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LA HAYE

International Court
of Justice

THE HAGUE

ANNEE 1995

Audience publique

tenue le lundi 6 novembre 1995, à 10 heures, au Palais de la Paix,

sous la présidence de M. Bedjaoui, Président

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

et

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

COMPTE RENDU

YEAR 1995

Public sitting

held on Monday 6 November 1995, at 10 a.m., at the Peace Palace,

President Bedjaoui presiding

in the case

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

and

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

VERBATIM RECORD

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

M. Valencia-Ospina, Greffier

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

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

L'Organisation mondiale de la Santé est représentée par :

M. Claude-Henri Vignes, conseiller juridique;

M. Thomas Topping, conseiller juridique adjoint.

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

et/ou

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

Le Gouvernement de l'Australie est représenté par :

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

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

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

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

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

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

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

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

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

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

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

M. Georges Abi-Saab, professeur;

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

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

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

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

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

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

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

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

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

Le Gouvernement de la République française est représenté par :

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

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

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

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

Le Gouvernement de la Fédération de Russie est représenté par :

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

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

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

Le Gouvernement des Iles Marshall est représenté par :

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

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

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

Le Gouvernement des Iles Salomon est représenté par :

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

S. Exc. M. Rex Horoi, ambassadeur, représentant permanent des Iles Salomon auprès de l'Organisation des Nations Unies, New York;

S. Exc. M. Levi Laka, ambassadeur, représentant permanent des Iles Salomon auprès de l'Union européenne, Bruxelles;

M. Primo Afeau, *Solicitor-General* des Iles Salomon;

M. Edward Nielsen, consul honoraire des Iles Salomon à Londres;

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

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

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

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

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

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

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

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

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

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

Le Gouvernement de l'Indonésie est représenté par :

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

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

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

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

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

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

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

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

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

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

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

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

Le Gouvernement italien est représenté par :

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

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

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

Le Gouvernement de la Malaisie :

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

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

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

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

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

Dato' R. S. McCoy, Expert;

M. Peter Weiss, Expert.

Le Gouvernement du Mexique est représenté par :

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

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

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

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

Le Gouvernement de la Nouvelle-Zélande est représenté par :

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

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

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

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

Le Gouvernement des Philippines est représenté par :

M. Merlin M. Magallona, agent;

M. Raphael Perpetuo Lotilla, conseil;

M. Carlos Sorreta, conseil;

M. Rodolfo S. Sanchez, avocat;

M. Emmanuel C. Llana, avocat.

Le Gouvernement de Qatar est représenté par :

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

M. Sami Abushaikha, expert juridique du Diwan Amiri;

M. Richard Meese, cabinet Frere Cholmeley, Paris.

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

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

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

M. Christopher Greenwood, conseil;

M. Daniel Bethlehem, conseil;

M. John Grainger, conseiller;

M. Christopher Whomersley, conseiller.

Le Gouvernement de Saint-Marin est représenté par :

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

Le Gouvernement de Samoa est représenté par:

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

M. Roger S. Clark, professeur.

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

The World Health Organization is represented by:

Mr. Claude-Henri Vignes, Legal Counsel;

Mr. Thomas Topping, Deputy Legal Counsel.

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

and/or

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

The Government of Australia is represented by:

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

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

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

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

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

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

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

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

Mr. George Abi Saab, Professor;

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

The Government of the Republic of France is represented by:

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

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

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

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

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

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

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

The Government of Indonesia is represented by:

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

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

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

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

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

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

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

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

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

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

Mr. M. Jafar Ghaemieh, Third Secretary, Embassy of the Islamic

Republic of Iran, The Hague;

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

The Government of Italy is represented by:

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

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

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

The Governement of Malaysia is represented by:

Dato' Mohtar Abdullah, Attorney-General - Leader;

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

Dato' Heliliah Mohd. Yusof, Solicitor-General;

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

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

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

Mr. Peter Weiss, Expert.

The Government of Marshall Islands is represented by:

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

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

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

The Government of Mexico is represented by:

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

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

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

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

The Government of New Zealand is represented by:

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

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

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

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

The Government of Philippines is represented by:

Mr. Merlin M. Magallona, Agent;

Mr. Raphael Perpetuo Lotilla, Counsel;

Mr. Carlos Sorreta, Counsel;

Mr. Rodolfo S. Sanchez, Advocate;

M. Emmanuel C. Llana, Advocate.

The Government of Qatar is represented by:

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

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

Mr. Richard Meese, Frere Cholmeley, Paris.

The Government of the Russian Federation is represented by:

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

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

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

The Government of Samoa is represented by:

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

Mr. Roger S. Clark, Professor.

The Government of San Marino is represented by:

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

The Government of Solomon Islands is represented by:

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

H.E. Ambassador Rex Horoi, Permanent Representative of Solomon Islands to the United Nations, New York;

H.E. Ambassador Levi Laka, Permanent Representative of Solomon Islands to the European Union, Brussels;

Mr. Primo Afeau, Solicitor-General for Solomon Islands;

Mr. Edward Nielsen, Honorary Consul, Solomon Islands, London;

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

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

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

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

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

Mr. Joseph Rotblat, Emeritus Professor of Physics, University of London

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

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

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

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

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

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

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

Mr. Christopher Greenwood, Counsel;

Mr. Daniel Bethlehem, Counsel;

Mr. John Grainger, Adviser;

Mr. Christopher Whomersley, Adviser;

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

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

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

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

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

Mr. D. Stephen Mathias, Legal Counsellor, Embassy of the United States, The Hague;

Mr. Sean D. Murphy, Legal Attaché, Embassy of the United States, The Hague;

Mr. Jack Chorowsky, Special Assistant to the Legal Adviser, U.S. Department of State.

Le PRESIDENT : Veuillez vous asseoir, je vous prie. La Cour reprend ce matin ses audiences publiques en l'affaire des deux avis consultatifs concernant la licéité de l'utilisation des armes nucléaires et sans tarder je voudrais donner la parole au représentant de l'Iran.

H.E. Mr. Javad ZARIF: Mr. President, Honourable Judges of the International Court of Justice,

1. On 14 May 1993, the World Health Assembly adopted resolution 46.40, requesting 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. On 15 December 1994, the General Assembly of the United Nations, by resolution 49/75 K, requested the Court to render its advisory opinion on the following question: "Is the threat or use of nuclear weapons in any circumstance permitted under international law?"

3. Two similar requests for an advisory opinion of the Court provide true testimony to the vital importance of the case to the international community, and also reflect a significant responsibility conferred upon the Court in this important respect.

4. The Government of the Islamic Republic of Iran has previously presented its written statements on both requests. Now, as the International Court of Justice has decided to hold one oral hearing for both cases, I have the honour to elaborate on our statements and to submit additional points concerning the illegality of the threat or use of nuclear weapons under international law. I have divided my presentation for the oral hearing into four parts. In the first part, I will explain our interest in this case and discuss the validity of the decisions of the requesting organ of the United Nations and of its specialized agency, as well as the responsibility of the Court in giving a reply. In Part II of my presentation, I will mainly cover the illegality of the threat or use of force in international relations. I will also touch upon the non-proliferation regime and its extension in the course of the recently held Review and Extension Conference. Part III of my statement is related to the incompatibility of the use of nuclear weapons with the objectives and principles of the law of armed conflict. In this section I will make particular reference to the protection of the environment

in times of armed conflict. In Part IV I will explain why the use of nuclear weapons is against public conscience. Finally, I will present my concluding remarks. So, with the permission of the Court, I will deal with Part I.

PART I

The Islamic Republic of Iran's Interest in this Case

5. Concerning our interest in the question before the Court, I wish to recall that the Islamic Republic of Iran ratified the 1968 Treaty on the Non-Proliferation of Nuclear Weapons on 2 February 1970 and is committed to the application of nuclear energy solely for peaceful purposes. Furthermore, Iran has concluded safeguard agreements with the International Atomic Energy Agency and has opened all its nuclear facilities and installations for routine and special inspections. Reports prepared by the IAEA experts have made it crystal clear that Iran uses its nuclear facilities for peaceful purposes only.

6. However, our interest in this case is not limited to our treaty obligations, but goes far beyond that. We, along with other peace-loving nations, share a common responsibility to save the present and succeeding generations from the horrendous and uncontrollable effects of the use of nuclear weapons. I wish to emphasize here that the Islamic Republic of Iran is one of the adamant proponents of a nuclear weapons free zone in the Middle East and is actively engaged in endeavours to this end.

Validity and Opportunity of Requests for Advisory Opinions

7. As to the validity of the requests for the opinion of the Court, reference should be made to Article 96, paragraph 1, of the Charter of the United Nations which authorizes the General Assembly and the Security Council to request the Court to render an advisory opinion on any legal question.

