

Committee should not only condemn at this session nuclear tests, as at present practised, and in whatever form, as illegal, but also keep this subject in constant review and carry on a relentless struggle to outlaw such tests until a safe and sure test is evolved, and in the meantime bring before the Bar of world opinion every nation that has been, or is, or will be, guilty of this grave crime against humanity.

It is, therefore, with the greatest pleasure, that I endorse every word uttered by the Distinguished Delegate of the U.A.R. in his concluding paragraph and support the resolution proposed by him to outlaw nuclear tests and to suspend and to prohibit such weapons, and to liquidate the bases of these tests, unless and until a safe and sure test is evolved.

Indonesia.—Nuclear tests have been watched by people all over the world with deep anxiety and profound concern. The stupendous possibilities of destruction of life and property and serious damage to future generations by nuclear explosions have been engaging the minds of jurists, scientists and statesmen ever since the atomic bombs were dropped on Hiroshima and Nagasaki. At the same time, the peaceful uses of nuclear energy have opened the eyes of the world to new avenues of dazzling progress through the application of this newly found source of energy for the benefit of mankind as a whole. While the discovery of gunpowder, the steam engine and electric power have brought about revolutionary changes in earlier ages, none of them has presented mankind with such a dilemma as the discovery of the energy hidden in the atom. The question of the legality of nuclear tests, as we are all aware, is a new subject in international law as the nuclear test itself dates back only to the last two decades. The importance of the subject, however, could hardly be exaggerated as the future of mankind and civilization may hinge upon the timely arrest of these tests. Moreover, as the tests which have been conducted so far have been mostly held in the Asian African region, the Asian and African States are the parties who are most directly concerned with the question. In addition to that, the consideration of the subject by the Committee has become almost imperative in view of the fact that notwithstanding the strong protests by Asian African and some other States, France has seen fit to hold in succession three tests in the Sahara and there has been no indica-

tion so far that she would depart from her ill chosen path even in the face of a resolution of the General Assembly of the United Nations expressing grave concern over the tests and urging the discontinuation of these tests. Before long more powers may acquire the scientific knowledge of producing atomic bombs and they also may wish to test the results of their research and to perfect their atomic devices. This in turn would induce others to do the same, and the most dreadful vicious circle ever to occur in the history of mankind would become a fact.

Before we proceed to deal with the legal issues involved in the conduct of nuclear tests, we wish to make it quite clear that we are at this session only dealing with the holding of nuclear tests in peace time and not with the legality of the use of nuclear weapons, although there is, as the distinguished Delegate for the U.A.R. has pointed out, a close relationship between the two questions, as the tests which have been held so far were meant to perfect nuclear and thermonuclear weapons, we do agree with the distinguished Delegate for India that the question of the legality of the use of nuclear weapons in warfare is in law a separate question governed by the conventional and customary rules of war. We wish also to make it perfectly clear that the remarks which we are going to make relate only to the kind of nuclear tests as are described in the note of the Secretariat. The Secretariat should in our view be commended for the excellent note they have prepared for the Committee.

As to the legality of nuclear tests, we have no doubt whatsoever that they are illegal and that they should be prohibited. The dangers to which mankind is exposed by the continuation of such tests have been amply described in the note of the Secretariat. Although the direct damage caused by heat, blast and radiation generated by the tests may be kept within certain controllable limits by the testing power as the tests which have been held in the past have been conducted in remote and thinly populated areas, the spread of radioactivity through the fall-out of radioactive dust cannot be predicted as the radioactive clouds created by the explosion, after having been blown in the atmosphere, may be carried by prevailing high winds to any part of the world and may endanger life or cause serious injury to persons living at far-away places. The grave risks inherent in the unpredictability

of the spread of the fall-out to places many thousands of miles away from the scene of the test have been established beyond any doubt by the studies done by Japanese scientists on the spread of radioactivity in Japan following in the wake of the test held by the United States in the Marshall islands through radioactive dust and rain. Even the fish caught in the seas around Japan have been found radioactive. While on the subject of the unpredictability of the spread of radioactivity through radioactive fall-out, may I draw the attention of the Committee to a news item which has appeared in the Japan Times of 18th February. The paper carried a report by a Japanese scientist who has recently returned from Italy to Kagoshima aboard of a fishing training ship, that his scientific team has found the Indian Ocean highly radioactive. The team has detected 60 to 70 counts of radioactivity per minute in plankton collected while the ship was in the Indian Ocean near to Equator. The question which immediately arises is where does this radioactivity come from? Most probably from the latest French test in the Sahara, because to our knowledge that is the only test which has been held recently. If that assumption is correct, it would again be another proof as to how far radioactivity can be spread by a fall-out. While excessive exposure to radioactivity may lead to death and serious injury or illness such as bone cancer, leukaemia and other serious diseases, particularly when it contains strontium-90, eminent scientists have also maintained that it caused adverse genetic effects. Moreover, it has been asserted that the genetic effects of radiation are cumulative. Thus any new explosion would not only present a serious danger to the present generation but also may endanger future generations. Although in some interested quarters there has been a tendency to minimize the dangers of these tests to mankind, the findings of the report by the World Health Organization on the physical and biological effects of exposure to radioactivity to the 1955 Geneva Conference on the Peaceful Uses of Atomic Energy should be accepted as authoritative.

Nuclear tests may be held by the testing State within its own territory or in a non-self-governing territory under its administration or in a trust territory or on the high seas. When the test takes place in its own territory, a State may claim that it is within its sovereign right to do so, but at the same time it should be pointed

out that in exercising its sovereign right a State is under an obligation to prevent its territory from being used for activities detrimental to the interests of other States. We fully agree with the preceding speakers that this customary rule of international law should apply here although the detrimental act has been committed by the State itself. No State has the right to endanger in peace time the lives of persons or to cause injury to them and their property in other States and the holding of nuclear tests with the consequential unpredictable spread of radioactivity through the fall-out of radioactive materials present undoubtedly a serious danger not only to neighbouring States but even to far away States, or to ships on the high seas. While it may be argued by others that such a rule does not exist in customary international law, it should be pointed out that it certainly violates the principle of good neighbourliness as enshrined in the preamble of the U.N. Charter and explicitly expressed in Article 74 of the Charter. Moreover, in our view, it is a violation of an inherent obligation of being a member of the community of nations. A State holding such tests commits in our view an illegal act or at least an international tort while the damage done to life and health of persons and property in other States should be compensated. This principle of responsibility and indemnification should also apply to foreigners who happen to be in the testing State while the compensation to be paid to its own nationals is a matter which falls within the purview of the municipal law of the State concerned.

