

## THE CASE FOR ILLEGALITY

Oral Statement on behalf of Australia by Senator the Hon Gareth Evans QC, Minister for Foreign Affairs, to the International Court of Justice: Requests for Advisory Opinions on Nuclear Weapons submitted by the World Health Organization and the United Nations General Assembly, The Hague, 30 October 1995.

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Mr President, Members of the Court

1. As Minister for Foreign Affairs of Australia, former Attorney-General and counsel, it is an honour and a pleasure for me to appear today before this Court. Given Australia's long-standing support of the Court, and given the importance which Australia has long attached to nuclear non-proliferation and disarmament as part of its foreign policy, I take particular personal satisfaction in speaking on behalf of my country in these proceedings.

2. My observations today are directed to both questions before the Court, but I will focus particularly on the broader question asked by the United Nations General Assembly. I will seek to establish the following three propositions:

**First**, nuclear weapons are by their nature illegal under customary international law, by virtue of fundamental general principles of humanity. It is therefore illegal not only to use or threaten use of nuclear weapons, but to acquire, develop, test, or possess them. The right of States to self-defence cannot be invoked to justify such actions.

**Second**, it follows that all States are under an obligation to take positive action to eliminate completely nuclear weapons from the world. To implement this obligation, States which do not possess such weapons cannot lawfully acquire them, and States which do possess nuclear weapons cannot add to, improve or test them. States which possess nuclear weapons must, within a reasonable timeframe, take systematic action to eliminate completely all nuclear weapons in a manner which is safe and does not damage the environment.

Third, while requiring elimination, international law must nonetheless deal with the reality of the present existence of large stocks of nuclear weapons. It is accordingly necessary and appropriate that during the course of the elimination process the principle of stable deterrence be maintained: this will enable for that period the possession or threat of use of nuclear weapons for the sole purpose of ensuring that nuclear weapons are never used by others. Given the inherently illegal nature of nuclear weapons, such deterrence can only be a temporary necessity, and can never make lawful the indefinite possession or threat of use of nuclear weapons.

## **Customary International Law and Fundamental Principles of Humanity**

Mr President, Members of the Court

3. As to the basic issue of the legality or illegality of nuclear weapons, there is manifestly a vast range of international law rules which might be violated by a threat or use of nuclear weapons in particular circumstances. The use of nuclear weapons in an armed attack on another State may constitute a violation of Article 2, paragraph 4, of the Charter of the United Nations. Equally, it might violate the customary international law rule to the same effect, recognized by this Court. Such an act directed against or affecting a neutral State might contravene the law of neutrality. The use by a State of a nuclear weapon against a particular group might constitute the crime of genocide. The conduct of nuclear weapons tests might be contrary to international law on the ground that it causes radioactive contamination of the environment of a third State or the global commons.

4. Many States have submitted written statements to the Court on one or both of the questions asked by the WHO and the General Assembly. A number of these have dealt in detail with the substance of the questions. The Court already has before it a considerable body of argument on issues such as the effect of Article 2, paragraph 4, of the Charter; the law of armed conflict and international humanitarian conventions such as the 1977 Additional Protocol I to the Geneva Conventions; international conventions restricting the manufacture, acquisition, deployment and use of nuclear weapons; international conventions prohibiting biological and chemical weapons; international law relating to human rights and the environment; and General Assembly resolutions declaring the use of nuclear weapons to be illegal. These arguments are powerfully put, for instance in the

submission of the Solomon Islands, but clearly the application of these individual provisions and resolutions to nuclear weapons issues will be contested equally vigorously, as evidenced by the written submissions of States such as the United Kingdom and the United States.

5. We certainly consider that all these arguments are pertinent to the question. But the difficulty confronted by the Court in these proceedings is the impossibility in practice of it considering every conceivable situation in which a nuclear weapon might be threatened or used, and every conceivable permutation of surrounding circumstances, in order to determine each of the specific rules of international law which might be violated by such conduct.

6. Rather than focusing on these matters as separate and discrete issues, we submit that a more direct route to the same conclusion is to address the question whether there is some general principle today which would render the use or threat of nuclear weapons illegal per se. If so, any threat or use in any circumstances, irrespective of context, would be contrary to international law, on the basis that it is inconsistent with that principle. If such a general principle can be identified, the Court need not consider all of the different situations in which nuclear weapons might be threatened or used.

7. We submit that the principles of international law of most direct and obvious relevance to the legality of nuclear weapons are the general principles of humanitarian law. The existence of "fundamental general principles of humanitarian law", against which the conduct of States can be judged under customary international law, was recognized by this Court in the Military and Paramilitary Activities case. These "principles of humanitarian law" were also recognized in the Corfu Channel case, in which the Court referred to "certain general and well-recognized principles, namely: elementary considerations of humanity".

8. The major conventions on humanitarian law in armed conflicts, such as the 1899 and 1907 Hague Conventions, and the 1949 Geneva Conventions and 1977 Additional Protocols, are in some respects a reflection of these fundamental principles. However, the general principles of humanity recognized under customary international law, and the specific treaty obligations under humanitarian conventions, are not identical. Some conduct which is prohibited by a provision of one of these treaties may not be prohibited by customary international law. But equally, the fact that particular conduct is not proscribed by

any international treaty does not of itself enable the conclusion to be drawn that such conduct is consistent with general principles of humanitarian law. The general principles may in some respects be broader than any existing treaty provision, and may apply in situations in which there is no applicable treaty provision at all.

