

DISSENTING OPINION OF JUDGE ODA

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I. INTRODUCTORY REMARKS — MY OPPOSITION TO THE COURT'S
DECISION TO RENDER AN OPINION IN RESPONSE TO THE REQUEST UNDER
GENERAL ASSEMBLY RESOLUTION 49/75 K IN THIS CASE

1. As the only Judge who voted against paragraph 1 of the operative part of the Court's Opinion, I would like to state my firm conviction that the Court, for reasons of judicial propriety and economy, should have exercised its discretionary power to refrain from rendering an opinion in response to the request for advisory opinion submitted by the United Nations General Assembly under its resolution 49/75 K of 15 December 1994. I am sorry to have to say that the conclusions the Court has now reached do not appear to me to constitute substantive or substantial answers to the questions that the General Assembly wanted to raise by means of its resolution and occasion doubts about the credibility of the Court.

(1) *The Inadequacy of the Question Put by the General Assembly
in the Resolution as the Request for Advisory Opinion*

2. (*The request laid down in resolution 49/75 K.*) The question put to the Court by the General Assembly, under resolution 49/75 K within the framework of the agenda item: "General and complete disarmament", reads strangely. It is worded as follows:

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

(The French text reads: "Est-il permis en droit international de recourir à la menace ou à l'emploi d'armes nucléaires en toute circonstance?")

The Court's Opinion points out the difference between the English and the French texts of the request and states that "[t]he Court finds it unnecessary to pronounce on the possible divergences" (Advisory Opinion, para. 20). We should, however, note that the resolution which originated in draft resolution A/C.1/49/L.36 (original: English), prepared and introduced by Indonesia (on behalf of the States Members of the United Nations that are members of the Movement of Non-Aligned Countries), was originally drafted in English and that, in the First Committee at the forty-ninth session (1994) which took up this draft resolution, the content of this original English text was not questioned by any delegate. Moreover, it would seem that the francophone delegates raised no question about the text of the French translation, as far as the verbatim records indicate. I shall therefore proceed with my analysis based on the English text.

3. (*The request was presented to the Court, not so much in order to ascertain its opinion as to seek the endorsement of an alleged legal axiom.*) When putting this question to the Court, the General Assembly — or those States which took the initiative in drafting the request —

clearly *never* expected that it would give an answer in the *affirmative* stating that: "Yes, the threat or use of nuclear weapons *is* permitted under international law in any circumstance [or, in all circumstances]." If this is true, it follows that, in fact, the General Assembly *only* expected the Court to state that: "No, the threat or use of nuclear weapons is *not* permitted under international law *in any circumstance*." The General Assembly, by asking the question that it did, wished to obtain nothing more than the Court's *endorsement* of the latter conclusion.

Since the Court was simply asked in this instance to give an opinion endorsing what is, in the view of the General Assembly, a legal axiom to the effect that "the threat or use of nuclear weapons is not permitted under international law in any circumstance", I wonder if the request really does fall within the category of a request for advisory opinion within the meaning of Article 96 (1) of the Charter of the United Nations. In the history of the advisory function of the Court, a simple endorsement or approval of what either the General Assembly or the Security Council believed to be a correct legal axiom has never been asked for in the form of a request for advisory opinion.

The drafting of the question put by the General Assembly seems to have been extremely singular. The Court has, however, reformulated the question to read, as indicated in paragraph 20 of the Advisory Opinion: "[the] real objective [of the question] is clear: to determine the legality or illegality of the *threat or use of nuclear weapons*" (emphasis added) and, furthermore, has implicitly reformulated the question to read: if nuclear weapons are not totally prohibited, under what circumstances is the threat or use of nuclear weapons considered to be lawful or permissible?

4. (*The lack of clarity as regards the concept of a "threat" in connection with nuclear weapons.*) I would like further to point out that the words "the threat of nuclear weapons" are not clearly defined in the request and may not have been understood in an unequivocal manner by the Member States which supported the resolution. An important point seems to be overlooked in the request, namely a possibility that nuclear weapons may well be considered to constitute a "threat" merely by being in a State's possession or being under production by a State, considering that the phrase "*threat or use of nuclear weapons*" (emphasis added) was first used in the request while the phrase "the use *or threat of use of nuclear weapons*" (emphasis added) had long been employed in the United Nations resolutions. In my view it was quite possible, at the time of the request, for some Member States of the United Nations to consider that the actual "possession" or "production" of nuclear weapons constituted a "threat". In other words, the request might have been prepared by some States who strongly upheld the straightforward notion of the illegality of nuclear weapons as whole.

5. (*Political history of the request.*) What actually gave rise to this inaptly phrased and inadequately understood request? I shall engage in a detailed analysis of this question and would like to stress one point, namely that, in spite of the Court's view that "regard [should] *not* [be had] to the origins or to the political history of the request, or to the distribution of votes in respect of the adopted resolution" (Advisory Opinion, para. 16; emphasis added), it appears to me pertinent and essential to examine why and under what circumstances the present request was submitted to the Court under resolution 49/75 K in 1994 and by whom — within the Organization of the United Nations or outside of it — this request was initiated. It is for this reason that I will engage in an analysis of the history of the request and the way in which some relevant decisions were taken by the General Assembly.

(2) *The Lack of a Meaningful Consensus of the Member States of the United Nations on the Request Drafted without Any Adequate Statement of Reasoning*

6. (*Preliminary attempt in 1993.*) It was not until 1994 that the General Assembly raised the question of what was the *existing international law* concerning nuclear weapons generally, despite the fact that the discovery, development and possession of nuclear weapons, as well as the threat of their use, had for the previous 50 years, since 1945, consistently been a matter of profound political concern to the international community.

However, prior to the adoption of resolution 49/75 K by the General Assembly at its forty-ninth session (1994), the idea of requesting the Court's opinion on the existing international law concerning nuclear weapons had been suggested at the forty-eighth session (1993) under the agenda item: "General and complete disarmament" (an item dating back to the twenty-sixth session (1971) of the General Assembly), when, in the First Committee, Indonesia introduced on 9 November 1993 a draft resolution on behalf of the Movement of Non-Aligned Countries: "Request for an advisory opinion from the International Court of Justice on the legality of the threat or use of nuclear weapons" (A/C.1/48/L.25).

In fact a request for an advisory opinion of the Court had already been made by the World Health Organization (WHA46.60) just a few months previously — a fact that was mentioned in the preambular paragraph of that Indonesian draft resolution.

On 19 November 1993 the sponsors of that draft resolution decided not to press for action on it, but without giving any explanation for that decision. A draft resolution with a similar content was, however, once again brought before the General Assembly in the following year at its forty-ninth session (1994).

7. (*The Movement of Non-Aligned Countries.*) Relevant to this was one of the decisions made at the Eleventh Ministerial Conference of the Movement of Non-Aligned Countries which was convened in Cairo

in May-June 1994. The Conference covered an extremely wide range of subjects and its Final Document on "Disarmament and international security" read:

"69. The Ministers *decided to retable and put to the vote* the resolution seeking an advisory opinion from the International Court of Justice on the legality of *the use and threat of use of nuclear weapons* during the forty-ninth Session of the General Assembly." (A/49/287; S/1994/894; emphasis added.)

The circumstances under which the Conference reached this particular decision were not clear from the documentation available.

The same decision of the non-aligned countries was repeated by the meeting of the Ministers of Foreign Affairs and Heads of Delegation of the Movement of Non-Aligned Countries to the forty-ninth session (1994) of the General Assembly held at the United Nations Headquarters on 5 October 1994 (A/49/532; S/1994/1179: para. 34).

8. (*Non-governmental organization.*) I would also point to another factor. The idea behind the resolution whereby the General Assembly (and also the WHO) requested advisory opinions, had previously been advanced by a handful of non-governmental organizations (NGOs) which initiated a campaign for the *total prohibition* of nuclear weapons but failed to persuade the States' delegations in the forum of the General Assembly, which has done no more during a period of more than ten years than to pass repeated resolutions suggesting a convention on the prohibition of the use or threat of use of nuclear weapons (cf. paras. 21-24, below). Some NGOs seem to have tried to compensate for the vainness of their efforts by attempting to get the principal judicial organ of the United Nations to determine the *absolute illegality* of nuclear weapons, in a bid to persuade the Member States of the United Nations to press for their immediate and complete prohibition in the political forum.

A statement made by an observer from the International Physicians for the Prevention of Nuclear War at the World Health Assembly in 1993 appears to shed light on what was behind the movement towards the attempt to get the International Court of Justice to render an advisory opinion on the matter in response to a request from the World Health Organization if not from the United Nations General Assembly. The observer stated that "WHO would be right to seek an opinion on the matter from the International Court of Justice".

An observer from the World Federation of Public Health Associations informed the World Health Assembly that

"it [itself] had unanimously adopted a resolution on nuclear weapons and public health which, *inter alia*, urged the World Health Assembly to request an advisory opinion from the International

Court of Justice on the legal status of the use of nuclear weapons, so as to remove the cloud of legal doubt under which the nuclear powers continued their involvement with such weapons, as well as to provide the legal basis for the gradual creation of a nuclear-free world”.

This matter is referred to in my separate opinion appended to the Court's Opinion in response to the request of the WHO (*Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, I.C.J. Reports 1996, pp. 88-96).

Another document of interest is an essay in a newsletter of the World Government of World Citizens, a part of which reads as follows:

“The threat to humanity's existence posed by nuclear weapons has encouraged humans the world over to consider new strategies for influencing their governments. One of these initiatives — the movement to ‘illegalize’ nuclear weapons — may increase participation in new governing structures being created to address global problems. The World Court Project is thus taking its place in the forefront of the antinuclear movement.

.....

To crystallize a united front against nuclear weaponry, several nongovernmental organizations (NGOs) . . . have established a World Court Project. These NGOs have *successfully lobbied the ‘non-aligned’ members of the United Nations General Assembly* and the U.N.'s World Health Organization (WHO) to establish, according to customary international law, *the illegality of nuclear weapons.*” (*World Citizen News*, Vol. IX, No. 6, December-January 1996; emphasis added.)

This gives the impression that the request for an advisory opinion which was made by the General Assembly in 1994 originated in ideas developed by some NGOs.

9. (*The Indonesian draft resolution in the forty-ninth session.*) In the First Committee at the forty-ninth session (1994), some States' representatives made various kinds of reference, in the general debate on all disarmament and international security agenda items that was held in the period 17-20 October 1994, to the earlier decisions of the Non-Aligned Movement as referred to paragraph 7 above.

While Benin was opposed to

“any initiative which could be counter-productive and which might necessitate a legal ruling from the International Court of Justice on questions which are essentially political in nature, such as those of the legality of the use or a threat of the use of nuclear weapons” (A/C.1/49/PV.3, p. 22),

the United Arab Emirates, Zimbabwe, Namibia, Tanzania and Malaysia were in favour of such an initiative (A/C.1/49/PV.5-7).

In that situation, Indonesia, on behalf of the members of the Movement of Non-Aligned Countries, introduced on 9 November 1994 a draft resolution on "Request for an advisory opinion from the International Court of Justice on the legality of the threat or use of nuclear weapons" (A/C.1/49/L.36) to the First Committee (A/C.1/49/PV.15, p. 7). This draft resolution, which proposed that the General Assembly should

"[d]ecide[s], pursuant to Article 96, paragraph 1, of the Charter, to request the International Court of Justice urgently to render its advisory opinion on the following question: 'Is the threat or use of nuclear weapons in any circumstance permitted under international law?'"

and which was practically identical to the 1993 text (A/C.1/48/L.25) proposed by Indonesia (which however did not press for action at the forty-eighth session (1993)) (see para. 6, above), became the subject of discussion at the First Committee on 17 and 18 November 1994.

In fact, the text of this question put to the Court, which was originally a part of the Indonesian draft, seems simply to have been copied, though not in exactly the same terms, from the General Assembly resolutions on a "Convention on the prohibition of nuclear weapons and prevention of nuclear war" (which have been adopted as a matter of routine and without being subjected to any substantive discussions in every session of the General Assembly since 1982) with an accompanying draft convention reading:

"The States Parties to this Convention solemnly undertake not to *use or threaten to use nuclear weapons under any circumstances.*" (Art. 1; emphasis added.)

