CR 95/25

Cour internationale de Justice

LA HAYE

International Court of Justice

THE HAGUE

ANNEE 1995

Audience publique

tenue le vendredi 3 novembre 1995, à 10 heures, au Palais de la Paix,

sous la présidence de M. Bedjaoui, Président

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

et

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

COMPTE RENDU

YEAR 1995

Public sitting

held on Friday 3 November 1995, at 10 a.m., at the Peace Palace,

President Bedjaoui presiding

in the case

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

and

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

VERBATIM RECORD

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

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

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

L'Organisation mondiale de la Santé est représentée par :

M. Claude-Henri Vignes, conseiller juridique;

M. Thomas Topping, conseiller juridique adjoint.

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

et/ou

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

Le Gouvernement de l'Australie est représenté par :

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

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

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

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

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

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

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

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

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

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

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

M. Georges Abi-Saab, professeur;

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

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

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

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

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

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

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

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

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

Le Gouvernement de la République française est représenté par :

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

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

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

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

Le Gouvernement de la Fédération de Russie est représenté par :

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

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

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

Le Gouvernement des Iles Marshall est représenté par :

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

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

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

Le Gouvernement des Iles Salomon est représenté par :

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Le Gouvernement de l'Indonésie est représenté par :

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

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

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

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

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

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

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

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

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

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

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

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

Le Gouvernement italien est représenté par :

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

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

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

Le Gouvernement de la Malaisie :

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

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

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

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

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

Dato' R. S. McCoy, Expert;

M. Peter Weiss, Expert.

Le Gouvernement du Mexique est représenté par :

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

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

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

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

Le Gouvernement des Philippines est représenté par :

M. Merlin M. Magallona, agent;

M. Raphael Perpetuo Lotilla, conseil;

M. Carlos Sorreta, conseil;

M. Rodolfo S. Sanchez, avocat;

M. Emmanuel C. Llana, avocat.

Le Gouvernement de Qatar est représenté par :

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

M. Sami Abushaikha, expert juridique du Diwan Amiri;

M. Richard Meese, cabinet Frere Cholmeley, Paris.

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

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

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

M. Christopher Greenwood, conseil;

M. Daniel Bethlehem, conseil;

M. John Grainger, conseiller;

M. Christopher Whomersley, conseiller.

Le Gouvernement de Saint-Marin est représenté par :

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

Le Gouvernement de Samoa est représenté par:

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

M. Roger S. Clark, professeur.

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

The World Health Organization is represented by:

Mr. Claude-Henri Vignes, Legal Counsel;

Mr. Thomas Topping, Deputy Legal Counsel.

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

and/or

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

The Government of Australia is represented by:

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

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

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

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

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

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

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

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

Mr. George Abi Saab, Professor;

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

The Government of the Republic of France is represented by:

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

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

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

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

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

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

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

The Government of Indonesia is represented by:

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

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

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

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

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

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

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

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

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

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

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

Republic of Iran, The Hague;

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

The Government of Italy is represented by:

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

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

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

The Governement of Malaysia is represented by:

Dato' Mohtar Abdullah, Attorney-General - Leader;

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

Dato' Heliliah Mohd. Yusof, Solicitor-General;

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

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

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

Mr. Peter Weiss, Expert.

The Government of Marshall Islands is represented by:

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

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

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

The Government of Mexico is represented by:

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

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

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

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

The Government of Philippines is represented by:

Mr. Merlin M. Magallona, Agent;

Mr. Raphael Perpetuo Lotilla, Counsel;

Mr. Carlos Sorreta, Counsel;

Mr. Rodolfo S. Sanchez, Advocate;

M. Emmanuel C. Llana, Advocate.

The Government of Qatar is represented by:

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

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

Mr. Richard Meese, Frere Cholmeley, Paris.

The Government of the Russian Federation is represented by:

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

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

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

The Government of Samoa is represented by:

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

Mr. Roger S. Clark, Professor.

The Government of San Marino is represented by:

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

The Government of Solomon Islands is represented by:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Government of the United Kingdom is represented by:

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

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

Mr. Christopher Greenwood, Counsel;

Mr. Daniel Bethlehem, Counsel;

Mr. John Grainger, Adviser;

Mr. Christopher Whomersley, Adviser;

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

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

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

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

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

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

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

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

Le PRESIDENT : Veuillez vous asseoir je vous prie. La Cour reprend ce matin ses audiences de plaidoirie dans cette affaire, les deux avis consultatifs demandés à la Cour par l'Organisation mondiale de la Santé et l'Assemblée générale des Nations Unies. Aujourd'hui, la Cour entendra l'exposé oral de l'Indonésie fait par M. l'ambassadeur d'Indonésie aux Pays-Bas, S. Exc. M. Johannes Berchmans. Il a la parole.

Mr. BERCHMANS SOEDARMANTO KADARISMAN:

1. Mr. President and Members of the Court, it is indeed a great honour for me to represent my Government before this august body in which two important questions, namely: the legality of the use by a State of nuclear weapons in armed conflict and the legality of the threat or use of nuclear weapons, initiated respectively by the World Health Organization and the United Nations General Assembly, are being examined. Cognizant of the fact that the International Court of Justice is the embodiment of, and accountable for, the international community's consciousness, I am confident that the result of your deliberations on the issues will be of paramount importance to the whole of mankind and its civilization.

2. In order to avoid presenting the Court with repetitive arguments, Indonesia wishes to state that it fully supports the written and oral presentations of many States concerning the inherent and unconditional illegality of the use of nuclear weapons in any circumstance, including the oral submission of the Egyptian Government.

3. Mr. President and Members of the Court, ever since the first atomic bomb tested by the United States Government at the New Mexico testing site and subsequently used on Hiroshima and Nagasaki (1945), the world has been living under the constant threat of a nuclear holocaust. This extortionate threat became even worse when the former Soviet Union, United Kingdom, France and China also managed to devise and test their own nuclear weapons. Moreover, several other countries are also suspected to have been able to acquire nuclear weapons, compromising further the security of the world in which the family of nations was supposed to live harmoniously in peace and free from fear. In an attempt to give an illustrative example of how devastating the effect of the nuclear

weapons on human beings, I should like to draw your attention to the fact brought forward by Antonio Cassese in his book entitled *Violence and Law in the Nuclear Age* that: "The [conservative] estimates produced by the Japanese Government during the 1950s ... gave 78,000 dead and 51,000 wounded out of 336,000 for Hiroshima and 23,000 dead and 41,000 wounded out of 270,000 for Tokyo." Cassese continues to say: "the quality of human suffering ... does not emerge from the figures and statistic only (which qualify human suffering in abstract numbers), but from the account of survivors". In this regard, this Court is also referred to materials from the International Symposium: Fifty Years since the Atomic Bombing of Hiroshima and Nagasaki, which were received by the Registrar as part of the citizens' evidence of "dictates of the public conscience".

4. The unprecedented and devastating effects of nuclear weapons on human beings and the environment, have led the international community, through the Final Document of the First Special Session of the United Nations General Assembly devoted to Disarmament (1978) to unanimously agree to qualify these weapons, along with the other indiscriminate weapons such as chemical and biological weapons, as weapons of mass-destruction. The document, which was adopted by consensus, furthermore agreed that concerted efforts should be made in trying to eradicate totally these weapons from the world's arsenals under strict and effective international control.

5. The bipolar structure of the world of the Cold War era, however, prevented such a lofty goal from being pursued. During the Cold War period, the two opposing camps, albeit fully aware that *nuclear war cannot be won and should not be fought*, were several times in a near-nuclear-war situation which could well have brought humanity to the verge of extinction. The collapse of this outdated political structure, while paving the way for bilateral agreements to reduce the nuclear weapons arsenals of the two most powerful possessing States, has nevertheless still failed to provide the international community with the real political impetus urgently required to conclude a series of multilaterally-negotiated legal instruments regulating totally these inhumane weapons.

6. This is due to the recalcitrant behaviour of some nuclear-weapons States which continue to maintain a policy of nuclear deterrence and to rely on the saga of nuclear weapons in pursuit of their own national interests at the expense of the non-nuclear-weapons States' security interests.

7. The possession of nuclear weapons by some States but not others, and the horrendous nature of these weapons, has created an unprecedented disparity of power between these two groups of States. So long as the nuclear "haves" do not take seriously their solemn obligation under Article VI of the Non Proliferation Treaty to move in good faith and with all deliberate speed toward the complete elimination of nuclear weapons, this disparity will continue to exist and will, in and of itself, constitute a threat to the survival of the "have nots" and of the "haves" as well.

8. This threat is further enhanced by the announced intention of the nuclear weapon States to reserve for themselves the right to use nuclear weapons in response to a perceived or actual threat of attack or, more generally, in defense of their national interests or security. Nor is this threat diminished by the position of the nuclear weapon States whereby the only purpose of their nuclear arsenals is to deter the use of force by others.

9. Indeed, the very concept of deterrence is meaningless without a credible willingness to use; hence "deterrence" equals "threat to use".
Thus, the question posed by the General Assembly goes beyond the *jus in bello* query of the World Health Assembly and ventures forth into the area of *jus ad bellum*. But the doctrine of *jus ad bellum*, as elaborated since the enactment of Article 2, paragraph 4, of the United Nations Charter, leaves no room for the legality of the threat of force under international law. Article 2, paragraph 4, categorically prohibits the threat or use of force by one State against another. The only exception to this prohibition is Article 51, which preserves "the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations".

10. But nothing in Article 51 sanctions a standing threat - a threat *in futuro* - by one State against another, named or unnamed. It sanctions only the use of retaliatory force once an armed attack occurs. Its application is limited to the very brief timespan following an attack; it cannot, therefore, sanction the threat or the use of force as a hypothetical matter inherent in the military doctrine of this or that State. Furthermore, the use of force in self-defence is subject to the rules of *jus in bello*. Hence, if use of nuclear weapons is prohibited under the rubric of *jus in bello*, the threat to use nuclear weapons can never be sanctioned under the rubric of *jus ad bellum*.

