

**Letter dated 20 June 1995 from the Acting Legal Adviser to the  
Department of State, together with Written Comments of the  
Government of the United States of America**



United States Department of State

Washington, D.C. 20520

June 20, 1995

Sir:

In accordance with the Court's order of June 20, 1994, and Article 66, paragraph 4, of the Statute of the Court, I have the honor to transmit to you the enclosed Written Comments of the Government of the United States of America on the Submissions of Other States concerning the Request of the World Health Organization for an Advisory Opinion on the Legality of the Use by a State of Nuclear Weapons in Armed Conflict.

Accept, sir, the assurances of my highest consideration.

Sincerely,

*Michael J. Matheson*

Michael J. Matheson  
Acting Legal Adviser

Enclosure:

As stated.

Mr. Eduardo Valencia-Ospina,  
Registrar,  
International Court of Justice,  
Peace Palace,  
The Hague, The Netherlands

BEFORE THE  
INTERNATIONAL COURT OF JUSTICE

The Hague  
The Netherlands

Request by the World Health Organization  
for an Advisory Opinion on the  
Question of the Legality Under International Law  
and the World Health Organization Constitution of the  
Use of Nuclear Weapons by a State in  
War or Other Armed Conflict

WRITTEN COMMENTS  
OF THE  
GOVERNMENT OF THE UNITED STATES OF AMERICA  
ON THE SUBMISSIONS OF OTHER STATES

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June 20, 1995

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## I. INTRODUCTION AND SUMMARY

By resolution WHA 46.40 of May 14, 1993, the World Health Organization ("WHO") has requested an advisory opinion from the International Court of Justice 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?

Upon receiving the request, the Court fixed June 10, 1994 as the time limit within which written statements relating to the question might be submitted by the WHO and Member States. The United States and a number of other Member States submitted such written statements. On June 20, 1994, the President of the Court extended the date for filing such statements until September 20, 1994 and fixed June 20, 1995 as the time limit within which States and organizations having presented written statements might submit written comments on the other submissions. The United States hereby submits its comments on those submissions.

### A. Jurisdiction.

As indicated in its initial written statement, the United States believes that the Court lacks jurisdiction to provide the requested opinion because the WHO has not been authorized to request an opinion on the legal question presented. In our view, none of the other submissions to the Court presents any contrary argument that was not fully dealt with in the initial written statement of the United States. Accordingly, we have no further comment on this issue at this time.

B. Exercise of jurisdiction.

Were the Court nonetheless to determine that it has jurisdiction to provide the requested opinion, the United States believes that the Court, in the exercise of the discretion provided by Article 65, paragraph 1, of its Statute, should decline to provide an opinion. As stated in the initial written statement of the United States, the legal question presented by the request does not address the functions and responsibilities of the WHO. It addresses complex issues which are the subject of consideration in other fora which have an express mandate to address these matters. A decision of the Court in regard to the question cannot provide any practical guidance to the WHO. Moreover, such a decision has the potential of undermining progress already being made in other fora.

In our view, the initial written statement of the United States fully dealt with most of the issues relating to the WHO request that have been raised in other submissions. A few additional comments seem in order, however, in light of some of these submissions.

In particular, a few of the other submissions appear to take the view that the use of nuclear weapons is prohibited by an extremely broad range of international agreements and principles having nothing to do with the rules of armed conflict, including those dealing with the environment and human rights. These instruments do not fall within the competence of the WHO under

its Constitution. Rather, they address matters for which other organizations are responsible.

For these reasons and the others cited in our initial written statement, the United States continues to urge the Court to decline the request by the WHO to provide an advisory opinion.

C. Substance of the request.

In view of the possibility that the Court may nonetheless decide to provide an advisory opinion, the initial written statement of the United States also addressed the legal question presented by the request. In particular, the United States argued that there is no general prohibition in conventional or customary international law on the use of nuclear weapons. Numerous agreements regulating the possession or use of such weapons and other state practice demonstrate that their use is not deemed to be generally unlawful. Nothing in the law of armed conflict indicates that the use of nuclear weapons is prohibited per se. Further, there is no basis for concluding that the use of nuclear weapons would violate the WHO Constitution.

Once again, in our view, the initial written statement of the United States fully dealt with most of the issues relating to the use of nuclear weapons that have been raised in other submissions. A few additional comments, however, seem necessary to deal with certain of the arguments made in some of these other submissions. In particular, as noted above, a few of these submissions appear to take the view that the use of nuclear

weapons is prohibited by an extremely broad range of international agreements and principles, including those dealing with the environment and human rights, which have nothing to do with the rules of armed conflict.

The United States believes that these instruments do not apply to the use of nuclear weapons. None of them expressly prohibits or regulates the use of nuclear weapons, and none was negotiated with the intention that it would be applicable in armed conflict.

It is, in our view, clear that a very substantial number of the States that negotiated these instruments would never have agreed to them if it had been understood that they would be regarded as prohibiting or restricting the use of nuclear weapons. Accordingly, the most immediate and far-reaching effect of any advisory opinion by the Court concluding that the use of nuclear weapons is restricted or prohibited by these instruments could be drastically to undercut the viability and acceptability of these essential instruments among important sectors of the international community.

Further, the United States believes that various principles of the law of armed conflict have been misstated or misapplied in several of the other submissions to the Court. Accordingly, we shall offer comments on these matters, including the question of the applicability to nuclear weapons of 1977 Additional Protocol I, the rules of neutrality and the concept of genocide.

In view of the importance of the legal question presented by the WHO request, the United States reiterates its request for an opportunity to provide further comments or observations relating to that question should the Court determine to respond to the request.

