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The World Court & The Legality of Use of Nuclear Weapons

In November, the International Court of Justice in the Hague, a.k.a., the World Court, heard two dozen States plead on the question posed by the General Assembly of the United Nations:

"Is the threat or use of nuclear weapons in any circumstance permitted under international law?"

Although only States can plead before the World Court, FAS played a most effective role in shaping public and Court opinion.

The FAS Council, backed by a dozen FAS experts, approved a "Declaratory Proposition", designed by FAS President Stone, that embodied a practical and effective outcome the Court could, if it wished, reach. This proposition concludes that "first-use" of nuclear weapons is unlawful.

States Pleading Were Confused

By contrast, the various States pleading were, instead, divided into two polarized camps: one urging the Court to avoid the issue on technical or jurisdictional grounds and the other--backed by the NGO "World Court Project"-- urging the Court to conclude that even the threat of ("second-strike") retaliatory use of nuclear weapons was banned.

The FAS Executive Committee approved an "amicus brief" containing the idea, and sent it to the Court; to be sure it registered with the Court, Stone published the gist of the amicus brief, on the second day of the Court's proceedings, in a newspaper that is widely read by the fourteen Judges, the *International Herald Tribune*. (See page 3 for the text.)

New Legal Argument Invented

On return from the Hague, where he spent a few days urging this view on the interested community of NGOs, and others, Stone invented a legal argument in which an obscure nuclear doctrine (the "negative security assurance") could be used by the Court to declare the Declaratory Proposition to be "Customary Law". This argument was seen by the press to be sufficiently important that the *International Herald Tribune* printed it, as well; it appeared in the last week of the pleadings. (See page 4 for the text).

Leading international lawyers (such as Burns Weston of the University of Iowa and Richard Falk of Princeton University) consider this novel argument, that first-use of nuclear weapons is already banned under customary law, to be a real contribution to the debate and are prepared to work with FAS to develop it in the professional literature.

Stone prepared a number of other op-eds, some of which are published or excerpted in this newsletter, seeking to draw the Court's attention to various aspects of the case which, under the circumstances, none of the States pleading were likely to point out. One urged the Court to use its Statute 50 to bring in more expert information (See page 5). Others provided background on the strategic issues (See pages 6, 7, 8).

Declaratory Proposition Widely Supported

During this very intense month in which Stone visited the Hague twice, and consulted widely with relevant experts, Stone received endorsements of the Declaratory

The International Peace Palace, home of The International Court of Justice

Proposition from the FAS Council and such FAS experts and key officials as (with former titles): Secretary of the Smithsonian Robert Adams & Editor of the *Bulletin of the Atomic Scientists* Ruth Adams; Nobel Laureate and head of the Theoretical Division at Los Alamos Hans Bethe; Author Ann Druyan; Nobel Laureate and head of the Atomic Energy Commission Glenn Seaborg; President of California Institute of Technology Marvin Goldberger; Deputy National Security Advisor to President Kennedy Carl Kaysen; award winning astrophysicist Richard Muller; World Federalist President Charles Price; Assistant Director for National Security (in the White House OSTP) Frank von Hippel; and Ambassador to the Comprehensive Test Ban Talks Herbert F. York.

Legal Experts Supported FAS Approach

Specialists in arms control and international law such as Louis Sohn and former ACDA Director Paul C. Warnke provided specific advice and encouragement--as well as the two international lawyers mentioned above whose support was all the more meaningful since they were intellectual leaders of the World Court Project with its own, different, point of view. (Only one expert consulted, the distinguished physicist Richard Garwin, saw alleged flaws in the approach; for his view see page 11.)

The Court is expected to announce its decision in January or February. Whether the FAS approach of seeking to ban first-use rather than even threats of retaliatory use, will find favor is, of course, unknown and unknowable.

This issue of the legality of use of nuclear weapons is, of course, a fundamental issue for FAS. Our consensual view of the situation, and our willingness to join behind the common-sense approach embodied in the FAS Declaratory Proposition, made it possible for FAS to champion an approach that would not, in the alternative, have been publicly presented as a Court option. So something important happened here. And we hope FAS members are content with it.

The FAS Executive Committee

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When Nuclear Weapons Are Summoned Into Court
(Summary of the Amicus Brief)

In the present era, can the use of nuclear weapons be declared illegal? The International Court of Justice this week entertains an application from the General Assembly of the United Nations to provide an advisory opinion on this issue.

The smart money assumes that the World Court will find a technical or jurisdictional way to avoid the question entirely.

Those urging the court to act want the use, or threat of use, of nuclear weapons to be banned even in response to the use of nuclear weapons by others. In principle, this would eliminate nuclear deterrence and leave states which abide by international law with no theory as to how they would respond to nuclear attack.

