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Berlin, 7 July 2009

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## Introduction

### Dear friends,

The past few weeks have been a busy and exciting time for the International IALANA. Two major events, the IALANA International General Assembly and the German Conference 'Frieden durch Recht?' (peace through law) were held in Berlin from the 25<sup>th</sup>-27<sup>th</sup> of June. This report will focus on the General Assembly, but it is worth noting that the German IALANA Conference attracted around 180 participants, including presentations from many prestigious guests such as German Parliamentarians Gregor Gysi, Hermann Scheer and Willy Wimmer, keynote speaker Peter Weiss and Dieter Deiseroth (Judge in German Federal Administrative Court). The conference easily constituted the largest and most successful German IALANA event in 20 years. Both successful events were fittingly topped off by a celebratory cruise on the River Spree to commemorate the 20<sup>th</sup> anniversary of the German IALANA - and give everyone a chance to relax after weeks of hard work and preparation!



*Yaeke Inoue (Japan), George Farebrother (England), Joachim Lau (Italy) and Kenji Urata (Japan) at the IALANA General Assembly*

We were fortunate enough to host the 2009 General Assembly at the charming European Academy Mansion located in picturesque Grunewald Berlin. The German IALANA were delighted to welcome the attendance of many distinguished international IALANA members from Japan, the U.S.A, New Zealand, Norway, Sweden, Italy and Poland. The successful tone of the event was set from the outset with an address from Vice President and Secretary Peter Weiss, covering the implications of President Obama's Prague address, yet

stressing the need for all international parties to take control and refrain from purely relying on American leadership. Presentations and discussions followed from Phon van den Biesen, George Farebrother and Ursel Reich on the legal and political aspects of returning to the ICJ and the NPT preparatory conference. The European Academy lived up to its reputation, supplying a fabulous dinner for delegates on Thursday evening, which, accompanied by top quality German wine from Peter Becker's vineyard, made for a very pleasant night!

Friday's programme at the General Assembly proved to be nothing short of jam packed with concurrently pressing issues, an incredibly high calibre of presentations - and as expected for such a group of delegates, an intense level of debate, discussion and productivity! The events were kick started with a very positive presentation from Alyn Ware (N.Z) reporting on recent progress in the realm of Nuclear Weapon Free Zones, the significant achievement of establishing a central Asian NWFZ, (an area with various strategic military relationships to the U.S.A and Russia) - and how the establishment of this zone breeds opportunity for further success in Central Europe, the Middle East and particularly North East Asia and the Arctic. Mr. Ware also reported on current political opportunities opening the way for a Nuclear weapons Convention, a theme elaborated on by Kenji Urata (Japan), who highlighted critical issues surrounding a Nuclear Weapons Convention. Peter Becker and Bernd Hahnfeld reported issues of importance to the German IALANA - their efforts to eliminate the current use of German airports for illegal warfare and to abolish U.S nuclear weapon stocks within Germany. Discussion over the Italian nuclear weapons situation followed.

The IALANA International Board Meeting constituted the final part of the General Assembly. The meeting provided a forum for analysis of IALANA's current situation, in which concrete measures to ensure the continued success of the organisation and its development could be discussed. A consensus was reached that the 2009 General assembly must be seen as the first of many, that from now on the International IALANA should meet at least once per year and that all IALANA members need to work

collectively to foster more international co-operation and communication.

IALANA board members adopted a resolution drafted by Peter Weiss and Phon van den Biesen reaffirming IALANA's position that, "a nuclear weapons free world requires the conclusion of a convention establishing total and permanent nuclear disarmament" and demanding the emergence of prompt negotiations for such a convention from the 2010 NPT Conference. In the event that the NPT fails to bring about such prompt negotiations the decision was made that IALANA will return to the ICJ for an advisory opinion. (Please see the resolution in this newsletter no. 2). Additionally board members agreed that IALANA Germany will now be termed IALANA's head office and that after the establishment of an International IALANA bank account, a large fundraising effort must be made by all IALANA members.



