1. Question Asked By Judge Koroma on 1 November 1995.

Part 1 of Question: Was resolution WHA 46.40 validly adopted?

Response:

Yes. Under Article 96 (2) of the United Nations Charter, specialized agencies may request advisory opinions if authorized to do so by the General Assembly. Such authorization is contained in Article X.2 of the Agreement between the United Nations and WHO.

Resolution WHA 46.40 was adopted in accordance with Article 76 of the Constitution of WHO and Rules 50 to 70 ("Conduct of Business at Plenary Meetings") and 71 to 84 ("Voting in Plenary Meetings") of the Rules of Procedure of the World Health Assembly (WHA). Rule 73 provides that "except as stipulated otherwise in these Rules" - a condition not applicable to the Resolution in question - "decisions ... shall be made by a majority of the Members present and voting."

It may be useful to review briefly the history of the adoption of WHA 46.40. It was introduced in Committee B of the 46th World Health Assembly (May 1993) under Item 33, "Health and Environmental Effects of Nuclear Weapons", and debated for three days. For the summary record of the proceedings, see WHA46/1993/-Rec/3.

There then ensued a series of procedural votes:-

Motion by Zambia that voting be by secret ballot: carried by 43 in favor, 36 against, 5 abstentions.

Motion by the United States that the draft resolution be determined not to be within the competence of WHO: defeated by 38 in favor, 62 against, 3 abstentions.

Motion by the United States to amend the draft resolution to thank the Secretary General for his report and remove the reference to seeking an advisory opinion: defeated by 33 in favor, 60 against and 5 abstentions.

Motion by the United States to call for a two-thirds majority on the ground that the resolution was an important question: defeated by 31 in favor, 61 against and 2 abstentions.

Motion on the draft resolution in Committee B: carried by 73 in favor, 31 against and 6 abstentions.

Upon referral of the draft resolution to the plenary, Zambia's motion for a secret ballot carried by 75 in favor, 33 against and 5 abstentions and the resolution itself was adopted by a vote of 73 in favor, 40 against and 10 abstentions.

In both the Committee and the plenary, Mr. Piel, WHO's legal counsel, advised the delegates that " it is ultimately for the World Health Assembly to decide on the range of its competence, including its competence to refer."

Part 2 of Question:

If so, is it now open to any state which was then a member of WHO to challenge the competence of WHO to request the Court to give an advisory opinion in terms of the question set out in the Resolution?

Response:

According to Article 75 of the WHO Constitution, Any question or dispute concerning interpretation or application of this Constitution which is not settled by negotiation or by the Health Assembly shall be referred to the International Court of Justice in conformity with the Statute of the Court, unless the parties concerned agree on another mode of settlement.

Article 75 does not state how such a question "shall be referred". There is, however, one precedent directly on point, i.e. Interpretation of Agreement of 25 March 1951 Between the WHO and Egypt, ICJ Reports 1980, p.67. In that case, differing views had been expressed as to the applicability of the negotiation and notice provisions of Section 37 of the Agreement to the removal of the WHO Regional Office from Alexandria. To resolve these differences, the WHA Assembly adopted a resolution referring the question to the International Court of Justice for an advisory opinion, which was rendered in due course.

In the instant case, it would have been open to the states opposed to WHA 46.40 to introduce a similar resolution, i.e. one requesting an advisory opinion as to whether WHA 46.40 was within the competence of WHO, but they did not do so. Not having done so, they should probably not be heard at this time to challenge either WHA 46.40 or the previous vote declaring the draft resolution to be within the competence of WHO, any more than they should be heard to challenge, or fail to comply with, any other Resolution validly adopted by WHA.

Addendum. It is not entirely clear from Part 1 of Judge Karoma's question whether it refers only to the procedural validity of the adoption of WHA 46.40, which is discussed above, or also to its substantive validity, i.e. to the competence of WHO. Against the possibility that the latter is the case, the attention of the Court is respectfully called to the Memorial of the Government of The Republic of Nauru II (Written Statements, September 1994) in support of the Application by the World Health Organization and its addendum.