(See, e.g., General Assembly resolution 48/76 B and Table III, Nos. 1-12, below.)

10. (*For and against the Indonesian draft.*) While Malaysia gave its support to this draft resolution by stating that:

"In the present post-cold-war climate, the legal opinion of the International Court of Justice could make an important contribution to the realization of a nuclear-weapons-free world. It could not replace nuclear disarmament initiatives, but it could provide the *legal and moral* parameters within which such initiatives could succeed" (A/C.1/49/PV.22, p. 4; emphasis added),

Senegal, Chile and Benin asked for the postponement of the discussions in order to have more time for consultations before voting (*ibid.*, pp. 4-6).

The United States, asserting that

“it is even harder to fathom the purpose of a draft resolution requesting such an opinion from the International Court of Justice this year, when further steps to control and eliminate nuclear weapons are being taken, negotiated or contemplated”,

urged its colleagues to abstain or to vote against this draft resolution (A/C.1/49/PV.22, p. 6).

Morocco appealed that no action should be taken on the draft resolution since “the consensus on this subject among the Movement of Non-Aligned Countries ha[d] been seriously eroded” (A/C.1/49/PV.24, p. 5). Germany, representing the European Union, was opposed to the draft resolution for the reason that

“[this] resolution would do nothing to help the ongoing consideration of the questions by the International Court of Justice and might adversely affect the standing of both the First Committee and the Court itself. It could also have wider adverse implications on non-proliferation goals which we all share”

and regretted having failed to convince its sponsors to withdraw it (*ibid.*, p. 6). Hungary immediately echoed the same position.

After Indonesia and Colombia had expressed their opposition to the motion submitted by Morocco for no action on the resolution, this motion was put to the vote and rejected by a recorded vote of 45 in favour, 67 against with 15 abstentions (*ibid.*, p. 7).

Prior to the voting on the Indonesian draft resolution, Russia took the view that

“the question of the advisability of the use of nuclear weapons is above all a political, not a legal problem . . . Since the Charter of the United Nations and the statutes of the International Court of Justice came into force, nuclear weapons have been considered in States’ doctrines not so much as a means of warfare but as a deterrent to war, especially global conflicts. They are therefore different from other weapons, in that they have a political function in the world today.” (*Ibid.*)

France stated that

“Trying to utilize for partisan purposes so respected an international institution as the International Court of Justice entails a very serious responsibility: that of putting at risk the credibility of the Court by leading it away from its mission. Indeed, who can seriously believe that the question posed is a legal one? It is, as we all know, a purely political issue . . . Need I recall that, for the first time since

the invention of nuclear weapons, the entire international community is engaged in multilateral negotiations on a universal and verifiable treaty on a comprehensive nuclear-test ban, and that important progress on this issue has already been achieved at Geneva?" (A/C.1/49/PV.24, p. 8.)

The United Kingdom stated that:

"the draft resolution . . . risks being seen as a deliberate attempt to exert political pressure over the Court to prejudice its response . . . Secondly, this draft resolution can do nothing to further the various positive diplomatic efforts under way in the field of nuclear disarmament, arms control and non-proliferation, notably on a comprehensive test-ban treaty . . . Thirdly, this draft resolution can do nothing to further global peace and security . . . Fourthly, this draft resolution risks serving the interests of those who wish to distract attention from the destabilizing accumulation of conventional arms and from clandestine programmes aimed at acquiring weapons of mass destruction and developing delivery systems." (*Ibid.*)

Germany (on behalf of the European Union) again pointed out that the European Union and its own country could not support the draft resolution (*ibid.*). Malta expressed its opposition and stated that

"[w]ithin the Non-Aligned Movement, to which we belong, we raised the question of withdrawal of the draft resolution. Unfortunately, our request was not acted upon by the Movement." (*Ibid.*)

The United Arab Emirates stated that it would not participate in the voting (*ibid.*, p. 9), and Benin once again expressed its support of the motion presented by Morocco (*ibid.*).

On the other hand, Iran and Mexico gave support to the draft resolution (*ibid.*).

11. (*Adoption of the Indonesian draft.*) The draft resolution proposed by Indonesia (on behalf of the Movement of Non-Aligned Countries) was adopted by the First Committee on 7 December 1994, as a result of a recorded vote of 77 votes in favour, 33 against with 21 abstentions (*ibid.*, p. 13).

After the voting, Canada, which had abstained from voting, stated that

"Canada is . . . concerned that the process of seeking an advisory opinion of the International Court could have a negative impact on certain of these ongoing negotiations by diverting attention from them" (*ibid.*).

Australia, which also abstained from the voting, explained that

“we are concerned that seeking an advisory opinion from the International Court of Justice on this issue could have an adverse rather than a positive effect on efforts to advance the process of nuclear disarmament. On the whole, we believe the question is unsuitable for adjudication. It certainly goes beyond a definable field of judicial inquiry and enters into the wider realms of policy and security doctrines of States.” (A/C.1/49/PV.24, p. 14.)

Sweden, which had also abstained from the voting, expressed the opinion that “the use of nuclear weapons would not comply with international law” and desired that “the legal situation be clarified as soon as possible by the Court” while stating, however, that that view was simply based on a report of the Swedish Parliament (*ibid.*).

To continue the explanation of votes, Chile stated that it had voted in favour of the draft resolution, as it felt that it should be guided by the majority orientation of the Movement of Non-Aligned Countries (A/C.1/49/PV.25, p. 1), and Japan gave an explanation of its abstention from the voting, saying that

“in the present international situation, pursuing the question of the legality of the use of nuclear weapons may simply result in confrontation between countries. Japan therefore believes that it is more appropriate to steadily promote realistic and specific disarmament measures.” (*Ibid.*)

China declared that it had not participated in the vote on the draft resolution, hoping that

“in the further promotion of nuclear disarmament and the prevention of nuclear war the General Assembly, the First Committee, the Disarmament Commission and the Conference on Disarmament, which have already played an important role, will continue to do so” (*ibid.*, p. 4).

12. (*My general views on the discussions in the First Committee.*) I would like to point out that, in spite of the support for the draft resolution proposed by Indonesia, hardly any explanation was given by any delegate backing the resolution as to why the *lex lata* concerning the “threat or use of nuclear weapons” should, as of 1994, require clarification by the International Court of Justice. No positive argument in support of the request was heard from any delegate who favoured the Indonesian proposal. Rather, the statements made in the First Committee by a number of those delegates appear for the most part to have been no more than appeals for the elimination of nuclear weapons.

In addition, the substance of the question or the wording of that ques-

tion to be asked of the Court, that is, “[i]s the threat or use of nuclear weapons in any circumstance permitted under international law?” was scarcely considered by any of the Member States in the General Assembly. The questions of what would constitute the “threat” of nuclear weapons, as opposed to the “threat of use” (a phrase employed in many United Nations resolutions) and whether the “threat” would imply the “possession” or “production” of nuclear weapons, together with the question of what was meant by “any circumstance”, were not raised by any delegate in the First Committee. However, it remains a fact that the Indonesian draft resolution was adopted by a majority in the First Committee.

13. (*Plenary meeting.*) The draft resolution adopted by the First Committee on 7 December 1994 by 77 votes in favour, 33 against with 21 abstentions (as stated in paragraph 11, above) was taken up at the Plenary Meeting on 15 December 1994 and was adopted by a recorded vote of 78 in favour, 43 against with 38 abstentions as resolution 49/75 K (see below Table I). France, Russia, the United Kingdom and the United States were among the opposing States, and China did not participate in the voting. Except for New Zealand and San Marino, there were no other countries in favour of the resolution in the category of West European and Other Countries.

14. (*Conclusion.*) I have thus demonstrated that the “question”, which itself appears to me to be inadequate as a request for an advisory opinion of the Court under Article 96 (1) of the Charter of the United Nations (as explained in paragraph 3, above), was drafted without any adequate statement of reasoning in support of any real need to ask the Court to rule on the “legality or illegality” of the “threat or use” (if not the “use or threat of use”) of nuclear weapons or, in more general terms, of nuclear weapons themselves. It is certain that the request did not reflect a meaningful consensus of the Member States of the United Nations or even of its Non-Aligned Members.

TABLE I

[Note: The nuclear-weapon States under the NPT are italicized;
“R” denotes recorded vote.]

Voting on the 1994 Resolution Requesting
the Court’s Advisory Opinion

The forty-ninth session (1994)

A/C.1/49/L.36: sponsored by: Indonesia (on behalf of the States Members of the United Nations that are members of the Movement of Non-Aligned Countries).

A/RES/49/75 K: adopted on 15 December 1994 by R78-43-38.

For: (78) [names of States not reproduced].

Against: (43) Albania, Andorra, Argentina, Belgium, Benin, Bulgaria, Cambodia, Comoros, Côte d'Ivoire, Czech Republic, Denmark, Djibouti, Estonia, Finland, *France*, Gabon, Georgia, Germany, Greece, Hungary, Iceland, Israel, Italy, Latvia, Luxembourg, Malta, Mauritania, Monaco, Netherlands, Poland, Portugal, Republic of Korea, Romania, *Russian Federation*, Senegal, Slovakia, Slovenia, Spain, Tajikistan, The FYR of Macedonia, Turkey, *United Kingdom*, *United States*.

Abstaining: (38) Antigua and Barbuda, Armenia, Australia, Austria, Azerbaijan, Bahrain, Belarus, Belize, Cameroon, Canada, Central African Republic, Chile, Croatia, Dominica, Eritrea, Ghana, Guinea, Ireland, Jamaica, Japan, Kazakhstan, Kyrgyzstan, Liechtenstein, Lithuania, Maldives, Micronesia (Federated States of), Niger, Norway, Republic of Moldova, Swaziland, Sweden, Togo, Trinidad and Tobago, Tunisia, Turkmenistan, Ukraine, Uzbekistan, Vanuatu.

Note: *China* was absent from the voting.

II. ONE ASPECT OF NUCLEAR DISARMAMENT — THE UNSUCCESSFUL EFFORTS OVER A LONG PERIOD TO BRING ABOUT A CONVENTION “PROHIBITING THE USE OR THREAT OF USE OF NUCLEAR WEAPONS UNDER ANY CIRCUMSTANCES” AS AN IMMEDIATE BACKGROUND TO THE REQUEST TO THE COURT

(1) *Declaration on the Non-use or the Prohibition of Nuclear Weapons*

15. (*Immediate background of the request.*) While the General Assembly resolution requesting an advisory opinion of the Court was prepared by Indonesia on behalf of the Non-Aligned Movement in 1994, as mentioned in paragraph 9 above, the following circumstances are noted as its immediate background.

The prohibition of the use of nuclear weapons had been an earnest desire of a group of some Member States of the United Nations and had been presented to the General Assembly throughout a long period extending over several decades. A review of the development of the idea of that prohibition in the United Nations General Assembly may reveal the background to resolution 49/75 K and is extremely useful when one evaluates that resolution, despite the Court's opinion, to a part of which I have already referred in paragraph 5 above, which states:

“once the Assembly has asked, by adopting a resolution, for an advisory opinion on a legal question, the Court, in determining whether there are any compelling reasons for it to refuse to give such an opinion, will not have regard to the origins or to the political history of the request, or to the distribution of votes in respect of the adopted resolution” (Advisory Opinion, para. 16).

16. (*The 1961 Declaration on the prohibition of the use of nuclear weapons.*) The General Assembly in its sixteenth session (1961), when

passing resolution 1653 (XVI) entitled "Declaration on the prohibition of the use of nuclear and thermo-nuclear weapons", declared that

"the use of nuclear and thermo-nuclear weapons is . . . a direct violation of the Charter of the United Nations; . . . is contrary to the rules of international law and to the laws of humanity; [and] . . . is a war directed . . . against mankind in general"

and that

"[a]ny State using nuclear and thermo-nuclear weapons is to be considered as violating the Charter of the United Nations, as acting contrary to the laws of humanity and as committing a crime against mankind and civilization".

