**Written Statement of the Government of the United Kingdom**

# LEGALITY OF THE USE BY A STATE OF NUCLEAR WEAPONS IN ARMED CONFLICT

(REQUEST FOR ADVISORY OPINION)

STATEMENT OF THE GOVERNMENT

OF THE UNITED KINGDOM

**CONTENTS**

INTRODUCTION

SUMMARY

CHAPTER I - THE WORLD HEALTH ORGANISATION'S INTEREST IN THE USE OF NUCLEAR WEAPONS

CHAPTER II - INTERNATIONAL EFFORTS TO CONTROL NUCLEAR WEAPONS

CHAPTER III - THE QUESTION OF POWERS: IS THE REQUEST INTRA VIRES THE WORLD HEALTH ORGANISATION?

CHAPTER IV - THE QUESTION OF PROPRIETY: IS THE REQUEST ONE WHICH, IN ALL THE CIRCUMSTANCES, THE COURT SHOULD DECLINE TO ANSWER?

CHAPTER V - THE PRINCIPLES OF LAW RAISED BY THE QUESTION

CONCLUSION

*INTRODUCTION*

**TERMS OF THE REQUEST AND STANDING OF THE UNITED KINGDOM**

1. The terms of the request made by the Forty-sixth World Health Assembly are as follows:-

> "The Forty-sixth World Health Assembly ....
>
> 1. DECIDES, in accordance with Article 96(2) of the Charter of the United Nations, Article 76 of the Constitution of the World Health Organization and Article X of the Agreement between the United Nations and the World Health Organization approved by the General Assembly of the United Nations on 15 November 1947 in its resolution 124(II), to request the International Court of Justice to give an advisory opinion on the following question:
>
> 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?"

2. The Court, by its Order of 13 September 1993, fixed 10 June

1994 as the time limit within which written statements may be submitted to the Court by the World Health Organisation and by those of its Member States who are entitled to appear before the Court, in accordance with Article 66, paragraph 2 of the Statute of the Court. That Order of the Court was notified to the Government of the United Kingdom. The United Kingdom has been a member of the World Health Organisation since the entry into force of its Constitution on 7 April 1948, is an original Member of the United Nations and by virtue of Article 93 of the United Nations Charter *ipso facto* a party to the Statute of the Court. It is in these circumstances a State to which the Court is open under Article 35 of the Statute of the Court and entitled to appear before the Court.

## SUMMARY

## MAIN POINTS OF THE UNITED KINGDOM SUBMISSION

1. As Chapter I of this Statement makes clear, the interest of the WHO in the legality of the use of nuclear weapons is very recent indeed. The principal international efforts to control the manufacture, use and proliferation of nuclear weapons have not taken place in the WHO, but elsewhere - in the United Nations, in bilateral talks (SALT I and II), and in multilateral negotiations over nuclear-free zones etc - and a number of agreements have been reached. These are described in Chapter II. Significantly, the States involved have not regarded answering the question as to the legality of the use of nuclear weapons as central to their task, or as likely to be productive.

2. The present request by the WHO raises serious doubts over whether the request is intra vires the Organisation, and these doubts are explained in Chapter III. It is difficult to see how the issue of legality of the use of nuclear weapons is a legal question within the competence of the WHO, and certainly no provision in the Constitution can be found which would suggest that such use by a Member State violates its constitutional obligations.

3. The request also raises an issue of propriety - even

assuming the request is otherwise _intra vires_ - and there are, in fact, cogent reasons why the Court should decline to answer this request. In Chapter IV it is suggested that this request for an Opinion in fact invites the Court to enter into an essentially political debate. Moreover, any Opinion from the Court would be unlikely to affect the constitutional obligations of Members, and would otherwise be of no practical effect. Any effect an Opinion might have could be highly detrimental both to the WHO and to the on-going negotiations for reducing the threat of nuclear war.

4. If notwithstanding these doubts as to the _vires_ and propriety of the request, the Court should nevertheless decide to respond to it, it is likely that no clear, unequivocal answer could be given. Chapter V contains a preliminary survey of some of the legal questions which arise, and shows that the issue is complex and highly fact-dependent; in these circumstances no answer can be given in abstract terms. Legality will depend on the facts of each case, particularly because any assessment of the validity of a plea of self-defence will depend on those facts. In view of the complexity of these questions, the United Kingdom reserves the right to make further submissions with regard to the request, should the Court decide to respond to it.

# CHAPTER I

## THE WHO INTEREST IN THE USE OF NUCLEAR WEAPONS

### 1. A Review of WHO activities in this matter

1. The WHO interest in nuclear weapons, prior to the passing of WHA 46.40 in 1993, was confined to the effects of nuclear weapons testing or potential use on health and health services.

2. Three resolutions were passed in the 1960's and early 1970's which focussed specifically on the health risks associated with the increased atmospheric radiation produced by such testing - WHA 14.56 (1961), WHA 19.39 (1966) and WHA 26.57 (1973).[1] Thereafter nuclear weapons were not dealt with again by the WHA until the 1980's, when four resolutions were passed concerning the effects of nuclear weapons on health and health services - WHA 34.38 (1981), WHA 36.28 (1983), WHA 39.19 (1986) and WHA 40.24 (1987).

---

[1] There were some previous resolutions on the health risks of radiation, but these did not specifically mention nuclear testing - WHA 9.54 (1956), WHA 10.21 (1957), WHA 11.50 (1958) and WHA 13.56 (1960).

3. WHA 34.38 (1981) was passed by 46 votes in favour to 43 against with 11 abstentions. It requested the Director-General to establish a committee of experts to study the consequences of thermonuclear war for the life and health of the peoples of the world. In response an International Committee of Experts in Medical Science and Public Health was established to prepare a report. The report was presented to the WHA in 1983. Its main conclusion was that, in view of the disastrous consequences of a nuclear conflict for human health and welfare, "the only approach to the treatment of the health effects of nuclear explosions is primary prevention of such explosions, that is the prevention of atomic war."

4. WHA 36.28 (1983) was passed by 97 votes to 12 against with 9 abstentions. It thanked the International Committee for its report, noted it with grave concern, and endorsed the conclusion that "it is impossible to prepare health services to deal in any systematic way with a catastrophe resulting from nuclear warfare, and that nuclear weapons constitute the greatest immediate threat to the health and welfare of mankind". The resolution also requested the Director-General to publish the report, to give it wide publicity and to transmit it to the Secretary-General of the UN. Finally, it recommended that the WHO, "in cooperation with the other United Nations agencies, continue the work of collecting, analysing and regularly publishing accounts of activities and further studies on the effects of nuclear war on health and health services".

5. The WHO duly published the Committee's report in 1984 under the title "Effects of Nuclear War on Health and Health Services" (Geneva, WHO, 1984). In addition, in order to continue work on this subject in accordance with WHA 36.28 (1983), the Director-General established a WHO Management Group. This Group prepared a progress report on its activities in 1985 (A.38/INF.DOC/5). WHA 39.19 (1986) subsequently requested the Director-General to continue to take appropriate measures to implement WHA 36.28 (1983) and to submit a report to the fortieth WHA.

6. For this purpose the WHO Management Group prepared a revised version of the 1983 report, drawing on additional material from new studies undertaken since then. Following this, WHA 40.24 (1987) was passed by 68 votes to 13 with 28 abstentions. It thanked the Management Group for its work, expressed deep concern at the report's conclusions, urged Member States to take it into consideration, requested its publication, and called for health aspects of the effects of nuclear war that were not reflected in the report to be further investigated in collaboration with interested UN bodies and other international organisations. The revised report was subsequently published under the title "Effects of Nuclear War on Health and Health Services, Second Edition" (Geneva, WHO, 1987). The WHO Management Group has since continued its work in this area, and in 1991 produced a report on its activities since 1981 (A44/INF.DOC/5).

7. None of these resolutions or reports was concerned with the

legality of the use of nuclear weapons. During the eighties, however, there was a growing interest among certain non-governmental organisations in the possibility of obtaining an advisory opinion from the International Court of Justice on legal questions relating to nuclear weapons. This idea was supported, for example, by a non-governmental event called the London Nuclear Warfare Tribunal, held in 1985. Subsequently an effort was made to persuade the Australian and New Zealand Governments to take the initiative within the United Nations to have the General Assembly request such an Opinion, but without success. The conclusion from this experience seems to have been that instead of persuading an individual state to take up this campaign, it would be easier to persuade the United Nations General Assembly directly or an international organisation to do so. (See "The World Court Reference Project", a leaflet produced by the Institute for Law and Peace, 1990).

8. In August 1987 an international conference of non-governmental organisations on nuclear weapons and international law was held in New York, sponsored by the Lawyers Committee on Nuclear Policy (USA) and the Association of Soviet Lawyers. This decided to found a world-wide organisation of lawyers opposed to nuclear weapons. This organisation, the International Association of Lawyers against Nuclear Arms (IALANA), was founded in April 1988 at another NGO meeting in Stockholm. In September 1989, at The Hague, the IALANA adopted its Hague Declaration on the Illegality of Nuclear Weapons. It also appealed to all member states of the United Nations "to take immediate steps toward obtaining a resolution by the United

Nations General Assembly under Article 96 of the United Nations Charter, requesting the International Court of Justice to render an advisory opinion on the illegality of the use of nuclear weapons" (see "The World Court Project on Nuclear Weapons and International Law", 2nd edition, 1993, p.xiii and Appendix 1).

9. Subsequently, in January 1992, IALANA, together with two other NGO's (the International Peace Bureau and International Physicians for the Prevention of Nuclear War) established the World Court Project. International Physicians for the Prevention of Nuclear War had previously suggested that the WHO as well as the United Nations General Assembly might provide a route to the International Court of Justice. In May 1992 the International Peace Bureau organised a meeting in Geneva to promulgate the Project's ideas ("The World Court Project on Nuclear Weapons and International law", 2nd edition, above ).

10. Also in May 1992, at the WHA itself, a number of states proposed a draft resolution on the "Health and Environmental Effects of Nuclear Weapons" (A45/A/Conf.Paper No.2). This resolution would have requested the Director-General "to refer the matter to the Executive Board to study and formulate a request for an advisory opinion from the International Court of Justice on the status in international law of the use of nuclear weapons in view of their serious effects on health and the environment." The General Committee recommended, however, that the WHA take no action on

the draft and this recommendation was endorsed by consensus in a Plenary Session of the Assembly.

11. Subsequently, at the request of some states the item "Health and Environmental Effects of Nuclear Weapons" was included on the provisional agenda of the 1993 WHA. As background the Director-General of the WHO, in consultation with the WHO Management Group, prepared a report on this subject, reviewing previous WHO work on the matter since 1981 and summarising its conclusions (A46/30). This did not make any reference to the question of the legality of using nuclear weapons. However, the draft resolution tabled by certain states did so; it was introduced in Committee B, and adopted there on 12 May (by 73 in favour to 31 against with 6 abstentions).

12. The debate both in Committee B, and subsequently in Plenary Session, centred on the competence of the WHO to address such an issue, and the possible costs it would entail. The Legal Counsel to the WHO spoke to the resolution in the Plenary Session on, inter alia, the question of competence:

> "It is not within the normal competence or mandate of the WHO to deal with the lawfulness or illegality of the use of nuclear weapons. In consequence, it is also not within the normal competence or mandate of the WHO to refer the lawfulness or illegality question to the International Court of Justice.
>
> The question of illegality of nuclear weapons falls

squarely within the mandate of the United Nations and is being dealt with by it, and in consequence it is clearly within the mandate of the United Nations General Assembly, should it wish, to refer the question of illegality to the International Court of Justice for an advisory opinion." (WHA Provisional Verbatim Records: A46/VR/13: p13)

13. In his address to the Plenary Session, the Director General of the WHO, Dr Nakajima, reiterated these concerns, and made clear his worries over the financial implications for the Organisation.

> "We must recognise the primary mandate of the United Nations to deal with nuclear weapons, disarmament, and related issues of law and diplomacy... Furthermore, in view of the difficult budgetary and financial position of the WHO and the need for prioritised use of resources, ... I would not be able to incur expenditures from within existing appropriations, and would have to rely on receipt of sufficient additional voluntary contributions in order to take the actions requested by this resolution". (WHA Provisional Verbatim Records: A46/VR/13: p15)

14. In the debate during the Plenary Session, speakers from the United States, the United Kingdom, France and Russia argued against the resolution, chiefly on the grounds that it dealt with matters outside the competence of the WHO. Speakers

from Mexico, Vanuatu, Zambia, Tonga and Colombia argued for the resolution, suggesting that the question of competence had been decided by the previous discussion in Committee B.

15. In the event, the resolution was passed in the Plenary Session on 14 May 1993 by 73 in favour to 40 against with 10 abstentions. On 27 August 1993, the WHO Director-General formally wrote to the International Court of Justice to request its Opinion on the question of the legality of the use of nuclear weapons.

