Survey and Preliminary Analysis of Domestic Cases in Which Defendants Raised the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons

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By seven votes to seven, with the determining vote cast by President Bedjaoui, the International Court of Justice declared that "the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law. However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake." [1]

In its historic decision of July 8, 1996, the International Court of Justice ("ICJ") issued an advisory opinion on the legality of the threat or use of nuclear weapons ("ICJ opinion"), pursuant to a request by the General Assembly. The General Assembly posed the following question to the Court: Is the threat or use of nuclear weapons in any circumstance permitted under international law?" The case was closely followed by many governments. Over two-thirds of the 45 participating states asserted that nuclear weapons are inherently indiscriminate and inhumane and their use thus illegal. On the other hand, the nuclear weapon states, including three NATO states, France, the United States, and the United Kingdom, as well as the Russian Republic, countered that there is no treaty expressly banning the use of nuclear weapons, and that the legality of any use would depend upon the circumstances. The other permanent member of

[1] *The Legality of Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, p. 226, para. 105(2)E. Three judges who voted no did so because they believed that any use of nuclear weapons violated international law; ten judges, therefore, were in favor of illegality.

the Security Council, China, did not participate; nor did Israel or Pakistan. India argued for an affirmative position. New Zealand, Australia, and other states ordinarily aligned with NATO participated and argued for an affirmative answer.

The ICJ is the most authoritative court of the international legal system. Advisory opinions rendered by the ICJ on specific legal questions are determinative. The principles and rules stated in the course of replying to these questions are authoritative, even if no particular action is called for at the time the opinion is rendered. (See below.) Since July 1996, several books and more than 150 articles have been written on the opinion and it has been used in a variety of resolutions and documents in United Nations and Nuclear Non-Proliferation Treaty contexts.

The nuclear states, particularly the United States, continue to argue that the proposition of law stated in the ICJ opinion did not change the existing law. Their position is that use of nuclear weapons was not declared illegal in all and every circumstance, albeit the threat or use of the weapons is subject to humanitarian law. Nuclear abolitionists and the peace community have argued that the holding in the opinion is definitive — the threat or use of nuclear weapons is illegal, since *there are no possible cases where the threat or use would not violate humanitarian law*. This debate is likely to continue. At the same time, it is clear that the disarmament and peace community are using the case in many fora political and legal. Here we report on one significant strand of the use of this ICJ opinion — the use by defendants in civil dissent cases in the domestic courts of states throughout the globe.

Legal defenses aside, there is an underlying political and jurisprudential strategy that the opinion, when used in domestic courts, supports, buttresses and helps formulate the international law principle of illegality. It is, as it were, nourishing and strengthening the roots for the tree which has been planted.

This essay will provide a brief survey and initial analysis of the domestic court cases in which the advisory opinion was raised. It will categorize the cases according to the disposition of the judgments of the courts. In so doing, the goal is to indicate how the ICJ opinion in particular and international law in general were significant in determinations of the domestic courts regarding individual defendants. Prior to focusing on the cases, there are three matters we shall discuss (briefly and in summary form) which provide a useful context for understanding the political and legal import of these matters: (1) the political and social movement activities undergirding the cases; (2) the jurisprudence of the authority and legal obligations stemming from advisory opinions; (3) a description of our database and other sources.

Political and Social Movement Activities

The advisory opinion is a direct result of civil society social movement activity. The broad context is the anti-nuclear movement. What is unique about this effort focussed on the ICJ is the attempt to utilize law to achieve the goal of eliminating nuclear weapons from the face of the earth.

It is both ironic and understandable that the presidential presence of George W. Bush and his minions promoting Star Wars II — national and "theater" missile defense — has triggered anti-nuclear sentiment and its re-emergence on the political agenda for the population at large. A year ago, when the initial draft of this research project was published, it is fair to say that nuclear weapons

had dropped off the political screen. (There was a blip in spring 1998 when India and Pakistan tested nuclear weapons; but it was only a blip.) To be sure, some strategic policy wonks, and perhaps more importantly, a core group of movement people who continued to pursue anti-nuclear activities, including the dissent cases on which we are here reporting, kept abreast, monitored and lobbied. However, it took the security and defense posture of George W. to reinvigorate the movement.

From the advent of the nuclear era, there have always been individuals and groups, including within the nuclear research community itself, who vehemently argued against any use of these weapons, except perhaps to demonstrate their deadliness by exploding them in territorial areas or ocean waters where individuals and property would not be harmed (leaving aside radiation fallout). One is reminded here of the statement attributed to Robert Oppenheimer on the detonation of the first atomic bomb near Alamagordo, New Mexico, 16 July 1945: "I remember the line from the Hindu Scripture, The Bhagavad Gita . . . 'I am become death, the destroyer of worlds.'" Following Hiroshima and Nagasaki this concern, if not opposition, was acted upon at the highest policy levels of the U.S. government. The Baruch-Lilienthal proposal to regulate all nuclear weapons was the most visible expression of these sentiments. The inability of the United States and the Soviet Union to agree on this proposal (the beginning of the Cold War, the Iron Curtain, and the Berlin Wall reversed these sentiments at the high policy level) led instead to the hydrogen bomb and an all out mad arms race resulting in some 55,000 nuclear weapons being deployed throughout the globe by the late 60s.

There were countervailing forces. Intense public concern about fallout, voiced especially by women, spurred agreement on the 1963 Partial Test Ban Treaty. During the 70s and 80s, when nuclear weapons were a centerpiece of foreign and defense policy issues within the Cold War frame, large scale demonstrations and civil dissent in Europe and the United States pressured governments to diminish nuclear capacity. In addition, there were three United Nations special sessions on disarmament which brought together large numbers of anti-nuclear activists from all regions of the world to the United Nations. And there was one major political initiative. President Gorbachev, in his memorable speech of December 7, 1988, announced the unilateral withdrawal of 500,000 Warsaw Pact troops from a threatening, aggressive posture, minimizing the need for extended deterrence.

However, after the fall of the Berlin Wall and Gorbachev's removal from office, public interest in these matters declined precipitously throughout the globe.