This resolution originated from the draft resolution (A/C.1/L.292), sponsored by some 12 States, and introduced by Ethiopia. After it had been subjected to extensive discussion, both for and against, in the First Committee, the Plenary Meeting adopted the part comprising the above-mentioned declaration by a recorded vote of 56 in favour, 19 against, with 26 abstentions. The resolution as a whole, itself comprising the declaration, was adopted by a recorded vote of 55 in favour, 20 against, with 26 abstentions on 24 November 1961 (see below Table II, No. 1).

The resolution, however, did nothing more than request the Secretary-General of the United Nations to consult Member States in order to ascertain the possibility of convening a special conference for signing a convention on the prohibition of the use of nuclear weapons.

17. (*The first special disarmament session.*) Nearly two decades elapsed in which no practical action was taken to implement the 1961 resolution. Being "[a]larmed by the threat to the very survival of mankind posed by the existence of nuclear weapons and the continuing arms race", the General Assembly held in May-June 1978 its first session devoted to disarmament, that is, the Tenth Special Session (*Official Records of the General Assembly, Tenth Special Session, Supplement No. 4; A/S-10/2*). The General Assembly at this first special disarmament session adopted a "Final Document" covering nearly 130 paragraphs including a programme of action, in which it was stated that "[a] convention should be concluded prohibiting the development, production, stockpiling and use of radiological weapons" (*ibid.*, para. 76). Among a number of proposals put forth at this special session for consideration, there was a draft resolution submitted by Ethiopia and India: "Non-use of nuclear weapons and prevention of nuclear war", the intention of which was to have the General Assembly declare that:

"(a) *The use of nuclear weapons* will be a violation of the Charter of the United Nations and a crime against humanity;

- (b) *The use of nuclear weapons should therefore be prohibited, pending nuclear disarmament*” (*Official Records of the General Assembly, Tenth Special Session, Supplement No. 4*, para. 125 (z); A/S-10/AC.1/L.11; emphasis added).

In that special session neither this nor any other particular resolution was adopted.

18. (*The 1978 resolution on “Non-use of nuclear weapons and prevention of nuclear war”.*) Ever since the thirty-third session (1978), that is, a regular session which was held a few months later, the General Assembly has included on its agenda an item entitled: “Review of the implementation of the recommendations and decisions adopted by the General Assembly at its tenth special session” (the item which has appeared at every session of the General Assembly down to the present day).

A draft resolution (A/C.1/33/L.2), submitted by some 34 States and introduced by India, entitled “Non-use of nuclear weapons and prevention of nuclear war” (which was practically identical to the one submitted by Ethiopia and India at the first special disarmament session, as mentioned in paragraph 17 above) was adopted at the Plenary Meeting on 14 December 1978 by a recorded vote of 103 in favour, 18 against with 18 abstentions as resolution 33/71 B (see below Table II, No. 2).

Under this 1978 resolution, which followed the spirit of the 1961 Declaration, the General Assembly declared that

“[t]he use of nuclear weapons will be a violation of the Charter of the United Nations and a crime against humanity [and] should therefore be *prohibited*, pending nuclear disarmament” (emphasis added).

and requested all States to submit proposals concerning the *non-use* of nuclear weapons and avoidance of nuclear war in order that the question of an international convention on the subject might be discussed at a subsequent session.

It may be noted that the idea of the *prohibition of the use of nuclear weapons* was introduced here for the first time as a part of the declaration in a General Assembly resolution.

19. (*The 1980 and 1981 resolutions.*) Thereafter, and at the thirty-fifth (1980) and the thirty-sixth (1981) sessions, practically identical draft resolutions, including declarations which were similar to the 1978 resolution, prepared by almost the same States (between 20 and 30 in number) were introduced by India and adopted with a similar vote, almost the same countries being against each time and almost the same countries abstaining each time (see below Table II, Nos. 3 and 4).

It should be pointed out, however, that the expression reading the “threat of use” of nuclear weapons and the idea that not only the “use”

but also, in parallel, the "threat of use" of nuclear weapons should be prohibited was introduced only in 1980 for the first time. No explanation was given by the sponsoring State nor did any discussion take place in the General Assembly meetings on what would constitute the "threat of use" of nuclear weapons or, more particularly, on whether the "possession" or the "production" of nuclear weapons would constitute a "threat of use".

TABLE II

[Note: The nuclear-weapon States under the NPT are italicized;
"R" denotes recorded vote.]

Voting on the United Nations Declarations Relating to the Use of Nuclear Weapons

1. The 1961 "Declaration on the Prohibition of the Use of Nuclear Weapons and Thermo-Nuclear Weapons"

The sixteenth session (1961)

A/C.1/L.292 and Add.1-3: sponsored by: (12) Ceylon, Ethiopia, Ghana, Guinea, Indonesia, Liberia, Libya, Nigeria, Somalia, Sudan, Togo, Tunisia.
A/RES/1653 (XVI): adopted on 24 November 1961 by R55-20-26.

For: (55) USSR [*names of other States not reproduced*].

Against: (20) Australia, Belgium, Canada, *China*, Costa Rica, *France*, Greece, Guatemala, Ireland, Italy, Luxembourg, Netherlands, New Zealand, Nicaragua, Portugal, South Africa, Spain, Turkey, *United Kingdom*, *United States*.

Abstaining: (26) Argentina, Austria, Bolivia, Brazil, Chile, Colombia, Denmark, Ecuador, El Salvador, Federation of Malaya, Finland, Haiti, Honduras, Iceland, Iran, Israel, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Sweden, Thailand, Uruguay, Venezuela.

2. The 1978 resolution on "Non-Use of Nuclear Weapons and Prevention of Nuclear War"

The thirty-third session (1978)

A/C.1/33/L.2: sponsored by: (34) Algeria, Argentina, Cyprus, Ethiopia, India, Indonesia, Malaysia, Nigeria and Yugoslavia, with the later addition of Angola, Barbados, Bhutan, Bolivia, Burundi, Colombia, Congo, Cuba, Ecuador, Egypt, Guinea, Jordan, Liberia, Madagascar, Mali, Mauritius, Morocco, Peru, Romania, Senegal, Sri Lanka, Syrian Arab Republic, United Republic of Cameroon, Uruguay, Zaire.

A/RES/33/71 B: adopted on 14 December 1978 by R103-18-18.

For: (103) *China* [*names of other States not reproduced*].

Against: (18) Australia, Belgium, Canada, Denmark, *France*, Germany (Fed. Rep. of), Greece, Iceland, Ireland, Italy, Luxembourg, Netherlands, New Zealand, Norway, Portugal, Turkey, *United Kingdom*, *United States*.

Abstaining: (18) Austria, Bulgaria, Byelorussian SSR, Czechoslovakia, El Salvador, Finland, Gabon, German Democratic Republic, Hungary, Israel, Japan, Mongolia, Nicaragua, Poland, Spain, Sweden, Ukrainian SSR, USSR.

3. *The 1980 resolution on "Non-Use of Nuclear Weapons and Prevention of Nuclear War"*

The thirty-fifth session (1980)

A/C.1/35/L.22: sponsored by: (24) Algeria, Angola, Argentina, Congo, Ethiopia, India, Indonesia, Jamaica, Madagascar, Nigeria, Peru, Romania, Sri Lanka, Uruguay, Yugoslavia and Zaire with the later additions of Bhutan, Costa Rica, Cyprus, Ecuador, Egypt, Malaysia, Qatar, Yemen.

A/RES/35/152 D: adopted on 12 December 1980 by R112-19-14.

For: (112) *China [names of other States not reproduced]*.

Against: (19) Australia, Belgium, Denmark, *France*, Germany (Fed. Rep. of), Greece, Iceland, Ireland, Israel, Italy, Japan, Luxembourg, Netherlands, New Zealand, Norway, Portugal, Turkey, *United Kingdom, United States*.

Abstaining: (14) Austria, Bulgaria, Byelorussian SSR, Canada, Czechoslovakia, German Democratic Republic, Hungary, Malawi, Mongolia, Poland, Spain, Sweden, Ukrainian SSR, USSR.

4. *The 1981 resolution on "Non-Use of Nuclear Weapons and Prevention of Nuclear War"*

The thirty-sixth session (1981)

A/C.1/36/L.29: sponsored by: (30) Algeria, Argentina, Bahamas, Barbados, Bhutan, Colombia, Cyprus, Ecuador, Egypt, Ethiopia, India, Indonesia, Jamaica, Jordan, Madagascar, Malaysia, Nigeria, Peru, Romania, Yemen, Yugoslavia with the later additions of Bangladesh, Congo, Ghana, Guinea, Mali, Niger, Qatar, Rwanda, Sri Lanka.

A/RES/36/92 I: adopted on 9 December 1981 by R121-19-6.

For: (121) *China, USSR [names of other States not reproduced]*.

Against: (19) Australia, Belgium, Canada, Denmark, *France*, Germany (Fed. Rep. of), Iceland, Ireland, Italy, Japan, Luxembourg, Netherlands, New Zealand, Norway, Portugal, Spain, Turkey, *United Kingdom, United States*.

Abstaining: (6) Austria, Comoros, Finland, Greece, Israel, Sweden.

(2) *The 1982-1995 Resolutions on the Convention on the Prohibition of the Use of Nuclear Weapons*

20. (*The second special disarmament session.*) The General Assembly, which was not satisfied with the development of disarmament so far,

held, in June-July 1982, its second session devoted to disarmament, that is, the Twelfth Special Session, and approved the "Report of its *Ad Hoc* Committee" (*Official Records of the General Assembly, Twelfth Special Session, Supplement No. 6; A/S-12/32*) as the "Concluding Document" of that session in which reference was made to a draft resolution proposed by India (among various draft resolutions put forward in that session). The Indian draft read:

"*The General Assembly,*

.....
Decides to adopt an international convention . . . , prohibiting the use or threat of use of nuclear weapons under any circumstances, pending nuclear disarmament." (A/S-12/32, para. 20; A/S-12/AC.1/L.4; penultimate and final emphasis added.)

The draft of the "Convention on the Prohibition of the Use of Nuclear Weapons" was annexed to this draft resolution which read:

"The States Parties to this Convention,

.....
 Convinced that *any use* of nuclear weapons constitutes a violation of the Charter of the United Nations and a crime against humanity,

Convinced that this Convention would be a step towards the complete elimination of nuclear weapons leading to general and complete disarmament under strict and effective international control,

Determined to continue negotiations for the achievement of this goal,

.....
 Article 1. The States Parties to this Convention solemnly undertake *not to use or threaten to use nuclear weapons under any circumstances.*" (Emphasis added.)

In fact this draft resolution with the annexed draft of the Convention originally submitted by India at this special disarmament session was subsequently put forward by India during each regular session of the General Assembly from 1982 to 1995, inclusive, as explained below.

21. (*The 1982 resolution on "Convention on the prohibition of the use of nuclear weapons".*) The thirty-seventh session (1982) of the General Assembly which met a few months after the second special disarmament session, that is, in the fall of 1982, included on its agenda item: "Review and implementation of the Concluding Document of the Twelfth Special

Session of the General Assembly”¹. Some twenty States presented a draft resolution (A/C.1/37/L.4), which was introduced by India in the First Committee. This draft resolution, after some minor revisions by the sponsoring States, was adopted by the Plenary Meeting on 13 December 1982 as resolution 37/100 C: “Convention on the prohibition of the use of nuclear weapons” as a result of a recorded vote of 117 in favour, 17 against with 8 abstentions (see below Table III, No. 1).

The resolution read:

“*The General Assembly,*

Reaffirming the declaration that *the use of nuclear weapons* would be a violation of the Charter of the United Nations and a crime against humanity . . .

1. *Requests* the Committee on Disarmament to undertake, on a priority basis, negotiations with a view to achieving agreement on an international convention prohibiting the *use or threat of use of nuclear weapons under any circumstances*, taking as a basis the text of the annexed draft Convention . . .” (Third and final emphasis added.)

