

Note Verbale dated 20 June 1995 from the Embassy of New Zealand,  
together with Written Statement of the Government of New Zealand

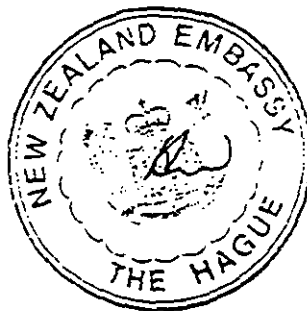


No.35/95

The Embassy of New Zealand presents its compliments to the International Court of Justice in The Hague and, with reference to the decision of the United Nations General Assembly, recorded in its resolution 49/75K, to seek an advisory opinion from the Court on the question: "Is the threat of nuclear weapons in any circumstance permitted under international law?", has the honour to refer to the Order of the Court dated 1 February 1995 inviting States entitled to appear before the Court to furnish information on the question in the form of written statements by 30 June 1995 in accordance with Article 66, paragraph 2 of the Statute of the Court.

Pursuant to this Order, the Government of New Zealand hereby submits the attached written statement on the question.

The Embassy of New Zealand takes this opportunity to renew to the International Court of Justice the assurances of its highest consideration.



THE EMBASSY OF NEW ZEALAND  
The Hague  
20 June 1995

## STATEMENT BY THE GOVERNMENT OF NEW ZEALAND

1. By resolution of 15 December 1994,<sup>1</sup> the United Nations General Assembly has requested an advisory opinion from the International Court of Justice pursuant to Article 96 of the Charter of the United Nations on the question: Is the threat or use of nuclear weapons in any circumstance permitted under international law?
2. This question was submitted to the Court on 19 December 1994. States entitled to appear before the Court and the United Nations have been invited by Order of the Court of 1 February 1995 to "furnish information" on the question in the form of written statements by 20 June 1995 in accordance with Article 66, paragraph 2 of the Statute of the Court.<sup>2</sup>
3. The request by the United Nations General Assembly follows an earlier request of the World Health Assembly, by resolution of 14 May 1993, for an advisory opinion from the Court on a similar but not identical question. New Zealand submitted a brief written statement in respect of that question on 8 June 1994.
4. New Zealand now wishes to furnish information to the Court with regard to the question presented in the request by the United Nations General Assembly. This statement furnishes information on New Zealand's position regarding nuclear weapons, and addresses the substantive legal considerations before the Court.

### NEW ZEALAND'S POSITION REGARDING NUCLEAR WEAPONS

5. Although New Zealand is distant from major sources of international tension, its security, like that of other states, can be affected by events far beyond its immediate neighbourhood. The possession and use of weapons of mass destruction, including nuclear weapons, have implications for all states irrespective of their geographical location. The testing of nuclear weapons in the South Pacific region has also been, and remains, a special concern of New Zealand; it was in response to such testing that New Zealand and Australia brought a case against France before the International Court of Justice in 1973 concerning continued nuclear testing in the atmosphere in the region.<sup>3</sup> Measures to prevent proliferation of such weapons and towards nuclear disarmament have been national priorities for New Zealand for more than thirty years.
6. Central to New Zealand's approach are the objectives, shared with other States Parties, which are set out in Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) adopted on 1 July 1968, namely the pursuit of negotiations in good

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<sup>1</sup> UNGA Resolution 49/75 K.

<sup>2</sup> New Zealand is a party to the Statute of the Court by virtue of Article 93 of the United Nations Charter.

<sup>3</sup> *Nuclear Tests (New Zealand v France)*, Judgment, I.C.J. Reports 1974, p.457.

faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control. New Zealand has contributed towards these objectives at the national, regional and global levels, for example through the enactment of national legislation, the establishment of the South Pacific Nuclear Free Zone,<sup>4</sup> and involvement in multilateral disarmament negotiations and regimes, in particular efforts to secure a comprehensive nuclear test ban treaty.

7. In New Zealand's view, encouraging progress has been made towards the objectives set out in Article VI of the NPT during the last five years, with good prospects for further progress. The INF Treaty,<sup>5</sup> the START treaties<sup>6</sup> and the soon to be concluded comprehensive test ban treaty, together with developments in other areas of disarmament and arms control such as the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and Their Destruction, are examples of the results which can be achieved through the negotiating process.

8. The NPT is a fundamental underpinning of further progress in nuclear disarmament and arms control. The continued importance of the Treaty is emphasised by the recent growth in States Parties to 178. Notably, they now include all five declared nuclear-weapon States as well as some states which were formerly in possession of nuclear weapons. The decision by the States Parties at their conference in May 1995 to extend the Treaty indefinitely further confirms its pivotal role in controlling nuclear weapons and in nuclear disarmament. The conference adopted unanimously a set of principles and objectives for nuclear non-proliferation and disarmament including the goal that negotiations on a universal and internationally and effectively verifiable Comprehensive Nuclear-Test-Ban Treaty be completed no later than 1996 and went on to state that, pending the entry into force of such a treaty, the nuclear-weapon States should exercise the utmost restraint.

9. Since 1972 New Zealand has taken a lead, with other States, in tabling a resolution each year at the United Nations General Assembly calling for a comprehensive test ban treaty to be negotiated. In 1993, for the first time, and again in 1994, the resolution was adopted by consensus. A comprehensive test ban treaty is now being negotiated in the Conference on Disarmament, with the active participation of the nuclear-weapon States. Such a treaty will make a significant contribution to halting the proliferation of nuclear weapons in all its forms, and hence have a major impact on the threat or use of nuclear weapons.

10. New Zealand strongly supports other recent multilateral steps towards nuclear disarmament that would further back up a comprehensive nuclear test ban. Such steps include the recent agreement by the Conference on Disarmament on a mandate for an ad hoc committee to begin negotiations on a treaty banning the production of fissile

<sup>4</sup> The South Pacific Nuclear Free Zone Treaty 1985, also known as the Treaty of Rarotonga.

<sup>5</sup> Treaty on the Elimination of Intermediate-Range and Short-Range Missiles, 1987.

<sup>6</sup> Treaty on the Reduction and Limitation of Strategic Arms, 1991 and 1993.

material for nuclear weapons purposes. New Zealand has also called for a negotiated and verifiable agreement to ban the future production of nuclear weapons.

11. Nuclear testing was a major factor in the establishment in 1986 of a South Pacific Nuclear Free Zone upon the entry into force of the Treaty of Rarotonga.<sup>7</sup> The Treaty reflects the collective will of South Pacific nations to renounce the possession of nuclear weapons, to ensure that nuclear weapons are neither tested nor stationed on national territory in the region, and to gain assurances of non-use of nuclear weapons from the nuclear-weapon States. Together with the areas covered by the adjacent Antarctic Treaty<sup>8</sup> and the Treaty of Tlatelolco,<sup>9</sup> the South Pacific Nuclear Free Zone contributes to an overall nuclear weapon free area which covers approximately 200 million square kilometres of the earth's surface.