9. This is specifically recognized in the so-called "Martens clauses" in some of the humanitarian conventions. These provide that even in cases not covered by 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". Furthermore, while the conventions are directed to conduct in times of armed conflict, the Court made clear in the Corfu Channel case that the general humanitarian principles apply also in times of peace. Indeed, the Court said that they are "even more exacting in peace than in war". General principles of humanity pervade the whole of international law, not just the law of armed conflict.

10. Of course, neither the concept of humanity, nor the "dictates of public conscience" are static. Conduct which might have been considered acceptable by the international community earlier this century might be condemned as inhumane by the international community today.

11. Furthermore, even where the content of a particular principle of humanitarian law has been established, the practical application of that principle at any given time will depend on the circumstances of that time. For instance, one of the most fundamental and longest-standing humanitarian principles is the prohibition on employing weapons or methods of warfare of a nature to cause unnecessary losses or suffering. Yet while this principle has remained constant, its practical application has not and will not. The suffering inflicted by a particular type of weapon may be accepted as "necessary" in one age, but condemned as unnecessary in another. Such changes in the dictates of public conscience may have a number of causes. Advances in technology or changes in methods of warfare may provide alternatives to the use of weapons of that type. Or it may be that in a later age the level of suffering in warfare which the international community is prepared to tolerate is lower than the level which it tolerated previously.

12. In line with such changes in the attitude of the world community, over time

the permissible uses of one particular type of weapon may be progressively restricted, until finally prohibited altogether. In the case of chemical weapons, for instance, the 1899 Hague Declaration 2 only prohibited the use of projectiles the sole object of which was the diffusion of asphyxiating or deleterious gases. A general prohibition on the use of asphyxiating and poisonous gases, as well as on the use of bacteriological methods of warfare, was later embodied in the 1925 Geneva Protocol, which stated that the use in war of asphyxiating or poisonous gases "has been justly condemned by the general opinion of the civilized world". Subsequently, the mere possession of such weapons was made illegal under the terms of the 1972 Biological Weapons Convention and 1992 Chemical Weapons Convention.

13. Such an evolution would also be possible in the case of nuclear weapons, under general principles of humanitarian law. It is not part of our argument that the use or threat of nuclear weapons was per se contrary to international law at the end of the Second World War, or for some period thereafter. The practice of the nuclear-weapon States during the decades following the end of the Second World war, in acquiring, testing and deploying large numbers of nuclear weapons, and the acquiescence in this by their allies and other non-nuclear-weapon States, makes it difficult to argue that there was any rule of per se illegality dating back to the time of construction of the worlds first nuclear weapon. But the question whether the use or threat of nuclear weapons was illegal in the 1940s, or even in the 1980s, is not of particular significance for present purposes. Even if the use or threat of nuclear weapons was not per se inconsistent with elementary considerations of humanity and the dictates of public conscience in the past, this does not determine whether it is per se inconsistent with those principles today.

14. The issue before the Court is thus whether the point has now been reached at which it is possible to conclude that, whatever the position may have been in the past, the use or threat of nuclear weapons would now be contrary to fundamental principles of humanity, and hence, contrary to customary international law. If the answer to that question is yes, Australia considers that it is not necessary for the Court to attempt to fix the precise time at which customary international law reached this point, and this would probably not be possible in any event. Both questions on which advisory opinions have been requested are framed in the present tense. They are forward looking, and are not concerned with any conduct which has occurred in the past. They are concerned only with what the law is today, and what consequences it will have for States today and tomorrow.

## **Developments Establishing the Per Se Illegality of Nuclear Weapons**

Mr President, Members of the Court,

15. In order to answer the question whether nuclear weapons are now contrary to fundamental principles of humanity, it is necessary to look at a variety of developments which have occurred since 1945, including political, technological and social developments, as well as developments in the law.

16. **Evolving nuclear technology.** There have been continuous and profound developments since 1945. The immense suffering caused by nuclear weapons was apparent already from their use that year in Hiroshima and Nagasaki. However, at that time, the single nuclear power had a limited nuclear arsenal, and its delivery systems by today's standards were primitive. In subsequent years and decades, things changed quite rapidly. Vastly more powerful nuclear weapons were developed. New technologies also emerged to make weapons and their delivery systems ever more efficient and deadly. Huge arsenals of awesome destructive power were amassed in a seemingly never ending search for security based on the threat of mass devastation. At the peak of the Cold War, there were almost 80 000 nuclear warheads in existence. The point was reached early in the Cold War where all the nuclear weapons in the world had sufficient destructive power to destroy all life on the planet many times over.

17. There was also a progressive proliferation of nuclear technology. Within twenty years of the first atom bomb, the number of nuclear-weapon States grew from one to five. Since then, nuclear science and technology has spread to the point at which the acquisition of nuclear weapons would be a practical possibility for not only a large number of other States, but possibly in the future also for non-State entities and even criminal organisations.

18. The international community has been intensely concerned by these developments. Numerous General Assembly resolutions have expressed alarm at

the threat to the survival of mankind and to the life sustaining-system posed by nuclear weapons.

In 1981, the General Assembly recognized that

all the horrors of past wars and all other calamities that have befallen people would pale in comparison with what is inherent in the use of nuclear weapons capable of destroying civilisation on earth.

