

Chemical

BANNED

Biological

BANNED

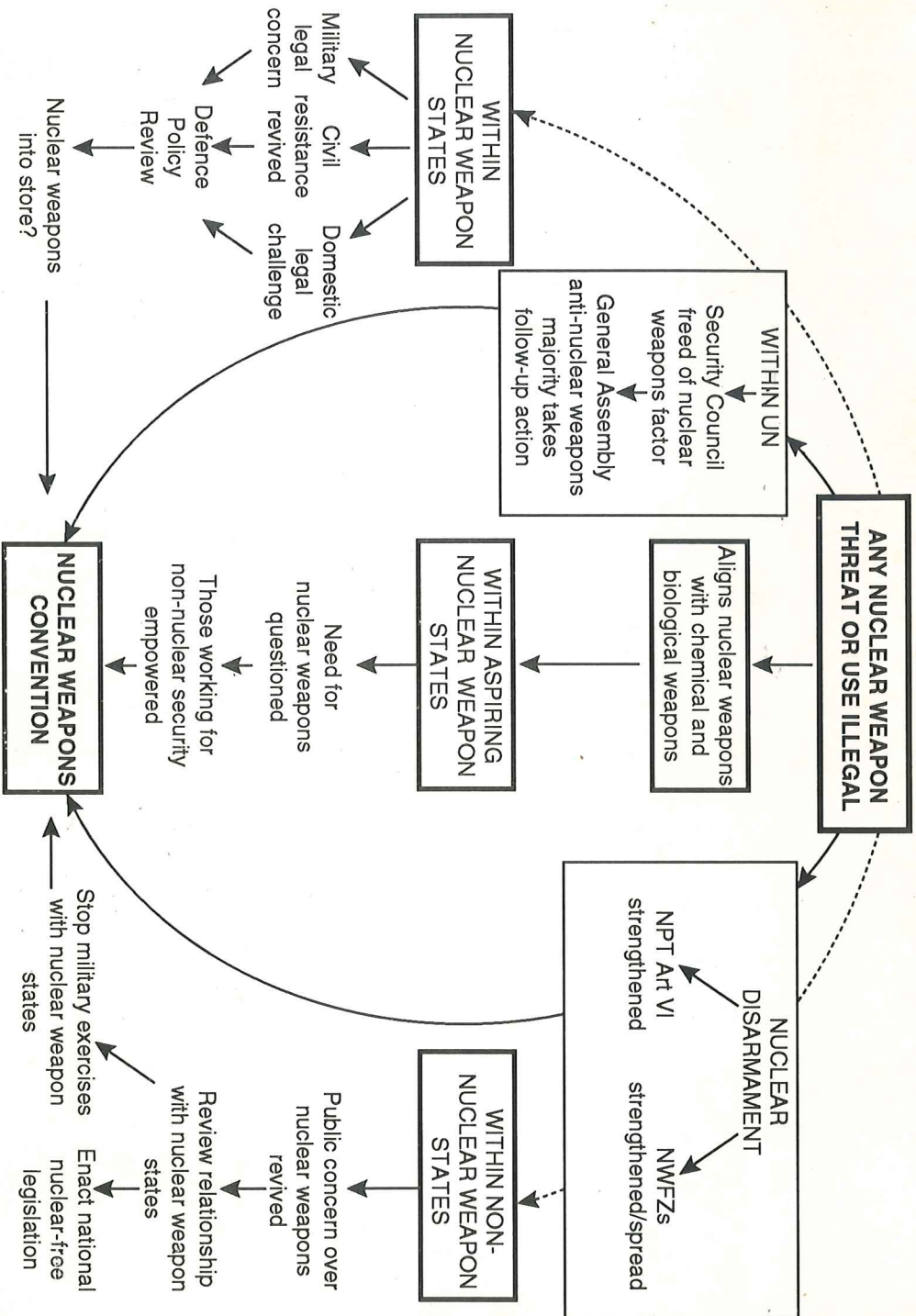
Nuclear

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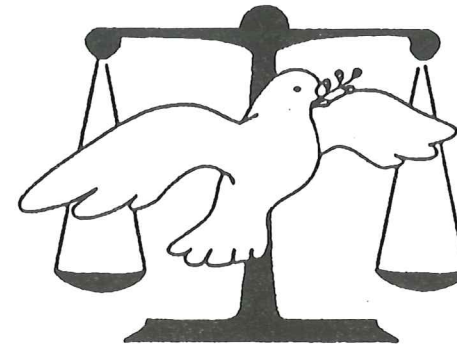
**IMPLICATIONS OF THE ADVISORY OPINION
BY THE INTERNATIONAL COURT OF JUSTICE
ON THE LEGAL STATUS OF NUCLEAR WEAPONS**



**WORLD COURT
PROJECT**



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A Discussion Paper
by
The World Court Project

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SUMMARY

THE COURT'S DECISION

On 8 July 1996, the International Court of Justice (ICJ) delivered its findings on the two questions before it from the World Health Organisation (WHO) and UN General Assembly (UNGA) on the legal status of nuclear weapons.

The ICJ did not give an Advisory Opinion on the WHO question, because it judged that the question did not arise within the scope of the WHO's responsibilities. However, it relied upon the WHO's evidence of the health and environmental effects of nuclear weapons for both questions. Moreover, the WHO's request had prepared the ground for the broader and deeper UNGA question.