What ought the Court to do? In an amicus brief sent to the Court, the Federation of American Scientists, founded by World War II atomic scientists in the Manhattan Project, has urged it to consider the merits of the following Declaratory Proposition:

"The use of any weapons of mass destruction such as chemical, biological or nuclear weapons is, and ought to be declared, illegal under international law."

This has the high rhetoric and strong position that most of the world wants. And it justly stigmatizes nuclear weapons by linking them to biological and chemical weapons whose use is already illegal under international law.

Reservation States Could Accept It

Certain "reservation" states could accept the Declaratory Proposition with the plausible and traditional understanding that violators of a rule of international law ought not be able to rely upon their victim's compliance. Thus, nuclear deterrence of nuclear attack would be preserved.

And, because the rule refers to all of the weapons of mass destruction, a violator of any part of it (such as Iraqis using biological or chemical weapons) could not be assured that the United States would forgo the use of even nuclear weapons. This approach would not preclude Secretary James Baker's successful, if ambiguous, threat against the Iraqis of Jan. 9, 1991. The Iraqis now admit that they considered it a nuclear threat and would otherwise have used such weapons against Saudi Arabia and Israel.

If it has all these loopholes, what substantive, and non-rhetorical, effect would the Declaratory Proposition have? The answer is that it would declare illegal the use of nuclear weapons against conventional attack.

The traditional threat of NATO against the former Soviet Union is now obsolete--unsupported by public opinion in the states at issue or by strategic requirements of their military advisers.

But it is precisely the votes of these NATO states and Russia that prevent current General Assembly resolutions from passing with that large consensus which the formation of international law requires.

Accordingly, the court has the opportunity, with the Declaratory Proposition, of ruling against an anachronistic threat of use of nuclear weapons--while declaring the use of all weapons of mass destruction to be illegal under international law.

The Federation of American Scientists, now 50 years old, has been struggling to prevent the further use of nuclear weapons since its founders invented the atomic bomb. We are, so to speak, specialists in the difficult political and technical questions of what the market will bear in this field. Having worked on this subject longer than any other civic organization, and feeling a moral right to advise the Court, we have dared to put our two bits into these august proceedings.

One thing is very clear about today's world. All states have a vital interest in stigmatizing and opposing weapons of mass destruction.

--J.J.S.

(Published in the *International Herald Tribune* of October 31, 1995)

Judges preparing for hearings at the International Court of Justice.
From left to right: Rosalyn Higgins (UK), Christopher Weeramantry (Sri Lanka), Carl-August Fleishhauer (Germany), Vice President of the Court Stephen M. Schwebel (US), President of the Court Mohammed Bedjaoui (Algeria). (Eight judges not shown)

A Court Ruling Against Nuclear Weapons?
(The Legal Case for the Declaratory Proposition)

Neither the anti-nuclear States nor the nuclear-weapon States contesting at the International Court of Justice hearings on the legality of the use of nuclear weapons will describe to the World Court the obscure nuclear doctrine it needs to know.

But this doctrine, the Negative Security Assurance, shows that "State practice" does not support the introduction of nuclear weapons into conventional hostilities and hence that the Court could declare such action illegal under international law.

Nuclear States vs. Non-Nuclear States

The U.S., Great Britain, France and Russia have undertaken, in parallel negative security assurances, not to use nuclear weapons against all but three non-nuclear States so long as these States do not attack in "alliance or association" with a nuclear State. (The three significant non-nuclear States not covered, because they refuse to sign the Non-Proliferation Treaty, are India, Israel and Pakistan.)

The fifth nuclear power, China, for its part, has undertaken never to use nuclear weapons first against any State.

This loophole for attacks in conjunction with nuclear powers, designed originally to deter North Korea from invading South Korea, is now anachronistic since Pyongyang's aggression would no longer be backed by China or Russia. Nor are the other States of concern to the U.S.--Libya, Iran or Iraq--going to wage attacks on U.S. forces in association with a nuclear power.

And what non-nuclear States are going to attack Great Britain, France or Russia, in association with a nuclear State?

Nuclear States vs. Nuclear States

Are the five avowed nuclear powers seriously threatening to introduce nuclear weapons into conventional hostilities with each other? They are not.

The case of NATO vs. Soviet Union was the only counter example. But the Soviet Union having become a non-communist Russia, and its conventional superiority having turned into conventional impotence, NATO defense ministers, if asked to testify, would spark a firestorm of criticism, if they asserted publicly that nuclear first-use was still a necessary doctrine.

And could Russia really fear overwhelming conventional attack by China in the Far East? These are just wild speculations.

Unavowed Nuclear-Capable States

Israel, Pakistan or India might, in extremis, introduce nuclear weapons into conventional hostilities but none dare proclaim this right--indeed, none dare to admit publicly that it has nuclear weapons or latent nuclear "capability". (And while they are not covered by the Negative Security Assurances, none of them can credibly fear first-use of nuclear weapons against them by a nuclear power.)