12. In order to be fully effective, nuclear free zones require the support of all nuclear-weapon States. Nuclear-weapon States Parties to the Protocols to the Treaty of Rarotonga undertake not to use or threaten to use nuclear weapons against South Pacific states and not to test nuclear weapons in the region. The security of the states in the region, which have all renounced nuclear weapons, will be further enhanced when all nuclear-weapon States have accepted these obligations.

13. In 1987, soon after the entry into force of the Treaty of Rarotonga, the New Zealand Nuclear Free Zone, Disarmament and Arms Control Act was enacted by the Parliament of New Zealand. The Act creates a nuclear free zone within New Zealand and also gives effect at the national level to New Zealand's obligations under international disarmament and arms control treaties including the Treaty of Rarotonga, the Partial Test Ban Treaty<sup>10</sup> and the Biological Weapons Convention.<sup>11</sup> The Act makes it an offence for New Zealand citizens or persons ordinarily resident in New Zealand to manufacture, acquire or possess or have control over any nuclear explosive device or aid, abet or procure any person to do so within the New Zealand Nuclear Free Zone or, if they are servants or agents of the Crown, to commit such acts beyond the Zone. There are further prohibitions in the Act on the stationing or testing of nuclear explosive devices in the New Zealand Nuclear Free Zone, and on the entry into New Zealand internal waters of nuclear powered ships and nuclear weapons.

## SOURCES OF LAW

14. The Court's jurisdiction to give advisory opinions arises from Article 65 of its Statute. The sources of law to be applied by the Court in considering questions submitted to it are as set out in Article 38(1) of the Statute, namely:

<sup>7</sup> *supra*, n.5.

<sup>8</sup> Antarctic Treaty 1959.

<sup>9</sup> Treaty for the Prohibition of Nuclear Weapons in Latin America (and Additional Protocols), 1967.

<sup>10</sup> Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, 1963.

<sup>11</sup> Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, 1972.

- a) International conventions, whether general or particular, establishing rules expressly recognised by the contesting states;
- b) International custom, as evidence of a general practice accepted as law;
- c) The general principles of law recognised by civilised nations;
- d) Subject to the provisions of Article 59 of the Statute, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

15. There is a considerable body of international law which is relevant to the issue of the threat or use of nuclear weapons. A number of treaties regulate nuclear weapons, and in various instances possession, testing, deployment, threats or use of nuclear weapons are expressly prohibited by them. Treaties to this end have been concluded in multilateral fora, and bilaterally between nuclear-weapon States. The nuclear-weapon States have also given unilateral commitments to non-nuclear-weapon States regarding the use of nuclear weapons.

16. There has, thus, been a progressive development of the international law relating to nuclear weapons since their inception. New Zealand regards this progressive development as reflecting an acknowledgment by all States that nuclear weapons, like other weapons of mass destruction, pose a particular risk to humanity, and that a special regime and special norms should apply to them.

17. Other more general international legal norms are also relevant to the threat or use of nuclear weapons, even though they may not expressly be stated to apply to them. Some of these pre-date the inception of nuclear weapons, and others are subsequent to them. This category includes international law regarding resort to force, the humanitarian laws of armed conflict, and environmental law, all of which, together with humanitarian principles, may be considered in relation to the question before the Court.

18. It is inevitable that requests for advisory opinions may touch upon issues that are at the vanishing point of international law. Advisory opinions are, by their very nature, seeking clarification. The formation of customary law rules at international law has been compared with the process by which paths are created over land: eventually the weight of footsteps stamps out a settled track. In the case of the legal regulation of nuclear weapons, the direction of this path and the ultimate goal have been set by a number of generally accepted multilateral treaties, including the cornerstone Treaty on the Non-Proliferation of Nuclear Weapons. The Court has now been asked to consider the extent of this development. In the words of Sir Garfield Barwick in his dissenting opinion in the *Nuclear Tests Case (Australia v. France)*:

“It cannot be doubted that customary law is subject to growth and to accretion as international opinion changes and hardens into law. It should not be doubted that the

Court is called upon to play its part in the discernment of whether that growth has taken place to the requisite extent and that the stretch of customary law has been obtained."<sup>12</sup>

## AGREEMENTS WHICH EXPRESSLY CONSTRAIN NUCLEAR WEAPONS

19. A large body of international law contained in arms control and disarmament agreements expressly constrains nuclear weapons in various respects. This includes prohibitions against the testing, deployment or use of nuclear weapons in Antarctica,<sup>13</sup> Latin America,<sup>14</sup> the South Pacific,<sup>15</sup> earth orbit, outer space, and on the moon and other celestial bodies,<sup>16</sup> and deployment on the seabed, ocean floor and subsoil thereof beyond the twelve-mile limit of national territorial seas.<sup>17</sup>

20. Several of these instruments express the goal in their preambles of the elimination of nuclear weapons.<sup>18</sup> The treaties establishing nuclear weapon free zones in Latin America and the South Pacific, together with the NPT, express in their preambles the view of the parties as to the threat which nuclear weapons present to life on earth.

21. Accordingly, arms control and disarmament agreements are important not only for the specific prohibitions and limitations they contain, but also as part of a notable body of developing international law that has as its objective comprehensive nuclear disarmament as a step towards more general and complete disarmament.

### Multilateral Treaties

#### *Treaty on the Non-Proliferation of Nuclear Weapons*<sup>19</sup>

22. As already noted, the Non-Proliferation Treaty (NPT) is the most important international instrument regulating the possession of nuclear weapons and, *ipso facto*, their threat or use. Support for the NPT, together with the regional treaties concluded consistent with Article VII (the Treaty of Rarotonga in respect of the South Pacific and the Treaty of Tlatelolco in respect of Latin America), means that virtually all except a

<sup>12</sup> *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, p.253, at p.435. Sir Garfield Barwick's dissenting opinion applied equally to the Judgment in *Nuclear Tests (New Zealand v. France)*, Judgment, I.C.J. Reports 1974, p.457, at p.525.

<sup>13</sup> Antarctic Treaty, 1959.

<sup>14</sup> Latin American Nuclear Free Zone Treaty 1967, also known as the Treaty of Tlatelolco.

<sup>15</sup> The South Pacific Nuclear Free Zone Treaty 1985, also known as the Treaty of Rarotonga.

<sup>16</sup> Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies (Outer Space Treaty), 1967; Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, 1979.

<sup>17</sup> Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof, 1971.

<sup>18</sup> Treaty of Tlatelolco; NPT; Treaty of Rarotonga.

<sup>19</sup> Treaty on the Non-Proliferation of Nuclear Weapons, 1968.

handful of states (other than the five declared nuclear-weapon States) have undertaken not to manufacture or acquire nuclear weapons.