On the UNGA question, it gave a 34-page main Opinion followed by over 200 pages of individual statements and dissenting Opinions by the 14 judges (one died just before the Oral Proceedings began in October 1995).

In the crucial subparagraph, the ICJ decided that **"a threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law."** In doing so, it confirmed that the Nuremberg Principles apply to nuclear weapons.

It added a caveat: "However, in view of the current state of international law, and of the elements of fact at its disposal, the Court **cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.**" Nonetheless, even in such an extreme case, threat or use must comply with the principles and rules of humanitarian law. Also, the Court treated threat and use as a single, indivisible concept.

Finally, the judges unanimously agreed that **"there exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control."**

IMPLICATIONS

The implications of the ICJ's decision are far-reaching. They are considered under the following headings:

The World Made Safer

Within Nuclear Weapon States

- ▶ undermining the public perception of nuclear weapons, especially among the military, as a security asset and "necessary evil";
- ▶ giving legal authority to all those opposing nuclear weapons;
- ▶ helping politicians who support nuclear disarmament take the legal high ground against the pro-nuclear lobby, who are now vulnerable to accusations of flouting the law;
- ▶ governments and military leaders will come under pressure to review the legal position of military personnel involved in the deployment of nuclear weapons;
- ▶ causing growing repercussions for their foreign and defence policies.

Within Other States

- ▶ those working within aspiring nuclear States for non-nuclear weapon policies will be empowered;
- ▶ how non-nuclear States allied with nuclear States or providing support for nuclear weapon deployment could be affected.

Within The UN

- ▶ options for UN General Assembly follow-up action if the nuclear States fail to comply with the Opinion;
- ▶ hastening reform of permanent Security Council membership;
- ▶ highlighting the need for the World Court to be seen to be free of manipulation by the permanent Security Council members.

Nuclear Disarmament Encouraged

- ▶ putting governments under pressure to expedite nuclear disarmament, and facilitating the process;
- ▶ strengthening Article VI of the NPT;
- ▶ hastening progress to a Nuclear Weapons Convention;
- ▶ underpinning the Canberra Commission Report;

- ▶ highlighting the deterrence debate;
- ▶ exposing the disparity with chemical and biological weapons;
- ▶ boosting non-nuclear security initiatives.

CONCLUSIONS

Putting the question to the ICJ fuelled the nuclear weapon debate, revitalised the nuclear disarmament agenda, and introduced a new, powerful legal dimension.

It also drew attention to the ICJ, which called to account the permanent members of the Security Council and stated the law as it found it. By accepting citizens' evidence for the first time, the ICJ acknowledged the strength of public concern, and their role in the issue. Thereby it enhanced its reputation as the world's ultimate judicial authority.

The initiative has affirmed a widely-held legal view on nuclear weapons. As an essential step to a nuclear weapon-free world, **the ICJ did not identify any lawful circumstance for the threat, let alone use, of nuclear weapons.**

ABOLITION 2000

The international network of citizens which launched the initiative and supported governments which participated in the case is now focusing on a campaign to help implement the Court's decision. Called Abolition 2000, its central aim is *to have by the year 2000 a signed global agreement that sets a firm timetable for the complete elimination of nuclear weapons.*

AIM OF THIS PAPER

This paper is intended to provide enough information on the Court's response to the two questions put to it by the World Health Organisation (WHO) and the UN General Assembly (UNGA) on the legal status of nuclear weapons to stimulate a public discussion of the implications.

INTRODUCTION

On 14 May 1993, the World Health Assembly, the governing body of the WHO, adopted a resolution requesting an Advisory Opinion from the ICJ on the 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?"* This built on years of study by the WHO on the consequences of nuclear weapon use and its prescription that prevention is the only solution.

By 20 September 1994, the ICJ had received 35 legal submissions from States on the WHO question. The unusually large number showed the importance attached to the issue. It was clear from government statements that strong differences of opinion exist between the nuclear weapon States and their allies and many non-nuclear States. Some two-thirds of the submissions argued for the illegality of use of nuclear weapons. All submitting States then received from the ICJ a copy of every other submission, and had until 20 June 1995 to comment in writing on them. On 27 June 1995, the ICJ announced that 8 States had submitted written comments: 4 argued for illegality, while 4 were pro- nuclear.

The WHO's request prepared the ground for the (UNGA), which on 15 December 1994 adopted a resolution requesting the ICJ urgently to render its Advisory Opinion on the following question: *"Is the threat or use of nuclear weapons in any circumstance permitted under international law?"*

The UN Secretary-General sent this request to the ICJ in a letter dated 19 December 1994. On 2 February 1995, the ICJ announced that it had invited entitled States to make new submissions on the UNGA question by 20

June 1995, and written comments on other States' submissions by 20 September 1995.

The ICJ received 28 submissions on the UNGA question. It considered the WHO and UNGA questions separately but simultaneously. Oral Proceedings were held from 30 October -15 November 1995. 22 States and the WHO made statements, of which 16 States argued for illegality. The US, UK, France and Russia (China took no part) were supported by Germany and Italy in arguing for the ICJ to use its discretion not to answer the questions. In all, 45 States and the WHO gave evidence, over twice the participation in a case in the ICJ's 50-year history. In addition, 3.7 million Declarations of Public Conscience were presented to the ICJ in support of the case: this was the first time it had accepted "citizens' evidence".

