

But the strong international opposition to nuclear testing is not of course confined to the South Pacific region alone.

Mr. President, I have already referred to the obligation on nuclear-weapon States under Article VI of the Nuclear Non-Proliferation Treaty and to the decision of the parties to the treaty in May 1995 to extend it indefinitely. That decision would not have been secured without agreement between the nuclear-weapon and non-nuclear-weapon States that a Comprehensive Nuclear-Test-Ban Treaty be concluded in 1996 and that the nuclear-weapon States exercise

"utmost restraint" in the meantime.

Already, non-nuclear-weapon States parties to the treaty feel a real sense of betrayal. Within a month of the compact being reached, China had conducted a nuclear test and France had announced its intention to terminate its three-year-long moratorium on nuclear testing by recommencing nuclear tests in the South Pacific. Since then, it has conducted three nuclear explosions in the region, the third less than two weeks ago. New Zealand, and many other countries, have expressed strong opposition to the actions by France in resuming nuclear testing in our region. The two nuclear testing States have provided no justification that could support a new recourse to nuclear explosions. Their actions are contrary to favourable developments in the international security environment in recent years. They appear determined to proceed with further tests regardless of the representations of other States or the damage that their actions are causing to the nuclear non-proliferation régime. Such actions undermine the integrity and the credibility of that régime, and they amount to an anachronistic and retrograde step.

French nuclear testing is, moreover, contrary to international law. I need hardly remind the Court of the views that New Zealand put to it very recently that French nuclear tests are contrary to the binding obligations on France under Article 16 of the 1986 Noumea Convention for the Protection of the Natural Resources and Environment of the South Pacific Region. France is obliged under that provision to conduct a prior Environmental Impact Assessment of the potential effects of major projects which might affect the marine environment so that appropriate measures can be taken to prevent any substantial pollution of, or significant and harmful changes within, the Convention Area. At the biennial meeting of the parties to this Convention, held in Apia in Western Samoa only last month, all the South Pacific Forum member countries present at the meeting supported a Declaration to that effect.

In paragraph 64 of its Order of 22 September 1995, the Court said that its present Order

> "is without prejudice to the obligations of States to respect and protect the natural environment, obligations to which both New Zealand and France have in the present instance reaffirmed their commitment".

In his dissenting opinion in that case, Judge Koroma commented that:

> "Under contemporary international law, there is probably a duty not to cause gross or serious damage which can reasonably be avoided, together with a duty not to permit the escape of dangerous substances ... Given this trend, it can be argued that nuclear testing as such is not only prohibited, but would be considered illegal if it would cause radioactive fallout."

Judge Weeramantry, in his dissenting opinion, said that the case raised, "as no case ever before the Court has done, the principle of intergenerational equity - an important and rapidly developing principle of contemporary environmental law". He went on to refer to the evidentiary difficulty in cases of possible environmental damage and noted that:

> "The law cannot function in protection of the environment unless a legal principle is evolved to meet this evidentiary difficulty, and environmental law has responded with what has come to be described as the precautionary principle - a principle which is gaining increasing support as part of the international law of the environment."

Mr. President, it is submitted that these are matters of very great importance to the countries of the South Pacific, given the reliance of small island States on their marine environment for their livelihood, and the damage that underground nuclear testing has been doing to the tiny atolls of Mururoa and Fangataufa. Countries of our region share a justified fear of further radioactive contamination from French nuclear testing.

That the tests are contrary to the wishes of the whole region also finds legal expression in the Treaty of Rarotonga of 1985 establishing the South Pacific Nuclear Free Zone. The South Pacific region, in its various institutions, operates on the basis of consensus, and co-operation is marked by the principle of good neighbourliness. As New Zealand said in this Court two months ago:

> "[In] Europe, ... France has accepted quite onerous obligations to carry out Environmental Impact Assessments by way of several regional treaties. ... [If] France were to conduct its nuclear testing in its European territory, would it first carry out an Environmental Impact Assessment? The answer must, of course, be 'yes'. It is inconceivable that France would test in Europe without first carrying out an EIA. One wonders ... why France is not prepared to accept the same obligations to its Pacific neighbours as it does to its European neighbours."

