

Cour internationale  
de Justice

LA HAYE

CR 95/33  
International Court  
of Justice

THE HAGUE

ANNEE 1995

*Audience publique*

*tenue le mardi 14 novembre 1995, à 15 h 30, 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)*

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COMPTE RENDU

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YEAR 1995

*Public sitting*

*held on Tuesday 14 November 1995, at 3.30 p.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)*

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VERBATIM RECORD

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*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

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*Present:*

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

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*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)*

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 consultatif 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 du Costa Rica est représenté par :

S. Exc. M. J. Francisco Oreamuno, ambassadeur de la République du Costa Rica aux Pays-Bas;

M. Carlos Vargas-Pizarro, conseiller juridique et envoyé spécial du Gouvernement du Costa Rica;

M. Rafael Carrillo-Zürcher, ministre-conseiller à ambassade du Costa Rica, La Haye.

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 Theodore G. 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 Victor Ngele, ministre de la police et de la sécurité nationale;

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 Louise 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 japonais est représenté par :

S. Exc. M. Takekazu Kawamura, ambassadeur, directeur général au contrôle des armements et aux affaires scientifiques, ministère des affaires étrangères;

M. Koji Tsuruoka, directeur de la division des affaires juridiques, bureau des traités, ministère des affaires étrangères;

M. Ken Fujishita, premier secrétaire à l'ambassade du Japon, La Haye;  
M. Masaru Aniya, division du contrôle des armements et du désarmement, ministère des affaires étrangères;

M. Takashi Hiraoka, maire d'Hiroshima;

M. Iccho Itoh, maire de Nagasaki.

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, juriconsulte et chef de la division du droit international, cabinet de l'*Attorney-General*;

Dato' R. S. McCoy, Expert;

M. Peter Weiss, Expert.



Le Gouvernement du Mexique est représenté par :

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

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

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

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

Le Gouvernement de la Nouvelle-Zélande est représenté par :

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

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

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

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

Le Gouvernement des Philippines est représenté par :

M. Merlin M. Magallona, agent;

M. Raphael Perpetuo Lotilla, conseil;

M. Carlos Sorreta, conseil;

M. Rodolfo S. Sanchez, avocat;

M. Emmanuel C. Llana, avocat.

Le Gouvernement de Qatar est représenté par :

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

M. Sami Abushaikha, expert juridique du Diwan Amiri;

M. Richard Meese, cabinet Frere Cholmeley, Paris.

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

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

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

M. Christopher Greenwood, conseil;

M. Daniel Bethlehem, conseil;

M. John Grainger, conseiller;

M. Christopher Whomersley, conseiller;

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

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

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

*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 Costa Rica is represented by:

H.E. Mr. J. Francisco Oreamuno, Ambassador of the Republic of  
Costa Rica to The Netherlands;

Mr. Carlos Vargas-Pizarro, Legal Counsel and Special Envoy of the  
Government of Costa Rica;

Mr. Rafael Carrillo-Zürcher, Minister Counsellor, Embassy of  
Costa Rica, The Hague.

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 Government 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 Japanese Government is represented by:

Mr. Takekazu Kawamura, Ambassador, Director General for Arms Control and Scientific Affairs, Ministry of Foreign Affairs;

Mr. Koji Tsuruoka, Director of Legal Affairs Division, Treaties Bureau, Ministry of Foreign Affairs;

Mr. Ken Fujishita, First Secretary, Embassy of Japan in the Netherlands

Mr. Masaru Aniya, Arms Control and Disarmament Division, Ministry of Foreign Affairs;

Mr. Takashi Hiraoka, Mayor of Hiroshima;

Mr. Iccho Itoh, Mayor of Nagasaki.