11. It is against this backdrop and taking into account the fact that the security interests of the overwhelming majority of nations, including that of Indonesia, will continue to be compromised by the existence of these weapons, that the Government of Indonesia has consistently called for the abolition of these horrendous weapons, for, the immense loss of human lives and the environmental devastation caused by the use of these weapons in the past is beyond dispute. Should they be used again, all nations without any exception would experience devastating consequences far beyond anything previously known in the past due to the more powerful and sophisticated nuclear weapons possessed by the nuclear weapons States. Their radioactive fallout could engender a toll of millions worldwide, in present and future generations. Equally disastrous would be the impact on the world economy and other vital aspects of the international community. All States would enter a downward spiral leading to utter misery for their populations and would suffer losses corresponding to many decades of progress. Economic and social conditions such as these would most certainly trigger latent political instability, causing social upheavals as well as civil and local wars. In short, in addition to the unconscionable human cost, the entire ecology of the world would be severely affected and the infrastructures of civilization totally shattered.

12. Mr. President and Members of the Court, all States must avoid the threat or use of force in their relations with one another. The United Nations Charter specifically prohibits the threat or use of force. Under the United Nations Charter, Article 2, paragraph 4:

> "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations."

13. The prohibition of the threat or use of force under Article 2, paragraph 4 has the status of *jus cogens*, a peremptory rule of international law which has been confirmed by the International Law Commission. Moreover, this prohibition extends to non-Member States (United Nations Charter). The United Nations Charter permits the threat or use of force only in individual or collective self-defence, including Security Council enforcement measures. Under Article 51:

> "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."

14. The Charter's prohibition on the threat or use for force, with the limited exception of self-defence, reflects a change in the development of international law. Historically, *jus ad bellum*, or the law of "just war", recognized the right of a State to resort to war for "just" reasons. In 1919, the Covenant of the League of Nations further limited a State's right to "resort to war". In 1928, the General Treaty for the Renunciation of War (Kellogg-Briand Pact, 1928) prohibited aggressive war "as an instrument of national policy" and "for the solution of international controversies".

15. The language of the Charter prohibits the "threat or use of force" rather than "resort to war", as the Covenant of the League of Nations did. The change in terminology reflects the recognition that a State might resort to the threat or use of force which does not rise to the level of war or resort to armed conflict without an open declaration of war (N. Bentwich and A. Martin, 1950). The League of Nations Covenant did, however, recognize the danger of threats in international relations. The Covenant declared: "any war or threat of war" is a matter of concern to the entire League and grounds for the League to take action to "safeguard the peace of nations".

16. The Preamble of the Non-Proliferation Treaty refers to "the devastation that would be visited upon mankind by a nuclear war". Similarly, the Treaty of Rarotonga States in its preambular paragraph:

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

The threat of use of nuclear weapons must be assessed in the light of the terrible risks identified in the foregoing and other treaties. Indeed, the concept of deterrence insisted upon by the nuclear weapons States as central to their security postures depends on the character of nuclear weapons as weapons of mass destruction whose use could devastate humanity and the earth. Those States cannot now be heard to deny that weapons are weapons of mass destruction whose use is indiscriminate and uncontrollable and therefore illegal. The argument that the threat of use of nuclear weapons has prevented nuclear war is unprovable and speculative in the extreme. Precisely the contrary argument could be made, albeit also in a speculative mode; namely, that deterrence has

several times brought the world to the brink of nuclear war and will continue to do so. The most cited examples of this atomic brinkmanship are Dien Bien Phu (1954) and the Berlin (1948) and Cuban (1960) missile crises.

17. The principles behind the Kellogg-Briand Pact and the League of Nations Covenant provided a foundation for the United Nations Charter (J. Keegan, 1993). The *travaux préparatoires* that preceded the adoption of the Charter further indicate a general understanding that a state of peace "could not be regarded merely as maintenance of the status quo but that it should imply active cooperation between Member States in order to promote the purposes of the Organization" (Herczegh, 1964).

Thus, Article 2, paragraph 3, which requires States to settle disputes peacefully, complements the prohibition of the threat or use of force. Moreover, the Charter's Preamble calls on States "to practice tolerance and live together in peace with one another as good neighbours". These affirmative obligations to co-operate peacefully would clearly be inconsistent with a legal regime that tolerates threats between States.

18. The statement of Mr. Hans Corell, the then Under-Secretary-General for Legal Affairs at the United Nations, during the Congress on Public International Law in March 1995, reaffirmed the principles that law should govern the relations between States and that disputes should be resolved peacefully.

19. The preparatory work of the United States in anticipation of the creation of the United Nations reflects a concern over threats of force. Its presidential memorandum (1943) containing "basic ideas which might be embodied in a constitution of an international organization for the maintenance of peace and security" listed as the first among the functions and purposes of the organization "to prevent the use of force or threats to use force". As the first of the principal obligations of a Member State, the memorandum listed "to refrain from the use of force or threat to use force".

20. The proposals which emerged from the Dumbarton Oaks Conference, in preparation for the United Nations Conference in San Francisco, formed the basis of the United Nations Charter. At

this Conference, the United States proposals were accepted as the basis for discussion and the structure they established was generally accepted (E. Luard, 1982). The Dumbarton Oaks draft of the principle which became Article 2, paragraph 4, reads: "All members of the Organization shall refrain in their international relations from the threat or use of force in any manner inconsistent with the purpose of the Organization."

21. Australia's amendment added the prohibition on threats or use of force "against the territorial integrity or political independence of any member or State".

22. Mr. President and Members of the Court, numerous United Nations resolutions and declarations have also confirmed the principle that States shall refrain from the threat or use of force in their international relations. This includes, *inter alia*:

(a) The Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (General Assembly res. 2625/XXXV/1970);

(b) The Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty (General Assembly res. 2131/XX/1965);

(c) The 1987 Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations; and

(d) The Final Document of the First Special Session of the United Nations General Assembly on Disarmament.

23. Additional declarations, which reaffirm the principle of refraining from the threat or use of force include: Essentials of Peace (General Assembly res. 290/IV), the Declaration on the Strengthening of International Security (General Assembly res. 2734/XXV), the Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States (General Assembly res. 36/103) and the Declaration on the Prevention and Removal of Disputes and Situations Which May Threaten International Peace and Security and on the Role of the United Nations in This Field (General Assembly res. 43/51).

24. Mr. President and Members of the Court, a number of collective security treaties confirm also the symbolic nature of threat and use of force. The North Atlantic Treaty (the NATO Treaty) requires State parties "to refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the United Nations". Similarly, the now lapsed Treaty of Friendship, Cooperation and Mutual Assistance (the Warsaw Pact, 1955) requires contracting parties "to refrain in their international relations from the threat or use of force". The Helsinki Final Act (1975) requires also the participating States to refrain from the threat or use of force, repeating the language of the Charter.

25. The American Treaty on Pacific Settlement (the Treaty of Bogota) requires the contracting parties to "refrain from the threat or the use of force, or from any other means of coercion for the settlement of their controversies...". The Convention on the Rights and Duties of States holds that: "No State has the right to intervene in the internal or external affairs of another." In addition, the Charter of the Organization of American States (1948) provides: "No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other States". The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic and cultural elements.

26. The United Nations General Assembly, through its resolution 95/I (1946) unanimously affirmed also "the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal". The principles "have since been universally considered to constitute an authoritative statement of the rules of customary international law" (Brownlie, 1963). The Nuremberg offenses "correspond largely to the obligations imposed by certain rules of *jus cogens*", as explained in the Report of the International Law Commission of 1976.

27. The principles as codified by the International Law Commission (1950) define crimes against peace as:

(a) the planning, preparation, initiation, or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;

(b) participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under *(a)*;

A crime against peace is "a culpable violation of the *jus ad bellum*" (H. McCoubrey and N. White, 1992).

28. Therefore, planning and preparing for aggression *is clearly proscribed*. In addition, while not so applied by the Nuremberg Tribunal, the Nuremberg principles support the proscription of planning and preparation for war crimes and crimes against humanity. A war involving such crimes would, therefore, be a "war in violation of international treaties, agreements or assurances".

29. Mr. President and Members of the Court, the United Nations Charter and the treaties and resolutions cited above do not distinguish between the legal status of the threat to use force and that of the use of force itself. Both are equally prohibited. Indeed, "if the promise is to resort to force in conditions in which no justification for the use of force exists, the threat itself is illegal" (Brownlie, 1963). The significance of the prohibition on threats or force becomes apparent when one considers the implications for previously accepted legal norms. Oppenheim's discussion of threats of force in relation to the obligation to issue an ultimatum before resorting to war suggests that the prohibition on the threat of force overrides previously accepted and codified legal standards.

30. The prohibition of the threat of force applies even where the threat is not carried out. As Professor Oscar Schachter notes: "The preponderance of military strength in some States and their political relations with potential target States may justifiably lead to an inference or a threat of force against the political independence of the target State ... and the applicability of Article 2, paragraph 4, in principle can hardly be denied." However, even though relative military strength and political relations can create situations of threat, "curiously Article 2, paragraph 4, has not been invoked much as an explicit prohibition of such implied threats" *(idem)*. According to Schachter, this may be due to the "difficulty of demonstrating coercive intent" or to the "widespread, though not unlimited, tolerance for disparities of power" *(idem)*.

31. An alternative explanation for the underuse of the prohibition on threat in Article 2, paragraph 4, is the difficulty of invoking it effectively. Since the authority to do so lies with the

Security Council, the failure of the non-permanent members to exercise that authority does not indicate their tolerance of implied or actual threats by the permanent members - who are also the declared nuclear weapon States - but rather their recognition of power disparities and the veto power of the permanent members. International legal scholars differ somewhat in their analyses of what constitutes a threat of force and what the role of threats in international law is. According to Brownlie, a threat "consists in an expressed or implied promise by a government of a resort to force conditional on non-acceptance of certain demands of that government." Romana Sadurska regards a threat in the international arena as "a message, explicit or implicit, formulated by a decision maker and directed to the target audience, indicating that force will be used if a rule or demand is not complied with" (Romana Sadurska, 1988). Both experts suggest that the use of force is conditional on the target's response to the threat and that the threat might be implicitly or explicitly expressed.