23. The specific obligations of the NPT are based around a number of objectives directed overall at minimising the danger of nuclear war:

- a) the prevention of the spread of nuclear weapons;<sup>20</sup>
- b) the assurance, through international safeguards, that the peaceful nuclear activities of states which have not developed nuclear weapons will not be diverted to making such weapons;<sup>21</sup>
- c) the promotion, to the maximum extent consistent with the other purposes of the Treaty, of the peaceful uses of nuclear energy through cooperation and technology sharing;<sup>22</sup>
- d) the undertaking by the parties to pursue further disarmament negotiations in good faith.<sup>23</sup>

24. The NPT does not refer to the threat or use of nuclear weapons. Nevertheless, in accordance with the United Nations General Assembly resolutions which led to the Treaty being drawn up, it embodies a balance of mutual responsibilities and obligations on the nuclear and non-nuclear Powers.<sup>24</sup>

#### *Nuclear Weapon Free Zones*

25. The development of regional nuclear weapon free zones, as contemplated by Article VII of the NPT, contributes further to the process of global nuclear disarmament and the strengthening of the international non-proliferation regime.

26. The Treaty of Tlatelolco,<sup>25</sup> concluded in 1967, prohibits parties from the testing, use, manufacture, production, acquisition, receipt, storage, installation, deployment and any form of possession of nuclear weapons in a zone encompassing the Latin American region, together with certain associated activities.<sup>26</sup>

27. The Treaty of Rarotonga of 1985<sup>27</sup> establishes the South Pacific Nuclear Free Zone in which states parties to the treaty agree not to manufacture or otherwise acquire, possess, have control over, station or test nuclear explosive devices. The parties also accept certain associated obligations and agree not to dump radioactive wastes and other radioactive matter at sea within the Zone.

28. Both treaties are accompanied by protocols to which the nuclear-weapon States may become party. The protocols contain specific prohibitions against, inter alia, using

<sup>20</sup> Articles I and II.

<sup>21</sup> Article III.

<sup>22</sup> Articles IV and V.

<sup>23</sup> Article VI.

<sup>24</sup> UN General Assembly Resolution 2028 (XX) of 23 November 1965, called for the conclusion of a Non-Proliferation Treaty based on five principles, including the principle that "the treaty should embody an acceptable balance of mutual responsibilities and obligations of the nuclear and non-nuclear Powers".

<sup>25</sup> Treaty for the Prohibition of Nuclear Weapons in Latin America (and Additional Protocols), 1967.

<sup>26</sup> Article I(1)(a).

<sup>27</sup> South Pacific Nuclear Free Zone Treaty, 1985.



or threatening to use nuclear weapons against parties to the treaties.<sup>28</sup> All five nuclear-weapon States have given such an undertaking in respect of parties to the Treaty of Tlatelolco, albeit with qualifications in three cases in the event of an attack by a state party to the treaty in association with a nuclear-weapon State,<sup>29</sup> but only two nuclear-weapon States have thus far given such an undertaking in respect of parties to the Treaty of Rarotonga.

### *Partial Test Ban Treaty*<sup>30</sup>

29. The community of nations has also agreed that the testing of nuclear weapons should be subject to a particular and much more restrictive set of rules than applies to conventional weapons. Significant legal regulation applies in this respect.<sup>31</sup>

30. The principal aim of the Partial Test Ban Treaty, as proclaimed in its preamble, is "the speediest possible achievement of an agreement on general and complete disarmament under strict international control" so as to "put an end to the armaments race and eliminate the incentive to the production and testing of all kinds of weapons, including nuclear weapons." The Preamble declares the further aim of the three Original Parties to the treaty as "the discontinuance of all test explosions of nuclear weapons for all time", and expresses their determination to continue negotiations to that end. The current negotiations in the Conference on Disarmament towards a comprehensive test ban are an earnest of the international community's intentions in this respect.

31. The parties to the Treaty undertake not to carry out any nuclear weapon test explosion, or any other nuclear explosion, in the atmosphere, under water, or in outer space,<sup>32</sup> or in any other environment if the explosion would cause radioactive debris to be present outside the borders of the state under whose jurisdiction or control the explosion is conducted.<sup>33</sup>

32. While the treaty does not specifically prohibit underground testing of nuclear weapons, such tests would be unlawful if the explosion from an underground test caused radioactive debris to spread beyond the borders of the state conducting the test.

<sup>28</sup> Article 3 of Additional Protocol II to the Latin American treaty; Article 1 of Protocol 2 to the South Pacific treaty.

<sup>29</sup> Their ratifications were accompanied by declarations outlining situations in which they would consider themselves not to be bound by the commitments of the treaty. Thus, the United Kingdom declared that "the Government of the United Kingdom would, in the event of any act of aggression by a Contracting Party to the Treaty in which that party was supported by a nuclear-weapon State, be free to reconsider the extent to which they could be regarded as committed by the provisions of Additional Protocol II."

<sup>30</sup> Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, 1963.

<sup>31</sup> In addition to the Partial Test Ban Treaty, bilateral agreements restrict underground nuclear testing by some of the nuclear-weapon States (*infra*, paragraphs 43 and 44). Testing in certain parts of the world is also prohibited.

<sup>32</sup> Article I(1)(a).

<sup>33</sup> Article I(1)(b).

33. The moratoria on nuclear tests observed by four nuclear-weapon States in recent years further supports the view that nuclear testing should no longer be regarded as an option for any state.<sup>34</sup>

34. It can be argued that the Partial Test Ban Treaty forms the basis of a customary rule of international law that would prohibit the testing of nuclear weapons in the areas proscribed, and that such a rule would be binding on *all* states whether party to the treaty or not. In his dissenting opinion in the *Nuclear Tests Case (Australia v France)*, Judge *Ad hoc* Sir Garfield Barwick recognised this possibility:

"It is said that there has been such a progression of general opinion amongst the nations, evidenced in treaty, resolution and expression of international opinion, that the stage has been reached where the prohibition of the testing of nuclear weapons is now part of customary international law...

I think it must be considered that it is legally possible that at some stage the testing of nuclear weapons could become, or could have become, prohibited by customary international law. Treaties, resolutions, expressions of opinion and international practice, may all combine to produce the evidence of that customary law. The time when such a law emerges will not necessarily be deferred until all nations have acceded to a test ban treaty, or until opinion of the nations is universally held in the same sense. Customary law amongst the nations does not, in my opinion, depend on universal acceptance. Conventional law limited to the parties to the convention may become, in appropriate circumstances, customary law."<sup>35</sup>

#### *The Antarctic Treaty*<sup>36</sup>

35. The Antarctic Treaty provides, in Article 1, that Antarctica shall be used for peaceful purposes only. Any measures of a military nature, including the establishment of military bases, the carrying out of military manoeuvres, and the testing of any type of

<sup>34</sup> One of these nuclear-weapon States, France, announced on 13 June 1995 that it would resume a limited programme of nuclear testing between September 1995 and May 1996, prior to the conclusion of a comprehensive nuclear test ban treaty. The New Zealand Government has condemned this announcement of intention to break the moratoria, which runs counter to the unanimously agreed call on the nuclear-weapon States at the NPT Review and Extension Conference in May 1995 for "utmost restraint" by the nuclear-weapon States pending the entry into force of a Comprehensive Nuclear-Test-Ban Treaty and cuts across the on-going negotiations on that treaty as well as the wishes of countries in the South Pacific region expressed most clearly in the prohibitions on nuclear testing in the South Pacific Nuclear Free Zone Treaty, 1985. New Zealand has also condemned testing by the fifth nuclear-weapon State, China, which has stated, most recently at the plenary meeting of the Conference on Disarmament in Geneva on 1 June 1995, that it would abide by the Comprehensive Test Ban Treaty following its entry into force, and would stop testing. New Zealand would regard actions that may undermine the negotiations on a Comprehensive Nuclear-Test-Ban Treaty as contrary to principles of good faith on which treaty negotiations are founded.