2. **Question Asked By Judge Shi On 1 November 1995**

Question:

Resolution 49/75K adopted by the General Assembly on 15 December 1994, by which the General Assembly requests an Advisory Opinion of the Court on the Legality of the Threat or Use of Nuclear Weapons, states in its preambular paragraph:

"Welcoming resolution 46/40 of 14 May 1993 of the Assembly of the World Health Organization, in which the Organization requested the International Court of Justice to give an advisory opinion on whether the use of nuclear weapons by a state in war or other armed conflict would be a breach of its obligations under international law, including the constitution of the World Health Organization,"

My question is this:

"What, if any, are the legal implications of said preambular paragraph in relation to the competence of WHO to request an advisory opinion from the Court on the question put to the Court?"

Response:

Under Article 96(2) of the UN Charter, the General Assembly is the source of authority for advisory opinion requests put to the Court by specialized agencies. In the case of WHO, such blanket authority was conferred by Article X.2 of the Agreement between the United Nations and WHO.

Each requesting organization is, in principle, competent to determine its competence to request an advisory opinion and, in this case, the World Health Assembly adopted a separate resolution confirming its competence before acting on WHA 46.40. Nevertheless, by "welcoming" resolution WHA 46.40, the General Assembly, as the source of WHO's authority in advisory opinion matters, confirmed and lent weight to WHA's own determination of its competence.

3. Question Asked By Vice-President Scwebel on 2 November 1995

Question:

France maintains that it is "undeniable" that its policy of nuclear deterrence has contributed, for almost half a century, to the maintenance of stability and of world peace. If this be the fact, what establishes that fact?

Response:

It is as difficult to "establish" that deterrence has kept the peace - or, for that matter, has not kept the peace - as it is to prove that ghosts exist, or do not exist. The only provable fact is that, for almost half a century, the major nuclear powers have not been at war with each other. They have, however, been at war with other countries and within themselves. For instance The United Kingdom with Argentina; China with Vietnam; the United States with North Korea, China, Vietnam, Grenada, Panama and Iraq; the Soviet Union with Afghanistan; the Russian Federation in Chechnya and other parts of its territory; Israel (a known but undeclared nuclear power) with several of its neighbors.

Attachment A lists 150 transborder and civil wars during the period 1945 to 1992, resulting in over fourteen million civilian and nearly eight million military deaths[1]. This is hardly a record of peace and stability. Indeed, it has been said that nuclear weapons made the world safe for conventional wars.

In addition to the conventional wars which were actually fought, many of which involved surrogates of the nuclear super-powers and were accurately dubbed "proxy wars", there were several instances in which the world teetered on the brink of nuclear war. In the Appendix to his by now famous book "In Retrospect", Robert Mc Namara, former Defence Secretary of the United States, makes an eloquent and well documented case for the proposition that

> the experience of the Cuban Missile Crisis in 1962 - and, in particular, what has been learned about it recently - makes clear that so long as we and other Great Powers possess large inventories of nuclear weapons, we will face the risk of their use.[2]

This leads Mc Namara to the conclusion that, "insofar as achievable ..., we should move back to a non nuclear world."[3]

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1 Ruth Sivard, World Military and Social Expenditures 1993, p.21
2 Robert Mc Namara, In Retrospect, p.338
3 Id. - See Attachment B

The argument that nuclear deterrence provides stability is based on the assumption (1) that governments act rationally, (2) that no government would rationally make a decision that could trigger nuclear retaliation and (3) that nuclear war is unlikely to occur unless deliberately chosen. All three assumptions are erroneous:

(1) Governments, like individuals, can fall prey to psychological or ideological imperatives which may override considerations of the long term interests of their countries. The Japanese attack on Pearl Harbor, which was sure to bring the United States into war with Japan, is frequently cited as an example of such irrationality.

(2) In the words of the United States Joint Chiefs of Staff, one "cannot rule out the possibility that an opponent may be willing to risk destruction or disproportionate loss following a course of action based on a perceived necessity, whether rational or in a totally objective sense."[4]

(3) The possibility of an accidental nuclear launch due, for instance, to computer malfunction or misreading, or to confusion resulting from convoluted command and control systems, is all too real. A recent study of such systems in the United States concludes: "Provocative and risky deterrent practices, ranging from strategic targeting to launch-on-warning to pre-delegation were developed with little oversight."[5] An even more frightening analysis of the increasingly unstable Russian "hair trigger" system is contained in the testimony given last August to a U.S. Senate Committee by Bruce Blair of the Brookings Institution, a former air force officer and project director of the Office of Technology Assessment of the U.S. Congress (See Attachment C).