**2. A review of World Health Assembly Resolution 46.40**

16. World Health Assembly Resolution 46.40 of 14 May 1993 refers to five previous WHA resolutions.

17. In the third preambular paragraph it recalls resolutions WHA 34.38, WHA 36.28 and WHA 40.24 on the effects of nuclear war on health and health services. In fact, these resolutions deal with, or recite, a number of matters, none of them however relating to the legality of the use of nuclear weapons under international law, or the consistency of the use of nuclear weapons with Member States' obligations under the WHO Constitution. These resolutions cover the following ground:

(i) the relationship between the preservation of peace in general terms and the preservation or improvement of health (WHA 34.38, preambular paragraphs 1 and 2 and operative paragraph 1; WHA 36.28, preambular paragraph

1; WHA 40.24, preambular paragraphs 1 and 2);

(ii) the relationship between peace and development (WHA 34.38, preambular paragraphs 3 and 4);

(iii) the role of physicians and health workers (WHA 34.38, preambular paragraph 4, and 36.28, preambular paragraph 2) and their views on the effects of nuclear war (WHA 34.38, preambular paragraph 6);

(iv) concerns regarding the effects of nuclear war on health and health services:-

(a) WHA 34.38 cites concern that the unleashing of nuclear war "in any form and on any scale" will lead to destruction of the environment, widespread deaths, and to grave consequences for the life and health of the population of all countries (preambular paragraph 5); and requests the Director-General to create an international committee composed of eminent experts in science and medical health to study and elucidate the threat of nuclear war and its consequences for life and health;

(b) WHA 36.28 considers the 1983 report of that body and notes it with concern (preambular paragraph 3, operative paragraphs 1 and 2), in particular its implications for health services and the

health of mankind (operative paragraph 3), commends it to Member States (operative paragraph 4), requests the Director-General to publicize it (operative paragraph 5) and recommends that the WHO continue its work in this field (operative paragraph 6);

(c) WHA 40.24 follows WHA 36.28 in its consideration of the 1987 report of the WHO Management Group on the effects of nuclear war on health and health services.

18. In summary, the above resolutions express concern over the effects of nuclear war on health and health services, but the issue of the legality of the use of nuclear weapons, or any possible incompatibility between their use and a Member State's obligations under the WHO Charter, are never mentioned. The concern of these resolutions is the effects of nuclear war on health services and the health of mankind irrespective of its legality, or of the legality of the use of nuclear weapons therein.

19. In its fifth preambular paragraph, WHA 46.40 recalls WHA 42.26 (WHO's contribution to international efforts towards sustainable development) and WHA 45.31 (effects on health of environmental degradation). These two resolutions cover the

following ground:

(i) WHA 42.26 considers the implications of sustainable development for health, but makes no specific mention of nuclear weapons, or the possible effects of their use. Indeed, other specific threats to the environment and to sustainable development are singled out, in particular "uncontrolled development and the indiscriminate use of technology" (preambular paragraph 6 and operative paragraph 3(2)); diseases resulting from uncontrolled development (operative paragraph 3(2)); anthropogenic influences on ecological systems (operative paragraph 3(4)); and the effects of hazardous and toxic substances, industrial processes and products, agricultural and food processing practices and climate change (operative paragraph 5(1)(a));

(ii) WHA 45.31 addresses the effects on health of environmental degradation, but again makes no specific mention of nuclear weapons, or the possible effects of their use. Instead, the resolution addresses environmental degradation specifically in the context of (for example) concerns over chemical safety (preambular paragraphs 1 and 5, operative paragraph 4(2)(b)), water and sanitation (preambular paragraph 1 and operative paragraph 4(2)(c)), and the expanding population of urban areas (preambular paragraph 4 and operative paragraph 4(2)(d)).

20. While both of the above resolutions consider the effects of environmental degradation, and some of its causes, they do not address the possible effects of the use of nuclear weapons, or its legality. The reference in WHA 46.40, preambular paragraph 5, to the environmental consequences of the use of nuclear weapons, does not follow directly from any specific concern expressed in these two resolutions.

21. While WHA resolutions adopted prior to WHA 46.40 indicate grave concern over the health and environmental effects of the use of nuclear weapons, none of the resolutions cited in WHA 46.40, or any other WHA resolution, expresses concerns over the legality of their use, or indicates how or why this is relevant to their possible health or environmental effects; or how the effects of lawful use might differ from the unlawful use of such weapons. Rather the focus of such previous WHO action as has taken place in this area has been on the effects of nuclear war on public health and the environment; concerns also recited in preambular paragraphs 1-7 of WHA 46.40. The issue of legality has not previously been taken up by WHO.

22. Preambular paragraph 9 of WHA 46.40 asserts that "the primary prevention of the health hazards of nuclear weapons requires clarity about the status in international law of their use." This is the first time in which a reference to this requirement appears in WHA resolutions. While WHO's concern over the health and environmental effects of nuclear weapons is well-documented, no previous resolution indicates why the lawfulness or otherwise of the use of nuclear weapons has any

relevance to their effects on health if they are used; and WHA 46.40 offers no such explanation.

23. Preambular paragraph 9 recites also that "over the last 48 years marked differences of opinion have been expressed by Member States about the lawfulness of the use of nuclear weapons". While it is true that such differences of opinion between States have arisen, WHA 46.40 marks the first time that such differences have been the subject of action by Member States of the WHO. Indeed international efforts to control the manufacture, use and proliferation of nuclear weapons (which ante-date the coming into force of the WHO Constitution on 7 April 1948) have, as set out in Chapter II, taken place in quite different organisations and institutions. WHA 46.40 is the first instance in which the legality of the use of nuclear weapons has been the subject of WHA action, and is thus an entirely new development.

24. It is assumed that the Court has access to all the Resolutions listed above. If this is not the case, copies can be supplied if requested.

# CHAPTER II

## INTERNATIONAL EFFORTS TO CONTROL NUCLEAR WEAPONS

1. The concern over the effects of nuclear weapons which is reflected in the request by the World Health Assembly for the Court's Opinion is not now, and never has been, confined to the WHA. It may therefore be helpful for the Court to provide a short account of the activities of the international community in this field.

2. Efforts to control nuclear weapons began immediately after the Second World War. The first resolution of the first United Nations General Assembly established a United Nations Atomic Energy Commission which considered a number of proposals for eliminating nuclear weapons.[1] In January 1952 agreement was reached on dissolving the United Nations Atomic Energy Commission, and creating, in the place of both it and the United Nations Commission for Conventional Armaments, a single United Nations Disarmament Commission to consider all aspects of disarmament together.[2]

3. Making progress remained difficult, despite the Commission's subsequent creation of a Five Power Sub-Committee in 1954[3]. In 1959 a Ten Nation Disarmament Committee was

---

1 Resolution 1(I) of 24 January 1946.
2 Resolution 502(VI) of 11 January 1952.
3 DC/49 of 19 April 1954.

established outside the framework of the United Nations but with the intention of keeping UN bodies informed of its progress (a point welcomed by the Disarmament Commission).[4] It met once in 1960. Subsequent discussions in 1961 between the United States and Soviet Union led, with the endorsement of the United Nations General Assembly, to the establishment in 1962 of an Eighteen Nation Disarmament Committee.[5] In parallel, separate tripartite negotiations between the United States, the Soviet Union, and the United Kingdom eventually led to the conclusion in 1963 of the Partial Test Ban Treaty (PTBT), banning any nuclear weapons test explosion, or any other nuclear explosion, in the atmosphere, in outer space and under water.[6]

4. The conclusion of the PTBT was followed by efforts to prevent the further proliferation of nuclear weapons. On 14 February the Latin American states opened for signature the Treaty of Tlatelolco and its two Additional Protocols[7], which were designed to create a nuclear weapon-free zone in that part of the world. At the same time the Eighteen Nation Disarmament Committee focussed on the negotiations that led to the Nuclear

---

4 The origins of the TNDC are in the Four Power Communique on Disarmament Negotiations of 7 September 1959 (US State Department Press Release 637 of 7 September 1959). The UN Disarmament Commission's welcome for it is in its resolution of 10 September 1959 (UN document A/4209 of 11 September 1959)

5 For the discussions between the United States and the Soviet Union, see the Statements by the American and Soviet representatives to the First Committee of the General Assembly on 13 December 1961 (A/C.1/PV1218, pp4-10, and A/C.1/PV.1218, pp.10-12). For the endorsement by the United Nations General Assembly, see Resolution 1722 (XVI) of 20 December 1961.

6 480 UNTS 43.

7 634 UNTS 281.

Non-Proliferation Treaty (NPT).[8] The NPT drew a distinction between the five states which had already exploded a nuclear device by 1 January 1967, which it designated nuclear weapon states, and all other states, which could only join the treaty as non-nuclear weapon states. The treaty's basic purpose was thus to draw a line under the proliferation that had already occurred. It was opened for signature in 1968 and entered into force in 1970.

5. After the conclusion of the PTBT and NPT the main focus of nuclear arms control efforts switched toward limiting the size of American and Soviet nuclear forces. The Strategic Arms Limitation Talks (SALT) between the United States and the Soviet Union began in November 1969. The first phase of these talks (SALT I) lasted until 1972 and produced two important agreements, the Anti-Ballistic Missile Treaty (ABMT)[9] and the Interim Agreement on Offensive Strategic Missiles.[10] They were immediately followed by a new SALT II negotiation aimed at concluding a more comprehensive treaty on offensive strategic nuclear weapons. Although a SALT II agreement was signed in 1979, it never entered into force. The results of the SALT process which are still in force today are the ABMT and its 1974 Protocol.[11]

6. Subsequently new US/Soviet talks during the 1980's led to separate agreements on theatre nuclear weapons and strategic

---

8 729 UNTS 161.
9 944 UNTS 13.
10 944 UNTS 3.
11 1042 UNTS 424.

nuclear weapons. The Intermediate Nuclear Forces Treaty (INF Treaty) was signed in December 1987 and entered into force in June 1988[12]. It provided for the elimination of all American and Soviet land-based missiles with ranges from 500 to 5500 kms. In accordance with the treaty these missiles have now been eliminated. The Strategic Arms Reductions Treaty (START I treaty) was signed in July 1991[13], but difficulties over its implementation arose when the Soviet Union was dissolved in December 1991. Agreements on this subject were reached at Lisbon on 23 May 1992 with the signature of a START I Protocol involving Belarus, Kazakhstan and Ukraine as well as the United States and Russia[14]. Shortly afterwards in June 1992 Presidents Bush and Yeltsin agreed a Joint Understanding on the framework for another treaty providing for further reductions

---

12 27 ILM (1988) 84.

13 CD/1192 of 5 April 1993 for the Treaty, its Protocols, the Memorandum of Understanding and related documents. Also to be found in "Arms Control and Disarmament Agreements: START" (Washington DC: United States Arms Control and Disarmament Agency). The Treaty (but not its Protocols, the Memorandum of Understanding or the other related documents) is also reprinted in the UN Disarmament Yearbook, volume 16, 1991, Appendix II, pp450-476 (New York: UN Office for Disarmament Affairs).

14 CD/1193 of 5 April 1993. Also to be found in the UN Disarmament Yearbook, volume 17, 1992, Appendix II, pp328-330 (New York: UN Department of Political Affairs, 1993).

beyond those required by START I[15]. This led to the START II treaty, a bilateral Russo/American treaty signed in January 1993[16]. Its entry into force is dependent, however, on the prior entry into force of START I, which has not yet occurred.

7. Since the PTBT was signed in 1963 there have also been further efforts to restrict nuclear testing. In 1974 the United States and the Soviet Union agreed to restrict the yield of their underground nuclear weapons tests to no more than 150KT, and to negotiate a similar limit on underground nuclear explosions for peaceful purposes. The bilateral Threshold Test Ban Treaty (TTBT) of 1974[17] and the bilateral Peaceful Nuclear Explosions Treaty (PNET) of 1976[18] were the result. In the event these were not immediately ratified, but in 1977 new negotiations began for a Comprehensive Test Ban Treaty (CTBT). These tripartite negotiations included the United Kingdom as well as the United States and Soviet Union. They foundered, however, in 1980, and by this time doubts about the verifiability of the TTBT and PNET had raised new questions about the desirability of ratifying those treaties. Bilateral

---

15 CD/1162 of 17 June 1992

16 CD/1194 of 5 April 1993 for the Treaty, its Protocols, and the Memorandum of Understanding. Also to be found in the UN Disarmament Yearbook, volume 18, 1993, Appendix III, pp314-338 (New York: UN Centre for Disarmament Affairs, 1994).

17 13 ILM (1974) 906.

18 15 ILM (1976) 891.

US/Soviet talks on testing resumed in 1986, and were followed in 1988 by negotiations which led in 1990 to the ratification of the TTBT and PNET with new Verification Protocols[19].

8. Given the essentially bilateral course of nuclear arms control efforts since 1969, the successors to the Eighteen Nation Disarmament Committee, which have provided the main forum for negotiating multilateral arms control agreements, have until recently focussed on non-nuclear issues. Shortly after the conclusion of the NPT, the Eighteen Nation Disarmament Committee was expanded to become the Conference of the Committee on Disarmament, and it was this forum which negotiated the Biological Weapons Convention, opened for signature in 1972[20]. The Conference of the Committee on Disarmament was later expanded and rechristened the Committee on Disarmament, which was itself later renamed the Conference on Disarmament[21]. Much of its work until recently has been concerned with the negotiation of the Chemical Weapons Convention, opened for signature in 1993[22].

9. Like all its predecessors, however, the Conference on Disarmament has also continued to discuss nuclear arms control and disarmament issues. It has, for example, taken a continuing interest in a ban on all nuclear testing. In August

---

19 CD/1066 for the TTBT and its new Protocol; CD/1067 for the PNET and its new Protocol.

20 1015 UNTS 163.

21 For a short account of the CD and its predecessors, see the UN Disarmament Yearbook, volume 13, 1988, p10 (New York: UN Department for Disarmament Affairs, 1989).

22 32 ILM (1993) 804.