As to nuclear tests conducted in non-self-governing territories, we fully agree that it is a violation of the United Nations Charter obligations as laid down in Articles 73 and 74. Article 73 defines the non-self-governing territories as territories whose people have not yet attained a full measure of self-government. It is clear that these territories are not parts of the metropolitan area proper of a State. Thus the administering State does not have sovereignty over the non-self-governing territory as it has over its own territory. This is particularly so because the administering State has the responsibility to develop self-government and to assist them in the progressive development of their free political institutions. Therefore, sooner or later, these territories must have their own government, unless they themselves desire otherwise. Article 73 requires, among others, that in administering the non-self-governing terri-

tories, that State must ensure the just treatment of the people of the non-self-governing territories and protect them against abuses. It will be very unjust indeed and a manifest abuse to explode a nuclear test on a non-self-governing territory and to subject the people there to dislocation, to destroy their land, and to expose them to the dangers of radiation. Under Article 73 of the Charter the administering State has accepted as a sacred trust the obligation to promote to the utmost the well-being of the inhabitants of these territories. The holding of nuclear tests would perhaps promote the interest of the administering State. But it could never be said that it will promote the well-being of the inhabitants of these territories. On the contrary it will retard their development and subject them to harms and damages of considerable extent. Moreover, Article 74 of the Charter prescribes that the administering State should follow the general principle of good neighbourliness in the non-self-governing territories and due account must be taken of the interests and well-being of the rest of the world. It is certain that the neighbouring States of the non-self-governing territories do not want to see the air of the non-self-governing territories polluted by radioactive materials endangering their own people and safety. By detonating nuclear devices in the non-self-governing territories, the administering authority has violated the provisions of the Charter and it should therefore be regarded as illegal.

While a State has a certain measure of sovereignty over a non-self-governing territory which may be termed conditional sovereignty, an administering authority of a trust territory does not have sovereignty. It is holding it as a trustee under the supervision of the United Nations. The conduct of nuclear tests there is certainly a violation of the principle of trusteeship. The test is definitely prejudicial to the interest and the safety of the people. No matter how elaborate the preventive measures are that are taken, it has not only the effect of destroying their property but also the effect of upsetting their way of life. They may also be exposed to radiation as has occurred in the Marshall Islands test in 1954 by the United States. The conducting of nuclear tests in trust territories is in contradiction of the basic principles of trusteeship and it also constitutes in our view an arrogation of sovereign rights which the administering authority does not possess. They should, to our mind, be regarded as illegal. Nuclear tests, if conducted on the high seas,

do in our view violate the four freedoms of the sea. These tests will definitely cause the pollution of the sea and the destruction of the living resources of the sea while in addition to the radioactive fallout, radioactive fish may endanger the life and health of people living in far away countries. Navigation, fishing, the flying over the danger area have to be suspended for quite some time while submarine cables may be affected. The freedoms of the high seas are designed for the benefit of humanity and not for the convenience of one or two States, detrimental to the rest of the world. We are, therefore, of the opinion that nuclear tests on the high seas are an infringement of the freedom of the high seas and are therefore illegal.

In conclusion, I wish to address myself to the suggestion made by the distinguished Delegate for the United Arab Republic to the effect that we should adopt a condemnatory resolution. We fully agree with the idea, and we are supporting it.

Iraq:—It has been suggested, if I may recall, that it would be more appropriate for the Committee at this juncture to deal primarily with the problem of immediate concern, namely, the legality or otherwise, of the nuclear weapon tests. We are in favour of this view. However, before proceeding with our comments on the subject, which will be presented in broad outline and in a rather sketchy fashion, we wish to emphasize that although Iraq is opposed to all tests of nuclear weapons wherever they are carried out, it however views with particular concern and anxiety the nuclear tests carried out by France in the Sahara desert, and we deem it opportune to voice our condemnation of these tests. In regard to the problem of the illegality of nuclear tests, we wish to make the following remarks :

We do not share the view that a State is free to use its own territory for testing nuclear weapons, because we believe there is ample evidence that such tests cause injury to life, health or property of nationals of other States, and are therefore, contrary to the general rules of international law. We are of the opinion that no State has an absolute right to close portions of the high seas, perhaps even temporarily, to users of other nations. Therefore, if the testing of nuclear weapons by a State results in barring parts of the high seas to users of other nations the conclusion seems inescapable, in our view, that this act is contrary to the rules of inter-

national law. This view may find support in the decision of the International Court of Justice in the *Anglo-Norwegian Fisheries Dispute* 1951, and also in the preamble to the Charter of the United Nations and in Article 74 of the same. It may be necessary, on the other hand, to point out in this connection that if nuclear tests carried out by a State in certain portions of the high seas result in inflicting actual injury on the life, health or property of nationals of other States by means of radioactive fall-out which may lead to a dangerous pollution of the atmosphere and water, when these nationals happen to be outside the danger zone, that would constitute an international tort. Indeed, one may go so far as to suggest that in these circumstances, and under specified conditions, certain international instruments, such as the Geneva Protocol on Poisonous Gases and Analogous Materials of 1925 and the Genocide Convention of 1948 may be applicable.

We are inclined to support the view that nuclear tests carried out in a trust territory, whether it be a strategic area or otherwise, are contrary to the letter or spirit of the pertinent Articles of the United Nations Charter or a trusteeship agreement concluded between the United Nations and any State.

Finally, we are of the opinion that this Committee should pass a resolution condemning these tests as a crime against humanity and recommending the initiation of international legislation to this effect.

Japan:—This Committee is well aware that the people and the Government of Japan are deeply concerned with this topic before us. As we are the only people in the world who suffered from the damage by atomic bombs dropped during the War, we have a very strong feeling that all the nuclear tests should be prohibited. Indeed, this feeling of ours is based on humanitarian considerations. As such, it is above any other consideration, legal or otherwise. Several resolutions which were adopted by both Houses of our Diet for the prohibition of atomic and hydrogen bombs may be regarded as a reflection of a deep feeling of the Japanese people.