32. In the *Corfu Channel* Case (United Kingdom *v.* Albania, 1949) the International Court of Justice concluded that the passage of British warships through the North Corfu Strait did not violate Albanian sovereignty. In that particular case, Albania had earlier fired on British ships, and the British "mission" was designed to affirm a right which had been unjustly denied" *(idem)*, i.e., the right of passage. The Court also held that Albania's obligation to notify international shipping of the mining of her waters stemmed from "certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States" *(idem)*. A concurring opinion by Judge Alvarez drew "special attention" to "acts contrary to international law, which are related to the present dispute: *intervention, pressure or threat of force, demonstration of force*, with a view to intimidation, *violation of sovereignty*, and *misuse of right* ..." *(idem)*.

33. In the *Fisheries Jurisdiction* case, (United Kingdom *v.* Iceland, 1973) a dissenting opinion by Judge Padilla Nervo notes the following regarding threats:

> "A big power can use force and pressure against a small nation in many ways, even by the very fact of diplomatically insisting in having its view recognized and accepted. The Royal Navy did not need to use armed force, its mere presence on the seas inside the fishery limits of the coastal State could be enough pressure. It is well

> known by professors, jurists and diplomats acquainted with international relations and foreign policies that certain 'notes' delivered by the government of a strong power to the government of a small nation may have the same purpose and the same effect as the use of threat of force." *(Idem.)*

34. Mr. President and Members of the Court, a threat of force alone does not constitute an "act of aggression" under the UN "Definition of Aggression" Resolution. In fact, the definition suggests that not all uses of force constitute acts of aggression, noting in the Preamble that "aggression is the most serious and dangerous form of the illegal use of force".

35. The International Law Commission incorporated the General Assembly's definition of aggression in the Draft Code of Crimes Against the Peace and Security of Mankind (1991):

(a) An individual who as leader or organizer commits or orders the commission of a threat of aggression shall, on conviction thereof, be sentenced ...

(b) The threat of aggression, consists of declarations, communications, demonstrations of force or any other measures which would give good reason to the Government of a State to believe that aggression is being seriously contemplated against that State.

36. The International Law Commission Report on the Draft Code to the General Assembly notes that in the context of this Article, "the word 'threat' denotes acts undertaken with a view to making a State believe that force will be used against it if certain demands are not met by that State" (*Yearbook of the International Law Commission*, 1989). A threat might take the form of declarations, communications, and demonstrations of force, such as "concentrations of troops near the frontier" *(idem)*. Moreover, the Commission emphasizes that the threat of aggression does not justify a threatened State resorting to force in self-defence *(idem)*.

37. The Commission is careful to link the acts of an individual who commits a crime against peace and security with the State. Only individuals "vested with the authority of the State" have the potential to commit this offence (*Yearbook of International Law Commission*, 1989). However, the State is not exempted from its responsibility for the crime. Thus, although the Draft Code places the liability directly on the individual (Article 3, Responsibility and Punishment), it also provides that: "Prosecution of an individual for a crime against the peace and security of mankind does not relieve a State of any responsibility under international law for an act or omission attributable to it."

38. The Commission also noted the importance of defining a crime of threat of aggression, particularly since powerful States have the potential to achieve improper objectives without committing an actual act of aggression (*Yearbook of the International Law Commission*, 1989). Indeed, the Sixth Committee of the General Assembly, in its review of the Commission Report, notes that "there had been many cases of States that had lost their independence through threats and ultimatums." The record went on to note: "Contemporary international law prohibited not only the use of force, but also the threat of the use of force, and thus its inclusion in the code would reaffirm the position of the international community in that regard." The Draft Code of Crimes Against the Peace and Security of Mankind, without any doubts, reflects the recent development of the concept of crimes against peace.

39. The UN Charter was adopted in San Francisco on 26 June, 1945, six weeks before the first use of the atom bomb on 6 August, 1945 (Herczegh, 1964). Had this time sequence been reversed, the Charter might well have contained a specific prohibition on the threat and use of nuclear weapons and other weapons of mass destruction.

> "The fact, however, that the existence of atomic weapons means an unprecedented source of danger for mankind and that it may be one of the gravest forms of the threat of force was immediately recognized by the United Nations, which then tried to solve this problem." *(Idem.)*

The concern of the world community with this new, startling development was evidenced by the fact that the first resolution adopted by the United Nations dealt with the subject of atomic energy and called, *inter alia*, "for the elimination from national armaments of atomic weapons and of all other major weapons adaptable to mass destruction..." (General Assembly resolution 0101).

40. Mr. President and Members of the Court, all international customary law and all treaties regulating the conduct of armed conflict among States are based on at least two fundamental principles, namely military necessity and humanity. These two basic principles, in combination, mean that only actions necessary for the defeat of the opposing side are allowed. Actions which cause needless losses or suffering are prohibited. Furthermore, the employment of arms causing "unnecessary" suffering or "unnecessary" destruction is prohibited under the "1907 Hague Convention IV on Laws and Customs of Land Warfare". Although the Hague Convention allows the

warring parties to inflict such destruction should it be imperatively demanded by necessity. The use of nuclear weapons that cause such destruction therefore runs counter to the spirit of this Convention and in contravention to the principle of military necessity. Long before the conclusion of the 1907 Hague Convention, there were also the Declarations of St. Petersburg of 1868, Brussels of 1874 and the Hague of 1898 which *inter alia* stated that the right of the belligerents to adopt means of injuring the enemy was not unlimited and they furthermore prohibited the employment of arms calculated to cause unnecessary suffering.

41. The 1949 Geneva Convention for the protection of war victims distinguishes clearly between military and non-military objectives. Its rules distinguish between combatants and non-combatants and oblige belligerents to protect civilians not taking part in the hostilities. *The indiscriminate nature of the use of nuclear weapons, however, renders this rule impossible to comply with.* It also fails to honour the principle of the inviolability of a neutral State in war time, since, the effects of a nuclear explosion including its radioactive fallout cannot be guaranteed not to affect neutral States.

42. The Preamble of the NPT of 1968 calls for

> "the cessation of the manufacture of nuclear weapons, the liquidation of all their existing stockpiles, and the elimination from national arsenals of nuclear weapons and their means of delivery ...".

Specifically, the Treaty prohibits the manufacture or acquisition of nuclear weapons by non-nuclear weapons States *(idem)*, and it requires nuclear weapon States to "pursue negotiations in good faith on effective measures relating to the cessation of the nuclear arms race at an early date and to nuclear disarmament" *(idem)*. It is therefore obvious the threat of use of nuclear weapons is inconsistent with the general purpose and goal of the Treaty as well as with the specific requirements of State parties.

43. The South Pacific Nuclear Free Zone Treaty prohibits the manufacture, acquisition, possession or control of nuclear weapons (the Treaty of Rarotonga). The Treaty for the Prohibition of Nuclear Weapons in Latin America prohibits the testing, use, manufacture, production or acquisition of nuclear weapons, directly or indirectly, by parties to the treaty or within the region

defined by the Treaty (the Treaty of Tlatelolco).

44. The pattern in international law regarding weapons of mass destruction is to prohibit not only the use but also the manufacture and acquisition of these weapons. The Treaties discussed above seek to eliminate both the use and the threat to use nuclear weapons; in no instance do they prohibit use while tolerating possession. Similarly, treaties regarding other weapons of mass destruction, namely the Biological Weapons Convention and the Chemical Weapons Convention, link *threat and use*. The illegality of the threat to use these weapons is underscored by provisions calling for their destruction, as stipulated in Article II of the Biological Weapons Convention and Article I, paragraph 2 of the Chemical Weapons Convention.

45. Mr. President and Members of the Court, resolution 255 of 1968 gives non-nuclear States assurances from the nuclear States that nuclear weapons will not be threatened or used against them. All of the declared nuclear States supported this resolution. Furthermore resolution 984 of 1995 of the Security Council provides that aggression or the threat of aggression with nuclear weapons against a non-nuclear weapon State would require the Security Council to act immediately. Both resolutions therefore implicitly recognize the illegality of the threat and use of nuclear weapons against a non-nuclear weapon State. A legal act would not require assurances against use nor require a Security Council response.

46. As has been elaborated earlier, the framers of the United Nations Charter could not be aware of the threat of nuclear weapons, but the first United Nations General Assembly resolution addressed the elimination of these weapons. Another United Nations General Assembly resolution, 704/VII (1953), reaffirms the prohibition of the threat or use of force and, in this context, calls on the Disarmament Commission to develop comprehensive plans providing for the "elimination and prohibition of all major weapons ... adaptable to mass destruction" and, specifically, the "effective international control of atomic energy to ensure the prohibition of atomic weapons ..." *(Idem)*.

47. The issue of assurances for non-nuclear weapon States against the use or threat of use of nuclear weapons has received overwhelming support from the international community. The General Assembly has passed numerous resolutions on Negative Security Assurances (1983-1984)

affirming the urgency of reaching an early agreement on effective international arrangements to assure non-nuclear weapon States against the use or threat of use of nuclear weapons. Moreover, the 1995 NPT Review and Extension Conference has agreed in its decision:

> "to assure non-nuclear weapons States party to the Treaty against the use or threat of use of nuclear weapons. These steps could take the form of an internationally legally binding instrument."

48. The conclusion of effective international arrangements to assure non-nuclear weapons States against the use or threat of use of nuclear weapons has been a key agenda item of the Conference on Disarmament. Furthermore, the report of the Conference in 1994 "stressed the necessity to recognize the right of non-nuclear weapon States not to be attacked nor threatened with these weapons". It is significant to stress that, in referring to this right, the Report called for its recognition rather than its creation.