After over six months' deliberation, the ICJ gave its decision on 8 July 1996.

THE ICJ AND ADVISORY OPINIONS

The ICJ, which sits in the Peace Palace at The Hague, is the principal judicial organ of the UN and the supreme tribunal ruling on questions of international law. Its jurisdiction is governed by its Statute, which is an integral part of the UN Charter.

The ICJ comprises fifteen judges drawn from the different legal systems of the world. The Security Council and UNGA elect them for nine years "regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are juriconsults of recognised competence in international law."¹ They are under oath to act impartially and conscientiously,² and are paid by the UNGA. As a general practice, however, there are nearly always judges from the five permanent members of the UN Security Council.

The ICJ's two functions are to decide legal disputes between States (known as contentious cases), and to give Advisory Opinions. The Security Council and UNGA may request an Advisory Opinion on any legal question. Other UN organs and specialised agencies (such as the WHO)

may also request Advisory Opinions on legal questions arising within the scope of their responsibilities.³

THE ICJ AND CITIZENS' EVIDENCE

On 10 June 1994, the ICJ Registrar received a citizens' delegation representing over 700 non-governmental organisations which had endorsed the initiative to ask the ICJ for an Advisory Opinion on the legal status of the threat or use of nuclear weapons. The delegation presented a unique collection of documents, which included:

- ▶ 170,000 individually signed Declarations of Public Conscience invoking the "Martens" clause from the 1907 Hague Convention⁴;
- ▶ a sample of more than 50 million signatures to the Appeal from Hiroshima and Nagasaki;
- ▶ 11,000 signatures to the MacBride Lawyers' Appeal Against Nuclear Weapons;
- ▶ material surveying 50 years of citizens' opposition to nuclear weapons.

Subsequently, over 3.5 million more Declarations of Public Conscience were presented, 3.3 million of them from Japan.

In accepting these into the ICJ archive, the Registrar undertook to draw the judges' attention to them when considering the case. He took care to point out that only entitled States and UN agencies are allowed to submit evidence to the ICJ; and that therefore these documents had not been accepted as legal evidence. Nonetheless, it is believed that this was the first time that the ICJ had accepted material from a citizens' delegation. It indicated that the ICJ acknowledged the strength of public concern worldwide about the issue - indeed, several judges drew attention to this aspect in their separate Opinions.

In addition, States presented evidence of the realities of nuclear weapons, not only in scientific studies but also through testimony at the Oral Proceedings from the Mayors of Hiroshima and Nagasaki and Lijon Eknilang, a woman victim of US atmospheric tests in the Marshall Islands; and written statements by indigenous people in lands affected by uranium mining and nuclear tests, by "Downwinders" and test veterans. Also the

Registrar received a deputation of representatives of indigenous peoples.

On the other hand, the ICJ refused to allow several citizens' organisations, including International Physicians for the Prevention of Nuclear War (IPPNW) and the International Peace Bureau (IPB) to file "Friend of the Court" briefs.

THE ICJ'S DECISION⁵

The ICJ's task was complicated by the death of Judge Mawdsley (Venezuela) on 24 October 1995, less than a week before the start of the Oral Proceedings. Because it was impossible for a replacement to be arranged at such short notice, the ICJ President was authorised by the Court's rules to use his vote to decide any tied vote.

THE WHO QUESTION

The ICJ found, by 11 votes to 3, that it was unable to give the Advisory Opinion requested by the WHO. Three conditions had to be satisfied in order to give its Opinion:

- 1) The requesting agency must be duly authorised
- 2) The opinion requested must be on a legal question
- 3) The question must arise within the scope of the work of the requesting agency

The ICJ decided that the first two had been met, but not the third, because the WHO's work in planning to coordinate the care of survivors of nuclear war would be the same whether the use of nuclear weapons was illegal or legal. However, in so doing it considered, and relied upon, the WHO's evidence of the health and environmental effects of nuclear weapons for both this and the UNGA question.

The three dissenting judges - Shahabuddeen (Guyana), Weeramantry (Sri Lanka), and Koroma (Sierra Leone) - considered that the question was clearly within the WHO's competence and responsibilities. They pointed out that the WHO dealt primarily with preventive medicine, and should be commended for having given its attention to the greatest man-made threat to human health thus far devised.

Also, this was the first time that the ICJ had refused to consider the request of a UN agency for an Advisory Opinion. Such a refusal should only be for compelling reasons; but no such reason had been shown to exist in this case. By declining, the Court had chosen to vacate its positive record in this sphere, particularly on a legal issue that has major implications for public health, humanity and global survival.