8. A decision of the General Assembly to seek an advisory opinion of the Court requires a simple majority. This is so because Article 18, paragraph 2, of the Charter, does not specify seeking of advisory opinions as an important question. Furthermore, the General Assembly has followed this procedure for the past 50 years. Thus, General Assembly resolution 49/75 K was adopted in

accordance with its rules of procedure. Now, it is for the Court to respond to the request duly made to it by the competent organ of the United Nations. As the Court has observed in the *Interpretation of Peace Treaties* case:

> "No State, whether a member of the United Nations or not, can prevent the giving of advisory opinion which the United Nations considers to be desirable in order to obtain enlightenment as to the course of action it should take."[5]

9. The General Assembly has a mandate, in accordance with Article 11 of the Charter, to "consider the general principles of co-operation in the maintenance of international peace and security, including the principles governing disarmament and regulation of armaments" in order to "make recommendations with regard to such principles to the members or to the Security Council or both".

10. The General Assembly has consistently addressed the issue of nuclear disarmament and, from its very first resolution, has called for the elimination of nuclear weapons. Since its inception, it has adopted numerous resolutions dealing with nuclear weapons, many of them condemning their use as a violation of international law, some calling their use a crime against humanity. For instance, the "Declaration on the Prohibition of the Use of Nuclear and Thermonuclear Weapons" adopted in 1962[6], and the resolution on Non-Use of Nuclear Weapons and Prevention of Nuclear War, adopted in 1981, could be mentioned[7].

11. Therefore, the request for an advisory opinion on the illegality of threat or use of force and nuclear weapons falls, without a doubt, within the scope of "functions and powers" of the General Assembly. Certainly, an opinion from the Court would assist the General Assembly to fulfil the mandate entrusted to it and, with the obligations of Member States with respect to principles governing disarmament and regulations of armaments. Thus, such a ruling will be of immense help to the United Nations, as well as to the cause of peace and security of the international community.

12. As regards the request made by World Health Organization, I would like to recall that in

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[5] *I.C.J. Reports 1950*, p. 71.

[6] UN doc. A/5100, 1962.

[7] GA res. A/36/92 I, 1981.

accordance with Article 96, paragraph 2, of the Charter, other organs of the United Nations and specialized agencies, if authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.

13. The World Health Organization has been authorized by the General Assembly, in accordance with Article 96, paragraph 2, of the Charter, to seek the advisory opinion of the Court on legal questions relating to its activities. Article 76 of the Constitution of the World Health Organization and Article X of the Agreement between the United Nations and WHO confirm the power given to the World Health Assembly. Resolution 46.40 of the World Health Assembly has been adopted in accordance with its rules of procedure, and therefore, attempts to question its validity have no legal basis.

14. The request by the World Health Organization also falls within the scope of its mandate, as it is related to the powers and functions of WHO to advance and promote global health, including the avoidance of present and future health catastrophes, as defined in its Constitution. There is no doubt that the use of nuclear weapons would pose catastrophic health problems on an unprecedented scale. As the Legal Counsel of WHO stated before the Court on 30 October 1995, "casualties and injury arising out of the use of nuclear weapons could vary from one million to one billion"[8].

15. In making the request to the International Court of Justice, the World Health Assembly noted, "it has been established that no health service in the world can alleviate in any significant way a situation resulting from use of even one single weapon" and that "primary prevention is the only appropriate means to deal with the health and environmental effects of use of nuclear weapons"[9]. This assertion clearly removes doubts, if there was any, on the genuine concern of WHO for the question put before the Court regarding the interpretation of its Constitution.

16. The Court itself observed in an Advisory Opinion on the *Interpretation of the Agreement between the WHO and Egypt* in 1980:

> "In situations in which political considerations are prominent, it may be particularly necessary for an advisory opinion from the Court as to the legal principles

[8]Statement made by the representative of WHO before the International Court of Justice at oral hearing on 30 October 1995.

[9]World Health Assembly 46.40, Geneva, 14 May 1993.

applicable with respect to the matter under debate, especially when these may include the interpretation of its Constitution."[10]

17. Lauterpacht has observed in Oppenheim's *International Law*:

"The advisory opinion of the Court has been designed primarily to assist the Security Council and the General Assembly in the discharge of their duties of conciliation and reporting upon disputes submitted to them by affording them an authoritative legal opinion."[11]

18. The Court has taken a progressive view of its advisory competence when it observed in the case concerning *Interpretation of Peace Treaties*:

"By lending its assistance in the solution of a problem confronting the General Assembly, the Court would discharge its responsibilities as the principal judicial organ of the United Nations ... The Court's opinion is not given to States but to the organ which is entitled to request it; the reply of the Court, itself an organ of the United Nations, represents its participation in the activities of the organization and, in principle it should not be refused."[12]

19. The Court further explained in the *Western Sahara* case conditions that may prevent it from rendering an advisory opinion:

"When the circumstances disclose that to give a reply would have the effect of circumventing the principle that a State is not obliged to allow its dispute to be submitted to judicial settlement without its consent."[13]

20. As it is evident, the question before the Court is not related to a dispute between two States; therefore, it does not undermine the consent principle. Consequently, we submit that there exists no compelling reason for the denial of the requested opinion.

21. Actually, the Court has accepted requests for advisory opinions on a number of subjects, including: interpretation of the Charter; the legal effects of the resolutions of the United Nations organs; decolonization, etc. In cases not involving a dispute between two States submitted without the consent of either of the parties, the present Court until now has never, *I repeat never*, refused to give an opinion even if the request was politically motivated.

22. It has been argued that the question before the ICJ is basically a political one, not a legal

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[10]*Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion rendered on 20 December 1980, p. 87, para. 33.

[11]Oppenheim, *International Law*, ed. Lauterpacht, Vol. II, 7th ed. p. 65.

[12]*I.C.J Reports 1950*, p.71.

[13]*I.C.J. Reports 1975*, p. 25, para. 33.

question. In this respect, I wish to state that it is difficult to perceive any question relating to violation of a specific rule of international law to be deemed non-legal in nature. It is obvious that many legal issues may have political dimensions or connotations. But, this should not, and cannot, prevent the Court from rendering its opinion on the legal aspects of that particular question.

As the Court has observed in 1984 on the case concerning *Military and Paramilitary Activities in and against Nicaragua*:

> "The [Security] Council has functions of a political nature assigned to it, whereas the Court exercises purely judicial functions. Both organs can therefore perform their separate but complementary functions with respect to the same event."[14]

23. Fitzmaurice has observed in this regard:

> "If the question put to the court is in itself a legal question (and *inter alia*, all questions relating to the interpretation of international instruments, with which requests for advisory opinions are usually concerned, are *ipso facto* legal questions) the fact that it has a political element is irrelevant."[15]

Responsibility of the Court

24. Now, with your permission Mr. President, I will deal with the responsibility of the Court. The important responsibility that has been conferred on the International Court of Justice, as the principal judicial organ of the United Nations, to consider requests for advisory opinions on a crucial question which relates to the very existence of the human species. The International Court of Justice, during its 50 years of life, has acquired considerable credibility among nations and its current consideration of this vital question is a true testimony to validity of this trust.

25. Today, the International Court of Justice is requested to fulfil an indispensable responsibility of issuing an opinion on the illegality of the use, or threat of use of nuclear weapons. A decision that would reaffirm the fundamental principle of international law, would bring to an end any doubt on this issue, and would constitute a major step towards achieving the lofty objectives of the United Nations, "to save succeeding generations from the scourge of war" and "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained".

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[14] *I.C.J. Reports 1984*, p. 435, para.95.

[15] Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Grotius Publications, Ltd., Cambridge, 1986, p. 116.

26. I wish to remind this august Court that the responsibility bestowed upon it is of legal, historic, and moral importance. Any doubt, hesitation or indecisiveness on this issue may encourage conditions for the repetition of disasters similar to Hiroshima and Nagasaki. Rendering advisory opinions is a mandate given to the Court by its Statute. As the Court observed on the *Interpretation of the Agreement between the WHO and Egypt* in 1980:

> "The function of the court is to give an opinion based on law, once it has come to the conclusion that the questions put to it are relevant and have a practical and contemporary effect and, consequently are not devoid of object or purpose."[16]

27. It is quite clear that the opinion of the Court in the present case will have practical and contemporary effects on the international community. Therefore, it will not be devoid of object or purpose. President Bedjaoui, speaking before the Sixth Committee in the current session of the General Assembly, emphasized the preventive nature of advisory opinions when he observed: "The advisory procedure thus appears, at the minimum, to be an instrument of 'preventive diplomacy', a particularly suitable means for the Court to defuse tension and ward off conflicts by determination of law."[17]

PART II

Illegality of Threat or Use of Force

28. Turning to the subject of the illegality of threat or use of force, I wish to emphasize that the unequivocal rejection of use or threat of use of force, contained in paragraph 4, Article 2 of the Charter of the United Nations, provides no room for use or threat of use of nuclear weapons against any State. In addition, this ban, in accordance with paragraph 6 of Article 2 of the Charter, is extended to non-members of the United Nations. This norm of international law, as the International Law Commission has concluded, is "a peremptory norm of international law"[18]. The International Court of Justice has called it: "not only a principle of customary international law, but also a

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[16] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, an Advisory Opinion rendered on 20 December 1980, para. 73.