In sum, of the 17,955 pairs of States that 190 States can generate, the threat of first-use of nuclear weapons in conventional hostilities applies, in today's world, to no more than a half-dozen hypothetical and very extreme cases.

The Growing Sense of State Obligation

The desuetude into which the threat of first-use of nuclear weapons has fallen is of great importance. Combined with a sense of State obligation (Opinio Juris), international lawyers will tell you, this favorable State practice can be construed as customary law. Accordingly, the Court could declare that such law exists in the Advisory Opinion requested by the General Assembly of the United Nations.

Since the laws of war are in part a function of "the dictates of the public conscience", this sense of State obligation can be seen all about us. The trend of decisions on weapons of mass destruction has been clear--in the evolving law concerning inhumane weapons; in the ever tighter constrictions on use and possession of chemical and biological weapons; and in the periodic votes in the General Assembly that, by large majorities, condemn the use of nuclear weapons.

Meanwhile, under the Non-Proliferation Treaty's Article VI, the nuclear States undertook the legal obligation to rid themselves of possession of nuclear weapons through disarmament--precisely to prevent such use.

The purpose of the rare first-use reservations by nuclear States is understandable--to deter life-or-death threats to States. The related doctrines are obscure precisely because States fear, in this climate of public opinion, even to enunciate this threat.

We are, therefore, that close to a world in which no State can permit itself to introduce nuclear weapons into conventional hostilities. Accordingly, it is well within the mandate of the Court to proclaim that "The use of any weapons of mass destruction such as chemical, biological or nuclear weapons is, and ought to be declared, illegal under international law." In this day and age, only those who violate this Declaratory Proposition need fear a nuclear response.

---*J.J.S.*

(*International Herald Tribune*, November 13, 1995.)

Court Processes May Keep Nuclear Weapons Legal
(A Call on the Court to Broaden its Processes)

The International Court of Justice in the Hague, the world's highest court, may fail to determine, in just concluded proceedings, that the introduction of nuclear weapons into conventional hostilities is as unlawful as the introduction of biological and chemical weapons simply because the Court's traditional processes are insufficiently robust to support a conclusion that is obvious to 85% of world states, and virtually every person on the Planet.

Any such unresponsive World Court Advisory Opinion to the U.N. General Assembly would shelter behind the technical and jurisdictional issues raised by nuclear powers. But the real problem would lie in the Court's traditional sole reliance on pleadings from interested parties--as opposed to testimony or evidence from disinterested parties.

Court processes are assuming that truth will be the resolvent of pleadings of about 25 states, none of which has an interest in providing the truth per se, and with little Court time for oral interrogation. It is assumed that a calculus of legal interpretations can go forward independently of facts unsupplied by the parties.

Parties Have No Interest in Providing Facts

But about two-thirds of these parties are trying to persuade the Court to overthrow the current world security system by pronouncing even retaliatory use of nuclear weapons to be unlawful. Meanwhile, the nuclear powers simply explain why the Court should butt out. So a lot of facts are being left out by both sets of parties who spend most of the time, in any case, on legal argumentation.

How then can the Judges generate the necessary factual confidence to support a sustained substantive consensus?

The Russians have a proverb that, on first visiting a foreign land, the "eyes open" but it is only on the second visit that the visitors "see". As the Court views the unearthly terrain of nuclear strategy, it may need to organize a second look.

Under Article 50 of the Court's Statute, the Court may "at any time, entrust any individuals, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion." Thus far, in a half-century, it has never done so.

But at the end of its scheduled pleadings, in mid-November, the President of the Court could solicit from the Members of the Court, and compile, a list of those evidentiary points which the Judges feel are insufficiently supported by pleadings to permit a considered opinion. Selected individuals, organizations, and States could then be invited to comment on them.

British citizens protest in front of the Peace Palace

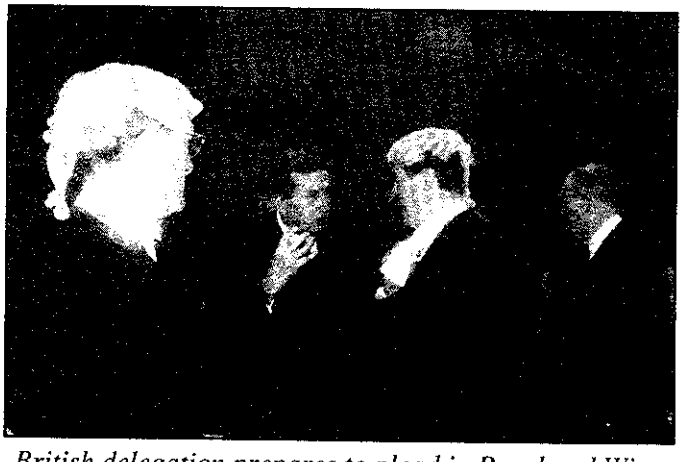
For example, the U.S. and France have argued that the issue cannot be decided "without reference to the specific circumstances under which any use of nuclear weapons would be contemplated". Experts could help the Court understand the first-use doctrine of these States.

