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Letter dated 19 June 1995 from the Ambassador of the Russian Federation, together with Written Statement of the Government of the Russian Federation

ПОСОЛ
РОССИЙСКОЙ ФЕДЕРАЦИИ

To the Registrar
of the International Court of Justice
Mr. E.Valencia-Ospina
Peace Palace

The Hague

The Hague, 19 June 1995

Dear Mr.Valencia-Ospina,

Please find enclosed "WRITTEN STATEMENT AND COMMENTS OF THE RUSSIAN FEDERATION ON THE ISSUE OF THE LEGALITY OF THE THREAT OR USE OF NUCLEAR WEAPONS".

Enclosure: as above mentioned, 20 pages

L.Skotnikov,
Ambassador of the Russian Federation

WRITTEN STATEMENT AND COMMENTS OF THE RUSSIAN FEDERATION ON THE ISSUE OF THE LEGALITY OF THE THREAT OR USE OF NUCLEAR WEAPONS

Moscow, 16 June 1995

1. The World Health Organization, by its resolution WHA 46/40 dated 14 May 1993, requested the International Court of Justice to give an advisory opinion on the following question: "In view of the health and environmental effects, would the use of nuclear weapons by a State in war or other armed conflict be a breach of its obligations under international law, including the WHO Constitution?"

2. The Russian Federation, being a UN member, is *ipso facto* a party to the Statute of the International Court of Justice under the provision of Article 93, paragraph 1 of the UN Charter and correspondingly is entitled to appear before the Court.

3. Having received an appropriate notification about the WHO's request and also about the readiness of the Court to accept, within the time-limit fixed by it, written statements of the states which are entitled to appear before the Court with respect to the question, the Russian Federation in accordance with Article 66, paragraph 2 of the Statute of the International Court has presented an appropriate written statement to the Court on 7 June, 1994.

4. Taking into account the above, as well as the fact that the similar statements have been presented to the Court by other states the Russian Federation, in accordance with Article 66, paragraph 4 of the Statute of the International Court and following the decision of the President of the Court of 20 June, 1994, hereby presents comments on the other relevant written statements pertaining to the issue.

5. The General Assembly, by its resolution 49/75K dated December 15, 1994, decided to request the International Court to give an advisory opinion on the following question: "Is the threat or use of nuclear weapons in any circumstances permitted under international law?"

6. The Russian Federation, proceeding from what was set forth in paragraph 2 above and having received an appropriate notification about the UN General Assembly request, in accordance with Article 66, paragraph 2 of the Statute of the International Court and in accordance with the decision of the Court dated February 1, 1995, hereby presents a written statement on the question, formulated by the UN General Assembly.

7. It is the opinion of the Russian Federation that questions formulated by the WHO and the UN General Assembly are essentially very similar and in this connection it thinks it possible and expedient to dwell on both of them in a single document which is being enclosed.

A study of written statements of other states even more firmly strengthened our opinion expressed in the Statement of June 7, 1994: the Court should not give an advisory opinion on the WHO's request.

1. In accordance with Article 96, paragraph 1 of the UN Charter the General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion "on any legal question".

In accordance with paragraph 2 of the same Article, specialized agencies which may at any time be so authorized by the General Assembly may also request advisory opinions of the Court "on legal questions arising within the scope of their activities".

As applied to WHO, this general rule relating to all specialized agencies is specified in Article X, paragraph 2 of the Agreement between the UN and the WHO of 1948 and in Article 76 of the WHO Constitution.

According to Article X, paragraph 2 of the Agreement of 1948 the UN General Assembly entitles the WHO to make request to the International Court of Justice to give an advisory opinion on legal questions arising in the sphere of the competence of the Organization and others than those concerning relations between the WHO and the UN or others specialized agencies.

Under Article 76 of the WHO Constitution, Organization may request the Court to give an advisory opinion on any legal question arising within the scope of the Organization's competence.