19. In terms of general principles of humanity, it was thus the collective existence of all such weapons, and the possibility of a global nuclear conflagration which they engendered, which became of foremost concern. It is not to the point that it may be possible to conceive of theoretical situations in which a nuclear weapon may cause no more damage than certain conventional weapons. The fact remains that the existence of nuclear weapons as a class of weapons threatens the whole of civilisation. This is not the case with respect to any class or classes of conventional weapons. It cannot be consistent with humanity to permit the existence of a weapon which threatens the very survival of humanity. The threat of global annihilation engendered by the existence of such weapons, and the fear that this has engendered amongst the entire post-War generation, is itself an evil, as much as nuclear war itself. If not always at the forefront of our everyday thinking, the shadow of the mushroom cloud remains in all our minds. It has pervaded our thoughts about the future, about our children, about human nature. And it has pervaded the thoughts of our children themselves, who are deeply anxious about their future in a world where nuclear weapons remain.

20. It is in any event today unlikely in practice that one nuclear weapon would be used in isolation: it would be academic and unreal for any analysis to seek to demonstrate that the use of a single nuclear weapon in particular circumstances could be consistent with principles of humanity. The reality is that if nuclear weapons ever were used, this would be overwhelmingly likely to trigger a nuclear war.

Mr President, Members of the Court,

21. **Evolving restrictions on nuclear activity.** In response to these realities, and to the dangers posed by nuclear weapons, there has been in fact intense international activity. In 1945, nuclear weapons were under no specific international controls at all, other than those applying to weapons generally.

Since then, progressive restrictions on the manufacture, acquisition, deployment, testing and military use of nuclear weapons have now been imposed by a series of universal conventions. Major milestones have been the establishment in 1957 of the International Atomic Energy Agency and the beginnings of international safeguards; the 1959 Antarctic Treaty; the 1963 Partial Test Ban Treaty; the 1967 Outer Space Treaty; the 1968 Nuclear Non-Proliferation Treaty (NPT); the 1971 Treaty on the Prohibition of the Emplacement of Nuclear Weapons and other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof; and the 1967 Treaty of Tlatelolco and 1985 Treaty of Rarotonga establishing nuclear-free zones in Latin America and the South Pacific respectively.

22. However, it is the eventual complete elimination of nuclear weapons that has become established as the primary goal of the international community. Article VI of the Nuclear Non-Proliferation Treaty made unequivocally clear the obligation of the nuclear weapons States to disarm:

Each of the Parties to the Treaty undertakes to pursue negotiations in good 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.

Commitment to the goal of elimination was reaffirmed, for instance, by the General Assembly in 1978 at its tenth special session on disarmament, in a resolution adopted without a vote which declared that:

Nuclear weapons pose the greatest danger to mankind and to the survival of civilisation. It is essential to halt and reverse the nuclear arms race in all its aspects in order to avert the danger of war involving nuclear weapons. The ultimate goal in this context is the complete elimination of nuclear weapons.

And that commitment was reaffirmed again, to take a more recent example, by the 1995 Non-Proliferation Treaty Review Conference, at which the States Parties reiterated their belief in the "ultimate goal of complete elimination of nuclear weapons".

23. To date, international efforts have not culminated in an international

convention banning the threat or use of nuclear weapons in all circumstances. However, this does not mean that the international community does not regard nuclear weapons as fundamentally inhumane or inconsistent with the dictates of public conscience. On the contrary, all the international efforts taken so far with the aim of ultimately eliminating nuclear weapons altogether suggest exactly the opposite. If nuclear weapons were perfectly compatible with general principles of humanity, there would seem little justification for such intense international effort aimed at their elimination.

24. Further evidence of the attitude of the international community can be found in a series of General Assembly resolutions dating back to 1961. In the first of these, resolution 1653, the Assembly declared that:

The use of nuclear and thermo-nuclear weapons is contrary to the spirit, letter and aims of the United Nations and, as such, a direct violation of the Charter of the United Nations.

The resolution declared further, in quite express terms, that:

The use of nuclear and thermo-nuclear weapons would exceed even the scope of war and cause indiscriminate suffering and destruction to mankind and civilization and, as such, is contrary to international law and to the laws of humanity.

This conclusion, that the use of nuclear weapons would be contrary to international law, has been expressed in a string of subsequent General Assembly resolutions, the last of which was resolution 49/75K requesting one of the present advisory opinions. In 1983, in a resolution entitled "Condemnation of nuclear war", the General Assembly "Resolutely, unconditionally and for all time" condemned nuclear war s being contrary to human conscience and reason, as the most monstrous crime against peoples.

Some of the General Assembly resolutions refer specifically to the prohibition of the "threat" of nuclear weapons, in addition to their "use".

25. The view has been expressed by at least one eminent scholar that resolution 1653 is an example of a "law-making" resolution of the General Assembly. It may well be that at the time it was adopted in 1961 it did not reflect established customary international law. Nevertheless, in view of the considerations to which

I have referred - in particular the threat to the whole of civilisation posed by nuclear weapons, the international commitment to the elimination of nuclear weapons and practical steps taken towards that end, and General Assembly resolutions declaring the illegality of nuclear weapons - it must be the case that at the very least, the illegality of nuclear weapons has been emerging as a principle de lege ferenda for some time. The question is whether it has yet finally established itself as lex lata. Australia submits that there have been a number of recent developments which justify the conclusion that this stage has now been reached.

Mr President, Members of the Court,

**26. International law of war and human rights.** A further development which merits attention in this respect is the significant change in the international community's attitude to war generally and to human rights. This of itself may have little direct bearing on the question of the legality or illegality of specific types of weapons, but is nonetheless important. A society which abhors war and condemns the use of force will have higher standards in assessing the humanity of weapons of warfare than a society which considers the use of force to be a permissible means of international dispute settlement. The preamble to the United Nations Charter expresses the determination "to save succeeding generations from the scourge of war". The prohibition on the use of force, enshrined in Article 2, paragraph 4, of the Charter, has since been continuously reaffirmed, and progressively more clearly articulated and defined in a series of authoritative General Assembly Declarations.