[17] Statement by Judge Bedjaoui, Sixth Committee, 16 Oct. 1995.

[18] *I.L.C. Yearbook 1966*, Vol. 2, p. 247.

fundamental or cardinal principle of such law"[19]. Accordingly, its violation under any circumstances, irrespective of any pretext, is unjustifiable. I wish to reemphasize that the right to self-defence as provided in Article 51 of the Charter, cannot be invoked to justify use of nuclear weapons. The right to self-defence is limited by the general principles of necessity and proportionality as well as those of international humanitarian law, which will be covered in part III of my presentation.

29. Numerous United Nation's General Assembly resolutions and declarations have confirmed the illegality of use of force in international relations. For instance, the Declaration on Principles of International Law Concerning Friendly Relations restates the language of Article 2(4) of the Charter and declares that: "Such a threat or use of force constitutes a violation of International Law and the Charter of the United Nations and shall never be employed as a means of settling international disputes."[20] The Declaration on the Inadmissibility of Intervention in Domestic Affairs of Other States further condemns "[Armed] intervention and all other forms of interference or attempted threats."[21] And finally, the 1987 Declaration on the Enhancement of the Principle of Non-Use of Force emphasizes: "The principle of refraining from the threat or use of force in international relations is universal in character and is binding, regardless of each State's political, economic, social or cultural system or relation of alliance."[22] Although resolutions of the General Assembly are commonly perceived to be of a recommendatory nature, declarations interpreting the provisions of the Charter, along with those declaring the principles of international law, certainly do not constitute mere recommendations.

30. The General Assembly resolution 1653 adopted in 1961 particularly should be mentioned

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[19]*Military and Paramilitary Activities in and against Nicaragua, I.C.J. Reports 1986*, p. 90, para. 190.

[20]The Declaration on Principles of International Law Concerning Friendly Relations and Cooperation in Accordance with the Charter of the United Nations, GA res. 2625, 1970.

[21]GA res. 2131, 1965.

[22]The Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, GA res. 42/22, para. 2.

here. Paragraph 1(A) of this resolution declared that the use of nuclear and thermonuclear weapons is contrary to the spirit, letter, and aims of the United Nations, and, as such, is a direct violation of the Charter of the United Nations. Clearly, this assertion is also not a mere recommendation because it is based on the provisions of the Charter.

Regional Security Treaties

31. After the coming into force of the Charter of the United Nations, a number of regional security treaties concluded in various parts of the world reaffirmed the commitment of States with respect to the principle of non-use of force in international relations. For instance, the North Atlantic Treaty, the Final Act of the Conference on Security and Co-operation in Europe, the Charter of the Organization of American States, and constituent instruments of the Organization of African States and the Organization of Islamic Conference do contain such provisions.

Non-Distinction between the Threat or Use of Force

32. The United Nations Charter, treaties, and resolutions pertaining to the prohibition of the use of force do not distinguish between actual use of force and the threat to use force. Both, use of force and threats to use force, are equally outlawed. Consequently, the argument advanced by the nuclear-weapon States that their deterrence policies, over the years, have helped to maintain stability and world peace, seems to be extraneous. The very essence of the deterrence policy is based on the threat to use force, the most deadly force in terms of nuclear arsenal, which contravenes the letter and the spirit of the Charter of the United Nations and is therefore purely illegal. We all remember the Cuban missile crisis, and the terrible conditions which prevailed in the years following that dilemma. The people of the world lived for decades, between war and peace, in uncertainty. Volatile and horrifying circumstances caused mainly by so-called deterrence policies of nuclear weapon States. Moreover, nuclear deterrence has not prevented conventional wars. Occurrence of almost 150 wars in 50 years, with casualties more than those of the Second World War, certainly do not correspond with the better and more peaceful world that the founders of the United Nations had in mind.

Non-Proliferation of Nuclear Weapons

33. It is quite appropriate here to recall obligations of States arising from the Non-Proliferation Treaty and the régime created by it for achieving in fact nuclear disarmament. The treaty on Non-Proliferation of Nuclear Weapons, which entered into force on 5 March 1970, is an essential measure towards achieving the goal of nuclear disarmament. Its preamble calls for: "Cessation of the manufacture of nuclear weapons, the liquidation of all their existing stockpiles, and the elimination from national arsenals of nuclear weapons and their means of delivery." Article VI of the Treaty which has been regarded as the most important part of the arrangements between nuclear and non-nuclear parties to the Treaty contains a legally binding commitment on all parties "To pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and nuclear disarmament."[23] This article reflects the undertaking of the nuclear powers to end vertical proliferation of nuclear weapons and eventually dismantle their nuclear arsenal as well as the commitment of non-nuclear States to end horizontal proliferation. This mutual undertaking was clearly expressed by the then Prime Minister of the United Kingdom, Harold Wilson:

> "We know that there are two forms of proliferation, vertical and horizontal. The countries which do not possess weapons and which are now undertaking an obligation not to possess them have the right to expect nuclear-weapon States will fulfil their part of the bargain."[24]

34. The United States representative, Adrian S. Fisher, stated at the 1968 Geneva Conference that Article VI of the Non-Proliferation of Nuclear Weapons Treaty constitutes a:

> "solemn affirmation of the responsibility of nuclear weapon States to strive for effective measures regarding cessation of the nuclear arms race and disarmament. Moreover, the Article does not make the negotiations of this measure conditional upon their inclusion within the framework of a treaty on general disarmament."[25]

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[23]The ICJ in the *Continental Shelf* Judgment describes negotiations with "good faith" in following terms: "The parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of elimination in the absence of agreement; they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it." (*I.C.J. Reports 1969*, p. 47, para. 85.)

[24]Statement by the British Prime Minister when NPT entered into force, United Nations doc. A/7961 (1970).

[25]Statement made by United States representative Adrian S. Fisher on 18 January 1968.

35. Throughout the history of the NPT, the non-nuclear States have strived for a universal and non-discriminatory régime like those established by the 1972 Biological Weapons Convention and the 1993 Chemical Weapons Convention. Each one of these Conventions provides for total elimination of certain classes of mass destruction weapons. From the beginning of the NPT negotiations, those States called for the elimination of all nuclear weapons and their delivery vehicles.

36. On 11 May 1995, the NPT Review and Extension Conference decided without a vote: "As a majority exists among States party to the treaty for its indefinite extension, in accordance with Article X, paragraph 2, the Treaty shall remain in force indefinitely." It needs to be clarified, however, that the extension decision was a part of a package of three inter-linked compromise decisions. The other two decisions were: "Strengthening the Review Process for the Treaty," which provides for a greater measure of accountability by all parties, in particular by the nuclear powers, and secondly, "Principles and Objectives for Nuclear Non-Proliferation and Disarmament", which reiterates "the ultimate goal of the complete elimination of nuclear weapons and a treaty on general and complete disarmament".

37. The indefinite extension of the Treaty, therefore, should in no way be interpreted as legitimizing the continued existence of nuclear weapons, nor should it be construed as permitting their use. The Decision number 2 on the Principles and Objectives for Nuclear Non-Proliferation and Disarmament, adopted by the Review and Extension Conference, affirms this point. Article 4 of this Decision stipulates the obligations of States parties with respect to achieving nuclear disarmament which is inherently linked to its indefinite extension. These commitments include:

- "The completion by the Conference on Disarmament of the negotiations on a universal and internationally and effectively verifiable comprehensive Nuclear-Test-Ban Treaty no later than 1996"[26],
- "The immediate commencement and early conclusion of negotiations on a non-discriminatory and

[26]Decision number 2, Principles and Objectives for Nuclear Non-Proliferation and Disarmament, adopted by 1995 Extension and Review Conference, para. 4 *(a)*.

universally applicable convention banning the production of fissile material for nuclear weapons or other nuclear explosive devices"[27], and

- "The determined pursuit by the nuclear-weapon States of systematic and progressive efforts to reduce nuclear weapons globally, with the ultimate goal of eliminating those weapons."[28]

38. The President of the 1995 Review and Extension Conference clearly explained the feelings of the participants in the conference in the following terms:

> "All wanted concrete steps taken towards nuclear disarmament and were emphatic that the indefinite extension of the treaty was not a *carte blanche* for the nuclear-weapon States to retain their monopoly over possession of these weapons forever."[29]

The Security Council Resolutions

39. The Security Council, Mr. President, in its resolution 255 (1968)

> "recognizes that aggression with nuclear weapons or the threat of such aggression against a non-nuclear State would create a situation in which the Security Council, and above all its nuclear-weapon-State permanent members, would have to act immediately in accordance with their obligations under the United Nations Charter".