Consequently, as distinct from the General Assembly and the Security Council, the WHO being a specialized agency, may request the Court to give an advisory opinion not on any legal question, but only on a legal question arising within the scope of the Organization's competence.

The WHO's competence is defined first of all in its Constitution. It is quite apparent that this document does not contain a provision, which would confirm *expressis verbis* that the WHO is competent to consider the matter of legality of use by a State not only of nuclear weapons but of any kind of weapons at all in an armed conflict.

The attempts to refer to an "implied" or "inherent" WHO's competence have no prospects either. This is proved by the 45- year practice of the WHO, which until the WHA resolution 46/40 of 14.05.93 has never appealed to the subject of legality of the use of nuclear weapons.

Accordingly, there is also no evidence that the WHO's practice or its resolutions have somehow developed the WHO's Constitution, so as to endow it with such a competence. In this respect, an analysis of WHO's activities, contained in Chapter I of the written statement presented to the Court by the UK Government in connection with the WHO's request, seems to be strongly convincing.

It is well-known that while interpreting a treaty any subsequent practice of its application which establishes the agreement between the parties regarding interpretation of the treaty (Article 31, paragraph 3.b of Vienna Convention of the Law of International Treaties, 1969) shall be taken into account. This rule is also applicable to the treaties setting up international organizations.

For us it's clear that WHA resolution 46/40 of 14.05.93, which was adopted with 73 votes "for", 40 - "against" and 10 "abstaining", does not establish such an agreement.

Thus, so far as the question of legality of the use of nuclear weapons does not fall within the competence of WHO and cannot emerge within this competence under Article 96, paragraph 2 of the UN Charter, Article 76 of WHO's Constitution and Article X, paragraph 2 of the Agreement between

between the UN and the WHO, the Organization had no right to request the Court to give an advisory opinion on such a question. So, the WHO Assembly's resolution and the question contained in it are the WHO's actions *ultra vires*.

2. In accordance with Article 65, paragraph 1 of the Statute of the International Court, the Court "may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request".

The verb "may", used in this wording, in our opinion, has two meanings.

First, the Court may give opinions exclusively upon the request of the body authorized to make such a request by the UN Charter or in accordance with it.

Taking into account what was said above in paragraph 1, it's difficult to consider the WHO as the organization authorized by the UN Charter or in accordance with it to make such a request in this particular case. Correspondingly, in our view in this case the Court hardly at all may, i.e. hardly has the right to give an advisory opinion upon such WHO's request.

However, naturally, the Court itself solves the question of its competence. And in this connection we would like once again to draw attention to the second meaning of the word "may".

As it was mentioned in our statement dated June 7, 1994 and in the statements of some other States, the Court may, but is not obliged to give advisory opinions i.e. it has a discrete competence in this respect.

In this context we would like to note those consequences for international law in general and for the law of international organizations in particular, which will arise as

a result of the realization by the Court of its right to give advisory opinion upon WHO's request, whatever this opinion might be.

We would like to emphasize that we are putting aside political aspects and are talking about purely legal consequences which shall be of primary importance for the International Court while solving the question whether to give or not to give an advisory opinion.

In this sense it is important that in this case taking a decision to exercise its right and to give an advisory opinion, the Court, in a way would establish a precedent of encouraging international organization activities *ultra vires*, would lend to such illegal acts legal consequences which they were called upon to achieve (we stress once again: irrespective of what this advisory opinion might be).

In our view, such an action by the Court would be harmful for the development of international law in general and the law of international organizations in particular.

II

Despite the differences in the wording, questions put before the Court by the WHO and UN General Assembly are very similar. In our opinion, the question, contained in General Assembly resolution 49/75K dated 15 December 1994 is formulated in a more general manner and somehow covers the question put before the Court by the WHO. That's why, and also with due regard to considerations set forth in Section I above, in this Section we intend to concentrate mainly on the UN General Assembly question: "Are the threat or use of nuclear weapons in any circumstance permitted under international law?"