International law is founded to an important extent on the principle of the sovereign equality of States, as it is on the principle of good faith. Both principles were declared to be "basic principles of international law" by the United Nations General Assembly in 1970, on its 25th

Anniversary when it adopted unanimously the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the United Nations Charter. In respect of the principle of sovereign equality of States, the Declaration provides that "Each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States." In its Judgment in the *Military and Paramilitary Activities* case, this Court placed weight on the Declaration as evidence of the *opinio juris* supporting the existence of customary international law. By not complying with its international obligations in the case of nuclear testing, not least under the Noumea Convention, France is acting in bad faith and contrary to fundamental principles of international law as to the solemn and binding nature of treaty commitments. The Court would be making a major contribution to the nuclear non-proliferation régime, and to international security generally, were it now to find that any testing of nuclear weapons should be regarded as no longer permissible under international law.

Mr. President, the Nuclear Non-Proliferation Treaty is the most significant of the Arms Control treaties. Twenty-five years ago, when it entered into force, people thought that the abolition of nuclear weapons was about to begin, in much the same way as they anticipated the elimination of biological weapons upon the entry into force of the Biological Weapons Convention in 1975 and the same way that they look forward to the elimination of chemical weapons once the Chemical Weapons Convention of 1993 enters into force.

It is significant to note that the two latter treaties do not countenance any use of the weapons concerned, even those that may be judged to be proportionate or in self-defence. The intentions were clear; these weapons are different - they are weapons of mass destruction - and are to be outlawed in their entirety. The intentions of the Nuclear Non-Proliferation Treaty were no different. If those intentions had been met, there would have been no need to have negotiated a variety of other treaties to prohibit the possession, testing, deployment, threat or use of nuclear weapons in various respects. Those treaties, which also reflect the disappointment of non-nuclear-weapon States at the failure of the Nuclear Non-Proliferation Treaty to deliver the

elimination of nuclear weapons, and the fact that the nuclear-weapon States continue to maintain nuclear weapon stockpiles, do not in any way change the nature and force of the commitment on the nuclear-weapon States to fully implement the objectives of the treaty contained in Article VI. That commitment has even greater force now that the parties have decided to make the treaty permanent.

The security interests of all States are engaged in the regulation of weapons of mass destruction. All live in the nuclear shadow. It is not therefore open to the nuclear-weapon States to argue that the obligations on them in the case of nuclear weapons, whether under treaty law or customary international law, are different from or less than other States on the ground that their interests, as the possessors of nuclear weapons, are most directly affected. None of the nuclear-weapon States have expressed any wish to see nuclear weapons spread to other States, but that would be the logical corollary of any such arguments on their part.

Mr. President, the large body of international law to which we have referred at some length demonstrates the extent of regulation that already exists in respect of nuclear weapons and the prohibitions of various kinds on their threat or use. There is a large amount of State practice in the area of nuclear disarmament and arms control; there are relevant prohibitions in the law on resort to force; there is all of the applicable international humanitarian law; and there are the still emerging areas of international law such as the protection of the environment. Much of this law is undergoing continuing development, and the pressure continues to mount, for a world without nuclear weapons.

Mr. President, the Nuclear Non-Proliferation Treaty, together with the range and weight of other international law that bears on this issue, leaves only one possible answer to the requests that have been put to the Court. There is only the one answer that the Court can give if it is to decide the matter in accordance with law, and not undermine it. It is clear to New Zealand that the international community has come more and more strongly to the view that no realistic scenario or case can any longer be mounted to support the proposition that the threat or use of nuclear weapons under any circumstance - and their testing - would be in conformity with

international law. Rather, the international community expects that nuclear weapons will now be eliminated. In short, New Zealand believes that the threat or use of nuclear weapons should be illegal. The Court should, in our view, reach a decision to that effect.

Such a declaration of illegality would serve as a powerful further step to the elimination of nuclear weapons. There are huge numbers of these weapons. We cannot wish them away. Only the countries that have them can get rid of them. We recognize that this may take time. Agreements will be required on associated steps, first the completion of the Comprehensive Nuclear Test Ban Treaty and then a ban on the production of uranium and plutonium for nuclear weapons. The Court needs to play its part in helping to set the scene for that to happen.

Mr. President, over 250 years ago, a famous French philosopher, Charles Louis de Montesquieu, wrote with considerable prescience in "*Les Lettres persanes*":

> "Ever since the invention of gunpowder ... I continually tremble lest men should, in the end, uncover some secret which would provide a short way of abolishing mankind, of annihilating peoples and nations in their entirety."