Each of IALANA's affiliates reported to the Board on their recent activities - a great exercise in creating awareness of how international IALANA members can aid each other in their individual or national pursuits. Japanese delegates Mr. Keisuke Okada and Ms. Yaeke Inoue presented a petition from JALANA to the International Commission on Nuclear Non-proliferation and Disarmament as well as papers on the prevention of North Korea's reinforcement of nuclear forces and recommendations for positive action following President Obama's Prague speech. Alyn Ware reported on the work of Aotearoa Lawyers for Peace (the New Zealand IALANA affiliate), their work on Nuclear Weapon Free Zones

and public promotion of the Nuclear Weapons Convention and IALANA through the World March for Peace Campaign. Updates on Swedish, Norwegian, Italian and American members and affiliates were also given and the presence and input of two Polish delegates, Piotr Janiszewski and Pasquale Policastro was a welcomed factor in the meeting. Reiner Braun reported that Ukrainian and Georgian delegates had in fact also accepted invitations to the General Assembly and were only prevented from attending due to Visa issues. The German IALANA will be making every effort to meet with and foster co-operation with these parties as well as our new Polish colleagues in the hope of soon creating Eastern European IALANA affiliates.

Nearing the meeting's conclusion reports on the correct interpretation of Nobel's Will and IALANA's position on the use of depleted uranium were given by Fredrik Heffermehl (Norway) and Robin Borrmann (Germany). The International Board were unanimously re-elected with the sole amendment that Robin Borrmann will now take on the role as an additional IALANA international Co-ordinator.

IALANA Germany would like to offer their sincere thanks to all those supporting and attending the 2009 General Assembly and for making the occasion such an outstanding success. Please note that the next International IALANA Board Meeting will be held in New York April 29-30<sup>th</sup> 2010, prior to the NPT Prepcom. On behalf of IALANA Germany we look forward to seeing you all there and to continuing such positive international co-operation until then!!!!

**With Kind Regards**

**Teresa Bergman, Jenny Becker, Reiner Braun**



*Peter Becker and Reiner Braun speaking during the IALANA boat cruise*



*Peter Becker Opening the 'Frieden durch Recht?' Conference*

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## 2. Resolution

### **adopted by the General Assembly of IALANA International Association of Lawyers Against Nuclear Arms Berlin, 26 June 2009**

IALANA, the International Association of Lawyers Against Nuclear Arms, is pleased by the swelling chorus of voices<sup>1</sup> from many countries and many political sectors endorsing the vision of a nuclear weapons free world. But a vision is not a policy. While ratification of the Comprehensive Test Ban Treaty, the enactment of a Fissile Material Cut-off Treaty and the renewal of START would all be steps in the right direction, more is needed to make the vision a reality.

A nuclear weapons free world requires the conclusion of a convention establishing total and permanent nuclear disarmament.

IALANA hopes that a demand for the prompt beginning of negotiations for such a convention will emerge from the 2010 NPT Review Conference. Failing such a demand, IALANA is prepared to embark on a campaign to ask the International Court of Justice for an Advisory Opinion defining the timeline for compliance in good faith with the general nuclear disarmament obligation required by Article VI of the NPT and the Court's Advisory Opinion of 8 July 1996. Time is of the essence. As stated in the 1996 Opinion the obligation is one to pursue and *bring to a conclusion* negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.

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<sup>1</sup> Influential voices calling for a nuclear-weapons-free world include, but are not limited to, the United Nations Secretary General (in his five-point plan for nuclear disarmament), Weapons of Mass Destruction Commission, New Agenda Coalition, Seven Nation Initiative, Hoover Institute Initiative (involving former United States high-level officials Henry Kissinger, George Shultz, Sam Nunn and William Perry), International Commission for Non-proliferation and Disarmament, joint statement of high-level Norwegian statesmen (former Prime Ministers Odvar Nordli, Kåre Willoch, Gro Harlem Brundtland and Kjell Magne Bondevik and former Foreign Minister Thorvald Stoltenberg), joint statement of high-level German statesmen (former Federal Minister Egon Bahr, former Federal Chancellor Helmut Schmidt, former Foreign Minister Hans-Dietrich Genscher and former Federal President Richard von Weizsaecker), joint statement of Norwegian Foreign Minister Jonas Gahr Store and German Foreign Minister Frank-Walter Steinmeier, joint statement of United States President Obama and Russian President Medvedev, Australian high-level statesmen (former Prime Minister Malcolm Fraser, former Defence Force chief General Peter Gration and former chief of the army Lieutenant-General John Sanderson), Polish high-level statesmen (former Polish Presidents Aleksander Kwasniewski and Lech Walesa and former Prime Minister Tadeusz Mazowiecki), Italian high-level statesmen (former Prime Minister Massimo D'Alema, President of Italian Chamber of Deputies Gianfranco Fini, former Minister for European Affairs Giorgio La Malfa and former Defence Minister Arturo Parisi), International Atomic Energy Agency Director-General Mohamed ElBaradei, Nobel Peace Laureates' statement on nuclear abolition, Mayors for Peace 2020 Vision, Global Zero, International Campaign for the Abolition of Nuclear Weapons (ICAN), the Parliamentarians Declaration Supporting a Nuclear Weapons Convention, Abolition 2000 (over 2000 organisations calling for a nuclear weapons convention), and the approximately 125 countries voting in favour of the Nuclear Weapons Convention at the United Nations General Assembly.