1. The very wording of the UN General Assembly question gives rise to questions.

First of all, in virtue of the principle of sovereignty, we treat as generally admitted the presumption that the state may accomplish any acts, which are not prohibited under international law. Basically, international law is a system of limitations, rather than permissions. In this connection, the question, whether international law permits the use of nuclear weapons or not is not likely to be correct. If we ask the question of this kind, we should ask whether international law prohibits the use of nuclear weapons. Anyway, the essence of the question is in the question whether international law contains the ban of the use of nuclear weapons or not.

At the same time, an extremely broad wording of the question formulated by the General Assembly, as well as by WHO, strikes one's eye.

It seems that the initiators of both requests didn't want to draw a distinction between the use of nuclear weapons by the aggressor and the use of such weapons in self-defence, for instance in the retaliation for the use of nuclear or some other mass destruction weapons, as well as a distinction in connection with the consequences of the use of nuclear weapons.

Meanwhile, in our opinion, these distinctions are very significant.

2. In our view, international law contains no general prohibition of use of nuclear weapons *per se*.

A study of main sources of international law - international treaties and international customs - proves our opinion. We don't consider here general principles of law, because we believe that they are reflected in international treaties or customs.

1) International treaties - general, as well as special - don't contain rules stipulating a complete ban on nuclear weapons *per se*.

A study of international treaties, especially those dedicated to the problems of nuclear weapons leads us to the following conclusions.

First of all, those treaties admit the existence of nuclear weapons and the possession of nuclear weapons by some states. At the same time these treaties envisage different limitations with respect to nuclear weapons, in particular:

- their proliferation (Treaty on the Non-Proliferation of Nuclear Weapons, 1968)1/;

- their testing (Treaty on Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, 1963; Treaty between the USSR and the USA on the Limitation of Underground Nuclear Weapons Tests 1974);

- their deployment in certain territories (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 the Subsoil Thereof, 1971; Treaty on the Prohibition of Nuclear Weapons in Latin America (Treaty of Tlatelolco), 1967; South Pacific Nuclear Free Zone Treaty (Treaty of Raratonga), 1985);

- certain types of nuclear arms, down to the elimination of certain types thereof, even if the word "nuclear" is not mentioned in the text. (Interim Agreement between the USSR and the USA on Certain Measures with respect to the Limitation of Strategic Offensive Arms, 1972; Treaty between the USSR and the USA on the Limitation of Strategic Offensive Arms, 1979, which though it has not entered into force so far, has been observed for several years; Treaty between the USSR and the USA on the Reduction and Limitation of Strategic Offensive Arms, 1991, to which, Russia, Belorussia, Kazakhstan, Ukraine and the USA have become parties after they have signed the 1992 Protocol to the Treaty; Treaty between

1/ The Russian Federation is continuing to exercise the rights and responsibilities of the former USSR under the international treaties.

Russia and the USA on Further Reduction and Limitation of Strategic Offensive Arms, 1993, which has not yet entered into force; Treaty between the USSR and the USA on the Elimination of Their Intermediate-range and Shorter-range Missiles, 1987).

Thus, treaties, devoted exclusively to nuclear weapons provide for significant number of restrictions in this regard, but there is no special treaty which would put a general ban on the use of nuclear weapons as such.

We think that there are no real prerequisites for concluding such a treaty at present as yet. No necessary and sufficient conditions exist. That is why the appeals of the General Assembly (General Assembly resolutions 45/59 A of 1990 and 46/370 of 1991) to the Conference on Disarmament proposing to begin on a priority basis talks aimed at the conclusion of a convention prohibiting the employment of nuclear weapons in any circumstances, have not been implemented. The very fact that there are projects of such a convention in General Assembly resolutions proves that presently no treaty provision in this regard exists.