49. The complete elimination of nuclear weapons has been a constant and recurring objective of the Disarmament Commission and the Conference on Disarmament (United Nations doc. A/49/42). In addition, the General Assembly has passed over 100 resolutions stating nuclear disarmament or the elimination of nuclear weapons as a goal. Hence, the majority of States do not accept the necessity argument for deterrence. A growing number of States have specifically prohibited nuclear weapons in their territory and have established, or are in the process of establishing, nuclear weapon free zones, including in my own region.

50. Mr. President and Members of the Court, the United Nations Human Rights Committee, which supervises the implementation of the International Covenant on Civil and Political Rights (ICCPR), has determined that nuclear weapons threaten the non-derogable right to life:

> "The designing, testing, manufacture, possession and deployment of nuclear weapons are among the greatest threats to the right to life which confront mankind today. This threat is compounded by the danger that the actual use of nuclear weapons may be brought about, not only in the event of war, but even through human or mechanical error of failure. Furthermore, the very existence and gravity of this threat generates a climate of suspicion and fear between States, which is in itself antagonistic to the promotion of universal respect for the observance of human rights and fundamental freedoms in accordance with the Charter of the United Nations and the International Covenants on Human Rights." (Report of the Human Rights Committee, United Nations doc. A/40/40.)

51. In other words, nuclear weapons both threaten the right to life and contribute to the spirit of mistrust among States which compound the likelihood of threats being carried out. In addition, the threat to use nuclear weapons conflicts with the commitment to provide children with the protection of society and the State (ICCPR) and to protect families *(idem)*. The right to life is confirmed as well in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), and in the American Convention on Human Rights (ACHR). Under these commitments, a derogation clause may be invoked in exceptional situations that threaten the life of the nation. However, the right to life is one of the four non-derogable rights which constitute the "irreducible core" of human rights (J. Oraa, 1992). A non-derogable right is one which cannot be suspended by the State even in times of public emergency.

52. Moreover, according to the then Judge Schwebel, now Vice-President of the International Court of Justice, in 1991, matters affecting international human rights obligations cannot be regarded as exclusively within the domestic jurisdiction of a particular State:

> "Once a State has undertaken obligations toward another State or toward the international community in a specified sphere of human rights, it may no longer maintain, vis-à-vis the other State or the international community, that matters in that sphere are exclusively or essentially within its domestic jurisdiction and outside the range of international concern."

Thus the manufacture and possession of nuclear weapons, which violate the right to life, cannot be defended by nuclear weapon States either as essential for defence in times of public emergency or as matters of domestic jurisdiction.

53. Mr. President and Members of the Court, before going any further, it will be useful to examine briefly the meanings of the terms "threat" and "force", both generically and within the context of the legal instruments relevant to this discussion. The common meaning of "force" is "strength, energy, power". The normal meaning of "the use of force", within the context of Article 2, paragraph 4, of the Charter, is the application of physical force of a military nature by one Member State against another.

54. Upon closer examination, however, it becomes apparent that more is involved here than a transboundary launch of tanks, troops or missiles. Article 2, paragraph 4, forbids not only the use

of force against the territorial integrity of a State, but also against its political independence, or "in any other manner inconsistent with the purposes of the United Nations". If Article 2, paragraph 4, had been aimed only at a cross-border military action, it would not have been necessary to add this further rejection qualification.

55. What kind of force, then, other than military force in action, can be used by one State against the political independence of another, without affecting its territorial integrity. Non-military force, to be sure - as for instance the erection of tariff barriers or other economic measures, but also the open or veiled promise of the use of force, including armed force, if certain demands are not met. This interpretation is consistent with the definition of "force" as "power to influence, affect or control" (the Random House Dictionary of the English Language).

56. "Threat", on the other hand, is defined as "a declaration of an intention or determination to inflict punishment, injury, death, or loss on someone *in retaliation for, or conditionally upon*, some action of course; an indication of probable evil, loss or violence to come; (or) warning" *(idem).* Even more relevant, for the present purposes, is the definition of "threat" in Black's Law Dictionary: "In criminal law, ... any menace of such a nature as to unsettle the mind of the person on whom it operates, and to take away from his acts that free and voluntary action which alone constitutes consent."

57. The UN Secretary General, in considering what constitutes a threat to use force, noted that "the person who utters the threat may not intend to carry it out, and the threat is then only a form of intimidation and 'blackmail'", as stated in the Report on the Question of Defining Aggression (UN Doc. A/2211). As one philosopher has noted:

> "Nuclear weapons are being used today and can be expected to be used in the future. Not that they are being detonated ... but that is not a requirement of their being used. Hence, a country uses nuclear weapons when it makes it known that it may launch them unless certain conditions are met, as the United States did against the former Soviet Union in the Cuban Missile crisis, against China during the Korean War, and against North Vietnam during the Vietnam War. And the very threat of retaliation that is at the heart of nuclear deterrence is a *use* of nuclear weapons, even if it is not the actual exploding of them." (R.L. Holmes, 1989.)

Hence, the concepts of "threat" and "use" in Article 2, paragraph 4, merge into each other in most circumstances, therefore the threat of use is itself a kind of use.

58. As has been indicated before, the threat of force for the purpose of affecting another State's political independence, or in any manner inconsistent with the purposes of the United Nations - what we may call a conditional threat - has been used throughout the entire post-World War - although unequivocally outlawed by the United Nations Charter, other international instruments and, indeed, the customary law of peace, security and humanity.

59. Considering that nuclear weapons represent the greatest conceivable instrument of threat available to any nation, the conditional threat to use nuclear weapons is, *a fortiori*, a gross violation of the law of peace and security.

60. The threat in the retaliatory sense can be explained as follows: "if you do such and such to me, I will do such and such to you". Surely no person, nor any State, can be deprived of the right to threaten harm as a means of self-defence. But this right is not unlimited: there is no right to threaten to commit a crime or other illegal act. As has been argued elsewhere, therefore, the use of nuclear weapons is illegal in any circumstance, even by way of self-defence or reprisal, the threat to use nuclear weapons must also be illegal in any circumstance (Brownlie and Oppenheim).

61. Although this general proposition disposes of the question of the legality of retaliatory threats to use nuclear weapons, it may be useful to examine somewhat more closely the forms which such threats may take.

62. Mr. President and Members of the Court, a threat of first use could include a threatened pre-emptive nuclear strike against a perceived nuclear or conventional attack or a threatened nuclear response to an actual conventional attack. Moreover, a threat of first use could be directed against developments falling short of the perception of an immediate attack. The essence of the current doctrine of "counter proliferation" is that the nuclear weapon States reserve the right to use nuclear weapons in order to discourage their potential enemies from developing - not necessarily using - weapons of mass destruction, whether nuclear, chemical, biological or other. Of the declared nuclear powers, only China has an official no-first-use policy, while the others have expressed their willingness to use nuclear weapons against both nuclear and non-nuclear weapon States.

63. A threat of first use of nuclear weapons is a direct violation of *jus ad bellum*. The

prohibition on the threat of force under the United Nations Charter covers threats of both conventional and nuclear weapons. The threat of first use is inherently a threat against the political independence and territorial integrity of another State. This is true not only when the threat is imminent and aimed at exacting specific changes but also, because of the unique nature of the weapons, when it is a longstanding posture not directly linked to specific demands. Any State in actual or potential conflict with a nuclear State that has a first-use policy, recognizes that the nuclear State has the weapons and the will to use these weapons should it be deemed necessary by the nuclear State. This inevitably influences the decision-making of that State vis-à-vis that particular nuclear-weapon State.

64. The unique nature of nuclear weapons makes the threat of their use a tool of unequalled intimidation, undermining the political independence of the threatened State. Any nuclear threat or use - and especially first use and its threat - is contrary to the purposes of the United Nations, which include the maintenance of international peace and security and the prevention of "threats to the peace" and suppression of "breaches of the peace" (Art. 1, para. 1) and the achievement of co-operation in promoting and respecting human rights (Art. 1, para. 3). Furthermore, the threat of first use of nuclear weapons can never satisfy the principle of proportionality, one of the foundation stones of the laws of war, since the magnitude of the event to which a pre-emptive response is being made is necessarily a matter of speculation.

65. The second use of nuclear weapons, and therefore the threat of such use, is not permitted under the law of reprisals. Reprisals "must conform in all cases to the laws of humanity and morality", as stated *inter alia* in Article 86 of the *Manual* published by the Institute of International Law and the Geneva Conventions of 1977. Reprisals may be justified, but they too must be in accordance with customary law (N. Singh and E. McWhinney, 1989).

66. It is common ground that the laws of war apply equally to all weapons and tactics, including those used in self-defence. The use of genocide, torture or terrorist attacks by one State against another does not justify the use of genocide, torture or terrorist attacks in response. Hence, self-defence cannot justify the threat of use of nuclear weapons in self-defence.

67. Threats need not be expressly communicated to be effective (Farrands, 1974). It is true that not every disparity of power between persons or economic or political units constitutes a threat actionable at law. Nevertheless, most systems of law recognize that mere size can and frequently does lead to abuses of power.

68. Many countries and regional groupings have laws forbidding the abuse of a dominant position (the Treaty of Rome and German Competition Law). However, as the European Court of Justice observed:

> "The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, *as a result of the very presence of the undertaking in question*, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition ..., has the effect of hindering the maintenance of the degree of competition still existing in the market." (*Hoffmann-La Roche* v. *Commission*, 1979.)

69. Substituting "country possessing nuclear weapons" for "undertaking in a dominant position" will give us a description of the distortion of "normal" international relations resulting from the "very presence" of such weapons. Similarly, the rationale of anti-trust laws providing for State control of mergers and acquisitions is to prevent mere size from distorting normal market relations, which is another way of saying that mere size poses a threat to their operation. Many countries and regional arrangements have such laws.