### 3. Message from Judge C. J. Weeramantry

*As IALANA meets in general conference, people of goodwill everywhere will wish it much success in its deliberations and in the projects it has in hand for ridding humanity of a cloud which has hung over its very existence for upwards of sixty years. There will also be excitement in the air as new rays of hope come flashing through, with the leadership in the world's most powerful nuclear nation making a commitment to seek a world free of nuclear weapons, with the UN Secretary General endorsing the proposed Model Nuclear Weapons Convention and with growing political support for the new Nuclear Weapon Free Zones proposed by IALANA.*

*It is sometimes said of lawyers that they are so immersed in their day to day legal activities that they fail to see the larger picture and to make their due contribution to human welfare. IALANA offers an outstanding contradiction of such criticism. For over two decades it has pursued with dedication one of the most important efforts mounted by lawyers as a group to ensure the survival of the values we cherish and of humanity itself.*

*It has achieved much but it has more to achieve especially when at this time of renewed hope new clouds are gathering on the nuclear landscape with new actors appearing on the nuclear stage and new power configurations appearing on the nuclear chessboard.*

*How is all this to be handled in the context of the law? We have to bring the current situation into line with the bedrock principles of international law. First of all there is the ground rule that treaties are to be honoured, not merely in the letter but in real good faith. Next there is the requirement of respect for the international legal system whose highest judicial authority has unequivocally and unanimously formulated a clear obligation on nuclear states to get rid of their arsenals. These bedrock principles are being severely tested by nuclear powers who are under a basic responsibility to honour them but, despite their professed respect for international law, continue to violate them*

*The NPT project and the ICJ project will be the major focal points of your important conference. What should be done in the treaty world in relation to the NPT and what should be done in the judicial world in regard to the ICJ Opinion? These major questions await urgent attention and IALANA can provide the necessary leadership. Obligations clearly undertaken in treaties and obligations explicitly formulated by the world's most authoritative international tribunal need to be followed if we are to have any hope of a world ruled by international law. The prime actors in the world of international relations need to set the example.*

*The legal position is clear but, since the political configurations are not, a body with the prestige of IALANA and its proven track record in the legal field can make a difference.*

*When the General Assembly meets, a vigorous campaign will need to be mounted, for experience has shown us that indecision can be overcome through providing the necessary information and perspectives. IALANA is well equipped to provide just that. It has done it before and it can do it again.*

*It was able to persuade an initially reluctant General Assembly to take the nuclear issue to the Court. It worked actively towards achieving the Nuclear Non Proliferation Treaty and pursuing its many ramifications. Both of these were unprecedented forward steps in the world of law and nuclear weapons.*

*We have the added incentive now that time is running out. The nuclear danger grows from day to day. Unless the framework is set for universal disarmament the chance of some nuclear incident occurring somewhere through some thoughtless act by some self interested party is ever present.*

*You will therefore be deliberating with a sense of urgency. The twenty first century, our century of last opportunity to put our planetary affairs in order, should have been ushered in on a note of peace, but was sadly ushered in on a note of war. Nearly a decade of that century has passed. In the words of President Obama, in Prague on April 5<sup>th</sup> 2009 “generations have lived with the knowledge that their world can be erased in a single flash of light”. The world cannot permit this situation to continue if it has any regard for the survival of civilization and the continuity of humanity.*

*We must spread the message worldwide that the goal of a nuclear free world is altogether attainable. This can be achieved and IALANA has a significant role to play in achieving this.*

*We need to get to work not merely urgently but with a new intensity. People of goodwill across the world are blessing your endeavours. May your deliberations be fruitful and your efforts be crowned with success.*

#### **4. The International Law Obligation for Nuclear and General Disarmament**

**Peter Weiss**

As an American speaking to you in Berlin, I find interesting connections between the German speaking world and the United States with respect to the theme of this conference, “Peace Through Law”. The first and perhaps only book bearing this title was published in 1944 by Hans Kelsen, who, like me, started in Vienna and wound up in the United States. In it he speaks somewhat disapprovingly of Article 227 of the Versailles Treaty which describes the act of starting a war as an offense against international morality, when it should be more properly described as an offense against international law.