A linchpin in the enterprise to seek an advisory opinion from the ICJ was the establishment of the World Court Project in 1992. There were a number of initiatives prior to the World Court Project which should be noted. The London Nuclear War Tribunal was convened in 1985 by the International Peace Bureau (IPB), chaired by Sean MacBride, and called for an advisory opinion. At the same time, the U.S. based Lawyers Committee on Nuclear Policy (LCNP) an advocate of resort to the ICJ since its inception in 1982, and a group of distinguished Soviet lawyers held a conference in New York which led to the formation of the International Association of Lawyers Against Nuclear Arms (IALANA). In 1989, IALANA adopted the Hague declaration condemning nuclear weapons as illegal and backed the ICJ initiative. In 1988, International Physicians for the Prevention of Nuclear War (IPPNW) and IPB, both Nobel Peace Prize winners, had already endorsed the project. More than 700 groups from the countries around the world endorsed the World Court Project and many of these groups lobbied their governments to vote for the World Health Organization (WHO) and General Assembly requests.

The significance of the WHO request should not be underestimated. The question on which WHO requested an opinion was the following: "In view of the health and environmental effects, would the use of nuclear weapons by a State in war or other armed conflict be a breach of its obligations under international law including the WHO constitution?" The Court refused to address the question on the ground the WHO had overstepped its substantive competence in seeking the opinion. Notwithstanding the ICJ's refusal to decide the WHO question, the WHO initiative was of great importance. It was spearheaded by IPPNW and thus mobilized a transnational group of physicians around the issue. Then other peace activist groups joined, which helped lead to a coalescence in building the World Court Project. Furthermore, the Court clearly relied on the major WHO studies of the effects of nuclear war on health and health service in its findings regarding the "unique characteristics" of nuclear weapons in the opinion responding to the General Assembly request.

Over the past 50 years, there has been an extraordinary change in global politics. The nuclear era and its mad arms race, decolonization, the Vietnam War, the demise of communism and the Warsaw Bloc, and the growth of the human rights, environment, and feminist movements have altered domestic societies and the interaction of states. The use of non-violent direct action in bringing down the oppressive governments of Iran, Poland, Haiti and the corrupt government of the Philippines, as well as its initial use in the Gandhian move for independence from Great Britain heralded a new form of legitimate political action — civil dissent.

We now live in a period in which these historical events have imprinted on our political myths and psyche. Even as the United States appears as the sole remaining super power, it has become clear that there is emerging a normative frame which constrains the activities of that super power. It might also be noted that radical overthrow of government to achieve an ideal polity is no longer a political objective of any large numbers of individuals, groups or states throughout the world — and this includes Cuba, the Peoples' Republic of China, Iraq and the like. In this setting anti-nuclear movements both in tactics and aspiration are promoting the establishment of a just legal system where the threat or use of nuclear weapons no longer hover over the consciousness of humanity.

The Authority of an Advisory Opinion

> *" . . . Although an advisory opinion has no binding force under Article 59 of the Statute, it is as authoritative a statement of the law as a judgment rendered in contentious proceedings."*
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> Precedent in the World Court (1996)
> Judge Mohamed Shahabuddeen

The Charter of the United Nations establishes the International Court of Justice as its principal judicial organ. The Court's functions are laid out in an annex, the Statute of the International Court of Justice. The Court hears cases from states who choose to bring disputes before the Court. These cases have come to be labeled as " contentious." Since 1946 there have been 98

contentious cases.

The Court is also mandated under the UN Charter (Article 96) to provide advisory opinions on any legal question which the General Assembly or the Security Council may request. This jurisdiction now comprehends two other organs of the United Nations, the Social and Economic Council and the UN Trusteeship, but excludes the Secretariat and the Court itself. In addition, 16 specialized agencies have been authorized to submit questions. Since 1946 the Court has rendered 24 advisory opinions. Topics ruled upon include a wide variety of matters: admission to United Nations membership, reparations for injuries suffered in the service of the United Nations, territorial status of Southwest Africa (Namibia) and Western Sahara, judgments rendered by international administrative tribunals, expenses of certain United Nations operations, applicability of the United Nations Headquarters Agreement, the status of human rights rapporteurs and in 1996, the opinion with which we are concerned, the legality of the threat or use of nuclear weapons. Given the range of issues and topics, and the fact that advisory opinions are frequently as lengthy and spawn as many individual judicial opinions as contentious cases, it is fair to say that many principles and rules of international law have been utilized and articulated in these opinions. As a result, there has been a good deal of discussion on the authority and/or " binding" nature of an advisory opinion. We shall not here review the jurisprudence which has emerged from this discourse. It will be useful, however, to state in somewhat simplified terms the major issues which have been addressed in the literature.

The traditional and still strongly held view by many states and some legal scholars is that advisory opinions are consultative in character. So understood, the entities who request the opinion are not bound to adhere to the Court's decision. Nevertheless, as Judge Shahabuddeen notes, advisory opinions are as *authoritative* a statement of the law as a judgment rendered in contentious proceedings. In order to understand Judge Shahabuddeen, we need to distinguish between the terms " authoritative" and " binding" .

According to Article 59 of the Statute, judgments in contentious cases are applicable *only* to the states in the particular proceeding. In these cases, the state parties have agreed to be bound and adhere to the Court's decision. Most importantly, this means implementing the remedy mandated by the Court. Advisory opinions do not bind the parties who submit the legal questions in that same sense.[2] However, the legal principles and rules which are pronounced by the Court in these advisory opinions unquestionably become part of the corpus of international law. These principles are frequently referred to as determinative and authoritative, not only by the parties who requested answers to the legal questions, but also by the various states in their dealings with one another and in their appearances before the Court. Indeed, in some instances, an advisory opinion may even be more authoritative than judgments rendered in contentious cases. A word of explanation.

The ICJ follows the jurisprudential mode of code legal systems

[2] There have been a number of advisory opinions where the parties, at time of submission of the legal question, agreed to be bound by the opinion of the court.

in which decisions are *stare decisis* — that is, definitive for the parties before the Court — but do not become precedent. An advisory opinion, on the other hand, does not obligate states to comply in a specific manner to the resolution pronounced by the Court. Thus, it is accurate to say that parties to the advisory opinion are not bound to follow the law of the opinion in the particular situation for which the legal question has been raised. The parties may, in attempting to resolve the underlying matter, seek alternative political and legal arrangements. Whether they do so or not, we underscore, however, the principles of advisory opinions become part and parcel of the corpus of international law. From this perspective, the ICJ opinion on the threat or use of nuclear weapons is of major import. As indicated above, 45 states chose to participate in the proceedings, obviously believing that an opinion on this matter would be of great significance; and since the opinion has come down, states continue to address and interpret its meaning.