**27.** International standards of human rights must shape conceptions of humanity and have an impact on the dictates of public conscience. International concern for human rights has been one of the most characteristic features of this era of international law. The commitment to human rights in Charter provisions such as Articles 1, 55, 62 and 76, has been developed and reinforced by instruments such as the 1948 Universal Declaration of Human Rights and the 1966 Covenant on Civil and Political Rights and Covenant on Economic, Social and Cultural Rights, as well as specific conventions on acts such as torture. It is now accepted that the most fundamental human rights are now part of customary international law. The General Assembly in a resolution adopted in 1983, drew the connection between international human rights and nuclear weapons, when it condemned

nuclear war "as a violation of the foremost human right - the right to life".

**28. International civilian protection law.** Another area of the law in which there have been significant recent developments is that of the protection of the civilian population in times of armed conflict. A significant step further was taken as recently as 1977, with the adoption of 1977 Additional Protocol I to the Geneva Conventions. Australia, together with the bulk of the international community, believes that the essential terms of the Protocol should be regarded as reflecting customary international law. Article 51, paragraph 4, of this Protocol prohibits "indiscriminate attacks", defined to include

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 54, paragraph 2, provides that a Party may not

attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party.

Further, Article 57, paragraph 2 (b), prohibits attacks where it is apparent

that the attack 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.

Mr President, Members of the Court,

**29. International environmental law.** Yet another development relates to the growing appreciation since 1945 of the health and environmental effects of

nuclear weapons, and of the development of international law in these areas. Not only have scientific and medical advances increased our understanding of the effects of such weapons, but since 1945 the gravity of potential damage to the world environment and the health of its population has grown with the growth of the worlds nuclear arsenals. In 1987, the World Commission on the Environment and Development reported that

The likely consequences of nuclear war make other threats to the environment pale into insignificance. Nuclear weapons represent a qualitatively new step in the development of warfare. One thermonuclear bomb can have an explosive power greater than all the explosives used in wars since the invention of gunpowder. In addition to the destructive effects of blast and heat, immensely magnified by these weapons, they introduce a new lethal agent - ionising radiation - that extends lethal effects over both space and time.

30. The development of environmental protection as a discrete field of international law has been quite recent, dating back only so far as the United Nations Conference on the Human Environment in Stockholm in 1972. The United Nations Environment Programme, UNEP, was established only in 1973. It was only a few years later, in 1976, that the International Law Commission, in its consideration of State responsibility, expressed the view that conduct gravely endangering the preservation of the human environment violated principles

which are now so deeply rooted in the conscience of mankind that they have become particularly essential rules of international law.

Its draft Article 19(3)(d) on State Responsibility, adopted the same year, classifies massive pollution of the atmosphere or of the seas as an international crime. The significance of the developments in environmental law since then has been such that in 1993 this Court decided to establish a Chamber for Environmental Matters pursuant to Article 26, paragraph 1, of the Statute.

31. More specifically, in recent times the issue of the protection of the environment in armed conflict has been a particular international concern. In 1976, the General Assembly adopted the Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques.

This Convention prohibits

military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State party.

The 1977 Additional Protocol I to the Geneva Conventions prohibits, in Article 35, paragraph 3,

methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.

Article 55 prohibits more specifically

the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.

The preamble to the 1981 Conventional Weapons Convention recalls

that it is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.

International concern for the protection of the environment against damage from warfare was expressed also in the General Assembly's 1982 "World Charter for Nature", and the 1992 Rio Declaration on Environment and Development.

32. Indeed, consideration of lethal effects of radiation over time provides a link between the principle which provides for the protection of civilian populations and the principle which provides for protection of the environment. The development of the principle of intergenerational equity has been gathering pace over the last several decades, but as long ago as 1972 found expression in the Stockholm Declaration on Human Environment. The first principle of that Declaration speaks of a "solemn responsibility to protect and improve the environment for present and future generations". Future generations of humanity,

innocent in the conflict which may give rise to the use of nuclear weapons, must be afforded protection on the basis of this principle of intergenerational equity. There is opportunity for this Court, as guardian of the legal interests of succeeding generations, to recognize and apply this newly emerging principle.

33. All these recent developments in the law point to an international rejection of the use of nuclear weapons. It is not to the point whether or not any of these specific conventions or instruments specifically applies to nuclear weapons, or purports to make the threat or use of nuclear weapons per se illegal. The question is not whether the threat or use of nuclear weapons is inconsistent with any of these instruments, but whether the threat or use of nuclear weapons is per se inconsistent with general principles of humanity. All these instruments, whether they themselves apply to nuclear weapons or not, provide cumulative evidence that weapons having such potentially disastrous effects on the environment, and on civilians and civilian targets, are no longer compatible with the dictates of public conscience.

34. **The illegality of nuclear weapon possession.** However Mr President, Members of the Court, developments since 1945 also point to much more than this: the illegality not merely of the use or threat of use of nuclear weapons, but the illegality of their possession. The mere existence of such weapons, and their possession by States as part of their military arsenals, gives rise to the ever present threat of the outbreak of nuclear war.