<sup>35</sup> *Nuclear Tests (Australia v France)*, Judgment, I.C.J. Reports 1974, p.253, at p.435. Sir Garfield Barwick's dissenting opinion applied equally to the Judgment in *Nuclear Tests (New Zealand v France)*, Judgment, I.C.J. Reports 1974, p.457, at p.525.

<sup>36</sup> Adopted at Washington in 1959.

weapons, are prohibited.<sup>37</sup> The Treaty also prohibits any nuclear explosions in Antarctica and the disposal of radioactive waste there.

#### *Outer Space Treaty*<sup>38</sup>

36. The Outer Space Treaty is restrictive of nuclear weapons in two important respects. It prohibits placing nuclear weapons in orbit around Earth, installing them on the moon or any other celestial body, or otherwise stationing nuclear weapons in outer space. It also limits the use of the moon and other celestial bodies exclusively to peaceful purposes and expressly prohibits their use for, inter alia, testing weapons of any kind.<sup>39</sup>

#### *Seabed Arms Control Treaty*<sup>40</sup>

37. The Seabed Arms Control Treaty prohibits emplanting or emplacement on the seabed and the ocean floor and in the subsoil thereof of any nuclear weapons, or other weapons of mass destruction, as well as structures, launching installations or any other facilities specifically designed for storing, testing or using such weapons, beyond the outer limit of a twelve mile "seabed zone".<sup>41</sup> The same prohibition applies to the area *within* a seabed zone, except in relation to the coastal State concerned.

### **Major Bilateral Treaties Between the United States and the former Soviet Union/Russia**

38. The two major nuclear weapon States, the United States and Russia, have also acknowledged the desirability of limiting nuclear arsenals and weaponry, by means of important bilateral agreements which have been developed in this respect.

#### *Strategic Arms Limitation Talks*

39. The Strategic Arms Limitation Talks (SALT) held between 1969 and 1972 produced a series of agreements concluded in Moscow in May 1972. The most important agreement in respect of limiting the size of the nuclear arsenals of the two countries was the Interim Agreement on Offensive Strategic Missiles,<sup>42</sup> which was

<sup>37</sup> Article I(1).

<sup>38</sup> Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and other Celestial Bodies, 1967.

<sup>39</sup> The same prohibitions appear in the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, 1979.

<sup>40</sup> Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof, 1971.

<sup>41</sup> In accordance with Article II of the treaty, the zone is measured in accordance with the provisions of the 1958 Convention on the Territorial Sea and Contiguous Zone.

<sup>42</sup> Interim Agreement on Certain Measures with Respect to the Limitation of Strategic Offensive Arms, 1972.

subsequently extended beyond its initial five-year period and provided for further negotiations toward a more comprehensive instrument.

### *Intermediate Nuclear Forces Treaty*<sup>43</sup>

40. The Intermediate Nuclear Forces Treaty (INF), was concluded by the United States and the Soviet Union in December 1987, and entered into force in June 1988. It provided for the elimination, for the first time, of a whole class of nuclear weapons, that is, all United States and Soviet land-based missiles with ranges from 500 to 5500 kilometres.<sup>44</sup> The leaders of both countries publicly recognised the historical importance of this treaty in the disarmament process.

### *Strategic Arms Reduction Treaties*

41. The two major nuclear powers have also taken steps to reduce their strategic nuclear arsenals through the Strategic Arms Reduction Treaties, START and START II.<sup>45</sup> START, signed by the United States and the Soviet Union in July 1991, aimed to reduce strategic arsenals by approximately one third. Belarus, Kazakhstan, Ukraine, and the Russian Federation assumed the obligations of the former Soviet Union under the treaty by means of a Protocol which was signed in May 1992 in Lisbon, and the Treaty entered into force on 5 December 1994.

42. START II was concluded between the United States and the Russian Federation in January 1993, to reduce the number of Russian and United States strategic weapons still further, and the condition precedent has now been met which would allow its entry into force.<sup>46</sup>

### *Testing of Nuclear Weapons*

43. The Threshold Test Ban Treaty was concluded and signed by the United States and the Soviet Union in 1974<sup>47</sup> and ratified with a new verification protocol in 1990. The treaty establishes a nuclear weapons testing threshold, as between the parties, by prohibiting underground nuclear weapons tests having a yield exceeding 150 kilotons.<sup>48</sup> The treaty also enjoins the parties to minimise their underground nuclear weapons tests and to continue negotiations toward a cessation of all such tests.<sup>49</sup>

<sup>43</sup> Treaty on the Elimination of Intermediate-Range and Short-Range Missiles, 1987.

<sup>44</sup> By the definitions contained in Article II of the INF Treaty, an "intermediate-range missile" is a ground-launched ballistic missile (GLBM) or a ground-launched cruise missile (GLCM) having a range capability between 1000 and 5500km. A "shorter-range missile" is a GLBM or GLCM with range capability between 500 and 1000km.

<sup>45</sup> Treaty on the Reduction and Limitation of Strategic Arms, 1991 and 1993.

<sup>46</sup> The entry into force of START II was conditional on the prior entry into force of START I.

<sup>47</sup> Treaty between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Underground Nuclear Weapon Tests, 1974 (and Protocol thereto).

<sup>48</sup> Article I(1).

<sup>49</sup> Article I(2) and I(3).

### *The Peaceful Nuclear Explosions Treaty*

44. The Peaceful Nuclear Explosions Treaty, concluded and signed in 1976,<sup>50</sup> was also ratified with a new verification protocol in 1990. The treaty governs all nuclear explosions carried out by the parties at locations outside the weapons test sites specified under the Threshold Test Ban Treaty. The agreed statement accompanying the treaty specifies that a “peaceful application” of an underground nuclear explosion does not include the developmental testing of nuclear explosives.

### **COMMITMENTS BY THE NUCLEAR-WEAPON STATES NOT TO USE NUCLEAR WEAPONS**

45. The five declared nuclear-weapon States have themselves placed restrictions on the possible threat or use of nuclear weapons through unilateral commitments they have given.

46. All five nuclear-weapon States have given unilateral assurances (referred to as “negative security assurances”) about the circumstances in which they would *not* use nuclear weapons. Reliance on negative security assurances is the logical corollary to the obligations accepted by non-nuclear-weapon States in the NPT.

