

Nukes on Trial

By JOHN BURROUGHS and JACQUELINE CABASSO



November 1995: World Court Project members line up outside the Peace Palace, The Hague, Netherlands; inside, the World Court considers the legality of nuclear weapons.

When the U.N. General Assembly unanimously called for “the elimination from national armaments of atomic weapons” in 1946, there was only one nuclear power and the number of atomic weapons could be counted on the fingers of one hand. Today there are eight nuclear powers and the world arsenal numbers at least 40,000 weapons. In the United Na-

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tions and in the context of the Nuclear Non-Proliferation Treaty (NPT), the five “declared” nuclear states have successfully resisted efforts to subject their monopoly to international control, conceding only an NPT obligation—with no deadline—to reduce nuclear arsenals with the “ultimate” goal of their elimination.

Frustrated in those arenas, non-nuclear countries mounted a challenge to nuclear weapons in the judicial branch of the United Nations, the International Court of Justice, popularly known as the World Court. The court is expected to respond soon to requests for a non-binding advisory opinion on whether the threat of use

or the actual use of nuclear weapons is prohibited under international law. The World Court initiative is an attempt by non-nuclear states to bring another international institution into play. “Our recourse to the court now, with the full support of civil society, is tantamount to a last appeal for justice,” Tan Sri Razali Ismail, Malaysia's representative to the United Nations, told the court.

In November 1995, two weeks of extraordinary hearings were held before the court in The Hague, Netherlands. The significance of the case was reflected in intense arguments on both sides and the unprecedented participation of 45 states. Twenty-

two made oral presentations at the hearings, and another 23 submitted written statements.

More than two-thirds of the presentations contended that nuclear weapons are instruments of mass destruction whose effects are inherently indiscriminate and uncontrollable, and therefore illegal. The nuclear states countered that there is no treaty explicitly banning use of nuclear weapons comparable to conventions on chemical and biological weapons. Whether nuclear use is legal, they said, depends on the circumstances of each case and cannot be prejudged.

One of the questions before the court is whether the use of nuclear weapons violates international law in view of its health and environmental consequences. In 1993, despite determined opposition by the nuclear states, non-nuclear countries mustered a majority in the World Health Organization (WHO) in support of a request for an advisory opinion on that question. In 1994, the General Assembly followed suit, posing the broader question of whether it is permissible to use or threaten to use nuclear weapons in any circumstance. The General Assembly request was intended in part to overcome objections to the standing of the WHO in raising a question involving issues of peace and security.

The decisions of the WHO and the General Assembly to bring these issues before the court reflect the growing influence of non-governmental organizations (NGOs). Working with the Non-Aligned Movement, a group of NGOs known as the World Court Project lobbied hard to secure majorities within the WHO and the General Assembly to request advisory opinions. The NGOs also assisted several non-nuclear states in preparing arguments.

In crafting an opinion, the court will, in effect, be choosing between a General Assembly majority that has long condemned nuclear weapons as illegal and called for their abolition, and the Security Council, controlled by the nuclear-armed permanent five, which has the real decision-making power within the United Nations. Citing a Swahili proverb that says "when the elephants fight, it is the grass that suffers," Egypt's advocate,

Prof. George Abi-Saab, told the court that the case reflects the desire of the "nuclear grass in the General Assembly" to clarify "the legal limits on the freedom of the elephants."

The right venue?

The United States, Britain, and France, along with NATO states Germany and Italy, contended that the court should refrain from assessing the legality of nuclear weapons because the questions posed by the WHO and the General Assembly are too abstract and hypothetical for judicial analysis. Alain Pellet, professor of international law at the University of Paris, argued for France that the court has been "placed in the position of a mathematician asked to solve an equation containing an infinite number of unknowns."

But the non-nuclear countries argued that it is the duty of the World Court, as a U.N. organ, to respond to the General Assembly and the WHO. "To postpone giving a legal opinion on

the threat or use of nuclear weapons until an actual case occurs is like substituting medicine with an autopsy," said Mexican Undersecretary of Foreign Relations Sergio González Gálvez.