Furthermore, it is apparent that while concluding numerous special treaties in this sphere, states have based their positions on the assumption that international law does not prohibit the employment of nuclear weapons as such. That is why treaties were signed with an aim either to lessen the possibility of its employment (for example, USSR-USA Treaty on the Prevention of Nuclear War of 1973; analogous treaties between the USSR and the UK (1978), the USSR and France (1976); the USSR-USA Agreement for the Creation of Nuclear Risk Reduction Centers (1987) or to pledge the non-employment of such weapons against specific countries, in specific regions or specific circumstances (the USSR, the USA, the UK and France have all signed Additional Protocol II of the Tlatelolko Treaty, in accordance with article 3 whereof they pledge not to use and not to threaten

to use nuclear weapons against the State-parties to the Tlatelolko Treaty; the USSR and China have also signed a similar Protocol to the Raratonga Treaty).

There does not exist a provision containing a general prohibition of the employment of nuclear weapons as such also in international treaties, which are not specially devoted to the subject of nuclear weapons.

It is well known that the UN Charter (Article 2, paragraph 4) obliges the Organization members to 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.

In this sense, as the threat or use of force in general, the threat or use of nuclear weapons by a state is prohibited, as are the threat or use of any other kind of weapons.

At the same time the Charter does not impair in any sense the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations (Article 51). Accordingly, in this sense the Charter admits the use of nuclear or other weapons *per se* by a state.

We do not consider the provisions of a number of the UN General Assembly resolutions, which stipulate that the use of nuclear weapons as such is a violation of the UN Charter (UN GA Res.1653 (XVI), UN GA Res.33/71/B, UN GA Res.35/152D, UN GA Res.36/923 and some others), as an authentic and binding interpretation of the UN Charter. Such General Assembly resolutions and declarations, regardless of how they were adopted, are not binding and do not create by themselves obligations for UN members. Any other, opposite view of the role of such General Assembly resolutions has no basis in the UN Charter.

A number of international treaties, not specifically devoted to the problem of nuclear weapons, contain certain restrictions in this regard (the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and other Celestial Bodies of 1967; the Antarctic Treaty of 1959). Nevertheless, there does not exist any general prohibition on the use of nuclear weapons in any such treaty.

Sometimes, to substantiate the point of view according to which international law prohibits the use of nuclear weapons, the reference is made to international human rights treaties and, in particular, to the Convention on the Prevention and Punishment of the Crime of Genocide of 1948.

We presume, however, that it clearly follows from the Convention that it is not the mere use of nuclear or any other type of weapons that constitutes genocide but respective act "committed with intent to destroy, in whole or in part, a national ethnical, racial or religious group, as such" (Article II of the Convention). Therefore, to qualify certain actions as genocide and as a violation of international law, one should take into account their aim and intent but not the weapons, means used to implement those actions.

Neither do we find correct the arguments that the use of nuclear weapons is not admissible under international law, because it violates the human right to life laid down, in particular, in the Universal Declaration of Human Rights of 1948 (Article 3) and the International Covenant on Civil and Political Rights of 1966 (Article 6).

The existence of the right to life does not mean that it is not possible to deprive a person of his life through legitimate use of force. This is confirmed, for instance, in Article 2, paragraph 2 of the European Convention on the Protection of Human Rights and Fundamental

Freedoms, which reads: "Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which... is absolutely necessary... in defence of any person from unlawful violence...". In this sense the use of nuclear weapons in self-defence does not constitute a violation of the right to life.

Besides, those putting forward arguments that the use of nuclear weapons is not admissible under international law, also appeal to international treaties codifying rules applicable to armed conflicts.

Restrictions set by the rules applicable to armed conflicts in respect of means and methods of warfare also extend to nuclear weapons. However, we are convinced that there is no general prohibition on the use of nuclear weapons as such in treaties codifying those rules.

The most recent rules applicable to an armed conflict are contained in Additional Protocols of 1977 to the Geneva Conventions of 1949. Restrictions on the methods and means of warfare are contained, in particular, in parts III and IV of the Additional Protocol I. However, as Frits Kalshoven reasonably observes, "the Diplomatic Conference" which adopted the Protocols, "was virtually unanimous in its view that it had not been convoked to bring the problems connected with the existence and possible use of nuclear weapons to a solution"1/. The drafting history of Protocol I shows that "any new rules and principles, embodied in the Protocol, were not written with a view to the potential use of nuclear weapons"2/. This is

1/ Frits Kalshoven. Constraints on the Waging of War, ICRC, Geneve, 1987, p.82.