The Government 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 Theodore G. Kronmiller, Legal Counsel, Embassy of the Marshall Islands to the United States;

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

The Government of Mexico is represented by:

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

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

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

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

The Government of New Zealand is represented by:

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

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

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

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

The Government of Philippines is represented by:

Mr. Merlin M. Magallona, Agent;

Mr. Raphael Perpetuo Lotilla, Counsel;

Mr. Carlos Sorreta, Counsel;

Mr. Rodolfo S. Sanchez, Advocate;

M. Emmanuel C. Llana, Advocate.

The Government of Qatar is represented by:

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

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

Mr. Richard Meese, Frere Cholmeley, Paris.

The Government of the Russian Federation is represented by:

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

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

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

The Government of Samoa is represented by:

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

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

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

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

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

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

Ms Louise Rands, Administrative Assistant, Foundation for

International Environmental Law and Development, London University.

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 Victor Ngele, Minister for Police and National  
Security;

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



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

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

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

Mr. Christopher Greenwood, Counsel;

Mr. Daniel Bethlehem, Counsel;

Mr. John Grainger, Adviser;

Mr. Christopher Whomersley, Adviser;

Mr. Andrew Barlow, 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 ses audiences publiques et donne la parole au Docteur Carlos Varga Pizarro, envoyé spécial du Gouvernement du Costa Rica.

Mr. VARGA PIZARRO: Thank you, Mr. President and distinguished Members of the Court. With your permission I would like to present our statement. However, before I start, I would like to express our sincere regret for the death of Judge Andrés Aguilar, distinguished Latin American member of this Honourable Court, and friend to all Costa Ricans.

It is certainly a great honour for us to participate in these hearings. We are confident that the results of your deliberations on the subjects under examination by this Court will be of paramount importance to the development of human civilization.

I would also like to ask for your indulgence to a lawyer who pleads in a language which is not his own, and I urge the Court to consider having the Spanish language, which is spoken today by more than 300 million people, heard in the near future as one of the working languages of this honourable Court.

Mr. President, and distinguished Judges, we feel honoured to argue a case which relates to such high aims such as the rights to preserve life, health and the environment. We consider that this is a case for all humankind, and it shall always be considered so.

Honourable President and distinguished Judges: at this stage, after two written pleadings presented before this Court, the Government of Costa Rica considers that we have enough arguments to prove that there exists a general violation of the international law by the threat or use of nuclear weapons.

At this stage we are going to demonstrate to the honourable Court that:

1. WHO and the United Nations General Assembly are competent to request an opinion on the legality of the use of nuclear weapons.
2. There is a general international law prohibition on the use of nuclear weapons.

The Government of Costa Rica would also like to state that it fully supports the written and oral arguments presented by some States related to the illegality of the threat or use of nuclear

weapons in any circumstance, including Egypt, Iran, Malaysia, New Zealand and Nauru.

In order to present Costa Rica's oral arguments, I have divided our presentation into two parts. In the first part, we will support the argument that no reasons exist to reject the two requests for advisory opinions presented for the consideration of the Court.

In the second part, I shall cover the subject of the illegality of the threat or use of nuclear weapons, making particular reference to the protection of the human rights to life, to health, and to the environment.

In relation to the first part regarding the jurisdiction of the Court and the admissibility of the application presented by WHO and the General Assembly, the Government of Costa Rica wishes to reiterate that the threat or use of nuclear weapons involves a health issue arising within the competence of WHO, and the scope of its activities, which is in fact a legal question.

As regards the request for an advisory opinion presented by the General Assembly, the Government of Costa Rica considers that the request for an advisory opinion on the illegality of threat or use of force utilizing nuclear weapons, falls clearly within the scope of the functions and powers of the General Assembly.

Both organizations are competent to request an advisory opinion from the International Court of Justice on the legality of the use of nuclear weapons, and the honourable Court is competent to give the advisory opinions on the questions submitted, since there are no compelling reasons why the Court should not give the opinion requested.