1993 an agreement was reached that the CD's Ad Hoc Committee on the Nuclear Test Ban should be given a mandate to negotiate a Comprehensive Test Ban Treaty (CTBT)[23]. Such a mandate was agreed on 25 January 1994[24], and negotiations for a CTBT are now in progress in this forum. The Conference on Disarmament is also likely to be the forum for any negotiations to ban the production of fissile material for nuclear explosive use[25].

10. The United Nations General Assembly has also taken a continuing interest in nuclear issues. Its First Committee debates these and other issues at its annual session, and the General Assembly has also held three Special Sessions on Disarmament (in 1978, 1982 and 1988). The first of these revived the United Nations Disarmament Commission as a deliberative organ. Prior to this it had not met since 1965, but since 1978 it has met annually[26].

11. In addition to these efforts to control nuclear weapons, proposals for a general prohibition of the use of nuclear weapons by treaty have been under consideration since the first discussions on nuclear weapons in the United Nations Atomic Energy Commission. Little has come of these proposals, although in 1961 the UNGA did adopt resolution 1653 (XVI).

---

23 CD/1212 of 10 August 1993.
24 CD/1238 of 25 January 1994.
25 CD/1239 of 25 January 1994 (paragraph 3).
26 For a short account of the UN disarmament machinery, see the UN Disarmament Yearbook, volume 13, pp8-10 (New York: UN Department of Disarmament Affairs, 1989).

This resolution was passed by 55 votes to 20 with 26 abstentions. It declared that the use of nuclear weapons was unlawful on various grounds, and requested the Secretary-General to consult the Governments of Member States to ascertain their views on the possibility of convening a special conference for signing a convention on the prohibition of the use of nuclear and thermonuclear weapons for war purposes. This resolution, which is of course not binding on Member States, and which has been followed by other resolutions requesting a similar convention, is discussed in more detail in chapter V. However, there has been no conclusion of any convention imposing a general prohibition on the use of nuclear weapons, although the CD regularly discusses the possibility of a Convention by which nuclear weapons states would undertake not to use nuclear weapons against non-nuclear weapon states.

12. Despite the lack of any agreements imposing a general prohibition on the use of nuclear weapons, there have been more limited agreements and assurances about their non-use in specific contexts:

(i) All five NWS have signed and ratified (with reservations) Additional Protocol II to the Treaty of Tlatelolco[27]. Under Article 3 of that Protocol the NWS undertake not to use or

[27] 28 ILM (1989) 1400ff. The reservations are reprinted in "Status of Multilateral Arms Regulation and Disarmament Agreements, 4th edition, 1992, volume 1, pp95-109 (New York: UN Department of Political Affairs, 1993).

threaten to use nuclear weapons against the Contracting Parties of the Treaty for the Prohibition of Nuclear Weapons in Latin America.

(ii) All five NWS took the opportunity of the United Nations first Special Session on Disarmament in May/June 1978 to give unilateral assurances about the circumstances in which they would not use nuclear weapons[28].

(iii) The Soviet Union and China have signed and ratified Protocol II to the Treaty of Rarotonga[29], which provides that NWS will not use or threaten to use any nuclear explosive device against:

(a) Parties to the Treaty; and

(b) any territory within the South Pacific Nuclear Free Zone.

These agreements and assurances are discussed in more detail in Chapter V. They demonstrate that, while ambitious efforts at global multilateral prohibition on the use of nuclear weapons have been unsuccessful, more specific steps have led to concrete results.

---

28 These assurances, and subsequent ones, are reprinted in the UN Disarmament Yearbook, volume 14, 1989, pp179-180 (New York: Department of Disarmament Affairs, 1990).

29 CD/693 and Corr 1. Also to be found in UN Disarmament Yearbook 1985, volume 10, Appendix VII pp531-541 (New York: UN Department for Disarmament Affairs, 1986).

## CHAPTER III

## THE QUESTION OF POWERS : IS THE REQUEST INTRA VIRES THE WORLD HEALTH ORGANISATION?

### The extent of power granted to WHO

1. There is no doubt that, for the purposes of Article 65(1) of the Court's Statute, the WHO is a "body...authorised by or in accordance with the Charter of the United Nations..."to request an Advisory Opinion. That authorisation was granted by the General Assembly in concluding the Agreement of 10 July 1948[1] between the United Nations and WHO. However, as Article X(2) of that Agreement stipulates, the authorisation by the General Assembly required under Article 96(2)[2] of the United Nations Charter is not unlimited:

> "1. ...
>
> 2. The General Assembly authorises the World Health Organisation to request advisory opinions of the International Court of Justice on legal questions arising within the scope of its competence other than questions concerning the mutual relationships of the Organisation and the United Nations or other specialised agencies."

---

1 The Agreement was approved by the General Assembly in Resol. 124(II) on 15 November 1947, and by the World Health Assembly on 10 July 1948: Off. Rec, World Health Organisation, 13, 81, 321.

2 This provides that specialised agencies, so authorised by the General Assembly, may request advisory opinions "on legal questions arising within the scope of their activities."

WHC.1

This limitation is faithfully reflected in Article 76 of the WHO Constitution which states

> "... the Organisation may request the International Court of Justice for an advisory opinion on any legal question arising within the competence of the Organisation."

Thus the limits on the power granted to WHO are expressed both positively and negatively. In the positive sense the opinion must raise "legal questions arising within the scope of its competence " and, in the slightly different terms of Article 96(2) of the Charter, "legal questions arising within the scope of [its] activities." In the negative sense the questions must <u>not</u> concern mutual relationships of WHO and the U.N.

2. A breach of these limits means that the request is *ultra vires*, and, if the Court should find that to be the case,[3] the Court has no option but to decline the request: the limits operate as an absolute bar to the request. This is therefore quite different from those cases - to be considered in the next Chapter - in which the Court exercises a discretion to either grant or refuse the request.

---

3 It is clear from the *Fasla Case* (Application for Review of U.N.A.T. Judgment No. 158), Advisory Opinion 12 July 1973: I.C.J. Report, 1973, p. 166 at pp. 172-4 that the Court is entitled to make its own assessment of what, constitutionally, are the proper limits of an organ's "activities".

Whether, in the present case, the request by WHO transgresses those limits requires an analysis of both the terms of the request and the competence (or scope of activities) of WHO. It is to this analysis that we now turn.

## Analysis of the request and WHO competence

3. *The terms of the request, and the circumstances in which it was made, have been outlined in Chapter I above. It may be* convenient to set the terms out here.

> "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 preliminary phrase is an assertion that the use of nuclear weapons has effects on human health and on the environment. That cannot be doubted.[4] Nor can it be doubted that WHO has a legitimate concern over health. Its functions under Article 2 of its Constitution would properly embrace assisting Governments, promoting co-operation amongst scientists, providing information, developing public opinion and so forth. WHO might properly study both the immediate and the longer-term effects of nuclear radiation, blast and heat on the human body, or the medical risks associated with the production of fissile materials - whether for use in peaceful

[4] See generally the Report by the Director-General of WHO, *Health and Environmental Effects of Nuclear Weapons*, A 46/30, 26 April 1993.

purposes or for use in nuclear weapons. And WHO might legitimately study what medical science could do to alleviate such risks, or to deal with radiation injuries.

4. Yet, clearly, none of this has anything to do with the legality of the use of a nuclear weapon. Whether the weapon is used lawfully or unlawfully is, as it were, irrelevant to all these legitimate concerns of WHO, for the medical and health problems which may arise will arise whether the use be lawful or unlawful.

5. Thus it is essential to distinguish between the questions of fact which are the proper concern of medical knowledge - i.e. what effects will the explosion of a nuclear weapon have? - and the question of law - i.e. is the use of that weapon lawful? The first is properly a matter of concern to WHO; the second is irrelevant to that concern for, whether used lawfully or unlawfully, the effects on health will be the same.

6. The importance of this distinction lies in the fact that WHO is authorised to request an advisory opinion only on legal questions arising within the scope of its competence and activities. It is not enough for WHO to demonstrate that the use of nuclear weapons gives rise to concerns that are within its competence. That can be admitted. WHO has to show that the legal question of the legality of the use of nuclear weapons arises within its competence. That the WHO cannot show, for the concerns of WHO arise irrespective of the

legality or illegality of the use of a nuclear weapon.[5]

7. As drafted, the question put to the Court by WHO is a legal question but the question does not identify the manner in which that question arises "within the scope of its competence" other than by posing the question whether the use of a nuclear weapon by a State would be "a breach of its obligations under international law including the WHO Constitution". Those terms raise a larger issue - i.e. whether the use would be a breach of international law - and a narrower issue - i.e. whether the use would be a breach of the WHO Constitution. These merit separate treatment.

a) **Use as a breach of international law**

8. This is certainly a legal question, and it will be discussed in Chapter V of this Memorial, but the issue relevant here is whether this is a question arising within the scope of WHO competence. *Prima facie* it is not and, as suggested above, it is entirely false to argue that because an activity poses a threat to health, therefore the legality of that activity arises within the competence of WHO.

---

5 Significantly, the Director-General's report (supra, note 4) nowhere discusses legality of use. His support for the elimination of all nuclear weapons (para. 53) is not based upon a view of the legality of their use. One might equally support the elimination of all fast-breeder reactors, because of the risks associated with the use of plutonium, without in any way questioning the legality of the use of fast-breeder reactors.

9. In fact many activities, whether State-sponsored or resulting from private enterprise, create risks to health. This would be true of the emission of $CO_2$ into the atmosphere, of the dumping of toxic wastes, of the disposal of sewage, of motor car manufacture, of coal-mining, or de-forestation and so on. But it is patently false to argue that because the activity involves a health risk therefore the legality of that activity is properly within WHO competence. On that basis WHO would become the guardian of legality over a wide range of State activities, entitled to question the legality of those activities before the International Court simply on the basis that the activity involved a health risk.

b. Use as a breach of a Member State's Constitutional obligations

10. The constitutional obligations of Member States are spelt out in the Constitution itself and can be seen to be limited in nature. For the primary emphasis in the WHO Constitution is on the functions of the various WHO organs, and most provisions in the Constitution deal with such matters. Relatively few provisions embody a direct constitutional obligation imposed on States, or even an obligation arising by way of inference from the functions or powers assigned to the WHO organs. However, the constitutional obligations, *stricto sensu*, seem to be the following.

(i) The obligation to meet the budgetary contribution allocated to that Member by the Assembly (Arts. 7, 56).

(ii) The obligation to nominate delegates of technical competence (Arts. 11, 24).

(iii) The obligation to take action relative to the acceptance of a convention of agreement (Art. 20).

(iv) The obligation to comply with regulations in respect of which a Member has given no rejection or made no reservation (Art. 22).

(v) The obligation to respect the exclusively international character of the Director-General and his staff (Art. 37).

(vi) The obligation to submit reports, communicate documents and transmit information (Arts. 61-65).

(vii) The obligation to grant legal capacity to the Organisation in the Member State's territory (Art. 66).

(viii) The obligation to confer privileges and immunities on the Organisation and to the Representatives of Members (Art. 67).

11. If these, then, are the constitutional obligations on each Member State, it is difficult to see how the use of a nuclear weapon can be a breach of those obligations. The obligations simply do not cover such conduct. It would therefore seem that the assertion that the use of a nuclear weapon may be a breach of constitutional obligations - an assertion implicit in the form of the question put to the Court - is simply a device to give credence to the idea that the legality of such use is "within the competence" of WHO. In fact the assertion is quite spurious, for none of the constitutional obligations has any relevance to the use of nuclear weapons, whether lawful or

unlawful.

12. There is ample evidence in the WHO's own conduct that this is, indeed, the case. It is significant that, although international concern about the use of nuclear weapons has been widespread since 1945, it was not until 1993 that the Health Assembly in adopting resolution WHA 46.40 first implied that such use may be a breach of the WHO Constitution. As shown in Chapter I above, no previous resolution had even hinted at this possibility. Nor had the Director-General's Report of 26 April 1993 (A 46/30) mentioned this as a possibility. It is thus remarkable that conduct by Member States, which has been possible, and a cause of great concern, for 45 years, should only be thought as capable of breaching the WHO Constitution in 1993. This fact alone supports the view that there is, in reality, no relationship between the State conduct in question and a State's obligations under the WHO Constitution.

13. So far as the WHO Constitution is concerned, it is a treaty which must be interpreted in accordance with the rules governing interpretation of treaties; and paramount amongst these is the principle of good faith. As expressed by one distinguished commentator

> "Or, si le traité doit être exécutée de bonne foi, il doit nécessairment être interprété de bonne foi. L'exécution dépend de l'interprétation et, sans se

confondre, ces deux opérations juridiques sont intimement liées."[6]

It would lack good faith to interpret that Constitution now, in 1993, so as to embody in it an obligation for Member States relating to the use of nuclear weapons which was never intended and which for 45 years no Member State has ever thought to exist. Indeed, for the Court to adopt so expansive a view of those treaty obligations would be highly damaging to international institutions, for States would be wary about taking on membership when this might imply legal obligations not spelt out in the constituent treaty, and not discernible by any accepted means of treaty interpretation.

14. Nor should there be any doubt as to the nature of this obligation which it is sought to imply in the WHO constitution by this request. The use of nuclear weapons would arise either in the context of a use of force involving an act of aggression, or in a use of force involving self-defence. It would be a singularly pointless exercise to construe the WHO Constitution as prohibiting aggression by means of nuclear weapons. This is not simply because it would be a perverse and ill-founded interpretation, but because it would be pointless and unnecessary. International law contains a quite

---

6 Yasseen, "L'interprétation de traités d'après la Convention de Vienne sur le Droit des Traités" 151 Recueil des Cours (1976 - III), 221.

sufficient legal basis for condemning aggression - whether nuclear or non-nuclear - without resorting to the WHO Constitution.