## II. COMMENTS ON THE QUESTION OF WHETHER THE COURT SHOULD EXERCISE ITS DISCRETION TO ISSUE AN OPINION

As indicated in the initial written statement of the United States, and as is generally accepted in the other written statements submitted to the Court, it is well established that the Court has discretion whether or not to provide an advisory opinion where it otherwise has jurisdiction to entertain the request.<sup>1</sup> Where the issuance of an opinion would not provide any practical guidance to the requesting body in the performance of its functions, or where providing an opinion could create difficulties for another part of the United Nations Organization in carrying out its responsibilities, the Court may and should decline the request.

The initial written statement of the United States set forth reasons why the requested opinion would provide no practical guidance to the WHO in the performance of its functions. The

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<sup>1</sup> Interpretation of Peace Treaties With Bulgaria, Hungary and Romania, Advisory Opinion, I.C.J. Reports 1950, p. 65 at p. 72; Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 15 at p. 19; S. Rosenne, The Law and Practice of the International Court (2d ed. 1985), pp. 652, 658, 698.

statement also described the serious risks that such an opinion by the Court would present to the substantial progress already made by States and international organizations in the field of arms control and the law of armed conflict concerning the possible use of nuclear weapons.

Several of the submissions by other States appear to assert that the use of nuclear weapons is prohibited by a very wide range of international agreements and principles having nothing to do with arms control or the rules of armed conflict. The list of instruments that purportedly have the effect of prohibiting the use of nuclear weapons includes virtually all of the environmental agreements and principles adopted during the past 25 years, a number of instruments concerning the protection of human health, many important instruments in the field of human rights, and a variety of other agreements and principles in other areas.

It is difficult to see how an opinion of the Court on the effect of environmental, human rights and other instruments on the use of nuclear weapons could assist the WHO in the performance of its functions. For example, environmental and human rights questions are within the competence of the United Nations Environment Programme (UNEP), the International Maritime Organization (IMO), the United Nations Human Rights Commission, and other international bodies. These matters are not within the competence of WHO, and WHO would in no way benefit from such an opinion in the exercise of its responsibilities.

For these reasons and the others cited in the initial statement of the United States, we believe the Court should, in the exercise of its discretion under Article 65 of its Statute, decline to provide a response to the WHO request.

### III. COMMENTS ON THE SUBSTANCE OF THE QUESTION POSED

The initial statement of the United States dealt with most of the issues raised in other submissions concerning the substance of the question posed by the WHO request. We shall not attempt to reproduce that material here, but refer the Court to our initial statement, which the United States continues to believe is an accurate analysis of the current state of international law concerning the use of nuclear weapons.

There are, however, a few areas in which some further comment is needed with respect to assertions made in a few of the statements submitted by other Member States. Several of these submissions appear to assert that the use of nuclear weapons is prohibited by an astonishing array of international agreements and principles having nothing to do with arms control or the rules of armed conflict, but dealing instead with such diverse subjects as the protection of the environment, human health and human rights.

In our view, it is clear that these instruments do not affect the use of nuclear weapons and were never intended to do so. Rather, States negotiating these instruments understood that

the use of nuclear weapons was a matter dealt with separately by international instruments concerning the law of armed conflict.

Very serious damage could be caused to international cooperation and the development of legal norms in these other substantive areas if the Court were to advise that these instruments somehow prohibited or restricted the use of nuclear weapons. In our view, it would be difficult to imagine that those who negotiated these instruments, including the nuclear-weapon States and those States that rely for their security on the nuclear deterrent capabilities of others, intended to prohibit nuclear weapons through the adoption of these various instruments.

For example, the United States has been an important leader in the development of international agreements and principles for the protection of the environment. But the United States would never have proposed or accepted an instrument that had the effect or intent of prohibiting or restricting the use of nuclear weapons, which have throughout the past several decades been an essential part of its national defense posture. It is safe to say that the same is true for the other nuclear-weapon States and those States which rely for their security on the nuclear deterrent capabilities of others.

Consequently, any advisory opinion by the Court concluding that these instruments prohibit or regulate the use of nuclear weapons would introduce a new and highly divisive element into international efforts to elaborate and enforce these instruments,

which could in many respects seriously obstruct international environmental cooperation. It could severely undermine and complicate the negotiation of new environmental instruments. In short, it could easily have a disastrous effect on international environmental law and cooperation.

The same is true for the other types of instruments cited above. It would seriously complicate negotiations on human rights, health and other important issues if it should become necessary, as a result of an advisory opinion of the Court, to decide as a matter of priority how the instruments in question should affect the use of nuclear weapons. The ratification of human rights and other treaties could be greatly complicated if it were to be assumed that these instruments affected the highly important and politically volatile question of the use of nuclear weapons.

It is essential for the success of international cooperation in these fields that the issue of the use of nuclear weapons -- however important -- be kept separate. This would, however, be difficult or impossible if the Court were to decide that these various instruments do in fact regulate or prohibit nuclear weapons, even though this was manifestly not the intent of States which negotiated them.

In addition, the United States believes that various principles of the law of armed conflict have been misstated or misapplied in several of the other submissions to the Court. Accordingly, this section comments on these matters, including

the question of the applicability to nuclear weapons of 1977 Additional Protocol I, the rules of neutrality and the concept of genocide.

A. Environmental Instruments.

A few of the submissions of other States to the Court assert that international environmental law prohibits the use of nuclear weapons in armed conflict. For the reasons set forth below, those assertions are incorrect.

Certainly no international environmental instrument expressly prohibits or regulates the use of nuclear weapons. Consequently, such an instrument could be applicable only by inference. Such an inference is not warranted, because none of these instruments was negotiated with the intention that it would be applicable in armed conflict or to any use of nuclear weapons. Further, such an implication is not warranted by the textual interpretation of these instruments.