40. The Security Council resolution 984 adopted in 1995 prior to the Review and Extension Conference

> "urges all States, as provided for in Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons, to pursue negotiations in good faith on effective measures relating to nuclear disarmament and on a treaty on general and complete disarmament under strict and effective international control which remains a universal goal"[30].

This resolution also gives non-nuclear States assurances from the nuclear States that nuclear weapons will not be threatened or used against them[31].

41. Resolutions 255 and 984, therefore, recognize the illegality of nuclear weapons and their use against a non-nuclear-weapon State. On the other hand they call for the pursuance of

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[27]*Ibid.*, para. 4 *(b)*.

[28]*Ibid.*, para. 4 *(c)*.

[29]Statement made by Ambassador Jayantha Dhanapala, UN Conference on Disarmament Issues, Nagasaki, 12-16 June 1995.

[30]S/res/984, April 11, 1995, para. 8.

[31]S/res/984, para. 1.

negotiations in good faith for achieving complete nuclear disarmament. Inclusion of "good faith" both in Article VI of the Non-Proliferation Treaty and in the Security Council resolution indicates the high value attached to good faith negotiations. The ICJ in the *Continental Shelf* Judgment described negotiations with good faith" in the following terms: "The parties are under an obligation to enter into negotiations with a view to arriving at an agreement." The Court further added:

> "They are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it."[32]

42. To say the least on the good faith negotiations, unfortunately we feel that nuclear-weapon States' words do not correspond with their deeds. In this respect, I wish to recall the statement made by the Minister for Foreign Affairs of Australia, Senator Evans, before the Court on 30 November 1995, in which he elucidated the aspects of the "continuous and profound developments" in nuclear technology. It is difficult to believe proclaimed intentions of the nuclear-weapon States to pursue negotiations with good faith while witnessing the ongoing endeavour to acquire ever more destructive, ever more deadly nuclear technology, and ever more efficient delivery systems.

PART III

Prohibition of Nuclear Weapons According to the Law of Armed Conflict

43. Now I come to the third part of my presentation which examines the illegality of use of nuclear weapons in accordance with the law of armed conflict. Although the world has not experienced a large-scale use of nuclear weapons, the consequences of the first use of atomic bombs in Hiroshima and Nagasaki still disturb the health and environment of those cities. The World Health Organization's 1987 study clearly describes the gravity of the destructive force of nuclear weapons in comparison to conventional weapons:

> "Qualitatively, the difference between nuclear and conventional weapons is of ever greater significance. In conventional weapons the two most lethal are blast and heat. Blast and heat both cause injury and death when nuclear weapons are used, but to an extent thousands of times greater. Nuclear weapons, however, also produce additional lethal effects by radiation. Apart from the direct effects of radiation, the radioactive materials from a nuclear bomb can be transported to a great distance from the site of the explosion, as has recently been demonstrated on a very much smaller scale by the accident at the nuclear power

[32] *I.C.J. Reports 1969*, p.47, para. 85.

> plant in Chernobyl. Moreover, radiation from the fallout may be an obstacle to rescue operations and effective care of injured survivors and have harmful or lethal effects long after the explosion. Its deleterious effects may indeed continue to be felt in future generations, long after hostilities would have ended."[33]

44. The endeavour of the people of the world to avoid war and achieve peace is as old as human history. Yet, despite the categorical rejection of use or threat of use of force in accordance with the Charter, armed conflicts continue to persist in international relations. Therefore, the international community over the years has ventured to place certain limitations on techniques and methods of war in order to bring hostilities under control and make them more compatible with the governing norms and principles of humanity. The objectives of the laws of armed conflict are as follows: limiting conflicts to combatants and avoidance of attacking non-combatants; limiting conflicts to war zones and prohibiting attacks on civilian areas; limiting devices of fighting; and finally, limiting conflicts to the belligerent and prohibiting attacks on neutral powers. Thus far, many declarations, treaties and conventions have been adopted, mainly in The Hague and Geneva, codifying or setting a number of rules to achieve the above-mentioned objectives.

International Humanitarian Law

45. Among these rules, international humanitarian law has acquired particular importance, and it is especially relevant to the current case before the International Court of Justice. There are well-established principles of international humanitarian law, expressed in a variety of specific conventions, that are widely regarded by States and publicists as part of customary international law and applicable to wars on land, sea and air. They are customary rules because their origins are found in the Hague rules, which mainly codified the customary laws of war. These principles are neither new nor established by protocols. As has been stated by the Secretary-General of the United Nations: "Much of the conventional law of war has beyond doubt become part of customary law."[34] Universal adherence to these rules by States is another reason for their customary status. Moreover, the general principles accepted through instruments relating to international humanitarian law, as has

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[33]*Effects of Nuclear War on Health Services,* 2nd ed., 1987, p. 7.

[34]Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808, S/25704, p. 35, para. 9.

been declared by the International Conference of the Red Cross, apply to nuclear weapons as well[35]. Due to the relevance of these rules to the case under review, I will venture to mention a few. First, with regard to the fact that means of injury are not unlimited.

Means of Injury Are Not Unlimited

46. Article 22 of the Regulations Annexed to the Hague Convention No. IV of 1907 provides that the right of belligerents to adopt means of injuring the enemy is not unlimited. This principle is reaffirmed in Article 35(I) of the Additional Protocol I of 1977. The ban on extremely inhuman weapons dates back to the 1868 St. Petersburg Declaration[36]. Since then, a number of other weapons that cause unnecessary suffering have been outlawed. For instance, the 1925 Geneva Protocol on the Prohibition of Use of Chemical Weapons and the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction can be mentioned.

47. The burn and blast effects of nuclear weapons and their instant and long-range aftermath, including genetic consequences, place them in the category of weapons that cause superfluous and excessive destruction and anguish. Therefore, we are convinced that use of these types of weapons would violate the above-mentioned principle of international humanitarian law.

Discrimination Between Combatants and Non-Combatants

48. The prohibition of weapons or tactics that cause indiscriminate harm between combatants and non-combatants is another argument against the legality of the use of nuclear weapons. Article 27 of the Hague Regulations, Articles 22 and 24 of the Draft Hague Rules on Air Warfare of 1923, largely accepted as customary law, and Articles 51 and 52 of Additional Protocol I, all prohibit indiscriminate attacks.

49. Here, I wish to submit that if a nuclear device with the yield of up to several megatons is delivered, in practice it would be impossible to differentiate between combatants and non-

[35]Resolution XVIII, International Conference of Red Cross, resolutions, Vienna 1965.

[36]The 1868 St. Petersburg Declaration, which banned projectiles designed to explode upon contact with the human body.

combatants. A convincing statement of the indiscriminate nature of nuclear weapons is found in the preamble of the 1967 Treaty for the Prohibition of Nuclear Weapons in Latin America:

> "Nuclear weapons, whose terrible effects are suffered indiscriminately and inexorably by military forces and civilian populations alike, constitute, through the persistence of the radioactivity they release, an attack on the integrity of the human species and ultimately may even render the whole earth uninhabitable."

50. I wish to emphasize that, use of both tactical and strategic nuclear weapons will cause non-discriminatory destruction and injury. All types of nuclear weapons release radioactivity which is destructive, detrimental to human beings and the environment and their incalculable effects are uncontrollable. So called "Micro-nukes", "Mini-nukes" and "Tiny-nukes", all are considered to be weapons of mass destruction. Thus, their use, irrespective of type and size, will constitute violation of this fundamental principle of international humanitarian law.

Belligerent Duties and Protection Under the Geneva Conventions

51. The use of nuclear weapons inevitably will impair fulfilment of certain duties of belligerents under the Geneva Convention of 1949. Briefly, the use of high-yield nuclear weapons will make it impossible for belligerents to perform their post-battle obligations under the Geneva Convention and would also cause damage to legally protected persons and property. These duties include, *inter alia*, collection of wounded or dead; individual burial; evacuation of prisoners; and the ban on exposing prisoners to unnecessary danger; and, the rules on protection of persons and property, including wounded and sick members of armed forces, hospital ships and medical transporters.

The Obligations of Belligerent Parties towards Neutral Powers

52. The principle of neutrality, contained in Article I of the Hague Convention No. V, in its classic perception, was aimed at preventing the incursion of belligerent forces into neutral territory, or attacks on the persons or ships of neutrals. In accordance with this principle, the territory of neutral powers are inviolable.

53. Given the very high likelihood of fall-out being transmitted from the area of conflict to the territory of such neutral States, any use of nuclear weapons would violate the neutrality rights of

States not participating in the conflict. Hence, use of nuclear weapons, due to their uncontrollable effects, constitute neutrality-violating devices *par excellence.*

Marten's Clause

54. "Marten's clause", which was developed by the St. Petersburg Declaration of 1868 and later found a place in the Hague Rules and Geneva Convention of 1949, along with Additional Protocol I, provides that:

> "In cases not covered by this protocol or by other international agreements, civilians and combatants remain under the protection and authority of principles of international law derived from established custom, from principles of humanity and from the dictates of public conscience."