15. Thus, if some useful obligation were to be extracted from the WHO Constitution, it must have been assumed to be useful by those responsible for drafting this question because it was an obligation prohibiting even the use of nuclear weapons in self-defence. Yet that interpretation of the Constitution defies belief.

16. There is first the objection that nothing in the *travaux préparatoires* - and certainly in the text of the Constitution itself - can be found to support that view. Equally, there is nothing in the subsequent practice of WHO to support it, and, so far as can be ascertained, no Member has ever suggested such an interpretation of its obligations. Clearly those Members who possess nuclear weapons did not believe there was any incompatibility between membership and the possession of nuclear weapons for use in self-defence; they have combined membership with nuclear capability for many years. And, lastly, there is the argument that if, under Article 51 of the U.N. Charter "nothing in the present Charter shall impair the inherent right of individual or collective self-defence...", it would be astonishing if the WHO Constitution did so. It is scarcely to be believed that, at San Francisco, States took such care to preserve their inherent right of self-defence but yet, in accepting the WHO Constitution, abandoned all claim to use nuclear weapons in self-defence. To assert that States

did in fact do so would require the clearest proof of such an intention, backed by express wording to that effect. The assertion could not possibly rest on mere inference, based upon a fanciful interpretation of constitutional obligations which make no reference either to self-defence or nuclear weapons.

17. The conclusion must be, therefore, that whether raised as a question of a breach of international law or as a question of a breach of the WHO Constitution, the issue of the legality of the use of nuclear weapons is not "within the scope of its competence."

18. There remains that part of the General Assembly's authorisation which excludes the WHO from referring to the Court legal questions "concerning the mutual relationships of the Organisation and the United Nations..." It is not thought, on balance, that this exclusion is relevant to the present case, primarily for the reason that there is no evidence to suggest that the issue of the legality of the use of nuclear weapons was ever the concern of WHO, and therefore that it was involved in the complex relationship between WHO and the United Nations. That the possession and proliferation of nuclear weapons has been the concern of the U.N. cannot be doubted. That the effects of nuclear weapons on human health has been the concern of WHO cannot be doubted. But the issue of the legality of the use of such weapons has not been a matter on which any relationship between the U.N. and WHO has ever existed.

## CHAPTER IV

## THE QUESTION OF PROPRIETY : IS THE REQUEST ONE WHICH, IN ALL THE CIRCUMSTANCES, THE COURT SHOULD DECLINE TO ANSWER?

1. It is clear that the Court is not bound to give an advisory opinion, even if the requesting organ or organisation is fully *intra vires* in requesting it: the language of Article 65 of the Statute is permissive rather than mandatory.

As the Court said in the *Interpretation of the Peace Treaties* Case:

> "Article 65 of the Statute is permissive. It gives the Court the power to examine whether the circumstances of the case are of such a character as should lead it to decline to answer the Request.. the Court possesses a large amount of discretion in the matter." (Advisory Opinion of 30 March 1950, I.C.J. Rep. 1950, pp. 71-72).

The point was re-iterated by the Court in its Advisory Opinion on *Reservations to the Genocide Convention*,[1] and again in the *Certain Expenses* Case.[2]

2. This being said, the Court has nevertheless indicated that, as the principal judicial organ of the United Nations, its opinion on a legal question posed by an organ or specialised agency of the United Nations ought normally to be given when requested.

---

1 Advisory Opinion of 28 May 1951: I.C.J. Rep. 1951, at p.19.
2 Advisory Opinion of 20 July 1962: I.C.J. Rep. 1962, at p.155.

Chapter V02

"But, as the Court also said in the same Opinion [viz. *Interpretation of the Peace Treaties*, I.C.J. Reports 1950, p.72] 'the reply of the Court, itself an 'organ of the United Nations', represents its participation in the activities of the Organisation, and, in principle, should not be refused' (ibid., p.71). Still more emphatically, in its Opinion of 23 October 1956, the Court said that only compelling reasons should lead it to refuse to give a requested advisory opinion (*Judgment of the Administrative Tribunal of the I.L.O. upon complaints made against UNESCO*, I.C.J. Reports 1956, p.86)."[3]

That position of principle is clearly right, and the desire of the Court to play a constructive role in assisting organs of the United Nations in the pursuit of their constitutional activities can be warmly supported. But, of course, the case would be entirely different if the request were *ultra vires*. It would also be different if a response to the request was in fact unlikely to provide any constructive assistance to the Organisation submitting the request, but, on the contrary, likely to prove detrimental to activities undertaken by the United Nations family at large. At this point the issue is one of propriety, rather than powers.

3 *Certain Expenses of the U.N.*, Advisory Opinion of 20 July 1962, I.C.J. Reports 1962, at p.155.

3. In fact the Court's own jurisprudence gives extremely useful guidance on the matter of propriety. A careful analysis reveals the categories of cases in which opinions ought to be given - and the reasons therefor: and also the categories of cases in which an opinion ought not to be given, as a matter of propriety.

## I. The Categories of Cases in which, as a matter of propriety, an opinion ought to be given

4. All the categories examined below show a common characteristic. They are all cases in which the opinion was likely to make a positive contribution to the work of the requesting organ, and to the well-being of the United Nations as a whole. That is to say, whilst there were groups of States who might have had difficulties with the opinion (and the matter must be assumed to have generated some disagreement to merit reference to the Court), the likelihood that these difficulties would have had effects detrimental to the work of the United Nations was small; and, conversely, the benefits to the United Nations of settling a disputed legal question were considerable. In short, the positive advantages to the United Nations clearly outweighed the possible negative consequences.

### a) Cases where the legal question involved the interpretation of a constitutional provision which had become the subject of dispute

5. Many of the cases fall into this category. For example, in

the *Conditions of Admission*[4] and *Competence*[5] cases the essential question raised was the proper interpretation of Article 4 of the Charter, specifically whether a Member State in voting on an application for admission could take into account conditions not expressly provided for in paragraph 1 of Article 4. And, following on from that, in the second opinion, whether paragraph 2 of that same Article allowed the General Assembly to proceed to vote on an application for admission in the absence of a prior, favourable recommendation of the Security Council. The Court dealt with both questions in abstract terms, unrelated to the disputes surrounding particular candidates for admission, and, although the Court was well aware of the highly political, and acutely controversial, nature of the disputes in the United Nations which had led to these requests,[6] its Opinions proved highly constructive. The impasse over the admission of new Members was removed, and the Organisation moved rapidly towards its goal of universality.

---

4 Advisory Opinion of 28 May 1948: *I.C.J. Reports* 1948, p.57.
5 Advisory Opinion of 3 March 1950: *I.C.J. Reports* 1950, p.4.
6 See Higgins, "Policy Considerations and the International Judicial Process" 17 I.C.L.Q. (1968) 58 at p.78 who supports the Court (*contra* Greig, "The Advisory Jurisdiction of the I.C.J. and the settlement of disputes between States" 15 I.C.L.Q.(1966) 325) in the view that most issues raised in requests for opinions will have given rise to disputes within the U.N., but that this should not, *per se*, prevent the Court from responding.

The *IMCO (Composition of the Maritime Safety Committee)*[7] case was similar. Although controversial, the issue of the proper interpretation of Article 28 of the Constitution, once settled by the Court, made a highly positive contribution to the future well-being of IMCO.

6. Certainly the present case has nothing in common with these cases. The request from WHO identifies not a single constitutional provision in the interpretation of which WHO seeks the guidance of the Court.

b) <u>Cases where the legal question involves matters on which the requesting organ or agency seeks guidance in the execution of its constitutional functions</u>

7. There is a broad range of cases in which the question posed related, not to the interpretation of a constitutional provision directly, but rather to the manner in which an organ should carry out its functions, or to a question of law which needed to be clarified in order than an organ should be able to carry out its functions.

8. Thus in the *Reparations* Case[8] the United Nations sought to know whether it might bring a claim against a State in respect of injuries suffered by an agent of the Organisation. And, although the interpretation of Charter provisions was involved,

---

7 Advisory Opinion of 8 June 1960: *I.C.J.Reports* 1960, p.150

8 *Reparations for Injuries suffered in the Service of the U.N.*, Advisory Opinion of 11 April 1949, I.C.J. Reports, 1949, p.174.

this was as part of a broader question of whether the Organisation possessed such international personality as would justify the power to bring an international claim.

9. In the *Peace Treaties* case[9] the General Assembly sought to know whether disputes under the Peace Treaties existed, and, if so, whether under the provisions of those treaties the Secretary-General was entitled to nominate the third member of the Treaty Commissions, notwithstanding that the Government concerned had failed to appoint a party member. The Opinion related more to the interpretation of the Peace Treaties than to the Charter, but it was the Secretary-General who required legal guidance.

10. The *Reservations to the Genocide Convention* case[10] was somewhat similar. The Secretary-General needed to know how to deal with such reservations in order to carry out his duties as Depositary under that Convention. And in cases such as the *Effect of Awards of the U.N. Administrative Tribunal*,[11] or the series of cases dealing with South-West Africa[12] it was the General Assembly which sought guidance: i.e. was the General Assembly legally bound to give effect to awards of compensation

---

9 *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory opinion of 18 July 1950, I.C.J. Reports 1950, p.221.

10 Advisory opinion of 28 May 1951, I.C.J. Reports 1951, p.15

11 Advisory opinion of 13 July 1954, I.C.J. Reports 1954,p.47.

12 *International Status of S.W.Africa*, Advisory Opinion of 11 July 1950, I.C.J. Reports 1950, p.128; *Voting Procedure on Questions relating to the Reports and Petitions concerning the Territory of S.W.Africa*, Advisory Opinion of 7 June 1955, I.C.J. Reports 1955, p. 67; *Admissibility of Hearings of Petitioners by the Committee on S.W.Africa*, Advisory Opinion of 1 June 1956, I.C.J. Reports 1956, p.23.

by the U.N. Administrative Tribunal, was the Assembly entitled to assume supervision over the mandated territory of S.W.Africa, and by what means could that supervision be exercised? And the various cases referred to the Court for an opinion under the Statutes of the U.N. Administrative Tribunal or the I.L.O. Administrative Tribunal are of the same character, for the Court is essentially advising these subsidiary, judicial organs on the exercise of their powers or functions.

11. It is certainly true that in the S.W. Africa cases, or the *Western Sahara* case[13] the Opinion sought by the Assembly had a bearing on the legal obligations of Member States (thus, for example, it necessarily followed from the S.W. Africa opinions that, as a Member State, South Africa was bound to accept U.N. supervision). But, as the Court emphasised in *Western Sahara*, the primary motivation for the opinion was to give guidance to the Assembly.

> "...The opinion is sought for a practical and contemporary purpose, namely, in order that the General Assembly should be in a better position to decide at its thirtieth session on the policy to be followed for the decolonisation of Western Sahara.
>
> ...
>
> the object of the request is ... to obtain from the Court an opinion which the General Assembly deems of

[13] Advisory Opinion of 16 October 1975, I.C.J. Reports 1975, p.12

assistance to it for the proper exercise of its functions concerning the decolonisation of the territory."[14]

12. In the present case it is difficult to see how the request by WHO could come within this category. It is impossible to see, at least from the Health Assembly's resolution 46.40 (1993) containing that request, how the Court's opinion could in any way guide the Assembly in the performance of its functions. The Assembly has managed to function for 45 years without the benefit of the Court's clarification of this legal question, and there appears to be nothing in the written record to suggest some new problem has arisen, so that the Assembly is now hampered in carrying out its functions by the lack of an answer to the question posed.

c) Cases where the legal question involves the interpretation of agreements between the Organisation and a Member State

13. This has long been regarded as an appropriate case for use of the Court's advisory jurisdiction. As early as 1946, in the 1946 U.N. Convention on Privileges and Immunities,[15] section 30 of that Convention provided for reference of disputes to the Court by way of a request for an advisory opinion.

---

14 At pp. 20,27. So, too in Certain Expenses of the U.N. (Article 17 (2) of the Charter), I.C.J. Reports 1962, p.151, although giving guidance to the Assembly on its budgetary functions, the Opinion carried necessary implications for the legal obligations of Member States.

15 I UNTS 15.

14. More recently, in the WHO *Regional Office* case[16] the Court was asked two questions by the World Health Assembly, the first asking whether section 37 of the WHO/Egypt Agreement of 1951 applied in the event of either Party wishing to transfer the WHO Regional Office from Egypt, and the second asking what were the consequential legal responsibilities of the two Parties. Obviously, since there was no question about the validity of the 1951 Agreement, to which WHO was a Party, the further question as to the legal obligations thereby imposed on both WHO and Egypt was entirely proper.

15. The present case is markedly different. *There is no* agreement concerning the use of nuclear weapons, to which WHO is a Party (not surprisingly, since this has never been regarded as an area of legitimate concern for WHO), and therefore the question now posed by WHO as to the obligations of member States does not arise as a natural consequence of a proper question regarding an agreement binding on WHO.

d) Cases where the legal question concerns the obligations of Member States consequential upon decisions or resolutions of the competent organs of the organisation.