1. International Environmental Treaties. It has been suggested in the submissions of some States that international environmental treaties are applicable in times of armed conflict and that these treaties collectively embody a "Principle of Environmental Security", which supposedly forms part of the law of war and prohibits the use of nuclear weapons.<sup>2</sup> In support of

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<sup>2</sup> See, e.g., Written Statement of the Government of the Solomon Islands, 10 June 1994, pp. 76-95; Written Statement of the Government of the Republic of Nauru, September 1994, pp. 36-47; Written Statement of the Government of Mexico, 9 June  
(continued...)

these assertions, one of the submissions to the Court states that "the silence of the great majority of treaties intended to protect human health and the environment allows the conclusion that they are designed to ensure environmental protection at all times, in peace and in war, unless expressly excluded."<sup>3</sup>

The international environmental treaties to which reference has been made include the 1985 Vienna Convention for the Protection of the Ozone Layer, the 1992 Framework Convention on Climate Change, and the 1992 Convention on Biological Diversity. As discussed below, none of these treaties was negotiated with any idea that it was to be applicable in armed conflict, much less to prohibit the use of nuclear weapons. None of them makes specific or veiled reference to armed conflict, and none of them reflects any "environmental security" principle or contains any other provisions that would suggest a restriction on the use of nuclear weapons. The application of these treaties to nuclear weapons would be for a purpose wholly different from that which was contemplated by the negotiating States.

a. 1985 Convention for the Protection of the Ozone Layer. A review of the text of the Vienna Convention for the

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<sup>2</sup>(...continued)  
1994, pp. 9-11.

<sup>3</sup> Written Statement of the Government of the Solomon Islands, 10 June 1994, p. 93.

Protection of the Ozone Layer<sup>4</sup> reveals no intent, whether express or implied, to address the legality of the use of nuclear weapons or any other form of armed conflict. The only provision of the Convention that even purports to regulate the conduct of the Parties is a general statement at Article 2(1):

The Parties shall take appropriate measures in accordance with the provisions of this Convention . . . to protect human health and the environment against adverse effects resulting or likely to result from human activities which modify or are likely to modify the ozone layer.

Article 2(1) does not contain any language which suggests that the Parties intended to prohibit any specific activities, and certainly none which suggests an intent to prohibit the use of any category of weapons.

Further, Annex I to the Convention sets forth an agenda for future research concerning substances and processes that may adversely affect the ozone layer. No reference is made, however, to research regarding the effects of the use of nuclear weapons, or to the effects of the use of any other weapons or means of warfare. The absence of any such reference further indicates that the Parties did not contemplate that the Convention would apply to such matters.

b. 1992 Convention on Climate Change. Nothing in the United Nations Framework Convention on Climate Change<sup>5</sup>

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<sup>4</sup> Convention for the Protection of the Ozone Layer, 22 March 1985, 26 International Legal Materials ("ILM") (1987), p. 1529.

<sup>5</sup> United Nations Framework Convention on Climate Change, 9 May 1992, 31 ILM (1992), p. 849.

addresses, expressly or by implication, the use of nuclear weapons or any other aspect of armed conflict. The objective of the Convention, as stated in Article 2, is to achieve "stabilization of greenhouse gas concentrations in the atmosphere . . . ." Similarly, the operative provisions of the Convention call on Parties to take various measures related to emissions of greenhouse gases. The Convention does not identify the use of nuclear weapons as a source of greenhouse gases (although it identifies other sources).

The record of the preparatory work for the Convention further establishes that the negotiating States did not intend to address the use of nuclear weapons. During preparatory work conducted by the UNEP/WHO Intergovernmental Panel on Climate Change that was tasked to develop possible elements of a convention, three proposals relating to armed conflict were suggested: one to refer to the 1977 Environmental Modification Convention,<sup>6</sup> a second suggesting a requirement that the climate be used only for "peaceful purposes", and a third suggesting that a linkage be established between nuclear stockpiles and climate change.<sup>7</sup>

It appears, however, that none of these proposals (or anything similar) was put forward or discussed during the

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<sup>6</sup> Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques, 18 May 1977, 1125 U.N.T.S. 3.

<sup>7</sup> "Report on Legal Measures by the Topic Coordinators", Response Strategies Working Group, Intergovernmental Panel on Climate Change (1990).

negotiations on the Convention that followed, nor were any such proposals included in the Convention text. The inescapable conclusion is that the States that negotiated the Convention did not intend to deal with such matters in that instrument.

c. 1992 Biodiversity Convention. Nothing in the text of the Convention on Biological Diversity<sup>8</sup> states or implies that it applies to the use of nuclear weapons or any other aspect of armed conflict. The only provision of even arguable relevance is Article 14, which requires that, in cases where an activity within a Party's jurisdiction poses an "imminent or grave danger" to biological diversity outside its jurisdiction, that Party shall "as far as possible and as appropriate" notify the States potentially affected and initiate action to "prevent or minimize" the danger. This provision is not designed to deal with armed conflict and in any event recognizes that there may be circumstances in which it is not possible or appropriate to prevent or minimize danger to biological diversity. Nothing in the negotiating record of which we are aware suggests that this general admonition was intended to regulate armed conflict, much less to prohibit nuclear weapons.