Another book with a similar title, “World Peace through World Law”, was published in 1958 and

also became a classic of international law. It was co-authored by Louis Sohn, born in Austria-Hungary in 1914 and later a very distinguished professor at Harvard Law School and legal adviser to the US State Department. The introduction to the book states that, had the United Nations Charter been drafted after the bombing of Hiroshima and Nagasaki rather than before, it would have turned out very differently and then lays out the design of an amended charter capable of preventing a repetition of the horrors of another nuclear catastrophe.

The third example is an article published last year in the Michigan Law Review entitled “Peace Through Law? The Failure of a Noble Experi-

ment”. Co-authored by John Yoo and taking as its point of departure Erich Maria Remarque’s World War I novel “All Quiet on the Western Front”, it comes to the conclusion that, while the interwar peace-through-law movement sought to prevent the carnage depicted in the book, it failed because of “unrealistic assumptions about the malleability of national self-interests and overconfidence in the efficacy of law.” This is not particularly surprising, since John Yoo is the principal author of the Bush-era torture memos recently released by President Obama, which redefined torture and held that the Geneva Conventions did not apply to the Guantanamo detainees.



*Peter Weiss speaking at the ‘Frieden durch Recht?’ Conference 26/07/09*

With these historical notes as background, we can now go to my assigned topic, “The International Law Obligation for Nuclear and General Disarmament.” Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons states: “Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to the 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.” Note that the two types of disarmament mentioned in Article VI, nuclear and general, are not interdependent. There is no reference to general and complete disarmament (hereafter GCD) in the title of the NPT, nor in any of its numerous provisions dealing with the implementation of nuclear disarmament. The US, furthermore, is on record as saying, at the time the NPT was negotiated, that, while GCD could obviously not be achieved without nuclear disarmament, GCD was not a condition precedent to nuclear disarmament.

The presence of GCD in Article VI is, in fact, an interloper, an uninvited guest. Nevertheless, it is there and, in a technical sense, is a continuing obligation to negotiate in good faith for GCD. There are, of course, a multitude of resolutions and recommendations (e.g. the Zorin-McCloy Agreement of 1961) dealing with GCD and there are some treaties dealing with individual weapons (e.g. chemical, biological, land mines, excessively injurious weapons) but the more or less accidental language of Article VI NPT seems to be the only one creating a GCD treaty obligation. In fact, the world community has turned its back on GCD after a brief flirtation with the concept in the nineteen sixties.

The situation is quite different with respect to nuclear weapons, which, one can assume, is due to the fact that these are by far the most brutal and lethal weapons ever invented. Here we have a great variety of treaties dealing with numerical (e.g. START, Treaty of Moscow) and geographic (e.g. Palindaba, Roratonga, Talte-lolco, Outer Space, Arctic) aspects of nuclear weapons.

We also have the 1996 Advisory Opinion of the International Court of Justice, which contains the following important holdings:

A threat or use of nuclear weapons should be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law (Unanimous – Par. 105[2]D)

The threat or use of nuclear weapons would generally be contrary to the rules of inter-

national law applicable in armed conflict, and particularly the principles and rules of humanitarian law ... (but) the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense, in which the very survival of a state would be at stake (Seven votes to seven, by the President's casting vote – Par. 105[2]E)

There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control (Unanimous – Par. 105[2]F)

Critics of the opinion point to the extreme circumstance language in par. 105(2)E as constituting an exception to the holding of general illegality. But this criticism is not justified. In the first place, the language in question is a *non liquet*, a deliberate failure to decide whether or not there is an exception. In the second place, the emphasis on “the principles and rules of humanitarian law”, both in this paragraph and in the preceding one, negates the possibility of an exception. The opinion was not a case of making new law by a group of so-called activist judges. It was based on principles and rules of humanitarian law, both customary and conventional, which long preceded the UN General Assembly's request for the opinion.

In essence, the relevant principles were the following:

It is prohibited to use weapons that are incapable of distinguishing between civilian and military targets;

It is prohibited to cause unnecessary suffering to combatants;

Civilians and combatants remain at all times 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 the public conscience (the Martens Clause).