We strongly regard the Court as a producer and disseminator of new and increasingly consensual legal knowledge, and we assert that the Court, through its advisory opinions, has contributed to the clarification and development of international law. Furthermore, the historic role played by the Court's advisory opinions provides examples of how the Court influences governments and international organizations.

To begin with the substance of our argumentation, I do not wish to burden the Court with citations, but there is a particular passage from a statement delivered by the Honourable President of this Court in plenary meeting of the General Assembly, at its Forty-Ninth Session of

13 October 1994, that supports our position regarding the first point that we are intending to prove: that the Court should satisfy the request for advisory opinions presented by WHO and the General Assembly.

The distinguished President stated:

"It is precisely this concept of a legal dispute, as traditionally opposed to that of a political dispute, which seems to have been misinterpreted and to have constituted one of the reasons for the under-utilization of the Court in contentious cases ... I solemnly appeal to States to review their criteria for the seisin of the Court, and at no time to disregard the fact that a referral to the Court of no more than a subsidiary legal aspect of a much broader political dispute, may well calm the situation down at once and change the whole face of that dispute ... In reality, when the Court has been seised of legal issues arising in the wider setting of an eminently political dispute, it has never refused for that reason to deal with the case."

While President Bedjaoui was referring expressly to contentious disputes, his remarks apply equally to requests for advisory opinions. There is a political controversy concerning the nature and pace of disarmament efforts by the nuclear-weapon States. There is also a controversy concerning the legal question on whether or not the threat or use of nuclear weapons is permissible under international law.

In giving an opinion on the legal question, the Court will also contribute to the resolution of the wider controversy concerning nuclear disarmament.

Mr. President, evidently the arguments presented above support the idea that no reasons exist for the Court to refuse to deal with the request for an advisory opinion presented by WHO.

Furthermore, it is clear that under Article 96 (2) of the United Nations Charter, the General Assembly is the source of authority for advisory opinions requested of the Court by specialized agencies. In the case of WHO, such authority was conferred by Article X.2 of the Agreement between the United Nations and WHO.

Each requesting organization is, in principle, able to determine its competence, and to request an advisory opinion. In this case, the World Health Assembly adopted a separate resolution confirming its competence before acting on resolution WHA 46/40. Nevertheless, by "welcoming" resolution WHA 46/40 as the source of WHO's authority in advisory opinion matters, the General

Assembly confirmed and gave weight to WHO's own determination and competence.

We consider that resolution WHA 46/40 was validly adopted in accordance with article 76 of the Constitution of WHO, and Rules 50 to 70 ("Conduct of Business at the Plenary Meeting"), and 71 to 84 ("Voting in Plenary Meetings") of the Rules of Procedure of the World Health Assembly.

On the other hand, Mr. President, Costa Rica considers that the position of some States Members of WHO, to challenge this Organization's competence to request the Court to give an advisory opinion, violates Article 75 of WHO's Constitution, which provides that:

"Any question or dispute concerning interpretation or application of this constitution which is not settled by negotiation or by the Health Assembly shall be referred to the International Court of Justice in conformity with the Statute of the Court, unless the parties concerned agree on another mode of settlement."

Article 75 does not state how such a question "shall be referred". There is, however, one precedent directly on point, i.e., *Interpretation of the Agreement of 25 March 1951 between WHO and Egypt (I.C.J. Reports 1980, p. 67)*. In that case, differing views had been expressed as to the applicability of the negotiation and notice provisions of Section 37 of the Agreement to the removal of WHO's Regional Office from Alexandria. To resolve these differences, the WHA adopted a resolution referring the question to the International Court of Justice for an advisory opinion, which was rendered in due course.

In the instant case, it would have been open to the States opposed to WHA 46/40 to introduce a similar resolution, i.e., requesting an advisory opinion as to whether WHA 46/40 was within the competence of WHO, but they did not do so. Not having done so, they should probably not be heard at this time to challenge either WHA 46/40 or the previous vote declaring the draft resolutions to be within the competence of WHO, no more than they should be heard to challenge, or fail to comply with, any other resolution validly adopted by WHA.