With such psychological background, the Government of Japan have made strong diplomatic representations, whenever and wherever the atomic or hydrogen bomb tests took place, for the suspension of such tests; they did so against the United States,

the Soviet Union and the United Kingdom. Recently they did the same against France. If the need arises, our Government will do so in the future.

However, it must be pointed out that there are two aspects in the use of nuclear energy. The one is the use of nuclear energy for peaceful purposes and the other for military purposes. We the Japanese people are determined to use nuclear energy for peaceful purposes and for peaceful purposes only. Admittedly, the use of nuclear energy for peaceful purposes involves in itself many complicated legal problems, both domestic and international. Take, for instance, the question of liabilities of the owner of nuclear reactors for the possible damage to the third party. As we understand, countries like the United States, the United Kingdom and Switzerland have enacted laws providing for strict liability on the part of the owner of the nuclear reactor. In Japan, too, a bill providing for strict liability is now being prepared by the Government and will, I suppose, be enacted by the Diet at its present session.

As for the international aspect of the peaceful uses of nuclear energy, common efforts are being made by jurists and lawyers of the world for international legislation on the subject; a Draft Convention on Third Party Liability in the field of nuclear energy prepared by the Organization for European Economic Co-operation and a draft Convention on Liabilities of the Operator of Nuclear Powered Ships prepared by the International Maritime Law Conference may be cited as examples.

However, we believe that the task for this Committee at present is not to be concerned with the peaceful uses of nuclear energy. Our task is to study another aspect of the picture, that is, the use of nuclear energy for military purposes.

Before we go into the discussion on this matter, we have to bear in mind that there are really two different questions involved. As the distinguished Delegate for India pointed out, in his very enlightening general statement, distinction must be made between the legality of the use of nuclear weapons in time of war and the legality of nuclear tests in time of peace.

As for the legality of the use of nuclear weapons in time of war, legal opinions may differ depending on the interpretation of

the existing customary international law, various international conventions, or the general principles of law as recognised by civilized nations. Yet, the Delegation of Japan wish to make it clear that the use of nuclear weapons in time of war *should*, to say the least, be prohibited as a matter of *lex ferenda*.

After having made this point clear, we now come to the point of more immediate and direct concern to the Committee—the legality of nuclear weapon tests in time of peace.

Here, again, the opinions differ on the question of fact. Opinions of scientists differ with regard to the effects of radioactive contamination resulting from nuclear tests. The views of Japanese scientists contained in the Background Paper prepared by the Secretariat indicate the harmful effects of radioactive contamination. On the other hand, the United Nations Scientific Committee which was entrusted with this work did not draw in its Final Report a clear conclusion regarding the harmful effects of radioactive contamination resulting from such tests. Such differences of opinion may subsist before a detailed and long-term study and observations shall have been carried out on the genetic effects of radioactive substances on human beings and their environment.

In the circumstances, our position is that, in the absence of scientific proof to the contrary, all the nuclear tests which may more or less contaminate the air should be suspended as soon as possible from the humanitarian point of view, since it seems to be only reasonable to assume that as long as nuclear tests are continued, the cumulative radioactivity may reach dangerous proportions injurious to human health to a point beyond the power of science to circumvent or cure.

Without prejudice to the humanitarian considerations mentioned above, we should like to touch briefly on the legality of nuclear tests. In doing so, we think that it may be useful for us to consider the matter in three different phases depending upon the places where such tests are to be carried out.

Firstly, the case in which nuclear tests are carried out in the territory of the State conducting such tests. We consider that in such cases the question of State responsibility under international law does not arise as long as such tests do not affect the life and

property of the population in the neighbouring and other States. Of course, if an alien in the territory of the testing State is affected by such tests, the alien's home State has the right to exercise its right of diplomatic protection in accordance with the existing international law. However, it seems hardly possible because of the very nature of radioactive fall-out that the effect of such tests could be limited in the territory and would not go beyond the territory of the testing State. Therefore, if the existence of the harmful effects beyond the territory of the testing State can be proved by scientific evidence, the testing State is to be held liable for an international delinquency. It may be further stated that in such a case, the liability of the State which carried out the tests should be that of strict liability, at least from the point of *lex ferenda*, if not under the existing international law in force.

Secondly, the case of nuclear tests carried out on the high seas. We think that there should be reasonable adjustments among the traditional four freedoms of the high seas mentioned in the Draft Convention on the High Seas adopted at the United Nations Conference in 1958, and the alleged new freedom to use the high seas for atomic tests. We consider that the carrying out of nuclear tests in the area vital for navigation or fishery on the high seas, for instance, is contrary to the existing international law.

Thirdly, the case of nuclear tests carried out in the United Nations trust territory. In our view, it will be contrary to the spirit of the Charter of the United Nations for a trustee authority to use territories which it holds on trust from the United Nations, although there is no explicit provision in the Charter which prohibits the use of trust territory for such purposes.

In closing, may I emphasize once again the urgent need for suspension of nuclear weapon tests based on the humanitarian considerations involved in the question of nuclear tests. This view of ours, we think, is shared at least by the common people both in the Communist and non-Communist States. We are firmly convinced that these overriding humanitarian considerations should not be lost sight of by the results of technical and legal analysis of the whole question.

Burma:—I have listened with rapt attention to the clear and dignified statements made by the distinguished leaders of the U.A.R., India and Ceylon. May I say for the Burmese Delegation that we endorse their views on the subject without any reserve. Whatever may be the specious arguments advanced to justify nuclear tests, the fact, incapable of being controverted, remains that the effects of these nuclear tests are harmful to the extreme, not only in the immediate vicinity where the test is carried out, but with prevailing winds or the vagaries of disturbed nature, the area affected may be boundless. We are told that there is such a thing as a clean bomb, but even if it is so, it is only a matter of degree and it nevertheless remains an evil; and it is unpardonable to foist evil upon mankind. For every argument that nuclear tests are permissible and legal, more convincing reasons can be advanced against such a proposition. In any case, it requires no great learning in law to be convinced that the effects of nuclear tests are evil and harmful to mankind, and that to pursue in carrying out these tests, despite protests, is immoral. I do not wish to say much on a subject which must revive such painful and bitter memories to our hosts who were the victims of atomic bombs. I share the pessimism of the distinguished Delegate of India when he said that legal solutions and legal restraints are hardly an adequate or constructive answer to a race in nuclear tests and therefore may I say only this, the Burmese Delegation is convinced that the pursuit of nuclear tests is immoral and should be condemned.