The draft Convention, which had been included in the Indian draft resolution submitted to the second special disarmament session (as quoted in paragraph 20 above) was annexed to this resolution.

The resolution certainly originated in the Indian draft proposal at the second special disarmament session of that year but, unlike that original Indian proposal, which would have led *the General Assembly itself to decide to adopt an international convention*, it requested that *negotiations should be undertaken in the Committee on Disarmament* (known presently as the Conference on Disarmament) in Geneva with a view to achieving agreement on an international convention “prohibiting the use or threat of use of nuclear weapons under any circumstances”.

22. (*The phrase “the use or threat of use of nuclear weapons under any circumstances”.*) The phrase “*the use or threat of use of nuclear weapons under any circumstances*” (emphasis added) was first used in a General Assembly resolution in 1982. However, there was no discussion of the

¹ This agenda item remains until the present day at every session of the General Assembly but with the addition of sub-item “Convention on the prohibition of the use of nuclear weapons: Report of the Committee on Disarmament” from the thirty-eighth session until the forty-second session, inclusive. From the forty-third session the sub-item simply referred to the Convention on the prohibition of the use of nuclear weapons without making any mention of the Report of the Committee on Disarmament.

phrase in the General Assembly. Furthermore, that phrase was initially used in the context of a possible prohibition in a future international convention.

It is important to note that the wording of the question in the request presented to the Court that reads: “Is the *threat* or use of nuclear weapons *in any circumstance* permitted under international law?” (emphasis added), which seems to have originated in the phrase used in a 12-year-old (1982) General Assembly resolution, is in fact different in that the question in the 1994 request singles out the “threat” of nuclear weapons and leaves open the possibility that this “threat” — not the “threat of use” — might be interpreted as meaning the “possession” or the “production” of those weapons. It is even more important to note that the phrase “threat of use” in the 1982 resolution was used in a quite different context, as I explained above, namely, with respect to a convention to be agreed upon in future.

23. (*From 1983 to 1995.*) In the thirty-eighth session (1983), the General Assembly, “noting with regret that the Committee on Disarmament, during its session in 1983, was not able to undertake [such] negotiations”, reiterated its request to the Conference on Disarmament² in Geneva

“to commence negotiations, as a matter of priority, in order to achieve agreement on an international convention prohibiting the *use or threat of use* of nuclear weapons under any circumstances, taking as a basis the text of [the annexed draft Convention which was identical to that of 1982]”³ (emphasis added).

In every session of the General Assembly since 1982 until 1995 (thirty-seventh to fiftieth sessions), under the same agenda item as referred to in paragraph 21 above, practically the same States presented practically identical draft resolutions with the attached draft convention which did not change at all during a 14-year period (which draft resolutions were invariably introduced by India) and these draft resolutions were adopted as a result of practically the same voting (see below Table III, Nos. 1-14). In fact, while the number of sponsoring States remained almost steady, the number of States which took a negative position on the resolution increased.

² From 7 February 1984, the date of commencement of its annual session, the Committee on Disarmament was to be known as the Conference on Disarmament.

³ The wording “as a matter of policy” was dropped since the forty-ninth session (1994) and the word “possible” was added so that it read “as a possible basis” since the forty-eighth session (1993).

24. (*Repetition of resolutions with the same content.*) The request of the General Assembly in New York that the Conference on Disarmament in Geneva should undertake negotiations and the General Assembly's *regret* that the Conference had failed to do so during the previous year, were repeated at every subsequent session down to the fiftieth session (1995) in practically the same wording⁴. The repetition of the same resolutions during this period of over fourteen sessions appears to indicate that the Conference on Disarmament (formerly the Committee on Disarmament) was never able to or never attempted to negotiate to achieve agreement on an international convention "prohibiting the use or threat of use of nuclear weapons under any circumstances". In other words *the cumulation of resolutions have not produced any noticeable effect*.

25. (*Motive behind the request for advisory opinion.*) It appears that the 1994 request for advisory opinion, particularly in view of the drafting of its text referring to "*the threat or use of nuclear weapons in any circumstance*" (emphasis added), was prompted by a group of practically the same States which, since 1982, had been sponsoring the resolutions calling for the conclusion of "an international convention prohibiting the *use or threat of use of nuclear weapons under any circumstances*" (emphasis added) (resolutions referred to below in Table III, Nos. 1-14), without any meaningful discussion on what was meant by the expressions "threat or use of nuclear weapons" or "any circumstances". I consider it likely that the "threat" of nuclear weapons would, in the view of some of those States which sponsored the resolution, comprehend the "production" and the "possession" of nuclear weapons.

Now the request, by purporting to ask whether "*the threat or use of nuclear weapons [is] in any circumstance permitted under international law*" (emphasis added), was in fact attempting to secure the Court's endorsement of an alleged legal axiom — the *threat* (which may imply the possession or the production) *or use of nuclear weapons is not permitted under international law in any circumstance* — in order to produce a breakthrough, thus laterally achieving agreement on the Convention which would establish the illegality of nuclear weapons themselves. It is to me quite clear that this request was prepared and adopted with highly political motives which do not correspond to any genuine legal mandate of a judicial institution. This certainly does not accord with the role that the advisory function of the Court has, in essence, to play under Article 96 (1) of the Charter of the United Nations.

⁴ In the resolutions of the forty-eighth and forty-ninth sessions, the preambular part, as quoted in the text, was simplified to read "was not able to undertake negotiations on this subject".

TABLE III

[*Note: The nuclear-weapon States under the NPT are italicized;
"R" denotes recorded vote.*]

Voting on the 1982-1995 Resolutions on "Convention on the Prohibition of the Use of Nuclear Weapons"

1. *The thirty-seventh session (1982)*

A/C.1/37/L.4 and Rev. 1: sponsored by: (20) Algeria, Argentina, Bahamas, Bangladesh, Bhutan, Congo, Cyprus, Ecuador, Egypt, Ethiopia, Ghana, Guyana, Indonesia, Jamaica, Madagascar, Mali, Nigeria, Romania, Yugoslavia, Zambia.

A/RES/37/100 C: adopted on 13 December 1982 by R117-17-8.

For: (117) *China, USSR [names of other States not reproduced]*.

Against: (17) Australia, Belgium, Canada, Denmark, *France*, Germany (Fed. Rep. of), Iceland, Italy, Luxembourg, Netherlands, New Zealand, Norway, Portugal, Spain, Turkey, *United Kingdom, United States*.

Abstaining: (8) Austria, Finland, Greece, Guatemala, Ireland, Israel, Japan, Paraguay.

2. *The thirty-eighth session (1983)*

A/C.1/38/L.55: sponsored by: (16) Algeria, Argentina, Bahamas, Bangladesh, Bhutan, Congo, Ecuador, Egypt, Ethiopia, India, Indonesia, Madagascar, Nigeria, Romania, Yugoslavia, with the later addition of Viet Nam.

A/RES/38/73 G: adopted on 16 December 1983 by R126-17-6.

For: (126) *China, USSR [names of other States not reproduced]*.

Against: (17) Australia, Belgium, Canada, Denmark, *France*, Germany (Fed. Rep. of), Iceland, Italy, Luxembourg, Netherlands, New Zealand, Norway, Portugal, Spain, Turkey, *United Kingdom, United States*.

Abstaining: (6) Austria, Greece, Ireland, Israel, Japan, Philippines.

3. *The thirty-ninth session (1984)*

A/C.1/39/L.50: sponsored by: (14) Algeria, Argentina, Bahamas, Bangladesh, Bhutan, Ecuador, Egypt, Ethiopia, India, Indonesia, Madagascar, Romania, Viet Nam, Yugoslavia.

A/RES/39/63 H: adopted on 12 December 1984 by R128-17-5.

For: (128) *China, USSR [names of other States not reproduced]*.

Against: (17) Australia, Belgium, Canada, Denmark, *France*, Germany (Fed. Rep. of), Iceland, Italy, Luxembourg, Netherlands, New Zealand, Norway, Portugal, Spain, Turkey, *United Kingdom, United States*.

Abstaining: (5) Austria, Greece, Ireland, Israel, Japan.

4. *The fortieth session (1985)*

A/C.1/40/L.26: sponsored by: (15) Algeria, Argentina, Bahamas, Bangladesh, Bhutan, Ecuador, Egypt, Ethiopia, India, Indonesia, Madagascar, Nigeria, Romania, Viet Nam, Yugoslavia.

A/RES/40/151 F: adopted on 16 December 1985 by R126-17-6.

For: (126) *China, USSR [names of other States not reproduced]*.

Against: (17) Australia, Belgium, Canada, Denmark, *France*, Germany (Fed. Rep. of), Iceland, Italy, Luxembourg, Netherlands, New Zealand, Norway, Portugal, Spain, Turkey, *United Kingdom, United States*.

Abstaining: (6) Austria, Greece, Grenada, Ireland, Israel, Japan.

5. *The forty-first session (1986)*

A/C.1/41/L.49: sponsored by: (13) Algeria, Argentina, Bangladesh, Bhutan, Ecuador, Egypt, Ethiopia, India, Indonesia, Madagascar, Romania, Viet Nam, Yugoslavia.

A/RES/41/60 F: adopted on 3 December 1986 by R132-17-4.

For: (132) *China, USSR [names of other States not reproduced]*.

Against: (17) Australia, Belgium, Canada, Denmark, *France*, Germany (Fed. Rep. of), Iceland, Italy, Luxembourg, Netherlands, New Zealand, Norway, Portugal, Spain, Turkey, *United Kingdom, United States*.

Abstaining: (4) Greece, Ireland, Israel, Japan.

6. *The forty-second session (1987)*

A/C.1/42/L.28: sponsored by: (13) Algeria, Argentina, Bangladesh, Bhutan, Ecuador, Egypt, Ethiopia, India, Indonesia, Romania, Yugoslavia, with the later additions of Madagascar, Viet Nam.

A/RES/42/39 C: adopted on 30 November 1987 by R135-17-4.

For: (135) *China, USSR [names of other States not reproduced]*.

Against: (17) Australia, Belgium, Canada, Denmark, *France*, Germany (Fed. Rep. of), Iceland, Italy, Luxembourg, Netherlands, New Zealand, Norway, Portugal, Spain, Turkey, *United Kingdom, United States*.

Abstaining: (4) Greece, Ireland, Israel, Japan.

7. *The forty-third session (1988)*

A/C.1/43/L.55: sponsored by: (14) Algeria, Argentina, Bangladesh, Bhutan, Ecuador, Egypt, Ethiopia, India, Indonesia, Madagascar, Romania, Viet Nam, Yugoslavia, with the later addition of Malaysia.

A/RES/43/76 E: adopted on 7 December 1988 by R133-17-4.

For: (133) *China, USSR [names of other States not reproduced]*.

Against: (17) Australia, Belgium, Canada, Denmark, *France*, Germany (Fed. Rep. of), Iceland, Italy, Luxembourg, Netherlands, New Zealand, Norway, Portugal, Spain, Turkey, *United Kingdom*, *United States*.

Abstaining: (4) Greece, Ireland, Israel, Japan.

8. *The forty-fourth session (1989)*

A/C.1/44/L.39: sponsored by: (12) Algeria, Bangladesh, Bhutan, Ecuador, Egypt, India, Indonesia, Malaysia, Romania, Viet Nam, Yugoslavia, with the later addition of Madagascar.

A/RES/44/117 C: adopted on 15 December 1989 by R134-17-4.

For: (134) *China*, *USSR* [*names of other States not reproduced*].

Against: (17) Australia, Belgium, Canada, Denmark, *France*, Germany (Fed. Rep. of), Iceland, Italy, Luxembourg, Netherlands, New Zealand, Norway, Portugal, Spain, Turkey, *United Kingdom*, *United States*.

Abstaining: (4) Greece, Ireland, Israel, Japan.

9. *The forty-fifth session (1990)*

A/C.1/45/L.25: sponsored by: (14) Afghanistan, Algeria, Argentina, Bangladesh, Bhutan, Ecuador, Egypt, Ethiopia, India, Indonesia, Madagascar, Malaysia, Viet Nam, Yugoslavia.