The Government of Costa Rica strongly believes that, since WHO is concerned with preventative measures, it is competent to request an advisory opinion to the Court in this case. We share the opinion stated in WHO's 1987 study, "Effects of nuclear War on Health and Health Services," in which it is stated that:

"When treatment is ineffective, the only solution available to the health

profession is prevention. Prevention is obviously the only possibility in case of a nuclear war."

Consequently, Costa Rica cannot agree with the argument of France, stating that the competence of WHO should be limited to succouring the victims of nuclear weapons. On the contrary, we consider that, since prevention is one of the fundamental principles of WHO, the request has been correctly presented before this Court. In this regard, Costa Rica endorses the analysis provided by the Government of Nauru in its written statement concerning the question presented by WHO, and submitted to this Court in September 1994.

Mr. President, a few States such as France, the Russian Federation, the United Kingdom, the United States, Germany and Italy, have asked the Court to use its discretion not to consider the question asked by the General Assembly. They argued that a decision from the Court could upset disarmament negotiations.

This proposition is a curious one, coming as it does from States which have shown only a limited commitment to nuclear disarmament. On the other hand, those non-nuclear States which could be the victims of any use of nuclear weapons, and thus have the greatest interest in progress on nuclear disarmament, are the ones supporting this case.

It also seems illogical that the General Assembly, which is the principal United Nations body dealing with disarmament questions, would undermine its own work by adopting a resolution that would be counter-productive to nuclear disarmament.

The Government of Costa Rica considers that, even if there were some merit to the argument that an opinion from the Court would harm disarmament negotiations, that is for the United Nations General Assembly to decide, not the Court. It is clear that the Court has been asked by the General Assembly to answer a question which the General Assembly believes will assist it in carrying out its functions. We consider that it is the Court's role not to judge the wisdom of such a request, but to render the opinion asked of it.

Regarding the second part of our verbal argumentation - the illegality of the threat or use of nuclear weapons - first of all, there is massive evidence of a global *opinio juris* that the threat or use

of nuclear weapons is illegal provided by scores of General Assembly resolutions; condemnations of nuclear weapons in the Tlatelolco Treaty, the Non-Proliferation Treaty, and other treaties; writings of jurists; and citizens' and non-governmental organizations' materials evidencing dictates of the public conscience and also public knowledge. With respect to the public conscience, Costa Rica wishes to draw the Court's attention to the position adopted by the Federation of American Scientists, which was founded in 1945 by atomic scientists who had participated in the Manhattan Project. They declare that: "The use of any weapon of mass destruction such as chemical, biological or nuclear weapons is, and ought to be declared, illegal under international law."

There is also State practice supporting illegality of possession and threat or use of nuclear weapons demonstrated by the non-proliferation régime; negative security assurances; the Tlatelolco and other regional nuclear-free zones, as well as the 50-year period of non-use of nuclear weapons in war since Hiroshima and Nagasaki. In this regard, Costa Rica endorses the arguments of Australia and New Zealand.

None the less, it has been argued that a rule of customary law specifically prohibiting the threat or use of nuclear weapons has not formed due to the declared policy of certain nuclear-weapon States that they may threaten to use, and possibly use, nuclear weapons in self-defence, including by first use of the weapons against conventional aggression or to attack an adversary's nuclear forces. This argument fails on several counts.

First, aside from the issue of the existence of a customary rule specifically applying to nuclear weapons, the policies of certain nuclear-weapon States in no way affect the validity of rules and principles of humanitarian law, human rights law, and environmental law which it has been demonstrated operate to prohibit the threat or use of nuclear weapons.