16. In the *Namibia* Case[17] the question put to the Court did involve the legal obligations of Member States, but, of course,

16 Advisory Opinion of 20 December 1980, I.C.J. Reports 1980, p.73.

17 Legal Consequences for States of the Continued Presence of South Africa in *Namibia (S.W.Africa)* notwithstanding Security Council Resolution 276 (1970), Advisory Opinion of 21 June 1971, I.C.J. Reports 1971, p.16.

in the specific context of action by both the General Assembly and the Security Council with regard to the territory. The Assembly, by Resolution 2145 (XXI) had terminated the Mandate under which South Africa held the territory, and Security Council Resolution 276 (1970) endorsed that decision, confirmed the illegality of further acts by South Africa in the territory, and called on Member States to refrain from dealing with South Africa contrary to paragraph 2 of the resolution. It was these decisions which created the legal obligations which the Court was asked to advise on.

17. In the present case the matter is entirely different. There were, prior to the request for an opinion, no resolutions[18] directly addressing the legality of the use of nuclear weapons by Member States. Therefore the question of the legality of such use cannot possibly be viewed as consequential upon prior resolutions. Moreover South-West Africa had over many years been treated as a proper responsibility of the United Nations. The Court itself had endorsed that view. In contrast, the issue of the legality of the use of nuclear weapons had never at any stage been viewed as a matter of legitimate concern to WHO.

---

[18] See above, Ch.I. To call on States to try to achieve disarmament (WHA 34.38); or to consider a report (WHA 36.28 and WHA 40.24); or to review their policies (WHA 42.26) is not the same as resolving that the use of modern weapons is, or may be, incompatible with the WHO Constitution.

18. If these then are the categories in which the Court s practice suggests it is proper to exercise its discretion in favour of giving an Opinion - and the present request falls into none of these categories - it may be useful to address the obverse question: are there categories in which it is proper for the Court to decline?

## II. <u>**The Categories of Cases in which, as a matter of propriety, the Court ought to decline to give an Opinion**</u>

### a) <u>Cases where an Opinion would be tantamount to deciding a contentious dispute between States</u>

19. Following the principle laid down by the Permanent Court in the *Eastern Carelia Case*[19] the present Court has endorsed this principle, designed to preserve the requirement of consent, but at the same time has refused to extend it to cases where, although arguably there is a dispute between States, the primary or sole purposes of the Opinion is to provide guidance to the requesting organ.

> "The circumstances of the present case are profoundly different from those which were before the Permanent Court of International Justice in the Eastern Carelia

---

[19] *Status of Eastern Carelia*, Advisory Opinion, 1923, P.C.I.J. Series B, No. 5. Rosenne, *The Law and Practice of the International Court* (1985), Vol. II, pp. 709-711 treats this as an illustration of the Court's adherence to an essential principle of the judicial process: *audi alteram partem*.

case (Advisory Opinion No. 5) when that Court declined to give an Opinion because it found that the question put to it was directly related to the main point of a dispute actually pending between two States, so that answering the question would be substantially equivalent to deciding the dispute between the parties, and that at the same time it raised a question of fact which could not be elucidated without hearing both parties... In the present case the Court is dealing with a Request for an Opinion, the sole object of which is to enlighten the General Assembly..."[20]

It is probable that the present request does not fall into this category, so as to be excluded as a matter of propriety by the *Eastern Carelia* principle. For, while disputes as to the legality of the use of nuclear weapons are clearly possible, they are happily hypothetical and no actual, pending dispute exists.

---

20 *Interpretation of the Peace Treaties*: First Phase. Advisory Opinion of 30 March, 1950: I.C.J. Reports 1950, p.72. In the *Namibia (S.W. Africa) Case*, Advisory Opinion of 21 June 1971: I.C.J. Reports 1971 the Court rejected South Africa's objection to the propriety of the Opinion, based on *E. Carelia*, on the ground that, whereas in *E. Carelia* the State Party to the dispute was not a member of the League, South Africa was a member of the U.N. and had participated throughout in any "dispute" over S.W. Africa. Moreover, no actual dispute was pending, and the fact that differences existed - common in all requests for an Opinion - was irrelevant. See also the *Western Sahara Case*, Advisory Opinion of 16 October 1975, I.C.J. Reports 1975, p.13 at pp.22-27 where the Court also stressed that, in *E.Carelia*, one Party was neither a Member of the League nor a Party to the Court's Statute.

b) <u>Cases where the motivation behind the Request is essentially political and extraneous to the proper aim of seeking guidance as to the legitimate functions of the organ or Organisation</u>

20. In this category of cases to be excluded on grounds of propriety, the true basis of the exclusion does not lie simply in the fact that political motives lie behind the request. As the Court said in the *Admissions* Case

> "It has nevertheless been contended that the question put must be regarded as a political one and that, for this reason, it falls outside the jurisdiction of the Court. The Court cannot attribute a political character to a request which, framed in abstract terms, invites it to undertake an essentially judicial task, the interpretation of a treaty provision."[21]

Thus, a request to interpret a treaty provision, a constitutional text, remains a 'legal question' within the Court's competence, whatever the political differences which may have led to the request. Indeed, as the Court noted in the *Expenses Case*, a background of political differences is to be expected:

---

21 Conditions of Admission, etc, Advisory Opinion of 28 May 1948, I.C.J. Reports 1948, p.61. Followed and approved in Competence of the General Assembly, etc., Advisory Opinion of 3 March 1950, I.C.J. Reports 1950, p.4.

"It is true that most interpretations of the Charter of the United Nations will have political significance, great or small. In the nature of things it could not be otherwise. The Court, however, cannot attribute a political character to a request which invites it to undertake an essentially judicial task, namely, the interpretation of a treaty provision."[22]

21. Summarising its position, based on its jurisprudence, the Court said this in the *WHO Regional Office Case*.

> "That jurisprudence establishes that if, as in the present case, a question submitted in a request is one that otherwise falls within the normal exercise of its judicial process, the Court has not to deal with the motives which may have inspired the request... Indeed, in situations in which political considerations are prominent it may be particularly necessary for an international organisation to obtain an advisory opinion from the Court as to the legal principles applicable with respect to the matter under debate, especially when these may include the interpretation of its constitution."[23]

These dicta are revealing when applied to the present case, for they serve to highlight what the present case is <u>not</u>. It is not a request for the interpretation of any particular

---

[22] Certain Expenses of the United Nations etc., Advisory Opinion of 20 July 1962: I.C.J. Reports, 1962, p.155.

[23] Advisory Opinion of 20 December 1980, I.C.J. Reports 1980, p. 73 at p. 87.

constitutional or treaty text. The request conspicuously fails to identify any constitutional provision which the Health Assembly considers may forbid the use of nuclear weapons by a Member State. True, it invites the Court to consider whether there may be such provisions, relying, as it were, on the Court's ingenuity precisely because it has itself failed to find any such provision. The invocation of a State's obligations under general international law is patently a "fall-back", a recourse to principles which might apply in the event - as the Assembly must be assumed to contemplate - that no relevant constitutional text or obligation can be found.

22. It is this which places the present case in a different category. There is a world of difference between requests on a matter of genuine treaty interpretation, identifying the treaty provision in question, albeit on an issue with political implications: and a request such as the present request where the invocation of legal principles is general and unspecific precisely because the legal question, as it affects the WHO, is quite spurious.

23. It is here, where the "legal question", as framed in the request, is used artificially, as a device to tempt the Court into an involvement in an essentially political debate, that the issue of propriety arises.

The spuriousness of the invocation of the WHO Constitution as the legal basis upon which the use of nuclear weapons can be held to be unlawful is apparent not only from the failure, in

the Request, to identify any particular constitutional provision but also from the whole genesis of this Request.

24. As demonstrated in Chapter I above, the genesis of this Request lies in the so-called "World Court Project",[24] a project in which the International Physicians for the Prevention of Nuclear War have joined. The legal memorandum explaining this project contains <u>not one single reference to the WHO Constitution</u>.[25]

25. The essential aim of the sponsors of this project is political. It is to seek the total abolition of nuclear weapons.[26] That is a legitimate political aim: but it is not a "legal question arising within the scope of (WHO) competence." It is said in the memorandum describing the project that an advisory opinion would reaffirm "...the obligation of each party to the treaty [the Non-Proliferation Treaty] to 'pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race... and to nuclear disarmament."[27]

---

24 The World Court Project on Nuclear Weapons and International Law, 2nd edition, 1993.

25 *Ibid.*, Chapter II.

26 *Ibid.*, p.xi. "The day for the abolition of nuclear weapons has arrived."

27 *Ibid.*, p.x. The Memorandum suggests a variety of sources to support its arguments on the illegality of the use of nuclear weapons. Apart from custom, the other treaties cited are the Declaration of St Petersburg 1868, the Hague Conventions 1899 and 1907, the Geneva Gas Protocol 1925, the U.N. Charter 1945, the Nuremberg Principles 1945, the Geneva Conventions 1949, the International Covenant on Civil and Political Rights 1966, and Protocol I of 1977 to the Geneva Conventions of 1949.

For the Court to spell out the obligations of Parties to the Non-Proliferation Treaty may well be a "legal question", but it has nothing whatever to do with the WHO Constitution.

26. To pursue negotiations, or to seek to persuade States to pursue negotiations, is, again, a political aim and, however laudable, it has nothing whatever to do with the WHO Constitution or the activities and functions of WHO.

27. The specific use of the legality of the use of nuclear weapons is seen in the Memorandum simply as a step in the wider process of pursuing this political objective of nuclear disarmament. The sequence of ideas seems to be the following:

(i) All uses are illegal (i.e. there is no right of use in self-defence).[28]

(ii) Therefore the possession of such weapons is *per se* an illegal threat of force.[29]

(iii) Therefore, since any possession is illegal, the goal must be that of total nuclear disarmament.[30]

---

28 *Ibid.*, pp. 9, 13-14.
29 *Ibid.*, p.14.
30 *Ibid.*, p.16.

28. The validity of those propositions is a matter to be examined later in Chapter V. The point to be made here is that they raise questions of law entirely extraneous to the WHO Constitution and they are raised as incidental in what is avowedly a political campaign. This present request is therefore entirely different from those previously dealt with by the Court, and discussed above. The conclusion must be that here, if only as a matter of propriety, the request should be declined.

(c) Cases where the Court's Opinion would have no effect on the Constitutional Obligations of Member States

29. In the *Northern Cameroons Case* the Court called attention to its duty to safeguard the integrity of the judicial function.

> "There are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore... The Court itself, and not the parties, must be the guardian of the Court's judicial integrity."[31]

The Court stressed the fact that this duty applied equally to both its contentious and advisory jurisdiction.[32] Accordingly, the Court ought not to pronounce an Opinion which will be *brutum fulmen*, without practical effect, or incapable of "effective application."[33]

---

31 *Northern Cameroons*, Judgment of 2 December 1963, I.C.J. Reports 1963, p.15 at p.29. See also the *Free Zones Case*, Judgment of 7 June 1932 P.C.I.J. Series A/B, No. 46, p.161.
32 *Ibid.*, p.30.
33 *Ibid.*, p.33.

30. If, therefore, the Court were to accede to the request and render an Opinion containing a positive and absolute finding, i.e. that the use of nuclear weapons <u>is</u> illegal in all circumstances, of what practical effect would that be? Assuming the finding of illegality were based upon a breach of international law generally (and not the WHO Constitution specifically), there would appear to be no effect so far as WHO is concerned. Nothing in the WHO Constitution provides for sanctions or remedial measures against a Member in breach of international law.

31. Even if the finding of illegality were based upon a breach of the WHO Constitution, there would still be no effect, for the only sanction provided by the Constitution relates to the failure of a Member to meet its financial obligations (Article 7).[34]

32. And, if the Court were to make not an absolute finding of illegality, but only a qualified one - i.e. the use would be illegal except in the exceptional circumstances of self-defence - that finding would be equally ineffectual (as well as unrewarding to the sponsors of the request). For, in the event of the actual use of a nuclear weapon the determination of illegality would have to await the assessment of all the facts

---

34 The WHO Constitution contains no provision for expulsion. An amendment to Article 7 adopted in 1965, allowing for expulsion for deliberate racial discrimination, has never entered into force.

surrounding its use in order to decide whether there was a justifiable plea of self-defence. And that assessment would be a matter for this Court, or the Security Council in the first instance, but not for the WHO.

33. Thus, in whatever way the Court responded positively to the questions posed, the Opinion would be of no practical value, and incapable of implementation by WHO. It is difficult to see how the rendering of such an Opinion could be compatible with the Court's judicial function.

d) Cases where the Court's Opinion would be unlikely to assist either the WHO, or the United Nations community generally, and may even prove detrimental to their efforts to achieve nuclear disarmament.

34. The recurring theme found through the Court's jurisprudence is that the Court will exercise its discretion to give, or not to give, an Opinion in the light of its duty to assist the organs and organisations of the United Nations family. In Chapter II of this Statement the range of efforts to limit the manufacture, spread and use of nuclear weapons has been described and it is apparent that a conscious decision has been taken not to permit the negotiations to become embroiled in debates about the legality of the use of nuclear weapons. That decision must be respected. There seems to be little point in the Court reaching a different decision, contrary to the experience accumulated by the negotiating States over many years.

35. All the evidence suggests that the Court's intervention would not help, and could in fact prove counter-productive. Certainly if the Court were to rule in favour of an absolute prohibition, excluding even the use in self-defence (as the World Court Project would wish), the effects could be highly damaging, as the following section will show.

36. For it is clear that several of the key treaties in the international effort to control and limit nuclear weapons - the Nuclear Non-Proliferation Treaty, Protocol II to the Treaty of Tlatelolco and the Partial Test Ban Treaty and other treaties limiting nuclear tests for example - are built on the assumption that the possession of nuclear weapons, and their use in self-defence, is lawful. These partial measures towards the goal of nuclear disarmament have been welcomed within the United Nations. If, however, the Court were to reject the whole premise upon which such measures have been based, negotiations on nuclear disarmament based on extending such measures would be seriously jeopardised, as States would not thenceforth be able, consistently with such an opinion, to take part in such partial disarmament measures.