Montesquieu's personal fear came true and several generations have come to share it, not as a possibility, but as a reality.

Mr. President, Members of the Court, all States must energetically pursue their common commitment to abolish these weapons, and this High Tribunal has an important role to play in this process. The potential consequences of failure, for all humanity, are too great to contemplate.

May it please Your Honours, those conclude the New Zealand submissions to this Honourable Court.

The PRESIDENT: Thank you Your Excellency, these last statements brings to an end the oral arguments of New Zealand. The Court will now have a break of fifteen minutes.

The Court adjourned from 11.40 a.m. to 11.55 a.m.

The PRESIDENT: Please be seated. The Court resumes its hearings and I give the floor to His Excellency Ambassador Rodolfo Sanchez.

H.E. Mr. Rodolfo SANCHEZ: Mr. President and Members of the Court, the Philippines has opted to appear before this Honourable body today on an issue which is of grave and historic significance out of a sense of duty as a concerned, peace-loving member of the family of nations.

The presentation by the Philippines will be given in two parts, the first part by myself and the second part by Mr. Merlin Magallona, Dean and Professor of International Law at the University of the Philippines. We will focus on the request made by the General Assembly. However, our arguments addressing the General Assembly request also comprehend the request made by the World Health Organization.

Mr. President and Members of the Court, with the Court's permission, I will refer mainly to certain truths and considerations that bear on the issue before this Honourable Court. I will also briefly outline the presentation to be given by Professor Magallona.

Much has been said about nuclear weapons and deterrence. We in the Philippines know very well the concept of deterrence. Like many other nations, we were once ourselves in the grip of this policy. For decades we housed foreign military bases, installations which were part of a global nuclear weapons structure created in the name of deterrence.

In 1987, aware of the dangers posed by nuclear weapons and mindful of the growing global opposition to these instruments of destruction, the Filipino people enshrined in their Constitution a provision that declares a policy of freedom from nuclear weapons.

Today these foreign bases no longer exist in our land. Today we no longer allow vessels that carry weapons of mass destruction to enter Philippine territory. Today the Philippines is working closely with its neighbours in crafting an agreement to establish a nuclear-weapon-free zone in Southeast Asia.

We are heartened and inspired by the actions of peoples and States in different parts of the world that seek to create nuclear-weapon-free zones. Now more than ever, it is not difficult to imagine a world free from these perfidious weapons. But determined as the vast majority of States are to rid the world of nuclear armaments, there are those who will go to great lengths to defend them. Their arrogant, insensitive disregard for the rest of the world is clearly seen in their

insistence to continue testing and refining these weapons.

The Philippines believes that true, just, lasting and meaningful peace cannot be achieved unless all weapons of mass destruction are eliminated. Their very existence, and ready availability for use, constitute a serious threat to humanity. States should and can redefine the way they deal with the world and each other without the need to maintain arsenals of mass destruction and death.

Today's new world brings new challenges before us. It also presents us with the unique opportunity to reinvent the dynamics of inter-State relations. If we so choose, we can base inter-State relations not on the vagaries of threats and confrontation but on the firm framework of norms of international law.

Mr. President and Members of the Court, with these considerations in mind, Professor Magallona will elaborate on the legal basis for our assertion that the threat or use of nuclear weapons under any circumstance is illegal under international law.

He will present a close analysis of the question before the Honourable Court and the context in which it is made. He will then discuss the current international law framework on which the rights, duties and limitations of State relations are based, particularly the rules on the threat or use of force, and how these relate to the legal issue before this Honourable Court.

On this issue, I would like to express our position that the norms in the United Nations Charter which admit of the use of force, do so with the strict restriction that levels and methods of force illegal under international law cannot be resorted to under these norms. The Philippines associates itself with previous presentations that elaborate on this point.

On the aspect of humanitarian law, it is a matter of known fact that the creation of this monstrous new weapon has given man a new, gruesome way of killing. For, in addition to blast and heat, this nuclear device emits lethal radiation which ends life by assailing every cell in the human body. As if this were not enough, the development of the new armament has come to an obscene height with the invention of the neutron bomb - an insidious weapon the bizarre purpose of which is to destroy life without destroying buildings. It is this particular, certainly odious and

frightening attribute of the nuclear weapon that places it under the classification of weapons prohibited under customary international law.