Nuclear powers and their allies argue that a Court opinion could undermine current disarmament negotiations or nuclear deterrence itself. Which, if any, Court decisions would do this is something experts could address.

Experts could also address the policies of nuclear-capable states (India, Israel and Pakistan) and the Court's questions could be sent to them as well. Traditionally, the Court has feared being inundated by briefs from interested parties. But this process distills essential questions from felt judicial needs.

Court opinions must be rooted in facts to secure the broad public acceptance that international law requires. Accordingly, in a case that arguably involves the fate of mankind, the Court should invite the outside evidence and orientation that it can not help but need.

---J.J.S.



British delegation prepares to plead in Powdered Wigs

No Such Thing As A Limited Nuclear War
(U.K. and U.S. Try to Mislead the Court)

It is especially hard today to conceive of a scenario in which an announced nuclear power, i.e., U.S., France, Britain, China or Russia, would initiate the use of nuclear weapons.

None of them anticipate any attack on itself, or on its allies, that could not be better handled with conventional weapons.

The outcry against French testing suggests how much greater an outcry there would be against any nuclear power's use of nuclear weapons. Political common sense, and a sense of State obligation in the face of popular horror, now rules out the initiation of the use of nuclear weapons in conventional hostilities.

Issue is Nuclear War, Not Nuclear Use

In particular, for nuclear powers, having announced through negative security assurances that they will not attack the non-nuclear States, the issue of first use turns on the use of nuclear weapons against another nuclear power.

No matter what the circumstances, or what the size of the nuclear weapons, such an attack could only be expected to produce a nuclear response from the other nuclear power, albeit perhaps a response in kind or a limited response.

Extensive studies in the 1950s and 1960s on the NATO-Soviet situation asked if a limited first-use of nuclear weapons might give rise, at least in some cases, to a "limited nuclear war".

The answer of the community of strategists and arms controllers, after the spilling of much ink, was "no". A consensus of experts concluded that there was no "firebreak" in warfare between two nuclear powers save the chasm between conventional and nuclear war.

The Fallacy of the Last Move

British and American representatives, at the proceedings of the International Court of Justice on the illegality of use of nuclear weapons, both committed the infamous "fallacy of the last move"--misleading the Court by discussing "specific circumstances" and "sizes" of nuclear weapons as if this--rather than inevitable nuclear escalation--was the issue.

In particular, first-use of nuclear weapons, for the announced nuclear powers, will not be a decision of technicians weighing size and circumstances of tactical military needs, but rather one made by Presidents facing the prospect of destruction of their own States within the next 24 hours as a result of their own acts.

American delegates l to r: Conrad K. Harper and Michael J. Matheson (State), John H. McNeill (DoD).

Non-governmental organization (NGO) drafters of the question put by the General Assembly to the Court tried to elicit the answer that all uses of nuclear weapons were illegal by asking whether "any" use was legal.

Thus anti-nuclear States talk in general terms because they want this extreme result. And this permits the nuclear States, in turn, to talk in general terms of "deterrence".

But if one had deemed "first use" of nuclear weapons to be the issue ripe for adjudication, the attention of the Court would have been drawn to a narrower and politically more realistic question.

In the end, the morality of first-use, and hence its legality, must turn in large part on its consequences.

First Use Means Nuclear Escalation

If first-use is bound to produce nuclear escalation, then its morality is the morality of a threatened murder-suicide pact. Indeed, the nervousness in Western Europe during the Cold War over the NATO policy of first-use of tactical nuclear weapons was based on the popular perception that it was just such a pact--an accident prone way of threatening to destroy Europe in order to save it.

Indeed, the first-use of nuclear weapons is likely to be more counterproductive than the first-use of chemical or biological weapons because it is more dangerous.

The nuclear States, in their advocacy before the Court, play on the popular assumption that a State has a right to do anything it wants in its own defense. But international law, arising from international legal conventions, binds States not to use chemical or biological weapons even

were they to be overwhelmed by conventional forces.

If so, why cannot international law, arising from customary law principles, bind States from initiating the use of nuclear weapons under any and all circumstances? In particular, if one accepts escalation as inevitable, the question arises whether genocide--or the threat, with all its risks, of detonation of a so-called doomsday machine--could be justified in self-defense.

The Veil Of Silence

Psychiatrists sometimes talk of "leakage"--the moment when a patient lets slip a comment more revealing than an hour of denial and assorted evasions. When the British delegation advised the Court that the international community had "sensibly elected to draw a veil of constructive silence" over the issue of the legality of nuclear weapons, that was leakage.

And perhaps the single best justification of what the anti-nuclear States, and the NGOs that back them, are trying to do is to destroy that veil; a world debate over the legality of the use of nuclear weapons is both moral and useful.