## CHAPTER V.

## THE PRINCIPLES OF LAW RAISED BY THE QUESTION

1. The question asks the Court whether the use of nuclear weapons by a State in war or other armed conflict would be a breach of that State's obligations under international law, including the WHO Constitution. Despite the terms in which it is framed, this question does not admit of a simple answer. In particular, there is no foundation for the view that the use of nuclear weapons would automatically contravene international law. The international community has never adopted in binding form any general prohibition on the use of nuclear weapons. Indeed, those treaties which have been adopted regarding nuclear weapons presuppose that there are circumstances in which such weapons might lawfully be used. Moreover, an examination of the principles of international law governing the use of force and the conduct of hostilities reveals that, while nuclear weapons (like all methods and means of warfare) are subject to limitations on their use, those limitations are not such as to render the use of nuclear weapons unlawful *per se*.

### I. Provisions specifically referring to nuclear weapons

2. No treaty specifically prohibiting the use of nuclear weapons has been adopted since 1945. Nor is the use of nuclear weapons outlawed by any provision contained in a treaty of more general application. As Chapter III has demonstrated,

the WHO Constitution, the only international agreement to which reference is made in the question submitted to the Court, contains no provision regarding the use of nuclear weapons. More importantly, the Charter of the United Nations makes no reference to nuclear weapons. Nor is there any suggestion that the use of nuclear weapons is in itself contrary to the principles of the Charter elaborated in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (UNGA Resolution 2625(XXV)), the Resolution on the Definition of Aggression (UNGA Resolution 3314 (XXIX)) or the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or use of Force in International Relations (UNGA Resolution 42/22).[1]

3. On the contrary, the international community has consistently declined to address the question whether the use of nuclear weapons is unlawful *per se*. Although in 1961 and in subsequent years the United Nations General Assembly proposed the conclusion of a treaty prohibiting the use of nuclear weapons,[2] that *proposal has not been followed* up and no conference to consider such a treaty has been convened. In

1 Resolution 42/22 refers to nuclear weapons only in the context of statements about the importance of avoiding armed conflict and contains no statement about whether the use of such weapons would be unlawful.

2 Resolution 1653 (XVI). This resolution and subsequent resolutions on the same subject are discussed below.

another context, the Diplomatic Conference which adopted the four Geneva Conventions of 1949 rejected a proposal that it adopt a resolution on the illegality of using nuclear weapons as being outside the terms of reference of the Conference.[3]

4. The Diplomatic Conference on the Development of Humanitarian Law 1974 to 1977, which adopted the two Additional Protocols to the Geneva Conventions of 1949 and which had broader terms of reference than the 1949 Conference, also did not discuss the legality of nuclear weapons. The International Committee of the Red Cross made clear that in submitting draft protocols for consideration by the Conference it did not intend to broach the subject of nuclear weapons. During the four sessions of the Conference, the United Kingdom and a number of other States made statements to the effect that the subject of nuclear weapons was not being discussed.[4] A large number of States also made declarations to that effect on signature or ratification of the Protocols.[5] Although some States maintained that the Conference should consider a ban on some or all uses of nuclear weapons, no formal proposal was put before the Conference and the Commentary on the Protocols published by the ICRC concludes that 'there is no doubt that during the four sessions of the Conference agreement was reached not to discuss nuclear weapons'.[6]

---

3 *Final Record of the Diplomatic Conference of Geneva*, vol. IIA, pp. 802-5.

4 *Official Records*, Vol.V. pp.134 (UK), 121 (USSR). 89 (Sweden), 179 (Argentina), vol. VII. pp. 192 (France), 295 (USA).

5 See below.

6 C. Pilloud et al, *Commentary on the Additional Protocols of 8 June 1977* (ICRC, 1987), p. 593.

The Protocols thus contain no reference to nuclear weapons[7].

5. Those treaties which have dealt expressly with the subject of nuclear weapons have not addressed the question whether such weapons are unlawful *per se* but have concentrated upon issues regarding possession, deployment and testing. The effect of these treaties may be summarised as follows:-

(a) *Possession*

6. By becoming parties to the Non-Proliferation Treaty, 1968,[8] as non-nuclear-weapon States or by ratification of a regional treaty, such as the Treaty of Tlatelolco,[9] most States have now undertaken not to manufacture or acquire nuclear weapons. The Peace Treaties concluded at the end of the Second World War also bind a number of States not to possess nuclear weapons.[10] In the case of Germany, this obligation was reaffirmed in the Treaty on the Final Settlement with respect to Germany, 1990.[11] The disarmament treaties concluded between some of the nuclear powers limit the number and types of nuclear weapons which those States may possess.[12]

---

7 The possible effect on the use of nuclear weapons of the more general provisions of Additional Protocol I is considered below.
8 729 UNTS 161.
9 634 UNTS 281.
10 Treaties of Peace with Bulgaria, Finland, Hungary, Italy and Romania.
11 29 ILM (1990) 1186, Article 3.
12 See, eg. The Anti-Ballistic Missiles Systems Treaty, 1972 (944 UNTS 13) and the Intermediate Range Nuclear Forces Treaty, 1987, (27 ILM (1988)84) between the Soviet Union and the United States.

(b) *Deployment*

7. The deployment of nuclear weapons is prohibited in Antarctica,[13] in outer space or on celestial bodies[14] and on the deep seabed.[15] For those States which have become parties to the Treaty of Tlatelolco or its 1st Protocol, the deployment of nuclear weapons is prohibited within the areas covered by that agreement[16]. Similarly, those States which are parties to the Treaty of Rarotonga or its 1st Protocol have undertaken not to deploy nuclear weapons within the areas covered by that agreement.[17]

---

13 Antarctic Treaty, 1959, Article I (402 UNTS 71).
14 Outer Space Treaty, 1967, Article IV (610 UNTS 205).
15 955 UNTS 115.
16 The areas covered by the Treaty of Tlatelolco comprise most of Latin America and certain adjacent waters and islands. The United Kingdom is a party to Protocols I and II to the Treaty.
17 The Treaty of Rarotonga applies to parts of the South Pacific. The United Kingdom has not become a party to the protocols to that treaty but the United Kingdom Government has stated that it is ready, as a matter of policy, to respect the intentions of the regional States and that it has no intention of testing nuclear weapons in the South Pacific or of basing nuclear weapons on British territories in the South Pacific (statement by the Minister of State, Foreign and Commonwealth Office in the House of Commons, 20 March 1987; HC Debs, vol 112, Written Answers, col.639; 58 BYIL (1987)635).

(c) *Testing*

8. Those States parties to the Partial Test Ban Treaty, 1963,[18] have agreed not to carry out atmospheric nuclear tests in the atmosphere, under water or in outer space. Bilateral agreements also restrict underground nuclear testing by some of the nuclear powers. In addition, testing in certain parts of the world is restricted by agreements such as the Antarctic Treaty. Negotiations currently taking place with a view to the adoption of a comprehensive test ban treaty are described in Chapter II.

9. The treaties, however, say little about the possible use of nuclear weapons by those States which have no obligation not to possess them. The Partial Test Ban Treaty, for example, while prohibiting the parties from conducting atmospheric tests, does not purport to restrict their use of nuclear weapons in the course

---

18 480 UNTS 43.

of hostilities.[19] Similarly, the Sea Bed Treaty prohibits the emplacement of nuclear weapons on the sea bed but does not restrict the use of nuclear weapons fired from other locations.

10. The Treaty of Tlatelolco is an exception. Article 3 of Protocol II to the Treaty contains an undertaking by those nuclear-weapon States which are parties to the Protocol not to use or threaten to use nuclear weapons against the States party to the Treaty of Tlatelolco. All five permanent members of the Security Council are now parties to this Protocol and have thus accepted this obligation, although each made a declaration on becoming party in which it indicated the circumstances in which it would regard itself as free to take military action involving the use of nuclear weapons. Thus, the United Kingdom declared that:

---

19 That the Partial Test Ban Treaty was not intended to apply to the use of nuclear weapons in an armed conflict was made clear by the United States Secretary of State in his report of 8 August 1963 to the President, in which he said:

> 'The article [Article I] does not prohibit the use of nuclear weapons in the event of war nor restrict the exercise of the right of self-defense recognized in Article 51 of the Charter of the United Nations.' (*Documents on Disarmament*, 1963, p.297.)

See also the advice of the State Department Legal Adviser, *op.cit.* pp.343-4. The Government of the Soviet Union took a similar approach in a statement on 21 August 1963, in which it said:

> 'the treaty also does not prohibit the Soviet Union, if need be, from holding underground nuclear tests, from increasing the stockpiles of nuclear arms, and even from using these weapons against the imperialist aggressors if they unleash a war in a fit of insanity.' (*Op.cit.*, p.456.)

'the Government of the United Kingdom would, in the event of any act of aggression by a Contracting Party to the Treaty in which that party was supported by a nuclear-weapon State, be free to reconsider the extent to which they could be regarded as committed by the provisions of Additional Protocol II.'[20]

---

20 28 ILM (1989) p.1400 at 1422. The United States made a similar statement on ratification (*loc.cit.* p.1423). On signature of the Protocol, China repeated its general undertaking that it would not be the first State to resort to the use of nuclear weapons (p.1414); France stated that:

> "The French Government interprets the undertakings set forth in Article 3 of the Protocol as not presenting an obstacle to the full exercise of the right of self-defence confirmed by Article 51 of the United Nations Charter.'(p.1415).

The Soviet Union stated that:

> "Any actions carried out by a State or States party to the Tlatelolco Treaty that are incompatible with its statute of denuclearization as well as the perpetration by one or several States party to the Treaty of an act of aggression with the support of a State possessing nuclear weapons or together with such State, shall be considered by the Soviet Union to be incompatible with the obligations of those countries under the Treaty. In such cases the Soviet Union reserves the right to review its obligations under Additional Protocol II.'(p.1418).

11. Although the Non-Proliferation Treaty contains no comparable provision,[21] in 1978 the United Kingdom and the United States each gave to non-nuclear-weapon States unilateral security assurances which referred to the Non-Proliferation Treaty. The United Kingdom assurance was in the following terms:

'I accordingly give the following assurance, on behalf of my Government, to non-nuclear-weapon States which are parties to the Treaty on the Non-Proliferation of Nuclear Weapons or to other internationally binding commitments not to manufacture or acquire nuclear explosive devices: Britain undertakes not to use nuclear weapons against such States except in the case of an attack on the United Kingdom, its dependent territories, its armed forces, or its allies by such a State in association or alliance with a nuclear-weapon State.'[22]

---

21 The Preamble to the Treaty makes clear that the Treaty was designed to contribute to the prevention of nuclear war by preventing the dissemination of nuclear weapons, that in doing so it was a response to the calls from the United Nations General Assembly for the adoption of an agreement on the spread of nuclear weapons and that it was a critical step in the process of concluding disarmament agreements.

22 Statement to the United Nations Special Session on Disarmament, 28 June 1978; UN Disarmament Yearbook, 1989, p.180.

The United States assurance was in substantially the same terms. China, France and the Soviet Union have also given assurances to non-nuclear-weapon States.[23]

In addition, some of the treaties discussed prohibit any use of force (whether with nuclear or conventional weapons) within a defined area.[24]

---

23 China gave an assurance that it would not use nuclear weapons against non-nuclear-weapon States or nuclear-free zones and that it would not be the first State to use nuclear weapons.

France has declared:

"qu'elle n'utilisera pas d'armes nucléaires contre un Etat non doté de ces armes et qui s'est engagé à le demeurer, excepté dans le cas d'une agression menée, en association ou en alliance avec un Etat doté d'armes nucléaires, contre la France ou contre un Etat envers qui celle-ci a contracté un engagement de sécurité".

The Soviet Union gave an undertaking not to be the first State to use nuclear weapons (UN Disarmament Yearbook, 1989, 179-80). More recently, the Russian Federation has stated that it:

> 'will not employ its nuclear weapons against any State party to the Treaty on the Non-Proliferation of Nuclear Weapons, dated 1st July 1968, which does not possess nuclear weapons except in the cases of: (a) an armed attack against the Russian Federation, its territory, armed forces, other troops or its allies by any State which is connected by an alliance agreement with a State that does possess nuclear weapons; (b) joint actions by such a State with a State possessing nuclear weapons in the carrying out or in support of any invasion or armed attack upon the Russian Federation, its territory, armed forces, other troops or its allies.'('The Basic Provisions of the Military Doctrine of the Russian Federation' adopted by Presidential Decree No.1833 on 2 November 1993.)

24 Eg. The Antarctic Treaty, 1959, and the Moon Treaty.

12. The treaties reviewed here and in Part II, together with the absence of a general treaty prohibition on the use of nuclear weapons, show that the international community has addressed the question of nuclear weapons through the medium of practical measures of disarmament and non-proliferation, rather than an attempt to outlaw nuclear weapons or to achieve a definitive statement on whether they are unlawful *per se*. The preambles, substantive provisions and drafting histories of the various treaties which have dealt with the question of nuclear weapons clearly place those treaties in the context of disarmament, as steps on the road to the goal of a more general disarmament. Neither expressly nor impliedly do they attempt to outlaw all uses of nuclear weapons. Nor do they support the inference that the use of nuclear weapons is regarded as unlawful under existing international law.