The Philippines believes that the laws that govern the destructive tendencies of man are certainly clearly established by custom and by treaties. Should man find a device equally treacherous and destructive or more so than nuclear weapons, such a new weapon would automatically fall within the ambit of prohibitions under existing international customary law and its threat or use would be summarily prohibited.

Mr. President and Members of the Court, we make our presentation, mindful of the fact that many of those who have gone before us have made clear and convincing presentation of arguments and authorities that coincide with those of our own. We associate ourselves with these formulations, specifically those which prove the existence of laws of humanity, the conduct of hostilities and the protection of the environment in relation to the illegality of nuclear weapons.

While the Philippines is ready to elaborate on the effects of nuclear weapons, we believe that the innumerable studies which document these effects and the graphic, eloquent and moving testimonies of other delegations that have been presented before this Court make further exposition on this point unnecessary.

The Philippines sadly notes that nuclear weapons were conceived and created because, with the corruption of the atom, perverse value was given to the weapon's capacity to end life and destroy the planet we live on.

It is precisely on the premise of this vast destructive force that the dubious doctrine of deterrence is based.

Many justifications have been presented and many more will be presented before the Court to declare the legality of the threat or use of nuclear weapons. The determination shown by those seduced by the power that this weapon represents has spared no effort on this behalf.

We should perhaps not be too surprised if Article 107 of the United Nations Charter, the infamous "enemy State" clause, would be invoked, for even in 1945 the intent was to legitimize the use of the atomic bomb under the pretext of ending World War II.

We see in these efforts attempts to colour with legality a strange fascination with these instruments of mass destruction.

Mr. President and Members of the Court, may I now call on Professor Merlin Magallona to continue with our presentation.

The PRESIDENT: Thank you Your Excellency, I give the floor to Professor Magallona.

Mr. MAGALLONA: Mr. President, Members of the Court. Once again, the issue of nuclear weapons comes to this Court, under the shadow of Hiroshima and Nagasaki, together with all knowledge within the ken of human experience that nuclear weapons consign the survival of the human specie and civilization to a precarious balance.

This was the totalizing crisis that engaged humankind in the era of the Cold War. The fragile mechanism of the rule of law became contingent on the mutual terror of nuclear deterrence, as soon as the world emerged from the scourge of war which, as the Charter of the United Nations reminds us, "twice in our lifetime has brought untold sorrow to mankind".

Now, the horrors and atrocities of the last global war are 50 years behind us. The Cold War, even as we live by its remnants, is over. If the international community as a whole is to demarcate a new world order it must confront the moral urgencies of our times as dictated by nuclear weapons.

It is in this light, Mr. President and Members of the Court, that highest judicial organ of the international community becomes a decisive force in resolving a central legal and moral dilemma of our troubled times. In the Decade of International Law, as proclaimed by the United Nations, it is most vital to clarify a crucial and historic issue. Will the international community continue to live under the régime of nuclear terror, or take a decisive step to enthrone the rule of law over nuclear warfare? As humanity moves into a new century, will it have the prospect of stability and order under international law, or will it continue to be bedeviled by the uncertainties of nuclear deterrence?

The primary question before this Court is as stated in the United Nations General

Assembly resolution 49/75 K of 15 December 1994 in which the General Assembly requests an advisory opinion from the Court on the following legal issue:

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

As formulated, the issue concerns not "nuclear weapons *per se*" or "nuclear weapons as such", but the *threat or use* of nuclear weapons. I submit that the words "in any circumstance" in the statement of this legal issue qualify the phrase, "threat or use of nuclear weapons". Thus, the question is focused on the threat or use in any modality or under any conditions of nuclear weapons. The sense of the issue therefore deals with the threat or use of nuclear weapons without regard to the category or physical properties of nuclear weapons involved, the means of delivery employed for this purpose, or regardless of the kind or scale of armed conflict in which nuclear weapons are used.

This brings me now to the main burden of this presentation:

First, restrictions on the general rule of the prohibition of the threat or use of nuclear weapons cannot be presumed, and upon failure to meet the burden of proving the existence of such a restriction, the general international law on the non-use of force necessarily applies; and

Second, that the threat or use of nuclear weapons is the gravest modality or form of threat or use of force contrary to the general international law on the non-use of force.

Therefore to the question put to the Court, our response is that the threat or use of nuclear weapons in any circumstance is impermissible under international law.