Second, adherence to an illegal course of conduct by a few States cannot negate the law. Where matters fundamental to humanity are concerned, dissent cannot be permitted to prevent the emergence of a customary rule. An example of a non-consenting State not being exempted from a customary rule is South Africa, which persistently dissented from the rule prohibiting racial discrimination while that rule was developing. As Professor Schachter has stated, the determination

of whether

"inconsistent practice should vitiate an asserted principle may involve drawing distinctions among norms based on value judgments of their significance. For example, a norm considered essential to peace (such as the principle of non-intervention) or one that expresses a basic universally held moral principle (such as that against torture) would retain its validity despite inconsistent practice." (*RCADI*, Vol. 178 (1982-V), p. 121).

Third, among the nuclear-weapon States there is no unanimity concerning the acceptability of threat or use of nuclear weapons. China has taken the position that in no circumstance would it engage in the first use of nuclear weapons against any other States. China has also endorsed the negotiation and conclusion, at an early date, of a treaty on the prohibition of nuclear weapons, under which all such weapons would be banned and destroyed under effective international supervision (see Summary Record of the 2nd Meeting of Main Committee I, 1995 NPT Review and Extension Conference, 20 April 1995, pp. 16-17, attached to the written version of the oral statement)<sup>1</sup>. Both China's unambiguous and universal no-first-use position and its support of a nuclear weapons abolition convention to a large extent are consistent with, and reinforce, the present illegality of threat or use of nuclear weapons. It should also be noted that India, which is widely believed to have at least a nuclear weapons capability, has declared to this Court in its written submissions that the threat or use of nuclear weapons in any circumstance is illegal under international law.

In this connection, Costa Rica would like to comment on one of the contradictions in the oral argument of France. France argued that its policy of nuclear deterrence has contributed, for several decades, to the maintenance of security and world peace. We consider that it is as difficult to establish that deterrence has kept the peace - or, for that matter, has not kept the peace - as it is to prove that ghosts exist, or do not exist. While the major nuclear Powers have not warred with each other, conventional wars involving those Powers directly or indirectly have raged throughout the world. Nor can there be any guarantee that nuclear war will not occur in the future.

The notion of "stable deterrence" is, simply, a myth. For example, former US Secretary of Defense Robert McNamara, in his book *In Retrospect*, has recently written that the Cuban missile

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<sup>1</sup>Not reproduced.



crisis of 1962 demonstrates that, so long as the "Great Powers possess large inventories of nuclear weapons, we will face the risk of their use". The argument that nuclear deterrence provides stability is based on the assumption that governments act rationally, that no government would rationally make a decision that could trigger nuclear retaliation, and that nuclear war is unlikely to occur unless deliberately chosen. We consider that all those assumptions are erroneous.

In addition, it should be noted that the value of deterrence, whatever one's view of it, is irrelevant to the questions before the Court. If the threat and use of nuclear weapons are illegal *per se*, they cannot be legitimated by any theory of deterrence.

Even were such legitimation possible, it could only be based on a scenario that would totally and unconditionally guarantee the non-use of nuclear weapons forever and a day. Such a scenario cannot seriously be defended in the world in which we live.

Costa Rica would also like to make some comments regarding the arguments relating to the Tlatelolco Treaty presented by the United States, the United Kingdom and France, in their written statements. They have argued that the conclusion of the Treaty of Tlatelolco prohibiting the threat or use of nuclear weapons in Latin America and the Caribbean indicates that there is no general prohibition against the use of nuclear weapons, and that States parties to this Treaty must be convinced of this fact. As one of the parties to the Treaty of Tlatelolco, Costa Rica rejects this argument of the nuclear States.

Costa Rica and many other parties to the Treaty have consistently supported the United Nations General Assembly resolutions which state that the use of nuclear weapons is a crime against humanity, a violation of the United Nations Charter, and/or a violation of international law. The prohibition against the use of nuclear weapons applies in all regions, and not only in those in which the nuclear States have agreed not to use or threaten to use nuclear weapons.