2. International Environmental Declarations. Several of the submissions of other States also argue that the use of nuclear weapons would be contrary to a series of non-legally

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<sup>8</sup> Convention on Biological Diversity, 5 June 1992, 31 ILM (1992), p. 882.

binding environmental instruments.<sup>9</sup> As will be seen from an examination of those instruments, this conclusion is wholly unwarranted.

a. 1972 Stockholm Declaration on the Human Environment. The 1972 Stockholm Declaration of the United Nations Conference on the Human Environment<sup>10</sup> is not a legally binding instrument, but rather a political statement of aspirations. Nothing in the Declaration purports to ban the use of nuclear weapons in armed conflict. Indeed, the one principle (Principle 26) expressly addressing nuclear weapons merely states that:

Man and his environment must be spared the effects of nuclear weapons and all other means of mass destruction. States must strive to reach prompt agreement, in the relevant international organs, on the elimination and complete destruction of such weapons.

At most, this is only a statement of a policy objective and is certainly not a statement of a legal prohibition on the use of nuclear weapons. All efforts at the Conference to prohibit the use of such weapons in armed conflict were rejected.<sup>11</sup>

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<sup>9</sup> See, e.g., Written Statement of the Government of the Solomon Islands, 10 June 1994, pp. 76-95; Written Statement of the Government of the Republic of Nauru, September 1994, pp. 36-47; Written Statement of the Government of Mexico, 9 June 1994, pp. 9-11.

<sup>10</sup> Stockholm Declaration on the Human Environment (16 June 1972), section I of the Report of the United Nations Conference on the Human Environment, UN Doc. A/CONF.48/14 & Corr.1 (1972).

<sup>11</sup> See L. Sohn, "The Stockholm Declaration on the Human Environment," 14 Harvard Int'l L.J. (1973), p. 423 at pp. 508-11.

Principle 21 of the Declaration provides:

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

It is clear, from a reading of the whole text of Principle 21, that it was designed to balance a statement of sovereign rights to exploit a State's own natural resources with a statement of the responsibility to ensure that the exercise of those rights does not result in damage to others. It was obviously not drafted to apply to the conduct of armed conflict, much less to the use of nuclear weapons in foreign territory.

b. 1992 Rio Declaration on Environment and Development. The Rio Declaration on Environment and Development,<sup>12</sup> like the Stockholm Declaration, is a non-legally binding political statement of principles and goals, adopted by consensus at the 1992 United Nations Conference on Environment and Development (UNCED). It does not address, even by inference, the legality of the use of nuclear weapons in armed conflict.

Only one of the principles of the Rio Declaration addresses armed conflict. Principle 24 provides:

Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary.

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<sup>12</sup> Rio Declaration on Environment and Development (14 June 1992), United Nations Conference on Environment and Development, UN Doc. A/CONF.151/5/Rev. 1 (1992).

Thus, Principle 24 calls on States to respect the existing international law providing protection for the environment in times of armed conflict, but does not in any way identify the content of that law, or express an opinion on the adequacy of its content. Although some States at the Rio Conference sought a general principle condemning weapons of mass destruction, they failed in this effort.<sup>13</sup>

Principles 1, 2 and 25 of the Rio Declaration have been cited for the proposition that the threat or use of nuclear weapons in an armed conflict would constitute a breach of generally accepted principles of international environmental law. However, none of these principles addresses armed conflict or the use of nuclear weapons.

Principle 1 provides:

Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.

Principle 2 is a restatement of Principle 21 of the Stockholm Declaration. Principle 2 provides:

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

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<sup>13</sup> See J. Kovar, "A Short Guide to the Rio Declaration," 4 Colorado J. of Int'l Environmental Law & Policy (1993), p. 119 at p. 138.

This text simply adds to Stockholm Principle 21 the words "and developmental" after the word "environmental" in the phrase "pursuant to their own environmental and developmental policies." It thus no more today supports the position that international law prohibits the use in armed conflict of nuclear weapons than it did twenty years ago.

Principle 25 provides that:

Peace, development and environmental protection are interdependent and indivisible.

While this principle identifies peace as an essential prerequisite to sustainable development, it does not purport to outlaw war, or to make the use of nuclear weapons in armed conflict unlawful.

Neither the nuclear-weapon States nor those States that rely for their security on the nuclear-weapon capabilities of others would ever have accepted a prohibition on the use of nuclear weapons in the context of such an instrument. The attempt ex post facto to interpret these instruments as if such a prohibition had been accepted would be to stand these instruments on their collective head and reverse the clear intent of the States that negotiated them.

Further, to the extent that the Court were to decide that the use of nuclear weapons is prohibited or restricted by international environmental agreements or principles, very serious damage could be caused to international cooperation and the development of legal norms in this area. Any determination by the Court that these instruments prohibit or restrict the use

of nuclear weapons would introduce a new and highly divisive element into international cooperation in this field.

#### B. Human Rights Instruments.

The argument has been made that the use of nuclear weapons violates the internationally guaranteed right to life, based on such international instruments as the Universal Declaration of Human Rights, the International Covenant of Civil and Political Rights, the American Convention on Human Rights and the European Convention on Human Rights. However, in the view of the United States, the use of nuclear weapons in the exercise of legitimate self-defense would not be in any way inconsistent with such a right to life.

The human rights instruments which recognize a right to life do not by their terms prohibit the use of nuclear or any other weapons. For example, the Universal Declaration provides in Article 3 that "[e]veryone has the right to life, liberty and security of person."<sup>14</sup> Nowhere in the Universal Declaration is there any mention of a limitation or prohibition on the use of any form of weaponry. The formulation contained in the International Covenant on Civil and Political Rights differs only

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<sup>14</sup> Universal Declaration of Human Rights, UNGA Res. 217A (III), UN Doc. A/811, adopted Dec. 10, 1948.

slightly, primarily by adding to this basic assertion that no one shall be "arbitrarily deprived" of life.<sup>15</sup>

None of these instruments prohibits, directly or indirectly, the taking of life for legitimate purposes, including in the exercise of the right to self-defense. That inherent right has long been understood and intended to comprehend the right to use lethal force, and it is inconceivable that the various human rights instruments cited could have been intended to abridge that right so long as the rules of armed conflict and the limitations of the U.N. Charter are observed.