70. The possession of nuclear weapons which are capable of wreaking complete destruction on an enemy, represents a unique case of power disparity. By its very existence, a nuclear arsenal in the hands of one State constitutes a threat of the greatest magnitude to the safety, indeed the survival, of every other State (Herczegh, 1964). It may be argued, in rebuttal, that the actual policy of the nuclear weapon States is to maintain their arsenals for the sole purpose of insuring their own security. But nations are not famous for observing their solemn promises when they perceive their vital interest to be at risk. If they were, the world would not have seen numerous cross-border wars break out since the enactment of the United Nations Charter.

71. What is known in current political science parlance as "vital interest" or "national interest" or "national security" used to be referred to as "reasons of State" and is understood to take priority

over law or morality. A recent example of this attitude is the statement by the Commander of the Russian ground forces, that the violation of the 1990 Conventional Armed Forces Treaty in Europe by the deployment of a new Russian army in Chechnya is justified because "the interests of Russia's security and integrity must come above the provisions set in this treaty" (*New York Times*, April, 1995). An earlier example is the statement by Jeane Kirkpatrick, US Ambassador to the United Nations, that the Charter "is not a suicide pact" (1984).

72. The point here is not to chastise this or that nation for placing its perceived vital interest above the commands of the law, since all nations are guilty of this offence, but to submit that, in assessing the threat posed by overwhelming power, one must look at what nations do, not what they say - starting from Lord Acton's famous aphorism that "power tends to corrupt and absolute power corrupts absolutely".

73. It is not difficult to see how all of this "tendencies" apply to the enormous power flowing from the possession of nuclear weapons, nor how this power is bound to be used as an instrument of national policy by those who possess it.

74. Mr. President and Members of the Court, deterrence cuts across the categories of threat discussed above. Because it is generally claimed to be the principal purpose of nuclear weapons, it merits special consideration. According to the US Joint Chiefs of Staff:

> "The fundamental purpose of US nuclear forces is to deter the use of weapons of mass destruction, particularly nuclear weapons, and to serve as a hedge against the emergence of an overwhelming conventional threat." (Joint Chiefs of Staff, Doctrine for Joint Nuclear Operations, 1993.)

75. The use of the adjective "fundamental" rather than "sole", tends to suggest that US nuclear forces may have purposes other than deterrence. The US Joint Chiefs went on to say that: "Deterrence is founded in real force capabilities and the national determination to use those forces if necessary." (*Idem.*) And that deterrence is:

> "a defense posture that makes possible war outcomes so uncertain and dangerous, as calculated by potential enemies, as to remove all incentive for initiating attack under any circumstance" (*idem*).

It was stated further that:

> "US forces and command and control systems must be viewed by enemy leadership as capable of inflicting such damage upon their military forces and means of support, or *upon their country*, as to deny them the military option." (*Idem.*)

76. Hence, the doctrine of deterrence implies a readiness and willingness: to use nuclear weapons; to inflict great damage on the enemy; and, if necessary, to inflict such damage on the enemy's country, not just his military forces and means of support. It cannot, therefore, be seen as a purely defensive doctrine, as argued before this Court.

As one analyst has noted:

> "The development of modern nuclear weapons and the systems needed to deliver them cannot be explained if one insists on defining deterrence in an essentially defensive and reactive form. Instead, the modern concept of deterrence has evolved into something much closer to the traditional understanding of the role of military force in the pursuit of national objectives. Deterrence is now seen as 'flexible' or 'extended', and a 'second-strike counterforce' capability is defended as part of a deterrent on the grounds that a credible response must be available if deterrence fails." (A. Krass, 1984.)

77. Mr. President and Members of the Court, support for the principle that the threat to commit an illegal act is also illegal can be found in international legal instruments and *opinio juris* as well as the general principles of law recognized by civilized nations.

78. We have already seen that treaties regarding weapons of mass destruction prohibit possession and manufacture of these weapons in addition to their use. Similarly, the Nuremberg Principles define as Crimes Against Peace the "planning" and "preparation" of war in addition to the "initiation" or "waging" of war. Additional examples include Protocol I of the Geneva Convention which lists a number of prohibited acts, *inter alia*: torture, corporal punishment, mutilation, outrages upon personal dignity, the taking of hostages, collective punishments, and "*threats to commit any of the foregoing acts*".

79. In addition, the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 renders punishable not only genocide, but also conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide, all of which might be perceived by the target as the threat of genocide.

80. Given the paucity of discussions in the legal literature concerning the meaning of "threat" in Article 2, paragraph 4, of the Charter, it may be useful to consider the treatment of "threat" in ordinary civil and criminal law.

81. The principle of criminalizing threat, either in itself or for the purpose of achieving some

unlawful end, is well established in the legal systems of many countries, including Indonesia.

82. Mr. President and Members of the Court, to sum up the submission of my Government, please allow me to state the following:

83. The use or threat of use of nuclear weapons runs counter to the letter, spirit and intention of all customary laws and treaties regulating the conduct of armed conflict among States. Although the existing treaties regulating the conduct of armed conflict among States do not bind non-contracting States and Article 2, paragraph 4, of the United Nations Charter does not prohibit directly the use or threat of the use of nuclear weapons, they are nonetheless considered as *lex feranda* as they were undoubtedly created with the intention to make them new binding rules of law.

84. The problem of the use of nuclear weapons therefore goes beyond the concerns of individual nations because the consequences of their use cannot remain limited or contained within predetermined boundaries. The immorality and illegality inherent in the status quo is beyond dispute and can no longer be perpetuated. Hence, a legal ban is not only a moral imperative but also a question of survival of the human beings as well as their environment and civilization. An advisory opinion by the Court prohibiting the use of nuclear weapons would provide a legal basis for an internationally binding instrument laying down the obligations not to use or threat to use nuclear weapons.

85. Although the 1995 Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons successfully addressed the question of extension, the mechanism of achieving nuclear disarmament within a reasonable time frame, however, remained untouched. Even worse, there is no clear-cut commitment by the nuclear-weapon States to the total elimination of these horrendous weapons.

86. The subjective threat or use of nuclear weapons remains as a real threat to the survival of all the world's present population and of generations to come. If this threat were regarded as legally wrong - as the embodiment of, and accountable for, the international community's consciousness - this Court should *advise that the threat and use of nuclear weapons is not permitted under international law in any circumstances*.

87. Mr. President and Members of the Court, I am fully aware of the fact that the Court is now confronted with issues highly critical to the course of mankind and its living environment. However, being knowledgeable of your personal qualities and vast experience, I am confident that you would be able to take the right decision which could pave the way for a nuclear weapons free world.

I thank you for your time.

Le PRESIDENT : Je remercie S. Exc. Soedarmanto Kadarisman pour son exposé oral. Ainsi s'achève le temps de parole alloué à l'Indonésie. La Cour observera maintenant une pause de quinze minutes et lorsqu'elle reprendra après cette pause elle donnera la parole au représentant du Mexique.

La séance est suspendue de 11 h 20 à 11 h 35.

Le PRESIDENT : Veuillez prendre place je vous prie. La séance est reprise, la parole est à S. Exc. M. Sergio González Gálvez, ambassadeur et ministre adjoint des affaires étrangères du Mexique.

Mr. GONZALEZ GALVEZ: Mr. President, Members of the Court, with your authorization and based on the options provided by Article 39 of the Statute, I will make my intervention in Spanish. For that purpose we have provided the appropriate interpretation. Mexico considers it important that the Spanish language, which is spoken by more than 300 million people, should be heard in this high Court.

Mr. President and Members of the International Court of Justice, before starting my intervention, I wish to express my profound regret for the untimely passing away of Judge Andrés Aguilar, a distinguished Venezuelan, a remarkable international lawyer and diplomat with whom I had the honour of working in the efforts of developing the international legal order.

Allow me, in the name of the Mexican Government, to assure this Court of the fundamental importance we give to its work as part of the common effort to ensure the full force of the rule of law in international relations.

The significance that Mexico has ascribed to the International Court of Justice ever since the foundation of the United Nations Organization precisely 50 years ago was expressed in the comments made by Mexico on the Dumbarton Oaks proposal. In the remarks paper, Mexico - which, as you are aware, was not invited to Dumbarton Oaks - adopted the position manifested by the distinguished jurists of the Informal Allies Committee on the future of the Permanent Court of International Justice. On the basis of previous experience provided by the League of Nations, Mexico felt that in the case of the International Court of Justice it would not be wise to repeat the organic link that connected the Permanent Court of International Justice to the League of Nations. This organic relationship, it was felt, could prejudice the independence of the Court's judges. Therefore, my country, Mexico, made the proposal of an international court of justice with the capacity of preserving the highest possible degree of independence in exercising its functions. In 1944 we felt that independence of action would be reflected in this supreme legal authority in the shape of growing freedom in the face of any repercussions, direct or indirect, that might affect a predominantly political body like the United Nations Organization would be, an organization which at the time was about to come into existence.

For several reasons, the San Francisco Conference voted for the opposite proposition and made the Court to which you so honourably belong a main organ of the United Nations. I would like to emphasize what Shabtai Rosenne says about this in his book entitled "The Law and Practice of the International Court"[5]. "The San Francisco decision makes the Court an integral part of the United Nations." As Judge Acevedo said when dealing with the *Peace Treaties* case in the Court to establish this tribunal's obligation to issue the advisory opinions requested by the General Assembly

> "The Court, which has been promoted to the status of main organ and an integral part of the United Nations mechanism, must do its utmost to co-operate with other organs so as to fulfil the objectives and the principles established in the Charter."

Despite our original stance, Mexico understands the significance of the change, and of course accepts the Court as an organ of the United Nations.

Also, Mr. President and Members of the Court, I would like to remind you that the

[5]ROSENNE, Shabtai, *The Law and Practice of the International Court*, 1965, Leiden, Netherlands; A. W. Sijthoff.

Government of Mexico, through the Minister for Foreign Affairs, and during the 50th General Assembly of the United Nations, voiced our decision to examine, to re-evaluate whether we should retain our reservation against the compulsory jurisdiction of the Court, and this is already being done by the authorities of my country, certainly taking into account the principle of reciprocity confirmed by the jurisprudence of this high Court.