Thus the argument that prohibition of use of nuclear weapons is not specifically mentioned in any international instrument seems to overlook "Marten's Clause." As has been stated by the Tokyo District Court in the Shimoda Case in 1963: "Specific prohibitions embody a wider principle and this principle extends to new weapon development not foreseen at the time when the prohibition was agreed upon."[37]

55. The last point that I wish to make concerning the law of the armed conflict relates to Article 147 of the Fourth Geneva Convention. It has specified, *inter alia*, commission of acts against protected persons, serious injury to body or health, and extensive destruction of property not justified by military necessity, as grave breaches of the provisions of the Convention. Furthermore, in accordance with Article 89 of protocol I, "Making the civilian population or individual civilians the object of attack", and "launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects" is considered to be as "grave breaches" of the Protocol and of the Convention and would constitute "war crimes"[38]. Furthermore, Article 19 (3) *(d)* of the first part the

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[37]Shimoda and Others Vs. the State, Tokyo District Court, 7 December 1983, reprinted in *Japanese Annals of International Law*, No.8, 1964, pp. 212-251.

[38]Article VI *(b)* of the Nuremberg Principles formulated by the International Law Commission and approved by the General Assembly specified, among others, commission of following acts as war crimes: Wanton destruction of cities, towns, villages, or devastation not justified by military necessity.

International Law Commission's project on State responsibility adopted by the commission in 1976, classifies massive pollution of the atmosphere or of the seas as an international crime of States.

56. As I indicated earlier, due to uncontrollable effects of nuclear weapons, if they are used, it will not be possible to distinguish protected persons and property from civilian property and objects. Consequently, their use will form grave breaches of the Convention and of the Protocol and will constitute "war crimes".

Laws Relating to the Protection of the Environment

57. It is quite clear that the use of nuclear weapons will cause widespread, long-term and severe damage to the natural environment[39]. Thus, their use goes against Article 35(3) and Article 55 of the Additional Protocol I of 1977 and Article 1 of the UN Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques. Before I enter into a discussion of the laws on the protection of the environment, it is quite pertinent to quote here again a paragraph from WHO's 1987 classic study, which is a concise and excellent illustration of the effects of the use of nuclear weapons on health and the environment:

> "Less quantifiable effects of nuclear war include atmospheric changes detrimental to agriculture and the economy, not only in the countries where the war takes place, but also in others not engaged in hostilities. Moreover, since the world has never experienced a large-scale nuclear war, other unpredictable direct and indirect effects cannot be excluded. Any assessment of the effects of a nuclear war must therefore be attended by a high degree of uncertainty. However, on the basis of the information derived from the explosions at Hiroshima and Nagasaki, the tests of nuclear weapons and accidents at nuclear power plants, research in radiation physics and biology, and earthquakes, fires, floods, volcanic eruptions, and other natural disasters, it is possible to predict with reasonable accuracy the main effects on people and their environment. Those effects would not be limited to the people of the area where the bombs fell; some of them would be felt by people throughout most of the world."[40]

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[39]The first 1976 Understanding of the Conference of Disarmament interprets the terms "widespread, longstanding, and severe" as follows:
(*a*) Widespread: encompassing an area on the scale of several hundred square kilometers;
(*b*) Long-lasting: lasting for a period of months, or approximately a season;
(*c*) Severe: involving serious or significant disruption or harm to human life, natural and economic resources or other assets.
Roberts and Gulf (eds.), *Documents on Laws of War*, 1982, p. 377.

[40]WHO, *Effects of Nuclear War on Health Services*, 2nd ed. 1987, p. 7.

58. The above words explicitly indicate the magnitude of the effects of use of nuclear weapons on the environment. Now I intend to discuss, in brief, laws pertaining to the protection of the environment. There are two categories of law on the protection of the environment. While environmental law entails protection of the environment in general, the law of armed conflict tends to protect unnecessary damage to the environment in time of war, in particular.

59. As far as the law of armed conflict is concerned, both the customary rules and the provisions of treaty law prohibit belligerent parties, directly or indirectly, from inflicting unnecessary damage on the environment. Parties to the armed conflict are obliged, in accordance with well-established rules of customary law pertaining to armed conflict, to protect the environment in time of armed conflict. These rules include proportionality and the prohibition on military operations not directed against legitimate military targets, as well as the prohibition of destruction of enemy property not imperatively demanded by the necessities of war.

60. Prohibition of the destruction of non-military enemy property, which is also a customary rule, is included in the Hague Rules on Land Warfare: Article 23(*g*) of these rules prohibits the destruction or seizure of enemy property "unless such destruction or seizure be imperatively demanded by necessities of war".

61. In addition to the obligation under customary law, parties to armed conflict are obliged, in accordance with treaty law, to protect the environment in time of war. Almost all States are legally bound by the 1949 Geneva Conventions, and are committed to comply with them in an international conflict. Articles 53 and 147 of the Fourth Geneva Convention provide a degree of indirect protection for the environment, in the context of protecting property rights in occupied territories. Thus, an occupying power that destroys, for example, industrial installations in an occupied territory, causing consequent damage to the environment, would be in violation of the Fourth Geneva Convention, provided that such destruction is not justified by military necessity. If such destruction is extensive, it would constitute a grave breach of

the Convention, or even a war crime, in accordance with the provisions of Article 147.

62. Additional Protocol I of 1977 also contains a number of articles relevant to the protection of the environment. The articles of particular relevance are Article 35(3), which prohibits the employment of methods or means of warfare which "are indeed, or may be expected to cause widespread, long-term and severe damage to the natural environment"; Article 55, which imposes an obligation upon the States Parties to be careful in conducting war in order to protect the environment against such damage; Article 54, which protects objects indispensable to the survival of the civilian population; and, Article 56, which protects certain works and installations containing dangerous forces. Thus, consideration of the provisions of Protocol I leads us to the conclusion that it prohibits clearly, first, attacks on the environment and second, the use of the environment as a tool of warfare. Since the use of nuclear weapons will have the above-mentioned effects on the environment, it will breach rules pertaining to the protection of the environment.

63. Apart from the above-mentioned, there are other instruments that have indirect relevance to the protection of the environment. For instance, the 1925 Geneva Protocol on the prohibition of the use of chemical and bacteriological weapons in time of war is pertinent.

64. Turning to the law on the protection of the environment in general, it must be pointed out that the general principles of customary international law clearly contain specific rules pertaining to protection of the environment. A fundamental rule of customary law, incorporated in Principle 21 of the 1972 Stockholm Declaration, is the obligation of States not to damage or endanger significantly the environment beyond their jurisdiction. There are a considerable number of international and regional agreements that support this rule, including *inter alia*, the United Nations Convention on the Law of the Sea, the 1978 Kuwait Convention on the Protection of Marine Environment in the Persian Gulf and Sea of Oman, the 1985 Vienna Convention on the Protection of the Ozone Layer, the 1992 Framework Convention on Climate Change, and the 1992 Convention on Biological Diversity.

65. The Principle of Environmental Security, apart from the above-mentioned agreements, is included in the Principle 24 of the Rio Declaration on Environment and Development which stipulates that

> "Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and co-operate in its future development, as necessary."

66. In 1991, Protection of the Environment In Times of Armed Conflict was included on the agenda of the General Assembly. The Sixth Committee entrusted the International Committee of the Red Cross to carry out a study on the subject and report to the General Assembly. The ICRC organized a meeting of experts, and summarized the conclusions of its study in a report to the Secretary-General as follows:

> "The idea of creating an entirely new body of international rules for protection of the environment was ruled out. Most experts insisted on the importance of existing law, while acknowledging that there were a number of gaps in the rules currently applicable. The first step, therefore, was to ensure that even more States accede to or ratify existing treaties, that they observe their existing obligations and, at the same time, enact co-ordinate domestic legislation."[41]

67. This conclusion of the ICRC, which was confirmed by the Sixth Committee, which I had the honour to chair, undeniably covers the protection of the environment against the use of nuclear weapons.

Now, Mr. President, distinguished Judges, with your permission, I will deal with Part IV of my statement regarding the use of nuclear weapons as an act against public conscience.

PART IV

Use of Nuclear Weapons Is Against Public Conscience

68. As provided in Marten's Clause, a customary rule of international law, in cases not covered by international instruments, civilians and combatants "remain under the protection and authority of principles of international law derived from established custom, from principles of humanity and from the dictates of public conscience". Since the case before the Court has vital importance as it is linked to the destiny of the human race, the Court needs to endeavour to determine the law on the subject. To this end the Court is authorized in accordance with Article 38 *(d)* of its Statute to apply "subsidiary means for determination of law". It can convincingly be argued that there exists an *opinio juris* on the cruel and inhuman nature of nuclear weapons as well as on the

[41] UN doc. A/47/328.

prohibition of their use as violating the generally accepted principles of international humanitarian law. A scrutiny of statements, draft rules, declarations, resolutions, and other communications expressed by Governments and highly qualified persons and institutions leads us to the conclusion that a rule concerning prohibition of the use of nuclear weapons, as Professor Abi-Saab mentioned here before the Court, is in the "process of crystallization"[42].