Thus, the prohibition in the International Covenant on Civil and Political Rights against arbitrarily depriving someone of his or her life was clearly understood by its drafters to exclude the lawful taking of human life. During the negotiation of the text which became Article 6, various delegations indicated a preference for including an explicit statement of the circumstances under which the taking of life would not be deemed a violation of the general obligation to protect life, including inter alia killings resulting from the use of force which is no

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<sup>15</sup> Art. 6(1) of the 1966 International Covenant on Civil and Political Rights provides: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." See also the 1969 American Convention on Human Rights, Art. 4(1): "Every person has the right to have his life respected. This right shall be protected by law, and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life." Article 4 of the 1981 African Charter on Human and Peoples' Rights states: "Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right."

more than absolutely necessary, or which occur in case of self-defense, or which are lawfully committed by the military in time of war.<sup>16</sup> Rather than attempt to identify all the possible circumstances under which the taking of life might be justified, the drafters agreed to a simple prohibition on the "arbitrary" deprivation of life. In any event, we know of no significant opposition to the proposition that the deprivation of life as a "lawful act of war" would not be violative of the protected right to life. The European Convention, which also guarantees the right to life, specifically recognizes the right of States to deprive persons of their lives through lawful acts of war.<sup>17</sup>

It has been suggested that the Human Rights Committee, in General Comments issued in 1982 and 1984, has construed the Covenant on Civil and Political Rights as prohibiting the possession and use of nuclear weapons. That is not, however, what the Committee actually said, and those Comments are not in fact inconsistent with the view that the Covenant does not prohibit the taking of life for legitimate purposes, including the proper exercise of the right of self-defense.

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<sup>16</sup> See, e.g., Bossuyt and Humphrey, Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights (1987), pp. 115-125.

<sup>17</sup> Article 2 of the European Convention on Human Rights prohibits the intentional taking of life, save in the case of capital punishment, or following the use of force which is no more than absolutely necessary in quelling riots or insurrections, preventing the escape of a lawfully-held prisoner, effecting a lawful arrest or in self-defense. Article 15 prohibits derogations from Article 2 "except in respect of deaths resulting from lawful acts of war."

The 1982 Comment, for example, notes that the U.N. Charter prohibits the threat or use of force by one State against another, but expressly recognizes the inherent right of self-defense.<sup>18</sup> The 1984 Comment, while recognizing that nuclear weapons are among the greatest threats to the right to life, does not purport to declare that possession or use of such weapons is prohibited per se by international law. Rather, it simply proclaims that the production, testing, possession, deployment and use of such weapons "should" be prohibited, thereby expressing an aspirational goal to be achieved and not a binding rule of international law.<sup>19</sup>

Accordingly, the citation of human rights instruments adds nothing to the analysis of the question whether the use of nuclear weapons is consistent with existing international law. The answer to that question is determined, as it must be, not by

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<sup>18</sup> See General Comment 6/16, July 27, 1982, at paragraph 2: "The Committee observes that war and other acts of mass violence continue to be a scourge of humanity and take the lives of thousands of innocent human beings every year. Under the Charter of the United Nations the threat or use of force by any State against another State, except in exercise of the inherent right of self-defence, is already prohibited. The Committee considers that States have the supreme duty to prevent wars, acts of genocide and other acts of mass violence causing arbitrary loss of life." HRI/GEN/1/Rev. 1 at p. 6 (1994).

<sup>19</sup> See General Comment 14/23, Nov. 2, 1984, paras. 4 and 6: "[T]he designing, testing, manufacture, possession and deployment of nuclear weapons are among the greatest threats to the right to life which confront mankind today. This threat is compounded by the danger that the actual use of such weapons may be brought about, not only in the event of war, but even through human or mechanical error or failure...The production, testing, possession, deployment and use of nuclear weapons should be prohibited and recognized as crimes against humanity." HRI/GEN/1/Rev. 1 at p. 6 (1994).

reference to human rights instruments but by application of the principles of international law governing the use of force and the conduct of armed conflict.

C. The Law of Armed Conflict.

The initial written statement of the United States addressed in some detail the applicability to nuclear weapons of the international law of armed conflict. For the most part, that statement dealt sufficiently with the arguments raised in submissions of other Member States in this area. A few points, however, require some elaboration. In particular, various principles of the law of armed conflict have been misstated or misapplied in several of the other submissions to the Court. Accordingly, the following contains comments on these matters, including the applicability to nuclear weapons of 1977 Additional Protocol I, the rules of neutrality and the concept of genocide.

1. 1977 Additional Protocol I. As indicated in the initial statement of the United States, Additional Protocol I to the 1949 Geneva Conventions<sup>20</sup> contains a number of new rules on means and methods of warfare, which of course apply only to States that ratify the Protocol. (For example, the provisions on reprisals and the protection of the environment are new rules

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<sup>20</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts ("Protocol I"), 12 December 1977, 1125 U.N.T.S. 3.

that have not been incorporated into customary law.)<sup>21</sup> It is, however, clear from the negotiating and ratification record of Protocol I that the new rules contained in Protocol I were not intended to apply to nuclear weapons.