For these reasons, "nuclear deterrence contains no provision for its own resolution short of continued escalation, a preemptive first strike, or accidental war."[6]

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4 Chairman of the Joint Chiefs of Staff, Doctrine for Joint Nuclear Operations, US Department of the Army, 1993.

5 The Bulletin of the Atomic Scientists, November/December 1995, p.41

6 Kennedy, A Critique of United States Nuclear Deterrence Theory, 9 Brooklyn Journal of International Law 66 (1983).

Finally, it should be noted that the value of deterrence, whatever one's view of it, is irrelevant to the questions before the Court. If the threat and use of nuclear weapons are illegal per se, they cannot be legitimated by any theory of deterrence. Even were such legitimation possible, it could only be based on a scenario that would totally and unconditionally guarantee the non-use of nuclear weapons forever and a day. It hardly needs saying that such a scenario cannot seriously be advanced or defended in the world in which we live.

4. Questions Asked by Vice-President Schwebel on 3 November 1995.

Question:

"When, in paragraph 23 of the Written Statement of Mexico on the General Assembly's question, it is maintained, in interpretation of the Nuclear Non-Proliferation Treaty, that the Treaty treats the possession of nuclear weapons as "temporary", is that term to be understood to mean that nuclear weapons may be retained in the arsenals of the five nuclear Power until the achievement of general and complete disarmament under effective international control?"

Response:

No, the term "temporary" is to be understood to mean that as a fact nuclear weapons will exist in the arsenals of the five declared nuclear weapon States until those weapons are eliminated pursuant to the obligation to negotiate "nuclear disarmament" set forth in Article VI of the NPT. This obligation applies whether or not a treaty on general and complete disarmament has been achieved pursuant to the obligation to negotiate such a treaty set forth in the second clause of Article VI. This is evident from the language of Article VI, which provides:

> 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.

The first clause requires negotiations of effective measures to cease the arms race, that is to halt nuclear weapons development, for example by a comprehensive test ban, and also to achieve nuclear disarmament, that is the elimination of nuclear weapons. The second clause, separated from the first by a comma, and prefaced in English with a second "on", requires negotiation of treaty on general and complete disarmament. Thus there is 1) an obligation to negotiate in good faith effective measures relating to cessation of the nuclear arms race and nuclear disarmament, and 2) an obligation to negotiate in good faith a treaty on general and complete disarmament. The obligation to negotiate nuclear disarmament and the obligation to negotiate general disarmament are clearly distinct.

This interpretation was stated by the United States upon its submission together with the Soviet Union of the draft of Article VI which eventually, with a minor amendment, was adopted. On January 18, 1986, the U.S. representative, Adrian S. Fisher, explained that Article VI constituted a "solemn affirmation of the responsibility of nuclear-weapon states to strive for effective measures regarding cessation of the nuclear arms race and disarmament." Mr. Fisher then stated, and this is the critical language: "Moreover, the article does not make the negotiation of these measures conditional upon their inclusion within the framework of a treaty on general and complete disarmament." ENDC/PV.357, reprinted in U.S. Arms Control and Disarmament Agency, Documents, 1968, at 14-15.

As George Bunn, one of the principal U.S. negotiators of the NPT, has explained, the practice of the parties subsequent to conclusion of the NPT confirms the foregoing interpretation. See George Bunn, Extending the Non-Proliferation Treaty: Legal Questions Faced by the Parties in 1995, American Society of International Law, Issue Papers on World Conferences No.2, 1994, pp.19-26 (see Attachment 1 for pertinent pages). The NPT was signed on July 1, 1968. Later that summer, the Soviet Union, United States and other countries present at the Geneva Conference gave meaning to Article VI by agreeing to a list of measures that could be discussed there under a heading taken directly from Article VI: "effective measures relating to the cessation of the nuclear arms race at an early date and to nuclear disarmament". The measures listed under that heading included "the cessation of testing, the non-use of nuclear weapons, the cessation of production of fissionable materials for weapons use, the cessation of manufacture of weapons, and reduction and subsequent elimination of nuclear stockpiles, nuclear free zones, etc." This set of measures was the first item on the agenda, and did not include general and complete disarmament. The latter topic rather was the fourth item on the agenda. See Report of ENDC to the United Nations and the UN Disarmament Commission of August 28, 1968, ENDC/236, reprinted in ACDA, Documents, 1968, at 591, 593. Thus under the agreed interpretation of the program implicit in Article VI made soon after the treaty was signed, negotiation of elimination of nuclear arsenals could take place under the "nuclear disarmament" heading without reference to achievement of general disarmament.