2/ Ibid., p.104. In the introduction to the draft Protocols the ICRC had stated that: "Problems relating to atomic, bacteriological and chemical warfare are subjects of international agreements or negotiations by governments, and in submitting there draft Additional Protocols the ICRC does not intend to broach those problems". See: Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949. Ed. by Y.Sandoz, Chr.Swinarski, Br.Zimmermann, Martinis Nijhoff Publ., Geneva, 1987, p.590.

reflected in the Protocols themselves in which there is neither reference to nuclear weapons nor mentioning of any other specific type of weapons, as well as in the declarations made by a number of countries (the USSR, France, the USA, Spain, the United Kingdom, the Netherlands, Belgium, the FRG and Italy) during the Conference, signing or ratification of the Protocol.

As is known, the 1949 Geneva Conventions contain no regulations concerning nuclear weapons.

Thus, the principal humanitarian law instruments adopted in the nuclear age do not prescribe any general ban on the use of nuclear weapons.

It is probably in this context that the advocates of illegality of the use of nuclear weapons substantiate their position by referring to earlier instruments - the Hague Conventions of 1899-1907 and even the Declaration to the Effect of Prohibiting the Use of Certain Projectiles in Wartime(St.Petersburg Declaration) of 1868.

In particular, they state that under the Declaration the only legitimate object which states should endeavor to accomplish during war is to weaken the military forces of the enemy; for this purpose it is sufficient to disable the greatest possible number of men, this object would be exceeded by the employment of arms which uselessly by aggravate the suffering of disabled men, or render their death inevitable; the employment of such arms would therefore be contrary to the laws of humanity.

Along with that, a reference is made to the "Martens clause" - a blanket formula contained in the Preambles to the Convention Respecting the Laws and Customs of War on Land of 1899 and to the Convention Concerning the Laws and Customs of War on Land of 1907 ("Until a more complete code of the laws of war has been issued, the... Parties deem it expedient to declare that, in cases not included in the Regulations adopted

by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience"), as well as to Article 22 ("the right of belligerents to adopt means of injuring the enemy is not unlimited"), Article 23b) ("it is forbidden... to employ arms, projectiles, or material calculated to cause unnecessary suffering"), Article 25 ("it is forbidden to attack or bomb in any way whatsoever unprotected cities, towns, houses or premises") of the Regulations annexed to the Convention of 1907.

As far as the regulations are concerned, the rules laid down in Articles 22 and 25 contain restrictions which refer to the use of any types of weapons, including nuclear ones. However, these articles do not prohibit the use of any particular type of weapons.

As to the attempts to justify the illigimacy of the use of nuclear weapons by references that they cause "unnecessary sufferings while injuring, uselessly aggravate the sufferings of disabled men, or render their death inevitable", they are also hardly reasonable. The report of the ICRC experts entitled "Weapons that May Cause Unnecessary Suffering or Have Indiscriminate Effects" stated: "What suffering must be deemed "unnecessary" is not easy to define. Clearly the authors of the ban on dum-dum bullets[1/] felt that the hit of a ordinary rifle bullet was enough to put a man out of action and that infliction of a more severe wound by a bullet which flattened would be to cause "unnecessary suffering"... The circumstance that a more severe wound is likely to put a soldier out of action for a longer period was evidently not considered a justification for permitting the use of bullets achieving such results. The concepts discussed

1/ The authors of the Hague Declaration Concerning the Prohibition of Using Bullets which Expand or Flatten Easily in the Human Body of 1899.

must be taken to cover all weapons that do not offer greater military advantages than other available weapons while causing greater suffering... In addition the concept of "unnecessary suffering" would seem to call for weighing the military advantages of any given weapon against humanitarian considerations"2/.