Some skeptics suggest that an advisory opinion finding the threat or use of nuclear weapons to be prohibited or restricted would have little effect. This seems too pessimistic. While such an opinion would not be directly binding on states or on the United Nations, it could spur efforts to seek nuclear abolition within the General Assembly and the NPT regime, and boost non-governmental anti-nuclear activism. In addition, the nuclear states have repeatedly acknowledged that use of nuclear weapons is subject to legal requirements. They would have to take account of an interpretation of these requirements by the highest and most authoritative court in the world on questions of international law.

Speaking for the Solomon Islands, James Crawford, professor of in-

The World Court Project

In 1986, Richard Falk, a professor of international law at Princeton University, met with activists in New Zealand and suggested that obtaining an opinion from the World Court could advance the effort to achieve a nuclear-weapon-free world. The initiative eventually attracted the support of the International Physicians for the Prevention of Nuclear War, the International Association of Lawyers Against Nuclear Arms, and the International Peace Bureau, which collectively formed the World Court Project.

In addition to being instrumental in bringing the case before the court, the World Court Project circulated model briefs drafted by its lawyers that some non-nuclear countries used in making written submissions. At the hearings, World Court Project lawyers and activists consulted with several non-nuclear states concerning their presentations. They also staffed an information clearinghouse, preparing daily updates for distribution internationally to supporters and the press.

More than 700 groups from countries around the world endorsed the World Court Project. Many lent their support by lobbying their governments to vote for the WHO and General Assembly requests for an advisory opinion and collecting "declarations of public conscience" condemning nuclear weapons as immoral and therefore illegal. These statements were inspired by the Martens clause in the Hague and Geneva Conventions, which provides that in the absence of a specific prohibition, the legality of a means of warfare is assessed in light of the "dictates of the public conscience." More than 1.5 million declarations, mostly from Japan, were presented to the court in October 1995.

ternational law at the University of Cambridge, said, "For the court to declare that the use or threat of use of nuclear weapons is unlawful in all conceivable circumstances would contribute to a solution to one of our greatest modern problems."

In addition to its potential impact on the nuclear status quo, the case could be pivotal in the development of the World Court. A comprehensive condemnation of nuclear threat or use would offend powerful states whose approval the court desires and whose participation it needs if it is to assist in the resolution of other important international disputes. "An opinion of the court on this particular question," Harmut Hillgenberg of the German Ministry of Foreign Affairs told the court, "might affect its integrity in the eyes of the international community and give rise to discussions as to the judicial functions of the court."

But a refusal to answer the questions would mark a retreat from critical issues, indicating an acceptance of a marginal institutional role. It also would offend the General Assembly majority, which controls funding for the court and which together with the Security Council elects the judges.

Mexico's González Gálvez reminded the judges that many states in the developing world are suspicious of the court and reluctant to accept its jurisdiction, viewing it as an instrument of an international legal order that is Eurocentric in origin and supportive of developed states in practice. The court has taken some steps away from this practice. In its 1986 decision in a case brought by Nicaragua against the United States, the court dared to challenge U.S. support of the *contras*, enhancing its reputation with developing states. It is unclear, however, whether the court is willing to make a similarly bold move with respect to the entire nuclear club.

Despite their proclaimed independence and impartiality, World Court judges generally follow the positions and interests of their countries. Because of a recent death, the 15-member court currently has only 14 judges. By custom, the judges include representatives from the permanent five of the Security Council. The remaining nine judges are from Italy, Germany, Japan, Algeria, Madagascar, Sri Lanka, Guyana, Hungary,

and Sierra Leone. The president, Mohammed Bedjaoui of Algeria, would cast the deciding vote in the event of a tie.