13. On the contrary, many of the provisions of those treaties make sense only on the assumption that some uses of nuclear weapons are compatible with existing international law. The commitment made by the nuclear-weapon States in Protocol II to the Treaty of Tlatelolco would be entirely unnecessary if the use of nuclear weapons was in any event prohibited by general international law. Moreover, the declarations made by the nuclear-weapon States at the time of signing or ratifying the Protocol, which were not challenged by the parties to the Treaty of Tlatelolco, indicate that those States consider there are circumstances in which resort to nuclear weapons would be lawful.

14. The Non-Proliferation Treaty and the security assurances offered by the nuclear-weapon States rest on the same assumption. Although the Non-Proliferation Treaty is concerned with possession, rather than use, of nuclear weapons, it is based upon a balance of responsibilities between nuclear and non-nuclear weapon States, which the agreement treats as two distinct categories. Thus, States possessing nuclear weapons are subject to markedly different obligations under the Treaty from those which do not possess such weapons and undertake not to acquire them. To treat the nuclear-weapon States in this way is incompatible with the total prohibition of the use of nuclear weapons. The entire structure of the Non-Proliferation Treaty shows that the parties did not regard the use of nuclear weapons as being proscribed in all circumstances. Moreover, the security assurances sought by non-nuclear-weapon States and given by the nuclear-weapon States can only be regarded as having any significance on the assumption that there are circumstances in which nuclear weapons might be used without violating international law.

15. The only documents which do treat nuclear weapons as if they were unlawful *per se* are a number of resolutions of the United Nations General Assembly, starting with Resolution 1653 (XVI), paragraph 1 of which declared that:

> '(a) The use of nuclear and thermonuclear weapons is contrary to the spirit, letter and aims of the United Nations and, as such, a direct violation of the Charter of the United Nations;
>
> (b) The use of nuclear and thermonuclear weapons would

> exceed even the scope of war and cause indiscriminate suffering and destruction to mankind and civilization and, as such, is contrary to the rules of international law and to the laws of humanity;
>
> (c) The use of nuclear and thermonuclear weapons is a war directed not against an enemy or enemies alone but also against mankind in general, since the peoples of the world not involved in such a war will be subjected to all the evils generated by the use of such weapons:
>
> (d) Any State using nuclear and thermonuclear weapons is to be considered as violating the Charter of the United Nations, as acting contrary to the laws of humanity and as committing a crime against mankind and civilization.'

However, the resolution went on to request the Secretary-General to consult States about the possibility of convening a conference to discuss a convention prohibiting the use of nuclear weapons.

16. This resolution was followed by resolution 2936 (XXVII), paragraph 1 of which solemnly declared

> 'on behalf of the States members of the Organization, their renunciation of the use or threat of force in all its forms and manifestations in international relations in accordance with the Charter of the United Nations, and the permanent prohibition of the use of nuclear weapons.'

A series of subsequent resolutions[25] declared that the use of nuclear weapons would be unlawful and called upon States to adopt a convention prohibiting their use and the threat of their use.

17. These resolutions are not, of course, legally binding instruments. Moreover, there are several reasons for rejecting any suggestions that they are declaratory of a rule of customary international law forbidding all use of nuclear weapons. First, an analysis of the voting figures reveals that the resolutions were controversial. Resolution 1653 (XVI) was adopted by 55 votes to 20, with 26 abstentions. Of the nuclear powers, France, the United Kingdom and the United States voted against the resolution, while the Soviet Union voted in favour. Resolution 2936 (XXVII) was adopted by 73 votes to 4, with 46 abstentions. The Soviet Union was one of the sponsors of the resolution and voted in its favour; France, the United Kingdom and the United States abstained. The later resolutions also failed to command the general support which characterised those resolutions which have often been treated as declaratory of customary international law.[26]

18. Secondly, it is evident that many of those States which voted for the resolutions concerned did not regard them as stating such a customary law principle. In the case of Resolution 1653, the link between the assertion of the illegality of nuclear weapons in paragraph 1 and the request that the

---

25 Resolutions 33/71 B, 35/152 D, 36/92I, 45/59B, 46/37D and 47/53C.

26 103-18-18; 112-19-14; 121-19-6; 125-17-10; 122-16-22; and 126-21-21 respectively.

Secretary-General consult States about the conclusion of a convention to prohibit the use of nuclear weapons raises the question whether those States which voted for the resolution regarded the use of nuclear weapons as lawful in the absence of such a convention. Statements by a number of States, including some of the sponsors of the resolution, suggest that they did not take such a position.[27] The later resolutions also refer to the adoption of a convention prohibiting the use of nuclear weapons.

19. Thirdly, in Resolution 2936 the prohibition of nuclear weapons was expressly linked to the renunciation of the use of force 'in accordance with the Charter of the United Nations'. The resolution thus leaves open the possibility that nuclear weapons might lawfully be used in self-defence, since the renunciation of the use of force was clearly not intended to preclude the exercise of that right. That was made clear by the Soviet Union, one of the sponsors of the resolution,[28] whose subsequent security assurances given to the Conference on Disarmament made clear that it regarded the use of nuclear weapons as lawful where that was a necessary measure of self-defence.

20. Finally, the significance of the General Assembly resolutions has to be seen in the light of State practice as a whole, including the conclusion of the agreements discussed above, the failure to adopt a convention of the kind suggested by the General Assembly, the decision not to discuss nuclear weapons at the

---

27 See, eg, the statement by Ceylon GAOR, 17th Sess., 1st Ctee., 1288th Mtg, para 8. See also the discussion in UN Doc A/9215, vol.1. pp.147-54.

28 See the statement by the Soviet Union at A/PV.2040, pp.26-33.

Diplomatic Conference on the Development of Humanitarian Law and the statements and security assurances made by the nuclear powers in the 1978 and in connection with the Treaty of Tlatelolco, all of which indicates that there is no consistent State practice from which a customary law prohibition of nuclear weapons might have developed.

**II. Nuclear weapons in the light of the general law on the use of force and conduct of hostilities.**

21. In the absence of a rule of international law specifically prohibiting the use of nuclear weapons, the legality of their use has to be assessed by reference to the principles of law applicable to any use of armed force. According to these principles, the use of force is lawful only if it is in circumstances in which resort to force is permissible under the principles enshrined in the United Nations Charter and if it meets the requirements of the law of armed conflict regarding the conduct of hostilities. The arguments which follow are based on the assumption that the general laws on the conduct of hostilities are applicable; they are however without prejudice to the position of other States which may argue that this general law is not applicable.

(1) The United Nations Charter and the Use of Nuclear Weapons

22. The use of nuclear weapons by one State against another

would amount to a violation of the prohibition on the use of force in Article 2(4) of the United Nations Charter unless that State could justify its action by reference to the right of self-defence or a mandate conferred by the Security Council in the exercise of its powers under Chapter VII of the Charter. Since the employment of nuclear weapons under the authority of the Security Council is improbable, this submission will concentrate upon the question whether, and in what circumstances, the use of nuclear weapons might constitute a legitimate exercise of the right of self-defence.

23. For a State's use of nuclear weapons to constitute a legitimate exercise of the right of self-defence it would have to comply with all the requirements of the right of self-defence. Those requirements are well known and need not be rehearsed here.[29] If those requirements were met, then the use of nuclear weapons would not violate the Charter. It has, however, been argued that the use of nuclear weapons could not comply with the requirement that measures taken in self-defence must be necessary and proportionate to the

---

[29] They are discussed at length in the Court's judgment on the merits in the Case concerning Military and Paramilitary Activities in and against Nicaragua, ICJ Reports, 1986, p.3

danger which they are designed to meet.[30] This view is based upon the thesis that the effects of any use of nuclear weapons would be so serious that it could not constitute a necessary and proportionate measure, at least if taken in response to a purely conventional attack and, in the view of some commentators, even if taken in response to an attack by an aggressor which itself employed nuclear weapons.

24. It has never been denied that recourse to nuclear weapons would be a step of the utmost gravity and one only to be taken in a case of the greatest necessity. The fact that none of the States possessing nuclear weapons has used those weapons in any of the conflicts in which it has been involved since 1945 testifies to the caution with which the use of these weapons is regarded. Yet it is not difficult to envisage circumstances in which a State which is the victim of aggression can protect itself only by resorting to the use, or the threatened use, of nuclear weapons. That would particularly be the case where the aggressor itself employed nuclear weapons to further its attack, since even a State with a considerable superiority in conventional forces would be likely to be overwhelmed in such circumstances. It could also be the case, however, where a State sustains a massive conventional attack which it has no prospect of successfully resisting unless it resorts to nuclear weapons. To deny the victim of aggression the right to use the only weapons which

---

30 The World Court Project on Nuclear Weapons and International Law, Legal Memorandum (1993), p.13; Brownlie, 'Some Legal Aspects of the Use of Nuclear Weapons' 14 ICLQ (1965), p.437 at p.446.

might save it would be to make a mockery of the inherent right of self-defence.

25. The contention that the use of nuclear weapons would never be a necessary and proportionate measure of self-defence also rests upon assumptions regarding the likely effects of resort to nuclear weapons which are unfounded. Those assumptions take little account of the variety of nuclear weapons which have entered use in the last twenty years and which afford to some States at least the possibility of a wide range of nuclear responses to attack. In addition, those who maintain that any resort to nuclear weapons by a State which is attacked will inevitably lead to an escalation in the conflict and the use of further nuclear weapons by the aggressor are guilty of adopting a simplistic approach to the highly difficult task of assessing the likely reaction of one State to the actions of another.

26. Finally, this approach to the limits of the right of self-defence cannot be reconciled with the practice of States. While those States possessing nuclear weapons have differed over the circumstances in which resort to those weapons would be legitimate, all have taken the view that their use would be a lawful response to a serious act of aggression against them or their allies which they were unable to resist by other means.[31] This approach has been endorsed by many non-nuclear States. Moreover, the statement of their positions by the

---

31 See the security assurances given by the nuclear powers (above).

nuclear powers in such contexts as adherence to Protocol II to the Treaty of Tlatelolco and the 1978 security assurances have not encountered opposition from the international community.

27. Once it is accepted that resort to nuclear weapons could fall within the scope of the right of self-defence, it would be inappropriate for the Court to attempt, in the context of an advisory opinion, to enter into detail about the circumstances when it would be legitimate. At one level, all that the Court would be doing would be to repeat the conditions which any use of force must meet if it is to constitute a legitimate act of self-defence. If, on the other hand, the Court were to attempt to give more detailed guidance, it would run the risk of attempting to legislate in the abstract for the taking of measures the legality of which could be determined only by reference to concrete factual circumstances. All that can really be said is that resort to nuclear weapons in a particular case will be compatible with the Charter if, in all the circumstances, it meets the requirements for the exercise of the right of self-defence.

(2) <u>The Law of Armed Conflict</u>

28. Assuming that a State's use of nuclear weapons meets the requirements of self-defence, it must still conform to the fundamental principles of the law of armed conflict regulating the conduct of hostilities.

29. It must however be recalled that not all of the provisions of Additional Protocol I, 1977, apply to the use of nuclear weapons. It has already been shown that the Conference on the Development of Humanitarian Law which adopted Protocol I proceeded from the outset on the basis that it would not discuss the use of nuclear weapons as such and that any innovations in the Protocol would be applicable only to the use of conventional weapons. Those rules of customary international law which were codified in the Protocol and which were already applicable to nuclear weapons, however, continued so to apply. On signing Additional Protocol I, the United Kingdom therefore recorded its understanding that

'the new rules introduced by the Protocol are not intended to have any effect on and do not regulate or prohibit the use of nuclear weapons.'[32]

Similar declarations have been made on signing or ratifying Additional Protocol I by Belgium, Canada, Germany, Italy, the Netherlands, Spain and the United States. That these declarations accurately reflect the applicability of the provisions of the Protocol has now been confirmed by most Commentators.[33]

---

32 UK Misc.19(1977), Cmnd.6927.

33 This is the view taken in the ICRC Commentary, note 6 above at p.593. See also Bothe, Partsch and Solf, *New Rules for Victims of Armed Conflicts* (1982), p.191, Kalshoven, 'Arms, Armaments and International Law' 191 Rec.de Cours (1985-II) p.183 at 282-3, and Rauschning, 'Nuclear Warfare and Weapons', in Bernhardt (ed), *Encyclopaedia of Public International Law*, vol.IV, (1982), p.49.

30. It has been argued that the use (or at least some uses) of nuclear weapons would violate various principles of the law of armed conflict. These arguments will now be considered in turn.

(a) *The Principle that the parties to a conflict do not have an unlimited choice of the methods and means of warfare.*

31. It has been suggested[34] that the use of nuclear weapons would violate the principle that the parties to an armed conflict do not have an unlimited choice of the methods and means of warfare, a principle stated in Article 22 of the Hague Regulations, 1907,[35] and reaffirmed in Article 35(1) of Additional Protocol I. While that principle is undoubtedly well established as part of customary international law, however, it cannot stand alone as a prohibition of a particular category of weapons. It is necessary to look outside the principle in order to determine what limitations are imposed by customary or conventional law upon the choice of methods and means of warfare. The argument thus begs the question whether there exists some other principle of international law which limits the right to choose nuclear weapons as a means of warfare.

---

34 Singh and McWhinney, *Nuclear Weapons and Contemporary International Law* (1989), p.115.

35 Regulations annexed to Hague Convention No.IV, Respecting the Laws and Customs of War on Land, 1907, UKTS 9 (1910), Cd.5030.