This Court is presented with an ironic spectacle. The nuclear powers insist that nuclear weapons belong to the general rule of sovereign freedom and that they have the right to use them if the international community fails to show a clear legal restriction. Under this formula, nuclear weapons determine the general rule and the principle of peace and security becomes an exception.

The proponents of this formula are being haunted by the ghost of the original *Lotus* presumption. They seek to charge the international community as a whole with the burden to prove that the threat or use of nuclear weapons should be shown to be covered by a specific prohibitory rule, otherwise the nuclear powers are left free in their discretion to use nuclear

weapons or not.

The Government of the Republic of the Philippines submits that by "the very nature and existing conditions of international law" today, the manner of presenting this legal issue should be reversed. The question of nuclear weapons involves the burden on the part of the nuclear powers to prove that there exists some permissive rule of international law in their favour. Upon failure to so specify, the threat or use of nuclear weapons remains prohibited under the general peremptory norm on the non-use of force embodied in the Charter of the United Nations.

About seven decades ago, the Permanent Court of International Justice declared in the *Lotus* case as follows:

> "International law governs the relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed."[3]

In principle, there is a presumption here in favour of State sovereignty and in the case of nuclear weapons this may be taken to imply the presumption that States have the right to use them as an expression of sovereignty. If the logic of the original *Lotus* presumption is pursued further, a prohibitory rule against the use of nuclear weapons becomes a derogation of State sovereignty, and the burden of proof to establish that restriction lies with States which consider the threat or use of nuclear weapons contrary to international law.

Indeed, it was most appropriate for the Permanent Court of International Justice to qualify that "This way of stating the question is ... dictated by the very nature and existing conditions of international law"[4] obtaining at the time. Since the *Lotus* case, the nature and structure of international law as well as of the international community as a whole have undergone fundamental changes.

In the light of these fundamental changes, we submit that in one particular area of

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[3] *1927, P.C.I.J., Series A, No. 10,* p. 18.

[4] *Ibid.*

international legal order, namely, the threat or use of force by States, the "independence of States" cannot any more be presumed and has ceased to be the measure of determining legality.

Mr. President, Members of the Court, the prohibition on the use of force constitutes general international law of *jus cogens* character. It embraces within its normative force all forms and gravity of the threat or use of armed force by States in international relations, including most specially the use of force through weapons of mass annihilation such as nuclear weapons. The States have abdicated their independence with respect to the use of force and have expressed their collective sovereign will in the prohibition defined in Article 2, paragraph 4, of the United Nations Charter. Thus, it is correct for Professor Dinstein to conclude that "the liberty to venture into war, and generally to employ inter-State force is obsolete"[5].

In contemporary international law, restrictions on the prohibition of the threat or use of force by States cannot be presumed. Those who seek an exception to the prohibition against the threat or use of force have the burden of proving the existence of a permissive rule to the contrary. However, this will prove to be a difficult task, for the present conditions of international law do not provide room for individual States to establish at will such a permissive rule. Under the régime of the Charter, only two such restrictions are recognized, namely, in cases of self-defence and collective security.

How the "independence of States" has been replaced by the general prohibition on the use of force is clear from the historical development of international law, as follows:

(a) Early treatment of war considered it beyond the regulatory reach of the law.[6] Nussbaum described the outbreak of war as a "metajuristic phenomenon, an event outside the range and control of the law"[7]. The 1924 edition of Hall's treatise observed that "international law has ... no alternative but to accept war, independently of the justice of its origin, as a relation which the parties to it may set up if they choose, and to busy itself only in regulating the effects

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[5]Y. Dinstein, *War, Aggression and Self-Defense*, 1994, p.93.

[6]See J.L. Brierly, *The Outlook for International Law*, 1957, p. 455.

[7]A. Nussbaum, *A Just War - A Legal Concept*, 42 Mich. L.R. 453,477 (1943-94).

of the relations"[8].

(b) In classical international law, States could, to borrow the words of Briggs, "resort to war for a good reason, a bad reason or no reason at all"[9]. Hershey referred to war as "a right inherent in sovereignty itself"[10]. Logically, the curious state of affairs in the expression of sovereignty or "independence of States" was that each State was at liberty to destroy the sovereignty of other States.

In this context, restrictions to the sovereign right or "independence of States" to resort to war or to the use of force had to be clearly established as exceptions to such general freedom of States. An example was the Locarno Treaty of Mutual Guarantee in 1925, in which Germany, France, and Belgium agreed not to "resort to war against each other"[11].