Pakistan:—I have listened with utmost respect to the admirable statements made by the distinguished Delegates. The moral and ethical principles enunciated by all of them, especially the distinguished Delegates from the U.A.R., India, Burma and Japan, are rationally valid and hold in them a promise for salvation of man. It is true, as has been pointed out, that the world is hanging insecurely between the prospects of a crushing sky and a gaping hell. It seems that with every increase in human skill as to means, there is also an increase in human follies as to ends. Intellect which has sharp eye for methods and tools appears oblivious at times to ends and values. The splitting of the atom, which would have been a boon to man, now hangs over his head like the sword of Damocles. The old complacent faith of man about his irresistible progress is tampered by serious doubt. The doubt has now passed into

alarm. Man is out to conquer the moon and Venus—he has yet to conquer his worst enemy—himself. We live at a stage of technological development where the moral of man to alleviate the perils of his own creation has become an imperative necessity. Life has some meaning and some purpose. An awareness of that meaning and purpose will give man his higher consciousness of his manifold relationship with the creator and the principles to live by and the purposes to live for. We see in these issues, a great moral and ethical crisis of our times. It has been pointed out also that it is an issue of International Law. The opinions of the jurists, however, are extremely conflicting. It involves very complicated and intricate questions of law of great importance and magnitude. I will refrain myself, at this stage, from offering any comments on this subject. It must, however, be admitted frankly and honestly that it is also a political issue of the utmost importance. We cannot build an ivory tower of our own and consider ourselves immune from the objective realities of political life. Our thinking unrelated to the political realities of the day may make it a form of escapism. Any blueprint of concepts and convictions unrelated to the objective realities may not be conducive to the attainment of the ideals it is meant to achieve. The Geneva talks were held by the Powers concerned regarding the banning of nuclear tests. The talks were suspended. The parties suspended nuclear tests according to their own statements, even though no agreements were reached. The talks are going to be resumed soon—I understand very soon, in the month of March—as I read in the papers. I am sure all-efforts will be made there to reach an agreement. Under the circumstances, my Delegation will not commit itself to any position or situation which will prejudice the Geneva discussions in any manner and further obscure the political atmosphere or make it a little more complicated or confused than what it is today. In view of our stand, not to prejudice the forthcoming Geneva discussions, I shall refrain from making any comments on the Agenda item we are discussing and I shall abstain from any voting on the item. However, in the end I shall reaffirm and reiterate the moral and spiritual crises as pointed out by the very distinguished Delegates, especially of U.A.R., India, Burma and Japan.

Observer for Ghana:—The legal and moral implications of nuclear tests have been so comprehensively thrashed out

by the distinguished Delegates that I do not intend to reiterate those points. I wish, however, to dwell briefly specially on the question of the French tests which in our view is tending rather to make any agreement on the cessation of nuclear tests more complicated, because we know that the three major nuclear Powers have agreed among themselves to suspend any further tests, but it is only France who lately has broken this moratorium and therefore my Government has not, as it is quite well known, hesitated; in company with other like-minded governments, to condemn this move on the part of France. The argument that the Sahara Desert is part of France is, of course, very much in dispute, and we have never been able to accept that theory. There is also the other point of whether a metropolitan power can undertake any action such as nuclear tests in a colony which we all know is prejudicial to the welfare of the inhabitants, so that my Government feels that since this Committee is composed of members which are not nuclear powers, it is especially appropriate that we should use any moral force we have to make our voice heard on the councils of the world and try to bring pressure—moral pressure—on the nuclear powers, not only to suspend, but to stop any further nuclear tests. As, I remember, was stated here not long ago by some delegate, international law so far has been designed to the interests of the greater powers. Whatever finally is to their interest has international sanction and there was a time when even colonialism was regarded as a matter of course because at that time the colonial powers felt it was in their interest that territories should be colonized. We are of the opinion that that era is now past forever, and that we should also in our own small way contribute to the formulation of the international code of conduct. If this Committee can pass a resolution or initiate any move on this subject to that effect, we shall be very grateful and we shall be pleased to associate ourselves with it.

Observer for International Law Commission (MR. F. V. GARCIA-AMADOR):—I would just like to say a word in connection with the subject of nuclear tests and, I will limit myself to the purely legal aspect. This is, of course, a problem of international responsibility like any other one and not only in the broad sense but also in the strict sense, because in normal cases, the injury in this case would be an injury to an alien and the international claim may be based.

and has been based in a very small number of cases, on the basis that an injury has been done. In this connection, I would like to read a short paragraph from my fifth report in which I deal with the matter. I was referring to the fact that there is not yet an international obligation of a precise, well defined character with respect to nuclear tests, and this is still so today as you have recognized in this discussion. Nevertheless, if a State experiments on the high seas, if the State involved has the freedom to use the high seas or the air space, or even its own territory, the question arises whether the exercise of that freedom would be lawful if it involved activities potentially harmful to such important interests as safety of human beings. From the point of view of international responsibility, the problem is not to determine whether or not there is a well defined precise prohibition against conducting a particular test on the existing condition. It is enough to know that the activities concerned imply by their very nature and by their harmful consequences, the abusive, unlawful exercise of a right. The expression "a right" is used because scientific tests that are incapable of causing injuries are entirely compatible with the freedom of the use of the high seas and of air space. But according to Article 2 of the Geneva Convention, this freedom, whatever its manifestation, shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas. In short, today, a proposal has been made to find a solution to this problem by the theory of objective absolute liability, liability or responsibility without fault, but unfortunately, technically speaking, this is not applicable simply because today we don't have an international obligation prohibiting those acts. We are looking for but still today there is no such obligation—on the contrary a State can do that either on the high seas under the freedom of use of the high seas or in its territory as an unquestionable right. So in order to find a basis for imputing international responsibility for damage done as a consequence of the nuclear experiment, you have to resort to the legal notion of the abuse of rights. There may be no international obligation to do it, but you find in international law today the notion that a State may not exercise its right in such a manner as to produce harm to others, and in this connection, there is no doubt that so far as the high seas are concerned, the Geneva Convention is literally applicable whether the tests are illegal or not, it does