The Court called these principles “intransgressible” and said that they were “scarcely reconcilable” with the use of nuclear weapons. This would be true even as applied to weapons

with a throwweight no greater than the bombs dropped on Hiroshima and Nagasaki. It requires no feat of the imagination to realize how much more true it is of nuclear weapons in existence today, which have multiple times the force of those earlier ones. Some commentators have sought to dismiss the ICJ Opinion as “merely advisory”. But this is a strange way of dealing with an authoritative interpretation of international law rendered by the highest court in the world qualified to do so. An advisory opinion may not be binding, in the sense that it cannot *per se* be the basis of enforcement action by the Security Council under Article 94 of the UN Charter. It is nevertheless controlling as an authoritative interpretation of a question of international law, which can be the basis of a Security Council resolution, the violation of which can lead to enforcement action by the Council. There is, of course, a minor problem: Security Council resolutions may be vetoed by any of the five permanent members, which is what the United States did in the Nicaragua case. Thus, a contentious decision by the Court is not necessarily any more binding than an advisory opinion, and an advisory opinion can be made binding with the intermediate step of a Security Council resolution calling for compliance with its content.

To summarize, the obligation, incumbent on all states, to negotiate in good faith for total nuclear disarmament is unquestionable and intransgressible, but its enforcement can be blocked by the veto of one or more of the “Big Five”, or simply by inaction. I will leave the elucidation of the nature of the good faith element to my colleague Phon van den Biesen and the other speakers at tomorrow afternoon's workshop on “Returning to the Court”.

So much for the strictly legal aspects of the matter. It is, however, a fact of political life that, despite the protestations of undying obeisance to “the rule of law” which embellish many a politician's speech, the law by itself is incapable of securing the values which it reflects or the specific objectives which it proclaims. It is necessary, therefore, to examine the political will to “go to zero”, to take, as it were, a reading of the world's anti-nuclear barometer.

In this respect, the news is not all bad. Since the appearance, in January 2007, of an article in the Wall Street Journal calling for a nuclear free world co-signed by two former Republican Secretaries of State and two elder Democratic statesmen, it has been possible, at least in my country, to speak of nuclear abolition as an issue transcending political battle lines, rather than as one owned only by liberals and progressives. Since then, hundreds of more or less prominent figures, from all corners of the political spectrum, have signed on to the call for “going to zero”. Similar calls have come from many parts of the globe, not only the non-nuclear countries which have always been for a nuclear weapons free world, but also from other nuclear weapons countries and countries under the “nuclear umbrella”, as well as from the Secretary General of the United Nations and the current President of the General Assembly. Add to this the Prague speech by President Obama, in which he affirmed his commitment to a nuclear free world and you will see that the climate concerning nuclear abolition has changed considerably in the recent past. This commitment has also been reaffirmed by all the 34 countries participating in the NPT Prepcon, the Preparatory Conference which met at the United Nations in New York from May 4 to 15 to prepare the agenda for the quinquennial NPT Review Conference which will meet, also in New York, from May 5 to May 28 next year. The mood at the Prepcon was in sharp contrast to that of the 2005 Review Conference, which was successfully sabotaged by the Bush administration and accomplished only a good deal of backtracking from the 2000 Conference, if you can call that an accomplishment. This time President Obama sent a message to the conference and promised to take “concrete steps” toward a nuclear free world. Even Senator McCain made a statement to the US Senate on June 3 headed “A World Without Nuclear Weapons”. It remains to be seen, however, what will be the content of the Nuclear Posture Review, currently being prepared in Washington and due to be released in October.

All of this presents a serious challenge to civil society. During the cold war, the danger of a nuclear holocaust was taken seriously. We had books, movies, demonstrations; getting rid of nuclear weapons was, for several years, at or near the top of public concerns. But all this mass

movement achieved was freezing the number of nuclear weapons at a level where they were sufficient to kill every man, woman and child in the world several times over. Today, paradoxically, a greater percentage of the public understands the uselessness of nuclear weapons and the fallacy of deterrence, but the number of people willing to do something about it is much smaller. Today’s mantra, intoned by many opponents of nuclear weapons, is “let’s go down to 1000” and that may indeed become the number agreed by the US and Russia at the negotiations for a renewal of the START Agreement, which is due to expire at the end of this year. As if 1000 nukes were a negligible number if used by either country under its current doctrine of extended deterrence. As if maintaining 1000 nukes in the arsenals of Russia and the US, and several hundred in each of the six other nuclear-armed states, were likely to persuade North Korea and Iran, and who knows how many other countries, not to build their own nuclear arsenals, rather than the other way around.