One additional matter should be noted here — the contribution of this advisory opinion to the progressive development from soft law to an enforceable legal regime outlawing nuclear weapons. Soft law is the label for legal principles and rules pronounced in non-binding declarations, resolutions and other documents which are initially conceived as recommendations and aspirational. However, a pattern has emerged involving a wide variety of topics in which much soft law, having entered the political process and public awareness, provides the societal ground and momentum which culminates in

binding law.[3]

Perhaps the best well known illustration of this process is to be found in the human rights area. The Declaration of Human Rights promulgated in 1948 by unanimous acclamation was viewed at best as aspirational. It was soft-soft law, not considered binding, but rather a guide for state conduct. There was no enforcement machinery, and states which violated the Declaration's specific proscriptions (*e.g.*, the prohibition of slavery), let alone states which did not meet its progressive standards (*e.g.*, rights to food and housing) faced no formal sanction process. Yet, the institutional and normative growth in this area has been remarkable. The two covenants on Civil and Political Rights and Economic, Social, and Cultural Rights, plus the enhancement of the UN Commission on Human Rights culminating in the appointment of the High Commissioner in 1993 has, in effect, created a human rights legal regime.

We believe this advisory opinion is an event of singular import in the process of moving the principle of illegality of nuclear weapons from soft to hard law. The origin of this soft law process may be fixed at various moments post-Hiroshima and Nagasaki. Indeed, the first General Assembly resolution of the United Nation, adopted in 1946, envisaged " the elimination from national armaments of atomic weapons" . For our purposes here, we point to the first

[3] A review of advisory opinions suggests that some of them evolve in an analogous way to the process whereby soft law over time becomes integrated within the normative code of the global legal system, a proposition we shall explore on another occasion. Here, we confine ourselves to the ICJ opinion vis-a-vis the emergence of the illegality of the threat or use of nuclear weapons.

General Assembly resolution stating the criminality of use of nuclear weapons promulgated in 1961. There has been a continuing series of UN resolutions over the past four decades passed by overwhelming majorities repeating this proposition. International legal scholarship — a source of international law — has also contributed to this process beginning with Judge Singh's 1959 volume[4] and the 1981 paper by Falk et al[5]. In addition, there have been some 25 major arms control and disarmament treaties dealing with nuclear weapons, the International Atomic Energy Agency has functioned as an on-the-ground inspector of peaceful nuclear energy sites, and the UN has engaged in well publicized efforts to monitor and control mass destruction weapons in Iraq. All of this with the continuing civil society lobbying to eliminate nuclear weapons.

The Court's advisory opinion adds a significant and powerful component to the establishment of hard " binding" law. In some sense, it is a powerful glue, solidifying the developments just noted. It is not too much to anticipate, then, that before long the institutional and enforcement machinery will come into being. Indeed, it was the Court's unanimous, unequivocal statement that the states of the world are obligated to meet the Article VI provision of the Non-Proliferation Treaty. In the language of the Court, " the legal import of that obligation goes beyond that of a mere obligation of conduct; the obligation involved here is an obligation

[4] Nagendra Singh, *Nuclear Weapons and International Law* (London: Stevens and Sons, 1959).

[5] Richard Falk, Lee Meyrowitz, and Jack Sanderson, *Nuclear Weapons and International Law*, Occasional Paper No. 10 (Center of International Studies, Princeton University, 1981).

to achieve a precise result — nuclear disarmament in all its aspects — by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith." This opinion thus adds impetus and momentum to enshrine the hard law of the illegality of nuclear weapons.

Database

The database in which the domestic court case documentation is being developed is in the New York office of the Lawyers' Committee on Nuclear Policy (LCNP). The materials used to compile the database include court opinions, motions, responses to motions, statements by defendants, expert testimony, communications from NGOs, personal correspondence from defendants and court observers, news articles, and information downloaded from the Internet. The materials vary greatly from case to case, and in some cases there is a dearth of information.

LCNP's database on domestic nuclear weapons civil disobedience cases is the result of LCNP's nearly 20 year history of offering legal assistance to individuals charged with various offenses arising from their opposition to nuclear weapons. Cases are often brought to the attention of the LCNP staff when a lawyer representing an individual charged with an offense contacts the office for help concerning how to handle the international law issues raised by these types of cases. Other ways that such cases come to the attention of LCNP are through website postings, publications monitored by LCNP staffers and interns, or sometimes by word of mouth. Whenever possible, LCNP tries to obtain transcripts

of the proceedings as well as copies of pleadings and decisions. LCNP maintains a roster of experts qualified to testify in nuclear weapons related cases, as well as a databank of useful briefs, both legal and factual in nature.

It is important to note that the cases presented in this article do not represent the full spectrum of cases. We have not considered those cases that were decided prior to the 1996 ICJ advisory opinion, including the numerous published decisions, mostly in the United States, rejecting international law related defenses.[6] Nor have we included cases where the defenses raised have not raised international law issues. The actual universe of related cases is far too large for complete inclusion in this article. For the year 2000, the *Nuclear Resister*, a newsletter produced by dedicated activists, reported a total of 813 arrests (most of which do not go to trial) related to nuclear resistance actions in the United States and Canada.[7] (See Appendix A for a record of arrests from 1983 to 2000.) In the United Kingdom, the campaign known as Trident Ploughshares reports that as of March of 2001 there had been a total of 1170 arrests resulting in 96 trials, with still many more trials set to begin in the near future.[8] These statistics are indicative of

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[6] *E.g.*, United States v. Allen, 760 F.2d 447 (2d Cir. 1985); United States v. Shiel, 611 F.2d 526 (4th Cir. 1979); United States v. Cassidy, 616 F.2d 101 (4th Cir. 1979); United States v. Quilty, 741 F.2d 1031 (7th Cir. 1984); United States v. May, 622 F.2d 1270 (9th Cir. 1980); United States v. Dorrell, 758 F.2d 427 (9th Cir. 1985); United States v. Seward, 687 F.2d 1000 (10th Cir. 1982); United States v. Montgomery, 772 F.2d 733 (11th Cir. 1985); In re Weller, 164 Cal. App.3d 44 (1985); Commonwealth v. Berrigan, 501 Pa. 118, 501 A.2d 226 (1985). For a recent decision, see United States v. Maxwell-Anthony, 129 F.Supp.2d 101 (D. Puerto Rico 2000), aff'd by 1st Cir., No. 00-2084, June 29, 2001.