32. The same is true of the argument based upon the 'Martens Clause' which appeared in the preamble to Hague Convention No.IV respecting the Laws and Customs of War on Land, 1907. A most recent version of this clause appears in Article 1(2) of Additional Protocol I, 1977, which provides that:

> 'In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience'.

While the Martens Clause makes clear that the absence of a specific treaty provision on the use of nuclear weapons is not, in itself, sufficient to establish that such weapons are capable of lawful use, the Clause does not, on its own, establish their illegality. The terms of the Martens Clause themselves make it necessary to point to a rule of customary international law which might outlaw the use of nuclear weapons. Since the existence of such a rule is in question, reference to the Martens Clause adds little.

(b) *The Prohibition of Poison, Chemical Weapons and Analogous Liquids and Materials.*

33. The use of nuclear weapons has been said to violate the long established prohibition on the use of poison and poisoned

weapons,[36] because the effects of radiation are described as a form of poisoning.[37] In addition, some commentators have invoked the provisions of the Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases and of Bacteriological Methods of Warfare, 1925, which applies to 'the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices,' on the ground that the effects of radiation make nuclear weapons analogous to asphyxiating or poisonous gases.

34. The prohibitions in both Article 23(a) and the 1925 Protocol, however, were intended to apply only to weapons whose principal effect was poisonous and not to those where poison was a secondary effect. As one leading commentator says of the 1925 Protocol, its drafting history makes clear that 'the scope *ratione materiae* of the Protocol is restricted to weapons the primary effect of which is to asphyxiate or poison the adversary.'[38] In the case of almost all nuclear weapons, the primary effects are blast and heat.

---

36 Article 23(a) Hague Regulations, 1907.
37 Singh and McWhinney, note 34 above, p.127, Schwarzenberger, *The Legality of Nuclear Weapons* (1958).
38 Kalshoven, note 33, above, p.284. See also McDougal and Feliciano, *Law and Minimum World Public Order* (1961), p.663.

35. Moreover, when the United States became party to the 1925 Protocol in 1975, thirty years after becoming the world's leading nuclear power, it made no reservation of its right to use nuclear weapons. It is inconceivable that a major nuclear power would inadvertently assume a treaty obligation which prohibited it from using one of the most important weapons in its armoury. Moreover, none of the other parties to the 1925 Protocol suggested, at the time of United States ratification, that the United States had assumed new obligations regarding the use of its nuclear weapons. It would appear, therefore, that the subsequent practice of the parties to the 1925 Protocol does not sustain the interpretation placed upon its terms by those who argue that it applies to the use of nuclear weapons.

(c) *The unnecessary suffering principle*

36. Article 23(e) of the Hague Regulations prohibits the use of 'arms, projectiles or material calculated to cause unnecessary suffering.'[39] This principle is designed to protect combatants from the use of weapons which are gratuitously cruel and, in the words of the St Petersburg Declaration, 1868, 'uselessly aggravate the sufferings of disabled men, or render their death inevitable.'[40] It has

---

39 An updated version of this provision appears in Article 35(2), Additional Protocol I, 1977.

40 The declaration, however, only prohibits the use of projectiles of a weight below 400 grammes which are explosive or are charged with fulminating or inflammable substances. It does not prohibit the use of explosive artillery shells.

sometimes been argued that the use of nuclear weapons would invariably violate this principle.[41]

37. The principle, however, prohibits only the use of weapons which cause *unnecessary* suffering or *superfluous* injury. It thus requires that a balance be struck between the military advantage which may be derived from the use of a particular weapon and the degree of suffering which the use of that weapon may cause. In particular, it has to be asked whether the same military advantage can be gained by using alternative means of warfare which will cause a lesser degree of suffering. The use of a nuclear weapon may be the only way in which a State can concentrate sufficient military force to achieve a particular objective. In those circumstances, it cannot be said that the use of such a weapon causes unnecessary suffering, however great the casualties which it produces among enemy combatants.[42]

(d) *The principle that the civilian population must not be made the object of an attack.*

38. The sponsors of the present request have also argued that any use of nuclear weapons would inevitably cause widespread casualties amongst the civilian population and would thus violate the principle that an enemy's civilian

---

41 Brownlie, note 30 above, at p.450.
42 Kalshoven, note 33, above, p.284; Green, The Contemporary Law of Armed Conflict (1993), p.126; McDougal and Feliciano, note 38 above, p.660.

population is not a legitimate target in its own right.[43] This principle is a part of customary international law and was codified in Article 51(2) of Additional Protocol I, 1977. The essence of this argument is that nuclear weapons cannot be used in a way which enables a distinction to be drawn between combatants and military objectives on the one hand and civilians and civilian objects on the other. They are thus said to be inherently indiscriminate weapons.

39. It is certainly the case that nuclear weapons could be directed against centres of civilian population or used in an indiscriminate way. It is not true, however, that nuclear weapons cannot be used in any other way. Modern nuclear weapons are capable of precise targetting and many are designed for use against military objectives of quite small size. The legality of a particular use of a nuclear weapon would depend upon whether it satisfied the criterion of proportionality, namely that the likely civilian casualties and damage to civilian objects were not excessive in relation to the military advantage expected to result from the attack.[44] Once again, it is not possible to generalize, since the legality of an individual instance of the use of a nuclear weapon would depend

---

43 Brownlie, note 30 above; *World Court Project*, note 30.
44 Kalshoven, note 33 above, p.285;

upon the exact circumstances in which it was used.

40. The same answer has to be made to two related arguments. First, it has sometimes been said that the use of nuclear weapons would be unlawful because it would make it impossible for a State to discharge its obligations towards persons and objects protected under the Geneva Conventions, 1949, such as the sick, wounded and prisoners of war or hospitals, as such persons and objects would inevitably be amongst the casualties of any nuclear exchange. The deliberate targetting or protected persons and objects would indeed be unlawful, irrespective of the weapons used, but the Geneva Conventions do not require the suspension of large scale hostilities merely because of the proximity of protected persons or objects. Moreover, the argument overlooks the drafting history of the Conventions, and in particular, the rejection of proposals to discuss the legality of nuclear weapons at the 1949 Conference. As one commentator has put it, 'to argue like this is to lay a heavier burden on the Geneva Conventions than they were ever meant to sustain.'[45]

41. Secondly, it has been argued that the use of nuclear weapons would inevitably cause so many civilian casualties that it would amount to the commission of genocide.[46] The Court has stressed that genocide is a crime which 'shocks the

---

45 Kalshoven, op.cit.
46 <u>World Court Project</u>, note 30 above.

conscience of mankind, results in losses to humanity... and is contrary to moral law and to the spirit and aims of the United Nations.'[47] Genocide is, however, a crime of intent and Article II of the Genocide Convention, 1948, requires 'intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.' To assume that the use of nuclear weapons must be accompanied by such intent would clearly be unfounded. The rule is not directed at collateral casualties resulting from an attack against a military objective.

(e) *The protection of the environment*

42. Another argument is that the use of nuclear weapons should be regarded as prohibited because of the effect that it would have upon the natural environment.[48] This argument rests on two sets of treaty provisions. Article I of the United Nations Convention on the Prohibition of Military or any other Hostile Environmental Modification Techniques, 1977,

---

47 Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Order of 13 September 1993, para 51.

48 World Court Project, note 30 above.

prohibits 'military or other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury' to another State. Article 35(3) of Additional Protocol I prohibits the employment of 'methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.'[49]

43. The Environmental Modification Techniques Convention, however, is not really applicable to most cases in which nuclear weapons might be used. That Convention was designed to deal with the deliberate manipulation of the environment as a method of war. Thus Article II of the Convention defines the term 'environmental modification technique' as 'any technique for changing - through the <u>deliberate</u> manipulation of natural processes - the dynamics, composition or structure of the Earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space'. The effects on the environment of the use of nuclear weapons however, would normally be a side-effect of those weapons. Article 35(3) of Additional Protocol I is broader in scope, in that it is applicable to the incidental effects on the environment of the use of weapons. It was, however, an innovative provision.[50]

---

[49] See also Article 55.

[50] See the statement by the Federal Republic of Germany, <u>Official</u> Records, VI, p.115.

It is therefore subject to the understanding, which was discussed above, that the new provisions created by Protocol I would not be applicable to the use of nuclear weapons.

44. It has been suggested that the use of nuclear weapons would inevitably have such catastrophic effects on the territory of neutral States and States not party to a conflict that it would violate the principle laid down in Article 1 of Hague Convention No V, Respecting the Rights and Duties of Neutral Powers and Persons in case of War on Land, 1907, which provides that 'the territory of neutral Powers is inviolable.' Whether the use of nuclear weapons would deposit radioactive fall-out on the territory of States not party to the conflict would, however, depend upon the type of weapon used and the location at which it was used. The assumption that any use of nuclear weapons would inevitably have such an effect is unfounded. Moreover, Hague Convention No V was designed to protect the territory of neutral States against incursions by belligerent forces or the deliberate bombardment of targets located in that territory, not to guarantee such States against the incidental effects of hostilities.

*Reprisals*

45. Even if a particular use of nuclear weapons is contrary to the laws of armed conflict, it remains necessary to consider whether that use might be justified as a belligerent reprisal. A belligerent reprisal is an action, taken by a party to a conflict, which would normally constitute a

violation of the laws of armed conflict but which is lawful because it is taken in response to a prior violation of that law by an adversary. To be lawful, a belligerent reprisal must meet two conditions. First, it must not be directed against persons or objects against which the taking of reprisals is specifically prohibited. Secondly, it must meet the criteria for the regulation of reprisals, namely that it is taken in response to a prior wrong, is proportionate, is undertaken for the purposes of putting an end to the enemy's unlawful conduct and for preventing future illegalities, and is a means of last resort.

46. The Geneva Conventions of 1949 prohibit the taking of reprisals against persons or objects protected by the Conventions.[51] That, however, would have little relevance here, since it is difficult to conceive of the use of nuclear weapons against such persons or objects.[52] The Conventions do not preclude the taking of reprisals against the enemy's civilian population or civilian objects in enemy territory.

47. Additional Protocol I, on the other hand, prohibits the taking of reprisals against the civilian population (Article 51(6), civilian objects (Article 52(1)), historic monuments (Article 53(c)), objects indispensable to the survival of the

---

51 Convention No.I, Article 46, Convention No II, Article 47 Convention No. II, Article 13, Convention No.IV, Art.33.

52 See section (d) above.

civilian population (Article 54(4)), the natural environment (Article 55(2)) and works and installations containing natural forces (Article 56(4)). Again, however, these provisions are widely regarded as innovative and thus as inapplicable to the use of nuclear weapons.[53]

48. So far as the second condition for the conduct of lawful reprisals is concerned, it has been argued that the use of nuclear weapons could never satisfy the requirements of proportionality and preventiveness. This argument, however, suffers from the same flaws as the argument that the use of nuclear weapons could never satisfy the requirements of self-defence. Whether the use of nuclear weapons would meet the requirements of proportionality cannot be answered in the abstract; it would depend upon the nature and circumstances of the wrong which prompted the taking of reprisal action. Nor can it be ruled out that the retaliatory use of nuclear weapons might have the effect of putting a stop to a series of violations of the law by an adversary.

---

53 Kalshoven, note 33 above, p.283. The ICRC Commentary, note 6 above, does not include the reprisals provisions in the list of provisions which it expressly regards as applicable to nuclear weapons, p.595.

## CONCLUSION

In conclusion, it is submitted that:

1. The legal question which forms the subject-matter of the request by the WHO for an advisory opinion in this case is not one arising within the competence of the Organisation as required by Article 76 of the WHO Constitution and Article X(2) of the Agreement between the United Nations and the WHO, and does not arise within the scope of its activities as required by Article 96(2) of the United Nations Charter. While the health effects of nuclear weapons are a legitimate subject for the Organisation's activities, the issue of legality of the use of such weapons has no relevance to those activities, or to the obligations of Member States under the WHO Constitution.

2. Alternatively, in this case the Court should decline to give an advisory opinion as requested, because

(i) the legal question put to the Court does not involve the interpretation of any constitutional provision, decision or resolution that is the subject of a dispute;

(ii) the WHO does not require the advisory opinion to assist it carry out its constitutional functions;

(iii) the request is motivated by political factors which are extraneous to any requirement to seek guidance as to the functions of the WHO; and

(iv) any opinion given by the Court would be unlikely to find general acceptance, and might even prove detrimental to efforts to achieve nuclear disarmament.

3. As regards the principles of law raised by the question, it is submitted that:

(i) the use of nuclear weapons would not involve a breach of States' obligations under the WHO Constitution;

(ii) there is no rule contained in either customary international law or treaty which expressly prohibits all use of nuclear weapons. Moreover, State practice regarding the possession of nuclear weapons necessarily implies that the use of nuclear weapons would be lawful in proper circumstances;

(iii) the legality of the use of nuclear weapons must therefore be assessed in the light of applicable principles of international law regarding the use of force and the conduct of hostilities, as for

other methods and means of warfare;

(iv) the use of nuclear weapons will not be contrary to the Charter of the United Nations if it meets the criteria for the exercise of the right of self-defence. Whether the use of nuclear weapons meets those criteria will depend upon the circumstances of each individual case; and

(v) nuclear weapons are not prohibited *per se* by the law of armed conflict. Their use will be lawful provided that it complies with the general principles of the law regarding unnecessary suffering and the protection of the civilian population. Their use in circumstances which would otherwise be illegal may moreover be lawful if it constitutes a legitimate belligerent reprisal.