The concluding of regional agreements is necessary because the nuclear States do not accept or abide by the general prohibition against their threat or use. There is no contradiction between seeking agreement from the nuclear States not to threaten or use nuclear weapons in a specific region, and believing that the threat or use is prohibited generally. In fact, the achieving of

agreements from the nuclear States not to threaten or use nuclear weapons in particular regions is a confirmation of the belief held by States in those regions that the threat or use of nuclear weapons is prohibited generally.

In its oral statement, France contended that in concluding the Treaty of Tlatelolco "the States parties confirmed that, subject to any treaty commitment, the use of nuclear weapons is not illegal in itself". The Treaty says no such thing. In fact, what the Treaty said is:

"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 specific reference to the indiscriminate nature of nuclear weapons, to the radioactivity they release and to the threat to humanity is in direct contradiction to any interpretation that France may wish to make about this Treaty confirming the legality of nuclear weapons use.

Furthermore, under the Treaty of Tlatelolco, nuclear States agree that nuclear weapons are weapons of mass destruction.

The United States, in its written statement, argued that "nuclear weapons can be directed at a military target and thus can be used in a discriminate manner". The United Kingdom in its written statement supported this view by stating that "nuclear weapons are capable of precise targeting and many are designed for use against military objectives of quite small size".

However, by signing Protocol II of the Treaty of Tlatelolco, under which they agree not to use or threaten to use nuclear weapons against parties to the Treaty, the nuclear States accepted the definition of nuclear weapons provided for in the Treaty, which reads: "a nuclear weapon is any device which is capable of releasing energy in an uncontrolled manner". The Preamble of the Treaty emphasizes that the effects of nuclear weapons are indiscriminate.

The nuclear-weapon States' acceptance of the Treaty's definition and description of nuclear weapons takes precedence over their contrary declaration before this Court.

Furthermore, Costa Rica considers that there has been controversy in the written and oral statements before the Court concerning whether Protocol I to the Geneva Conventions governs the

use of nuclear weapons. In Costa Rica's view it is beyond dispute that customary international law, reaffirmed and codified in Protocol I, governs and prohibits the use of nuclear weapons. In this regard, Costa Rica wishes to endorse the analysis provided by the International Committee of the Red Cross in its letter of 19 September 1995, to President Bedjaoui. A copy of this letter is attached to the written version of this oral statement.

The Red Cross begins by noting the relevance of the de Martens Clause as expressed in Protocol I. It further states that

"no one can be unaware of the fact that today nuclear arms of all kinds are generally considered to be weapons of mass destruction, as are biological and chemical weapons. *A priori*, their use would thus appear to be incompatible with the prohibition, reaffirmed in Protocol I, of methods or means of combat which cannot be directed at a specific military objective and are thus of a nature to strike military objectives and civilians, without distinction."

In Costa Rica's view, the customary law codified in Protocol I, including but not limited to the provisions cited by the Red Cross, prohibits the use of nuclear weapons as contemplated in the strategies of the nuclear-weapon States.

In conclusion, I wish to emphasize that Costa Rica considers that any use or threat of nuclear weapons by a State would violate the international law obligations reflected under the rules for the protection of the human right to life, health, a clean and healthy environment, and peace; and especially the universality, indivisibility and interdependency of those rights. In this regard, I request the Court to consider the effects on the rights to life and health of nuclear testing, an indicator of the effects of the use in war of these weapons, as shown in the attached newspaper article<sup>2</sup> about the experience of a community exposed to radioactivity released by test explosions.

As a prime mover of the Central American Peace Process, and as the country whose former President, Oscar Arias, received the Nobel Peace Prize, Costa Rica has an appreciation and understanding of the conditions required for the achievement of peace. This means peace not just in the sense of the absence of armed conflicts, but peace in the sense of commitment to co-operation and common values. In the view of Costa Rica, the maintenance of a threat of use of nuclear

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<sup>2</sup>Not reproduced.

weapons, a threat which can be executed instantaneously with consequences devastating for all mankind, is incompatible with the achievement of peace in its true sense in the world that we have now. In fact, the maintenance by several States of the threat of use of nuclear weapons is fundamentally incompatible with a rational global order as envisioned by the United Nations Charter.