(c) Over time, the development of law in regard to resort to war or use of force consisted in the expansion of *exceptions* to the general freedom to go to war. Under the Covenant of the League of Nations, for example, Members were restricted under Article 12 "in no case to resort to war until three months after the award by the arbitrators or the judicial decision, or the report of the Council", and under Article 15(6) if the Council's report on a dispute was carried unanimously, Members agreed "not to go to war with any party to the dispute which complies with the recommendations of the report".

(d) Sovereignty or "independence of States" as to resort to war was radically limited by the General Treaty for Renunciation of War as an Instrument of National Policy of the Kellogg-Briand Pact of 1928[12]. The General Treaty took a giant step away from the régime of war as a sovereign prerogative by renouncing it "as an instrument of national policy" in the relations of contracting States. This renunciation of war "for the solution of international

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[8]W. E. Hall, *A Treatise on International Law*, 1924, p. 82.

[9]H. W. Briggs, *The Law of Nation*, 1952, p. 976.

[10]A. S. Hershey, *The Essentials of International Public Law*, 1912, p. 349.

[11]League of Nations, *Treaty Series*, 1925, Vol. 54, pp. 289, 293; see Article 2.

[12]League of Nations, *Treaty Series*, Vol. 94, p. 57.

controversies" was reinforced by the provision for the settlement of all disputes only by peaceful means.

However, the Kellogg-Briand Pact left a major gap as it did not deal with the use of force short of war, plus its failure to enlist the entire international community for the prohibition of war.

(e) Finally, the highest point in the progress of subjecting the use of force to the rule of law was achieved when the Charter of the United Nations came into being. Article 2, paragraph 4, of the Charter declares:

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

Its comprehensive coverage overcomes the deficiencies of the Kellogg-Briand Pact. It proscribes not only war but also all forcible measures short of war. Its prohibition goes beyond the actual use of force and covers threats of force. Article 2, paragraph 4, effectuates the abolition of threat or use of force in the entire international relations of all UN Member States. An expansive interpretation of its coverage is justified by its residual clause which contemplates the interdiction of other threat or use of force "in any other manner inconsistent with the Purposes of the United Nations".

While exceptions to the prohibition are admitted, the Charter limits these exceptions to only two, namely: the use of force by authority of the Security Council under Articles 42 and 53 of the Charter and self-defence under Article 51. Member States have no legal competence to add any other restriction or limitation to the application of the prohibition as thus defined by the Charter.

This brief survey should serve the purpose of showing:

First, that the development of international law on the use of force is characterized by the replacement of the "independence of States" in resorting to war or use of force by the general and comprehensive prohibition;

Second, that the general prohibition on the use of force, as defined by the Charter, must be presumed to prevail upon failure to prove the existence of exception or restriction to the general

international law prohibiting the use of force; and

Third, that since the threat or use of nuclear weapons are specially subsumed in the general prohibition of Article 2, paragraph 4, of the Charter, there is no room for the argument that the use of nuclear weapons are still left to the sovereign freedom or independence of States.

On the nature of nuclear weapons as radically differentiated from conventional weapons, we share the view of Professor Burns H. Weston. He clarifies as follows:

> "...[N]uclear weapons differ from conventional weapons in at least three very critical respects. First, and most obvious, is the fact that most nuclear weapons, certainly all in the 'strategic' category, are not just 'somewhat more destructive', but many thousands or millions of times more powerful than even the largest conventional high-explosive weapons. One average nuclear weapon by today's standards ... represents about seventy or eighty times the intensity and scale of devastation wrought at Hiroshima and Nagasaki ... Unlike conventional weapons, nuclear weapons risk putting an end to civilization as we know it. Secondly, the majority of nuclear weapons, 'tactical' as well as 'strategic', differ from conventional weapons in the variety as well as the intensity and scale of their physical effects ... Finally, in still further contrast to conventional weapons, ... nuclear weapons are capable of harming noncombatants (including civilians and neutral parties)..."[13]

To elaborate on the horrendous consequences of the use of nuclear weapons is needless, even from the viewpoint of public consciousness as dramatized in the current worldwide protest against the French nuclear tests in the South Pacific.