35. The proponents of theories of limited nuclear war, and deterrence based on such theories, ask all of us to make assumptions about control over the use of weapons and human reliability in crisis management that cannot, in fact, be supported. Mistakes, accidents, loss of control are commonplace in human experience. Such events have occurred in the past when conventional weapons were being used. The costs have been high in terms of human lives, both armed and civilian. Such costs if nuclear weapons were involved would be vastly higher.

36. More critically, it has been utterly fundamental in debate about nuclear war fighting that proponents have insisted they could maintain escalation control. This is without credibility. An attempt to stop preponderant conventional force by use of tactical or battlefield nuclear weapons - so called "flexible response" - would, it is now widely recognized, involve crossing a nuclear threshold and thus attract a response with nuclear weapons, almost certainly more powerful. General Colin Powell, recording his reaction in 1986 to the question of a possible Soviet

attack upon Germany with conventional weapons, wrote in his recent autobiography about his scepticism that major civilian casualties, and subsequent escalation, could be avoided:

No matter how small these nuclear payloads were, we would be crossing a threshold. Using nukes at this point would mark one of the most significant political and military decisions since Hiroshima. The Russians would certainly retaliate, maybe escalate. At that moment, the world's heart was going to skip a beat. From that day on, I began rethinking the practicality of these small nuclear weapons.

37. If "small" nuclear weapons lack "practicality", what can be said of the others? In 1979, Lord Louis Mountbatten, former United Kingdom Chief of Staff said "As a military man I can see no use for any nuclear weapons". In 1982, another UK Chief of Staff, Field Marshall Lord Carver, wrote that he was totally opposed to NATO ever initiating the use of nuclear weapons. In 1979, Dr Henry Kissinger said in Brussels

Our European allies should not keep asking us to multiply strategic assurances that we cannot possibly mean or, if we do mean, we should not execute, because if we execute we risk the destruction of civilization.

In 1987, Helmut Schmidt said "Flexible response is nonsense. Not out of date, but nonsense". In 1982, Melvin Laird said "These weapons... are useless for military purposes". With nuclear weapons, the avoidance of "the destruction of civilization" rests upon an assumption of escalation control which cannot be made, not least because on at least one side it would involve - as again Dr Kissinger put it - what "we cannot possibly mean, or if we do mean, we should not execute".

38. Given this ever-present threat of destruction that is inherently associated with nuclear weapons, and the way in which that threat is now so universally understood, Australia submits that the attitude of the international community is that there are some weapons the very existence of which is inconsistent with fundamental general principles of humanity. In the case of weapons of this type, international law does not merely prohibit their threat or use. It prohibits even their acquisition or manufacture, and by extension their possession.

39. Such an attitude has been manifested in the case of other types of weapons of mass destruction. Both the 1972 Biological Weapons Convention and the 1992 Chemical Weapons Convention do not merely prohibit the use of biological and chemical weapons of mass destruction, but prevent their very existence. Under these conventions, States Parties are obliged never in any circumstances to acquire, retain, transfer or use such weapons, and are required to destroy all such weapons that they already possess. They are further prohibited from assisting other States from acquiring such weapons. Both conventions have widespread adherence. The Biological Weapons Convention has 131 States Parties. The very recent Chemical Weapons Convention has 159 signatories and already 40 ratifications or acceptances.

40. The final preambular paragraph to the Biological Weapons Convention expresses the conviction of the States Parties that the use of biological weapons

would be repugnant to the conscience of mankind and that no effort should be spared to minimize this risk.

Clearly, this is a strong international statement that the use of such weapons would be contrary to fundamental general principles of humanity. The approach of both conventions indicates a further conviction that the threats posed by certain types of weapons are so grave that they should be eliminated altogether, with their mere possession by a State made unlawful.

41. Although neither of these conventions applies to nuclear weapons, they are indicative. Nuclear weapons are the last of the trilogy of weapons of mass destruction, and overwhelmingly the most destructive of the three. They can be no more consistent with fundamental principles of humanity than the other two.

42. The international community has already clearly begun to go down the path of elimination of nuclear weapons in formal treaty law. The centrepiece of international efforts to combat the proliferation of nuclear weapons and to advance the cause of nuclear disarmament is the 1968 Nuclear Non-Proliferation Treaty, Article VI of which commits every State to general and complete nuclear disarmament. This treaty is of enormous practical significance in a number of respects, including the international safeguards mechanisms it provides to prevent diversion of nuclear material from peaceful uses to nuclear weapons or other nuclear explosive devices.

43. Insofar as the question of the present legality of nuclear weapons is concerned, it is Articles I and II of the Non-Proliferation Treaty which are of particular importance. Article II prohibits non-nuclear-weapon States from receiving the transfer of nuclear weapons or of control over such weapons, directly or indirectly, from any transferor whatsoever. It further prohibits non-nuclear-weapon States from manufacturing or otherwise acquiring nuclear weapons, or from seeking or receiving any assistance in the manufacture of nuclear weapons. The Article applies not only to nuclear weapons, but also to any other nuclear explosive devices. Article I of the Treaty imposes a corresponding obligation on the nuclear-weapon States not to transfer nuclear weapons to non-nuclear-weapon States, or to assist non-nuclear-weapon States to manufacture or acquire them.