The nuclear threat is inherently a threat against the sovereignty of other States and is also inherently contrary to the purposes of United Nations, which include maintenance of international peace and security, and co-operation in the promotion of the achievement of human rights.

Costa Rica urges the Court to determine the legality of the threat or use of nuclear weapons in the context of an alternative conception of security, which is both more realistic and finding wide acceptance in the whole world. This alternative conception takes into account the security needs of all States, because only if all States' security needs are met can any one State be secure. Hence it seeks the achievement of "common security". Common security is impossible in a world in which the use of nuclear weapons is threatened and could occur in actuality.

Thus, we consider that in this decade of international law, the Court should recognize and declare that the threat or use of nuclear weapons is illegal, not only because it is contrary to humanitarian law and the general prohibition of customary law, but also because nuclear threat or use cannot coexist with the achievement of a global order embodying common security that realizes the purposes of the United Nations and provides fundamental human rights for all persons in the whole world. Thank you, Mr. President, and Members of the Court.

Le PRESIDENT : Je remercie beaucoup Monsieur l'envoyé spécial du Gouvernement de Costa Rica, le Dr. Carlos Vargas Pizarro, pour son exposé oral. Ainsi s'achève l'exposé oral de Costa Rica. Je n'ai plus d'autres orateurs sur ma liste cet après-midi. En conséquence, l'audience publique est suspendue et sera reprise demain matin, mercredi 15 novembre à 10 heures.

*L'audience est levée à 16 h 30.*

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Annex to the statement of the Honourable Varga Pizarro  
of Costa Rica

*Translation of Mr. Yves Sandoz's letter of 19 September addressed to H.E. Mohammed Bedjaoui,  
President of the International Court of Justice, The Hague*

Re: Request for an advisory opinion on the lawfulness of using or threatening to use nuclear weapons

Mr. President,

Having learned that the International Court of Justice has been asked to give an opinion on the question of whether it is lawful to use or threaten to use nuclear weapons, we feel it is important for the Court to be informed of the position of the International Committee of the Red Cross (ICRC) in this regard. Indeed, the issue is largely one of international humanitarian law and, as you are aware, the international community has entrusted the ICRC with wide powers in this area. The current Statutes of the International Red Cross and Red Crescent Movement, adopted by the 1986 International Conference which was attended by the great majority of States, stipulate that one aspect of the ICRC's role is

"to work for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any development thereof" (Article 5, para. 2 (g)).

It was in pursuance of this mandate that in 1986 the ICRC published its *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (the English version was published in 1987).

In view of the ICRC's recognized competence in the field of international humanitarian law, it is highly probable that one of the parties concerned will refer to this *Commentary* or to the ICRC'S other writings on the subject. We therefore wish to give a brief outline to our current thinking so as to avoid any misunderstanding.

First of all we venture to suggest that the members of the Court read the section of the *Commentary* concerning nuclear weapons (paras. 1838 to 1862), copy of which is enclosed. This section mentions the circumstances prevailing at the time of the Diplomatic Conference of 1974-1977 and discusses their consequences with respect to interpretation of the relevant texts. In view of the complexity of the matter, it is important that the section be read in its entirety, since the meaning of the authors might be misunderstood if only parts of it were read or if passages were quoted out of context.

Moreover, it should be stressed that the *Commentary* analyses the situation as it was at the time. This obviously leaves open the question of subsequent developments in customary law, especially in view of the widespread acceptance of the 1977 Protocols as a whole, or at least of most of their principles and rules.

We also believe that any examination of the problem today should take into account the "Martens clause", recognized as customary law, as it is expressed in Protocol I:

"In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience" (Article 1, para. 2).