69. A number of resolutions adopted by the General Assembly of the United Nations during its 50 years of existence, have called for the non-use of nuclear weapons and prevention of nuclear war. For instance, as I mentioned earlier, the "Declaration on the Prohibition of the Use of Nuclear and Thermonuclear Weapons" adopted in 1962[43], and the resolution on Non-use of Nuclear Weapons and Prevention of Nuclear War, adopted in 1981, could be mentioned[44]. These resolutions certainly reflect the views of the Governments concerning the abhorrence of the use of nuclear weapons and the fact that they consider their use illegal.

70. In reaction to the use of nuclear weapons by the United States after the bombing of Hiroshima, the Japanese Government strongly protested the "killing and injuring in one second a large number of civilians and destroying a great part of the town". The Note of Protest recalls

> "an elementary principle of International Public Law that in time of war the belligerent do not have unlimited right in the choice of the means of attack and that they cannot resort to projectile arms or any other means capable of causing the enemy needless suffering"[45].

This Note of Protest makes it clear that

> "the bombs in question used by Americans, by their cruelty and by their terrorizing effects, surpass by far gas or any other arm, the use of which is prohibited by treaties for reasons of their characteristics"[46].

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[42]Statement made by Professor Abi-Saab before the International Court of Justice on 1 November 1995.

[43]UN doc. A/5100, 1962.

[44]GA res. A/36/92 I, 1981.

[45]Text of the protest of Japan can be found in Hisakazu Fujita, *International Regulation of the Use of Nuclear Weapons*, Kansai University Press, 1988, Appendix No. 1, pp. 308-309.

[46]*Ibid.*

The Note, at the end, calls this act "a new crime against humanity and civilization"[47].

71. Furthermore, immediately after the Hiroshima and Nagasaki bombings of August and September 1945, the ICRC, in a circular letter to national Red Cross societies stated:

> "It is realized now, somewhat late, that the massive bombardment of cities did not pay from a military standpoint. Such bombardments were not justified either morally-legally or even from a practical point of view. Most jurists now consider that the use of atomic bombs is contrary to law."

Therefore, following the first and only use of nuclear weapon, the consensus in the international community, clearly establishing *opinio juris*, was that the use of atomic bomb constituted a clear violation of international law[48].

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[47] *Ibid.*

[48] Text of the ICRC circular can be found in *Essays in Honor of Jean Pictet*, The Hague: Nijhoff-ICRC, 1984, p. 404.

72. At its Edinburgh Conference of 1969, the Institut de droit international adopted a resolution on "the distinction between military objectives and non-military objects in general and particularly the problems associated with weapons of mass destruction". This resolution particularly prohibits "the use of weapons, the destructive effect of which is so great that it cannot be limited to specific military objectives or is otherwise uncontrollable"[49].

73. The Nuclear Free Zone treaties that have been concluded in three regions of the world are clear examples of the conviction and commitment of the States of these regions to the prohibition of use, testing, manufacturing, production and acquisition of these types of weapons[50]. It must be added that there are ongoing endeavours, in and outside the United Nations, for declaring certain other regions of the world as nuclear weapons free zones. Obviously, due to political reasons, these objectives have yet to be realized.

74. Non-Aligned States on various occasions have repeatedly called for nuclear disarmament on the grounds that the use of nuclear weapons would be a crime against humanity. For instance,

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[49]The last four paragraphs of this resolution read as follows:

> "5-Existing international law prohibits all attacks for whatsoever motive or by whatsoever means for annihilation of any group, region or urban center with no possible distinction between armed forces and civilian populations or between military objectives and non-military objectives;
>
> 6-Existing international law prohibits, irrespective of the type of weapons used, any action whatsoever designed to terrorize the civilian population;
>
> 7-Existing international law prohibits the use of all weapons which, by their nature, effect indiscriminately both military objectives and non military objects, or both armed forces and civilian populations. In particular, it prohibits the use of weapons the destructive effect of which is so great that it cannot be limited to specific military objectives or is otherwise uncontrollable, as well as of blind weapons;
>
> 8-Existing international law prohibits all attacks for whatsoever motive or by whatsoever means for annihilation of any group, region or urban center with no possible distinction between armed forces and civilian populations or between military objectives and non-military objectives."

[50]Antarctica has been declared demilitarized by the Antarctic Treaty of 1 December 1959, which prohibits, inter alia: stockpiling and use of nuclear weapons in that area. The treaty for prohibition of Nuclear Weapons in Latin America, which concluded on 14 February 1967, prohibits the use, testing, manufacturing, production or acquisition of nuclear weapons, directly or indirectly, by parties to the treaty or within the region defined by the treaty. The South Pacific Nuclear Free Zone Treaty, which was concluded on August 6, 1985 and entered into force on December 11, 1986, prohibits the manufacture, acquisition, possession or control of nuclear weapons.

while speaking on behalf of the Non-Aligned countries in 1993, Ambassador Wisnimurti of Indonesia stated before the General Assembly:

> "The advent of nuclear weapons has added a new and frightening dimension to the potentialities for world catastrophe. Their possession constitutes an unprecedented threat to human society and civilization. For what is at stake is the most fundamental right of humans and nations which is the right to their survival."

He continued by stating that "the immorality and illegality inherent in the present situation can no longer be perpetuated"[51].

75. Finally, I wish to recall Aristotle's unsurpassed definition of war: "The aim of all war is peace." In this definition he underlines, on the one hand, that war is an interruption, a temporary replacement of normalcy, or the explosion of a gradually developed disequilibrium, that must result in a new normalcy. On the other hand, Aristotle's dictum also describes the overall philosophy of the 20th century's law of war, and suggests that within a relatively short historical perspective, every war will come to an end. Hence, in the law of United Nations and in the logic of its Charter which provides a general prohibition of resort to force except in self-defence, even such legitimate use of force must be conducted in accordance with laws of war, and with the post-war situation in mind. It must not lead to disorganization so great as to ruin even the defeated. Article 40 of Additional Protocol I prohibits exactly what the use of nuclear weapons will cause. It prohibits "to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis". Given the uncontrollable nature of the effects of the use of nuclear weapons, it is quite clear that their use is not aimed at achieving peace but to destroy everything, which certainly contravenes the general principles of international humanitarian law.

Conclusion

76. In conclusion, Mr. President, distinguished Members of the Court, I wish to emphasize, once more, that the requests for an advisory opinion of the Court has been made in accordance with Article 96, paragraphs 1 and 2, of the Charter of the United Nations, and that the subject of requests falls within the functions and powers of the requesting organ of the United Nations, as well as those

[51]Statement made by Ambassador Wisnimurti before the First Committee of the General Assembly on behalf of the Non-Aligned countries, 19 November 1993.

of the World Health Assembly. Hence, we urge the International Court of Justice to confirm the common beliefs of the law-abiding nations of the world, and declare the threat or use of nuclear weapons as illegal and unjustifiable under any circumstances. Certainly, an opinion of the Court in this respect would reaffirm the fundamental principles of international law; would constitute a major step towards achieving the noble objectives of the Charter of the United Nations; will assist the requesting bodies in discharge of their functions; will serve as an instrument of preventive diplomacy and will help eliminate conditions that may lead to the repetition of catastrophes which will clearly be far more horrifying than those that occurred in Hiroshima and Nagasaki.

Mr. President, Honourable Judges of the International Court of Justice, I thank you very much for your kind attention.

The PRESIDENT: I thank His Excellency Dr. Javad Zarif, Deputy Foreign Minister of the Islamic Republic of Iran for his statement.

La Cour va maintenant suspendre son audience publique pour observer une pause de 15 minutes, après quoi elle donnera la parole au représentant de l'Italie.

La séance est suspendue de 11 h 25 à 11 h 45.

The PRESIDENT: Please be seated. The Vice-President of the Court would like to put a question to the distinguished representatives of Iran, I give him the floor.

The VICE-PRESIDENT: Thank you Mr. President.

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

Had the General Assembly's Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States also invoked by Iran been adopted, not as it was by consensus and without the opposition of a single Member, but rather by a vote in which some

20 States, including Permanent Members of the Security Council, had voted against or abstained while denying that the Friendly Relations Declaration constituted an authoritative interpretation of the Charter, could the Declaration be regarded as an authoritative interpretation of the Charter? If not, how can the cited resolutions on nuclear weapons be so regarded?

The PRESIDENT: I wish to inform the distinguished representatives of the Islamic Republic of Iran that their reply to the question posed by the Vice-President should be made in writing within 15 days of today.

Now I give the floor to His Excellency Professor Umberto Leanza of the Ministry of Foreign Affairs of Italy.