47. In 1995, the United States, the United Kingdom, France and Russia have harmonised their unilateral assurances to a large extent.<sup>51</sup> They have reaffirmed that they will not use nuclear weapons against non-nuclear-weapon States Parties to the NPT, except in the case of an invasion or any other attack on their territories, armed forces or other troops, their allies, or a state to which they have given a security commitment, carried out by such a non-nuclear-weapon State in association or alliance with a nuclear-weapon State.<sup>52</sup>

48. China’s assurance is unconditional in that it is not limited to parties to the NPT but extends to all non-nuclear-weapon States. Its guarantee to non-nuclear-weapon States also applies “in all circumstances”, and it has reaffirmed its undertaking not to be the first to use nuclear weapons at any time and under any circumstances.

49. The international community has been discussing for many years the possibility of incorporating negative security assurances into an international instrument. Most recently, the NPT Review and Extension Conference in May 1995 stated in the

<sup>50</sup> Treaty between the United States of America and the Union of Soviet Socialist Republics on Underground Nuclear Explosions for Peaceful Purposes, 1976 (and Protocol thereto).

<sup>51</sup> The five Nuclear Weapons States announced to the Conference on Disarmament Plenary of 6 April 1995, updated unilateral negative security assurances.

<sup>52</sup> In addition, in Resolution 984 (1995), adopted on 11 April 1995, the United Nations Security Council recognised “the legitimate interest of non-nuclear-weapon States Parties to the Treaty on the Non-Proliferation of Nuclear Weapons to receive assurances that the Security Council, and above all its nuclear-weapon State permanent members, will act immediately in accordance with the relevant provisions of the Charter of the United Nations, in the event that such States are the victim of an act of, or object of a threat of, aggression in which nuclear weapons are used”.

Declaration of Principles it adopted without a vote that further steps, which could take the form of an internationally legally binding instrument, should be considered to assure non-nuclear-weapon States Parties to the Treaty against the use or threat of use of nuclear weapons. In New Zealand's view, this effort should not detract from the legal status that may be accorded to the present assurances given unilaterally. Such assurances, made in good faith, give rise to a legitimate expectation on the part of non-nuclear-weapon States that they will be complied with.

50. The Court, in its judgment in the *Nuclear Tests Case (New Zealand v France)*, stated that unilateral declarations by states may be binding at international law:

"It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound by its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of a *quid pro quo*, nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was made.

Of course, not all unilateral acts imply obligation: but a State may choose to take up a certain position in relation to a particular matter with the intention of being bound - the intention is to be ascertained by interpretation of the act. When States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for.....

One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential. Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation created be respected."<sup>53</sup>

## INTERNATIONAL LAW REGARDING RESORT TO FORCE

51. The threat or use of nuclear weapons has also to be considered with reference to the general rule in Article 2(4) of the United Nations Charter proscribing the threat or use of

<sup>53</sup> *Nuclear Tests (New Zealand v France)*, Judgment, I.C.J. Reports 1974, p.457, at pp.472-473.

force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.

52. The Charter recognises only tightly prescribed exceptions to the general rule against the threat or use of force. Thus, the threat or use of force is lawful if made as part of Security Council enforcement action under Chapter VII of the Charter in the event of any threat to peace, breach of the peace or act of aggression, or if force is used in self defence as provided in Article 51 of the Charter.

53. Decisions by the Security Council under Chapter VII to take enforcement action in any particular case require the support of nine of the fifteen Council members, and are subject to veto by any of the permanent members of the Council. As the primary organ of the international community in respect of the maintenance of international peace and security, it can be expected that the Security Council will always be concerned to discharge its high responsibilities in full accordance with all applicable principles of international law.

54. The right of self defence is not open-ended. Under Article 51 of the Charter, the inherent right of individual or collective self defence in the event of an armed attack against a member of the United Nations is not impaired by the Charter "until the Security Council has taken measures necessary to maintain international peace and security". Members exercising this right are required to report immediately to the Security Council, and the measures that they have taken do not in any way affect the authority and responsibility of the Security Council under the Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

55. Moreover, the right of self defence cannot be exercised in isolation from other applicable rules and principles of international law. In particular, measures taken in self defence are subject, where relevant, to the laws of armed conflict generally. They must, for instance, be necessary and proportionate to the danger which they are designed to meet.<sup>54</sup>

56. Under customary international law, the right of self defence has included preventive measures taken in anticipation of an imminent threat, and not only upon the occurrence of an armed attack. While the relationship between this customary right of anticipatory self defence and Article 51 of the Charter has not been authoritatively established, at customary law the right appears to have been available only in cases of imminent and overwhelming danger.<sup>55</sup> It would also be subject to the same constraints of proportionality and other applicable rules of the law of armed conflict.

<sup>54</sup> The Court has held that the reliance on the right of (collective) self defence to support recourse to the threat or use of force in one case was not lawful because the canons of necessity and proportionality were not complied with: *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p.14, at pp.122-123.

<sup>55</sup> The customary right of anticipatory self defence is generally acknowledged as having been implicitly recognised in the exchange of notes between the United States and Great Britain following the *Caroline* incident in 1837. The then United States Secretary of State, Webster, declared that a State is entitled to take forcible measures in self defence where it can demonstrate a:

57. The threat or use of nuclear weapons is also to be considered with reference to the doctrine of belligerent reprisals, by which an act that would normally be illegal is rendered lawful by a prior illegal act committed by the state against which the reprisal is directed where the objective of the state carrying out the reprisal is to compel a belligerent to abandon illegitimate acts of warfare.<sup>56</sup> Notwithstanding the reference to reprisals in the Geneva Conventions of 1949,<sup>57</sup> the continued application of this doctrine in view of the provisions of the United Nations Charter has, again, not been authoritatively established.

58. An international arbitral award in 1928 attached three conditions to the use of force in reprisal:

- a) a previous act in violation of international law must have occurred;
- b) an unsatisfied demand to cease the actions in question must have been made, since the use of force is only justified if absolutely necessary; and
- c) the degree of force used in reprisal must not be disproportionate to the prior illegal act.<sup>58</sup>

59. Even in the case of belligerent reprisals, therefore, some constraints on the use of force would still be applicable.

## INTERNATIONAL HUMANITARIAN LAW

60. The concept that the conduct of armed hostilities is governed by rules is well recognised in international law. Regardless of whether armed conflict is justified under the law concerning the resort to force, international humanitarian law applies to set limits on *how* any armed conflict may be carried out. The humanitarian laws of armed conflict set standards for the conduct of armed hostilities with the purpose of circumscribing the areas within which the savagery of war is permissible and limiting and reducing the suffering of individuals. In the words of the St Petersburg Declaration of 1868,<sup>59</sup> one of the earliest attempts to codify this area of customary law, international

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"necessity...instant, overwhelming, leaving no choice of means and no moment for deliberation....The act justified by the necessity of self defence must be limited by that necessity and kept clearly within it."

The Nuremberg Tribunal implicitly recognised the *Caroline* formula, and thereby the continued existence of the right to anticipatory self defence, in observing that:

"...preventive action in foreign territory is justified only in case of an instant and overwhelming necessity for self defence, leaving no choice of means, and no moment for deliberation."

Quoted in Hearn, William R. *The International Legal Regime Regulating Nuclear Deterrence and Warfare*, LXI British Yearbook of International Law 1990, 199 at pp.211-212.