Six of the judges are from countries that argued that the court should either abstain from deciding the questions or find that nuclear use could be legal in some circumstances. Though not a majority, judges from the United States, Britain, France, Russia, Germany, and Italy could be instrumental in shaping an opinion that does not unduly antagonize the nuclear states. The Chinese judge, Shi Jiuyong, and the Japanese judge, Shigeru Oda, bear watching. China did not participate in the case, but has declared in other forums its commitment to no first use and an early conclusion of an abolition convention. That position is largely consistent with illegality, although it admits the possibility of nuclear reprisal. It is hard to conceive of a judge from Japan endorsing the legality of using nuclear weapons. The Sri Lankan judge, Christopher Weeramantry, is already on record, having written a scholarly analysis of the illegality of nuclear weapons.

The sides line up

Australia and New Zealand joined such Non-Aligned Movement states as Costa Rica, Egypt, Indonesia, Iran, Malaysia, Mexico, the Philippines, and Zimbabwe in making powerful arguments before the court for illegality.

Australia's strong stand, made on the opening day of the hearings, was especially remarkable in view of the nation's integration into U.S. strategic plans. Australian Minister of Foreign Affairs Gareth Evans declared that it is "illegal not only to use or threaten use of nuclear weapons, but to acquire, develop, test, or possess them." Effectively challenging current programs to maintain and develop weapons absent underground testing, Evans argued that the nuclear states "cannot add to [or] improve" their weapons or "engage in action intended to ensure maintenance of their nuclear arsenals indefinitely into the future." Instead, nuclear countries "must, within a reasonable time frame, take systematic action to eliminate completely all nuclear

weapons."

Australia's far-reaching position reflected outrage over resumed French testing and intensified anti-nuclear sentiment in the Pacific. But its analysis also contained contradictions reflecting its role as a close U.S. ally. While Evans made clear that Australia would welcome an opinion condemning all uses of nuclear weapons, in brief opening remarks Australian Solicitor General Gavan Griffith supported the nuclear states' view that the questions before the court involve too many factual unknowns to admit proper judicial assessment. Evans also endorsed "stable deterrence" pending nuclear disarmament. The practical implications of this endorsement emerged plainly in a post-argument press conference in which Evans said that Australia will continue to cooperate with U.S. nuclear forces.

New Zealand's Attorney General Paul East told the court that the NPT has "delegitimized" nuclear weapons by banning their acquisition by most states and committing the nuclear states to their elimination. "The agreed premise of the treaty," he said, "is that a world free of nuclear weapons would be a better and more secure place."

Anti-nuclear views were also voiced by another U.S. ally, Japan, which took an ambivalent stance reflecting the tension in that country between reliance on the U.S. nuclear umbrella and a powerful abolition movement. While saying that "the use of nuclear weapons is clearly contrary to the spirit of humanity that gives international law its philosophical foundation," Takekazu Kawamura, director general for arms control and scientific affairs, stopped short of arguing for illegality. He presented the mayors of Hiroshima and Nagasaki to introduce evidence of their cities' tragic experiences, but noted that their statements would be made "independently of the position of the Japanese government." Hiroshima Mayor Takashi Hiraoka concluded, "It is clear that the use of nuclear weapons, which cause indiscriminate mass murder that leaves survivors to suffer for decades, is a violation of international law."

The force of the anti-nuclear case was bolstered by the care exhibited

not only by mid-range and large states but by the Pacific Island nations, which expended tremendous resources given their small size. Samoa, the Marshall Islands, and the Solomon Islands made coordinated

presentations featuring prominent international lawyers. The Marshall Islands representative gave the nuclear threat a human face by introducing Lijon Eknilang, an indigenous woman from Rongelap Atoll, who described

the effects of her community's exposure to radiation from the U.S. "Bravo" test, including the birth of "jellyfish" babies with no bones and transparent skin. The Solomon Islands representative also read a statement about the intrinsically indiscriminate nature of nuclear weapons by Joseph Rotblat, the 1995 Nobel Peace Prize winner and rapporteur for WHO studies of the effects of nuclear war on health and health services.