At the outset of the negotiations that led to Protocol I, the International Committee of the Red Cross (ICRC) stated that:

Prohibitions relating to atomic, bacteriological and chemical warfare are subjects of international agreements or negotiations by governments, and in submitting these draft Additional Protocols the ICRC does not intend to broach these problems.<sup>22</sup>

Explicit statements to the same effect were made during the negotiations by the United States and others. For example, the representative of France stated that:

The French delegation therefore wishes to make it quite clear that its Government could not under any circumstances permit the provisions of Protocol I to jeopardize the "inherent right of . . . self-defence", which France intends to exercise fully in accordance with Article 51 of the United Nations Charter, or to prohibit the use of any specific weapon which it considers necessary for its defence. Already in 1973, the French Government noted that the ICRC did not include any regulations on nuclear weapons in its drafts. In participating in the preparation of the additional Protocols, therefore, the French Government has taken into consideration only conflicts using conventional weapons. It accordingly wishes to stress that in its view the rules of the Protocols do not apply to the use of nuclear weapons. On numerous occasions the French Government has indicated its willingness to study the problems of nuclear weapons with the Powers directly

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<sup>21</sup> See M. Bothe, K. Partsch & W. Solf, New Rules for Victims of Armed Conflicts (1982), pp. 312, 317; International Committee of the Red Cross, Commentary on the Additional Protocols of 8 June 1977 (1987), p. 662.

<sup>22</sup> International Committee of the Red Cross, Commentary on the Additional Protocols of 8 June 1977 (1987), p. xxxii.

concerned, in an attempt to achieve general disarmament with suitable controls.<sup>23</sup>

The representative of the United Kingdom is reported as stating that:

His delegation also endorsed the ICRC's view, expressed in the Introduction to the draft Protocols, that they were not intended to broach problems concerned with atomic, bacteriological or chemical warfare, which were the subject of existing international agreements and current delicate negotiations by Governments elsewhere. It was on the assumption that the draft Protocols would not affect those problems that the United Kingdom Government had worked and would continue to work towards final agreement on the Protocols.<sup>24</sup>

The representative of the United States is reported as stating that:

. . . From the outset of the Conference it had been his understanding that the rules to be developed had been designed with a view to conventional weapons. During the course of the Conference, there had been no discussion of the use of nuclear weapons in warfare. He recognized that nuclear weapons were the subject of separate negotiations and agreements and, further, that their use in warfare was governed by the present principles of international law. It was his Government's understanding that the rules established by the Protocol were not intended to have any effect on, and did not regulate or prohibit the use of, nuclear weapons. It further believed that the problem of the regulation of nuclear weapons remained an urgent challenge to all nations which would have to be dealt with in other forums and by other agreements.<sup>25</sup>

The representative of the Soviet Union is reported as stating that:

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<sup>23</sup> Official Records of the Diplomatic Conference of Geneva, Vol. VII, p. 193.

<sup>24</sup> Official Records of the Diplomatic Conference of Geneva, Vol. V, p. 134.

<sup>25</sup> Official Records of the Diplomatic Conference of Geneva, Vol. VII, p. 295.

His delegation agreed with the point of view of the ICRC as to the tasks of the Conference with regard to the prohibition of weapons. As was pointed out by the ICRC in the introduction to the draft Additional Protocols: "Prohibitions relating to atomic, bacteriological and chemical warfare are subjects of international agreements or negotiations by Governments, and in submitting these draft Additional Protocols the ICRC does not intend to broach those problems."<sup>26</sup>

We are aware of no convincing evidence to the contrary in the negotiating record. The submission of one Member State to the Court in the present case cited statements by several delegations that nuclear weapons should be prohibited by the Protocol, but these statements of negotiating objectives were made at the very beginning of the four-session Conference and were not reiterated in the later stages of the Conference when it had become clear that no such prohibition had been accepted.

We are aware of only one specific assertion in the Conference record that any part of the Protocol applies to nuclear weapons -- namely, a brief assertion by the Indian delegation that the "basic rules" contained in one particular article of the Protocol applied to nuclear as well as other types of weapons.<sup>27</sup> This statement, however, in addition to being qualified and limited in scope, appears not to have actually been made in debate but simply to have been inserted for the record among many other pro forma explanations of vote. It is, in other words, an unpersuasive basis on which to assert that there was a

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<sup>26</sup> Official Records of the Diplomatic Conference of Geneva, Vol XVI, p. 188.

<sup>27</sup> Official Records of the Diplomatic Conference of Geneva, Vol. VI, p. 115.

significant challenge to the clear and repeated assertions of the other delegations mentioned above.

Furthermore, in creating an ad hoc committee to consider specific restrictions on the use of conventional weapons thought to present special dangers to the civilian population, the Conference rejected a proposal to expand the scope of this study to nuclear weapons. The Committee concluded that many delegations accepted "the limitation of the work of this Conference to conventional weapons," noting in particular the important function of nuclear weapons in deterring the outbreak of armed conflict.<sup>28</sup>

Nevertheless, in light of the importance of this point, a number of States made clear formal statements upon signature or ratification emphasizing that the new rules adopted in the Protocol would not apply to nuclear weapons. For example, the signature of the United Kingdom was based on the formal understanding that "the new rules introduced by the Protocol are not intended to have any effect on and do not regulate or prohibit the use of nuclear weapons."<sup>29</sup> The signature of the United States was based on the formal understanding that "the

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<sup>28</sup> Official Records of the Diplomatic Conference of Geneva, Vol. XVI, p. 454.