not really matter nor is it necessary to impute international responsibility. But the only thing is that in cases of injury the fact, that the State has abused its right, is enough. This is the opinion, that was held by a very well known French Professor of public international law, Prof. GIDEL, who very strongly condemned not only such tests but argued very wisely that all these argumentations set forth by some other writers trying to justify the legality of these tests were incorrect. So what we can say in regard to the tests on the high seas, we can also say with regard to the tests conducted by a State in its own territory, or territories under its jurisdiction. There is no doubt that a State's territory may be used for any kind of experiment, but, if that State's territory is used or I should say abused, with all the consequences I have mentioned, international responsibility is automatically incurred, and in this respect I would like to call your attention to a rather recent international decision, namely the decision of the *Trail Smelter Arbitration* between the United States and Canada in which the tribunal admitted that though the State was exercising a right in general, if the exercise of that right caused damage, that State would be responsible for injuries done in the territory of other States or to persons in the territory of other States.

III. TOPICS FOR DISCUSSION

Topics for Discussion

(a) Factual, Scientific and Medical Aspects

1. The nature of direct damage caused by atomic explosions resulting in deaths of human beings and destruction of lives and property—area over which such destructive effects are spread out—can it be confined within the areas or territories of the State which is carrying out the tests ?

2. The nature of indirect damages :—

- (a) *Pollution of the air* with radioactive material—area over which such radioactive material can be said to contaminate the atmosphere—can such pollution be confined to the territories of the particular State which is carrying out the experiment—the effect of such pollution on the health of the people.
- (b) *Economic Effects* : (1) Mass movement of the population due to evacuation of the areas in which tests are to be carried out; (2) possibility of the deprivation of means of livelihood of such people due to their movement from the place of their residence and work; (3) Adverse effects on particular industry or industries due to contamination with radioactive matter *e.g.*, effects on fishing industry in Japan after the Marshall Island tests.
- (c) *Meteorological Effects* : Effect on the weather—variation in temperature, radioactive rain etc.—the area over which such effects take place and the time during which these effects remain.
- (d) *Interference with the freedom of air navigation and navigation in the High Seas*, due to vast area being rendered unsafe for such navigation at times when the tests are being carried out.
- (e) *Destruction of the living resources of the Seas.*

(b) Legal Aspects

- 1. (a) Is a State responsible or ought it to be so for direct damages caused to the inhabitants of the area where the tests are carried out due to deaths of human beings and destruction of their property resulting from explosions of atomic devices under the law of tort or principles analogous thereto ?

(b) If such damage is caused to a foreign national resident or sojourning in its territory or to one who may be accidentally passing through the danger area, would the State which is carrying out the tests be liable to pay reparation to the injured alien's home State under the principles of State Responsibility in International Law ?

(c) If such damage is caused to a foreign national whilst resident or sojourning in a neighbouring State, would the State carrying out the test be held liable to pay reparation to the injured person's home State under principles analogous to that of State Responsibility in International Law ?

II. (a) Can it be said that a State which carries out atomic tests in its own territory is endangering the safety and well being of its neighbouring States and their inhabitants due to possibilities of radioactive fall-out ; and if so, whether the use by a State of its own territory for such purposes is not contrary to the principles of International Law ?

(b) Can it be said that the use by a State of its own territory for the purpose of carrying out nuclear tests by explosion of atomic devices amounts to an abuse of its rights in respect of use of its State territory ?

III. (a) If it is established that explosion of nuclear devices results in pollution of the air with radioactive substance and that such contaminated air is injurious to the health of the peoples of the world, would the State carrying out the tests be said to be responsible for an international tort in accordance with the principles laid down in the Trail Smelter Arbitration Case ?

(b) In an action based on commission of an international tort, would it be necessary for the claimant State to prove actual damage, or is the general scientific and medical evidence on the effects of nuclear explosions sufficient to maintain the action ?

(c) Even if the harmful effect resulting from contamination of the air can be confined within the territories of the particular State, can it be said that the State has violated the human rights of the citizens and aliens living in its territory, and if so, whether the State is responsible for the harm caused to the aliens under the principles of international law relating to State Responsibility ?

IV. Is the use of atomic weapons in a war illegal, and if so, can the tests carried out for the purpose of manufacture and perfection

of such weapons be said to be illegal by itself without proof of any damage ? Can the question of stoppage of such tests be said to be a matter of international concern ?

V. Would the payment of damages by a State for injuries suffered due to nuclear tests be regarded as sufficient or should an injunction for stoppage of such tests be necessary ?

VI. Does the interference with the freedom of air or sea navigation resulting from declaration of danger zones over the areas where the tests may be carried out amount to violation of the principles of International Law ?

VII. Is the destruction of living resources of the sea which result from nuclear tests on islands or areas of the high seas to be regarded as violative of the principles of International Law ?

VIII. Is it lawful for a Trustee Authority to use territories, which it holds on trust from the United Nations, for purposes of holding nuclear tests ?

**IV. STATEMENTS OF DELEGATES
AND OBSERVERS MADE AT
THE FIFTH SESSION**

Statements of Delegates and Observers Made at the Fifth Session

Ceylon : My Delegation has endeavoured, in accordance with the suggestion made by our Secretary at the meeting of the Heads of Delegations on 17th January, to deal with the subject of nuclear tests in the first instance by propounding answers to the questions posed as Topics for Discussion.

In regard to the first question posed in paragraph I (a), our opinion is that the causation of damage or even death to the inhabitants of the area within the territorial jurisdiction of the testing State, except in the case of non-national inhabitants and except in highly exceptional circumstances pertaining to nationals, would not constitute a breach of international law, although of course, the damage may constitute an infringement of the Declaration of Human Rights.

Questions I (b) and (c) are questions falling within one of the two exceptions I have already mentioned, but I do not propose to offer any opinion on them at this stage because it seems to me that unless this Committee were to formulate an opinion that nuclear tests are illegal, in so far as they constitute either an international tort committed against other nations or an abuse of rights of the testing nation, little purpose would be served by any expression of opinion by this Committee on the comparatively minor problem of injury to alien residents of the testing State.