A/RES/45/59 B: adopted on 4 December 1990 by R125-17-10.

For: (125) *China*, *USSR* [*names of other States not reproduced*].

Against: (17) Australia, Belgium, Canada, Denmark, *France*, Germany, Iceland, Italy, Luxembourg, Netherlands, New Zealand, Norway, Portugal, Spain, Turkey, *United Kingdom*, *United States*.

Abstaining: (10) Bulgaria, Czechoslovakia, Greece, Hungary, Ireland, Israel, Japan, Liechtenstein, Poland, Romania.

10. *The forty-sixth session (1991)*

A/C.1/46/L.20: sponsored by: (15) Afghanistan, Algeria, Bangladesh, Bhutan, Ecuador, Egypt, Ethiopia, India, Indonesia, Madagascar, Malaysia, Viet Nam, Yugoslavia, with the later additions of Bolivia, Lao People's Democratic Republic.

A/RES/46/37 D: adopted on 6 December 1991 by R122-16-22.

For: (122) *China*, *USSR* [*names of other States not reproduced*].

Against: (16) Australia, Belgium, Canada, Denmark, *France*, Germany, Italy, Luxembourg, Netherlands, New Zealand, Norway, Portugal, Spain, Turkey, *United Kingdom*, *United States*.

Abstaining: (22) Albania, Argentina, Austria, Bulgaria, Czechoslovakia, Estonia, Finland, Greece, Hungary, Iceland, Ireland, Israel, Japan, Latvia, Liechtenstein, Lithuania, Marshall Islands, Poland, Republic of Korea, Romania, Samoa, Sweden.

11. *The forty-seventh session (1992)*

A/C.1/47/L.33: sponsored by: (15) Algeria, Bangladesh, Bolivia, Costa Rica, Ecuador, Egypt, Ethiopia, India, Indonesia, Lao People's Democratic Republic, Madagascar, Malaysia, Viet Nam, with the later additions of Bhutan, Democratic People's Republic of Korea.

A/RES/47/53 C: adopted on 9 December 1992 by R126-21-21.

For: (126) *China, USSR [names of other States not reproduced]*.

Against: (21) Australia, Belgium, Bulgaria, Canada, Czechoslovakia, Denmark, *France*, Germany, Hungary, Iceland, Italy, Luxembourg, Netherlands, New Zealand, Norway, Poland, Portugal, Spain, Turkey, *United Kingdom, United States*.

Abstaining: (21) Armenia, Austria, Estonia, Finland, Greece, Ireland, Israel, Japan, Latvia, Liechtenstein, Lithuania, Malta, Marshall Islands, Republic of Korea, Republic of Moldova, Romania, Samoa, San Marino, Slovenia, Solomon Islands, Sweden.

12. *The forty-eighth session (1993)*

A/C.1/48/L.13 and Rev. 1 and 2: sponsored by: (20) Algeria, Bangladesh, Bhutan, Bolivia, Colombia, Costa Rica, Democratic People's Republic of Korea, Ecuador, Egypt, Ethiopia, India, Indonesia, Lao People's Democratic Republic, Madagascar, Malaysia, Mexico, Viet Nam, with the later additions of Haiti, Honduras, Sudan.

A/RES/48/76 B: adopted on 16 December 1993 by R120-23-24.

For: (120) *China [names of other States not reproduced]*.

Against: (23) Andorra, Belgium, Bulgaria, Canada, Czech Republic, Denmark, Finland, *France*, Germany, Hungary, Iceland, Italy, Luxembourg, Monaco, Netherlands, Norway, Poland, Portugal, Slovakia, Spain, Turkey, *United Kingdom, United States*.

Abstaining: (24) Albania, Argentina, Armenia, Australia, Austria, Estonia, Georgia, Greece, Ireland, Israel, Japan, Latvia, Liechtenstein, Lithuania, Malta, Marshall Islands, New Zealand, Republic of Korea, Republic of Moldova, Romania, *Russian Federation*, Slovenia, Sweden, The FYR of Macedonia.

13. *The forty-ninth session (1994)*

A/C.1/49/L.31: sponsored by: (20) Bangladesh, Bhutan, Bolivia, Colombia, Democratic People's Republic of Korea, Ecuador, Egypt, Ethiopia, Honduras, India, Indonesia, Lao People's Democratic Republic, Madagascar, Malaysia, Mexico, Myanmar, Sudan, Viet Nam, with the later additions of Costa Rica, Haiti.

A/RES/49/76 E: adopted on 15 December 1994 by R115-24-31.

For: (115) *China [names of other States not reproduced]*.

Against: (24) Andorra, Belgium, Canada, Czech Republic, Denmark, Finland, *France*, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, Monaco, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Spain, Turkey, *United Kingdom, United States*.

Abstaining: (31) Albania, Argentina, Armenia, Australia, Austria, Belarus,

Bulgaria, Croatia, Estonia, Fiji, Georgia, Ireland, Israel, Japan, Kazakhstan, Latvia, Liechtenstein, Lithuania, Malta, Marshall Islands, Micronesia (Federated States of), New Zealand, Republic of Korea, Republic of Moldova, *Russian Federation*, Samoa, Slovenia, Sweden, Tajikistan, The FYR of Macedonia, Ukraine.

14. *The fiftieth session (1995)*

A/C.1/50/L.47: sponsored by: (28) Bangladesh, Belize, Bhutan, Bolivia, Botswana, Brunei Darussalam, Colombia, Democratic People's Republic of Korea, Ecuador, Egypt, Ethiopia, Haiti, India, Indonesia, Iran (Islamic Republic of), Kenya, Lao People's Democratic Republic, Madagascar, Malawi, Malaysia, Mexico, Micronesia (Federated States of), Myanmar, Nepal, Nigeria, Philippines, Sudan, Viet Nam.

A/RES/50/71 E: adopted on 12 December 1995 by R108-27-28.

For: (108) *China [names of other States not reproduced]*.

Against: (27) Andorra, Belgium, Bulgaria, Canada, Czech Republic, Denmark, Finland, *France*, Germany, Greece, Hungary, Iceland, Italy, Latvia, Lithuania, Luxembourg, Monaco, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Spain, Turkey, *United Kingdom, United States*.

Abstaining: (28) Afghanistan, Albania, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Bahamas, Barbados, Belarus, Croatia, Equatorial Guinea, Estonia, Georgia, Ireland, Israel, Japan, Liechtenstein, Malta, New Zealand, Republic of Korea, Republic of Moldova, *Russian Federation*, Slovenia, Sweden, The FYR of Macedonia, Ukraine, Uzbekistan.

III. ANOTHER ASPECT OF NUCLEAR DISARMAMENT — NUCLEAR DISARMAMENT IN THE PERIOD OF THE COLD WAR AND THE ROAD TO THE CONCLUSION OF THE NON-PROLIFERATION TREATY

(1) *The Nuclear Arms Race and the Control of Nuclear Weapons in the Period of the Cold War; the Emergence of the Non-Proliferation Treaty*

(a) *Development of nuclear disarmament*

26. (*Arms race between the United States and the Soviet Union.*) After the success of the first nuclear weapons test by the Soviet Union in 1949 and the first test of hydrogen bombs by the United States in 1952, and even with the participation of France, the United Kingdom and later China in the group of States in possession of nuclear weapons, these weapons remained a source of friction between the United States and the Soviet Union in the post-war period known as the Cold War. However, in parallel to the arms race between them, the United States and the Soviet Union, which were themselves fully aware of the catastrophic effects of nuclear weapons once actually used, recognized that some restraints would be needed.

In their search for the means of achieving restraints on the quantity of strategic nuclear weapons or even the freezing of these weapons, the United States and the Soviet Union made the Joint Statement of Agreed Principles for Disarmament Negotiations (United Nations document A/4879) in 1961. The plan included a gradual process of elimination and suspension of the production of weapons of mass destruction — such as nuclear weapons — and marked the beginning of the negotiation between the two countries of the Strategic Arms Limitation Talks (SALT I) in 1969, which was ended by the conclusion of the 1972 Anti-Ballistic Missile (ABM) Treaty, and was followed by SALT II in 1972. The Treaty on the Limitation of Strategic Offensive Arms (SALT II Treaty) was concluded in 1979 but has never been ratified. Negotiations within the framework of the Strategic Arms Reduction Talks (START) commenced in 1982.

27. (*Committee and later Conference on Disarmament (CD) in Geneva.*) With the agreement of the United States and the Soviet Union and with the endorsement of the United Nations under resolution 1722 (XVI) on “Question of disarmament”, the Eighteen-Nations Committee on Disarmament (ENDC) was set up in Geneva in 1961, composed of an equal number of States in each “bloc” — that is, five on each side, together with eight additional non-aligned countries — as a forum for global disarmament. The ENDC became the Conference of the Committee on Disarmament (CCD) with the membership of 26 States (which was increased to 31 in 1975) in 1969, and, pursuant to the decision of the 1978 first special disarmament session of the United Nations General Assembly (the conference being then composed of 40 States, including all five nuclear-weapon States), changed its name to the Committee on Disarmament. This has, since 1984, been in existence as the Conference on Disarmament (CD), an organ of disarmament negotiations.

28. (*Partial Test-Ban Treaty.*) In an international context that included the Cuban missile crisis in October 1962 and with the agreement of the United States and the Soviet Union, the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water (Partial Test-Ban Treaty (PTBT)), with the United States, the Soviet Union and the United Kingdom as the original parties, was signed in Moscow on 5 August 1963. The signatories agreed:

“to prohibit, to prevent, and not to carry out any nuclear weapon test explosion, or any other nuclear explosion . . . in the atmosphere; beyond its limits, including outer space; or under water, including territorial waters or high seas” (Art. 1) (United Nations, *Treaty Series (UNTS)*, Vol. 480, p. 43).

This treaty was to be of unlimited duration and was open for signature to all States. Ninety-nine States have, as of 1 January 1995, ratified or

acceded to it and five have only signed it. The complete banning of all nuclear tests, including underground tests, has still not been finally achieved at this writing, while negotiations on the Comprehensive Nuclear-Test-Ban Treaty are at present in progress.

29. (*The 1978 first special disarmament session of the United Nations.*) The United Nations General Assembly has from the outset, and with the close collaboration of the ENDC in Geneva, adopted, in parallel with bilateral negotiations between the United States and the Soviet Union related to nuclear weapons, a number of resolutions concerning nuclear weapons, one of which was the 1961 resolution 1653 (XVI) in 1961 concerning the "Declaration on the prohibition of the use of nuclear weapons", to which I referred in paragraph 16 above (see Table I). This 1961 resolution, which met some strong opposition and reservations, has, however, for long been regarded as one of the leading objectives to be achieved for nuclear disarmament and has led to the regular succession of resolutions aiming at the Convention on the prohibition of the use of nuclear weapons which, however, has not yet borne any fruit (see paras. 20-25 above).

Considering the issues of nuclear disarmament as a problem of global peace and security, the first special session devoted to disarmament (Tenth Special Session) of the General Assembly was held in May-June 1978 to lay the foundation of an international disarmament strategy which would aim at a general and complete disarmament under effective international control (cf. para. 17 above).

The Final Document of this special session set out various principles, including the primary responsibility of nuclear-weapon States for nuclear disarmament, the observance of an acceptable balance of mutual responsibilities and obligations for nuclear- and non-nuclear-weapon States, the consideration of proposals designed to secure the avoidance of the use of nuclear weapons and the prevention of nuclear wars, and the non-proliferation of nuclear weapons.

A programme of action in that Final Document indicated that the ultimate goal should be the complete elimination of nuclear weapons and for this purpose it encouraged, among other things, the cessation of nuclear-weapon testing by all States within the framework of an effective nuclear disarmament process, the giving of assurances to non-nuclear-weapon States of their intent to refrain from any use or threat of use of nuclear weapons, and the encouragement of the establishment of nuclear-weapon-free zones on the basis of arrangements freely arrived at among the States of the regions concerned.