These reasonable comments of the ICRC experts confirm two considerations. First, the principle of not causing "unnecessary suffering" is not in itself a general ban on the use of nuclear weapons as such. Second, attempts to apply blanket norms formulated in the second half of the 19th century - beginning of the 20th century to new types of weapons do not seem to be convincing.

As to nuclear weapons the "Martens clause" is not working at all. A "more complete code of the laws of war" mentioned there as a temporary limit was "issued" in 1949-1977 in the form of Geneva Conventions and Protocols thereto, and today the "Martens clause" may formally be considered inapplicable.

But it is not all. Protocol I of 1977 reproduces, with slight changes (Art.35), the above-mentioned provisions of the Articles of the 1907 Convention, but they, being treaty norms, are not applied to nuclear weapons (see pp.10,11 above).

The view that the said blanket formulas are not considered by the international community as a whole as a general ban on the use of specific types of weapons, including nuclear weapons as such, is supported by the fact that international law did choose the option of special ban of particular types of weapons and their use. That is how the 1925 Protocol on the Prohibition of the Use in War of Suffocating, Poisonous and other Similar

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2/ ICRC: Weapons that may Cause Unnecessary Suffering or have Indiscriminate Effects. Report on the work of experts. Geneva, 1973, p.13

Gases and Bacteriological Means; the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, together with Protocols thereto; the 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxic Weapons and on their Destruction; 1993 Convention on the Prohibition of Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction appeared.

It is probable that in some time a treaty will appear on the ban of the use of nuclear weapons and of nuclear weapons themselves. But today such a treaty does not exist.

2) Constraints on the use of nuclear weapons are provided not by a treaty law, but by customary general international law. However, we are quite sure that there is no customary rule of international law, prohibiting the use of nuclear weapons in general.

To respond in substance to the request of the General Assembly the Court in accordance with Article 38, paragraph 1(b) of its Statute, shall apply "international custom as evidence of a general practice accepted as law". As it was stated above, it is not a permissive rule, but the rule prohibiting the use of nuclear weapons *per se*.

Our study shows that there is no general practice accepted as law, that provides for such a prohibition.

For the purpose of this statement we do not intend to distinguish between the evidences of existence or, which is more accurate, of absence of relevant practice and *opinio juris*.

As it is shown above, the treaty practice, the treaty form of coordination the wills of States demonstrates not only the absence of a general prohibition of the use of nuclear weapons *per se*, but also the

presence of presumption that in principle the use of nuclear weapons is admissible. This is testified by the treaty acts by which States voluntarily refuse to use nuclear weapons in certain circumstances or agree to adopt measures to reduce the risk of a nuclear war (Protocols to the Treaties of Tlatelolko and Raratonga, agreements between nuclear Powers, see above, pp.7,8).

There are also other international agreements of non-treaty nature which contain similar provisions about the voluntary refusal of nuclear states to use nuclear weapons (Memoranda on the security guarantees in connection with Belorussia', Republic of Kazakhstan' and Ukraine's adhesion to the NPT, signed by those states respectively and Russia, UK and USA in December 1994).

The unilateral will of states, their unilateral acts do not support the general practice and/or *opinio juris* on the matter under consideration either, quite on the contrary, what they do prove, is the lack of such practice and *opinio juris* and the presence of major contradictions in views.

While some states claim that any use of nuclear weapons would be contrary to international law, others officially proclaim the doctrine of nuclear containment and stick to it in practice, thus expressly emphasizing the admissibility of the use of nuclear weapons. At the same time the nuclear states made unilateral statements (see: UN Documents S/1995/261, S/1995/262, S/1995/263, S/1995/264, S/1995/265) in which, while granting to non-nuclear state-parties to the NPT the security guarantees against an aggression with the use of nuclear weapons, voluntarily gave up their right to use nuclear weapons in certain circumstances.

The reports themselves, submitted to the Court and thus containing the official point of view, testify that no uniform opinion exists among the states on this question.