So, what is to be done? Most of the groundswell of anti-nuke talk takes the form of advocating a series of intermediate steps, the most important of which are ratification of the Comprehensive Test Ban Treaty and negotiation of a Fissile Material Cut-off Treaty and a follow-on treaty to START. These are important steps, to be sure, but they are not the beginning of a serious effort to bring about a nuclear weapons free world. An international meeting to start talking about a nuclear weapons convention would be such a beginning. That is what Ban Ki-moon has suggested and that is what civil society should be calling for.

One thousand is two zeros too many. One zero has to be our goal, and the sooner the better. The time is ripe. The moment is opportune. Let us determine to seize it. The law can help us do that. In the words of President Kennedy, addressing the United Nations on September 25, 1961, “We prefer world law, in the age of self-determination, to world war, in the age of mass extermination.”

**Peter Weiss, Berlin, June 26, 2009**

## 5. Return to the International Court of Justice: An Effective Strategy to Support Productive Negotiations on a Nuclear Weapons Convention

Phon van den Biesen

The former President of the International Court of Justice, Judge Rosalyn Higgins, at the time the only woman among the Court's 15 judges, her successor is a man, (which should worry and concern all of us), once said that there exists a tradition of the Court of "using advisory opinions as an opportunity to elaborate and develop international law." She did not say this at some reception over drinks, nor at any of the lectures she is giving all over the world; she put down this observation in her Separate Opinion attached to the Court's Advisory Opinion on the "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory."<sup>2</sup> Clearly, the Court's earlier Advisory Opinion of 8 July 1996 on the *Legality of the Threat or Use of Nuclear Weapons* fits in to this tradition of developing and elaborating international law.<sup>3</sup>

When President Higgins observes that the Court is developing international law in its Advisory Opinions, we should be aware that these are not merely academic exercises. Advisory Opinions state the law as it stands today. As such, the substance of an advisory opinion is precisely as binding as the law it sought to clarify. Judge Gros in the *Western Sahara* Advisory Opinion observed:

"[W]hen the Court gives an advisory opinion on a question of law it states the law. The absence of binding force does not transform the judicial operation into a

<sup>2</sup>*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, ICJ Reports 2004, p. 136, Separate Opinion of Judge Higgins, p. 213, para. 23.

<sup>3</sup>*Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p. 226.

legal consultation, which may be made use of or not according to choice. The advisory opinion determines the law applicable to the question put."<sup>4</sup>

The difference between Advisory Opinions and Judgments delivered by the Court in contentious cases (cases between two or more states, *i.e.* between an applicant party and a respondent party) does not lie in the binding nature of one as opposed to the other, but in the enforceability. A Judgment may be enforced by the Security Council through the mechanism of Article 94, paragraph 2 of the Charter of the United Nations. By its very nature an advisory opinion cannot, as such, be enforced, but it serves as clarification of legal questions to the UN organ that requested the opinion.<sup>5</sup> Obviously, the requesting UN organ and, for that matter, all UN organs will accept them for what they are: a stating of the law as it needs to be applied.

One of the important and interesting features of the 1996 Opinion of the Court on the legality of Nuclear Weapons is the opinion that the Court included on Article VI of the NPT. Actually, this was a response to a question which was, as such, not submitted to the Court by the General Assembly in its initial request for an advisory opinion<sup>6</sup>. Apparently the Court - and the, then, President of the Court, Judge Bedjaoui, has

<sup>4</sup> *Western Sahara, Advisory Opinion*, 1975 I.C.J. Reports 73, ¶ 6 (Oct. 16) (declaration of Judge Gros).

<sup>5</sup> Through an accord de siège, an international organization and its hosting state can submit a dispute to the Court for an "advisory opinion" that is considered binding.

<sup>6</sup> For the full text of the General Assembly resolution containing the question submitted to the Court, see *Legality of the Threat or Use of Nuclear Weapons*, *supra*, pp. 227-228, para. 1.

confirmed this numerous times, since -felt very strongly that the Article VI obligation shows the way forward<sup>7</sup>. These circumstances make this part of the opinion even more powerful.