THE UNGA QUESTION

The ICJ accepted the UNGA question. It gave a 34-page main Advisory Opinion, plus over 200 pages of separate statements and dissenting Opinions by individual judges. The final paragraph of the main Opinion, known as the "Dispositif", follows:

"For these reasons,

THE COURT

(1) By thirteen votes to one,

Decides to comply with the request for an advisory opinion;

IN FAVOUR: President Bedjaoui (Algeria); Vice-President Schwebel (US); Judges Guillaume (France), Shahabuddeen, Weeramantry, Ranjeva (Madagascar), Herczegh (Hungary), Shi (China), Fleischhauer (Germany), Koroma, Vereshchetin (Russia), Ferrari Bravo (Italy), Higgins (UK);

AGAINST: Judge Oda (Japan),

(2) Replies in the following manner to the question put by the General Assembly:

A. Unanimously,

There is in neither customary nor conventional international law any specific authorisation of the threat or use of nuclear weapons;

B. By eleven votes to three,

There is in neither customary nor conventional law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such;

IN FAVOUR: President Bedjaoui; Vice-President Schwebel; Judges Oda, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Ferrari Bravo, Higgins;

AGAINST: Judges Shahabuddeen, Weeramantry, Koroma.

C. Unanimously,

A threat or use of force by means of nuclear weapons that is contrary to Article 2, paragraph 4, of the United Nations Charter and that fails to meet all the requirements of Article 51, is unlawful;

D. Unanimously,

A threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict particularly those of the principles and rules of international humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons;

E. By seven votes to seven, (by the President's casting vote),

It follows from the above-mentioned requirements that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law;

However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake;

IN FAVOUR: President Bedjaoui; Judges Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Ferrari Bravo;

AGAINST: Vice-President Schwebel; Judges Oda, Guillaume, Shahabuddeen, Weeramantry, Koroma, Higgins.

F. Unanimously,

There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control."

INTERPRETATION

Unique Characteristics of Nuclear Weapons. The ICJ stated that it was "imperative for the Court to take account of the unique characteristics of nuclear weapons, and in particular their destructive capacity, their capac-

ity to cause untold human suffering, and their ability to cause damage to generations to come.”⁶ Thereby, the ICJ confirmed that *nuclear weapons are in the same stigmatised category of weapons of mass destruction as chemical and biological weapons*.

It emphasised that “use of nuclear weapons could constitute a catastrophe for the environment”,⁷ adding that “States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives.”⁸ Indeed, the effects of nuclear weapons are *more severe, widespread and long-lasting than those of chemical weapons* of which the development, production, stockpiling and use are prohibited by specific international convention regardless of size. Also radiation effects are analogous to those of biological weapons, which also are outlawed by specific convention.

Threat and Use Indivisible. No attempt was made to separate use and threat. The ICJ thereby endorsed the view that the Law of Peace and Security (*jus ad bellum*), as it has evolved since the adoption of the UN Charter, treats “threat or use” as a single, indivisible concept. Moreover, the Court stated that the notions of “threat” and “use” of force under Article 2, paragraph 4, of the Charter stand together in the sense that if the use of force is illegal, the threat to use such force will likewise be illegal.⁹ The relevance of this to deterrence doctrine is that the very concept of deterrence is meaningless without a credible willingness to use nuclear weapons.

Divisions over Deterrence. The highly sensitive issue of reprisals and deterrence doctrine was avoided in the main Opinion.¹⁰ In so doing, the ICJ acknowledged the deep divide on deterrence in the international community. The full Opinion shows that this extends to the judges of the nuclear States and their allies. In Judge Shi’s dissenting Opinion, he challenged the Court’s assertion¹¹ that deterrence was supported by an “appreciable section of the international community”. He also made it clear that the political policy of deterrence “should be an object of regulation by law, not vice versa”. Judge Ferrari Bravo agreed, stating that it “has no legal value”.

On the other hand, Judge Schwebel included in his dissenting Opinion a political justification of deterrence based on hearsay reports and US

politicians’ views from the Gulf War, making little reference to legal arguments.¹² This bore out Judge Shi’s point that “the Court...simply cannot have regard to this policy practice of certain States as, if it were to do so, it would be making the law accord with the needs of the policy of deterrence.”

Law of War Applies to Nuclear Weapons. In deciding that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, the ICJ confirmed that the principles of the Law of War (*jus in bello*) apply to nuclear weapons.¹³ These principles are drawn from international treaties and agreements such as the Hague Conventions, Geneva Conventions and Genocide Convention. These prohibit the use, even in self-defence, of weapons which:

- ▶ fail to discriminate between military and civilian personnel (Principle of Discrimination)
- ▶ cause harm disproportionate to their preceding provocations and/or to legitimate objectives (Principles of Proportionality and Necessity)
- ▶ cause unnecessary or superfluous suffering (Principle of Humanity)
- ▶ affect neutral States (Principle of Neutrality)
- ▶ cause widespread, long-lasting and severe damage to the environment (Principle of Environmental Security)
- ▶ use asphyxiating, poisonous or other gases, and all analogous liquids, materials or substances (Principle of Toxicity)¹⁴

Martens Clause and Nuremberg Principles Apply to Nuclear Weapons. The ICJ explained why and how both the Martens clause and Nuremberg Principles are vital components of the principles and rules of humanitarian law, which it confirms apply to nuclear weapons.¹⁵

In so doing - and in accepting “citizens’ evidence” invoking the Martens clause - the Court acknowledged the cumulative impact of anti-nuclear efforts in global civil society. It cited the continuing spread of nuclear weapon-free zones as testifying to “a growing awareness of the need to liberate the community of States and the international public from the dangers resulting from the existence of nuclear weapons...”¹⁶

Final Vote Effectively 10-4 for General Illegality. In the final vote, the judges split 7-7: so the vote of the President, Judge Bedjaoui, was decisive. However, examination of the dissenting Opinions reveals that Judges Weeramantry, Shahabuddeen and Koroma did so because they had no doubts that the threat or use of nuclear weapons in any circumstance is illegal. So the vote for general illegality was effectively 10-4.