<sup>29</sup> International Committee of the Red Cross, Public Information Division, CD-ROM on International Humanitarian Law (September 1993) (containing an up-to-date list of signatures, ratifications, accessions and successions relating to international humanitarian law treaties, as well as the full text of reservations, declarations and objections thereto) (United Kingdom).

rules established by this protocol were not intended to have any effect on and do not regulate or prohibit the use of nuclear weapons."<sup>30</sup> The ratification of Belgium was subject to the formal declaration that:

The Belgian Government, in view of the travaux preparatoires for the international instrument herewith ratified, wishes to emphasize that the Protocol was established to broaden the protection conferred by humanitarian law solely when conventional weapons are used in armed conflicts, without prejudice to the provisions of international law relating to the use of other types of weapons.<sup>31</sup>

The ratification of Canada was subject to the following formal understanding:

It is the understanding of the Government of Canada that the rules introduced by Protocol I were intended to apply exclusively to conventional weapons. In particular, the rules so introduced do not have any effect on and do not regulate or prohibit the use of nuclear weapons.<sup>32</sup>

The ratification of Germany was subject to the formal declaration that:

It is the understanding of the Federal Republic of Germany that the rules relating to the use of weapons introduced by Additional Protocol I were intended to apply exclusively to conventional weapons without prejudice to any other rules of international law applicable to other types of weapons.<sup>33</sup>

The signature of Italy was subject to the following formal understanding:

It is the understanding of the Government of Italy that the rules relating to the use of weapons introduced by

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<sup>30</sup> Id. (United States).

<sup>31</sup> Id. (Belgium).

<sup>32</sup> Id. (Canada).

<sup>33</sup> Id. (Germany).

Additional Protocol I were intended to apply exclusively to conventional weapons. They do not prejudice any other rule of international law applicable to other types of weapons.<sup>34</sup>

The ratification of the Netherlands was subject to the formal declaration that:

It is the understanding of the Government of the Kingdom of the Netherlands that the rules introduced by Protocol I relating to the use of weapons were intended to apply and consequently do apply solely to conventional weapons, without prejudice to any other rules of international law applicable to other types of weapons.<sup>35</sup>

The signature of Spain was subject to the formal declaration that:

It is the understanding that this Protocol, within its specific scope applies exclusively to conventional weapons, and without prejudice to the rules of International Law governing other types of weapons.<sup>36</sup>

None of these statements and declarations was cast in the form of a reservation because, of course, none of the States making them had any reason to believe that their substance was in any way inconsistent with the provisions of Protocol I. To our knowledge, no State made any comment or objection to any of these formal and clear statements and declarations, nor did any State express a contrary view in connection with its own signature or ratification of Protocol I. In short, the record of signature and ratification of Protocol I reflect a manifest understanding

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<sup>34</sup> Id. (Italy).

<sup>35</sup> Id. (Netherlands).

<sup>36</sup> Id. (Spain).

that nuclear weapons were not prohibited or restricted by the new rules established by Protocol I.

Under the rules of treaty interpretation codified in the Vienna Convention on the Law of Treaties,<sup>37</sup> this record is dispositive as to the interpretation of the Protocol on this point. The preparatory work of Protocol I and the instruments filed by States signing or ratifying the Protocol show that nuclear weapons were not prohibited or restricted by the new rules established by the Protocol.

This conclusion is consistent with the analysis of those experts on international humanitarian law who are best informed on the Conference's work. For example, the official Commentary of the ICRC concluded: that "there is no doubt that during the four sessions of the Conference agreement was reached not to discuss nuclear weapons"; that the principles reaffirmed in the Protocol "do not allow the conclusion that nuclear weapons are prohibited as such by international humanitarian law"; and that "the hypothesis that States acceding to the Protocol bind themselves without wishing to -- or even without knowing -- with regard to such an important question as the use of nuclear weapons, is not acceptable."<sup>38</sup> Likewise, the extensive commentary of Bothe, Partsch and Solf on the Protocols concludes that the negotiating record "shows a realization by the

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<sup>37</sup> Convention on the Law of Treaties, 22 May 1969, 1155 UNTS 331.

<sup>38</sup> International Committee of the Red Cross, Commentary on the Additional Protocols of 8 June 1977 (1987), pp. 593-94.

Conference that the scope of its work excluded the special problems of the use of nuclear weapons."<sup>39</sup>

2. The Law of Neutrality. It was asserted in a few of the submissions to the Court that the rules of neutrality in the law of armed conflict apply to and prohibit the use of nuclear weapons.<sup>40</sup> However, the principle of neutrality<sup>41</sup> is not a broad guarantee to neutral States of immunity from the effects of war, whether economic or environmental. It was intended to preclude military invasion or bombardment of neutral territory, and otherwise to define complementary rights and obligations of neutrals and belligerents.<sup>42</sup> We are aware of no case in which a belligerent has been held responsible for collateral damage in neutral territory for lawful acts of war committed outside that territory.<sup>43</sup>

Further, the argument that the principle of neutrality prohibits the use of nuclear weapons is evidently based on the

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<sup>39</sup> Bothe, Partsch & Solf, supra, p. 191.

<sup>40</sup> E.g., Written Statement of the Government of Malaysia, pp. 9-10; Written Statement of the Government of Nauru (September 1994), pp. 35-36.

<sup>41</sup> See Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, 18 October 1907, reprinted in A. Roberts & R. Guelff, eds., Documents on the Laws of War (2d ed. 1989), p. 63.

<sup>42</sup> See, e.g., Greenspan, The Modern Law of Land Warfare, p. 356 (1959); W. Bishop, Jr., International Law: Cases and Materials, pp. 1019-20 (1971).

<sup>43</sup> See G. Schwarzenberger, International Law as Applied by International Courts and Tribunals, Vol. II, pp. 582-591 (1968).

assertion that the use of such weapons would inevitably cause severe damage in the territory of neutral States. This assumption is incorrect and in any event highly speculative. The Court could not find that such damage would occur without knowing the precise circumstances of a particular use. Like any other weapon, nuclear weapons could be used to violate neutrality, but this in no way means that nuclear weapons are prohibited per se by neutrality principles.