It is noteworthy that the lack of a general prohibition of the use of nuclear weapons as such in international law is not signalled by nuclear states alone (see, for instance, the reports submitted by the governments of Germany and the Netherlands).

Some nuclear states have, at different times, made statements of the non-use of nuclear weapons first (the former USSR, China) which also signifies that, in their opinion, the use of nuclear weapons has not been banned in principle.

The advocates of the existence of such a ban in international law refer to a number of General Assembly resolutions (1653(XVI), 1961; 33/71B, 1978; 34/83B, 1979; 35/125D, 1980; 36/92I, 1981; 45/59B, 1990; 46/37D, 1991), where it is stated that the use of nuclear weapons would be a violation of the UN Charter and a crime against humanity.

As it has been already mentioned above (see page 8), such General Assembly resolutions do not create by themselves any obligations for states which are UN Members. They are not, in our opinion, an expression of *opinio juris* of the world community either. It is not even a question of the voting results on those resolutions (not one of them was adopted either by consensus, or by acclamation, or by a vast majority of UN Members). Many states vote for these resolutions, or abstain from voting, not voting against, having in mind that, according to the Charter, they do not create new law and do not signify the recognition of any rules as such, but are only of recommendatory nature.

This does not mean that these resolutions do not reflect the *opinio juris* of some states with a different point of view. Nevertheless, they do not represent a form of coordination of wills of all UN Members in relation to acceptance of these provisions as international law.

The same thing can be said about the question of in what capacity these GA resolutions form the other element of a customary provision - universal practice.

Furthermore, it is worth noting that the acts of international organizations even in their contents give proof to the fact that different opinions exist on the question at hand. Thus, in the resolution of the WHA 46/40 it is noted that "over the last 48 years marked differences of opinion have been expressed by Member States about the lawfulness of the use of nuclear weapons". The UN Security Council resolution 984 of 11 April 1995 (S/Res./984(1995) is also exemplary in this sense, because, according to it, the body charged with the main responsibility for the maintenance of international peace and security "takes note with appreciation" of the above-mentioned statements of nuclear states on the assurances to the non-nuclear Parties to the Nuclear Non-Proliferation Treaty (while these statements testify to a definite approach of their authors to the legality of nuclear weapons use). Furthermore, it is stated in this Security Council Resolution that, according to the relevant provisions of the UN Charter, "any aggression with the use of nuclear weapons would endanger international peace and security". Thus, it is clear from what is stated in the Security Council Resolution that not just any use of nuclear weapons per se would constitute a violation of the UN Charter but an aggression with the use of nuclear weapons.

In our opinion, the facts stated here prove conclusively that presently there is no universal practice nor a universal *opinio juris* on the unlawfulness of nuclear weapons' use. And if so no customary international law provision exists which would envisage a general ban on the use of nuclear weapons *per se*.

3. Naturally, all that has been said above does not mean that the use of nuclear weapons is not limited at all. Even if the use of nuclear weapons is in principle justifiable - in individual or collective self-defence - that use shall be made within the framework of limitations imposed by humanitarian law with respect to means and methods of conducting military activities. It is important to note that with respect to nuclear weapons those limitations are limitations under customary rather than treaty law.

The issue of legality of the use of nuclear weapons shall be dealt with on a case-by-case basis from a viewpoint of the correspondence of such use to criteria of self-defence and the above limitations.

As Hans Blix said, "it is certainly correct to say that the legality of the use of most weapons depends upon the manner in which they are employed. A rifle may be lawfully aimed at the enemy or it may be employed indiscriminately against civilians and soldiers alike. Bombs may be aimed at specific military targets or thrown at random. The indiscriminate use of the weapon will be prohibited, not the weapon as such"[1/]. We should add that it is a duly qualified use rather than the use of weapons as such at large that will be regarded as illegal.

1/ Hans Blix. Means and Methods of Combat. In: International Dimensions of Humanitarian Law. Publ. by UNESCO, Martinis Nijhoff Publ., 1988, p.144-145.