

NZ struggles to illegalise nuclear arms

By IAN WARDEN

WHEN the history of nuclear disarmament is written, 100 years hence, will a decomposed snail and a pair of woollen underpants be found to have played a small part in that planet-saving process?

While Messrs Gorbachev and Reagan receive the disarmament limelight, minor labourers in that vital vineyard keep up the good work. One of them, Harold Evans, a retired New Zealand stipendiary magistrate, seems to have made some progress in encouraging his country's nuke-allergic government to think of asking the International Court of Justice to consider whether or not the possession of nuclear weapons, let alone the first use of them, might be illegal.

New Zealand's Minister of Foreign Affairs, Mr Russell Marshall, has said that he hopes to be able to "float the proposal informally" at the United Nations in New York this month during the UN's Special Session on Disarmament.

Mr Evans is also trying to interest the Australian Government in joining New Zealand in urging the ICJ to dwell on the matter and is about to receive support for this from the Australian Section of the International Commission of Jurists. The secretary-general of the Australian Section, David Bitel, expects a letter to be sent to Australia's Minister for Foreign Affairs and Trade, Mr Hayden, in a few days time.

The story so far is that in March last year Mr Evans delivered an open letter on this subject to the two Australasian governments. That letter was essentially a compilation of the views of six distinguished international law jurists, with all of them reaching the conclusion, in their own individual ways, that this was a matter of great urgency, and that it was reasonable to go to the ICJ to argue that the use, possession, deployment, manufacture and testing of nuclear weapons are illegal because the distinctive quality of such weapons is their potential to injure, kill, destroy and exterminate indiscriminately on a scale far exceeding the restraints and limits formerly recognised by the international law of war.

The General Assembly or the Security Council of the United Nations can ask the ICJ to give an advisory opinion on any matter of law and any member nation of the United Nations may move that the General Assembly ask the ICJ to do just that. Mr

Evans wants New Zealand and Australia to move the motion that the ICJ be asked to give an opinion on nuclear weapons.

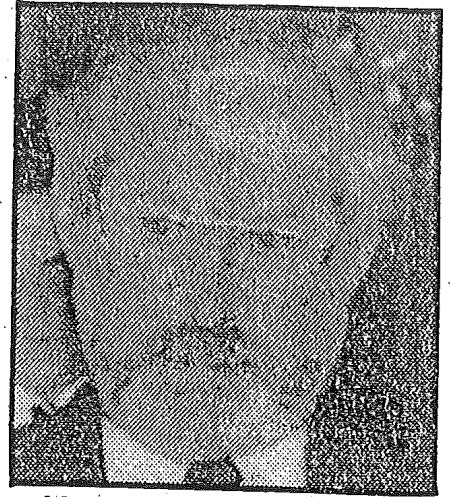
New Zealand's Mr Marshall is being nagged, now, by the New Zealand Section of the International Commission of Jurists, who have written to him to say that his government should move the required motion in the UN because "the use and particularly the first use of nuclear weapons would be contrary to the principles of international humanitarian law and of the laws of war. A strong argument can be made that it would also be a crime against humanity and a violation of the right to life recognised by the international law of human rights. . ."

"We strongly believe," the New Zealand Section told Mr Marshall, "that the drive to reduce and eventually eliminate the threat of nuclear war would derive new impetus from a declaration by the ICJ that the use, and particularly the first use, of nuclear weapons is illegal or, failing that, some other authoritative affirmation to the same effect by or on behalf of the world community. . ."

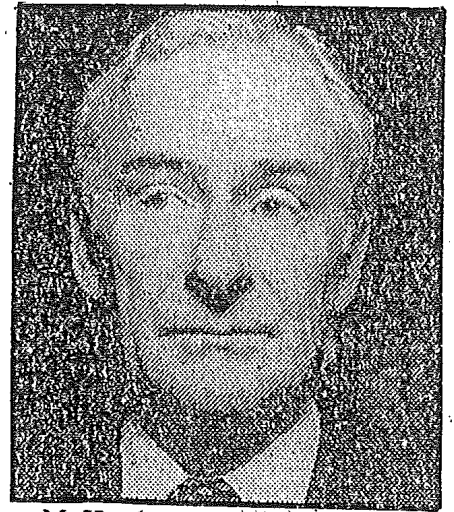
THE AUSTRALIAN Section is about to write to Mr Hayden to put a comparable view, and must be encouraged by the thought that Australia has a history of support for, and use of, the ICJ. In 1973-1974 Australia joined New Zealand in taking France to the court over France's atmospheric nuclear testing in the Pacific, and in October, 1985, the Australian Attorney-General, Senator Evans, rhapsodised to the parliament that the ICJ was of "central importance . . . to the international regime of law and justice".

We must wait to see what, if any, misgivings Mr Hayden has, but his New Zealand counterpart had two, in particular when he last wrote to Mr Evans on May 18. He was worried that there was no certainty that the ICJ would come to the conclusions that the New Zealand government and Mr Evans would like and that there was a risk that they would find the other way (that it was no more illegal to keep and use nuclear weapons than to keep and use a refrigerator). If they did come to that conclusion, Mr Marshall agonised, "it would damage the entire anti-nuclear cause and do little to enhance New Zealand's international reputation".

His other dread was that even if the ICJ did come out against nuclear weapons the



Mr Marshall: agonising over damaging nuclear cause



Mr Hayden: must wait to see if he has any misgivings

nuclear weapons states would ignore the opinion, thus putting their tongue out at and undermining the standing of the court.

Mr Evans, a persistent man, and learned in the law, has already written back to Mr Marshall to counter these two dreads. In dismissing the second of them he says that the policies of the states in question are not unalterable and that international public opinion has great weight. In dismissing the second he has told Mr Marshall that uncertainty is always a problem when one goes to court but then offers, as a parable, two apparently famous court cases, *Donoghue v. Stevenson* (1932) and *Grant v. Australian Knitting Mills* (1936).

In the first of these a woman took a ginger-beer manufacturer to court after drinking some contents of a bottle of that beverage and then finding a decomposed snail wallowing in the dregs. She suffered from shock and then, a little later, from gastro-enteritis. In the second of the cases a man took to court a manufacturer of woollen pants after a chemical irritant in the pants gave him dermatitis.

The point about these cases, Mr Evans explains in great detail, is that both plaintiffs won their cases and "journeyed successfully" but only after treading "an uncertain road" which saw them lugged through various courts which found for them, then against them, and then for them again.

Will this parable of the gastropod and of the rash have stiffened Mr Marshall's resolve? We shall find out later this month.