In response to this final document of the first special disarmament session, the General Assembly has, since its thirty-third session in 1978, placed the "Review of the implementation of the recommendations and

decisions of the tenth special session” on its agenda at every session down to the present day.

30. (*The 1982 second special disarmament session of the General Assembly.*) Although the General Assembly had noted that developments since 1978 had not lived up to the hopes engendered by that special disarmament session, it held the second special disarmament session (the Twelfth Special Session) in 1982 to review the implementation of the recommendations and decisions adopted by the General Assembly at its previous disarmament session in 1978 (cf. para. 20 above). The Concluding Document, that is, the Report of the *Ad hoc* Committee, was adopted at this special disarmament session (A/S-12/32).

Ever since the thirty-seventh session (1982) held late in the same year, the General Assembly has had on its agenda at every session down to the present day an item entitled “Review and implementation of the Concluding Document of the Twelfth Special Session of the General Assembly”. Under this agenda item, the General Assembly adopted at its thirty-seventh session (1982) various resolutions concerning nuclear disarmament among which a resolution entitled “Convention on the prohibition of the use of nuclear weapons” was to be noted (as stated in paragraphs 21-22 above). The General Assembly repeated an almost identical resolution from 1982, over a period of fourteen sessions, until 1995 (see para. 23 above). The number of sponsoring States did not increase, but opposition to the resolution grew and abstentions from the voting became more numerous. In fact this resolution had no impact on any occasion when it was passed, so that the General Assembly had to repeat at every session its regret that no result had been achieved in the previous year. There has never been any discussion of substance, either at the United Nations in New York or at the Conference on Disarmament in Geneva, in relation to the Convention prohibiting the use or threat of use of nuclear weapons under any circumstances.

(b) *Separation between nuclear-weapon States and non-nuclear-weapon States*

31. (*The Non-Proliferation Treaty.*) In the atmosphere of détente which was brought about by the conclusion in 1963 of the Partial Test-Ban Treaty (PTBT), the United States and the Soviet Union became concerned with the prevention of the proliferation of nuclear weapons beyond those States which already possessed them. The United States and the Soviet Union jointly submitted the draft of the Treaty on the Non-Proliferation of Nuclear Weapons (Non-Proliferation Treaty (NPT)) in July 1968 in Geneva where, with the participation of the non-nuclear-weapon States, the multilateral negotiations had been conducted. The Non-Pro-

liferation Treaty, with the agreement of the United States, the Soviet Union and the United Kingdom, was opened to all States for signature in three cities: London, Moscow and Washington (*UNTS*, Vol. 729, p. 161). It became effective on 5 March 1970 after its ratification by all three original member States and the deposit of the instruments of ratification of 40 other signatory States (China and France ratified the Treaty only in 1992).

This Treaty clearly distinguished between, on the one hand, the *nuclear-weapon States*, defined as those which prior to 1 January 1967 had manufactured and exploded a nuclear weapon or other nuclear device, and which would undertake not to transfer nuclear weapons to non-nuclear-weapon States or to assist, encourage or induce any of them to manufacture or acquire nuclear weapons (Art. I), and, on the other hand, the *non-nuclear-weapon States* which would not receive the transfer of nuclear weapons or other nuclear explosive devices and would not manufacture them or otherwise acquire them (Art. II). The Treaty imposed, however, on all the States parties, whether nuclear-weapon States or non-nuclear-weapon States, the obligation to pursue negotiations in good faith with a view to the taking of effective measures relating to the cessation of the nuclear arms race and to nuclear disarmament (Art. VI). It is also to be noted that, at the First Special Disarmament Session of the General Assembly in 1978, the five nuclear-weapon States gave assurances to the non-nuclear-weapon States which were parties to the Treaty, undertaking not to use nuclear weapons against them.

The balance of power, as far as nuclear weapons are concerned, would be maintained between the nuclear-weapon and the non-nuclear-weapon States by this seemingly unequal treaty, which in fact reflected the reality of the international relations in the 1970s and 1980s. Up to the end of 1979, 111 States had become parties to the Treaty and at the end of 1989, 138 States were parties. To date, the Treaty has received 182 ratifications.

Twenty-five years after the entry into force of that Treaty, in 1995, a Conference was to be convened to decide, by a majority of the parties to it, whether the Treaty should continue in force indefinitely or should be extended for an additional fixed period or periods (Art. X (2)).

32. (*Nuclear free zone — Treaty of Tlatelolco.*) The Non-Proliferation Treaty recognized the right to any group of States to conclude regional treaties in order to assure the total absence of nuclear weapons in their respective territories (Art. VII).

The Treaty for the Prohibition of Nuclear Weapons in Latin America (later the words “and the Caribbean” were added) (the Treaty of Tlatelolco) was signed on 14 February 1967 by 14 Latin American States (with 7 additional States signing subsequently) and became effective on 22 April 1968 (*UNTS*, Vol. 634, p. 281). This Treaty is drawn up to be of

a permanent nature and to remain in force indefinitely (Art. 30), and is currently valid among 30 States in the region.

The five nuclear-weapon States would be bound to compliance with this Treaty by their acceptance of Additional Protocol II by which the nuclear-weapon States would “undertake not to use or threaten to use nuclear weapons against the Contracting Parties of the Treaty” (Art. 3). The United Nations General Assembly in its resolutions adopted in successive sessions (resolutions 2286 (XXII), 2456 (XXIII), etc.) welcomed this Treaty with special satisfaction and invited the five nuclear-weapon States to sign and ratify this Additional Protocol, by which they would become bound by the Treaty. In fact, the five nuclear-weapon States had successively signed and ratified Additional Protocol II by the end of the 1970s but accompanied their actions by declarations whereby some attached reservations.

33. (*Treaty of Rarotonga.*) Following the Treaty of Tlatelolco covering the Latin American region, the South Pacific Nuclear Free Zone Treaty (Treaty of Rarotonga) was signed by eight States at the South Pacific forum on 6 August 1985 (with the later addition of one signature), to provide for the abandonment of instruments of nuclear explosion, the prevention of their placement by nuclear-weapon States and the prevention of testing (UNTS, Registration No. 24592 of 2 January 1987). This Treaty became effective on 11 December 1986 and is of a permanent nature, remaining in force indefinitely (Art. 13) and currently valid among 12 States in the region.

Protocol 2, which was aimed at securing the agreement of the five nuclear-weapon States “not to use or threaten to use” any nuclear explosive device against the parties to the Treaty (Art. 1), had by 1988 been signed and ratified by China and the Soviet Union, to which instrument they appended respectively some reservations. Signature by France, the United Kingdom and the United States had to wait until March 1996.

(2) *Perpetuation of the NPT Régime*

(a) *Non-Proliferation Treaty*

34. (*End of the Cold War.*) The collapse of régimes in eastern Europe, which commenced with the destruction of the Berlin Wall in November 1989 and the dissolution of the Soviet Union and which led to the end of the Cold War, had a very strong impact on the question of nuclear weapons at the end of the 1980s and beginning of the 1990s.

35. (*Expectation of the comprehensive test-ban treaty.*) Since the conclusion of the Partial Test-Ban Treaty in 1963, the complete banning of

all nuclear explosion tests has been the most important political task — in Geneva in particular — and it became, with the approach of 1995, a most essential matter for the nuclear-weapon States to achieve the indefinite extension of the Non-Proliferation Treaty, thus perpetuating that Treaty's régime. When the Conference on the Review of the Non-Proliferation Treaty broke down in 1990 due to the conflict concerning the Comprehensive Nuclear-Test-Ban Treaty (CTBT), the spotlight fell upon that latter Treaty. The nuclear-weapon States had become aware that, if they were to succeed in bringing about the indefinite extension of the Non-Proliferation Treaty, they would have to give up any planned tests of nuclear weapons.

In 1991 the “Comprehensive Nuclear-Test-Ban Treaty” was included for the first time as a consolidated and independent agenda item of the General Assembly and a proposal sponsored by 45 States was adopted on 6 December 1991 by 147 States in favour, 2 against and 4 abstentions, and became the resolution 46/29 entitled “Comprehensive Nuclear-Test-Ban Treaty” (see below Table IV, No. 1). The United States and France were against, and China and the United Kingdom abstained. This resolution required all States to do their utmost to achieve the total prohibition of nuclear weapon tests and asked the Conference on Disarmament to proceed with negotiations.

36. (*Negotiations in Geneva.*) The real negotiations in Geneva started in 1992 and late in that year the United Nations General Assembly adopted resolution 47/47 — which was practically identical to the previous resolution — on 9 December 1992 by 159 votes in favour, 1 against and 4 abstentions (see below Table IV, No. 2). It was noted that, although the United States voted against, France, because of the modification to its national policy, no longer voted against it but abstained. The United States had likewise changed its policy with the start of President Clinton's term of office in January 1993 as well as in consideration of the fact that it would soon be time for the extension of the Non-Proliferation Treaty. Thus, the draft resolution on “Comprehensive Nuclear-Test-Ban Treaty” in 1993 was sponsored by 157 States, including the United States, and adopted without being put to the vote as resolution 48/70 (see below Table IV, No. 3).

In fact, through the CTBT negotiations at the Conference on Disarmament in Geneva in 1994 there began to be a real hope that the Treaty could be drafted. At the forty-ninth session of the General Assembly in 1994, the resolution on the same subject, which was sponsored for the first time by all five nuclear-weapon States, was adopted on 15 December 1994, again without being put to the vote, as resolution 49/70. That resolution called upon the participants in the Conference on Disarmament to negotiate intensively as a high priority and to conclude a universal treaty

for a comprehensive ban of nuclear tests, which would contribute to nuclear disarmament and the prevention of the proliferation of nuclear weapons in all their aspects (see below Table IV, No. 4).

It was stated that, in order to have an effective implementation of Article VI of the Non-Proliferation Treaty, as referred to in paragraph 31 above, the completion by the Conference on Disarmament of the negotiation on the CTBT was expected by no later than 1996. In 1995 the General Assembly at its fiftieth session again adopted resolution 50/65 on "Comprehensive Nuclear-Test-Ban Treaty" without its being put to the vote (see below Table IV, No. 5) and the CTBT will, it is hoped, be concluded in 1996.

(b) *Indefinite extension of the Non-Proliferation Treaty*

37. (*Convocation of the conference.*) In spite of the fact that the 1968 Non-Proliferation Treaty has certainly been seen as unequal, the monopoly of nuclear weapons by a limited number of States and the prevention of the proliferation of nuclear weapons beyond those States has for some time been the linchpin of the doctrine of nuclear deterrence. Under this Treaty, a conference would be convened in 1995 to decide whether the treaty should continue in force indefinitely or should be extended for an additional fixed period or periods (Art. X (2)). The General Assembly at its forty-seventh session (1992) adopted by a recorded vote of 168 votes in favour to none against with no abstentions (India later advised the Assembly that it had intended to abstain) resolution 47/52 A by which it took note of the decision of the parties to the Treaty to form the preparatory committee for this 1995 Review and Extension Conference, which would meet in May 1993, and requested the possible assistance of the Secretary-General. Pursuant to the decision of the preparatory committee the Review and Extension Conference was held in April-May 1995 in New York.

38. (*Security assurances given by the nuclear States.*) In order to perpetuate the NPT régime, it was necessary for the nuclear-weapon States to give some assurances to the non-nuclear-weapon States concerning the use of these weapons. Prior to the Conference in April-May 1995, the five nuclear-weapon States proceeded early in April 1995 to make their respective statements, in which they gave security assurances of their intent to refrain from any use of nuclear weapons against the non-nuclear-weapon States that are parties to the Non-Proliferation Treaty. The Security Council in its resolution 984 (1995) on 11 April 1995, which it adopted unanimously, "[took] note with appreciation of the statements" made by the five nuclear-weapon States. The assurances given by the nuclear-weapon States were more or less identical, stating that "[each

State] will not use nuclear weapons against non-nuclear-weapon States Parties to the NPT” (S/1995/261, the Russian Federation; 262, the United Kingdom; 263, the United States; 264, France) except that China gave the assurance that it would “not . . . be the first to use nuclear weapons at any time or under any circumstances” and that “[it] undertakes not to use or threaten to use nuclear weapons against non-nuclear weapon States or nuclear-weapon free zones at any time or under any circumstances” (S/1995/265). In fact, a similar security assurance had also been given five years previously, in 1990.