Passing now to the second major question, at number II, paragraph (a) of that question is in two parts. The first part raises only a question of fact whether atomic tests in one territory do endanger the safety of neighbouring States and their inhabitants due to possibilities of radioactive fall-out. Perhaps the formulation of the questions preceded the Secretariat's Report, a reading of which leads very nearly to the conviction that the first part of the question must necessarily receive an affirmative answer, on the basis of the correctness of the facts as stated in the Report of the Secretariat concerning proved results of some of the tests, namely that the safety of neighbouring States and their inhabitants is necessarily endangered. I propose to refer later to the second part of the question at II (a) which is a purely legal question, whether the use by

a State of its territory for the purpose of atomic tests is contrary to the principles of international law.

I propose also to refer later to the question posed in *paragraph II (b)* but again on the same basis, namely that the Report of the Secretariat as to proved damage resulting from nuclear tests is to be acceptable to the Committee. But I should state straightaway that if the question intended to be posed in this *paragraph (b)* is whether there can be an abuse of rights *without proof of damage*, the question must be answered in the negative.

In the order of the topics there comes now that which is numbered III. Concerning *paragraph (a)*, it commences with the conditional clause referring only to the possibility that the explosion of nuclear devices causes pollution of the air and is thus injurious to the health of peoples of the world. Here again an expression of legal opinion is not called for unless it be correct that the fact of pollution has been established to our satisfaction by available evidence. Accordingly the legal opinion which I reserve to be expressed later upon this question will depend upon the assumption that from the report furnished by the Secretariat we regard the fact of dangerous pollution as being established to our satisfaction.

The answer of my Delegation to the question at *para III (b)* is a definite negative. We cannot conceive of any attribution of liability in tort which is not based upon actual proved damage caused by the alleged tortfeasor.

With reference to *para III (c)*, I need only reiterate the views already expressed concerning the comparative irrelevancy or at least unimportance of parts *(b)* and *(c)* of the question marked I.

I do not propose to offer any answer to the question formulated in *Para IV*. Undoubtedly the question whether the use of atomic weapons in war is illegal is one of unparalleled importance, and if the proper legal answer is in favour of the illegality of their use, it would follow very simply that the testing of such weapons is equally illegal if damage is caused thereby to the citizens or property of other States. But since the subject before this Committee is the comparatively narrower subject of the legality of nuclear tests, my own opinion is that a decision on that subject should not be based upon a decision on a parent problem which has not been proposed for our discussion.

The question marked V again assumes the illegality in international law of nuclear tests for no injunction can issue except in the event or at least the appearance of the commission or the imminent commission of an illegal act. Even on that assumption I do not understand the question posed in this para because it seems to me that the question under consideration, namely the question whether nuclear tests are legal or illegal in international law, does not call for any expression of opinion as to penalties or sanctions to be enforced against a nation guilty of the illegal act. Even if the matter of a sanction is within the scope of our discussion, I, personally, am unfamiliar with the existence of any device in the international organisation analogous to the device of an injunction issued in the ordinary process of a civil court.

Our opinion on the questions raised in paras VI and VII are in the affirmative, namely that the declaration of danger zones over areas where nuclear tests are carried out interfering with the sea navigation or causing the destruction of living resources of the sea is illegal. In so far as there may thus be interference with the freedom of the air, we express no opinion.

In answer to question VIII, our emphatic opinion is that if nuclear tests are proved to be injurious to the inhabitants of trustee territory on which they are carried out, the tests are illegal.

I have reserved our opinion on two matters. In regard to the second of those matters, namely the question of the applicability of the doctrine of the abuse of rights, I offer a tentative opinion. A suggestion has been made that the principle of abuse of rights might provide a solution of the problem of the legality of nuclear tests. That this doctrine is part of international law is subject to certain qualifications. It is true that a survey of the jurisprudence of the International Court of Justice and the Permanent Court of International Justice shows recognition of this doctrine. Although there is no authoritative decision or statement on the basis of this doctrine or any elaboration of its principles, surely in this field development can take place to cover this new situation.

Our opinion is that in view of the references, however indirect and *obiter* they may have been, made in judgments of the courts to the doctrine, it may fairly be said that if in fact there has been abuse of a national right causing injury to any State or its nationals, then

having regard both to any lack of justification on the one side and to the gravity of the damage on the other, there would be readiness on the part of a competent tribunal to apply the doctrine of the abuse of rights. Even so, the question of justification would be one of fact on which divergence of opinion may be possible.

It seems, therefore, relevant to consider whether a State which conducts nuclear tests can claim to have any justification for the tests. My personal view is that no such claim would be acceptable to an impartial international tribunal which, in the peculiar dreadful circumstances, should in my estimation form an opinion unfavourable to a nuclear testing nation. After all, what is the justification? It seems to me that nation A can only claim that it wishes to carry out nuclear tests in order to perfect weapons, which will be more effective in what that nation considers to be necessary self-defence against weapons which it fears might be perfected by nation B. Assuming this to be a real fear, and assuming the tests to be designed for the purpose just mentioned, what are the two matters which have to be weighed against each other in the scales? On the one hand, there is the fear of the greater effectiveness of the weapons which may be used by a possible opponent. It is a fear real enough but yet only of a possible danger. But on the other side of the scales is the actual damage inevitably caused by the tests themselves, the magnitude of which cannot yet be estimated. For myself, I would certainly think that the infliction of actual and present injury must outweigh the fear of a possible superiority in weapons, however dreadful their effectiveness. At the same time I must fairly concede that a nation which has real cause to fear that it may be the first victim of a possible enemy's use of nuclear weapons may find itself unable to agree with my opinion.

The earlier reservation of opinion on my part related to the question in II (a). The Report of the Secretariat suggests two bases, other than the principle of the abuse of rights, upon which liability for damage caused by nuclear tests can be said to rest. I ask for the indulgence of the Committee to defer, to a later stage of these discussions, a full statement of the views of our Delegation on the rather difficult questions which are involved.

For the present I will only indicate that we are inclined to the view that absolute liability for damage through acti-

vities *per se* dangerous are generally actionable according to the law recognized by civilized nations, and that accordingly that principle becomes applicable in International Law under Article 38 of the Statute of the International Court.