Finally, we should like to point out that, while we are not aware of any technical development that might have modified the characteristics of specific nuclear weapons, it is obvious that any such development would have to be carefully examined before any ruling is given on the lawfulness of using these particular weapons.

Indeed, no one can be unaware of the fact that today nuclear arms of all kinds are generally considered to be weapons of mass destruction, as are biological and chemical weapons. *A priori*, their use would thus appear to be incompatible with the prohibition, reaffirmed in Protocol I, of "methods or means of combat which cannot be directed at a specific military objective" and are thus "of a nature to strike military objectives and civilians (. . .) without distinction" (Article 51, para. 4). In our opinion, the interpretation given to the principle of proportionality does not help resolve the problem. This principle as expressed in Protocol I considers to be indiscriminate, and thus contrary to international humanitarian law, "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated" (Article 51, para 5 (b)).

It is important, therefore to determine what is meant by "the concrete and direct military advantage anticipated". An inordinately broad interpretation would mean acknowledging that very heavy losses may be inflicted on civilians, and a significant part of the regulations designed to protect civilians would thus be rendered meaningless. This would be unacceptable, and the *Commentary* clearly says no in the following paragraphs.

"Comments were also made in various quarters that paragraph 5 (b) authorized any type of attack provided that this did not result in losses or damage which were excessive in relation to the military advantage anticipated. This theory is manifestly incorrect. In order to comply with the conditions, the attack must be directed against a military objective with means that are not disproportionate in relation to the objective, but are suited to destroying only that objective, and the effects of the attacks must be limited in a way required by the Protocol; *moreover*, even after those conditions are fulfilled, the incidental civilian losses and damages must not be excessive. Of course, the disproportion between losses and damages caused and the military advantages anticipated raises a delicate problem, in some situations there will be no room for doubt, while in other situations there may be reason for hesitation. In such situations the interests of the civilian population should prevail, as stated above.

The idea has also been put forward that even if they are very high, civilian losses and damages may be justified if the military advantage at stake is of great importance. This idea is contrary to the fundamental rules of the Protocol; in particular it conflicts with Article 48 (*Basic rule*) and with paragraphs 1 and 2 of the present Article 51. The Protocol does not provide any justification for attacks which cause extensive civilian losses and damages. Incidental losses and damages should never be extensive" (paras. 1979 and 1980).

If the illegality of any use of nuclear weapon is not admitted, it would therefore be necessary to determine whether specific types of nuclear weapons, having regard to their current technical characteristics, might be used in well-defined situations without contravening the principles and rules of international customary law as set out in Protocol I.

To sum up our institution's concerns, we do not wish the opinions stated in the ICRC's



*Commentary* to be misinterpreted. Moreover, we should like them to be understood as reflecting the situation prevailing at the time when they were expressed, bearing in mind the possibility of developments in customary law and changes in the public conscience and even in the scientific parameters of the question.

We trust that the opinion which the Court has been requested to give will enable progress to be made in this particularly sensitive issue. Should it be determined that a particular nuclear weapon might lawfully be used in certain specific situations while respecting the international humanitarian law currently in force, it would seem clear that such use could only be very limited and it would be imperative to define without the slightest ambiguity the circumstances in which it would be permitted. As the *Commentary* points out,

"[the] uncertainty which exists regarding the scope of international humanitarian law with respect to the use of nuclear weapons is potentially harmful for such law and consequently all the victims that it aims to protect. This danger is all the greater as a first use of nuclear weapons, considered to be lawful by its user, could be considered a violation by its victim, and clearly entails the risk of uncontrolled escalation" (para. 1861).

We hope that these explanations and our thoughts on the matter will be helpful to the Court and should be happy to provide you with any further information you may require.

Please accept, Mr. President, the assurance of our high consideration.

Yves Sandoz  
Member of the Executive Board  
Director  
Principles, Law and Relations with the Movement