44. Obligations under the Nuclear Non-Proliferation Treaty may have been no more than treaty obligations at the time it was concluded. However, over the years, the number of States Parties to the Treaty has steadily risen. By 1992, when China and France acceded to it, all five acknowledged nuclear-weapon States were Parties to it. It now has 180 States Parties, the vast majority of all States in the world. At the Nuclear Non-Proliferation Treaty Review and Extension Conference held in May this year, the Treaty was extended indefinitely by unanimous decision of the Conference of States Parties. In view of this widespread, indeed near universal, adherence to the Treaty; in view of the indefinite duration now of its provisions; and in view of all the other international activities and evidence (not least in the context of the hostile reaction world-wide to the continued weapons testing by France and China) manifesting the clearest conviction that nuclear weapons must ultimately be eradicated, Australia submits that Articles I and II of the Nuclear Non-Proliferation Treaty must now be regarded as reflective of customary international law.

45. Those two provisions, to adopt the terminology used by this Court, are provisions which have

constituted the foundation of, or [have] generated a rule which, while only conventional or contractual in its origin, has since passed into the general corpus of international law, and is now accepted as such by the opinio iuris, so as to have become binding even for countries which have never, and do not, become parties to the Convention.

For those States who are parties to the Non-Proliferation Treaty the conventional obligations and the corresponding obligations under customary international law, exist side by side.

46. If non-nuclear-weapons States cannot legally acquire such weapons, they cannot legally possess them. The possession of such weapons following their illegal manufacture or acquisition would be a continuing illegality. And if such States cannot lawfully manufacture or acquire such weapons, they cannot test them. Testing is in any event a step in the manufacture or acquisition of such weapons, or a use of them, both of which we have argued to be illegal. It is therefore illegal to acquire, develop, test, possess, or otherwise use or threaten to use nuclear weapons.

47. The right of States to self-defence cannot be invoked to justify such actions. The right to self-defence is not unlimited. It is subject to fundamental principles of humanity. Self-defence is not a justification for genocide, for ordering that there shall be no enemy survivors in combat or for indiscriminate attacks on the civilian population. Nor is it a justification for the use of nuclear weapons.

48. This prohibition under customary international law must apply equally to nuclear-weapon States and non-nuclear-weapon States. It is in the nature of rules of customary international law that they apply to all States alike. If humanity and the dictates of conscience demand the prohibition of such weapons for some States, it must demand the same prohibition for all States. And following the end of the Cold War, there can no longer be, if there ever was, any practical imperative for treating nuclear-weapon States and non-nuclear-weapon States differently. True, the Nuclear Non-Proliferation Treaty does not state that it is illegal for the nuclear-weapon States to continue to acquire, possess, test, threaten or use nuclear weapons. Indeed, it seems to assume they will do some or all of these things, at least for a period. However, it is also true that the Non-Proliferation Treaty confers no positive right on the nuclear-weapon States to continue to possess such weapons. Furthermore, the Treaty points to the ultimate aim of the complete elimination of nuclear weapons through general and complete nuclear disarmament. That Treaty cannot be seen as a bar to the emergence of a rule of customary international law which would fill the gap, making the threat or use of nuclear weapons illegal for nuclear-weapon States in the same way as for non-nuclear-weapon States.

## **The Obligation to Eliminate and the Principle of Stable Deterrence**

Mr President, Members of the Court,

49. Having reached this conclusion that the acquisition, development, testing, possession, use or threat of use of nuclear weapons is contrary to international law, it follows that all States are under an obligation to take positive action to eliminate completely nuclear weapons from the world. To implement this obligation, States which do not possess such weapons cannot lawfully acquire them, and States which do possess nuclear weapons cannot add to, improve or test them. States which possess nuclear weapons must be subject to an obligation to eliminate their existing weapons. They must within a reasonable timeframe take systematic action to eliminate completely all nuclear weapons in a manner which is safe, and does not damage the environment.

50. International law must nonetheless deal with the reality of the present existence of large stocks of nuclear weapons. It is accordingly necessary and appropriate that during the course of the elimination process the principle of stable deterrence be maintained: this would enable for that period the possession or threat of use of nuclear weapons for the sole purpose of ensuring that nuclear weapons are never used by others. Given the inherently illegal nature of nuclear weapons, such deterrence can only be a temporary necessity, and can never make lawful the indefinite possession or threat of use of nuclear weapons.

51. At the time that the nuclear-weapon States acquired nuclear weapons, their possession and deployment, threat or even use, may not yet have been illegal per se. But, having acquired them, international law then changed. It must be accepted that this gives rise to practical difficulties. The nuclear-weapon States have structured their defence policies on the basis of the existence of their own nuclear arsenals, and those of the other nuclear-weapon States. The defence policies of the nuclear-weapon States are based on the principle of stable deterrence. That is, the simultaneous possession of nuclear weapons by the nuclear-weapons States, and the mutually assured destruction which would result from any use of such weapons, deters their use at all. In these circumstances, one nuclear-weapon State cannot be expected unilaterally to undertake a complete nuclear disarmament. This would undermine the basis of the policy of deterrence, and if anything would make the actual use of nuclear weapons more, rather than

less likely. We cannot foresee the future, and should never assume the projection into the indefinite future of present conditions. If the prospect of any nuclear-weapon State initiating a nuclear attack on a nuclear disarmed State looks far-fetched now, it might not be so at some time in the future.

52. Consistently with this conclusion, Australia, together with many other governments, supports the principle of stable nuclear deterrence pending complete nuclear disarmament. However, we state again that stable deterrence can only be accepted as an interim or transitional condition - ie. until the complete elimination of nuclear weapons accompanied by substantial verification provisions is achieved.