The separation of the obligation to negotiate nuclear disarmament and the obligation to negotiate general disarmament has been maintained during the 25 year history of the NPT since it entered into force in 1970, as shown by the attitude of the NPT parties towards the U.N. Special Session on Disarmament in 1978. That the nuclear disarmament agenda is distinct from other disarmament agendas was recognized by the Special Session. Its final document, at paragraph 45, laid down the world's disarmament priorities in this order - nuclear weapons, then other weapons of mass destruction, then conventional weapons. Further, the programme of action set out at paragraphs 43 to 112 discussed separately the steps to be taken with respect to those priorities. This distinction between nuclear disarmament and general disarmament was reaffirmed by the

1985 NPT Review Conference. As George Bunn records, supra at 23, the final declaration of the 1985 Conference, in referring to the results of the 1978 Special Session, "reflects agreement by the NPT's parties that zero nuclear weapons need not be pursued solely in the context of general and complete disarmament. In their Article VI recommendation, the 1985 NPT parties summarized with approval, the conclusions of a 1978 special General Assembly session on disarmament - thereby agreeing that "phased programme" leading to zero nuclear weapons was within the Article VI obligation relating to 'nuclear disarmament,' not just that relating to general and complete disarmament."

This year, on 6 April 1995, shortly before the NPT Review and Extension Conference, a "Declaration by France, Russia, the United Kingdom and the United States in Connection with the NPT" was made in the Conference on Disarmament on 6 April 1995. It contained the following paragraph: "We solemnly reaffirm our commitment, as stated in Article VI, to pursue negotiations in good faith on effective measures relating to nuclear disarmament, which remains our ultimate goal". Neither in that paragraph nor in any part of the declaration is there any linkage between the achievement of nuclear disarmament and the achievement of general disarmament. CD/1308, 7 April 1995 (see Attachment 2).

Finally, the Principles and Objectives of Nuclear Non-Proliferation and Disarmament adopted by the 1995 Review and Extension Conference maintain the distinction between nuclear disarmament and general disarmament. NPT/CONF.1995/32 (Part I), pp.9-12 (see Attachment 3). For example, paragraph 3 includes the statement that "the nuclear-weapon States reaffirm their commitment, as stated in Article VI, to pursue in good faith negotiations on effective measures relating to nuclear disarmament". No reference is made in that paragraph to general disarmament. Paragraph 4 identifies the following as part of a "programme of action" "important in the full realization and effective implementation of Article VI": "The determined pursuit by the nuclear-weapon States of systematic and progressive efforts to reduce nuclear weapons globally, with the ultimate goal of eliminating those weapons, and by all States of general and complete disarmament under strict and effective international control". This formulation reflects the separation between nuclear disarmament and general disarmament found in the original language of Article VI and confirmed by the negotiating history and subsequent practice and statements of states parties.

Any suggestion that nuclear disarmament is dependent upon conventional disarmament erodes the line which the conscience of humanity has drawn between conventional weapons and weapons of mass destruction. It treats in derisory fashion the obligation to achieve elimination of nuclear weapons - the worst of the weapons of mass destruction - because it makes fulfillment of that obligation contingent upon a process for which the world is not yet ready, namely comprehensive conventional disarmament.

In contrast to conventional weapons, serious proposals, negotiations, and conventions relating to elimination of weapons of mass destruction including nuclear weapons have been on the international agenda for decades, including the Geneva Gas Protocol of 1925, the Acheson-Lilienthal proposal for an international agency that would control all weapons usable nuclear materials in the late 1940s, and the biological and chemical weapons conventions concluded in recent years. As appealing as it may sound to some peace advocates, or as convenient an excuse for avoiding reduction and elimination of nuclear arms as it may be for others, there exists no necessary link between nuclear disarmament and general and complete disarmament, nor must any be established, for that would totally negate prospects for elimination of nuclear weapons within a reasonable timeframe.

Question:

"When, in paragraph 26 of the Written Statement of Mexico, it is noted that the nuclear disarmament obligations contained in the Treaty have 'taken on indefinite force until they are fully complied with', does that imply that, until the abolition of nuclear weapons, their possession, and threat and use in certain circumstances may not be prohibited?"