<sup>56</sup> *Oppenheim's International Law*, Vol.I (Peace), 9th edn, Sir Robert Jennings and Sir Arthur Watts (Eds), 1992, p.419 (n.12, and the works cited therein).

<sup>57</sup> *infra*, paragraph 70.

<sup>58</sup> *Nautilaa Incident Arbitration, Portugal v Germany* (1928) Reports of International Arbitral Awards, Vol. 2, p.1012.

<sup>59</sup> *infra*, n.74.



humanitarian law is designed to "conciliate the necessities of war with the laws of humanity".

61. One of the fundamental principles underlying this area of international law is the principle of humanity. In accordance with this principle, the use of force that causes suffering not necessary to obtain legitimate military objectives is barred.

62. While many rules of international humanitarian law are set out in international conventions, customary law remains very significant in this area. International conventions, in this area as others, are, however, contributing to the further development of customary law.

### **Application of international humanitarian law to nuclear weapons**

63. In general, international humanitarian law bears on the threat or use of nuclear weapons as it does of other weapons.

64. International humanitarian law has evolved to meet contemporary circumstances, and is not limited in its application to weaponry of an earlier time. The fundamental principles of this law endure: to mitigate and circumscribe the cruelty of war for humanitarian reasons. The Nuremburg Tribunal put the matter in the following terms:

The law of war is to be found not only in treaties, but in the customs and practices of States, which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practised by military courts. The law is not static, but by continual adaptation follows the needs of a changing world.<sup>60</sup>

65. The "Martens Clause" included in the preamble of Hague Convention IV of 1907<sup>61</sup> pointed to the general applicability of international humanitarian law:

"Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and belligerents remain under the protection and the rule of principles of the law of nations, as they result from usages established amongst civilised peoples, from the laws of humanity, and from the dictates of public conscience".

66. The general application of international humanitarian law to the use of nuclear weapons has also been specifically acknowledged by nuclear-weapon States.<sup>62</sup>

<sup>60</sup> 22 *Trial of German Major War Criminals* 445 (1950). In the case of *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p.14, at p.114, the Court said that the obligation to respect the Geneva Conventions 1949 "does not derive only from the Conventions themselves, but from the general principles of international humanitarian law to which the Conventions merely give specific expression".

<sup>61</sup> *infra*, n.75.

<sup>62</sup> Writers on the subject have pointed to military manuals on this point. For example, Hearn quotes a United Kingdom *Manual of Military Law*, as follows:

### Customary Law Rules

67. The customary rules of international humanitarian law can be considered with reference to a number of interrelated propositions.

*(1) The right to adopt means of injuring the enemy is not unlimited.*

68. This general principle, first set out in the St Petersburg Declaration of 1868, has been reiterated in many international conventions since. The significance of this principle lies in the fact that combatants are not necessarily unrestricted in their use of weapons even in the absence of a specific prohibition relating to those weapons. This is in contrast to the general presumption of international law that actions by a state on the international plane are permitted unless there is a rule of law prohibiting them.<sup>63</sup>

*(2) It is prohibited to use weapons or tactics that cause unnecessary or aggravated devastation and suffering.*

69. While any armed conflict will inevitably cause suffering, this suffering must be limited to what is necessary to achieve the legitimate aims of the resort to force in accordance with the Charter of the United Nations. That is to say, any actions in armed conflict must be proportionate to the legitimate aims of the conflict. It is unlawful to cause suffering and devastation which is in excess of that required to achieve these legitimate aims. Application of this proposition requires a balancing of necessity and humanity.

*(3) It is prohibited to effect reprisals that are disproportionate to their antecedent provocation or to legitimate military objectives, or disrespectful of persons, institutions and resources protected by the laws of armed conflict.*

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"There is no rule of international law dealing specifically with the use of nuclear weapons. Their use, therefore, is governed by the general principles laid down in this chapter.... In the absence of any rule of international law dealing expressly with it, the use which may be made of a particular weapon will be governed by the ordinary rules and the question of the legality of its use in any particular case will, therefore, involve merely the application of the recognised principles of international law." Quoted in Hearn, William R, *The International Legal Regime Regulating Nuclear Deterrence and Warfare*, LXI British Yearbook of International Law 1990, 199, at p.223.

Likewise, Meyrowitz quotes United States military manuals, as follows:

"In addition to analogy, the legality of new weapons or methods of warfare is determined by whether the weapon's effects violate the rule against unnecessary suffering or its effects are indiscriminate as to cause disproportionate civilian injury or damage to civilian objects." Quoted in Meyrowitz, Elliot: *Prohibition of Nuclear Weapons: The Relevance of International Law*, 1990, at p.31.

<sup>63</sup> This general presumption of law is derived from the case of *"Lotus"*, Judgment No. 9, 1927, P.C.I.J., Series A No. 10.

70. Reprisals which are excessive in relation to provocation or which lack a reasonable connection to legitimate objectives are inconsistent with international law. In addition, reprisals must not be used against persons, institutions and resources protected by international humanitarian law: these include civilians and civilian populations,<sup>64</sup> civilian objects,<sup>65</sup> the natural environment,<sup>66</sup> the wounded, sick, shipwrecked, and prisoners of war,<sup>67</sup> and medical establishments and personnel.<sup>68</sup> At least some of these specific prohibitions may be regarded as forming part of customary law.

*(4) It is prohibited to use indiscriminate methods and means of warfare which do not distinguish between combatants and civilians and other non-combatants.*

71. Discrimination between combatants and those who are not directly involved in armed conflict is a fundamental principle of international humanitarian law. While it is prohibited to actually target civilians and civilian objects, there is no absolute protection from collateral damage. The application of the principle requires an assessment of whether the civilian casualties are out of proportion to the legitimate military advantage achieved and whether collateral damage is so widespread as to amount to an indiscriminate attack.

*(5) It is prohibited to use asphyxiating, poisonous or other gases and all analogous materials*

72. The use of poison and poisoned weapons has long been prohibited. The prohibition is set out in the 1925 Geneva Protocol<sup>69</sup> but also forms part of customary law.

*(6) Methods and means of war should not cause widespread, long-term and severe damage to the environment*

73. Long-standing international humanitarian law is relevant to this proposition.<sup>70</sup> A specific treaty prohibition is now contained in Protocol I of 1977.<sup>71</sup> Protection of the global environment is now a major concern of the international community, with widespread support for progressive development of international treaty law in this area.<sup>72</sup> The condemnation of the large-scale environmental damage wreaked upon

<sup>64</sup> Article 51(6) of 1977 Protocol I (*infra*, n.87).

<sup>65</sup> Article 52(1) of 1977 Protocol I.

<sup>66</sup> Article 55(2) of 1977 Protocol I.

<sup>67</sup> Geneva Conventions 1949 (*infra*, n.82): Article 46 of the First Convention, Article 47 of the Second Convention and Article 13 of the Third Convention.

<sup>68</sup> For example, Articles 19 and 24 of the First Geneva Convention 1949.

<sup>69</sup> *infra*, n.80.

<sup>70</sup> Damage to the environment in particular cases may, for example, not be justified by military necessity and be contrary to the laws of armed conflict accordingly.