President Bedjaoui added in his separate statement: "I cannot insist strongly enough that the inability of the Court to go further...*cannot in any way be interpreted* (his emphasis) as itself evidence of a half-open door for the recognition of the legal permissibility of using nuclear weapons."

No Finding of Any Legal Circumstance for Nuclear Weapon Threat or Use. The Court unanimously determined that any threat, let alone use, of nuclear weapons should be compatible with the requirements of international law applicable in armed conflict, particularly those of humanitarian law. Moreover, it added that "the use of such weapons in fact seems scarcely reconcilable with respect for such requirements."¹⁷

In deciding that it could not conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, the ICJ *left no exception*. On the contrary, it challenged the nuclear States that they had neither specified any legal circumstance for use, nor convinced it that "limited use would not tend to escalate into the all-out use of high yield nuclear weapons."¹⁸ Thereby the Court placed the onus on the nuclear States to prove that a specific use of nuclear weapons would not flout its conclusion that threat or use would generally be illegal.

Any ambiguity as to the identity of "a State" in paragraph 2E is resolved in paragraph 97 of the discussion preceding the "Dispositif", where this clearly refers to the State proposing to engage in the threat or use of nuclear weapons.

Unanimous Call for Complete Nuclear Disarmament. The ICJ stated: "In the long run, international law, and with it the stability of the international order which it is intended to govern, are bound to suffer from the continuing difference of views with regard to the legal status of weapons

as deadly as nuclear weapons. It is consequently important to put an end to this state of affairs: the long-promised complete nuclear disarmament appears to be the most appropriate means of achieving that result."¹⁹ President Bedjaoui emphasised separately: "The existence of nuclear weapons is therefore a challenge to the very existence of humanitarian law..."

The ICJ then highlighted the unambiguous obligation in Article VI of the Nuclear Non-Proliferation Treaty (NPT) on the nuclear States "to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control." It added that the legal import of that obligation is "to achieve a precise result - nuclear disarmament in all its aspects - by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith."²⁰

The Court reinforced this by quoting a UN Security Council resolution of 11 April 1995 which reaffirmed the need for all NPT signatory States to comply fully with all their obligations, specifically repeating Article VI.²¹ In the final subparagraph of the main Opinion, the ICJ went further *by omitting the clause from Article VI relating to a treaty on general and complete disarmament* - with which hitherto the nuclear States have linked nuclear disarmament in Article VI. This explicit, unanimous statement was unexpected, as it had not been requested. *It may well turn out to be the most important part of the Court's decision.*

Nuclear States under Obligation to Respect ICJ Decision. It is generally claimed that Advisory Opinions are not directly binding on governments in the same way as a treaty. However, all governments accept that they are bound by international law. Furthermore, they do not hesitate to use international law to condemn other governments.

The nuclear weapon States are all parties to the Hague and Geneva Conventions and, apart from China, have affirmed the Nuremberg Principles.²² They are therefore bound to abide by these conventions and norms. Thus, the ICJ's decision that the threat or use of nuclear weapons would generally violate the Law of War as codified in these conventions and principles means that all parties to them are under an obligation to respect this.

IMPLICATIONS

The World Made Safer. The Opinion has already made the world safer by:

- ▶ strengthening both political and military inhibitions against actual nuclear weapon threat or use
- ▶ providing a new, legal stop to help keep open longer the window of opportunity for nuclear disarmament created by the end of the Cold War

WITHIN NUCLEAR WEAPON STATES

Public Perception. Provided that the public are informed about it, the Opinion will undermine the common perception of nuclear weapons - especially among the military - as a security asset and "necessary evil" as they realise it not only places nuclear weapons in the same stigmatised category as chemical and biological weapons, but that they are far worse.

Chemical and biological weapons are not considered necessary or acceptable because they are too repulsive and indiscriminate - which is also why they have been banned by specific conventions. Yet in his personal statement, Judge Bedjaoui went so far as to call nuclear weapons "the ultimate evil". Arguments for their necessity are further eroded by the availability of more discriminate conventional weapons without what the Court describes as the "potentially catastrophic" effects of nuclear weapons.²³

Opposing Nuclear Weapons Is Lawful. By its decision, the ICJ has implicitly confirmed that opposing nuclear weapons is lawful. The Opinion gives legal authority to all those opposing nuclear weapons. Domestic law is affected: citizens now have a powerful new defence in support of civil resistance and attempts to challenge in court government nuclear weapon policies and military practices. They can cite Nuremberg Principle VII, which prohibits "complicity in the commission of a crime against peace, a war crime, or a crime against humanity." The associated shift of public perception against nuclear weapons will assist such initiatives.

In the same way, the Opinion impinges on the work of nuclear weapon scientists and engineers.²⁴ For example, it can be invoked in support of

whistle-blowers like Mordechai Vanunu, who exposed Israel's nuclear weapon programme.