[7] *Nuclear Resister*, January 30, 2001, p.2, available at www.nonviolence.org/nukeresister.

[8] See www.gn.apc.org/tp2000/html/intro.html. For a list of trials

the fact that there is a strong community of activists taking part in nuclear disarmament actions around the world, many of which utilize the ICJ opinion and/or international law to justify their actions.

Universe of Cases

There are currently a total of 22 cases litigated to conclusion in the database with which we are working. All of the cases were brought in industrialized states. All of the states are NATO states.

Six different societies have adjudicated the cases in which international law and the ICJ opinion was raised. Eight of the cases were brought in the United States; seven in England; four in Scotland; two in Germany; and one in France. (The Annex appended to this article contains information concerning the court, the date of decision, facts and disposition of all cases noted herein.)

There are six cases in which the defendants have been acquitted on all charges. In each of those cases defendants were permitted to present testimony relating to the ICJ opinion and international law, and in at least four (Trident Convoy, H.M. Advocate v. Zelter, Crown v. Boyes and River, and Washington State v. Bernard) that testimony appears to have been decisive. Following is the breakdown of these cases according to national site: England-2; Scotland-2; United States-1; France-1 (defendant's conviction reversed on appeal).

There are sixteen cases in which the defendants have been

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set as of June 16, 2001 see www.gn.apc.org/tp2000/html/latcourt.html.

convicted on one or more charges in which they presented or sought to present testimony and defenses related to the ICJ opinion and international law. Following is the breakdown of those cases: United States-7; England-5; Scotland-2; Germany-2 (in one of the cases the defendant was initially acquitted then convicted following appeal). In some of these cases, ICJ opinion/international law testimony and defenses were explicitly ruled out, in others such evidence and argument was limited, and in some it was fully aired prior to convictions. Though all of these cases involve convictions, ICJ opinion/international law defenses and testimony nonetheless in some cases resulted in acquittals on some charges (*e.g.*, Wisconsin v. Howard-Hastings) or likely affected the punishment (*e.g.*, Crown v. Hipperson and Walford, Crown v. Zelter and Boyes).

Defenses in which the ICJ opinion and international law play a role typically relied upon in the following cases include a "Nuremberg" or "international law" defense; prevention of crime defense; and necessity defense. How these defenses were presented and related vary from case to case and jurisdiction to jurisdiction, but they can be described in broad strokes as follows.

The international law justification for non-violent direct action against nuclear weapons has two basic components: (1) condemnation of current policy as contrary to the requirements of international law; and (2) vindication of protest as a proper means of upholding those requirements. Each of these elements was argued in the cases which we have collected. The Nuremberg defense, also based on the Tokyo War Crimes Tribunal, is that not only do

individuals have the duty to refuse orders that are unlawful under international law, but they also have the right and even the duty to prevent the commission or threatened commission of international crimes. The prevention of crime defense, which is based in national law but supports the Nuremberg defense, is that individuals are justified in committing otherwise unlawful acts in order to prevent the commission or threatened commission of crimes. The necessity defense, also based in national law, is that individuals are justified in committing otherwise unlawful acts to prevent great evils or harms. The lawful excuse defense can refer to either of the latter two justifications. International law can also sometimes be raised as part of a claim that the government has failed to prove the elements of the offense, for example that defendants had the intention to sabotage preparation for national defense (Wisconsin v. Howard-Hastings).

Preliminary Analysis

As noted above, there are several thousand instances in which activists engaged in civil dissent against nuclear weapons. The specific focus here are the cases in which the 1996 ICJ advisory opinion was a prominent aspect of the defense. Our analysis begins with a tale of two cases — Bernard and Zelter.

1. Washington State v. Bernard et al., Kitsap County District Court, Washington, United States (jury trial). Decided June 10, 1999.

On August 9, 1998, the 53d anniversary of the US atomic bombing of Nagasaki, nine persons sat in the path of traffic into the

Trident submarine base in Bangor, Washington. They were charged in state court with intentionally obstructing traffic without lawful authority.

In pre-trial motions, a Kitsap County judge ruled that defendants could not present expert testimony on international law and the Trident nuclear weapons system. However, at trial the judge permitted a defendant, Brian Watson, to testify at length about the incompatibility of Trident with US legal obligations under the Hague Conventions, the Nuremberg Principles, and the ICJ opinion. Watson showed the jury an exhibit containing key excerpts from the ICJ opinion, for example the statement that under humanitarian law, "methods and means of warfare, which would preclude any distinction between civilian and military targets, ... are prohibited."

The judge also instructed the jury that "a person acts with 'lawful authority' when he or she acts in reliance upon his or her reasonable interpretation of a relevant state or local ordinance, state or federal statute, *treaty*, or state or federal court ruling" (emphasis added), and that "to the extent there may be a conflict between a law of the State of Washington and a right granted, or an obligation imposed, by a treaty of the United States, the right granted or the obligation imposed by the treaty will govern."

The jury found the defendants not guilty, and their comments afterwards made clear that the international law testimony had been decisive. "We just kept going back to the treaty issue," said one juror. "We based our decision totally on what we believed the law to be, and the instructions we were given," said the presiding

juror.[9]

On August 6, 1999, another group blocked the road to Bangor. Prosecutors chose a different strategy to prosecute them. They were charged with a traffic violation, display of an unauthorized sign designed to alter the flow of traffic. This referred to the long banner that the four people held across the road, which read: "Bangor Closed! Trident Violates International Law!" A different judge ruled that they were innocent of the charge, in that they were expressing views protected by the First Amendment, not trying to "alter the flow of traffic." From August 1999 through June 2001, there have been four more direct actions at Bangor where people have closed the base by blocking the road. Kitsap County prosecutors have chosen not to press charges against any of these people.