53. On the question of verification, it is perhaps worth making the point that, on the evidence of the now successfully concluded Chemical Weapons Convention, a comprehensive and effective verification regime is both practical and achievable. The nature of the technology and associated commercial industry involved makes the detection of chemical weapons manufacture and possession very much harder than would be the case for nuclear weapons. If verification is possible for chemical weapons, making it possible in due course to rid the world of this whole class of weapons of mass destruction, then there is no reason why it should not be possible for nuclear weapons.

54. During this transitional phase of negotiated nuclear disarmament, the nuclear-weapon States remain under a legal obligation to continue to negotiate in good faith with other States, and otherwise to make every possible effort to achieve complete nuclear disarmament within a reasonable timeframe. Such a "duty to negotiate" under customary international law is not unprecedented. An analogous duty exists in customary international law relating to continental shelf delimitations between neighbouring or opposite coastal States. In that context, this Court has referred to the existence of a "duty to negotiate with a view to reaching agreement, and to do so in good faith, with a genuine intention to achieve a positive result".

55. State practice is consistent with, and confirms these conclusions. As has been seen, Article VI of the Nuclear Non-Proliferation Treaty imposes an obligation on the nuclear-weapon States, and on all other Parties to the Treaty, to pursue negotiations in good 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. At the 1995 Non-Proliferation Treaty Review and Extension Conference, the nuclear-weapon States reaffirmed

their commitment, as stated in article VI, to pursue in good faith negotiations on effective measures relating to nuclear disarmament.

The ultimate goal of eliminating those weapons was also reaffirmed.

Mr President, Members of the Court,

56. During this transitional phase, all States, including the nuclear-weapon States are prohibited by customary international law from engaging in any action inconsistent with this commitment. They cannot introduce new nuclear weapons. They cannot refine their existing stockpiles. They cannot engage in action intended to ensure maintenance of their nuclear arsenals indefinitely into the future.

57. In particular, the testing of nuclear weapons under any circumstances must now be prohibited. Not only is testing a "use" of nuclear weapons, and therefore subject to the primary obligation, but testing for the purpose of developing new nuclear weapons or for refining existing weapons would clearly be illegal, as they are directed to enhancing nuclear armaments, rather than eliminating them. However, even testing for the purpose of maintaining existing stockpiles would be inconsistent with the obligation, since such conduct is aimed at extending the period in which the status quo can be maintained. The argument that some testing of existing stocks may continue to be necessary during the transition period in order to ensure the basic physical safety of those weapons legitimately retained for balanced deterrence purposes, is belied by the acceptance in principle by all nuclear-weapon States of the conclusion, as early as next year, of a genuinely comprehensive Comprehensive Test Ban Treaty (CTBT) which would allow no such tests. France has argued that it needs to conduct tests now to ensure the safety of its stockpile after the CTBT is concluded. But this argument has manifestly failed to win wider international acceptance - no doubt because it is well-known that safety can be maintained through computer simulation, and widely believed that France has, or could have if it chose, access to all relevant data.

58. It follows that continued nuclear testing by France and China runs directly

counter to the obligations that I am talking about. It also runs counter to the express undertakings of France and China, and the other nuclear-weapon States, at the recent NPT Review and Extension Conference, when they undertook to exercise "utmost restraint" in nuclear testing pending the entry into force of a comprehensive test ban treaty. The actions of France and China have been regarded by the overwhelming majority of the international community as a clear betrayal of this undertaking, accepted in good faith by the international community.

59. Yet testing goes on. Only three days ago France exploded a third nuclear device in the South Pacific. The device tested was over four times the size of the Hiroshima bomb. Frances testing is an affront to the peoples of the South Pacific, whose desire, clearly established in the Treaty of Rarotonga, is to live in a nuclear free region. It is also an affront to the commitment of the South Pacific to nuclear non-proliferation and nuclear disarmament, and a betrayal of their strong support for the indefinite extension of the NPT. And it is an affront to the entire international community, as Australia has consistently and forcefully maintained since the test series was announced.

60. As I indicated at the outset, specific uses of nuclear weapons in particular cases may also violate rules of international law other than those to which I have referred in this part of our argument. For instance, the Court will recall that earlier this year Australia and four other States applied for permission to intervene in proceedings brought by New Zealand against France. Had we been permitted to intervene, Australia proposed to argue that the current French nuclear tests in the Pacific are a violation by France of erga omnes obligations relating to the protection of the marine environment. That case was concerned with the environmental effects of the French nuclear tests, and Australia, as an applicant for permission to intervene, did not seek to broaden the scope of the proceedings because we could not in the context of that particular case. However, for the reasons I have given, irrespective of the environmental effects, Australias position is that the testing of nuclear weapons is now per se illegal under customary international law.

## **Achieving Elimination in Practice**

Mr President, Members of the Court,

61. Consistent with the obligation to negotiate to which I have referred, substantial political efforts to further the process of nuclear disarmament are now under way, which Australia fully supports. The main challenge for the international community over the coming years will be to ensure that the recent achievements in nuclear disarmament are locked in and that the downward trend in nuclear arsenals, reversing the forty years of the nuclear arms race, is continued and broadened, until complete elimination of nuclear weapons has been achieved.