The point to be emphasized here is that within the coverage of the peremptory norm of international law on the use of force under Article 2, paragraph 4, of the Charter, the threat or use of nuclear weapons constitutes a special category of acts of State which are the object of interdiction by this norm. Owing to their qualitatively peculiar nature as weapons of mass destruction, nuclear weapons in use occupy a position *sui generis* among the categories of acts

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[13]B.H. Weston, "Nuclear Weapons Versus International Law", 28 McGill 542 (1983).

embraced by the prohibition of Article 2(4).

In its most recent application of Article 2, paragraph 4, of the Charter, the Court in the *Nicaragua* case declares that:

> "it will be necessary to distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave forms"[14].

Mr. President, Members of the Court, we submit that under the present state of modern warfare or the technology of force, the threat or use of nuclear weapons is the gravest form of the use of force prohibited by Article 2 (4) of the Charter. On this account, the threat or use of nuclear weapons is most specially governed by the following normative characteristics of the prohibition under Article 2 (4):

(a) The fundamental principle in Article 2 (4) binds not only the Member States of the United Nations. As customary norm of international law, the obligation not to use force in international relations applies to all States. In the *Nicaragua* case, the Court points out:

> "A further confirmation of the validity as customary international law of the principle of prohibition of the use of force expressed in Article 2, paragraph 4 of the Charter of the United Nations may be found in the fact that it is frequently referred to in statements by State representatives as being not only a principle of customary international law but also as a fundamental or cardinal principle of such law."[15]

(b) As recognized by the International Law Commission and, impliedly, by this Court in the *Nicaragua* case[16], "the law of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*"[17].

Subsuming the prohibition against the use of nuclear weapons, Article 2 (4) exhibits three features as a *jus cogens* norm, namely:

(i) it is a general international law;

(ii) it is accepted and recognized as a peremptory norm by the international community of States as a whole; and

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[14]Case concerning *Military and Paramilitary Activities in and against Nicaragua, I.C.J. Reports 1986*, p. 101.

[15]*Ibid.*, p. 100.

[16]*ILC Yearbook* 1966, Part II, p. 247.

[17] *Ibid.*, pp. 100-101.

(iii) it does not permit of derogation.

Taking the rules on *jus cogens* in the law of treaties as a customary norm and as a fundamental principle of the international *ordre publique*, treaties containing a permissive rule for the threat or use of nuclear weapons will through appropriate proceedings be adversely affected as null and void or voidable by the operation of Article 2 (4).

(c) In correlation with the character of Article 2 (4) as *jus cogens* norm, the prohibitory rule against the use of nuclear weapons that it subsumes creates an *erga omnes* obligation, which according to the Court in the *Barcelona Traction* case[18] is an obligation which every State owes to the international community as a whole. Use of nuclear weapons properly belongs to the category of acts covered by Article 2 (4), which are, to borrow the words of the former President of this Court, T.O. Elias,

> "so injurious and so grave that if committed by one State against another State that such acts must *ipso facto* involve the offending State in international responsibility to all States"[19].

(d) The obligation defined by the principle embodied in Article 2 (4) assumes a superior status under Article 103 of the Charter which ordains thus:

> "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

In consequence, the obligation defined by Article 2 (4) subsuming the use of nuclear weapons as the gravest form of the prohibited acts, shall prevail over obligations in other agreements which purport to provide a permissive conduct for the use of nuclear weapons.

(e) The principle embodied in Article 2 (4) applies not in isolation but in confluence with the other fundamental principles of the Charter. In particular, the duty under Article 2 (3) is most significant. It provides:

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

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[18] *I.C.J. Reports 1970*, p. 32.

[19] T.O. Elias, *The Modern Law of Treaties*, 1974, p. 135.

By no stretch of the imagination can the obligation under Article 2 (3) be compatible with any permissible rule for the use of nuclear weapons, and the clear implication of Article 103 of the Charter must be affirmed to set aside any obligation in derogation of Article 2 (3).

It is hereby submitted that the threat or use of nuclear weapons is incompatible with the fundamental obligations assumed by the nuclear-weapon States under the Charter. How can a nuclear-weapon Member State claim that it is *performing in good faith* its obligations to refrain from the use of force, to settle disputes by peaceful means, and to establish friendly relations while it is engaged in the threat or use of nuclear weapons? In this sense, nuclear-weapon States have placed themselves in a legally impossible situation in observing the cardinal principle of *pacta sunt servanda*.