M. LEANZA : Monsieur le Président, Madame et Messieurs de la Cour, c'est pour moi un grand honneur de vous présenter, au nom du Gouvernement italien, les concises et essentielles observations qui suivent, à l'égard des deux questions qui font l'objet de la procédure actuelle.

Pour la première, concernant la licéité de l'utilisation d'armes nucléaires dans un conflit armé, proposée par l'Organisation mondiale de la Santé, le Gouvernement italien fait référence aux observations déjà produites par écrit, en vous demandant de ne pas donner de réponse à une question en toute évidence irrecevable. Son objet en effet ne retombe pas sous la portée et l'activité de l'Organisation mondiale de la Santé, telles qu'indiquées aux articles 1 et 2 de la constitution de cette Organisation et la question ne remplit donc pas les conditions requises prévues par l'article 96, paragraphe 2, de la Charte des Nations Unies. On pourrait tout au plus inclure parmi les buts et les fonctions de l'Organisation la question des effets de l'emploi d'armes nucléaires sur la santé de l'homme, l'impact de cet usage sur l'environnement et les techniques qui pourraient être utilisées pour en limiter la portée. Mais ces aspects sont loin de s'identifier avec l'objet de la question proposée, dont au contraire, ils se diversifient complètement, même s'ils y sont liés par un rapport de conséquence, qui n'est pas d'ailleurs très explicite.

2. Par contre, Monsieur le Président, Madame et Messieurs de la Cour, les problèmes soulevés par la deuxième question, proposée par l'Assemblée générale des Nations Unies et ayant pour objet la licéité de la menace ou de l'emploi d'armes nucléaires, sont bien plus complexes. A ce sujet, je

dois avant tout déclarer que le Gouvernement italien est conscient de la délicatesse de la matière, mais il est aussi persuadé que les risques et les implications connexes à l'éventualité de l'emploi d'armes nucléaires sont parfaitement évalués par tous les gouvernements qui ont jusqu'à présent fait preuve - et on peut estimer qu'ils en feront à l'avenir - d'un grand sens de responsabilité.

Mais la procédure en cours, à laquelle j'ai l'honneur de prendre part, exige que l'on réponde à la question sur la base de critères et d'évaluations de nature exclusivement juridique, à savoir sur la base du droit international en vigueur. A ces critères et à ces évaluations,les observations que je suis en train de proposer pour le Gouvernement italien seront strictement inspirées. Dans cette perspective, il faut souligner la diversité des problèmes qui se posent en matière d'emploi de ceux en matière de menace d'emploi d'armes nucléaires.

A la première hypothèse, comme en toute autre hypothèse de violence armée, les dispositions pertinentes de la Charte des Nations Unies doivent être appliquées et donc, avant tout, l'article 2, paragraphe 4, qui établit en termes tout à fait généraux l'interdiction de l'utilisation de la violence armée. Toutefois, cette interdiction admet des exceptions configurant des situations où l'emploi de la violence armée est censé licite. Notamment, ces situations sont envisagées par l'article 42, qui consent au Conseil de sécurité des Nations Unies d'entreprendre des actions impliquant l'usage de la force armée vis-à-vis d'un ou de plusieurs Etats qui se sont rendus responsables de menace à la paix, de violation de la paix, ou d'agression; et à l'article 51, qui admet l'exercice du droit naturel d'auto-défense individuelle et collective, au cas où un Etat ait subi une attaque armée.

Les dispositions sus-mentionnées, avec le nécessaire corollaire généralement reconnu du respect du principe de proportionnalité, constituent la partie centrale du *jus commune* applicable en matière d'exercice de la violence armée. C'est justement en raison de leur caractère général que ces normes ne permettent pas de donner une réponse appropriée à la question, qui fait référence spécifiquement à la qualification nucléaire des armes.

3. D'ailleurs, Monsieur le Président, Madame et Messieurs de la Cour, on ne doit pas croire que la réponse à la question qui nous intéresse puisse être donnée d'après d'autres dispositions plus détaillées, puisque les détails qui les distinguent du *jus commune* impliquent que leurs auteurs ont pris en considération un certain nombre de facteurs et de présupposés ultérieurs qui limitent

remarquablement le domaine de leur application.

Selon le Gouvernement italien, il y a lieu d'exclure que puissent avoir de la valeur à ce sujet les normes du droit international de guerre qui ont pour objet la limitation de l'emploi d'armes classiques. Notamment, les dispositions contenues dans les conventions adoptées par les conférences de La Haye de 1899, de La Haye de 1907, de Londres de 1909 et de Genève de 1949 ont été élaborées en se référant exclusivement à l'emploi d'armes classiques et elles ne peuvent être appliquées qu'à cette éventualité.

Une application, par analogie, de ces dispositions à l'usage des armes nucléaires est non seulement improposable, mais il faut même retenir que le caractère nucléaire des armes mentionnées dans la question doit être considéré comme la raison qui permet *a priori* de nier leur pertinence par rapport à la réponse.

4. Monsieur le Président, Madame et Messieurs de la Cour, je tiens à souligner que le Gouvernement italien est bien conscient de l'existence et de l'importance de l'aspiration générale et fortement ancrée de la communauté internationale de parvenir à la définition d'une interdiction totale et formelle de l'emploi d'armes nucléaires et à une convention de désarmement nucléaire général et complet, soumis à un contrôle international strict et efficace. La conscience des risques graves et inévitables liés à toute forme d'emploi d'armes nucléaires et la réticence des Etats dotés d'armes nucléaires à avoir recours à ces armes - que pourtant il détiennent légitimement - sont les indices indirects mais très significatifs d'un *status conscientiæ* de la communauté internationale, dans la direction que je viens d'indiquer.

D'ultérieurs indices ressortent de nombre de résolutions adoptées par l'Assemblée générale des Nations Unies, concernant l'emploi d'armes nucléaires. Aucune de ces résolutions n'a été adoptée par consensus, bien au contraire elles ont toutes été délibérées à la majorité et avec les voix contraires des Etats détenteurs d'arsenaux nucléaires, circonstance qui révèle, à l'état des choses, une divergence profonde d'opinions au sein de la communauté internationale, en ce qui concerne l'emploi d'armes nucléaires.

Le contenu de ces résolutions nous porte à développer des considérations qui peut-être ne manquent pas d'intérêt. Certaines d'entre elles font référence à des problèmes spécifiques et

délimités, qui n'ont qu'une simple connexion avec l'emploi d'armes nucléaires. Rappelons par exemple la résolution 36/100 de 1981 qui condamne l'emploi «en premier» des armes nucléaires; et la résolution 37/100B de 1982 qui préconise le gel des armements nucléaires. Ensuite, le Gouvernement italien est bien persuadé que, s'il est vrai que de nombreuses résolutions portent une interdiction formelle de l'emploi d'armes nucléaires, on ne peut pas y fonder la conviction que cette interdiction est imposée par le droit international en vigueur. A ce propos, on souligne que la résolution 39/148P de 1984 s'adresse expressément à la conférence sur le désarmement, en lui demandant d'accélérer les négociations pour la définition des mesures de prévention, appropriées et concrètes, de la guerre nucléaire; et que les résolutions 38/73G de 1983, 39/63H de 1984, 40/151F de 1985, 41/60F de 1986 et 47/53C de 1992 portent en annexe un projet de convention sur l'interdiction de l'emploi d'armes nucléaires. Les circonstances auxquelles on vient de faire référence prouvent que même l'Assemblée générale des Nations Unies est consciente du fait que l'interdiction généralisée d'armes nucléaires ne peut être édictée que par une convention internationale *ad hoc*, à négocier dans le cadre des négociations sur le désarmement.

5. En termes plus généraux, je voudrais attirer l'attention de cette illustre Cour sur la donnée importante représentée par le développement lent mais continu d'un *corpus* de normes internationales, toutes d'origine conventionnelle, qui visent à établir tantôt des restrictions spécifiques à l'emploi d'armes de destruction de masse, tantôt des interdictions de portée plus générale.

A ce *corpus* de normes appartiennent le traité de Washington sur l'Antarctique de 1959; le traité de Tlatelolco sur la dénucléarisation de l'Amérique Latine, de 1967; le traité de Londres, Moscou et Washington sur les principes qui régissent l'activité des Etats dans l'exploration et l'usage de l'espace extérieur, y compris la lune et les autres corps célestes, de 1967; le traité de Londres, Moscou et Washington sur la dénucléarisation du fond et du sous-sol océanique, de 1971; et le traité de Rarotonga, instituant une zone dénucléarisée dans le Pacifique Sud, de 1985. L'objet des dispositions sus-visées n'est pas seulement l'interdiction de l'emploi d'armes nucléaires, mais aussi la défense de déployer ces armes sur des territoires et des espaces déterminés, qui jouissent d'une sauvegarde spéciale.