62. We should be under no illusions about the size of the task of nuclear disarmament which confronts the international community. More than 40,000 nuclear warheads exist in the world today, with a total destructive power around a million times greater than that of the bomb that flattened Hiroshima. Under START I, the United States and Russia have agreed to nuclear reductions which are seeing each country dismantle some 2,000 warheads annually. But Russia's stockpile is much greater: around 25,000 warheads, compared with some 15,000 for the United States. A further 1,000 are possessed by the other three nuclear-weapon States, the United Kingdom, France and China. If the reductions envisaged under START I are achieved, this will still leave some 20,000 nuclear warheads. At their present rate, the United States and Russia will have reached their START I targets in about ten years. Under START II, both parties have agreed to further deep cuts. But even if the dismantlement schedules can be maintained, the five nuclear-weapon States by 2003 would still have around 12,000 warheads. As agreed by Presidents Bush and Yeltsin, the United States would then have a maximum of 3,500 strategic warheads each: the balance would be made up of the approximately 1,000 strategic warheads held by the United Kingdom, France and China, which I have just mentioned, and the tactical warheads held by all nuclear-weapon States.

63. The task of these reductions requires a major commitment from the nuclear weapon States. The task does not end with the dismantlement of weapons. There are further processes that will have to be pursued. The components need to be destroyed. The weapons grade nuclear material needs to be burnt in reactors, or diluted for peaceful nuclear use. At the stage of dismantlement, the nuclear-weapon States have a special responsibility for accounting for and protecting the components and weapons grade material.

64. The START agreements undoubtedly represent a major leap forward in reducing the threat of nuclear conflagration. But they clearly do not remove that threat. The world still needs, if we are to achieve the complete elimination of nuclear weapons within a reasonable timeframe, a practical program of nuclear reductions to which all five nuclear-weapon States are committed, and which they will pursue in good faith and with renewed vigour.

65. Much work clearly needs to be done to identify what that reasonable timeframe would in practice be. We do not ask that the Court itself attempt to tackle that task: it is enough that the basic principle be articulated. But I can advise the Court that Australia is prepared to do everything it can to advance knowledge of what is both desirable and possible in this respect. Prime Minister Paul Keating announced last week that we would establish a group of knowledgeable, imaginative and distinguished individuals from around the world to produce a report on how to achieve a nuclear weapons free world as soon as possible, outlining the practical steps that would need to be taken to achieve that goal.

66. The first multilateral step towards the elimination of nuclear weapons will clearly be the CTBT, which we hope and expect will be concluded next year. The CTBT will be a major impediment to the development of new generations of nuclear weapons by the nuclear-weapon States. Without nuclear testing, the nuclear-weapon States ability to modernise their arsenals - by developing new weapons designs, and modifying existing designs - will be seriously constrained. A CTBT will thus break the spiral of qualitative competition between the nuclear-weapon States and open the way for further nuclear weapons reductions. Cessation of nuclear testing will furthermore mean that the nuclear-weapon States will find it difficult to maintain the expertise and facilities to develop more sophisticated nuclear warheads.

67. The next multilateral step after a CTBT will be persuading those countries which have produced fissile material for weapons to cease doing so permanently and accept international supervision of their sensitive nuclear material production facilities so that there is no future increase in the supply of such material for use in nuclear arsenals.

68. This will be achieved by the negotiation of a "cut-off" Convention banning the production of fissile material for weapons. The enrichment and reprocessing

facilities in nuclear-weapon and nuclear threshold States would be either placed under international inspection or dismantled. This would be a major step forward towards the application of international safeguards to all nuclear activities in these States.

69. Further nuclear arms reductions treaties will need to be progressively negotiated by the United States and Russia, with moves made as early as possible to involve the five nuclear-weapon States. This process of negotiation and implementation of nuclear arms reduction treaties adds an essential element of confidence between the States concerned and prepares the ground for further reductions. Through transparency and mutual, as well as international, inspection will come confidence, experience and the development of control measures which will provide the essential framework for the safe, secure total elimination of nuclear weapons. Added transparency would also come from the development of a regime requiring all States to declare and account for their present stocks of fissile material. The universal acceptance of non-proliferation obligations through membership of the NPT will also be essential for this process.

70. When the world is approaching the total elimination of nuclear weapons, there will be a need to address the legal obligations of nuclear-weapon States under the NPT and the nature of the application of international safeguards on their peaceful nuclear activities. Clearly safeguards measures will have to take into account the fact that the States concerned have detailed knowledge about the design and production of nuclear weapons.

## **Conclusion**

Mr President, Members of the Court,

71. So long as nuclear weapons exist, humanity faces the risk they might be used. The prevailing military doctrines justifying the acquisition of nuclear weapons have rested upon the notion of their utility as deterrents - that the possibility they might be used will ensure that an attack with nuclear or, in some cases conventional, weapons, will not occur. This notion itself rests absolutely upon recognition of the unique destructive power of nuclear weapons, on the profound difference between them and conventional weapons.

72. As was hideously demonstrated at Hiroshima, where a relatively minuscule atomic bomb was detonated, and as the release of radiation by the Chernobyl disaster showed to our horror, any use of nuclear weapons, anywhere at any time, would be devastating and in no way comparable to any use, in whatever magnitude, of conventional weapons. The 12,000 warheads that will be left in 2003, assuming START II has been implemented by then, will be enough, it has been credibly estimated, to destroy more than ten times over human society and the planetary environment as we have known it - through a combination of blasts, shock-waves, ionising radiation and impact upon the ionosphere and climate.

73. Australia submits that the answer to these concerns that is demanded by law, by rationality, by morality and by humanity is verifiable and effective nuclear disarmament, pursued without delay and under conditions of stable deterrence. This Courts unique ability to advise on the law in this context is of the deepest historic importance because, if you are minded to address the substantive issues raised in the questions before you, your advice can and will materially effect the achievement of that nuclear disarmament.

I thank you, Mr President and Members of the Court, for your kind attention.