2. H.M. Advocate v. Zelter et al., Greenock Sheriff Court, Scotland (jury trial). Decided October 21, 1999.

On June 8, 1999, Ellen Moxley, Ulla Roder, and Angie Zelter, all members of Trident Ploughshares 2000, boarded Maytime, a floating laboratory in Loch Goil, Scotland, which conducts research regarding the "sonar invisibility" of the United Kingdom's Trident submarines. The three damaged computers and machinery with superglue, sand and syrup, and throwing equipment overboard. They were arrested more than three hours later and charged with malicious mischief and theft causing £100,000 in damage.

At trial, defendants maintained their actions were a justified means of opposing the deployment and threatened use of Trident

[9] Quotations concerning the Bernard case and its aftermath are from local press reports available from LCNP.

which they argued is both unlawful and poses a risk of immeasurable harm. They put on expert testimony concerning the role of Trident in Britain's military strategy, the illegality of Trident under international law including as set forth in the ICJ opinion, and the present status of international negotiations concerning non-proliferation and disarmament.

On October 21, 1999, Sheriff Margaret Gimblett instructed the jury at Greenock Sheriff court, Scotland, to acquit the defendants. In explaining her decision on the previous day, Sheriff Gimblett relied heavily on the International Court of Justice advisory opinion on the legality of threat or use of nuclear weapons. She stated that after listening to defense experts, and absent any contradictory expert evidence from the government:

> " I have to conclude that the three accused ladies in front of me in company with many others were justified in thinking that their Britain in their use of Trident, not simple possession, their use and deployment of Trident allied with that use and deployment at times of great international unrest, coupled with a first strike reservation policy and in the absence of any indication from any government official then or now that such use fell into the very strict category suggested by the International Court of Justice in their opinion, then the threat or use of Trident could be construed as a threat, has indeed been construed by other states and as such is an infringement of international customary law. I think following on from that ... is the three accused took the view that if it was illegal and given the horrendous nature of nuclear weapons

that they had an obligation in terms of international law, never mind morally, to do the little they could to stop the going about the deployment and use of nuclear weapons in a situation which could be construed as a threat." [10]

The government applied to the Scottish High Court of Justiciary for a review of points of law raised by the case; the acquittal itself was not at issue. The proceedings before the High Court involved two weeks of argument. Angie Zelter, who represented herself below and before the High Court, had the judges closely studying the effects of a 100 kiloton bomb on Edinburgh, drawing their attention to hospitals, schools, churches, and the zones for heat and blast effects. One judge asked her, "Start with direct Nuremberg Principles - people shouldn't carry on with the commission of a crime. You extend that to people not in any way concerned with the commission of a crime?" She answered, simply, "Yes", of course having in mind "mere" citizens, not themselves having their finger on the nuclear trigger, who act to resist the nuclear threat. During the hearing before the High Court, a member of the Edinburgh City Council treated defendants to a reception at the Council chambers.

Despite the interest and even sympathy displayed by some of the High Court judges during the hearing, and the evident widespread support for the actions among the Scottish public, in its opinion issued March 30, 2001, the High Court firmly

[10] For a full transcript of the ruling, see http://www.gn.apc.org/tp2000/greenock/gimbgk.html.

rejected the reasoning of the defendants and of Sheriff Gimblett. The Court stated that the defendants had not satisfied the requirements of the necessity defense under Scottish law, including because the harm was not imminent and the action taken could not reasonably be expected to avert the harm. While the High Court made clear that it did not believe it was appropriate under British case law regarding justiciability of national security matters for it to assess the lawfulness of Trident, the Court considered that the government had invited such an examination and engaged in an extended analysis of the ICJ opinion. The Court stated that deployment of Trident in "time of peace", without more, could not be considered an unlawful threat as defined by the ICJ. Relying in part on the ICJ's inability to reach a definitive conclusion regarding the legality of nuclear threat or use in an extreme circumstance of self-defense, the Court stated that it is not "possible to say *a priori* that a threat to use Trident, or its use, could never be seen as compatible with the requirements of international humanitarian law." [11]

These two cases, Bernard and Zelter, are highlighted because it is our judgment that they stand as authentic prototypes and epitomize many individuals who have engaged, and continue to do so, in civil dissent against nuclear weapons. These defendants embody the experiences, feelings and struggles of many individuals. They

[11] Lord Advocate's Reference No. 1 of 2000 [March 30, 2001] Misc 11/00 H.C.J. (Scot.), also available at http://www.gn.apc.org/tp2000/lar/laropin.html, paras. 93, 95; see also para. 88.

are committed political activists who have been engaged in the movement for many years. International law justification, including an extensive use of the advisory opinion, was a central feature of their defense. Although expert testimony was permitted in the Zelter case, the defendants presented comprehensive knowledgeable and legally skilled argumentation of these matters. The defendants won in both cases. In Bernard, a jury acquitted; in Zelter, Sheriff Gimblett directed a not guilty verdict. In the aftermath, the cases appear to diverge dramatically. In Zelter, the government called for a Reference, a procedure which allows for a review of the law, but has no bearing on the disposition of the defendants. The High Court in the Reference unanimously declared that the Sheriff was wrong on the law in that she had misread the advisory opinion and misapplied international law. (For trenchant criticisms, see the papers by Weiss[12] and Moxley[13].) However, there is, as it were, no divergence on the ground. The individuals in Bernard and Zelter persist in civil dissent. They have drawn other people to this movement, are becoming known throughout the globe, and inspired others to join with them.

One additional feature identified in the description of the Bernard case is encouraging and potentially of great significance — non-prosecution. The prosecutor's statement following Bernard and

[12] Peter Weiss, " The International Court of Justice and the Scottish High Court: Two Views of the Illegality of Nuclear Weapons," lecture at Waseda University, Tokyo, July 31, 2001.