<sup>71</sup> Articles 35(3) and 55(1) of the Protocol; also *infra*, paragraphs 94 and 97.

<sup>72</sup> In the last ten years, a number of major treaties for the protection of the global environment have been adopted: Vienna Convention for the Protection of the Ozone Layer, 1985; Montreal Protocol on Substances that Deplete the Ozone Layer, 1987; Basel Convention on the Control of Transboundary

Kuwait by Iraqi forces during the "Gulf War" in 1991 was in part a reflection of this concern. It would be a matter for consideration by the Court whether the avoidance of widespread, long-term and severe damage to the environment during war could yet be regarded as itself a rule of customary law.<sup>73</sup>

*(7) Methods and means of warfare should not violate the neutrality of non-participating states*

74. There are two key aspects to this rule. First, belligerents have no right to carry on hostilities in the territory of a non-involved state. Secondly, non-participating states have the right to exclude entry of belligerent forces. Consequently neutral states have the right to freedom from harm and injury arising from armed conflict with which they are not involved.

### **International Conventions**

75. The main conventions in the area of international humanitarian law which remain in force and ought to be considered in the context of the threat or use of nuclear weapons are as follows:

*St Petersburg Declaration 1868*<sup>74</sup>

76. The Declaration sets forth two general principles which have remained the basic tenets of subsequent efforts in this area: that the right to injure the enemy is not unlimited and that means of warfare which cause unnecessary suffering are prohibited. The preamble to the Declaration sets out the following propositions:

"Considering that the progress of civilisation should have the effect of alleviating as much as possible the calamities of war:

That the only legitimate object which states should endeavour to accomplish during war is to weaken the military forces of the enemy:

That for this purpose it is sufficient to disable the greatest possible number of men:

That the object would be exceeded by the employment of arms which uselessly aggravate the suffering of disabled men or render their death inevitable;

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Movements of Hazardous Wastes and their Disposal, 1989; Convention on Biological Diversity, 1992; United Nations Framework Convention on Climate Change, 1992. All of these treaties entered into force quickly and have wide international support.

<sup>73</sup> The relationship between customary international law and treaties was considered by the Court in the cases of *North Sea Continental Shelf*, Judgment, I.C.J. Reports 1969, p.3 and *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p.14. In the former case, the Court noted that rules of customary international law may be crystallised or generated by treaties and bind states that never become party to them, and that such a process could in certain circumstances take place over only a short period of time. In the latter case, the Court reiterated that rules of customary international law embodied in treaties have an independent existence, and noted that instances of inconsistent state conduct do not affect the existence of a rule of customary international law where state practice has, in general, been consistent with it.

<sup>74</sup> 1868 St Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 grammes Weight.

That the employment of such arms would, therefore, be contrary to the laws of humanity..."

77. The Declaration specifically prohibited the use of exploding bullets or bullets charged with fulminating or inflammable substances which weighed less than 400 grams.

*The various conventions adopted at the Second Hague Peace Conference of 1907*

78. The First Hague Peace Conference held in 1899 had adopted two conventions and two declarations relating to the laws of armed conflict. These embodied principles contained in the St Petersburg Declaration.

79. The Final Act of the First Conference proposed that a subsequent conference be held to consider matters on which no agreement was reached. Among the 13 conventions relating to armed conflict adopted at the Second Hague Peace Conference held accordingly in 1907, two may be argued to be of relevance to the question before the Court.

80. First, Convention IV (Convention respecting the laws and customs of war on land)<sup>75</sup> included the following provisions:

"Article 22 The right of belligerents to adopt means of injuring the enemy is not unlimited.

Article 23. In addition to the prohibition provided by special Conventions it is especially forbidden:

- a) To employ poison or poisoned weapons...
- b) To kill or wound treacherously individuals belonging to the hostile nation or army...
- e) To employ arms, projectiles, or material calculated to cause unnecessary suffering...

Article 25 The attack or bombardment, by whatever means, of towns, villages, dwellings or buildings which are undefended is prohibited".

As already noted above,<sup>76</sup> the preamble of Convention IV of the 1907 Conference also included (as had the equivalent convention of 1899) the "Martens Clause". This clause was included because the drafters wanted to make it quite clear that "in the absence of a written undertaking, unforeseen cases should not be left to the arbitrary judgment of military commanders".<sup>77</sup> This clause, or something similar, has been reiterated in subsequent conventions.<sup>78</sup>

<sup>75</sup> 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land.

<sup>76</sup> *supra*, paragraph 65.

<sup>77</sup> Preamble to 1907 Hague Convention IV.

<sup>78</sup> For example, Articles 45 and 63 of the First Geneva Convention 1949, Articles 46 and 62 of the Second Convention, Article 142 of the Third Convention, and Article 158 of the Fourth Convention (*infra*, n.82); Article 1(2) of, and the Preamble to, respectively, Protocol I and Protocol II to the Geneva Conventions

81. Secondly, Convention V: the Hague Convention on Neutrality in Land War<sup>79</sup> declared that the territory of neutral powers was inviolable.

*Geneva Protocol on the Use in War of Gases and Bacteriological Weapons*<sup>80</sup>

82. This protocol embodied pre-existing customary law on the use in war of asphyxiating, poisonous or other gases and of all analogous liquids, materials or devices, declaring in specific terms that the prohibition shall be universally accepted as part of international law, and extended coverage to the use of bacteriological methods of warfare.

83. While it has been argued that this prohibition extends only to weapons whose prime effect is to injure by use of gas, analogous materials or bacteriological methods, it has also been argued that there is no basis for a distinction between the physical properties of poison gas and radiation, with the radiation-enhanced neutron bomb as an evident example.

*The Genocide Convention*<sup>81</sup>

84. This Convention, which applies in times of war or peace, restates existing customary law relating to acts of genocide. It prohibits a wide variety of acts but only where they are committed with intent to destroy national, ethnic, or religious groups.

85. Nevertheless, it has been argued that owing to their uniquely devastating effect the threat or use of nuclear weapons is likely to breach this convention, especially given the likelihood of escalation. Adherents of this view tend to claim that once the nuclear threshold is crossed escalation is extremely likely if not unavoidable, and that such escalation will lead to the inevitable annihilation of populations.

*The 1949 Geneva Conventions*

86. The four Conventions adopted by the 1949 Geneva Conference<sup>82</sup> are of broad application in cases of armed conflict. The Geneva Conventions are a comprehensive statement of international humanitarian law. They have very broad acceptance and may be considered declaratory of customary international law.

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(*infra*, n.87); Preamble to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, 1981.

<sup>79</sup> 1907 Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land.

<sup>80</sup> 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare.

<sup>81</sup> United Nations Convention on the Prevention and Punishment of the Crime of Genocide, 1948.

<sup>82</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea; Geneva Convention relative to the Treatment of Prisoners of War; Geneva Convention relative to the Protection of Civilian Persons in Time of War.