Not only the fact that the Article VI part of the Opinion was included is significant, but this is also true as to its substance, since it really provides an indispensable clarification of the precise meaning of Article VI of the NPT. The Court took away any doubt about the nature of the Article VI obligation in stipulating that this “is an obligation to achieve a precise result— nuclear disarmament in all its aspects.”<sup>8</sup> This is where the great contribution of the Advisory Opinion to our cause is located. This is what the Court, unanimously, found:

“There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.”<sup>9</sup>

Since the Court delivered this opinion, over more than 12 years virtually nothing occurred that could be interpreted as the Nuclear Weapon States trying to effectively live up to this obligation. For that reason Ialana and several other Civil Society Organisations started the preparation for a new campaign aimed at returning to the Court, in order to ask the Court what it takes for States to actually live up to the obligation, to ask the Court to provide legal guidance as to the legal implications of the existence of the obligation. In support of that we produced this little booklet “Good faith negotiations leading to the total elimination of nuclear weapons”<sup>10</sup>. It was drafted in a close and

very effective collaboration with the International Human Rights Clinic at Harvard Law School. The Memo now functions as a resource for lawyers, diplomats and civil society alike. It summarizes the earlier Opinion, explains the procedural issues related to obtaining an Advisory Opinion, and most importantly it provides the reasons for returning to the Court and discusses the questions that should be asked.

First, we would like the Court to pronounce on the most important question of today: is negotiating reductions to be considered as fulfilling the obligation rather than negotiating total elimination? The Secretary General of the UN, Ban Ki-moon, in October 2008 said it this way:

“I urge all NPT parties, in particular the nuclear-weapon States, to fulfil their obligation under the Treaty to undertake negotiations on effective measures leading to nuclear disarmament.

They could pursue this goal by agreement on a framework of separate, mutually reinforcing instruments. Or they could consider negotiating a nuclear-weapons convention, backed by a strong system of verification, as has long been proposed at the United Nations. Upon the request of Costa Rica and Malaysia, I have circulated to all United Nations Member States a draft of such a convention, which offers a good point of departure.”<sup>11</sup>

It is clear that Ialana is convinced that the comprehensive way as formulated by the Secretary General is the only way to live up to the article VI obligation. Obviously,

<sup>7</sup> TO BE ADDED

<sup>8</sup> *Id.*, p. 264, para. 99.

<sup>9</sup> *Supra*, note 2, page 267

<sup>10</sup> Available on line: Lawyers Committee on Nuclear Policy, [www.lcnp.org](http://www.lcnp.org)  
International Human Rights Clinic, Human Rights Program, Harvard Law School,  
[www.law.harvard.edu/programs/hrp](http://www.law.harvard.edu/programs/hrp)

<sup>11</sup> Ban Ki-moon, UN Secretary-General, Address to the East-West Institute: The United Nations and Security in a Nuclear-Weapon-Free World (Oct. 24, 2008), <http://www.un.org/News/Press/docs/2008/sgsm11881.doc.htm>.

this is what we would like to see being confirmed by the Court.

Second, the world could obtain guidance from the Court as to the legal consequences as well as to the legal principles that flow from the “good-faith” language explicitly included in Article VI. After all, in its 1996 Opinion, the Court already referred to the application of the principle of good faith to the Article VI obligation, a reference that clearly needs to be elaborated.<sup>12</sup> In our Memorandum we refer to a set of specific elements and conditions that need to be fulfilled in order for conduct to be “in good faith” and, therefore, to be in conformity with the law. It would be very helpful to obtain the Court’s view on these and additional elements and conditions, in order to get true negotiations on total nuclear disarmament underway. In addition to that, the question of whether 12 years of standstill is in conformity with the good-faith requirement should be part of the issues analyzed by the Court. And also the question whether modernizing existing stockpiles could or should not be considered to be in line with the good faith obligation.

Also, the world could obtain a clarification from the Court on the question whether the obligation to negotiate and conclude a nuclear disarmament treaty applies only to states that are party to NPT. A positive response to this question would make it impossible for any state party to the NPT to stay away from the negotiating table under the pretext that not all states possessing nuclear weapons are to be present.

Another issue that should be discussed in the context of a case on Article VI are the legal consequences of the adoption in 2000 of the “13 steps” by the NPT Review Conference. These 13 steps were adopted by consensus and supposedly were to function as a “Road Map” on the way

towards a further fulfilment of the Article VI obligation. The first question here, obviously, would be whether this particular road map would be sufficient to finally meet the Article VI obligations. The second question would be whether the fact that the 13 steps were not implemented should be considered a violation of the Article VI obligation and/or of the good faith obligation included in this provision.