But the current debate, such as it is, is badly undermined by the extravagant form of the question being posed. The anti-nuclear States have seized on the most forbidding terrain for their battle--that of banning deterrence, second-strikes, and nuclear retaliation.

Had they chosen to attack "first-use" of nuclear weapons, it would have been seen by press and public as sufficiently realistic to be worth covering. Indeed, although States pleading before the Court are treating first-use as a minor issue, one can prove otherwise with mathematical precision. How? By observing that so long as there is no first nuclear use, there will be no nuclear uses at all!

---J.J.S.

Divide the Question Rather Than the Court
(Truths No State Dared to Plead)

When the General Assembly of the United Nations asked the World Court to deliver an Advisory Opinion on a single question, it asked, in fact, four questions. The question was:

"Is the threat or use of nuclear weapons in any circumstance permitted under international law?"

This question, clearly, is two different double questions:

A. (First-Use): "Is it is permitted under international law to introduce, or threaten to introduce, nuclear weapons into conventional hostilities?"

B. (Second-Use): "Is it permitted, under international law, to retaliate with nuclear weapons against nuclear attack (or the attack with other weapons of mass destruction), or to threaten to do so?"

Since so many world citizens are informed by their common sense, any international legal consensus is precluded from conclusions that are inconsistent with common sense. Accordingly, putting aside the question of what constitutes international law on these questions, what are the answers in common sense?

Question A: First-use

The first question is easy to answer. With regard to use, Defense ministries are not seriously planning, in this era, to introduce nuclear weapons into conventional hostilities. And their Governments are giving out negative security assurances to non-nuclear states to foreclose such options precisely because--for political reasons, and to forestall the proliferation of weapons of mass destruction--they consider that the World will be safer if they do not try to keep such unreal options open.

And with regard to nuclear states, Governments with nuclear weapons are justly afraid to introduce nuclear weapons into conventional conflicts for fear of escalation. In a visit to Beijing, for example, Russian President Yeltsin advised the Chinese Government that his Government would reciprocate, vis-a-vis China, its no-first-use declaration--despite the unease of the Russian Ministry of Defense about the Far-East.

Moreover, if Governments see good political reasons not to use nuclear weapons "first", and to foreclose those options, they are certainly not in the first-use-threatening business--so this part of the question is answered as well.

In sum, in common sense at least, there appears to be no compelling reason why the Court should not respond to this half of the four-headed question posed by the General Assembly. The Court need only take note of State practice while fabricating this State practice into some kind of customary law--as recommended by the FAS Declaratory Proposition.

Question B: Retaliatory Use

Question B is more complicated. Consider the threat to retaliate for the use of nuclear weapons with nuclear weapons. This "deterrent" threat kills no one directly, affects the environment directly in no way and could, arguably, usefully persuade those who possess nuclear weapons not to use them--a clear benefit certainly.

Can a threat of this kind with such a useful benefit be unlawful? For example, shooting at a man is "against" the law but a threat to shoot back if shot upon is normally not. In the morality of Quakers and Amish and pacifists world-wide, this threat would be immoral. But for most human traditions, it is just common sense.

What about the carrying out of this threat? Here the situation is different. What might be morally plausible to threaten could be immoral to implement.

Certainly, the implementation of a threat to retaliate for attacks on U.S. cities with attacks on Russian cities would seem a great wrong for many reasons.

But, once fired upon, or even given unequivocal indications that it was about to be fired upon, U.S. attacks on Russian missiles and submarine bases might be morally acceptable if made in effort to suppress an attack underway from continuing or as an effort to terminate the war.

Accordingly, the Court is being asked under Question B to assert that there is "no" justifiable threat or use of nuclear weapons when, in common sense, there is.

Thus the compelling reason for the Court to avoid saying "no" to Question B is that it could not be sustained even in common sense much less in law.

And the common-sense reason to avoid saying "yes" to Question B is that, while it while it would be literally true, it would undermine the desirable world-wide campaign to stigmatize, and discourage the use of, nuclear weapons and to encourage negotiated disarmament.

The Court Dilemma Has A Unique Answer

What then are the parameters of any useful Court opinion? To answer what can be answered, it should answer Question A. But to conform to the truth, while maintaining respect for the opinion of mankind, it should avoid answering Question B.

The problem is that the rules under which the Court acts require it to answer the question posed to it--which includes questions A and B.

Herein lies the genius of the FAS Declaratory Proposition which answers Question A--while seeming to answer both Question A and B. And it does so in a way that permits those who know the truth about Question B to interpret the Court's answer in an acceptable way.

From this point of view, the FAS Declaratory Proposition is not an "invention" but a "discovery", i.e. something that already exists in (intellectual) nature. Moreover, it seems uniquely defined by the above parameters, i.e. what else could the Court say that does all of the above?

Of course, other logically equivalent formulations can be found to the FAS Proposition such as "no-first-use of weapons of mass destruction". But such a formulation is too explicit to fit the demand of the Court for augustly-formulated propositions--propositions that can command the respect of mankind.