Political Implications. The Court's Opinion will help politicians who support nuclear disarmament take the legal high ground against the pro-nuclear lobby, who are now vulnerable to accusations of flouting the law.

With a majority of public opinion in the US and UK but not yet France now against nuclear weapons, the Opinion can be used in a powerful new drive for nuclear disarmament which can be presented as responsible, keeping the law, and discrediting nuclear weapons as political virility symbols. Central to this struggle for compliance will be the challenge offered by the Court's decision to the current perception among NATO decision-makers that "nuclear might is right".

Military Implications. Governments and military leaders will come under pressure to review the legal position of military practice and personnel involved in the deployment of nuclear weapons. What is at stake here is a crucial difference between military professionals and hired killers or terrorists: *military professionals need to be seen to act within the law* - military, international and domestic law.

In most countries, military practice is incorporated into military manuals which proscribe particular practices both in war and peace. Also, most foreign affairs and defence departments have a legal advice section. The military manuals of, for example, the US and UK require military personnel to adhere to principles of international law relating to warfare. Even in the absence of such specific references, armed forces are bound by the principles of the Law of War.²⁵ That is why they cannot legally use weapons of mass destruction such as chemical and biological weapons. Indeed, military professionals shunned them before they were prohibited by specific conventions. They need to know that, through the Court's decision, nuclear weapons are now in the same category.

The nuclear weapon States have argued that the threat or use of nuclear weapons does not necessarily violate these principles. The US Military Manual (1956) states: "The use of explosive atomic weapons, whether by air, sea, or land forces, cannot as such be regarded as a violation of international law in the absence of any customary rule of international law or

convention restricting their employment." This statement is now challenged by the Opinion, because any contemplated nuclear weapon use is now presumed to be illegal unless it is compatible with the requirements of international law applicable in armed conflict, particularly those of humanitarian law.

Taking a specific example, *the legal position of the crews of ballistic missile-firing submarines deployed on deterrent patrol is now in question*. Of immediate relevance is the new joint UK-France doctrine of threatening "rogue" States, nuclear-armed or not, with a low-yield warning strike if British or French "vital interests" anywhere in the world are at risk.²⁶ *This is now clearly illegal*, as are both the US doctrine of "counter-proliferation sub-strategic deterrence" and the insistence by all the nuclear States except China on the option to use nuclear weapons first.

Not only firing a missile would be illegal: even deployment on patrol can be interpreted as threat of use, and thus also illegal - in which case patrols become pointless and should be stopped, and the nuclear warheads put ashore in storage separated from their missiles. Just such an immediate step is recommended by the Canberra Commission on the Elimination of Nuclear Weapons in their recent report to the Australian government.²⁷ It would be a dramatic way to build confidence while negotiations resume for further nuclear disarmament.

If political and military leaders choose to ignore the issue of nuclear weapon deployment, crew members might be required by law to refuse to be involved in patrols. Nuremberg Principle IV states:

"The fact that a person acted pursuant to order of his government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible for him."

The British Manual of Military Law is even stronger. It states:

"If a person who is bound to obey a duly constituted superior receives an order to do some act which is manifestly illegal, he is bound under a legal duty to refuse to carry out the order." A crew member, if court martialled, could invoke the Opinion in his defence. *Not only military personnel, but all who are involved in any threat or use of nuclear weapons, should be informed that this now violates the Nuremberg Principles by which they are bound.*

Hence nuclear weapon State governments can expect to come under increasing domestic and international pressure to replace their reliance upon nuclear weapons as instruments of national policy with a concerted drive towards a Nuclear Weapons Convention. This will require a fundamental review of their foreign and defence policies. Such a review would entail a reassessment of the diplomatic and military costs of retaining a nuclear arsenal and the political and economic savings from dismantling it.

WITHIN ASPIRING NUCLEAR WEAPON STATES

The current array of nuclear capability deployed by the declared (and undeclared) nuclear weapon States clearly creates a climate where it is easy for a State which is not yet nuclear to see the acquisition or development of such weaponry as indispensable to its security. The aspiring nuclear State's belief is the product of an epoch of strategic doctrine where the threat of mutual annihilation is defined as "stable deterrence", and considered to be a legitimate option of balanced statecraft rather than an illegal aberration.

Most nuclear threshold States have indicated that they would support and respect a global prohibition on nuclear weapons like the Chemical Weapons Convention. Some would prefer nuclear disarmament, but are keeping their options open while the nuclear States insist that they need nuclear weapons for their security, and show no serious intent to eliminate their arsenals. The Opinion provides important legal support to threshold States in their efforts to persuade the nuclear States to expedite nuclear disarmament.

The Opinion has the potential power to unzip the sequence of inter-related postures from the top downwards. Its acceptance by the US, for example, would force the UK to follow suit. The other three declared nuclear weapon States would come under heavy and growing pressure to join them. This would transform the nuclear stand-off between India and Pakistan, put Israel under much greater pressure to dismantle its nuclear arsenal, and ease nuclear-related tensions in East Asia. Naturally such developments would empower those within aspiring nuclear weapon States working for non-nuclear weapon policies.