Mais on doit inclure également dans ce *corpus* les conventions grâce auxquelles a été achevé

le long et laborieux procès qui a permis la mise au ban à l'échelle planétaire de certaines armes de destruction de masse, telles que les armes chimiques et bactériologiques. Je songe notamment au protocole de Genève sur l'interdiction de l'utilisation en guerre de gaz asphyxiants, toxiques et *similia* ainsi que de moyens bactériologiques, de 1925; à la convention de Londres, Moscou et Washington sur la mise au point, la production et le stockage d'armes bactériologiques, de 1972; et à la convention de Paris sur la production d'armes chimiques, de 1993. La réglementation qui y est prévue ne se limite pas à une simple interdiction de l'emploi d'armes chimiques et bactériologiques, laquelle resterait en soi-même velléitaire et ne créerait pas un état de confiance réciproque entre les Etats, nécessaire pour la concrète mise en œuvre de l'interdiction. Ce régime inclut de même des règles sur la production, la détention, le stockage et la circulation des substances qui peuvent être employées pour la production des armes susdites; et surtout, il prévoit des mécanismes de contrôle strictement fonctionnels à la solution des problèmes posés par les armes chimiques et bactériologiques.

En matière de production, de détention et d'emploi d'armes nucléaires, le processus de développement d'une législation conventionnelle complète et efficace n'est pas encore conclu. Le point de départ est sans doute le traité de Londres, Moscou et Washington de non-prolifération nucléaire, de 1968, qui bloque les arsenaux nucléaires et, tout en défendant aux Etats qui ont de telles armes de les transférer aux Etats qui en sont dépourvus et aux Etats dépourvus d'en acheter des Etats qui les détiennent, sauvegarde la liberté de recherche des Etats non nucléaires et admet la possibilité d'échanges entre les Etats nucléaires et non nucléaires dans le domaine de l'utilisation pacifique de cette énergie. En 1995 ce traité a été prorogé par la conférence de New York, qui a approuvé une décision énonçant les principes et les objectifs de la non-prolifération et du désarmement nucléaire. Par cette décision on a engagé la conférence pour le désarmement à adopter pas plus tard qu'en 1996 un traité d'ample portée pour la mise au ban des expérimentations nucléaires, et à mettre en chantier dans les meilleurs délais et à conclure le plus tôt possible une convention non discriminatoire et de portée générale pour la mise au ban de la production de matériel fissile utilisable pour la production d'armes nucléaires ou d'autres engins nucléaires explosifs. Cette décision a en outre souhaité, certes à la suite de la résolution 984 du Conseil de sécurité,

l'accomplissement d'ultérieures étapes en matière de garanties contre l'emploi ou la menace d'emploi d'armes nucléaires qui pourraient avoir une valeur contraignante; et enfin, elle a proposé que le but ultime de la négociation sur le désarmement soit l'élimination des armes nucléaires et un désarmement général et complet sous un contrôle international strict et efficace.

Monsieur le Président, Madame et Messieurs de la Cour, il semble donc nécessaire de conclure que le droit international en vigueur ne prévoit pas une interdiction d'emploi se référant spécifiquement aux armes nucléaires et que cette matière attend encore une discipline satisfaisante qui complète les normes du traité de non-prolifération nucléaire dans la partie relative à l'utilisation non-militaire des matériaux nucléaires et établisse des contrôles internationaux appropriés en ce qui concerne la détention et l'emploi de ces matériaux. Il conviendra en tout cas de se fonder sur la décision adoptée par la conférence de prorogation du traité pour élaborer des normes parfaitement compatibles avec ce traité, visant à garantir que les armes nucléaires ne soient plus jamais utilisées.

Sur la base des considérations qui précèdent, le Gouvernement italien retient que la question introduite est formulée de manière à ne pouvoir recevoir, en l'état actuel du droit international, et donc *de jure condito*, une réponse appropriée à la complexité de la matière.

En conséquence, le Gouvernement italien attire l'attention de cette illustre Cour sur le fait que toute réponse qu'elle donnerait - quelle que soit sa formulation - finirait par avoir une valeur politique qui, au contraire, ne doit jamais affecter les prononcés de la Cour, notamment en ce qui concerne les avis, lesquels, du fait de leur tâche d'aider le bon fonctionnement de l'organisation internationale et, plus généralement, le déroulement des relations internationales, doivent exprimer, *de jure condito*, des contenus certains et adéquats.

7. En ce qui concerne la partie de la question qui fait référence à la menace d'emploi des armes nucléaires, son caractère, Monsieur le Président, Madame et Messieurs de la Cour, est davantage politique. Ce profil pose en effet des problèmes encore plus délicats, inhérents aux stratégies de défense nationale et de conduite de la politique internationale, en considération du fait, généralement accepté, que la force de dissuasion, constituant la raison d'être de toute menace, sert à éviter - et pas à engendrer - la violence armée à travers la représentation des risques qui s'ensuivent. Ceci est d'autant plus exact, dans l'hypothèse de l'arme nucléaire, dont la réelle efficacité consiste

paradoxalement dans la force de dissuasion de la menace et non pas dans son emploi effectif.

Permettez-moi de réitérer à ce sujet, en les adaptant aux détails de cette partie de la question, au moins quelques-unes des considérations déjà développées. Il va de soi que, au cas où cette illustre Cour aurait l'intention de répondre à la partie de la question examinée maintenant, cela devrait être fait en interprétant la discipline générale établie par la Charte des Nations Unies, et spécialement par l'article 39 qui, faisant pendant à l'article 2, paragraphe 4, envisage la menace à la paix comme un délit international; et par l'article 51, dont on peut déduire les critères employés pour évaluer la licéité de l'emploi et de la menace d'employer la force armée. Il y aurait lieu également de tenir compte des dispositions du traité de non-prolifération nucléaire qui interdisent à un grand nombre d'Etats de produire et de détenir des armes nucléaires et *a fortiori* leur défendent aussi d'en menacer l'emploi.

Mais une réponse claire, adéquate et conforme aux attentes de la communauté internationale dans son ensemble ne pourra être fournie qu'à la conclusion des négociations sur la production et la détention des armes nucléaires, ainsi qu'à l'établissement de contrôles internationaux appropriés sous l'application de ces normes. Personne ne peut maintenant savoir si, même lorsque les négociations sur le désarmement nucléaire seront conclues, il en résultera une interdiction tout à fait générale et inconditionnée de menacer l'emploi des armes nucléaires.

8. Sur la base de ce qui a été observé jusqu'ici, le Gouvernement italien invite respectueusement cette illustre Cour à évaluer l'opportunité de ne pas répondre à la question, en se prévalant de la faculté implicite au paragraphe 1 de l'article 65 de son Statut. Une telle attitude, qui trouve son fondement sûr et incontestable dans le caractère essentiellement politique de la question qui a été proposée, pourra bien être considérée conforme aux précédents décidés par cette Cour. Je songe notamment à l'avis consultatif de 1962 sur *Certaines dépenses des Nations Unies* (*C.I.J. Recueil 1962,* p. 155).

Même si cet argument ne vous satisfait pas complètement, Monsieur le Président, Madame et Messieurs de la Cour, il faudrait également que cette Cour parvienne à la détermination de s'abstenir de donner un avis qui pourrait sérieusement nuire au progrès des négociations sur le désarmement nucléaire. Le grave risque que je viens d'évoquer peut bien être qualifié comme une raison

contraignante susceptible de persuader la Cour à décliner sa réponse : d'ailleurs la Cour a expressément considéré cette possibilité dans les avis consultatifs de 1956 sur la compétence du tribunal administratif de l'Organisation internationale du Travail à connaître des requêtes introduites contre l'Unesco (*C.I.J. Recueil 1956,* p. 86) et de 1989 sur l'applicabilité de la section 22 de l'article VI de la convention sur les privilèges et immunités des Nations Unies (*C.I.J. Recueil 1989,* p. 191).

En sous-ordre, le Gouvernement italien demande avec déférence à cette illustre Cour de bien vouloir donner une réponse dans laquelle le *jus commune* en vigueur en matière d'emploi et de menace d'emploi de la violence armée soit énoncé, spécifié et appliqué à la matière qui constitue l'objet de la requête pour avis, en articulant en tout cas sa réponse selon les articles 2, paragraphe 4, 39 et 51 de la Charte des Nations Unies.

Monsieur le Président, Madame et Messieurs de la Cour, je vous remercie de votre bienveillante attention.

Le PRESIDENT : Je remercie S. Exc. le professeur Umberto Leanza pour son exposé oral fait au nom de l'Italie.

I would like to draw the attention of the representatives of the Islamic Republic of Iran that a copy of the question posed by the Vice-President will, of course, be made available to them immediately.

La Cour n'a plus d'orateurs inscrits à l'ordre du jour de la présente audience publique. Je déclare en conséquence l'audience de ce matin suspendue. Elle reprendra demain matin à dix heures.

L'audience est levée à 12 h 15.