As a solution to the Court's problem, the FAS Declaratory Proposition is, in fact, over determined, as mathematicians say, because it fits other side conditions as well.

In particular, any formulation of the Court must, as the FAS proposition does, treat nuclear weapons as a member of the class of weapons of mass destruction. This is what the New Zealand delegation meant when it said that, should another such weapon be found, it would "automatically fall within the ambit of prohibitions under existing international customary law...".

And, needless to say, only when nuclear weapons are seen as part of this class, already dealt with in conventions on chemical and biological use, can Judges find the trend of decision and laws necessary to a useful pronouncement.

Weakness of the Pleading Process

The weakness of the "pleading-process" has never been so clear as it is in the transcripts of the two-dozen States appearing before the World Court. Hardly a State has bothered to distinguish these two questions. And in the resulting impossible effort to answer both A and B together, States bemuse themselves while confusing the Court..

Avoiding A Division of the Court

To command the respect necessary to deal with an issue this sensitive, the Court should protect itself by ruling with as much unanimity as possible. This is the real meaning of the tacit threats made by the U.S. and U.K. delegations when they said this case threatened the "integrity" of the Court.

The FAS Declaratory Proposition invites the Court to join in a single approach even if it is viewed by different Judges in somewhat different ways. For the Court, this may be its most important aspect. ---*J.J.S.*

World Court Project officials hold press conference. Left to right: A.H.J. van den Biesen and Peter Weiss.

Who's A Friend of the Court?

According to the *New York Times* ("World Court Weighs Legality of Atomic War"; November 20, 1995), the organizers of the campaign to secure an Advisory Opinion from the International Court of Justice on the legality of the use of nuclear weapons do not really care how the Court rules.

"It's a win-win situation", they say:"If the court says nuclear weapons are not illegal, there will be a tremendous push from non-nuclear states for a convention banning them. If the court says the weapons are illegal, many states will ignore the ruling, which would lead to perhaps an even greater effort to force the adoption of a convention."

How must the Judges on the Court view this stunning equanimity from the activists who are putting the Court through the wringer? As the Judges wrestle to fulfill their function, while developing their Court's standing, they know that hard cases can not only make bad law, they can undermine institutions.

A "failed Amicus" sees in the "win-win" approach the real reason why some campaign organizers are indifferent, or worse, to the advantages of his Declaratory Proposition. They want a polarized situation. He tells them that his Declaratory Proposition is "the best that they can get from a divided court". He says an unexceptional statement with the possibility of nuclear state "reservations" could satisfy all concerned. But some organizers are not so naive; a broadly acceptable result could turn their "win-win" situation into a loss--and a win only for the Court!

---*J.J.S.*

Einstein Misled on International Law

Albert Einstein is being misquoted in certain circles as having said "International law exists only in textbooks on international law".

This incident arose from a late 1940s conversation between Einstein and Ashley Montagu, an English-born Princeton University anthropologist and social biologist on a film that Montagu was making on atomic energy for our own Federation of American Scientists.

In a forthcoming book "Einstein: A Life" (John Wiley, May, 1996) , Dennis Brian described the incident:

Montagu: "At the first meeting we'd got on to the question of what does one do in addition to making such films about getting people interested in seeing that nuclear energy isn't misused? And I asked, 'What do you think?' And he said 'International Law'.

I said, 'Professor Einstein, international law exists only in textbooks on international law'.

Einstein exclaimed that that was really an outrageous remark, then took the pipe out of his mouth and thought for several minutes. He finally said, almost mournfully, 'you're quite right'. Montagu then told him that of all the treaties that had ever been signed between nations every one had been broken with the exception of the one establishing the borders between Canada and the United States."

One legal scholar observed: "Einstein was right the first time: Montagu's remark was outrageous and ignorant. His statement about treaties manifests appalling illiteracy".

What is Extended Deterrence?

It is difficult for young Westerners, much less for citizens of non-Western States, to understand the NATO states emphasis on nuclear weapons.

At first, when battlefield nuclear weapons were developed, they were rushed into Western Europe to be used as tools for war-fighting if the feared Soviet conventional invasion materialized.

Within a few years, even the proponents of this strategy recognized that the use of the tactical nuclear weapons would escalate rapidly; they really were functioning, all agreed, as a "trip-wire" to ensure the use of the strategic weapons to which tactical use would rapidly escalate.

Rather than admit a mistake, there was a strategic effort to turn a sows ear ("escalation") into a silk purse ("deterrence of invasion").

It was recognized that the desired "deterrence of invasion" was quite a different animal than the run-of-the-mill nuclear deterrence of attack upon ones own State. Such ("second-strike") nuclear deterrence was quite credible by its nature.