Notably absent from the case, however, were several important "threshold" and non-nuclear states. Pakistan, Israel, Argentina, and Brazil did not participate. India, which despite its nuclear weapons capability had made written arguments for illegality, withdrew from the hearings. At the last moment, Colombia, the 1995 head of the Non-Aligned Movement, also withdrew. South Africa, which was prominent in forging the April 1995 compromise package that made the NPT permanent while reaffirming the nuclear disarmament obligation, did not participate. Nor did Canada, although it had spoken eloquently of the need for nuclear disarmament while lobbying for votes to support the NPT's indefinite extension.

The debate

"History is written by the victors. Thus, the heinous massacre that was Hiroshima has been handed down to us as a perfectly justifiable act of war. As a result, for over 50 years we have never directly confronted the full implications of this terrifying act for the future of the human race."

—*Takashi Hiraoka, Mayor
Hiroshima, Japan*

"Nuclear weapons, as is true of conventional weapons . . . can be targeted in ways that either increase or decrease resulting incidental civilian injury or collateral damage; and their use may be lawful or not depending upon whether and to what extent such use was prompted by another belligerent's conduct."

—*John McNeill, Senior Deputy General Counsel
U.S. Defense Department*

"Any use of nuclear weapons will unlawfully cause unnecessary suffering and cannot discriminate between civilian and military targets; will violate many fundamental human rights, especially the right to life of present and future generations; and will violate basic environmental norms. . . . The experience of the Marshallese people confirms that . . . human populations which are hundreds, or even thousands, of miles from a nuclear blast may be caused to suffer serious injury, death after prolonged illness, and severe birth defects."

—*Theodore Kronmiller, Legal Counsel
Marshall Islands Embassy to the United States*

"Since the Second World War, the concept of deterrence has been fundamental to the maintenance of the peace and security of a substantial number of states. Not only the nuclear powers themselves, but many non-nuclear states have sheltered under the umbrella of these weapons."

—*Nicholas Lyell
Attorney General, Britain*

"The argument that the threat of use of nuclear weapons has prevented nuclear war is unprovable and speculative in the extreme. Precisely the contrary argument could be made, albeit also in a speculative mode; namely, that deterrence has several times brought the world to the brink of nuclear war and will continue to do so."

—*Johannes Berchmans Soedarmanto Kadarisman
Indonesia's Ambassador to the Netherlands*

"Five countries cannot arrogate to themselves forever the exclusive privilege of having their fingers on the nuclear trigger. . . . If the laws of humanity and the dictates of the public conscience demand the prohibition of such weapons, the five nuclear-weapon states, however powerful, cannot stand against them."

—*Tan Sri Razali Ismail
Permanent Representative to the United Nations, Malaysia*

Arguments take shape

Citing the rules regulating the conduct of war codified in the Hague and Geneva Conventions and Protocols, non-nuclear countries argued that protecting civilians, the environment, and succeeding generations from the effects of warfare precluded the use of nuclear weapons in any circumstance. The law of war, they stressed, applies equally to all sides of a conflict, to the defender as well as the aggressor state. "The right to self-defense is not unlimited. . . . Self-defense 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," said Australia's Evans.

In response, the nuclear states acknowledged that nuclear weapons, like any weapons, are subject to the law of war. "Restrictions set by the rules applicable to armed conflicts in

respect of means and methods of warfare definitely also extend to nuclear weapons," said A.G. Khodakov of the Russian Ministry of Foreign Affairs. But, the nuclear states alleged, compliance is possible. Thus British Attorney General Nicholas Lyell said a nuclear attack could be permissible because "the greater the military advantage which can be reasonably expected . . . the greater the risk of collateral civilian casualties which may have to be regarded as within the law." This approach would validate a wide range of attacks, notably on an enemy's nuclear forces. It was effectively rebutted by Zimbabwe's representative, Jonathan Wutawunashwe. Citing a Red Cross interpretation, he argued that Protocol I to the Geneva Conventions prohibits attacks that cause extensive civilian casualties, regardless of justification.