[13] Charles Moxley, " The Unlawfulness of the United Kingdom's Policy of Nuclear Deterrence: The Invalidity of the Scottish High Court's Decision in Zelter," *Disarmament Diplomacy* (No. 58, June 2001), available at http://www.acronym.org.uk/dd/dd58/58moxle.htm.

the First Amendment acquittal case is particularly revealing. He stated that, "The conduct that these people are going through does not meet our community's definition of a serious law violation. They're very peaceful, they're very sincere, they're very articulate.... It is unlikely that a jury would behave differently than juries have in the past, and therefore going ahead ... would not be a wise use of our resources, the public's money." This acknowledgment that citizens who make up a jury are not likely to convict is a crucial element emerging in the fact of non-prosecution.

A policy of non-prosecution has been followed in a number of other jurisdictions within the United States.[14] In Nevada, the non-prosecution policy has been in effect since 1987 for persons arrested on the perimeter of the Nevada Test Site. The local county was highly concerned about the costs of prosecution and incarceration of thousands of protesters who descended upon the Nevada Test Site in the late 1980s, and local judges were imposing nominal fines ($10). After one of the local judge indicated a receptivity to necessity and international law defenses, the prosecutor announced the non-prosecution policy. In California, a pattern of non-prosecution of persons who block entrances into the Lawrence Livermore National Laboratory has emerged since a well-publicized jury trial arising out of a mass arrest of two thousand

[14] The following discussion of non-prosecution is drawn from an unpublished Ph.D. dissertation, John Burroughs, Nuclear Obligation: Nuremberg Law, Nuclear Weapons, and Protest (University of California at Berkeley, 1991), and Jackie Cabasso and Susan Moon (eds.), Risking Peace: Why We Sat in the Road (Berkeley: Open Books, 1985).

persons in 1983. Arrests are made on traffic charges not requiring a jury trial, and the charges are typically dropped before or on the day of trial. A similar pattern seems to be developing at the Los Alamos National Laboratory.

Nor is this policy confined to the United States. In February 1999, a grassroots nuclear testing movement with overwhelming popular support emerged in the Soviet Republic of Kazakhstan, site of the principal Soviet testing ground near Semipalatinsk. Employing diverse tactics, electioneering, as well as mass demonstrations in which arrests were not made, the movement forced a one-year halt to Soviet testing beginning in October 1989. The Kazakhstan campaign was named the Nevada-Semipalatinsk movement, after the principal U.S. and Soviet test sites and in solidarity with protests at the Nevada Test Site. In Belgium, prosecutors have declined to proceed with jury trials against large numbers of protesters including members of parliament who in 1999 cut a fence and entered a NATO air base at Kleine Brogel to conduct an "inspection" for suspected nuclear weapons. The non-prosecution decision was made after a court determined that the Belgian constitution required a jury trial on the offense charged.

It is well to recall that the civil dissent activities are a way of delegitimizing unjust, oppressive and highly egregious mistaken government policy. In the United States, dissent practices during desegregation and opposition to the Vietnam War were undoubtedly significant factors in reversing government policy. Opponents of that war commonly invoked international law. Activists who were engaged in the Ghandian non-violence movement against

British rule and the caste system, the anti-apartheid movement throughout the globe and the transnational environment movement also made use of international law principles in promoting their causes. In so doing, these principles were simultaneously insinuated into domestic legal systems and their validity supported within the evolving international legal system. When legal officials choose not to prosecute, or when, as in Zelter, Sheriff Gimblett associates herself with dissent, there is a harbinger of real progress, in delegitimating and ultimately dismantling the nuclear war systems. The tenacity, persistence and courage of the individuals who engaged in these civil dissent actions has been extraordinary, and our appreciation and acknowledgment of their contribution is one of the reasons we are writing this essay. It is, at a minimum, a report to activists throughout the globe on the strength of the movement. Hopefully, it will also, now that the nuclear issue is back on the political agenda, engage a wider audience.

Tentative Conclusion

The International Court of Justice is the paramount entity which adjudicates issues of international law. By answering the question posed to it by the General Assembly, the ICJ has decreed that the threat or use of nuclear weapons is contrary to international law. The strand that we have adopted in our efforts to move toward the goal of eliminating nuclear weapons is the implementation of that authoritative opinion in domestic courts.

The use of international law and the ICJ opinion in domestic courts supports and legitimizes the principle that the threat or use of nuclear weapons is illegal.

While convictions are to be regretted, the cases themselves are significant because decision makers and the public at large are forced to confront the issue; and where acquittal verdicts do occur, or when non-prosecution becomes official policy, the delegitimation process is enhanced. The use of the ICJ opinion in this way develops the national foundations for the international normative structure proscribing weapons of mass destruction.

This is only the beginning of our research; we are planning to continue with our efforts and hope that others will as well. Moreover, because of the difficulties in collecting data on municipal court cases globally, our initially data gathering efforts has revealed scattered findings. The research, however, has indicated that the ICJ opinion has begun to be integrated into court decisions in several NATO states. The continued exposure of the tenets of the ICJ opinion in domestic courts increases the likelihood that the principles of the ICJ opinion will be incorporated into national as well as international norms, policies, and practices.

The defendants who engaged in these acts of civil resistance are the vanguard of a movement of individuals and groups throughout the world determined to rid the world of nuclear weapons. The penalties for those found guilty of criminal offenses covered a wide range - from probation, community service, fines, through imprisonment, with many sentences substantial, one calling for 41

months of incarceration. Like social activists who resisted colonialism, imperialism, apartheid, and civil rights abuses, this movement will also succeed. Our efforts to record and report their activities is done in the spirit of appreciation and solidarity. We promise to continue to do so.

ANNEX: Basic Information on Cases in Database Concerning ICJ Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons

Note: cases are listed alphabetically.

A. Cases resulting in acquittals on all charges in which the ICJ opinion and international law were raised:

Crown v. Boyes and River
Court: Manchester Crown Court, United Kingdom (jury trial)
Decided: January 18, 2001
Facts: Defendants attempted to disarm a Trident submarine, and were caught by security guards wearing wetsuits and carrying hammers. They were charged with conspiracy to commit criminal damage.
Disposition: Defendants argued that use of Trident as a deterrent violates international law, including the ICJ opinion. Expert testimony was allowed regarding the military role of Trident and the effectiveness of direct action in causing change in policy. The jury acquitted by majority verdict.