India : As this House is aware, the subject of legality of nuclear tests has been taken up for examination by this Committee at the instance of the Prime Minister of India, who drew the attention of the jurists to the subject in his inaugural address at the First Session of this Committee held in New Delhi in 1957. In the last Session of the Committee at Tokyo, considerable interest was shown in the subject by the distinguished Delegates who displayed a great deal of anxiety over the problem. Accordingly, the Committee decided that this subject should be placed first on the agenda of the present Session. The decision emphasises the importance which the member countries attach to the subject, and it is a matter of great satisfaction to the Government of India that the other member countries share their desire with equal keenness to study legal pros and cons of nuclear tests.

Since this Committee met last in Tokyo, various nuclear Powers have conducted quite a large number of tests causing serious alarm in the neighbouring countries. The resumption of these tests has heightened the urgency of our examination of their legality.

It is hardly necessary for our Delegation to set out at this stage the dangers to human life and property which nuclear tests imply. In the Tokyo Session, the distinguished leader of our Delegation had portrayed the widely destructive and damaging effects of nuclear tests and the other distinguished Delegates had also recalled with facts and figures the grave injury caused by the use of nuclear weapons in the past and the potential harms of nuclear tests. The Secretariat of the Committee, under the able guidance of our popular Secretary, Shri B. Sen, has made a close study of the subject and has presented to us a volume of material to assist us in our deliberations. We are indeed thankful to the Secretariat for the excellent work done by them in this direction.

Even the great Nuclear Powers are agreed that nuclear tests, being a preparation for nuclear warfare, are a malice to the very existence of mankind. Attempts have been made and are being made even now to ban nuclear tests totally, but as long as the race

for military predominance and the race of armament continue, the chances of total prohibition of nuclear tests appear to be bleak. Meanwhile, the non-nuclear nations, especially the neighbours of the nuclear nations remain in a state of tension, in a state of fear, that the large scale of nuclear tests might some day throw them out of existence. We, sitting around this table, have embarked upon examination of the problem from a legal angle, but we certainly cannot shut our eyes against the deeper human aspects of the problem.

Coming to the legal implications of nuclear tests, the questions which this Delegation considers relevant are : Has any nation a legal right to carry on activities which present a potential danger of causing mass destruction of the life and property of its nationals? In particular, has any nation a legal right to carry on activities which are likely to endanger the life and property of the adjoining nations? If a nation has no such right, what is the remedy available to its nationals and to the adjoining nations to prevent these activities? If these activities cannot be prevented, is the erring nation liable to make reparation to the victims of these activities? These appear to be major questions which this Committee is called upon to examine.

It is said that a nation enjoys absolute sovereignty over its territory and other nations have no right to challenge or criticise the doings of a nation over its own territory. Such a startling proposition might have held good in the ancient barbaric days, but does it make an appeal in the modern civilised world? Has a nation the unrestricted and unlimited power to deal with its nationals?

I. (a) The English courts and the courts of the various countries which follow the English legal system have been observing the law, the rule in *Rylands*, which lays down that any person who keeps anything likely to do mischief, if it escapes, keeps it at his own peril and is *prima facie* answerable for all the damage which is the natural consequence of such a keeping. It appears from a study of the Secretariat that that principle, somewhat in a modified form, was adopted by the major legal systems of Europe as well as by America. This rule, however, does not import the principle of State responsibility but implies responsibility of the individual who keeps the thing that causes damage. However, our view is that a State which permits prosecution of ultra-

hazardous activities like nuclear tests would also be responsible for the damage. The ultimate responsibility for the welfare of the State is of the State and, if the State allows people to carry on on its territory activities of an abnormal nature which are likely to cause unpredictable damage or destruction, the State must hold itself liable for the consequences of such activities. It is urged in some quarters that the State enjoys absolute sovereignty over its territory and it can do or permit the doing of anything on its territory for which it cannot be held responsible. This proposition, to our minds, appears to be a relic of the ancient barbaric age and cannot be advanced and could not make an appeal in the modern civilised world. That a nation does not enjoy unrestricted and unlimited power to deal with its nationals is, we think, amply recognised. No State can act "in complete disregard of the elementary dictates of humanity". This proposition has been accepted as declaratory of the existing law by the International Military Tribunals of Nuremberg as far back as 1946 and deeds of outrage have also been well settled by rules of international customary treaty law. We, living in the civilised age, must assume that the State cannot itself carry on, or permit any one to carry on, in its territory activities which present a grave hazard to the life and property of the community. The Charter of the United Nations also reaffirms, in its preamble, "faith in fundamental human rights, in the dignity and worth of human person." This, again, is an indication of the modern trend towards curtailment of the absolute sovereignty of a State over its territory. The Universal Declaration of Human Rights adopted by the United Nations also speaks of the willingness of States to surrender a portion of their sovereignty to preserve the right to life, liberty and security of every person. Under the Genocide Convention, the States have accepted as a treaty obligation to refrain from and punish genocide. These international developments in the recent times clearly established the recognition by the States of the principle that the State cannot exercise absolute and unrestricted sovereignty even in its own territory or in relation to its own nationals. Our Delegation is firmly of the view that in the light of the significant changes in the concept of State sovereignty which have been accepted by most of the States, the State must be held responsible for any damage caused to its nationals as a result of hazardous activities carried on on its territory with its knowledge or permission.

I. (b) A foreign national, resident or sojourning in the territory of a State, in whatever circumstances, would have the same rights as the nationals of that State, if he suffers damage due to hazardous activities in the State. The home-State will not *per se* be entitled to enforce the rights which will have to be enforced by the victim in the domestic courts. If, however, a State discriminates against aliens and denies to them those rights, it appears that their home-State can take up their case in the International Court of Justice on the ground of international delinquency caused by abuse of rights.

I. (c) In the *Corfu Channel case*, the International Court of Justice has recognised the principle of international customary law that a State shall not knowingly allow its territory to be used for acts contrary to the rights of other States. The *Trail Smelter case* is another instance where that principle was accepted. Accordingly, if a State, by its acts, causes damage on a territory of another State, the first State commits an international tort and is answerable to the second State for reparation. That second State can seek reparation not only on behalf of its own nationals who have suffered but on behalf of nationals of other States also on its side. It is doubtful whether the other States whose nationals have suffered damage in the territory of the second State can seek reparation directly against the tortious State.