39. (*The indefinite extension of the NPT.*) One hundred and seventy-five member States participated and ten non-member States sent observers. The Conference decided that, “the Treaty [should] continue in force indefinitely” (Decision 3) as a majority existed among States parties to the Treaty for its indefinite extension, in accordance with Article X, paragraph 2. The nuclear-weapon States, while looking forward as far as possible to nuclear disarmament and the non-use of nuclear weapons, did not alter their positions. On the other hand the non-nuclear-weapon States, while expressing their appreciation of the efforts made by the nuclear-weapon States to promote nuclear disarmament, were agreed that the nuclear-weapon States, given their privileged status, would continue to remain the only States to hold nuclear weapons. That decision of the Conference was noted by the General Assembly in its resolution 50/70 Q on “1995 Review and extension conference of the parties to the treaty on the non-proliferation of nuclear weapons” on 12 December 1995 by a recorded vote of 161 in favour, none against with the abstention of only India and Israel.

It can, then, be said that the NPT régime has thus been firmly established in the international community.

40. (*Nuclear free zone treaties.*) Following the Treaties of Tlatelolco and Rarotonga, some further treaties have been concluded to expand the non-nuclear weapon zones pursuant to Article VII of the Non-Proliferation Treaty.

In South-East Asia in December 1995 a Treaty of the Non-Nuclear Regions was signed in Bangkok on the occasion of the Conference of the Heads of State of the Association of South-East Asian Nations (ASEAN) by ten States in that area and this Treaty should remain in force indefinitely. The Protocol was opened for signature to the five nuclear-weapon States. It is reported that China and the United States declined to sign the Protocol for the reason that the Treaty covered the exclusive economic zone and the continental shelf in the region.

In Africa, where South Africa gave up its nuclear weapons, the establishment of a nuclear free zone became a reality and the United Nations Gen-

eral Assembly at its forty-ninth session (1994) adopted resolution 49/138 on "Establishment of an African nuclear-weapon-free zone" requesting the Secretary-General to work in consultation with the Organization of African Unity (OAU) on the text of a treaty on an African Nuclear-Weapon-Free Zone. In June 1995, after the extension of the Non-Proliferation Treaty was decided, the Conference of Heads of States of the OAU adopted the African Nuclear-Weapon-Free Zone Treaty (the Treaty of Pelindaba) which was signed by 42 African States on 11 April 1996 in Cairo. China, France, the United Kingdom and the United States signed Protocol I at the same time by which they undertook not to use or threaten to use nuclear weapons against the parties to the Treaty. The Treaty is of unlimited duration and should remain in force indefinitely.

41. (*Conclusion.*) One can conclude from the above that, on the one hand, the NPT régime which presupposes the possession of nuclear weapons by the five nuclear-weapon States has been firmly established and that, on the other, they have themselves given security assurances to the non-nuclear weapon States by certain statements they have made in the Security Council. In addition, those nuclear-weapon States, in so far as they adhere to the Protocols appended to the respective nuclear-free zone treaties, are bound not to use or threaten to use nuclear weapons against States parties to those respective treaties.

This reality should not be overlooked. It is most unlikely that those nuclear-weapon States will use those weapons, even among themselves, but the possibility of the use of those weapons cannot be totally excluded in certain special circumstances. That is the meaning of the Non-Proliferation Treaty. It is generally accepted that this NPT régime is a necessary evil in the context of international security, where the doctrine of nuclear deterrence continues to be meaningful and valid.

TABLE IV

[*Note: The nuclear-weapon States under the NPT are italicized; "R" denotes recorded vote.*]

General Assembly Resolutions on "Comprehensive Nuclear-Test-Ban Treaty"

1. *The forty-sixth session (1991)*

A/C.1/46/L.4: sponsored by: (45) *USSR [names of other States not reproduced]*.

A/RES/46/29: adopted on 6 December 1991 by R147-2-4.

For: (147) *USSR [names of other States not reproduced]*.

Against: (2) *France, United States.*

Abstaining: (4) *China*, Micronesia (Federated States of), Israel, *United Kingdom*.

2. *The forty-seventh session (1992)*

A/C.1/47/L.37: sponsored by: (99) *Russian Federation [names of other States not reproduced]*.

A/RES/47/47: adopted on 9 December 1992 by R159-1-4.

For: (159) *Russian Federation [names of other States not reproduced]*.

Against: (1) *United States*.

Abstaining: (4) *China*, *France*, Israel, *United Kingdom*.

3. *The forty-eighth session (1993)*

A/C.1/48/L.40: sponsored by: (159) *Russian Federation, United States [names of other States not reproduced]*.

A/RES/48/70: adopted *without a vote* on 16 December 1993.

4. *The forty-ninth session (1994)*

A/C.1/49/L.22/Rev.1: sponsored by: (87) *China, France, Russian Federation, United Kingdom, United States [names of other States not reproduced]*.

A/RES/49/70: adopted *without a vote* on 15 December 1994.

5. *The fiftieth session (1995)*

A/C.1/50/L.8/Rev.1: sponsored by: (91) *France, Russian Federation, United Kingdom, United States [names of other States not reproduced]*.

A/RES/50/65: adopted *without a vote* on 12 December 1995.

(3) *Significance of the NPT Régime in the Period of the Still Valid Doctrine of Nuclear Deterrence*

42. (*Ultimate goal of elimination of nuclear weapons.*) The resolution sponsored and introduced by Japan and entitled “Nuclear disarmament with a view to the ultimate elimination of nuclear weapons” was adopted on 15 December 1994 as resolution 49/75 H at the forty-ninth session (1994) by a recorded vote of 163 in favour, none against and 8 abstentions (see below Table V, No. 1). In that resolution, the General Assembly “urge[d] States not parties to the Treaty on the Non-Proliferation of Nuclear Weapons to accede to it at the earliest possible date” and “call[ed] upon the nuclear-weapon States to pursue their efforts for nuclear disarmament with the *ultimate objective of the elimination of nuclear weapons* in the framework of general and complete disarmament” (emphasis added).

After it was determined in May 1995 that the NPT was to be indefinitely extended, the General Assembly at its fiftieth session (1995) adopted on 12 December 1995, by 154 votes in favour, none against and 10 abstentions, resolution 50/70 C (see below Table V, No. 2) by which the General

Assembly “[c]all[ed] for the determined pursuit by the nuclear-weapon States of systematic and progressive efforts to reduce nuclear weapons globally, with the *ultimate goal of eliminating those weapons*, and by all States of general and complete disarmament under strict and effective international control” (emphasis added).

It is to be noted that another resolution similarly entitled “Nuclear disarmament” which proposed “effective nuclear disarmament measures with a view to the total elimination of [nuclear] weapons *within a time-bound framework*” (emphasis added) was adopted on the same day as resolution 50/70 P but met strong opposition as reflected in a recorded vote of 103 in favour, 39 against and 17 absentions (see below Table V, No. 3).

TABLE V

[Note: The nuclear-weapon States under the NPT are italicized;
“R” denotes recorded vote.]

General Assembly Resolutions on “Nuclear Disarmament with a View to the Ultimate Elimination of Nuclear Weapons”

1. The forty-ninth session (1994)

A/C.1/49/L.33/Rev.1: Sponsored by: Japan.

A/RES/49/75 H: adopted on 15 December 1994 by R163-0-8.

For: (163) *China, Russian Federation* [names of other States not reproduced].

Against: (0).

Abstaining: (8) Brazil, Cuba, Democratic People’s Republic of Korea, France, India, Israel, *United Kingdom, United States*.

2. The fiftieth session (1995)

A/C.1/50/L.17/Rev.2: sponsored by: Japan, with the later additions of Australia, Austria, Belgium, Canada, Denmark, Finland, Germany, Iceland, Ireland, Italy, Malta, Netherlands, New Zealand, Norway, Poland, Spain, Sweden, Venezuela.

A/RES/50/70 C: adopted on 12 December 1995 by R154-0-10.

For: (154) *France, Russian Federation, United Kingdom, United States* [names of other States not reproduced].

Against: (0).

Abstaining: (10) Algeria, Brazil, *China*, Cuba, Democratic People’s Republic of Korea, India, Iran (Islamic Republic of), Israel, Myanmar, Pakistan.

General Assembly Resolution on “Nuclear Disarmament”

3. The fiftieth session (1995)

A/C.1/50/L.46/Rev.1: sponsored by: (33) Algeria, Angola, Bangladesh, Cambodia, Colombia, Cuba, Democratic People’s Republic of Korea, Ecuador, Egypt,

Fiji, Ghana, India, Indonesia, Iran (Islamic Republic of), Iraq, Kenya, Malaysia, Marshall Islands, Mauritius, Mexico, Mongolia, Myanmar, Nigeria, Pakistan, Papua New Guinea, Philippines, Samoa, Sri Lanka, Sudan, Thailand, United Republic of Tanzania, Viet Nam, Zimbabwe.

A/RES/50/70 P: adopted on 12 December 1995 by R106-39-17.

For: (106) *China [names of other States not reproduced]*.

Against: (39) Albania, Andorra, Argentina, Austria, Belgium, Bulgaria, Canada, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Monaco, Netherlands, Norway, Poland, Portugal, Republic of Moldova, Romania, Slovakia, Slovenia, Spain, Sweden, The Former Yugoslav Republic of Macedonia, Turkey, *United Kingdom, United States*.

Abstaining: (17) Antigua and Barbuda, Armenia, Australia, Azerbaijan, Bahamas, Belarus, Benin, Croatia, Cyprus, Equatorial Guinea, Georgia, Japan, Kazakhstan, New Zealand, Republic of Korea, *Russian Federation*, Ukraine.

IV. CONCLUDING REMARKS

(1) *Re-examination of the General Assembly's Request for the Court's Advisory Opinion*

43. (*Re-examination of the request.*) I have shown, *firstly*, that the request contained in General Assembly resolution 49/75 K and that reads: "Is the threat or use of nuclear weapons permitted in any circumstance under international law?" was, in fact, nothing more than a request to the Court to endorse what, in the view of those that framed it, is a legal axiom that the threat or use of nuclear weapons is *not* permitted under international law in any circumstance, and so cannot be considered as a request for advisory opinion in the real sense as laid down by Article 96 (1) of the Charter of the United Nations.

In the second place, I maintain that the request contains an element of uncertainty as regards the meaning of the phrase "threat or use of nuclear weapons", as opposed to "the use or threat of use of nuclear weapons", and provides no clarification of the concept of "threat", leading one to raise the question of whether or not the possession or the production of nuclear weapons should be included as an object of the request. In my view there was sufficient reason to believe that, in view of the background to the drafting, the absolute illegality of nuclear weapons themselves was in the mind of some States.

Thirdly, as can be seen from the *travaux préparatoires* of the request, the adoption of that resolution was far from representing a consensus of the General Assembly (cf. paras. 6-14 above).

44. (*Standstill of the movement towards an agreement on the convention prohibiting the use of nuclear weapons.*) In the development of

nuclear disarmament in the forum of the United Nations, the movement aiming at the conclusion of a treaty to totally prohibit the “use or threat of use of nuclear weapons” was at a standstill for more than ten years, that is, from 1982 to 1994. Support for such repeated resolutions on disarmament within the United Nations General Assembly in New York did not increase but rather decreased (see above Table III), and the Conference on Disarmament in Geneva made no attempt to respond favourably to those resolutions nor did it commence negotiations in order to achieve agreement on such a convention.