87. While the first three conventions replaced earlier conventions on the same subject, the fourth, relating to the protection of civilians, dealt with matters not previously the subject of a specific convention. Together the four Geneva Conventions confirm the fundamental distinction between combatants and non-combatants and the prohibition against unnecessary and aggravated suffering. Each of the conventions contains a restatement of the "Martens Clause".<sup>83</sup>

#### *Hague Cultural Property Convention*<sup>84</sup>

88. International humanitarian law has long made some provision for the protection of cultural property during armed conflict. World War II demonstrated that the existing provisions were inadequate. This realisation led to the conclusion of the convention.

89. Cultural property to which the Convention applies is defined as movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, archaeological sites and works of art. Buildings, such as museums and large libraries which are designed to house movable property, are also covered by the definition. The Convention obliges parties to avoid action likely to expose such property to damage as the result of armed conflict.

90. The protections, however, are not absolute. They do not apply where cultural property is given a military purpose. In addition, the immunity of the property can be withdrawn in "exceptional cases of unavoidable military necessity".<sup>85</sup> This withdrawal of immunity endures only for so long as the unavoidable necessity continues and, whenever circumstances permit, advance notice must be given to the opposing party.

#### *United Nations Convention on the Prohibition of Military Use of Environmental Modification Techniques*<sup>86</sup>

91. This convention prohibits the hostile use of environmental modification techniques having widespread, long-lasting or severe effects. "Environmental modification techniques" refers to any technique for changing, through the deliberate manipulation of natural processes, the dynamics, composition or structure of the earth, including its biota, lithosphere, hydrosphere, and atmosphere, or of outer space.

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<sup>83</sup> *supra*, n. 78.

<sup>84</sup> Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1954.

<sup>85</sup> *ibid*, Article 11.

<sup>86</sup> United Nations Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, 1977.

*1977 Protocols to the Geneva Conventions*<sup>87</sup>

92. The two Protocols to the Geneva Conventions are, in part, declaratory of pre-existing customary international law and, in part, a further development of the law.

93. The Protocols again restate the basic principles that the right to choose methods of warfare is not unlimited and that weapons and methods of warfare which cause unnecessary suffering or superfluous injury are prohibited.

94. Protocol I also provides for the protection of the environment. It prohibits methods or means of warfare which are intended or may be expected to cause widespread, long-term and severe damage to the environment.<sup>88</sup>

95. The Protocols also contain important elaboration of the rules regarding the protection of civilians. The basic rule set out is in Article 48 of Protocol I:

“In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”

96. The Protocols set out a series of specific prohibitions for the protection of civilians. Acts or threats of violence, the primary purpose of which is to spread terror amongst the civilian population, are prohibited.<sup>89</sup> Indiscriminate attacks are defined and prohibited,<sup>90</sup> and precautionary measures are to be taken to spare the civilian population.<sup>91</sup> Attacks against civilian populations or objects by way of reprisal are prohibited.<sup>92</sup> Destruction of food sources required by civilian populations is prohibited,<sup>93</sup> as is the destruction of works or installations containing destructive forces such as dams.<sup>94</sup> Cultural objects and places of worship are protected from attack.<sup>95</sup>

97. In considering the application of the Protocols to the use of nuclear weapons, it is to be noted that two of the nuclear weapon States participated in the negotiations on the basis that new rules established by the Protocols would not be applicable to nuclear weapons. These reservations were repeated upon signature of the Protocols by the two states concerned and by a number of other states. The Protocols therefore clearly apply to the use of nuclear weapons only in so far as they set out general principles or rules of international humanitarian law that codify or represent customary international law.

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<sup>87</sup> 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I); 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).

<sup>88</sup> *supra*, n.71.

<sup>89</sup> Article 51(2) of Protocol I; Article 13(2) of Protocol II.

<sup>90</sup> Article 51(4) and (5) of Protocol I.

<sup>91</sup> Articles 57 and 58 of Protocol I.

<sup>92</sup> Articles 51(6) and 52(1) of Protocol I.

<sup>93</sup> Article 54 of Protocol I; Article 14 of Protocol II.

<sup>94</sup> Article 56 of Protocol I; Article 15 of Protocol II.

<sup>95</sup> Article 53 of Protocol I; Article 16 of Protocol II.



## Recent Developments

98. That international humanitarian law is continuing to develop, and retains its potency, is demonstrated by the statutes adopted in 1993 and 1994 by the United Nations Security Council to establish international tribunals in respect of serious violations of international humanitarian law in, respectively, the Former Yugoslavia and Rwanda and neighbouring countries.<sup>96</sup> The function of the tribunals is to call to account individuals responsible for such violations, which include, in the case of the Former Yugoslavia, violations of the laws or customs of war, specifically including employment of poisonous weapons or other weapons calculated to cause unnecessary suffering, wanton destruction of cities, towns or villages or devastation not justified by military necessity, and destruction done to institutions dedicated to religion, education, the arts and sciences, and historic monuments.<sup>97</sup>

## FINAL COMMENTS

99. New Zealand's position on nuclear weapons is clear. New Zealand strongly opposes the proliferation of nuclear weapons and supports measures for nuclear disarmament. It is also opposed to the testing of nuclear weapons, and is a strong supporter of a comprehensive nuclear test ban, which it has been calling for in the United Nations General Assembly since 1972. These have been priorities for New Zealand for many years.

100. As regards the legal question, it is the case that only in a limited (but nevertheless significant) number of cases do treaties prohibit in specific terms the use of whole classes of weapons: for example, biological weapons,<sup>98</sup> chemical weapons,<sup>99</sup> exploding bullets,<sup>100</sup> and certain booby traps and weapons based on non-detectable fragments.<sup>101</sup> It is also the case, however, that while nuclear weapons are the only "weapon of mass destruction" not expressly subject to general prohibition by treaty, there is a large body of international law, both treaty law and rules of customary international law, which circumscribes the threat or use of nuclear weapons. Treaties in the arms control and disarmament field circumscribe the threat or use in various respects, and other areas of

<sup>96</sup> UNSC Resolutions 827 (1993) and 955 (1994).

<sup>97</sup> Article 3 of the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.

<sup>98</sup> Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, 1972.

<sup>99</sup> Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and Their Destruction, 1993.

<sup>100</sup> 1868 St Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 grammes Weight.

<sup>101</sup> Protocols I and II to the 1981 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (also known as the Inhumane Weapons Convention).

international law, particularly international humanitarian law, circumscribe other threats or uses of nuclear weapons, and bear on the question before the Court.

101. Moreover, international law and relevant state practice in this area has been steadily increasing and developing over the years. There have been developments at both the regional and the global levels and, in New Zealand's case, at the national level through the enactment of legislation. Emerging principles and developments in related areas of international law, such as protection of the environment,<sup>102</sup> can also be pointed to. All of this provides reinforcement for the view that various norms of international law have emerged in this area. Even if it may not yet be possible to say that, in every circumstance, international law proscribes the threat or use of nuclear weapons, there can be little doubt that the law has been moving in that direction. In New Zealand's view, the sooner that point is reached, through the progressive development of international law, including the negotiating process, the more secure the international community will be.

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<sup>102</sup> *supra*, paragraph 73.