Response:

The requests for advisory opinions before the Court do not expressly concern possession. Concerning threat or use, there is nothing in the Nuclear Non-Proliferation Treaty (NPT) that in any way exempts the nuclear-weapons States party to the treaty from the rules and principles of the law of armed conflict, environmental law, human rights, the United Nations Charter, and laws of humanity that make illegal the threat or use of nuclear weapons in any circumstance. Further, the reference in the preamble to "the devastation that would be visited upon all mankind by a nuclear war" and the Article VI requirement that nuclear disarmament be negotiated in good faith are wholly consistent with, indeed support, the illegality of the threat or use of nuclear weapons.

To the extent the Court wishes to address the legality of possession, the NPT does recognize the existential fact that nuclear weapons will exist in the arsenals of the nuclear-weapons States party to the Treaty until the weapons are eliminated pursuant to the Article VI obligation and the other mandates of international law. Nowhere, however, does the Treaty in any way clothe this fact with any entitlement or right. Rather, the Treaty acknowledges the fact of possession of nuclear weapons pending their elimination only indirectly, by identifying nuclear-weapon States as parties to the Treaty who have manufactured and exploded a nuclear weapon prior to January 1, 1967 (Article IX(3)) and placing certain obligations on those States, for example not to transfer nuclear weapons

to "any recipient whatsoever" (Article I). In contrast, the prohibition of possession of nuclear weapons by State parties not meeting the definition of a nuclear-weapon State set forth in Article II directly and expressly establishes a rule of illegality of possession applicable to the vast majority of States. Combined with the illegality of threat or use of nuclear weapons and the nuclear disarmament obligation of Article VI applicable to the nuclear-weapon States, it appears that a universal rule of illegality of possession has crystallized, though states possessing nuclear weapons are still in the process of complying with that rule.

Question Asked By Judge Schwebel On 3 November 1995.

Question:

In paragraph 45 of its Written Statement, Mexico maintains that Security Council Resolution 984 (1995) and the intent of States party to the Non-Proliferation Treaty "implicitly recognize the illegality of the threat or use of nuclear weapons" against a non-nuclear weapons State and the Mexican statement goes on to say: "Obviously, were the threat or the use of nuclear weapons a legal act, negative security assurances to protect NNWSs would have been unnecessary." Why does this follow? Do States only restrict possible course of action because such courses of action are illegal?

Response:

No, as a general matter, states do not only restrict possible courses of action because such courses of action are illegal. However, many - perhaps most - treaties by which states impose restrictions on themselves and each other are based on and confirm or codify general principles of law. Non-aggression pacts, for instance, were the common currency of international relations well after the illegality of aggression had entered the body of customary law.

It is in this sense that Mexico's proposition should be understood, i.e. "There is a customary norm illegalizing the use and threat of use of nuclear weapons; the negative security assurances implement this norm."

Question asked by Vice-President Schwebel on 6 November 1995

Question:

The distinguished representative of the Islamic Republic of Iran advanced the argument that the General Assembly's resolutions that declare the use of nuclear weapons a violation of the United Nations Charter and a crime against humanity are an authoritative interpretation of the United Nations Charter.

Had the General Assembly's Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States also invoked by Iran been adopted, not as it was by consensus and without the opposition of a single Member, but rather by a vote in which some 20 States, including Permanent Members of the Security Council, had voted against or abstained while denying that the Friendly Relations Declaration constituted an authoritative interpretation of the Charter, could the Declaration be regarded as an authoritative interpretation of the Charter? If not, how can the cited resolutions on nuclear weapons be so regarded?

Response:

Iran's position in its oral statement to the Court was:

> Although resolutions of the General Assembly are commonly perceived to be of a recommendatory nature, declarations interpreting the provisions of the Charter, along with those declaring the principles of international law, certainly do not constitute mere recommendations.
>
> The General Assembly resolution 1653 adopted in 1961 particularly should be mentioned here. Paragraph 1(A) of this resolution declared that the use of nuclear and thermonuclear weapons is contrary to the spirit letter, and aims of the United Nations, and, as such, is a direct violation of the Charter of the United Nations. Clearly, this assertion is also not a mere recommendation because it is based on the provisions of the Charter. (Uncorrected Verbatim Record, 6 November 1995, pp. 26-27)

Iran further stated concerning the existence of opinion juris that General Assembly resolutions "certainly reflect the views of the governments concerning the abhorrence of the use of nuclear weapons". Id., p. 45.