Why should “we”, why should the General Assembly, go back to the Court, now that both President Obama and president Medvedev have announced that they will on short notice resume talks on substantial reductions of their nuclear arsenals? The answer to that is, actually, quite simple: because talking about reductions has been keeping the world waiting for over 40 years now, while the pledge of total elimination has never been fulfilled. As Otto Scheer rightly stated yesterday evening: the importance of article VI of the NPT cannot easily be overestimated: without this particular provision the treaty would not have been concluded. It contains the legally binding promise of the NWS to effectively realize total elimination. The fulfilment of that pledge has been long overdue and, by now, this situation provides for a powerful excuse for non-nuclear States to not wait any longer and to begin considering the acquirement of nuclear weapons themselves. As we all know the number of States that possess nuclear weapons, now is on the rise rather than the contrary. So today, more than ever, there are compelling reasons for total nuclear disarmament.

In May 2010 the periodical NPT Review Conference will take place in New York. If the outcome of the NPT Review Conference would be that, indeed, negotiations on a total framework or a Nuclear Weapon Convention should begin immediately, obviously, there would be no need to return to the Court to raise the questions discussed here. Since, in that case the honouring

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<sup>12</sup> *Id.*, pp. 264-265, para. 102.

of the pledge of total elimination of nuclear weapons would become visible. However, if this would not be the outcome of the Review Conference, the need for an Advisory Opinion would be even more urgent than ever. With that situation in mind, Ialana has decided to – together with as many others as possible- embark on a lobbying campaign in order to get States prepared to discuss already now the adoption of a Resolution in the General Assembly of the UN in the fall of 2010 requesting an Advisory Opinion on the nuclear disarmament obligation, including the good faith aspects of that obligation.

So a lot of work on our part is needed, while there is also the need for several states that are not afraid to take the lead in such an effort. Political will is not enough here, political strength is the key issue. It is time for civil society to get going again and rally against the threat posed by Nuclear Weapons, as it did in the 80s and the 90s of the last century.

**Phon van den Biesen**

**Berlin, 27 June 2009**

### 6. Photos



## 7. Book Announcements:

### a) Book Announcement – Legal Obligation to Nuclear Disarmament, Völkerrechtliche Pflicht zur nuklearen Abüstung?, L’Obligation de Désarmement Nucléaire?

The authors of this tri-lingual book devote themselves to the question:

What does it mean under international law that a legal obligation exists “*to pursue negotiations in good faith and to bring it to a conclusion which leads to nuclear disarmament in all its aspects under strict and effective international control*”?



#### Subject Content includes:

- Good Faith, International Law and Elimination of Nuclear Weapons
- The Intersection of Nuclear weapons and International Human Rights Law: Implications for the Good-Faith Obligation to Negotiate Nuclear Disarmament
- Good Faith Negotiation – The Nuclear Disarmament Obligation of Article 6 of the NPT and Return to the International Court of Justice.
- The use and function of human rights

**Mohammed Bedjaoui** - President of the International Court of Justice, 1994-1997, and a judge on the Court from 1982-2001. From 2005 to 2007, he was the Algerian Minister of Foreign Affairs.

**Karima Bennoune** - Professor of Law and the Arthur L. Dickson Scholar at the Rutgers School of Law – Newark. From 2005-2008, she also served on the board of directors of Amnesty International USA.

**Dieter Deiseroth. Dr. jur** - Judge at the Bundesverwaltungsgericht (German Federal Administrative Court) in Leipzig.

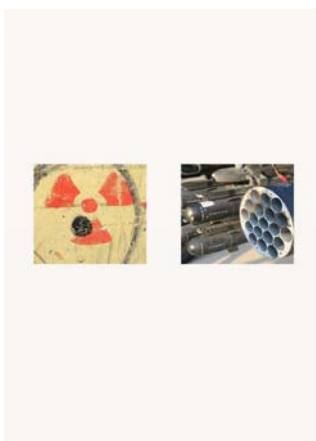
**Elizabeth Jay Shafer, J.D.** - (City University of New York Law School at Queens College, 1991). 2004 – 2007 Board Member of the Lawyers’ Committee on Nuclear Policy (LCNP), since 2008 Vice-President.

## b) Good Faith Negotiations Leading to the Total Elimination of Nuclear Weapons

Request for an advisory opinion from the International Court of Justice

Legal Memorandum

Foreword by Judge C. J. Weeramantry



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