3. Rendering Death Inevitable. At least one of the submissions to the Court asserts that the use of nuclear weapons would violate the principle expressed in the 1868 St. Petersburg Declaration concerning weapons that "render death inevitable."<sup>44</sup> This assertion is evidently based on the argument that any nuclear weapon "would not leave those within the immediate vicinity of the explosion with any reasonable chance of survival."<sup>45</sup>

This argument is based on a misconception of the St. Petersburg principle, which was directed at weapons (such as poisoned projectiles) that were deliberately designed to kill when that design feature was not needed to disable enemy combatants or to destroy a lawful military objective. This does not mean that it is unlawful to use a weapon that has a high

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<sup>44</sup> Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, 11 December 1868, reprinted in Roberts & Guelff, supra note 41, p. 29.

<sup>45</sup> Written Statement of the Government of the Solomon Islands (June 10, 1994), pp. 47-48.

probability of killing persons in its immediate vicinity if that design feature is required to fulfill a legitimate military mission.

For example, any large high-explosive or fragmentation weapon has a high probability of killing exposed persons within a certain distance of the detonation. An effective anti-submarine, anti-aircraft or anti-tank weapon has a high probability of killing the crews of these vehicles. This fact does not make these weapons unlawful, since these lethal effects are necessary for the effective accomplishment of their legitimate mission.

By the same token, a nuclear weapon is not prohibited per se by the St. Petersburg principle if its effects are required for a legitimate military mission. For example, the use of a nuclear weapon to destroy a naval vessel or an armored formation does not violate this principle, even though there would likely be a very high casualty rate among targeted combatants.

4. Genocide. At least one of the submissions to the Court asserts that any use of nuclear weapons which affects a large number of non-combatants could constitute genocide, and that "the element of intent for genocide could be inferred from the mere failure of the person using the nuclear weapons to take account of its full effects . . . ." <sup>46</sup> This is a serious misstatement of the elements of the offense of genocide, which is only committed if violent acts are done "with intent to destroy, in whole or in part, a national, ethnical, racial or religious

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<sup>46</sup> Id., p. 52.

group . . . ."<sup>47</sup> The deliberate killing of large numbers of people is not sufficient to establish this offense unless this genocidal intent is demonstrated. Like any other weapon from firearms to poison gas, nuclear weapons could be used to commit genocide, but this fact in no way renders their use illegal per se.

5. Application of the Rules of Armed Conflict. The United States has long taken the position that various principles of the international law of armed conflict would apply to the use of nuclear weapons as well as to other means and methods of warfare.<sup>48</sup> However, this in no way means that the use of nuclear weapons is precluded by the law of war. Rather, as is explained in some detail in the initial statement of the United States in this case, the legality of the use of such weapons depends on the precise circumstances of their use.

A few of the submissions to the Court argue that the use of nuclear weapons is inherently precluded by these principles of international humanitarian law, regardless of the circumstances of their use.<sup>49</sup> It seems to be assumed that any use of nuclear weapons would escalate into a massive strategic nuclear exchange,

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<sup>47</sup> Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, UN General Assembly Resolution 260 A(III), 78 UNTS 277, Art. II.

<sup>48</sup> See International Red Cross Conference Resolution XXVIII, 20th International Red Cross Conference (1965).

<sup>49</sup> E.g., Written Statement of the Government of the Solomon Islands (June 10, 1994), p. 43, 47; Written Statement of the Government of Nauru (September 1994), pp. 53-54.

with the deliberate destruction of the population centers of the opposing sides.<sup>50</sup>

Such assumptions are speculative in the extreme, and cannot be the basis for conclusions by the Court on the legality of hypothetical uses of nuclear weapons that otherwise comply with the principles of international humanitarian law. In fact, any serious analysis of the legality of a hypothetical use of nuclear weapons would of necessity have to consider the precise circumstances of that use, including the nature of the enemy threat, the importance of destroying the objective, the character, size and likely effects of the device, and the magnitude of the risk to civilians.

Such factors cannot be adequately defined, let alone evaluated, in the abstract, and any attempt by the Court to do so would, in our view, be speculative and inappropriate. As the ICRC has stated in its official Commentary on the 1977 Additional Protocols to the 1949 Geneva Conventions, "it is difficult to accurately define the borderline between a use of nuclear weapons which may be lawful and a use which is unlawful: this could only be established by means of negotiations between States aimed at determining the scope and consequences, as regards nuclear weapons, of the principles and rules restated in the Protocols."<sup>51</sup> In light of the fundamental importance of this

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<sup>50</sup> E.g., Written Statement of the Government of the Solomon Islands (June 10, 1994), p. 50-51.

<sup>51</sup> International Committee of the Red Cross, Commentary on the Additional Protocols of 8 June 1977 (1987), p. 595.

subject, the Court should not lightly embark on any hypothetical examination of circumstances that could only be dimly understood in advance of an actual situation.

#### IV. CONCLUSION

The United States remains of the view that the WHO has been authorized to request opinions only in regard to questions arising within the scope of its competence. The question of the legality of the use of nuclear weapons is not within the competence of the WHO, and therefore, the Court lacks jurisdiction to provide the requested opinion. If the Court nonetheless determines that it has jurisdiction to provide the requested opinion, the Court should, in the exercise of the discretion provided by Article 65, paragraph 1, of its Statute, decline to provide an opinion. In any event, there is no general prohibition in conventional or customary international law on the use of nuclear weapons; there is no basis for speculation by the Court as to the manner in which the law of armed conflict might apply to the use of nuclear weapons in hypothetical future situations; and there is no basis for concluding that the use of nuclear weapons would violate the WHO Constitution.