Against the background of that situation, a group of States stimulated by a few NGOs attempted to achieve a breakthrough by obtaining the Court’s endorsement of an alleged legal axiom in order to move towards a worldwide anti-nuclear weapons convention. I have no doubt that the request was prepared and drafted — not in order to ascertain the status of existing international law on the subject but to try to promote the total elimination of nuclear weapons — that is to say, with highly *political* motives. This reason, among others, explains why, in 1994, resolution 49/75 K, although passed at the General Assembly with the support of 78 States, did meet with 43 objections while 38 States abstained from the voting.

45. (*The reality of the NPT régime.*) The reality of international society is far removed from the desires expressed by that group of States which supported resolution 49/75 K. In the period of the Cold War, the monopoly of nuclear weapons by five States and the prevention of proliferation beyond that restricted circle, were regarded as essential and indispensable conditions for the maintenance of international peace and security, as proved by the conclusion of the Non-Proliferation Treaty in 1968 which clearly distinguished between the five nuclear-weapon States and the non-nuclear-weapon States. The doctrine, or strategy, of nuclear deterrence, however it may be judged and criticized from different angles and in different ways, was made a basis for the NPT régime which has been legitimized by international law, both conventional and customary, during the past few decades.

The situation has remained unchanged down to the present day, even in the post-Cold War period. The term of the 1968 Non-Proliferation Treaty was extended indefinitely in 1995. In such an international climate in which nuclear disarmament is incomplete and general and complete disarmament chimerical, a total prohibition of these weapons would have been seen as a rejection of the legal basis on which that Treaty was founded. If the total prohibition of nuclear weapons was the driving force behind the request, then the question put under resolution 49/75 K could only have been raised in defiance of the then legitimately existing NPT régime.

There is another point which should not be overlooked. As a matter of fact the nuclear-weapon States have tended to undertake not to use or threaten to use nuclear weapons against the States in some specific regions covered by the nuclear-free-zone treaties and these five nuclear-weapon States, early in 1995, gave security assurances through statements made in the Security Council in which they undertook not to use or threaten to use these weapons against the non-nuclear-weapon States. In other words, if legal undertakings are respected, there is little risk of the use of nuclear weapons at present by the five declared nuclear-weapon States. Under such circumstances there was, in 1994, no imminent need to raise the question of the legality or illegality of nuclear weapons.

46. (*Caricature of the advisory procedure.*) In the climate in which the NPT régime was about to be legitimized for an indefinite term, and at a time when there was no probability of the use of nuclear weapons by the five nuclear-weapon States, the General Assembly on the same day, 15 December 1994, was asked, under resolution 49/76 E on a "Convention on the prohibition of the use of nuclear weapons", to request the Conference on Disarmament in Geneva to prepare such a convention (without much expectation of success), and was also asked to adopt two other resolutions under the same agenda item "General and complete disarmament" — one, resolution 49/75 H, aimed at the *ultimate elimination* of nuclear weapons and the other, resolution 49/75 K, requesting from the Court the endorsement of the illegality of nuclear weapons under contemporary international law. This is highly contradictory. There was no need and no rational justification, under the circumstances prevailing in 1994, for the request for advisory opinion by the General Assembly to the Court concerning the legality or illegality of the threat or use of nuclear weapons. This was simply, in my view, a caricature of the advisory procedure.

(2) *Role of the Advisory Function and the Discretion of the Court to Decline to Render an Advisory Opinion*

47. (*Function of the advisory opinion.*) The International Court of Justice is competent not only to function as a judicial organ but also to give advisory opinions. However, the advisory function is a questionable function of any judicial tribunal and was not exercised by any international tribunal prior to the Permanent Court of International Justice, which first introduced it amidst uncertainty and controversy. The advisory function has now been incorporated into the role of the International Court of Justice in parallel with its contentious function, but continues to be regarded as an exception and to be seen as an incidental function of the Court. This is the reason why, as distinct from the exer-

cise of its contentious jurisdiction, the Court has discretion in exercising its advisory function, as stated in Article 65 of the Statute, which provides that “the Court *may* give an advisory opinion . . .” (emphasis added).

48. (*One refusal to render an advisory opinion in the period of the Permanent Court.*) The Permanent Court once declined to give an opinion but not because it exercised its discretionary power in so doing. In the period of the Permanent Court, the advisory function played a relatively important role in settling inter-State disputes (as in contentious cases), and in cases involving an inter-State dispute, the consent of the States in dispute was required for an advisory opinion to be rendered. The *Eastern Carelia* case in 1923 was very important in this respect and was the only case in which the Permanent Court declined to render an advisory opinion. In that case, which was related to the interpretation of a declaration concerning the autonomous status of Eastern Carelia in the 1920 Dorpat Peace Treaty between Finland and Russia, Finland first appealed to the Council of the League of Nations to ask the Court for an advisory opinion. Russia, which was not a member of the League of Nations, opposed that move. Further to proceedings before the Court in which Russia was not represented, the Court, when declining to deliver an advisory opinion, indicated its unwillingness to take the matter any further under the circumstances and invoked a well-established principle of international law to the effect that

“no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement” (*P.C.I.J., Series B, No. 5, p. 27*).

In all the advisory cases in the period of the Permanent Court which involved inter-State disputes and which followed the *Eastern Carelia* case, the consent of the State concerned was secured in advance or there was at least a guarantee that neither party to the dispute would object to the proceedings. In the circumstances, the precedent of the *Eastern Carelia* case as dealt with by the previous Court is of no relevance to the present case.

49. (*Advisory function in the International Court of Justice.*) Of the 20 advisory opinions that the International Court of Justice has rendered to date, 12 were given in response to requests made pursuant to General Assembly resolutions.

There have been seven cases, all in the early period of the Court, in which it dealt simply with the interpretation of the United Nations Charter itself or with matters concerning the functions of the United Nations, that is, *Conditions of Admission of a State to Membership in the United Nations (Article 4 of Charter)* (1948); *Reparation for Injuries Suffered in*

the Service of the United Nations (1949); *Competence of the General Assembly for the Admission of a State to the United Nations* (1950); *Effects of Awards of Compensation Made by the United Nations Administrative Tribunal* (1954); *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa* (1955); *Admissibility of Hearings of Petitioners by the Committee on South West Africa* (1956); and the case concerning *Certain Expenses of the United Nations* (Article 17, paragraph 2, of the Charter) (1962).

Unlike the previous Court, which dealt mostly with inter-State disputes even in the context of advisory cases, the present Court has on only a few occasions been asked to give an advisory opinion on a matter related to an inter-State dispute, that is, in the cases concerning the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (1950) and the *Western Sahara* (1975). On some occasions the Court has dealt with disputes between international organizations and States, such as the *International Status of South West Africa* case (1950) and the *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947* case (1988).

50. (*Legal questions of a general nature.*) In fact, during the life of the present Court, there has only been one case in which a legal question of a general nature was dealt with and that was the one concerning *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (1951) in which the meaning of reservations attached to a multilateral convention was questioned. In that case, however, the request to the Court arose from circumstances of practical necessity, and it was asked to focus upon the question of whether

“the reserving State [can] be regarded as being a party to the [Genocide] Convention while still maintaining its reservation if the reservation is objected to by one or more of the parties to the Convention but not by others” (*I.C.J. Reports 1951*, p. 16)

and to render an opinion on the meaning of the reservation attached to a multilateral convention and, more particularly, on the concrete question of the interpretation and application of the Genocide Convention. This fact makes that case quite different from the present case in which no issues of a practical nature are in dispute and there is no need to specify the legality or illegality of the threat or use of nuclear weapons, as I explained in paragraph 45 above.

51. (*Declining to render an advisory opinion.*) If one looks at this practice, it can be seen that no request for an advisory opinion concerning a legal question of a general nature, where that question is unrelated either to a concrete dispute or to a concrete problem awaiting a practical solution, has ever been submitted to the Court. It is true that the present

Court, even though given a discretionary power to render or to decline to render an advisory opinion, has in the past had no occasion to decline to render an opinion in response to a request from the General Assembly. The fact is however that, in the past, the Court has never received any requests which could reasonably have been refused in the given circumstances. In this connection it is irrelevant to argue, in the present context, that "[t]he Court . . . is mindful that it should not, in principle, refuse to give an advisory opinion" and that "[t]here has been no refusal, based on the discretionary power of the Court, to act upon a request for advisory opinion in the history of the present Court" (Court's Opinion, para. 14).

(3) Conclusions

52. (*Judicial propriety.*) Under the circumstances and considering the discretionary competence of the Court in declining to render an advisory opinion, the Court should, in my view, for the reason of *judicial propriety*, have dismissed the request raised under resolution 49/75 K. Moreover, in the event, it seems to me that the elementary or equivocal conclusions reached by the Court in the present Opinion do not constitute a real response to the request, and I am afraid that this unimpressive result may cause some damage to the Court's credibility.

53. (*Judicial economy.*) In addition, I would like to explain why I consider that the request should have been dismissed in the present case, on account of considerations of *judicial economy*. There are any number of questions which could be brought to the Court as requiring legal interpretation or the application of international law in general terms in fields such as the law of the sea, law of humanitarian and human rights, environmental law, etc. If the Court were to decide to render an opinion — as in the present case — by giving a response to a legal question of a general nature as to whether a specific action would or would not be in conformity with the application of treaty law or of customary law — a question raised in the absence of any practical need — this could in the long run mean that the Court could be seised of a number of hypothetical cases of a general nature and would eventually risk its main function — to settle international disputes on the basis of law — to become a consultative or even a legislative organ.

If the flood-gates were thus opened for any legal question of a general nature which would not require immediate solution, in circumstances where there was no practical dispute or need, then the Court could receive many cases of an academic or intellectual nature with the consequence that it would be the less able to exercise its real function as a judicial institution. I have expressed my concern at an abuse of the right to request an advisory opinion in my separate opinion appended to the Court's Opinion rendered today in response to the request from the World Health Assembly, in terms which I would like to repeat:

“I am personally very much afraid that if encouragement is given or invitations are extended for a greater use of the advisory function of the Court — as has recently been advocated on more than one occasion by some authorities — it may well be seized of more requests for advisory opinions which may in essence be unnecessary and over-simplistic. I firmly believe that the International Court of Justice should primarily function as a judicial institution to provide solutions to inter-State disputes of a contentious nature and should neither be expected to act as a legislature (although new developments in international law may well be achieved through the jurisprudence of the Court) or to function as an organ giving legal advice (except that the Court may give opinions on legal questions which arise within the scope of activities of the authorized international organizations) in circumstances in which there is no conflict or dispute concerning legal questions between States or between States and international organizations.” (*Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996*, p. 89, para. 3.)

54. (*My personal appeal.*) In concluding this exposition of my position against the Court's rendering an opinion in the present case, I would emphasize that I am among the first to hope that nuclear weapons can be totally eliminated from the world as proposed in General Assembly resolutions 49/75 H and 50/70 C, which were adopted at the General Assembly without there being one single objection. However, a decision on this matter is a function of *political* negotiations among States in Geneva or New York and is not one which concerns our judicial institution here at The Hague, where an interpretation of *existing international law* can only be given in response to a genuine need.

V. SUPPLEMENTARY OBSERVATIONS ON MY POSITION AS REGARDS PARAGRAPH 2 OF THE OPERATIVE PART OF THE PRESENT ADVISORY OPINION

55. While I take the position that the Court should have declined to render an advisory opinion, I proceeded nonetheless to cast my vote on all of the subparagraphs in its operative part in view of the rule that no Judge may abstain from the voting on the operative part of any decision of the Court. I have done so although, in my view, the statements listed in paragraph 2 may not be interpreted as constituting replies to the question posed by resolution 49/75 K while subparagraph F, in particular, concerns a matter which, in my view, should not be advanced in the operative part of the Advisory Opinion as it simply reproduces Article VI of the Non-Proliferation Treaty. However, I did vote in favour of all the subparagraphs A to F — apart from the subparagraph E — as I can

accept the statements made in each one of them. The equivocations of subparagraph E prove my point that it would have been prudent for the Court to decline from the outset to give any opinion at all in the present case. The fact that the Court could only come to such an equivocal conclusion hardly serves to enhance its credibility.

(Signed) Shigeru ODA.