II. (a) A State carrying on atomic tests in its own territory is without doubt endangering the safety and well-being of its neighbouring States—even perhaps of the States beyond the neighbouring States—due to the possibilities of radioactive fall-out. As far as the present scientific knowledge goes, the direction of the radioactive fall-out cannot be controlled and it depends largely on weather conditions. The use by a State of its own territory for purposes of nuclear experiments is definitely contrary to the principles of international law, in view of the possible injurious effects thereof on the people and property of the other States. The observations of the International Court of Justice in the *Corfu Channel case* unquestionably indicate that a State which knowingly uses its territory or allows its territory to be used for acts contrary to the rights of other States commits an internationally illegal act. Every State and its nationals are entitled to live without any fear of injury from the neighbouring States and if the neighbouring States carry on activities which will endanger the

safety and well-being of that State, there would be, it appears, a violation of the basic principles of international law, although no claim for reparation would arise, unless actual damage or injury is caused.

II. (b) A State carrying out nuclear tests in its own territory would, we feel, be abusing its rights in respect of use of its territory. As already stated, a State cannot indulge in acts which cause or are likely to cause damage either to its own nationals or nationals of the neighbouring countries on a large scale.

III. (a) Scientific research has established beyond all reasonable doubt that explosions of nuclear devices thus result in pollution of the air with radioactivity, thereby creating atmosphere injurious to the health of the peoples within the neighbouring zones. The principle in the *Trail Smelter Arbitration* ought to be applied to such a situation. It is true that the award in the *Trail Smelter case* cannot in isolation be regarded as laying down a positive principle of international law to cover all situations, but it is undeniable that the principle ought to be applied to injury caused by nuclear tests. We draw attention here again to the implications of the preamble to the Charter of the United Nations and the Universal Declaration of Human Rights which ought to be regarded as formulating new principles of international law, if not declaring the existing principles.

III. (b) The damage which the nuclear tests are likely to cause or cause is not merely actual damage but also potential damage or delayed damage. Scientists have told us in unmistakable terms and the proposition is abundantly demonstrated by the events which followed the tragic atomic bomb explosions in Nagasaki and Hiroshima (about which our distinguished colleague from Japan will bear testimony and also enlighten us in greater detail), that even years after the explosions the effects of radiation manifest themselves in human bodies. Diseases like leukaemia and genetic diseases appear not merely after a victim is exposed to radiation but a long time thereafter. It is, therefore, not correct to say that actual damage has to be established for the claimant State to base an action on commission of an international tort. In this connection it would be useful to mention that the Draft Convention on Civil Liability for Nuclear Damage, which has been drawn up under the auspices of the

International Atomic Energy Commission by legal experts, of several countries and revised by representatives of many countries does take notice of the delayed effects of radioactivity and provides for compensation even in anticipation of the damage so far as the guilty State is concerned.

III. (c) Even if the harmful effects resulting from contamination of the air are confined within the territory of the experimenting State, that State must be regarded as having violated the human rights of its citizens and aliens living within its territory. As already stated, the sovereignty of the State is to be regarded as having been curtailed to this extent, and the State ought to be deemed to be abusing its sovereignty in out carrying such dangerous experiments. The question whether the State is responsible for the harm caused to the aliens residing in its territory has already been dealt with. Apart from that, it has been scientifically established that the harmful effects of contamination of the air cannot be controlled to any particular area. We may quote, in this connection, the explosion at Bikini Atoll. Radiation and radioactive material released by the explosion caused contamination far beyond the area defined as the warning zone by the exploding State. The fate of the Japanese fishing vessel *Lucky Dragon* is another instance of miscalculation of the danger area.

IV. As the leader of our Delegation made it clear in his statement at the Tokyo session, the question whether the use of atomic weapons in a war is legal or not is not for the consideration of this Committee, and we do not propose to express any views thereon. We are, however, of the firm belief that the tests carried on for the manufacture and perfection of atomic weapons involve widespread danger to life and property and are therefore illegal. Proof of damage is unnecessary; the possibility of damage which is unpredictable is sufficient to condemn the tests as illegal. The stoppage of such tests is undoubtedly a matter of international concern, as is evident from the fact that even the great Nuclear Powers have engaged themselves in exploring ways and means to establish cessation of such tests.

V. An injunction for stoppage of nuclear tests is indeed necessary. The International Court of Justice has the power to indicate, if circumstances so require, provisional measures which ought to be taken to preserve the respective rights of either party (vide Article

41 of the Charter). We feel confident that if occasion arises for the International Court of Justice to decide the question of legality of nuclear tests, proposed to be carried out by any State, the Court would not hesitate to grant an injunction. The question of reparation comes after the event, and it is no solution to the real issue which is to save humanity and property from damage and destruction.

VI. It is certainly a violation of the principles of international law if a nation carrying on nuclear tests marks off certain areas as danger zones and thus prevents the exercise of the freedom of air or sea navigation. It is not necessary to repeat in any detail that every nation has the right to navigate in the high seas and to fly over the high seas. This freedom has been recognised for quite a long time and has been implicitly reaffirmed in the latest conventions on the Law of the Sea. An express provision is made in one of these Conventions that a State shall not pollute the waters of the high seas—it is merely a declaration of the existing rule of international law.

VII. If nuclear tests result in destruction of the living sources of the sea, the testing nation does violate the principles of international law. The living sources are a common property of all nations and no nation has a right to destroy them or to injure them in any way.

VIII. A trustee authority which holds territories on trust from the United Nations has no right to use the trusteeship territories for the purpose of holding nuclear tests. Any such activity is clearly contrary to the basic objectives set out in Articles 73 and 76 of the Charter of the United Nations.

Indonesia : The Indonesian view regarding the legality of nuclear tests has already been presented to the Committee by the Indonesian Delegation during the Tokyo Session last year. However, I may be permitted to make a few additional observations regarding some aspects of the matter under consideration, based upon the report prepared by the Secretariat.

Firstly, regarding nuclear tests on the metropolitan territory. Nuclear weapons tests within the metropolitan territory or national territory of a State involve the principle of State sovereignty and