Iran's position thus appears to be that the General Assembly resolutions are more than mere recommendations, and should be accorded great weight in interpreting the Charter and determining customary law. This position is unassailable. The fact that nuclear-weapon states and their close allies have voted against or abstained as to the General Assembly resolutions, and have continued to maintain nuclear weapons and declare their weapons may be used, is not dispositive.

It should be noted, in this connection, that, while 20 may seem a large number of negative votes, many UNGA resolutions calling the use of nuclear weapons a crime against humanity, a violation of the UN Charter and/or a violation of international law were adopted by what may be fairly described as overwhelming margins, e.g. 72 to 4 (Res. 2936 of 1972), 103 to 18 (Res. 33/71B of 1978), 112 to 16 (Res. 34/83C of 1979) 113 to 19 (Res. 35/152D of 1980), 121 to 19 (Res. 36/921 of 1981), 117 to 17 (Res, 37/100C of 1982), 95 to 19 (Res. 38/75 of 1983), 128 to 17 (Res. 39/63H of 1984), 126 to 17 (Res. 40/151F of 1985), 132 to 17 (Res. 41/60F of 1986), 135 to 17 (Res. 42/39C of 1987), 133 to 17 (Res. 43/76E of 1988), 134 to 17 (Res. 44/117C of 1989), 125 to 17 (Res. 45/59B of 1990), 122 to 16 (Res. 46/37B of 1991), 126 to 21 (Res. 47/53C of 1993), and 120 to 23 (Res. 48/76B of 1993).

Also, while repetition by itself may not create a binding norm, as France observed in its oral statement, constant repetition over an extended period of time certainly helps. "Repetition answers the objection that resolution represents only a temporary majority which may quickly change." (Sloan, United Nations General Assembly Resolutions in Our Changing World (1991) p. 112).

Adherence to an illegal course of conduct by a few states cannot negate the law. As the Court stated in the Nicaragua case, "The court does not consider that, for a rule to be established as customary the corresponding practice must be in absolutely rigorous conformity with the rule." Nicaragua v. USA (I.C.J. Reports 1986, para. 186). "[A] customary rule may arise notwithstanding the opposition of one State, or even perhaps a few States, provided that

otherwise the necessary degree of generality is reached." Waldock, General Course on Public International Law, p. 87. The necessary degree of generality in the case of nuclear weapons is reflected in the non-use of such weapons since 1945, the commitments to non-use made in negative security assurances and in connection with nuclear free zones, the prohibition of possession by the vast majority of states set forth in the Non-Proliferation Treaty, and the repeated declarations of a large majority of States over more than three decades that their use is illegal. Moreover, where matters fundamental to humanity are concerned, dissent from norm articulation and deviation in practice cannot be permitted to prevent the emergence of a customary rule or an accepted interpretation of the Charter.

As Professor Schachter has remarked: "In many cases, it would be pertinent to determine whether State practice both before and after the adoption of the resolution varies so significantly from the norm asserted as to deprive it of validity as custom or agreed interpretation. This determination -- namely, whether inconsistent practice should vitiate an asserted principle -- may involve drawing distinctions among norms based on value judgments of their significance. For example, a norm considered essential to peace (such as the principle of non-intervention) or one that expresses a basic universally held moral principle (such as that against torture) would retain its validity despite inconsistent practice. On the other hand, a norm relating to demarcation of jurisdiction or States' rights in areas beyond national territory (for example, the declarations on sea-bed mining or outer space) should probably not be maintained as valid in the face of substantial inconsistent State conduct." (International Law in Theory and Practice, 178 Recueil des Cours 121 (1982-V).) Few will disagree that the norm here at issue fall into the first of Professor Schachter's categories.

An example of a non-consenting state not being exempted from a customary rule is South Africa, which persistently dissented from the rule prohibiting racial discrimination while that rule was developing and after it had been universally accepted.

When a particular norm embodies in a series of resolutions acquires a binding force is a question incapable of being answered precisely. In this case, it is submitted, the normative threshold was crossed long ago. The Court is also referred to the oral statement made on behalf of Samoa by Professor Clark on 13 November 1995.

Finally, aside from the issue of the existence of a customary rule specifically applying to nuclear weapons, the policies of certain nuclear-weapon States in no way affect the validity of general rules and principles of humanitarian law, human rights law, and environmental law which, as it has been demonstrated, operate to prohibit the threat or use of nuclear weapons.