WITHIN NON-NUCLEAR WEAPON STATES

Non-nuclear weapon States, determined to safeguard their integrity by distancing themselves from an illegal strategy, could pass domestic legislation outlawing nuclear weapons, citing this Advisory Opinion. This would strengthen the international norm against nuclear weapons.

Those allied with nuclear weapon States, or providing support for nuclear weapon deployments, can now be challenged to review their foreign and defence policies. This includes bases, military exercises, aircraft overflights and landing, and nuclear-armed warship port access and transit.

As nuclear alliances come under strain, and even disintegrate as in the case of the ANZUS Treaty, like-minded non-nuclear States will seek new relationships. For example, Aotearoa/New Zealand and South Africa recently signed a Memorandum of Cooperation committing them to work for a nuclear-free Southern Hemisphere, strengthen existing nuclear weapon-free zones, and hasten other nuclear disarmament initiatives.²⁸

WITHIN THE UN

UN General Assembly Follow-up Action. If the nuclear weapon States fail to comply with the Opinion, the anti-nuclear majority in the UNGA, which requested it, will most likely increase international pressure for nuclear disarmament by tabling and adopting resolutions on one or more of the following ways ahead:

- ▶ Call for negotiations to begin on a Nuclear Weapons Convention (similar to the Chemical Weapons Convention)
- ▶ Authorise the Secretary-General to begin to implement a programme of action for the elimination of nuclear weapons
- ▶ Censure the permanent members of the Security Council, who are also the declared nuclear States, for failing to fulfil their obligations under international law

UNGA members can emphasise the Court's declaration that States have a legal obligation to conclude such negotiations.

Security Council Reform. The Opinion could well hasten reform of permanent membership of the Security Council, as it undermines the status of nuclear weapons. It also draws attention to a long-standing concern of UN member States that the Security Council sometimes disregards, and even violates, international law.²⁹ If the declared nuclear States refuse to proceed to abolition, they risk being branded as "pariah" States - particularly as India, Iran and North Korea argued at the Court that nuclear weapon threat or use is illegal in any circumstance.

World Court Reform. The case highlighted the fact that, although no State is entitled to a judge, the Court includes one from all five declared nuclear States, and almost always has done. There would appear to be a need for the Court to resolve this anomaly if it wishes to be seen to be free of manipulation by the permanent Security Council members.

NUCLEAR DISARMAMENT ENCOURAGED

Global Public Concern. The Opinion will intensify public concern worldwide about nuclear weapons. It will put governments under new pressure to expedite nuclear disarmament, and will facilitate the process.

The international network of citizens which launched the initiative, lobbied the WHO and UNGA to put questions to the ICJ, and supported States participating in the case, is now focusing on how to help implementation of the Opinion. *In a campaign called Abolition 2000, its central aim is to have a Nuclear Weapons Convention ready for signing by the year 2000, to include a firm timetable for complete elimination of nuclear weapons.*

Effect on the NPT. Several States have not joined the NPT because they see it as institutionalising "nuclear apartheid", in that it allows a select group of States to possess nuclear weapons while prohibiting possession by others.³⁰ Moreover, because the NPT does not define a nuclear weapon, a non-nuclear weapon State which is a party to the Treaty could produce all the components - including the fissile core - and not violate it until they had been assembled. Alternatively, an aspiring nuclear weapon State could withdraw from it under Article X (by giving three months' notice, as North

Korea threatened to do) and then acquire nuclear weapons with legal impunity.

At present the UN, through the International Atomic Energy Agency (IAEA), can only act to monitor and prevent nuclear weapon acquisition if the State concerned is a party to the NPT, or if the Security Council deems the situation to be a threat to international peace and security. Such action by the Security Council could be seen as hypocritical given that its five permanent members have nuclear weapons themselves.

The Opinion is non-discriminatory because it treats all States equally under the law, which will encourage support and compliance by non-NPT states. It also strengthens Article VI of the NPT. It will therefore hasten progress to a Nuclear Weapons Convention.

Indeed, the President of the 1995 NPT Review and Extension Conference in New York, Jayantha Dhanapala, said in his opening address that the decision to extend the NPT should be seen "in its true perspective - a consolidation of the gains on the road to outlawing the most horrendous weapon so far invented by humankind - in the same way as we have outlawed chemical weapons, biological weapons, inhumane weapons and other categories. Those weapons were not disinvented. They were declared illegal."

Underpinning the Canberra Commission Report. Dhanapala was also a member of the Canberra Commission on the Elimination of Nuclear Weapons. Its report "notes with satisfaction" the Advisory Opinion,³¹ which will help to hasten and facilitate its recommended steps to a nuclear weapon-free world. The Commission highlights the importance of securing any disarmament agreements as legal, as well as political, obligations.³²

Non-Nuclear Security Promoted. The Opinion will help to shift the emphasis in international security initiatives to give more prominence to non-nuclear solutions. It confirms that nuclear weapons are a security problem, not a solution. In calling for their elimination, the Court ruled them out of any responsible future policies for deterring war.

The Opinion *will encourage moves to strengthen existing nuclear weapon-free zones, and to establish new zones* in the Middle East, Scandinavia, Central and

Eastern Europe. Also the way will be eased to a common non-nuclear European security policy, which is currently complicated by disagreement over the role of the British and French nuclear arsenals.