Crown v. Howse et al.
Court: Reading Crown Court, United Kingdom
Decided: September 1, 1997
Facts: Four defendants cut wire fence to challenge production of nuclear weapons and depleted uranium for munitions at bomb factory.
Disposition: Defendants based their defense on international law as clarified by the ICJ opinion. The judge ruled that international law testimony would be admissible. The Crown announced it would offer no evidence, apparently facing difficulties in proving the damage was caused by defendants. Defendants were acquitted and awarded costs.

H.M. Advocate v. Zelter et al.
Court: Greenock Sheriff Court, Scotland (Jury Trial)
Decided: October 21, 1999
Facts: Defendants damaged the research infrastructure for a nuclear-armed submarine.
Disposition: Defendants were acquitted of malicious mischief and theft based on a defense established by the ICJ opinion. In addition to raising the ICJ opinion, they also invoked the

Nuremberg principles as part of their defense. Issues of law raised by the case, but not the acquittal, were referred to the Scottish High Court for review. On March 30, 2001, the High Court stated that defendants had not met the requirements of the necessity defense and that deployment of Trident submarines in "time of peace" under the government's declared policy regarding nuclear weapons does not, without more, represent a threat to use nuclear weapons barred by international law.

Procureur v. Levillayer
Court: Court of Appeal of Caen, France
Decided: April 2, 1997
Facts: Defendant staged an anti-nuclear weapons protest on land owned by the French army.
Disposition: Citing the ICJ opinion, defendant argued that there was no circumstance in which nuclear weapons could be used legally. He was convicted by the trial court, but the conviction was reversed on appeal on the ground that the lower court was without jurisdiction to try the case.

Trident Convoy
Court: Sheriff's Court, Balloch, Scotland (Bench Trial)
Decided: September 19, 1996
Facts: Thirteen defendants, including six dressed as judges, stopped convoy carrying nuclear warheads.
Disposition: Defendants were acquitted based on a defense established by the ICJ opinion.

Washington State v. Bernard et al.
Court: Kitsap County District Court, Washington, United States (Jury Trial)
Decided: June 10, 1999
Facts: Eight defendants blocked traffic at a naval base for nuclear-armed submarines.
Disposition: Defendants were acquitted of disorderly conduct based on a defendant's testimony regarding the ICJ opinion, the Hague Conventions of 1907, and the Nuremberg Principles. Jurors explained that they acquitted on international law grounds.

B. Cases resulting in convictions on some or all charges in which the ICJ opinion or international law was raised:

Crown v. Helen John and Anne Lee
Court: Ripon Magistrates Court, England
Decided: May 7, 1998

Facts: Two defendants taped off an entrances to bases for communication with nuclear-armed submarines.
Disposition: Defendants based their defense on the Nuremberg Principles, the ICJ Opinion and also argued that customary international law is incorporated into English law. Defendants were convicted of criminal damage to government property and were fined 555 pounds each. They appealed the convictions which were affirmed. The penalty was diminished; the appellants were ordered to pay 100 pounds and the costs of the respondent.

Crown v. Hipperson and Walford
Court: Reading Crown Court, England (Jury Trial)
Decided: July 23, 1998
Facts: Two defendants removed part of a fence at the Atomic Weapons Establishment.
Disposition: In the first trial, defendants offered international law testimony for a lawful excuse defense, which resulted in a hung jury. However, at retrial international law evidence was excluded, and the defendants were convicted. The defendants were given a two-year conditional discharge.

Crown v. Newell and Van der Hijden
Court: Chelmsford Crown Court, England (Jury Trial)
Decided: May 25, 2001
Facts: Defendants entered an air force base and hammered on a nuclear weapon convoy truck.
Disposition: The court did not permit the jury to hear expert witnesses or international law arguments. Defendants were convicted and sentenced to 12 months in prison each. They were released because they had served half that time.

Crown v. Spalde et al.
Court: Preston Crown Court, England (Jury Trial)
Decided: October 21, 1999
Facts: Three defendants were arrested within the perimeter of a fence of a nuclear facility on suspicion of going to commit criminal damage.
Disposition: In both the first and second trials the defense was based upon the Nuremberg Principles, the ICJ opinion, and the UN Declaration of Human Rights. International law testimony was allowed in both instances. In the first trial, the jury could not reach a verdict; in the second, two defendants were convicted, and sentenced to time served of six months (proceedings against the third defendant, who was ill, were stayed).

Crown v. Sunderland and Cole
Court: Horseferry Road, London, England (Bench Trial)
Decided: April 23, 1998
Facts: Two defendants wrote on a wall of the Ministry of Defence with charcoal.
Disposition: International law was invoked as a basis for the defense of lawful excuse. Defendants were convicted and ordered to pay costs.

Crown v. Zelter and Boyes
Court: Dumbarton Sheriff's Court, Scotland (Bench Trial)
Decided: October 14, 1998
Facts: Two defendants entered a naval armaments depot and used police boat for inspections.
Disposition: The defendants cited Nuremberg Principles and ICJ opinion in their defense. They were found guilty of forcible entry and "clandestinely taking and using the property of another" and were given a warning, but were not otherwise punished.

People v. Eberhard et al.
Court: District Court of Cochem, Germany
Decided: May 14, 1998
Facts: Defendants entered air base for the purpose of inspecting a nuclear weapons depot.
Disposition: Defendants quoted from ICJ opinion while arguing in their defense that their action was justified by international law. They were found guilty of trespass and fined.

People v. Sternstein et al.
Court: District Court of Stuttgart, Germany
Decided: April 20, 1999
Facts: Seven defendants broke into grounds of EUCOM, headquarters for US military forces, in 1992.
Disposition. Defendants were acquitted in 1996 based on a defense of necessity and the illegality of US nuclear deployments in Europe as shown in part by the ICJ opinion. Appeals ensued, resulting in a reversal of the decision and eventually in a conviction of Sternstein on April 20, 1999. He was fined 7200 marks or 240 days in prison.

Procurator v. Lammerant and Hanna
Court: Argyll and Bute District Court, Helensburgh, Scotland (Bench Trial)
Decided: November 10, 1998
Facts: Defendant cut the perimeter fence of a base for nuclear-armed submarines..
Disposition: Defenses of necessity, self-defense, and prevention of crime (under international

law citing the Tokyo War Crimes Tribunal). International law testimony was admitted, including reference to the ICJ opinion and to a report by the World Health Organization. Defendants were convicted of vandalism and breach of peace and fined 270 pounds.