What was hard was persuading diabolic attackers--in the Pentagon, all worst-case attackers are diabolic--that one would really use strategic nuclear weapons, thus risking ones own state, in the face of an attack that was only on ones allies abroad. This kind of deterrence of conventional

(*continued on page 10*)

(*Continued from page 9*)
invasion abroad by threat of use of nuclear weapons was called by its inventor, Herman Kahn, "extended deterrence" to distinguish it from deterrence.

To make extended deterrence credible, one had to make it automatic. To make it automatic, the tactical nuclear weapons had to be deployed in such a way as to ensure that the escalation to strategic nuclear weapons could not be avoided.

Even today, with battlefield tactical nuclear weapons being withdrawn, the justification for NATO's nuclear-armed aircraft based in Germany is, precisely, to provide this "trip-wire"--assuring the Germans that they could not be abandoned to their fate.

In effect, NATO rigged Western Europe into a doomsday machine, primed to go off in the event of an invasion--and called it a wondrous "extended deterrent". The threat is gone but the trip-wire remains--the danger having been vastly reduced by the absence of any force with which to "trip" the wire.

In my opinion, the situation has reached such a point of absurdity, and unnecessity that, even if the Court's Advisory Opinion were taken as an enforceable writ, to be complied with instantly, the NATO Governments, and NATO public opinion, could live with it.

These States have now a greater interest in the stigmatizing of weapons of mass destruction--so as to prevent terrorism and proliferation--than they have in continuing to implement anachronistic theories of extended deterrence against non-existent enemies. And, indeed, this observation should be part of any such Advisory Opinion.

Indeed, at least in America, the conservatives who would be outraged at an Advisory Opinion questioning nuclear retaliation would be sanguine about opinions questioning a rube goldberg machine that makes America hostage to European turmoil.

---*J.J.S.*

FAS Holds Climate Change Conference With World Bank

On the weekend of December 8-10, FAS hosted a two-day retreat for 40 distinguished scientists and World Bank employees to discuss the issue: "Should World Bank decision-making on lending for projects that would result in the emission of greenhouse gases reflect the global damage which such emissions might cause?". Testimony was collected on related issues.

The Bank co-sponsored the meeting and its delegation was led by Vice President for Environment and Sustainable Development, Ismail Serageldin. The next issue of the FAS PIR will summarize the proceedings.

1979 FAS Amicus Brief was Initially Effective

In 1979, the U.S. Government moved for "prior restraint" of the publication by Progressive Magazine of the secret of the H-bomb. To avoid the first such prior restraint order on the press in U.S. history FAS proposed, in an Amicus Brief, a mediating committee of editors and scientists. The Judge asked the parties to agree and the Government did so. But the editor of the publication resisted the initial agreement of his Board and so the prior restraint order was issued. The case was later mooted when the secret was found on the shelf of a public library in Los Alamos.

Amicus Briefs & The World Court

According to specialists on the International Court of Justice, the Court has, only once in its half-century existence, solicited an amicus brief and this one was never supplied.

Under a procedure invented by the existing registrar, Sr. Educardo Valencia-Ospina, unsolicited amicus briefs normally get a polite letter advising them that the brief cannot be submitted into the record of the Court but that they will be "available to members of the court in their library".

Accordingly, when the FAS Amicus Brief arrived, FAS was advised, informally, that it would be unfair to interested groups that had earlier asked to be invited to provide such a brief if the FAS amicus brief were inserted in the record.

When, on October 31, the *International Herald Tribune* carried the summary of the Amicus Brief (printed on page 3), the Court, fearing a deluge of Amicus Briefs, wrote to the Tribune explaining its position--which letter appeared on November 15--noting that "all such documents are given consistent treatment".

Later, the Costa Rican advocate caused a related stir by inserting for the record, in his pleadings, a letter the Court had received from the International Red Cross. The Court, one observer suggested, saw this as an end-run of its efforts to keep amicus briefs, and unsolicited letters, out of its formal proceedings. Accordingly, although the Costa Rica advocate had referred to the FAS Declaratory Proposition in his presentation without citation of the brief, the Federation discouraged him from submitting the brief for the record retroactively or even amending his remarks to "cite" the amicus brief.

In sum, FAS has learned that it is better to publish than to send the Court an unsolicited Amicus Brief. ---*J.J.S.*

Richard Garwin's Dissent

What follows are the substantive paragraphs of a letter Dr. Garwin sent to the World Court opposing the Executive Committee Amicus Brief on the Declaratory Proposition.

"It seems likely to me that nuclear weapons are in quite a different category, legally, from chemical weapons and biological weapons. For BW (and Toxin Weapons) there is the "Biological Weapons Convention on the prohibition of the development, production and stockpiling of BW and Toxin Weapons and on their destruction." This Convention that was signed be the United States April 10, 1972, and entered into force March 26, 1975. The Chemical Weapon Convention is well on its way to being signed, ratified, and implemented. Neither of these permits the use of BW or CW in retaliation, since they bar the possession of BW and CW.

I hope that the BWC and CWC will soon be universalized, in the sense that almost all nations will sign these Conventions, freely entered into, and those that do not will be regarded as seriously outside the community of nations.