Mr. President, the search for peace with justice is, in our opinion, the greatest challenge of our times. The role that the rule of law plays or can play in this task is one of the most interesting issues confronted by society. Firstly, to put peace on a solid foundation, the force of law is necessary, although law in itself does not guarantee peace: to disregard its principles can make any action to achieve this aim arbitrary and subjective. In the words of the *libertador* Simon Bolivar, international law must be "that body of laws that in peace and in war is the shield of our destiny".

Mexico has emphasized the importance of ensuring the rule of law in international activities since it submitted its comments on the Dumbarton Oaks Plan. In one of its first statements, Mexico defined as one of its objectives in joining this international organization "the need for the co-existence of nations to develop harmoniously under the rule of law".

Sir Wilfred Jenks, a British jurist with a long career in the International Labour Organization, describes in his book "The World beyond the Charter"[6], what he called the basic paradoxes that the world faces. Among these he notes the following in relation to international law:

> "Never before have so many areas of human activity been subject to regulations. We have achieved fundamental principles of behaviour that are already accepted by the international community, and we have codified in treaties and by the resolutions of international organizations - which acquire more force every day as source of obligations - rules applicable to those activities that have deserved priority attention from the community. However, the truth is that there is still little confidence in law as the way to solve our most basic problems. International law is not a popular subject in public opinion mechanisms, and when it is mentioned, it is almost always to criticize its lack of effectiveness. There is a growing scepticism about the pertinence of using legal measures to control the dynamic changes of today's society. The most tragic implication of this paradox is the ever present danger that law, by not responding properly to the challenge of our society, due to lack of imagination to understand the problems to be solved, among other reasons, will cease to have any influence on human activity."

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[6]JENKS, Wilfred 1972 (1909), *El Mundo más Allá de la Carta: Cuatro Etapas de la Organización Mundial*; Madrid, Tecnos, Colec. Ciencias Sociales.

Allow me, Mr. President and Members of the Court, a few moments of your time to share some thoughts on this situation. They will no doubt have clear relevance to the subject at hand and for the function that the Court, in our opinion, must perform on the basis of the Charter and its Statute.

Charles De Visscher pointed out in his book "Theory and Reality in Public International Law"[7] that the historical development of the organized international community has suffered two fundamental changes in quality, and these are reflected in the gradual transformation of international legal order.

The first of these was the breakdown of medieval society, which gave way to an uncontrollable drive to create a new order. The first sign of this was the establishment of nations in Western Europe. This stage, legally endorsed by the Treaties of Westphalia in 1648, marked the beginning of the modern international legal system.

At the beginning of this period, international law was the exclusive property of a small circle of Christian nations. A European club where the major Powers, which exerted collective hegemony over Europe, claimed to have the authority as a group to intervene in questions they considered to be of general interest, as Professor Mosler reminded us in his course at the Hague Academy in 1974 on the subject of "International Society as a Legal Unit". In time, classical international law, Professor Mosler said, came to embrace Africa, Asia and Latin America, not as active participants, creators of a collective effort, but as objects of colonial exploitation. The international legal order was moulded to the structure of colonial power and its premises were defined as a result of relations among the colonial Powers as long as these continued to dominate the so-called "New World".

Perhaps the person who has assessed this issue most eloquently is yourself, Mr. President, in your book entitled "Toward a New International Economic Order"[8] published in Spanish in Salamanca in 1979. Here you remarked that

> "The legal order created by ancient international society had the appearance of

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[7]DE VISSCHER, Charles, *Theory and Reality in Public International Law*, 1957, Princeton, Princeton University.

[8]BEDJAOUI, Mohammed, *Hacia un Nuevo Orden Económico Internacional*, 1979, Salamanca, España, edit. Sígueme.

> neutrality or indifference, but the *laisser faire laisser passer* that it endorsed in fact led to interference with law and encouraged injustice. Therefore, classic international law, though apparently indifferent, was actually permissible. It recognized and confirmed the right of supposedly civilized nations to dominate. It was a colonial and imperial law, which was institutionalized in the Berlin Congress on the Congo in 1885. At that time, this classical international law was presented as a system of rules which were based on geography (it was European), inspired by race and religion (it was Christian), motivated by economy (it was trade oriented), with certain political objectives (it was imperialist)."

As Judge Bedjaoui continues,

> "it was necessary to wait until the United Nations Charter for an open community to replace a closed one, and for the term 'civilized nations' to give way to the expression 'peace-loving nations', as stated in the first paragraph of Article 4 of the Charter".

The second historical change discussed by De Visscher in the evolution of the international community was the emergence of a considerable number of independent States as a result of the fall of the colonial system. Between 1945 and 1976, thanks to the United Nations, more than 2 billion people living in the former colonial world were liberated, and thus brought into the mainstream of world developments.

There is no doubt that decolonization had a decisive influence in redefining the contents and scope of contemporary international law. Consequently, the disappearance of colonialism changed the position of many States: from being objects of international law they became full subjects, and active participants in the readjustment of the legal order on the basis of the new features of the international community.

But even so, international life continued to be governed by classic international law that had been based on the practices of a small number of colonial Powers in the 18th and 19th centuries. In many cases this meant continued inequality and exploitation.

The emergence of a large number of new States as a result of this process poses a question of principle: how far these new States, which did not contribute towards creating international law, already in force when they came into being and whose provisions often do not reflect their interests, are bound by its rulings? This is a vexed question that has been studied by many authors in recent times. Clearly, from a legal and practical point of view the issue is very simple: when a State joins the international community, by this very act it accepts the existing rules and institutions. However,

the problem is much more complex and difficult: if numerous regulations of international law are not accepted and actively supported by a large sector of the international community, it will be difficult to ensure the rule of law in contemporary society.

The tendency described is certainly not to be found in the entire field of international law, but many important international regulations do reflect this inequality. Therefore, it is not surprising that new nations that were not joint authors so to speak, but passive objects of this international law, sometimes give the impression that they rebel against the application of it. The rebellion is direct, as in the case of peoples who aspire to full international personality and have had to resort to violence to overthrow a long-established colonial yoke. Colonialism was endorsed by the Charter of the United Nations, but this stemmed from political conditions that no longer exist today. On other occasions this rebellion can take indirect forms, which will be described briefly below.

We all remember the scant response to the International Law Commission's proposal for arbitration procedures made in the General Assembly. The draft treaty drawn up by the Commission provided for a series of innovative and severe measures to prevent parties from evading, during the proceedings, their initial obligation to settle the dispute through arbitration. Most countries that do not follow traditional lines in the matter of State responsibility opposed this project. What was the reason why new nations did not support mandatory or almost mandatory arbitration? I ask this question objectively and without *parti pris*, since Mexico is one of the few countries on the American continent that has ratified with no reservations the Bogota Pact providing for compulsory arbitration. Additional examples which illustrate our comments could be mentioned. For example, the famous controversy between Iceland and Great Britain on fisheries. This was the classical case where the small country would have come to this Court for the support of law. However, the jurisdiction was never accepted by Iceland at the time. Or, there is the subject of Great Britain and Belize on the territorial dispute, which also provided an example which could have made use of the frame of the rule of law in defence of the interests. However, Guatemala was always opposed to this.

This fact is surprising at first sight. The law is almost the defence *par excellence* for the

weak. Precisely because small countries cannot use force to protect themselves it is to their advantage to see that an international legal order is established with care and applied on a compulsory basis.

Indirect rebellion on the part of new nations has also been manifested by their little inclination to accept the binding nature of the International Court of Justice's rulings. In an international community of 185 Member States, most of which are small or gained their independence relatively late, only slightly more than 30 of those which did not have a hand in establishing international law have accepted the jurisdiction of the Court as binding.

This is due to the same reason mentioned above. It is not a matter of distrusting the Court itself, nor is it the result of its little devotion to law. Basically this problem stems from their not completely unfounded conviction that the body of laws to be applied by the Court generally speaking does not reflect their needs, since it was created during other times and with the practice of States whose interests were very different.

To find a fitting solution to this problem we must be fully aware that this situation exists, and understand it. The solution, as I said before, is not to reproach new nations, small and mid-sized countries for their scant enthusiasm for law and simply lament the fact that the number of States which have accepted the Court's jurisdiction as binding is so small. But rather, they must be given access to the processes of creating international law through the activity of international organizations and, of course, the Court. Despite the confidence that a fair number of countries have placed in the Court, it has not been able to affirm itself as the forum *par excellence* for the peaceful settlement of disputes. The Court has wide discretionary powers and in our opinion should use them to benefit the international community as a whole. Only so far as the Court faces up to the new international environment, will it be able to help keep international peace and security.

The subject that draws us together today is a very good example of the opportunities and challenges that the evolution of international conditions represents for this Court. I respectfully submit the following observations in connection with the two questions being discussed. I will refer especially to the advisory opinion requested by the United Nations General Assembly.

(a) Mexico reaffirms each and every one of the considerations contained in the document we have submitted on the basis of the request for an advisory opinion by the United Nations General Assembly in its resolution 49/75 K. In particular, I would like to quote the following paragraph:

> "The threat posed to the survival of mankind by the existence of nuclear weapons grants to the international community as a whole the right to pronounce itself on the illegality of such weapons and to act accordingly above any sovereign right that a State may claim, to acquire any means it deems appropriate to guarantee its defence. Certainly, nuclear weapon States cannot claim that this question belongs to their internal jurisdiction. The Charter of the United Nations undoubtedly established as its principal purpose the maintenance of international peace and security. The mere possession of nuclear weapons runs contrary to the security of mankind."

(b) The International Court of Justice, as a principal organ of the United Nations, has a clear responsibility to determine the merits of the problem brought before it concerning such an important issue on the international agenda.

We respectfully reject the comments made by some Member countries that the Court should not pronounce itself on this matter. To argue the supposed political nature of the issue, the claimed vagueness of the questions posed, or the argument that the United Nations General Assembly should not have requested an advisory opinion on subject-matters of its exclusive competence or falling within the competence of the Security Council, is not acceptable.