In addition to relying on the law of war, representatives of the Solomon Islands and several other non-nuclear states contended that the effects of radioactivity on people far removed in space and time from hostilities render the use of nuclear weapons illegal under human rights law and environmental law. The nuclear states dismissed this argument, ignoring that nuclear explosions escape the bounds of war and thus implicate laws intended primarily for peacetime. Human rights treaties, said Russia's Khodakov, "exist in a quite different dimension" and "were not designed with a view to covering situations in which nuclear weapons could be used."

Non-nuclear countries also claimed that though there is no express treaty prohibition on the threat or use of nuclear weapons, a "customary" prohibition akin to a common law standard has emerged. State practice and legal opinion demonstrating the norm, they argued, are embodied in scores of General Assembly resolutions over three decades; the illegality of possession or use of nuclear weapons in most parts of the world under the NPT, regional nuclear-weapon-free zones, and negative security assurances; and 50 years of non-use since Hiroshima and Nagasaki.

The nuclear states were on somewhat more solid ground in denying the existence of a customary norm

than they were in arguing compliance with the law of war. There is no international consensus on illegality, the nuclear states argued, because they and their allies have consistently opposed General Assembly resolutions and made nuclear weapons central to their security postures. The NPT, the nuclear states stressed, recognizes their present possession of nuclear weapons while placing no limitations on nuclear threat or use.

"The conduct and publicly stated views of many states reflect that they do not recognize a general legal obligation to refrain from using nuclear weapons," explained U.S. State Department lawyer Michael Matheson. "Each of the permanent members of the Security Council has made an immense commitment of human and material resources" in nuclear weapons, upon which "many other states have decided to rely for their security."

Another U.S. advocate, Defense Department lawyer John McNeill, said "the policy of nuclear deterrence has saved many millions of lives from the scourge of war during the past 50 years." He added, "In this special sense, nuclear weapons have been 'used,' defensively, every day for over half a century—to preserve the peace."

Deterrence spotlighted

As McNeill's remarks illustrate, a central strategy of the nuclear states was to attempt to shift the debate by claiming that nuclear weapons are not military means to wage war but rather political instruments to prevent war. Marc Perrin de Brichambaut of the French Ministry of Foreign Affairs asserted that France's policy of deterrence has "contributed, for several decades, to maintaining that essential asset, world security and peace." He went so far as to "warn" the court against interfering with deterrence. Similarly, Britain's Lyell said that "to call in question now the legal basis of the system of deterrence on which so many states have relied for so long . . . could have a profoundly destabilizing effect."

The non-nuclear countries took differing approaches to the deterrence rationale. Costa Rica's representative Carlos Vargas Pizarro refuted it head-on. "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."

In contrast, the Solomon Islands' Crawford contended that because the issue of possession of nuclear weapons is not before the court, the court need not challenge deterrence. Nuclear use or a specific threat of use is prohibited, he argued, but merely maintaining the capability—and hence implicitly deterring potential enemies—is permissible. A similar but more narrowly defined attempt to accommodate deterrence was Australia's endorsement of "stable deterrence," pending elimination of nuclear arsenals, for the sole purpose of ensuring that the weapons are never used.

Inadvertently revealing the weakness of deterrence doctrine, the United States responded that supporting deterrence while declaring the illegality of nuclear use is contradictory. "If these weapons could not lawfully be used in individual or collective self-defense under any circumstances," said the State Department's Matheson, "there would be no credible threat of such use in response to aggression and deterrent policies would be futile and meaningless."

Over the two-week period of arguments last November in The Hague, such assertions from the nuclear states exposed their continuing reliance on a threat of mass destruction—just six months after the indefinite extension of the NPT was secured by a vague promise to pursue the reduction and eventual elimination of nuclear arsenals. Faced with an onslaught of powerful arguments backed by decades of condemnation of nuclear weapons by most of the world, the nuclear states were placed in the position of proclaiming that "nuclear weapons are legal as long as we say so." In the longer term, this stance may prove unsustainable, regardless of whether the court issues an opinion finding nuclear weapons illegal. ■