So a Declaratory Proposition that "the use of any weapons of mass destruction such as chemical, biological or nuclear weapons is, and ought to be declared, illegal under international law" is too weak a statement as regards BW and CW. It is a step backward. It ignores the fact that the nations of the world themselves, through their governmental processes, will have made the stronger judgement that not only the use but the possession of such weapons is illegal.

The 1991 report of the Committee on International Security and Arms Control of the National Academy of Sciences concludes "that the principal objective of U.S. nuclear policy should be to strengthen the emerging political consensus that nuclear weapons should serve no purpose beyond deterrence of, and possible response to, nuclear attack by others." Dr. Stone takes this position into account by assuming that some states would accept the Declaratory Proposition as meaning only "no first use." But the same analysis would then allow those states (or others) to make the same argument about response to the use of BW or CW by others. For the World Court to adopt such a declaratory proposition, it seems to me, trivializes the work of nations in arriving at such treaties.

It seems to me that the proposed Declaratory Proposition would result in reduced respect for international law, rather than the strengthening of international law that is an important current goal."

---Richard L. Garwin

(Invited to clarify whether he supported a policy of no-first-use, Dr. Garwin said he "favored a U.S. policy of no-first-use of nuclear weapons though not an agreement between States on no-first-use." But he said: "...to ban 'use' of nuclear weapons when the intent is to authorize use under certain circumstances would not increase respect for law....So I think that the International Court of Justice might instead declare illegal the first use of nuclear weapons by any State.")

Stone responds:

The Garwin letter to the Court errs in logic and grammar, common-sense and law. In logic and grammar, the Declaratory Proposition reference to three weapons as all being weapons of mass destruction whose use is, or ought to be, banned does not deny that even more restrictions apply to two of these weapons in signed conventions! Moreover, in common sense, one can depend on the Court to make this clear since they will be quoting just such existing conventions. Indeed, in law, an Advisory Opinion of the World Court could not, in fact, reverse such conventions.

Nor could States take the same (first-use) reservation with regard to chemical or biological weapons as nuclear states might take on nuclear weapons, as the letter alleges, since, in this regard, they are bound by signed conventions! And since the Declaratory Proposition would universalize and institutionalize no-first-use of nuclear weapons, it would appear to be a great step forward. From the Court's point of view, this is a tempest in an irrelevant grammatical teapot.

The real issue, not to be lost sight of, is that FAS urged the Court to adopt a position amounting to "no-first-use" of nuclear weapons when virtually all States pleading wanted "all" or "nothing" outcomes.

A letter, too long to include, supporting these conclusions with the special expertise of an international lawyer, by Professor Burn H. Weston, Associate Dean of International and Comparative Legal Studies at the University of Iowa, is available from FAS. It says in particular,

"While your Declaratory Proposition phrase...could be read to mean that chemical and biological weapons are not already banned (or about to be banned), obviously that is not your intention...a close grammatical reading makes clear that the Declaratory Proposition means for the totality of weapons of mass destruction to be declared illegal [in use; ed. note] not just the chemical and biological weapons. Thus, in my view, your Declaratory Proposition not only does not trivialize the treaty work of nations or reduce respect for international law, it reinforces and extends each."

---J.J.S

FAS Atomic Scientists' Appeal Getting Underway

The Federation of American Scientists is collecting signatures on an appeal (see September-October, 1995 PIR) that originated with a letter from Dr. Hans Bethe to the Federation of American Scientists calling on:

"all scientists in all countries to cease and desist from work creating, developing, improving, and manufacturing further nuclear weapons--and, for that matter, other weapons of potential mass destruction such as chemical and biological weapons".

The drafting of the appeal (viz. "further" nuclear weapons), and its intention, was not to interfere with work whose purpose was to ensure the safety and sustainability of the existing stockpile of nuclear weapons rather than to develop new weapons.

The Council of the Federation of American Scientists has approved the Atomic Scientists' Petition, and in July, at FAS's request, the Council of the Pugwash Conference on Science and Public Affairs, which recently received the Nobel Peace Prize, also supported the Petition.

If you are professionally involved in related work and can endorse this petition, please put your signature on this page and return it to the Federation of American Scientists with any comments.

We are equally interested in hearing the views of any who cannot agree with a view to stirring a debate over this important issue. If then you are willing to be quoted on your adverse opinion, do please register it also.

Please send all completed forms to:

"Scientists' Appeal", FAS
307 Massachusetts Avenue, NE
Washington, DC 20002

Atomic Scientists' Appeal
(Please Circulate)

I _____agree (____do not agree) to:
"cease and desist from work creating, developing, improving, and manufacturing further nuclear weapons and/or other weapons of potential mass destruction such as chemical and biological weapons".

I have these comments which you may quote:

Signature: _____

Print Name:_____

Address:

Position and Profession:_____

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