In relation to the first procedural objection it is pertinent to recall what Sir Gerald Fitzmaurice said in his book "The Law and Procedure of the International Court of Justice"[9] published in 1986:

> "If the question submitted to the Court is in itself a legal issue and *inter alia*, all the questions related to the interpretation of international instruments are *ipso facto* legal ones, the fact that the subject contains political elements is irrelevant."

In this context, Judge Fitzmaurice cited the following cases brought before the Court: the case of *Admissions* in 1948; the 1950 *Admissions* case, also submitted to this high Court.

We do not consider the argument that the question is supposedly hypothetical or very abstract in the way it is presented as justification for the Court not pronouncing its verdict on the merits of the case. According to Article 96 of the Charter and Article 65 of the Court's Statute, this tribunal

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[9] FITZMAURICE, Gerald, *The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points*, *apud*, Shabtai Rosenne, *op. cit.*

can give an advisory opinion on any legal question, whether abstract or not. It could be pointed out that that criterion was applied in the two *Admissions* cases examined by the Court and already mentioned. To quote again from Judge Fitzmaurice's 1986 book mentioned above,

> "the Court has the right to give advisory opinions on abstract matters and if the subject is of a legal nature, it is irrelevant whether this is done in abstract terms or a specific case is referred to".

We do not know the grounds for considering the terms of the question put to the Court as "abstract", when in fact the nuclear threat has been a very real constant in international conflicts, even after the end of the Cold War. In this regard, I would like to refer to the studies prepared by David R. Morgan, national President of the organization "Veterans Against Nuclear Arms" dated 22 October 1995 and entitled "Summaries of the Threats of Use of Nuclear Weapons During the Sixteen Known Nuclear Crises of the Cold War (1946-1985)" and the article entitled "Nuclear Targeting of the Third World" by Milan Rai and Declan McHugh, which is also pertinent to this case. To try to convince the Court of the danger in which we live, I would submit as an information document the article by F. Barnaby, published by an Oxford research group, Current Research Report No. 13 of this year, entitled "The Current Global Nuclear Arsenals". To postpone giving a legal opinion on the threat or use of nuclear weapons until an actual case occurs is like substituting medicine with an autopsy. Specifically, we would like nations to know whether the policies that they consider as options are legal and are not likely to have consequences that could bring them after the act into an international court.

Mr. President and Members of the Court, for years we have been facing a process of globalization. One of the consequences of this situation is the general agreement that many problems should be solved on a multinational basis. This has produced a widened sphere of application for classic international law, which has grown from the right of nations to coexist, to a law that recognizes that, and recognizes certain minimum levels of well-being as common aims. In 1969, Wolfgang Friedmann considered the expansion of the sphere of international law in the following terms:

> "The expansion of international law in progressing from an essentially negative code of laws of abstention to positive laws for co-operation - very fragmentary and inadequate though they may be in the present state of international politics - is an extremely important

development for the principles and structure of the international legal order."

In support of this idea, "co-operation as a principle of law", the former British Judge in the International Court of Justice, Sir Gerald Fitzmaurice, whom I had the honour to know in my first years, said in his special report to the Institute of International Law entitled *The Future of Public International Law and the International Legal System in the Circumstances of Today*:

> "We believe that, on the whole, it is not too much to think that the idea of the obligation to co-operate is well advanced on the path towards being accepted as a general principle of international law *(jus cogens).* Once the obligation to act in good faith is accepted, it must be recognized that something more is needed than abstention from acting in bad faith: an attitude *uberrimae fidei* is needed, which probably embraces the idea of recognizing a general common interest when this manifestly exists, and the wish to participate in measures to promote this common interest, or at least to refrain from measures that could harm it."

Here it is also pertinent to remember the verdict of the International Court of Justice in the case of the *Barcelona Traction* aired in this tribunal in 1970. In this Judgment, a distinction was made between the obligations for "the international community in general" and the "obligations of one nation towards another". On this occasion, the Court stated:

> "By their very nature, the first interest all States, given the importance of the rights at stake; all States can be said to have a legal interest in protecting them, they are obligations *erga omnes*."

As regards the contention that the General Assembly should not have asked for guidelines on a subject of its competence, it must be pointed out that there are clear precedents in this regard. In this case, the Assembly merely requested clarification on a point of law, and in this respect I would remind you of the precedent of the *Peace Treaties* case, 1950, which the Court considered. This Advisory Opinion does not mean that the Assembly relinquished its jurisdiction, which had been clearly established since resolution 1 of the first United Nations General Assembly, at which the Atomic Energy Commission was established by unanimous decision, its first task being to prepare specific proposals "for the elimination of national arsenals of atomic weapons and all other arms capable of causing mass destruction", and in practice the Commission dedicated itself entirely to the subject of nuclear weapons.

There is no doubt, distinguished Court, that the nuclear attacks on Hiroshima and Nagasaki produced a negative effect on the future of the United Nations Organization just a few weeks after its

founding Charter had been signed on 26 June 1945, and only months before the first General Assembly met in London on 24 January 1946, thereby creating a situation that changed the basic concepts under which the United Nations had been created, and which it had to address as a matter of priority as is shown in this resolution 1 of the first Assembly.

(c) The decision to abolish nuclear weapons is still the main goal of organized mankind. However, the advisory opinion refers only to the legality of use or the threat of force involving nuclear weapons, which according to law is clearly illegal.

In this respect, Mexico reasserts the absolute nature of the principle contained in the United Nations Charter that prohibits the threat or use of force in international relations. Therefore, we stress that it is impossible in these times to conceive the principle prohibiting the threat or use of force simply as a limitation of a nation's activity.

This principle also means that the competent organs of the United Nations are given a virtual monopoly of the authority to judge and decide, as well as the coercive power necessary in the international community as a whole, although it is not complete. Ever since San Francisco, and to the extent that the Organization is inefficient, that is to say, to the extent that centralization is not complete, the collective security system recognized the need for States to take on certain and limited aspects of the use of force by exercising the right of legitimate self-defence, either individually or collectively.

However, this exceptional power is conceded to a State only when the Organization needs to be replaced or assisted because it has inadequate means of action, that is, in concrete terms, for the use of force properly speaking. Such exceptional power could not be conceded in that other respect where the centralization of powers is legally complete, that is to say in such time in which the organization is indeed empowered to legally decide on a final and binding decision on whether or not force should be used, to what extent and in what conditions.

In this context, for the reasons we give in our written statement and which we shall now develop, the threat or use of force with nuclear weapons falls within the scope of the prohibitions described above, including the prohibition in the exercise of legitimate collective or individual self-

defence or pursuant to the resolutions of the Security Council or the General Assembly, following the precedent set by the resolution "Uniting for Peace".

Furthermore, we reject the theory that began to take shape in the organization's earliest years which maintains that legitimate self-defence can be used not only against an armed attack that has already begun but against a State whose level of preparation for war and manifest aggressive intentions justify the suspicion that an attack is imminent.

It does not need much imagination to realize where this theory would lead us in a situation of atomic balance. It is enough to think that at this very moment there are still hundreds and perhaps thousands of projectiles with thermonuclear warheads ready to be fired. Fortunately, the rational statesmen who have the control of nuclear arsenals in their hands handle the ideas of "clear and imminent danger" with less disrespect and levity than certain jurists do.

The second trend adversely affecting the Charter does not directly widen the scope of the right to resort to legitimate self-defence, but it is very closely linked to this very issue. To demonstrate the importance that this trend has, it is enough to say that it was put before the United Nations Charter Committee of the International Law Association at its 1962 Session in Brussels by the Rapporteur, Professor Schwartzenberger, and which may be summarized as follows:

> "the belligerent whose enemy violates the contractual obligation not to resort to force or warfare has the right, in reprisal, even when the attack was made with ordinary weapons, to use nuclear and thermonuclear weapons".

An attempt was made to establish this theory by saying that the limitations imposed by customary international law on the use of biological and chemical weapons are based on their incompatibility with rules forbidding the use of poisons or poisoned weapons, rather than on their nature as weapons of mass destruction.

The interesting point about this theory is that a certain number of distinguished jurists supported it, although it is only fair to say that probably a larger number rejected it. It is also interesting to note that it re-emerges from time to time in academic and even political fora, as it happened just a few days ago when a nuclear co-operation programme between two nuclear-weapon States was announced, apparently - I say "apparently" because I am relying only on news

information - including among their defence doctrines the launching of an atomic bomb as a warning in case "their vital interests are threatened".

Theoretically, the concept of "vital interests" or "national interests" or "national security" was known to us as *raison d'Etat*, or as Pascal said in his well-known aphorism: "The State has its reasons, which reason knows nothing of."

On this particular subject, I will simply say that in the opinion of my country the use of nuclear weapons in reprisal - or on any other pretext - against a non-nuclear attack is contrary to the principle of proportionality.

"If a belligerent barbarously massacres women and children, it is not human for the other to respond with the same barbarity." (D. Antokiletz, *"Derecho internacional publico",* 440, 4th. Ed., 1944, trans.) Torture is not a permissible response to torture. Nor is mass rape acceptable retaliation for mass rape. Just as unacceptable is retaliatory deterrence - "You have burnt my city, I will burn yours."

As stated by Judge Jens Evensen, a former Member of this Court, in a 13 April 1989 press conference at The Hague:

> "Reprisals are themselves violations ... [and] the very nature of modern weapons are such that nuclear weapons should never be allowed to be used, never as first use, never as reprisals ... the use of nuclear weapons is the ultimate crime ... we can formulate all kinds of scenarios, but that does not change the basic approach that there are certain weapons of warfare that are illegal and criminal and the behaviour of the other party does not make them legal."

All the explosives used during the five years that the Second World War lasted amounted to two megatons and now, as we all know, there are nuclear weapons available each with the explosive power of 50 megatons or more. Secondly, international law protects neutral States, and the effect of nuclear weapons cannot be controlled to this extent.