U.S. v. Berrigan et al.
Court: Federal District Court, District of Maine, Portland, Maine, United States (Jury Trial)
Decided: May 5, 1997
Facts: Six defendants poured blood and hammered on tubes from which nuclear missiles can be launched on destroyer class ship.
Disposition: Necessity and international law defenses including the Nuremberg principles and Article 2 of the UN Charter were not permitted. The defendants were convicted of damaging government property and conspiracy to damage government property. Sentences ranged up to 27 months.

U.S. v. Cordaro
Court: Federal District Court, Southern District, Greenbelt, Maryland, United States (Bench Trial)
Decided: September 23, 1998
Facts: Five defendants poured blood and hammered on a B52 bomber.
Disposition: Testimony regarding ICJ opinion was allowed, but the judge convicted defendants of the misdemeanor of willful injury to government property. One defendant was sentenced to four months in prison, another was sentenced to six months, and a third was sentenced to ten months.

US v. Kabat
Court: Federal District Court, Denver, Colorado (Jury Trial)
Decided: May 2, 2001
Facts: Defendant scaled a twenty-five foot security wall at the Minuteman Silo Site in Weld County, Colorado to protest the storage of three nuclear warheads on site.
Disposition: Citing the ICJ Opinion and the Nuremberg Principles, the defendant argued that citizens are protected for protesting weapons of mass destruction that can be used to commit genocide. The court granted a motion in limine by the government which severely restricted the defense testimony at trial. Defendant was found guilty of a misdemeanor charge of breaching a military security fence. He was sentenced to time served which amounted to 83 days.

U.S. v. Sicken et al.

Court: Federal District Court, Denver, Colorado, United States (Jury Trial)
Decided: November 4, 1998
Facts: Two defendants poured blood and hammered on missile launching pad
Disposition: Necessity and Nuremberg defenses not allowed. The defendants were convicted of sabotage, conspiracy to commit sabotage and destruction to government property in excess of $1000. One defendant was sentenced to 41 months in federal prison, and the other was sentenced to 30 months. The defendants were also required either to pay $21,299.40 or perform 30 hours per month of community service for three years after release from prison. The prosecutor's appeal of the sentences was denied by the Tenth Circuit Court of Appeals.

US v. Spring and Urfer

Court: Federal District Court, Western District, Wisconsin, United States (Bench Trial)
Decided: February 21, 2001
Facts: Defendants sawed down poles supporting the Navy's Extremely Low Frequency (ELF) antenna system for communication with Trident submarines.
Disposition: The court refused to allow expert testimony regarding the ELF system and international law, except for very limited testimony about international law based on an "advice of counsel" defense. Defendants were convicted. Sprong was sentenced to two months in prison, and Urfer to six months, with one year supervised release for each. Each was additionally ordered to pay $7,942 in restitution.

Wisconsin v. Donna and Thomas Howard-Hastings

Court: Ashland County Circuit Court, Wisconsin, United States (Jury Trial)
Decided: September 11, 1996
Facts: Two defendants toppled transmitter poles for communication with nuclear-armed submarines at a U.S. Navy communications center.
Disposition: The ICJ opinion as such was barred from being cited in the case, but expert testimony was allowed concerning the parameters of national defense under international law. The defendants were found not guilty of sabotage interfering with preparation for military action or national defense, apparently based on the jurors' belief that the government had failed to rebut defense testimony that the communication system served no legitimate national defense purposes, but were convicted on a lesser charge of destruction of property. One defendant was given a three-year sentence including a year in prison. The other was put on probation for three years. The two were ordered to pay $7,500 in restitution.

Wisconsin v. Shafto et al.

Court: Ashland County Circuit Court, Wisconsin, United States (Bench Trial)

Decided: April 20, 1998

Facts: Defendants entered a naval base in an attempt to act as citizen inspectors verifying the connection between a transmitter and nuclear-armed submarines.

Disposition: Defendants invoked various principles of international law in forming their defense including the ICJ opinion, violations of Article 6 of the Non-Proliferation Treaty and breaches of international humanitarian law. They were convicted of trespass and ordered to pay fines of $181 each. Failure to do so would result in a five-year suspension of driving privileges or imprisonment.

APPENDIX A

NUCLEAR RESISTANCE ARRESTS,

U. S. AND CANADA, 1983-2000

YEAR	# OF ARRESTS	# OF SITES	# OF ACTIONS
2000	813	28	49
1999	730	22	46
1998	655	25	48
1997	910	32	59
1996	590	25	48
1995	990	34	77
1994	910	41	73
1993	1,000	37	80
1992	2,480	40	90
1991	2,550	32	65
1990	3,000	41	85
1989	5,530	75	150
1988	4,470	65	160
1987	5,300	70	180
1986	3,200	75	165
1985	3,300	120	170
1984	3,010	85	160
1983	5,300	60	140

Nuclear Resister editors' note: For accurate comparison, the statistics quoted here include only those arrests and actions that included a clear anti-nuclear component.

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Selected Bibliography: Books and Articles

The ICJ nuclear weapons opinion is available in law libraries at I.C.J. Reports 1996, p. 226, and at 35 International Legal Materials (No. 4, July 1996) 814. It can also be found on several websites including http://www.lcnp.org/wcourt/opinion.htm.

Below is a sampling of literature concerning the opinion. A full bibliography is at http://www.lcnp.org/pubs/biblio.htm. The bibliography as well as most of the items listed below can also be obtained from:

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211 E. 43d St., Suite 1204
New York, NY 10017
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Laurence Boisson de Chazournes and Philippe Sands (eds.), *International Law, the International Court of Justice, and Nuclear Weapons* (Cambridge: Cambridge University Press, 1999)

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International Review of the Red Cross (No. 316, January 1997), issue devoted to the ICJ nuclear weapons opinion, with foreword by Judge Géza Herczegh and articles by Yves Sandoz, Luigi Condorelli, Eric David, Louise Doswald-Beck, Hisakazu Fujita, Christopher Greenwood, Timothy L.H. McCormack, Manfred Mohr, and John H. McNeill; available at http://www.icrc.org

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