Highlighting the Deterrence Debate. The ICJ's avoidance of the deterrence debate in its main Opinion highlights the privileged status assumed by the nuclear States in arguing for the legality of nuclear deterrence for themselves alone. The NPT depends on sustaining this assumption which can only encourage those States which refuse to become signatories - and some which have signed - to acquire nuclear weapons.

The Court's indecision about the circumstance of extreme self-defence is disappointing for the overwhelming majority of non-nuclear States which believe that any threat or use of nuclear weapons would be illegal. In particular, the disparity with chemical and biological weapons will be noted, as nuclear weapons are far more dangerous.

However, the Court was clear that its indecision on this *was not a green light for legality*, and could only be resolved by concluding negotiations on "nuclear disarmament in all its aspects." Thereby, the Opinion can be used to hasten progress to a Nuclear Weapons Convention.

CONCLUSIONS

The implications of the ICJ's Advisory Opinion, therefore, are far-reaching. The process of putting the WHO and UNGA questions before the ICJ fuelled the nuclear weapon debate, revitalised the nuclear disarmament agenda, and introduced a new, powerful legal dimension which cannot be ignored.

It also drew the world's attention to the UN's under-used legal machinery. This was established as part of the UN Charter to ensure that governance of world affairs would be based on law as well as political, economic and military power. The ICJ implicitly asserted its vital responsibility to call to account the permanent members of the Security Council and check their tendency to disregard, or even violate, international law.

In light of widespread awareness that this was the most radical issue on the nuclear disarmament agenda, the Court's decision demonstrated its

capacity to resist geopolitical pressures and state the law as it found it. Also its unprecedented acceptance of citizens' evidence showed that it acknowledged the strength of public concern, and their role in bringing the issue before it. Thereby the Court enhanced its reputation as the world's ultimate judicial authority.

Contrary to some fears, this initiative has affirmed a view widely held by the international legal community on the legal status of nuclear weapons, and is an essential step towards realising a nuclear weapon-free world.

Footnotes

1 Statute of the International Court of Justice, Article 2.

2 Statute of the International Court of Justice, Article 20 states: "Every member of the Court shall, before taking up his duties, make a solemn declaration in open court that he will exercise his powers impartially and conscientiously."

3 UN Charter, Article 96.

4 Named after Frederic de Martens (1845-1909), the principal Russian delegate to the First and Second Hague Peace Conferences in 1899 and 1907. He helped draft the 1907 Hague Convention, in the preamble of which appears the following clause: "Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and from the *dictates of the public conscience*." (emphasis added)

5 A copy of the text can be obtained in hard copy from International Legal Materials, 2223 Massachusetts Ave NW, Washington DC 20008-2864 USA; tel (202) 939-6000; fax (202) 797-7133. It is also available on Worldwide Web at http://www.dfat.gov.au/ild/icj_nuc/icj_nuclear_weapons.html

6 Main Opinion on UNGA question, paragraph 36.

7 Ibid paragraph 29.

8 Ibid paragraph 30.

9 Ibid paragraph 47.

10 Ibid paragraph 67.

11 Ibid paragraph 96.

12 Vice-President Schwebel's dissenting Opinion, pages 8-13.

13 Main Opinion on UNGA question, paragraphs 85-86.

14 Curiously however (Ibid paragraphs 55-56), the Court rejected the argument that the use of nuclear weapons can be regarded as specifically prohibited by the 1925 Geneva Gas Protocol.

15 Ibid paragraphs 78-87.

16 Ibid paragraph 63.

17 Ibid paragraph 95.

18 Ibid paragraph 94.

19 Ibid paragraph 98.

20 Ibid paragraph 99.

21 Ibid paragraph 103.

22 Four of the nuclear weapon States (US, USSR, UK and France) were the leading creators of the Nuremberg Principles (China did not vote for affirmation of the principles in UNGA Resolution 1(95) of 1946 because the People's Republic of China did not then occupy the seat).

23 Main Opinion on UNGA question, paragraph 35.

24 There is concern among scientists and engineers formerly involved in research, development and production of nuclear weapons that this Opinion could lead to criminal prosecution. In the view of World Court Project legal advisers, such concern is unfounded, because the Opinion has no retrospective effect.

25 The US Army Field Manual FM 27-10 (1976) and Navy Field Manual NWIP 10-2 (1955), for example, prohibit the commission of war crimes, crimes against peace, and crimes against humanity.

26 "Nations draw closer on use of nuclear weapons" (UK Financial Times, 31 October 1995).

27 Report of the Canberra Commission on the Elimination of Nuclear Weapons (August 1996), pages 53-54.

28 Memorandum of Cooperation on Disarmament and Arms Control, signed in Cape Town on 8 August 1996 by Nelson Mandela and NZ Prime Minister Jim Bolger.

29 James A Paul, "Security Council Reform: Arguments about the Future of the United Nations System" (Global Policy Forum, Policy Papers No 2, February 1995), pages 15-16.

30 However, Thomas Graham, US spokesman at the Third Preparatory Committee Meeting of the NPT Review and Extension Conference in September 1994 admitted: "While the NPT reflects the reality that five nuclear weapon states existed in 1968, it does not legitimize the permanent possession of nuclear weapons."

31 Canberra Commission Report, page 27.

32 Ibid Annex B, page 99.