In addition, nuclear weapons do not make any distinction between armed forces and the civilian population; nuclear weapons are blind, and because of their probable effects on future generations due to their very nature, may even be considered inevitably genocidal. Let us ask ourselves: how is it possible in these circumstances to deny that the use of nuclear and thermonuclear armaments is contrary to the United Nations Charter and is the gravest example of the

use of force?

(d) Mexico happens to be one of the many countries that recognize legal value as a source of international law to some of the resolutions adopted by international organizations, even though those resolutions may not necessarily reflect the existence of a custom - a theory pioneered by the Mexican jurist Jorge Castañeda among others, I should add - and since many of the decisions that we cite to declare the use and threat of force with nuclear weapons illegal, are precisely resolutions of multilateral fora, I would like to spend a few minutes explaining our grounds for this theory to the Court.

It is true that a resolution of the United Nations General Assembly cannot be compared in legal value to a treaty in force between two or more countries. In a treaty, the States enter into a formal commitment with the clear intention of being bound by everything that appears in its text and in strict conformity with their respective constitutional regulations. On the other hand, the resolutions of the General Assembly, although drawn up by specialized commissions, are the result of overcrowded debates and are passed by the vote of representatives from each country, normally appointed by their executive power. Nevertheless, there is a wide difference between agreeing that the contents of a resolution of the Assembly do not have the full binding force of a treaty, and denying it any legal effect. This cannot be ignored at the risk of committing a serious error.

The reasonable attitude is to consider that the resolutions of the United Nations General Assembly, though lacking the binding force of a treaty, often express a general consensus - especially if they have been approved by a strong majority - and therefore they confirm or reinforce precedents in international law. As Oliver Lissitzyn said in his book *"International Law in a Divided World*", published in Montevideo in 1965:

> "Coming from the representative organ of the largest of the organizations ever conceived by mankind, resolutions must have considerable significance in the development of international law, since they recognize or confirm general practices or legal principles, which can come to be general principles of law."

The juridical value of some resolutions is so undeniable that innumerable decisions of this high Court cite them as a source of law. In other words, they are used as the best way of determining the principles recognized by nations, in my opinion not only to confirm the existence of a customary

rule, but to validate the theory of *lex ferenda.*

Finally, there is a decisive argument: whatever opinion one may have about the legal value of the resolutions of a forum like the United Nations General Assembly, no one can claim that the opposite of what has been passed by an overwhelming majority in a forum that represents the feelings of almost all the nations in the world can be held as an international custom or as a generally recognized principle of international law. Consequently, even denying that these resolutions are binding legal regulations or that they confirm rules or legally valid principles, it is clear that the opposite principle, the one overthrown in a vote, cannot be presented as a valid rule either.

In Mexico's opinion, the above confirms the relevance of the legal value of the Declaration on the Prohibition Against the Use of Nuclear and Thermonuclear Weapons (1653 XVI) which states that "the use of nuclear and thermonuclear weapons is contrary to the spirit, letter and objectives of the United Nations, and as such, a direct violation of the United Nations Charter". This Declaration, adopted by the General Assembly, is ratified in resolutions such as number 2938 (XXVII) (Part B) and others. All of them supported by significant majorities, all stressing the use or threat of nuclear weapons as a violation.

Furthermore, the treaties that forbid not only the use and threat of nuclear weapons but also their possession, transfer and production, such as the Tlatelolco Treaty for the Proscription of Nuclear Weapons in Latin America, the Antarctic Treaty, the Treaty on the Prohibition of Nuclear Tests in the Atmosphere, in Outer Space and Under Water, and the Treaty on the South Pacific Denuclearized Zone (Rarotonga Treaty) reflect one of the most effective, in my own view, procedures for attaining the abolition of nuclear weapons throughout the world: that is by gradually reducing the areas of conflict in nuclear terms.

Therefore, the argument that the existence of these treaties proves that there is no universally applied regulation is untenable. It would be tantamount to saying that the only source for international law are the treaties, which is not compatible or consistent with Article 38 of the Statute of the International Court of Justice, and even less with our theory put forward in this intervention on the value of some resolutions of the United Nations General Assembly; what some theorists call

"instant custom" as a source of obligations and rights.

As Mexico stated in its written comments, even the Treaty for the Non-Proliferation of Nuclear Weapons, as has also been observed by the Indonesian delegation, has as its final objective the abolition of this type of artefacts, as it was expressly mentioned in the last review and extension conference of this international instrument. On that occasion, Mexico specifically rejected the argument that by the indefinite extension we were accepting a dichotomy between those countries that have nuclear weapons and those that do not. As was stated in the press release of the Ministry of Foreign Affairs (5 September 1995), Mexico attaches great importance to the maintenance of this international instrument, that is, the Treaty on the Non-Proliferation of Nuclear Weapons, but also to the need to meet the obligations with regard to nuclear disarmament entered into at that conference, and should these not be complied with, should these not be fulfilled, we would need to revise our continuation as party to the Treaty for the Non-Proliferation of Nuclear Weapons on the basis of Article X.

In short, as a country we are not prepared under any circumstances to accept a monopoly in the possession of nuclear weapons or to allow the modernization of these devices through tests whose legality we also respectfully question.

(e) International law applicable in cases of armed conflict, also known as humanitarian law, is valid in this discussion and is composed of the set of legal provisions that ensure respect for human life, as its name indicates, in the case of armed conflicts. This is divided into two branches, one of which is the law of The Hague and the other, the law of Geneva. The first establishes the rights and duties of nations during wartime, and among its most important precepts is the one limiting the freedom to choose the means of combat. If we accept the principle by which the use of any weapon is legitimate only as far as it is employed to put the combatant *hors de combat*, whether or not in self-defence, we could not even think that international law permits the possibility of defeating mankind as a whole as a result of the use of a nuclear weapon.

These stipulations of humanitarian law stem mainly from the agreements approved in The Hague in 1899 and amended in 1907. This is why it is known as the law of The Hague,

although this branch also includes other conventions such as that of St. Petersburg in 1868 prohibiting certain weapons, and the 1925 Geneva Protocol which forbids asphyxiating gases, bacteriological weapons and similar weapons.

The aim of the law of Geneva *per se* is to protect soldiers who are *hors de combat*, as well as those who do not take part in hostilities. Its stipulations are elaborated in the four Geneva Conventions of 1949 and in the Additional Protocols to these instruments. They are the most significant effort made so far to codify the rules for protection individuals in cases of armed conflict. The most important feature of this set of laws is that it tries to somehow prevent civilians from becoming direct victims of warfare.

Finally, it is worth emphasizing a general principle that was included in the preamble of the two Hague Conventions, known as the "Martens Clause" after the Russian jurist Fedor Fedorovich Martens. Its purpose is to confirm the enforcement of international law even in cases where existing international conventions do not stipulate the rules to be applied in determined situations.

This clause specifies that in such cases

> "The inhabitants and belligerents remain under the protection of the rule of the principles of law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of public conscience."

And if there were any doubts concerning the preoccupation of mankind regarding this problem, the association of survivors of the nuclear attacks against Nagasaki and Hiroshima handed me in New York the copies of 100,000 signatures, out of the 50 million persons who subscribed a declaration expressing their repudiation of nuclear weapons.

It is exactly this principle embodied in the "Martens Clause", and another which emerged from the Hague conferences establishing that "excessively cruel or repulsive weapons, although they have military use, should be prohibited". The devastating effects produced by nuclear weapons of an indiscriminate nature, as was evidenced by the attacks on Hiroshima and Nagasaki, and which reaffirm the illegality of the use and threat to use nuclear weapons in any circumstances and I repeat, in any circumstance, as I have tried to prove in this statement. And here I would like to refer to the studies prepared by the World Health Organization on the effects of nuclear warfare on health and

health services which were already submitted for the consideration of this Court.

Finally, and not to take up too much of this Court's time, I would also like to endorse the comment of the Indonesian delegate as concerns human rights and their pertinence for the deliberations which are taking place at present.

These, Mr. President and Members of the International Court of Justice, are the comments that Mexico submits in its first appearance since this tribunal was created. I hope they will contribute substantially to the advisory opinion that the Court will issue in response to the request of the General Assembly, the forum which best represents the opinion of mankind in subject-matters such as the present one. Thank you.

Le PRESIDENT : Je remercie Son Excellence M. Sergio Gonzales Galvez de son exposé oral fait au nom du Mexique. Je donne la parole au Vice-Président de la Cour qui voudrait poser deux questions à M. le Représentant du Mexique.

The VICE-PRESIDENT: Thank you Mr. President. When, in paragraph 23 of the Written Statement of Mexico on the General Assembly's question, it is maintained, in interpretation of the Nuclear Non-Proliferation Treaty, that the Treaty treats the possession of nuclear weapons as "temporary", is that term to be understood to mean that nuclear weapons may be retained in the arsenals of the five nuclear Powers until the achievement of general and complete disarmament under effective international control? When, in paragraph 26 of the Written Statement of Mexico, it is noted that the nuclear disarmament obligations contained in the Treaty have "taken on indefinite force until they are fully complied with", does that imply that, until the abolition of nuclear weapons, their possession, and threat and use in certain circumstances may not be prohibited?

In paragraph 45 of its Written Statement, Mexico maintains that Security Council resolution 984 (1995) and the intent of States party to the Non-Proliferation Treaty "implicitly recognize the illegality of the threat or use of nuclear weapons" against a non-nuclear weapons State and the Mexican statement goes on to say: "Obviously, were the threat or the use of nuclear weapons a legal act, negative security assurances to protect NNWSs would have been unnecessary". Why

does this follow? Do States only restrict possible courses of action because such courses of action are illegal?

Le PRESIDENT : Je vous remercie.

J'indique à la délégation mexicaine qu'elle recevra incessamment le texte écrit de ces questions et qu'elle a le loisir d'y répondre par écrit dans un délai de quinze jours.

La Cour n'a pas d'autres orateurs inscrits pour cette matinée en conséquence l'audience est suspendue et sera reprise lundi matin à 10 heures.

L'audience est levée à 12 h 40.

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