The duty defined under Article 2 (3) reinforces the imperative and comprehensive character of the principle of non-use of force, in that a breach of the Article 2 (3) obligation becomes integral to the duty defined by Article 2 (4) under its residual clause "in any other manner inconsistent with the purposes of the United Nations". It is in this same context that we should locate the obligation of all United Nations Member States, "to develop friendly relations among nations ... and to take other appropriate measures to strengthen universal peace".[20]

Hence, the three fundamental obligations defined by the Charter, namely, the duty to refrain from the threat or use of force, the duty to settle disputes by peaceful means, and the duty to establish friendly relations, all converge to preclude the use of nuclear weapons as this is subsumed in the general prohibition against the use of force.

The universal *jus cogens* norm of *pacta sunt servanda* specially applies to the obligations under the Charter, Article 2 (2) of which mandates that:

> "All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter."

In the light of these considerations, it becomes logical for the United Nations General Assembly to declare, as it has declared, that the use of nuclear weapons would be a violation of

[20]United Nations Charter, Art. 1 (2).

the Charter in resolution 1653 (XVI) of 24 November 1961, resolution 33/71 B of 14 December 1978, resolution 34/83 G of 11 December 1979, resolution 35/152 D of 12 December 1980, resolution 36/92 I of 9 December 1981, resolution 45/59 B of 4 December 1990, and resolution 46/37 D of 6 December 1991. These resolutions deserve juridical treatment as interpretations of the Charter.

The qualitatively new conception of the use of force in international relations as embodied in the Charter strikes a radical departure from classical international law in one other respect. The Charter puts an end to unilateral use of force as expression of State sovereignty and establishes in the United Nations a monopoly in the use of armed force. This revolutionary concept for a new world order born out of the scourge of war is articulated in the Preamble of the Charter as a fundamental objective of the United Nations Organization, namely:

> "to unite our strength to maintain international peace and security, and to ensure, by the acceptance of principles and the institutions of methods, that armed force shall not be used, save in the common interest ...".

Thus, as a constituent instrument of the international community organized into the United Nations, the Charter establishes a direct correlation between international peace and security and the necessity that "armed force shall not be used, save in the common interest". From this correlation two implications can be clearly drawn, namely:

first, the prohibition of the threat or use of force by individual States in their international relations; and

second, the imperative for general and complete disarmament.

It becomes therefore logical for the United Nations "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among states in accordance with the Charter of the United Nations" - a United Nations General Assembly resolution which, in the *Nicaragua* case, the Court considers as embodying customary norms of international law - to define the necessity for disarmament as a component principle of the prohibition against the use of force. The Declaration provides:

> "All States shall pursue in good faith negotiations for the early conclusion of a universal treaty on general and complete disarmament under effective international control and strive to adopt appropriate measures to reduce international tensions and

strengthen confidence among States."

Mr. President, Members of the Court, against this background it would be misplaced to argue, as some States have before this Court, that if the Court were to render an advisory opinion on the request of the General Assembly and of the World Health Organization, it would be interfering with the sovereign prerogative of States and the Court might thus jeopardize "the complex and sensitive process of negotiating nuclear disarmament".

This argument has no place in the law of the United Nations in which all States have the duty to pursue in good faith negotiations for a general and complete disarmament. This duty is not left to arbitrary exercise of sovereign prerogative of States. It is an obligation which each State owes to the international community as a whole, based as it is on the constitutional foundation of the United Nations.

From this perspective, the relevant function of the Court is clarified. Far from interfering with the sovereign prerogative of States, the Court will find its most vital and critical role in strengthening the collective will of States towards complete disarmament, in general, and nuclear disarmament, in particular, in ruling that the threat or use of nuclear weapons is contrary to international law.

Mr. President, Members of the Court, having made its presentation, the Government of the Republic of the Philippines wishes to end by joining the President of the Court in his hope, as expressed in his recent publication, that

> "...[W]here questions arise which are deemed important on account of their repercussions for peace, that very importance will not be seized upon as a reason for forgetting that what it calls for is not so much a release from the bondage of rules as a firmer anchorage in law"[21].

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

The PRESIDENT: Thank you Professor Merlin Magallona for your statement. This statement brings to an end the oral arguments of the Philippines. The Court will resume its hearings tomorrow, Friday morning, at 10 a.m. The meeting is adjourned.

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[21]M. Bedjaoui, *The New World Order and the Security Council: Testing the Legality of its Acts*, 1994, pp. 127-130.

The Court rose at 12.40 p.m.

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